ARBITRABILITY OF CAPITAL MARKET DISPUTES: A NEW SHOCK WAVE*

Abstract

Dispute is an inevitable element in any sector of our society. Its inevitability necessitates the establishment of a system that would help resolve such dispute. The capital market is a sensitive sector of any nation which plays fundamental roles in the economic stability of any nation. However, such sector as the capital market is not existent without prevalent disputes. Through the doctrinal research methodology, this study revealed that capital market is responsible for the growth and development of any nation's economy. As a matter of fact, the capital market alone has the tendency to single handedly lead a nation to economic surplus. The study further revealed that although disputes in the capital market sector is inevitable, yet to preserve the sanctity of the market a suitable dispute resolution mechanism must be adopted, in this case, arbitration. The study concludes that capital market disputes are arbitrable and as such, subject to arbitration. Further, the study identified the variant benefits of resolving capital market disputes through arbitration. The paper recommends that arbitration should be legally adopted as an official means for the resolution of capital market disputes.

KEY WORDS: Capital market, Dispute, Arbitration, Alternative Dispute Resolution.

1.0. Introduction

Human interaction is mixed with perpetual disputes, disagreements and conflicts. Where there is a dispute, there must also exist a system put in place for the resolution of such dispute. Dispute and its resolution methodology go hand in hand. In the capital market sector, disputes are inevitable. Disputes may arise from time to time between the players in the sector. Nonetheless, the resolution (peaceful) of such disputes is fundamental to avoid a collapse of the system or result in lingering or unresolved or partially resolved disputes. The arbitration of capital market disputes is of great gain to any society. Arbitration offers parties a variety of advantages which make dispute resolution seamless. To this end, this study will be divided into six (6) sections which comprises of the first, the introduction; second, concept of arbitration; third, capital market dispute; four, arbitration and capital market dispute; five, conclusion; and six, recommendation.

2.0. Concept of Arbitration

The term arbitration is described as an arrangement between persons that their disagreement or possible disagreement will be determined through a lawful and binding way by a neutral third party upon the presentation of evidence before him or them . . . After a dispute has risen, and such has been submitted to the neutral third party for determination, the process is known as

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arbitration and a decision given by the neutral third party is known as an award.[1] From this definition, there are some foundational points that should be noted. First is that there must be an agreement between the parties before or even after the dispute has arisen to arbitrate; second, a decision must be given by the neutral third party; and third, this decision is known as an award. [2]

Furthermore, Orojo and Ajomo have both described arbitration as 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. The process derives it force principally from the agreement of the parties and, in addition, from the state as supervisor and enforcer of the legal process. So, where two or more persons agree that a dispute or potential dispute between them shall be decided in a legally binding way by one or more impartial persons of their choice, in a judicial manner, the agreement is called an arbitration agreement.[3] This definition underscores a vital point in the practice of arbitration, which is 'state supervision and enforcement'. Although arbitration is party oriented, private and independent, yet both arbitration and judiciary must work together for progress. In this case, arbitral awards cannot be actualized or enforceable without the assistance of the judiciary.[4]

Under the Nigerian jurisdiction, arbitration is also defined. The Arbitration and Conciliation Act 2004,[5] describes the term as all forms of relationships with a commercial nature which includes any trade transactions for the supply or exchange of goods or services, distribution agreement, commercial representation or agency, factoring, leasing, construction of works, constructing, engineering licensing, investment, financing, banking, insurance, exploitation, agreement or concession, joint venture and other forms of industrial or business co-operation, carriage of goods or passengers by air, sea, rail or road.[6]

There are two types of arbitration agreements, and they are: arbitration clause and submission agreement. These two agreements are vital for any arbitral proceeding. An Arbitration Clause is always written and can be found in many commercial agreements. The arbitration clause evidences the agreement of the arbitral parties to resolve their future dispute through arbitration. This arbitration clause house vital information such as the venue of arbitration, the seat of arbitration, number of arbitrators, among others. The other type of arbitration agreement is the submission agreement. Whereas arbitration clause is made before any dispute, the submission agreement is an agreement to arbitrate, made after a dispute had arisen. The submission agreement provides parties with an opportunity to still refer their disputes to

[1] R Barnstein, 'Handbook of Arbitration Practice' <https://trove.nla.gov.au/work/12387801> accessed 29 December 2020.
[2] MS Rao, 'Arbitration in the Field of Information Technology and E-Commerce: Role of Technocrats' (National Conference on Mediation/Arbitration, Bangalore, 20 July 2001).
[3] JO Orojo and MA Ajomo, *Law and Practice of Arbitration and Conciliation in Nigeria* (Mbeyi & Associates Limited 1999).
[4] TO Main, 'Arbitration, What is it good for?' (2018) 18 Neveda Law Journal 457.
[5] Arbitration and Conciliation Act, Cap A18 Laws of the Federation of Nigeria (LFN) 2004 (ACA 2004).
[6] ibid.

arbitration for resolution. This agreement can be made during litigation so as to take such matter off the jurisdiction of the court, and to a private settlement.[7]

One recurrent issue that comes to limelight when treating arbitration is the issue of arbitrability. What then is arbitrability? Arbitrability is a fundamental principle in arbitration,[8] which places emphasis on whether or not a matter can be arbitrated. Therefore, arbitrability refers to the quality of being capable of resolution through arbitration.[9] As a principle of arbitration, arbitrability is employed to exempt some classes of disputes from arbitral proceedings, thereby giving national courts or proceedings the opportunity to adjudicate on such matters.[10] To Nwakoby, Aduakka and Orabueze, arbitrability bothers on the competence of the arbiter(s) to engage in arbitration with regards to any issue directed to them. Simply put, arbitrability can also be seen as a jurisdictional issue which considers whether or not arbitrators have the requisite authority to decide or precide over a dispute.[11] To Sutton, Gill and Gearing, the question of arbitrability can be seen from three levels in arbitration. First, arbitrability arises upon a submission to stop the arbitration, where the opposing party claims that the [arbitral] tribunal is without the authority to decide a matter since it is not arbitrable. Second, the question of arbitrability arises on the hearing of a protest that the tribunal is without of substantive jurisdiction. Third, on a submission to challenge the award or to oppose its execution.[12]

The concept of arbitrability is classified into two perspectives, objectivity and subjectivity arbitrability.[13] The subjective arbitrability is that which deals with the capacity of parties to go into an arbitration agreement. The connotation of this is that parties must have the lawful capacity to do so, forming a part of the legal validity of the agreement. By subjective arbitrability, the parties in the arbitral agreement must be eligible to go into an arbitral agreement.[14] On the other hand, the objective arbitrability, which is otherwise known as the non-arbitrability doctrine, deals with the eligibility of the subject matter to be referred to arbitration. In this sense, arbitrability means that some disputes house delicate matters which are only considered to be addressed completely by the judicial authority of a state.[15]

In Nigeria, the Arbitration and Conciliation Act, 2004, as well as judicial pronouncements determine issues of arbitrability. This was clearly reiterated in the case of *Kano State Urban*

[7] ibid.
[8] PO Idornigie, *Commercial Arbitration Law and Practice in Nigeria* (Law Lords 2015).
[9] ibid.
[10] V Anusornsena, 'Arbitrability and Public Policy in regard to the Recognition and Enforcement of Arbitral Award in International Arbitration: The United States, Europe, Africa, Middle East and Asia' (Scientiae Juridicae Doctor thesis, Golden Gate University 2012).
[11] GC Nwakoby, CE Aduakka and CI Orabueze, 'Arbitration Agreement: The Issue of Arbitrability in Nigeria Arbitration Practice' (2018) 1 International Journal of Law and Society 92.
[12] DJ Sutton, J Gill and M Gearing, *Russell on Arbitration* (23rd edn, Sweet & Maxwell 2007).
[13] C Mrotzek, 'The Development of concept of Arbitrability: An International Comparison' (LLM thesis, University of Cape Town 2017).
[14] New York Convention, Art 5(1) (a).
[15] JDM Lew, LA Mistelis and SM Kroll, *Comparative International Commercial Arbitration* (Kluwer Law International 2001).

Development Board v Fanz Construction Co.,[16] where, relying on Halsbury's law of England, the court settled the issue of arbitrability, by stating that parties to an arbitration agreement must ensure that the matter which they refer to arbitration are justiciable issue triable civilly. The Supreme Court of Nigeria has gone ahead to determine matters that are not arbitrable. Some of such matters will include: issues leading to a change of status such as divorce petition, bankruptcy proceedings, and winding up a company; gaming and wagering; matters arising from an illegal contract, indictment for an offence of a public nature; and any arbitral arrangement that authorizes the arbiter to offer a verdict in property,[17] fraud,[18] matters under section 251 of the constitution.[19]

3.0. Capital Market Disputes

This section of this study focuses on the prevalent disputes in the capital market. However, this agendum cannot be properly achieved without first laying a foundation by defining what capital market means. Capital Market is a platform where medium and long term finance can be raised.[20] It entails a network of specialized financial institutions, series of mechanisms, processes and infrastructure that, in various ways facilitate the bringing together of suppliers and users of medium and long term capital for investment in economic developmental projects.[21] Furthermore, it is defined as the market where buyers and sellers (individuals and corporations alike) engage in trade of financial securities which take the form of stocks, bonds, among others.[22]

The Nigerian capital market deals with a variety of long term securities which is grouped into two categories: primary and secondary market.[23] First, the primary market entails those institutions which encompasses merchant banks and stock brokers who basically make available means for directing savings into new investment outlets.[24] On the other hand, the secondary market is the medium for liquidating long term financial claims (that is, shares and stocks) by the withdrawal of one of the parties.[25] Although different, yet research reveals that there is a relationship between the primary and the secondary market.[26] In Nigeria, the core

[16] (1990) 4 NWLR part 142, 1.
[17] Anusornsena (n 10).
[18] *BJ Exports & Chemical Processing Co. v Kaduna Refining and Petrochemical Co.* Delivered on 31 October, 2002, by Mahmud Mohammed, Justice of the Court of Appeal, Court of Appeal, Kaduna Division, Nigeria (unreported).
[19] The Constitution of the Federal Republic of Nigeria (as amended) 1999, s 251, where the Federal High Court of Nigeria has exclusive authority to accept certain disputes by virtue of section 251 of the Nigerian Constitution.
[20] SS Akingbohungbe, *The Role of the Financial Sector in the Development of the Nigerian Economy* (Center for African Law and Development Studies 1996); A Idigbe, 'Dispute Resolution in the Capital Market: A Review of Administrative and Judicial Mechanisms' (The Securities and Exchange Commission's Judges Workshop, Nigeria, February 2016).
[21] M Ai-Faki, 'The Nigerian Capital Market and Socioeconomic Development' (4th Distinguished Faculty of Social Science Public Lecture, Benin, July 2006).
[22] *'Definition of Capital Market' <https://economictimes.indiatimes.com/definition/capital-market> accessed 1 January 2021.*
[23] SE Edo, 'The Nigerian Capital Markets in an Era of Privatization' (1997) 1 Journal of Business perspectives 45.
[24] ibid 49.
[25] ibid.
[26] ibid.

institution of the capital market is the Nigerian Stock Exchange which regulates trading in shares and stocks, while performing other necessary functions that enhance resource allocation and efficiency companies.[27] The apex institution of the Nigerian capital market is the Securities and Exchange Commission (SEC).

The capital market has been referred to as a complex institution through which some economic units desiring to invest their excess funds, interact directly or through financial intermediaries with those who wish to procure funds for their businesses.[28] Regardless, the capital market is of great essence to any economy of the world. To ensure economic growth, the capital market is important as it houses the capacity to mobilize and facilitate investments and saving exercises.[29]

The nature of capital market dispute in Nigeria can be traced back to Denis Odife's panel on the review of Nigeria's capital market in 1996. This panel was charged with the responsibility to deliberate on the desirability or otherwise of establishing an appropriate informal judicial forum within the capital market. This forum was to be assigned the duty of promptly determine any question, controversy or dispute that may spring up between the institution and the market operators.[30]

Sequel to this, the panel defined the nature of dispute in the Nigerian capital market, which entails: dispute between Securities and Exchange Commission and the Lagos Stock Exchange, dispute between these two institutions that have arisen in the last few years and event presently include:[31] intervention by the Secretaries and Exchange Commission in the secondary market; a directive by the Securities and Exchange Commission that the time be changed from Nigerian Stock Exchange and suspension of latter's key officers as a result of the refusal to comply with the directive; trade halt by the Securities and Exchange Commission; lack of consensus on the list of receiving agent; discipline of member; lack of consensus on guideline for price movement; decision by Securities and Exchange Commission that commercial bank should act as issuing houses; and lack of consensus on foreign investment in the Nigerian capital market.[32]

4.0. Arbitration and Capital Market Disputes: A New Shock Wave?

Arbitration, as has been established is an alternative to litigation. Generally, ADR has been embraced by many jurisdictions of the world as a way to circumvent the ills of the traditional method of resolving disputes. To this end, arbitration (like other forms of ADR) which was developed not as a result of choice but sequel to technical delays experienced by Judges,

[27] ibid 50.
[28] JN Taiwo, A Adebayo and A Evawere, 'Capital Market and Economic Growth in Nigeria'(2016) 1 Account and Financial Management Journal 497.
[29] ibid 500.
[30] Chief Dennis Odife (Odife's panel). See. Federal Ministry of Finance, Final Report of the Panel on the Review of the Nigerian Capital Market, September 1996. p. 21.Term of reference N0.12. See generally K Appah, 'An Appraisal of the Law and Practice of the Investment and Securities Tribunal in resolving Capital Market Dispute in Nigeria' <http://hdl.handle.net/123456789/10914> accessed 29 December 2020.
[31] ibid.
[32] ibid 21.

litigants and legal practitioners due to court congestion and the room for systematic appeals.[33] This was clearly depicted by the words of Oke, who opined that the courts experience overflow of cases, thereby leading to congestion in the courts, resulting in agony in the parties. Furthermore Judges have a list of multiple cases. In the same vein, it must not be forgotten that court proceedings in many jurisdictions are still being recorded in long hand and with other various technical problem. There is also delay in the process since cases last for years from the date of filing.[34]

One fundamental reason why arbitration is a suitable dispute resolution approach for the resolution of capital market dispute is the protection of the interests of investors. Arbitration is investment friendly. Definitely, investors refrain from litigation due to its protracted nature, but rather opt for a friendly dispute resolution technique. Arbitration can provide the players in the capital market an opportunity to circumvent the delay and lengthy adjudication experienced and witnessed in the courts.[35] Furthermore, another vital merit of capital market arbitration is that it provides parties with independence. What this means is that the parties, by agreement, can decide how the proceedings should be run. One of the fundamental principles of arbitration is party autonomy. Through party autonomy, the parties are able to limit state or government interference, save for the enforcement of the award. One major way by which arbitration exercises the party autonomy principle is the ability of the parties to choose/select a qualified decision maker to adjudicate capital market disputes. Parties in arbitration have the liberty and privilege to select a neutral third party who is an expert in capital market, thus making disputes capable of adjudication. Thus, by the appointment of a neutral third party who is a specialist in the field of capital market, it is believed that the outcome will be more effective and accurate when compared with the decision attained in litigation.

Furthermore, arbitration guarantees capital market players the opportunity to have their disputes resolved confidentially and privately. The connotation of this is that capital market disputes can be resolved through a private and confidential forum. In litigation, everything done by parties from the commencement to the end of the proceedings, is open to the public. This is basically because litigation is a public dispute resolution technique where all done is open to the general public through personal attendance of court or through the press or through the perusal of court records. This is also necessary considering the peculiarity of capital market and the sensitivity of its activities.

Another reason why arbitration is suitable for capital market disputes is the need to conserve cost of adjudication. Litigation is expensive; this cost comes from the expenses incurred in securing the services of legal practitioners, witnesses, appeals, among others. This position is well discussed by Oputa who declared that the administration of justice suffer from expense

[33] ibid.
[34] OO Oke, 'Decongesting the Courts: The Place of the LMDC' (Access to Justice Forum, Lagos, September 2003).
[35] U Akpan, 'Nigerian SEC and Arbitration' <https://www.academia.edu/4571890/Nigerian_SEC_and_Arbitration> accessed 1 January 2021.

and delay.[36] However, on the flip side, arbitration is cost effective. This is as a result of the flexibility, briefness, finality and bindingness of the system. Furthermore, the lack of judicial interference and employment of qualified individuals to serve as arbitrators make the system less expensive.[37] These factors account for its inexpensive nature, and as such, arbitration would be of greater benefit whence applied to the adjudication of capital market disputes.

5.0. Conclusion

The Nigerian capital market, like any other capital market, is an integral part of any country. They are saddled with the responsibility of carrying out a sensitive and germane duty in any nation, the summary of which is to spur economic group and development. Their functions are majorly commercial in nature, yet if not handled appropriately, may lead to the drastic fall of a nation's economy. Against this backdrop, and with the awareness that activities in this capital markets are carried out by humans who interact one way or the other, or by one form to the other, there is bound to be disputes of various kind. It is therefore to this extent that there is a need to seek out an appropriate means through which such disputes are carefully, peacefully, and professionally adjudicated in order not to hamper the sensitivity of the capital market. Conventionally, the adjudication of any form of dispute is a responsibility solely assigned to or under the auspices of the judiciary of any country. As the case may be, Nigerian courts are smeared with many challenges that have redirected the attention of disputants to seek other alternative approaches with which their disputes may be resolved. Hence the emergence of arbitration. As has been established in this research, arbitration has quite a variety of merits which would serve the capital market appropriately.

6.0. Recommendation

Many jurisdictions have come to formally accept arbitration as either one of many forms through which capital market disputes may be resolved, or the major mechanism for the resolution of such disputes. Be thou as the case may be, what is fundamental to note is that arbitration has now gained, in some jurisdictions, a legal backing to be adopted as a means to resolve capital market disputes. Hence, this study recommends that other jurisdictions should follow suit. This approach is essential and proactive as it facilitates economic growth and development. It will indeed be of no gain for capital market disputes to linger in courts, or be made a thing of the public or to incur more cost. Hence, arbitration should be adopted as a mechanism for the resolution of capital market disputes.

[36]U Abugu and D Obalum, 'An Agenda for Improving Legal Claims for Medical Malpractice in Nigeria' (2018) 14 Asian Social Science 118.

[37] D Horowitt, 'The Pros and Cons of Arbitration' <https://www.experts.com/articles/pros-cons-arbitration-by-darryl-horowitt> accessed 29 December 2020.