

THE APPLICATION OF ARBITRATION FOR EFFECTIVE DISPUTE RESOLUTION IN THE NIGERIAN BANKING SECTOR

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Abstract

The global economic melt-down of 2008/2009 has taught us numerous lessons, one of which is an efficient banking system. An effective and efficient banking system is a Sine-qua-non for a vibrant regional and global economy. The banking sector plays a vital role in the economy of any nation. Because of the role played by the banks, it is exposed to innumerable situations and proceedings which inexorably give rise to conflicts, disagreements and disputes. In discussing the Application of Arbitration for Effective Dispute Resolution in the Nigerian Banking Sector, it is trite to identify the circumstances and situations that often generate disputes, the role of the judiciary in managing disputes arising from day-to-day activities of banks, proffer solutions towards achieving an effective dispute resolution mechanism in the banking sector.

Keywords: Application, Arbitration, Effective, Dispute, Resolution and Banks

Background to the Study

Dispute has primordial origin as it has been with mankind from the beginning of time. Therefore, in the course of business, it is inevitable that occasional disputes will occur. Dispute involving the banking sector in Nigerian are numerous and arise from several issues deriving from interactions between the banks and their customers, employer, employee relationship, inter-bank interactions, intra-bank relationships and sometimes from interactions between the banks and the Central Bank of Nigeria (CBN) in the course of CBN's performance of its statutory regulatory functions. As it is customary with disputes in other spheres of life, banking sector disputes are mostly referred to the courts for adjudication majority of cases have been determined from the trial courts through the court of Appeal and up to the Supreme Court.

Nigerian, Law reports are replete with cases that endured a fierce legal battle which lasted for decades in the traditional court system. A dispassionate review of many cases reveals that most cases ought not to have gone to the courts in the first place. An alternative to

litigation ought to have been employed in resolving these disputes. However, the loads of bank related cases contained in our law reports are rather fractions of actions that attend the courts either for or against the banks. Unfortunately, the Nigeria legal system has often been exploited or employed to retain numerous cases and preserve them for decades without trial.

The application of injunction, interlocutory appeals and lack of diligent prosecution renders judges handicapped in exercising speedy disposition of cases. Sometimes matters that reach the climax of the judicial ladder are remitted to trial courts to be heard *denouo*. The time, human and materials recourses committed to legal battles in the banking industry take their toll on the performance of and activities of the bank, in addition to numerous side effects. The consequences of the losses ultimately affect the macro-economy in several ways. The main objective of this paper is to urge parties to such cases to adopt Alternative Dispute Resolution (ADR) mechanisms where appropriate for speedy dispensation of justice.

Conceptual Clarification

Arbitration is a process of setting an argument or disagreement in which the people or groups on both sides present their opinions and ideas to a third person or group. It is an alternative dispute resolution mechanism employed in resolving dispute or grievances outside a court system. Redfern and Hunter (1991) posit that in its origin the concept of Arbitration as a method of resolving dispute was simple. "The practice of arbitration therefore comes, so to speak, naturally to primitive bodies of law, and after courts have been established by the State and a recourse to them has become the natural method of setting disputes, the practice continues because the parties to the dispute want to settle the with less formality and expense than is involved in a recourse to the courts."

Fouchard (1965) a distinguished French writer described Arbitration as an "apparently rudimentary method of setting disputes, since it consists of submitting to ordinary individuals whose only qualifications is that of being chosen by the parties. Lord Mustill (1989) notes that it is not difficult to visualize the rudimentary nature of the arbitral process in its early history. To him: "Commercial arbitration must have existed since the dawn of commerce. All trade potentially involves disputes and successful trade must have a means of dispute resolution other than force. From the start, it must have involved a natural determination and agreement, tacit or otherwise, to abide by the result, backed by some kind of sanction. It must have taken so many forms, with medication no doubt merging into adjudication. The story is now lost forever. Even for historical times, it is impossible to piece together the details, as will readily be understood by anyone who nowadays attempts to obtain reliable statistics on the current audience and varieties of arbitrations. Private dispute resolution has always been resolution private."

The fundamentals of two or more parties, whether in anticipation of dispute or already in dispute, agreeing to nominate another private person to resolve the issues between them by arriving at a decision, is known as an arbitral process and the private person is known as an arbitrator, culminating into an arbitral panel. The arbitral panel evaluates the audience and the argument of the parties and then arrives at a decision on the dispute. This decision is given in writing, in the form of an award. This award is binding on parties as in its finality. Other form of ADR mechanisms are negotiation, mediation and conciliation. All these methods are alternatives to litigation.

Arbitration under the Nigerian Law

Arbitration and conciliation Act, Cap 18, LFN 2004 is the main Nigerian statute dealing with arbitration. Section 57 of this statute defines Arbitration to mean “A commercial Arbitration whether or not administered by a permanent arbitral institution” This definition is rather restrictive as it applies to settlement of commercial disputes. This definition is rather seeking a distinction between a commercial arbitration or otherwise which it fails to supply. However, the concept of Arbitration is not new in Nigeria Arbitration and other alternative dispute resolution methods were used to resolve conflicts. Extrajudicial settlement of dispute has always been a feature of Nigeria's indigenous customary laws. Such settlements are accepted and enforced by the courts provided they satisfy requirements. Akpata (1997) posits that: “It is not hazardous to say that the Anglo-Saxons, the Romans and indeed every community that lived under the sun in ancient times used arbitration, mediation or conciliation, in one form or another to resolve disputes.” Nigeria Inclusive (Emphasis mine). The primary sources of the Nigerian law of Arbitration are the common law, Nigeria Customary Law and Nigeria Statutes. Arbitration can be either domestic, international, institutional, Ad-hoc and document only Arbitration.

Circumstances of Commercial Disputes in the Banking Sector

Disputes in the Banking sector usually arise from a plethora of commercial transactions and relationships, ranging from banker/customer relationships, employer/employee relationships, inter-bank disputes, dispute with regulators, dispute with investors/shareholders and shareholders representatives and disputes with employee's union. The breakdown in these relationships automatically translates into commercial disputes because of the sheer volume, complexity and value of the transactions.

A major characteristic of commercial disputes is that key players desirous of swift resolution of their disputes, unless a party to the dispute do not want justice. In England or the average state in the United States of America, key players in commercial dispute invariably prefer to seek a settlement out of the regular court system to maintain commercial relationship. Judicial powers over commercial disputes is vested on the Federal High Court, High Courts, National Industrial Courts, some tribunals and regulatory institutions that control and coordinates the activities of the bank.

Section 251(1)(d) of the 1999 Constitution provides that:

- (1) Notwithstanding anything to the contrary contained in this constitution and in addition to such other jurisdiction as may be conferred upon it by an Act of the National Assembly, the Federal High Court shall have and exercise jurisdiction to the exclusion of any other court in civil causes and matters.

- (1) Connected with and pertaining to banking banks, other financial institutions, including any action between one bank and another, any action by or against the Central Bank of Nigeria arising from banking, foreign exchange, coinage legal tenders, bills of exchange, letters of credit, promissory notes and other fiscal measures, provided that this paragraph shall not apply to any dispute between an individual customer and a bank in respect of transactions between the individual customer and the bank.

At a glance, this section suggests exclusive jurisdiction of the Federal High Court on inter-bank disputes. However, this may not always be the case as the subject matter and the nature of the transaction determines whether it is an inter-bank dispute within the meaning of section 251(1)(d). The understanding of this position by disputants, lawyers and judges is very paramount in the speedy disposition of commercial disputes.

The Role of Judiciary in Commercial Disputes

Various courts in Nigeria have jurisdiction over commercial disputes. The question is whether the structure of these courts adequately cater for commercial disputes as at when due. The bulk of litigation involving banks in Nigeria stems from Bank/Customer relationship. These disputes may arise from debt recovery, out of non-payment of loans by debtors, excess charges of interest on loans and overdrafts, negligence, defamation, foreclosure of mortgages and exercise of right of sale, failure to honour cheques, fraud by bank staff etc.

In *Agabanelo v. UBA (Warri Branch)* a simple case of issuance of a bank draft lasted for 12 years from the trial court to the apex court based on technicalities of irregular signature and the addition of the words "Warri Branch". The germane issue of a bank draft was kept aside for these 12 years and the courts were battling with the issue of damages for defamation and the quantum of such damages.

According to Wanka (2013), in banking sector disputes, the courts can be faced with serious fundamental issues and indeed urgent ones that hit at the bottom of the economy of the nations that must be handled with dispatch, as failure to do so will tell on the economy. This fundamental issues ranges from unnecessary delays and lapses based on technicalities of Law in the administration of justice. Achike Jca (1988) (as he then was) blames the Bar, Bench and the Law itself for these shortcomings of the judiciary.

The case of *ACB v Ihekwoaba* is another classical example of how long and turbulent disputes involving a bank and her customers can be. The case arose out of the exercise of the bank's (ACB) right of sale of mortgaged property after the respondent defaulted in the repayment of loan granted to him in 1982. The matter lasted from 1987 – 2003. The matter was finally determined at the Supreme Court when the apex court restored the verdict of the trial court that the mortgage should act bona fide and observe reasonable precautions to obtain not the best price but a 'proper price'. It suffices to say that the misplacement of 'proper price' with best price is enough to delay justice.

Similarly in the case of *Diamond Bank Plc v. Partnership Investment Ltd*, parties dragged themselves from the trial court to the Supreme Court largely on the professionalism of the bank's staff. The first respondent instituted this action against the appellant and the second respondent alleging negligence on the issuance of bank drafts in breach of instructions earlier given to it by the first respondent. The Appellant in its defence contended that the cheques being certified bank drafts were honoured on presentation and that the first respondent had no powers to give further instructions regarding the payment. The trial court found in favour of the respondent where upon the appellant followed up with appeals up to the Supreme Court. The Supreme Court, while dismissing the appeal, held that the principle that a bank draft is payable at sight and therefore cannot be countermanded was inapplicable.

In *Eze v. Spring Bank Plc*. The Appellant challenged his dismissal from work by the respondent for gross misconduct. The Appellant alleged that his right to fair hearing as enshrined under Section 36(1) and (4) of the constitution was breached. The Supreme Court held that since the Appellant was given the opportunity to reply to the query issued to him by the respondent, his complaint of breach of his right to fair hearing under the constitution has no basis whatsoever. On the issue of dismissal for gross misconduct, the apex court also held that the employer has the right to dismiss the employee unless such acts also disclose criminal offenses without waiting for the outcome of the prosecution of the employee for such criminal offenses. This case lasted for almost two decades 19 years to be specific. Other recent cases between banks and their customers that made it to the Supreme Court include *Adetona and Anor v. Zenith International Bank Plc* which lasted for about 10 years, *Agbola v. UBA Plc* and 2 others lasted for 17 years, *Abacha Foundation for Peace and Unity and 5 others v. UBA Plc* lasted for 12 years and many others.

Application of Arbitration to Commercial Dispute

Commercial disputes include disputes arising from a payment default on delivery of goods or a dispute concerning the payment and/or finalization of project usually a dispute settlement clause in a commercial contract indicates the forum at which an existing or future dispute should be settled. Gates (2014) opined that for any business in any industry located anywhere in the world, commercial disputes can present an array of serious problems of not addressed swiftly, effectively and cost effective. Commercial disputes can jeopardize profitability, reputation and sometimes the very existence of a business.

Although a commercial contract does not have to be in writing, it makes sense to have a clear writing agreement establishing a legal position at the onset the best course to take in resolving any anticipated dispute. The application of commercial arbitration to commercial dispute is a determinative process where the decision of the arbitrator or arbitral tribunal is final and bringing in a manner similar to a decision obtained in the Court. Commercial arbitration is conducted pursuant to an arbitration agreement between the parties in dispute. An arbitration agreement is an agreement in writing to refer disputes of a commercial nature that arise under a contract for resolution by arbitration.

The Arbitration and Conciliation Act Cap 19 LGN 2004 provides the legal framework “for the fair and efficient settlement of commercial disputes”. It provides an alternative to tedious litigation where the parties provide for arbitration in their contract. A clause stating that “any disputes arising out of the agreement between the parties will be referred to arbitration in accordance with the Act” will suffice to create the groundwork for reference to arbitration. The same is true of arbitration of international commercial transactions, which are guided by the Act, making applicable the convention on the recognition and enforcement of Arbitration Award (New York Convention) to any arbitration award made in Nigeria or in any contracting state arising out of international commercial arbitration.

Ajogwu (2009) postulates that Alternative Dispute Resolution Methods (ADR) (Arbitration) are best adjusted to commercial disputes, for their time saving nature and benefits. They are more often than not recognizing the time value of money better than litigation does. Belgore JSC (1997) stated that when parties, by their contractual agreement, provide resort to arbitration first and only after failure of agreement on arbitral award, can a party pursue a cause of action in court. An arbitration clerk to stay access to the court is known as “Scott v Avery Clause”.

Advantages of Arbitration over Litigation

The question that needs answer is often goes thus, why do parties particularly in the business (Banking) would need arbitration rather than the regular court system? The answer is found in the following reasons:

- i. Arbitration is time saving than litigation in the court system as analyzed earlier on. A court action involves conformity with laid down produces which can never be altered, but in arbitration parties set their terms of operation without recourse to court procedures
- ii. Arbitration is VSS experience than litigation. Because litigation last longer, it involves more costs to the parties
- iii. Arbitration process permits some disputes to be resolved on document without hearing. Every litigation must be heard in court.
- iv. Parties can represent themselves in arbitral proceedings or by proxy whether lawyers or non-lawyers in contracts, non-lawyers have no right of audience in the court of law and representation therein is only by lawyers.
- v. In arbitration parties choose the arbitrator and determine the number of arbitrators.

- In litigation parties are bound by court rules of appointment of judges.
- vi. Arbitration is less formal than litigation which takes place in the open court, before the whole world. Arbitration can be made very informal and confidential; therefore parties are more relaxed in arbitral proceedings.
 - vii. Arbitration takes care of the convenience of the parties and their witnesses in fixing the date, time and place for hearing, this is not the case with normal court proceedings where what is paramount is the convenience of the court.
 - viii. Arbitration allows for selection of experts to look into dispute on the other hand deals with any dispute that is brought before him. It does not matter that he has no special knowledge of the issues involved.
 - ix. Arbitration is conciliatory in nature and contract litigation has the connotation of a battle between the litigants. At the end of the litigation the relationship between the parties may never be cordial again.
 - x. The decision of an arbitral tribunal is final and binding on the parties. Consequently, an arbitral award is not subject to appeal and most parties prefer to have final decisions rather than face the prospects of appellate litigation.

Conclusion/Recommendations

Disputes, unlike wine do not improve by ageing. Delay in settlement or disposal of conflicting claims is indeed a primary enemy of justice and peace in a community. This is also true of banking disputes. The Banking Sector is based on trust and confidence which can be easily eroded where there are uncontained and unresolved banking disputes. It is therefore recommended that Banks should adopt any of the alternative dispute resolution process and use the courts as the last resort. Thus the courts should not be used for resolving commercial and banking disputes where, after evaluation, it is clear that other processes are more appropriate. The banks should understand that this process requires legal engineering and engagement of those who understand ADR issues and processes to find nexus between a dispute and a process to ascertain which better fits the dispute.

It is good enough for High Court Rules (as most states have) to provide for reference to ADR processes but there should be a law compelling reference like in the USA and other jurisdictions. For the economy to grow on a sustainable basis, banking disputes should be resolved expeditiously so as to avoid loss of time and resources. Where it is clear that the court lack jurisdiction, proper order should be made to avoid the issue of jurisdiction litigated up to the Supreme Court while the substantive suit is pending. The lynch pin of a virile economy is a judicial system that ensures that obligations are respected and enforced swiftly. The chartered institute of Bankers should commission a study to test the veracity of the hypothesis of swift resolution of commercial dispute as in political and criminal cases, because the judicial response to the adjudication of commercial disputes is a barometer for virile investment climate whether for foreign direct investment or local investments. There should be a special court with sole jurisdiction over banking matters and the judges be given specialized training on novel technology-driven trends such as internet banking and mobile banking, especially as they affect the interpretation of the incidence of liability, in case of breach.

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