EXAMINATION OF ALTERNATIVE DISPUTE RESOLUTION MECHANISMS IN THE SETTLEMENT OF INTERNATIONAL TRADE DISPUTES IN THE OIL AND GAS SECTOR IN NIGERIA*

Abstract

Dispute is not peculiar to the oil and gas industry whose operators comprise of humans. The oil and gas industry possess various unique features, distinguishing it from every other industry. It has a complex mix of industry segments which includes upstream, midstream, downstream and services. As well as phased project activities like exploration, construction, production and decommissioning. In Nigeria disputes arise from various international contractual obligations. Investor's rights are threatened where the dispensation of justice is plagued with uncertainties which include delay, lack of expertise, cumbersome rigorous procedures, inefficient dispute resolution institutions and all the challenges associated with litigation. Most oil and gas contracts are international in nature; alternative disputes resolution (ADR) fits in as the best mode to addressing any contractual dispute that may arise because it gives the disputants the opportunity to participate in the settlement process voluntarily. This study adopted the doctrinal research methodology, which examined both primary and secondary sources. Primary sources such as statutes, cases conventions were utilized in the course of writing this dissertation. Also, secondary sources like text books, journals and articles and internet materials were critically analysed. The work recommended the need to train and/or espouse judges and legal practitioners for settlement of International trade disputes in the oil and gas sector.

Keywords: Alternative Dispute Resolution, Arbitration, Mediation, International and Nigeria.

1. Introduction

Dispute has become a common and recurrent phenomenon in both the private and public sector globally.[1] The prevalence of disputes occurring in the Oil and Gas industry is quite high rate as disputes are inevitable in any human relationship. Therefore, Disputes are not strange to the oil and gas sector as it's comprises of humans.[2] Investment guarantees and promises are however sometimes difficult to obtain due to the economic changes and complex nature of the oil and gas sector. More so the rules and procedures of doing business and the resolution of disputes differ across the globe.[3] Appropriate measures should be taken as soon as notice of discontent has been served on the management or government.[4] The adoption of ADR as a primary method of dispute resolution even before disputes arises in the oil and gas sector gives ADR systems primacy in enhancing economic equilibrium and reducing friction among parties. The very reasons for origin of ADR are the tiresome processes of litigation, costs, delay and inadequacy of the court system.[5] Litigation provides several problems which arise as a result of the delay in the adjudicatory system and have caused severe intolerable hardship in the judicial sector. Its adversarial nature and specificity to national and international laws are evidently detrimental to parties of different jurisdictions;[6] the lack of confidentiality from proceedings and judgment being a matter of public record which are best suited for disputes on points of law;[7] its decisions are appealable; lacks international recognition and enforcement except where there is a bilateral treaty.[8] Importantly, such decisions imports drastic measure capable of grave consequences to the commercial relationship as well as, gruesomely impacting the huge capital investment already deployed in the oil and gas industry sector.[9] The nature of oil and gas business requires partakers to invest in large, complex and capital intensive projects that have long life spans. Disputes escalated publicly, therefore poses significant risks in the oil and gas sector. The risk is basically how well the parties can manage to get a satisfactory result.[10] In achieving this, the judiciary and institutions have major role to play in the settlement of such disputes with the use of ADR.

The purpose of ADR is to resolve the conflict in a more cost-effective and expedited manner while fostering long term relationships.[11] ADR procedures are extensively recommended to reduce the number of cases and provide a cheaper and less adverse form of justice, which is less formal and less complicated.[12] Modern ADR is voluntary, accordingly, parties intentionally enter a structured negotiation or refer their disputes to a third party for evaluation and/or facilitation of resolution.[13] Judges have started appreciating and recommending ADR to avoid congestion of cases piled up in court.[14] In essence, the system of ADR rather than laying emphasis or placing premium on winner take all, focuses on increasing access to justice, improving efficiency and reducing court delays.[15] Given the multilateral

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[1] P D Dahida and A J Adeshola, 'A Comparative Analysis of Trade Disputes Settlement in Nigeria Public and Private Universities' [2013] vol 18 *Journal of Law, Policy and Globalization* 60.
[2] E Uwazie, Alternative Dispute Resolution and Peace Building in Africa (Cambridge Scholars Publishing 2014) 1.
[3] B N Luki and N Abubakar, Dispute Settlement in the Oil and Gas Industry: Why is International Arbitration Important?
[4] A C Anyim, O C Chidi and O P Ogunyomi, 'Trade Dispute and Settlement Mechanism in Nigeria; A Critical Analysis' [2012] vol 2 (2) Interdisciplinary Journal of Research in Business 2.
[5] W Obayomi, 'Raising Standards in Litigation Management' (2004) *Negotiation and Dispute Resolution Journal*, 93-106.
[6] M Clarke & J Neuberger, *Drafting Effective Dispute Resolution Clauses, in R King, Dispute Resolution in the Energy Sector: A Practitioners Handbook* (Global Business Publishing Ltd, 2012); A F M Maniruzzaman, 'The Problems and Challenges Facing Settlement of International Energy Disputes by ADR Methods in Asia: The Way Forward' (2003) *6 IELTR* 193.
[7] Roberts, Gas Sales and Gas Transportation Agreements Principle and Practice (Sweet and Maxwell, London, 2004) 318.
[8] R W Bentham, 'Arbitration and Litigation in the Oil Industry' (1986) *International Energy Law and Taxation Review*, 35.
[9] T W Walde, 'Mediation/ADR in Oil, Gas and Energy Transactions: Superior to Arbitration/Litigation from a Commercial and Management Perspective' (2003) 2 *OGEL*, 65.
[10] T Martins, 'Dispute Resolution in the International Energy Sector: An Overview' (2011) 333 *J W E L B* 368.
[11] *Ibid*.
[12] D Kabir, 'Towards the Institutionalization of ADR Processes in Nigeria,' (2011) 4(5) *Ahmadu Bello University J Private Comparative Law*, 248.
[13] B N Luki and N Abubakar, 'Dispute Settlement in the Oil and Gas Industry: Why is International Arbitration Important?' (2016) 6(4) *Journal of Energy Technologies and Policy* 30.
[14] A F M Maniruzzaman, 'The Problems and Challenges Facing Settlement of International Energy Disputes by ADR Methods in Asia: The Way Forward' (2003)6 *IELTR*, 193.
[15] S N P Sinha and P N Mishra, 'A Dire Need of Alternative Dispute Resolution System in a Developing Country Like India' (2004) Vol. XXXI (3&4), *Indian Bar Review*, 299.

dimension of the oil and gas sector, structured negotiations, easy access to justice and quick resolution of disputes are the hallmark of ADR.

2. Conceptual Clarifications

To fully grasp and appreciate this article, terms relevant to this study will be defined. The concepts relevant to this study include disputes, conflict, trade/industrial disputes, alternative dispute resolution, arbitration, mediation, conciliation and negotiation.

Disputes: Disputes can be ordinarily said to be argument; debate, to question the truth or validity of a situation or an unclear intention. It could be to strive against; resist: dispute the actions of a competitor(s) as the case may be. A dispute is a disagreement on a point of law or fact, a conflict of legal views or of interests between two persons.[16] According to Burton, a dispute is a short-term disagreement that can result in the disputants reaching some sort of resolution; it involves issues that are negotiable.[17]

Alternative Dispute Resolution Mechanisms: Brown and Marriot defined ADR as a range of different procedure which serves as alternative to the adjudicatory procedure of litigation and arbitration for the resolution of disputes, generally, but not necessarily involving the intercession and assistance of a neutral third party who helps to facilitate such resolutions.[18] In their views, alternative dispute resolution fundamentally is an option in contrast to a conventional court hearing or adjudication. They are ways and techniques for settling disputes outside the legal procedure formal adjudicatory court settings.[19] Avtar actually defined Alternative Dispute Resolution as a technique of dispute resolution through the involvement of a third party whose decision is not legally binding on the parties.[20]

Arbitration: It is a method of dispute resolution involving one or more neutral third parties who are usually appointed by the disputing parties and whose decision is binding.[21] Romilly defined Arbitration as a reference to the decision of one or more persons either with or without umpire, of a particular matter in differences between the parties. For Fulton Maxwell, J Arbitration is a private process whereby a private disinterested person called an arbitrator, chosen by the parties to a dispute, acting in a judicial fashion, but without regards to legal technicalities, applying either existing law or norms agreed by the parties, and acting in accordance with equity, good conscience and the perceived merit of the dispute makes an award to resolve the dispute.[22]

3. History of Alternative Dispute Resolution in Nigeria

Before the colonial rules were introduced in Nigeria, there were operational systems of laws in the various autonomous territories that were later to become Nigeria. The laws and systems of laws basically anchored on traditions and customs.[23] Currently, there are many statutory and institutional frameworks through which Alternative Disputes Resolution has been sustained as a legitimate means of dispute settlement in Nigeria. In fact, the first statute on arbitration in Nigeria was the Arbitration Ordinance which came into force on the 31st December, 1914. The law was fashioned after the English Arbitration Act of 1889 and was then applicable to the whole of the country. In 1954 Nigeria was regionalized as a federal structure, the ordinance became the respective laws of the Regions and thereafter States.[24] In 1958, the ordinance was reenacted as chapter 23 of the revised law of Nigeria and Lagos. The Military Government later repealed and promulgated the Arbitration and Conciliation Decree 1988. The current law is now the Arbitration and Conciliation Act, 2023 having repealed the 2004 Act recently.[25] The main source of Nigerian alternative disputes resolution, especially Arbitration Laws and Rules are derived from common law and doctrines of equity, statutes and trade usages. Other national legal frameworks incudes various Acts, Judgements, Treaties and Conventions, Agreements of the parties and Practices and Custom.

4. Legal Framework for Alternative Disputes Resolution in Nigeria

The legal and regulatory framework of alternative disputes resolution in the settlement of international trade disputes in the oil and gas sector and the contracting obligations arising thereof have evolved in various ways across oil-producing states.

National Legal Framework

Minerals and Mining Act 2007

This Act was enacted to regulate all aspects of the exploration and exploitation of solid minerals in Nigeria. It governs investments in the solid mineral sector and stipulates the conditions for the grants of all licenses and leases for; mineral exploration and exploitation,[26] mining lease[27] and quarrying lease and also provides mining incentives. The Act[28] provides that the Minister, amongst others, has the power to ensure the orderly and sustainable development of Nigeria's mineral resources. The Minister is to develop a well-planned and coherent program of exploitation of mineral resources taking into account economic developments, ecological and environmental factors. The Minister is also empowered to create an enabling environment for both Private Investors and foreign investors by providing adequate

[16].D Peters, *Alternative Dispute Resolution (ADR) in Nigeria Principle and Practice*, (Lagos; Dee Nigeria Limited, 2004) 3.
[17]J W Borton, *Conflict: Resolution and Prevention* (United Kingdom: Macmillan, 1990) 1.
[18] H Brown & A Marriot (Supra) (2011) 2.
[19]Sustac, et al, *Alternative Ways of Solving Conflicts* (ADR), (Bangladesh; Publishers: University, 2008) 242.
[20]A Singh, *Law of Arbitration and Conciliation and Alternative Dispute Resolution Systems* (Lucknow; Eastern Book Company, 2009) 511.
[21] B A Garner, *Black Law Dictionary*, (6th edn, West Group Publishers, 1991) 43.
[22] F J Maxwell, *Commercial Alternative Dispute Resolution,* (England: The Law Book Co Ltd, 1989) 55.
[23] *Odonigi v Oyeleke* (2001) 6 NWLR (pt. 708) p 12 @ 27-28.
[24]J Nwazi, 'Accessing the Efficacy of Alternative Dispute Resolution (ADR) in the Settlement of Environmental in the Niger Delta Region of Nigeria,' (2017) *Journal of Law and Conflict Resolution*, 26.
[25] Arbitration and Conciliation Act, cap A 18, Laws of the Federation, 2004.
[26] Nigerian Minerals and Mining Act ss.43 and 46.
[27] *Ibid*, ss. 65, 66 and 67.
[28] Repealed the Minerals and Mining Act, No. 34 of 1999). 87; s. 4 (a) to (m).

infrastructure for mining activities; and identifying areas where governmental interventions are desirable not only in achieving policy goals but also fostering proper perspective in mineral exploration.[29]

Petroleum Act 2004

The Act provides that there will be settlement of disputes arising by the application of the Act by arbitration. Thus, in specific terms, it stipulates that: Where by any provision of this Act or any regulation made thereunder a question or dispute is to be settled by arbitration, the question or dispute shall be settled in accordance with the law relating to arbitration in the appropriate State and the provision shall be treated as a submission to arbitration for the purposes of that law.[30] This justify the fact that arbitration is provided as a medium for the settlement of dispute in oil pipeline transaction.

Oil Pipelines Act 2004

The Act provides that no one shall make pipeline installations except licensed to do so.[31] Anyone who contravenes this provision commits an offence. One of the penalties is that, the pipeline and any ancillary installation will be removed and the Ministry of Petroleum Resources would purchase them, and any dispute which results from the determination of price will be settled by arbitration.[32] This is another statutory provision which entrenches arbitration in oil and gas industry in Nigeria.

Nigeria Liquefied Natural Gas (Fiscal Incentives, Assurances and Guarantees) (NLNG) Act 1990[33]

The Nigeria LNG (Fiscal Incentives, Guarantees and Assurances) Act (hereinafter referred to as the "Act") is a special purpose Act. The Act created a joint venture between the Nigerian National Petroleum Company (NNPC)[34] and International Oil Companies (IOCs) in the Nigeria LNG Limited for executing the LNG project. This is due in part to the magnitude of investments in the project. In the NLNG Act, the Government of Nigeria in its capacity as the host government conferred pioneer status and granted tax and other incentives to the Nigerian LGN Limited (the Company).[35] It also provides guarantees and assurances to the Company and the shareholders, including the affirmation of Shareholders' (Investors) Rights[36] to prompt, adequate and effective compensation in the event of expropriation of tangible property, property rights or interference with contract rights;[37] fair and equitable treatment; transparency of national laws and stabilization clause. By this Act, the Government showed its desire to ensure stability and a predictable legal framework for investment. The aim of the Act is to attract foreign investment for development of Nigeria reach Oil and Natural resources.[38]

Nigerian Investment Promotion Commission Act 2004[39]

The Nigerian Investment Promotion Commission Act was first enacted in 1995. It deals extensively with investment promotion in Nigeria, with specific provision for the resolution of disputes arising between an investor and any Government of the Nigerian Federation or any agencies of government. The Act recommends the referral of disputes in certain sectors including the oil and gas industry, foreign investors within the framework of any bilateral or multinational agreement on investment protection to the Rules of the International Centre for Settlement of Investment Disputes (ICSID).

Trade Disputes Act 2004

A trade dispute is defined by Section 48 of the Trade Disputes Act as 'any dispute between employers and workers, or between worker and workers, which is connected with employment or non-employment or terms of employment and physical conditions of work of any person.'[40] The trade Disputes Act provide for reference to arbitration, Mediation and Conciliation. The Act provides that where voluntary settlement fails,[41] the court can resort to mediation, conciliation and arbitration where a particular process fails.

Petroleum Industry Act 2021

The proceedings in the oil and gas alternative resolution tribunal generally provide a conducive and level playing ground for all participants in the oil and gas sector. The Act made provision for Arbitration like the petroleum Act. Arbitration has a long history in the settlement of disputes in the Petroleum Industry in Nigeria. The Act provides that the authorities may mediate in disputes in respect of third-party access.[42] The role of the various arbitration institutions will therefore be to make harmonized regulation globally, for the resolution of disputes within the oil and gas industry regulate. The PIA provides that the Authority shall make regulations concerning dispute resolution and customer protection.[43]

Arbitration and Mediation Act (AMA) 2023

The recent Arbitration and Mediation Act repealed the Arbitration and Conciliation Act, 2004 on the 26th of May, 2023 by the former president Muhammadu Buhari. The Arbitration and Mediation Act serves as the principle legal framework governing arbitration,

[29] O V C Ikpeze, Examination of some Legislations Referencing Acquisition of Rights for Oil exploration, prospection and mining in Nigeria (2015) vol 5 (9) *Journal of Energy technologies and Policy*, 3.
[30] Petroleum Act, cap p 10, LFN (2004) s. 11(1) & (2).
[31] Oil Pipelines Act, Cap 07, LFN 2004, s.7 (4).
[32] *Ibid* s.7 (6).
[33] Nigeria Liquefied Natural Gas (Fiscal Incentives, Assurances and Guarantees) (NLNG) Act, 1990, s 22.
[34] The Nigerian National Petroleum Corporation (NNPC) is an agency of the Federal Government, established pursuant to Article 1(1) Nigerian National Petroleum Corporation (NNPC) Act, Cap 320, LFN, 1990. 64 *Shell Gas B.V. CLEAG Limited and Agip International B.V*
[35] Articles 1-3 of the Second Schedule to the NLNG Act.
[36] Article 21
[37] These rights are described in the shareholders' contract dated 19th May, 1989 between the *Nigerian National Petroleum Corporation, Shell Gas B.V. CLEAG Limited and Agip International B.V.* as amended. See the opening paragraph to the Second Schedule to the Act made pursuant to 9 of the Act.
[38] *Ibid*, 22 of the Act.
[39] Laws of the Federation of Nigeria (2004) Cap N117, s. 26.
[40] Cap, T8, Laws of the Federation of Nigeria 2004.
[41] Trade Disputes Act 2004, ss 3, 4, 6, 8 and 9.
[42] Petroleum Industry Act, 2021 s. 163.
[43] *Ibid*, s. 33 (t).

Mediation, arbitral awards, arbitral tribunals and institutions in Nigeria. Some of the key innovations of the Arbitration and Mediation Act includes that the Arbitration and Mediation Act adopted the UNCITRAL Model Law on International Commercial Mediation, 2018 and for the first time provided for mediation which was given a legal backing. The AMA also adopted both the 1958 Washington Convention on the Recognition and Enforcement of Foreign Arbitral Awards and the 2018 Singapore Convention on Mediation.

International Legal Framework

UNCITRAL Model Law on Arbitration 1985

The model law began with a proposal to reform the New York Convention. The establishment of UNCITRAL was in 1966 by the United Nations General Assembly with the express mandate of furthering the progressive harmonisation and unification of arbitration laws of different countries of the world for international trade.[44] Its outline is to achieve greater unity in the international arbitration laws. Since the utilisation of the Model Law is in the context of existing treaty provisions regarding recognition and enforcement of arbitration awards, its drafters hope that such Law would help establish a universal framework for efficient settlement of disputes that arise in international commercial relationships.[45] The Model has been a major success as the arbitral process from beginning to the end is in simple and readily understandable form.

New York Convention 1958

The New York Convention generally referred to as the Convention on Recognition and enforcement of foreign Awards came into force on June 10, 1958 and Nigeria became a signatory to it on March 17, 1970. As at 2021, the Convention had 165 state parties which include 161 of 193 United Nations member states. The New York Convention is the most important international treaty relating to international commercial arbitration. It is a major factor in the development of arbitration as a means of resolving international trade disputes. The convention provides for a simpler and effective method of obtaining recorgnition and enforcement of foreign arbitral awards. It also replaced the GENEVA Convention of 1927 as between states that are parties to both conventions. In other to enforce arbitral agreement, the New York Convention adopted the technique found in the GENEVA Protocol of 1923. In Article II (3), the convention requires the court of contracting states to refuse to allow a dispute that is subject to arbitration agreement to be litigated before a court of that state if such litigation is raised by any of the parties to the arbitration agreement. The convention also applies to international arbitration agreements, rather than purely domestic arbitration agreements.[46]

5. Institutional Framework for Alternative Disputes Resolution in Nigeria

Institutional framework refers to situation where specialized institution intervenes and takes on the role of administering the arbitration process. There are many arbitral institutes in the world today, the foremost global international institutions include ICSID, the International Chamber of Commerce (ICC) International Court of Arbitration; the American Arbitration Association's (AAA) International Center for the Dispute Resolution (ICDR); and the London Court of International Arbitration (LCIA). Key African arbitral institutions now include the Cairo Regional Centre for International Commercial Arbitration (Egypt); the Arab Centre for Commercial Arbitration (Morocco); the Arbitration Foundation of South Africa (South Africa); and Lagos Court of Arbitration (LCA). The more that arbitral institutions solidify their reputations throughout the continent as established outposts for international disputes, the more likely it is that lawyers and business people will feel comfortable referencing that institution in an arbitration agreement on the front end of a transaction.[47]

ICSID

ICSID is an institution that was created through an international convention, and has been proven to be one of the most popular multilateral arbitration regimes in terms of the number of ratifications received.[48] The mandate of ICSID involves disputes arising directly out of investment.[49] The greatest advantage of ICSID is that it initially removes jurisdiction of the dispute from municipal courts, but later employs the courts to enforce the decision.[50] ICSID was established by the Washington Convention of 1965.[51] It gave both private individuals and corporations who were investors in a foreign State the privilege of bringing legal proceedings against that State, before an international arbitral tribunal.[52] ICSID sought to remove major hurdles to the free international flow of private investment posed by non-commercial risks and the absence of specialized international methods for investment dispute settlement. ICSID is an autonomous international institution established under the "Convention on the Settlement of Investment Disputes between States and Nationals of Other States (the Convention).[53]

International Chamber of Commerce (ICC) International Court of Arbitration

The International Court of Arbitration of the International Chamber of Commerce (ICC) was established in 1919 in Paris, France. The ICC International Court of Arbitration is the world's foremost institution in the resolution of international business disputes. The ICC has played an important role in promoting international laws on laws on arbitration such as the New York Convention. ICC is an international business organization with hundreds of thousands of member companies in over 130 countries spanning virtually every

[44]P Dlagnekova, 'The Need to Harmonize Trade-Related Laws within Countries of the African Union: An Introduction to the problems Posed by Legal Divergence' (2009) 1 *Fundarnina* 15.
[45]Y Oke, *Nigerian Energy Law and Practice; Oil and Gas Law- Practice, Cases and Theories* (Lagos, Princeton & Associates Publishing Co, 2019) 354.
[46]A A Redfern, M Hunter, *Law and Practice of International Commercial Arbitration,* (4th edn, Thomson Sweet and Maxwell) 68.
[47]J Amadi, Alternative Disputes Resolution under the Federal High Court (Civil Procedure) Rules 2019 (Port Harcourt: Pearl Publishers International Ltd, 2019) 99.
[48] S J Toope, *Mixed International Arbitration: Studies in Arbitration between States and Private Persons*, (1990).
[49] ICSID Convention, Art 25(1).
[50] *Ibid*.
[51]Convention on the Settlement of Investment Disputes between States and Nationals of other States, done at Washington, March 18, 1965. United Nations Treaty Series (1966), Vol 575,160.
[52] G S Tondapu, 'International Institutions and Dispute Settlement: The Case of ICSID' (2010) vol. 22 *Bond Law Review* 80.
[53]U.N.T.S. 159 (No. 8359) (1966), www/worldbank.org/icsid/. ['the Convention]. Produced at Washington, D.C., 18 March 1965. ['The Convention].

sector of private enterprise.[54] The ICC is one of the leading providers of dispute resolution services for individuals, businesses, states, government entities and international organizations seeking alternatives to court litigation.[55] A key benefit offered by the ICC is its International Court of Arbitration, which allows businesses to resolve international disputes without facing the potential risks and biases of foreign courts and foreign laws.[56] The International Court of Arbitration is a branch of the International Chamber of Commerce (ICC) and one of the world's leading institutions for providing international arbitration services.

The London Court of International Arbitration

The London Court of International Arbitration (LCIA) is one of the leading international institutions for commercial dispute resolution. The LCIA was said to have been traditionally founded in 1892 in essence LCIA is the oldest international arbitral institution. In its modern form it is comparatively new. It is responsible for appointing tribunals, determining challenges to arbitrators, and controlling proceedings. Its Secretariat is headed by a registrar who administers disputes referred to the LCIA. LCIA is based in London but it has established LCIA Europe, North America, India, an independent arbitration institution based in New Delhi. It has also established the DIFC-LCIA Arbitration Center in Dubai. The LCIA is composed of thirty-five members and it is the final authority for the proper interpretation and application of LCIA Rules. One of the advantages of LCIA is that it is cost-effective in the sense that administrative charges are not based on sums in issue. A registration fee is payable with the Request for Arbitration and thereafter, hourly rates apply for both LCIA and the arbitrators. LCIA also acts as the appointing authority and arbitration administered under the United National Commission for International Trade Law (UNCITRAL) arbitration rules. It is recognized as the most popular international arbitration institution in the world.

The American Arbitration Association's International Center for Dispute Resolution

The American Arbitration Association (AAA) is an organization with offices throughout the United States. It has a long history and experience in the field of alternative dispute resolution, providing services to individuals and organizations who wish to resolve conflicts out of court. The American Arbitration Association does not itself arbitrate disputes, but provides administrative support to arbitrations before a single arbitrator or a panel of three arbitrators. The American Arbitration Association role in the dispute resolution process is to administer cases, from filing to closing. In a nutshell, in the arbitration parties choose a neutral venue for the resolution of their dispute; choose arbitrators who are not nationals of a country which is not a home country of either party to the dispute and have no relationships with any party to the dispute. As a result, this makes arbitration a neutral process. It also administers mediation and other forms of alternative dispute resolution.

6. Analysis of Alternative Dispute Resolution Mechanisms in the Oil and Gas in Nigeria

Most oil and gas contracts are international in nature; the ADR option definitely fits in as the best mode to addressing any contractual disputes that may arise since it gives the parties the opportunity to participate in the nomination and appointment of the tribunal or panel for the resolution of dispute as shown in this study.[57] Therefore, we shall examine various ADRs processes available in the oil and gas industry includes but not limited to expert determination, mediation, conciliation, and arbitration.[58]

Expert Determination

Expert determination can be defined as a means by which the parties to a contract jointly instruct a third party to decide an issue between them.[59] In Iraq, the expert determination clause made provisions regarding Expert's appointment and cost, neutrality, qualification, and decision time frame.[60] By providing that the Expert shall act as an expert and not as an arbitrator in other words an Expert Determinator cannot act like an arbitrator. Expert determination is widely used in the settlement of international trade disputes in the oil and gas industry owing to the technical or commercial nature of the industry.[61] The benefits of using expert determination was echoed by an Australian judge[62] who held that on a practical level, expert determination has apparently been attractive, largely because it is less expensive and speedier, avoids the rigors of the application of the rules of evidence and procedure and offers a finality which avoids delays, potential re-hearing and appeals, which is particularly suitable where the parties may have a continuing relationship.[63] The principle is highly recommended and applies to both the oil and gas industry and many other sectors where expert determination is popularly in use. One of the major keys to expert determination is speed.[64] It is usually consensual process in which a neutral third party usually an expert in the field in which the dispute arises gives a binding determination on this issue in dispute based on the exercise or his professional judgment.[65] Also, Expert determination is confidential.[66]

Expert determination may be set aside in the English court if the experts have been found to depart from explicit instruction given by the parties. For instance, in the case of *Veba Oil Supply & Trading GMBH v Petrotrade Inc,*[67] there was an agreement for the supply of oil

[54]Y Oke, *Nigerian Energy Law and Practice; Oil and Gas Law- Practice, Cases and Theories* (Lagos, Princeton & Associates Publishing Co, 2019) 348.

[55]A A Redfern, M Hunter, *Law and Practice of International Commercial Arbitration*, (4th edn, Thomson Sweet and Maxwell) 70.

[56]The International Court of Arbitration is known for resolving international commercial and business disputes, administering more than half of all arbitration disputes worldwide.

[57]S P Sathe, 'Judicial Activism in India-Transgressing Borders and Enforcing Limits,' (4th edn, Oxford India Paperbacks, 2007) 234-235.

[58]E Nosyreva, 'Alternative Dispute Resolution in the United States and Russia: A Comparative Evaluation' (2001) 7 *Annual survey of International and Corporative Law*, 9.

[59] J Kendall *et a,* '*Expert Determination',* (4th edn, London: Sweet & Maxwell, 2008), 1.

[60] The Iraq Model Production Oil Field Technical Service Contract, Art 37.3.

[61] Arbitration Rules, First schedule to Arbitration and Conciliation Act, Cap 18 LFN, 1990, art. 29.

[62] Einstein J.

[63] *The Heart Research Institute Ltd v Psiron Ltd* [2002] NSWSC 646 at [86].

[64] H R Dundas; 'Dispute Resolution in the Oil & Gas Industry: An Oilman's Perspective' *OGEL* 3 (2004), 3.

[65] Arbitration Rules, First schedule to Arbitration and Conciliation Act, cap 19 LFN, 1990, art. 31 (1).

[66] M Clarke, *et al* '*The Price isn't Right - Gas Pricing Disputes*' (Westlaw, 2015) 14.

[67] (2015) EWCA Civ 717 (CA (Civ Div)

and gas between two parties which required an expert determination process to take place prior to any sale, to a standard which had been mutually agreed between the buyer and the seller. The expert performed his duty and found the density to meet the contractual specification, but via a different method to the one he was instructed to abide by. The buyer in the process of resale, found that when tested again the MGO quality failed the quality inspection and launched an appeal on the ground of breach of contract. The court found that in choosing to employ a different test against the one instructed, the expert did not merely make a mistake but departed from the instruction thus invalidating their findings. In the proceedings the court made a clear distinction between the experts choosing to disregard the instructions in which cases their findings were invalid. Experts are bound to determine what was explicitly stated in the contract agreement. Expert determination appears suitable in the oil and gas industry, largely because it is less expensive and speedier.

Settlement by Mediation

In many countries, governments have taken a special interest in introducing mediation as a means of improving judicial performance.[68] In the settlement of international trade disputes in the oil and gas industry, mediation is one of successful mechanisms of settling disputes within the industry. Mediator acts only as a facilitator and scrupulously avoids making any kind of evaluation and recommendation concerning either party's case during negotiation process (a facilitative mediator). Mediation tends to be more successful when the mediator has knowledge of the industry or a technical process used within it. Mediation serves as a veritable tool in the settlement of international trade dispute in the oil and gas sector in most developed states. Well-trained mediators know that the process itself is as important as the outcome.[69] Mediation like many ADR strategies has distinct advantages over the traditional courts/ tribunals format of dispute resolution. The case for mediation for resolving disputes in the oil and gas sector includes parties' control of the outcome; communication; confidentiality; the list is endless as parties have an incentive to settle because of time, less expensive and security.[70] A lot depends upon the nature of the international trade dispute in the oil and gas sector. The more complicated the matter, the more private meetings would be necessary to pave the ground for a joint meetings to ameliorate the disputes in issue.[71] The mediator's role as a neutral, trained and skilled expert to explore the determinants of a dispute is important, and although technical knowledge and understanding of the sector is advisable, it is not always necessary for the mediator to be an expert in the oil and gas industry provided the mediator is a good negotiator and have persuasive power to convince the parties for successful resolution.[72]

Settlement by Arbitration

Arbitration is widely used in the settlement of disputes in oil and gas industry. Several factors contribute to the use of arbitration for dispute resolution in international agreements in the petroleum industry including the fact that parties in the oil and gas relationship are characterized by long term agreement where success is highly dependent on cooperation. Arbitration has become the principal method of dispute resolution in the industry, especially where there are international contract spanning from many countries. Arbitration is an efficient tool for resolving trade disputes in the oil and gas sector between parties nationally and internationally. Arbitration is most commonly resorted to in cases involving commercial disputes, for instance, in the recent case of *Process and Industrial Developments Ltd v Federal Republic of Nigeria (P&ID).*[73] It is important for arbitrators to ensure that contracts entered into by the government are prepared by competent and experienced legal and other experts with impeccable degree. With respect to the above-stated case, three arbitration awards were made in favour of P&ID against the Federal government by a London tribunal on the 3rd of July 2014, 17th of July, 2015 and 31st January 2017[74] respectively. Upon conducting late investigation, the issue of fraud and bribery were raised thereafter the sum of $6.6 billion had been awarded against Nigeria which accumulated to $11 billion in 2021. Nigerians narrowly escaped huge debt that would have crumbled the economy if not for positive legal intervention.[75] Miraculously the Court quashed the judgment against P&ID and gave its verdict in favour of Nigeria on the 23rd of October, 2023.

7. Prospects of Arbitration

Notwithstanding the challenges facing arbitration and ADR in the oil and gas industry in Nigeria, quite a lot of prospects abound in the choice of arbitration in the settlement of disputes in the oil and gas sector. One of such prospects is the designation of Lagos State as the seat of Arbitration in international commercial arbitration for West Africa. By this, the difficulty that parties in oil and gas dispute might be thinking of as regards venue no longer poses a challenge. The designation of Lagos as the centre of Arbitration for West Africa by the International community was an effort to make available easy access, user friendly and fair financial terms for dispute resolution in Nigerian. Some other states are following suit. Rivers State has just established their Multi Door Court House which is a step in the right direction. The settlement of international trade disputes in the oil and gas sector calls for adequate attention. There is need for a specialized court to handle settlement of international trade disputes in the oil and gas sector. The justice sector needs to be transformed by training judges and legal practitioners to have the right attitude in the dispensation of justice in settlement of international trade disputes in the oil and gas sector. Also, the ratification and domestication of ICSID Convention is a welcome development in the enforcement of ICSID award. Nigeria ratified the International Centre for Settlement of Investment Dispute (ICSID) Convention as far back as August 23, 1965. The ICSID Convention has been implemented in Nigeria through the International Centre for Settlement of Investment Disputes (Enforcement of Award) Act.[76] The Act provides for the enforcement of ICSID award directly at the Supreme Court of Nigeria as a court of first instance. Disputes in the oil and gas industry are covered by the ICSID Convention as most disputes in oil and gas are purely investment disputes. This enables parties in the oil and gas to seek the enforcement of arbitral awards made in the oil

[68]N M Alexander, 'What's Law Got to Do with It? Mapping Modern Mediation Movements in Civil and Common Law Jurisdictions' (2001) 13(2) *Bond Law Review*, 5.
[69]Center for Effective Dispute Resolution (CEDR), *The Fourth Mediation Audit: A Survey of Commercial Mediator Attitude as and Experience* (London, 2010) 8.
[70] A Goodman & A Hammerton, *Mediation Advocacy*, (India: Universal Law Publishing Co PVT Ltd, 2010) xx1.
[71] S Avtar, *Law of Arbitration and Conciliation (including ADR Systems)* (7th edn, Eastern Book Company, Lucknow, 2006) 533.
[72] K N Nwosu, '*Critical Issues in Negotiation*' (2004) vol 1 (1) *Negotiation and Dispute Resolution Journal*, 1.
[73] [2019] EWHC, 2241 (Comm.).
[74] In 2017, the tribunal awarded damages to P&ID in the sum of $6.597 billion with interest at the rate of 7% starting from March 20, 2013.
[75] No. 21-7003 (D.C.Cir. 2022).
[76] Cap I 20 LFN 2004.

and gas industry directly from the Supreme Court. The Arbitration and Mediation Act is topnotch in the dispensation of justice in the commercial sector.

8. Recommendations

Intensive Continuous Training of Judges and Judicial Officers

The role that the justice sector plays in the ADR sector is imperative. There is an overwhelming need for court-connected ADR in the settlement of International Trade disputes in the oil and gas sector. Intensive training of Judges, Lawyers and judicial staff responsible for settlement of international trade disputes in the oil and gas sector should be mandatory. The training will be on a continuous basis by highly qualified personnel and world-class ADR Institutions. It is also needful to educate stakeholders in the oil and gas industry and the citizens on the various alternative dispute resolution mechanisms and its merits through conferences, seminars, lectures and symposia. This will go a long way in igniting interest, awareness and greater participation of citizens/would-be stakeholders in adopting varying modules of ADR in settling their conflicts. As obtained and practiced in the United Kingdom (UK), Judges appointed for international trade disputes in the oil and gas should be designated Commercial Court Judges. This, not only defines and earmarks them with specialty, but as well, delimits the kind of matters to be handled in their courts. Thus, over time, a system of localized and cost friendly ADR Procedure Rules would evolve.

Provision of Court -Connected ADR Centers

As can be gleaned, this study has shown justification for advocating for court-connected ADR in the settlement of commercial disputes in the oil and gas sector in Nigeria. Thus, the delay and exaggerated cost involved in the extant dispute resolution system (litigation), the need to overhaul the legal framework to support a more aggressive use of Court-connected ADR in the settlement of commercial disputes in the oil and gas sector, cannot be over-emphasized. It is therefore most imperative that a National Court-connected ADR Policy be formulated. As it were, there is currently no National Policy framework for Court-connected ADR in Nigeria except the local procedure practised in Lagos. The Federal and State Judiciary as well as other stakeholders especially the Nigerian Bar Association needs to fashion out and inculcate a Policy for implementing Court-connected ADR for settlement of commercial disputes in the oil and gas sector in Nigeria and Africa generally.

Overhaul of ADR institutions

As canvassed, selecting the appropriate arbitral institution for the settlement of disputes in the oil and gas sector is a crucial decision for parties involved in the dispute. It is essential to ensure that arbitral institutions are not only capable but also possess sufficient experience in administering ADR effectively and that, the Procedural Rules are not only familiar but such that instill confidence in the parties. The fact that the Centre in Nigeria is not operational is most unfortunate and undesirable. It is expected that once the Centre becomes operational, it would not only attract and increase the volume of International Commercial Arbitration to the Region but also, co-ordinate and assist the activities of existing Arbitral Institutions particularly among those within the region. Thus, rendering assistance in the conduct of ad-hoc arbitration particularly those held under the UNCITRAL Arbitration Rules and as well, ensuring the enforcement of Arbitral Awards. It is opined that the envisaged law will go a long way to boost economic activities.

Practice Direction to include Time Limit within which to conclude ADR

In all, the Time limit or life span for the conduct of ADR is very important. The study suggests a period of 6 months. Thus, Heads of courts should come up with Practice Direction which would stipulate a precise period for the Hearing and determination of the case. This is because, a quick dispensation of justice is the hallmark of ADR and an indeterminate ADR process is likely to be a huge challenge. To reiterate, ADR models provide an appropriate framework for solving disputes in the oil and gas sector. All in all, the opinion of this dissertation is that if the foregoing recommendations are adopted in the settlement of international trade disputes in the oil and gas sector, the much-needed symbiotic development of the economy and the Courts will be achieved. As it were, Arbitration, Mediation, Conciliation, Expert Determination as an ADR adjudicatory Model and the Courts as an extant Institutional Models share similarities in the adjudication process.