FORMALITIES AND ESSENTIAL REQUIREMENTS OF ARBITRATION AGREEMENTS

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Abstract

This paper highlights the emergence of arbitration as the choice dispute resolution mechanism, in the behest of manifold commercial transactions on daily basis. The preference given to arbitration for dispute resolution of commercial transactions is not unconnected with the expedite dispensation of justice. Therefore, it is important to consider the formalities and essential requirements for constituting an arbitration and the legal implications thereof. Particular reference is had on the Arbitration and Mediation Act which is an adaptation of the UNCITRAL arbitration framework. The study examined the nature, formality and utility of arbitration clause in constituting arbitration proceedings. The study finds that where arbitration clause exists in a commercial agreement, parties are duty bound to first exhaust the arbitration route, otherwise it becomes unripe to explore other possible remedies. The study, however, notes that on instances where the matter is not arbitrable, the arbitration agreement will fail. Therefore, contraction parties are required to consider these requirements of law when incorporating arbitration clause into their commercial transactions.

Keywords: Arbitration, Essentials of Arbitration Agreements, Formalities of Arbitration Agreement

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1.0 Introduction

Arbitration is one of the alternative dispute resolution mechanism. "Arbitration is the reference of a dispute or difference between not less than two persons for determination after hearing both sides of the dispute, by another person or persons, other than a court of competent jurisdiction".[1] It is a private adjudicatory process founded on the agreement and choice of parties; a concept known as party autonomy.[2] It allows parties to decide a lot of issues, including: the choice of adjudicator(s), the seat of arbitration, the language of the arbitral proceeding; applicable substantive and procedural rules and matter or concerns to the parties.[3] Arbitration thrives on the privacy and confidentiality which it offer parties and afford expedite dispensation of justice. These are qualities which places arbitration over litigation as the choicest dispute resolution mechanism in commercial transactions. Arbitration is developed as a method of dispute settlement poised at departing from the baggages of litigation.

Arbitration has gradually become a resort for resolving disputes on the basis that it has never been doubted that increased communication and co-operation can help parties avoid disputes. Parties can resort to arbitration provided they possess the legal capacity. Arbitration has become the prevalent dispute resolution mechanism for both international and domestic commercial transactions. The current trend

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[1] *NNPC v. Lutin Investment Ltd & Anor* (2006) 2 NWLR (Pt 965).

[2] B Osibanjo, 'An Appraisal of Arbitration and Litigation Techniques as Panacea for Fair Justice Administration under the Nigerian Legal System', (2016) <http://www.spaajibade.com-An-Appraisal-of-Arbitration-and-Litigation-Techniques-as-Panacea-for-Fair-Justice-Administration-under-the-Nigerian-Legal-System.pdf> accessed 29 July, 2022.

[3] SA Fagbemi, 'The Doctrine of Party Autonomy in International Commercial Arbitration: Myth or Reality?', (2015) 6 (1) Afe Babalola University: Journal of Sustainable Development Law & Policy 222, 222.

is that most commercial transactions are regulated and place reliance on arbitration as a means of resolving disputes arising from such commercial ventures rather than subject such disputes to litigation. This is due to the delays associated with court cases which has less commercial prudence.

The complexities associated with commercial transactions, in view of their global and cross-border dimension between businesses, investors and states, has the potency to stir up disagreement between contracting parties. It is not uncommon to see the adoption of arbitration as a standard method for dispute resolution in certain highly specialised industries and sectors such as: construction, commodities, shipping, insurance, etc.

As noted earlier, arbitration is a private dispute resolution mechanism. This is because, unlike the court which automatically has the judicial powers to determine civil and commercial disputes between conflicting parties, arbitration is a private arrangement by disputing parties to submit themselves to the arbitral process. Arbitration thrives on parties' autonomy. These are usually contained in clearly written arbitration agreements which guides and regulate the conduct of parties to the arbitration process. Therefore, the preoccupation of this scholarly engagement is to examine the nitty gritty of arbitration agreements: what it entails; how it is constituted; its characteristics and legal implications.

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2.0 Nature of Arbitration Agreements

Modern commercial transactions instruments are embellished with arbitration clauses. In the case of *MV Lupex v. Nigeria Overseas Chartering & Shipping Ltd*,[4] the court reiterated the rights of parties to

[4](2003) 15 NWLR (Pt. 844) 569.

enter an arbitration agreement to suit their preference. Arbitration agreement is an embodiment of the principle of contractual freedom to the parties of a contract, whereby parties are given power to manage and dictate the direction of their contractual dispute and control of the judicial process.[5] The court held in the case of *Doleman & Sons v. Ossett Corporation*[6] that for an arbitration agreement to be valid and complete there has to be a prevailing dispute and actual reference of the dispute to arbitrator(s). Under the Act, an arbitration agreement is irrevocable except by leave of court or agreement of parties. The revocation cannot be unilateral, but the parties may agree to revoke their submission to arbitration.

Section 2 Arbitration and Mediation Act requires that every arbitration agreement has to be in written format or contained in some kind of document by way of correspondence or in exchange of points of claim and defence; or a document containing an arbitration clause. Essentially, only written agreements entered into by parties before or after the dispute arises are subject matter of arbitration. Although the Act does not have a customised form of written arbitration agreement, it is sufficient that the agreement is captured in any written form disclosing the intention of parties to subject themselves to arbitration. Thus, the paramount consideration of parties in this regard is the intention and willingness of parties to arbitrate.[7] In other words, the law considers the substance, rather than the form of the agreement.

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3.0 How Arbitration Agreements is Constituted

[5]Masoudreza Ranjbar & Mehdi Dehshiri, 'General and Specific Conditions of Arbitration Agreement', (2017) 10 (5) Journal of Politics and Law 95, 98.
[6] (1912) 3 KB 257.
[7]Collins Chijioke, 'The Nature of Arbitration Agreement in Nigeria- An Overview', 914, 917.

Any party can use arbitration as long as they have legal capacity. Some business industries always rely on arbitration to resolve their disputes rather than take the dispute to the courts. There are many institutions which provide rules when commencing arbitration. These rules can be incorporated into arbitration agreements that are made before commencing business ventures, wherein it is usually mentioned that in the event of a dispute, both parties would agree to use arbitration as a method of dispute resolution, rather than resort to the traditional litigation in courts.

Arbitration is a consensual process because it requires parties to agree to enter into a contract which will oblige them to refer certain types of disputes to arbitration and which excludes the parties' rights to have those disputes determined by the court. This contract is called the arbitration agreement. The arbitration agreement can form part of the parties' underlying commercial contract or it can be a separate document. It can therefore be entered into either before or after the dispute has arisen.

Arbitration agreement can be commenced by two means. One of such means is the ad-hoc arbitration, which implies that the concerned parties can enter the agreement after a dispute has arisen. The term has two meanings. First, it refers to the fact that parties can enter into an arbitration agreement after a dispute has arisen. Therefore, when there is a present dispute, the parties can decide, ad hoc, that they will have it determined by arbitration rather than in the courts. An example of an ad hoc arbitration would be one which does not incorporate any arbitration rules.

The second but more common meaning involves a situation where parties make an arbitration agreement before a dispute has arisen but do not identify in their arbitration agreement any particular institution to

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administer their arbitration. The occurs when the parties make an arbitration agreement before a dispute has arisen but they do not mention the arbitration institution that would govern the institution.

4.0 Arbitration Clause

An arbitration clause is a clause in a contractual document that expresses parties' willingness to subject disputes arising from the contract to settlement by arbitration. The clause set out the applicable laws, forum, rules, information and criteria necessary for activating and dispensing with the arbitration process. It is common to find an arbitration clause embedded in a substantive contract. It has been held that, in agreement of this nature the substantive terms of the contract and the arbitration clause are to be treated as distinct contract that can operate independent of each other.[8] The subject matter of the contract and the arbitration clause are two different contracts which validity does not depend on each other. Thus, even though the substantive contract is rendered illegal, the validity of arbitration agreement will outlive the invalidity of the contract. It is also immaterial if the contract is terminated as a result of breach.[9] However, if the contract is vitiated by reason of lack of capacity of parties, the arbitration clause will also suffer the same defect.

A valid arbitration clause should at least disclose the intention of the parties to subject the dispute to arbitration and the relevant law on the basis of which the substantive and procedural issues should be resolved.[10] For instance, the arbitration clause should clearly state that disputes arising out of the agreement "shall be finally settled by

[8] *Harbour Assurance C. (UK) Ltd. v. Kausa General International Assurance Co.* (1993) Q.B. 701.
[9] *Heyman v. Darwins Ltd* (1942) AC 356.
[10]Nigel Blackaby, Contantine Partacides, Alan Redfern & Martin Hunter, *Redfern and Hunter on International Arbitration, Student Version* 6th ed. (Oxford University Press, 2015) 233.

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arbitration". The applicable laws, both substantive and procedural, is an important aspect that should be stated in the arbitration clause. For instance, it can be mentioned that Nigerian law and the UNCITRAL Arbitration Rules are the respective substantive and procedural laws that would guide the arbitral proceeding.

Under the UNCITRAL Arbitration system, there are four positive requirements of arbitration agreement.[11] The Annex to the UNCITRAL Arbitration Rules provided a model arbitration which contracts are to be determined under the UNCITRAL Rule should comply with. The UNCITRAL model arbitration clause is captured thus: "Any dispute, controversy or claim arising out of or relating to this contract, or the breach, termination or invalidity thereof, shall be settled by arbitration, in accordance with the UNCITRAL Arbitration Rules". The UNCITRAL Arbitration Rules went further to enjoin parties to include four core particulars that should be captured in an arbitration clause.

These include the following:
(a) the name of person or institution which shall act as the appointing authority;
(b) the number of arbitrators that shall constitute the tribunal which should ordinarily be one or three arbitrators;
(c) the town and country which is to host the seat of arbitration; and
(d) the language in which the arbitral proceedings shall be conducted.

Although the aforementioned four criteria are essential to a valid arbitration agreement, non-satisfaction of the language criterion per se does not render an arbitral clause or agreement invalid. This defect appears to have been cured by Article 22 (1) UNCITRAL Model Law

[11] The Arbitration and Mediation Act 2023 is modeled after the UNCITRAL arbitration framework.

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which enables the arbitral tribunal to determine the language of the proceedings in the event that the parties did not agree on the language that is to be used in the arbitral proceedings.

Notwithstanding the failures in satisfying the vital requirements of an arbitration clause, it is not a defective that is incurable, as it does not affect the validity of the arbitration clause but renders it ineffective. On instances where the appointing authority is not stated in the arbitration clause, it is not clear how the arbitration tribunal shall be constituted. Arbitral tribunal derive their validity from how they are constituted. Whereas arbitration tribunal is not constituted in accordance with the arbitration clause, there is no means through which it can derive its authority to preside over the arbitral proceedings. However, Article 6 (1) UNCITRAL Arbitration Rules specifically recognises the right of a party to suggest an appointing authority to constitute the arbitral tribunal. Article 3 (3) UNCITRAL Arbitration Rules appears to have given parties the room to use the notice of arbitration to cure the defect of non-satisfaction of the four highlighted criteria under the Annex of UNCITRAL Arbitration Rules. By the provision of Article 3 (3) UNCITRAL Arbitration Rules, a notice of arbitration can be used to address issues regarding the number of arbitrators, language and place of arbitration, if disputing parties have not previously addressed these issues. It can also be used to make proposal on the designation of an appointing authority.[12]

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5.0 Implication of Arbitration Agreements

In the event of dispute arising from a contractual relationship, the arbitration clause would effectively prevent parties from resorting to litigation without first exploring arbitration which is the local remedy

[12] Article 3 (4) UNCITRAL Arbitration Rules.

for such dispute.[13] Indeed, Section 5 Arbitration and Mediation Act 2023 empowers the court to stay proceedings in the determination of a dispute, where there is an arbitration agreement in the subject matter of the dispute. The Supreme Court approved this position in the case of *Niger Progress Ltd v. NEI Corp*.[14] In a later case,[15] the same court held that, it amounts to an abuse of court process for a party to commence a new suit arising from the same dispute while there is ongoing arbitral proceeding.

The attitude of Nigerian Courts has been to encourage parties to explore alternative means of dispute resolution other than litigation for commercial transactions. This attitude is more so expressed when there is an arbitration agreement entered by parties. In line with their mandate under Section 5 of the Arbitration and Mediation Act 2023, the court is more inclined to stay proceedings in such instances. It simply requires a party to demonstrate the existence of an arbitration agreement between parties, or that there is a pending arbitration proceeding are that active steps have been taken to activate the arbitration clause. Ordinarily, a notice of arbitration or any other evidence of existing arbitration would serve as proof to convince the court to stay such court proceeding and order parties to return to explore and exhaust the arbitration process.

While the foregoing is the general rule, it is not without exceptions. There are instances where the court can discountenance the existence of arbitration clause and still proceed to determine the dispute between parties. For a start, the powers of the court under Section 5 of the Arbitration and Mediation Act is a discretionary power. The implication

[13]Shittu Rilwan and Oladapo Busayo, 'Arbitration Proceedings under Nigerian Law: Arbitrable Disputes and the Approach of Courts to Arbitration Clauses in Agreements'. *Unilag Law Review*
[14] (1989) 3 NWLR (Pt 107) 68.
[15] *Owners of M.V. Lupex v. Nigerian Overseas Chartering and Shipping Ltd.* (2003) 15 NWLR (Pt. 844) 469.

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is that the court may decide to exercise its discretion one way or the other. Thus, before taking any step after entering its appearance in a dispute, it is within the province of a party to bring the arbitration agreement to the attention of the court to enable it stay proceedings in the matter. Where a party joins issue with the claimant, such party is deemed to have waived its right to arbitration of the dispute.[16] In the case of *Akpaji v. Udemba*,[17] the court held that, it is the duty of the defendant to bring the existence of an arbitration agreement to the attention of the court at the early stage of the trial before taking any positive step, else such party risk the chances of waiving the right to arbitration.

Also, case laws have provided various instances where the court exercised its discretion against upholding an arbitration clause which purports to oust the jurisdiction of the court, as this would be considered as an act contrary to public policy, unenforceable and therefore discountenanced.[18] The rationale behind this point is that, the powers of the court to determine dispute between parties is constitutional and statutory, hence, private arrangement of parties is not superior to the statutory powers conferred on the court.

Another instance where the court will discountenance arbitration agreement is when the matter is not arbitrable. This implies that such matter cannot be subjected to arbitration. There are specific matters or causes of action that cannot be resolved by resort to arbitration. In the case of *Shell Nigeria Exploration and Production & 3 Ors v. Federal Inland Revenue Service and Ors*,[19] the court held that tax matters are not

[16] See, *Doleman & Ors. v. Ossett Corporation* (1912) 3 KB 257.
[17] (2003) 6 NWLR (Pt. 815) 169.
[18] See, *Owners of M.V. Lupex v. Nigerian Overseas Chartering and Shipping Ltd.* (2003) 15 NWLR (Pt. 844) 469.
[19](2016) 11 CLRN 36.

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subject matter for arbitration. For instance, it would be contrary to public policy to subject tax matters, criminal matters, election petition matters, etc. to arbitration. Considering the public nature of these matters, it is not ideal for such matters to be left to the control and determination of private entities. Thus, the agreement of parties goes to no issue in this regard. In determining the criteria as to whether a dispute is arbitrable, the court held, in the case of *United World Ltd. Inc v. MTS*,[20] that "the precise nature of the language in which the arbitration clause is framed. Its terms… may be either expressly or by implication reduce what would otherwise be the full ambit of the clause or again will extend it further".

6.0 Conclusion and Recommendation

Unlike courts, arbitral tribunals in commercial disputes have no inherent power of jurisdiction. Their authority arises from arbitration agreement entered by parties. It is selection of the tribunal by parties in their arbitration agreement that confers such authority on the tribunal to adjudicate and determine the dispute between the parties. It is the arbitration agreement that activate the protection of the statute. Therefore, parties to an agreement should take particular care in drafting arbitration clauses or agreements in a contract. This is because, as soon as a dispute ensue from a transaction, it becomes difficult for parties to reach further agreement on the resolution of the dispute due to the personal interest of disputing parties.

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[20](1998) 10 NWLR (Pt. 568) 106.