LEGAL ANALYSIS OF ARBITRATION AS A FORM OF ALTERNATIVE DISPUTE RESOLUTION (ADR) IN NIGERIA

BY

- **Timothy Ifedayo Akomoledc**. LLB (Hons) B.L, LL.ML M.Phil. Ph.D,MBA, ACIS, Senior Lecturer. Department of Business Law, Faculty of Law. Olabisi OnabanjoUniversity, Ago Iwoye, Ogun State, Nigeria.
- Lateef Ayoola Ogboye LL.B(Hons), B.L, LL.M, Ph.D, . Lecturer, Department of Jurisprudence and International Law, Faculty of Law. Lagos State University, Ojo, Lagos State, Nigeria.

INTRODUCTION

A practice that has long been embraced in most advanced jurisdictions of the world is to reduce the ever-increasing pressure on the courts ay avenue for settlement of disputes. This development to which a lot of resources have been dissipated gained a lot of momentum especially in those countries with the adversarial system of dispensing justice through the courts. Alternative Dispute Resolution (ADR) and its variants or forms are gaming more recognition and ascendancy as conflict or dispute resolution methods in the developing countries including Nigeria. Out of the ADR variants or forms, arbitration remains the most popular and is widely used to settle disputes that are either domestic or commercial in nature. This paper therefore examines the nature, purpose and characteristics of arbitration within the existing legal framework with the view to highlighting its usefulness in resolving disputes without resorting to conventional litigation.

Conceptual Issues

Arbitration arises out of a. written agreement to submit present or future differences to arbitration whether an arbitrator is named therein or not.' The foregoing underscores the consensual basis of arbitration. Thus, it arises as a matter of contract which contract is regulated by the provisions of the Arbitration and Conciliation Acts and the common law. Succinctly put therefore, arbitration is the reference of a dispute or difference between not less than two parties for determination after hearing both parties." Therefore, a tribunal constituted for a purpose other than determination of dispute or difference between parties is not arbitral tribunal/[1] A person or persons to whom a reference to arbitration is made is called an arbitrator or arbitrators. His decision is called an award and one or more arbitrators may be constituted into an arbitral tribunal and the decision of such a tribunal is known as an award. Where it is provided that in the event of a disagreement between arbitrators the dispute is to be resolved by a third person, the • third person is called an umpire and his decision is also called an award. For arbitration to exist, three elements must be present. These are:

a. There must be a real dispute and not a mere difference of opinion. The dispute must be justifiable which in turn is based on the premises that the

---

' Section 32, English Arbitration Act. l():o.

" Hulsburys Laws oil ingland 3""ed. Vol. P 2. Misr (Mm.) Lid v. Oycdclc j l°96j 2A1/R 57: Gams H/ejiolor. The i.a\\ of Arbitration in NUgcnnJjd &J;M^(j_994j_p..3 Nigerian Ports Authority v. Panalpma Work! Transport Nigeria Ltd. & ors 11974! 4. U.l.LR. 89.

arbitration award is capable of being registered and enforced as judgment through the courts.

b. There must be an agreement between the parties to refer the dispute to one or more specially nominated persons for hearing or settlement.

c. The parties must intend to settle their difference in that way rather than in a court of law. That is, the agreement to submit to arbitration must be a binding contractual obligation[5].

Forms of Arbitration[5]

Arbitration takes two forms. Binding and non-binding arbitration. In binding arbitration which is voluntarily agreed to by all the parties, an arbitrator will issue an award that is binding on the parties. Even if the award reflects a clearly erroneous interpretation of the law or facts, no appeal on the award is allowed unless serious misbehaviour on the part of the arbitrator can be proved such as failure to disclose an interest or refusal to hear one side of the case.

In non-binding arbitration, parties have a right to appeal within a specified time. If no appeal is filed within the prescribed time, the award becomes binding. If an appeal is filed and a new trial is held penalties may be assessed against the appealing party if that party does not improve on the arbitrator's original decision.

Tolson J.A Organising and Administering Arbitration. Journal of the Chartered Institute of Arbitrators, May 1993 p. 79.

Disputes That **Can Be Referred** To **Arbitration**

It is not every dispute that can be referred to arbitration. Disputes which are preferable to arbitration must be justifiable issues that can be treated as civil matters.' They must be disputes that can be compromised by way of accord and satisfaction. Examples include al! matters in dispute about real or personal property. Disputes as to whether either party has breached a contract or whether one or both parties have been discharged from further performance thereof.'

Advantages/Benefits Of Arbitration

Arbitration as a form of A DR has certain advantages or benefits when juxtaposed with litigation. These benefits are summarized below:

(i) Arbitration in most cases can be quicker than litigation. This is because in litigation the parties must conform with laid down procedure beginning with the institution of the case to the actual conduct of the case in court. Arbitration does not have to follow any laid down procedure. It must be noted however that it is not in all cases that arbitration may be faster than litigation. For instance, some commercial arbitration may take longer time especially where cases are stated.[9]

---

[6]Ezejiofor, G, Lav, of Arbitration in Nigeria, op. cit. p.3 '

[7]Baker v. Townsend (1X17)7 Taunt 422

[8]Herman v. Darwins [1°42| A.C. 356

[19]In this tvpe of situation, knotty questions or issues are referred to the court by the arbitrations) for adjudication after which the resolution would he adopted as the basis of the award of the Arbitrator(s),

(ii) Again, arbitration can be less expensive that litigation, A lot of COST is Involved in litigation, Processes have to be filed and counsel have to be paid. Parties have to be present in court during hearing days. This can be particularly worrisome when parties reside outside the towns where the court is situated. As a corollary of the foregoing, because litigation lakes a longer time to conclude n is more costly than arbitration. If a dispute is of a technical nature and a technically qualified arbitrator is appointed, he can conduct the arbitration effectively and quickly without the involvement of legal counsel. A lot of time is saved in the process[10].

(iii) Expertise of the decision-maker. The arbitrator is selected by the parties and not imposed on them by the courts. Thus, parties are free to appoint an arbitrator that is an expert in the area of the subject matter of the dispute.

(iv) There is the opportunity to conduct proceedings in private without access by members of the public. This situation encourages the parties to present their cases as frankly as possible. It is a better approach especially where parties still look up to a friendly atmosphere after the resolution of the dispute.

---

[10]/Ejiofor, G. op. cit. at p.13.

(v). Appeals are easily discouraged especially where there is a provision in the arbitration agreement that the decision of the arbitrator shall be final. The court would always be willing to give effect to this type of clause to deter unnecessary and frivolous appeals. This again incidentally saves a lot of time and cost that would have been wasted in prosecuting those appeals.

(vi) Arbitration takes care of the convenience of the parties and their witnesses since place and time of hearing can be fixed taking cognizance of their convenience as against what is obtainable in the courts where the court's interest and convenience are paramount in fixing hearing dates.

(vii) Again, arbitration is conciliatory in nature in contrast to litigation which has the potential of permanently separating the parties to it.

(viii) In arbitration, parties are allowed to represent themselves or by other persons who may not necessary be legal counsel. In litigation, if parties are to be represented, then it should be legal representation.

(ix) Arbitration also affords parties the opportunity of having more than one person adjudicating on disputes that affect them. It is particularly useful where parties have different socio-cultural background as arbitrators may be selected to reflect such diverse socio-cultural background.

(x) Arbitration is immensely useful in International Commercial Transactions where parties may decide to neutralize a dispute by appointing a national of a state different from theirs especially where these is suspicion or likelihood of bias.

(xi) Finally, states guard jealously their sovereignty in international law and as such may be unwilling to submit themselves to the jurisdiction of foreign courts. In most cases, arbitration serves as the veritable machinery for resolving disputes arising between states and nationals of other states.

Disadvantages of Arbitration

Arbitration as a form of ADR is not without some dements winch are succinctly discussed as follows: -

(i) Arbitration may take longer time in some cases where reference is made to the regular courts to interpret an issue or question that has arisen in the course of arbitral proceedings.

(it) Arbitral tribunal has limited powers to deal with matters chat may arise during the proceedings,

(iii) It does not have the coercive powers to compel recalcitrant wfinesses to appear before it or compel the production of documents to he examined by it. It has to make use of the coercive powers of the courts.

(iv) It is often difficult to bring multi-party disputes before one arbitral tribunal the way cases can be consolidated by the regular court for adjudication in one single process.

(v) An arbitration award can also be set aside by the regular com is at the instance of one of the parties to the arbitration especially m a non-binding arbitration. When this happens, then the obvious advantage of arbitration over litigation would have been obliterated.

(vi) Enforcement poses a lot of problems and challenges to arbitral awards. Enforcement is often through the machinery of the courts where it can be enforced in a summary and expeditious manner as provided for in the Arbitration and Conciliation Act.[11]

The Arbitration Process

Arbitration proceedings are always sequel to a power contained in a document signed by the parties thereto submitting their disputes to arbitration. The arbitrator must be an impartial umpire. He has the power to grant interim relief pending the conduct of the arbitration. He can visit places outside the venue of the proceedings for purposes of investigation. His task is completed on the signing of thee award which must be in writing, but may not give written explanation of their opinions or

[11]S.31 (3), Arbitration and Conciliation Act. Cap A 18, Law of the Federation of Nigeria, 2014

decision, James Myers' advocated at least ten te'chiiiques of successfully managing arbitration which are summarized below: -

i. Issue simplification: - The arbitrator must simplify the issue(s) before him by narrowing them to manageable proportion leaving out irrelevant or mundane issues.

ii. Admission of evidence: - in so far as the strict rules of evidence are not applicable in arbitration proceedings, the arbitrator should make use of rules of evidence as guidelines or reference points such (hat only evidence or testimony with higher probative value are accepted. iii. Controlling the order and managing the testimony: - The arbitrator should be at liberty to determine and control the procedure of the arbitration process. Where it s appropriate, the arbitrator should ask the party introducing the witness to summarize the evidence of each witness in writing for the arbitrator after the end of the testimony,

iv Legal issues- where these come up during the arbitration hearings. They should be promptly argued by the parties so as to prevent deia\ during the hearings. Where issues are to be referred to courts for determination this should be done promptly to ensure that proceedings arc concluded in good time.

---

12 Myers, James, 10 Techniques for managing Arbitration Hearings, Published in (1996)

v. Interim Decision- Arbitrators should be willing to make inicrim decisions where necessary which might not necessarily dispose off ilu- v-asc but would prevent cumulative evidence that tends'lo prolong (lie hearing of the case.

vi. Expert witness- The arbitrator should discourage the use *>!' expert witnesses except where an issue cannot be resolved without {hem. Where excessive use of it is resorted to, issues are confused further winch lends to delay hearings especially where the experts differ on major issues. In that type of situation, the experts should be brought together and asked questions to resolve whatever differences that might exist.

vii. Bifurcation of issues- At nines, issues are bifurcated to ensure speedy hearings. For instance, issues as to liability may first be determined before assessment of damages.

viii. Time limits- The parties may. fix a time before the hearing begins within which hearing should be completed. In deserving situations however, the arbitrator may fix the time and encourage the parties to comply.

ix. Documental evidence- Documentary evidence is well received in advance in a well-managed pre-hearing proceedings. These documents are numbered sequentially and this saves a lot of time during hearing.

x. Encouraging settlement- while arbitrator's pre-occupation is often limited to adjudication of the dispute, arbitrators should encourage the parlies to go to mediation with an independent mediator. Anolher --nggestion particularly in large cases is for the parties to engage a shadow mediator who attends the hearing and confers with the-.-parties at (he end of each day in the capacity of a mediator with the view to resolving dispute. There is no gainsaying the fact that the foregoing techniques offered in Myers would go a long way in ensuring smooth arbitration hearings especially \--hen time is of the essence of such hearings. The above catechism has no doubt contributed to the huge success of many arbitral awards in the developed countries.

The Appointment of the Arbitrator

The arbitrator derives his powers from the clause in the agreement. if follows therefore that if the agreement is void then the arbitration clause in it is also void and of no effect,[1]" Parties to an arbitration agreement may determine the number of arbitrators to be appointed under the agreement, but where no such determination is made, the number of arbitrators shall be three,"[1] Arbilrainrs can be appointed in any of the following ways:[15] a. By a procedure specified by the parties in the arbitration agreement.

---

[13] Heyman v Darwins Ltd. (I 942) AC' 3,56 Harbour Assistance Assurance Co. (I MO I.id V. Kansa General International Insurance **Co.** Ltd (1992), Lloyds Rep. 81.
[11] Section 6, Arbitration and Conciliation Act Cap A 18 Laws of Federation 2010
[15] Appointment of arbitrators is governed by Section 7 of the Arbitration and Conciliation Act. 1996.

b. Where a procedure specified fails in any of (lie ways enumerated under Sections 7(3) of the Arbitration and Conciliation Act. then the appointment is made by the court taking into consideration the terms of the arbitration agreement.

c. Where there is no procedure specified, then in case of arbitration within three arbitrators, each party shall appoint one arbitrator and the two shall appoint the third. If however a party fails to appoint an arbitrator within thirty days of the receipt of the request to do so by the other party or the (wo ;irbitrators appointed fail to appoint the third arbitrator within thirty day.-- nf their appointment an appointment shall be made by the court on the application of any of the parties.

Again, in case of arbitration with only one arbitrator, where the parties fail to agree on the arbitrator. the appointment shall be made by the coin! on the application of any of the parties within thirty days of such disagreement Thus the appointment is either made by the parties themselves through a clause or procedure clearly stated in the arbitration agreement or by the court where no such procedure is prescribed or where the procedure has failed to achieve the desired results.

---

16 See S. 7 (2) (a) (i) &, Neale v. Badger 18 East 51 Contrast with well v. Cook 2B & a218

The Scott v. Avery Clause

The case *of Scott v. Avery*[1] establishes that once there is an ;n nitration clause in an agreement the parties must submit themselves to arbitral ion first before resorting to litigation. This clause has been construed by the courts not to constitute an ouster of the court's jurisdiction which would .have made entire contract contrary to public policy and therefore illegal.

The provision making arbitration a condition precedent to an action in court has thus become popularly known as the *Scott. v. Avery* clause and ii constitutes a defence to any proceedings commenced before the publication of an award and it is certainly independent of any right of an application tor a stay of proceedings which is only granted at the discretion of the courts. The effect of the existed.-e of the clause in an agreement is to deprive the court of her jurisdiction until the clause which operates as a condition precedent has been fulfilled.[18]

The point must however be made that the courts in Nigeria have not been consistent in interpreting this clause in agreements. For instance, the Supreme Court of Nigeria in the case of *Obembe v. Wemahod Estates Limited*[19] held that the High Court has jurisdiction to try cases of breach of contract where references to

---

[17] Reported in (1856) 25. 1.J Ex 308: S.H.L. 811

[18] Madukolu v. Nkemdlim (1962) 1 ALL..NI ,R 587

[19] (1977) | S.C. 1 !5. at 131 See also Oyedeie v. New Assurance Co. Ltd. (969[l])) (3) A.I..R. Comm 200: Jebara v. Mercury Assurance Co. Ltd. (1971) A.1..R. Comm I Cipriani v Bunett (1933) A.C. 83: 1 liekman \'. Roberts 11 9 1 3 A.c 229 Oycdele - New India Assurance Co Ltd. (!969)|(3) A.L.R. Comm. 200: Jebara v Mercury Assurance Co. *Ltd.*. (1971). A.L.R Comm I Cipriani v Burnett (1933) A.C.83: I Hickman v Roberts (1913) A.C 299

arbitration clauses are provided in so far a party to the contract brings an action by virtue of section 230 of the 1979 Constitution. However, in the case of Kano State *Urban Development board* v *Fauz Limited* [20] it was held that High C OHM has the discretion under the Arbitration Laws to stay proceedings for such reference on the application of either of the parties after entering of appearance but before pleadings are filed. It is submitted that this clause should be construed as a condition precedent to the exercise of the jurisdiction of the courts that are faced with the task of adjudicating on disputes arising from agreements containing arbitration clauses. **Powers of the Arbitrator**

The arbitrator's powers derive; form the arbitration agreement and the Arbitration Act. Provided the agreement is valid and the arbitrator has been properly appointed, he is given the powers to conduct the proceedings and to make an enforceable award. His powers may however be extended by agreement between the parties or modified by the rules contained in some standard form contracts. Where however, it is considered expedient to seek further powers to enable him conduct the arbitration, the arbitrator may seek for such powers from the parties by way of an agreement or to the court in court-induced arbitral ion.

---

20 (1986) 5 NWLR (Pt 39)74)

Termination of Appointment of an Arbitrator

The mandate of arbitrator terminates in any of the circumstances enumerated below: -

i. If he withdraws from office.

ii. If the parties agree to terminate his appointment by reason of his inability to perform his functions.

iii. If for any other reason he fails to act without undue delay[21]

However, the fact that an arbitrator's mandate is terminated in any of the circumstances spelt out above shall not be deemed as constituting or implying grounds challenging his ability to act as arbitrator.

Customary Arbitration

Customary arbitration has been a recognized feature of indigenous African systems for a long-time. This has been necessitated by the need (o preserve the kinship and traditional ties that link the rural inhabitants all over Africa including Nigeria. Thus, customary or traditional arbitration had been given judicial imprimatur in a number of cases. The Supreme Court in Nigeria affirmed a long-line of cases when it held in *Nwoke v Okere*[22] that customary arbitration constitutes estoppel *per rem judicatam i*f the subject matter, parties and cause of action are the same in the arbitration as in the court action. Also, in the same case.

[21] S. 10(1) Arbitration and Conciliation Act

the court as per Justice Kutigi rejected another form of alternative dispute resolution which is the "the juju" method, on the ground *inter cilia,*

> *That its activities, methods and procedure would appear to belong to the realm of the unknown even though the effects may he real in /he end. The worst, of it all is that a "juju" decision or judgment is not subject to an appeal like the one we are all witnessing now in the suit*[23]

The bewilderment of the Honourable Justice of the Supreme Court

stemmed from the mystical and perhaps clandestine ways of "juju" or oracle" arbitration which leave non-adherents or non-cult members at the mercy of "worshippers". It is therefore suggested that for a form of, customary arbitration to be binding and legally enforceable, it must be open, recognized and acceptable to all and above all, it must capable of being appealed against in case any of the parties thereto desires to pursue his case further,

The potency of customary' arbitration was also recognized in the case of *Idika v. Erisi*[24] by the Supreme Court where both parties relied on the decision of arbitrators appointed under native law to settle a land dispute. The trial court failed to make a finding as to the competence of the traditional arbitration and rather condemned their competence and the procedure adopted by them, in ordering a retrial of the case, the Supreme Court per Justice Obaseki, observed as follows:

---

22 (1994) 5 NWLR 169 at 172 - 173

it is settled law that where there are divergent evidence of customary law arbitration the court should make a definite finding of fact on whether there was properly constituted arbitration since the arbitration would he binding on the parties.[25]

INTERNATIONAL COMMERCIAL ARBITRATION

Arbitration is international in any of the following circumstances: -

a. The parties to an arbitration agreement have, at the time of conclusion of the agreement, their places of business in different countries.

b. If the place of arbitration or any place where a substantial pan of the obligation under the commercial agreement is to be performed is situated outside the country in which the parties have their places of business.

c. The parties have expressly agreed that the subject matter or the arbitration agreement relates to more than one country.

d. The parties, despite the nature of the contract, expressly agree that dispute arising from the commercial transaction shall be treated as international arbitration.[26]

Parties often resort to international arbitration mostly because of lack of confidence in the judicial processes of other countries. Nationals of different countries are most unwilling to have their cases adjudicated in foreign courts.

---

[23] Nwokc v. Okere. op. cit. P. 173.

[21] Reported in (1988) 2 NWLR (Pt 78) 563

[3:5] Obaseki. JSC at p. *572*

"[6] These are ihe elaborate provisions of S. 57(2) of the Arbitration and Conciliation Act but the combined previsions of S.57 *(2)* (c) & (d) give the impression that parties can internationalize an arbitral process when the facts do not make it an international arbitration.

They often prefer international arbitration conducted in neutral territories by arbitrators other than nationals of their countries." International arbitration institutions include The International Chamber of Commerce (ICC), the London Court of International Arbitration (LCIA), the American Arbitration Association (AAA), and The International Centre for the Settlement of Investment Disputes (ICSID).

The Arbitration and Conciliation Act"' provides unified legal framework for fair and efficient settlement of commercial disputes by arbitration. The Act adopted the model law developed for international commercial arbitral inn by the United Nations Commission on International Trade Law (UNC1TRAL). Pan III of the Act makes elegant provision for international commercial arbitration. Provisions governing recognition and enforcement of award are also exhaustively made[29] while provisions are also made for the application of the Comvention Recognition and Enforcement of Foreign Arbitral Awards (Ne\\ York Convention)."[1']

It is however pertinent to observe at this junction that the attitude of Nigerian Courts towards international arbitrations holding outside Nigeria has not been encouraging. This judicial attitude could be gleaned from the decision of the

---

[27] Ezejiofor G. Law of Arbitration in Nigeria. Op oil P. 136

[28]Chapter A 18. Laws of the Federating Nigeria, 2004

[29]S. 51, Arbitration and Conciliation Act

[30] S. 54 Arbitration and Conciliation Act (supra)

Court of Appeal sitting in Lagos in *The Owners of the M.V. Lupex v Nigerian Overseas Chartering & Shipping Limited (the Lupex)*[31] where the court re ("used to grant a stay of proceedings and set aside the order of arrest of The Lupex made by the lower court pending the conclusion of an arbitration proceedings which had got to an advanced stage in London as provided for under Sections 4 and ~; of the Arbitration and Conciliation Act.'[1]" The reasoning for the judgment was that if the court had ordered a stay, there would not be anything left for the Nigerian .shipping company.

It is submitted with respect that the foregoing reasoning of the Court of Appeal did not take cognisance of the relevant provisions of the New York Convention on the Recognition and Enforcement of Foreign Arbitral awards which this country has not only ratified, but incorporated into our municipal law by virtue of the Arbitration and the Conciliation Act. It is further submitted that having adopted the UNC1TRAL Model law and the New York Convention on Recognition and Enforcement of Foreign Arbitral awards, it is imperative that our courts accords recognition to international arbitrations holding outside Nigeria so that the same privileges can be extended to her by other countries.

---

31 (1993 – 1995) 5 NSC 182

32 Conciliation and Arbitration Act (supra)

Concluding Remarks

This paper has comprehensively examined [he nature and characteristics of arbitration as a form of Alternative Dispute Resolution especially in relation to domestic and International Commercial arbitration. That arbitration occupies an important position in the dispute resolution process in Nigeria is no longer subject to any controversy. This is abundantly lent credence to by the activities of the various professional bodies on arbitration that often commit vast nine and resources to the training and continuing education of arbitrators to ensure that the quality of arbitration improves in Nigeria. The rising profile of Alternative Dispute Resolution and its variants especially arbitration and other vacant must be sustained in the overall interest of the dispensation of justice system -A inch has suffered a lot of criticisms in the recent past in Nigeria.