Thought Leadership | Daniel Odupe

Efficiencies: Optimizing Alternative Dispute Resolution Options for Contract Effectiveness

Introduction

It is sometimes prudent to presume that disputes may take on the status of near inevitability in business and commercial transactions. Yet the dispute resolution clauses included in most contracts are often boilerplates which fail to take cognisance of the unique context and business objectives of the parties at the commencement of the contractual relationship. The resultant loss of time and resources when parties fail to make provision for appropriate dispute resolution alternative is no doubt inefficacious and bad for business.[1]

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This is because the impact of a dispute resolved by adversarial methods, especially litigation, can cripple (as an example of negatively impacting), business relationships. Also, specialized industry customs and practices play a key role in the choice between litigation and Alternative Dispute Resolution (ADR) mechanisms. Experienced neutrals with targeted industry experience can limit the risk of awards/ decisions/results outside the range of reasonable industry expectations.

Again, international investors typically include ADR clauses to avoid unfamiliar judicial procedures, foreign languages and customs, and the potentially 'partial' courts of their foreign partners in pursuit of predictability and neutrality.[2] Thus, what parties want from a dispute resolution process is a fair outcome on their disputes with minimal negative impact on their transactions and investments.

This article explores the status of ADR under the Nigerian Legal System as well as proffer hints on harnessing same to achieve contractual efficiency and meet bespoke transactional and investment needs.

Legal Status of ADR Clauses

ADR mechanisms are fully embedded into the Nigerian legal system through diverse legislative provisions the primary law being the ***Arbitration and Conciliation Act (ACA), Cap. A18, LFN 2004***. Thus, there are several other statutes which make provisions for the use of ADR.[3] Legal practitioners are also enjoined to attach appropriate importance to ADR by informing clients of this option before resorting, to or continuing litigation, on behalf of such clients.[4] Although some experts believe that arbitration is not an ADR mechanism because of its formal nature and the bindingness and finality of an arbitral award,[5] it is categorised as an ADR mechanism under this discourse in order to distinguish it from litigation and its attendant proceedings.

ADR options such as negotiation, mediation, early neutral evaluation and the hybrids are generally not regulated by statute. However, the ***ACA*** provides the legal framework for the settlement of commercial disputes through two of the ADR mechanisms, namely arbitration and conciliation; and makes applicable the ***Convention on the Recognition***

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[1] ***'Commentary to Boilerplate Clauses - Dispute Resolution', Australian Encyclopaedia of Forms & Precedents (Nov. 2012), p. 63.***

[2] ***Bernard E. Le Sage, 'The Choice of an International Arbitration Forum: Contracting Parties can Avoid the Uncertainty of Foreign Courts', Los ANGELES LAWYER, Sep. 1998, at 19.***

[3] For example, ***section 26, Nigerian Investment Promotion Commission Act, Cap. N117, Laws of Federation of Nigeria (LFN) 2004; section 11, Petroleum Act, Cap. P10, LFN 2004; section 4, Nigeria Export Processing Zones Act, Cap. N107, LFN 2004; sections 76 and 225, Minerals and Mining Act, Cap. M12, LFN 2004; sections 27, 28*** and ***30, Public Enterprises (Privatisation and Commercialisation) Act, Cap. P38, LFN 2004; section 49, Nigerian Co-operatives Societies Act, Cap. N98, LFN 2004; sections 4, 6 and 8, Trade Disputes Act, Cap. T18, LFN 2004.***

[4] ***Rule 15(3)(d), Rules of Professional Conduct, 2007; Order 3 Rule 11 of the High Court of Lagos (Civil Procedure) Rules 2012; Section 38(1) Magistrates' Court Law of Lagos, Cap. M1, Laws of Lagos State 2003.***

[5] *See for example:* ***Marat Mukhamediyev, 'Alternative Dispute Resolution in Business Contracts, Especially Mediation Clauses', Thesis on Masters Programme in European Business Law, Spring 2011, p. 7,*** http://lup.lub.lu.se/luur/download?func=downloadFile&recordOId=1970964&fileOId=2199968 *accessed on 04.04.2018.*

and Enforcement of Foreign Arbitral Awards (New York Convention, 1958) to any awards made in Nigeria or in any contracting state arising out of international commercial arbitration.[6]

This is further reinforced by ***section 19(d), the Constitution of the Federal Republic of Nigeria 1999 (CFRN)*** which stipulates that Nigeria's Foreign Policy Objectives shall include respect for international law and treaty obligations as well as the seeking of settlement of international disputes by negotiation, mediation, conciliation, arbitration and adjudication. Thus, an arbitration clause in a contract will in the event of a dispute, ordinarily preclude parties from instituting proceedings in court without first resorting to arbitration. In ***C.N. Onuselogu Ent. Ltd. v. Afribank (Nig) Ltd,***[7] the Court of Appeal (CA) held that arbitral proceedings are a recognized means of resolving disputes and should not be taken lightly by both counsel and parties.

Are Courts Bound to Enforce an Agreement to Explore ADR?

In ***Kano State Urban Development Board v. Fanz Construction Company Limited,***[8] the Supreme Court (SC) established that the courts alone has both the jurisdiction and the duty to settle dispute between parties if called upon to do so. However, in the exercise of that jurisdiction, the court has power to stay proceedings in an action brought to it in breach of an arbitration agreement. Again, the **SC** in ***Onyekwuluje & Anor. v. Benue State Government & Ors***.[9] held that an arbitration clause does not exclude or limit rights or remedies of parties but simply provides a procedure which the parties may resort to settle their grievances. These seem to leave the enforceability of ADR to the discretion of the court. In ***Niger Progress Ltd. v. N.E.I. Corp,***[10] the **SC** followed ***section 5 ACA*** which gives the Court the jurisdiction to stay proceedings where suits are brought in breach of an arbitration agreement.

On the other hand, ***section 34 ACA*** provides that the court shall not intervene in any matter governed by the Act, except where so provided in the Act. It was largely on this basis[11] that the **CA** in ***Statoil & Anor. v. NNPC & 3 Ors.,***[12] discharged the *ex parte* injunction granted by the ***FHC (Okeke J)***, stopping an ongoing arbitration. The **CA** held that: *"the [ACA] was made to provide for easy settlement of commercial disputes and as a general rule, it does not want the intervention of the courts in proceedings referred by agreement of the parties to the jurisdiction of an arbitral tribunal."*[13]

But it has been held that the intendment of the legislature in promulgating ***section 34 ACA*** is not to exclude the jurisdiction of the court but to ensure that the latter would not have direct control over arbitration proceedings. This is to ensure that ADR remains an alternative to judicial adjudication rather than an extension of court proceedings.[14] Therefore, courts have the jurisdiction to entertain questions relative to the enforcement of an agreement to explore ADR. But are they bound to enforce such agreements?

The **SC** in ***Owners of M.V Lupex v. Nigerian Overseas Chartering and Shipping Ltd.,***[15] held that where parties have agreed to refer their dispute to arbitration, the court has a duty to enforce the agreement of the parties by staying any proceedings commenced in court contrary to the arbitration agreement.

The **SC** further held that it was an abuse of process for the Respondent to institute a fresh suit in Nigeria against the Appellant for the same dispute during the pendency of arbitration proceedings in London. Again, in interpreting the effect of a contractual arbitration clause, the **CA** in ***Williams v. Williams***[16] held that: *"an arbitration clause,*

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[6] The Preamble, ***ACA***
[7] ***[2005] 1 NWLR (Pt. 940), 577***
[8] ***[1990] 4 NWLR (Pt. 142), 1***
[9] ***[2015] 16 NWLR (Pt. 1484), 40***
[10] ***[1989] 3 NWLR (Pt. 107), 68***
[11] Other grounds for the CA's decision were: (a) the fact that the Respondent did not make full and fair disclosure of the facts whilst applying for the ex parte injunction (for example that it had agreed in writing that the Tribunal considered both the substantive matter and its preliminary objection together, and its submission of counter-claim against the Appellants at the arbitration, stating that the Arbitral Tribunal had jurisdiction to hear and determine same); and (b) given the almost five months that elapsed between the date of the judgment pursuant to which the Respondent was applying for ex *parte* injunction, and the date of filing the said injunction, there was no real case of urgency to warrant issuing the *ex parte* injunction. See ***Statoil (supra), at 14 BF; 15 E-F; 17-18, G-G***.
[12] ***[2013] 14 NWLR (Pt. 1373), 1***
[13] The sacrosanct power of the court to try cases brought to it within its jurisdiction and the absence of a carte blanche on the part of defendant on when to apply for stay of proceedings was enunciated in ***Kano State Urban Development Board v. Fanz Construction Company Limited*** (supra note 8) as an exception to arbitrability.
[14] ***Adamen Publishers (Nig) Ltd v. Abhulimen [2016] 6 NWLR (Pt. 1509), 431 CA.***
[15] ***[2003] 15 NWLR (Pt. 844), 469***
[16] ***[2014] 12 NWLR (Pt. 1430), 213***

where embedded in a document constitute an agreement of such parties concerned, that if any dispute occurs with regard to the obligations which the parties have undertaken to each other, such dispute should be settled by a body or tribunal of their own constitution and choice."

It should be noted that the enforceability of ADR is not without qualification. The conditions for the enforceability of an arbitration clause were outlined in ***Neural Proprietary Ltd. v. UNIC Ins. Plc,***[17] where the ***CA*** held that before a court of law can decline jurisdiction on the basis of an arbitration clause, the law requires that such a clause must be **mandatory**, **precise** and **unequivocal**. This requirement must of necessity apply to other ADR clauses to make them mandatory on parties. In ***Akpaji v. Udemba,***[18] the ***CA*** held that a defendant who fails to raise the issue, and rely on an arbitration clause at the early stage of proceedings but takes positive steps, he would be deemed to have waived his right to rely on the arbitration clause to stop the action.

Drafting the ADR Clause: Practical Considerations

Drafting clear, unambiguous clauses contributes to the efficiency of the ADR process. Contracting parties often fail adequately to anticipate issues that lie dormant during negotiations but wreak havoc during performance. This is why it is sometimes advised that contractual agreements should be negotiated under the assumption that parties are or could become sworn enemies. Doing this helps solicitors to maintain a dispassionate posture throughout the drafting process.

The ADR clause should not only anticipate future problems but should also contain provisions that seeks to satisfactorily resolve the problem in a manner that is beneficial to both parties. Specific ADR clauses should be tailored for each particular transaction, taking into account the various factors and circumstances that may have an impact on the parties' decision to refer to ADR. ADR clauses should be drafted deliberately, rather than routinely. This is possible only if the parties ensure that the solicitor has an in-depth understanding of the transaction. In all, attention must be paid to essential questions while an ADR clause is being drafted.

ADR clause must be as detailed as possible providing requisite clarity. Issues such as when, where, how and who will resolve or settle a disagreement once a controversy has arisen, should be well covered. The ADR clause must also specify the officials of the parties that will represent them during the dispute resolution process in contemplation. This is to ensure that the whole process does not turn out futile where at the resolution stage, the representative in attendance lacks the authority to compromise or take crucial decision regarding the dispute.

Parties must ensure that the solicitor recognises the uniqueness of each deal or transaction to determine the dispute resolution mechanism appropriate. A wrong ADR mechanism may have an adverse effect, thereby defeating the purpose of the ADR clause. It is therefore supremely important to get the parties involved in drafting their ADR clause. Parties will be more readily disposed to abide by the terms of the dispute

[17] *[2016] 5 NWLR (Pt. 1505), 374 C.A*
[18] *[2003] 6 NWLR (Pt. 815), 169*

resolution clause that they actively participated in negotiating.

Conclusion:

Disputes are an unavoidable element of day-to-day routines. Businesses and commercial transactions are more susceptible to this reality. This is why parties must take care to ensure that the options and procedures for the resolution of potential dispute meets their particular needs as they anticipate them at the beginning of the relationship. No doubt, a poor ADR clause could ruin the business relationship and goals of parties. Every time parties enter a contractual agreement, they have the opportunity to determine, with cool heads, how hypothetical disputes could be resolved. Under the Nigerian Legal System, an ADR clause need only fulfil the basic requirement of being **mandatory**, **precise** and **unequivocal** to be capable of being enforced, thereby serving as a tool for contractual efficiency.

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