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AN APPRAISAL OF ARBITRATION AND LITIGATION TECHNIQUES AS PANACEA FOR FAIR JUSTICE ADMINISTRATION UNDER THE NIGERIAN LEGAL SYSTEM[1]

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Litigation/Dispute Resolution

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Introduction:

Even before a dispute arises, it is always important and in the best interest of parties to agree on a just and effective forum for the resolution of their disputes. Arbitration and litigation are fundamental modes of dispute resolution;[2] however, arbitration is considered by a majority of practitioners as the best alternative to litigation as the decision of arbitration is not only binding as a litigated lawsuit, it is amenable to the collective agreement of the parties while side-stepping many of the constraints and rigidity of lawsuits.

In many jurisdictions, the court system is seen as the most prominent way of settling disputes as it is perceived as a system which is independent, inspires the respect of society and has rules for procedures and evidence that have been refined over a long period of time to ensure fairness. The strength of the court system is such that over several centuries it has evolved as the preferred method for resolving disputes while other forms of dispute resolution are traditionally regarded as “alternative” dispute resolution methods.

In Nigeria, litigation is the most common form of domestic dispute resolution, with the legal system and method of litigation modeled after the English common law. As with other common law jurisdictions, Nigeria operates the adversarial system of adjudication, with opposing parties seeking an outcome most favourable to their position, while the judge plays a non-inquisitorial role of an arbiter. In Nigeria today, the jury system is not used in the administration of justice

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[2] Other alternative dispute resolution mechanisms include negotiation, mediation, conciliation, etc.

and the presiding judge is both a judge of the law as well as the facts. Furthermore, litigation consists of a body of rules which regulate the commencement, conduct and determination of proceedings before the court or tribunal.[3] It also regulates how the decision of the court is enforced in tandem with the Judgment Enforcement Rules (and the Sheriffs and Civil Process Act), so as to retain the confidence of those who rely on the judicial system for obtaining justice or seeking redress. This includes proceedings not only at the court of first instance but also on appeal.

The aim of rules of court is focused at providing orderly as well as the expeditious enforcement of claims in court and in the settlement of disputes. Modern civil procedure rules must therefore be made to improve access to justice, reduce time and cost of litigation; remove unnecessary complexity and ensure compliance with modern means of communication.[4] The rules guiding the conduct of litigation may be gleaned from the rules of court,[5] enabling statutes, [6]the Constitution,[7] judicial decisions on procedure,[8] practice directions[9] and other special statutes on procedure.[10]

Aside from litigation, the Nigerian legal system also recognizes arbitration and other variants of dispute resolution generally described as Alternative Dispute Resolution ("ADR") and these

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[3] Efevwerhan D.I., PRINCIPLES OF CIVIL PROCEDURE IN NIGERIA (Enugu: Chenglo Ltd. 2007) p. 1.

[4] *See*, for example, Order 2 of the High Court of the Federal Capital Territory, Abuja (Civil Procedure) Rules 2004; Order 5 of the Oyo State High Court (Civil Procedure) Rules 2010; Order 5 of the High Court of Lagos State (Civil Procedure) Rules 2012; all of which deal with the effect of non-compliance with the rules of court].

[5] The various courts in Nigeria have their own rules of practice and procedure, which are usually made by the authorities prescribed by statute or the law establishing the court. Examples are the Supreme Court Rules 1985 (as Amended), the Court of Appeal Rules 2011, and High Court Civil Procedure Rules of the various States etc.

[6] Apart from the fact that in most cases the civil procedure rules of the court are made pursuant to powers conferred on the appropriate authority by the statute creating that court, the statutes sometimes also make specific provisions for practice and procedure. For example, the provisions of S. 25 Court of Appeal Act 1976 and S. 7 of the Supreme Court Act, respectively, provide for the time within which an appeal may be lodged.

[7] The Constitution also serves as a source for the rules of civil procedure. Appellant rights and procedure are provided for under s. 233 and 240 – 246 of the 1999 Constitution (as amended). Section 36 of 1999 Constitution deals with fair hearing, and spells out certain procedures for securing this right.

[8] This is subject to the rules of judicial precedent *(stare decisis)*, decisions of superior courts of law and certain rules of procedure which derive from decisions of the courts arising either from interpretation of existing rules or formulation of new rules. *See* Craig v. Craig (1966) 1 All NLR 173.

[9] This is a direction given by the appropriate authority stating the way and manner a particular rule of court should be complied with, observed or obeyed. *See* University of Lagos v. Aigoro (1984) 11 S.C. 152 at 159, per Bello J.S.C.

[10] There are certain aspects of procedure not covered in the Rules of Court; therefore, specific procedures and rules will apply. For example, the Sheriffs and Civil Process Act, and the Judgment Enforcement Rules which applies to the enforcement of judgments, the Companies winding up Rules 2001, Matrimonial Causes Rules 1983 etc.

methods have gained considerable ground in recent times. Other types of ADR in Nigeria are mediation, conciliation and negotiation and the current rules of procedure encourage resort to these methods of dispute resolution, having been incorporated into the rules of practice and procedure of some of the Nigerian Courts.[11]

The principal legislation regulating the practice of arbitration in Nigeria is the Arbitration and Conciliation Act[12] which was enacted in 1988 modeled on the UNCITRAL Model Law on International Commercial Arbitration 1985,[13] with minor modifications and the rules made applicable thereto. In addition, some states of the Federation also have their own arbitration laws, notable amongst which is Lagos State.[14]

Arbitration has been accepted as a private form of dispute resolution preferable to litigation in many all parts of the world, and ideally should be well-suited for resolving all forms of disputes that may arise between parties. However, certain types of actions involving criminal liabilities, Fundamental Right Enforcement Proceedings, Matrimonial Causes etc., which should normally be open to arbitration, are not since our laws do not give room for such matters to be resolved through the arbitration process.[15]

Some Conceptual Issues:

According to Professor Ezejiofor,[16] the term arbitration refers to the settlement of a dispute between two or more persons after hearing the parties in a quasi-judicial manner by persons other than a competent court. Justice Orojo[17] defines arbitration as a procedure for the settlement of disputes under which the parties agree to be bound by the decision of an arbitrator whose decision is, in general, final and legally binding on both parties. On the other hand, Blake, Browne and Sime[18] defined arbitration as an adjudicative dispute resolution process which is based on agreement between the parties to refer a dispute or difference between them

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[11] *See* Order 3 Rule 11 and Order 25 Rules (1) and (2) of the Lagos State High Court (Civil Procedure) Rules 2012; Order 25 Rule 1 of the Oyo state High Court (Civil Procedure) 2010, and Order 17 Rule 1 Federal Capital Territory (High Court Civil Procedure) Rules 2004.
[12] Cap. A18, Laws of the Federation of Nigeria 2004 ("ACA").
[13] THE ACA 1988 WAS ENTIRELY BASED ON THE 1985 MODEL LAW.
[14] Lagos State Arbitration Law 2009.
[15] C.A. Candide-Johnson and Olasupo Shasore, COMMERCIAL ARBITRATION LAW AND INTERNATIONAL PRACTICE IN NIGERIA, LexisNexis, 2012 pp. 45 - 46.
[16] Ezejiofor G., THE LAW OF ARBITRATION IN NIGERIA (Lagos: Longman Nigeria Plc. 1997) p. 3.
[17] Orojo M.A, LAW AND PRACTICE OF ARBITRATION AND CONCILIATION IN NIGERIA (Lagos: Mbeyi & Associates (Nig.) Ltd., 1999 p. 41.
[18] Blake S., Browne J. & Sime S., PRACTICAL APPROACH TO ALTERNATIVE DISPUTE RESOLUTION (New York: Oxford University Press, 2011) Ch. 26.

to impartial arbitrators for a decision. Finally, arbitration is also regarded as a reference of a dispute or difference between not less than two parties for determination, after hearing both sides in a judicial manner, by person or persons other than in a court of competent jurisdiction.[19]

Litigation, on the other hand, can be defined as a submission of a dispute between, at least two parties, for adjudication by a competent court,.[20] This may be between a subject and the state, or a subject and another subject.

Appraisal of Arbitration and Litigation Techniques:

As already indicated above, arbitration is one of the different methods by which disputes can be resolved. It is an adjudicative dispute resolution process which derived its recent growth and appeal from the apparent relief which it affords from the procedural complexity and other logistical challenges which disputants have to contend with in litigation.[21] Like litigation, arbitration is adjudicatory but the procedure is usually less formal and quicker.[22] It is based on an agreement between the parties to refer a dispute or difference between them to an impartial arbitrator(s) for a decision.

Arbitration is similar to litigation in the sense that the award of the arbitrator (like a court judgement) is usually final and binding on the parties. Depending on the jurisdiction within which the arbitration is held, the grounds upon which an arbitral award can subsequently be challenged are generally limited.[23] Nevertheless, but there are significant differences between arbitration and litigation. Foremost amongst these is the private and confidential nature of arbitration, as compared with the public nature of litigation. The parties to arbitration may have

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[19] Lord Hailsham., *Halsbury's Laws of England.* 4th ed., vol. 2, (London: Butterworth & Co. Ltd. 1978) p. 256, para. 501.

[20] Oyewo A.T.,(Please be consistent in your referencing style – Initial before Name, or Name followed by Initial. Which one? See footnote 22 below for example of a different style) THE LAW OF CIVIL LITIGATION IN NIGERIA (Ibadan: Jator Publishing Company) 1994. p. 1.

[21] *See* Orojo *op. cit.* [n 17] p. 41.

[22] *See* A. Tweedale and K. Tweedale, ARBITRATION OF COMMERCIAL DISPUTES: INTERNATIONAL AND ENGLISH LAW AND PRACTICE, Oxford University Press 2005, pp. 5-6 paras 1.07 – 1.08 (pointing out that there is now a 'creeping tendency' to conduct international commercial arbitrations in much the same way as litigation, creating unnecessary delays and introducing prohibitive costs. *See generally* G. Phillips, "Is Creeping Legalism Infecting Arbitration?" Dispute Resolution Journal, Feb-April 2003.

[23] *See* Gunter Henck vs. Andre & Cie S.A. (1970) 1 Lloyd's Rep. 236 at p. 238; the court held that "*if parties choose to have their disputes settled by arbitration, then subject to certain limited exceptions, the attitude of the court has been that the parties should take arbitration for better or for worse.*

their differences settled in private, and the existence and result of the arbitration will usually remain confidential so long as there is no need to enforce the award in open court.[24]

Secondly, arbitration is consensual. It cannot be imposed on the other party. This is unlike litigation which can, without the prior agreement of the other party, be imposed on it/him. The existence of an arbitration agreement is crucial to the commencement of the process, but the timing of when the agreement comes into effect is usually not detrimental. The arbitration agreement is frequently made when the parties' contract is formed but where it is not, the parties may still choose to introduce an *ad hoc* agreement after the dispute as arisen.[25] However, unless and until they make such an agreement, arbitration proceedings cannot be commenced.

Thirdly, arbitration is a private system of dispute resolution with the freedom of choice of experienced and knowledgeable adjudicators who have expertise in the subject matter of the dispute. The parties usually have the powers to choose their arbitrator or arbitrators but failing agreement on that, they may still choose the appointing body when a dispute arises, but the best time to agree on the appointing body is when the arbitration agreement is entered into.

The arbitrator's award is enforceable through the courts. When asked to enforce, the court is not permitted to interfere with the contents of the award and will confine its enquiries to whether the award was made pursuant to a valid arbitration agreement by a validly appointed arbitrator. Thus the court will generally not attempt to check whether the award accords to its own view of the issues and will simply enforce or not enforce, according to its view of the validity of the arbitration agreement and the validity of the arbitrator's appointment.[26]

The arbitrator's award may be challenged on the basis of serious irregularity on the part of the arbitrator, which has caused or will occasion substantial injustice to the applicant.[27] To be successful with such a challenge, the applicant is required not only to prove the irregularity, but also that the irregularity has resulted in substantial injustice. However, the court's jurisdiction is both inherent and statutory.

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[24] *See* C.A. Candide-Johnson and Olasupo Shasore, *supra* [n 15] at pp. 8-9.
[25] *See* Alan Redfern et al, LAW AND PRACTICE OF INTERNATIONAL COMMERCIAL ARBITRATION, 4th ed. Sweet & Maxwell 2004,pp. 49-50 paras 1.104-1.107.
[26] Cockburn L.J. observed in Re Hopper (1961) 31 L.J. Ch. 420 that *"…we must not be over ready to set aside awards where the parties have agreed to abide by the decision of a tribunal of their own selection, unless we see that there has been something radically wrong and vicious in the proceedings".*
[27] Section 68 United kingdom Arbitration Act 1996.

As indicated above, an arbitration agreement must be in writing and not only must it be in writing, the subject matter must be an arbitrable one under the applicable law. For there to be a valid arbitration agreement, the parties must show a contractual obligation to submit the dispute to arbitration. Asides the requirements of writing and mutuality, other elements such as the number of arbitrators, language of the arbitration and place of arbitration ought to be incorporated in the arbitration agreement. All these elements embedded in arbitration would ensure parties have good measure of control and autonomy over the arbitration procedure especially since most of the provisions of the arbitration statutes are subject to the agreement of parties.

Litigation on the other hand is a product of an adjectival or procedural law. It consists of rules which regulate the commencement, conduct and determination of proceedings before the court or tribunal. It regulates how the decision of the court or tribunal is enforced, so as to retain the confidence of those who rely on the judicial system for obtaining justice or seeking redress. This includes proceedings not only at the court of first instance but also on appeal.

Litigation proceedings are always conducted in accordance with specific rules and regulations which are binding on the parties and without reference to their preferences.[28] Apart from these rules, there are also preliminary matters[29] which an aggrieved person must take into consideration before proceeding to file an action in court. Failure to take care of these preliminary matters may lead to a premature termination of an action; or a dismissal at the end of a tortuous and costly trial. Furthermore, for a court to successfully determine the issues before the parties, such court must know the limits imposed on its power by the constitution.[30] In other words, a court must have jurisdiction to hear and determine any matter placed before it, as a court without jurisdiction will have its proceedings, judgment and or order nullified. The 1999 Constitution established various courts of record and assigned to each original and appellate jurisdictions.[31] The Constitution also empowers the National Assembly and State Houses of

[28] For e.g., Rules of Court, Statutes creating Courts, the Constitution, Judicial decisions on procedure, Practice Directions and Special Statutes on Procedure. On the other hand, parties to an arbitration are free to select the applicable rules, like the ICC, LCIA, LCA or the ACA rules.
[29] Cause of action, jurisdiction, *locus standi,* proper parties etc., are a few examples.
[30] Under the Constitution of the Federal Republic of Nigeria, (as amended) certain jurisdictional powers have been assigned to the various courts. For instance, the jurisdiction of the Federal High Courts is quite distinct from those of the state High Courts.
[31] Chapter VII of the 1999 Constitution.

Assembly to establish courts of law to exercise specific jurisdictions, whether original or appellate, regarding their respective competencies.[32]

The importance of arbitration in the settlement of commercial disputes cannot be over emphasized. Arbitration is quick, convenient, and substantially free of the technicalities involved in litigation. That is why it is most suitable for the resolution of commercial disputes.[33]

Conclusion and Recommendations:

With the congestion of the regular courts and interminable delays in justice delivery, coupled with the high cost of litigation, it is only reasonable that arbitration and other alternative dispute resolution processes should be integrated into the regular court system. In this regard, the establishment of the Lagos Multi-door Court House should be applauded. Likewise, the introduction of the Alternative Dispute Resolution (ADR) mechanism into the Lagos State High Court (Civil Procedure) Rules 2012. These have made considerable progress in the settlement of commercial disputes in Lagos.

It is recommended that the various states in Nigeria should follow the initiative of Lagos State in enacting an Arbitration Law and a Court of Arbitration through the provision of a multi-door court house facility. This will give citizens access to quicker and more expeditious methods of settlement of commercial disputes than litigation.

Secondly, our legislators should look beyond commercial disputes for our arbitration practice in Nigeria by considering a legal framework to accommodate some other forms of disputes to our arbitration system.[34] Some matters need to be taken away from our courts if we are to make appreciable progress in the speedy resolution of disputes and the quick administration of justice.

Finally, it has been discovered that our arbitration practice in Nigeria is short of a vibrant awareness mechanism, that is to say, laypersons lack proper understanding of how the arbitration system operates and how it is practiced. Perhaps, it is due to the fact that the Constitution doesn't specifically make provisions for the adoption of the arbitration method in the resolution of disputes. Also, an arbitral award which is the decision of an arbitration tribunal in writing is subject to the recognition of the court system before it can be enforced even when the

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[32] Section 6 (5) (j) (k) of the 1999 Constitution.
[33] *See* A. Tweedale and K. Tweedale, *supra* pp. 39-40, paras 2.14 – 2.15.
[34] Some of the disputes that can be accommodated under Arbitration are Labour and Trade disputes, Matrimonial disputes, disputes arising from administration of estates etc.

processes of arriving at the said award is similar to that of the court system. This, in our view, may be another reason why people get discouraged in arbitrating instead of litigating.

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