IMMUNITY OF THE ARBITRATION PANEL VIS-A-VIS THE OTHER ALTERNATIVE DISPUTE RESOLUTION (ADR) PANELS*

Abstract

Immunity is an exemption from prosecution. Immunity helps to ensure the finality of an award. Arbitral immunity exempts arbitrators from certain acts or omissions arising out of or in relation to their function, Alternative Dispute Resolution (ADR) is a term generally used to refer to mechanism for the resolution of disputes either as alternative to the traditional court system or as a supplement or complement to that. Any method advising the parties to settle their dispute outside the court is an "ADR" process. Some of the ADR methods usually employed for amicable resolution of dispute are negotiation, conciliation, mediation and certification. They are geared towards amicable settlement of dispute or decision making. This paper intends to discuss the immunity of arbitration panel vis-à-vis that of the other ADR panels. The methodology adopted is doctrinal. The research found out that there have been arguments on whether arbitrators and other ADR panels like negotiator, conciliator, mediators and certifiers are supposed to be immune since they are persons acting in judicial capacity. This has generated a lot of confusion in our judicial system. The position of the relevant laws is not clear cut on this. Though there are arguments in favour of the grant of arbitral immunity. The research concluded that the main consequence of the distinction between arbitration panel and the other ADR panels is that arbitrators are immune from action for negligence, while the answers with respect to immunity of the other ADR panels are not clear-cut. In some circumstances some of them are not immune while in some they are.

Keywords:
Immunity, Arbitrators, Mediators, Negotiators and Certifiers

1. Introduction

ADR has been defined differently by several authors, commentators and scholars. Brown and Marriot[1] defined ADR as a range of procedure that serve an alternative to litigation through the court for resolution of disputes, generally involving the intercession and assistance of neutral and impartial third party. Karl Mackie[2] described ADR as a structured dispute resolution process with third-party intervention which does not impose a legally binding outcome on the parties. ADR is further defined as a structured negotiation process during which the parties in dispute are assisted by one or more third person (s), the 'Neutral', and is focused on enabling the parties to reach a result whereby they can put an end to their differences on a voluntary basis[3]. It is worthy to state that as much as ADR and arbitration share much features, there are some differences between them. Arbitration is based on contract and requires that the parties have agreed to submit their disputes to the jurisdiction of an arbitral tribunal. Once the parties have

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[1] H Brown and A A Marriot, *In ADR: Principles and Practice*, 2nd edn (London: Sweet and Maxwell,1999) p 12

[2] K Mackie, *The ADR Practice Guide: Commercial Dispute Resolution* (Tottel, 3rd edn., 2007) p 8. See also Kehinde Aina on Dispute Resolution (NCMG Intetnational and blankson LP, 2012); Idornigie P O, *Commercial Arbitration Law and Practice in Nigeria* (Law Lords, 2015) p 29

[3] Goldsmith, Pointon and Ingen-Honz, *ADR in Business, Practice and Issues Across Countries and Cultures* (Kluwer Law International, 2006) p 6

agreed to submit themselves under that jurisdiction, the outcome of the decision is binding. ADR is also based on contract which provides that the parties in dispute agree to involve a neutral. However, in mediation the neutral has no jurisdiction to enforce any decision on any party.[4]

In contrast to the process of ADR, the arbitral tribunal require the parties in dispute to delegate the power to determine their legal right to the arbitrator. Arbitration processes is solely or at least primarily driven by lawyers and the arbitrator and it is adversarial in nature. Conversely, ADR is a voluntary and non-legalistic process, as it is not focused on determining the parties legal right but on identifying the basis on which the parties may be willing to settle their dispute voluntarily, consequently, ADR process do not necessarily require the involvement of lawyers though, some form of lawyer involvement may be desirable. Another notable differences between Arbitration and ADR is the power of the arbitrator to act as amiable composituers which is often in conjunction with the power to decide ' *ex aequo et bono*' when the rule permits, that is to decide in fair dealing and good faith.[5] The outcome of arbitration is determined in accordance with applicable law while in ADR the outcome of the settlement is determined by the will of the parties and this accounts for why ADR is said to be an interest based procedures. Alternative Dispute Resolution (ADR) refers to any method of resolving disputes without litigation. ADR regroups all processes and techniques of conflict resolution that occur outside of any governmental authority. The most famous ADR methods are the following: Arbitration, Mediation, Conciliation, Negotiation and Certification. All ADR methods have common characteristic that is, enabling the parties to find admissible solutions to their conflict outside of traditional legal/court proceedings, but are governed by different rules. For instance, in negotiation there is no third party who intervenes to help the parties reach an agreement, unlike in mediation and conciliation, where the purpose of the third party is to promote an amicable agreement between the parties. In Arbitration, the third party (an arbitrator or several arbitrators) will play an important role as it will render an arbitration award that will be binding on the parties. In comparison, in conciliation and mediation, the third party does not impose any binding decision. ADR refers to any means of settling disputes outside of the courtroom.

When we talk of immunity of Arbitration panel we mean legal immunity or immunity from prosecution. It simply means a legal status where by an individual or entity cannot be held liable for a violation of the law, in order to facilitate societal aims that outweigh the value of imposing liability in such cases. Such legal immunity may be from criminal prosecution, or from civil liability (being subject of lawsuit), or both.[6] Arbitral immunity exempts arbitrators from certain acts or omissions arising out of or in relation to their function[7] There have been arguments on whether Arbitrators are supposed to be immune since they are persons acting in judicial capacity. Judicial immunity is a common law principal that states that any person acting within a judicial capacity shall enjoy immunity from any liability that may result from him discharging his obligations and duties provided he acts within jurisdiction.[8] The concept of arbitral immunity derives justification from judicial immunity in common law jurisdiction.[9] In

[4] ibid

[5] Brown and Marriot (*supra*) p59

[6] https://en.m.wikipedia.org accessed on 21/7/22 @ 11:30am

[7] See Black's Law Dictionary 8th edn (United State Thomson West, 2004) p. 765

[8] Adedoyin Rhodes – Vivour, Commercial Arbitrators law and practice in Nigeria through the cases, (South Africa; Lexis Nexis 2016) P. 216.

[9] Judicial immunity dates back at least to two early 17th century English cases, Floyd v Barker 77 Eng. Rep. 1305(1607) and The Marshalsea, 77 Eng. Rep. 1027 (1612) in which Lord Coke announced the rule of Judicial Immunity, stated its purposes, and specified its limitations

Bremer Sduffban's case, [10] Donaldson held that courts and arbitrators are in the same business, namely the administration of Justice. Donaldson J. however affirmed that the only difference is that the courts are in the public and arbitrators are in the private sector of the industry. Some scholars and opponents argued that arbitrators should not enjoy the same immunity of judges. That there are differences between an arbitrator and a judge in the carrying out of their functions. Firstly, that a Judge's power is gotten directly from a state, while an arbitrator's power is gotten from the agreement of the parties. Also that the Judge is accountable to the state while the arbitrator is accountable to the parties and the arbitral institutions where applicable. Furthermore, in most jurisdictions an arbitrator's decision is not subject to appeal or is subject to appeal on limited grounds while a Judge's decision can be revised or rectified on appeal. An arbitrator is paid by the parties while a Judge derives his remuneration from the State.[11] Arguments are thus advanced that parties and arbitral institutions deserve a right of action against arbitrators who act carelessly, negligently or compromise in any form the expectations of the parties.[12] There are arguments in favour of the grant of arbitral immunity.[13] Immunity helps to ensure the finality of an award. It also ensures the protection of the public in those cases in which truly the judicial functions are exercised.[14]

2. The Other Alternative Dispute Resolution (ADR) Panels

Alternate Dispute Resolution (ADR) is a term generally used to refer to mechanism for the resolution of disputes either as alternative to the traditional court system or as a supplement or complement to that. Any method advising the parties to settle their dispute outside the court is an "ADR" process. Some of the ADR methods usually employed for amicable resolution of dispute are negotiation, valuation, conciliation, mediation and certification. They are geared towards amicable settlement of dispute or decision making. A decision can be equated to and treated almost like a judgment of a court. On the other hand, the parties or a party may simply ignore some decisions without their consequences or no consequence at all. A more serious question is whether the decision maker, be that arbitrator, Certifier, Conciliator. Negotiator, Mediator or what have you can incur liability by making the decision.[15] Before one undertakes to play the third party role, he needs to know in advance whether a duty of care is cast on him, upon pain of liability in case of failure to act accordingly. For proper understanding of the above mentioned Alternative Dispute Resolution Mechanisms, it is better to discuss them *ad seriatim.*

3. Immunity of Arbitrators Explained

Arbitration is the involvement of a neutral umpire called (an Arbitrator) in the settlement of a dispute between parties who have pre-submitted themselves to its proceedings wherein the Arbitrator, having heard both parties gives a decision also known as an Arbitral Award which will be binding on parties and enforceable in court of competent jurisdiction. Arbitration is also the fastest wide spread ADR method and it is recognized across the globe. It is statutorily recognized and governed in Nigeria by the Arbitration and Conciliation Act Cap A18 LFN, 2004. Even though this method of ADR is expensive vis-a-vis other mechanism, same is

[10] Bremer Sduffban v South *Indian Shipping Corp* 1981 AC 1999-21

[11] See R, Mullerat, J. Blanch, *"The liability of Arbitrators: A survey of Current Practice"* Dispute Resolution International Vol. No. 1 June 2007 P. 106.

[12] A Redfern and M. Hunter, *Redfern and Hunter on International Arbitration* 6tth edition (New York: Oxford University Press, 2015 pg 325.

[13] ibid

[14] ibid

[15] C E, Ibe, *Insight on the Law of Private Dispute Resolution in Nigeria* (Enugu: EL "Demark Publishers, 2008) Pg 43.

however preferred for its procedural and formalized system. Arbitration has a close similarity with litigation most especially in the aspect of calling of witnesses and tendering of documents. However it is more of party involvement than advocacy. In respect of certain categories of persons it has long since been settled that they cannot be held liable in damages for their action in negligent or otherwise.[16] In Nigeria certain categories of executives are immune to civil suits and criminal prosecution during their tenure of office. These include governors and the president.[17] This in effect means that temporarily they incur no liability personally for whatever they do or omit to do during their continuance in office. One of the reasons adduced for justifying this position lies on the notion that a person occupying such a high position needs no distraction and that to allow suits or charges against him will open a flood gate of opponents who would sooner than later use la suits against him/them to bug down the system.[18]

The question which arises is, are arbitrators bound by the theory of duty of care? Can they be sued in damages for a breach of, contract or of duty of care? Jurisprudentially, are they immune or liable for negligence or breach of contract in respect of their decision? The traditional justification of immunity is the public interest considerations that an arbitrator fulfils a quasi-judicial function and should as a result be protected in the same manner as a judge.[19] It is worthy to note that in Nigeria, the Arbitration and Conciliation Act[20] makes no provisions on the immunity of arbitrators. However, common law is applicable in Nigeria and arbitral immunity from suits exists at common law. Thus, courts in various common-law jurisdictions have consistently recognized that arbitrators perform duties of a judicial character and enjoy the same immunity as judges in view of the adjudicatory nature of their functions.[21] The Lagos State Arbitration Law specifically provides for arbitral immunity adopting the provisions of the English Arbitration Act 1996.[22] Also in jurisdiction where there are no express provisions on Arbitral immunity, common law is deemed to be applicable. Equally the provisions of the English Arbitration Act, 1996 on the immunity of an Arbitrator were adopted with little or no modifications in Ghana.[23] The new Act[24] in its Section 13 provides for immunity of an arbitrator, appointing authority and arbitral institution. This is a new development. There was no such provision in the previous Act.[25] Section 13 of the Arbitration and Mediation Act (AMA), 2023 provides thus;

1. An arbitrator, appointing authority or an arbitral institution is not liable for anything done or omitted in the discharge or purported discharge of their functions as provided in this Act, unless their action or omission is shown to have been in bad faith.

[16] *Rondel v Wosely* (1962) QB 443 where it was held that barristers cannot be sued.
[17] Constitution of Federal Republic of Nigeria 1999. S. 308 (1); *Bola Tinubu v LMB Securities Plc* (2001) 10 SCNJ 1
[18] C.E Ibe, *insight on the Law of Private Dispute Resolution in Nigeria* (Enugu: EL 'Demak Publishers, 2008) pg 45-46
[19] G. Born, *International Commercial Arbitration*, 2nd Edn (2014), Ch 13. 02, P. 1967; Fouchard, Gaillard, Goldman (1999), P. 588, No. 1077. See however criticisms by P. Lalire, note on Courd' Appel de Paris' (1999) 13 Rev. de I'Arb. 113, 117, no. 23
[20] CAP A18 LFN 2004
[21] *Lendon v Keen* (1996) 1 KB, 994; Arenson Casson Beckman Ruttley & Co. (1977) AC 405 (HL).
[22] Lagos State Arbitration Law 2009, S. 18(1) – (3)
[23] Alternative Dispute Resolution Act 2010, S. 23(1); Liberia-Liberian Commercial Code of 2010 and Kenya – Arbitration Act 1995 as amended in 2010, S. 16 B.
[24] Arbitration and Mediation Act, 2023
[25] Arbitration and Conciliation Act Cap A18 LFN, 2004

2. Subsection (1) applies to an employee of an arbitrator, appointing authority or an arbitral institution as it applies to the arbitrator, the appointing authority or the arbitral institution in question.

This section shall not affect any liability incurred by an arbitrator by reason of the arbitrator's withdrawal under section 12 of this Act. In conclusion, arbitrators should be able to perform their functions without threats, harassment or intimidation from a losing party.

4. Immunity of Mediators Explained

The concept of mediation postulates the involvement of a neutral and impartial third party with the spirit of resolving the conflict between disputants by giving free speech having heard from both parties and their interest in the issue at hand. Mediation is more structured and procedural in nature. Unlike a conciliator, a mediator does not evaluate but only facilitate the mediation process with specific focus on settling the dispute via natural agreement between parties. To many people mediation means a lot and is defined to mean a voluntary and confidential process where a neutral third party called a mediator assisting the disputants to negotiate and arrive to a decision. It may be voluntary or follow a contractual or statutory obligation or an order of court for settlement. But once the mediation is initiated, it becomes voluntary and the procedures to be adopted depend on the mediator, he could meet them separately or together but it is advised to meet them separately. This helps to reduce hostility between the parties and help them to engage in meaningful discussion. A mediator is usually taken to be a person accepted by the parties whose role is to help the disputants reach an agreed settlement. A mediator is actually not a decision maker. He does not himself suggest a solution to the parties and cannot compel them to reach a settlement. He merely helps disputing parties to resolve their dispute by themselves. A mediator does not seek to expose the guilty and pacify the innocent. Rather, he aims at getting the parties to use compromise as a veritable instrument of settling their problem.[26] The question here is: Are mediators bound by the Atkinian theory of duty of care? Can they be sued in damages for a breach, be that of contract or of duty of care? Jurisprudentially, are the immune or liable for negligence or breach of contract in respect of their decision? Recall that the Atkinian theory of negligence posits that you must take reasonable care to avoid acts or omissions which you can reasonably foresee will likely injure your neighbor. This theory is subject to the jurisprudential theory now being considered. In the case of mediation, the mediator does not himself make a decision as has been stated before. The mediator is immune on grounds of logic and common sense. He has no authority to bind the parties and so his decision may or may not be accepted by any or all the parties, in which case the matter is at an end. It is this state of affairs that thus frees the mediator from liability and thus he is immune as stated by an erudite scholar, C E Ibe[27] in one of his textbooks. It is important to note that the old Act did not make provision for mediation at all. The new Act[28] in its Section 81 provides for immunity of a mediator. This is also one of the innovations made in the new Act. There was no such provision in the previous Act.[29] The new Act recognizes and codifies mediation as a dispute resolution mechanism for the first time.[30]

Section 81 of the New Act[31] provides thus;

[26] C.E Ibe, 'Insight on the Law of Private Dispute Resolution Nigeria (Enugu: Demak Publishers, 2008) pg 25.
[27] ibid
[28] Arbitration and Mediation Act, 2023
[29] Arbitration and Conciliation Act Cap A18 LFN, 2004
[30] See, Part II, Sections 67-87 ibid.
[31] Arbitration and Mediation Act, 2023

> Mediators and mediation providers are not liable for any act done or omitted in the discharge or purported discharge of their functions under this part, unless their action or omission is shown to have been in bad faith.

Prior to this Act there were no extant legal provisions on mediation and this Act is a federal law that codifies explicit guidelines to govern the practice of mediation in Nigeria which is a major development for growing the practice and popularity of mediation. The new Act addresses key gaps and shortcomings of its predecessor, offering enhanced clarity, flexibility, and procedural frameworks for both arbitration and mediation processes. By incorporating provisions for the enforceability of mediation settlements, allowing for electronic mediation, and providing a comprehensive approach to international mediation, the new Act reflects a progressive and inclusive approach to dispute resolution.

5. Immunity of Conciliators Explained

Conciliation is the process of facilitating an amicable resolution between the parties, whereby the parties to the dispute use conciliator who meets with the parties separately to settle their dispute. Conciliator meets separately to lower the tension between parties, improving communication, interpreting issues to bring about a negotiated settlement. There is no need of prior agreement and cannot be forced on party who is not intending for conciliation. It is different from arbitrator in that,

(A) The party initiating conciliation shall send to the other party a written invitation to conciliate and this party, briefly identifying the subject of the dispute.

(B) Conciliation proceedings shall commence when the other party accepts in writing the invitation to conciliate.

(C) If the other rejects the invitation, there will be no conciliation proceedings.

Also parties are permitted to engage in conciliation process while the arbitral proceedings are on. This is a dispute resolution mechanism in which a neutral third party trusted by disputant gives a non-binding decision after hearing both sides and considering the merit of their respective cases. It may involve one conciliator or three conciliators.[32] Under part II of our Arbitration and Conciliation Act reference is made to one or three conciliators whereas the rules provide for one, two or three conciliators[33]. In part II of our Arbitration and Conciliation Act, the appointment of the third conciliator is done by the two parties after each has solely appointed one. In other context the issue of immunity obviously does not arise in some instances because of the very nature of the third party involvement. The conciliator is immune on ground of logic and common sense. He has no authority to bind the parties and so his decision may or may not be accepted by any or all the parties, and this state of affairs thus frees the conciliator from liability and thus he is immune.

1.5. Immunity of Certifiers Explained

Certification is a situation where an independent person is appointed by the parties for him to peruse the documents or certificates to see whether they are genuine and then form an opinion as to their genuineness. A certifier is usually a qualified professional. He may be an engineer, architect, a builder or a quantity surveyor. Building contracts usually provide that some acts should be done to the satisfaction of a third party that is required to issue a certificate

[32] See Arbitration and Conciliation Act Cap A18 LFN, 2004, S. 40.
[33] ibid Section 40

as evidence of such satisfaction.[34] The question has always been whether a certifier is an arbitrator or not. The answer, it has been contended, is not clear-cut. This is so because in quite a number of arbitrations, the duty of the arbitrator may simply amount to certification[35]. Since it is the certifier that has to determine the quality of work done and certify that the job is worth what is claimed. The duty of determining the state and stage of work can either be arbitration or certification. It can even be a valuation. Therefore, the dividing line between certification and arbitration in such a situation becomes difficult to draw. However, certain factors will usually be considered in arriving at a conclusion. The first consideration would be to ascertain whether a dispute has indeed because a dispute is most likely to arise in that connection. If a dispute has arisen or one is anticipated, obviously certification in that instance is actually tantamount to arbitration. Another factor that ought to be considered is the extent of the certifier's independence. If the certifier was simply engaged by one of the parties, then of cause, he is not an arbitrator because one party cannot unilaterally appoint an arbitrator or arbitrate between him and other party. Indeed, under those circumstances, the certifier is not independent. On the other hand if both parties choose and commission the certifier who is not subservient to any of them, in that case, certification is conterminous with arbitration. This is so because the certifier is independent and has to render a decision in that manner to resolve the issue.[36] It is important to note that the argument in favour of in posing a duty of care on and thus making valuers and certifiers liable is based on the grounds that they exercise their professional skills and competence. That is to say that certifiers are not entitled to judicial immunity; they are consequently liable for negligence, for over-certifying.

6. Immunity of Negotiators Explained

A negotiation for settlement exists where a third party on his own volition without the agreement of the disputing parties goes into the dispute with an intention to settle it between them. Negotiation is the preeminent mode of dispute resolution while the two most known forms of ADR are arbitration and mediation, negotiation is almost always attempted first to resolve a dispute. Negotiation allows the parties to meet in other to settle a dispute. The main advantage of this form of dispute settlement is that it allows the parties themselves to control thr process and the solution. Negotiation is much less formal than other types of ADRs and allows for a lot of flexibility. The decision reached during negotiation for settlement does not bind the parties unless it is accepted by them.[37] In *Inyang v Essien*[38] the court held that the decision did not bind the parties and that what the body did was an attempt to settle the dispute and make peace among them, that the decision of the body could not constitute a *res judicata.* In *Ekwueme v Zakari's* case the court dismissed the action holding that the parties where not bound by the decision since they did not prior to the negotiation for settlement agree to be bound by the decision. In a negotiation for settlement the decision will become binding on the parties if they accept it. In that instance it transmutes into settlement.

7. Conclusion

Arbitrators should be able to perform their functions without threats, harassment or intimidation from a losing party. However, arbitrators are professionals who are being

[34] Gaius Ezejiofor, *The Law of Arbitration in Nigeria* (Longman Publishers, 1997) Pg 9

[35] C E Ibe, *'Insight on the Law of Private Dispute Resolution in Nigeria'*(Enugu: EL Demak Publishers,2008) Pg 39

[36] ibid; see also Gaius Ezejiofor, *The Law of Arbitration in Nigeria* (Longman Publishers, 1997) pg 9; the case of *Chambers v Gold Thorpe* (1901) 1 ICB 624; *Sutclift v Thachrah* (1984) AC 727

[37] Chidi Ekwueme v Sam Zakari (1972) 2 ECSLR, 631

[38] (1957) 2 FSC 39,

remunerated for the tasks they perform. All jurisdictions, civil law and common law recognize that arbitrators own duties to the parties. Irrespective of whether they follow the contractual or jurisdictional approach. The main consequence of the distinction between arbitration panel and the other ADR panel already discussed is that arbitrators are immune from action for negligence, while the answer with respect to immunity of the other ADR panels are not clear-out. In some circumstances some of them are not immune while in some they are. Recently, the immunity of mediators and other mediation providers are now recognized by virtue of the promulgation of the new Act. Arbitration is a quasi-judicial in nature and cannot take the place of litigation as its subjects to the agreements between the parties in accordance with the applicable laws. Arbitration is usually seen as part of the wide range of Alternative Dispute Resolution Mechanism which is complementary to the traditional court system of dispute resolution. ADR and arbitration should not be competing with each other, rather they need to complement each other in that ADR is more likely to promote the development of arbitration. It must be stated that both mechanisms may produce an enforceable outcome, although ADR is rather a consensual and contractual agreement in nature. In view of the above, it is recommended that other ADR panels should enjoy the same immunity the arbitrators are enjoying.