

# Interrogating the Potency of Arbitration as a Means of Commercial Dispute Settlement in Nigeria.

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## Abstract

*In every human relation, be it social or commercial the fact of conflict arising thereof is certain and the natural thought or instinct is to proceed to court to litigate with a view to seek redress. However, litigation is impersonal and can burn bridges, more stress, in anxiously waiting for the lawsuit to commence and end. Hence a need for a different approach which is found in an aspect of alternative dispute resolution (ADR)-arbitration. The idea of alternative dispute resolution is multifaceted but it can be tailored to meet the specific need of a disputant. Some of the forms include but are not limited to mediation, conciliation, negotiation and Arbitration. This article analyses the concept of arbitration as an aspect of ADR with a view to advocate for its wider usage in commercial agreements and transactions as opposed to litigation in Nigeria. The pros and cons of this method of settling commercial disputes and the legal framework that creates it vis a vis the most recent Arbitration and Conciliation Act 2023.*

**Keywords:** Arbitration, Litigation, Commercial, Dispute and Settlement.

## 1. Introduction

Alternative Dispute Resolution (ADR) is a means available to disputants to settle their dispute outside the traditional means of approaching the court - litigation. It is one of these friendly methods of settling disputes. However, by its nature, it is similar to litigation. According to Carrol and Dixon, litigation and arbitration are similar because both are judgmental<sup>1</sup> even though arbitration affords parties

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<sup>1</sup> Carrol and Dixon. "Alternative Dispute Resolution Developments in London" (1990) 4 The International Construction Law Review. 437.

with the maintenance of their privacy and procedural flexibility.<sup>2</sup> Emphasizing the nature of flexibility in the arbitration process, Karia observes that arbitration provides for the disputing parties flexibility to tailor the process in accordance with their needs.<sup>3</sup> Thus, the disputing parties have the collective responsibility to build the process in a more convenient way that suits them. This can be achieved in their arbitration agreement or the arbitration clause wherein they can outline, itemize and enunciate the process and procedure should any dispute arise in their contractual relationships.

Arbitration is a settlement process which involves the parties to the dispute and a neutral third party whose decision is called an award and the said award is itself binding on the parties except a third party or non-party to the agreement or settlement. It is said to be a dispute settlement model which is private and for which the parties have agreed to be bound by the final decision of the arbitrators). The arbitrator(s) is/are the neutral third party who superintends and settles the dispute of the parties after which he gives his decision - an arbitral award.<sup>4</sup> Describing the nature of arbitration, it is observed that in the process of arbitration, the disputing parties will appoint members of the arbitral panel which will consist of an odd number of persons. The task for the said arbitral panel is to evaluate and assess the evidence and arguments presented by the parties before them and at the end arrive at a decision which will be binding on the parties.<sup>5</sup> The decision must be made in writing and it is called an award.

The idea of arbitration has been utilized by mankind in time immemorial to resolve disputes. Ibrahim<sup>6</sup> observes that the use of arbitration to resolve disputes had been entrenched in the traditional African society before the colonization of Africa. The formal court

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<sup>2</sup> E. O. Ezike, "Developing a Situation Framework for ADR in Nigeria" (2011-2017) 10 Nigerian Juridical Review, 250-251.

<sup>3</sup> T. Karia. "Managing Costs and Time in Arbitration" in Dave. Humer and Nariman (eds.) Arbitration in India (Kluwer Law International 2021).

<sup>4</sup> H. I. Ijorji and L. C. Opara. "Arbitration in Place of Litigation for the Settlement of Commercial Disputes in Lagos Nigeria: a Discourse" (2020) 7 (2) Nnamdi Azikiwe University Journal of Commercial and Property Law, 106.

<sup>5</sup> Godwin Odumu, Arbitration as a tool for Dispute Resolution in Nigeria. How Relevant Today? (University of Ibadan, Ibadan, 2011)

<sup>6</sup> M. O. Ibrahim. "Positioning. Arbitration as the future of Dispute Resolution in Nigeria: Issues and Prospects" (2020) <<https://legalleiaonline.com/positioning-arbitration-as-the-tuturc-of-dispute-resoIution-in-nigeria/amp/>> accessed 27 September 2023.

system came with the colonization. Thus, the traditional mode of settlement of dispute in the olden days was by the way of arbitration. This point was well captured in the case of *Okpwuru v Okpokan*<sup>7</sup> by the Court of Appeal, per Oguntade, J.C.A. (as he then was), in a dissenting judgment observed thus;

*...in the pre-colonial timed and before the advent of the regular court, our people (Nigerians) certainly had a simple and inexpensive way of adjudicating over disputes between them. They preferred them to elders or a body set up for that purpose. The practice has over the years become strongly embedded in the system that they survive today as a custom.*

It is however noted that the present nature of arbitration has lost some of its earlier feature which were inherent in the traditional society.<sup>8</sup> One of which is that it has lost its simplicity nature.<sup>9</sup> The surviving features which are fundamental to the nature and concept of arbitration are stated thus, it involves a situation where two or more persons, whether already in dispute or in anticipation of a dispute, agree to nominate another private person to resolve the issues and disagreements between them by arriving at a binding decision.<sup>10</sup> This point was well captured by Idigbe in a paper presented at the Nigerian Bar Association Section of Business Law as follows, the key distinctive feature of arbitration is that the parties agree to arbitrate their dispute.<sup>11</sup>

The present state of the nature of arbitration is such that it has developed over the years with a lot of legislative interventions and formalization.<sup>12</sup> It is a special form of ADR whose features distinguishes it from litigation and the other forms of ADR.<sup>13</sup>

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<sup>7</sup> (1998) 4 NW LR (pl. 90) 554.

<sup>8</sup> Arbitration as a tool.

<sup>9</sup> Ibid.

<sup>10</sup> Ibid.

<sup>11</sup> A. I. Idigbe. "Court Control of Arbitral Process" (2006) Paper presented at the NBA Section on Business Law 2-Day Workshop on Alternative Dispute Resolution as an Alternative and Expedient and Cost-Effective Means of Dispute Resolution held at Eko Hotels, Vi, Lagos on 5th July 2006.

<sup>12</sup> Ezike, *op.cit.*, 252.

<sup>13</sup> A. Rhodes-Vivour, *Commercial Arbitration Law and Practice in Africa*, 2016.

According to Ezike,<sup>14</sup> arbitration as a distinctive mode of resolving dispute accorded it with several advantages which outweighs its disadvantages.

Due to the nature of the concept of arbitration, not all disputes can be resolved through its medium. Put differently, there are disputes that are not arbitrable. The primary legal framework for arbitration in Nigeria, the Arbitration and Conciliation Act 2<sup>(H)</sup>4, does not make provision for disputes that are arbitrable and those that are not.<sup>15</sup> The court has however laid down the test for determining when a dispute is arbitrable and when it is not. In *United World Ltd. Inc. v MTS*<sup>16</sup> the court held, *inter alia*, that a dispute is arbitrable if it can be compromised lawfully by way of accord and satisfaction. Thus, disputes that bother on crime, illegal and void contracts, including matters that can result in the change of the status of any of the parties are not disputes that are arbitrable<sup>17</sup>. Same thing applies disputes which impact on the tax liability of a person.<sup>18</sup>

Stemming from the above analysis, the concept of arbitration can be described as a private means of dispute settlement which is done in private in accordance with the agreement of the parties to the dispute by which the parties agree and accepts to be bound by the decision or outcome of the process as delivered by the arbitrator or arbitrators.<sup>19</sup> The arbitrator or arbitrators are pre-chosen by the parties and not imposed on them. It has been described as a quasi-judicial process for the settlement of disputes.<sup>20</sup> By way of voluntary submission of the parties to the disputes to a neutral third party - the arbitrator(s) - hear, assess and determine their disputes and at the end make a binding decision called an arbitral award. The award itself is enforceable in court like a judgement emanating from a judicial trail.

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<sup>14</sup> Ezike. op cit, 253.

<sup>15</sup> F. Adekoya, I. Berenibara and O. Philip-Idiok, "GAR know How Commercial Arbitration - Nigeria (20-0) <www.aalex.com>. accessed 20 September 2023.

<sup>16</sup> (1998) 10 NWLR (pt. 568) 106.

<sup>17</sup> *Mekwunye v Lotus Capital Limited & Ors.* (2018) LPELR-45546.

<sup>18</sup> *Eso Petroleum and Production Nigeria Ltd & Anor. v NNPC* (unreported, Appeal No. CA/A/507/201-).

<sup>19</sup> I. A. Ayima, A.K Adebayo and B. Ayinla, "An Appraisal of the Nexus and Disparities between Arbitration and Alternative Dispute Resolution (ADR)" (2017) 8 (1) Nnamdi Azikiwi University, *Journal of International Law and Jurisprudence*, 182.

<sup>20</sup> *Ibid.*

<sup>21</sup> in the case of *Emerald Energy Resources Limited v Signet Advisors Limited*<sup>22</sup>, the Court of Appeal specifically held thus, “An arbitral award has the force of a judgement. It has a binding force and operates as a judgment”.

Following the introduction, which set out the tune, is the historical context of alternative dispute resolution in Nigeria. Then article went further to take a cursory look at the legal framework for arbitration in Nigeria. The critical role of Arbitration in the resolution of commercial disputes Nigeria, However, this paper further exposed the merit in the use of arbitration to resolve commercial disputes in Nigeria. Finally, the role of the Judiciary in the administration of arbitration in commercial disputes and conclusion.

## 2. Historical Context of Alternative Dispute Resolution in Nigeria

It is well documented that arbitration as a means of dispute settlement was practiced in the pre-colonial era of Nigeria.<sup>23</sup> Thus, the practice of arbitration is older than the history of Nigeria as an entity. According to Orie. this olden form of arbitration is still in existence but is called customary arbitration in which the elders of a community are selected to sit over an ensure amicable settlement of disputes to ensure stability and social equilibrium in their society.<sup>24</sup> In the case of *Ohiaeri v Akabueze*,<sup>25</sup> the court held thus.

*it is a common feature of customary arbitration in a closely-knit community that some of the arbitrators, if not all. not only have poor knowledge of the facts of the dispute, but also have their prejudices and varying interests in the matter, and are therefore sometimes judges in their own causes and are likely to prejudice the Issues.*

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<sup>21</sup> Ibid.

<sup>22</sup> (2021) 8 NWLR (Pt. 1779) 579.

<sup>23</sup> A. O. Okoye, Law in Practice in Nigeria (Snaap Press Nig. Ltd, Enugu 2011, 323.

<sup>24</sup> Orie, op.cit, 4.

<sup>25</sup> (1992) 2 NWLR 9pt 22D1.

The formal nature of arbitration as known today and as regulated by law started in Nigeria during the colonial era with the enactment of the Arbitration Ordinance of 1914. The 1914 Ordinance was fashioned after the English Arbitration Act of 1889. In 1958 the Arbitration Ordinance was re-enacted as Arbitration Ordinance Act 1958<sup>26</sup> which evolved to the current 2023 Arbitration and Conciliation Act.

The applicability of the 1958 Act included the Northern, Eastern and Western Regions and Lagos State. The same law is largely the same as what now constitute the Arbitration and Conciliation Act, 2004.<sup>27</sup> This supports the need for its review and update which finally gave birth to the 2023 ACA.

It is observed that the provisions of the 1958 Ordinance Act were limited to domestic arbitration in Nigeria as it did not make any reference to international commercial arbitration. However, the first indigenous legislation on the regulation of arbitration was the Arbitration and Conciliation Decrees of 1988. The 1988 Decree was re-enacted as the Arbitration and Conciliation Act 2004. The present Act therefore recognizes the applicability of international commercial arbitration instruments in Nigeria.<sup>28</sup> It has therefore been observed that it is the 1988 Arbitration and Conciliation Decree that enabled Nigeria to adopt the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, relating to international commercial arbitration.

### **3. A cursory look at the legal framework for arbitration in Nigeria.**

The primary law governing the arbitration process in Nigeria is the Arbitration and Conciliation Act, 2004<sup>29</sup> (now Arbitration and Conciliation Act 2023). In Lagos state, there is also the Lagos State

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<sup>26</sup> Cap. 13 L.F.N and Lages. 1958.

<sup>27</sup> A. Akinbole. "Arbitration of Africa - the Sure of Arbitration in Nigeria' (2008) A paper presented at the 2008 Colloquium of the Association for the Promotion of Arbitration in Africa held at Djeugu Palace Hotel. Yaoundé from 14-15 January, 2008.

<sup>28</sup> Ibid.

<sup>29</sup> Cap. A18 Laws of the Federation of Nigeria 2004.

Arbitration Law, 2009.<sup>30</sup> The legal framework for arbitration in Nigeria consists of many laws which is not *strictu sensu* limited to ACA. The applicable legislation sometimes depends on the industry from which the dispute arose from. Thus, in the oil and gas industry related disputes, some provisions of the statutes regulating the said sector provide for settlement by arbitration.<sup>31</sup> These laws will help apply side by side with the Arbitration and Conciliation Act 2023, which is the primary legislation for arbitration in Nigeria. The following therefore constitute part of the legal framework for arbitration in Nigeria:

- i. Arbitration and Conciliation Act 2023
- ii. Arbitration Rules
- iii. Nigeria Investment Promotion Commission Act<sup>32</sup>
- iv. New York Convention of the Recognition and Enforcement of Foreign Awards
- v. Foreign Judgment (Reciprocal Enforcement) Act
- vi. Admiralty Jurisdiction Act<sup>33</sup>
- vii. The Oil Pipelines Act, 2004<sup>34</sup>
- viii. The Nigeria Liquefied Natural Gas (Fiscal Incentives, Guarantees and Assurances) Act, 2004<sup>35</sup>
- ix. The Constitution of the Federal Republic of Nigeria, 1999 (as amended)<sup>36</sup>
- x. Trade Disputes Act, 2004<sup>37</sup>
- xi. Rule of Court.<sup>38</sup>
- xii. Akwa Ibom Multi-Door Courthouse Procedure Rules, 2009
- xiii. Judicial Precedents<sup>39</sup>
- xiv. Riven Suite Arbitration Law 2019

<sup>30</sup> B. Agbakoba-Onyejiana and N. Kalu, "Key Provisions of the Arbitration and Mediation Bill 2022" (2022) <<https://www.mondag.com/nigeria/arbitration.dispute-resolution/1205316.key-provision-of-the-arbitration-and-mediation-bill-2022.>>

<sup>31</sup> Section 17(5) of the Oil Pipelines Act, Cap. 07, LFN 2004; Section 22 of the Nigeria Liquefied Natural Gas (Fiscal Incentives, Guarantees and Assurance) Act, Cap. N. 38, KFn 2004.

<sup>32</sup> Section 26 of the NIPC Act, Cap. N 117, LFN 2004.

<sup>33</sup> Section 20 of the Admiralty Jurisdiction Act 2004.

<sup>34</sup> Section 17 (5) of the Nigeria Liquefied Natural Gas Act 2004.

<sup>35</sup> Section 22 of the Nigeria Liquefied Natural Gas Act 2004.

<sup>36</sup> Section 6 of the Constitution of the Federal Republic of Nigeria, 1999 (as amended).

<sup>37</sup> Section 6 and 12 of the Trade Disputes Act, 2004.

<sup>38</sup> Order 42 of the National Industrial Court of Nigeria (Cim Procedure) Rules, 2017.

<sup>39</sup> *Lignes Aeriennes Congolaises (LAC) v. Air Atlantic Nigeria Limited* (2006) 2 NWLR (pt. 963) 49 at 73; *Taylor Wooddraw (Nig.) Ltd. v. Suddentsche Entawerk GMBH* (1993) 4 NWLR (Pt. 286) 127 at 141; Baker.

xv. United Nations Commission on International Trade Law Arbitration Rules.

xvi. The Convention on Settlement of Investment Disputes (ICSID)

The above list is not exhaustive and therefore many other laws can be included, the rule of customary law can also be included in the list<sup>40</sup>. Orié<sup>41</sup> in her article list the other laws that can be included in the list thus, the Petroleum Act<sup>42</sup>, Nigeria Co-operative Societies Act.<sup>43</sup> Minerals and Mining Act,<sup>44</sup> National Health Insurance Scheme Act,<sup>45</sup> Public Enterprise (Privatization and Commercialization) Act,<sup>46</sup> Regional Centre for International Commercial Arbitration Act<sup>47</sup> and Nigerian Communications Commission Act.<sup>48</sup>

#### 4. Arbitration and the Resolution of Commercial Disputes

Arbitration as a means of resolving disputes by way of alternative disputes resolution (ADR) is most suitable for resolving commercial disputes. Several factors account for this assertion. One of which is the fact that of all the ADR options for dispute resolution, it is arbitration that has enforcement capabilities. Put differently, of all the ADR mechanisms for resolving disputes, it is only arbitration that can result in an enforceable outcome.<sup>49</sup> The arbitral award is the outcome of the arbitration process and can be enforced against any of the defaulting parties like a judgment of court. Thus Order 19 Rule 13(1) of the High Court of the Federal Capital Territory (FCT) Abuja (Civil Procedure) Rules 2018 provides thus, “An application to enforce an award on an arbitration agreement in the same manner as a judgment or order may be made *ex parte*, but the court hearing the application may order it to be on notice.”<sup>50</sup>

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<sup>40</sup> C. C. Darueke “An Overview of the Nigeria Legal Framework on Emergency Arbitration” (2019) Unilag Law Pioneer, 1.

<sup>41</sup> E. G. Orié, *An Appraisal of the Sources of Arbitration Laws in Nigeria*, (2021) 15 UBJPPL, 15-16.

<sup>42</sup> Section 11, 28 and 30 of the Petroleum Act, Cap.P. 10, LFN 2004.

<sup>43</sup> Section 49 of the Nigeria Co-operatives Societies Act, Cap, N98 LFN 2004.

<sup>44</sup> Section 76 and 255 of the Minerals and Mining Act, Cap M.12, LFN 2004.

<sup>45</sup> Section 25 and 26 of the National Health Insurance Scheme Act, Cap N.42 LFn 2004.

<sup>46</sup> Section 27, 28, and 30 of the Public Enterprise Act, 2004.

<sup>47</sup> Section 4 of the Regional Centre of International Commercial Arbitration Act, Cap, R5 LFN 2004.

<sup>48</sup> Section 4 of the NCCACT, Cap N97 LFN 2004.

<sup>49</sup> A. O. Okoye, *Law in Practice in Nigeria*, (Snaap Press Nig. Ltd., Enugu 2011), 343.

<sup>50</sup> See also: Order 28 Rule 4 of the High Court of Lagos State (Civil Procedure) Rules, 2019.

It is worthy of note that section 57 (1) of the Arbitration and Conciliation Act in defining arbitration refers to it as ‘commercial arbitration’. The reference to arbitration as commercial arbitration has however been criticized by Stanley-Idum and Agaba to wit: the reference to commercial arbitration only means that not only does the Act apply to commercial disputes only, it also gives the impression that only commercial disputes can be the subject of arbitration.<sup>51</sup>

The above shows the preference of arbitration for the resolution of commercial disputes. This research however agrees with the above stated criticism by Stanley-Idum and Agaba of the provision of section 57(1) of the Arbitration and Conciliation Act. Arbitration though suitable for commercial disputes is not exclusively meant for resolving commercial disputes. The commercial in ‘commercial arbitration’ is defined by the Arbitration and Conciliation Act. Section 57(1) of the Act defines the term ‘commercial’ to mean,

*All relationships of a commercial nature, including any trade transaction for the supply or exchange of goods or services, distribution agreement, commercial representation or agency, factoring, leasing, construction works, consulting, engineering, licencing, investment, financing, banking, insurance, exploitation agreement or concession, joint venture and other forms of industrial or business co-operation, carriage of goods or passages by air, sea, rail or road.*

Quoting the above definition, Ezejiofor<sup>52</sup> comments thereafter thus, “the definition covers a wide range of trade and business transactions and the list is not exhaustive”.

In most commercial transactions or agreements, parties agree ahead of time as to the terms of resolving their disputes whenever they arise. Reference is made in such agreements for resort to arbitration before litigation. Such provision in a commercial

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<sup>51</sup> M. M. Stanley-Idum and J. A. Agaba, *Civil Litigation in Nigeria*, 3<sup>rd</sup> Edition (Renaissance Law Publishers Limited, Lagos 2020), 61.

<sup>52</sup> G. Ezejiofor, *The Law of Arbitration in Nigeria* (Longman, Lagos 2020), 61.

agreement, called ‘arbitration agreement’ is enforceable by the court.<sup>53</sup> It is the copious advantages of arbitration over litigation that endears parties in a commercial agreement to resort to arbitration for dispute settlement, and also, “it is obvious that arbitration is a veritable tool for the settlement of commercial and contractual disputes.”<sup>54</sup>

## 5. Any Merit in the Use of Arbitration to Resolve Commercial Disputes in Nigeria?

It is the obvious advantages of arbitration that makes it appealing to parties to commercial transactions for the settlement of their disputes. According to Eyongndi and Ebokpo, Arbitration as a dispute resolution mechanism, when compared to litigation and other amicable dispute settlement mechanisms, has certain advantages. Arbitration is speedier, informal, less expensive, less rancorous and confidential.<sup>55</sup> The private nature of arbitration over litigation allows for business secret to be protected and preserved by the parties to dispute.

The other advantages of arbitration can be enumerated as follows:

- i. The arbitral award is final and binding and is not appealable unlike the other options of ADR.
- ii. Arbitral award is recognized and also enforceable by the parties as a standard judgment of court.
- iii. Arbitrators can summon witnesses to appear before it in order to assist it reach a meritorious decision unlike the other ADR mechanisms for dispute resolution.
- iv. It is cheaper for the parties to adopt arbitration over litigation in the settlement of commercial disputes.
- v. Parties are free to choose persons to preside over their case.
- vi. They are less rigid than litigation.
- vii. It is faster than litigation.

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<sup>53</sup> P. O. Idornigie, *Commercial Arbitration Law and Practice in Nigeria* (Lawlords Publications, Abuja 2015); T. Oyekunle and B. Ojo, *Handbook of Arbitration and ADR Practice in Nigeria*. (LexisNexis, South Africa 2018).

<sup>54</sup> D. T. Eyongndi and J. I. Ebokpo, “Between the National Assembly and State Houses of Assembly: who has legislative power under the 1999 Constitution to make law on Arbitration?” (2021) 11 (2) *Nigerian Bar Journal*, 124.

<sup>55</sup> Eyongbi and Ebokpo, *op cit*, 121.

- viii. It is less rigid than litigation as parties can agree on the entire process and proceedings to be followed in the arbitral process.
- ix. Technical matters are better handled through arbitration than by court since arbitrators are usually appointed based on their expertise in the field of dispute.
- x. According to the New York Convention, arbitral awards are given more recognition at international level, especially in the UK, than judgment of court.<sup>56</sup>
- xi. Inter-personal and commercial relationships is maintained.

## **6. Judicial Role in the Advancement of Arbitration in Commercial Dispute.**

The court has important role to play in the advancement and use of arbitration for the resolution of commercial disputes. One of such roles is the insistence by the court that parties must abide by the arbitration agreement by first resorting to arbitration to settle their disputes. It has been pointed out that some lawyers are fond of rushing to court to get injunction to frustrate the course of arbitration for the settlement of commercial disputes.<sup>57</sup> The court can also encourage the parties to explore arbitration as a means of settlement of their commercial disputes.<sup>58</sup> In a recent article, Dibi observes that there are several instances where the courts have intervened to ensure compliance with the arbitration proceedings.<sup>59</sup> It is opined that most of the interventions by the court have served useful purposes for arbitration.<sup>60</sup> Court will intervene in arbitration because it operates in human society aimed at only justice.

The former Chief Justice of Nigeria, Hon. Justice Walter Onnoghen in his official directive to Heads of Courts in Nigeria on the 26<sup>th</sup> May 2017 enjoined them to invoke their constitutional and inherent power under their respective rules and practice directions to

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<sup>56</sup> Stanley-Idum find Agaba, *op cit*, 70.

<sup>57</sup> A. Akinbote, "Arbitration in Africa- the State of Arbitration in Nigeria" (2008) A Paper presented at the 2008 colloquium of the Association for the Promotion of Arbitration in Africa held to Djeuga Palace Hotel, Yaounde from 14-15 January, 2008.

<sup>58</sup> T. Sourdin, "The Role of the Court in Alternative Dispute Resolution" (2013) *Asian Journal on Mediation*, 80.

<sup>59</sup> D. Dibi, "An Examination of Courts' Support for Arbitration Proceedings in Nigeria" (2021) 12 (1) *The Gravitas Review of Business and Property Law*, 93.

<sup>60</sup> S. A. M. Ekwenze, "Arbitration Agreement: Nature and Implications" (2010) 4 *University of Ado-Ekiti Law Journal*, 334.

ensure the protection or enforcement of arbitration agreements and by extension ensure the enforcement of arbitral awards emanating from arbitral proceedings.<sup>61</sup> In the 16<sup>th</sup> May 2017 directive the former CJN directed thus,

- i. Courts should not entertain cases instituted to enforce a contract or for award of damages due to breach of such contract where the parties had by their consent included in such contract an arbitration clause and without first exhausting the provisions of the said clause.
- ii. Courts should enforce arbitration clause in a contract by declining jurisdiction except where parties had already explored arbitration. Substantial cost should also be awarded against parties who go contrary to the provision of the arbitration clause.
- iii. Any party who files a case in court to enforce a breach or violation of the contractual terms containing a clause for arbitration without evidence that he had first invoked the provision of the clause is himself in breach of a fundamental term of the contract and therefore should not be encouraged by the court.
- iv. May I bring to the attention of the courts that due to the time saving potential of arbitration proceedings encourage huge commercial activities and attract more foreign investments and thus needs the encouragement and support of the Nigerian Courts.<sup>62</sup>

The Arbitration and Conciliation Act 2023 provides for the role of the court in the course of resolution of commercial dispute by way of arbitration. Sections 5 and 7 of the Act gives the courts powers to grant stay of proceedings pending the utilization of arbitration and to appoint arbitrators. Sections 29 and 30 of the Act empowers the courts to carry out juridical review of arbitral awards. In the case of *Kano State Urban Development Board (KSUDB) v.*

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<sup>61</sup> V. N. Enebeli, "The Role of the Nigerian Judiciary in Resolving Commercial Disputes through Arbitration: Spotlight on Rivers State Judiciary" (2019) 8(1) *British Journal of Advanced Academic Research*, 7.

<sup>62</sup> Ibid.

*FANZ Ltd.*<sup>63</sup> the court had exercised its power of judicial review to held *inter alia* that,

*the exercise of the power of the court to stay proceedings does not affect, in any way, the validity of the exercise of the power of the court to refuse an application to set aside the arbitral award or to grant leave to a party for the enforcement of the award.*

Resort can be made to the court by application for the appointment of arbitrators for the resolution of commercial disputes. According to Wingate and Okoli, by the combined provisions of the Constitution of the Federal Republic of Nigeria, 1999 (as amended) and the Arbitration and Conciliation Act, 2023 the Federal High Court is vested with the jurisdiction for the appointment of arbitrators for arbitration proceedings.<sup>64</sup> The parties have the freedom to appoint their arbitrator(s), but instances exist where there may be need to resort to the court to appoint arbitrator(s). On what will constitute such instances, Wingate and Okoli notes thus,

*... when parties cannot agree on the choice of their arbitrator(s) or settle for a third party other than courts to make the choice for them. In these situations, parties only recourse will be to seek the court's assistance to help them constitute the arbitral tribunal, known as the default procedure.*<sup>65</sup>

It is worthy of note, that the role of the court in the arbitration process for the settlement of commercial disputes is qualitative and also limited by virtue of section 34 of the Arbitration and Conciliation Act, 2023. According to Ani,<sup>66</sup> the intendment of the said section 34 of the Act is not to unnecessarily limit the jurisdiction

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<sup>63</sup> (1990) 4 NWLR (pt. 142) 1.

<sup>64</sup> E. O. Wingate and P. N. Okoli, 'Judicial Intervention in Arbitration: Unresolved Jurisdictional Issues Concerning Arbitration Appointments in Nigeria' (2021) 65 (2) *Journal of Africa Law*, 223.

<sup>65</sup> *Ibid*, 227.

<sup>66</sup> C. C. Ani, "The Role of the Court in Arbitration in Nigeria" (2019) <[https://www.acejnica.edu/31853478/THE\\_ROLE\\_OF\\_THE\\_COURr\\_IN\\_ARBITRATION\\_IN\\_NI GERIA.](https://www.acejnica.edu/31853478/THE_ROLE_OF_THE_COURr_IN_ARBITRATION_IN_NI GERIA.)> accessed 10 September 2023.

of the court in determination of matters within its jurisdiction but it seeks to ensure that the arbitral process is not rendered unattractive and nugatory by the incessant, unnecessary and irrelevant interventions by the courts. The interventions by the court are limited to the allowable provisions of the Arbitration and Conciliation Act, 2023.

The rules of various courts have aided in the advancement of arbitration in dispute settlement in Nigeria. In the first place, these rules encourage parties to resort to ADR for the settlement of their disputes. One of such ADR mechanisms being arbitration. In Abuja and Lagos, their high court rules mandate the filing of proof that parties had earlier explored ADR in the settlement of their dispute before the institution of the case in court. In Lagos it is called Pre-action Protocol Form 01<sup>67</sup> while in Abuja it is called Certificate of Pre-action Counseling.<sup>68</sup>

Other provision of the Rules of Court that promote arbitration are the provision that recognize and allows the court to enforce arbitral awards. The provisions of Order 19(13) and (14) of the Abuja Rules and Order 28 Rule 4 of the Lagos Rules are relevant in this regard. In the High Court Rules of Rivers State 2023, the rules make provision for the setting aside and enforcement of arbitral award, remission of award and refusal of enforcement and the appointment of arbitrators.<sup>69</sup>

In a plethora of cases, the courts have made decisions for the advancement of arbitration as a means of settling commercial disputes in Nigeria. Worthy of mention are the cases of *Commerce Assurance Limited v Buraimoh*<sup>70</sup> where the Supreme Court held, *inter alia*, that any award made by an arbitrator that was appointed by the parties is binding on them; *Williams v Williams*<sup>71</sup> where the court held that parties who had arbitration clause in their contractual agreements must first exhaust it before resorting to litigation. But where the case has already been filed, the court has power to stay proceedings and refer the parties to arbitration. Other decision

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<sup>67</sup> Order 5 Rules 1 (2) of the High Court of Lagos State (Civil Procedure) Rules 2019.

<sup>68</sup> Order 2 Rule 2 of the High Court of FCT, Abuja (Civil Procedure) Rules 2018.

<sup>69</sup> Order 39 of the High Court of Rivers State (Civil Procedure) Rules, 2023.

<sup>70</sup> (1992) 3 NWLR (pt. 232) 710.

<sup>71</sup> (2012) All FWLR (pt. 632) 1745.

worthy of note include, *NNPC v Lutin Investment Ltd*<sup>72</sup> and *Obembe v Wemaboard Ltd*.<sup>73</sup>

If the courts or judges do not make concrete decisions as regards binding declarations on the validity of the arbitration agreements; to order for the stay of proceedings on parties that abandon the earlier agreement to arbitrate and go to court for litigation; to assist in appointment of arbitrator(s) where a party is being obstinate and to compel the attendance of witnesses where they refuse to attend, then the arbitral process would be treated with levity and would not be attractive to disputants. Another role of the courts is that the courts or judges are also there to act as a check on the conduct of the arbitrator(s) and to assist in the enforcement of arbitral award. Where a party is aggrieved about the outcome of the award, it is the court that will be the listening ear to consider the propriety of the award and make appropriate decisions.

## **7. Issues Standing Against Arbitration in Resolving Commercial Disputes in Nigeria**

Despite many advantages of the use of arbitration in the resolution of commercial disputes in Nigeria, there also exist some challenges or problems which undermine the adoption of arbitration for the settlement of commercial disputes. One of such is the attitude of some lawyers to insisting on litigation even when they are aware of the existence of an arbitration clause in the commercial agreement of the parties. The problem here is not unconnected to lack of training of some lawyers in the practice and procedure of arbitration specifically and ADR in general. When these lawyers become judges and justices, they take this perception along with them to the bench. The problem becomes complicated where there is no adequate provision of training for judges and other judicial officers in respect of arbitration.

Another challenge in the arbitration of commercial disputes in Nigeria is the interference by the courts. One of the reasons why parties prefer arbitration over litigation is the speedy disposition of commercial disputes by arbitration. When parties apply to court for

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<sup>72</sup> 155 (2006) 2 NWLR (pt. 965) 50 (SC).

<sup>73</sup> 154 (1977) 5 SC 129.

intervention one way or the other, especially in respect of appointment of arbitrator(s) or other preliminary orders or the enforcement of the arbitration awards, such applications to the court suffers delay and unnecessarily prolong the process. The main challenge here is that there are no specialized courts for arbitration matters in Nigeria.

Another problem or challenge is in the drafting of the arbitration clause in the commercial agreements. Inelegant or ambiguous arbitral clause can cause more problems than solve them for the parties when dispute arises. Thus, it is noted that practitioners charged with responsibility of writing arbitration agreement should make it clear and unambiguous.<sup>74</sup> This problem also boils down to lack of proper training for some lawyers in the practice and procedure of arbitration.

## **8. Chances for Arbitration as a means of Resolving Commercial Disputes**

There are several prospects for the adoption of arbitration for the settlement of commercial disputes in Nigeria. Chief of which is the general acceptability and resort to arbitration for the settlement of commercial disputes in Nigeria. There is hardly a contemporary commercial agreement today that does not contain arbitration clause. In some standard drafts or forms of commercial agreements, arbitration clause is a permanent feature. It appears that commercial businessmen and investors have come to terms with the uncommon advantages of using arbitration to resolve their commercial disputes.

Similarly, the contemporary attitude of courts and the rules of court to resort to arbitration especially for disputes where the agreement had provision for arbitration clause. The directive of the former Chief Justice of Nigeria of 26 May 2017 to all heads of court in Nigeria further echo this point. Courts are ready to insist that parties honour their terms of agreement by first exploring the mechanism of arbitration to settle their commercial disputes.

Equally worthy of note is the establishment of court-connected ADR centers and multidoor courthouses to serve as institutions for

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<sup>74</sup> Ekwenze, *op cit*, 340.

the practice and procedure of arbitration. These centres and multi-door courthouses have further encouraged parties to resort to arbitration for the settlement of their commercial disputes.

## **9. Conclusion**

The analysis of the use of arbitration to resolve commercial disputes in Nigeria is sacrosanct to commercial and economic progress and success. It emphasized the role of the courts in ensuring the general use of arbitration in this regard. Although arbitration is identified as the best option for resolving commercial disputes, some parties activate litigation instead of compliance with their arbitration agreement. The court's role in this regard is to insist on compliance with the arbitration and to enforce the resulting arbitral award. The challenges are copious but surmountable. The prospects highlighted show that hope is not lost in respect of the use of arbitration to resolve commercial disputes. More needs to be done to make arbitration the most effective and efficient tool in this regard.

The recommendation hereby proffer is that the National Judicial Council should as a matter of urgency forward to the National Assembly a bill for the establishment of specialized courts for arbitration matters in Nigeria. All necessary commercial contracts and agreements should have arbitration clause in it. Where such exist, courts should insist on the implementation of it before parties take the route of litigation.