

Commercial Disputes & Arbitration

The first week of October 2003, I was again at ExxonMobil (Eket & Bonny) as a Legal Facilitator on financial and estate planning. One of the important returns from this project is the need to be proactive, to take responsibility and ACTION in the management of our finances, to invest and stop procrastinating on the main ground that we do not earn enough money.

Also new in October was the opening of the Abuja Multi-Door Court House, which is another attempt to seek alternative methods to dispute resolution, as litigation remains very expensive, technical and cumbersome in procedure, and prolonged in conclusion. Like the one in Lagos, it is a 'Court-connected ADR centre'. According to the Director of the Lagos Multi-Door Court House ('LMDC'), cases get to the latter through:

- Referrals from High Court Judges by virtue of the Court's practice directions in Lagos State .
- Direct contact by the disputing party or parties.
- By the terms of a contract that a dispute should be referred to LMDC.
- By direct invitation by LMDC.

Lagos State Ministry of Justice and the Lagos Branch of the Nigerian Bar Association ('Lagos NBA') also held some workshops on the new High Court (Civil Procedure) Rules 2003, which would soon come into operation. A lot of optimism awaits the commencement of these new Rules as they are expected to speed-up the court processes.

Arbitration as An Alternative Dispute Resolution Method

That disputes are an integral part of human existence cannot be contested. The only contest is the mode of resolving disputes as most of the time, individuals find it difficult to separate a dispute, which may be minor, from a larger activity, which can continue pending the resolution of the dispute. Instead, the disputing parties engage in prolonged litigations that eventually destroy all cordiality and the main stratum of the larger activity.

Professor Gaius Ezejiofor SAN described Arbitration in his book, 'The Law of Arbitration in Nigeria' ('the Book'), as the reference of a dispute to an independent person for hearing and

determination in a judicial manner in contrast to a determination by a Court of Law.

An Arbitrator(s) can hear only civil disputes; criminal cases are as a matter of public policy, handled by the government. Also, disputes arising from an illegal contract cannot be referred to Arbitration.

In order for you to further appreciate the difference between Arbitration and litigation, let us briefly review the advantages of Arbitration over litigation, some of which are highlighted in the above mentioned Book:

- Arbitration has less frustrating delays than litigation.
- Because of the above, Arbitration can be less expensive to the parties, in the long run.
- Arbitration is less formal as the parties can rely solely on documents and written briefs of arguments, thus also saving time and money.
- Litigation is held in public and trade secrets can be disclosed during this process to the peril of either party or both parties. But Arbitration proceedings are held in private; the parties' trade secrets can be heard in private and protected from public disclosure.
- Parties in Arbitration can represent themselves or chose their own Arbitrator(s) who may be persons familiar and versed with the party's industry, culture and country.
- Arbitration takes care of the conveniences of the parties and their witnesses in fixing dates, time and place for its hearings in marked contrast to litigation where the priority is the convenience of the Court and not necessarily that of the parties.
- Arbitration is conciliatory and not combative like litigation. It allows for neutralisation of the venue and the procedure in the proceedings to preserve trust in a conciliatory manner in the entire process.

Though Arbitration has many advantages, it also has some disadvantages:

- An Arbitration panel has no coercive powers of its own; the panel has to rely on the assistance of the regular Courts to achieve compliance.
- An Arbitration panel cannot adjudicate or consolidate multi party suits or disputes; this can lead to multiplicity of suits and wastage of resources.
- An Arbitration panel's decision can be set aside by a Court of Law.

An Arbitration decision, usually called an Award, is final as the substantive issues cannot be re-contested before a Court of Law. However, a party can, under Sections 29 and 30 of the Nigerian

Arbitration and Conciliation Act (?the Act?), seek to, within a period of three (3) months of the award, set aside the award on either of the following grounds:

- That the award contains decisions on matters/issues, which were beyond the scope of the issues submitted to the arbitration, for resolution and decision.
- That the Arbitrator(s) misconducted himself/themselves or that the award was improperly procured.

Conclusion

In practice and as a delay mechanism, it is found that an unsuccessful party to an award usually commences an action in Court as soon as he loses, challenging the award either under Sections 29 or 30 or both, of the Act.

Also, the lack of having its own coercive powers under the Law, like a regular Court of Law, is a big disadvantage to the arbitration process as one or both of the parties may decide to be unreasonable or disobedient to the orders or directions.

In addition, in order to arm an Arbitration award, legal proceedings are required to be commenced under Section 31 of the Act. This process can become the subject of delays and cumbersome procedural manoeuvring that traditionally accompany litigation leading to long periods of time between the grant of the award and its enforcement.

While I will continue to recommend this method of dispute resolution, parties, Legal Counsel and all stakeholders in the administration of justice will do well to learn to obey agreements, orders and directions that are, on the average, just and equitable. This is because, a part of human nature, does not allow us to be satisfied all the time.

There is finally the need to also review the Arbitration and Conciliation Act to meet the challenges of the twenty first century by for example, requiring the decisions/awards of the Arbitration panel to be final in fact and a challenge to the decisions in a Court of Law to be under more rigorous terms and conditions, which secures the award no matter how long the Court challenge takes.

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