

WHY ARBITRATION TRIUMPHS LITIGATION: PROS OF ARBITRATION

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Abstract

This article weighs the benefit between litigation and arbitration. This article reveals that business men and women are always in a hurry of resolving their disputes in the bid of protecting the growth of their various businesses. Hence owing to the flaws of litigation, they are compelled in looking for alternative means of resolving their disputes. This article shows that arbitration has come to fill in the lacunas of litigation through stating the differences and grounds in which arbitration triumphs over and above litigation.

Keywords: Arbitration, Litigation, Disputes, Business men and women.

Introduction

*'Discourage litigation. Persuade your neighbours to compromise whenever you can...As a peacemaker the lawyer has superior opportunity of being a good man. There will still be business enough.'*¹

It is well settled that owing to nature of human beings and the number of activities engaged into makes dispute and conflicts inevitable. The traditional method of resolving these disputes is through litigation. Courts exist and are maintained by the state to provide a dispute settlement service for parties. It is a manifestation of state power and the responsibility of the state to ensure that courts exist, that appropriately qualified judges are appointed, that there are procedural rules to regulate the basis of jurisdiction and the conduct of cases before the court.²

However, litigation in different jurisdictions has never been found to be perfect in resolving disputes. With attendant problems pervading litigation such as overcrowded cause-list, unduly cumbersome procedure, unwholesome technicalities, its expensive nature and unprecedented bureaucracy has led to calls for reforms and alternatives for resolving disputes. Arbitration which is a procedure for resolving disputes through which parties in disputes appoints a person(s) who

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¹ Abraham Lincoln (1809-1865) Notes from a law lecture

<http://quod.lib.umich.edu/l/lincoln/lincoln2/1:134?rgn=div1;view=fulltext> accessed August 2nd 2014

² Julian D M Lew et al (2003): Comparative International Commercial Arbitration, Kluwer Law International

shall be preceding over them and any decision made by the appointed person(s) shall be final and legally binding, has come to remedy the flaws of litigation. This paper reveals criticisms to litigation as well as the advantages of arbitration over litigation.

Litigation

This is the act of bringing or contesting a lawsuit in court. Parties in disputes before going into litigation may negotiate on resolving their disputes but where there is a deadlock, negotiations will fail and the next step is to resort to the traditional method of resolving such disputes which is litigation. There is the intervention of a third party neutral, acting in an official capacity as a judge, with wide powers to examine the facts of disputes as presented and on the basis of the applicable law make a binding pronouncement on the rights, obligation and liabilities of disputants³. Disputants are represented by lawyers who present the case of the disputants to the judge. Unlike in civil law systems, common law uses the adversarial proceedings in which the judge doesn't examine or cross-examine parties in disputes and their witnesses or in other words the judge doesn't descend into the arena. He merely observes, listens, writes and makes his verdict or judgment.

Irrespective of the beauty attached to litigation, it has being plagued with a lot of problems. In the words of Derek Bok⁴:

'The law that governs affluent clients and large institutions are numerous, intricate, and applied by highly sophisticated practitioners. In this sector of society, rules proliferate, law suits abound, and the cost of legal services grow much faster than the cost of living. For the bulk population, however, the situation is very different. Access to justice may be open in principle. In practice, however, most people find their legal rights severely compromised by the cost of legal services, the complication of existing rules and procedures, and the long, frustrating delays involved in bringing proceedings to a conclusion...No one can be satisfied with the state of affairs.'

According to Ayua:

*'...apart from the fact that the search for justice is always an elusive ideal, legal justice becomes formalistic and technical. It tends to elevate form over substance, no matter how much the judges insist in rhetoric 'that justice is not a fencing game in which the parties engage in a whirligig of technicalities.' These complexities become more chronic and costly as litigation goes up the judicial pinnacle, thereby making judicial proceedings both mysterious and daunting for most people.'*⁵

³ Dele Peters (2004): *Alternative Dispute Resolution (ADR) in Nigeria Principles and Practices*, Lagos: Dee-Sage Nig. Limited

⁴ Derek Bok: 38 *The Record*, Association of the Bar of the City of New York 12-13, Jan-Feb, 1983

⁵ Ayua I.A., "Nigerian Legal Profession: Problems and Prospects" in Ayua (ed.) *Law, Justice and the Nigerian Society* (1995): NIALS Commemorative Series I, Nigerian Institute of Advanced Legal Studies, Lagos p. 6 <http://www.nials-nigeria.org/journals/Peter%20Anyebe-%20Towards%20Fast%20Tracking.pdf> accessed August 2 2014

With attendant factors such as excessive cost of legal services, frustrating delays in determining the substance of the dispute, issues of confidentiality, cumbersome and technical procedures to conform to makes litigation largely criticized. If the court is usually described as the last resort for the common man to obtain redress, it may be submitted that one will be living in fantasy for having such mentality. The concept of legal justice has to a great extent varied based on the class of lawyers offering their legal services. The monetization of justice and the notion that 'justice is for the highest bidder' has laid itself as an altar in the judicial system. A poor man whose rights have being infringed upon in a commercial arrangement has no chance to obtain legal justice when pertinent issues surrounding litigation remains the order of the day.

Commercial men and women are by their nature and practice of their business in a hurry when a dispute arises in their business transactions to have their rights and liabilities determined as soon as possible without undue waste of time so that they can get on with their business.⁶ Hence, a faster and cost effective procedure is sought for to resolve their dispute. Arbitration serves as the best process in meeting the demands of business men and women for resolving their respective disputes.

Arbitration

According to Prof. (Dr.) J Olakunle Orojo CON and Prof. M. Ayodele Ajomo:

*'Arbitration is 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.'*⁷

David defines it as a device whereby the settlement of a question, which is of interest for two or more persons, is entrusted to one or more other persons – the arbitrator or arbitrators – who derive their powers from a private agreement, not from the authorities of a State, and who are to proceed and decide the case on the basis of such an agreement⁸. Furthermore Halsbury's Laws of England sees it as a process by which a dispute or difference between two or more parties as to their mutual legal rights and liabilities is referred to and determined judicially and with binding effect by the application of law by one or more persons (the arbitral tribunal) instead of by a court of law⁹.

Essentially arbitration is a party-driven procedure. They are at liberty to choose whosoever is knowledgeable on the core principles surrounding their dispute, decide on where the arbitration will take place, agree on which rules and laws will be applied, the language to be used etc. It is imperative to assert here that the fundamental features of arbitration include:

1. An alternative to litigation¹⁰
2. A private mechanism for dispute resolution
3. Selected and controlled by the parties
4. Final and binding determination of parties' rights and obligation

It is a method of dispute resolution, involving one or more neutral third parties, who are agreed to by the litigants and whose decision is final and binding. Arbitration in recent times has being seen as a better and more preferable alternative to litigation owing to the fact that it reduces the

⁶ Orojo Olakunle .J. and Ajomo Ayodele M. (1999): Law and Practice of Arbitration and Conciliation in Nigeria, Lagos: Mbeyi & Associates (Nig.) Ltd.

⁷ Ibid

⁸ Rene David (1985): Arbitration in International Trade, Netherlands: Kluwer Law and Taxation Publishers p. 5

⁹ Halsbury's Laws of England (1991), 4th ed. England: LexisNexis Butterworths para. 601, 332

¹⁰ Ibid, Julian DM Lew et al (2003)

work load of the judges, is designed to be cheaper, quicker, flexible, informal and private. In a contract, parties would insert an ‘*arbitration clause*’ in bid of referring their dispute solely to arbitration. A typical example of an arbitration clause is modeled in this manner:

‘In the event of any dispute or difference arising between the parties to this agreement from or in connection with this agreement or its performance, construction or interpretation, such dispute shall be referred to arbitration by a single arbitrator in accordance with the provisions of the Arbitration and Conciliation Act CAP 18 Laws of the Federation of Nigeria 2004 or any amendments thereto, whose decision in relation to any such dispute or difference shall be final and binding on all parties hereto.’

There are four types of arbitration:

1. **Domestic arbitration:** This refers to arbitration carried out between persons resident or doing business in the same country.¹¹
2. **International arbitration:** Involves parties to an arbitration agreement who have their places of business in different countries or where the subject matter of the arbitration agreement relates to more than one country, or where the parties expressly agree that any dispute arising from the commercial transaction shall be treated as an international arbitration.¹²
3. **Institutional arbitration:** The arbitration proceedings are conducted by or under the auspices of an arbitration institution which promotes or administers arbitral processes.¹³ Examples are International Centre for Settlement of Investment Disputes, Chartered Institute of Arbitrators United Kingdom, the London Court of International Arbitration etc.¹⁴
4. **Ad Hoc arbitration:** Here the arbitration is conducted based on an agreement which does not refer to any arbitration institution but is conducted between the parties themselves. In other words this arbitration is self-executing.¹⁵

It will be instructive at this juncture to state some the core differences between arbitration and litigation. The table below affords a clearer understanding:

Issue	Arbitration	Litigation
Formalities	Less formal than litigation, strict rules of evidence do not apply but procedural rules may be based on institutional rules.	Formal, rigid, strict evidential and procedural rules are prescribed.
Time	Ought to be short but may extend over a long period if hearing protracted. Procedure	Longer period because of overcrowded cause-list.

¹¹ Akin Ibidapo Obe & Abayomi Williams F. (2010): *Arbitration in Lagos State A synoptic guide*, Lagos: Concept Publications Ltd.

¹² Ibid

¹³ Ibid Orojo Olakunle .J. and Ajomo Ayodele M. (1999): *Law and Practice of Arbitration and Conciliation in Nigeria*

¹⁴ Ibid

¹⁵ Ibid

	and time frame to be agreed by parties.	
Confidentiality	Private and awards are not published.	Public and judgment reported
Third party intervention	A third party(s) known as arbitrator(s) are appointed by the parties.	A third party known as a judge is not appointed by the parties but by the State.
Control by parties	Parties have control over choice of arbitrators, language, time, venue, applicable law, procedural rules etc.	Parties do not have control in all ramifications.
Satisfaction of parties	Parties are usually satisfied because they were mostly involved throughout the arbitration process.	Parties satisfaction is often times low because the court uses the win-lose approach

It is imperative to note that arbitration as an alternative to the traditional method of resolving disputes also has its own shortcomings but its advantages outshines it. Arbitration triumphs over litigation on the following basis:

1. **Privacy:** Some disputes are by its nature sensitive and confidential. Disputants would wish to settle them in private rather than allowing the whole world to know that the cause of their dispute. Arbitration guarantees the privacy of the parties and the confidentiality of the dispute. See the case of *Gunter Henck v. Anre & Co. Cie*¹⁶. Unlike litigation, anybody is free to attend court proceedings and listen to matters that don't concern him/her.
2. **Expedition:** Arbitral tribunal can reach a quicker decision by avoiding the cumbersome and dilatory process of the court. Under litigation a trial setting can take up to two (2)-three years. Time is of the essence in the commercial world. Arbitration ensures that time is not wasted.
3. There is flexibility with respect to law of evidence under arbitration proceedings. In Nigeria the Evidence Act expressly prohibits the application of the law of evidence to arbitration. Be that as it may under statute, the arbitrators make uses of the rules of evidence for resolving disputes. Time and expense in meeting rigid evidentiary rules are diminished.
4. **Choice:** The parties to a dispute in an arbitration matter choose their own tribunal provided they have been freely agreed upon by the parties and are sufficiently knowledgeable, the language that will used throughout the proceedings, the time and venue of the arbitration. In litigation cases are allocated at the discretion of the Chief Judge of a State and so a case can fall into the hands of any judge.
5. **Preserves the existing relationship of parties:** Arbitration triumphs over litigation because when a judgment is given in court, such judgment is going to be in favor of one party to loss of the other party. In other words it is a win-lose situation. This outcome can destroy the relationship between the disputants thereby preventing future contractual

¹⁶ (1970) 1 Lloyd's Rep. 235

arrangements. However, arbitral proceeding which is relatively a friendly procedure makes parties to continue to work together after the arbitration might have been over.

6. **Decisions:** Decisions given by the courts are known as judgments which are appealable up to the Supreme Court. However, a unique feature of arbitration is that its decision are known as awards which are final and binding on the parties as well as non-appealable. The Nigerian Arbitration and Conciliation Act adopting the Convention on the Recognition and Enforcement of Foreign Arbitral Award¹⁷ otherwise known as New York Convention, in its section 51 (1) states that:

“An arbitral award shall, irrespective of the country in which it is made, be recognized as binding and subject to this section and section 32 of this Act, shall, upon application in writing to the court, be enforced by the court.”

Hence, the award will be treated as the judgment of the court enforcing it. One may however set aside the award on certain grounds as may be stipulated under relevant statutes and rules under different jurisdictions.

Conclusion

Generally, the traditional method of resolving disputes between parties is through litigation. Litigation which refers to contesting a lawsuit in a public courtroom has being largely discredited by writers, scholars, business men and women etc. Owing to the geometric rate of economic and political development not only in Nigeria but in the world, disputes arising from transactions cannot entirely be resolved through litigation. Men and women engaged in commerce are always time-conscious pertaining to the determination of any dispute that may arise in the course of their business. With attendant factors attributable to litigation such as unwarranted delay in both institution and determination of a lawsuit makes litigation a wrong option to resolving commercial disputes. Arbitration has come to fill up the lacunas of litigation.

Arbitration is a consensual procedure whereby parties in disputes agree on the intervention of a neutral third party, knowledgeable concerning the issues for determination, and agreeing to be bound by the decision of the neutral third party. This method of resolution triumphs over and above litigation on numerous grounds ranging from privacy, speed of process, flexibility of rules and procedure, cost of process, ability to agree on the arbitrator etc. On this basis, it may be submitted that arbitration should be patronized more owing to its effectiveness and efficiency it will create for disputants.

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<<http://quod.lib.umich.edu/l/lincoln/lincoln2/1:134?rgn=div1;view=fulltext>> accessed August 2 2014
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¹⁷ United Nations Conference on International Arbitration: Convention on the Recognition and Enforcement of Foreign Arbitral Awards http://www.uncitral.org/pdf/english/texts/arbitration/NY-conv/XXII_1_e.pdf. accessed August 2nd 2014

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