

# **THE COURTS AND COMMERCIAL DISPUTES RESOLUTION IN NIGERIA: THE NEED FOR SPECIALIZATION.**

## **Introduction**

Nigeria in the last three decades presents a study of a burdened Nation straining to cope with an unprecedented upsurge in business and financial activities brought about by the discovery of oil and gas in its territories and the other important roles the Country is called upon to play in the Continent of Africa as a leader in resources, human and material. The baton of political power handed over by the erstwhile colonial administrators to a Civilian government has however been less than satisfactorily retained as the nation has within a corresponding period of time suffered several military interregnums and instability which culminated in the return to democratic rule on 29<sup>th</sup> May 1999.

Political instability and a myriad of other problems took its toll on the justice delivery system. The justice sector for all those years suffered significantly from neglect and inadequacies of resources and infrastructure, mismanagement of resources, inadequate logistics problems inherent in the legal framework and in the Judicial framework. There was also the corrosive influence of corruption and disregard for the rule of law couched in the garbs of ouster clauses in the decrees churned out by the military leaderships. The military saw law as an appendage to the process and not as an integral part of it. It is against this unsavoury background that the Nigerian courts in a democratic era have managed the dispute resolution requirement of a modern business world, which gets more sophisticated and technologically – driven by the day as well as increasingly voluminous. Needless to add, that the justice delivery system has buckled under these loads.

There can be no better indictment of our justice and legal delivery system than the resort to militia vigilance groups for amongst other matters, resolution of commercial transactions disputes. Recently, a client of a law firm who felt dissatisfied with the spate of adjournment of his case in court regarding recovery of the sum of N5 million due to him from a recalcitrant defendant sought the services of a feared militia group and got his money paid in full within 48 hours together with a letter of apology thrown in by the now very repentant debtor company.

## **The New dynamism**

In the context of commercial law adjudication, the present scenario, which requires a Judge to stand aloof from the dusty arena of conflicts, appears to be out of tune with the new development which sees the Judge as an activist for speed and justice delivery. This non-intervention stance of the court often resulted in litigants seizing control of the court to make the ultimate action of quick and fair redress almost an illusion. An environment where commerce is conducted under extreme caution, suspicion and prudence portends a snail-slow speed in all dealings with serious fall-outs in all facets of the economy. For fear of ending up with a wasteful and never-ending court case businessmen may opt out of an otherwise legitimate and beneficial dealing completely. As it is for the individual, so it is for the mercantile community – corporate bodies, banks, insurance companies, chambers of commerce and indeed Government bodies.

It has also been recognized that in addition to a change in the stance of the courts, the judicial delivery system ought to be empowered to interface and keep pace with contemporary

developments in all other sectors of Governance. The Country's newfound democracy cannot be nurtured if the rule of law is not accorded all seriousness as being central to democratic consolidation.

In recent times, international institutions like the world bank have identified that development can only take place in a comprehensive manner if all sectors of the economy are borne along. This new development approach referred to as the Comprehensive Development Framework (CDF), recognizes the critical roles of the judicial and legal process in the whole spectrum of national, economic and political developments. It can be restated that investments will not come if people do not know what the Country's laws say, neither will there be stability if people have no confidence in the Judiciary. As the nation embarks resolutely on a massive privatization and commercialization programme<sup>1</sup>, the pertinent question to ask is – In the context of the commercial/mercantile community, where do we take the law?

### **The need for commercial courts**

To show that the Justice delivery machinery is a very crucial aspect in commercial disputes resolution, let us take an example from the debt recovery scenario in the banking sector in the courts in the present framework. It is to be acknowledged that there are various stages at which the problem of debt management/control can be tackled, and these include screening/appraisal (including debt classification, documentation and recovery). Staff of the lending bank performs the preliminary stage of screening and documentation in-house. These are basically steps taken to ensure that the customer/borrower (and perhaps his guarantor) is credit worthy and that the loan is adequately secured. Granted that these are necessary steps in an efficient debt control/management system, experience has shown that utmost care taken even at these stages usually does not eliminate the incident of resort to litigation to recover the debt. The following illustration will suffice. "A" borrows a huge amount from bank "B". The loan is secured with a legal mortgage over "A's" landed property giving the bank the power to sell "A's" property (without recourse to the court) in the event that "A" default in his payment obligations. The mortgage security is properly documented and all necessary legal requirements are satisfied. "A" eventually defaults. The bank serves him with a notice of sale (as required by law). Upon receiving the notice, "A" proceeds to court, and upon the basis of spurious and often concocted allegations, obtains an injunction restraining the bank from enforcing the security pending the determination of a frivolous case that may take years to conclude. It does not matter that "A" may eventually lose the case on the merit (as it often happens). What is important for the present purpose is that he has succeeded in achieving substantial delay, which is the greatest impediment in most debt recovery endeavours.

The problem as can be seen is therefore not of under-utilisation of the delivery system but that of over-burdened judicial personnel and over-congested court lists, the result of long adjournments and the bane of disputes resolution environment of Nigeria's modern business community. For every problem there is a cause. Two major factors account for the state of affairs in Commercial Dispute Resolution in Nigeria today namely:

1. Obsolete laws (particularly with regard to the rules of procedure) and
2. Judicial attitude (particularly with the lack of specialization of Judicial personnel).

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<sup>1</sup> See the Public Enterprises (Privatization and Commercialization) Act 1999.

## **New Rules of Procedure**

The civil resolution of Commercial Disputes is one of the many functions of the High Courts in the various states of Nigeria. The Lagos High Court for instance is constituted to deal with all manner of cases ranging from the trade Union/Labour Relations matters to commercial, the Environmental to the Matrimonial, Professional Practice to the Arbitration award etc. It is commendable that a commercial division of the court has been established to deal exclusively with resolution of commercial disputes<sup>2</sup>. It has long been realized that in commercial matters time is of the essence as time is money, moreso, in the context of a fast growing economic environment such as Nigeria's. Only a speedy and effective system of resolution of business disputes will ensure that redress is not sought in unlawful extra-judicial means, as sometimes is the case or that business executives do not choose the other option of licking their wounds in the event of botched transactions to the detriment of the common good. The current practice in the Lagos high Courts follows the English practice.

A commercial list was formally constituted by the Administration of Justice Act 1970 in England to give statutory effect to the English practice dating back to more than seventy years whereby commercial actions were expeditiously dealt with by special judges using a simple and effective procedure.

A striking feature of this simplified procedure is its adaptability to the continually changing need of the business and mercantile community.

The other main feature of the English practice for commercial actions is that a Judge of the commercial list could also act as an arbitrator in disputes of commercial character and that departures from normal procedure may be ordered by consent of the parties in order to ensure the speedy and economical disposal of cases.

Actions in the commercial list in England are commenced through a special form of pleadings on clear and concise points of claim or defence and in some cases the court may order that pleadings be dispensed with entirely to eliminate any possibility of delay. Written briefs are ordered for the same reason. Applications for hearing dates are taken early in the proceedings and a waiting list system followed whereby counsel notifies the court of the possibility of any change in the assigned dates by the court.

Litigation under the commercial list is front-loaded. Parties are required to put their pleadings and all relevant papers for trial before the court – witnesses, testimonies, submissions, arguments etc. and refer to this as required. The room for 'dribbling' of one party by the other is therefore closed and each party comes to trial knowing the case it is to answer. The nearest thing to this practice in our court is the pre-trial process under the Civil Procedure Rules 2000 of the Federal High Court.

It has been estimated that about 40% of all cases coming before the courts in Lagos State for example, are commercial disputes. The Nigerian mercantile community generally speaking, depends to a large extent, on the judicial machinery for the resolution of its disputes. It is however not incorrect to say that the community has shown insufficient interest in the workings and progress of the judicial system. It is to be stressed that it is the Nigerian

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<sup>2</sup> The Commercial Divisions of the Lagos High Court commenced sitting from the beginning of the 2002 Legal year .New rules of procedure are expected to come into force with effect from the 1<sup>st</sup> day of December 2003.

mercantile community that can, acting on a common interest-group platform, champion and effectively pressurize the legislative authorities into effecting the improvements in the Judicial/Legal framework necessary to meet its peculiar litigation requirements in the millennium. As it was in England, so can it be in Nigeria, as the success of the commercial courts depends on its users involvement in the supply of information and suggestions, litigants and advisers alike.

There exists in England, a commercial court users liaison committee, composed in the main, of commercial court litigants and their professional legal Advisors. The committee has, over the years, proved to be a dynamic and effective channel of communication between the English mercantile community (the major user of the commercial courts) and the Legislative/Judicial authorities responsible for law reform and administration.

The committee has also proved to be of immense value in the process of updating, and monitoring the rules of court administered by commercial courts, and the committee has enjoyed remarkable support and encouragement from the Judges of the commercial courts. The Practice Directions in the form of a “*Guide to commercial court practice*” issued in 1986 by a working party of Practitioner members of the committee has since received the approval of the commercial court Judges and are being implemented. Mercantile legal practitioners aimed the Guides at advancing practical recommendations as to how the procedures of the commercial courts may be employed to meet the interest of the mercantile community, and also at drawing attention to various provisions of the procedure rules that had in the past been overlooked.

From a global prospective, and using the example of England where the adversarial common law system sprung from, the new thinking is that the courts themselves must take control of cases rather than leaving progress to the parties. It is this thinking that crystallized into the Civil Procedure Rules which came into force on 26<sup>th</sup> April, 1999. According to Lord Harry Woolf, (Master of the Rolls) who reviewed the old rules;

*“Without effective judicial control... the adversarial process is likely to encourage an adversarial culture and to degenerate into an environment in which the litigation process is too often seen as a battlefield where no rules apply. In this environment the question of expense, delay, compromise and firmness may only have a low priority. The consequence is that expense is often excessive, disproportionate and unpredictable, and delay is frequently unreasonable”.*

CPR 1999 has addressed this state of affairs by the adoption of the ‘overriding objective’ principle as its fulcrum. The overriding objective is to enable the court deal with cases justly. Rule 1 (2) of the CPR explains this objective to include ensuring that the parties are on equal footing, saving expense, dealing with the case in ways which are proportionate to the amount of money involved etc. ensuring that it is dealt with expeditiously and fairly and allotting to it an appropriate share of the courts resources, while taking into account the need to allot resources to other cases.

For the foregoing reasons a pro-active approach known as case management is to be adopted by the court for the progress of the cases. Active case management, as outlined in S.1.4.2. Of the CPR 1999, includes:

- a. Encourage the parties to cooperate with each other in the conduct of the proceedings;
- b. Identify the issues at an early stage;
- c. Deciding which issues need full investigation and trial and accordingly disposing similarly of the others;
- d. Deciding the order in which issues are to be resolved;
- e. Encouraging the parties to use alternative dispute resolution procedure if the court considers that appropriate and facilitating the use of such procedure. Negotiation, Arbitration, and Mediation;<sup>3</sup>
- f. Helping the parties to settle the whole or part of the case;
- g. Considering whether the likely benefits of taking a particular step justify the cost of taking it;
- h. Dealing with the case without the parties needing to attend at court (one development that will please the business community in Nigeria)
- i. Making use of technology; and
- j. Giving direction to ensure that the trial of a case proceeds quickly and efficiently.<sup>4</sup>

Other highpoints of the new rules worthy of mention is the issue of allocation of cases to tracks namely small claims (not exceeding f5000) fast (f5000-f15000), and multi-track (over f15000). Add this development to the acknowledgement by the rules of the following methods of serving a document – Document exchanges, fax, e-mail etc and what you have is a set of rules in tune with the demands of modern business and information technology. The Nigerian courts are in dire need of reforms along the lines of the CPR 1999 and the journey has begun with the establishment in Lagos State of commercial courts and the alternative disputes resolution center known as the Multi-door Courthouse, to reduce the pressures and complement the efforts of the Commercial Courts. It is hoped that other states will follow suit.

### **Judicial Personnel**

This paper will not be complete without a mention of the need for specialization of judicial personnel who will man the commercial courts. Hand in hand with the clarion call for commercial courts in all judicial divisions in Nigeria, will be the need for specialist Judges in all spheres of commerce, Banking and Credit, Companies and Allied Matters, Patents and Intellectual Property etc. These Judges by their background and training will be adequately equipped to appreciate the needs and aspirations of the business community in their adjudication. The ideal justice delivery system such as that envisaged by the establishment of commercial courts will be that where process and personnel are positioned to take full

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<sup>3</sup> A practice direction for an ADR center known as the Lagos Multi-door Courthouse was pursuant to S.274 of the Constitution of the Federal Republic of Nigeria 1999 signed by the State's Chief Judge on the 11<sup>th</sup> day of June 2003.

<sup>4</sup> See the Woolf reforms – A practitioner's guide "temple Lecture Series – 1999, Balberg and Lonsdale.

advantage of the developments in technology by employing the appropriate scientific devices to save judicial time and remove the physical stress placed on Judges in court who at the present time still take notes in long hand, a job that can be more efficiently and conveniently handled by trained stenographers.

In summary, public interest and the interest of all persons in commerce demand the establishment of commercial divisions within our various courts to take the nation into the new Information technology era in partnership with other advanced countries of the world who have given priority to the role of Judicial and legal reforms as a necessary element of development within the comprehensive development framework of the more advanced and prosperous nations of the world.