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CORPORATE GOVERNANCE, COMMERCIAL ARBITRATION AND RESOLUTION OF CORPORATE DISPUTES IN NIGERIA: LOSSES OR LESSONS?

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Abstract

There is no doubt that companies do have conflicts with other companies or internal conflicts within the company. In essence, conflict resolution is inevitable in corporate governance and arbitration has proven to be one of the means through which it can be resolved. This paper seeks to evaluate the importance and efficiency of Alternative Dispute Resolution (ADR) mechanisms, particularly arbitration in corporate governance and in solving corporate governance disputes, its growth and success rate compared to the traditional court systems. The paper further assesses the capability and effectiveness of the system in, and against corporate disputes. It also identifies its weaknesses as a whole and within the framework for corporate governance, while identifying and recommending international best practices for its use in resolving corporate governance disputes in Nigeria when juxtaposed with other jurisdictions. In addition, the paper stresses the importance of having a convenient business dispute resolution mechanism in order for businesses to thrive even in times of adversity, while also maintaining a cordial relationship, important to corporate governance in order to achieve the goals and objectives of the investors.

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The paper adopts the doctrinal methodology of research through analysis of opinion of authors, case laws, and statutory provisions relating to the subject, which are examined for the purpose of further analysis and contribution to existing body of knowledge. The paper recommends among others the holistic adoption of arbitration in resolving corporate governance from litigation process as it is done in sports disputes by organisations such as FIFA in order to maximise the gains arbitration brings to the commercial investment.

Keywords: Alternative Dispute Resolution (ADR), Corporate Governance, Corporate Governance disputes, Arbitration, Dispute.

1.0 Introduction

The protection of existing cordial relationships in the face of a dispute especially between the members of the board is a very important issue in corporate governance. Over the years, multinationals and big corporations across various sectors have sworn by the efficiency of alternative dispute resolutions, particularly arbitration in corporate governance dispute resolution. Private enforcement by shareholders has also been regarded as a vital catalyst in improving board accountability.

In this paper, we explore the role and functions of alternative dispute resolution, particularly arbitration in resolving disputes arising from corporate governance. The first part defines the relevant terms, while the second part examines the legal framework for arbitration within and outside Nigeria. The third part examines the legal framework for corporate governance within and outside Nigeria while the forth part discusses corporate governance and disputes, its scope, the role of arbitration in resolving corporate disputes, arbitration as a tool for resolving corporate disputes in other jurisdictions and its efficacy in resolving corporate governance disputes in Nigeria and beyond. The paper

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concludes by recommending reforms for improving the arbitral system as it applies to resolution of corporate governance disputes.

2.0 Definition of Terms

2.1 Definition of Arbitration

Arbitration refers to an alternative dispute resolution method where the parties in dispute agree to have their case heard by a qualified arbitrator out of court.[1] Decisions reached through arbitration are binding just like a court case is and pursuing a claim through arbitration precludes you from also raising it in the traditional court system. Arbitration is used because it is often much less expensive than litigation due to its less stringent procedural requirements.[2]

Arbitration can also be defined as a dispute resolution process agreed between parties in which the dispute is submitted to one or more arbitrators who issue an award.[3] It is an alternative dispute resolution mechanism that allows parties resolve their dispute by submitting such dispute to an independent arbitrator or panel of arbitrators who hears both sides, reviews the merits of the case, and makes a legally binding decision, known as an award about the dispute. It should be noted that arbitration can only take place if both parties have consented to it, either at the inception of the contractual relationship or when the dispute occurs.[4]

Arbitration has been aptly defined as a mechanism for the resolution of disputes which takes place in private pursuant to an agreement between

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[1] Cornell Law School, Arbitration, (June 2022), available at <https://www.law.cornell.edu/wex/arbitration>, accessed 6 October 2022.

[2] *Ibid*

[3] International Arbitration Information by Aceris Law LLC, 'Definition of Arbitration' , (Aceris Law LLC, February 18, 2018) , available at <https://www.international-arbitration-attorney.com/definition-of-arbitration/>, accessed 6 October, 2022.

[4] Termly Legal Dictionary, 'Arbitration', available at < https://termly.io/legal-dictionary/arbitration/>, accessed 6 October. 2022.

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two or more parties under which parties agree to be bound by the decision of the Arbitrators.[5]

In addition, arbitration is a form of alternative dispute resolution (ADR) where the parties to a dispute refer it to one or more persons called "arbiters" by whose decision the "award" they agree to be bound.[6] It is a settlement technique in which a third neutral party reviews the case of disputants, decides on the basis of their claims and decision that is legally binding for both sides.[7] Arbitration can either be voluntary or mandatory. It is voluntary where the parties voluntarily submit the dispute to arbitrators for determination. It could however be mandatory where the extant law compels the parties to resort to arbitration in any case of dispute.[8]

The Arbitration and Conciliation Act[9] provides for a unified legal framework for the fair and efficient settlement of commercial disputes by arbitration and conciliation; and to make the Convention on the Recognition and Enforcement of Arbitral Awards (New York Convention) applicable to any award made in Nigeria or in any contracting State arising out of international commercial arbitration.

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[5]Ezeanya Ann Ugonna, 'Legal Framework of Arbitration In Nigeria', Professional Ethics and Skills, pp 2.

[6] Professor Grant Jones, 'ADR glossary: alternative dispute resolution, arbitration, expert determination & mediation/conciliation' available at < https://gmjones.org/adr_glossary.php> accessed 28 October, 2022.

[7] All Answers ltd, 'Arbitration Agreement and Doctrine of Separability' (Lawteacher.net, October 2022) available at <https://www.lawteacher.net/free-law-essays/contract-law/arbitration-agreement-and-doctrine-of-separability-contract-law-essay.php?vref=1> accessed 28 October, 2022.

[8] Jason Gordon, 'Voluntary and Mandatory Arbitration Explained' available at < https://thebusinessprofessor.com/en_US/criminal-civil-law/statutorily-mandated-arbitration> accessed 28, October 2022. The provision of section 107 of the Pension Reform Act, 2014 uses the word "may" which does not make arbitration under the Act compulsory but voluntary. Hence, arbitration is largely voluntary in Nigeria. Unless the UNCITRAL Model Arbitration Clause for contract which mandates dispute arising out of the contract to be settled by arbitration.

[9] Cap. A18 LFN 2004.

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2.2 Meaning of Corporate Governance

Corporate governance is the institutional framework that regulates the division and exercise of power in the corporation.[10] It is the system of rules, practices, and processes by which a company is directed and controlled.[11] Corporate governance essentially involves balancing the interests of a company's many stakeholders, such as shareholders, senior management executives, customers, suppliers, financiers, the government, and the community.[12]

It can also be defined as the set of rules and mechanisms governing the behavior of a firm which ensures that shareholders, investors and creditors are protected from abuse by managers and large stakeholders and have sufficient incentive to supply the firm with finance and credit.[13]

It should be noted that corporate governance is different from the daily operational decisions and activities that are executed by the management of an organization. Corporate governance is the domain of the Board of Directors, as opposed to its management team such as the Chief Executive Officer and other C-suite executives.[14] Corporate governance refers to the

[10]Science Direct, 'Corporate Governance' available at <https://www.sciencedirect.com/topics/social-sciences/corporate-governance> accessed 6 October, 2022.

[11] Chartered Governance Institute UK & Ireland, 'What is corporate governance?' available at <https://www.cgi.org.uk/about-us/policy/what-is-corporate-governance#:-:text=corporate%20governance%20is20the%20system,accountability%2C%20and%20who%20makes%20decisions.> accessed 28 October, 2022.

[12] James Chen, 'Corporate Governance Definition: How it works, principles and examples', (Investopedia, 18 August, 2022) available at <https://www.investopedia.com/terms/c/corporategovernance.asp>accessed 7 October, 2022.

[13]Iraj Hashi, 'The Legal Framework for Effective Corporate Governance: Comparative Analysis of Provisions in Selected Transition Economies', [2003] 268, Studies & Analyses, pp 6

[14]Kyle Peterdy 'Corporate Governance', available at <https://corporatefinanceinstitute.com/resources/knowledge/other/corporate-governance/> assessed 7 October, 2022.

mechanism of internal and external controls of the actions and inactions of the organs of a company in a manner that ensures compliance with public policy, the interest of stakeholders, and the avoidance of corporate failure/corporate collapse and abuse. The basis for corporate governance includes corporate transparency, accountability, credibility, integrity, and trust.

There are quite a number of legal frameworks for the various sectors of the Nigerian economy as far as codes of corporate governance are concerned. They include the Nigerian Code of Corporate Governance 2018, the Securities and Exchange Commission Code of Corporate Governance for Public Companies 2019. For the banking sector, the Code of Corporate Governance for Banks and Discount Houses issued by the Central Bank of Nigeria in 2014, as well as the Insurance sector housed in the National Insurance Commission Code of Corporate Governance for the Insurance sector in 2009. In the same vein, the pension sector has the Pension Fund Administrators Code of Corporate Governance issued by PENCOM. Code of Corporate Governance for Finance Companies in Nigeria (CCGFCN) was issued by the CBN and came into force on April 1, 2019. Also, we have the Nigerian Communications Commission Code of Corporate Governance for the Telecommunication Industry. Time will not permit us to delve into the details of the provisions of the above-mentioned codes in order to narrow it to the essence of this lecture which is its roles in the training of lawyers in the 21st Century.

3.0 Legal Framework of Arbitration within and outside Nigeria

Arbitrations are either national or domestic in nature. They are often classified as either national or international due to the nature of the dispute, the nationality of the parties, and the place of holding the arbitration tribunal. An arbitral process is considered to be international when, according to Article1 (3) of the UNCITRAL Model Law, it falls within the following three ambits:

i. If the parties to the arbitration have at the time of completion of the agreement, their places of business in different places.

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ii. If one of the following places is situated outside the state in which the parties have their places of business.

(a) The place of arbitration if determined in or pursuant to the arbitration agreement

(b) Any place where a substantial part of the obligation the commercial relationship is to be performed or the place with which the subject matter of the dispute is more closely connected. iii. The parties have expressly agreed that the subject matter of the arbitration agreement relates to more than one country.[15] The resolution of disputes by arbitration under international commercial contracts is widely conducted under the auspices of several major international institutions and rule-making bodies. The most popular are;

i. The International Chamber of Commerce (ICC),
ii. The International Centre for Dispute Resolution (ICDR),
iii. The International Branch of the American Arbitration Association (AAA),
iv. The London Court of International Arbitration (LCIA),
v. Hong Kong International Arbitration Centre.[16]

International arbitration is often affected by several factors unknown to domestic arbitration, with the major one being the multiplicity of laws. Most times, different laws are used in an international arbitration process while in domestic arbitration only the national law is put into consideration. Also, in international Arbitration, the chairman of the arbitration tribunal may come from a completely different country from the parties.[17]

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[15]Wuraola O. Durosaro, 'The Role of Arbitration in International Commercial Disputes', [2014] 1 *International Journal of Humanities Social Sciences and Education*, pp 2.

[16]Maniruzzaman, A. F. M., 'Modernization of International Arbitration Law in the Age of Globalization: A Bangladesh Perspective [2004] *International Company and Commercial Law Review*', No. 5, pp 132.

[17]Yu H & Molife P, 'The Impact of National Law Elements on international Commercial Arbitration. *International Arbitration Law Review'*, [2001], 4 (2), pp. 23-28.

3.1 Arbitration in Nigeria

The Nigerian Arbitration law is largely derived from statutes both foreign and local. The foreign statutes include:

a. The UNCITRAL (United Nations Commission on International Trade Law) Model Law:

The approval of this law became pertinent in order to liberalize international commercial arbitration by limiting the role of national courts and allowing the parties freedom to choose how their disputes should be determined. It was also to provide a framework for the conduct of international commercial arbitration so that in the event of the parties being unable to agree on procedural matters, the arbitration would nevertheless be capable of being completed. The law has the advantage because it is not a treaty but a model law that may be adopted with necessary amendments to suit each jurisdiction. Furthermore, it is limited to disputes relating to international contracts leaving each nation which adopts it still free to make provisions for purely domestic arbitration. Lastly, it was made to aid the enforceability of awards and to clarify certain controversial practical issues. The UNCITRAL Arbitration Rules The major arbitral institutions have their own rules which are up-to-date for resolution of disputes contained in the UNCITRAL Arbitration Rules.[18]

b. **The UNCITRAL Arbitration Rules;** and

c. The New York Convention.

While the local statute is **The Arbitration and Conciliation Act, 1988**

3.2 The Arbitration and Conciliation Act 1988

The Arbitration and Conciliation Act, 1988 is currently the applicable law on arbitration and conciliation throughout the Federation of Nigeria

[18] Ezeanya Ann Ugonna, 'Legal Framework of Arbitration in Nigeria', Professional Ethics and Skills, pp 3.

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except in Lagos state and Rivers State.[19] It provides a unified legal framework for the fair and efficient settlement of domestic and international commercial disputes in Nigeria and where the rules of arbitration is in conflict with the provision of the this Act, the provision of this Act shall prevail.[20]

In Lagos State, arbitration is regulated by the Lagos State Arbitration Law 2009. Section 2 of this Law places all arbitration in the state under the law except where parties agree expressly that another arbitration law shall govern their arbitral proceeding.

Among other provisions, the Arbitration and Conciliation Act (ACA) mandates equal treatment of the parties,[21] the arbitration award must be in writing and signed by the arbitrators, with reasons stated for the absence of any signature by the non-signing arbitrator. It must also state the place and date of the award.[22] The Act further provides that domestic arbitration must be conducted under the Arbitration Rules contained in the First Schedule to the ACA.[23] Also, it does not restrict party representation to legal practitioners licensed to practice law in Nigeria.[24] It however advised that the appointing authority in appointing an arbitrator, should take into account the nationality of the parties to the arbitration.[25] The Arbitration and Conciliation Act (ACA) does not stipulate the number, and qualifications of arbitrators, giving parties the right to choose arbitrators of their choice. In the absence of an agreement as to the number, the default number of arbitrators is three for arbitration to which the ACA applies. Regarding nationality, the ACA does not stipulate that

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[19] Rivers State Arbitration Law 2019 (Aluko & Oyebode, December 2019) <https://www.aluko-oyebode.com/insights/emergency-arbitrator-and-the-new-rivers-state-arbitration-law-2019-law/> accessed 9 march, 2023.

[20] s. 1, First schedule, of the Arbitration and Conciliation Act (ACA)

[21] s. 14 of the Arbitration and Conciliation Act (ACA).

[22] *Ibid*. s. 26

[23] *Ibid*. s. 1 (n 20)

[24] *Ibid* s. 44 (10); Article 4, Section 1 of the First Schedule of the Arbitration and Conciliation Act (ACA)

[25] *Ibid* s. 44 (4)

an arbitrator must be a national of Nigeria or be licensed to practice in Nigeria to serve as an arbitrator. No person can be disqualified from being appointed as arbitrator by reason of his or her nationality.[26]

The Arbitration and Conciliation Act (ACA) also requires that a person appointed as an arbitrator must be independent and impartial, and thus, such a person must disclose any circumstances that are likely to give rise to justifiable doubts about their independence or impartiality.[27]

For the appointment of arbitrators, the general position is that parties have the right to determine the procedure for the appointment of their arbitrators.[28] However, where parties fail to agree on a procedure for appointment, the ACA provides that the appointment shall be made by the court on the application of any party to the arbitration agreement.[29] Section 8 of the Lagos State Arbitration Law (LSAL) makes the Lagos Court of Arbitration the appointing authority where the parties have not provided alternative default provisions. Thus, if such disagreement persists for thirty (30) days then either of the parties shall apply to a High Court for the appointments of the arbitrators. The decision of the court in the appointment of an arbitrator is final and is not subject to appeal. Unless there is a contrary agreement between the parties, the arbitral proceedings in respect of a particular dispute commence on the date the request to refer the dispute to arbitration is received by the other party.[30] Furthermore, it should be noted that the arbitrator cannot compel a party to produce documents, such a party can only make adverse inferences regarding the failure to comply, neither does the arbitrator has the power to order the attendance of witnesses or compel a non-party to the arbitration to appear at the hearing to give testimony or produce evidence such as documents for the use in the arbitration. To order the production

[26] *Ibid*. s. 44(n 24)
[27] *Ibid*. s. 45(1)
[28] *Ibid*. s 7(1)
[29] *Ibid*. s. 7(2)
[30] *Ibid*. s. 17

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of any document or the attendance of any relevant witness, the parties to the arbitration must make an application to a court.[31]

In addition, it should be noted that Nigerian law contains no provision about the confidentiality of the arbitration proceedings and awards. As a matter of practice, however, proceedings are kept confidential. Also, an award can be made public only with the consent of both parties.[32] However, once an application is made to the court to enforce or set aside an award, the records of the arbitration become part of the court's record, and that arbitration loses its confidential status.[33]

4.0 Commercial Arbitration in Other Jurisdictions

London, the United States, Hong Kong and Singapore are popular venues for international arbitration. For the purpose of this paper however, the focus would be on the United States and the United Kingdom.

4.1 Arbitration in Selected Jurisdictions of the United States of America

Irrespective of its complex dual federal and state legal system, the United States is a great forum for international arbitration. The country's federal and state arbitration statutes and decisional law reflect a strong public policy in favour of arbitration, especially international arbitration. Nowhere is this pro-arbitration policy more clearly expressed than in the Federal Arbitration Act ("FAA") and the cases decided under the act such as *New Prime v Oliveira* and *Henry Schein, Inc. v. Archer & White Sales, Inc*.[34] These legal regimes govern international commercial arbitration in the United States.[35]

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[31]*Ibid* s. 23

[32] Article 32, Arbitration Rules, ACA.

[33]S. 29, Arbitration and Conciliation Act (ACA)

[34] Kevin M. Lewis 'An Avalanche of Arbitration: Three Federal Arbitration Cases at the Supreme Court' *Congressional Research Service* (USA, 15 January 2019) 1-5

[35]Global Legal Insights, 'International Arbitration laws and regulations 2022' (Global Legal Insights, 8 April, 2022) available at

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In the US, the parties to arbitration can determine the number of arbitrators and how to select the arbitrators. The parties usually accomplish this by agreeing to arbitrate under arbitration rules that regulate these issues. Where the arbitration agreement is silent on how arbitrators are to be selected, recourse is made to section 5 Federal Arbitration Act (FAA).[36] The FAA governs the scope of arbitration agreements. It requires courts to enforce arbitration agreements according to their terms. Where a conflict happens between the Act and any state Law(s), the FAA overrides such law(s). [37]

4.1.2 Arbitration in the United Kingdom

The body regulating arbitration and arbitration processes in London is the London Court of International Arbitration (LCIA). Where a party wishes to commence arbitration under the LCIA Rules, such party shall deliver to the Registrar of the LCIA Court a written request for arbitration. Such request (including all accompanying documents) shall be submitted to the Registrar in electronic form in accordance with Article 4.1 of the LCIA Rules, and it shall be assumed that the arbitration has commenced for all purposes on the date upon which the Request is received electronically by the Registrar, provided that the LCIA has received the registration fee. Where the registration fee is received subsequently the commencement date will be the date of the LCIA's actual receipt of the registration fee.

Within 28 days of the commencement date, or such lesser or greater period to be determined by the LCIA upon application by any party or upon its own initiative (pursuant to Article 22.5), the Respondent shall

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<https://www.google.com/amp/s/www.globallegalinsights.com/practice-areas/international-arbitration-laws-and-regulations/usa/amp> accessed 7 October, 2022.

[36] Section 5 provides that either party can make an application to the court who shall then designate and appoint an arbitrator (s)

[37] 'Mandatory Arbitration and the Federal Arbitration Act' (@EveryCRSRport, 20 September 2017) <https://www.everycrsreport.com/reports/R44960.html> accessed 9 January 2023.

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deliver to the Registrar a written response to the written request for arbitration.[38]

5.0 Legal Framework of Corporate Governance within and outside Nigeria

Corporate governance could be described as a practice that involves governing and controlling a business to increase the values of shareholders and also to meet the needs of other stakeholders. It is also described as a set of rules, regulations, and controls which prescribe the corporate behaviour of an organization. These principles, rules, regulations, and controls provide the ethical standards of a corporation.

With the dominant involvement of corporate governance breaches in most corporate failures such as the Industrial and Commercial Bank collapse of 1930 and the failed Nigerian Mercantile Bank, the importance of corporate governance in corporate administration cannot be overemphasized. Its importance is also further highlighted by the adoption of corporate governance codes by nearly every country. Also, these codes are frequently revised to keep them contemporary and suited to meet the demands of the corporate environment. The absence of a universal corporate governance code applicable in all countries has posed some challenges. Countries have their different corporate governance codes created specifically to suit their peculiar purpose. This is however not surprising given the difference in the corporate environment of different countries.[39]

The main statute regulating corporate organizations in Nigeria is the Companies and Allied Matters Act. In addition to this, however, there are several corporate governance codes, and some of them are industry-

[38]LCIA, 'Dispute Resolution Services' available at <https://www.lcia.org/Dispute_Resolution_Services/lcia-arbitration-rules-2020.aspx.> accessed 7 October 2022.

[39] Leonard C. Opara & Ayodele John Alade 'The Legal Regime of Corporate Governance in Nigeria: A Critical Analysis' [2014] 26, *Journal of Law, Policy and Globalization*, p. 40.

specific. Some of the codes applicable in Nigeria include the Nigerian Code of Corporate Governance 2018, the Securities and Exchange Commission Code of Corporate Governance for Public Companies 2019. For the banking sector, the Code of Corporate Governance for Banks and Discount Houses issued by the Central Bank of Nigeria in 2014, as well as the National Insurance Commission Code of Corporate Governance for the Insurance sector in 2009. In the same vein, the pension sector has the Pension Fund Administrators Code of Corporate Governance issued by PENCOM. Code of Corporate Governance for Finance Companies in Nigeria (CCGFCN) was issued by the CBN and came into force on April 1, 2019. Also, we have the Nigerian Communications Commission Code of Corporate Governance for the Telecommunication Industry.

In Nigeria and other jurisdictions, the system rests on four key premises that define the modern corporation: (a) indefinite life, (b) legal personhood, (c) limited liability, and (d) freely transferable shares. Like a real person, a corporation can enter into contracts, sue and be sued, and must pay tax separately from its owners. As an entity in its own right, it is liable for its own debts and obligations, provided it complies with applicable laws; the corporation's owners (shareholders) typically enjoy limited liability and are legally shielded from the corporation's liabilities and debts.[40] At the International level, Corporations are subject to the laws of the state of incorporation and to the laws of any other state in which the corporation conducts business; they may therefore be subject to the law of more than one state.

The United State has not adopted a code of corporate governance for US companies. Corporate governance matters are provided in state and federal laws, regulation and listings.[41] Thus, there are four key sources of corporate governance law and regulation in the United States:

[40]Kenneth Holland's, Review of the book 'Corporate Governance: Law, Theory and Policy', [2005] Carolina Academic Press, 2004; S. 42, Companies and Allied Matters Act 2020

[41] Thomson Reuters 'Corporate Governance and Directors' Duties in the United States: Overview (Practical Law, October 1 2022)

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i. State Corporate Law,[42]
ii. Federal Securities Law, including the US Securities Act of 1933 and the US Securities Exchange Act of 1934, and the regulations of the US Securities and Exchange Commission (SEC) under those Acts;
iii. Stock Exchange Listing Rules (predominantly the New York Stock Exchange (NYSE) and the NASDAQ);
iv. Federal and State Laws regarding particular areas of corporate practice.[43]

In addition to this old of rules and regulations, US public companies are also influenced by institutional investors which yield significant influence and voting power and have increasingly sought to assert their views on a wide array of corporate governance issues. Together, these legal requirements and other influences make for a complicated and continually evolving environment.[44]

The UK's corporate governance legal framework is also regulated by a combination of key statutory legislation, capital markets regulation, governance codes, investor expectations and best practice guidance, these include but are not limited to the Companies Act 2006 ("Companies Act") - the primary legislation for all UK companies which provides fundamental governance requirements including those relating to general

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<https://uk.practicallaw.thomsonreuters.com/w-011-8693?transitionType=Default&contextData=(sc.Default)#:~:text=The%20US%20ha3s%20not%20adopted,around%20corporate%20governance%20also%20exits> accessed 9 January 2023

[42] Predominantly Delaware, in which over half of all US publicly traded corporations, are incorporated.

[43] For example, regulations promulgated by the Federal Reserve and other federal and state agencies with respect to financial institutions, and by other similar regulatory bodies in other regulated fields.

[44]Sabastian V. Niles & John L. Robinson, 'Corporate governance in the United States: overview and outlook' (Wachtell, Lipton, Rosen & Katz, 2022) available at < Corporate governance in the United States: overview and outlook – The In-House Lawyer (inhouselawyer.co.uk)> accessed 8 October, 2022.

directors' duties and powers, the preparation and content of a company's annual report and accounts, the appointment and removal of directors, capital maintenance principles, shareholder rights and fundamental company matters which require shareholder approval, is the company's constitutional document, known as its "articles of association". The articles of association set out the main body of rules governing how the company regulates its affairs, subject to the Companies Act and common law. The articles of association also form a statutory contract between the company and its shareholders (also referred to as "members") and cover matters including the operation of the board and shareholders' meetings.

Other UK legislation governing the directors' conduct and governance is also relevant, including law relating to insolvency i.e The Insolvency Act of 1986, law and also the regulation relating to employees, health and safety, the environment and human rights matters.

Companies also pay due consideration to the recommendations and best practice policy guidelines developed by a range of industry and shareholder advisory groups, such as the Investment Association, Glass Lewis, the Pre-Emption Group, and the Pensions and Lifetime Savings Association (PLSA). These investor bodies publish non-binding guidance and voting recommendations on various governance issues and have significant influence over the shareholder community when making strategic investment decisions or when voting on company matters.[45]

The current United Kingdom Corporate Governance Code was published in July 2018. The code alongside the supporting guidance is to help companies address specific aspects of governance and accountability.[46] The code is divided into five sections:

[45]Patrick Sarch & Danette Antao, 'Corporate Governance Laws and Regulations' (ICLG, 6 September, 2022) available at <https://www.google.com/amp/s/iclg.com/practice-areas/corporate-governance-laws-and-regulations/united-kingdom/amp> accessed 7 October, 2022.

[46] 'UK Corporate Governance Code' (The Financial Reporting Council) <https://www.frc.org.uk/directors/corporate-governance/uk-corporate-govenance-code> accessed 9 March 2023

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i. Board Leadership and Company Purpose
ii. Division of Responsibility; Composition, Succession and Evaluation
iii. Audit, Risk and Internal Control
iv. Remuneration

The code is applicable to companies with a premium listing on the London stock Exchange irrespective of their place of incorporation.[47] The adherence to the code start when a company becomes premium listed. Thus before listing, a company should consider the code's requirement and be prepared in advance.

The code operates on a 'comply or explain' basis i.e a company can either choose to operate in accordance with the code or choose a bespoke governance arrangement most suitable to their circumstances in both the short and the long term. This is due to the code's recognizance of the fact that one approach does not necessarily suit all companies and where the company choose to depart from the code, it should explain how their chosen alternative is more appropriate and Beneficial In Upholding High Standard Of Governance.[48]

5.0 Corporate Governance Disputes

5.1 The Scope of Corporate Governance Disputes

Corporate governance disputes typically involve corporate authorities including shareholders, board directors, and senior executives, in the exercise of their duties.[49] It is different from the labour, commercial, and consumer disputes involving the company. Thus, care should be taken to properly identify the parties involved in a dispute, and the nature of the dispute so as to differentiate corporate governance disputes from other corporate-commercial disputes.

[47] *Ibid*
[48] *Ibid*
[49] ADR Toolkit, 'Resolving Corporate Governance Dispute' Volume 1 Pg 1.

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Corporate governance disputes emerge in many different ways. They typically include disagreements between the company's shareholders and the company or its board. A shareholder or a group of shareholders may claim that their rights as shareholders have been violated or that their shares' value has declined or disputes between the board and the CEO and/ or senior management. Therefore, corporate governance disputes could be intra or inter corporate organizations.

It is generally advised that board of directors of corporate organizations be well prepared to handle disputes when they occur. Unfortunately, however, corporations generally tend to avoid conflict and disputes. They often either do not anticipate conflict, or they may find it difficult to anticipate the conflict's scope or seriousness. Some of those involved are wary of admitting that a conflict may be brewing, despite their suspicions. However, since the cost of inaction is likely to be high, the board should ensure that the company has a systematic, strategic approach to address the potential for disputes related to business matters within management and the board. Hence, adequate grievance redress procedures must be deployed swiftly in order to avoid the huge cost or of the resort to arbitration or litigation.

5.2 The Role of Arbitration in Resolving Corporate Disputes

Over the years, companies have been resorting to arbitration as an alternative to the court with increasing frequency. This can be attributed to the effectiveness of arbitration when compared to the delay, expense, and formality of the courts, because arbitration is generally thought to be cheaper, faster, and more flexible than litigation as a means of resolving commercial disputes. Arbitration is also desirable because experts familiar with the customs and practices peculiar to an industry may serve as arbitrators.[50]

[50] Robert Coulson, Business Arbitration-What You Need To Know (3rd Edition, American Arbitration Association 1986)

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The administration of justice through regular courts is usually filled with delays for so many different reasons, and in a bid to solve the problem of delays and ensure speedy dispensation of justice has seen the emergence of arbitration in its effective use, as this form of dispute resolution discourages delays and degeneration of an adversarial culture in the attainment of civil justice. Not only does the process reduce parties' expenses and time, but it is also more expeditious than the regular courts. The need for speed, resulting in more efficiency and economy in contract drafting, has always dominated international commercial transactions.[51]
In addition, the process also ensures that confidentiality is maintained, a feature important in corporate disputes. It is not adversarial as it is obtained in the regular courts.
Indeed, there seem to be few areas of commercial practice that have not begun to feel the pressure to consider the option of replacing traditional court litigation with private arbitration as the means of resolving commercial differences. The process is typically conducted pursuant to contractual agreements to submit either future or existing disputes to an arbitrator for resolution.
The use of arbitration however has its setbacks: it suffers the same adversary principles as normal court adjudicatory proceedings under the common law. Despite these, parties to contractual agreements more often than not prefer arbitration as an effective means of settling disputes to any other ADR mechanisms.[52]

5.3 Arbitration as a Tool for Resolving Corporate Disputes in Other Jurisdictions

Like Nigeria, developing and developed nations are increasingly resorting to arbitration as an alternative to traditional courts. The popularity of

[51] Klaus Peter Berger, Private Dispute Resolution in International Business. Negotiation, Mediation, Arbitration, (3rd edition, *Kluwer Law International* 2015)
[52] Oyeniyi O. Abe, The Legal Framework For The Institutionalization Of International Commercial Arbitration In Nigeria: A Critical Review (*Afe Babalola University: Journal Of Sustainable Development Law and Policy*, 2013)

commercial arbitration as an alternative for the resolution of corporate disputes is increasing, as is criticism of the existing remedial schemes for shareholder and corporate derivative actions. As a result, commentators and practitioners have begun to consider the feasibility and merits of arbitrating shareholder derivative claims pursuant to arbitration provisions in corporate charters.[53]

What once seemed to be an unexplored territory, in facilitating in the most effective way the resolution of intra-company shareholder disputes has now gained popularity, mainly due to its many benefits over the traditional court system like; speed, confidentiality, lack of complex litigation or adjudication procedures, freedom of choice of arbitrators, healthier party post dispute resolution relationship, and ease of arbitral award enforcement in general. Thus, like the global paradigm shift from governmental control to deregulation in all facets of life, a similar shift from placing reliance on strict legal provisions in resolving business or commercial disputes to the use of processes of Alternative Dispute Resolution (ADR). A phrase designed to cover a wide range of processes adopted for the resolution of conflict other than through litigation including arbitration, which has shown to be the most widely embraced process for business disputes, especially across national borders and boundaries.[54]

One important thing to note however, is that arbitration, both national and international arbitration is not to be seen as a simple, cheap, or quick alternative to the traditional court system as it seems. While hearings can be for as short as one week, there is a lot of written work before and after a hearing and international arbitration may have other non-monetary advantages over national courts, such as having shorter rules.

It has been seen, however, as the preferred choice of dispute resolution for a majority of large corporations around the world as a research undertaken by PricewaterhouseCoopers (PwC) and Queen Mary, the

[53] G. Richard Shell, Arbitration and Corporate Governance (*North Carolina Law Review*, 1989)

[54] Wuraola (n 15)

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University of London in 2006, found that 73% of respondent corporations preferred international arbitration.[55] This growth is a natural by-product of a globalised world, where parties to a commercial deal come from different legal systems with different laws and, therefore, need a dispute resolution process that operates above and beyond national borders.[56] A basic tenet of arbitration in international business disputes is the freedom of the parties to agree to have disputes arising from their contract resolved outside the national court regime by resorting to the alternative dispute resolution mechanism as well as using the applicable law of their choice.[57]

6.0 Resolving Corporate Governance Disputes through Arbitration in Nigeria

This paper asserts that arbitration is the ultimate means of resolving disputes in the coming decades. This is because arbitration has risen to prominence over the years as prospective disputants are forced to resolve issues through alternative dispute resolution mechanism and would only be entertained in court where and when the court reasonably believes and agrees that the parties have tried to resolve in futility.[58] This is no doubt thanks to its benefit of effectively reducing the workload of traditional courts, amongst other important benefits.

Compared to other alternative dispute resolution mechanisms, it has risen into prominence and it seems like the projectile of growth and development of this effective and reliable means of dispute resolution including corporate disputes.

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[55] S.I. Strong, Research And Practice In International Commercial Arbitration: Sources And Strategies (Oxford University Press, 2009)

[56] Arbitration Act 1996

[57] Wuraola (n 15)

[58] M.O Ibrahim, 'Positioning Arbitration as the Future of Dispute Resolution in Nigeria: Issues and Prospects', (Legalpedia, June 5 2020),<https://legalpediaonline.com/positioning-arbitration-as-the-future-of-dispute-resolution-in-nigeria/amp/> accessed 29 October, 2022.

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Despite this impressive growth, however, the system still faces some notable challenges in reaching its full potential and these include but are not limited to:

i. The lack of awareness about both the existence of Alternative Dispute Resolution mechanisms including arbitration and the numerous opportunities in its practice;
ii. Attitude of the citizens regarding the finality and resulting appeal of arbitral awards resulting in the losing party in arbitration trying to avoid complying with the terms of an award by resorting to the local courts of the states where such award is to be enforced and deploying all manners of court process to frustrate its enforcement.
iii. Failure to fully maximize the full potentials of arbitration which would unarguably clear the court dockets of matters that are not really contentions mostly arising out of ignorance;
iv. Adverse consequences associated with the adaptation boilerplate arbitration clauses in resolving disputes, especially without the proper consultation of an arbitration expert.
v. Delay in the resolution of appeals, especially at the Supreme Court where there are few numbers of judicial personnel on the bench and the need not to breach the right of a party to appeal arbitral awards.
vi. The high cost of financing arbitral proceedings poses a challenge to the resolution of corporate disputes through its framework.
vii. Constitutional impediments which allows an appeal process has been a clog in the wheel of progress of arbitration as the gains made could be subjected to long and delayed appellate processes and procedures thereby losing the speed, gains, confidentiality and progressive business environment which arbitration envisaged in reslolving corporate disputes.

7.0 Summary of Findings

This section summarizes the main research findings of this paper. The main aim of this paper was to evaluate the importance and efficiency of

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Arbitration in the resolution of corporate governance disputes compared to traditional court systems in Nigeria and other jurisdictions. Evidently, the administration of justice through regular courts is usually troubled with delays for different reasons. The attempt to find a solution to these delays and ensure swifter dispensation of justice resulted to the birth of arbitration. The need for speed, resulting in more efficiency, has always dominated international commercial transactions. Thus, the need for resorting to arbitration is more compelling considering the lethargic attitude of Nigerian courts to the resolution of sophisticated commercial disputes.

However, while it has been proven that Nigeria possesses adequate provisions for the institutionalization of arbitration, when compared to other jurisdictions like the UK and the US, the country still has a long way to go if it aims to become the hub of international commercial arbitration in Africa, with the major problem being the distrust occasioned by endemic corruption and lack of faith in the entire judicial sector in managing dispute resolution in Nigeria.

In addition to this, Nigeria also suffers from the endemic problem of enforcement. International contractual agreements avoid Nigerian law even where one of the parties is a Nigerian. Thus, it cannot be confidently said that Nigeria has attained its height in the administration of international commercial arbitration, compared to other developed societies such as United States, and United Kingdom.

Furthermore, considering the need to enhance commercial activities in Nigeria and the indisputable right of international parties to resolve disputes through arbitration, when adjudicating over disputes that have foreign elements, Nigerian judicial officers must tread with caution and to do this effectively, these officers must be abreast of developments in multi-jurisdictions. These arbitration laws in other jurisdictions provide a specialized and highly-supportive legal regime for most contemporary international commercial arbitrations. This legal regime provides an enticement for the conduct of international trade. Thus with an efficient

and effective judicial system, free flow of commercial transactions will be encouraged.

The implication of the foregoing is that Nigerian courts should take the issue of arbitration proceedings very seriously. To reach an enviable status where Nigeria will be chosen more frequently as the hub of international commercial arbitration, foreign parties have to be assured that our laws are efficient and enforcement mechanisms are effective in tune with the dictates of modern trend.[59]

8.0 Conclusion

In conclusion, good corporate governance practice is important in corporate administration as a result of its huge benefits to companies, its shareholders and other stakeholders and one of the major factors in ensuring this, is the maintenance of a cordial relationship amongst the key players. It is thus generally advised that governing boards of organizations be well prepared to handle disputes when they occur.

This leads to the application of Alternative Disputes Resolution Mechanisms, particularly arbitration which has shown to be the most widely embraced process for business disputes especially across national borders and transnational boundaries.

While the traditional court system is still applied in the resolution of certain disputes in addition to corporate and commercial disputes, we strongly believe that commercial arbitration is the ultimate future of dispute resolution especially corporate governance disputes due to the need to protect the relationship of the parties involved. While the system has grown over the years to effectively resolve corporate governance disputes, to ensure the future is not bleak however, the nation and by an extension the world needs to work on the shortcomings of the system and make amendments, some of which has been earlier highlighted in this paper. There is no doubt that businesses in Nigeria have suffered huge

[59] Oyeniyi O. Abe, 'The Legal Framework for The Institutionalization Of International Commercial Arbitration In Nigeria: A Critical Review' [2013] 1, *Afe Babalola University*: *Journal of Sustainable Development Law And Policy*, Pp 147.

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losses occasioned by delays in resolution of commercial disputes and lessons should be learned to avoid further losses.

9.0 Recommendations

Popularly known for its effective time and cost management, arbitration is thus, considered a preferred mode of resolving corporate disputes. In addition to the fact that it may preserve the business relationship of the disputing parties, it also saves the time of the parties and reduces the cost that may be incurred in protracted litigation. Consequently, invoking arbitration clauses in commercial agreements or executing submission agreements in the absence of an arbitration clause is important for corporate relationships.

However, while arbitration is a fast-paced process in principle, its implementation may be hindered by judicial intervention. It is therefore pertinent to revamp the arbitration process in Nigeria, especially as it relates to the intervention of courts, with a view to preserving its attraction as a time and cost-saving alternative dispute resolution mechanism. . Arbitration clauses should be strictly adhered to avoid unnecessary litigation except where such as where the execution of such arbitration clauses would occasion miscarriage of justice.

Publicity of alternative dispute resolution mechanisms should also be taken seriously in order to ensure the citizens of the country are aware of the existence of these mechanisms and maximize them to the fullest. Concerning the issue of appealing arbitral awards too, the introduction of the time limit(s) for determining a challenge to an award is also recommended. A time-bound challenge procedure should be implemented for arbitration considering its importance in encouraging the ease of doing business and maximization of profit. This would, in addition to the laudable provisions contained in the Arbitration and Conciliation Amendment Act (Repeal and Re-enactment) Bill currently pending before the National Assembly, enhance Nigeria's image as a global destination for arbitration.

In the alternative, expertise in arbitration should be made a criterion for judges and justices selected to determine cases filed to challenge arbitral awards. An arbitration expert is in a better position to appraise an arbitration agreement and an arbitral award in effectively determining a challenge to an award. This will reduce, to the barest minimum, falling into a similar error as the honourable Court of Appeal did in the case of *Mekwunye v Imoukhuede*.[60] In this instant case, the appellant and the respondent executed a tenancy agreement which contained an arbitration clause. After a dispute had arisen between the parties, the appellant prepared a notice of arbitration and it was served on the respondent. Both parties submitted to arbitration and an award was made. When the appellant sought to enforce the award, the respond went to court to have the award set aside. The trial court refuse to set aside the award but upon an appeal to the court of appeal, the award was set aside on the grounds that;

i. The notice of arbitration was defective for non- compliance with article 3(3) of the arbitration rules
ii. The arbitration institution referenced in the arbitration agreement was non existent
iii. The arbitrator was not validly appointed as the appointing authority only recommended her
iv. The arbitrator misconducted herself when the letter of adjournment was written by the arbitrator on a firm's letter head as rather than the arbitrator's personal letter head.

Fortunately, the decision of the court of appeal was reversed by the Supreme Court upon appeal by the appellant on the basis that the respondent has waived his right to challenge the award having participated in the arbitration proceeding without any objection.

Although the decision of the Supreme Court is laudable but the post-arbitration process in this case failed to satisfy the desired time-

[60] (2019) LPELR-48996(SC).

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management result generally attributed to arbitration as the arbitral award was only affirmed twelve years after it was made.

Therefore, resolution of these arbitration disputes is best served by special knowledge or expertise on the part of the decision maker and the judiciary is therefore implored to invest in arbitration training for its justices.

Also, there may be adverse consequences if parties simply adapt boilerplate arbitration clauses in resolving their disputes. An arbitration expert should be consulted at all times to either craft a bespoke arbitration clause to meet the needs of the principal agreement between the parties or review such arbitration clauses.[61] This will help prevent avoidable corporate governance disputes.

Pre-incorporation contracts such as shareholders agreements, directors service contracts, promotion agreements, formation agreements, should be drafted by experts in such as way as to confine dispute resolution to the corridors of arbitration practice.

Constitutional amendment is recommended to limit arbitration practice in the court to only interpretation of the laws relating to corporate governance disputes and not to resolution of arbitration disputes and this interpretation should be done within a specified time frame as it obtains in election petition cases. This will help alleviate the long duration it takes to resolve disputes in courts, especially in Nigeria.

Furthermore, as recommendation, we suggest that in reforming the Nigerian's arbitration laws and system, focused is placed particularly on its publicity and the appeal of its award in order to meet up with global best practices and increase Nigeria's attractiveness as a major arbitration

[61]'Revamping the Arbitration Process in Nigeria in Ensuring Speedy Resolution of Commercial Disputes: A Consideration of the Case of *Mekwunye v. Imoukhuede*' (Brooks & Knights, 27 May 2020) <https://iclg.com/briefing/12679-revamping-the-arbitration-process-in-nigeria-in-ensuring-speedy-resolution-of-commercial-dispute-a-consideration-of-the-case-of-mekwunye-v-imoukhuede/amp> accessed 9 October 2022

hub in Africa and globally, as they would help demonstrate Nigeria's commitment to adopt the latest arbitral practices.

Finally, considering the fast pace of information dissemination, especially in this era of social media, trade secrets need to be preserved in order to avoid compromises and unnecessary publicity of corporate disputes. Resort to arbitration and other flexible ADR options seems to be the best bet for companies in Nigeria and it is strongly recommended despite its lapses and challenges within the Nigerian commercial space.

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