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Alternative Dispute Resolution in Commercial Contract under the Arbitration and Mediation Act, 2023: Averting Litigation and Enhancing Stability

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Abstract

Disputes in commercial activities in Nigeria can spiral into violence and conflict due to the lack of effective judicial systems that can provide a reliable and quick process for resolving disputes. Alternative dispute resolution procedures can strengthen dispute settlement systems and bridge the gap between formal legal systems and customary means of African justice. Alternative dispute resolution may specifically contribute in stabilization efforts when judicial institutions are weak and social tensions are high. This paper reviews the Arbitration and Mediation Act, 2023, draws on secondary sources such as academic literature and reports as well as analysis of historic data to provide insight on how Alternative dispute resolution procedures prevents conflict and stability in commercial activities in Nigeria.

Keywords: Alternative Dispute Resolution, Commercial Contract, Arbitration and Mediation Act, 2023, Litigation, Stability.

1. Introduction

Litigation is one of the foremost ways of resolving commercial disputes in Nigeria. It is without doubt that the judicial system in Nigeria is faulted with delay, cumbersome procedure, the rigidity of procedure and technicality, among other things. The introduction of Alternative Dispute Resolution (ADR) into the Nigerian judicial system has brought a lot of relief in this regard. ADR is a way of commencing alternative methods and procedures of settling disputes whether civil, criminal, marital, and commercial without approaching the courts. It brings relief to some problems associated with litigation as a means of settling dispute, for example, ADR takes a shorter time unlike litigation which is time consuming in the sense that a particular matter may last up to ten years or more in the court of first instance; if the matter goes on appeal again, it may last for another ten years and so on. ADR also saves cost of settling dispute. Litigation is very expensive. This makes it very difficult for the less privileged to approach the court whenever their rights are infringed upon.

ADR as a means of resolving dispute is acknowledged under section 19(d) of the 1999 Constitution of the Federal Republic of Nigeria (as amended). The said section of the Constitution sets one of its foreign objectives "as the seeking of settlement of international disputes by negotiation, mediation, conciliation, arbitration, and adjudication." ADR is also recognized under rule 15(3)(d) of the Rules of Professional Conduct for Legal Practitioners, 2023 where it provides that: "In his representation of his client, a lawyer shall not fail or neglect to inform his client of the option of alternative dispute resolution mechanism before resorting to or continuing litigation on behalf of his client." Likewise, in any proceeding before the Court, the court may promote reconciliation among the parties and encourage and facilitate an amicable settlement of disputes.[1]

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[1]For example, Order 18 of the Federal High Court (Civil Procedure) Rules, 2019 provides that "Where a matter comes before the Court for the first time, the Judge shall in circumstances where it is appropriate, grant to the parties, time, not more than thirty days within which parties may explore possibilities for settlement of the dispute." Furthermore, Order 52 of the same rules provides a guideline as to arbitration procedure in the Federal High Court.

The Arbitration and Mediation Act, 2023 provides for different methods of ADR available and procedures through which a party who is aggrieved can apply in settling disputes through ADR. In this paper, the writer will consider the different methods of ADR under the Arbitration and Mediation Act, 2023 and the procedures therein as regards preventing conflict and stabilizing commercial activities in Nigeria.

2. Types of Alternative Dispute Resolution

ADR incorporates various ways of settling disputes outside of the courtroom. There are different types of alternative dispute resolution options you can go with. They include negotiation, mediation, conciliation and arbitration. Let's look into each of the methods so that you can make an informed decision.

Negotiation

Negotiation is mostly the type of ADR attempted first to resolve a dispute. Negotiation allows only the parties to meet in order to settle a dispute, which will also give them the opportunity to control the process and the solution.[2] This method of ADR is much less formal than other types of ADRs and is very suitable in preventing the escalation of disputes and improving relationships.

Mediation

Mediation is also another type of ADR and also an informal one, it brings parties together and attempt to work out a settlement or agreement that both parties can accept or reject.[3] It is a voluntary non-binding process in which a third-party called the mediator is hired to help reach a resolution to the conflict. The mediator does not provide advice or express opinions on the matter, neither will he determine the final outcome of the mediation. The Mediator mainly focus on guiding the process. Most times, the mediator is an attorney, retired judge or someone who has special training in helping people to communicate in an effective way to agree upon a mutually beneficial solution. Parties usually enter into mediation and choose the mediator who proposes a solution for the parties' consideration and acceptance. The parties may decide to withdraw from the mediation process. The outcome of the mediation is non-binding except the parties agree that it should be binding.[4]

Conciliation

Conciliation as a form of ADR is a process in which a neutral party meets with the parties to a dispute and explores how the dispute might be resolved. Similar to mediation, conciliation consist of an impartial third party called the conciliator. The conciliator has a similar role as a mediator; they also help parties reach a mutual agreement without making a final decision or judgment. On the other hand, the conciliator participates more actively, raise possible solutions and can provide advice on the issues discussed unlike the mediator.[5]

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[2] C K Okorie& K Okorie, 'Alternative Dispute Resolution in Nigeria: Issues and Challenges' Nigerian Journal of Legal Studies',<https://www.researchgate.net/publication/379759340_ALTERNATIVE_DISPUTE_RESOLUTION_IN_NIGERIA_ISSUES_AND_CHALLENGES >accessed 2 May 2024.

[3] J Nwazi, 'Assessing the Efficacy of Alternative Dispute Resolution (ADR) in the Settlement of Environmental Disputes in the Niger Delta Region of Nigeria', (2017) 9 (3) *Journal of law and Conflict Resolution*,26.

[4] Ibid.

[5] S Dike, *et al*, 'Transforming Mediation and Conciliation Practices for Effective Dispute Resolution in Nigeria' (2020) 12 *Journal of Property Law and Contemporary Issues*,230.

Arbitration

Arbitration is one of the most growing forms of ADR. Arbitration is more formal than mediation and conciliation and has a lot of similarities with traditional court proceedings involving limited discovery and simplified rules of evidence. Arbitration is a process where neutral arbitrators are brought in to make a decision based on evidence. Arbitration is usually binding and can be enforced through the court system once a final decision has been made. In *NNPC v Lutin Investment Ltd*,[6] the Supreme Court of Nigeria defined arbitration as "a private method of dispute resolution in which the parties select the individual or individuals who will finally decide the matters in issue on a process agreed upon by the parties, with no or a minimum of court intervention." Arbitration relies on the consent of the parties; therefore the arbitration agreement is important because it is the doorway to the system or form of ADR called arbitration. The arbitration is headed and decided by an arbitral panel or a single arbitrator, depending on the agreement of the parties. Arbitrators do not have to be lawyers; parties can select arbitrators from other fields that they consider more suitable for the resolution of the dispute.

In Nigeria, the Arbitration and Mediation Act, 2023 is the applicable arbitral legislation providing the legal framework for the just and proficient settlement of disputes by arbitration and mediation. In the next section, the writer shall review the Arbitration and Mediation Act, 2023.[7]

3. An overview of the Arbitration and Mediation Act, 2023

Before May 2023, the applicable arbitral legislation in Nigeria was the Arbitration and Conciliation Act.[8] The ACA was in force for more than three (3) decades but did not reflect global best practices in arbitration in the 21st century.

The Arbitration and Mediation Act, 2023 was signed into Law by the then President of the Federal Republic of Nigeria, Muhammadu Buhari on 26th May 2023. The objective of the AMA as expressed in the explanatory memorandum is the same as the ACA except for the replacement of 'Conciliation' with 'Mediation'. The objective of the AMA is to:

> *provide a unified legal framework for the fair and efficient settlement of commercial disputes by arbitration and mediation, and make applicable, the convention on the recognition and enforcement of foreign arbitral awards (New York Convention) to any award made in Nigeria or in any contracting state arising out of international commercial arbitration.*

AMA is divided into three (3) Parts with a total of ninety-two (92) Sections and three (3) schedules thus:

a. Part I pertains to Arbitration – it applies to both international and domestic arbitral proceedings in Nigeria,

b. Part II provides for Mediation – the practice of commercial mediation in domestic and international dispute settlement in Nigeria, and

c. Part III covers Miscellaneous Provisions

And three Schedules:

[6](2006) 2 NWLR (pt. 965) at 542-543

[7] Hereinafter referred to as AMA.

[8] Hereinafter referred to as ACT.

1st Schedule – Arbitration Rules

2nd Schedule – Convention on the Recognition and Enforcement of Foreign Arbitral Awards June 10, 1958

3rd Schedule – Arbitration proceedings.

There are new provisions introduced into the AMA and below are some of them.

1. The AMA recognizes electronic communication, such as email, as a form of arbitration agreement in writing.[9]Electronic communication would satisfy the requirement for an arbitration agreement to be in writing, provided the information contained therein is accessible so as to be useable for subsequent reference. The requirement for arbitration agreement to be in writing is met where it is contained in an exchange of points of claim and defence in which the existence of an agreement is alleged by one party and not denied by the other.[10]
2. The AMA modifies section 4 of the ACA and deletes section 5 of the ACA. The AMA now empowers the courts to stay proceedings commenced in breach of the arbitration agreement and if the court finds that the agreement is void, inoperative or incapable of being performed.[11]
3. The Act now provides that where the number of arbitrators is not determined, the default is a sole arbitrator, rather than three as it was under the ACA.[12] And the authority of an arbitrator shall not be revoked by the death, bankruptcy, insolvency or other change in circumstances of the party who appointed the arbitrator.[13]
4. A notable improvement of the Act is its provision for the creation of an "Award Review Tribunal" (ART) under section 56 of the AMA. It gives the parties the option to stipulate in their agreement that arbitral awards could be reviewed by another arbitral tribunal if a party makes an application pursuant to section 55(3) of the AMA.
5. The AMA permits a party that requires emergency relief to, concurrently with the filling of a request for a dispute to be referred to arbitration, submit an application for the appointment of an emergency arbitrator.[14]
6. The AMA includes provisions about an arbitral tribunal's power to grant interim measures.[15] More considerably, the AMA recognizes interim measures issued by the Arbitral tribunal as binding and further provides that they are enforceable upon application to the court, irrespective of the country in which it was issued,[16] subject to section 29 of the AMA. Further, the AMA specifically empowers tribunals to order "security for the legal or other cost of any other party."[17]
7. In the AMA, parties can agree to consolidate arbitral proceedings or hold concurrent hearings.[18] Additional, the AMA empowers the arbitral tribunal to permit the joinder of

[9]AMA, s 2(4).
[10]Ibid.
[11]Ibid, s 5.
[12] Ibid, s 6.
[13]Ibid, s 4(1 &2).
[14]Ibid, s 16(1).
[15]Ibid, s 20-29.
[16]AMA, s 28.
[17]Ibid, s 52.
[18]Ibid, s 39.

additional parties to the arbitration, provided that, prima facie, the additional party is bound by the underlying arbitration agreement.[19] The provisions of section 39 and 40 of the AMA are praiseworthy, it will increase efficiency and reduce time in arbitration and multi-contract disputes can be consolidated before one arbitral tribunal and prevents inconsistent or duplicative decisions on related claims and factual issues.

8. The Act sets out Third-Party funding (TPF) provisions which apply to arbitrations in Nigerian courts. Section 91 of the AMA defines a Third-Party funder as "any natural or legal person who is not a party to the dispute but who enters into an agreement either with a disputing party, an affiliate of that party, or a law firm representing that party, in order to finance part or all of the cost of the proceedings, either individually or as part of a selected range of cases." The AMA provides that an "arbitral tribunal shall fix the costs of arbitration in the final award and term costs includes… the cost of obtaining Third-Party funding."[20] Furthermore, the AMA specifically abolishes the obstacles of common law torts of maintenance and champerty concerning TPF of arbitration.[21] This is a very laudable innovation by the AMA as there will be the possibility for many commercial organizations to institute and defend arbitration claims despite the rising costs of arbitration. Ultimately, this will raise commercial organizations' access to justice, while they retaining sufficient cash flow for their business operations.
9. The AMA has introduced important changes to the grounds for setting aside an arbitral award.[22]The AMA assumes a stringent stance setting aside arbitral awards, restricting the courts' authority to get involved and potentially annul arbitral awards, improving the finality and preservation of awards. The AMA excludes "misconduct of the arbitrator" as a ground for challenging arbitral awards. It is also required for a party to show that the ground for setting aside the award "has caused or will cause substantial injustice to the applicant."
10. Another distinguished change in the AMA is the introduction of comprehensive provisions on Mediation in replacement of Conciliation, which was in the ACA. Inherently, Part II of the Act brings into line with the 2018 UNCITRAL Model Law on International Commercial Mediation. Precisely, it outlines a mediation procedure where at a party's request; a jointly appointed mediator may review the conflict, hear from the parties, and then submit settlement recommendation. A legally binding settlement agreement is then drawn up if both parties agree.[23] Furthermore, Section 87 of the Act clearly establishes the scope of application of the Singapore Convention on Mediation to international settlement agreements made outside Nigeria with the conditions that the country is a party to the Singapore Convention and the dispute arises out of what would be considered a "commercial" legal relationship under Nigerian law.

4. Averting Litigation and Enhancing Stability in Commercial Activities through ADR

ADR plays a crucial role in commercial activities. It provides a cost-effective and efficient way to resolve disputes that arise in the course of commercial activities and averting litigation. ADR can be used in a number of commercial disputes, such as contract disputes and labor disputes.

[19]Ibid, s 40.
[20]Ibid, s 50(g).
[21]Ibid, s 61.
[22]Ibid s 55(1).
[23]Ibid, s 82.

In contract disputes, for example, ADR can be used to resolve differences between parties over the terms of a contract. Mediation is mostly employed in contract disputes, as they allow the parties to work together to find a mutually acceptable solution. Arbitration can also be used in this case, providing a more formal method of resolving the disagreement. ADR can also be used in resolving labour disputes. A dispute is a labour dispute if the purpose is legitimate and is in furtherance of lawful interests of workers.[24]It can come in form of strike, lockout or picketing. Mediation can be used to resolve it as well as arbitration.

In this days and age, a lot of commercial contracts include, or should include, an ADR provision. A provision in a commercial contract to turn to mediation or arbitration as a precondition before resorting to the courts or litigations has the potential of saving the parties' time and resources and enhancing stability in commercial activities. Furthermore, ADR methods are very important and beneficial to the parties; this is because ADR offers the parties full substantive and procedural control over the resolution-seeking process, including the convenience of arranging the meeting or hearing as per the parties' schedules, needs, and preferences.[25]

It is noteworthy that there has been a paradigm change in Nigeria about conflict resolution from the traditional court system to alternative dispute resolution procedures that facilitate amicable settlement of disputes. Arbitration is fast becoming best practice for resolving commercial disputes.[26] Businesses are gradually opening up to it as they become more aware of its benefits over court rulings, particularly the fact that arbitral decisions are worldwide enforceable.

Nigerians now accept arbitration as a means of alternative dispute resolution (ADR) on a broad basis, partly as a result of increased trade and foreign direct investment. Businessmen are gravitating towards alternative dispute resolution (ADR) when it comes to their international commercial agreements since it maintains and strengthens corporate ties while resolving conflicts pleasantly, quickly, and inexpensively.[27]

Similarly, most formal employment agreements have terms stating that in the event of a dispute, alternative dispute resolution (ADR) procedures must be used before going to court. Nigeria is beginning to recognise the value of alternative dispute resolution (ADR) methods for resolving business and labour disputes, but litigation is still a common practice. In ADR procedure, judgments are not legally binding and do not effectively establish rights, as many Nigerians believe. Some of the factors affecting the success of ADR in Nigeria, especially in the industrial sector, are a lack of faith in the results of ADR, ignorance of the procedures involved, and a shortage of ADR experts.

Because of the associated detrimental impacts of litigation on trade and commerce, litigation is not the optimal method for settling labour and commercial disputes—with very few exceptions. The Chief Justice of Nigeria, Kayode Arowoola, lamented the appalling state of affairs regarding the

[24] J O Coker, 'Exploring Alternative Dispute Resolution Mechanisms in Resolving Commercial and Labor Disputes: Comparative Analysis of Nigeria and the United States', (2023) 3 (2) *Socio Economy and Policy Studies*, 3.

[25] I Todorović & B Harges,'Alternative Dispute Resolution in the World of Commercial Disputes. *Journal of Strategic Contracting and Negotiation* (2021) 5(4) 214 <https://doi.org/10.1177/20555636221074424> accessed 7 May 2024.

[26] Coker, (n24).

[27] E Minawa 'Resolving Individual Labour Disputes: A Comparative Overview' International Labor Office Genevaavailable'(2023)<https://www.ilo.org/wcmsp5/groups/public/---dgreports/--dcomm/--publ/documents/publication/wcms_488469.pdf> accessed 9 May 2024

overuse of litigation for dispute resolution in Nigeria and the necessity of alternative dispute resolution (ADR) on Wednesday, September 20, 2023, at the swearing-in ceremony of nine newly appointed justices of the Court of Appeal held in Abuja. He said:

> *we are constantly on our toes and the dockets are ever rising in response to the challenges of the time. This underscores the undisputed fact that Nigeria continuously ranks among the most litigious countries in the world. The writer strongly believe it is high time we began to imbibe the culture of less litigation and more of alternative dispute resolution mechanisms so that our courts can be freed of unnecessary burden and depletion of both human and material resources.*

There have been many successful ADR cases in business activities. For example, in a contract dispute between Apple and Samsung, the parties were able to resolve their dispute through mediation, avoiding a lengthy and expensive trial. The companies showed some willingness to compromise in an effort to avoid going to court.[28]In Nigeria, there is a recent example of an ADR case. Nigeria sought to collaborate with Process & Industrial Developments Limited (P&ID) on a power generation project. The project resulted to a dispute, leading to an extensive arbitration proceedings. In 2017, the arbitral tribunal awarded P&ID the sum of US$6.6 billion, an amount which, with interest, had grown to over US$11 billion in 2023. Although Nigeria appealed to English High Court to set aside the award on the grounds that it was procured through corruption and got judgment, it is still an example of ADR regardless.

5. Conclusion

Whether through litigation or alternative dispute resolution (ADR), the goal is to settle disputes. Even though the process to reach that goal might take longer than necessary, disagreements are eventually settled. Because of the peculiarities of labour and commercial disputes, which, if they are not promptly addressed, can have disastrous consequences on a country's economy. Thus, there is a need for quick, affordable, and amicable methods of resolving labour and business disputes, which ADR mechanisms provide. ADR plays a critical role in commercial activities. It provides a cost-effective and efficient way to resolve disputes that arise in the course of business operations. Aspiring entrepreneurs should consider ADR as a viable option for resolving disputes in their businesses. Unlike Nigeria, where a sizable number of labour and commercial disputes are pending in court, severing numerous business relationships, the United States has been able to use the advantages of alternative dispute resolution (ADR) to resolve the majority of these disputes.

[28] L. Burns, 'Negotiation in Business: Apple and Samsung's Dispute Resolution Case Study' (2016) <https://www.pon.harvard.edu/daily/business-negotiations/apple-v-samsung-an-example-of-negotiation-in-business-gone-bad> accessed 9 May 2024.