



Evaluating commercial arbitration in Nigeria

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Abstract

Litigation is not the best grievance remedial mechanism in Nigeria. It has its own advantages, but in the modern world of advanced trade and commercialization, litigation has proven to be inadequate in providing acceptable solution to business dispute without hurting the commercial efficacy and goodwill between the parties. Arbitration on the other hand has gained widespread acceptance and usage. The strength of arbitration lies in taking away the hostility and win/lose attributes of litigation and instead using flexibility and other mild approaches in approaching business related disputes between parties.

Keywords: litigation, commercialization, Nigeria

1. Introduction

Commercial arbitration is recognised in Nigerian especially in commercial disputes. Commercial companies in Nigeria are using arbitration to settle disputes in greater numbers than before. Litigations in Nigeria is slow and this was self-evident recently when the Court of Appeal in Nigeria reaffirmed the current policy of refusing to “merit review” arbitrators’ decisions. In *Mutual Life & General Insurance Ltd V Kodi Iheme* ^[1]. The justices of appeal rejected counsel’s invitation to review an arbitral decision on grounds of misconduct and the proverbial allegation of “error on the face of the award” ^[2] Commercial arbitration is governed by the arbitration and conciliation act ^[3]. Commercial arbitration is the voluntary submission of a dispute arising from relationships of a commercial nature for determination in a judicial manner by a person or a body of persons chosen by the parties ^[4].

Nigeria has almost the same process of commercial arbitration like England and Wales except for the use of Multi door court house which England does not practice.

In Nigeria there are international organizations that are concerned with commercial arbitration and they are: International chamber of commerce (ICC), the London court of international arbitration (LCIA), the American arbitration association (AAA), the United nations commission on international trade law (UNCITRAL), the international centre for the settlement of investment disputes (ICSID), Nigerian branch of the London based Chartered Institute of Arbitrators established in 1998.

In Nigeria the Lagos Regional Centre for International Commercial Arbitration was established in Lagos Nigeria in 1989 under the auspices of the Asian-African Legal Consultative Organisation (AALCO) and the Nigerian Government ratified the treaty in addition to codification of its terms in a municipal law (Regional Centre for International Commercial Arbitration ^[5] "Regional Act No. 39 of 1999" (Act) ^[6] The procedure for the recognition and enforcement of ICSID act ^[7], provides that an ICSID award shall be enforced judgment of the Supreme Court if a copy of such an award,

duly certified by the secretary general of the centre, is filled in the Supreme Court by the party seeking its recognition and enforcement ^[8].

2. Applicable Law

There are two main sources of the law relating to commercial arbitration in Nigeria. The first is the common law and the doctrines of equity, and the second is statutes. The principal statute governing commercial arbitration in Nigeria is the arbitration and conciliation act ^[9]. The act provides a legal framework for arbitration and conciliation ^[10] leaving all the lacunae and crevices to be filled by the common law and the doctrines of equity supplemented by trade usages and the agreement of the parties ^[11]. There are other statutes that contain provisions for arbitration ^[12].

Commercial Arbitration in Nigeria could be mandatory or consensual ^[13]. Mandatory commercial arbitration is provided under the Trade Dispute Act ^[14] whereby industrial dispute are required to be referred to the Industrial Arbitration Panel before the National Industrial Court may have jurisdiction. Commercial consensual arbitration arises where the parties to certain transactions drawn up an arbitration agreement or include an arbitration clause in their contract to resolve any dispute which may arise therefrom. The basis for proceeding to Commercial arbitration is that the arbitration agreement or the arbitration clause must be voluntarily executed by the parties. For example the Nigeria arbitration and conciliation act ^[15] provides that “every arbitration agreement shall be in writing contained in a document signed by the parties or in exchange of letters, telex, telegrams or other means of communication which provides a record of the arbitration agreement or in an exchange of points or claim and of defence in which the existence of an arbitration agreement is illegal by one party and not deemed by the other ^[16]. An arbitration agreement may take the form of a separate agreement or it may take the form of a clause contained in a contract concluded by the parties. When a commercial agreement takes the form of a separate agreement or as part of a contract, it is

regarded as a separate contract. It is irrevocable except by agreement of the parties or by leave of court ^[17]. An arbitration agreement may be framed in such a manner as to prevent any right to court proceedings until an award is first made ^[18]. Such a clause is known as *Scott V Avery* Clause ^[19]. At common law, the parties could have an oral agreement to submit to arbitration and such arbitration agreement would be valid. But by virtue of the above provision every arbitration must be in writing, this implies that an allegation of the existence of the arbitration agreement which is not deemed by the other party, will constitute a written agreement ^[20]. Notwithstanding the provision of the Act, the parties to an international commercial agreement may agree in writing that dispute in relation to the agreement shall be referred to arbitration in accordance with the arbitration rules set out in the first schedule to this Act or the UNCITRAL Arbitration Rules set or any other international arbitration rules accepted to the parties. The effect of these provision are first that in domestic arbitrations, the parties as well as the arbitral tribunal are bound by the provisions of the arbitration rules ^[21] in the first schedule. Thus, the much flaunted party autonomy In respect of arbitral procedure is very much more limited in domestic arbitration under our law than the UNCITRAL law. Article 19 of the model law provides that subject to the provision of the law “the parties are free to agree on the procedure to be followed by the Arbitral tribunal in conducting the proceedings”. Under the Nigeria arbitration law the parties are bound to adopt the arbitration rules in domestic arbitration ^[22].

3. Commercial arbitration agreements in Nigeria

Section 17 of Arbitration and Conciliation Act of 1988 provides that: Unless otherwise agreed by the parties, the arbitral proceedings in respect of a particular dispute shall commence on the date the request to refer the dispute to arbitration is received by the other party ^[23] The commencement of litigation or arbitration is very important in determining the limitation of time as to the right to bring an action or claim. If time limit is not observed the right to action or claim may be lost ^[24].

Lord Denning M.R in *Jones v Natural Coal Board* ^[25] is of the view that no judge can stop a party that wants to use arbitration first before litigation. Also the Supreme Court of Nigeria in the case of *Nwafor Ejike v Nwokeocha & Ors* ^[26] is of the view that no judge can take over the proceedings from a party ^[27].

4. Multi-Door courts as a commercial arbitration in Nigeria

With the introduction of multi door court houses in some states, the procedure for the recognition and enforcement of an award is much easier. Under the Lagos multi door court house law, settlement agreements duly signed by the parties shall be enforceable as a contract between the parties and when such agreements are further signed by an ADR judge or any other person as directed by the Chief Judge, they shall be deemed to be enforceable under section 11 of the Sheriff and Civil Process Law (Lagos multi door court house law 2007) ^[28]. By these provisions a settlement agreement which includes an arbitral award, signed by an ADR Judge becomes a judgement

of the high Court of Lagos State and is enforceable under section 11 of the Sheriff and Civil process law ^[29]. Multi-Door Courts (MDCs) are independently run and managed, but are attached to a specific court (in the case of Kano, Abuja and Lagos - the High Court of each respective state). They have the benefit of offering different doors for resolving disputes in respect of cases that may or may not already be within the court system ^[30].

In Nigeria there are two ways in which a matter can come before the Multi-Door Court.

- a) Through a judge who can refer an existing case that he/she deems suitable for ADR. Cases are referred to the MDCs via the High Court and occasionally the Magistrates Court. These are known as court referred cases, once resolved, these cases are sent back to the referring court in order for the „terms of settlement“ to be sealed by the referring judge.
- b) Through Parties or a party will apply directly to the Multi-Door Court for resolution of their dispute, with or without having first commenced court action (usually without). These is known as ‘walk-in cases.

Nigeria has an ADR Judge who is a High Court Judge that has been appointed by the Chief Judge of the relevant state to oversee all matters that are brought before the Multi-Door Court. Their roles and powers vary from state to state but all have the power to endorse agreements reached in cases that have come before the Multi-Door Court, thus ensuring that any agreement reached is given the same status as full judgments of the High Court. The legal status of a case that has come before the Multi-Door Court is that once a court referred case is resolved before the Multi-Door Court, the terms of settlements are sent back to the referring judge who will endorse the settlement as a sealed order of the court ^[31].

If a ‘walk-in’ case is resolved, the ADR judge will endorse the terms of settlements thereby giving full legal weight to a matter which is most likely to have never been litigated. This has an invaluable advantage for both parties as the ADR process, if successful, will have resulted in parties obtaining an order from a High Court judge ensuring that the terms of settlement will be followed ^[32].

5. Conclusion

The practice of commercial arbitrations in Nigeria is very similar with that of England and Wales. This research has attempted to explain the procedure of commercial arbitrations in Nigeria and also the multi door court house in Nigeria. There can be no real development in trade and commerce in Nigeria if investors, merchants and the citizens are not confident in the dispute resolution process. The choice of arbitration over litigation is simply because, arbitration is less rigid and the outcome can come in swiftly and handily unlike litigation that can be protracted before an outcome the judge arrives to a decision.

6. References

1. (2013) 2 CLRN 68
2. PLC - Arbitration procedures and practice in Nigeria: overview, www. PLC - Arbitration procedures and practice Nigeria, last accessed 15th March 2018

3. The legislation applicable to arbitration in Nigeria is the Arbitration and Conciliation Act 1988 (Laws of the Federation of Nigeria 2010, Cap A18) (Arbitration Act). The ACA mirrors the UNCITRAL Model Law and incorporates the UNCITRAL Arbitration Rules. A few states in Nigeria have passed their own arbitration legislation, for example Lagos State (Arbitration Law 2009 of Lagos State (Lagos Arbitration Law)
4. Gogo George Otuturu, Some aspects of law and practice of commercial arbitration in Nigeria, <http://www.academicjournal.org/JLCA> last accessed 5th June 2018. Commercial' as defined under section 57 (1) includes "all relationships of a commercial nature including any trade transaction for the supply or exchange of goods or services, distribution agreement, commercial representation or agency, factoring, leasing, construction of works, constructing, engineering licensing, investment, financing, banking, insurance, exploitation, agreement or concession, joint venture and other forms of industrial or business co-operation, carriage of goods or passengers by air, sea, rail or road.
5. PLC - Arbitration procedures and practice in Nigeria: overview, [www. PLC - Arbitration procedures and practice Nigeria](http://www.plc-arbitration.com), last accessed 15th August 2018
6. These organisations maintain a list of qualified arbitrators and provide services such as hearing rooms, libraries, training courses, transcription and secretarial services to support arbitration and other alternative dispute resolution (ADR) processes. Some chambers of commerce, industries, associations and State bodies also provide arbitration services for their members. These include the: Lagos Chamber Arbitration Centre (LAC) established in 2001 under the auspices of the Lagos chamber of commercial industry (LCCI) (www.lagoschamberng.com/committees_arbitration.php). Society of Construction Industry Arbitrators (SCIArb) (<http://sciarb.com/index.html>), Maritime Arbitrators of Nigeria (www.maanigeria.com), Negotiation and Conflict Management Group (NCMG) (www.ncmggroup.org/index.aspx). Lagos Multi-Door Court House established by Edict No. 21, 2007, Lagos State: www.thelagosmultidoor.org/index.html, Abuja Multi-Door Court House was commissioned in 2003: www.amdcng.net, last accessed 5th June 2018
7. Cap. 120, Laws of the Federation of Nigeria, 20045
8. PLC - Arbitration procedures and practice in Nigeria: overview, [www. PLC - Arbitration procedures and practice Nigeria](http://www.plc-arbitration.com), last accessed 15th August 2018
9. PLC - Arbitration procedures and practice in Nigeria: overview, [www. PLC - Arbitration procedures and practice Nigeria](http://www.plc-arbitration.com), last accessed 15th August 2018, some aspects of law and practice of commercial arbitration in Nigeria, www.academicjournals.org/article, Last accessed in 15th August 2018.
10. See Moh IS. An overview of alternative Dispute Resolution (ADR) in the Dispensation of justice in Nigeria" in Fagbohun O and Oloworaran BD (eds). Reading in contemporary law and policy issues, Port Harcourt, Pearl Publishers, 2013, p. 139.
11. Orojo TO, Ajomo MA. Law and practice of Arbitration and Conciliation in Nigeria, Lagos, Mbeyi & Association (Nigeria) Ltd. 1999, p.12
12. Nigerian investment Promotion Commission Act, Cap N117, S 26(3) (a) which provides for the application of ICSID Rules in arbitration of investments disputes.
13. Section 26, Arbitration Act
14. Cap. T18, Laws of the Federation of Nigeria 2004
15. Cap A 18, Laws of the Federation of Nigeria 2004.
16. Sec I (1) (a-c) Arbitration and Conciliation Act 2004.
17. Arbitration and conciliation Act, s2
18. Scott V Scott. 5 HLC 81 and also Oyedele V New India assurance Co, Ltd (1969) 3 ALR Comm 200 HC, Kurubo V Zack-Motison (Nig) Ltd (1992)5 NWLR (Pt.239)102 CA, Niger Progress Ltd v north East Line Corporation (1989) 3 NWLR (PT 107) 68 SC, African Insurance Dev. Co. Ltd V Nigeria LNG Ltd (2000) 4 NWLR (Pt. 653) 494 JSC, 1856.
19. [1856]5 HLC 81, The implication of the decision is that where there is Scott V Avery clause in an arbitration agreement, there is no right of action until the arbitrators have made their award
20. United Nations General Assembly Resolution 31/98, made on 15th December, 1976. See Report of the UNCITRAL on the Work of its Ninth Session, UN Doc. A/31/17. last accessed 5th June 2018. [http://daccess-dds-ny.un.org/doc/RESOLUTION/GEN/NR0/302/81/IMG/NR030281.pdf? Open Element](http://daccess-dds-ny.un.org/doc/RESOLUTION/GEN/NR0/302/81/IMG/NR030281.pdf?OpenElement). Last accessed on 5th June, 2018
See 15 (1) of the Act provides that "the arbitration proceedings shall be in accordance the procedure constrained in the arbitration rules set out in the first schedule to this Act". Party who knows that any provision of, or requirement under, these rules has not been complied with yet proceed with the arbitration without promptly stating the objection of such non-compliance shall be deemed to have waived his right to object. Also sec 15 (2) which provides that "Where the rules refer to in subsection (1) of this section contain no provision in respect of any matter related to or connected with particular arbitral proceedings, the manner as it considers appropriate to as to ensure fair hearing".
Article 15.1 provides that "subjects to these rules the arbitration tribunal may conduct the arbitration in such a manner as it considers appropriate, provided that the parties are treated equally and that at any stage of the proceedings each party is given the opportunity of presenting his case." With regard to international commercial arbitration, section 53 of the Act provides as follows
21. Oyele V New India assuarnace Co. Ltd V Nigeria LNG Ltd [1969] 3 ALR Comm. 200 HC and Kurubo V Zack-Motison (Nig) Ltd [1992] 5 NWLR (PT.239)102 CA and also in In Ogunwale V Syrian Arab Republic(2002) 9 NWLR (Pt. 771) 127 at p. 146 per Chukwuma-Eneh, JCA, the court of appeal stated that it is only a decision strictly within section 7(2) and (3) of the act that shall not be subjected to appeal against a decision of court

- appointing arbitrator to apply, the following conditions must exist:
1. A binding, Valid, Compellable arbitration Clause
 2. A dispute capable of being referred to arbitration
 3. A party must have refused or defaulted to make an appointment
22. PLC - Arbitration procedures and practice in Nigeria: overview, [www. PLC - Arbitration procedures and practice Nigeria](http://www.plc-arbitration.com), last accessed 15th August 2018.
 23. Section 17, Arbitration and Conciliation Act. See also article 3.1.3.3 and 3.4 of Arbitration Rules. Article 3.1 provides that the party initiating resource to arbitration that is the claimant shall give to the other party, the respondent a notice of arbitration. Art 3.3 provides that the notice of an arbitration shall include the following:
 - a. Request that the dispute be referred to arbitration
 - b. The name and address of parties
 - c. A reference to the arbitration clause or the separate arbitration agreement that is invoked
 - d. A reference to the contract out of or in relation to which the dispute invoked arises
 - e. (e) The general nature of the claim and an indication of the amount involved, if any;
 - f. (f) The relief or remedy sought
 - g. (g) A proposal as to the number of arbitrator that is one or three if the parties have not previously agreed thereon.
 - h. The notice of arbitration may also include the following.
The approval for the appointment of a sole arbitrator.
(ii) The notification of the appointment of an arbitrator where each party is to appoint one;
 24. Funke Adekoya, arbitration in Nigeria, a practical guide. f a party starts court proceedings in breach of an arbitration agreement, the other party can make an application to the court to stay the proceedings, pending a reference to arbitration. The court, in giving effect to the agreement of the parties to resolve their disputes by arbitration, will order a stay of proceedings and refer the parties to arbitration. The Nigerian courts have recognised the importance of honouring parties' agreement to arbitrate (for example, the Supreme Court of Nigeria in *The Owners of MV "Lupex" v Nigerian Overseas Chartering & Shipping Limited* (2003) 15 NWLR (Part 844) 469).[www. Arbitration in Nigeria](http://www.arbitrationinigeria.com), last accessed 5th June 2018
 25. (1952) 2 WLR 760 at 776
 26. (1984) 12 S.C 301 at 312
 27. PLC - Arbitration procedures and practice in Nigeria: overview, [www. PLC - Arbitration procedures and practice Nigeria](http://www.plc-arbitration.com), last accessed 15th August 2018
 28. Lagos multi-door court house law 2007. s. 19(1). See also the case of *Akinsete v Akosile* [1966] 1 ALL NR 142 at 148. *OluIbukan v Olu – Ibukun*[1974] 2.Sc 41.
 29. Under section 11 of the sheriff and civil process law, judgements of courts may be recovered by levy of execution against the goods, chattel, movable and Immovable properties of the judgement debtor that are formed within the jurisdiction of the court.
 30. Gogo George Otuturu, Some aspects of law and practice of commercial arbitration in Nigeria, [http://www. academicjournal.org/JLCR](http://www.academicjournal.org/JLCR) last accessed 15th June 2018
 31. Gogo George Otuturu, Some aspects of law and practice of commercial arbitration in Nigeria, [http://www. academicjournal.org/JLCR](http://www.academicjournal.org/JLCR) last accessed 5th June 2018
 32. Gogo George Otuturu, Some aspects of law and practice of commercial arbitration in Nigeria, [http://www. academicjournal.org/JLCR](http://www.academicjournal.org/JLCR) last accessed 5th June 2018