

LEGAL AND INSTITUTIONAL FRAMEWORKS FOR SETTLEMENT OF FOREIGN INVESTMENT DISPUTES IN NIGERIA

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ABSTRACT: *The need for an elaborate legal and institutional framework for the settlement of foreign investment disputes in Nigeria has become a subject of utmost importance. This is because; such sound legal framework attracts foreign investments which automatically lead to greater economic development of the country. This paper has therefore examined the relevant Nigerian legal framework for the promotion and protection of foreign investments in Nigeria. Concepts like models of alternative dispute (ADR) resolution, customary law arbitration, and capital market operations and investment regulations were discussed. The recognition and enforcement of foreign judgments have equally been discussed and fully analyzed. Issues like relevance of alternative dispute resolution (ADR) in resolving investment disputes and fostering investment development, challenges associated with ADR and examples of ADR utilization by the Nigerian Government have equally been fully addressed in the present study.*

KEYWORDS: legal frameworks, institutional frameworks settlement, foreign investment, disputes, Nigeria

INTRODUCTION

The relationship that exists between the standard of living and foreign direct investment (FDI) is one of the core areas in measuring economic growth. FDI is an investment done to achieve lasting interest in businesses operating outside of the investor's country¹. Though it also implies ownership transfer from domestic to foreign residents, there is also the possibility for foreign investors to manage and control host country's firm.^{2,3}

The nature of the legal environment for foreign investment is a factor that determines whether the environment is conducive or not. Both the local investors and foreign investors are usually concerned about the environment to invest in. Apart from a good investment climate, the security of the investment is next in the line of importance. Foreign investment is categorized into: (i) foreign direct investment,⁴ (ii) portfolio investment and (iii) loans to governments, otherwise

¹M. Mosima, "The Attraction of the Foreign Direct Investment (FDI) by the African Countries," Mimeo, 2003

² See C.W. Hill, *Global Business Today*, McGraw Hill/Irwin, 3rded. New York, 2004), see also K. Sandey, "Foreign Direct Investment in Developing Countries in the Globalised World," Paper presented at the DSA Conference, University of Strathclyde, Glasgow (2008).

³ See S.O. Akinmulegun, "Foreign Direct Investment (FDI) and Standard of Living in Nigeria," *Journal of Applied Finance and Banking*, Vol. 2, No 3, 2012, pp 295-309.

⁴ See Robert Pritchard, "The Transformation of Foreign Investment Law –More than a pendulum Swing," (1997) 7 *ICCIR* , 233, 234; the total value of foreign direct investment in 2011 amounted to \$8.9 billion with Nigeria

tagged as foreign debts. Portfolio investments are directed at earnings without participating in management.

Apart from statutory frameworks required to promote foreign investment, other factors which include physical infrastructure such as ports, good system of transportation, good road networks, water, electricity, good communication system are equally important. In addition, the foreign investor is “far more concerned about the risk of adverse legal change over the longer term than about the prospect of short term incentives”⁵. Further, as conflicts cannot but arise, the foreign investor wants guarantee of what is termed guarantee of certainty in enforcing contracts.⁶ As part of the requirement to attract foreign investment, the government introduced and encouraged changes in policies that would create conducive environment. The government created incentives such as tax relief for pioneer industry aimed directly at facilitating foreign investment.⁷

The recognition of arbitration and other methods as alternative methods of dispute resolution in Nigeria has developed by leaps and bound over the years and has reached a stage when the legal and institutional frameworks can be compared with other countries. Without any doubt, this is sequel to the mounting pressure on the judicial institutions and on the dispensation of justice system to look inwards for more stable, viable, speedier and societal friendly means of resolving conflicts which are inevitable concomitants to human and societal development.⁸

Arbitration and other methods of dispute resolution can confidently now be referred to as an alternative way of resolving dispute without going through the rigors of litigation. An American jurist once said that “the courts of this country should not be the place where disputes begin and end. They should be the places where disputes end and after all means of resolving disputes have been considered and tried.”⁹ From definitional perspectives, arbitration arises out of written agreement by parties in conflicts to refer the present and future differences to arbitration whether an arbitrator is named therein or not.¹⁰ Clearly put, arbitration is the reference of a dispute for

recording over 20 per cent of the total FDI to Africa, analysts at Renaissance Capital (RenCap) revealed that FDI inflow into Africa in 2011 increased by 28 per cent to \$35 billion as against the \$27.4 billion in 2010, the bulk of West Africa’s FDI ended up in Ghana and Nigeria with total made up about 74 per cent of the sub regions inflows and concentrated in petroleum industry.

⁵Robert Pritchard *ibid*.

⁶Robert Pritchard *ibid* at p. 234.

⁷ The legal framework are provided in the following laws viz Industrial Development (Income Tax Relief Act, the Nigerian Investment Promotion Commission, 1995 herein after referred to as the NIPC Decree, and the Foreign Exchange (Monitoring and Miscellaneous Provisions) Decree No. 17 of 1995, hereinafter referred to as FEMM Decree.

⁸ See Akomolede, *An Appraisal of the Legal Regime of Arbitration in Nigeria: In the role of the Judiciary in Nigerian Democratic Process*, a book in honour of Justice Iche N. Ndu, edited by Prince OnyeKagbo A. Ikedinma, an Associate Professor (2008) published by Vox Nigeria Limited., Chapter 20, p.327.

⁹Justice Sandra Day O’Connor.

¹⁰ Section 2 of the English Arbitration Act, 1950 Halsbury Laws of England, 3rd edition, vol. 2, 1984; see also *Misr (Nig.) Ltd v. Oyedele* (1996) 2 ALR. 57; see Gaius Ezejiofor, *The Law of Arbitration in Nigeria*, (Lagos: Longman, 1997), p. 3.

determination. Therefore, a tribunal for a purpose other than determination of dispute is not an arbitral tribunal.¹¹

MODELS OF ALTERNATIVE DISPUTE RESOLUTION

Going through the historical lane, the earliest known model of ADR is arbitration. This was later followed by mediation and conciliation. So also, negotiation is a common feature in this form of judicial process. Putting it in hierarchical terminology, the traditional ADR process starts from negotiation, mediation, conciliation and finally arbitration. Litigation is conceived as a last and not also as part of ADR system. In addition, there are other hybrid processes being used over the years and which have been developed all along. These hybrid processes include med-arb, mini-trial, early neutral evaluation and private judging commonly found in developed world but yet to be fully blown and developed in Nigeria. The present awareness of hybrid processes is daily increasing the necessity for this alternative that will bring revolutionary change in the general court and judicial system in Nigeria.

Negotiation

Negotiation is a qualified communication process. It can be circumscribed as a voluntary communication process whereby two or more parties seek an agreement to establish what each shall give or take or perform and receive in a transaction between them. Modern negotiation theory is mostly concerned with strategy and tactics, psychology of the negotiation process, skills and styles of negotiation. In Nigeria, negotiation has been used to resolve many political and commercial disputes. In political situation, the issue of Niger Delta crisis in pursuance of granting amnesty to the militant in exchange for dropping their weapons.¹² The end result was that there was restoration of peace in the Niger Delta area. Another resultant effect was the resumption of operation by the oil and construction companies that had deserted the Niger Delta area. The approach to negotiation was an attempt to take the best element of competitive bargaining and element of cooperative bargaining as a principle negotiation.

Mediation

Mediation is not a hybrid process. It is one of the primary processes defined by Berger as the intervention of a neutral but acceptable third party who may not have authoritative power but can help the parties in the dispute to voluntarily arrive at mutually acceptable settlement. Mediation could also help strengthen the trust and respect between the parties.¹³ In environmental disputes, the use of mediation is elaborately provided by the Environmental Impact Assessment Act (EIAA).¹⁴ This empowers the Federal Ministry of Environment to refer disputes to mediator who in the opinion of the Ministry possesses the required knowledge or expertise in the EIA matter. The mediator is empowered to help the participant to reach the consensus on the environmental effects of the project concerned.¹⁵

¹¹*Nigerian Ports Authority v. Panalpina World Transport Nigeria Ltd. & Ors* (1974) 4 UILR 89.

¹² This was done by the Late President Alhaji Umaru Yaradua where the late President directly negotiated with the militant.

¹³ Moore, *The Mediation Process*, 15; see also Brown and Marriott, *ADR Principle's and Practice*, No-7001.

¹⁴ See section 32 of the Environmental Impact Assessment Act, Cap?

¹⁵Section 24 of EIA Act 34.

Conciliation

Conciliation comes in when negotiation fails, thus offering another opportunity for parties in disputes to reach an out of court settlement. Within the law, (ACA) conciliation is seen as alternative to arbitration. By definition, conciliation is the adjustment and settlement of disputes in a friendly, non-antagonistic manner. The word “friendly” is used in the sense that the conciliators do not impose their rulings unlike in arbitration where decisions are imposed. Conciliation is a formal procedure in dispute resolution and it is regulated under Arbitration and Conciliation Act (ACA).¹⁶In conciliation, the paramount intention is to seek amicable settlement of any disputes arising out of contractual or other legal relationship. The parties may elect that the conciliation rules contained in schedule to the Act shall apply to settle the matter or they may choose to exclude or vary the rule.

THE HYBRID PROCESS

The hybrid process includes med-arb, ministerial tribunal, early neutral evaluation, private judging, otherwise known as ‘rent- a- judge.’ Considering them one by one, Med-arb is the abbreviation for mediation-arbitration where the parties agree in advance that their disputes would be resolved by mediation and if it fails, then the mediator will proceed to arbitration.¹⁷ The system has no fixed rules on how to conduct the proceedings and also possible to inter mediate during this period. Thus, it is possible to mediate during the course of the arbitration or after arbitration hearings have been concluded but before the award is delivered and it is also possible to narrow down the issues in the disputes by mediating in discreet terms. Parties could arbitrate discreet issues and mediate the remaining issues in the disputes and with the advice from the neutral observer; settlement can be negotiated by the respective executives.

Mini-Trial (Executive Tribunal)

A mini-trial is otherwise called executive tribunal by thus indicating the parties who can be involved in the mini-trial. Mini- trial is a hybrid mediation and traditional settlement negotiation, a completely voluntary procedure initiated by the disputants. The procedure and formats of mini-trial vary involving high level calibre of the company executives and one neutral adviser, most time a retired judge. Often, non-judicial experts can be used such as accountants and engineers.

Early neutral evaluation (ENE)

In ENE, experts are invited to carry out a task of valuation in a transaction for the benefits of the disputants. It is done by bringing the parties and lawyers together during pre-trial stage for presentation of summaries of their cases. They also get a non-binding assessment from a neutral third party with experience in such cases. The process is used as a settlement device.

¹⁶ See section 39-42 of the Act and schedule 3 of the ACA Act.

¹⁷ See J. Orojo and M.A. Ajomo, *Law and Practice of Arbitration in Nigeria*, published by Mbeyi Associate, p. 37.

Private judging (rent- a –judge)

This is a private process which empowers individual to hear and issue a binding decision in the matter. This process may originate from an agreed contract between the disputing parties or statutes.

Multi-door court house

This is a court connected to ADR. In reality, it is a court of law which has all the facilities for ADR. People say it is a formal integration of ADR into the court system rather than having a court system with avenue for AAR integration. The multi-door court offers parties to disputes the choice of ADR process which may be appropriate for a particular case. It is a concept and not a reference to the building where ADR is practiced within the court premises and really, it is not the ADR section of court premises. The establishment of multi-door court house is an act of official recognition and availability of ADR processes as part of justice delivery system in a particular jurisdiction. The multi-door court house system has its own trained manpower that is court connected.

THE LEGAL FRAMEWORK OF ARBITRATION AND ALTERNATIVE DISPUTE RESOLUTION (ADR)

Free-market economy usually presents with itself avenues for clash of interest and disputes in the pursuit of different business interests. The law provides different ways of resolving disputes amicably and through civil action and by litigation in the court of law. Litigation as observed by experts from its nature is a cause for anxiety by parties concerned; be it the litigants or the counsel primarily because of the uncertainties of the possible outcome.¹⁸

In addition to the general uncertainty of the outcome of litigation are worries of cost implications, protracted litigation caused by frequent adjournments and the consequences of a judgment against the party. Finally, followed by the possibility of appeal with its attendant costs and the unreliability of witnesses, a jurist once posited “as a citizen I would fear litigation beyond anything but sickness and death, every hour spent in a windowless room being deposed is an hour the manager is not spending executing the business plan.”¹⁹

In a nutshell, the aim of ADR methods is to resolve commercial disputes on time and with less resource.²⁰ The legal framework of arbitration and alternative dispute resolution is divided into three:

- (i) Customary Law Arbitration,
- (ii) Domestic Statutory Framework and
- (iii) International Obligations under various international instruments.

¹⁸ See Fabian Ajogwu, *Commercial Arbitration in Nigeria: Law and Practice*, published 2009, p. 1

¹⁹ See C. Bagley, *Winning Legally*, (Cambridge, M.A.: Harvard Business School Press, 2005).

²⁰ (see Order 25 of the High Court of Lagos State Civil Procedure Rules of 2004. The Civil Procedure Rules introduced a pre-trial conference as a way of exploring a mediated settlement of the parties to the dispute).

CUSTOMARY LAW ARBITRATION

Customary law as stated in the case of *Oyewunmi v. Ogunesan*²¹ is “the organic or living law of the indigenous people of Nigeria regulating their lives and transactions. It is organic in that it is not static, it controls the lives and transactions of the communities subject to it and it is the mirror of the culture of the people and imports justice to the lives of the people.” The basic aims of dispute resolution in customary law are reconciliation, peace and the assuagement of feelings that might otherwise dislocate social cohesion and solidarity.²² From historical background, experts on this issue agree that arbitration and alternative dispute resolution unlike litigation are not imported mechanisms.²³ The contact which Africa had with outside world inevitably changed many of the traditional ways and this was visible in the rules regulating private transactions.

The general belief is that traditionally, disputes were resolved through arbitration and alternative dispute resolution to the extent that customary law arbitration remained as part of the Nigeria legal system. Some statements were established in some judicial decisions as examined below. In the case of *Oparaji v. Ohanu*²⁴ Justice Iguh JSC stated that “where two parties to a dispute submit willingly the matter in contention between them to an arbitration in line with customary law and agree expressly that the decision of such arbitration would be final and binding, then once a decision is arrived at by the arbitrators, the other would be permitted to back out from the decision.”

Similarly, in *Okpuruwu v. Okpokan*²⁵ Oguntade JCA observed; “during the pre-colonial times when regular courts had not been there, Nigerians surely had a simple and cheap method of adjudicating over disputes occurring among them. The parties were usually referred to as elders or a body set up for that purpose.” It was also pointed out that customary arbitration and alternative dispute resolution methods recognize the practice of oath taking before shrines. In some parts of Nigeria, oath taking before the shrines had long been abolished but in some areas of the south/east, south /south, worshipping in shrines is commonly recognized.

DOMESTIC LEGAL FRAMEWORK

The advent of judicial development in dispute settlement has necessitated putting in place proper legal framework for arbitration and alternative dispute resolution in Nigeria.²⁶ The Arbitration Ordinance came into force since December 31st, 1914, shortly after the amalgamation of Southern

²¹ (1990) 3 NWLR (Pt. 137) 182, 2907, per Justice Obaseki JSC

²² See Kom, Customary Arbitration, Review of Ghana Law 16, 1987 – 88, 148; see Ezediaro Guarantee and Incentives for Foreign Investment in Nigeria; International Lawyer; 1971, 770; U, Nwangwu, Is Customary Arbitration part of Nigerian Jurisprudence: GRBPL; 2, 1989, 62; Igboke, The Law and Practice of Customary arbitration in Nigeria; *Agu v. Ikweibe* and Applicable Law revisited, *JAL*: 41, 1997, 201, 95.

²³ See Asouzu; Development of Arbitration Laws in Africa. 2001, p.117

²⁴ (1999) 9 NWLR (Pt. 618), 290 at 304, see also *Onyenge & Ors v. Ebere & Ors.* (2004) 11 MJSC184 at p. 199; *Agu v. Ikweibe* (1991) 1 NSCC, 385 at p. 385, 399.

²⁵ (1998) 4 NWLR (Pt. 90), 554 at 586.

²⁶ See Rhodes – Vivour: Arbitration and Alternative Dispute Resolution as instruments for Economic Reform; solicitors, advocate and arbitrators.

and Northern Nigeria by Lord Lugard. With regionalization of the country in 1954, the Federal Ordinance was taken as the laws of the three Regions and later the States.^{27,28}

UNCITRAL was established by United Nations Resolution Assembly to enable UN to play a more active role in reducing or removing legal obstacles to the flow of international trade by promoting the progressive harmonization and unification of the law of international trade.²⁹ The preamble to the Resolution noted divergences from the laws of different states in matters relating to international trade and this constituted obstacles to the development of world trade. Accordingly, it was thought that the process should be substantially coordinated, systematized and accelerated.³⁰

In an attempt to attract foreign investment, successive Nigerian administrations introduced and encouraged changes in policies that would create a conducive environment for foreign investments. Other ways of facilitating foreign investments are the provisions of various incentives such as tax relief for pioneer industries under the Industrial Development (Income Tax Relief Act)³¹ and in addition, the promulgation of two statutes which were The Nigerian Investment Promotion Commission Act No. 16 of 1995 (hereinafter referred to as the NIPC Decree). The decree repealed the Industrial Development Coordination Committee Decree No. 36 of 1988 under which an Industrial Development Coordination Committee (IDCC) was established to assist potential foreign investors) and the Foreign Exchange (Monitoring and Miscellaneous Provisions) Decree No. 17 of 1995 (hereinafter referred to as the FEMM Act), which was passed and aimed directly at facilitating foreign investments.

To put the evaluation of the Nigerian Investment Promotion Commission Act in proper perspective, it was promulgated to replace the hitherto antagonistic laws that militated against the promotion and protection of foreign investment in Nigeria. The Commission came to be a

²⁷ The law was based on the English Arbitration Act in 1889 and a carbon copy of it and was applied to the whole country being governed then as a unitary state until when Nigeria was created into three regions of Northern, Western and Eastern Regions with headquarters in Kaduna, Ibadan and Enugu. This was apparently to satisfy the then emerging agitating leadership of the three Regions.

²⁸ See sections 6, 9, 11, 12, 13, and 15 of the Ordinance compared with sections 7 and 19 of the English Arbitration Act, 1889.) The Ordinance was enacted as Chapter 13 of the Revised Laws of Nigeria, 1958 and Lagos. This section was later repealed by the Federal Government and was promulgated under the military administration as Arbitration and Conciliation Decree, 1988 Laws of the Federal Republic of Nigeria, hereafter referred to as (ACA) which is a modification of the United Nations Commission on International Trade Law (UNCITRAL) Model Law on international arbitration. At the international arena, member states of the United Nations adopted the UN Model Law were regarded as 'investors friendly.' Resolution as an Instruments for Economic Reform. 2010.

²⁹ GA Resolution 2205 (XXI) Of 17 December 1966 1 UNCITRAL YB. P.65. Members of UNCITRAL are elected by UNGA taking into consideration adequate representation of the principal economic and legal systems of the world and of the developed and the developing states. Since 1973, its membership has increased from 21 to 36 states with the following distributions (a) 9 from African States (b) 7 from Asian states (c) 5 from Eastern European states (d) 6 from Latin American States (e) 9 from Western European and other states see GA Resolution 2205 of 1966, s. 1 para 1; GA Resolution 2108 (XXVIII) of 12 December 1973. 5 UNCITRAL YB. Pp 10-11, s. 8.

³⁰ Nigeria acceded to the UN Convention on the recognition and Enforcement of Foreign Arbitral Awards, the Convention was generally referred to as the New York Convention

³¹ Cap. 179 LFN 1990.

government official policy organization to regulate issues pertaining to foreign investment. In line with this thinking, it was a distinct legal body with right of perpetuity, a body answerable to the Governing Council created in the established law.³² The government as the host nation wanted a legal framework that would regulate and exercise control on foreign investments.

The creation of NIPC was to pursue the goals prescribed in the law and to remove the bureaucratic build-up in the Ministry. This was to the delight of a foreign observer who commented on the Investment Promotion Commission Decree as such: “When FDI becomes unregulated by the host nation such that it appears as wholly-owned subsidiaries, the control of the investment would then be in the hands of the foreign investors”

The Nigerian Investment Promotion Commission (NIPC) is to encourage, promote, and coordinate investments in Nigeria.^{33,34} The NIPC also regularly hosts investment forums abroad in order to encourage additional businesses to settle in Nigeria.³⁵ The One Stop Investment Centre (OSIC) formally commenced operations with the official commissioning of the Centre 20th March, 2006. The legal framework provided by the Enterprises Promotion Decrees in 1970, 1972 and 1989 was repealed by the Foreign Exchange (Monitoring and Miscellaneous) Provisions (FEMM) Decree No. 17 of 1998, which the domestic legal framework on foreign investments dispute settlements as espoused in the Arbitration and Conciliation Act³⁶ mainly follows the Model Law with some slight modifications to suit the Nigerian system.³⁷ The two pillars of international commercial arbitration are the United Nations Model Law on International Trade Law (UNCITRAL Model Law) and the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958. The Model Law is a comprehensive study into arbitration laws throughout the world which had led to uniformity and harmonisation of the laws relating to international commercial arbitration for the settlement of investment disputes. The fear of the unknown particularly as it relates to judicial matters is allayed as Model Law limits the judicial intervention in arbitral proceedings.³⁸

The UNCITRAL Model Law authorizes any person, including a non- Nigerian to deal in, acquire or dispose or create or transfer any interest in securities traded on the Nigerian Capital Market or

³² Section 2 (1-3) NIPCD, 1995; It was made of representatives of the Ministry of Industry, Ministry of Commerce and Tourism, Ministry of Finance, Ministry of Foreign Affairs, National Planning Commission, the Governor of Central Bank of Nigeria and representatives of the organized private sectors.

³³ N0. 16 of 1995

³⁴ www.nipc.gov.ng

³⁵ 2011, China forums

³⁶ Cap 19 1990 of the Laws of the Federation of Nigeria.

³⁷ The Decree came into effect on the 14th of March 1988 and is now referred to as Act by virtue of the provisions of section 315 of the Constitution of the Federal Republic of Nigeria, 1999. Section 315 provides that an existing law shall have effect with such modification as necessary to bring it into conformity with the provision of the constitution such existing law are to be deemed to be made by an Act of the National Assembly dependent on the powers of the National Assembly or a House of Assembly to make such laws.

³⁸ This generally referred to as the principle of non-intervention. See Article 5 of the Model Law. This principle has been opted into various National Laws including the English Arbitration practice.

in private placements in Nigeria.³⁹ The Act actually referred to the categories of portfolio investments in banking, insurance, manufacturing etc., with the sole aim of injecting foreign capital into the Nigerian economy. The Act also established an Autonomous Foreign Market for the conduct of transacting in foreign exchange. The law further allows investment in any enterprise or security with foreign currency or capital imported from investment into the country through an Authorized Dealers. The law also include a guarantee of unconditional transferability of funds in freely convertible currency relating to dividends or profits, payment in respect of loans, remittance of proceeds and other obligations in the event of liquidation, sale or any interest attributable to the investment.⁴⁰ Born in mind is the liberalization of investment climate which thus reduced the restrictions on exchange control regulations to the barest minimum.

The third aspect was that of tax reliefs reflected in budgetary policies of the government. The provision shows a policy of generous tax incentives in Personal Income Tax and Companies Income Tax as well. The tax relief indicates a paramount intention of promoting the welfare of citizens and also attracting foreign investment. This was clearly reflected in the 1997 budgetary allocation as policy exemption from Value Added Tax (VAT) of certain goods with the purpose of encouraging investment in certain preferred areas of the economy.⁴¹ Fiscal policies in the 2017 budget contained additional few innovations. Going by budget pronouncements and utterances of government functionaries, the stimulation of foreign investment is now regarded as essential for the growth of the Nigerian economy. This however requires encouraging the foreign investors through the use of guarantees though the entrenchment of the appropriate legal framework for the resolution of conflicts that may arise in the course of the foreign national, running his business in Nigeria.⁵²

The fourth area is in the creation of Export Processing Zones. In furtherance, the Nigerian Export Processing Zones Decree No. 63 of 1992 was promulgated to establish the Nigerian Export Processing Zones Authority (NEPZA) as one of the strategies the government adopted in the last 20 years to expand the economic space in the country. Export processing zones were designated physically as free trade zones due to the deficits of infrastructure and other constraints such as power, roads, water etc.⁵³ The areas were set aside by government to encourage foreign investment in the production of goods for export.⁵⁴ The Decree set out other incentives⁴² as was further observed, foreign investors are more concerned about the risk of adverse legal change over the longer term than about the prospect of short term incentives.”⁴³

³⁹Section 26 (2).

⁴⁰Section 15 (4).

⁴¹ The goods include locally produced fertilizer, tractors, ploughs, agricultural equipment

⁵² Y. Omorogbe (1998) ‘Investment Guarantees and Incentives in the Nigerian Natural Gas Industry,’ *Modern Practice Journal of Finance and Investment Law*, 2(4), p143.

⁴² Section 18 (1) As was rightly observed, the export processing zones scheme was a clear attempt to attract foreign investment into Nigeria. See D.A. Guobadia, “Issues in Facilitating Foreign Investment for National development in Nigeria,” *Modern Practice Journal of Finance and Investment Law*, vol.2 No.4, 1998 p.45

⁴³Robert Pritchard (supra)

Despite the various constraints consisting of poor power supply, funding, there is no doubt the country has safety challenges. The investors are aware that Nigeria has the market, mindless of taking the risk to invest if there is the right investment climate. The President recently allayed the fears of investors in the power sectors and this has begun to yield good results. The target now is to get automobile assembly plants, telecom/electronic operators, textile and garment industry to come to Nigeria. Kia Motors has production line in Mali with tiny population compared to Nigeria. The possibility of relocating to Nigeria is bright and others like Toyota and Honda Motors will follow. The presence of these companies in the country will make the cars cheaper and the major problem of employment partially addressed (Nigeria still has an assembly plant for Peugeot in Kaduna. Also Bauchi, Ibadan, and Lagos had Volks and all had become defunct).

GENERAL VIEW ABOUT LITIGATION IN THE RESOLUTION OF FOREIGN INVESTMENT DISPUTES IN NIGERIA

When two parties are considering the resolution of foreign investment disputes, litigation is regarded as never a friendly method. The aim of dispute settlement mechanism is to secure a positive solution to a dispute, a presumption that there has been breach of the covered bilateral or multilateral agreements and in such case; it shall be up to the parties to rebut the charges.⁴⁴ The resolution of disputes by civil actions in courts is by its nature a serious cause for anxiety to the host and investor states as well as the lawyers called to handle the case. With the general belief that the principal duty of a lawyer is to resolve disputes as a course of their main business, it is the uncertainties of the outcome of litigation.⁴⁵ In some communities in Nigeria, the colloquial saying as quoted in prayers is that God will not allow us to enter into litigation.⁴⁶

In all seriousness of purpose in considering litigation as an option in legal disputes, there are many uncertainties that enter into consideration as to the outcome for the parties concerned. Some of the uncertainties are the worries as to the cost of protracted litigation, the consequences of having judgments against the party, the possibility of appeal with the attendant costs and the unreliability of witnesses. An honourable judge once told a group of lawyers that as a citizen, 'I fear litigation beyond anything but sickness.'⁴⁷ Another eminent commentator had this to say: "It is, not a matter of who wins, it is a matter of who loses less."⁴⁸ Speaking generally, it is the inefficiencies of litigation that call for alternative ways of resolving disputes especially in foreign investment disputes that was entered in a friendly manner between two investors and between two known friendly States.

Most bilateral investment agreements often contain provisions whereby the parties involved could resolve some disputes arising from such investments by recourse to such bodies like the World Bank's International Centre for Settlement of Investment Disputes (ICSID). Article 1(2) of the ICSID Convention of 1965 provides that the purpose of the centre shall be to provide facilities for

⁴⁴ See Olufemi Soyaju, *Nigerian Law of Transactions*, (1st ed.), chapter 24, p.601.

⁴⁵ Fabian Ajogwu, *Commercial Arbitration in Nigeria: Law and Practice*, (2009), p1.

⁴⁶ This is constantly quoted in Yoruba language as "atiebiati are, Olorunkoni je kiaroejo," meaning in prayer the resultant effect is whether right or wrong, God will not allow us to enter into litigation.

⁴⁷ C. Bagley, *Winning Legally*, (Cambridge, M.A.: Harvard Business School Press, 2005).

⁴⁸ Jay Walter ; the founder of Priceline.com- in an interview with C. Bagley , Boston , Massachusetts, 2003.

conciliation and arbitration of investment disputes between contracting states and nationals of other contracting states in accordance with the provisions of the Convention. Of all the different forms of Alternative Dispute Resolution (ADR) mechanisms, arbitration is the most developed and more often utilized by parties to disputes. In Nigeria, the law governing arbitration is contained in the Arbitration and Conciliation Act,⁴⁹ and this enactment is modern, comprehensive and based almost substantially on the UNCITRAL Model Law on international commercial Arbitration and its rules.⁵⁰

RELEVANCE OF ADR IN RESOLVING INVESTMENT DISPUTES AND FOSTERING INVESTMENT DEVELOPMENT

It has been asserted that litigation has jurisdictional limitation as opposed to arbitration and other ADR mechanisms. In any dispute that arises from any investment and a suit is filed in any court of law, it automatically follows that foreign investors are attracted to the jurisdiction of that court. A foreign investor may not be properly acquainted with the legal system of that country and will not feel safe to invest but where an investment contract inserts a 'clause' on arbitration or other ADR processes, there are numerous benefits that are accrued.⁵¹

A cardinal indicator for attracting international foreign investment and trade into any country is through the practice of the rule of law and good governance. The surest ways to ensure good governance is for a host state to promote access to justice and this can best be achieved through the use of ADR. Good governance is simply defined as governance according to agreed rules and regulations that satisfies the developmental needs and aspirations of the members of a given society.⁸⁰ It emanates from a good government that does not act in arbitrary manner and able to achieve common goals.⁵² The World Bank described good governance as "the manner in which power is exercised in the management of a country's economic and social resources for development."⁵³

INSTITUTIONAL FRAMEWORK FOR ADR IN NIGERIA

As presently constituted, the government and its agencies are not involved in the administration and funding arbitration or any arbitral bodies. The States have no direct control over the activities of arbitral proceedings. In Nigeria, arbitration practice is regulated within the legal framework of ACA and International Arbitration Rules.

The four main Arbitral Bodies in the country are therefore:

⁴⁹ Cap 19, Laws of the Federation of Nigeria, 1990.

⁵⁰ See M.O. Ogungbe, *et al* "Alternative Dispute Resolution and its Relevance in Criminal Matters" In A. A. Jimoh (ed) *Modern Practice Journal of Finance and Investment Law* (Lagos: Learned Publishment Ltd, 2002) vol.6 at p.361.

⁵¹ See P.O. Idornigie, "The Role of Arbitration and ADR in Attracting Foreign Investment in Africa" in C.J. Amasike (Ed) *Op cit* at pp. 159-160.

⁵² D. A. Guobadia & Epiphany Azinge, (2000) *Globalization, National Development and the Law* (NIALS) p. 24.

⁵³ See the United Nations Development Programme (UNDP) states good governance is the use of political, economic and administrative powers in all levels of government to deal appropriately with a problem.

- (1) The Chartered Institute of Arbitrators.⁵⁴ It develops and promotes arbitration and its practice of arbitration in Nigeria. Membership is drawn from various professions but mainly dominated by lawyers.
- (2) The Chartered Institute of Arbitrators.⁵⁵ Recently established by some of seasoned arbitrators mainly comprising senior lawyers and retired judges.
- (3) Construction Arbitrators of Nigeria. It comprises majorly professionals in the construction industry in Nigeria.
- (4) The Maritime Arbitrators of Nigeria was incorporated in 2005. Its main purpose is to enlighten the general public and stakeholders in the maritime industry about ADR.

Around the world, ADR is growing and arbitration and mediation are the popularly used mechanisms globally. The practice of arbitration affords the parties confidentiality, provide parties with cost-effective resolution. Currently, there is a new concept called 'MedArb'. It is the infusion of mediation and arbitration as one.

In Nigeria, the landscape of dispute resolution is growing well to reflect current best practice and a more cost effective dispute resolution for most especially, commercial contracts. At the institutional level, the Chartered Institute of Arbitration is promoting the use arbitration and other ADR methods. The critical area of challenge is in enforcement of arbitral awards where it seems some lawyers see arbitration as pre-litigation. The Lagos State Conciliation Arbitration Law (LSCAL), 2004 appears to have given much leeway for impeachment of an arbitral award can be by parties particularly when the case is not moving in their favour.

The development can be sustained by constant training and research, attendance of conferences and seminars. Arbitration, being parties structured dispute resolution mechanism is not anchored on courts or litigation process though arbitral tribunal cannot stand on its own without the assistance from courts for proper enforcement of awards. It is therefore apparent that Nigerian business men prefer arbitration abroad. No businessman or corporate venture would like to initiate a business in a place where access to justice and the outcome of judicial process is dilatory, protracted and uncertain.

Nigerian courts have adopted positive approach to the arbitration growth and development. It is imperative for the judiciary to intervene particularly in the enforcement of award and public policy⁵⁶ Nigerian courts have adopted a positive approach to the enforcement of arbitration agreements as was clearly indicated in *C.N. Onuselogu Ent. Ltd v. Afribank*.⁵⁷ In that case, the court held that arbitral proceedings are recognized means of resolving disputes which should not be taken lightly by both counsel and parties. In Nigeria, the general consensus arrived at the 2008 colloquium of the Association for the promotion of arbitration in Africa was that the future of

⁵⁴UK and the Nigerian Branch.

⁵⁵ Nigeria.

⁵⁶*Gramham Oil Co. v. Arco Product Co*, see also *Afribank v. Nigeria Plc.* (unreported FHC/L/FHC/CS/476/2008.

⁵⁷ (Nig) Ltd (2005) 1 NWLR (Pt. 940), 577

arbitration is bright and the congestion in the courts equally discourages parties from litigation in preference to alternative forms of disputes resolution.⁵⁸

One can therefore safely conclude that the institutional framework needs to be strength

Table 2-2: Time Element in Litigation Illustrated

S/ N	Parties	Citation	Duration from High Court to Supreme Court	Cost awarded at Supreme Court
1	<i>Alhaji G. Kyari v. Alhaji C. Akdid</i>	(2001) 11 NWLR (pt.724) 412	1986-2001; 15 yrs	11,000
2	<i>Ekpe v. Oke</i>	(2001) 10 NWLR (pt.721) 341	1998-2001; 17 yrs	10,000
3	<i>Bank of the North v. Alhaji Jau</i>	(2001) 10 NWLR (pt.721) 404	1987-2001; 11yrs	10,000
4	<i>ACB Ltd. & Ors v. BB Apugo v.</i>	(2001) 5 NWLR (pt.707) 483	1983-2001; 18yrs	10,000
5	<i>Psychiatric Hosp. Mgt Board v. Edosa 361</i>	(2001) 5 NWLR (pt.707) 612	1988-2001; 12yrs	10,000
6	<i>Onogoruwa v. Akinremi</i>	(2001) 13 NWLR (pt.729) 38	1980-2001; 12yrs	10,000
7	<i>Obasohan v. Oorodion</i>	(2001) 13 NWLR (pt.721) 298	1985-2001; 16yrs	10,000
8	<i>Adeleke v. Iyanda</i>	(2001) 13 NWLR (pt.729) 1	1982-2001; 19yrs	10,000
9	<i>Adeniran v. Alao & Ors</i>	(2001) 18 NWLR (pt.745)	1988-2001; 13yrs	10,000
10	<i>Ikine v. Edjerode</i>	(2001) 18 NWLR (pt.745) 501	1988-2001; 13yrs	10,000
11	<i>Union Bank v. Emole</i>	(2001) 18 NWLR (pt.745) 501	1989-2001; 12yrs	10,000
12	<i>Igbinokpogie v. Ogedegbe</i>	(2001) 18 NWLR (pt.745) 412	1978-2001; 23yrs	10,000
13	<i>Agbeje v. Ajibola</i>	(2002) 2 NWLR (pt.750) 127	1992-2002; 10yrs	10,000
14	<i>Comptoir Commercial & Ind. Ltd. v. O.G.S.W.C</i>	(2002) 11 NWLR (pt.773) 629	1987-2002; 15yrs	10,000
15	<i>The Reg Trustees v. Nikume</i>	(2002) 1 NWLR (pt.749) 726	1981-2002; 21yrs	10,000
16	<i>Awolaja v. Seatrade G.B.V</i>	(2002) 4 NWLR (pt.758) 520	1988-2002; 14yrs	10,000
17	<i>Maja v. Samouris</i>	(2002) 7 NWLR (pt.765) 78	1993-2002; 9yrs	10,000

⁵⁸ See Akin Akinbote, President of OHADA, Nigeria and former Chairman, NBA, Lagos Branch in a paper presented at the 2008 Colloquium of the association held at Djeuga, Yaounde from 14th to 15th January, 2008, on "Arbitration in Africa: the state of Arbitration in Nigeria."

18	<i>Nwadiogbu v. Nnadozie</i>	(2002) 12 NWLR (pt.727) 318	1979-2002; 23yrs	10,000
19	<i>Layinka v. Makinde</i>	(2002) 10 NWLR (pt.775) 358	1987-2002; 15yrs	10,000
20	<i>West African Brew. Ltd. v. Savannah Ltd</i>	(2002) 10 NWLR (pt.775) 401	1992-2002; 10yrs	10,000

Source: Kevin Nwosu in Proceedings of the 2002 National Seminar of Banking & Allied Matters for Judges, Published by the Chartered Institute of Bankers of Nigeria in collaboration with National Judicial Institute (NJI), 2003, reproduced by Unegbu, M.O.C.K in C. J. Amasike (ed) op. cit at p.187.

THE CHALLENGES ASSOCIATED WITH ADR

It is also necessary to highlight some of the challenges associated with alternative dispute resolution despite the proceedings may be quick and short, the dreaded court delay may occur.

(i) One of the problems identified particularly is the issue of delay when a party objects to an award or the court set aside an award followed by a protracted litigation. In such a case, the time saved and the cost effectiveness realized may be lost where no settlement is achieved.¹¹

(ii) Another challenge is in the judiciary as to whether the judicial attitudes and the legal culture in the country are friendly to ADR. A GOOD example is the instance of the late justice Akpata is illustrative who before he retired frowned on ADR systems and when he retired, became a beneficiary of it. Another side of ADR is the lack of precedents as they sought to resolve dispute on a case-to-case basis. Further.

(iii) It is a well-known fact that ADR results are private and really published, in which case, it be expected to establish legal precedent. The different findings and awards can be a supplement and judicial support for reforms.

(iv) Other challenges are the lack of manpower, although, there exist some institutions providing arbitral training for ADR practitioners, the quality of manpower is still inadequate. To tackle the challenge of manpower, there must be a large reservoir of neutrals from which service providers may be chosen Despite the many advantages,

(v) ADR is not meant for all purpose or superior to litigation the effectiveness of ADR process is determined by the facts and circumstances of the particular case.

(vi) The sole important thing is for the ADR practitioners to have the knowledge and skill to determine and adopt the right mechanism that suits the particular case.

(vii) Some of the cases that present challenges are cases that entail legal interpretation of statutes and contract, cases that appear lucrative to the plaintiff and no great harm if he loses and also cases where one party has acted so unreasonably or negligently to make the settlement reaching impossibility.

(viii) The ripple of government is crucial for the successful operation of ADR from the investigatory evidence; the government is not taking the challenge seriously. Many cases that should have been handled by ADR are still handled by the judicial system.

(ix) For ADR to flourish, the enabling environment, which is the responsibility of the government, must be provided. Lagos State is showing the way for other States to emulate and the recent passing of two laws is evidence that the State is on the move to properly provide conducive environment for ADR to strive. The Federal government in the past has utilized the ADR process to solve the Niger Delta crisis, the Justice Oputa panel set up by the Federal government is another commendable move. Other States as Rivers and Bayelsa in setting up Kayode Eso panel of truth and reconciliation in Rivers and Peace and Reconciliation Committee at the peak of Niger crisis respectively. With all these challenges, there are suggestions being fostered to solve the problems. The teaching of ADR courses in universities, and secondary schools should be a paramount consideration.

EXAMPLES OF ADR UTILIZATION BY THE NIGERIAN GOVERNMENT

The ripple of government is crucial for the successful operation of ADR from the investigatory evidence; the government is not taking the challenge seriously. Many cases that should have been handled by ADR are still handled by the judicial system. For ADR to flourish, the enabling environment, which is the responsibility of the government, must be provided. Lagos State is showing the way for other States to emulate and the recent passing of two laws is evidence that the State is on the move to properly provide conducive environment for ADR to strive.

There are three areas that are regarded as the 'keys' whose definitions are important in economic and legal terms that hold sway in this study. The three areas examined are international investments, alternative dispute resolution, peace and development. Each of these key areas lead to another that are the 'means' to achieve economic development, which is the desire of any government and the ultimate end to peace. ADR is a generic term which denotes a range of disputes resolution processes developed as alternative to litigation before domestic courts, which has been frequently criticized as too slow, too costly and ultimately failed to provide resolution of disputes that is fair and also, that the parties will respect. ADR has developed into a legal service industry in litigious industry of United Kingdom and United States; Nigeria is following the patterns of these countries.

The much of a concern is the nature of pluralism in Nigerian systems of justice and the tensions created by it. The fears are raised to what is commonly recognized as the initial constituent elements of pluralist structure which are the indigenous customary dispute resolution procedures and the modern judicial procedures introduced by colonial masters. Allott offers a good summary of the typical customary procedure: justice was popular, justice was local and speedy and justice was simple and flexible. In other words, the key attributes of the customary system are simplicity, informality, intelligibility accessibility.⁵⁹ The pattern of development has given way to dynamic

⁵⁹Allot, *The Future of African Law*; in H. Carper and L Kuper eds. Eds supra ed., supra at 22-25.

pluralism of justice that is the co-existence of mechanisms, serving a plurality of judicial need that allows the litigants to move among the structures of judicial system. What can be said about the issue of access to justice is the feature of the dynamic pluralist approach to create new hybrid mechanisms in response to inevitable changes in juridical needs.⁶⁰ There is no doubting the extent the new mechanisms is proving workable in the improvement in access to justice in Nigeria. In academic term, this is the significance of social pluralism in varying support of dynamic pluralism.

The point was made by Bush, despite the high degree of pluralism in social and juridical needs, justice is accessible not only to the commercial disputants but also the growing class of right conscious litigants and other disputants for “everyday” disputes resolution needs – consumers, tenants, landlords, local and international merchants, formal courts cannot provide justice in the way of direct fees and costs, time and energy demanded by litigation in an unfamiliar and intimidating atmosphere. Court system is certainly a necessity and has become overwhelmingly predominant in our system, justice in a pluralistic context must be provided.

CONCLUSION

For neutral cross-border arbitration to be effective, arbitrators should be made to have the first word during the interpretation of contracts. The judges can then have the last word on aspects with very important public policy implications. There is also the need for robust legal and institutional framework for the settlement of foreign investment disputes in Nigeria in order to attract the desired foreign investments. This paper has therefore examined relevant aspects of the Nigerian legal framework for the promotion and protection of foreign investments. Matters of importance to alternative dispute resolution (ADR) and fostering of investment development in Nigeria were equally addressed

⁶⁰See Cappelletti, Mand B. Garth, *Access to Justice*, Vol. 1 A World of Survey edited by Cappelletti; see R.A. Bush, “Developments in System of Justice in African National, A Pluralistic understanding of Access to Justice,” pp. 303 – 314.

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