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A LEGAL X-RAY OF ARBITRATION IN SETTLEMENT OF LABOUR AND INVESTMENT DISPUTES IN NIGERIA

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Abstract

This study critically examines the role of arbitration as a viable and increasingly globalized mechanism for resolving labour and investment disputes, with particular emphasis on the Nigerian legal framework. Employing a doctrinal methodology, the research undertakes a rigorous analysis of statutory instruments, judicial decisions, and international conventions governing arbitration, supplemented by comparative insights from jurisdictions with robust arbitration regimes. The findings underscore arbitration's inherent advantages—procedural flexibility, confidentiality, expert adjudication, and enforceability of awards—which render it an attractive alternative to conventional litigation. However, the Nigerian context reveals structural and institutional impediments that undermine its efficacy, especially in labour disputes where ministerial oversight under the Trade Disputes Act compromises the autonomy of arbitral proceedings. Furthermore, the absence of specialized arbitration centers and a limited cadre of trained arbitrators constrains the system's capacity to deliver timely and credible outcomes. The paper advocates for comprehensive reforms, beginning with the amendment of the Trade Disputes Act to eliminate executive interference in arbitral processes. It further recommends the establishment of sector-specific arbitration institutions—namely, a Labour Arbitration Centre and an Investment Arbitration Centre—to enhance specialization and procedural efficiency. Capacity-building initiatives for arbitrators are also proposed to elevate professional standards and foster public confidence in arbitration. In conclusion, the study affirms arbitration's potential to serve as a cornerstone of dispute resolution in Nigeria's evolving economic landscape. By implementing the proposed reforms, Nigeria can align its arbitration framework with international best practices, thereby attracting foreign investment and promoting industrial harmony through a more credible, autonomous, and efficient dispute resolution architecture.

Keywords: *Arbitration, Labour and Investment Disputes in Nigeria*

1. Introduction

In every country of the world, labour and investment disputes have been found to be inexorable. Dispute is an inevitable part of every human facet and organizational structure, both formal and informal. This is because as individuals have differences, so also exist, the differences in the goals and objectives of different organisations. Dispute is therefore part and parcel of human life, and must always be present. However, disputes in whatever form has to be resolved in such a manner as to ensure peace, stability, harmony and progress in all aspects of human society.

Over the years, globalization has played a remarkable role in promoting foreign direct investment through partnerships and trade agreement relationships between organisations in two or more different jurisdictions operating different laws, as a result, dispute is inevitable. Industries are the spinal cord of the economy of any nation, because a nation can only earn revenue and attract foreign direct investment through productions and exportation. To this end, it becomes imperative to properly understand the ways of resolving disputes in the industries, while the process remains fair, timely and in line with international best practices as it is one essential factor that determines the success or otherwise of the industries or businesses.

In the ordinarily sense, the process of formal resolution of dispute has in most cases, been the exclusive preserve of the court which has at its disposal, the full control of the state in enforcing its decisions[1]. This court system is not without some challenges as there are a number of problems associated with it, among which are; court congestion, unnecessary delay in court proceedings and the use of complicated and technical rules and procedures.

It is a common knowledge that in business, time management and efficient allocation of resources are very important. Thus, business organisations would not want to be involved in dispute mechanisms that are time consuming with technical procedures and rules. This and many others have made the society to seek for alternative form of dispute resolution that are gaining increasing popularity over the globe to resolve industrial and labour disputes.

It is pertinent to state that dispute resolution mechanism is very important in every form of business relation and commercial transactions. This is particularly so because no matter how much prudence is observed in the drafting of contracts, disputes will still inevitably arise, as is shown by the volume of litigation generated by the commodity trades, shipping industry, and the rest of the commercial transactions, despite the widespread use of carefully drafted and well-known standard form contracts. In general, it may be said that disputes are likely to arise where one party seeks to act opportunistically, by taking advantage of a change in circumstances or uncertainty in the agreement or in the law. Even the best drafted contract cannot provide with absolute certainty for every eventuality.

Industrial and labour dispute has remained a major hindrance to the economic development and growth of most countries of the world, Nigeria inclusive. This kind of dispute has spawned several issues resulting from disagreement between the employers and employees, corporations and their staff, trade unions and government or labour organizations and state at different times. In the midst of these disagreements leading to industrial actions, the major players such as labour union leaders and representatives of government have failed to take into consideration, the negative effects of their actions on the economic growth of the country by failing to adopt a fast and simpler means of resolving their differences in order to save the nation's economy from suffering retrogression. This is more so because the consequences of industrial disputes are usually harmful to all stakeholders, management, employees, the economy and the society at large. Thus, where there is no appropriate means of settlement of industrial dispute, within the business organisation or corporation, the growth, and progress of such corporation will be thwarted and the subsequent failure of the organization is inevitable.

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[1] Constitution of the Federal Republic of Nigeria, 1999, as amended (CFRN), s 6

There must therefore be mechanisms for resolving those disputes. The simplest, and most beneficial, is for the parties to seek to resolve the dispute through the alternative dispute mechanism without going through the rigorous process of court litigation and one alternative method is arbitration which ushered in a confidential, friendlier, simpler, and more flexible method as agreed by the parties involved in the dispute.

2. Nature of Arbitration

In every democratic society, the citizens are of liberty to choose other modes of resolving disputes without resort to the conventional method that is the state judicial system. Arbitration is one of such means. Arbitration presupposes that after a dispute has arisen or dispute is likely to occur, instead of parties to sick for remediation at the conventional courts, they rather decide to refer the dispute to a private tribunal (arbitrators) for settlement in a judicial manner. The implication of that agreement is that the decision of the arbitral tribunal (known as an award) will be binding on them. To ensure that such a method of settling disputes is effective, recourse is made to the conventional court system so as to ensure that such awards can be enforced. The conventional court can in certain circumstances, impeach such an award.

In recent times, there has been a tremendous growth in both national and international trade and investment which has thus affected labour and industrial relations both nationally and internationally. Associated with this growth is the increasing intricacy in the nature of disputes arising therefrom. It is in recognition of this fact that Castel pointed out that: the phenomenal growth and increasing complexity of international trade in recent years have resulted in arbitration becoming the preferred method of settlement of international commercial disputes[2].

For a dispute to be referred to arbitration, such reference must be contemplated in the contract or arbitration agreement between the parties. Thus, an arbitration agreement is the contractual basis for the resolution of disputes by the arbitration process. An arbitration agreement may be a clause in the contract by which the parties agree to refer future disputes under that contract to arbitration (arbitration clause) or it may be a separate agreement to refer an existing dispute (sometimes known as a submission agreement). In most cases, the majority of arbitration agreement is included in or annexed to a main contract, but in some other cases, the arbitration agreement stands alone as separate contracts[3].

It is important to note at this point that an arbitration agreement is an exceptional type of contract. This is particularly so because even if a contract containing an arbitration clause is declared null and void, that cannot entail ipso jure the validity of the arbitration clause as the arbitration agreement survives on the doctrine of separability[4]. The rationale behind this doctrine has been attributed to the fact that an

[2] J G Castel, 'International Commercial Arbitration' in Emond Paul (ed) *Commercial Dispute Resolution: Alternative to Litigation* (Ontario, Canada: Canada Law Book Inc.; 1989); 122
[3] D S Sutton, *Russell on Arbitration*, 21st Ed., (London: Sweet & Maxwell, 1997); 27
[4] *Heyman & Ors v Darwin* Ltd (1942) AC 356, *Bremer Vulkar Schiffbau and Maschinenfabrik v South India Shipping Corporation Ltd* (1981), Lloyds Rep 253 at 259 and *Harbour Assurance v Kansa General International Insurance Co Ltd* (1993) QB 701.

arbitration clause constitutes a self-contained contract collateral or ancillary to the underlying or main contract[5].

Arbitration as one of the mechanisms of resolving dispute is distinct from other forms of dispute resolution mechanisms. Like litigation, arbitration is adversarial in nature while the other alternative dispute resolution mechanism like conciliation, mediation, are non-adversarial. Similarly, while a final award is binding in the case of arbitration, there is no award in case of other alternative dispute resolution mechanisms and the resolutions are non-binding[6].

3. Settlement of Labour and Investment Disputes in Nigeria

The procedure for the settlement of labour disputes in Nigeria is statutorily provided for in the Trade Disputes Act (TDA)[7]. The Act requires the parties in dispute to first attempt to resolve their disputes by coming together in representation to discuss and agree on terms, which is referred to as collective agreement. The TDA provides as follows:

> If there exists agreed means for settlement of the dispute apart from this Act, whether by virtue of the provisions of any agreement between organizations representing the interest of employers and organization of workers or any other agreement, the parties to the dispute shall first attempt to settle it by that means[8].

The above presupposes that parties to labour or industrial dispute must attempt to resolve their dispute by means agreed upon by the parties. This is achievable through discussion among selected representatives of the disputing parties with the intent of resolving their disputes. This process may also be referred to as collective bargaining and as it has been argued, collective bargaining is another legally recognized means of settling trade or labour dispute in Nigeria. Zailani[9], observed thus: To this end, legal science has considered it imperative to devise various mechanisms for dispute settlement. In Nigeria, the mechanisms put in place for the resolution of labour disputes accord recognition to collective bargaining[10]. The term collective bargaining has been defined as to mean the process of arriving or attempting to arrive at a collective agreement[11].

[5] Arbitration and Conciliation Act, Cap A18 LFN, 2004 (ACA), s 12(2)
[6] (n 2) 39.
[7] Trade Disputes Act, Cap 18 LFN, 2004 (TDA)
[8] *Ibid*, s4(1).
[9] B Zailani, 'An Appraisal of Trade Disputes Settlement Mechanisms in Nigeria'(Unpublished Dissertation, Ahamadu Bello University 2016) <https://www.kubanni.abu.edu.ng/jspui/bitstream/123456789/9328/1/an/appraisal/of/trade/dispute/settlement/in/nigeria> accessed 13 December, 2022.
[10] *Ibid*, 57.
[11] LA 2004, s9(1).

In the view of Okene,[12] the principal purpose of collective bargaining is to settle and determine terms and conditions of employment[13]. The agitation for improvements in the terms and condition of workers' employment is the foremost duty of trade unions and collective bargaining is the major means whereby trade unions can ensure that the terms and conditions of employment given to their members are adequate[14]. The major interest of trade union is in winning wage concession from employers through collective action. Where the employer fails to concede to the demands of the workers, this could lead to industrial action. This collective bargaining provides the mechanisms for dispute settlement by negotiation of working conditions and terms of employment[15].

By the provision of the TDA, where amicable settlement of the dispute fails or disputing parties were unable to resolve their conflicts through collective bargaining, parties can thereafter report the dispute to the Minister for amicable settlement, to wit; if within seven days of the date on which a mediator is appointed in accordance with section 4(2) of the TDA, the dispute is not settled, the dispute shall be reported to the Minister by or on behalf of either of the parties within three days[16]. Section 7 of the TDA permits the Minister to issue a notice to parties where they are unable to settle their dispute specifying steps which must be taken for the resolution of the dispute.

Nigeria has a lot of investment potentials and therefore requires an enabling environment that is friendly for both local and foreign investment and investors to strife. Just like every other business arrangement, dispute can arise in investment relationships. This dispute can arise from various issues such as breach of contract, violation of investors rights, expropriation of investment and other related matters. The disputes may arise between two investors or between investors and the Nigerian government in relation to investment agreement, contracts or other related matters. Therefore, the mode for the resolution of these disputes are of most importance to investors before making the choice of investment. This is particularly so as many investors prefer dispute resolution mechanism that is more friendly, faster, confidential and with adjudicators who are expertise knowledge in the area of dispute. This is the more reason why these investors avoid the conventional litigation process in the settlement of investment dispute.

It has been argued that the settlement of investment disputes by litigation appears to be undesirable among foreign investors for several reasons:

1. Litigation is regarded as protracted because it often takes a court years to render a final judgment. Many foreign investors could not afford, or are not willing to wait for such a long period;
2. Most foreign investors tend to remove potential disputes arising out of their investments in host countries from the jurisdiction of the national courts of these countries because they lack sufficient knowledge about the legal systems of the host countries, and they do not know

[12]O V C OKene, *Labour Law in Nigeria: Selected Essays* (1st edn, Faculty of Law, RSU Port Harcourt) 165.
[13]*Ibid*.
[14]O V C Okene, *Labour Law and Industrial Relations in Nigeria* (4th edn Faculty of Law, RSU Port Harcourt) 214.
[15](n 6), 166.
[16](n 1), s 6(1).

whether they have well-established judicial systems that are capable of resolving disputes arising from these sophisticated transactions;

3. Because of the publicity which often accompanies court hearings, litigation is not in harmony with the desire of most foreign investors to keep their investment disputes confidential;
4. Most importantly, foreign investors have no confidence in the impartiality of national courts of some host countries[17].

It has also been argued that litigation has jurisdictional limitation as opposed to arbitration and other ADR mechanisms. In any dispute that arises from any investment and a suit is filed in any court of law, it automatically follows that foreign investors are attracted to the jurisdiction of that court. A foreign investor may not be properly acquainted with the legal system of that country and will not feel safe to invest but where an investment contract inserts a 'clause' on arbitration or other ADR processes, there are numerous benefits that are accrued[18]. For these and other reasons, foreign investors often seek an alternative dispute settlement mechanism. The most effective mechanism, frequently used by foreign investors, is arbitration. This is because arbitration is the most developed form of alternative dispute resolution mechanisms.

As stated in the previous paper of this dissertation, Nigeria is a signatory to the International Convention on the Settlement of Investment Dispute (ICSID). Therefore, foreign investors who have invested in Nigeria may submit disputes arising from their investments to the International Centre for the settlement of Investment Dispute through arbitration. In addition to the above, Nigeria has entered into several Bilateral Investment Treaties (BIT) with other countries which contains provision for the protection of foreign investors. Also, there is enacted in Nigeria, the Nigerian Investment and Promotion Commission (NIPC) Act which provides for the promotion, regulation and protection of investment in Nigeria, and also establishes the Nigerian Investment and Promotion Commission to be responsible for facilitating and promotion of investment in Nigeria.

Therefore, in an event of a dispute between a foreign investor and the Nigerian government, the investor may seek redress through international arbitration under the ICSID Convention or the arbitration mechanism provided for in the BITs. Where such is the case, the arbitral tribunal will apply relevant provisions of the BITs, NIPC Act and the Nigerian law in the resolution of the dispute.

4. Parties to Labour and Investment Disputes

In the Nigerian labour sector, there are three major actors that often form the parties in most trade/industrial disputes. These factors include, the trade unions or workers' union, employers' association and the Nigerian state who is represented by the Federal Ministry of Labour. It has been

[17] Y Al-Saman, 'The Settlement of Foreign Investment Disputes by Means of Domestic Arbitration in Saudi Arabia' [1994] (9) 3 *Arab Law Quarterly*; 217.
[18] P.O. Idornigie, 'The Role of Arbitration and ADR in Attracting Foreign Investment in Africa' in P P A Ajudua, (Ed) 'Legal and Institutional Frameworks for Settlement of Investment Disputes in Nigeria' [2020] 8 (1) *Global Journal of Politics and Law*; 24.

contended that for any dispute to qualify as a trade dispute within the meaning of the Act,[19] there must be proper parties. It presupposes that the parties to a trade dispute must be clearly defined in other to fully understand what kind of dispute constitutes a trade dispute. For a dispute to qualify as trade dispute, there must be workers on one side or both sides of the dispute[20]. It must be a dispute between workers and employers or between workers and workers[21].

It is therefore, trite to observe that any of these two set of people may constitute the required parties to a trade/industrial dispute. The implication of the above is that, disputes between either an employer and another employer cannot suffice as a trade dispute, whether or not it is connected to the terms and conditions of employment. In the same vein, dispute between an employee and another employee cannot constitute as a trade or industrial dispute as it were.

In Onumalobi v NNPC,[22] it was held that, a dispute between an employer and another employer is not a trade dispute. It is further observed that in reality, a trade/industrial disputes can involve employers and trade unions rather than the individual workers as contemplated by the Act.[23] Lord Wright in N.A.L.G.O v Balton Corporation,[24] stated thus: it would be strangely out of place to hold that a trade union cannot act on behalf of its members in a trade dispute or that a difference between trade union acting for its members and their employer cannot be a trade dispute. Similarly in National Union of Road Transport Workers v Ogbodo,[25] The Court of Appeal held, inter alia… that the dispute must be between: employers and workers: or workers and workers; or the dispute must be connected with the employment or non-employment, or the terms of employment, or physical conditions of work of any person.

It has been observed that Trade Disputes Act has identified parties to a trade/industrial dispute as employers and workers or workers and workers[26]. In broader view, the National Industrial Court Act[27] has sufficiently outlined parties to trade/industrial dispute to include, employers and employees and/or their respective organization[28]. The implication of the foregoing provisions of the Act is that industrial disputes are usually contention or conflicts between employers and workers or workers and workers, including their respective unions.

[19] TDA (n 1).
[20] O V C Okene, *Labour Law and Industrial Relations in Nigeria* (4th edn, Port Harcourt: Faculty of Law, Rivers State University, 2019) 286.
[21] *Apena v National Union of Printing Publishing and Paper Products* [2003] 8 NWLR (Pt 837) 382.
[22](1999) 12 NWLR (pt. 633) 628.
[23](n 1).
[24](1943) AC 166 at 169.
[25](1998) 2 NWLR (pt 537) 189.
[26](n 1), s 48, TUA s54.
[27](n 16).
[28](n 16) 54(1).

In another vein, investment dispute as discussed earlier, is basically dispute between investor(s) and the government of Nigeria, or between an investor and another investor. Therefore, parties to an investment dispute are the investors (whether foreign or indigenous) and the government of Nigeria.

5. Application of Arbitration to Settlement of Investment Dispute in Nigeria

Arbitration is increasingly becoming an essential means of settling disputes around the globe. Around the world, commercial transactions involving energy, finance, construction, oil and gas, banking and so on carries with it dispute between parties to such a contract. In an attempt to look for a more swift and effective means of resolving whatever form of dispute that may arise, contracting parties incorporate an arbitration clause in their contract which will serve as a means of resolving their disputes rather than going into litigation.

In another vein, developing countries including Nigeria are exploring avenues to boost their economy. One of the best way to boost a nation's economy is attracting foreign investors into the country. This is by allowing international companies to invest in various sectors of the host country with the aim of generating income and developing the host country's economy. However, dispute is inevitable as the more the investment, the more likelihood for dispute to occur[29]. These international companies wouldn't want to subject the determination of the dispute to the municipal adjudication of the host countries. This is predicated on the fact that the law governing the host countries may not be favourable to them or a fair and just judgment may not be given[30]. In the bid of avoiding any form of impartiality and delay in the course of a trade and commerce, arbitration is resorted to where party autonomy is guaranteed; they are at liberty to choose the law that will govern them rather than the imposition of the municipal law of the host country[31].

In Nigeria, Investment dispute is best resolved through the process of investment arbitration. Investment arbitration is said to be a legal mechanism used to resolve disputes between investors and the government of Nigeria or other parties in relation to investment contracts, agreements and other investment related issues[32]. Investment arbitration in Nigeria is regulated by the Investment and Securities Act[33] which establishes the Investment and Securities Tribunal (IST) as the principal forum for resolving investment disputes in Nigeria. Notwithstanding the establishment of IST, the ISA also recognizes the jurisdiction of international arbitral tribunals in the resolution of investment disputes in Nigeria. Investment dispute can arise from various issues such as breach of contract, violation of investor's rights, expropriation of investment, and so on.

[29] A T Bello, Arbitration: 'A Panacea for investment Disputes' [2014] (4) 2 *Arabian Journal of Business and Management Review (OMAN Chapter)*; 10
[30] *Ibid*
[31] *Ibid*
[32] O. M Atoyebi, 'Overview of Investment Arbitration in Nigeria including protection for foreign investors' <https://omaplex.com.ng/overview-of-investment-arbitration-in-nigeria-including-protection-for-foreign-investors/ > accessed on 12 July, 2023.
[33] Investment and Securities Act, 2007 (ISA)

Arbitration has emerged as a significant mechanism for resolving disputes in various sectors, including labor relations. In Nigeria, the issue of minimum wage has been a contentious topic, often leading to strikes and industrial actions. While it is commendable that arbitration has caused a significant shift from the N33, 000 minimum wage in 2019 to N70, 000 in 2024 this is only a step in resolving labour dispute, compared to labour forces in other emerging economies.

Either the government or an investor can initiate an investment arbitration in Nigeria. Ordinarily, arbitration process in Nigeria is conducted in accordance with the provisions of the Arbitration and Conciliation Act, however, when it comes to investment arbitration, international arbitration rules may also apply. This is basically so because the process may involve some foreign investors from countries having bilateral or multilateral treaties with Nigeria. Nigeria has thus signed and entered into Bilateral Treaties (BITs) with so many countries among which are China, France, Germany, Bulgaria, United Kingdom, Egypt, Spain, Netherland, Taiwan and Italy[34]. The BITs signed between Nigeria and these countries enables nationals of these countries to establish businesses and invest in Nigeria. It also gives protection to investors from these countries as well as the resolution of foreign investment disputes through arbitration. Theses BITs also allow investors to pursue an arbitration claim through the ICSID or ad hoc arbitration panel in accordance with the UNCITRAL rules or any other rules mutually agreed by the parties[35].

Pursuant to the above, some cases have been initiated against Nigeria by foreign investors at the ICSID. One of such is the case of *Guadalupe Gas Products Corp. v Nigeria*[36], where the subject matter was on the production and marketing of liquefied natural gas. The outcome of the arbitral proceedings was a settlement agreement which was recorded in the form of an award pursuant to Arbitration Rules 43 (2). Another example is the case of Shell Nigeria Ultra Deep Limited v Federal Republic of Nigeria[37] which was registered on 26 July 2007 in respect of a hydrocarbon concession. However, the case was discontinued on August 1 2011.

As stated earlier, the principal legislation addressing the resolution of investment disputes through arbitration in Nigeria is the Nigerian Investment Promotion Commission Act[38]41. Section 26(2) of the NIPC Act provides as follows:

> ‘any dispute between an investor and any Government of the Federation in respect of an enterprise to which this Act applies which is not amicably settled through mutual discussions may be submitted at the option of the aggrieved party to arbitration as follows:

[34] United Nations Conference on Trade and Development (UNCTAD): Full list of BITs concluded, 1 June 2013 <http://unctad.org/Sections/dite_pcbb/docs/bits_nigeria.pdf> accessed 10 July, 2023.
[35] Arbitrating Foreign Investment Dispute in Nigeria: Prospects and Challenges <http://www.internationallawoffice.com/newsletters/detail.aspx?g=63ec87d9-a8ed-4616-b339-62e5684f94eb> accessed 10 July 2023
[36] (ICSID) Case ARB/78/1
[37] (ICSID) Case ARB/07/18
[38] CAP N117 LFN 2004 (NIPC Act)

> a. In the case of a Nigerian investor, in accordance with the rules of procedure for arbitration as specified in the Arbitration and Conciliation Act; or
>
> b. In the case of a foreign investor, within the framework of any bilateral or multilateral agreement on investment protection to which the Federal Government and the Country of which the investor is a national are parties; or
>
> c. In accordance with any other national or international machinery for the settlement of investment disputes agreed on by the parties.'

In a similar vein, the Nigeria LNG (Fiscal Incentives, Guarantees and Assurances) Act[39]44, in its section 22 provides that:

> 'In the event of any dispute in respect of a substantial matter arising from the provision of this Act, the aggrieved Shareholder(s) in the Company shall issue a letter of notification to Government formally notifying Government and other shareholders of the dispute. The Government's representatives and one or more of the Company's Shareholders as the case may be, shall make serious efforts to resolve amicably such dispute. In the event of failure to reach amicable settlement within 90 days of the date of the letter of notification mentioned above, such dispute may be submitted to arbitration before the International Centre for the settlement of Investment Disputes'[40]

It has been submitted that these statutes try to maintain a favourable investment climate in Nigeria by adopting a more liberal mechanism in resolving differences that may occur in the course of a domestic or foreign investment[41]. To this end, parties in an investment dispute are free to arbitrate provided there is a written document evidencing an arbitration clause. Thus, in Onward Enterprises Ltd. V M.V Matrix[42], the Court of Appeal clearly stated that: Once an arbitration clause is retained in a contract which is valid and the dispute is within the contemplation of the clause, the court should give regard to the contract by enforcing the arbitration clause. It is therefore the general policy of the court to hold parties to the bargain which they had entered. Where there is no such document but disputants wish to use arbitration, they may enter a submission agreement allowing arbitration to resolve their dispute.

The above being the case, the question may be asked as to why resolving investment dispute through arbitration other than the conventional dispute resolution mechanisms? In other words, why is investment arbitration a better approach in Nigeria? This shall be revealed under the below heading.

[39] CAP N87 LFN 2004
[40] *Ibid*, s 22.
[41] A T Bello (n 28) 18.
[42] [2010] 2 NWLR (Part 1179) 530, 558

6. The Economic Effect of Settling Investment Disputes by Arbitration

i. **It Promotes Friendly Environment for Foreign Investors**: International trade plays a crucial role in the economic and social development of any country. Nigeria has a lot of investment capabilities and thus require to create an economic environment that is friendly for foreign investors and investment to strife. Thus having an investor friendly environment is very important because it helps to promote the economic development of the country. One of the ways of promoting an investor friendly environment is having an effective commercial dispute resolution regime that will boost the confidence of investors. Arbitration is therefore the preferred method for resolving cross-border disputes within the international business community that helps to boost the confidence of investors. Arbitration is crucial to creating a better investment climate and facilitate more cross-border trade and investment.

ii. **It helps to Reduce Economic and Political Pressure in Resolving Investment Disputes**: Investment arbitration is supposed to lead to de-politicization of investment disputes, that is resolving dispute without any form of political interference from state or non- state actors. This is the reason why the ICSID expressly prohibits the exercise of diplomatic protection while a claim is pending before an investment tribunal[43]. This provision is to reduce the possibility of economic and political pressure from the powerful home county of foreign investors[44]. Therefore, it seems more preferable to have a neutral quasi-judicial body to resolve investment disputes with private parties than to have the one that has government influence and is more exposed to external pressure from some powerful states. For instance, it is not in doubt that the United States of America (USA) is the world's strongest power and has a greater percentage of foreign investment in Nigeria[45]. Where there is dispute between the Nigerian government and some foreign investors from USA, there is every likelihood that the government of USA will exercise some kind of influence over the Nigerian government in the determination of the dispute. This influence may be in form of threat of withdrawal of further plans of investing in Nigeria, and so on. Therefore, investment arbitration is desirable for Nigeria to avoid any sort of pressure from such world powers.

Again, it has been argued that investment arbitration protects states from defending cases that are indefensible[46]. Thus when a state subscribes to investment arbitration, it gets shielded from other dispute settlement systems which sometime may be mandatory in nature. A classic example is the World Trade Organization Dispute Settlement system[47]. Therefore, investment arbitration is an exceptional mechanism for states like Nigeria to avoid any other forms of international or domestic litigation or political pressure which ordinarily are probable

[43] ICSID Convention, Art 27.
[44] O. M Atoyebi (n 28)
[45] W J Burns, 'A Rising Partnership' <https://nigeria.usembass.gov/article060402013.hmt> accessed 10 July, 2023.
[46] A Reinish, 'The Future of Investment Arbitration' <http://www.oxfordscholarship.com/view10.1093/acprof:oso/> accessed 10 July, 2023
[47] *Ibid*

consequences for the breach of any investment agreement. Nigeria thus need to have a soothing investment environment with less exposure to the risk of foreign litigation[48].

iii. **Protection of Foreign Investors**: Foreign investors are individuals, companies or organizations that invest in a foreign country other than their own country. In investment arbitration, foreign investors are often involved in disputes with host states over issues related to their investment such as breaches of contract (for instance the case between Nigeria and P&ID company), expropriation, discrimination, or other actions that may be detrimental to their investments. Foreign investors are not always willing to submit themselves to the jurisdiction of the national courts of a host country because they feel that these local courts are not always devoid of political interference and that they lack sufficient knowledge about the legal systems of the host countries, and as such they do not know whether they have well-established judicial systems that are capable of resolving disputes arising from their sophisticated transactions[49].

As noted earlier, Nigeria is a signatory to the ICISD Convention, meaning that, foreign investors who invested in Nigeria may submit disputes arising from their investment to the ICSID for the resolution of their disputes through arbitration. In addition to the convention, Nigeria also entered into several Bilateral Treaties with other countries which contain provision for the protection of foreign investors. Therefore, in the event of a dispute between a foreign investor and the Nigerian government, the investor may seek redress through international arbitration under the ICSID Convention or other arbitration mechanisms provided for in the Bilateral Treaties. This of course helps to protect foreign investors and boost their confidence to invest in Nigeria.

7. Application of Arbitration to Settlement of Labour Disputes in Nigeria

The need for the settlement of dispute through the Arbitration has become necessary due to the backlog of cases and the expensive cost and delays associated with litigation in the traditional court system. Arbitration assists disputants to settle their disputes through an informal and less expensive process. Considering the economic effects of the nature of labour related disputes, Arbitration is preferred for the quick resolution of industrial or labour related dispute so as to help avoid the possible negative effects on the economy of the nation.

The settlement of labour dispute through arbitration is not without statutory flavour. The Trade Disputes Act recognizes the settlement of labour dispute by mediation, conciliation and arbitration and also provides for the establishment of an arbitration tribunal under section 9, 10 and 13 respectively. It is important to point out that the Arbitration and Conciliation Act, is the framework regulating the settlement of commercial disputes such as investment disputes through arbitration and conciliation, and does not by any stretch, regulate the settlement of labour disputes in Nigeria. Rather, it is the Trade

[48] *Ibid*
[49] Y Al-Saman (n-16)

Dispute Act. Section 4 of the Act,[50] made provision for an agreed means of settlement of dispute amongst disputants by themselves or representatives. Where that fails, parties can employ the mediation mechanism to amicably settle their dispute[51]. The Minister may, pursuant to this section, take steps, which includes, appointment of a conciliator under section 8 of the TDA or a reference of the dispute or any matter relating thereto for settlement to the Industrial Arbitration Panel under Section 9 of the TDA or a reference of the dispute to a board of inquiry under section 33 of this Act.[52]

The import of the foregoing provision is that mediation, conciliation, arbitration and board of inquiry are all alternative dispute resolution mechanisms and are usually employed under the Trade Disputes Act for the resolution of industrial or labour related conflicts. The strange practice which is alien to the justice derivable from the objective of arbitration and other forms of ADR is that the TDA empowers the Minster of Labour and Employment to coordinate the whole processes of settlement of labour related dispute under the Act. This is quite different from what is obtainable in commercial arbitration or investment arbitration.

8. The Economic Effect of Settling Labour Disputes through Arbitration

The economic benefit of settling labour dispute through arbitration and other ADR mechanisms cannot be over emphasized. Abila[53] citing *Marful-sua* of the Ghana Court of Appeal reiterated thus;

> When ADR is well coordinated and effectively practiced, the right economic and political environment that will foster international trade and investment will be created. A country that has its industrial sector in dispute will hardly attract any investment, both local and international thereby hindering the economic development of such country.[54]

Some of the economic benefits of resolving labour dispute through arbitration are as follows:

i. Sustenance of Relationship

Unlike the conventional court system wherein there must be a winner and a loser at the determination of a dispute, when dispute is settled through arbitration, it is usually a win-win situation where both parties are almost totally satisfied with the results. Nobody is at fault and Nobody is without fault, this kind of situation where no one is to be blamed, helps to retain/preserve existing relationships that would have been hampered by the conflict. Disputing parties can go about their businesses as usual with little or no grievance.[55]

[50](n 1).
[51](n 1) s 4 (1) & (2).
[52]*Ibid*, s 5 (2).
[53]S Abila and D Damfebo 'Teaching Alternative Dispute Resolution for Peace and Development' (Saintcity Multimedia 2015) < https://www.researchgate.net/publication/283727641-Teaching-Alternative, Dispute, Resolution for peace and Development> accessed 20 June 2023.
[54](n 52).
[55] *Ibid*, 3.

Understandably, no investor would want to invest in an environment where there is high rate of dispute between employers and employee as such disputes disrupt production activities thereby affecting the income of the investor. As noted earlier, increase in commercial activities brings about economic development in every country therefore, a sustained peaceful environment is needed for economic development, hence a swift and amicable mechanism of resolving conflicts in the labour sector is a huge necessity.[56]

For any economy to prosper and bring about positive impact on the citizenry, then the need to maintain industrial peace is inevitable. This can only be achieved when matters relating to labour or trade disputes are expeditiously resolved without much delay. Ajonuma,[57] maintains that the impact of a dispute resolved by adversarial methods, especially litigation can cripple business relationship.[58]

In the case of *Adebayo & Ors v Ondo Rugipoly & Anor*,[59] the court asserted that:

> Organized labour is the bedrock of a nation. Dispute arising from such labour or trade need to be settled as quickly as possible, because failure to do so might grind to a halt the economy of the nation. This is why the Constitution intends expectation trial/settlement of matters before the NIC.[60]

The implication of the forgoing emphasizes the need to quickly resolve industrial related conflicts as they not only disrupt the chain of production but can also halt other economic activities and occasion serious adverse economic effect as investment and trade will be greatly affected.

ii. Attraction of Foreign Investment and Trade

Good governance and the prevalence of the rule of law in a nation can be achieved through the promotion of a rapid access to justice which is greatly achieved through the resolution of disputes by arbitration. Thus a country that encourages the resolution of dispute through arbitration stands a better chance of attracting foreign investment and trade. This is so because the practice of arbitration helps to boost investors' confidence as the processes are less stressful, cheap and efficient.[61] Apart from the need to maintain national security, the maintenance of peace is considered necessary in a nation if economic survival is to thrive[62] as nobody will be willing to do business in a conflict abundant/residing environment. Many sectors of our economy such as mining, manufacturing and agriculture, have experienced growth and

[56] *Ibid*.
[57] J A Ajonumah and O E Ehie, 'The Applicability of Alternative Dispute Resolution Mechanisms to Labour Disputes in Nigeria' [2019] (7) (1) *International journal of Business and Law Research* 47-54.
[58] *Ibid*, 47.
[59] [2017] 4 NWLR (pt.1555) 264 at 291.
[60] *Ibid*.
[61] (n 56) 37.
[62] *Ibid*.

development as a result of foreign investment thereby increasing the Gross Domestic Profit (GDP) of the nation.

From the foregoing, it can be observed that investment and trading can thrive well in a nation with a judicial system that ensures speedy, efficient, less expensive conflict resolution mechanisms. International commercial arbitration has become attractive to investment and business communities all over the world due to its obvious advantages over litigation.[63]

iii. Preventing the Wastage of Time and Resources

Article 4 of the Instrument[64] provides for the mandates and the benefit of the Centre to wit:

1. To enhance and facilitate quick, efficient and equitable resolution of certain employment labor and industrial relations dispute within the jurisdiction of the court;
2. To minimize, reduce, mitigate and eliminate stress, cost and delays in justice delivery by providing a standard Alternative Dispute Resolution framework for fair, efficient and amicable settlement of disputes
3. To assist disputants in the resolution of their disputes without acrimony or bitterness.[65]

The implication of the provision reiterated above is that the ADR Centre including arbitration created by the Instrument aims at ensuring that labour related conflicts are handled to eliminate cost, stress and delays in justice delivery which ordinarily will act as a strong clog against the wheel of economic advancement. The phrase eliminating of cost here, did not just end at the financial expenses made by the disputants in the conventional court by system of employing legal counsel, filing, transportation or prosecution and presentation of evidence but also the losses to be incurred as a result of the halt in production and distribution, including loss of revenue by the government. All these shall in no little means affect the nation's economy negatively.

9. Issues and Challenges Affecting Effective Application of Arbitration in Resolving Labour and Investment Disputes in Nigeria

There are some challenges affecting the effective application of arbitration in settling labour and investment disputes in Nigeria. Some of these challenges are highlighted below:

i. Imbalance of Bargaining Power between Employees and Employers

In labour matters most especially as it relates to contract of employment, most arbitration clauses or agreements are usually contained in the contract of employment and it is usually

[63] *Ibid*, 39.
[64] NICN ADRCI 2015.
[65] (n 63), Art.4(1)(2) & (3).

signed during the time when the employee is being employed by the employer. At that time, the employee is totally subordinate to the employer. An arbitration clause in an employment contract is usually on a take-it-or-leave-it basis and is potentially unfair from the employee's perspective. The ability of the employee to opt out of the arbitration is minimal because the employee would want to retain his job. Thus there is a high imbalance of bargaining power between the employee and the employer. A classical example is in the case of in *Faber v Menard, Inc*[66], where an employee successfully argued that an arbitration clause in his employment agreement was procedurally unconscionable because of his weak bargaining power and financial standing compared to his employer's. The United States Court of Appeals (Eighth Circuit) decided that the arbitration clause was unenforceable. This decision was partly because the employee was told that he must either agree to participate in the arbitration programme or be replaced.

The weak bargaining power of employees particularly in the Nigerian context should therefore be taken into full consideration in determining the enforceability of an arbitration clause contained in contract of employment. To avoid this power imbalance, it is submitted that parties should be allowed to choose whether to resolve their dispute through arbitration only when the dispute has arisen and it is before the court, in this case, the National Industrial Court of Nigeria which is the proper court with jurisdiction to entertain and determine labour and employment disputes. This position is justified on the basis that though arbitration is said to be less expensive compared to litigation, however, this is not always the case as most Nigerian employees especially the low income earners may find arbitration expensive. To them, litigation is often a cheaper option because the cost of filing relevant documents is very minimal especially when considering the value of the claim[67].

Also, costs awarded against the employee are also very minimal in litigation. Again, employees (especially low- and mid-level) will find it very difficult to pay arbitrators' fees. It is to this end that Hickox recommended that employees should not be required to pay the arbitrator(s) fees and other arbitration expenses to facilitate the enforcement of arbitration agreements with respect to employment contracts[68]. However, this approach will also increase the issue of power balance during the arbitration proceedings as the party that pays the arbitrator's fees may seem to have more control over the proceedings over the employee who did not pay any fee.

ii. Independence of Arbitration Process

As noted earlier in this dissertation, the ACA regulates the resolution of commercial disputes by arbitration while the TDA regulates the resolution of labour disputes by arbitration. In resolution of labour disputes by arbitration, the Minister of Labour has a major role to play. The

[66] 267 F. Supp 2d 961
[67] P N Okoli, *Promoting Foreign Judgments: Lessons in Legal Convergence from South Africa and Nigeria* (2019, Wolters Kluwer) 14–15.
[68] S Hickox "Ensuring Enforceability and Fairness in the Arbitration of Employment Disputes" [2010] 16 *Widener Law Review:* 113.

TDA empowers the Minister take steps to resolve the disputes, which includes, appointment of a conciliator under section 8 of the TDA or refer the dispute or any matter relating thereto for settlement to the Industrial Arbitration Panel under Section 9 of the TDA.

In all of this, it is clear that there is a form of political interference in the resolution of labour dispute through arbitration or other ADR mechanism. Processes. There is a general saying in Nigeria that he who pays the piper detects the tune. Thus there is every tendency that the Minister who is empowered by law to refer the dispute to the Industrial Arbitration Panel for settlement may have a kind of control over the proceeding. The Nigerian State should therefore allow for an independent system in the application of arbitration or other ADR procedures in the settlement of labour disputes. The power of the Minister of Labour and Employment under the TDA does not allow for any form of independence in the system, as the Minister who is always party to trade dispute will not seat as a judge in his own matter.

iii. Attitude of Parties

The ACA provides for the grounds for the setting aside of an arbitral award. One of such is provided in section 30 of the ACA to wit: Where an arbitrator has misconducted himself, or where the arbitral proceedings, or award, has been improperly procured, the court may on application of a party set aside the award. This provision is not contained in the Model Law and has thus caused a lot of unanticipated problems. This is because what amounts to misconduct is not defined in the ACA and has thus allowed the courts to consider error of law on the face of the award as a misconduct. This means that the courts had the power to review the entire proceeding as if it were an appellate body.

The Supreme Court of Nigeria has tried to address this issue in the case of *NITEL v. Okeke*[69] *where a* complaint of the appellant was that the arbitrator had not considered the evidence the way a judicial panel would have and that the tribunal did not analyse the pleadings as a court would. The Supreme Court rejected this argument and held that [a] court should not therefore upset the expectation of the parties except for the clearest evidence of wrongdoing or manifest illegality on the part of the arbitrator. The Supreme Court stated expressly that a challenge application is not a merits appeal and deprecated the appellant's approach of attacking the substance of the award rather than demonstrating the alleged misconduct. This being the case, even though it is said that an arbitral award is final and binding, the losing party may seek leave of Court to set aside the award on the grounds of misconduct of the Arbitrator. For investment disputes with huge financial implications, the losing party may even appeal to the Court of Appeal and then the Supreme Court if the application to set aside the award is dismissed. In such a circumstance, the winning party may be exposed to the same troubles of delay or publicity faced by a litigant in conventional Courts which the parties actually tried to avoid by inserting the arbitration clause in the contract agreement.

[69] *[2017] 9 NWLR (Pt. 1571) 439.*

iv. Injunctive Orders against Arbitration

It has been discovered that some parties who are reluctant and not ready to comply with arbitral awards or amicable settlement of disputes through arbitration, usually resort to the conventional courts to obtain an injunctive order stopping or suspending the conduct of arbitral proceedings or enforcement of arbitral awards[70]. It is in responses to this position that the Singapore High Court in *Mitsui Engineering and Shipbuilding Co. Ltd. v Easton Graham Rush*[71] held that it had no power to grant anti-arbitration injunction restraining an arbitrator from proceeding with the arbitration but made clear that it could set aside the award if the circumstances so warranted. It is pertinent to state at this point that the Nigerian Courts should adopt this position by refusing to grant unnecessary injunctive orders which constitute an interference on arbitration process.

10. Measures to Enhance Effective Arbitration in Settling Labour and Investment Disputes in Nigeria

Considering the practice of arbitration and other alternative dispute resolution mechanisms in some other jurisdictions in resolving disputes, it is pertinent to observe that there are enormous lessons and measures for Nigeria to learn, import and/or transplant in order to enhance our machinery for dispute settlement. Some of these measures include;

i. Independence of Arbitration Process

In the Republic of South Africa, its arbitration and other ADR system is allowed to be free from any form of governmental control. It is provided that everyone has the right to have any dispute that can be resolved by a fair public hearing before a court or, where appropriate another independent and impartial tribunal[72]. Flowing from the above, the Nigerian State need to allow for an independent system in the application of arbitration in settling labour disputes. The power of the Minister of Labour and Employment under the Trade Disputes Act does not allow for any form of independence in the system, as the Minister who is always party to trade dispute will now seat as a judge in his own matter. Hence, this does not allow for independence of the process. It will therefore be appropriate for either the Nigerian Labour Congress or the Trade Union Congress to choose to refer the dispute to arbitration and not the Minister having the sole power to refer labour dispute to arbitration panel.

ii. Limitation of Appeals against Outcome of Arbitral Proceedings

As pointed out earlier in this dissertation, one of the reasons why arbitration is preferred over the other conventional methods of dispute resolution is because of its efficient, quick and confidential way of resolving disputes. Investors' confidence in arbitration is tied to how quickly and efficiently commercial disputes are resolved by independent experts in a confidential manner and without any form of publicity. It is observed that most investors do not

[70] Opebi & Ors v Noibi & Ors. [1977] 2 NSCC 464
[71] [2004] 2 SLR at 14.
[72](n 27), s34.

want to be associated with litigation in the regular courts because of publicity that is common with the regular court proceedings, thus they rather adopt the dispute resolution process that is more confidential. However, when arbitral proceedings or awards are being appealed against at the regular courts, it makes the investors to be exposed to the delays and publicity common with the regular courts which they initially tried to avoid by submitting their disputes to arbitration.

In the United Kingdom (England), one of the factors which has practically made arbitration practice to be more successful is in the area of the limits placed on appeals of arbitral awards and all arbitration appeals being heard by the specialist commercial court. This leads to a lower volume of arbitration appeals and those appeals which do go to the English courts are being determined expeditiously[73]. In Nigeria, appeals against arbitral proceedings and awards often suffer from significant delays in the Nigerian courts due to the high volumes of cases in the court and limited personnel determining these cases. There should therefore be a limitation of appeals against arbitral proceedings and award to avoid arbitration matters going to the regular courts. Also, just as it is applicable in the UK, there should be established in Nigeria a Commercial Court to entertain commercial disputes as well as hearing appeals from arbitral tribunals so as to enhance a quick dispensation of disputes and to achieve the purpose of arbitration which is to resolve disputes in a more efficient, quicker and confidential way."

11. Conclusion

The economic benefits of effective arbitration in the resolving labour and investment disputes in Nigeria were identified and some of the issues and challenges affecting the effective application of arbitration in the settlement of labour and investment disputes were also highlighted. It is found in this paper that in spite of all the attendant problems associated with arbitration practice in Nigeria today, arbitration has come to stay as a veritable tool for alternative dispute resolution. Arbitration is still very relevant as a dispute resolution mechanism especially in domestic and international commercial transactions, and if its advantages are properly harnessed, will decongest the perpetually congested cause lists in our courtrooms, dispense quick justice and fast track growth, development, commerce and confidence in the Nigerian economy, in line with the new world order.

The practice of arbitration is vibrant and it has received growing patronage in recent times in Nigeria and all over the world. Its advantages by far outweigh its disadvantages. The inadequacies though momentous are amenable, and as various arbitration practitioners continue to gain experience by exploiting the advantages of arbitration, it is expected that healthier arbitration practice and norms will continue to evolve until the newer and faster procedural methods take the centre stage in Nigeria. It is also expected that cost and time effective principles will at the long run be adopted by practitioners and arbitral institutions.

[73] O Taiwo, Arbitration Practice, Nigeria can copy from UK (Lagos: Punch Newspaper, 29 June, 2017) <https://punchng.com/arbitration-practice-nigeria-can-copy-from-uk-searle/> accessed 27 August, 2023

12. Recommendations

In view of the aforesaid, we recommend that hereunder outlined:

i. Sections 8,9,17 and 33 of the Trade Disputes Act, should be amended to release the Minister of Labour and Employment from overseeing the application of arbitration in settling labour disputes as provided for under the Act. This is because the continues superintendence of the process by the Minister is an indication that the practice and procedures is still attached to and/or controlled by the executive arm of government, who are also employers of labour and by extension major party to labour disputes in Nigeria. That, being the case, achieving substantial justice in such atmosphere without compromise is arguably unrealistic.

ii. There should be created in Nigeria, a special Commercial Court for the hearing of appeals against arbitral proceedings and awards just as it is applicable in the United Kingdom. This will help to achieve the purpose of arbitration which is the fast resolution of disputes. In alternative, the Nigerian investment tribunal should be upgraded to a full court with expanded jurisdiction and expressly subordinate to the Supreme Court Jurisdiction, to concretize investors' confidence in the Nigeria project.

iii. The weak bargaining power of employees particularly in the Nigerian context should be taken into full consideration in determining the enforceability of an arbitration clause contained in contract of employment. Parties should be allowed to choose whether to resolve their dispute through arbitration only when the dispute has arisen and it is before the court, in this case, the National Industrial Court of Nigeria which is the proper court with jurisdiction to entertain and determine labour and employment disputes and not to be stated in the contract of employment which is being signed when the employee is totally subordinate to the employer.

iv. The Nigerian Courts should abstain from the persistent granting of injunctive orders that are anti-arbitration so as to reduce the unnecessary court interference with arbitration processes thereby upholding the principle of sanctity of contract.

v. Appeals against arbitral proceedings and awards often suffer from significant delays in the Nigerian courts due to the high volumes of cases in the court and limited personnel determining these cases. There should therefore be a limitation of appeals against arbitral proceedings and award to avoid arbitration matters going to the regular courts.