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EXTERNAL NON-ADJUDICATORY MECHANISMS AND TRADE DISPUTES SETTLEMENT IN NIGERIAN OIL AND GAS INDUSTRY (2005-2018)

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ABSTRACT: *This study investigated the efficiency of external non-adjudicatory mechanisms (mediation, conciliation and arbitration) setting trade disputes in oil and gas industry in Nigeria from 2005 to 2018. The study was guided by three research objectives. In order to achieve these objectives, the study adopted the survey research design that involved a combination of in-depth interview and interpretation of existing data from the records of The Ministry of Labour and Employment. The population universe were NUPENG and PENGASSAN officials, but the sample was drawn from the officials of five selected oil and gas companies in Nigeria using purposive sampling technique. Fourteen (14) officials were drawn from NUPENG and sixteen (16) officials were drawn from PENGASSAN for the purpose of the interview. Content analysis was adopted in analyzing the responses to the interview questions, while tables, frequencies and percentages were used to analyze data from the records of The Ministry of Labour and Employment. It was found that Mediation was efficient in settling trade dispute in the oil and gas industry but it experienced low usage (10.94%); conciliation enjoyed the highest usage (57.81%), but was not very efficient; and industrial arbitration panel has not been efficient in settling disputes referred to it. Thus, the study concluded that the overall performance of these non-adjudicatory mechanisms in settling trade dispute in the oil and gas industry has not met the expectation of the stake-holders in terms of efficiency. Therefore, it was recommended that mediation should be adopted more frequently in settling trade dispute; the statutory period for conciliation and arbitration should be extended.*

KEYWORDS*: mediation, conciliation, arbitration, trade dispute, settlement, oil and ga industry*

INTRODUCTION

The need to regulate the relationship between employers and their employees in order to create a peaceful industrial environment has always been the concern of government of various countries. This is with the understanding that for any country to achieve any meaningful economic development and social welfare there must be relative industrial harmony. Given this objective, the Nigerian government has developed various labour legislations aimed at regulating the industrial relations environment. For example, the Nigerian government's first significant labour policy is the 1938 Trade Union Ordinance which enabled the formation and recognition of trade

union (Fajana, 2006) following International Labour Organization's Convention on Freedom of Association. The ordinance empowered a minimum number of five workers to form their union. This policy led to the proliferation of workers' organization as pockets of trade unions cropped up with its attendant increased trade disputes, thereby overheating the industrial relations environment. Although, the trade Union Ordinance of 1938 was replaced by the Trade Union Act of 1973, which increased the minimum number of workers to fifty for the purpose of formation of a trade union, it did not arrest the increasing spate of trade disputes. Thus, it was reported by Central Bank of Nigeria Annual Statistical Bulletin (2007) that between 1968 and 2004, 6,287 trade disputes were declared. The number that resulted in strikes or work stoppages is 4,079 or 64.88% when compared to the number of dispute declared.

This increasing rate of trade disputes cuts across various sectors of the Nigerian economy including the oil and gas sector. Even though the oil and gas industry is a strategic industry which constitute about 90 percent of Nigeria's foreign exchange earnings and 83 percent of the gross national product (Ogbeijun, 2008), it has continue to witness a fair share of trade disputes in Nigeria. The upstream oil and gas industry is characterized by expatriate quota abuse, delay and non-implementation of collective agreements, bargaining in bad faith and all shades of unfair labour practices like casualization, outsourcing, contract staffing and various forms of labour flexibility (Ogbeifun, 2008). These key employment issues have always attracted attention and condemnation of the unions in the sector. Some of these issues have fuelled dramatic and recurrent trade disputes in the upstream oil and gas industry in Nigeria. This is to the extent that from 2005 to 2018 sixty-four (64) cases of trade disputes were reported in the industry (Ministry of Labour and Employment, 2005-2018). Specifically, in a brief meeting between representatives of Federal Government and the leadership of Petroleum and Natural Gas Senior Staff Association held on July 21, 2016 there was a consensus resolution that the matters responsible for incessant trade disputes in the oil and gas sector which should be addressed are: anti-labour practices and unfriendly management disposition to trade unions in the industry; engagement of Labour Contractors without recruiters' license; non-payment of terminal benefits and other remunerations to members of the trade unions; unilateral termination of Contract of Employment of members of the trade unions; non-implementation and renewal of collective bargaining agreement in member companies in the industry; and unilateral lock-outs and strikes by Management and Branch Unions.

Following the increasing rate of trade disputes in this important sector as well as other sectors of the Nigerian economy, the government of Nigeria was prompted through its National Policy on Labour to create external non-adjudicatory mechanisms for managing and settling trade disputes in Nigeria. The Trade Disputes Ordinance of 1941 was enacted to grant the state the right to intervene in Labour disputes when, in its judgement the joint machinery for settling grievance and disputes had failed. For this purpose, the law made available non-adjudicatory mechanisms

such as mediation, conciliation and arbitration (Fashoyin, 1992). However, there have been criticisms over the efficient functioning of the non-adjudicatory mechanisms for disputes settlement. Specifically, Okene (2010) criticized the mechanisms for settlement of labour dispute as being overly bureaucratic and cumbersome. This defeats the objective of the mechanisms for the settlement of trade disputes, which is to temporarily suspend the right to strike and provide an adequate, impartial and speedy resolution of the dispute (Okene, 2010). Thus, it has been observed that trade dispute especially in the oil and gas sector has been on the increase despite the existing non-adjudicatory mechanisms for managing trade dispute. Therefore, the purpose of this study is to examine how efficient the non-adjudicatory mechanisms (Mediation, Conciliation and Arbitration) have been in settling trade disputes in oil industry in Nigeria in the current democratic regime.

Statement of Problem

Although government appears to be responding to trade disputes in the oil and gas industry due to the strategic importance of this industry to the Nigerian economy, however, there is no sufficient data for the oil and gas industry in relation to the efficiency of adoption of external non-adjudicatory mechanisms in settling trade disputes in the industry. Specifically, such data should be provided in the Central Bank of Nigeria (CBN) Annual Statistical bulletin and the Annual Report of Ministry of Labour and Employment which provide statistics on employment disputes, strikes, settled and unsettled cases. While the report often represents country-wide trend, it fails to present information on trade dispute incidence and settlement on oil and gas industry. This makes it a little difficult to know which non-adjudicatory mechanism is frequently used in the oil and gas industry for trade dispute settlement and which non-adjudicatory mechanism proves efficient. Part of the challenge is changes in labour legislations in Nigeria especially within the last two decades, such as the enactment of the National Industrial Court Act, 2005 and its amendments in 2016 as well as amendment of Trade Union Act in 2005. For instance, the amendment of Trade Union Act in 2005 which specified voluntary union membership has affected union density and the bargaining power of unions.

In the face of these challenges, it appears yet that researchers are silent on how non-adjudicatory mechanisms have performed in managing trade disputes in the industry. For example, a study by Anyim (2009) which focused on the critique of the dispute resolution mechanisms in Nigeria between 1968 and 2004 carried out a shallow investigation of the effectiveness of these external non-adjudicatory mechanisms in the education sector during the military era. But since Nigeria transited from military to civilian rule, there has been a change in labour-management relations which hitherto was characterized by intimation and incarceration of union leaders in the oil and gas sector. The study equally assessed the effect of statutory sanctions on the number of reported disputes during the military regime, but failed to provide empirical evidence on the performance

of any of these non-adjudicatory mechanisms in the oil and gas sector. Thus, the overall gap is insufficient information on trade dispute incidence and settlement in the oil and gas industry in terms of which statutory machinery has been frequently used and which statutory machinery proves more efficient in settling trade dispute even in the current democratic arrangement.

Aim and Objectives

The aim of this study was to investigate how the existing external non-adjudicatory mechanisms impacted on disputes settlement in the oil industry in Nigeria. In order to achieve the stated aim, the study addressed the following specific objectives:

i. examined the efficiency of the adoption of mediation in settling trade disputes in the oil and gas industry;
ii. determined the efficiency of trade dispute conciliation on settlement of trade dispute within the statutory period;
iii. assessed the influence of trade dispute arbitration on efficient arbitral award within statutory period

Conceptual Review

The concept of external non-adjudicatory mechanism for dispute settlement relates to statutory instruments developed by the government to regulate relationships within the industrial relations system. These mechanisms are the options available to the disputing parties for settling and resolving trade disputes when the internal/voluntary dispute settlement mechanisms have failed. Specifically, there are three external non-adjudicatory mechanisms for dispute settlement within a regulated industrial relations environment. These mechanisms include: mediation, conciliation, and arbitration.

The Trade Dispute Act, 1976 and 2004 as amended made provisions for the conditions and procedures in the use of these external machanisms. However, the Trade Dispute Act, 1976 encouraged both employers' and employees' associations to settle their dispute voluntarily, without recourse to external mechanisms (Fajana, 2006). Section 3 of the Trade Dispute Act 1976 provides that where there is in existence a procedural agreement between organization representing the interest of employers and of workers, or any other agreement, the parties to the dispute shall first attempt to settle by that means. It is when the parties have exhausted the internal machinery to no avail that the external machinery is resorted to (Otobo, 2007).

Mediation is a process of settling trade dispute with the aid of a neutral third party. Section 3 of the Act makes it obligatory for disputing parties to meet within seven days of the existence of the dispute either together by themselves or their representatives, under the chairmanship of a mediator mutually agreed upon and appointed by one or both of the parties, with a view to

amicable settlement of the trade dispute (Fajana, 2006). Although mediators can adopt different approaches depending on the nature of the conflict, however, the role of the mediator is expected to be facilitative. Facilitative mediation focuses on the process alone and avoids making any suggestions or proffering remedies to the disputing parties (ILO, 2013). This means that the mediator does not have the power to impose any solution on the disputing parties since he remains only the appointee of the parties in dispute.

According to International Labour Organization (1983), "conciliation is the practice by which the services of a neutral third party are used in a dispute as a means of helping the disputing parties to reduce the extent of their differences and to arrive at an amicable settlement or agreed solution. It is a process of rational and orderly discussion of differences between the parties to a dispute under guidance of a conciliator." Okene (2010) pointed out that the duties of the conciliator are to inquire into the causes and circumstances of the dispute and, by negotiation with the parties to the dispute bring about settlement. Conciliation does not just focus on bringing settlement but ensures that such settlement is achieved speedily. The Trade Dispute Act stipulates that such settlement should be achieved within seven days; although this is hardly achieved in practice. In this case, the conciliator operates with certain guidelines that focused on securing settlement, maintaining impartiality, and avoiding criticisms of parties involved. However, in practice, conciliators tend to ignore some of these guidelines. Although, this action is not intentional in many cases, but often manifest as a result of lack of experience and patience on the part of the conciliators. Otobo (2005) sees conciliation as arising from the failure of collective bargaining. ILO (2013) also advanced the same view that "conciliation extends the bargaining process by encouraging the disputing parties to reach a consensus but without imposing a solution to their dispute. It is sometimes referred to as assisted bargaining." In this case, conciliation is considered as an extension to collective bargaining. "Thus, the voluntary settlement which is the aim of conciliation is the parties reaching an agreement which is as much a collective bargaining agreement as one resulting from unassisted direct negotiations between parties" (Otobo, 1997). The process involves facilitating communication between the disputing sides. This may involve the conciliator holding a joint meeting with the parties to a dispute, and after that separate them for negotiations and later put proposals to each side separately.

On the other hand, arbitration involves the intervention of a neutral third party who is empowered to examine legal arguments and evidence from both sides and make a binding decision in the case (Nicosia, 2007). It also stands as an alternative to the exercise of power as a method of breaking otherwise intractable bargaining stalemates, and is very often seen by all parties as a preferable and rational alternative (Thompson, 2010). Orojo and Ajomo (1999) sees arbitration as a procedure for the settlement of disputes under which parties agree to be bound by the decision of an arbitrator whose decision is in general final and legally binding on both parties. The arbitrator is the independent person or persons conducting an arbitration hearing and

making an award. "In some cases an arbitration hearing is conducted by a panel or board comprised of several members rather than an individual" (ILO, 2013). According to Chukwu (1995) arbitration is a semi-judicial means of settling disputes in which both sides agree in advance to be bound by the decision of a neutral arbitrator or a panel of arbitrators. It adopts inquisitorial approach to dispute settlement and thus requires a neutral third party to hear both sides and then make a decision to settle the case (ILO, 2013). Although, Industrial Arbitration Panel is not a typical court of justice, however, it adopts quasi-judicial approach in settling trade disputes. Thus, the role of the panel as a quasi-judicial agency is to service the need of stakeholders in both the private and public sector of the Nigeria economy, maintain peaceful atmosphere in all sectors of Nigeria (Essien, 2014).

Empirical Review

A study carried out by Chartered Institute of Personnel Development (CIPD) in Europe in 2011 reported that 57% of organizations had used mediation in managing trade dispute compared with 43% in 2008. More than two in five respondents say they use internal mediation only, while fewer than one in five rely on external mediation only. Two in five use both. In a telephone survey conducted by ACAS (2008) on managers in 500 SMEs to assess their experience of mediation; of those that used mediation, almost half said that the last mediation had resolved the issues completely (49%), and more than four in five (82%) said it has resolved issues either completely or partly The 2008 CIPD survey on workplace mediation showed that three-quarters of respondents considered mediation to be the most effective approach to resolving conflict in the workplace (CIPD, 2013). In the CIPD online survey (2008) researchers found that: "the amount of time spent on the process of mediation was fairly evenly distributed between cases where mediation took less than a day (22%), one day (28%), two days (22%) and longer than two days (28%). Mediation tended to take more time in larger organizations, in public sector, and where an external mediator was used."

According to data compiled from CBN Annual Statistical Bulletin in Nigeria between 1968 - 2004 shows that the number of disputes settled by conciliation within the same period is 3,719 or 59.15% of the disputes reported. Anyim (2009) conducted a study titled, "A critique of Trade Dispute Settlement Mechanism in Nigeria: 1968 to 2004." The study involved 700 sample size drawn from the trade unions in the tertiary educational sector and oil and gas sector. The findings showed that in comparative terms, the largest proportion of the disputes within the period under study were settled through conciliation. "Out of 6287 disputes reported within the period covered by this study, 2559 (40.70%) were either settled or frustrated; 3719 (59.15%) settled through conciliation; 601 (9.53%) through arbitration while 411 (0.53%) were settled through adjudication."

Another study conducted in India by Sapkal (2015) focused on the relevance of conciliation method in labour dispute resolution and also aimed at analyzing the impact of mandatory and

non-mandatory conciliation mechanisms on the negotiated settlement and dispute resolution time. The study used a dataset comprised of samples of labour disputes filed between 2008 and 2011 in two Central Government Industrial Tribunal-cum-Labour Court (known as CGIT's) – namely: New Delhi and Mumbai. It was found that "at an aggregate level, cases settled in the mandatory conciliation process take less time than those cases appeal in the labour courts." The study further inferred that "Alternative Dispute Resolution (ADR) participation through disputes concluded in conciliation process reduce total disposition time, promote settlement and reduces differences in the final payments received by workers." The researcher concludes that "the role of conciliation process in resolving labour conflicts is indeed efficient method as compared to adjudication in the labour court."

Ashgar and Ahmad (2011) carried out a study on speedy resolution of labour disputes in the interest of Industry and economy of the country. The study which was carried in Malaysia covered the period from 2002-2007. The data relied on the existing secondary data from Industrial Relations Development in Malaysia. The result showed that out of the 34,416 cases of trade dispute reported within the period under study, 15,780 (45.85%) were settled through conciliation.

METHODOLOGY

This study adopted survey research design which involved the use of in-depth-interview and supplemented with secondary data. The population universe incorporated NUPENG and PENGASSAN officials of the five branches of the selected oil companies (Shell PDC, Schlumberger, Mobile, Total Nig. Plc and Chevron) who are directly involved in negotiation and dispute settlements. The Branch Executive Committee of NUPENG has 12 officials, while the Executive Committee of PENGASSAN, also known as the Central Working Committee (CWC) which has 15 officials. There were 60 NUPENG officials in the branches of the selected oil companies and 75 PENGASSAN officials in the branches of the selected oil companies. This brought the total number of officials to 135. The figure represented the population from where sample was drawn.

The sample for this study was drawn from among the officials of NUPENG and PENGASSAN in the branches of the selected oil companies in Nigeria. Fourteen (14) officials were drawn from NUPENG while sixteen (16) officials were drawn from PENGASSAN. In all, thirty (30) principal officials were drawn from the branches of the selected five major oil and gas companies. The choice of thirty (30) sample size was due to the fact that this study adopted in-depth interview technique which was purely qualitative in nature. The sample size of thirty (30) was in line with recommendation from authorities in literature. For example, Creswell (1998) suggested that 5 to 25 sample size is adequate for in-depth interview in a phenomenological

study and Morse (1994) suggests at least six. For all qualitative studies, Bertaux (1981) suggested that fifteen is the smallest acceptable sample. In order to select this sample, this study adopted purposeful sampling technique which aimed at selecting officials who have participated or represented their organizations in trade dispute settlement or negotiation of terms and conditions of service.

In this study, data were collected using in-depth interviews and supplemented by existing records of the Ministry of Labour and Employment. The interview consisted of structured and open-ended questions. In this study, data collected on the demographic profile of the research participants and data from the records of the Ministry of Labour and Employment were analyzed with the use of tables, frequencies, and percentages. While the study adopted content analysis in analyzing and interpreting the interview questions.

RESULTS

The result showed that out of the 64 reported cases within the period under study, 37 were settled using conciliation. This was followed by mediation which had 7 number of usage, and the least is arbitration which had 4 number of usage, and others were either settled by adjudication or frustrated. This is a clear indication that among all the external non-adjudicatory mechanisms for trade dispute settlement, conciliation appeared to be more preferred or has the highest appeal in the oil and gas industry in Nigeria. The result from the analysis of the records of Ministry of Labour and employment showed that out of the seven (7) cases that went for mediation within the period of study, five cases were settled in not more than seven days. Only two cases lasted close to one month. The general theme in the responses of the majority (70%) of the interview participants was that mediation is an efficient tool for settling trade disputes in the oil and gas industry, even though the adoption is still low. This is an indication that mediation is an efficient external non-adjudicatory mechanism for settling trade disputes in the oil and gas industry in Nigeria. In the case of conciliation, a total of 37 cases were settled by conciliation within the period. Of all the cases, only 2 were settled within 7days statutory period. Eighteen (18) cases took up to 3months to settle, 5 cases took up to 6months, two cases lasted up to 12months, while 10 cases lasted more than 12months. Not less than 56% of the interview participants maintained that conciliation has not been efficient. This result is an indication that conciliation has not been efficient in settling trade disputes within the 7days statutory period.

For arbitration, the result showed that, of the four cases settled, two lasted up to 7months to 12months, while two cases lasted over 12months. However, the statutory period for arbitration should not last more than 21days. However, cases settled with arbitration within 2005 and 2018 took more than the statutory period. Out of the thirty principal officials in the interview, not less than 17 officials (56.67%) pointed out that the greatest challenge of Industrial Arbitration Panel

is their inability to resolve the dispute within acceptable time frame. This is a clear indication that arbitration has not been efficient.

DISCUSSION

In the case of the adoption of mediation in settling trade disputes in the oil and gas industry in Nigeria, the study found that there is low adoption of mediation as statutory machinery for dispute settlement. Out of the 64 trade disputes reported within the period under study, only seven (7) were settled using mediation, which constituted just 10.94% of the reported cases. Even though it suffered from low adoption, however, mediation has been found to be efficient and positive in settling trade disputes in the oil and gas industry in Nigeria. In five occasions where mediation was used, it proved efficient by settling the trade dispute in not than seven days. This accounted for the trust which parties have reposed on the instrument. One of the reasons behind this, is because mediation provides the parties the freedom to own the settlement process since the choice of the mediator is made by the parties themselves. This finding conforms to the findings of other studies such as ACAS (2008) and Chartered Institute of Personnel Development (2013). This study also found that the reasons adduced for its low usage are in line with the findings of Fasoyin (1992) who identified the following reasons:

i. The failure of the Ministry of Employment to enforce the relevant provisions which requires its use, and also to set-up a resource bank of mediators who could be called upon by industry.
ii. The cost consideration of mediation. The services of Mediators are not free, therefore, the parties are required to pay for such services. The Ministry of Employment conciliation service is free, and readily available when the internal machinery fails. Therefore, the parties tend to use conciliation.
iii. The requirement that the parties must agree on a mediator may pose a difficulty, especially where they have strong distrust towards each other.
i. The nature of the issue: Issues for which mediation can be successfully used are those that would result in considerable cost and damage if solution is not quickly found.

It was found in this study that mediation lacks the legal backing and enforcement, thus making the decisions of the mediators not to be binding on the parties. In this case, it relies more on moral persuasion to make the parties accept the decision on personal volition.

In the case of conciliation, this study found that conciliation enjoys the highest usage in the oil and gas industry in Nigeria as machinery for settling trade disputes. Out of the 64 cases reported within the period covered (2005-2018), thirty-seven (37) cases were settled using conciliation, which constituted 57.81% of the total reported cases. This finding is in agreement with the

finding of Anyim (2009) which showed that in comparative terms, the largest proportion of the disputes within the period under study were settled through conciliation. This finding equally concurred with the finding of Ashgar and Ahmad (2011) in a study they carried out in Malaysia. The finding of Ashgar and Ahmad (2011) showed that out of the 34,416 cases of trade dispute reported within the period under study, 15,780 (45.85%) were settled through conciliation. Although, conciliation enjoys the highest usage in the oil and gas industry in Nigeria, however, it has not been efficient in settling trade disputes within the statutory period of 7days. Therefore, contrary to the popular view that conciliation makes for speedy and expeditious settlement of disputes, it was found that conciliation has not met that expectation in the oil and gas industry in Nigeria.

Another striking finding of this study is that Industrial Arbitration Panel has not been efficient in its arbitral award to parties in dispute in the oil and gas industry in Nigeria. Although, compared to the numbers that were referred to conciliation, only four (4) cases progressed to arbitration panel. Of all the cases referred to arbitration panel within the period under study in the oil and gas industry in Nigeria, none was settled with the 21days statutory period. Put differently, arbitration took longer period of time before cases brought before it were settled. This finding is supported by Anyim (2009) who reported that out of the six hundred and one (601) cases referred to arbitration panel from 1968 to 2004, only 4.85% were settled within 21days to 42days. This agreed with the view in literature that the major challenge of arbitration is delay in delivering the awards since it has to go through the Minister, thereby leading to frustrated expectation (Fashoyin, 1992).

CONCLUSION

In conclusion, this study has established that the overall performance of these external non-adjudicatory mechanisms in settling trade dispute in the oil and gas industry has not met the expectation of the stake-holders in terms of efficiency. However, there is a general preference for conciliation in settling disputes in the oil and gas industry. Even though, government through Trade Dispute Act, 1976 established these external non-adjudicatory mechanisms for swift and expeditious settlement of dispute, evidence has shown that the non-adjudicatory mechanisms have not performed well with regard to this objective. Conciliation has been frequently used to settle many trade disputes in the oil and gas industry, but it still falls short of speedy settlement as many cases lasted beyond the statutory period before they were settled. It is therefore recommended that mediation should be adopted more frequently in settling trade disputes in the oil and gas industry since it has proven efficient in the few cases it was used by setting up resource bank of mediators, enforcing the relevant provisions which require its use; and working

out modalities for parties to reach agreement on a mediator. Finally, the statutory period for conciliation and arbitration should be extended in order to improve the process.

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