

THE CHALLENGES OF ENFORCEMENT OF ARBITRATION AGREEMENT IN NIGERIA: AN APPRAISAL

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Abstract

When there is dispute as to rights, interests and recognitions, those concerned at times end up in court. The law always brought to the fore though law itself may perhaps not be a guarantee to justice. A modern civil justice system should proffer a variety of approaches and options to dispute resolution. Arbitration as one of the ADR mechanisms to litigation involves third party intervention to assist the resolution of a dispute. This paper examined the Enforcement of Arbitration Agreement in Nigeria with a focus on its challenges. The major challenge envisage in this paper is the absence of precedent decision. This paper work revealed that Arbitration and other ADR mechanisms fair and effective means of resolution of dispute and also an inextricably part of the justice system. The paper further revealed that arbitration agreement in a contract does not oust the jurisdiction of the court, although the court is under obligation to respect and enforce the agreement of the parties to a contract. The mere agreement of party in an arbitration agreement cannot automatically deprive one of the constitutionally guaranteed right of access to the court. Recommendation was therefore made for a precedent in arbitration and other ADR mechanisms in Nigeria.

Keywords: Agreement, Arbitration, Arbitration Agreement, Litigation contract, court.

Introduction

Over the years, litigation, a western initiative and perception of dispute resolution, has been in the main. Litigation is the most common form of dispute resolution all over the world.¹ It is not voluntary, parties have to appear when demanded or suffer penalty. The decision is founded on law and precedent, Technicalities, delay, costs and the focus on who is right and who is wrong between the opposing parties are some of the identified pitfall of the adversarial trial process.² The rule of law is a fundamental feature of a modern justice system. It is the central protection that gives people and organizations confidence that society's rules will be respected and upheld. Obviously lack of strict rules in Arbitration, its informal nature and absence of legal precedent are the major challenges in promoting the use of Arbitration, its informal nature and absence of legal precedent are the major challenges in promoting the use of Arbitration in the Justice system. The present study is therefore undertaken in order to investigate the challenges which make the enforcement of Arbitration Agreement difficult in Nigeria.

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¹P.T. Akper, 'Promoting the use of ADR processes in courts' National Judicial Institute (ed), Conference of all judges of the Lower Courts 2002, (Mij, Professional Publishers 2004) 144.

² Akper (n1)

Definition of Terms

a. Agreement:

A mutual understanding between two or more persons about their relative rights and duties regarding past or future performance; a manifestation of mutual assent by two or more persons. The parties' actual bargain as found in their language or by implication from other circumstances, including course of dealing, usage of trade and course of performance.³

b. Arbitration

The Arbitration and Medication Act, defines Arbitration as a commercial arbitration whether or not administrated.⁴ To conserve arbitration in this narrow sense may not be helpful because arbitration is not limited to commercial dispute alone, as envisage by the Act, but it can be applied to resolve an array of non-commercial disputes such as family, labour commercial and many other civil disputes.⁵

c. Arbitration Agreement

The Arbitration and Mediation Act⁶ and the UNCITRAL Model Law⁷ defines the expression Arbitration Agreement as an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not.

Thus, the Arbitration and Mediation Act and the UNCITRAL Model Law include existing and future disputes in addition to non-contractual in its definition of the term Arbitration Agreement.

d. Contract

Contract can be defined as a set of rules governing the relationship, content and validating of an agreement between two or more persons (individual, compares or other institutions) regarding sale of goods, provision of services or exchange of interest or ownership. As all encompassing this definition appears it does not cover the full ambit of situations in which contract law will apply. The reason for this is due to the vast number of examples in which contract can arise in everyday life.⁸

The Supreme Court in *Bilante Int'l Ltd v NDIC*⁹ defined and gave the essentials of a contract as an agreement between two or more persons which creates an obligation to do or not to do a particular thing. Its essentials are competent parties, subject matter a legal consideration mutuality of agreement and mutuality of obligations. To constitute a binding contract between parties, there must be meeting of mind of often referred to as consensus ad idem. The mutual consent relates to offer and acceptance. An offer is the expression by a party of readiness to contract on the terms specified by him which if accepted

³Arbitration and Medication Act 2023. S. 91 (1)

⁴ (n3)

⁵ C.E. Daniel, *Arbitration and Dispute Resolution in Nigeria: Practice and Procedure* (Kraft Books Limited 2022) 4.

⁶ (n3)

⁷ Art. 7 (1) UNCITRAL Model Law.

⁸ E.E. Aloba, *Law of Contract* (2nd edn, Princeton & Associate Publishing Co. LTD 2016).

⁹ (2011) 6 MJSC 69 at 71

by the offeree give rise to a binding contract where the offeree signifies a clear and unequivocal intention to accept the offer.

e. Litigation

Litigation is the process of carrying on a lawsuits.¹⁰ It is a method of dispute resolution on civil litigation which involves a plaintiff or claimant facing off against a defendant before a judge or a judge and jury. The judge or jury is responsible for weighing the evidence and making a ruling. The information conveyed in hearing and trials usually enters and stays on the public record.

Judicial disputes resolution is typically adversarial in nature, for example involving antagonistic parties or opposing interest seeking an outcome most favourable to other position. But, as it is well known, commercial men and women are by nature and practice of their business in a hurry when a dispute arises in their business transactions to have the rights and liabilities determined as soon as possible without under wastes of time so that they can get on their business like atmosphere. Again, some disputes are sensitive and of a confidential nature and privacy is required. Complexities of litigation usually increase the cost of litigation. These complex circumstances and the need to decongest the court dockets, have a given rise to other alternative processes for amicable resolution of disputes in Nigeria in particular and the world at large.¹¹

f. Court

In Nigeria, like other countries, the functions of Administration of Justice rests, on the courts as provided in section 6 of the constitution.¹² Section 91 (1) of the Act¹³ defined court to mean the High Court of a State the High Court of the Federal High Court.

The jurisdiction of these courts to entertain arbitration matters is subject to the constitutionally granted jurisdiction by the Constitution on arbitration matter of the Arbitration cannot have jurisdiction to intervene in the matter.¹⁴

Enforcement of Arbitration Agreement

It has become common practice for parties to insert arbitration clause in their contracts stating arbitration as the agreed mechanism and proper forum for resolving disputes that may arise from such contracts. However dispute the presence of arbitration clause more often than not parties resort to the resolution of any dispute arising from the contract.¹⁵

Those commercial contacts that contains arbitration clause from which the reference to arbitration is derived are known as arbitration agreements. It must be noted that an arbitration agreement does not

¹⁰C. J. Amasike, Arbitration and ADR in Africa (Dr. C. J. Anosike & Associates 2005) 1

¹¹(n5) 9-10

¹²Constitution of the Federal Republic of Nigeria 1999 (as amended)

¹³(n3)

¹⁴(n5) 244-245

¹⁵E. Majemite and other 'Determining the jurisdiction of courts in the face of an Arbitration clause

<<https://www.mondq.com/nigeria/arbitration-dispute-resolution/988206/determining-the-jurisdiction-of-courts-in-the-face-of-an-arbitration-clause>> Accessed 9 June 2024

only serve as evidence of consent of the parties to arbitration and establish the obligation to arbitrate, it also serve as a basic source of the power of the arbitral tribunal may exercise such powers that may be conferred by the law governing arbitration. The essence is to family determine the mode of resolutions of a dispute if and when arises.

When parties have by agreement accepted to refer all disputes arising from their contract to Arbitral tribunal the court is enjoyed to enforce such agreement. This is because an arbitration clause is a written submission agreed by the parties to the contract and like other written submission, it must be construed according to its language and in the light of the circumstances in which it is made.

However, cases abound where notwithstanding the provision of arbitration clause, institute matters in court for determination. The Arbitration and Mediation Act¹⁶ empowers the count to stay proceedings and preserve the res pending reference to Arbitration. The court has jurisdiction and power to order an injunction to preserve the subject matter of agreement whether or not it contains an arbitration clause. It is a well-established rule of law that the proceedings in the court shall be stayed pending arbitration in circumstances where an arbitration clause is inserted in the agreement between the parties. In other that a stay might be granted, the applicant for a stay must satisfy certain conditions one of which is that the applicant must apply for the stay not later than when submitting the first statement on the substance of the dispute.

The power of the court as conferred by section 5 of the Act¹⁷ is mandatory. It is a power conferred by statute¹⁸ Section 5 of the Arbitration and Mediation Act (AMA) now mandates Nigerian Courts to enforce arbitration Agreement by staying proceedings when dispute which are subject matter of Arbitration are taken to court. Under the repealed Arbitration and Conciliation Act (ACA), stay of proceedings was discretionary. Once a party has agreed that their dispute should be settled by arbitration if any arise this is considered a solemn contract which should be honoured by the parties.

A party to the agreement is therefore not allowed to breach that agreement by having recourse to court without first submitting such dispute to Arbitration, such an agreement has formed part of the terms of the said contract and both parties are legally bound to comply with the terms of the Agreement¹⁹, failure to do might ordinarily oust the jurisdiction of the court. This particular provision is however quite controversial. This is because, on one hand, where there is a consensus between parties in a contract the only duty of the court is to enforce the agreement premise on the principle of *Pacta Sunt Servanda* which places a responsibility on the court to respect the intention of the parties and give effect to the terms unanimously agreed upon, provided it does not go against the boundaries of the law.²⁰

¹⁶ (n3) S. 5

¹⁷ (n 16)

¹⁸F. Ajogwu, Commercial Arbitration in Nigeria: A Law and Practice (Mbeyi & Associates 2009) 88 - 89

¹⁹(2001) 10 NWLR (pt 720) 64

²⁰O. M. Atoyebi, 'Arbitration Clause and Enforcement in Nigeria: An Overview' <<https://awpavillion.com/bio/arbitration-clause-and-enforcement-in-Nigeria-an-overview>> Accessed 4 April 2024.

On the other hand, there is a constitutionally guaranteed right of access to court and to deny a party of such right merely on the basis of a contractual agreement would appear unreasonable and ultimately unconstitutional²¹

In the light of the above it is safe to say that although parties cannot resort to court before exploring arbitration where an arbitration clause is present the jurisdiction of the court is not completely ousted. Where a party approaches the court, the other party to challenge the jurisdiction of the court to entertain the suit and apply for a stay of proceeding pending the conclusion of Arbitration.²²

The Arbitration and Mediation Act, mandates a court to stay proceedings and refers the matter to arbitration unless the court finds that the arbitration agreement is void, inoperative, or incapable of being performed. Furthermore where a necessary make an interim or supplementary order for the purpose of preserving the rights of parties²³

Section 5 of the Arbitration and Mediation Act provides thus;

5 (1) notwithstanding the provision of any other law, a court before which an action is brought in a matter, which is the subject of an arbitration agreement shall, if any of the parties request not later than when submitting their first statement on the substance of the dispute refer the parties to arbitration unless it finds that the agreement is void, in operative or incapable of being performed.

Section 5 (2) where an action referred to in subsection (1) has been brought before a court arbitral proceedings may be commenced or continued and an award may be made by the arbitral tribunal while the matter is pending before the court.

Section 5 (3) where a court makes an order for stay of proceeding under subsection (1) the court may, for the purpose of preserving the rights of parties, make an interim or supplementary order as may be necessary.

Under the repealed Arbitration and Conciliation Act, stay of proceedings and reference to same to an arbitral tribunal was subject to the discretion of the court despite the existence of a valid arbitration agreement. For a party to arbitration agreement to obtain a stay, he (the requesting party) had the responsibility of showcasing his willingness to engage in arbitration.²⁴ The inclusion of the willingness criterion in the provision of the repealed Arbitration Act led to a considerable ambiguity and debate. In some cases, the court held that there is an obligation on the requesting party to initiate.²⁵

²¹CFRN 1999 (as amended) S 6(6) (b)

²² (n 20)

²³ (n 16)

²⁴Arbitration and Conciliation Act S. 5 (1) and (2)

²⁵Onward Ent. Ltd vs MV Matrix (2010) 2 NWLR (pt 1179) 530.

Also in the case of *MV Panormose Bay vs. Olam (Nigeria) Plc*²⁶ the court held that a party applying for a stay of proceedings pending reference to arbitration in order to succeed must show in his affidavit evidence, the steps he took or intend to take for the proper conduct of the Arbitration. It is not enough for him to merely depose in his affidavit that he is ready and willing to do all things necessary for the proper conduct of the such arbitration. The party asking for a stay of proceeding pending reference to arbitration is duty bound to initiate the arbitration. If not so done, it has failed to discharge the obligation placed on it by law and therefore cannot turn around to complain.

Consequently, this has impacted negatively on the effectiveness of enforcing Arbitration agreement over the years. However, with the introduction of the Arbitration and Mediation Act 2023, the requirement of demonstrating willingness has been eliminated by the Act.

The Arbitration and Mediation Act mandates the court to uphold arbitration agreement by staying or suspending ongoing proceedings and referring the parties to arbitration unless the court finds that the arbitration agreement is void in operative or in capable of being performed.

Challenges of Enforcement of Arbitration Agreement

This paper reviews the challenges associated with the practices and enforcement of Arbitration in Nigeria. In discussing some of these challenges, emphasis will be placed on the following areas:

1. Judicial Precedent

The doctrine of judicial precedent or stare decisis is the principle of English Law that precedents are authoritative, binding and must be followed unless there is a reason to deviate from it.²⁷ The doctrine of precedent is well noted in the Nigeria Jurisprudence. It is well settled principle of judicial policy which must be strictly adhered to by all lower courts. Redefined by the Supreme Court as meaning ‘stand by your decision of our predecessor, however wrong they are and whatever injustice they may inflict’.²⁸

The implication is that a lower court is bound by the decision of a higher court even where that decision was given erroneously. The practice of precedent is that court should stand by or apply an earlier correct decision. However, where there is no existing law on a matter, a judge in such an instance can go ahead and give a decision. Such decision the becomes a precedent or a case law which may be followed in subsequent precedent correctly states and represents the principle on such given matters²⁹

In Nigeria, for instance the binding force of award of ICSID is only limited to the parties. It does not extend to others before different tribunal or ADR institutions and also does not create a binding precedent.³⁰

²⁶ (2004) 5 NWLR (pt 805) 1 at 15 Paras F-H, ratio 5.

²⁷ G. Williams, Learning the Law (11th edn, London Stevens & Sons (1982) 67.

²⁸ National Electricity Power Authority vs. Onnah (1997) 1 NWLR (pt 484) 688.

²⁹ E. Malemi, The Nigerian Legal Method (2nd, Princeton c Publishing Company 2012) 125.

³⁰ Art. 50 of the ICSII convention 1965

Arbitration and other ADR mechanism cannot deliver a precedent decision and in circumstances where precedent is required, Arbitration and other ADR mechanism will be absent for example a car insurance company may be involved over the interpretation of a policy in order to substantiate its stance towards all policy holders. It should be borne in mind that the precedent in this regard can operate both ways, that is both beneficial and disadvantageous is unsuccessful in that resolution, it will not only lose the case, but also publicly declare to other holders of similar policy that they too have a right to redress against the company.³¹

Arbitration and other ADR mechanism function with fewer formalities than typical court proceedings.³² The common reason for ADR is to move away from a focus of legal entitlement to a problem solving frame of reference.³³ The fundamental feature of ADR is that they are dispute resolution processes undertaken in private.³⁴ Both processes and outcome of the procedure are private and generally confidential to the parties.

2. Flexibility or Less Strict Rules

Arbitration and other ADR mechanisms are perhaps commended for its flexibility. Critics argued that the flexibility of allowing parties to design their own process chose their own third party neutral will absolutely weigh much influence on how things will happen.³⁵ Also to have the same decision maker organize each step in the process is a vice as against being a virtue in Arbitration. It is contended that the rules both procedure and evidentiary learned to suit the parties and disputes are either enforced or enforced in a less strict manner. Also, there is the argument that the Arbitrator's wide scope to design a remedy leaves the parties minimally to predict possible outcome of their disputes.³⁶ Thus, since Arbitrators control the proceedings in its entirety, they indeed have power to keep the parties in check than would be in litigation.

3. Lack of Efficient National Court

The lack of efficient National Court for Arbitration just like the National Industrial Court will affect the role played by the court as stipulated in the Act. For the court to perform those specific roles assigned to it by the Act, a lot depends on the quality of Judicial Officers. In a situation where the Head of courts and many judicial officers, including those charged with the administration of Justice are not conversant with arbitral techniques skills, processes, culture and philosophy, that will be more undesirable and unhelpful³⁷.

³¹A. O. Ajetunmuobi, *Alternative Dispute Resolution and Arbitration in Nigeria: Law Theory and Practice* (Princeton and Associates Publishing Co. Ltd 2017) 51.

³²D. Kew and K. Nwosu, *Training Manual on Alternative Dispute Resolution and Restorative Justice* A lecture delivered at the National Judicial Institute, Abuja on October 2007, 114.

³³(n31)

³⁴(n 33)

³⁵(n 31) 50

³⁶Art. 42(1) of the ICSID convention 1965

³⁷ (n 5) 340 - 342

4. Poor Infrastructure

The lack of infrastructure is usually a great challenge in the practice and development of Arbitration. In Nigeria there is a general infrastructural deficit in almost all the sectors ranging from roads, public building, railways, airlines are in deplorable conditions, making movement very tardy and laborious, the few commercial airlines operating in the country are either on charter arrangement or quit expensive which cost is not affordable to the ordinary man. The high cost of transportation, poor internet service and the deplorable state of most infrastructures in the country will definitely affect the practice and development of arbitration. This makes it difficult for Nigeria to attach meaningful Foreign investors and business in the country.³⁸

5. Privatization of Jurisprudence

With the increased use Arbitration and other ADR mechanism there is the proclivity to have fewer cases being made available to the public court domain for making of precedent creation of rules and political values for the larger community.³⁹ Because of settlements being handled in private and with confidentially clause being attached to them, other members of the public will not realize about wrong committed by the Defendants. Consequently, information will be shielded from public glare. Generally, settlement based on non-legal criteria may threaten compliancy with and enforcement of laws. By reason of the foregoing, claims are more likely to be individualized rather than collectivized.

6. The Rising Cost of Arbitration/ADR

The importance of Arbitration is a mechanism for dispute resolution in Nigeria and elsewhere cannot be overemphasize. It has helped in decongesting the courts and spreading up the resolution of disputes. However, in recent times, rising cost of arbitration albeit dispute resolution is of concern to users of arbitration and arbitration practice in Nigeria. The costs involved in the process of arbitrating a dispute are enormous and are borne by the parties. The internal costs to the parties involved in lending support to any dispute resolution process such as in-house counsel, company witnesses and other professional or technical support, depend on the type of arbitration selected (institutional or ad hoc)⁴⁰.

Due to the complexity of most commercial arbitration cases, the assistance of experts would be required. Parties are responsible for the experts fees which can range from a hundred thousand naira to Ten of millions of naira depending on the complexity of the case parties also bear the cost entailed in preparing witnesses for the written and oral testimony, including travel and accommodation cost.

Other elements of cost in arbitration include: the hiring of venue for the meeting, payment made to the Registrar and supporting staff for their services, transportation and accommodation expenses to the Arbitrators. These administrative expenses are different from the fees payable to the Arbitrators.

³⁸(n 5) 344 - 345

³⁹(n 31)

⁴⁰(n 5) 342 - 343

Conclusion and Recommendations

Conclusion

The adversarial system of litigation in common law jurisdiction are fraught with problems, such as delay in the determination of cases, over congestion of the courts docket and inordinate expenses tied with its procedural complexities. Arbitration refers to assemblage of flexible approaches to resolving disputes more quickly and at a lower cost other than going through the tedious path of adversarial proceedings. Arbitration agreement in a contract ensures that arbitration is first explored before recourse to litigation. This allows parties to enjoy the visit benefits of arbitration over litigation. Which include private way of resolving dispute unlike litigation that is open court system.

Despite the vast benefits of Arbitration there are several challenges face by users in enforcing arbitration agreement such as lack of judicial precedent and reporting, lack of strict rules 1for Arbitration, high cost associated with Arbitration, among others.

Recommendations

It is recommended that Nigeria should put in place legal framework that will specifically establish a precedent decision for arbitration, improve infrastructure establish efficient National court for Arbitration in Nigeria just like the National Industrial court, increase awareness and education on arbitration benefits. By addressing these challenges, Nigeria can enhance the effectiveness and efficiency of arbitration proceedings, promoting a favourable business environment for Arbitration.