PROBLEMS OF LITIGATION IN SETTLEMENT OF MARITIME DISPUTES FOR NIGERIA TODAY: THE PREFERENCE FOR ARBITRATION[1]

Abstract

This study examines the problems of litigation in settlement of disputes in maritime industry in Nigeria, which sector is vital to the nation's economy. It also investigates the prospects and viability of arbitration technique as an alternative. It is discovered that although litigation has been the most common mechanism for the resolution of disputes including maritime, yet delays in determination of cases, lack of confidentiality, corruption, high pecuniary cost in some cases, and some other problems often lead parties to advert to arbitration. The paper argues that arbitration is preferable to litigation as a result of parties' autonomy to choose their arbitrators, the applicable laws, and the forum of arbitration. Arbitration too preserves friendship, confidentiality and trade secrets. Above all, the study advocates for arbitration technique due to its speed and win-win result. The paper recommends a proper and sufficient legislative framework for settlement of maritime disputes in and for Nigeria.

Key words: *Maritime arbitration, Litigation, Settlement of Disputes, Law, Nigeria*

1. Preamble

Maritime activities constitute a vital sector of the Nigerian economy. Having a coastline of approximately eight hundred and fifty three kilometres, Nigerian maritime infrastructure and facilities also include ports, and inland waterways of about three thousand kilometres. [2] Ojo states that 'Nigeria is not only a littoral state but also blessed with rich internal waterways. Maritime activities in Nigeria could be seen as a major life line of the nation's developing economy. Nigeria's maritime industry accounts for about 120 million tones mile (about 0.13% of the world total) and yet is already playing a very significant role in the nation's economy, second only to petroleum. Apart from being a major foreign exchange earner, the maritime industry of Nigeria should generate substantial employment opportunities and boost national income and Gross Domestic Product (GDP).[3]

Nigerian port, particularly, is an important source of nation's revenue, and given the spate of activities within the sector including that relating to incoming and outgoing cargo, maritime disputes are bound to arise. Therefore, maritime transactions and consequently maritime disputes are an ever present feature of the Nigerian commercial landscape'.[4] The Dollar investments in free trade zones are also bound to increase the level of commercial interactions and potentials for disputes. More still, it is not unusual for parties to maritime contract such as a towage agreement or vessel charter to have a dispute. The issue is when such dispute arises, how best is it to be resolved? Generally, the formal mechanism for resolving maritime disputes in Nigeria has been litigation as recourse has often been made to the courts. Very rarely is arbitration considered. As time progressed and people began to get enlightened through education, there was an increasing need to resolve disputes through alternative mechanisms

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[2] A Rhodes-vivour, 'Maritime Arbitration in Lagos' (2007) <htlp://www.drvlawplace.com/media/ maritimearbitratio n>accessed on 31st July, 2013.

[3] J CAnishere, 'Maritime Administration in Nigeria (2) Developing Local Capacity in the Maritime Industry in Nigeria' (2012) <h"ltp://www. shipsports.org/detailadmiralty> accessed on 14"[1] August, 2013.

[4] 'Comment on Mrs Adcdoym Rhodes- vivour's Paper Titled: Arbitration in the Resolution of Maritime Disputes' A Paper Presented at the 11th Maritime Seminar for Judges on the 1st of June, 2010. *A Compilation of Ministry of Justice Library,* Awka p. 3.

such as arbitration. This paper seeks to delineate reasons why litigation is not to the best interest of parties in maritime contracts. The study sees arbitration as a viable and preferential alternative.

2. Nature and Causes of Maritime Disputes

Disputes are inevitable in any societal context. Human beings are bound to disagree on and at almost every point in life, as long as they interact.[5] Man has been described as a gregarious animal and thus disputes must occur in the course of co-existence and interactions in daily activities. This is also true in the maritime sector. Just as there are varying types of transactions, so are myriad of parties involved in the maritime industry. These include ship owners, charterers, the crew, insurance companies, port administrators, dock workers, inspection agents, bankers, sellers and buyers. Thus, the many contractual relationships generated thereby are potential sources of disputes in the sector.[6] Maritime disputes cover a wide range of areas such as charter parties, bills of lading, sale of ships, ship financing, ship building contracts and contracts of marine insurance. Such disputes usually span oceans and are international in nature.[7] There are also contracts of affreighment under which substantial exporter or importer may secure the agreement of a company for the supply of a number of ships to carry cargo over a period of time.

The first positive step to the resolution of maritime as of any disputes is to determine their cause(s). There are three possible causes of maritime disputes. The first arises over disputed sovereignty over land. Maritime disputes are common where countries compete over inhabited and uninhabited Islands. Maritime disputes also involve the question of sovereignty over certain islands. Two countries can claim the same Island or the same area of mainland as in the case between Nigeria and Cameroon. Cameroon had taken Nigeria to the International Court of Justice (ICJ) in 1994 over a dispute relating essentially to the question of sovereignty over the Bakassi Peninsula,[8] which it claimed was in part under military occupation of Nigeria. Cameroon extended the subject of the dispute to include the question of sovereignty over Cameroonian territory in the area of the Lake Chad and the frontier between Cameroon and Nigeria from Lake Chad to the Sea. 1CJ decided on 10th October 2002 that sovereignty over the Bakassi Peninsula lies with Cameroon and that the boundary is delimited by the Anglo German agreement of March 1913. Maritime disputes are therefore common where countries compete over inhabited and uninhabited islands. Such disputed areas may often contain important natural resources, such as mineral resources.

Again, dispute may result from overlapping entitlements to maritime rights and jurisdictions. Delimitation of maritime boundaries has for a long time become a lively issue because of the establishment by states of economic rights over areas of the sea. In recent years, the discovery of large offshore hydro-carbon reserves has aroused keener interest in maritime delimitation.[9] The problem has, therefore, centred on the delimitation of offshore jurisdiction between two or more opposite or adjacent states with competing claims, especially, if petroleum deposits straddle their border. The knowledge or the perception of significant petroleum reserves and

[5] K. Alna, "The Multi-door *Court* House Concept: a Silent Revolution iti Legal Practice' (June 2008) 6 (1) *NBLPJ,*
[6] A Rhodes- Vivour, The Agreement to Arbitrate- A Primary Tool for the Resolution of Maritime Disputes' (2008) <htlp://www.drvlawplace.com/media/AGREEMENT- TO-ARBITRATE.pdf> accessed on 24th July, 2013.
[7] A Rhodes-vivour,' Arbitration in the Resolution of Maritime Disputes" *op cit.*
[8] H V Lukong, *The* (*Cameroon-Nigeria Border Dispute Management and Resolution 1981-2011* (Cameroon: Langaa Research & Publishing Common Initiative Group, 2011) p. 88.
[9] D Anderson. 'Methods of Resolving Maritime Boundary Disputes' http://www.chathamhouse.org/sites accessed on 3 1st July 2013.

other mineral resources or presence of fishery resources or other economic interests in the disputed area, or even access to the sea or water has been a major factor that has made the resolution of the disputes more difficult. This is also the case between Nigeria and Cameroon. Cameroon took Nigeria to the International Court of Justice challenging not only the land, but also the maritime boundaries between the two adjacent states. This problem had been best explained by Asiwaju in the following words:

> What has rendered the coastal and maritime extensions of the Nigeria/Cameroon border spectacularly "troublesome" is the status of the areas as the economic underbellies of the two adjacent states. The matter therefore is the location of the hydrocarbon deposits across undefined boundaries, not just between Nigeria and Cameroon, but also between each of them and other respective states sharing the larger oil-rich region of the Gulf of Guinea, such as Equatorial-Guinea, Gabon as well as Sao Tome and Principe.[10]

More still, some writers have traced the cause of maritime disputes to colonialism. Falana, opined that the contemporary boundary dispute that exists between Nigeria and Cameroon particularly over the ownership and control of Bakassi Peninsula can be traced primarily to colonialism, the scramble for African territories and the creation of artificial boundaries in Africa. There are three ways in which those who drew borders created problems. First, they gave territories to one group ignoring the fact that another group had already claimed the same territory. Second, they drew boundary lines, splitting ethnic (or religious or linguistic) groups into different countries, frustrating national ambitions of various groups and creating unrest in the countries formed. Third, they combined into a single country, groups that wanted independence. Some scholars posited that the results of artificial boundaries can be disastrous in that artificial borders increase the motivation to safeguard or advance nationalist agenda at the expense of economic and political development.[11] The resultant effect of this artificial boundaries creation has been constant conflicts, legal challenges to boundary demarcation and several other cartography related clashes. The ethnocentric survey of Nigerian international boundaries would reveal that several of the ethnic groups spilled over to Nigerian neighbouring states of Republic of Benin where you find a good presence of Yoruba on the Southwest and Hausa in the Northwest as in Niger, Chad and Cameroon respectively. These borders were drawn essentially according to the geopolitical, economic and administrative interests of the colonial powers, often taken into account at a global scale.[12]

Yet, the case of the boundary between Nigeria and Cameroon in the eastern part of the country has a more complex dimension. After the Treaty of Versailles in 1919, the German territory of Cameroon was divided between the French and the British under the League of Nations mandate, with the French taking a larger portion of the territory. The British mandate comprised Northern and Southern Cameroon, which were ruled directly from Nigeria though they were not legally and politically speaking, territorial part of Nigeria. The ownership of the territory continued to generate controversies between Nigeria and Cameroon for several years that followed until 1994 when Cameroon approached the International Court of Justice on the dispute and requested for a ruling relating essentially to the question of sovereignty over the

[10] A I Ashvaju, 'The Bakassi Peninsula Crisis; An Alternative to War and Litigation" in C II Schoffield *et al,* (eds) *Boundaries and Energ v: Problems and Prospects* (Great Britain: Kluwer Law International, 1998) p. 33.
[11] *Ibid.*
[12] F Falana, 'Nigeria: Bakassi Peninsula-Legal Dimensions of Self Determination Threat' *op cit.*

Bakassi Peninsula which Cameroon declared was under the control of Nigeria.[13] The basis for the settlement of the Bakassi Peninsula dispute between Nigeria and Cameroon is the October 10, 2002 judgement by the ICJ which awarded the ownership and conferred sovereignty over the disputed territory to Cameroon.

3. Challenges of Settlement of Maritime Disputes by Litigation

The most common formal mechanism for resolving disputes till recent times has been litigation. Litigation is the process of carrying on a law suit.[14] It has been defined as a legal action including all the proceedings therein. It means action, cause or matter in courts of law.[15] The history of litigation has been one of adversarial dispute resolution, of a win-lose process. With this process it is rare to understand the underlying motives behind conflicts. Litigation involves the presentation of percipient and expert witnesses either for deposition and/or trial. Globally, litigation is gradually giving way to alternative dispute resolution techniques such as negotiation, conciliation, mediation and arbitration.

In Nigeria, maritime law falls within the exclusive legislative competence of the federal government and original jurisdiction to administer same is vested in the Federal High Court to the exclusion of all other courts.[16] In exercising its admiralty jurisdiction, the Federal High Court is involved in the adjudication of two types of causes, namely, action *in personam* and action *in rem.* The action *in personam* is an action against persons who are usually the owners of the ship or vessel that gave rise to the cause of action while the action *in rem* is an action against a "*res"* or property which is usually the vessel itself. The types of claims which may be heard and determined by the court are set out in the Admiralty Jurisdiction Act. The claims are classified as proprietary claims, maritime liens and general or statutory liens.[17] The filing of court process to commence a maritime action is governed by the provisions of the Admiralty Jurisdiction Act,[18] the Admiralty Jurisdiction Procedural Rules (AJRP)[19] and Federal High Court Civil Procedure Rules.[20]

It seems that litigation is not the best alternative for resolving a maritime dispute as its shortfalls are many. Litigation, in our view, ought to be the last resort in resolving maritime disputes. In spite of some advantages, litigation is not without perceived flaws. Procedural problems in the way of litigants in their efforts to have expeditious disposal of their maritime matters are numerous. In Nigeria, litigations involving shippers and providers of shipping services have always been long drawn and, sometimes, inclusive, leaving either the plaintiff or the defendant and even both, on some occasions, feeling shortchanged.[21] There are instances where vessels which have been arrested at the instance of a shipper are allowed to stay at anchor for unduly long time. At the time the matter is resolved, the ships may have become so dilapidated that

[13] F Price, 'The Bakassi Peninsular: The Border Dispute between Nigeria and Cameroon' <http://www.american.edu/ Ted/ice/Nigeria-cam> accessed on 4Ul August, 2013.
[14] ABA Gumel, 'Trends in the Adjudication of Maritime Cases: The Experience of a Trial Court Judge" (2003)1 No 1 NJML, 58.
[15] G C Nwakoby & F Anyogu, 'Institutionalizing Alternative Dispute Resolution Mechanism in the Nigerian Legal System' (2004) 4 No. 1 *UNIZIK.LJ.* 147.
[16] Federal High Court Act Cap F12 Laws of the Federation of Nigeria 2004 s. 7 (1) (g).
[17] Admiralty Jurisdiction Act Cap A15 Laws of the Federation of Nigeria 2004 s. 7 (1) (g).
[18] 2004.
[19] Admiralty Jurisdiction Procedural Rules 2011.
[20] Federal High Court (Civil Procedure) Rules 2009.
[21]L. Adedeji "Dispute Resolution and the Practice of Arbitration[1] <http:/www .thelawyerschronicles.com/index.php?option=coin> accessed on 12th November, 2013.

they could be classified as scraps. Such is the convoluted process of admiralty litigation that many shippers have to abandon their maritime claims.

Another problem is traceable to interlocutory applications. The ultimate effect of interlocutory applications is the unnecessary delays and frustration of litigants which the Rules[22] and practice in maritime matters occasion. This situation is illustrated by the case *of Maersk & anor v Adidide Investment Limited & anor*[23] which interlocutory appeals alone went up to Supreme Court with a final determination on the interlocutory issues after seven years. The substantive action was commenced in January 1996. The appeals and counter appeals arising from the interlocutory decisions of the trial court and the Court of Appeal ended at the Supreme Court in April 2003. It is not that the court and the litigants have not identified the problems in the way of expeditious disposal of admiralty matters; it is not also the fact that solutions have not been presented to these problems; but the fact is that solutions are inadequate and the problems still exist in these areas. Procedural problems continue to hunt our judicial process and counsel have not helped matters too. Uwais, JSC (as he then was) vividly captured this albatross in *Amadi* v *NNPC* thus:

> The chequered history of this case once more brings to light the dilatory effect of interlocutory appeals on the substantive suit between the parties. The action in this case was brought on the 29th day of April 1987... the final judgement on the interlocutory appeal is delivered today by this court. It has taken thirteen years for the case to reach this stage... the case is to be sent back to the High Court to be determined hopefully on the merits after a delay of 13 years... I believe that counsel owe it as duty to the court to help reduce the period of delay in determining cases in our courts by avoiding unnecessary preliminary objections, as the one here, so that the adage of "Justice delayed is justice denied" may cease to apply to the proceeding in our courts.[24]

More still, litigation by its nature is a cause for anxiety to those concerned with it whether as lawyers or as parties. This is primarily because of the uncertainties on the outcome of litigation. In addition to the general uncertainty on the outcome are worries on the cost of protracted litigation, the consequences of a judgment against a party and the reliability of witnesses.[25] The expenses, inconvenience and delay associated with litigation can be disproportionate to the amount in dispute. Moreover, litigation is unlikely to preserve the business relationship. Its end product is rancour and enmity. What ought to resolve a dispute and put the parties together will only turn out to make them perpetual enemies, worse than they were before the court proceeding. It is obvious that litigation is not the best option for resolving a maritime dispute.

4. The Preference for Arbitration

It goes without saying that culture of litigation has had serious negative impact on the development and competitiveness of the Nigerian maritime industry due to delays and other disadvantages. A veritable alternative is arbitration which is well entrenched in settling maritime disputes in the advanced jurisdictions of the world and the reason is not far-fetched.

[22] Admiralty Jurisdiction Procedural Rules 2009 *op cit.* Or. 16 r. 2 & 3.
[23] (2002)1 SC vol. II 157
[24] [2000] l0 NWLR (pt 676)76
[25] F Ajogwu, *Commercial Arbitration in Nigeria: Law & Practice* (Lagos: Centre for Commercial Lav. Development, 2009) p. I.

Arbitration is the settlement of disputes between parties who agree not to go before the court but to accept the decision of a panel of their choice as final, in a place of their choice, usually subject to laws agreed upon in advance and usually under rules which avoid much of the formalities, proof and procedure required by the courts.[26] Arbitration has emerged as an effective and efficient system of dispute resolution. Arbitration is different from the courts. Its key theme is party autonomy. Parties who are free to conduct their affairs by agreement are by agreement also free to opt out of the jurisdiction of the courts and to decide before whom to have any dispute resolved.[27]

Maritime business by its very nature is capital intensive and time-related.[28] The general attitude therefore, is to settle disputes amicably and take into account commercial considerations such as desire to maintain the existing trading arrangement and to avoid the expense and delay involved in going to court. Maritime arbitration is simply the process of resolving maritime disputes through arbitration.[29] The major maritime activity that often leads to disputes to be resolved by arbitration is the carriage of goods by sea.[30] The other maritime activities under which disputes can be settled by arbitration include the financing, building, construction, sale, acquisition, or repair of ships; the deployment of ships; fishing; salvage; charter parties; damage to goods and liability therefor; damage to ship; lay days and demurrage including damage resulting from late entry to late access to the wharf, force majeure and maritime insurance.[31]

Many shipping disputes are referred to arbitrations before arbitrators who will have particular experience (commercial or legal) in the areas of dispute. In any case, arbitration clauses will normally be found in many shipping contracts such as charter parties and bills of lading, as well as in ship sale, ship building and salvage contracts to mention a few.

Nigeria's maritime industry records more litigation than arbitration or ADR[32] in settlement of maritime disputes.[33] The reason for this is basically lack of an arbitration and ADR culture, while opportunities for employing arbitration in settling maritime disputes abound. These opportunities have not been exploited.[34] The maritime industry is such that all the players are dependent on one another for the business to progress. One party buys the consignment; another takes charge of the shipment and delivery at the port of discharge; whilst another party clears the consignment from the port of discharge; and yet another delivers the consignment finally to the consignee. Even the vessel used for the shipment of the consignment is more often than not a product of a charter who may again lure the vessel to a third party.[35] It is obvious or

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[26] A Rhodes-vivour. 'Arbitration in the Resolution of Maritime Disputes' (2010) <http://www.drvlavvplace.ami/media/arbitration.m> accessed on 31s' July, 2013.

[27] K N Chatiirevid 'Arbitration, Arbitrabilitv and Privacy' in A k Bansal (ed) *Arbitration: Procedure and Practice* (India Lexis Nexis, 2009) p. 17.

[28] 1 Wilson. 'Policy Paper tor the Application of" ADR in the Maritime Industry in Nigeria' (July- October *2002) 2 JMLN,* 19.

[29] A Bhodes-vivour, "Arbitration in the Resolution of Maritime Disputes" *op cit.*

[30] *Ibid.*

[31] F Ajogmj, 'Challenge and Enforcement of Maritime Arbitration Awards "(2012) <httpy/kennapaj1ner.s.com/upload accessed on 31st July, 2013

[32] Alternative Dispute Resolution (ADR).

[33] A Bamgboye, 'Maritime Industry: ADR to Rescue" <http:/Avww.dailylmsl.com.ng/index.php/otIiersect! oiis/la\v-accesscd on 29th August, 2013.

[34] A Biu, 'Shippers Council - Capable of Regulating Maritime[1] (2012) <hltp://ww\v. Lhotidenews-online.com/2012/4/ 12/shippers%E2> accessed on 7th February, 2013.

[35] S Ogwemoh, "Imperative of a Nigerian Maritime Organisation' <http://\vw\v'.nigerdeltacongress.com/arUcle.s/in>accessed on 31s[1] July 2013.

glaring that the various players in the maritime industry relate at some point in the ordinary course of business and this relationship gives rise disputes and disagreements. The problem however, has always been that of identifying the appropriate dispute resolution mechanism to apply in resolving the disagreements.

Arbitration is recommended where confidentiality must be preserved, where the parties wish to avoid delays, expense and publicity of a court trial, and where specialized expertise of the tribunal will assist the parties in resolving their dispute. Arbitration may be contractually agreed by the parties in advance of the dispute, ordered by a court in a pending lawsuit, or initiated voluntarily after the dispute has arisen. Arbitration is seen as a more effective means to resolve disputes than litigation, not least because it is confidential in nature and much more informal than courtroom proceedings. Arbitration is particularly useful in technical cases, or those involving specialized knowledge, such as maritime disputes. Most importantly, parties can choose their own arbitrator(s) unlike the court system, where judges are assigned to the case. In arbitration, the parties choose a decision maker who has experience in the subject matter of the dispute. In contrast to courtroom proceedings, in arbitration the parties can agree on the location and schedule for the hearing, the manner of obtaining and using evidence, the use of live testimony or declarations, the confidentiality of proprietary information, the identity and number of arbitrators, and the scope of issues to be arbitrated. The arbitral tribunal's decision can be final (binding) or not final (non-binding), depending on the rules of the arbitration, which are usually set in advance by the parties themselves, by the court, or by law or contract. The arbitral tribunal may spell out in writing the reasons for a particular decision, but often it gives only the decision. That decision, if properly filed with a court, can have the same weight and effect as a formal court judgment. The fact that this method of dispute resolution allows for the relatively speedy resolution of disputes in a confidential and informal manner makes it perfectly suited to maritime disputes. Indeed, the development of the maritime arbitration market has been hinged on respect of the proceedings, encouragement by the judicial system and the enforcement of the awards by the vast majority of seafaring nations.[36]

5. Conclusion

This study has argued that arbitration rather than litigation should be adopted in the settlement of maritime disputes. Arbitration enables resolution of disputes by persons with specialized skills, experience and training. Much of maritime arbitration is no doubt international in nature. Issues are often raised about the independence of the judiciary, the delays associated with judicial proceedings, unfamiliarity with the local law, and anxiety on how to relate within an unfamiliar legal system and culture. Concerns could also arise on the effect of the doctrine of sovereign immunity particularly as in most developing countries a large proportion of the larger maritime contracts would be with the states either directly or indirectly. Although Nigerian legal regime is supportive of arbitration, Nigeria is yet to be recognized as a favourable seat for international maritime arbitration. In spite of the existence of Maritime Arbitrators Association in Nigeria, the immense benefits of settling maritime disputes through arbitration still elude the industry due to the absence of special rules. It is therefore strongly suggested that the making of these rules has become urgent.

Arguing for the use of arbitration in the settlement of maritime disputes does not suggest a total disdain for litigation. After all, the role of the courts in recognition and enforcement of maritime arbitration awards cannot be gainsaid. The study also does not disregard the use of other forms

[36]G. d'Angelo, *Introduction to the Law of Admiralty*, 2003.

of alternative dispute resolution (ADR) mechanisms. They may even be quicker in the case of parties who are men of honour given the fact that the outcomes of such resolution methods are not necessarily legally binding on the parties. At this event, arbitration surely becomes the necessary and happy win-win via medium approach between litigation and other forms of ADR.