ARBITRATION AS A DISPUTE RESOLUTION METHOD SHARES THE SAME DEFECTS WITH LITIGATION, IS THIS ASSERTION A MYTH OR A REALITY

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Abstract

Arbitration is one of the main appendages in the Alternative Dispute Resolution Model. Basically, its aim is to fast-track justice delivery in areas where the concept is applied in relation to dispute resolution. The general impression is that it is flexible in its operation, more forward reaching and less costly than litigation. In recent years, it has been observed that the inherent defects in litigation which the module was meant to address has fallen short of this objective as arbitration rules and procedures are now as complex as litigation processes. This paper will examine in its totality the operations of these concepts, their advantage and disadvantages and the defects that are common in both of them. It shall also proffer solutions on the best possible remedy that could be applied to make the operation of both concepts accessible and legally responsive to the needs of the users it is meant to serve.

Conflicts are inevitable aspects of human existence. They are part and parcel of life and certainly as old as human history. Resolution of conflicts in whatever shapes it

takes calls for a combination of different skills put in place by establishments with the sole aim of addressing issues of divergent intents so as to amicably agree on resolving these issues for peaceful co-existence. In most cases and particularly within the context of the adversarial system of justice delivery which we inherited from our erstwhile colonial masters, recourse to court for dispute resolution is usually adhered to.

In other words, the courts have been empowered to handle the responsibility of conflict adjudication by virtue of section 6(1) of the 1999 constitution of the Federal Republic of Nigeria. However, before a person can gain access to courts, certain rules guiding procedures and regulations must be put in place which certainly must be adhered to by the party seeking access to justice delivery via the legal process. The observation of these rules and the adjudicatory process they follow in court is known as litigation (Nwadialo, 2000).

It must however be placed on record that due to technicalities that are involved in rules of procedures in court, delay in justice delivery becomes imminent and sometimes results in strained relationships among litigants. This situation has made it imperative for people to seek for another method of conflict resolution which are diverse in nature but conciliatory in approach. Some of these methods include arbitration, negotiation, conciliation and mediation among others.

As earlier pointed out, the writers focus in the paper will be to discuss arbitration as a dispute resolution process and compare it with litigation with a view to highlighting the advantage and disadvantages of both concepts in dispute resolution matters and thereafter proffer solutions on how to make it user friendly.

Meaning of Litigation

Litigation is an adversarial system of dispute resolution whereby parties in a dispute uses the instrumentality of the courts system established by law to determine their legal rights (Oluwa, 2000). Also, it was further defined as the entire process or the framework within which a person or an organization oversees or coordinates institutions, prosecution and enforcement of any claim by it or against it (Oluwa, 2000).

However, a person proposing to commence an action in court has to consider among other things the appropriate court in which to do so, the nature of the action to be filed and claim or remedy available to him in success of his actions (Nwadialo, 2004).
In addition to this, parties to an action are saddled with the responsibilities of securing the attendance and examination of witnesses and establishing the burden of proof of each case with the provision of material evidence to establish their cases. Generally speaking, it is the litigants who decide on the course of action to pursue in court and the appropriate remedy to seek with the professional guidance of a lawyer. Also parties are required to personally source for and provide their evidence, pay for the originating

processes and record of proceedings for cases on appeal, settle solicitor, fee and take care of other incidental costs. Thereafter, the court adjudicates based on evidence provided before it.

It is trite low to say that the rule of law is tailored to guide the court to attain justice and no matter how well a decision may appear on the face of it, non-compliance with the rule of court can vitiate a judgment, or fatal in litigation such as filling a case in an inappropriate court, commencing an action in a wrong court or joining a person wrongly as a party to a case. These complex processes have led to a very severe criticism on litigation as a fair model of dispute resolution process.
These complex processes have led to a very severe criticism on litigation as a fair model of dispute resolution process. Other apparent defects of litigation which scholars have viewed as hindering the attainment of justice are:

i. Corruption
ii. Procedural difficulty
iii. High cost of litigation
iv. Delays in litigation
v. Rancor
vi. Absence of confidentiality (Nwankwo, 2004)

All these inadequacies notwithstanding, it is still very topical to state here that the court still provides the best possible avenue for resolution of constitutional matters, serious criminal cases such as murder, land dispute, etc.

Having stated this obvious fact about litigation, it becomes necessary at this juncture to take a critical look on arbitration as a process of dispute resolution method.

Meaning of Arbitration

Arbitration is defined as a process of resolving disputes between people or group of persons by referring them to a third party neutral either agreed on by them or provided by law who makes a judgment (Ejiofor, 1997).

Also arbitration was further defined by (Moore, 2003) as a general term for vocabulary process which parties to a conflict request the assistance of an impartial and neutral third party to make a decision for them regarding contested issues. This then means that an exercise is not arbitration, strictly so called if it does not answer to this definition notwithstanding that it is described as arbitration (Ejiofor, 1997).

Thus an arbitration board appointed not to settle a dispute but to determine the value of certain assets taken over by the government from certain companies is not arbitration within this definition (Ports Amendment Act, 1969). A person or persons to whom a reference to arbitration is made is called an arbitrator or arbitrators. His or their

decision is called an award. One or more arbitrators may be constituted with an arbitral tribunal, and the decision of such a tribunal is called an award.

These definitions are self explanatory and simply denote that arbitration means referring disputes to a neutral third party for adjudication, devoid of the formality and rigidity that is associated with legal processes and proceedings.

This scenario ought to make arbitration more flexible and responsive to the society in matters of dispute resolution but it has been observed over the years that this has not been the case. But before getting into this it must be stated that arbitration as a dispute resolution method has certain apparent advantages over litigation. These advantages are:

1. It is quicker than litigation. A court action will normally involve formality and laid down procedures which cannot be circumrotated by parties whereas arbitration does not follow such procedure.
2. It is less expensive than litigation as parties to litigation in most cases retain the services of counsel whom they pay heavily. This is not applicable to arbitration *suo moto*.
3. It permits some disputes to be resolved by mere presentation of documents without a hearing which saves time and cost.
4. Parties in arbitral proceedings can represent themselves without recourse to the hiring of expert.
5. It is less formal than litigation in context and in character.
6. Arbitration takes care of the convenience of parties and their witnesses in fixing the date, time and place of hearing. This is not so in the conventional legal system.
7. It allows for selection of experts to look into disputes on matters in which they are proficient.
8. It is conciliatory in nature unlike in litigation which has the connotation of a battle between litigants.
9. In international commercial transaction parties to a dispute may neutralize it to prevent such a dispute from being handled by regales courts of that country.
10. Decision of an arbitral tribunal is final and binding on parties waiting to use. Consequently, arbitral award is not subject to appeal as parties prefer it to the prospects of an appellate litigation.
11. For reasons of national pride, state and state institutions do not readily want to submit to the jurisdictions of foreign country. They prefer to settle their disputes using the mechanism of arbitration than litigation.

In spite of all these seemingly apparent advantages arbitration has over litigation, it has been observed over the years that the practice of arbitration is now almost entangled with the same defects that are associated with litigation as a dispute resolution method. These defects are:

1. Arbitral rules of practice and procedure are now as complex as that of litigation in dispute resolution matters. It now takes weeks if not months for parties to arbitral proceedings to exchange brief in compliance with arbitral procedures.
2. It is a well known fact that a court of competent jurisdiction can very readily set aside an arbitral award, thereby making nonsense of all the time, money and energy that was expanded in arbitral proceedings.
3. It is equally an established fact that the cost of resolving disputes in arbitration is increasingly becoming as expensive as litigation, particularly when it involves engaging the services of a professional or an expert to resolve expert-related dispute.
4. Most importantly, a court of competent jurisdiction can make an injunctive order preventing an arbitral tribunal or panel from sitting. If this is done, the order defects in its entirety the requisite advantages parties to an arbitral dispute will gain by resolving to arbitration.

From these defects, it is very obvious that arbitration as a dispute resolution process shares almost the same defects in logic and procedure with litigation as a dispute resolution method. The next question as a research hypothesis becomes, how it can be made user friendly?

Answer to this shall be subsumed into the conclusive and recommendation aspect of this paper.

Conclusion

The stability of the processes of the Alternative Dispute Resolution method which arbitration shares implicitly denotes the tacit disapproval of the regular and predominant adjudication of litigation against which accusation of delay, cost, corruption, tardiness that necessitated the new entrant which directed the need for a new method of dispute resolution and the central import of the ADR system is to provide enhanced, timeous, cost effective and user-friendly alternative to litigation in resolving disputes.

The primary reason for the adoption is to provide viable options and reduce the hardship that is associated with litigation as a process of dispute resolution. In other words, the whole idea of ADR reflects essentially, the traditional method of conflict resolution, refined and re-injected into modern system by western countries. Arbitration is one of this concepts and it is meant to serve as a stop-gap measure to address the

inherent inadequacies that are associated with litigation as a dispute resolution mechanism.

Unfortunately, arbitral proceedings are now entangled with the same defects that are associated with litigation. How can it be made user friendly becomes the recommendation.

Recommendation

This work examined in details the concepts of litigation and arbitration as a dispute resolution process. It also noted the weaknesses and strength of both concepts taking into cognizance the advantages arbitration ought to have over litigation in resolution of dispute.

However, it was discovered that the practice of arbitration is now being fraught with the same defects and inadequacies that are associated with litigation as a dispute resolution mechanism. Being an academic paper, it is the normal procedure in such an exercise to find a middle course approach which is tagged as recommendation. Accordingly, it is hereby recommended as follows:

1. Arbitral tribunal should be given more powers under the law to make injunction orders.
2. Since parties are required to file their pleadings and bring their witnesses to the tribunal, it makes the procedure very complex in which case, it is being recommended that the arbitral tribunal, adopt the recent practice of front loading to avoid the heavy procedural difficulties that are found in arbitral proceedings.
3. Legislation should be put in place to lesson the intractable web that are associated with its procedure and make it more responsive, accessible and well appreciated by the generality of the people it is meant to serve.

Where there recommendations are carried out, arbitral proceedings will be less cumbersome, less complex and user friendly than litigation and that is the position of this paper.

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