# BANKER-CUSTOMER DISPUTES RESOLUTION IN NIGERIA- IS ARBITRATION THE WAY FORWARD?

## Introduction

In Nigeria disputes between banks and their customers are typically resolved through litigation in the courts. By section 251(1) of the Constitution of the Federal Republic of Nigeria 1999 the Federal High Court has exclusive jurisdiction to entertain disputes between banks and other financial institutions, but the section contains a proviso which confers concurrent jurisdiction on the Federal and State High Courts for matters between a customer and his bank in respect of transactions between the customer and the bank[1].

Due to the typical relationship between a bank and its customer, banker-customer disputes are almost invariably commercial disputes, which usually ought be resolved within a reasonable period of time. However, over the years, the sheer number of cases filed in both the Federal High Court and State High Courts (particularly Lagos) in Nigeria has meant that the wheels of justice tend to grind much slower than expected by commercial litigants. With the passage of time and unabated increase in the number of cases filed in the courts, it is not difficult to predict that the already significant delays in the conclusion of cases are more than likely to increase in severity. As a consequence, the exploration and consideration of alternative mechanisms of resolution of banker-customer disputes is not only desirable but also a necessity.

## Why are banker-customer disputes not usually resolved by arbitration?

The issue of jurisdiction is one that is typically most hotly contested by lawyers in Nigeria, irrespective of whether a genuine question of jurisdiction actually exists, as a result of which, for whatever it is worth, it is important to briefly address the point here.

It is the law in Nigeria that an arbitration clause does not have the effect of ousting the court's jurisdiction to entertain the same dispute that is subject to the arbitration clause. Therefore, either party to such an agreement may, before a submission to arbitration or an award is made, commence legal proceedings in respect of any claim or cause of action

[1] SEE ECOBANK V. ANCHORAGE LEISURES LTD & ORS (2018) LPELR-45125(SC) AND NIGERIA DEPOSIT

included in the submission. See **CITY ENGINEERING (NIG.) LTD V. FHA.**[2] Consequently, the referral of a banker-customer dispute, which is essentially contractual, to arbitration does not have the effect of ousting the jurisdiction of the Federal or State High Courts to entertain such disputes and are arbitrable under Nigerian law[3].

Banking sector disputes in Nigeria are numerous and usually arise from a myriad of issues deriving from relationships between banks and their customers, employer-employee relationships, inter-bank interactions, intra-bank relationships and sometimes from interactions between banks and the Central Bank of Nigeria (CBN) in the course of the CBN's performance of its statutory regulatory functions in relation to the banks[4]. The overwhelming majority of banker-customer disputes in Nigeria revolves around loan facility defaults by bank customers or inappropriate loan facility management by the banks and is the focus here. In most of these cases, the default dispute resolution mechanism, after negotiation, is litigation. For the banks, available options generally include debt recovery actions, winding up or receivership proceedings, while for the customers, options include counterclaims in bank loan recovery actions or pre-emptive actions against the banks. In all of these scenarios, the parties usually seldom consider the option of arbitration as a possible mechanism for the resolution of their disputes.

The principal reason why most banker-customer disputes are not resolved by arbitration is that most of the loan facility agreements, from which such disputes arise, do not usually contain arbitration clauses. Having regard to the fact that loan facility agreements are almost invariably drawn up by the banks, the reason for the exclusion of arbitration clauses from such agreements is best known by the banks. In this respect, there is a distinct possibility that the banks do not believe that arbitration is an effective dispute

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[2] (1997) 9 NWLR (PT. 520) 224

[3] ADEOLA A. OLUWABIYI, 'A COMPARATIVE LEGAL ANALYSIS OF THE APPLICATION OF ALTERNATIVE DISPUTE RESOLUTION (ADR) TO BANKING DISPUTES', JOURNAL OF LAW, POLICY AND GLOBALIZATION VOL. 38, 2015

[4] ROSECANA .G. ANKAMA, JOHN NMA ALIU & HAUWA ALIYU, 'THE APPLICATION OF ARBITRATION FOR EFFECTIVE DISPUTE RESOLUTION IN THE NIGERIAN BANKING SECTOR', INTERNATIONAL JOURNAL IN ADVANCED RESEARCH IN SOCIAL ENGINEERING AND DEVELOPMENT STRATEGIES VOL. 2 NO. 1, OCT. 2014

resolution mechanism for disputes that may arise pursuant to loan facility agreements. Another possible reason for this behaviour of banks is that litigation very often results desirable outcomes for the lender, which is usually the party with the dominant bargaining power in loan agreements[5].

**Should more banker-customer disputes be arbitrated?**

In a banker-customer dispute, litigation does have benefits for the banks. For instance, litigation offers banks the possibility of obtaining summary or default judgments from the court, where the circumstances so allow. In such circumstances, banks are able to obtain judgment from the courts relatively quickly and in a manner that brings about speedy disputes resolution, as usually required by commercial disputes. However, the present reality is that, by commercial standards, the likelihood of a quick resolution of banker-customer disputes through litigation is rapidly declining, as the courts' dockets continue to swell yearly. As a result, it is not uncommon for banker-customer disputes to remain pending in court system and unresolved for upwards of ten years[6].

Having regard to the average time it presently takes for a commercial case to make its way through the court systems, surely, there are more than enough reasons for more banker-customer disputes to be resolved by arbitration, as opposed to litigation. One of such reasons is the fact that arbitration affords the parties the opportunity to have their commercial disputes resolved by experts in the filed of the subject matter of the dispute, as opposed to a judge who is trained to deal exclusively with legal issues, due to the fact that the parties are able to agree as to the qualifications of the arbitrator(s). Also, arbitration proceedings are not as prone to the factors that tend to cause delay in litigation proceedings, such as unnecessary adjournments, unending jurisdictional or procedural objections and interlocutory appeals.

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[5] NAEL G.BUNNI, 'WHAT HAS HISTORY TAUGHT US IN ADR? AVOIDANCE OF DISPUTE!', (2015) ARBITRATION 176

[6] SEE DIAMOND BANK LTD. V. PIC LTD. (2009) 18 NWLR (PT. 1172) 67, UNION BANK OF NIGERIA PLC. V. MR. N.M. OKPARA CHIMAEZE (2014) LPELR-22699, UNION BANK OF NIGERIA PLC V. ALHAJI ADAMS AJABULE & ANOR (2011) LPELR-8239 AND INTERDRILL NIGERIA LIMITED & ANOR V. UNITED BANK FOR AFRICA PLC (2017) LPELR-41907

In many banker-customer disputes, the question is not as to whether a liability exists, but as to the extent of that liability, which has already be acknowledged by the parties to exist. In this respect, the inherent nature of banking transactions means that the resolution of extent of liability disputes will involve the consideration of technical aspects of banking and finance. However, in as many of such cases, where the parties have resorted to litigation, this narrow issue of extent of liability often gets lost in the procedural skirmishes between the parties, such that even upon the conclusion of the litigation the issue remains unresolved, despite several years of litigation. In contradistinction to litigation, where the issue between the parties is the determination of extent of liability, arbitration affords the parties the opportunity to narrow their focus to the real issue in controversy, with the possible benefit of having that issue resolved by an arbitrator most equipped to deal it. A collateral benefit is also that arbitration, due to its less adversarial nature in comparison to litigation, may have the effect of preserving the relationship between the banker and its customer even after the resolution of the dispute, whereas litigation is often a catalyst for permanent deterioration in the parties' relationships.

**Will anything change?**

In banker-customer disputes, particularly ones with high value subject matters, the parties (especially the banks) generally prefer litigation due to their ability to leverage on the coercive powers of the court, especially where preservative orders are required. Having regard to the fact that most agreements on which banker-customer relationships are based are drawn up by the banks, in view of the inherent benefits of arbitration, it is left to be seen whether banks will be disposed to giving up the significant leverage that litigation affords in the resolution of banker-customer disputes.

However, notwithstanding some positive judicial reforms, particularly in Lagos State, in the absence of more radical reforms in the administration of civil justice in Nigeria, there is little expectation of any significant improvements to the speed of justice delivery in commercial disputes. In such a scenario, dealing with the question of adoption of ADR mechanisms, such as arbitration, to the resolution of banker-customer disputes is fast becoming more necessary than desirable. The tragic consequence of delay in the

determination of commercial disputes in Nigeria is that several trillions of Naira remains trapped in the court system, with no route to exit in sight. As a result, an approach to the resolution of banker-customer disputes that ensures that the amount of money trapped in the courts does not increase but reduces is most certainly one that is not only welcome but also most necessary.

A possible option may be for the Central Bank of Nigeria, as the market regulator, to issue regulations providing that arbitration should be the default dispute resolution mechanism for certain types of banker-customer disputes, as it has already done with the E-Payment Dispute Arbitration Framework, provided the fundamental arbitration principle of party autonomy is preserved. Ultimately, however, the development of banking and finance arbitration rests largely on the expertise and commitment of the arbitrators and the preparedness of the courts to allow arbitration thrive through a non-interventionist approach to the litigation of arbitration matters. In this regard, there is no question that the market possesses great capacity in terms of arbitrators with the experience and expertise to resolve banker-customer disputes and the courts are gradually adopting a non-interventionist approach to the litigation of arbitration matters. Both of these positives are helpful but perhaps their benefits are yet to be seen because the scope for improvement is much greater.

**MOFESOMO TAYO-OYETIBO**[7], **ACIArb**

[7] Mofesomo Tayo-Oyetibo is an arbitration practitioner and the Managing Partner of the commercial law Firm, Twelve Legal.