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EVALUATION OF THE DIFFERENCES AND SIMILARITIES BETWEEN LITIGATION AND ALTERNATIVE DISPUTE RESOLUTION IN MANAGEMENT OF CORPORATE DISPUTES IN NIGERIA

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ABSTRACT

In Nigeria, it is well established that litigation is the most common form of domestic dispute resolution with the legal system and method of litigation modelled after the English common law. The Nigerian legal system also recognizes arbitration and other variants of dispute resolution generally described as Alternative Dispute Resolution (ATR) and these methods have gained considerable ground in recent times. Other types of Alternative Dispute Resolution 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. The principal legislation regulating the practice of arbitration in Nigeria is the Arbitration and Conciliation Act which was enacted in 1988 modelled on the UNCITRAL model law on International Commercial Arbitration 1985 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. In the main, arbitration has been accepted as a private form of dispute resolution preferable to litigation in many 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 Act 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. The aim of this paper is to examine the differences and similarities between Litigation and Alternative Dispute Resolution (ADR) in management of corporate duties in Nigeria. The work adopted doctrinal method of data collection and relied on primary sources such as statutes, case laws, journals, and textbooks to examine litigation and arbitration. It was found that arbitration share many similarities with litigation and despite these similarities, arbitration is more or less an alternative dispute resolution which complementary to litigation. It is recommended that with the congestion of the regular courts and interminable delays in justice delivery, coupled with high cost of litigation, it is only reasonable that arbitration and other alternative dispute resolution process should be integrated into the regular court system.

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Introduction

Arbitration like negotiation, mediation, conciliation etc are considered alternative dispute resolution mechanism. Arbitration has gradually evolved with the best alternative to litigation due the procedures and effect of the decision of arbitral tribunals. 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 law suits.[1]

Arbitration is an integral part of litigation and they share indispensable similarities. Apart that both litigation and arbitration have rules, principles and procedures, the laws and rules are incorporated in Nigeria Acts, laws of the federation, state laws and rules of courts of various states of Nigeria.

One notable difference between arbitration and litigation in the contemporary period lies on the scope of the two. The scope of Arbitration is limited to the scope of litigation. Remarkably, the disputes or differences which the parties agree to refer to arbitration must consist of a justiciable issue triable civilly.[2] In *K.S. U.D.B. v Fanz Construction Co. Ltd*[3] the court held that a fair test of such dispute is whether the differences or disputes between the parties can he compromised by way of accord and satisfaction.

The adjudicatory method and alternative dispute resolution share some common similarities. In both methods of dispute resolution, there is the presence of a neutral person who will be a judge or an arbiter in the case at hand. The Latin maxim *nemojudex in parts sua* meaning no one can adjudicate a case within which they are interested party. The umpire must be distant from the case at hand, ii is better that he has no relation or interest in the subject matter or in the parties involved for the sake of justice. More so, justice will not allow a party to be a judge in his own case, *nemojudex in causa sua* debars a party to a case to be an adjudicator in same.

In addition, the umpire in both case is expected to be completely neutral, impartial, act without prejudice of any form and give an equitable verdict or remedy as the case may be in the conflicting case.

Also, the principle of *audi alteram partem* is held in high esteem in both dispute

[1] B Ostbanjo "An Appraisal of Arbitration and Litigatior. Techniques as a Panacea for Justice Administration under the Nigerian legal system, (2016), April 15 SPA, Ajibade-and Co. Legal Practitioners, Arbitrators and Notaries Public

[2] G C Nwakoby. *The Law and Practice of Commercial Arbitration in Nigeria'.* Snaap Press Ltd. 2014.

[3] (1990) 4 NWLR (pt 142) 1.

resolution method. The umpire, judge or arbiter, in his quest to reach a fair, just and right decision should hear parties, their issues, facts, evidences, prayers should be weighed on an equitable scale, with this justice will not be crushed. It is a trite law that the events that give rise to a legal dispute are made up of myriads of facts linked together like a chord hence for the judge or arbiter to resolve the dispute he must delve into ascertaining the facts that led to the action before applying the law to the facts vis-a-vis the evidences adduced and the testimony of the witnesses

The Conceptual Clarifications the Concept of Arbitration

Arbitration has been defined by section 57 (1) of the Arbitration and Conciliation Act[4] as a-commercial arbitration whether or not administered by permanent arbitral institutions.

Orojo[5] while trying to emphasize that litigation is not the means for dispute resolution stated that going to law does not necessarily mean litigating a case in court as there is another way of enforcing a claim, that is arbitration.

Arbitration is the submission of a dispute between two or more parties for decision by a third party of their choice. Ronald Bernstein[6] defined arbitration as an agreement of the parties that a dispute between them be settled by a tribunal of their choice. The courts equally have tried to judicially define arbitration.

Romilly M.R in *Collins* v *Collins*[7] defined arbitration as a reference to the decision of one or more persons either with or without umpire, of a particular matter in difference between the parties.

[4] Arbitration and Conciliation Act cap A18 Laws of the Federation of Nigeria 2004

[5] O Orojo, "Arbitration as a Means of Dispute Resolution" Workshop Paper of Centre of Africa Law and Development Studies, 15th September, 1995.

[6] R. Bernstein, 'Handbook of Arbitration Practice, Sweet and Maxwell, London, 1987, page 8.

[7] 28 LICH 186

For Fulton Maxwell, J:

> Arbitration is equally a private process whereby a private disinterested person called an arbitrator, chosen by the parties to a dispute, acting in a judicial fashion, but without regards to legal technicalities, applying either existing law or norms 'agreed by the parties and acting in accordance with equity, good conscience and the perceived merit of the dispute makes an award to resolve the dispute.[8]

[8] F.J. Maxwell, 'Commercial Alternative Dispute Resolution, the Law Book Co. Ltd 1989, 55.httD.//law.uballedu/career/students/currentstudents/CoDv%200f%20Quide%20Qdi accessed 9/9/2020

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Any area of the law can be the subject of litigation. Some litigators are generalists whose practice includes a wide range of matters. Most specialise in one or more areas of the law. Commercial litigation generally involves one or more business entity and a financial dispute. Some commercial litigators have a sub-specialty in a particular area of the law such as antitrust, securities, or intellectual property. Commercial litigators often represent both plaintiffs and defendants. With many other civil litigation practices, especially personal injury, medical malpractice, product liability/toxic tort, and employment discrimination, litigators usually represent plaintiffs or defendants, not both.[9]

The Legal Framework on the Similarities between Litigation and Alternative Dispute Resolution in Management of Corporate Disputes in Nigeria

Where there are several benefits associated with taking the disputes to court, the popularity of doing so has caused countless problems for the courts particularly in resolution of corporate disputes. As a result of the sheer volume of cases, the process became very slow and meant that individual could be waiting for months and even year to have their cases seen or decided By the courts. As the cost of litigation became expensive, a social class argument arose on whether the rich and the poor could stand on the same pedestal in resolution of corporate disputes. This relative disadvantage, became.an element of concern to corporate managers who opted for an alternative driven largely by the oversubscribed and arguably inaccessible nature of litigation system in resolution of corporate disputes. Despite the efforts made by several jurisdictions to improve on the efficacy of litigation in resolution of disputes in general, it is still very costly and slow with cost penalties on technical issues that may not be of great relevance at a particular point in time.

Be that as it man, it is pertinent to state here that dispute resolution may also arise under following circumstances.

a. By order of Court:

This means that sometimes a matter may be referred by the court to arbitration proceedings and reports of such intervention is equally expected by the court as the case may be

b By Statute:

The example of this can be found under the trade Dispute Act whereby parties are compelled by law to seek settlement by arbitrators rather than disrupt economic activities by strike and lock out

c. By Agreement of the Parties

This is by far the commonest way in which arbitration or ADR arises.

The relative advantage of this process iri handling corporate disputes could be summed up as follows:

1. Preserves relationship between the

[9] Law Career Development Office Op Cit.

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employer and the employee
2. Provides opportunity to balance business and personal needs in a friendly atmosphere.
3. Build trust between employee's representative and managers.
4. Parties are committed to make it work.
5. Saves cost and time by all parties.
6. It is flexible and simple in its procedures
7. It is urgent in its application.
8. There is freedom to choice applicable law.
9. There is also freedom to choose tribunal and venue for its operation

Similarities between Litigation and ADR in Management of Corporate Disputes in Nigeria

The similarities between litigation and ADR in the resolution of corporate disputes can also be highlighted as follows:-

1. Both concepts are dispute resolution processes aimed at resolution of corporate disputes.
2. In resolving corporate disputes both concept aims at ensuring that justice is done to all parties.
3. The two processes allow for presentation of evidence by all parties in-the course of establishing the veracity of their cases
4. The principles of fair hearing are the underlying concept of both processes hi their attempt to resolve corporate disputes.
5. The process allows all parties the choice of legal representation in the case of litigation -, and neutral experts in the case of arbitration
6. Decisions of both processes are subject to appeal to a higher court or arbitral tribunal as the case may be
7. Agreement by all parties to resolve their disputed through arbitration are sometimes expressly slated and such position could be implied in the case of litigation.
8. The two processes are recognized by law and gave legal validity in its modus operandi

All these shall he discussed in greater details in subsequent chapter. But the point being stressed here is that while litigation is contentions and combative hi resolution of corporate disputes, ADR provides free flow of information between workers and management to express their feelings in a potentially explosive issue that could lead to conflict and resolve it amicably.

The Relationship between ADR and the Courts in Resolution of Corporate Disputes

At the onset of ADR process, the relationship between it and the court was not cordial as the courts were unwilling to accord recognition to the decision of arbitral tribunal both in Nigeria and overseas. But as arbitration continued to grow and

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develop, and both merchants and investors continued to make use of it, the courts attitude to this process gradually began to give way to its hostility, since business men preferred arbitration in their commercial dealing with each other.

Presently, Judges and opponents of the ADR processes have accepted and recognized that the pressure which favours ADR as alternative to litigation can no longer resisted or refused

The Impact of ADR Direct Application to Resolution of Corporate Disputes

1. ADR establishes formal procedures for grievances, listens to employees complaints and formulates policies that aids organisation to resolve their disputes.
2. ADR provides, parties the opportunity to balance both their business and personal needs in friend environment providing flexible working patterns which helps to improve the work life of employee and promotes the corporate objectives of the establishment.
3. By so doing, ADR helps to build trust between employee's representatives and management and this adds value to the organisation by ensuring that workers work efficiently and respond positively to the needs of the establishment

By handling their grievances, managing their absence and treating workers fairly through training and motivation, ADR encourages establishment to think out initiatives, do job design and develop the individual to reassert and place his commitment to realize the objectives of

ADR encourages free Mow of information between workers and management which is best for both parties to express their feelings on a potentially explosive issues that could lead to conflict and resolve it from the unset through positive and friendly communication link. And in so doing, ADR becomes panacea in harmonizing a more active role between workers and management in motivation and coaching through agreed stages and plans to move the corporate establishment to greater heights.

Advantages and Disadvantages of Litigation

Prior the determine the process which will be used to settle a dispute, parties shall weigh all necessary advantages and disadvantages of the processes and also consider which mechanism fits best tor the dispute in question. Each dispute resolution mechanism has its own advantages and disadvantages. However, in this part the author solely focuses on the benefits and drawback of litigation

i. Advantages of Litigation

The advantages of litigation are as follows:

- There is a significant body of substantive law and procedure that

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exists and automatically controls a law suit and parties do not have to create the rules that will govern the lawsuit.

- The judge, by law, must be impartial and the judge's pay check is not dependent upon whether the parties ever use that particular judge in another matter. The judge is not personally affected by the outcome of the case.
- Either party of a dispute is entitled to appeal whole or any part of the decision issued by trial/court of first instances

One out of ten corporations prefers to rely on litigation instead of ADR methods. Those corporations that arc preferred to rely on litigation tend to fall into one of two categories:

- Corporations operate principally in developed countries, where they believe that they will have access to an independent, impartial judicial system, and
- Corporations from developing countries that may be inexperienced with and apprehensive about the arbitration process and feel more comfortable resolving disputes in their own court systems[10]

ii. Disadvantages of Litigation

As per the survey with regard to the corporate attitudes and practices to international arbitration conducted by the School of International Arbitration, Queen Mary College University of London, and PricewaterhouseCoopers in 2006, the most common anxieties about litigating under a foreign law before a court far from home are as follows;

- **Lack of familiarity with local court procedures and language:** In the event that the disputants established in different countries, they usually do not prefer to defend or submit their case to the local court which is unfamiliar with respect to the law governing, procedures and language
- **Lack of confidentiality surrounding proceedings.** Although each jurisdiction stipulates distinctive rules as to the confidentiality of court proceedings, these proceedings are usually open to public and also media
- **Long lasting trials and appeal processes:** There is no doubt that court proceedings last longer than that of ADR mechanism due to the existence of wide range of appellate proceedings and high volume docket numbers.
- **Excessive cost of pursuing litigation overseas:** Following a case in overseas may engender considerable amount of expenditures and also cause

[10] Internationa[l] Arbitration Corporate Attitudes and Practices 2006, available **at** www.pwc com/en_BE/be/ publications /ia-study-pwc-06.pdf. The question does not appear to have been repeated in the Queen Mary /PwC survey, completed in 2008 and most recent in 2010 sponsored by White and Case

considerable wearing upon the foreign part.

- **Lack of independent or impartial judiciary and corrupted system.** There is no doubt that local court remained close to the local party and such unfair attitudes jeopardize their credibility before foreign panics
- **Difficulties with regard to the foreign judgments.** Each country has its own sovereignty right and may cause significant problems while enforcing and/or recognizing foreign court judgments

Conclusion

Extra-judicial dispute resolution in the form of mediation is norm in corporate establishment. Most times, aggrieved individuals bring action in courts to enforce some right or redress particular breach arising from transaction between the company and private individuals, state, or other corporate establishment. Dispute resolvers will not relinquish the opportunity to mediate a case and urge the parties to reach a settlement agreement. Arbitration no doubt has been elective and efficient and serves a significant social function in saving judicial resources and maintaining social harmony. There are still considerable amount of business people who does not prefer to break their routine on applying litigation.

Recommendation

Having examined the difference between arbitration and litigation, the work recommends that it is necessary for disputants to evaluate existing position of their case and their needs prior higher order to determine the best method to be used while resolving the dispute at stake. Each method has its benefits as well as drawbacks. Due to this ground, it is not possible to reach a conclusion that any of the methods absolutely circumvent others. It is worthy of note that there is a clear intention in the business world to often apply Alternative Dispute Resolution (ADR) while dealing with the conflicts arisen from corporation and other commercial contracts.