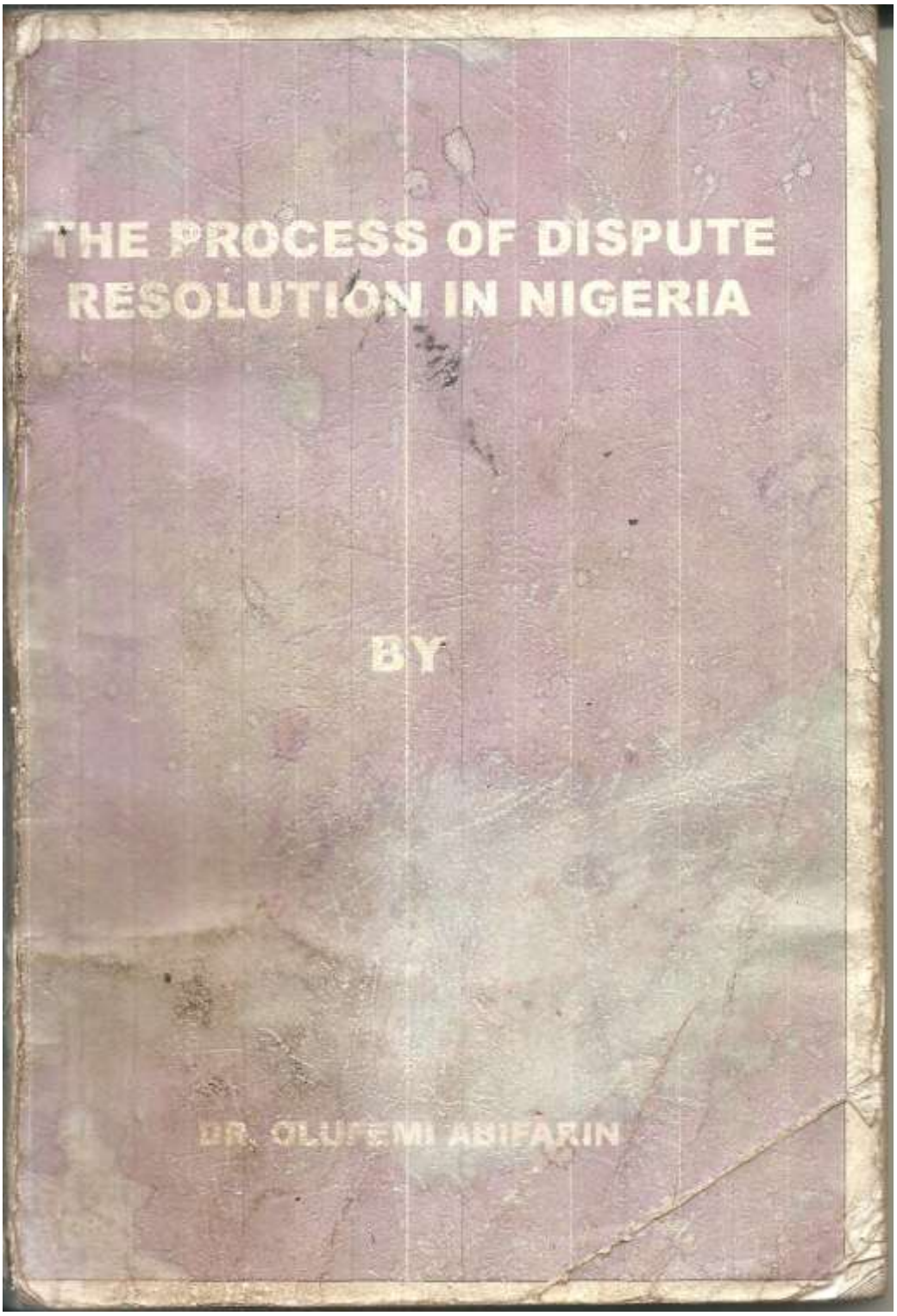
THE PROCESS OF DISPUTE RESOLUTION IN NIGERIA
BY
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CHAPTER ONE
MEANING, NATURE AND SCOPE OF ALTERNATIVE DISPUTE RESOLUTION

1.1 INTRODUCTION

Disputes are generally an inevitable part of interaction. They are common place in the affairs of men and are bound to arise at one stage or the other in all human interactions. Millennia of human experience have exposed this, as one of the serious flaws and imperfections of the homo-sapiens. Human nature is prone to and inclined to differences leading to disputes. In the majority of the instances, none of the parties to the dispute could in fact be found to want or cherish the situation. But in yet another paradox of the existence of man in this terrestrial globe, the parties who themselves know or ought to know the strength and weakness of their respective cases, most often find it difficult, if not almost impossible to resolve the differences by themselves unaided by a third party. Consequently, resort is made to courts to solve such disputes.

The purpose of this research work is to briefly analyse the difficulties associated with resolution of disputes through the state's judicial machinery which has led to the quest for better alternatives and to highlight these alternatives which those engaged in science and technology and indeed other professionals and people in commerce and industry would find useful, both the legal implications concomitant to each method and the limitations of employing these methods will be considered. Because alternative dispute resolution takes various forms, it is not intended that what is presented therein are all there are as the list is inexhaustible at the rate which ADR is growing.

1.2 DEFINITION OF ALTERNATIVE DISPUTE RESOLUTION

Alternative dispute resolution is defined by Black as a procedure for settling a dispute by means other than litigation, such as arbitration or mediation.[1] ADR has also been defined as encompassing all legally permitted processes of dispute resolution other than litigation.[2] Ware[3] criticizes this definition when he said "while this definition is widely used; ADR proponents may object to it on the ground that it privileges litigation by giving the impression that litigation is the normal or standard process of dispute resolution while alternative processes are aberrant or deviant". That impression is false according to him; litigation is a relatively rarely used process of dispute resolution.

Alternative processes especially negotiation are used far more frequently. Even dispute involving lawyers are resolved by negotiation far more often than litigation. So ADR is not defined as everything but litigation because litigation is not the norm. ADR is defined as everything but litigation because litigation, as a matter of law, is the default process of dispute resolution. ADR is also defined as a range of dispute resolution processes or mechanisms designed and available outside of, but supplementary to litigation. It arises out of the realization that not all disputes have to end in courts or traditional system of litigation, as sometimes disputes can be settled amicably between the disputing parties and faster too. It is also seen as descriptive of a wide variety of dispute resolution mechanisms that are short of, or alternative to full scale court processes. It can refer to everything from facilitated settlement, negotiations in which disputants are encouraged to negotiate directly with each other prior to some other legal

[1] *Black's Law Dictionary,* 6th Ed. Minnesota USA, 2004 P. 1380 Print.
[2] Daver A. Manual of Dispute Resolution: ADR Law and Practice Vol. 1 Colorado Springs McGraw-Hill Inc. 1994 P. 40 Print.
[3] *Black's Law Dictionary op. cit.*

process to arbitration system or mini-trials that look and feel very much like a courtroom process.

For the purpose of this research, we shall define ADR as a range of dispute resolution processes or mechanisms designed and available outside of courts or annexed to courts but supplementary to litigation. This definition in our opinion covers all types of ADR including those outside the court system, and those court annexed ADR processes. The definition also takes care of the argument whether or not ADR is alternative to litigation or complementary to it. In our view ADR serves the dual purpose of being an alternative to litigation, and at the same time complementary to litigation because ADR can never eradicate court litigation as we shall show later in this work those instances where litigation is the only appropriate mode of settling disputes. But significantly ADR has reduced court congestions in most jurisdictions but has not and cannot eradicate litigation while in quite a number of cases ADR rely on the courts for its enforcement especially in arbitration cases.

These definitions point out certain characteristics:

a) Flexibility, which implies the absence of technicalities in procedure.

b) The cost effectiveness which suggests that it is cheaper than litigation.

c) Speed, which makes the process attractive to disputants.

And also implicit in the definitions is the multifaceted nature of ADR. The most widely used methods of the ADR are mediation (where a neutral third person helps facilitate an agreement between the parties) and arbitration (where a neutral third person hears both sides of a dispute). There are different procedures, each one with its unique structure, giving parties an abundance of ways to approach their particular problem.

In the pre-colonial era, traditional legal system was hinged on it. Then, resolving conflicts and disputes was identified in hierarchical options: first, the disputants try to resolve their matters by themselves (negotiation), failing which the assistance of the senior kinsmen is sought (mediation), if this option failed, it was taken to the Head man of the neighbourhood in which the defendants live (neutral evaluation/mediations). In the eventuality of the matter not being resolved, it was then referred to a High Chief or King for a binding decision (arbitration).[4]

In the colonial and post colonial Nigeria, however, the police and the formal court had the responsibility of ensuring law, justice and order in the society. The formality of the setting of the courts, the incomprehensibility of the language, the mode of dressing of the court officials, adversarial nature and strangeness of the entire proceedings all combined to make such disputants not only formal adversaries but antagonists in the real sense. Quite often, the commencement of litigation often marked the beginning of enmity and possibly conflict of the relationship, both formal and informal, whether the parties are educated or not.[5]

1.3 ORIGIN OF ALTERNATIVE DISPUTE RESOLUTION

To adapt to analogy often given of the traditional African approaches to dispute resolution handed down by customs as the basis for development of the modern ADR movement, it has often been said that these traditional systems of resolution of conflicts in African societies know nothing of the formality and technicality of modern process of litigation. They were concerned with reconciling parties to dispute and ensuring a win-win rather than a win/loose outcome. The third party whose responsibility it was to adjudicate these disputes usually played the role of a mediator. In some other

[4] Opeyemi, O. Judicial System: Any Alternative in ADR? *ThisDay* Vol. 14 No. 5209, 27th July 2009, p. 54. Ibe C.E., *Insight on the Law of Private Dispute Resolution in Nigeria* El Demak Enugu, 2008 P. 45 Print.
[5] *Ibid*

circumstances, when there were contentious issues between disputants, particularly groups of disputants, the approach adopted was negotiated in order to arrive at some workable or amicable solution. The advantage of these methods included the relatively easy access disputants could have conflict resolution process, the affordability of same, as well as the opportunity they provided for community participation in the resolution of disputes. These translate into or relate to what has become a modern movement aimed at developing ADR in which the United States of America has been somewhat of vanguard. Some writers[6] traced this phenomenon to the intellectual impetus given by social scientists and legal scholars consequent upon their studies of dispute resolution processes in other climes, particularly Africa. It has also been observed that in America, this process, such as mediation by respected community members was common place within cohesive immigrants or religious groups as early as colonial New England.[7]

The modern movement however picked up some time in the 1970's in response to strife arising from such problems as race relations. The 1970 Pound's conference which members of the legal profession deliberated upon the problems associated with the courts did much to direct attention at the need for change. At that conference, Prof. Frank Sander of the Harvard Law School proposed his concept of the "multi door court house", in which the court moves from being just a "court house" to a dispute resolution centre where the grievances with the aid of a screening clerk, would be directed to the process or sequence of processes most appropriate to a particular type of case.[8] This proposal led to the establishment of pilot schemes of model multi door court houses in parts of the

[6] Atlas, N.F., Stephen, K.H. & Evendy, T.H. (eds) *Alternative Dispute Resolution: The Litigants Handbook.* American Bar Association Publishing, 2000 P. 420 Print.

[7] Burton, J.W., *Conflict Resolution as Political Philosophy in Conflict Resolution Theory and Practice: Integration and Application*. Edited by Cler, M.H. and Dennis, J.D.S., Manchester and New York, Manchester University Press, 1993 P. 250 Print.

[8] Dunlop, J.T. and Arnold M.Z. *Mediation and Arbitration of Employment Disputes*. C. San Francisco, Jossey-Bass Publisher, 1997 P. 350 Print.

United States. The use of arbitration and mediation as dispute settlement processes was similarly to be encouraged. Thereafter, community based dispute resolution programmes began to be introduced in different parts of the United States.[9] Though the ADR movement was slower in the United Kingdom, it eventually began to take root.

2.4 NATURE OF ADR PROCESSES

As pointed out above, Alternative Dispute Resolution (ADR) processes are the methodologies for resolving disputes outside the court room. It is not meant to substitute litigation neither is it meant to supplant it. Rather, it is to complement litigation. Although a very fundamental aim of ADR is to decongest our courts, it will be hyperbolic to say that ADR has immediate answer to court congestion. It should be seen rather as a necessary part of any efficient framework for dispute resolution. While it has the potential to decongest the courts, even when the courts are no longer congested, it does not throw ADR into disuse. Rather, it is a vital component of justice delivery in any judicial system. Although ADR is not an entirely new concept in Africa, indeed, Nigeria, the nature of ADR as practiced today or as advocated is definitely not particularly familiar. With the laws and rules of the various High Courts in Nigeria giving power to the courts to, "…promote reconciliation among the parties thereto and encourage and facilitate the amicable settlement thereof[10] as well as providing for court annexed ADR procedures in the name of multi-door court house, we surely have a new trend in ADR.

The main features of ADR processes are that:

a) It is voluntary.

b) It is flexible.

c) It is privately done.

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[9] Consensus Building Principles http://www.resolv.org/certides/princ.html, Web, Uwazie, E.E. Promoting ADR for Conflict Mediation. *The Guardian,* 17 November 2009, p. 84 Print.

[10] Section 28 High Court Laws of Rivers State; Sections 24 & 25 of the High Court Laws of Lagos State.

d) It is collaborative.

e) It provides high party involvement/participation.

f) It is non judgmental.

g) It is largely interest/need based.

1.5 SCOPE OF ADR

Alternative Dispute Resolution (ADR) as practiced globally and by extension, Nigeria is divided into arbitral and non arbitral methods or what others called adjudicatory and non adjudicatory processes. The scope of this research covers both arbitral or adjudicatory and non arbitral or non adjudicatory processes. We shall first discuss arbitration.

Arbitration

Arbitration is the only known arbitral or adjudicatory process in the sense that in arbitration, evidence is taken from parties to the dispute and an award is made or a judgment entered in favour of one party whose claim is sustained by admissible evidence. This is akin to the procedure in national or state courts but it differs significantly from litigation because arbitration, arguably, could be said to be the first step towards privatization of justice, in that as an alternative to resolution through national or state courts, the parties have greater control over the appointment of arbitrators, language of the arbitration, place of arbitration and the principles to be applied to issues under consideration whereas in litigation through national or state courts, the courts are public institutions funded by the government. Appointment of court officials is also done by the government and the government provides the court rooms and other facilities and the doctrine of judicial precedent is always enforced in courts but that is lacking in ADR.

The non-adjudicatory or non arbitral alternative dispute resolution processes are:

1) Conciliation
2) Mediation
3) Negotiation
4) Renegotiation
5) Expert determination
6) Certification
7) Mini-trial
8) Rent judge
9) Early neutral evaluation (ENE)
10) Mediation Arbitration (Med. Arb.)
11) Summary Jury Trial
12) Settlement Week
13) Ombudsman
14) Neutral case evaluation
15) Novel media which has its origin in Nigeria

We shall define each of these processes now but later in this research work, we shall discuss each of them in detail.

1.5.1 Conciliation is described as a settlement of a dispute in an agreeable manner. It is a process in which a neutral person meets with the parties to a dispute and explores how the dispute might be resolved, especially by a relatively unstructured method of dispute resolution in which a third party facilitates communication between parties in an

attempt to help them settle their differences. Some jurisdictions such as California have family conciliation courts to help resolve problems within the family.[11]

1.5.2 Mediation is a method of non binding dispute resolution involving a neutral third party who tries to help the disputing parties reach mutual agreeable solution.

From legal literature, conciliation and mediation have generated a lot of controversies; one school of thought believes that the two words mean the same thing and that they could be used interchangeably. The other school asserted that they are distinguishable. This school contends that conciliation uses a third party to iron out the differences between the disputing parties and arrived at an amicable solution. But in mediation the third party plays an evaluative role by expressing his opinion whereas in conciliation, the role of the third party is a facilitative one. He does not advice parties about his own opinion and a game played with so little reserved by those taken up with it that they will sacrifice their own ultimate interest in order to win it.[12]

1.5.3 Renegotiation comes into play when a contract is already in existence. It is a mode used to modify the terms of an existing agreement, either at periodic intervals or if certain stated events occur. Re-negotiation involves adjusting and balancing of the contract terms so that neither party remains at disadvantage by initial terms. For a meaningful renegotiation to be undertaken, it is important to provide for a renegotiation clause in the original contract that is precisely defined in such a way that events that could trigger renegotiation are exhaustively enumerated. It is when negotiation and renegotiation fails that resort is had to other modes of dispute resolution within ADR processes or outside them.[13]

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[11] Bryan A. G, *Black's Law Dictionary*, 8th Ed. Minnesota, USA, 2004 P. 380 Print.
[12] Bryan A.G., *A Dictionary of Modern Legal Usage*, 554, 2nd Ed, 1995 P. 1882 Print.
[13] *Op cit P. 1371*

1.5.4 Expert Determination an expert is a person who through education or experience has developed a skill or knowledge in a particular subject, so that he or she may form an opinion that will assist the fact finder. Sometimes, a contract provides that any dispute arising from the transaction shall be resolved by a person acting as an expert and not an arbitrator. Such a person is not an arbitrator and is not subject to Arbitration and Conciliation Act or any other arbitration rules or regulations. He is under no obligation to hear evidence or argument although he may if he wishes. He is entitled to rely solely on expertise and any investigation he may carry out on his own. Where some price or value is to be determined, an expert can best produce the result cheaply and quickly. Bryan opined that the distinction between mediation and conciliation is widely debated among those interested in ADR, arbitration and international diplomacy.[14] Some suggest that conciliation is a non binding arbitration whereas conciliation is merely assisted negotiation. Others put it this way; conciliation involves a third party trying to bring together disputing parties to help them reconcile their differences.[15] Whereas mediation goes further by allowing the third party to suggest terms on which the dispute might be resolved. Still others reject this attempt at differentiation and contend that there is no consensus about what the two words mean- that they are generally interchangeable. Though a distinction would be convenient those who agree that usage indicates a broad synonym are most accurate. In our opinion however, conciliation is a facilitative process while negotiation goes further than facilitation to suggestion of terms and expression of helpful opinions in resolving the dispute.

1.5.5 Negotiation is described as a consensual bargaining process in which the parties attempt to reach agreement on a disputed or potentially disputed matter. Negotiation

[14] *Ibid*
[15] *Ibid*

usually involves complete autonomy for the parties involved without the intervention of third parties. According to Fuller, "negotiation, we may say, ought strictly to be viewed as a means to an end. It is the road the parties must travel to arrive at their goal of mutually satisfactory settlement. But like other means, negotiation is easily converted into an end in itself; it readily becomes a game played for its own sake.[16]

1.5.6 Valuation is described as the process of determining the value of a thing or entity or the estimated worth of a thing or entity.[17]

Often, experts in various fields are invited to carry out a task of valuation for the benefit of parties to a transaction. A common example is where a rent review clause in a lease provides that a new rent should be fixed by a qualified valuer or surveyor, or where the articles of association of a private company provides that the company's auditor shall determine the price at which shares are to be sold when an existing shareholder decides to sell his shares to the directors.

1.5.7 Certification building contracts usually provide that some acts should be done to the satisfaction of a third party who is required to issue a certificate as evidence of such satisfaction. For example a contract may provide that a third party, such as an architect, has to indicate his satisfaction with a party's performance of a contract before that party's right to payment arises. If the certifier is employed by both parties- he is an arbitrator but if the certifier is employed by one of them, he is not an arbitrator but the process is certification.[18]

1.5.8 Mini-Trial: mini-trial is a form of evaluative mediation which as a non binding ADR process which assists the parties to a dispute to gain a better understanding of the

[16] Lon L. Fuller Anatomy of the Law, 128 Amazing (1968) Print.

[17] Bryan A.G. *op cit.*, Mark Kantor *Valuation for Arbitration* the Arbitrator vol. 75 No. 1, 2009, p. 135 Print.

[18] Bodunrin A., Expert Determination as a form of ADR, *The Arbitrator* Vol. 11, No. 1, 2007, p. 11 Print.

issues in dispute, thereby enabling them to enter into settlement negotiations on a more informal basis. Mini-trial usually takes the form of a short presentation of the issues by the respective in-house lawyers of the parties who now sit together on the opposite side of the table facing disputants, or in the case of corporations, their chief executive decision makers.[19] The disputants literally become the jury assisted by a neutral expert who may be a former judge or some other person with authority in the field of the dispute selected as neutral adviser to elucidate any problem which may arise during presentation. The executives then retire and try to negotiate a settlement. This enables them to review the dispute in a better perspective and helps them to settle in a more dispassionate manner. Here again, the neutral as in the mediation, can have a significant role by acting as a facilitator of the parties' negotiation.

1.5.9 Med-Arb: in Med-Arb which is an abbreviation for "mediation arbitration' attempt is first made to resolve a dispute by agreement through mediation, and if that fails, then it proceeds to a binding arbitration., the advantage of this is that if settlement cannot be reached, the initial mediator can now be appointed the arbitrator entrusted with the duty of making a binding determination, especially if during the course of the mediation, a relationship of trust has developed between the mediator and the disputants.[20]

In Med-Arb process, the decision to go to arbitration if mediation is unsuccessful is one to which the parties commit themselves in advance before the process commences. In this regard, it has been said that this offers the advantages, real perceived, that first the process will produce a resolution, one way or another, secondly that parties may perhaps try harder to be reasonable and to resolve the matter during the mediation phase; and

[19] Dele P., *ADR Principle and Practice*, Deesage Nig. Ltd., Lagos 2004 P. 220 Print.
[20] *Ibid*

thirdly that if adjudication is required, there will be no loss of time or cost in having to reacquaint a new neutral with the facts of the case and the issues between the parties.

1.5.10 Early Neutral Evaluation: early neutral evaluation is generally used to assess the likely outcome of a legal action. This evaluation provides a quick method of obtaining a neutral advisory opinion, which may assist the parties in the negotiation. The evaluation word, Early Neutral Evaluation (ENE) is a non binding process designed to improve case planning and settlement processes by giving litigants an early advisory evaluation of the case. Like mediation, ENE is thought to be applicable to many types of civil cases including complex disputes. In ENE, a neutral evaluator usually a private attorney with expertise in the subject matter of the dispute holds a confidential session with the parties and counsel early in the litigation generally before much discovery has taken place to hear both sides of the case. The evaluator then helps the parties clarify issues and evidences, identifies strengths and weaknesses of the parties, positions and gives the parties a binding assessment of the value or merits of the case. Depending on the role of the programme, the evaluator also may mediate settlement discussion or offer case management assistance such as developing a discovery plan.[21]

1.5.11 Summary Jury Trial: the summary jury trial is a non binding ADR process designed to promote settlement in trial ready cases. A judge presides over the trial where attorneys for each party present the case generally without calling witnesses but relying instead on submission of exhibits. After this abbreviated trial, the jury deliberates and then delivers an advisory verdict. After receiving the jury's advisory verdict, the party

[21] *Ibid.*

may use it as a basis of subsequent negotiations or proceed to trial. A summary jury trial is typically used after discovery is complete.[22]

1.5.12 Settlement Week: in a typical settlement week, the court suspends a normal trial activity and aided by volunteer mediators, sends numerous trial ready cases to mediation sessions held at the court house. The mediation session may last several hours with additional sessions held as needed cases unresolved during settlement week's return to the court's docket for further pre-trial or proceedings as needed.[23]

1.5.13 Case Evaluation (Michigan Mediation): case evaluation provides litigations in trial ready cases with a written, non binding assessment to the case value. A panel of three attorneys makes the assessment after a short hearing. If all parties accept the panel's assessment, the case proceeds to trial. This arbitration like process has been referred to as "Michigan mediation" because it was created by the Michigan state courts and subsequently used by the federal court in Michigan as well.[24]

1.5.14 Ombudsman: The ombudsman is an official appointed by the government to investigate and report on complaints made by citizens against public authorities. The parties are obliged to attempt resolution seriously before passing on the dispute to the ombudsman. Decisions are usually based upon written evidence, although there is an increasing trend towards meeting with the parties both jointly and individually.[25] The ombudsman in Nigeria is the Public Complaints Commission which has functional branches in all the states of the federation. It is a creation of statutes in Nigeria and other states.[26]

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[22] John T., *Conceptual and Practical Analysis of ADR, Emerging Issues in Nigerian Law*, Alubo (ed) Abuja 2009, p.54 Print.
[23] *Ibid.*
[24] *Ibid.*
[25] *Ibid.*
[26] Public Complaint Commission Act Cap P 3, Laws of Federation of Nigeria, 2004.

1.5.15 Novel Media: the last but not the least is the novel media type of ADR which is indigenous to Nigeria. Novel media are local television programmes like *Gboromiro* meaning "hear my plight", of NTA channel 7 Lagos, *Mogbejomide* - this is my complaint, a Lagos television channel 8 programme, *Agborodun* "sympathizer", an NTA Ibadan programme or *Olowogbogboro* "the long arm that delivers", an NTA Abeokuta programme and *so da bee*? "Is it right?" A BCOS television programme of Ibadan. These programmes are either conducted in English or Yoruba and it is popular in all the states in South Western Nigeria.

Under these programmes, complaints are written to the co-ordinator of the programme in any of these television houses who will summon both complainant and defendant to come with their witnesses. When they appear, they state their cases and the panel will attempt to settle them. The settlement is a non binding one but because of the public ridicule that may follow non co-operation and compliance with the decision of the panel, most disputing parties abide by the outcome of the decision of the panel. This list is not exhaustive of the type of ADR available, there are others like Collaborative Divorce, Party Directed Mediation and Online Dispute Resolution which we shall discuss later in this work.

1.6 SOURCES OF LAWS OF ALTERNATIVE DISPUTE RESOLUTION

The main sources of ADR in Nigeria are statutes and common law. The main arbitration law is the Arbitration and Conciliation Act Cap A18 LFN 2004, which provides for the right to settle disputes by conciliation. The Act[27] provides that the parties to any agreement may seek amicable settlement of any disputes in relation to agreement by conciliation under this Act. In addition, section 55 of the Act provides that the parties to alternative commercial agreement may agree in writing that a dispute in

[27] Section 37 of Arbitration and Conciliation Act Cap A18 LFN 2004.

relation to an agreement shall be settled by conciliation under the conciliation rules set out in the third schedule to the Act. We also have the Lagos State Arbitration Law 2009, Lagos Court of Arbitration Law No. 8 2009, Citizens' Mediation Centre Law 2009 and Lagos multi-door court House Law 2007. We also have Citizens Mediation Law of Kwara State, 2008.

High Court Civil Procedure Rules of various high courts have provisions for ADR in Nigeria. For example, the High Court of Lagos State Civil Procedure Rules, 2004, Order 25 Rule 6 provides that in the promotion of amicable settlement of cases, parties may adopt the alternative method of dispute resolution. So also do Kwara State High Court Civil Procedure Rules 2004 and Kogi State High Court Civil Procedure Rules, 2006.

Lastly, Mediation and Arbitration Procedure Rules (2003) Practice Direction of the Abuja Multi-door Court House and Order 17 of the High court of Abuja Civil Procedure Rules provide for ADR. The foregoing analysis therefore indicates that the practice of ADR has statutory backing.

CHAPTER TWO

2.1 IMPORTANCE OF ALTERNATIVE DISPUTE RESOLUTION

The inability to meet the need of the ordinary citizen was however not merely one of the content of the substantive law but also because of the structure and procedural requirements of the court. This means that many people were denied access to courts. However, Customary and Area Courts of the rural community had their philosophical background in the customary law that was being practiced by traditional leaders. It could however also be seen as a particular application of the consensual principle of ADR and its non-authoritarian consensus producing processes within the structure of a specific community and according to the culture of its prevailing moral norms and social standards.

The Constitution of the Federal Republic of Nigeria 1999 is based on the principles that people are equal before the law.[28] The problem is that the equality thus achieved will be more of a façade than a reality if people are still de-facto excluded from justice due to injustice prevailing in the economic, social or cultural ability to make use of those rights to participate meaningfully in the administration of justice. In this setting, it is justifiable that consideration be given to alternative remedies and processes that may make justice fair and more accessible.

Quite a number of concomitants of litigation constitute serious drawbacks to the use of judicial machinery of the state in dispute resolution. These include but are not limited to the following:

a. Excessive Formalism

A court trial is always formal. The setting is strict and formal. Judges and lawyers in the higher courts dressed in robes, all to the discomfiture of the parties and their

[28] Section 17 of the 1999 Constitution of the Federal Republic of Nigeria (as amended)

witnesses. Even in the lower courts, there is the compulsion to dress in suits by both litigants and presiding officials. Again, litigation entails that the parties must comply with the standard rules of procedure established in the rules of courts and the Evidence Act. In arbitration and other forms of ADR, parties are free to determine the rules of the game to a large extent. Parties to ADR may agree to have their matter determined on the basis of documentary evidence only without inviting witnesses and oral testimony. However, the degree of informality in arbitration is dependent on the parties and their arbitrators.[29]

b. Inconvenience

In a court proceeding, the court's convenience is paramount hence, quite often, we hear lawyers make application to court, "subject to the convenience of the court". This is disadvantageous to parties who must subsume their own convenience to the courts. On the issue of convenience, an experienced arbitrator or umpire fixes and arranges for arbitral proceedings and time to suit the convenience of all the parties and their witnesses. In litigation, only the convenience of the court and lawyers are often taken into consideration.[30]

c. Limited Choice

In most cases, parties cannot choose a judge or judges of their liking to preside over their dispute without running the risk of facing contempt proceedings. This is a

[29] Bernstein R, Arbitrators knowledge and experience, *Arbitrator* vol. 52 No 2 1986 p 96 krikorian, Aldrience L litigate or mediate? Mediation as an Alternative to Lawsuits http://mediate.com/articles/krikorian. cfm.advanced of Dispute Resolution ADR Law and practice University of Ekrado: conflict research consorticism available at http://www.beyondintractability.org/booksummary&10157/. Morns, C. way of Addressing conflict or processing Dispute Peacemakers trust available at http://www.peacemakers.ca/publications/ADRdefinitions.htmlN ways Web. 12-3-2013

[30] Stephen B.G. *et al*. Dispute Resolution, Boston Little, Brown x coy 1985. Continuation of Dispute Resolution Processes Bickerman Dispute Resolution Group Available http://wwww.bickerman.com/chart/shtml. krisvis Jeffery Desktop Guide To Alternative Dispute Resolution Available at http://www.firstmediation.com/desktopguide/index.html. Web. 12-3-2013

serious disadvantage because a judge is not omniscient. Besides, parties cannot choose any person except members of the bar to represent them in court.[31]

d. Lack of Expertise

One of the major reasons and advantages of ADR and arbitration in particular is the opportunity that it gives to the parties to choose as their arbitrators, person or persons experienced in the field in which the dispute arises.

> According to Bernstein, even if, as sometimes it happens that an arbitrator has been chosen in spite of or even because of his ignorance in a particular field, it will be because he has qualities that stem from experience of other kinds.[32]

A judge or barrister may be chosen to arbitrate in for example, on oil refinery, or engineering dispute. But that will be because of his experience and expertise in the preparation for the management of complex disputes. In litigation, often as is the practice, a single judge presides over disputes. A judge first has to comprehend cases of the parties, determine the issues for decision and then decide the case as best as he can. The dispute may involve wide ranges of discipline and fields, both commercial, industrial and matrimonial. The judge who, however, is trained in law alone may know nothing in commerce and in which case he is not so enlightened in the field of business and trading. As stated above, a judge may not be an expert in the field, which he is called upon to administer justice. Yet in almost all the cases, matters which can best be understood and handled by an Architect, Surveyor, Estate valuer or Planner is left to the judge for decision. Courts do not have the power to *suo motu* call experts in aid. On the

[31] Yarn, D.H. Definition of Alternative Dispute Resolution in *Dictionary of Conflict Resolution,* San Francisco C.A Jossey-Bass 1999. Tunde Oyesina, Alternative Dispute Resolution: Cost and Time saving option to Litigation. *Nigerian Tribune* 15 March 2010 p 30. History of Alternative Dispute Resolution Available at http://www.mediation.com/html/history.html Web. 12-3-2013

[32] Bernstein, R. *op cit* note 1.

other hand, Arbitrators under section 22 of the Arbitration Act can do so, unless the parties agree otherwise.[33]

e. Absence of Confidentiality

Proceedings in a court of law are anything but confidential. With the few exceptions, parties are not shielded from adverse publicity. This in many cases may be inimical to their personal and business interest. Section 36 (3) of the 1999 Constitution of Nigeria has made it clear that proceedings of a court or any tribunal relating to matters in section 36(1) shall be held in public.[34] This means that save for the exceptions in section 36(4)(a) of the 1999 Constitution of Nigeria, trial in the court must be conducted in the public glare in which case members of the public and the press have the right to attend. Arbitration proceedings and awards are not made public except at the instance of the parties. A privately appointed arbitrator conducted all the arbitral proceedings in private with the parties, witnesses, and representatives being present, and as such confidentiality can be preserved where there is a valid basis for that so as to protect the business secrets of the parties and their business reputation.

f. Tardiness

Another importance of ADR is its speedy nature in the facilitation of the resolution of disputes. Thus the period which is the period between the time the dispute is brought before the neutral third party for determination and the actual resolution is short. The importance of this cannot be over emphasized because the larger the time that elapses, the more the business relationship the parties is strained and the more the dispute takes a life of its own.

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[33] Orojo, J.O. and Ajomo, M.A. *Law and Practice of Arbitration and Conciliation in Nigeria*, Mbeyi & Associates, Lagos, 1999. P. 32 Ezejiofor G., *The Law of Arbitration in Nigeria*, Longman, Lagos 1998 P. 24 Print.

[34] Section 36(1) of the 1999 Constitution of the Federal Republic of Nigeria (as amended)

The litigation of case in Nigeria can take an extremely long time from the initial filing of the claim and proceedings in the courts until the delivery of judgment. In some situations, cases last for eight to ten years without any assurance that they will ever be heard and determined by the court. The old adage that justice delayed is justice denied is reaching a compelling and irresistible stage and commercial men are not ready to leave their matters and differences in the hands of judges and courts that may never sit and even when they sit, may never handle a matter with dispatch.

Rather than experiencing the reverse, the saying, justice delayed is justice denied seems to be actualized and embedded in our justice system, so that today many are denied justice because of the sluggish nature of court proceedings. In this connection, it has been attributed to Williams Shakespeare the statement that the slowness of the legal process is one of the, "slings and arrows that may well drive a man to frustration, despair or even death," and that was evidently what led him (Shakespeare) to suggest in another of his work that, "the first thing we do, let's kill all the lawyers."[35]

The claim that arbitration is speedier than litigation needs to be qualified. In the beginning it was. However, nowadays this advantage has been seriously eroded, partly because of the increasing complexities in the nature of the modern business and disputes arising there from. Furthermore, some legal practitioners have carried into arbitration practice unnecessary delay tactics such as maximizing the use of provisions enabling a party to file certain papers within a given period and doing the same in respect of provisions enabling parties to ask for extension of time within which to file such papers. In *Black Clawson International Ltd v. Pap. Jerwerke Waldof-Aschaffenburg AD*,[36] the arbitration proceedings were so much elongated that those constituting the original

[35] Hamlet, Quoted by Ilochi A. Okafor with Obidinma E.O.in *Unizik Law Journal*. Vol. No. 3, 2001 p 252 Print.

[36] (1981) 2 Lloyds Reports, P. 486

arbitration panel resigned and a new set appointed. The case was finally disposed of after fifteen years.

g. Rancour

It is common knowledge that once parties take their matter to court a "war" is declared and they see themselves as fighting "legal battle", with the attendant implications. Even after the "battle", their centre can no longer hold and so parties fall apart for a time indefinite.

h. Lack of Economy

Cost and expenses are minimized in ADR. Filing fees are not paid as in litigation. In ADR, parties are free to represent themselves or to appoint their employees to represent them. In litigation, the filing fees payable by the parties have been increased in all the courts in Nigeria and this is a form of obstacle on the way of administration of justice as the timid and poor now suffer in silence because of the increased filing fees and cost of litigation. Because court proceedings last long, it is costly and besides, lawyers' professional fees must be paid. However this need to be qualified, as every other professional engaged in any field must be paid but in most cases there are professionally approved scales of charges. The point being made is that delays in court proceedings have the effect of increasing legal costs, whether in regard of lawyers fees or incidental expenses.

The probative cost of litigation is most common general complaint about the current justice system in Nigeria. This prevents meaningful access to courts and even those with access are often victims of delay. For most litigants, delay means added expenses and for many people, litigation had put justice beyond the reach of the ordinary citizen. The incomprehensibility and adversarial nature of the process with a resulting

lack of control (parties can) only participate in an indirect manner further leads to a sense of frustration and disempowerment. Courts offering only trials are furthermore limited in their response to a legal dispute.

Litigation always creates winners and losers and even winners may feel like losers given the limited nature of legal remedies that may be imposed from a limited range of win or lose options. In this regard, it is to be noted that societies come to appreciate the necessity or access to justice through alternative dispute resolution techniques based on what can be called, "co-existential justice". When parties choose litigation over ADR, it is not that they consciously desire to litigate. Parties are driven to that process by their mutual desire to win the battle. Examples abound like: the case of *McDonnell Douglas Corp/General Dynamics v. U.S. Fed.*[37], which involved a default termination of contract to produce the Navy's A-12 attach aircraft. The parties spent almost three years in preparing for trial. More than $3 billion was at issue in the case. It has been estimated that the parties were spending $66 million a year in litigation process and expenses. After many years of pre-trial preparation with both sides reviewing and processing literally thousands of documents and interviewing countless individuals, the US Court of Federal Claims decided the matter. Having decided in favour of the contractor, the court avoided a full scale trial on the merits of the contractor's allegation of constructive charges and breach. Instead, the court required both sides to "share the pain" of the contract termination by restricting the contractor's recovery to their incurred cost of performance by excluding profits and amounts included in the contractor's request for equitable adjustment.

The big question: if the parties could start over again, would they have chosen to pursue the ADR route that would have empowered them to arrive at a resolution that

[37] (1999) 7 USCFC P. 97

would have empowered them to arrive at a solution that would be equal to or better than the solutions the courts were provided? The facts relied upon by the courts were probably well known by the parties. Facts of course, are everything in alternative dispute resolution. What kept the parties from utilizing this powerful tool to exploit them? There is an important fact common to successfully negotiating the settlement of a dispute and it is that the amount of discovery taken to prepare for trial is usually far more than that needed for settlement. This is particularly significant to parties who have learned that discovery and pre-trial processes can become "black hole" for time and cost.

The foregoing litany of woes and impediments to court processes conversely justify resort to alternative dispute resolution. When the parties select ADR instead of litigation, arbitral type of proceeding being an exception, they substitute for a judge who decides the case for the parties. This is particularly attractive to business persons who want to be in charge of their destiny.

The ADR neutrality encourages parties to listen carefully to each other instead of arguing, extorting or game playing. Instead of procrastinating, the p-arties, encouraged by the ADR neutral's participation are able to come to terms with the strengths and weaknesses of their respective cases so that they can decide what is best for them. ADR quickly clarifies the issue and helps the parties to appreciate what the likely outcome would be if they choose litigation.

Another important fact to note is that many docketed cases settle before or during trial. Why? The parties learn more about each other's position from pre-trial motions, discovery and preliminary hearings. The parties due to deadlines set by tribunal are better able to understand the facts, appreciate the risks and assess the likelihood of success at trial. The cost, time and anxiety of the trial itself cause the parties to take a good look at

their prospective positions. Thus, frequently, the parties come to terms and do not see the need for full trial of the case.

2.2 ADVANTAGES OF LITIGATION OVER ADR

Though ADR has obvious advantages and generally preferred by commercially minded men or business men, there are certain areas where litigation may be preferable. Such areas are:

- Where there is a question bordering on the interpretation of statutes or other legal instruments, litigation is a better option as it allows the judges who have the constitutional or statutory powers to interpret laws and legal provisions.
- Where legal precedent needs to be set. The need for legal precedent is very important in any legal system. Precedents make for standard and certainty so that an individual adjudicator's discretion in any particular case could be gauged against available precedent in that area.
- Litigation takes better care of emergency situations. No ADR process confers upon a mediator, adjudicator or facilitator any power to grant any injunctive relief. An order of interim injunction may be required at certain occasions to forestall certain steps being proposed to be taken by any party to a dispute which only a court can grant.
- Public policy
- Litigation is necessary to avoid an action from being statute barred. Every person who agrees to go into negotiation or any other ADR process has at the back of his mind the realization that if it fails, the last bus stop is the court room. It is however very common to see that many a person submits to ADR process only with the hope of postponing the fulfillment of his obligation to the other party.

Sometimes, even where parties agree to negotiation, it is wiser for the claimant to file a stay of course of action. This is because the other party may continue to play for time until he is sure that the statute of limitation has caught up with the claim before he will pull out of the process. For example, by virtue of Section 2(1) of the Public Officers' Protection Act[38] (POPA) any action against a public officer must be commenced within three months or else, it becomes statute barred. The Supreme Court has widened the meaning of "public officer" to include public office.[39]

- Litigation is a better option when the cause of action is frivolous. A frivolous claim that will certainly suffer dismissal by the court is better left for litigation so it will be appropriately dealt with instead of wasting the time of the other party trying to negotiate nothing or mediating in nothing.

2.3 DISADVANTAGES OF LITIGATION

- Unlike ADR, litigation is not voluntary, at least not for the defendant. Once he is sued, he must appear whether he likes it or not. In ADR, the other party may decline to submit to ADR and he cannot be forced. In litigation, if you fail to take steps after commencement, judgment may be entered against you.
- Litigation procedures are basically standard form in character and not flexible as in ADR. In other words, parties cannot choose the venue or time of meeting or even the mode of proceeding. The court room is fixed, so also is the time of sitting and the rules of procedure.

[38] Cap 14 Laws of the Federation of Nigeria, 2004

[39] *Ibrahim v. Judicial Service Committee*, Kaduna State (1998) 10-12 SCNJ. P. 255

- Lack of privacy: in litigation, hearing is in public and this is a constitutional requirement.[40]

  Where a court takes proceedings in private, such proceeding is a nullity. Many breaches of the rights of persons have gone unaddressed in the country largely because the parties aggrieved do not want publicity. Matrimonial causes suffer in this regard. Dispute between staff and employees and between sister companies have suffered in this regard especially where trade secrets are involved. Victims of such offences as rape and indecent assault have had to bear their agonies in secret rather than face the publicity that goes with trial of the offender in such cases against the background that the guilt of the accused must be proved beyond reasonable doubt.[41]

- In litigation, the parties have no control over the process neither do they have any control over the outcome. Once the parties are in court, what is in issue is not amicable settlement but the determination of the legal right and/or obligation of the parties which each party must take, subject, only to the right of appeal.
- The problem of enforcement. Because parties are in control of neither the process nor the outcome, judgment of the court comes to one or some of the parties as a shock. The implication is that the enforcement of the judgment is difficult as the losing party may do anything within his means to frustrate the judgment.
- LITIGATION is expensive. In the adversarial system which we operate, parties bear the cost of filing the court processes e.g. the plaintiff has to pay for the application for the interim or interlocutory relief as well as pay his counsel if he

[40] See Section 36 (1) and Section 36 (3) of the Constitution of the Federal Republic of Nigeria 1999 which altogether provide that in the determination of the civil right and obligations of litigants the courts or tribunal, the proceedings must be held in public.

[41] Section 138 of the Evidence Act, cap E14 Laws of Federation of Nigeria, 2004

so wishes and pay for filing of all court processes which he needs to file. Where each party wants to use document, they have to do all that is necessary to make the document up in the form in which it is admissible.[42] Where they intend to use expert or other witnesses, they shall be responsible for the entire cost and attendance of such witnesses at the trial. Where a plaintiff's claim is ₦2,000,000 – for instance, he may, at the end of the proceedings end up having spent well over ₦2,000,000 – such that if he succeeds at the end of the day, his success would be better regarded as a pyrrhic victory.

- Undue delay. Apart from the Federal Capital Territory and a few states who have taken some giant strides in the reform of their Civil Procedure Rules by the introduction of the front loading system, it takes a minimum of six months to take the first witness in a case instituted at the High Court. For example, where the defendant resides outside the jurisdiction of the court, the Rules of court as well as the Sheriffs and Civil Processes Act provide that the defendant enters appearance within 30 days.[43] Where the dispute involve land, the plaintiff has 60 days from the date the defendant enters appearance within which to file his statement of claim.[44] The defendant has another 60 days from the date of service of the statement of claim upon him to file his statement of defence.[45] The plaintiff has another 30 days after service of the statement of defence upon him to file a reply if he wants. The above shows clearly that even without any interlocutory application or any adjournment by any party to the cause, no less than 180 (one

[42] Section 97(2) Evidence Act, Cap E14 Laws of Federation of Nigeria, 2004.
[43] Section 99 Sheriffs and Civil Processes Act, Cap S6, Laws of Federation of Nigeria, 2004. See Laos Sken consult Nigeria Ltd v. Sekondy Ukey (1981) 1SC P. 6
[44] Order 25 Rule 1, the proviso thereto to the uniform High Court Civil Procedure Rules, (Kano State) 1987.
[45] Order 25 Rule 3 (1), proviso thereto (Kano)

hundred and eighty) days are already wasted. In practice, the minimum number of days before hearing starts in any case is 360 (three hundred and sixty) days. This inordinate delay has resulted in untold frustrations and further created apathy for litigation as a mode of dispute settlement, in addition to the attendant cost implication.[46]

- In litigation, rather than see dispute as a problem to be solved, parties see it as a battle to be won. In a developing country like Nigeria, for instance, every disagreement including disagreement on political ideology is seen as enmity. Once parties are in court, the friendship or other relationship is lost forever as litigation is neither future focused nor interest based. The case of **Jadesimi v. Okotie-Eboh**[47] is a classical case of a family polarized and disintegrated by litigation.

2.4 THE CONCEPT OF CONFLICT

Self help, litigation, arbitration, negotiation, mediation, conciliation are all methods by which disputants, parties in dispute or conflict resolve their differences. The bottom-line of all these processes is conflict. In other words, parties have to disagree before they can talk about any or all of these mechanisms. A clear understanding of the concept of conflict will aid, in no small measure, in appreciating the various mechanisms of ADR that will be discussed in this work. If, as we pointed out earlier on, the focus of ADR is interests and needs of the parties, a deeper knowledge of what is responsible for the conflict between the parties will far better than the bogus claims and defences put forward by the parties, perhaps in their pleadings before an adjudicator. Although, like the elephant, a conflict is easily recognized when one is seen, it is not so easy to define.

[46] Order 25 Rule 3 (4) (Kano)
[47] (1996) SCJN P. 40.

This is why it is said that, "the academic literature describes conflict better than it defines it"[48]. According to Thomas, an expert in conflict and negotiation process, conflict is;

> The process that begins when one party perceives that the other has negatively affected, or is about to negatively affect something that he or she cares about…[49]

Pondy is of the opinion that "behavior should be defined as conflictful if, and only if, some or all the participants perceive it to be conflictful."[50] For Olowu, it is a perceived incompatibility of goals: what one party wants, the other party sees as harmful to its interests.[51] Other experts in conflict and conflictology, Kornhauser, Dubin and Ross also see conflict from the angle of perception and/or belief.[52] On his part, Dana, sees conflict from three perspectives which he describes as "Blips," "Clashes" and "Crises".[53] He posited thus:

> Some conflicts are hardly noticeable as they ebb and flow through our daily social encounters. Others grow into intense disputes that span interpersonal tragedies. The severity of conflict ranges from insignificant blips through a middle range of clashes to severe crises that threaten the life of the relationship.[54]

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[48] Taylor, D.M. and Moghaddam, F.M. "Realistic Conflict Theory" in Theories of Inter-group Relations. 2nd Ed. Westport Cn; Praeger, 1994 p. 55 Print.

[49] Thomas, K. "Conflict and Negotiation Process in Organisations" in Dunnette M. & Hough I. (eds) *Handbook of Industrial and Organisation Psychology* (Pato Alto: C.A. Consulting Psychosis's Press, 1992 p. 119 Print.

[50] Pondy L., "Organisational Conflict, Concepts and Models". *Administrative Science Quarterly* 12, 1967, p. 303 Print.

[51] Olowu, S. "Conflict and Conflict Resolution" *Ife Psychologia* Vol. 9 No. 3 2001 p. 119 Print.

[52] Kornhauser, A. Dubin, R. and Ross, A. (eds) *Industrial Conflict,* New York: McGraw-Hill, 1954 p. 14 Print.

[53] Daniel, D. *Managing Differences,* 4th Ed, Ikansas: MTI Publications, 2005, p. 37 Print.

[54] *Ibid*

Conflict has also been defined as a serious disagreement between two or more persons, a serious difference of opinions, wishes etc, a struggle or a fight.[55]

Although the points made on the perception character of conflict are apposite, they are, with due respect, too subjective to adequately explain the term "conflict". What one cannot deny or run away from is the objective dimension of the term. Most conflicts undoubtedly involve conflicts of interest although as rightly pointed out by Kornhauser and Ross, they may not involve economic facts of life. The fact that resources may be too scarce to be shared satisfactorily, the fact that various people may be pursuing goals that are incompatible or at least difficult to reconcile, the fact that people differ on cultural grounds, or even common ego may be potential sources of conflict even though the people involved may not yet perceive the threat to their respective interests. The point being made here is that the situation the people described above find themselves provide the antecedent condition for conflict. Epie, sees this as latent conflict.[56] Such objective situation of conflict, according to him, increases considerably the likelihood of the appearance of overt conflict. He gave a further illustration, using crises in the labour industry.

> To take a practical example, it is the inherent conflict of interest in the employment relationship itself that leads to strikes or to legal actions. While employers are happy to recruit good workers and workers are happy to get a job, the interest of employers is to minimize the cost of labour while that of workers is to maximize it. Thus, the employment

[55] Crowther (Ed) *Oxford's Advanced Learners Dictionary of Current English,* Special price Edition, New York: Oxford University Press, 1998, p. 241 Print.

[56] Epie, C. "Alternative Dispute Resolution: Understanding the Problems–solving (win/win) Approach in Negotiations" NDR J, Lagos: Negotiation Powerhouse Co. Vol. 1 No. 1 2004 p. 73 Print.

relationship is characterized by endemic though not overt acts of conflicts of interest.[57]

The above represents the pervasive character of conflict. It is beyond doubt that wherever one turns, there is conflict in human relationship ranging from the person himself with respect to otherwise insignificant things such as what to wear on a particular day to the question of who should lead the community etc. What is of interest to us, however, is when these conflicts arise, how do we go about them? There are three strategies to resolve conflicts. These are might, right and problem solving.

A good example of a resort to problem solving strategy after the use of right which yielded unsatisfactory result is the agreement between the Cameroonian and Nigerian governments to sit at a round table to find amicable way of getting round the harshness of the judgment of the International Court of Justice. There were several diplomatic shuttles between officials of both countries on the issue under the authority of the then United Nations' Secretary General, Koffi Anan, all aimed at finding a soft landing for Nigeria who bears the brunt and shock of the Judgment. Perhaps, this was a result of the fear that there may be a resort to might if the judgment is to be complied with in its raw form.

All that we have discussed above show that understanding the origin of a conflict/dispute, what the interest of the parties are, provide the best approach to solving the dispute. It is the problem solving strategy of ADR that has the opportunity of inquiring into these as the adversarial system does not permit the court to inquire into certain matters especially those outside the pleadings of the parties.[58] For example, anger, hatred, ego, love etc are emotions that belie the various conflicts that exist in

[57] *Ibid.*
[58] *North Brewery Limited v Mohammed* (1972) NNLR P. 133.

human relations. While these may be exposed in the course of negotiation, no party would be "foolish" to acknowledge before the court or in his pleadings that he acted or failed to act in a particular way. Rather, falsehood and cover-ups are the rules of the games in litigations.

2.5 PROMOTING ADR IN NIGERIA

Many African countries especially in the west and east have recently initiated major legal reform plans in response to both the internal and external demands for creating access to justice. The court in Nigeria, for example, as in many others in Africa, is fraught with problems: antiquated structures where the judges must take note by hand as there are no stenographers; orders and other records are still written on manual typewriters.[59] Most, if not all record keeping is done manually; there are a few or no computers among others. The worst problems, however, is over-crowding. Many trial judges or magistrates have 100 cases per day on their course list a number impossible to call. In some courts, there is not enough room for all parties to sit inside the courtroom.[60] Delay is the operative result in most of the cases. It can take many years to get to trial and months to have a motion heard. It is not uncommon in many countries to take a decade or more to reach resolution as a case grinds its way through the courts. Many people lose faith in the ability to obtain timely closure to their conflicts from the courts, sometimes leading people taking "self help" measures, which are illegal and socially problematic; the result in a large number of cases is aptly described by the common phrase of "justice delayed is justice denied". The worst case scenario is simply lawlessness. The judiciary is painfully aware of the problem, and is taking halting steps to modernize and create a more efficient and just system of justice. Since the pioneer

[59] Uwazue, E. Case for Conflict Mediation: The Settlement Week. *The Guardian*, 17th November 2009, p.84. Enemo I., The Future of Conflict Resolution in Africa *NLPL* 00/2 Vol.2 No.1, 2009 p. 92 Print.
[60] *Ibid.*

ADR work in West Africa, including Nigeria, in 1996, a case has been made for the integration of ADR into the court system as a major component of legal sector reform programmes in Africa.[61] In Nigeria, things are not different. The courts are overwhelmed with cases. There is a shortage of judges, in most cases across the country, though the problem is more acute in some states. The ability of the judicial system to be an engine of justice is open to question. In Nigeria, for example, the ADR movement has taken hold since its introduction in 1996. The creation of the Lagos Multi-Door courthouse in 2002 was a landmark development in Nigeria, with the collaborative efforts of the Lagos judiciary, Ministry of Justice and the leadership of Mr. Kehinde Aina of the Negotiation and Conflict Management Group (NCMG). To date, there are other or emerging multi-door courthouse in Abuja, Kano, Ilorin, Maiduguri and Uyo. Outside of the courts, the Citizens' Mediation Centre in Lagos and Community Mediation Centre in Enugu they provide innovative alternative for win-win resolution of conflicts, ranging from landlord/tenant issues to child/spousal maintenance claims. Now, the prospects are real for establishing similar multi-door courthouse and Citizens' Mediation Centres in Abia and Kaduna States under the on-going World Bank sponsored project.[62] In summation, ADR has now taken a centre stage in reviewing and reshaping the future of legal practice and justice delivery in Nigeria. It is a well established fact that ADR is a global phenomenon. You may as well call it "African Dispute Resolution" if not appropriate dispute resolution. According to Uwazie[63] in the grave yard of potential erudite legal talent, are advocates who did not succeed because they failed to understand that the primary role of the advocate is simply conflict resolution to the satisfaction of the clients' interest. In many instances, the courts may address the legal question. But not

[61] *Ibid.*
[62] Promoting ADR at Lagos Settlement Week. *The Guardian*, 17 November 2009, p. 85 Print.
[63] *Ibid.*

necessarily resolve the conflict. In fact, a court judgment, as well as the inherent adversarial process can escalate the conflict and damage the party's relationship. Often one party may still be pointing his finger after the court's litigation. Therefore, the new or future lawyer advocate, to be successful, must appreciate and internalize his critical role in seeking the most appropriate dispute resolution process for his or her client. A satisfied client attracts more clients and increase in revenue as well as create a happy advocate. For the court, appropriate use of the litigation process would ease the long delay and human toll on judges who are forced to hear and rule on all cases filed in court without an out-of-court settlement.

The institutionalization of ADR in Nigeria as envisioned under this World Bank sponsored project, will not only serve the interest of the Nigerian people, but will also serve her donor countries or investment partners. American or European companies have never been afraid to pursue commercial opportunities in developing countries, but to do so; they must have a certain amount of stability and legal predictability. Being able to provide a minimum level of legal predictability will encourage commerce, which will in turn enhance relationship between the co-operating government and their people. Our economic development, commerce and trade are among the corner-stones of the foreign policy of many African countries and their western partners, providing an environment in which commerce can take place and furthers global peace and security interest. By increasing local standard of living through commerce and trade, by reducing the need for "self-help" or violence and by planting the seeds for a culture of peaceful dispute resolution, the potential for rebellion and terrorism is reduced. According to Oke, O.[64] the Lagos Settlement Week of November 2nd to 6th, 2009, was set at the Lagos Multi-door Courthouse (LMDC). Over 100 cases pending in court, mostly commercial and

[64] Oke, O. Judicial System, Any Alternative in ADR? *ThisDay* 27 July 2009 p. 24 Print.

some were being selected for settlement through mediation, with the leadership of the Lagos Judiciary and the Multi-door Courthouse. A pair of 40 trained co-mediators were selected to work with the disputants and their lawyers to seek resolution of their cases in an amicable process. Any settlement agreement by the parties will be signed by the ADR judge as legally enforceable and result in disposition of their court case. The main objectives of the Lagos settlement week were to: decongest the court docket and reduce case backlog, increase public awareness and the use of ADR, provide a more satisfactory process of conflict resolution for the parties, mainstream ADR prospects in the country's judicial reform, and share lessons and talents with other states. Similar experience of settlement week, lasting five days, with 185 out of 225 mediated cases fully settled. In each case, he noted, mediation lasted two to three hours.[65] In a follow-up programme in 2007, 99 out of 155 cases from 10 trial courts in Accra region of Ghana were fully settled. In Ethiopia, theirs took the form of a hybrid indigenous-civil law system, whereby they also conducted a pilot mediation week in the court with good results. Of the 31 cases mediated over three days in August 2008, 17 resulted in full and six partial agreements. The disputants reported high level of satisfaction and 95 percent responding that they would use it in future or recommend it to others.[66] Even the lawyers or advocates who participated in the mediation sessions, without interrupting the direct communication between the disputants, expressed pleasant surprise at the seeming magic of mediation without an imagined threat (by some) that ADR attracts a decline in revenue. Similar results of high rate of agreement and satisfaction were obtained in other mediation week activities in Kenya and Tanzania.[67] Apart from the Lagos example, where there has been success so far, with the proper case selection, careful selection and

[65] *Ibid.*
[66] *Ibid.*
[67] *Ibid.*

international level training of the mediators, appropriate assignment of the case and a tailored orientation for the advocates, its level of success depends on the effective cooperation of the disputants and preparation of their lawyers/advocates, the Lagos experience will help inform similar programme development and planning in other pilot States of Abia and Kaduna or other states that may eventually key into the programme. With sustained interest and good planning, it is expected that future settlement week activities will improve, with good lessons for mediation training and practice in Nigeria.

2.6 SKEPTICISM ABOUT ADR IN NIGERIA

Every change in human society is usually visited with frenzy, fear and sometimes, agitation. It is a normal part of human life. For example, almost every lawyer now hail the new High Court Civil Procedure Rules of the Federal Capital Territory, Abuja, Kwara, Kogi and Lagos States of 2004. A very salient feature of these rules is front-loading system which, to every lawyer, who has the interest of the justice and that of his client at heart, is a welcome development that is fast bringing to an end the nightmare, called civil proceedings in our courts especially in these states and Abuja. But then, when the rules were to be introduced, it was greeted by opposition, agitation and attacks from various quarters including eminent legal practitioners of both the inner and outer bar. In the key note address at the opening ceremony of the workshop organized by Rules-Watch on the Lagos and Abuja High Court Civil Procedure Rules, 2004, (held between 26th and 27th May 2005) the then Attorney General of the Federation, Chief Akin Olujimi, SAN, gave a plethora of reasons why he thinks the new Rules will not succeed. Many lawyers had argued that the front-loading system would kill advocacy skill and professionalism, etc. The underlying factor for the opposition by some lawyers, however, is the fact that the front loading system which the new rules represent would end frivolous litigations and unnecessary adjournments, and consequently, signal the end

of unearned appearance fees. The views expressed by E.C. Aguma Esq. to which references shall be made in the course of this work, bear this point out.

In the case of ADR, when the "Alternative" wind started blowing in Nigeria a few years back, it was welcomed by lawyers with lukewarmness, apathy and later, fears of the unknown. While some dismissed ADR as an idea that can never work, others see it from the view that with the entry into the area by non-lawyers, laymen were simply allowed to rub shoulders with them in an area that would ordinarily be exclusively theirs. The fear was further heightened by the fact that most of the works in the area were done by non-lawyers at a time that majority of lawyers had not embraced the idea or even have not heard of it. According to Kelvin N. Nwosu, although lawyers have better potentials and opportunity to be good ADR practitioners, ADR practice is not an exclusive preserve of lawyers. He confesses:

> In fact, in my experience as an academic, and ADR practitioner, a majority of the very good texts and articles I have read on ADR are written by non-lawyers. Also, a good number of the internationally renowned ADR practitioners I have met or heard about are non-lawyers…ironically, because of the largely adversarial nature of a lawyer's orientation and training especially in our jurisdiction. It is usually more difficult to get lawyers to understand and practice ADR than it is with non-lawyers.[68]

We must not fail to lend our voice to the above assertion by saying that some of the good written works we have read are written by non-lawyers. For example, the Effective Mediator[69] written by Segun Ogunyanwo is a classic local piece on ADR and

[68] Nwosu, K.N. "Alternative Dispute Resolution", being a text of a lecture delivered at the Professional Foundation Course on ADR organized in Abuja by DCON Consulting on 20th May 2005, p. 43 Print.
[69] Ogunyanwo, S. *The Effective Mediator,* HMB Nigeria, Hephzibah Publishers, 2005 P. 46 Print.

the author is an engineer by profession. Negotiate Your Way to Riches[70] written by Peter Wink is also a good piece on negotiation and author was a marketer. Again, a lecture on conflict and conflictology dealing with disputes as an introductory part of ADR was delivered by A.A. Olowu of the University of Ife, a professor of Psychology.[71]

This fear that the entry of non-lawyers into the arena of dispute resolution would reduce the lawyer's fees is re-echoed by one of Nigeria's good ADR practitioners and writer, Dele Peters. In his book, he stated:

> We have pointed out earlier that the training of legal practitioners in Nigeria is such that tend to perceive adversarial procedure as the best procedure for settling disputes and thus satisfy the yearnings and aspirations of their clients. This thinking as we have noted is responsible for the lukewarm attitude of legal practitioners in Nigeria to the ADR paradigm today. Generally speaking, the view is held and the fear also expressed erroneously though, that should the current campaign in favour of ADR persist, then the demand for the services of legal practitioners would diminish greatly.

It was in the face of these fears and uncertainties that the Lagos Multi-door court house was established followed by the Abuja Multi-door courthouse. To give vent to ADR, the two jurisdictions came up with the new High Court of Lagos State (Civil Procedure) Rules 2004; and Abuja with the High court of the Federal Capital Territory, Abuja (Civil Procedure) Rules 2004. Both Rules clearly embody ADR and give official recognition to the Multi-door courthouse.

[70] Wink P., *Negotiate Your Way to Riches*, Career Press, U.S.A. 2003 P. 22 Print.
[71] Professor Olowu is also the publisher of Ife Psychologia.

Aguma, C.E.[72] is one of the private practitioners who seriously expressed doubt about the efficiency of ADR and its suitability for Nigeria. He argued:

> The proponents of ADR appear to be winning the battle even in the glaring absence of local empirical data in support of their postulates and the theoretical advantages of ADR.[73]

He continues:

> For Doubting Thomases like me, we are yet to be provided with credible facts on how the LMDC has enhanced justice delivery, made it timely, cost effective and user friendly or increased access to justice.[74]

Referring to the conciliation provision in the Matrimonial Causes Act in the case of divorce proceedings which, he maintains, has never been used, he states further:

> At this stage, there is therefore the palpable fear that ADR shall only serve the purpose of temporarily decongesting the traditional courts, congesting the multi-door courthouse with the cases of litigants who are not interested in the justice of the MDC and who eventually re-appear in the regular court halls whose justice they prefer in that they want resolution not settlement.[75]

The views expressed above and many more by Aguma which we shall refer to later in this work, certainly raise fundamental issues which we shall deal with subsequently. Suffice now to say that the ADR was greeted with doubts, fears and opposition by lawyers. Whether those fears are genuine or not, it is noteworthy that they

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[72] Aguma, C.E. is a principal counsel of Aguma & Co. (Legal Practitioner) Port Harcourt.

[73] Aguma, C.E "Alternative Dispute Resolution and the delivery of Justice – The Myth and the Reality" being the text of a paper delivered at the Nigerian Bar Association Port Harcourt Annual Law Seminar 2005 held at the Bar Centre in Port Harcourt Print.

[74] *Ibid*.

[75] *Ibid*.

did exist and still pervade the horizon especially among uninformed or less informed lawyers. The next chapter of this work shall deal extensively with these skeptics and consequently allay the fears and apprehensions.

But, when lawyers argue for or against ADR from a purely economic point of view, they seem to forget that a truly satisfied client will likely have a multiplier effect on the lawyer's earnings in the long run. Doubtlessly, a client whose needs are fundamentally satisfied is bound to repose more confidence in the lawyer's services again than a client who is dissatisfied.

If mediation for example, is best in the client's circumstances, it should be attempted without delay. If it proves successful, even though there might be a diminution in the fee income that could otherwise have been achieved by litigating the particular case to trial, the firm or the lawyer will have achieved client's satisfaction, leading to strengthened relationship.

Lawyers who have the foresight to recognize the marketing power of a truly satisfied client will certainly have an edge over the more conservative lawyers to whom litigation represents a one-size-fits-all garb for all disputes.

To a legal practitioner a client's satisfaction ought to be paramount to every other consideration, and if ADR can suitably meet the client's needs why waste his precious time walking him through a long-winding and, oftentimes, tortuous litigation whose outcome is very often uncertain.

Granted, sometimes the lack of interest in ADR or mediation may not be that of the lawyer but of the client who, in most cases is completely, but understandably, ignorant of the process and for who litigation represents a magic wand for curing all his legal ills. Some clients see court system as a place to oppress and intimidate opponents

and would naturally oppose ADR which by its very character cannot lend its arms to intimidate but to reconcile warring parties and help them find mutually satisfactorily solution

CHAPTER THREE
ARBITRATION AS AN INTEGRAL PART OF ADR IN NIGERIA

3.1 INTRODUCTION

Prior to the introduction of English law to Nigeria by the British Colonialist, customary arbitration was in operation in Nigeria. This was administered in the acephalous or chiefly communities by the rulers while in acephalous or republican communities by the council of elders or nominated elders as the case may be. This continued until the introduction of Arbitration Ordinance of 1914 which was based on the English Arbitration Act of 1889. It was initially made applicable to Lagos and later extended to other parts of the country in 1958.

The 1914 Ordinance obviously became unsuitable to deal with many of the new situations that were appearing and this led to a call for a more modern and suitable legislation on arbitration. Happily, this came in 1988 through Arbitration and Conciliation Act, 1988 which was based largely on the UNCITRAL Model Law on International Commercial Arbitration and the UNCITRAL Model Rules. Apart from the 1914 Act that has been made applicable to Lagos, Lagos State now has the Lagos Court of Arbitration and it is empowered by statute to function as an international arbitral institution. This is in addition to the existing Lagos Regional Centre for International Commercial Arbitration pioneered by the Asian African Legal Consultative Committee (AALCC) Regional Centres for Arbitration which has other centres in Kuala Lumpur and Cairo. These centres are intended to provide facilities for settling international commercial disputes undertaken in Asia and Africa. The centre which was inaugurated in 1989 started

operation in1999.[76] The Lagos State government has also gone further to create the Lagos Multi Door Court House[77] and citizens mediation and conciliation centre.[78]

Although arbitration and litigation share some common features because of their adversarial and rancorous tendencies, arbitration has become accepted as a viable alternative to litigation. Even though it seems that arbitration under the general law is yet to take its proper place in the country's growing economy as a dispute settlement mechanism. This phenomenon most probably derives from the failure of some sections of the business community to appreciate the advantages of arbitration over litigation. Most businesses the world over want to stay out of court. They prefer to settle their differences by conciliation, mediation or arbitration.

This work intends to look critically at arbitration as an integral part of ADR and the need to strengthen the legal and institutional framework in Nigeria.

In some countries, industrial and trade associations have taken the lead in creating arbitration systems to resolve disputes in accordance with the procedures that reflect the needs of a particular industry and indeed initiated the enactment of arbitration statutes in those countries.[79] There are no reasons why Nigerian business men should not emulate this practice. Although the Nigerian Bar Association is waking up from its slumber in this direction by its recent pronouncements.[80] The citizens are waiting to see how far it can go in this enterprise.

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[76] Orojo O. and Ajomo M.A. *Law and Practice of Arbitration and Conciliation in Nigeria in Nigeria*. Mbeyi & Associate, Lagos, 1999 P. 33 Print.

[77] Lagos Multi-door Courthouse Law No 21, Laws of Lagos State 2007.

[78] Citizens Mediation Centre Law No. 6, Laws of Lagos State, 2007

[79] Kellor, F. American Arbitration: Its History, Functions and Achievements, *Cambridge Law Journal* 28, 1948 P. 45 Print.

[80] NBA Inaugurates Arbitration Working Group, *The Guardian* 3 February 2009, Specialized Centre for Maritime Arbitration Underway, *ThisDay*, 7 May 2010 p. 31 Print.

3.2 MEANING AND ESSENCE OF ARBITRATION

The Arbitration and Conciliation Ac t[81] that formally introduced arbitration into the country did not give useful definition of arbitration. The Act in section 57 (1) simply defines arbitration in the following way: "Commercial arbitration whether or not administered by a permanent arbitral institution". This definition is unhelpful and leaves one or the enquiry in a worse situation than when he set out.[82] The reference to commercial arbitration only means that not only does the Act apply to commercial disputes only, it also gives the impression that only commercial disputes can be subject of arbitration under the Act.[83] This definition rules out customary arbitration and other arbitration matters falling outside commercial transaction. But in practice, since the enactment of the Act, other disputes other than commercial disputes have been resolved by arbitration in Nigeria.[84] We shall therefore have recourse to other works for working definition of arbitration.

Halsbury Laws of England, defines arbitration as the reference of a dispute or difference between not less than two parties for determination after hearing both sides in a judicial manner, by a person other than court of competent jurisdiction.[85]

While Stroud's Judicial Dictionary relying on *Collins v. Collins*[86] defines arbitration as a reference to the decision of one or more other persons either with or without an umpire of a particular matter in difference between the parties.[87]

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[81] Arbitration and Conciliation Act Cap A18 Laws of Federation of Nigeria 2004.

[82] Harriman, R. "Mediation: Practice and Procedure." Being a text of a lecture delivered at the professional foundation course on ADR organized by the DCON Consulting at Command Guest House Asokoro, Abuja, 20th May 2005 Print.

[83] Ezejiofor, G. *The Law of Arbitration in Nigeria*, Longman Lagos 1998 P. 41 Print.

[84] *Ibid*.

[85] Halsbury Laws of England Fourth Edition Nexis Lexis 2013 P. 1408

[86] 28 L.J. Ch P. 186.

[87] *Stroud's Judicial Dictionary*, Third Edition Vol. 2, p. 180 Print.

Berstein, view arbitration as a situation where two or more persons agree that a dispute between them shall be decided in a legally binding way by one or more impartial persons in a judicial manner that is, upon evidence before him or them, the agreement is called an arbitration agreement, when, after a dispute has arisen, it is put before such person or persons for decision, the procedure is called an arbitration and the decision when made is called an award.[88]

As pointed out above, arbitration is a mechanism for resolution of disputes between two or more persons under which they agree to be bound by the decision to be given by neutral third party (the arbitrator) according to law or if so agreed, other consideration after a fair hearing, such a decision being enforceable in law.

It has been argued that an exercise is not arbitration, strictly so called, if it does not answer to this definition, notwithstanding that, it is described as arbitration. Thus an arbitration board appointed not to settle a dispute but to determine the value of certain companies is not arbitration within this definition.[89]

A person or persons to whom a reference to arbitration is made is called an arbitrator or arbitrators. His or her decision is called an award.[90] If it is provided that in the event of a disagreement between the arbitrators, the dispute is to be resolved by a third person normally referred to as an umpire, the decision of an umpire is also called an award.[91] However, the current Nigerian arbitration statute makes no provision for an umpire, but for a third party who unlike an umpire, cannot alone hand down an award.

[88] Bernstein, R. *The Hand Book of Arbitration*, London, Sweet and Maxwell, 1998 P. 420 Print.
[89] Ezejiofor G. *op. cit* note 3.
[90] *Ibid*
[91] *Ibid*

3.3 IS ARBITRATION PART OF ADR PROCESS?

Before going further in this research work, it is pertinent at this juncture to discuss the raging controversy with regard to the status of arbitration. In recent times, it has been doubted whether arbitration can be described as an ADR method.[92]

The general stand on the issue is fluidy, in that opinions are divided. Arbitration has some of the features of ADR properly so called and some of the features of adjudication through court process. Some writers view arbitration as an ADR but which are not available to court litigation. Some of these are autonomy of the parties in choosing the arbitral tribunal, informality, confidentiality and absence of antagonism which leaves the parties in arbitration with the opportunity to resume business relations with little or no disruption after the award has been rendered.[93]

On the other hand are weighty arguments against classifying arbitration as an ADR process. Arbitration is said to be closer to litigation in approach. In the first place, an agreement to enter into arbitration will be enforced by the courts whereas agreement to enter into an ADR process will not be. Secondly, in arbitration, the outcome is determined in accordance with an objective standard, i.e. the applicable law. In mediation, for example, any outcome is determined by the will of the parties. This is why it is often said that mediation is an interest based procedure.[94] Thirdly, in arbitration, a party's task is to convince the arbitral tribunal of its case. On the other hand, in mediation, for example, since the outcome must be accepted by both

[92] Orojo, J.O. and Ajomo, M.A. *Law and Practice of Arbitration and Conciliation in Nigeria,* Lagos, Mbeyi Associates, 1999 P. 46 Print.

[93] Akpata, E. *Nigerian Arbitration Law in Focus*, West Africa Book Publisher, Lagos, 1997 P. Print.

[94] Uche, N. International Commercial Arbitration in Practice: Effective ADR or just Exortic Litigation, Corpus of Topical Legal Issues, Collection of Legal Essay written in Honour of Justice S.U. Onu, Rogent Printing and Publishing Ltd Kaduna 2008 P. 240 Print.

parties and is not decided by the mediator, a party's task is to convince or compromise with the other side[95].

Fourthly, mediation and conciliation, in many countries, are not subject to any statutory regulation, the position was the same in Nigeria until 1988 when the Arbitration and Conciliation Act was promulgated[96].

In the light of what we have explained above, it is hereby asserted that arbitration is in a curious position when discussing ADR processes. It is basically a form of adjudication, though like ADR properly so called, is also an alternative to litigation. The difference between ADR process like mediation and conciliation on the one hand, and arbitration on the other hand stems from the fact that, in mediation or conciliation, the parties retain the responsibility for controlling the process and making a binding award. In the light of the above, it is submitted that arbitration should not be left out of ADR process because arbitration is not an exclusive preserve of lawyers and the courts but other professionals like accountants, architects, engineers, surveyors or insurers who also have roles to play depending on the nature of the subject matter. It is also evident by empirical analysis that arbitration in most cases are faster, preserves relationship and is cheaper than litigation.[97]

3.4 NATURE AND SCOPE OF CUSTOMARY ARBITRATION

In Nigeria, arbitration has been known from time immemorial and has been used in settling various types of disputes such as those arising from land. Thus, in *Larbi v. Kwasi*[98] a West Africa (Ghana) case, the Privy Council held that a customary arbitration was valid and binding and that it was repugnant to good sense for the losing party to

[95] Orojo J.O and Ajomo A. *op cit* Note 4.
[96] *Ibid.*
[97] Uche N. *op cit* note 16
[98] (1952) WACA P. 76.

reject the decision of the arbitrator to which he had previously agreed. Also in *Mensah v Takyiam Pong and Ors*[99] the West African Court of Appeal held, *inter alia*, that, in customary arbitration when a decision is made, it is binding upon the parties, such as decision upon arbitration in accordance with native law and custom have always been that unsuccessful party is barred from re-opening the question decided and that if he tries to do so in courts, the decision may be successfully pleaded by way of estoppel.

Even in modern times, the courts have upheld customary arbitration insisting that arbitration was preserved by the Constitution. In *Nwuka v Nwhaeche*,[100] the courts of appeal quoted with approved its views on customary arbitration in *Okpuruku v. Okpokum*[101] where it said *inter alia* that - in submission to arbitration, the general rule is that the parties choose their own arbitrator to be the judge in the dispute between them, they cannot when the award is good on its face, objects to its decision either upon not the law or the facts and when matters in difference between the parties are investigation at a meeting and in accordance with customary and general usage, a decision is given, it is binding on the parties and the Supreme Court will enforce such decision.

A distinctive feature of customary arbitration is that agreement to conduct the same is oral and its proceeding and decision are not normally recorded in writing. Because of these factors, customary arbitration is not regulated by the Arbitration and Conciliation Act, which is concerned with written agreements to arbitrate. It was not regulated by the Arbitration and conciliation Act, which is concerned with written agreement to arbitrate. It was also not regulated by the repealed Arbitration Act, which

[99] (1940) 6 WACA P. 118.
[100] (1991) 5 NWLR 295 at P. 308
[101] (1988) 4 NWLR P. 55.

also dealt only with written agreement. It is, however, still popular among people in the villages and recognized by the courts. If there is a disagreement as to whether there is in fact a properly constituted arbitration between the parties, the court makes a specific finding of fact on the question. According to the West African Court of Appeal:

> ...where matters in dispute between parties are, by mutual consent, investigated by arbitrators at a meeting held in accordance with native law and custom and a decision given, it is binding on the parties and the Supreme Court will enforce such decision.[102]

However, a decision or an award of a customary arbitration is not a judgment of a court of law. Consequently, it has no force of law and therefore cannot be enforced like a judgment until it is pronounced upon by a competent court. But the courts will not make such an approving pronouncement unless the award is specially pleaded and proved in proceedings before it, involving the parties to the arbitration, or their privies.[103] When this is done, the award may be accepted as creating an estoppel by way of *res judicata*, provided that the person or body that conducted the arbitration is a judicial tribunal which hands down judicial decisions.[104] It is submitted that this judicial pronouncement should be constructed to mean that the person or body must reach his or its decision judicially or in a judicial manner. In other words, the awards must be made on the basis of evidence led by the parties and their witnesses before the arbitrator at proceedings in which the parties are given a fair hearing. It is erroneous to interpret judicial tribunal in this context to mean a body statutorily vested with judicial authority,

[102] *Assampong v Kweku Amuaku & Ors* (1932) 1 WACA P. 192 at P. 201.
[103] *Ofomata & Ors v Anoka & Ors* (1974) 4 ECSLR P. 90 at P. 253.
[104] *Assampong v Kweku op cit.*

and to equate such judicial decision to a decision of a body, or judgment of courts in all its implication.[105]

We therefore submit that Federal Supreme Court was in error in holding, in Inyang & Ors., V. Essien & Or,[106] that the decision of Iman Council did not constitute *res judicata* on the ground that the Council was not a Native Court set up under the Native Courts Ordinance, Cap. 142 of the Laws of Nigeria1990.[107] According to the court, that case was 'distinguishable from the case of chief *Kweku Assampong v Kweku Amuaku and others*.[108] In that case the native tribunal was a native court and its decision had a binding effect, but in this case, Iman Council is not a native courts'. But there is no indication whatsoever in the law reports in the Assampong's case that the arbitrators were invested with judicial authority, either by statute or by general law. Their decision could therefore not be that of a court of law. The arbitrator were merely a body of persons recognized under the customary law to settle differences between members of the community.

The courts will then ratify and enforce the award, provided that its inquiry reveals that it is certain, final, reasonable, legal, and possible of execution and disposes of all the difference submitted to arbitration.[109] If the award is conditional, or contingent upon something which may or may not happen, it is not final. In *Ofomata & ors v. Anoka 7 Ors*,[110] there was a dispute between the plaintiffs and defendants over a piece of land. The parties agreed that the elders of the village should settle the dispute by

[105] *Njoku v Ekeocha* (1972) & ECSLR P. 199 at P. 205
[106] (1957) 2 FSC P. 39
[107] *Ibid* P.40
[108] (1932) 1 WACA 192
[109] *Ofomata v Anoka (*1974) ECSLR P. 251.
[110]*Ibid.*

arbitration. The arbitrators took evidence from both parties, found that the land belonged to the plaintiffs' family. No oath was sworn to because the parties did not meet for the purpose as was previously agreed. It was held that the award was not final because it was conditional on the swearing of an oath, which might or might not take place. According to the court, the proper line of action would have been for the arbitrator to adjourn the award until the oath was sworn. In its opinion, the arbitrators should have supervised the oath swearing ceremony.

The above case can be contrasted with *Njoku v Ekeocha & Ors*.[111] The plaintiff sued the defendants claiming title to two pieces of land, damages for trespass and injunction against further trespass. Evidence before the court revealed that the plaintiff's father had, some years earlier, claimed to be the owner of the two pieces of land, which he alleged were pledged to the defendant's father, who was then dead. The parties then mutually agreed to submit the dispute to arbitration by the elders, the *amalas*, and to be bound by their decision. The elders examined the case and came to the conclusion that the pieces of land belonged to the defendants, but directed that if the plaintiff's father was not satisfied he would produce an oath to be sworn by the defendants. If they did not die within one year after swearing, the pieces of land would belong to the defendants, but if they both died within the year, the pieces of land would be lost to them in favour of the plaintiff's father. This decision was accepted by the parties.

The oath was produced and sworn to as agreed and the defendants did not die within the year. The plaintiff's father accepted the decision and no longer disputed the defendant's ownership of the pieces of land. On his death, the plaintiff commenced this action, claiming the land all over again. It was held that the plaintiff, just like his father, was bound by the decision of the arbitrators and was therefore stopped from reopening the case. This is particularly so as the

[111] (1972) ECSLR P. 199.

defendant were led by the plaintiff's father to take a step prejudicial to their interests by being put in peril of losing their lives by swearing the oath.

As we observed above, parties to a valid customary arbitration must be given a fair hearing. Consequently, proceedings leading up to a customary award must be conducted in accordance with the rules of natural justice. For example, the parties and their witnesses must have adequate opportunity to present their case to the arbitrator.[112] Similar, an arbitrator must not behave in a way that tends to compromise his impartiality, such as where he is called as a witness by one of the parties to the dispute. The proceedings will also be vitiated if the award is arrived at between disputing partners when no proper accounts has been taken.[113]

It must be shown that the parties voluntarily agreed to submit their dispute to arbitration and that they expressly or impliedly agreed to accept the decision of the arbitrator. If these are proved to the satisfaction of the court and if the selection of the arbitrator was done in accordance with customary law, the decision will bind the parties and can be enforced, through the court, but the unsuccessful party cannot repudiate the arrangement at this stage. In *Oline v. Obodo*,[114] the plaintiffs and defendants jointly executed a lease in favour of a government corporation. Later, a dispute arose between them over the sharing of the rents accruing from the grant. The District Officer in charge of the area wrote to the parties suggesting that his assistant, Mr. Lawrence met the parties on the land, whereupon they orally agreed to be bound by his award. After taking evidence from the parties and viewing the *locus* in *quo*, he delivered his award on the spot orally. Thereafter, he reduced the award into writing and it was tendered in evidence. In the award, he set out how much each of the parties would get out of the rents. But the defendants were not willing to share the rents, whereupon the plaintiffs commenced this

[112] *Mbagwu v. Agochukwu* (1973) ECSLR 90 at 95.
[113] *Ekwueme v. Zakari* (1972) 2 ECSLR 631.
[114] (1958) FSC P. 84.

action against them, claiming title to the demised land and an order of the court to allow the plaintiffs to withdraw their own share of the rents according to the award. It was held by the Federal Supreme Court that since there was evidence, which was accepted by the trial court that the parties orally agreed to submit their dispute to arbitration by Mr. Lawrence and that his award would bind them, they could not, after all these, contend that they were not bound.

It follows that if parties to a dispute have not voluntarily submitted themselves to a person or persons for settlement, arbitration has not taken place, any decision reached by such a person or persons will not be enforced by the court. The case of *Ekwueme v. Zakari*[115] is illustrative. In April, 1970, the defendant started a hotel business at Abakaliki and employed the plaintiff as one of his workers. There was, however, an understanding between them that the business could be converted into a partnership of two if after about three months they were both satisfied that they could work together in that relationship. Unfortunately, they fell apart almost immediately because differences developed between them regarding the management of the business. Later, five mutual friends of the parties on their own initiative undertook to look into the dispute with a view to settling it. The panel took evidence from the parties and on the basis that the parties were equal partners in the business, awarded the sum of £631:6:3 to the plaintiff as his share of his profit of the partnership. The plaintiff commenced this action to enforce the decision. It was held that there was no arbitration because the parties did not voluntarily submit the dispute to the panel, nor did they agree to be bound by his decision. That being the case, the so-called awards could not be enforced.

If parties voluntarily agree, to submit their differences to arbitration and to abide by the decision of the arbitrator, they cannot repudiate such a decision when it is made. The question is whether they can, in those circumstance, resile from the arrangement before an award is made.

[115] (1972) ECSLR P. 631.

The point was considered by the Privy Council in the then Gold Coast of *Kwasi v Lardi*.[116] In that case, the plaintiff commenced an action in a native courts against the defendants, claiming a declaration of title and an injunction over a certain piece of land. The elders of the community intervened and offered to withdraw the case for arbitration, whereupon it was therefore adjourned, in other to enable the arbitration to take place. The elders heard the parties and their witnesses and sent court messengers to view the land in dispute in the company of the parties. The plaintiff cooperated with the messengers and pointed out their boundaries to them. At the end of the exercise, the messengers instructed the parties to meet the arbitrator on a specified date. On that date the defendant did not attend the meeting, but sent a message to the arbitrators that they had withdrawn from the arbitration. This information was ignored and the arbitrators went ahead and made an award in favour of the plaintiff.

The case was then remitted back to the native court and against the defendant's opposition; the plaintiff urged the court to enforce the award. The opposition was rejected by the courts and the award was accepted and made a judgment of the court. On appeal to the Privy Council, the Board held that:

1. The proceeding before the elders were of the nature of an arbitration and not merely a negotiation for a settlement, because it was undertaken with the consent of the parties, and
2. The defendants had no right to resile from the arbitration before the award since they had no such right after the award. [117]

The defendants had been unable to satisfy the Board that such a right which is so contrary to the basic conception of arbitration is recognized by native customary law. It would seem from

[116] (1952) 13 WACA P. 76.
[117] *Ojele Etim v Edumawu Aduo* (1954) WACA P. 278.

the statement of the Privy Council that a party can specifically reserve the right to resile from the arbitration before an award is made. According to the Board, the appellants in the instant case must fail, since it is established that the parties gave their consent to the submission of the dispute to the elders without any express reservation of a right to resile.[118]

The implication would seem to be that if a party specifically reserved such a right *ab initio* and in fact resiled midstream, but the arbitrator nevertheless continued the proceedings, any award made by the arbitral tribunal would not bind the party. It has, however, not been suggested that a right to resile after the award is made can be reserved.

The foregoing analysis show that the ingredients of a valid customary arbitration are:

1. Voluntary submission of the dispute to arbitration by the parties.
2. Agreement by the parties before hand to be bound by the decision or award of the arbitrator or arbitrators.
3. Pronouncement by the arbitral panel of a decision or an award which is final and unconditional.

(If all these requirements are met in any given situation and provided there are no procedural or other irregularities). This will make the parties to be bound by the award and none of them will be allowed to repudiate same because it does not favour him. If it is properly pleaded in an action the award will operate as an *estoppel per rem judicata.*

However, the Supreme Court has held in the cases of *Agu v. Ikewibe*[119] and *Ohiaeri v Akabueze,* [120] that a valid customary arbitration is manifested where.

1. The parties voluntarily submitted to the arbitration.

[118] *Kwasi v Larbi* (1952) 13 P. 76 at P. 80.
[119] (1991) 3NWLR (Pt 180) P. 385
[120] (1992) 2NWLR (Part 221) P. 1.

2. The parties beforehand agreed expressly or by implication to be bound by the arbitral decision or award.
3. None of the parties withdrew from the arbitration midstream.
4. None of the parties rejected the award immediately it was made.
5. The arbitration was conducted in accordance with the custom of the people and;
6. The arbitration handed down a decision or an award which is final.[121]

The effect of the decision is that a party can validly resile from the arbitral process voluntarily. Before the conclusion of the proceedings, thereby rendering the proceeding inconclusive. The Supreme Court has said in one and the same breath that a valid customary arbitration takes place when the parties agree beforehand to be bound by the resultant award and at the same time that the same parties are free to reject the award when it is made. This is clearly contradictory and retrogressive.

Unless the development introduced by these cases is arrested, customary arbitration, which is a very useful institution, will be emptied of any meaningful content. In another case,[122] Nnaemeka-Agu, J.S.C correctly restated obiter the prerequisites of customary arbitrator, viz:

1. Voluntary submission of the dispute to arbitration by the parties.
2. Agreement by the parties, expressly or by implication, to be bound by the award.
3. Conduct of the arbitration according to customary law, and
4. Publication of a decision which is final.[123]

It is thus hoped that the Supreme Court will soon realize that its decision in the Agu and Ohiaeri cases are erroneous and that it will retrace its steps as soon as it has opportunity to do

[121] Karibi W., JSC in *Agu's case* and Akpata JSC in *Obieri's cases*, *op cit.*
[122] *Awosile v. Sotunbo* (1992) 5NWLR (part 243) P. 514.
[123] This is a restatement of what he said in his dissenting judgment in *Agu's case*.

so.[124] A number of scholars have pointed out this error in their writings but the Supreme Courts is yet to respond.[125]

[124] *Njoku v Ekeocha* (1972) 2ECSLR P. 199.

[125] Ibrahim, I. The Legal Regime of Customary Arbitration in Nigeria Revisited, *CJJIL* Vol. 3 No. 2, 2010 p 58, Ariyo-Osu, D.A., Customary Arbitration as Dispute Resolution Mechanism and its Operation Framework as Estoppel per Rem judicata-2009 *UILTP* Vol. 5 No P. 122; Ayiala, L.A., ADR and Relevance of Native or Customary Arbitration in Nigeria, 2009, VILJ P. 254 Print.

CHAPTER FOUR

4.1 TYPES OF ARBITRATION

Arbitration can be safely categorized into four types namely, Domestic, international, institutional and Ad hoc.[126]

a. Domestic Arbitration

Arbitrator is domestic where the parties are resident or carry on business and the contract (subject of arbitration) is to be performed in the same country,[127]

b. International Arbitration

International arbitration is one between persons who have their places of business in different countries or where the subject matter of the arbitration agreement relate to more than one country or where the parties expressly agree that any dispute arising from the commercial transaction between them shall be treated as an international arbitration.[128]

c. Institution Arbitration

In this kind of arbitration, the parties usually provide in their contract that in the event of dispute, same shall be settled by arbitration institution or agency. Such agencies include: the Regional Center for Arbitration, Lagos; the London Court of International Arbitration (LCIA).[129] American Arbitration Association (AAA), The International Centre for Settlement of Investment Disputes (ICSID), World International Property Organisation (WIPO), Arbitration and Mediation Centre etc.

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[126] Bernstein, R. the Handbook on Arbitration, London: Sweet & Maxwell, 1998, Ajomo, M.A. Arbitration Proceedings paper presented at the 17th Advance Course in Practice and Procedure at Nigerian Institute of Advance Legal Studies, Lagos, 16th June 1997 P. 33 Print.

[127] *Ibid*

[128] Babayide, O. "Developing Nigeria into International Arbitration Centre". *The Arbitrator*, vol. 4 No 1, January-April 2007 p 1 Print.

[129] Sigrad J. "The Role of International Commercial Arbitration in the Modern World" *Arbitration* Vol. 75 No. 1 2009 p. 65 Print.

d. Ad Hoc Arbitration

This is a kind of arbitration which is entered into by the parties only after a dispute has arisen. In order words, in the contract between the parties, no reference is made to arbitration rules of commercial arbitration of any arbitration agency or institution. The parties in this case usually set their own rules of procedure that fits the dispute between them.[130] It is always a post contract arbitration process. In India, arbitration is also classified into Fast Track Arbitration, Neutral Listener Agreement, Rent a Judge and Final Offer Arbitration.

4.2 ARBITRATION AGREEMENTS

By Section 1(1) of the Arbitration and Conciliation Act, every arbitration agreement must be in writing. The requirement does not necessarily mean that the arbitration clause or agreement must be contained in the original contract or that there must be a special format that the agreement must take. While the agreement may be contained in a document signed by the parties, as required by section 1 (1) of the Act, it may also be contained in an exchange of letters, telex, telegrams and other electronic mail systems.[131] It must be noted that there is no set format as to the content of the arbitration agreement. Thus, a clause to the effect that: "all disputes arising from this transaction to be settled by arbitration" would be sufficient. There can also be post contract arbitration agreement.

4.3 COMMENCEMENT OF ARBITRATION PROCEEDINGS

As earlier stated, the parties can, in their agreement decide which rule of arbitration procedure to adopt in the event of dispute. Generally, the party who is initiating the process (the

[130] *Ibid*.
[131] Ezejiofor, G. *op cit* Note 3.

claimant) shall give to the other party (the respondent) a Notice of Arbitration.[132] By virtue of Section 3 (1) of the Act, arbitral proceedings are deemed to have commenced on the date of receipt of the Notice of Arbitration by the respondent. The Notice would normally contain the following information:

a. A demand that the dispute be referred to arbitration;

b. The names and addresses of the parties;

c. A reference to the arbitration clause or the separate arbitration agreement that is invoked;

d. A reference to the contract out of or in relation to which the dispute has arisen;

e. The general nature of the claim and an indication of the amount involved, if any;

f. The relief or remedy sought;

g. A proposal as to the number of arbitrators (i.e. one or more), if the parties have not previously agreed thereon.[133]

Unlike a mediator who helps parties to work out their own solution, an arbitrator decides what the solution would be. After the proceedings has commenced, the arbitrator would take evidence and possibly, argument of the parties and make his award as he deems appropriate.[134] Other mainstream ADR processes where parties have total or some control over the process and the outcome, such as in arbitration, the parties only have some control over the process but have no control over the outcome. Arbitration is an adversarial process and to that extent, shares more characteristics with litigation than ADR.

4.4 ADVANTAGES OF ARBITRATION

It however, has the following advantages over litigation:

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[132] Article 3 (1) Arbitration Rules First Schedule to the Arbitration and Conciliation Act Cap. 18 Laws of Federation of Nigeria, 2004.

[133] Bernstein, R. *op. cit* note 66.

[134] (a) See *Awosile v Sotumbo (1992) 5 NWLR (Pt. 243) P. 514.*

a. It is cost effective;

b. It is more expeditious than litigation;

c. It gives the parties the opportunity of selecting their decision maker who is usually an expert in the field of the dispute;

d. It is less formal than litigation and the risk of losing an otherwise good case on technical grounds is almost nil;

e. It is private;

f. It helps in building and/or maintaining relationship of the parties especially business friendship;

g. While parties have a choice to embrace arbitration they have no such choice with litigation.[135] Once a writ of summons or other originating process is issued, the other party has no choice than to enter appearance or risk an enforceable judgment of court;

h. While parties to arbitration can choose their own norms and rules, they have no choice in litigation. To fast track arbitration, for example, parties may agree to limit the issues, the exchange of documents and the rules of evidence to apply or adopt any other means to reduce costs and attain a quick decision.[136]

4.5 SHORTCOMINGS OF ARBITRATION

The advantages of arbitration discussed above notwithstanding, arbitration is definitely not without its draw backs. Here are some of them:

[135] Nwakoby, G.C. Arbitrate, Avoid Courts, *Unizik Law Journal* Vol. 4 No. 3, 2000 p. 15 Print.
[136] Marshall, A.E. *The Law of Arbitration*, 4th Ed, London, Sweet & Maxwell 2001 p.4 Print.

a. Ouster of court jurisdiction

It has been argued by some writers that arbitration practice ousts the jurisdiction of court and in fact, infringes on the unlimited jurisdiction of the High Court under the Constitution.[137] With due deference to Bernstein and others who think in the same light, the above argument is not appealing in the least as far as the state of the Law in Nigeria is concerned. This is because arbitral tribunals in Nigeria under the Arbitration and Conciliation Act, as in many other countries, do not operate independently of the courts. The Act empowers a High Court to revoke an arbitration agreement.[138] It also confers on the court the discretion to stay proceedings in court for reason of arbitration.[139] It provides for appointment of arbitrators by the parties or by the court upon application by any party.[140] It empowers a court to impeach an arbitral award,[141] all go to show that the arbitral tribunals complements the works of the courts and do not attempt or pretend to interfere with the jurisdiction of the courts.

b. Bias and partiality

Another attack on arbitration is the opinion expressed by some that since arbitrators are appointed by the parties personally, each arbitrator tends to lean in favour of his appointor. According to Blata and Candilihe et al:

> The parties to the submission, being such entitled to nominate an arbitrator, choose a friend who would be disposed to be more favourable to the party making the selection and the other party was actuated by the same considerations, and the transactions from his view to that of each party looking upon his nominee rather

[137] Bernstein, R. "Arbitration or Litigation – A 1915 Perspective" *Arbitration* Vol. 56 No. 1 Feb. 1990 p.6 Print.
[138] Section 3 of Arbitration and Conciliation Act CAP. A 18 Laws of Federation 2004.
[139] Sections 3 and 4.
[140] Sections 6 and 7.
[141] Sections 29 and 30.

> in the light of an advocate than an independent arbitrator was not long in maturing.[142]

This argument has, however, been rightly and adequately debunked by Nwakoby.[143] In his words:

> The views expressed by these scholars are wrong for obvious reasons. The party appointing an arbitrator appoints a person who is an expert in the field of the dispute and who is experienced in handling of complex commercial disputes. The attraction in appointing any person is his knowledge and experience and not friendship. The arbitrator will be disqualified if he has any relationship whatsoever with any of the parties to the dispute.

We cannot agree more with the above and submit that bias and partiality are out of the question.

c. Delay

Experience has shown that delay which was the main factor that made arbitration more attractive than litigation has become familiar feature of arbitration. Instances abound of arbitrations which have dragged on for years. Delays may result from challenges to an arbitration agreement, choice of an arbitrator, fault of parties or their counsel, and most importantly where the arbitrator is a busy professional person whose services are in high demands, the timetable is likely to be governed by the arbitrator's availability than by the choice of the parties.[144]

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[142] Blata and Candilihe et al "Confidentiality and Integrity in International Commercial Arbitration" *Arbitration* Vol. 75 No. 1, 2009, p.2 Print.
[143] Nwakoby, G.C. *op cit* P 172.
[144] Marshall, A.E. *op cit* note 56.

d. Cost of Arbitration

The cost of litigation was another reason that made arbitration quite attractive. It has however become clear that arbitration is often more costly than litigation especially international arbitration. The reason is obvious, while in litigation, judges, court staff, court premises is provided for by the state, in arbitration, the parties in addition to paying the fees of solicitors have to pay the arbitrator's fees, travel expenses, venue and all other expenses incidental to the hearing.[145]

e. Flexibility

Arbitration has become so formalized that it has become difficult to tell an arbitral proceedings from a court proceedings. With solicitors and counsel employed by both sides as well as expert and other witnesses paraded, disputants would, in some cases, prefer all the formalities of court proceedings.[146]

From the above, it is clear that for arbitration to retain its attraction it has to free itself from the bottlenecks that plagued litigation such as delay, cost and unnecessary formalities expected to play in ADR. In doing so, we shall consider the roles of lawyers in each of the known ADR mechanisms so that we can conveniently come to the conclusion on whether the fear that ADR would take food away from the lawyer's table is well founded.

4.6 RECOGNITION AND ENFORCEMENT OF AWARD

An award is the final judgment or decision of an arbitral tribunal which could be domestic or international or foreign.

The law imposes specific duties on the arbitrators as to award e.g. the tribunal must itself make the award and it must be in writing. It must be signed by at least a majority of the

[145] Felix, A. "ADR: Antidote to Court Congestion "http Web.

[146] John, F.O. "The Effect of Arbitration Agreement on Jurisdiction of the Court in Nigeria" *NJPL* Vol. 2 No. 1, 2009, p. 310 Print.

arbitrators and state certain prescribed particulars. There may be minority award. Reason must be given for the absence of signature of any arbitrator. See Article 32(4) of the Rules. The decision/award must be one made by the tribunal itself and the duty must not be delegated. Under the International Chamber of Commerce (I.C.C) Rules, the award must be given within six months. The Arbitration and Conciliation Act did not prescribe a time limit but the parties are free to fix a time limit and where they do, the arbitral tribunal must observe it and keep within it.

4.6.1 Impeachment of an Award

An award can be set aside by the court on application of a party to the arbitral proceeding for improper conduct on the part of the arbitrator, as well as bias and partiality under Section 48 of the Act. The Act did not set a time limit for challenging an award but it must be done within a reasonable time or as a matter of urgency one may suggest a period of 30 day. If a challenge is successful, the award is set aside by the court.

4.6.2 Recognition

Recognition means ratification, confirmation and acknowledgement of an award. This is the first step after an award is made before we talk about enforcement of an award. An award can be recognized without being enforced. If enforced it could be deemed of having been recognized. If based on an award a court stops proceedings on *res judicata*, the court has recognized the award sections 31 and 51 of the Arbitration and Conciliation and subsequent enforcement of an award. While under sections 31 an and under the Act qualifies automatically as *res judicata*, it is not so with customary award which has to pleaded and proved b evidence in court before it could constitute *res judicate*, section 51 relates to international arbitration.

4.6.3 Enforcement of Awards

(a) Domestic Awards

Enforcement of an award means the actualization, or putting into effect the decision contained in the award. Under the ACA, enforcement can be pursued only in two whys namely, by application in writing to the court and by leave of court as a judgment or order of court. Section 31(1) & (3) of the Arbitration and Conciliation Act enumerated the two ways explicitly.

There can be an objection to recognition of an award as section 32 of the Act provides that any of the parties to an arbitration agreement may request the court to refuse recognition or enforcement of an award. The section did not provide for grounds of such application but such ground could be lack of valid submission, disqualification of arbitrators and that the award though valid when made but ceased to be binding because it has been discharged.

(b) Foreign Awards

Before the Arbitration and Conciliation Act 2004 the two methods of enforcing foreign awards were by registration under the Foreign Judgments (Reciprocal Enforcement) Act 1960 and under the New York Convention 1958. Sections 2 and 4 of the Foreign Judgments (Reciprocal Enforcement) Act provide in effect that a foreign award may be registered in the High Court at any time within six years after the date of the application for registration; it could be enforced by execution in the country of the award. With the enactment of the Arbitration and Conciliation Act 2004, there is no need for registration because section 51 of the Act makes it clear that such an award shall be recognized as binding and shall be enforced by the court on application.

Section 51 provides as follows:

a) An arbitral award shall, irrespective of the country in which it is made, be recognized as binding, and subject to this section and section 32 of this Act shall upon application in writing to the court, be enforced by the court
b) The party relying on an award or apply for its enforcement shall supply:

a. The duly authenticated original award or a duty certified copy there of and
b. The original arbitration agreement or a duty certified copy there of and
c. Where the award or arbitration agreement is not made in English Language, a duty certified translation thereof into English Language. The section adopted Article 35 of the UNCITRAL Model Law but it is wider in scope than the UNCITRAL Model Law Recognition and enforcement can also be refused or objected in foreign awards based on section 52(1) of the Act.

4.6.4 Recognition and Enforcement under the New York Convention

The New York Convention made on June 10, 1958 was acceded to by Nigeria on 17th March 1970. Article 1.1 of the Convention provides that the convention shall apply to the recognition and enforcement of territorial awards made in the territory of a state other than the state where the recognition or enforcement of such awards are sought and arising out of difference between persons, whether physical or legal. It shall also apply to arbitral awards not considered as domestic awards in the state where their recognition and enforcement are sought.

For avoidance doubt Article 1.2 provides that the term arbitral awards include not only awards made by the arbitrator appointed for each case but also those made by permanent arbitral bodies to which the parties have submitted. While Article 1.3 provides that in signing or ratifying

or acceding to the Convention, a state may, on the basis of reciprocity declare that it will apply the Convention to the recognition and enforcement of awards made only in the territory of another contracting state, it may also declare that it will apply the Convention only to differences arising out of legal relationship whether contractual or not which are considered as commercial under the national law of the state making such declaration.

In pursuance of this Article, the Nigerian government signed the convention in 1970 which made the New York Convention part of our law of arbitration. Refusal or objection of recognition and enforcement is also available under section 51(2) of the ACA.

4.6.5 Recognition of Arbitral Award under the New York Convention

Article iii of the Convention provides that each constructing state shall recognize arbitral awards as binding and enforce them in accordance with the rules of procedure of the territory where the award is relied upon. The Article specially provides that "there shall be not be imposed substantially more onerous conditions or higher fees or charges on the recognition or enforcement of arbitral awards which the convention applies than are imposed on the recognition or enforcement of domestic arbitral awards".

This ensures that there is no discrimination between a domestic award and an international convention award in the conditions of recognition or enforcement.

4.6.6 Interim Orders in Arbitration

An interim order is a measure of any temporary nature, whether in the form of an award or in another form prior to the issuance of the award by which the issue is finally decided. The purpose is to maintain status quo pending the determination of the dispute so that the rest is not prejudiced or used to preserve relevant evidence. Section 13 of the Act gives an arbitral tribunal

this power. Section 13 provides "unless otherwise agreed by the parties, the arbitral tribunal may before or during an arbitral proceeding:

(a) at the request of a party, order any party to take such interim measures of protection as the tribunal may consider necessary in respect of the subject matter of the dispute and

(b) request any party to provide appropriate security in connection with any measure taken under paragraph (a) of this section.

This section has been interpreted to mean that an arbitral tribunal can give order for interim protection and preservation of property and can order for undertaking for security. The Lagos Arbitration Law 2009 in Section 21 has similar provisions except that the Lagos Law split the power between the High Court and the arbitral tribunal. Which Section 21(1) gives power to High Court to issue such order, Section 21(2) gives the arbitral tribunal the concurrent power to issue interim and protection order. This gives the parties options to either use arbitral tribunal or High Court to secure the interim order. And in the case of *Environmental Development Construction Ltd v. Umaru Associate Nigeria Ltd*,[147] the court of Appeal held that interim orders issued in the course of an arbitration are enforceable and binding as final award. An award of arbitral tribunal is binding but when the other party refuses to abide b it, the court will enforce it.

While the Act does not give a time limit to an interim order, the Lagos Arbitration Law gives 20 days as the time limit for an interim order in Section 26 of Lagos Arbitration Law.

The arbitral tribunal also has power to vacate, modify, suspend or terminate any interim order as a result of fraud, non disclosure of some material facts, misrepresentation or supervening facts.

[147] (2000) 4 NWLR (pt 652) P. 293. See Shodeinde v. Ahmadiya (1980) 1-2 SC; Kigo v. Holman (1980) 5-7 SC. 60; See Article 9 of the Model law; Article 26(r) of the Rules; the use of Anton Piller KG v Manufacturing Processes Ltd. (1976)1 Ch. 55 at 60 Per Lord Denning Mr. See Ekwenze S.A.M Judicial Intervention in Nigeria Arbitration Law and Practice Snaap Press Ltd. Enugu 2010 P. 161-166.

4.6.7 Cost of Arbitration

Cost of Arbitration includes such matters as arbitrators fee or remunerations, their out pocket expenses, travelling allowances of witnesses and the cost of employing experts and secretariat staff to assist the arbitral tribunal. Under the common law, there is an implied term in commercial arbitration contract that the arbitrator shall be paid a reasonable sum of money for his services. Sections 49 and 50 of the A.C.A empowered arbitrators to charge fees and cost of the proceeding.

CHAPTER FIVE

5.1 THE ROLE OF LAWYERS IN ARBITRATION

The fact that arbitration can play immense role in the administration and dispensation of justice is beyond doubt that the tripod on which the administration of justice stands are: the litigants, the lawyers and the judges. Any defect in any of these three legs would make justice not only shake but also to shake convulsively. We shall, for purposes of segment of this work look only at the three legs of the tripod, that is, the lawyer, litigants and judges or courts. The three constitute the stakeholders in justice dispensation. Needless to say that some of the demands created by modern society which Nigeria cannot shy away from, are the arbitration initiatives. Those who are or are supposed to be in the vanguard of this "arbitration movement" and who must not be sidelined or stand aloof are lawyers, be they in the academia, in the public or private practice. To this end, every legal practitioner's hand must be on deck to ensure that he embraces arbitration since it is almost clear that the future of legal practice depends largely on the extent to which the legal practitioners integrate arbitration into legal practice.

5.1.1 The Law Teacher and Arbitration

Because of the undue emphasis on the adversarial procedure of dispute resolution by the common law which we received with its case law approach, little or no mention is made of other dispute resolution methods both at the university level and at the law school. Because the teacher cannot teach what he does not know, there is a need to make the law teachers themselves acquire the requisite skills and knowledge in arbitration principles and practice. This can only be done by training and retracing of law teachers by seminars and workshops.

5.1.2 Lawyers at the Public Bar and Arbitration

The public bar represents the office of Attorney General (prosecutors) legal aid counsel and legal officers of public corporations. Majority of the cases that adorn our case lists in the courts today which the Federal, State or local governments or any of their agencies is a party are cases that, with adequate knowledge of arbitration and other methods would have no business in our courts. The lawyers can advise their clients to arbitrate or mediate or conciliate there is also need for public campaigns. Since these lawyers act as legal advisers to the various agencies of government which they represent, there is need for them to acquire relevant skills and knowledge of arbitration and other processes so that they can appropriately advise their organizations by designing Dispute Resolution Systems in those institutions.

5.1.3 Private Legal Practitioners and Arbitration

Although the ultimate decision as to whether a case should go to court or not is that of the litigant, the private legal practitioner has, no doubt, a great role to play in most cases whether or not a resort should be made to litigation in any particular case. Because a carpenter whose only tool is a hammer sees every problem as a nail to be rammed in, in much the same way, a lawyer whose only skill is litigation will see every client's case as one that must be commenced in court. As long as these classes of legal practitioners continue to lay emphasis on litigation and litigation alone, the society will remain far from imbibing the culture of arbitration and alternative dispute resolution. The success of the Alternative Dispute Resolution Movement in Nigeria will depend, to a large extent, on how much of arbitration and practice, principles and procedure each lawyer understands since that would determine also the quality of legal advice he offers.

Specifically, we shall now look at the role a lawyer plays in each of these processes to make it clear that imbibing ADR would not make a lawyer jobless or even diminish his income earning power.

5.1.4 Lawyer and Arbitration

As earlier pointed out, arbitration is governed by statute in Nigeria as in many other parts of the world. The fact that arbitration proceedings end in a decision one way or the other after the taking of evidence from the parties by the arbitrator is what makes arbitration adversarial. It is seen in the same light as litigation by some. However, because of some salient similarities it shares with other ADR processes such as choice of arbitrator, convenience, privacy, rate of effectiveness, time saving and flexibility, it is seen as a viable alternative to litigation.

A lawyer can be appointed as an arbitrator whether in domestic or international arbitration. Today, it is common to see lawyers sitting as arbitrators in disputes that are not legal in nature but purely commercial.

A lawyer can also act as counsel to one of the parties to the dispute in arbitration. As earlier observed, arbitration is more formal than any other ADR processes and it includes filling of claims, defences and counter claims, the calling of experts and other witnesses and all other matters incidental to hearing. Because these are familiar features in litigation, lawyers are best suited for it. Thus a lawyer can act as counsel to the claimant or the respondent.

Apart from acting as arbitrator or a counsel to the parties, in international arbitration, a lawyer may even receive instructions to act as the registrar/facilitator capacity in an arbitral proceeding. Thus, whichever way, a lawyer features prominently in arbitration.

5.2 THE ROLE OF COURTS AND JUDGES IN ARBITRATION

It has been argued that the relationship which exist between national courts and arbitral tribunals is one of constant changes and shifts and that the relationship between national courts

and arbitral tribunals is that of partnership even though the partnership is not of equal status.[148] National courts can exist without arbitration but arbitration cannot exist without national courts.[149] Court does interfere when called upon to do so in three stages of arbitration namely (a) the beginning of the arbitral proceeding (b) during the arbitral proceeding and (c) after the arbitral proceeding in accordance with section 34 of the Arbitration and Conciliation Act.[150] Arbitration needs not only judicial support and assistance in Nigeria but also when necessary requires adequate judicial supervision. For this supervisory role of the court and the partnership to be effective and enhance arbitration practice, there is need for judicial commitment and leadership by effective management of other judges by the chief judge, motivation of other judges and staff of the judiciary, ensuring speedy dispensation of justice by disposing off motions and other applications that can delay arbitral proceeding on time.

5.3 THE DEVELOPMENT OF INSTITUTIONAL ARBITRATION IN NIGERIA

The growth of arbitration law naturally gave rise to the establishment of arbitration institutions all over the world. These institutions are established to assist the arbitral process in varying degree. Some of them are professional and trade bodies involve in arbitration in specific professions or trades, e.g. Royal Institute of British Architects (RIBA). In Nigeria, the Nigerian Institute of Architects (NIA) and the Nigerian Society of Engineers (NSE) perform a similar function.[151] Some arbitration institutions, are concerned with arbitration generally, that is, the resolution of all types of commercial disputes, e.g. the Chartered Institute of Arbitrators in the UK and the American Arbitration Association in the United States of America.

[148] Amuchieazi, A.D. "Arbitration and the Courts in Nigeria" *MPJFIL* Vol. a No. 3-4 2005, p. 345 Print.
[149] *Ibid*
[150] Mohammed, M.A. "Examining the Effect of Section 34 of the Arbitration and Conciliation Act on the Jurisdiction of the Court". *NJPL* Vol. 3 No. 1, 2009, p. 298 Print.
[151] Orojo, J.O. and Ajomo, M.A. *op. cit* note 14.

Taking a cue from these, the Nigerian branch of the Chartered Institute of Arbitrators in the UK was established in March 1998 although the Nigerian group of the institute had functioned since 1996.[152] One major function of the institute is to promote and facilitate the determination of disputes by arbitration. The institute also sets standards for the performance of Arbitrators and issues guidelines for procedure to be adopted. It publishes rules for the conduct of arbitration in respect of national disputes and in specialist areas. The institute has developed a comprehensive service information, advice and assistance on matters related to arbitration and dispute settlement which is available to its members and also through the commercial firms, trade association, commodity bodies, chambers of commerce, professional bodies' educational establishment and government departments.[153]

The Chartered Institute publish rules for general arbitration and publishes what is titled guideline of good practice for arbitrators to guide arbitrators in their professional duties. The guidelines cover such matters as professional standard, elements of bias, duty of disclosure, communication between parties, diligence, confidentiality, award and costs.

The Chartered Institute of Arbitrators (Nigeria) started operation as Association of Arbitrators of Nigeria in 1978 but it remained inactive until 1997 when it was apparently waken up by the competitive success of the Chartered Institute of Arbitrators (UK) Nigerian branch. It has put a place a programme of education like the other group.[154]

The Association of Construction Arbitrators was established in Nigeria in 1997 and it was designed to concentrate on construction arbitration. Other professional associations such as Nigerian Institute of Architect, has provisions for the conduct of arbitration in its field. So does the Nigerian Institute of Quantity Surveyors. These national institutes also help to encourage

[152] *Ibid*
[153] O'Ccumnel, C. "Arbitration for a Commercial Clients Perspective" *Arbitration* Vol. 75, No. 1, 2009, p. 71 Print.
[154] Babalola, A. ADR: The Nigerian Experience, *Nigerian Tribune*, 15 December 2008, p. 41 Print.

arbitration through educational and recommends and appoint arbitrators when required to do so.[155]

In spite of these local chartered institutes in Nigeria, there is presently no national arbitration institution for international arbitration. Thus in over two decades of existence of these institutions, they have not handled any arbitration dispute of international dimension in a 21st century Nigeria. This is not good enough.

5.4 FUTURE OF ARBITRATION IN NIGERIA

At the global level, with the continuing expansion of international trade and investment, the number of arbitration cases in general will also increase.

Changes in technology and in international trade and investment will lead to corresponding changes in international contract practice which, in turn, will be reflected in changes regarding the subjects of international arbitration. Compared to the traditional areas, using arbitration, new kinds of contracts in fields such as telecommunication, e.g. MTN Nigeria Plc, Global Com. Nigeria Plc, Airtel etc. The transfer of technology, genetic engineering, electronic commerce, entertainment and sports, including sponsorship will present their specific demands to dispute settlement and probably take a relatively greater share of arbitration cases.[156]

In a globalized economy, the growing relevance of intellectual property has not only led the World Intellectual Property Organization (WIPO) to create a highly sophisticated dispute settlement machinery with many creative ideas possibly relevant for other fields of business, but will lead to new kinds and numbers of international disputes, as is already illustrated by the many domain name disputes. Also, the growing commercialization of sports may lead to new arbitration bodies such as the Court of Arbitration for Sports (CAS) in which either sport

[155] *Ibid*

[156] Ariyoosu, O.A. Arbitration as a Dispute Resolution Mechanism in Telecommunication Industry; An Appraisal of Law and Practice *CJJIL* Vol. 2, 2009, p. 140 Print.

federations or individual athletes may appear as parties.[157] Thus the various cases involving Nigerian Football Federation regarding the election of their executives could be resolved by court of Arbitration for sports in Nigeria rather than the regular courts.

Parallel to this development of international commercial arbitration, one may have to take into account that, starting in the later part of the last century, arbitral procedures have been used for the peaceful settlement of politically and highly sensitive disputes. Though one would not expect arbitration to be the settlement solution in situations of political turmoil or military disputes, as a perspective for the new country; it is comforting to see that at least in some politically sensitive international disputes arbitral procedures have provided the basis for the peaceful settlement of international conflicts.[158]

Regarding the disputing parties, private companies will, no doubt, continue to represent the greatest number of parties in international arbitration as they are the most numerous and significant players in international trade. However, as in history and particularly in the last century, states, state institutions and state enterprises as well as international governmental organizations can be expected to participate in many ways by way of contracts in international trade and even more in the field of international investment, and consequently in arbitration proceedings.

Domestic arbitration does not exist in a vacuum, but subject to and influenced by its national political, economic and legal environment as well as the practice of state courts and the

[157] Karl-Heinz, B. "Future Perspective of Arbitration" *The Revolver*, February 2009, p. 1 Print.

[158] Nwosu, K.N. – ADR as a tool for Alteration and protection of Business investments in Nigeria. A paper presented at 2005 Annual Conference of NBA Leto – Jos, Plateau State, 28 August 2005. Targema, J. Conceptual and Practical Analysis of Alternative Dispute Resolution (ADR) *Emerging Issues in Nigeria Law,* Alubo, A.O. *et al* (eds), Constellation Nigeria Publishers, Abuja, 2009, p. 541 Print.

usages of the national business community. For the different regions of the world, cultural differences will continue to play a role regarding the settlement of disputes.[159]

For the Asian region, where previously, mediation and conciliation were primarily used to resolve disputes, a study of the Asian Development Bank confirmed that, as markets expanded beyond the national frontiers; informal dispute settlement mechanisms became less reliable and formal institutions and procedures with power of decision and enforcement more important. On the other hand, the Asian tradition may have an impact on arbitration in other parts of the world in promoting arbitral procedures in which an amicable settlement is pro-actively sought for with the consent of the parties.[160]

At the local level one of the gains of privatization and commercialization of public enterprises is foreign direct investment which necessarily will lead to increase in industrial and commercial disputes which arbitration and other ADR methods are expected to play leading roles in their settlement in Nigeria. The war against corruption championed by the EFCC and ICPC will also lead to investor's confidence in Nigeria. The consequent increase in volume of trade will also lead to increase in volume of commercial disputes that ADR is most suitable to settle.

The current Central Bank of Nigeria reform in financial sector will also generate increase in foreign direct investment which will require local and international arbitration and ADR institutions that will settle commercial dispute using global best practices that will guarantee investor's confidence.

[159] Ajibola, B. "The Future of Arbitration in Africa" being a paper presented at the International Chamber of Commerce on 20th – 21st, November, Lagos, 2000 Print.
[160] Enemo, I. "The Future of Conflict Resolution and Conflict Resolution Mechanism in Africa" *NSPL* Vol. 2, No. 1, p. 92 Print.

The passage of Anti-terrorism Bill by the National Assembly will allay the fears of foreign investors on the security situation in Nigeria. This will also increase the volume of trade and the volume of dispute which arbitration and ADR will be most appropriate to settle. The passage of Freedom of Information Bill by the National Assembly will equally go a long way in reducing bribery and corruption which has been the scaring away potential foreign investors. The passage of the Petroleum Industry Bill will also attract new entrants into the oil and gas industry. By and large, arbitration and the other ADR methods cannot be relegated to the background in the future economic direction of Nigeria.

We have considered arbitration as an integral part of ADR, its advantages, challenges and prospects. We shall conclude by outlining the expected gains derivable from integration of arbitration into settlement of disputes generally in Nigeria.

First of all, one would expect a growing harmonization between national and states arbitration laws. National legislators will continue to be pushed by their own constituencies, to adapt their respective legal frameworks to the demands of international business practices for efficient dispute settlement machineries. This, and also the many similarities between the other modern national arbitration laws even if they do not follow the Model Law, has already led to and will continue to lead to a harmonization of national and states arbitration law to an even greater extent in the future.

Our next prediction, though it may sound strange, is that international arbitration will become more international. With the growing number of international arbitration cases and the growing number of lawyers and arbitrators involved in international arbitration, one would expect them to become less dependent on their specific national peculiarities and more open and flexible to the specific needs of disputes in the international context.

In a more and more globalized economy and contract practice, regional differences will become less important. A globalization of arbitration can also be noted as parties seem less to take the traditional approach of selecting arbitrators from their own legal background, but rather select arbitrators from any region of the world whom they consider best equipped for the particular case.

Finally, the often repeated truism that arbitration can only be as good as its arbitrators will also be valid in the future. In view of the fast growing number of cases, it may become increasingly difficult to find the best possible arbitrators for each individual case. On the other hand, the growing number of arbitration cases will produce a growing number of lawyers experiencing international arbitration as counsel and a growing number of persons having some experience in the practice of arbitration. However, both in national arbitration and even more so, in international arbitration, it is not sufficient merely to select a good lawyer or a good jurist or a good engineer. If one wants to ensure the specific advantages of arbitration and ensure that the particular arbitration procedure does not become the practice ground for a new arbitrator to the detriment of the interests of the parties, acquaintance with an experience in the particular demands of arbitration and particularly international arbitration will continue to be indispensable. Video conferencing in local and international commercial arbitration which is already in use shall become popular with the growth in information and communication technology globally[161] Nigeria cannot be an exception but it is expected to play a leading role in Africa. Video conferencing will not be limited to arbitration but to other species of Alternative Dispute

[161] Levy Kanfman the use of ICT in Arbitration, www.ik-k.com/data/document/theuse 12 Nov. 2012, S.A.M Ekwenze Video Conferencing in International Commercial Arbitration Law and Practice Snaap Press Ltd Enugu 2010 P. 1, S.A.M Ekwenze Video Conferencing in Arbitration: An Overview Papers Ssrn.com/sol3papers of cfm 12 Nov. 2012.

Resolution.[162] Video conferencing in mediation and arbitration has been said to have negotiated over 2 billion dollars settlement since 2005[163]. It saves time and travelling expenses too.

[162] Jean Morrow Mediation by Video Conferencing, Nothing is Lost www.joanmorrow.com/mnlayers Article, 12 Nov. 2013.
[163] Henring I, Mediation and Arbitration – e Neutral Video Conferencing www.henningmediation.com/abouteneut. 12 Nov. 2013.

CHAPTER SIX

NEGOTIATION AND CONCILIATION

6.1 INTRODUCTION

The fact that disputes are part of a living process makes it inevitable for the existence of some form of mechanisms for resolving them. We have said earlier that the mechanisms for resolving disputes can be categorized under two broad heads – Adversarial and Non – Adversarial mechanisms. This aspect of the research work however, is concerned with the non – adversarial mechanisms having discussed the adversarial aspect in the last chapter. Non-Adversarial mechanisms of resolving disputes are essentially those methods of dispute resolution that do not involve a third party. They give no room to legal form, formality and technicalities. Rather these methods set out to assist disputants to find an acceptable and lasting solution in solving the problems between them. These methods are also sometimes referred to as Alternative Dispute Resolution mechanisms – a group of flexible approaches to resolving disputes more quickly and at a lower cost than going to court. Some of these non – adversarial mechanisms will be considered in this work.

ADR as a term covers the whole range of alternatives to litigation or arbitration, which involve third party intervention to assist in resolution of disputes. Sometimes, arbitration is also referred to as ADR: it was of course, the first well developed Alternative Dispute Resolution which focuses on the cultivation of an attitude of patient negotiation, seeking mutual understanding, tolerance and accommodation. Interestingly, this was the consensus dictate found in many ancient cultures of Nigeria but which have gradually faded away by the invasion of European legal system, military aberrations and modern reasoning that lacks patience, dialogue and tolerance. Also to be noted is the fact that the term “alternative”, is no longer appropriate to

now mainstream processes. It is better to think of these techniques as "Effective Dispute Resolution" – matching the process to the needs of the parties in order to use the most effective techniques in each situation, as we have earlier pointed out that ADR can never replace or supplant litigation but it can only complement it.

ADR is flexible, adoptable and specific. ADR processes can be devised to suit complex disputes in commercial and other sectors. Where willingness exists to use alternative methods of dispute resolution, an appropriate process can be found. The following are detailed analysis of some of the ADR processes used in resolving disputes.

6.2 NEGOTIATION

This is usually the first step in most ADR. It is perhaps the best, cheapest, most economical, most satisfactory and commonest of divers methods of dispute resolution. Negotiation is an everyday activity for human beings. Most of it is not recognized as negotiations at times, and most of the time it is effective, yet has only recently been studied, understood and refined. Negotiation is certainly one of the oldest forms of ADR. It consists of a "Quid pro quo" of a sort, that is, giving up something in order to get something else in return. It involves discussions of dealing about a matter, with a view to reconciling differences and establishing areas of agreement, settlement or compromise that would be mutually beneficial to the parties or that would satisfy the aspiration of each party to the negotiation. Compromise here implies flexibility on both sides and flexibility derives from a genuine desire on the part of the parties to reach agreement.[164] The role of the negotiator is to assist the parties in deciding for themselves. Direct negotiation requires the negotiators to communicate with each other about the dispute and often about their willingness to compromise.

[164] Ajomo, M.A., Alternative Dispute Resolution, *Continuing Legal Education Association of Nigeria (CLEAN) Journal,* 1996, P. 1 at P. 4 Print.

Usually when deterioration becomes noticeable in a relationship as long as parties concerned are still communicating, the situation could be checkmated from developing into a full-blown dispute. Even at a point of full-blown dispute, in most cases, efforts are sometimes made to resolve that dispute through "Talk to each other" negotiating.

What is Negotiation?

Communication for the purpose of persuasion[165] is how notable ADR proponent, Prof. Frank Sander defined negotiation. Direct negotiation is a process which parties to a dispute meet to reach a mutually acceptable resolution. For most business executives, negotiation is a major part of their professional duties. A wide variety of contract and other transactional arrangement are regularly negotiated while myriad forms of disputes are daily negotiated. One of the most important benefits of negotiation as a dispute resolution mechanism is that the disputants retain control both over the process and over the outcome. Communication in negotiation centers on the search for common ground and compromise.

Negotiation is a voluntary, unstructured and usually private process through which parties to a dispute can reach mutual gentlemanly agreement for the resolution of their disagreement. It is usually an informal dispute resolution process in which the disputants have firm and total control of the entire arrangement. The success or failure of this process more often than not depends entirely on the disputants themselves since the process offers an opportunity for them to talk on one on one basis. A common feature of negotiation is the absence of a third party facilitator. Disputants themselves present their own case, marshal arguments and lead evidence. They may or may not appoint individuals or professionals such as lawyers, etc. to represent their

[165] Sander *et al*, Dispute Resolution, Little Brown Co. New Jersey, Dunlop and Arnold M.Z. Mediation and Arbitration of Employment Disputes. San Francisco, Jossey-Bass Publisher, 1997 P. 140 Print.

interest.[166] The totality of the foregoing attribute of this dispute resolution hybrid has engendered the explanation of negotiation as the fastest, least expensive, most private, least complicated and most party-centred oriented process. Generally speaking, negotiators have two primary objectives. The first and the more obvious is to achieve the negotiator's bargaining goals. The other and equally more fundamental objective is to avoid being exploited in the negotiation process. Over the years however, a strategy has evolved for avoiding exploitation while creating cooperation. The strategy that is most effective in developing cooperation is commonly called "tit for tat", that is, responding either competitively or cooperatively by matching the opponent's previous move.[167]

The strategy has five broad rules. They are as follows:

RULE 1 – BEGIN COOPERATIVELY

The first rule of negotiation to be born in mind by a negotiator at the commencement of a negotiation is that he should as much as possible be cooperative in an attempt to signal the other side that cooperation is sought. The intention is to receive reciprocal gesture from the other party. However, the negotiator must be at alert to avoid exploitation. Thus, the instance of cooperation can be a small one such as responding promptly and politely to a request for information that one is already obligated to share.[168] By limiting the risk to an issue the negotiator can afford to lose, the negotiator can send a cooperative message without jeopardizing major issues.

[166] Goldberg, Sander & Rogers; *Dispute Resolution Negotiation, Implication and Other Processes*, 3rd Ed. Aspen, Aspen Publishers Incor. 1999. Daver E.A.: Manual of Dispute Resolution: ADR Law and Practice Vol. 1 Colorado Springs McGraw-Hill Inc. 1994 P. 120 Print.
[167] Lay, D.A. and Seberenus J.K. *The Manager as Negotiator*, New York: Free Press, 1988 Print.
[168] Exelrod R.; *The Evolution of Cooperation*, New York: Basic Books 1984 at P. 38 Print.

RULE 2- TO RETALIATE THE OTHER SIDE IS COMPETITIVE

It is not unusual in negotiation for a negotiator to misinterpret a signal for cooperation from another negotiator as sign of weakness. This misinterpretation of signal may therefore engender competitive rather than cooperative negotiation. The proper attitude to this is therefore to retaliate if the other side is competitive. By responding competitively to all competitive moves as a protects him from exploitation, and the negotiator signals that the opponent cannot gain anything by being competitive but rather that cooperation will be more beneficial to both parties.[169]

RULE 3 – TO FORGIVE THE OTHER SIDE BECOMES COOPERATIVE

Once a hitherto competitive negotiator abandons that stance and embraces cooperative negotiation, it shows simply that cooperation is now the preferred method of negotiation. It is imperative that his hitherto stance and competitive disposition be forgiven and over looked so as to ensure that progress is made.[170]

RULE 4 – TO BE CLEAR AND CONSISTENT IN THE APPROACH

Consistency and clarity in a negotiator's approach to negotiation is important. An inconsistent negotiator is most likely to be taken unserious. Besides, such an attitude may unduly prolong the length of negotiation. By being consistent, the negotiator becomes predictable. This allows the opponent to risk being cooperative. Thus, the parties begin focusing on the future rather than the past.[171]

[169] *Ibid.*

[170] Michael A. Wheeler: Negotiation Analysis: An Introduction, Harvard Business School, 1771 p.4 Print.

[171] Seberenus J.K., Six Habits of a Merely Effective Negotiator, Harvard Business School Publishing, 2001 p. 111 Print.

RULE 5 – TO BE FLEXIBLE

One of the factors that ordinarily determine the success or otherwise of a negotiation process is flexibility. Negotiation as a dynamic process will not succeed in the face of rigidity. Thus, adhering to any approach beyond the time it is effective lessens the potential for agreement. Even with a clear strategic direction, negotiators must remain flexible, seeking ways to move a competitive negotiator to become more cooperative.[172]

The first four rules of the "tit for tat" approach have been described as being nice, provocable, forgiving and transparent.[173] The strategy has been shown to create pockets of cooperation among negotiators even where the vast majority of negotiators bargain competitively.

This approach is not without its shortcomings. For instance, some authorities,[174] have argued that while the tit for tat approach may be useful in negotiating substantive issues, it may cause a breakdown in the bargaining relationship if applied to relationship issues. They maintain that being competitive on relationship issues may impair the relationship. They caution against competitive moves regarding non-substantive issues. Notwithstanding these criticisms, the tit-for-tat approach perfectly suits other negotiations apart from those touching on relationship issues.

Decisions arrived at in a negotiation for settlement does not bind the parties, unless they agree to be bound by it. This is well illustrated in *Ekwueme v. Zakari*.[175] In that case, dispute between the parties arose in respect of management of a hotel business, jointly operated by the

[172] Herb, G., You can Negotiate Anything, New York Batman Books 1980. Kozicky S, Creative Negotiator Holbrook M.A. Adams Media Corporation 1998 Print.
[173] Cordlin, R.I.: Bargaining in the Dark. The Normative Incoherence of Lawyer Dispute Bargaining Rule. 51 Maryland Law Review, 1992 p. 57 Print.
[174] Fisher, R. and Brown, S., Getting Together: Building a Relationship that Gets to Yes. Boston Houghton Mifflin 1998, pp. 197-202 Print.
[175] (1972) 2 ECSLR P. 221 at P. 224

parties. Friends of the parties, *suo motu* invited the parties with a view to helping them resolve their differences. After hearing the disputing parties, the friends rendered a decision on the dispute. One of the parties rejected the decision consequent upon which the other party sued to enforce the decision. The court dismissed the action holding that the parties were not bound by the decision. However, a decision in a negotiation for settlement will become binding on the parties if they accept it. In that instance, it transmutes into settlement.

Thus, it would be seen that whereas in negotiation for settlement any person or persons can *suo motu* or on the request of a party or both parties to a dispute wade into the disputes and propose a settlement. This to some extent is like conciliation. However, conciliation is governed by Arbitration and Conciliation Act, Cap A18 Laws of Federation of Nigeria 2004 and there are elaborate provisions in the conciliation rules.[176] There is no statutory provision dealing specifically with negotiation for settlement. Furthermore, parties to conciliation undertake not to initiate, during the conciliation proceedings, any arbitral or judicial proceedings in respect of dispute that is the subject of the conciliation proceeding.[177] These restrictions do not apply to negotiation for settlement.

6.3 CONCILIATION

Conciliation, a non-adversarial dispute resolution mechanism, is the bringing together of disputants in an endeavour to settle their differences. Conciliation is an old method of dispute resolution and is also very common especially in traditional societies.[178] There appears to be no available evidence on the extent to which this method is being used in commercial practice at least in Nigeria. The Arbitration and Conciliation Act has only one section relating to

[176] See for instance Article 1 of Conciliation Rules Third Schedule to Cap A18.
[177] Article 16 Cap.A8 Laws of Federation of Nigeria 2004.
[178] Lord Philips' Alternative Dispute Resolution: An English View-Point, *Arbitrator*, Vol. 74 No. 4, 2008; p. 406 Print.

conciliation. The section[179] simply provides inter alia that notwithstanding the provisions of the Act, the parties to an international agreement may agree in writing that disputes in relation to the agreement shall be settled by conciliation. The Act also provides for Conciliation Rules in its third Schedule. The main object of conciliation is to achieve an amicable settlement of the dispute with the assistance of a neutral conciliator who is respected by both parties. A conciliator performs a slightly different function from a mediator. Like a mediator, he is a neutral third party, trusted by the disputed parties. First of all, he inquires from the parties whether they are prepared to try to settle the dispute amicably. If the response is positive, he then arranges a joint meeting with the parties, after studying the relevant documents (if any). At the meeting, the conciliator invites each party to set out his case, while he listens carefully and asks questions in the joint sessions, he may meet with each party separately and privately, with a view to discussing the matter in confidence and finding out the point beyond which the party is not prepared to go.[180] In other words, he seeks to find out the party's bottom line. He then carefully considers each party's evidence and submission against the rebuttal thereof by the other party. Against the background of all these, the conciliator draws up and proposes the terms of settlement, which represents, in his own perception a fair compromise of the dispute. Unlike in arbitration, a conciliator does not make decision for the parties. Rather, the conciliator assists the disputants in reaching an agreed settlement. This is usually achieved by the conciliator proposing solutions for the disputants and since the decision is actually reached by the parties themselves (and not imposed on them) enforcement is likely to be a lot easier. Secondly, parties are more

[179] Section 55 Cap.A18 Laws of Federation of Nigeria, 2004.

[180] Orojo, J.O. and Ajomo, M.A., *Law and Practice of Arbitration and Conciliation in Nigeria*, Lagos, Mbeyi Associates, 1998 P. 63 Print.

likely to preserve the good business relationship that exists between them than in arbitral or judicial proceeding.[181]

In most cases the conciliator acts on his own prompting, meeting the parties, seeking to know whether they are willing to settle their dispute amicably. If the parties agree, he then meets jointly, listens to them as they present their respective cases following which he may ask questions, drawing out the various issues raised by the parties. He then studies carefully these issues; comparing the stories from both sides aided by documentary evidence furnished him by the parties where applicable. He may consult each party separately again and in this private meeting, he seeks to reach the heart of the party, drawing out what concessions the party is willing to make. This information is given in confidence. It is consequent upon this that he formulates his solution to the dispute, presents the same to the parties in the form of a suggestion. Parties are then free to reject or accept the drawn up proposal. It must be borne in mind that the conciliator's proposed solution is actually what it is a mere proposal which may or may not be accepted by the parties. It is not akin or similar to an award. However, if the parties accept the proposal, that binds them, not on the authority of the conciliator but on their post conciliation agreement accepting the proposal.[182] The term "conciliation" is sometimes used to denote facilitative, that is, non-evaluation. Mediation may differ or be interchangeable depending on the country or dispute sector involved. Conciliation is a generic term, which is commonly used to describe a form of dispute intervention, or conflict management, which is less formal than mediation.

Conciliation has disadvantages. For instance should the mechanism fail; money and time spent on it might have been wasted. Ajomo has suggested that this disadvantage might be

[181] Ezejiofor G.: *The Law of Arbitration in Nigeria*, Lagos: Longman, 1997 P. 27 Print.
[182] Article 13(3) of Schedule 13. Conciliation Rules Arbitration and Conciliation Act Cap.17, 18 Laws of Federation of Nigeria 2004.

reduced to some extent if the contract did not require the parties to attempt conciliation prior to their initiation of conciliation proceedings.[183] It has been said, however, that conciliation is reaching an amicable settlement.[184]

[183] M.A. Ajomo "Arbitration Proceedings" A paper presentation on the 16th of June 1997 Print.
[184] *Ibid.*

CHAPTER SEVEN

7.1 MEDIATION

Very often, it is difficult for parties involved in a dispute to negotiate constructively in their direct attempt at the resolution of their conflict, perhaps because of their emotions which may prevent them from searching for a common ground of settling the dispute. Mediation comes in to overcome this problem. Mediation could be annexed or free from court. It is court annexed when it is integrated to the court by the law like the Lagos Multi Door Court House Law 2007 while it is free from court when it is done by the parties privately between themselves without court intervention. This is the type promoted by Kwara State Citizen Mediation Centre Law 2008.

7.1.1 What is Mediation?

Mediation is a process in which an impartial third party called "a mediator" is invited, or intervenes to facilitate the resolution of a dispute by the agreement of the parties. Mediation helps the disputant resolve or better manage disputes by reaching agreement about what both will do differently in the future.[185] The mediator essentially, facilitates communication, promotes problem-solving techniques to enable the parties to reach amicable settlement. Mediation can be seen from the common sense idea that the intervention of an experienced, independent and trusted person can be expected to help the parties settle their quarrel by negotiating in a collaborative rather than adversarial way.[186]

Mediation, like any other ADR process is not a new concept. It has been used in various communities, the world over. What is new is the approach. In fact, a close look at the traditional

[185] Sebok, T. "Preparing for Your Negotiation" *N.D.R.J.* Vol. No. 1. p. 29 Print.

[186] Krikorian, Aldrienne Litigate or Mediate? Mediation as Alternative to Law Suit http://mediate.com/articles/krikorian.cfm Web. Accessed 23-10-2012

methods of mediation would reveal that, it was not as smooth as it is today because they were not all that voluntary. According to Michael Noone,[187]

> The traditional dispute resolution process in many small scale villages and nomadic societies is a form of mediation, where persons in dispute are expected to sit down with elders and talk out the matter. Such mediators tend to uphold community values by employing a range of tactics ranging from persuasion, to ridicule, to witchcraft, to threat of ostracism."

Quoting from the anthropologist, Barton, R.,[188] he describes the mediator of the earlier times:

> To the end of peaceful settlement he exhausts every art of *Ifuguo* diplomacy. He wheedles, coaxes, flatters, threatens, drives, scolds, and insinuates . . . the Monkalun has no authority. All he can do is to act as a peace making go-between. His only power is in his art of persuasion, his act and his tact and his skillfulness playing on human emotions and motives.

Today's viewer will definitely see the process described above as unsatisfactory, being seen to be manipulative and unduly coercive upon one or both parties with the outcome reflecting and re-enforcing authoritarian and paternalistic power structure. Yet, it was an acceptable communal mediation process. Among the Chinese, their traditional system involves the use of scholars and sages who were expected to use their knowledge to assist the parties to find solution. The village sage ideally sought to divine a satisfactory and truly moral outcome.[189]

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[187] Noone, M. *Mediation-Essential Legal Skills,* London; Canvendish Publishing Limited, 1998 p. 5 Print.
[188] *Ibid.*
[189] Anthony Clark: The Future of Civil Mediation, *Arbitration* Vol. 74 No. 4, 2008 p.419 Print.

In most contemporary, industrialized Asian countries, mediation continues to be seen as the best method of dispute resolution.[190]

7.1.2 Principal Features of Mediation

a. Accessibility – All disputes whether already in litigation or not can be referred to mediation. It can be conducted at a very short notice and anywhere the parties feel comfortable as it needs not be formally convened.[191]

b. Voluntariness – This is the most outstanding characteristic of mediation. In mediation, parties take responsibility for the resolution of their disputes. Each party must freely choose to participate in the process; freely choose to continue in the mediation; freely choose to reach or not to reach agreement including the right to withdraw from the process at any stage. The fact that mediation is voluntary largely accounts for the success and finality of most agreements reached through mediation, as psychologically, persons are much more likely to feel committed to an agreement which they have personally negotiated and agreed to accept than to one which is imposed upon them by an adjudicator.[192]

c. Confidentiality – The parties in mediation are usually freer than in litigation or arbitration as they freely discuss their needs, interests and feelings. This is because, they are fairly certain that whatever they say during mediation is confidential and without prejudice – not to be used in any latter judicial or arbitral proceedings. This is largely so because as part of this process, parties usually, expressly agree before the mediation takes off that the mediator shall not be called later to give evidence on any matter over which he mediated and that

[190] Collin, J.: Wall Framework for Mediation in Hong Kong, *Arbitration* Vol. 75 No. 1, 2009 p.78 Print.
[191] Funmi R., Mediation: Tool for Evolving Commercial Solution to Commercial Dispute in Nigeria. *The Arbitrator* Vol. 4 No. 1, 2007 P. 16 Print.
[192] *Ibid.*

documents used at the mediation are either returned or destroyed at the end of the mediation session.[193]

d. Facilitation – because mediation is interest-based and problem-solving as distinguished from rights determination and crack position-based bargaining, the mediator assists the party to retain control of their disputes while working out a solution by:
    i. Identifying each disputant's needs and underlying interests;
    ii. Developing/ generating as many options as possible for settlement;
    iii. Reaching an agreement which satisfies them and accommodates all their needs.[194]

7.1.3 Other Models of Mediation

Because mediation is a flexible process, there are other contemporary models of mediation apart from the facilitative model. Michael Noone identifies three of such models:[195]

a. **The Compromise model** which is usually found in the context of large commercial and industrial conflicts and personal injury disputes. Unlike the facilitative models which seeks to avoid the parties taking up position too early but to rather concentrate on their underlying needs and interest, this model concerns itself squarely upon each party's apparent legal entitlements and previously defined position demands. In this model, the mediator actively seeks to establish each side's "bottom line" at the beginning of the session and then encourage incremental bargaining towards a mutually acceptable compromise figure.
b. **The Therapeutic model** – This is usually employed in dealing with domestic disputes. It is often offered by psychological and counseling services. This model tends to define disputes mainly in terms of behavioural and emotional factors and relationship issues. The underlying objective of this model is to reconcile the parties. The main problem with this model,

[193] *Ibid.*
[194] *Ibid.*
[195] Michael Noone *op. cit* note 221.

however, is that it tends to confuse the proper role of the mediator with that of the social worker or counselor.

c. **The Managerial model** – This is a process/model usually requested for by persons who are involved in financial and business disputes. By this process, a mediator who is specially skilled in the area of dispute of the parties is engaged. This model emphasizes rights and objectives, standards and measures. The mediator in this process is more active in the negotiation than in conventional mediation process. He offers his expert advice and acts more like an adviser and manager than a conventional mediator as the parties have less control over the negotiation as well as the outcome. Its focus on right rather than interests explains why it is sometimes referred to as "non-binding arbitration."

7.1.4 Keys to Successful Mediation

For a mediation to be successful, the mediator must possess the following qualities:[196]

i. Effective communication skill
ii. Ability to break deadlocks
iii. Good listening skills
iv. Persistence
v. Ability to build rapport among the disputants
vi. Flexibility and creativity
vii. Empathy
viii. Patience
ix. Tolerance and neutrality
x. Ability to handle conflict situations

[196] Brodow E., Tips for Successful Mediation, *Negotiation and Dispute Resolution Journal* Vol.1 No.1 2004 p.115. Funmi R., The Role of Counsel in Mediation; *The Arbitrator* Vol. 5 No. 3, 2008, p. 19 Print.

xi. Positive and optimistic attitude

xii. Trustworthiness

xiii. Confidence

7.1.5 Phases of Mediation Process

Although there is no standard form or procedural rules regulating mediation proceedings, as a matter of practice, the process of mediation involve different stages. Essentially, there are six stages/phases in the mediation process.[197]

1. The Preparation Stage –

At this stage, the mediator must be in possession of the statement of issues filed by the parties. The mediator must ensure the following at this stage:

a. The parties have hearing notice; within a given time before the mediation.

b. All documents required to be used have been served on all parties to the mediation;

c. That any document which in the opinion of the mediator is not available, is asked for;

d. That arrangements are made for the conveniences of any of the parties or representative who will be in attendance including the provision of interpreters where required;

e. That one or more of the parties is represented by counsel. Foreknowledge of this fact is important because where one party has legal representation while the other has none, it creates some form of imbalance so that the mediator can adequately inform the party without a counsel of the dangers of going without one;

f. That whoever is coming to the mediation has the requisite authority so as to avoid a situation where so much energy shall be dissipated, a party may tretreat on the pretext of going to receive further briefing;

g. That the agreement submitted to mediation has been signed by both parties;

[197] David, M., Development in Mediation Confidentiality and Conduct, *The Resolver* August 2008. p. 1 Print.

h. That the venue is ready and convenient for the parties;

i. That the sitting arrangement is done in such a way that shows not only that the mediator is in control, but also that there is no favouritism to any of the parties;

j. That he warmly welcomes the parties (especially when he is meeting them for the first time) so as to build the rapport he requires for the process.[198]

k. That every party confesses that there has been fair hearing as all doubts are cleared to avoid any ambiguity.

2. The Opening Phase

This stage accommodates introduction of the mediator and all the parties present, including the bio-data and impartial status of the mediator, neutrality, confidentiality, etc. the ground rules, confirmation of parties authority to participate in the process, comments and questions as well as opening statements.[199]

3. Exploration Phase

This is the stage where the mediator begins to find out the real issues between the parties which may not be anything close to what is contained in their statements of issues or the positions they stand on. Depending on the nature of issues to be determined, the mediator may consider the necessity to meet with the parties or continue in a joint session. Where meeting is adopted, the mediator must assure the parties before-hand that whatever he says is held in confidence and he must also assure the party waiting that he will be given equal opportunity to bare his mind.[200]

[198] *Ibid.*
[199] *Ibid.*
[200] *Ibid.*

4. The Negotiation Phase

The line between the exploration stage and the negotiation stage is a thin one and it is important that the mediator knows exactly at what point to move from exploration to negotiation. Any premature movement may truncate the process and no settlement may be reached with each party sticking to his position. The question to ask at this stage is: "Are the real interests of the parties identifiable now?"

It is at this stage that the mediator employs what is called "reality testing" i.e. using hypothetical question for noncommittal offers such as "would you feel better if he were to apologize for his inaction", "What if", "supposing", "imagine" etc.[201]

5. Conclusion Phase

At this stage, it is clear what the areas of agreement between the parties are. For emphasis, the mediator would read out the areas of agreement for the parties to affirm or correct and a successful completion of this brings the parties to the last stage which is settlement.[202]

6. **Settlement** – When parties have a mind at a settlement, then a formal agreement in writing will be drawn up for the parties to execute and after this stage, such agreement/settlement shall become binding and no party shall be free to resile after execution of the agreement.[203]

7.1.6 Why Mediation Fails

We have already made the point that mediation is one of the most efficient ADR process used the world over and it is has recorded substantial success story. However, mediation fails

[201] *Ibid.*
[202] *Ibid*
[203] *Ibid*

sometimes. The following are some of the factors responsible for failure of mediation processes:[204]

a. Where a party entered into the process with genuine intention to settle but for purposes of stonewalling;

b. Lack of adequate mediation skill on the part of the mediator and this includes:

   i. Lack of preparation

   ii. Lack of good communication skill

   iii. Inability to break deadlock

   iv. Failure to take firm control of the process

   v. Poor listening skill

   vi. Inability to identify the real interests of the parties

c. Where a party who came into the mediation process has no authority to reach settlement;

d. Unwillingness of either or both parties to submit relevant documents or other materials necessary for the process;

e. Impatience;

f. Failure to cross-check confidentiality;

g. Getting into negotiation stage in a hurry;

h. Where the settlement reached is unworkable;

i. Where the mediator shows bias; or and partiality.

j. Where a party suggested mediation to the other party, so that there is no trust or confidence in the arbitration process.

[204] Mark Mattason; Compelling Parties to Mediate: How Far Should a Judge Prepare To Go, *The Resolver*, August 2008 p.2 Print.

7.1.7 Mediation Versus Litigation

Mediation and litigation are not necessarily compatible. On many occasions, mediation can be used during litigation in an attempt to settle a case, often when the parties are beginning to look for ways to get off the litigation treadmill. Because mediation takes place "without prejudice" basis, nothing can be lost by using it. Mediation is not, however, a panacea or suitable for resolving all disputes, as it is essentially a consensual process where both sides need to agree to use it.[205] The agreement can arise from a contractual requirement to use mediation to resolve a dispute or as is most common, take the form of an agreement to mediate dispute. Litigation is, however, often the only way if a party will not enter into discussions or refuses to acknowledge that there is a problem. Mediation is also unsuitable where a court declaration is required in a test case or where an injunction is required to prevent illegal actions or to protect assets.[206] Litigation is an adversarial and delayed process that destroys relationship and permits a judge to impose a final win-lose decision.[207] While mediation is much more economical and efficient than going to court, especially since the parties split the cost of mediation, legal representation is encouraged but not required as in consultation with other experts if parties so choose.[208] All the parties and their representatives work together for a fair solution. Mediation can be used at any stage of dispute, before or after a suit has been filed. Many courts refer cases to mediation because of its high success rate largely because the parties understand their case and advances of their relationship better than anyone. A vast majority of those who participate in mediation are satisfied with the process since the inception of ADR centre in Abuja, especially since it is less time consuming and less expensive than traditional court system and most cases are successfully

[205] Patterson, Susan and Grants. *Essential of Alternative Dispute Resolution*, Pearson Publications Company 1997 P. 30 Print.
[206] *Ibid.*
[207] *Ibid.*
[208] *Ibid.*

resolved. Regardless of the reason for choosing mediation, research demonstrates that people prefer mediation to all other dispute resolution methods.[209]

Mediation is an increasing popular alternative to litigation. It involves bringing in a neutral third party who can help the disputants reach a mutually acceptable resolution of dispute. Unlike in arbitration, a mediator does not make any decision about the outcome. The actual resolution of the problem comes directly from the parties, and each side is free to accept or reject a particular solution. The benefits of bringing a dispute to mediation are substantial. For example, it is far less expensive than going to court. The only cost involved is the mediator's hourly fee which is usually split between the parties. Average mediation lasts one or two days, the total cost per party is likely to be less than ten thousand naira. Additional costs, civil fees and expert witness expenses are eliminated. Since mediation can be completed so quickly, it will allow one to put the matter to rest within a few days and get back to the business at hand. In sharp comparison, the average court case can take place anywhere from two to five days to be resolved. Mediation also allows you to avoid the endless hours spent in discovery and dispositions. In mediation, the resolution of the matter remains complete in the hands of the two parties. No judge will settle the matter for you. You get to decide whether to accept the other party's offers. Mediation also tends to pressure and may even strengthen the relationship involved, while a court case inevitably drives a wedge between the parties. During mediation, you may learn something about the other side's needs that will allow you to change your policies or work environment for the better. In addition, in that process, you may regain the trust of a valued employee. One can even avoid the negative publicity that usually comes from most of these disputes by making an agreement before the mediation begins that no information about the

[209] Alternative Dispute Resolution, Emergence of and Salvation to Ailing Administration of Justice. A paper delivered by Hon. Justice Kayode Eso at the Nigerian Bar Association Conference, Ilorin, 2006 Print.

mediation or the terms of the settlement will be given to the press. These allow the mediation to remain in-house learning experience, rather than a free-for-all in the press. Cases that are submitted to mediation are resolved to the satisfaction of both parties. It works because of the parties' common willingness to resolve the dispute. However, if you still go to court afterwards any information that was revealed during mediation cannot be used against any party. Mediation differs from arbitration. According to the Chairman of the New York State Mediation Board, "Mediation and arbitration have conceptually nothing in common. The one (mediation) involves helping people to decide for themselves, the other (arbitration) involves helping people in deciding for them.[210] "Arbitration proceedings result in a binding and enforceable award whereas mediation terms which are subject to acceptance of the parties do not. Also, neither the mediator nor conciliator can compel the parties to reach settlement or impose an award on them. More so, an arbitrator is immuned from action for negligence but a conciliator or mediator is not so immuned.[211]

7.1.8 The Benefits of Mediation

Alternative dispute resolution mechanisms are not intended to supplant court adjudication, but rather to supplement it. Mediation boasts of diverse advantages. For instance, it is said to save financial, time and emotional costs of other processes. Emotional stress as a result of long trials of cases in court and is necessary adjournment. The parties have increased control over the process and the outcome. They have improved communications, more opportunities to deal with underlying issues, less tension, great understanding and less destructiveness than other processes. Besides, complex issues among multiple parties may be addressed more easily; more

[210] Mayer, "Function of the Mediator in Collective Bargaining" cited in Gulliver P., Dispute and Negotiation Across Prospective. 2nd Ed. New York: Academic Press, 1919, p. 210 Print.

[211] *Suteliff v. Thanekrah* (1974) 1 All ER 859; *Arenson v. Arenson* (1975) 3 WLR 815; Ezejiofor G., *The Law of Arbitration in Nigeria*, Lagos, Longman, 1997 P. 40 Print.

settlement options are created thereby avoiding a zero-sum approach and there is a higher degree of commitment to settlement.

Other benefits of mediation include:

1. Mediation is not touchy-free "counseling, issues related to blame, fault and guilt must be referred to in order to facilitate open and full disclosure, where appropriate, the mediator will refer issues out for valuation by appraisers and accountants or other experts. Good will is difficult to measure and value, but parties to mediation are generally more cooperative with each other upon the conclusion of mediation. In addition, because resolutions are mutually created and agreed upon rather than imposed, compliance is greater secured than through litigation.
2. Mediation however, is based on cooperation instead of competition. Animosities can be reduced as the couple concentrate on planning for the future of their children rather than dwelling on the past and failed marriage. In mediation, the parties decide together, their child care plan and the end result is an individualized agreement taking into consideration the needs of both parents and children. Because parents have more knowledge and understanding of their children, their agreement will be better and more flexible than an order imposed by a judge who has limited knowledge of the family.
3. In mediation, participants identify the real issue in a dispute in a more efficient way than court proceedings. It is less damaging to on-going personal and business relationships and the process is usually, but not always, faster and less expensive than traditional litigation.
4. Parties in mediation are directly in the negotiation of the settlement, as a neutral third party can view the dispute objectively and can assist the parties in exploring alternatives,

which they might not have considered on their own. As mediation can be scheduled at an early stage in dispute, settlement can be reached much more quickly than in litigation. Parties in mediation generally save money through reduced legal costs and less staff time and thereon, enhance the likelihood of continuing their business relationship.

5. Parties who mediate their differences are able to attend to the details of implementation. Negotiated or mediated agreements can include specially tailored procedures for how the decisions will be carried out. Thus the fact often enhances the likelihood that parties will actually comply with the terms of the settlement.

6. Mediation settlement tends to hold up overtime, and if a later dispute results, the parties are more likely to utilize a cooperative form of problem-solving to resolve their differences than to pursue an adversarial approach.

7. Interest-based mediated negotiations can result in settlement that is more satisfactory to all parties than simple compromise decisions.[212]

[212] Erichsuter, The Progress from Void to Valid Agreements to Mediate, *Arbitration* Vol. 75 No. 1, 2001 p. 11 Print.

CHAPTER EIGHT

8.1 MINI–TRIAL

This is yet another alternative dispute resolution mechanism. It is a process whereby counsel for each disputant makes a presentation on the legal, factual as well as evidential stance to effect settlement of disputes, and a third party neutral that serves as an adviser. Through this presentation, all disputants in a case are afforded opportunity to assess the strength and weakness of their positions and thereby decide whether or not to settle out of court or resort to adversarial procedure. If at the end of their presentation the parties are unable to agree on settlement, the third party neutral adviser shall evaluate the case for both sides by examining the facts as presented, the evidence tendered and the position of the law on the issues. Thereafter, the adviser gives an opinion that is strictly speaking not binding on the disputants. This opinion which is usually a reflection of the probable outcome should the disputants go to a full trial often engender the disputants to go into further confidential settlement-negotiating in an attempt to reach a mutual acceptable agreement.[213]

The mini-trial is a flexible, non-binding ADR process used primarily out of court. A few judges have developed their own versions of the mini-trial, which is generally reserved for large cases. In a typical court based mini-trial, each side prevents a shortened version of its case to party representatives who have settlement authority, for example, the senior executives of corporate parties. The hearing is informal, with no witnesses and with relaxed rules of evidence and procedure. A judge or a non-judicial neutral may preside over the hearing. Following the hearing, the client representatives meet; with or without neutral preside to negotiate a settlement. The mini-trial method is particularly efficient and cost effective means of settling contract

[213] Dele P., *Alternative Dispute Resolution in Nigeria Principles and Practice*, Dee-Sage Nigeria Ltd, Lagos, 2004 P. 30 Print.

disputes and can be used in other cases where some or all of the following characteristics are present:[214]

a. It is important to get facts and positions before high-level decision makers.

b. The parties are working for a substantial level of control over the resolution of the disputes.

c. Some or all the issues are of a technical nature, and

d. A trial on the merits of the case would be very long and/or complex.

8.2 EARLY NEUTRAL EVALUATION

Early neutral evaluation is generally used to assess the likely outcome of a legal action. This evaluation provides a quick method of obtaining a neutral advisory opinion, which may assist the parties in their negotiation. The evaluation words, early neutral evaluation (ENE) are a non-binding process designed to improve case planning and settlement prospects by giving litigants an early advisory evaluation of the case. Like mediation, ENE is thought to be widely applicable to many types of civil cases, including complex disputes. In ENE, a neutral evaluator, usually a private attorney with expertise in the subject matter of the dispute holds a confidential session with the parties and counsel early in the litigation generally before much discovery has taken place to hear both sides of the case. The evaluator then helps the parties clarify issues and evidence, identifies strengths and weaknesses of the parties' positions, and gives the parties a non-binding assessment of the value or merits of the case. Depending on the roles of the programme, the evaluator also may mediate settlement discussions or offer case management assistance such as developing a discovery plan.[215]

[214] John, T., *Conceptual and Practical Analysis of Alternative Dispute Resolution, Emerging Issues in Nigerian Law*, Alubo A.O. et al (eds), Constellation Nigeria Publishers, Abuja, 2009, p. 54 Print.
[215] *Ibid*

The process was originally designed to improve attorney's pre-trial practices and knowledge of their cases by forcing them and their clients to conduct core investigative and analytical work early, to communicate directly across party lines, to expose each side to the other's case, and to consider the wisdom of early settlement. In some direct courts with ENE programmes, the ENE sessions occur later, rather than earlier, in the case. Although the term "early neutral evaluation" is less apt in such circumstances, the key feature of the process evaluation of the case by a neutral remains the same.[216]

8.3 MEDIATION-ARBITRATION (Med.Arb)

Mediation-arbitration as the name suggests combines mediation and arbitration. In this arrangement, the parties agree in advance that if they are unable to resolve their dispute using mediation, they will arbitrate and receive an advisory or binding judgment on all or part of the issues, which remain in dispute. In those instances, the mediator will typically switch roles and as arbitrator, provide the judgment.[217] The mediation-arbitration process has some advantages over mediation or arbitration alone. There is greater incentive for parties to cooperate at the mediation stage of the process because they know that if they are unable to come to an agreement voluntarily, they may have a solution imposed upon them at the arbitration stage. Similarly, mediating a dispute before arbitration affords the parties the opportunity to craft their own resolution on all or some of the issues, rather than have an independent third person decide the case for them.[218]

8.4 SUMMARY JURY TRIAL

The summary jury trial is non-binding ADR process designed to promote settlement in trial ready cases. A judge presides over the trial, where attorneys for each party present the case,

[216] *Ibid*
[217] *Ibid*
[218] *Ibid*

generally without calling witnesses but relying instead on submission of exhibits. After receiving the jury's advisory verdict, the parties may use it as a basis for subsequent negotiations or proceed to trial. A summary jury trial is typically used after discovery is complete. Depending on the structure of the process, it can involve both facilitated negotiations which can occur throughout the planning, hearing, deliberation and post-verdict phases and outcome prediction, that is, an advisory verdict. Part or all of the cases may be submitted to the jury.[219] The jurors are chosen from the court's regular venue; some judges tell the jurors at the outset that their role is advisory, but others wait until a verdict has been given. Some judges use this process only for protracted cases where the predicted length of a full trial justifies the substantial resources required by summary jury trial. Other judges use it for routine civil litigation where litigants differ significantly about the likely jury outcome. The format of this ADR process is determined by the individual judge more than in most ADR procedures. A variant of the summary jury trial is summary bench trial, where a judge, rather than a jury, issues the advisory opinion.[220]

8.5 SETTLEMENT WEEK

In a typical settlement week, a court suspends a normal trial activity and aided by volunteer mediators, sends numerous trial ready cases to mediation sessions held at the courthouse. The mediation session may last several hours, with additional sessions held as needed. Cases unresolved during settlement weeks return to the court's regular docket for further pre-trial or proceedings as needed. If settlement weeks are held frequently and are a court's only form of ADR, parties who want to use ADR may have to look outside the court or may incur additional litigation expenses while cases await referral to settlement weeks. This can be

[219] James Was and Louis Barkes: Managing Interpersonal Conflict, HBR, 1978 P. 96 Print.
[220] *Ibid.*

overcome by regular offering at one other form of ADR. This kind of settlement week had been conducted in Lagos, Nigeria, Ghana, Kenya, Ethiopia, etc.[221]

8.6 CASE EVALUATION (MICHIGAN MEDIATION)

Case evaluation provides litigants in trial ready cases with a written, non-binding assessment to the case value. A panel of three attorneys makes the assessment after a short hearing. If all the parties accept the panel's assessment, the case proceeds to trial. This arbitration-like process has been referred to as "Michigan Mediation"[222] because it was created by the Michigan State Courts and subsequently used by the Federal Court in Michigan as well.

8.7 OMBUDSMAN

The ombudsman is officially appointed by the government to investigate and report on complaints made by citizens against public authorities. The parties are obliged to attempt resolution seriously before passing on the dispute to the ombudsman; decisions are usually based upon written evidence, although there is also an increasing trend toward meeting with the parties, both jointly and individually.

In Nigeria, the public complaint commission set up by Public Complaint Commission Act is the body charged with the responsibility of settling dispute between public bodies and individual citizens but in practice they also investigate and recommend for settlement complaints against private organizations.[223]

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[221] Uwazue, E., Case for Conflict Mediation: The Settlement Week. *The Guardian*, 17th November 2009, p. 84 Print.

[222] *Ibid*

[223] Section 5 of the Public Complaint Commission Act gives power to the Commission to investigate administrative action of Federal, State and Local Governments, Statutory Corporations, registered Companies etc where there is any complaint by the affected party. Section 7 Public Complaint Commission Act empowers the commission to make recommendation, cancel or modify the administrative action.

8.8 COLLABORATION DIVORCE

This type of ADR is also known as collaborative practice or family law. It is a legal process enabling couples who have decided to separate or end their marriage to work with their lawyers and other family professionals in order to avoid the courts and to achieve a settlement that best meets the specific needs of the parties and their children without the underlying threat of contested litigation.

Under this process, a voluntary process is initiated when the couple signs a contract called "The Participation Agreement" binding each other to the process and disqualifying their respective lawyers' right to represent either of the parties in any future family related litigation. This approach was created in 1990 in Minnesota by a family lawyer Stuart Webb. It is now practiced in Europe, America, Canada and Australia. Over 22,000 lawyers are now trained in this area in at least 46 states of the United States of America. Collaborative law is used to resolve divorce, cohabitation and other family disputes. It was launched in England in 2003 and over 1,200 lawyers have been trained. In the U.S. model Uniform Collaborative Act was enacted in 2009.[224]

8.9 PARTY DIRECTED MEDIATION

It is a mediation approach that seeks to empower each party, in a dispute, enabling each party to have more influence upon the resolution of a conflict by offering both means and process for enhancing the negotiation skills of the contenders. The intended prospect of party directed mediation is to improve upon the ability and willingness of disputants to deal with subsequent differences.[225]

[224] http/www.nccust.org accessed on 6/8/11 Web.
[225] *Ibid*

8.10 ONLINE DISPUTE RESOLUTION

Strictly speaking, this is a methodology of dispute resolution process which uses technology to facilitate the resolution of disputes between parties. It primarily involves negotiation, mediation or arbitration or a combination of these three. It can be used to resolve consumer dispute, marital separation and interstate disputes. This will facilitate e-commerce across borders. Online Dispute Resolution is a synergy between ADR and ICT. It is often called "Internet Dispute Resolution" or "Electronic Dispute Resolution". It is a consensual method using automated negotiation.[226]

[226] *Ibid*

CHAPTER NINE

9.1 DISPUTE SYSTEMS DESIGN

Dispute systems design involves the creation of a set of dispute resolution process to help an organization, institution, nation state or other set of individuals better manage a particular conflict and or series of conflicts.[227]

DSD involves the design of systems or mechanisms which are used routinely to handle similar, repeated disputes. It is especially useful for organizations that have similar kinds of problems occurring over and over again such as disputes between co-workers, over work assignment or between workers and management over compensation, working conditions or work performance.[228] The concept was first developed by William Ury, Jeane Brett and Stephen Goldberg in their book getting Dispute Resolved.[229] This book divide conflict resolution processes into three types; namely those which negotiate interests, those which adjudicate right and those which rest relative power.

Most conflicts, they say, should be negotiated on the basis of interest. In other words, the parties should negotiate directly with each other or with the help of a third party mediator to try to give each side what they want or need, at least to the extent possible.[230] Some conflicts, however, involve a question of rights, not interest which cannot be negotiated. Rather, right needs to be clarified in an adjudicatory (court like) process.[231]

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[227] William U., Jeanne, M.B. and Stephen B.G., *Getting Dispute Resolution Design Systems to cut the Costs of Conflict*, Pon Books, 1993 P. 40 Print.
[228] Oluseye A. Dispute Systems Design and Legal Practice in Nigeria, *National Mirror*, 30 January 2012 p. 46 Print.
[229] Designing Conflict Management System Jossy-Bass Ury, Brett Pon Books 1993 P. 65.
[230] *Ibid.*
[231] Cathy, C. and Christiana, S., *Merchant Designing Conflict Management System*, Jossy-Bass, 1996 Print.

A few conflict cannot be resolved either through interest based bargaining or through adjudication because they fundamentally involve relative power, since power struggles tend to be very long lasting and destructive, Ury, Brett and Goldberg urge that they be avoided whenever possible and cut short when they are necessary.[232] This can be done by developing ways to go back to negotiation as soon as the likely outcome of the power struggle is clear rather than continue to the ultimate end. This makes power struggle less damaging, and costly than they might otherwise i.e. and allow the disputants to 'loop back' to more constructive dispute resolution mechanisms as soon as possible.

DSD usually involves creating a hierarchy of dispute resolution mechanisms. It starts with relatively informal processes to adjudicate rights-based question.[233] Some systems will end with a mechanism for testing relative power while others will not, assuming that all disputes can be handled with interest or right based approaches. While Nigerians will continue to need attorneys who are effective in court, lawyers are increasingly called upon to play a much wider range of roles. These roles include helping the client build dispute system into their organizational processes which necessitates a more integrated approach to legal practice.

Thus Dispute System Design (DSD) evolved as an aggregation of comprehensive knowledge, practice area, skill sets and dispute resolution mechanisms.

At this juncture, it is important to note that there isn't one framework for the application of DSD. Ury, Brett, and Goldberg pioneered one of the first Dispute Systems Design (DSD) frameworks in the 1980s,' as a method for resolving intractable or frequent conflicts in troubled organizations, businesses, or entire industries. Their pioneering work was done at the Caney Creek Coal Mine, a mine that hand been plagued by strikes in the 1970s. By 1993, Ury, Brett and

[232] Ury, Brett *et al op. cit* Conflict principles of the Problem Solving Organization 8 Harvard Negotiation Law Review Pp. 133-157 2003 Print.
[233] Michael L.M. and Robert C.B. (eds) *The Handbook of Dispute Resolution,* RON Books, 2005 P. 50 Print.

Goldberg articulated the notion of dispute systems design. Their work focused primarily on systems that included interest based procedures for resolving industry related disputes such systems have since been created and applied in an ever-widening variety of venues.[234]

In Nigeria, the phenomenon of dispute systems design is nascent but also evolving at a fast rate due to the following trends and factors:

1. The mainstreaming of mediation as a popular dispute resolution mechanism in the Nigerian Commercial Landscape (i.e. Court connected mediation via the Lagos Multi-Door Courthouse project).
2. The ever increasing burden of litigation on the justice system (time, cost and enforceability) coupled with the challenges faced by commercial consumers of justice with regard to enforceability of contracts.
3. The negative perception of the judicial system by the international business community coupled with the one sided arrangements that usually define the hitherto only viable alternative of arbitration in foreign jurisdictions leaving Nigerian companies at a disadvantage; and
4. The after effects of the 2006 Banking reforms which created a large backlog of litigation (averaging between 250 to 500 on going cases pending in courts of law across the country per bank) which left the banking sector desperate seeking; a cost effective, time saving dispute resolution solution.

The last factor created a need by the banking sector for a better way to handle disputes as newly merged banking corporations found themselves presiding over a dazzling array of disputes that exposed them to various forms of risks i.e. reputational credit, legal and operational risk and also revealed a disproportionately large contingent liability profile.

[234] Ury Brett *et al op. cit*.

Meanwhile, other commercial sectors continued with a similar combination of challenges and the general consensus is that the Nigerian Legal Practitioner is not capable of providing solutions to the challenges of the accumulated litigation portfolios that represent clear and present contingent liabilities to large local and multi-national enterprises.

Now to put this into proper context, the main adaptors of DSD in Nigeria are large local and multinational enterprises in the Financial, Telecommunications and Oil and Gas in the main.

The usual practice of providing, dispute resolution services to the large local and multi-national is basically demand driven. The client wants representation and the law firm provides same, the client also defines the content of that representation and align it with their expectations thus clients expectations of local and international high net worth clients is guaranteed.

A cursory analysis of the nature of demand for dispute resolution services points to an increasing emphasis on an integrated solution. In the past, clients simply requested that Law Firms institute action on disputes and then provided the law firm with details for filing at the court registry. Today, that instruction has broadened as Legal Departments in large companies come under increasing pressure from management to look for ways to reduce, eliminate and better manage the risk that a growing contingent liability profile portends.

The Dispute Systems Design option in adopting the DSD option, law firms will be better able to respond to the instructions letter previewed above by giving the client the comfort of knowing that the firm is attuned to its expectations.

Apart from effectively managing individual disputes, a fast growing area of client demand is emerging wherein the dispute portfolio of corporate clients as a whole needs to be managed with the aim of reducing volume of disputes in a way and manner that ensures that the

company is able to effectively reduce its exposure to prevailing risk. Let us look at what looks like DSD in some institution in Nigeria – CPC, NCC, Cooperative and IMC.

9.1.1 ADR and Consumer Protection in Nigeria

The enforcement of consumer right is a serious problem in Nigeria. Consumers are often reluctant to enforce their rights for a variety of reasons, including, ignorance of their rights, poverty, and the judiciary's rigid adherence to strict legal rules that make it very difficult for consumer to win cases in court.

When a consumer alleges that the defects in a particular product are the results of negligence for example, the consumer must prove the facts or commission in the production process that constitute negligence. This issue is complicated by the defence of fool proof system. The practice adopted by the manufacturers is to demonstrate an impeccable system of production with a view to convincing the court that such a system is incapable of admitting any defect as alleged by the consumer. Decided cases show judicial inclination to accepting such fool proof system as a defence.[235]

Given this scenario, the establishment of State Consumer Protection Committees is seen by consumer's activists as a development that has the potential to engender interest in the enforcement of consumer rights.

The Consumer Protection Council Act provides for the establishment of a Council at the federal level and a state committee in each state of the federation.[236] The Consumer Protection Council is a federal consumer enforcement agency with the mandate to provide redress to consumer complaints through negotiation, mediation and conciliation.[237]

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[235] *Boardman v. Guinness Nig. Ltd* (1980) NCLR P. 109 at P. 126. *Okonkwo v. Guinness Nig. Ltd* (1980) NCLR P. 130. *Ebeamu v. Guinness Nig. Ltd* FCA/101/82.

[236] Section 4 of the Consumer Protection Council Act Cap. C 3 Laws of the Federation, 2004.

[237] Section 8 of Consumer Protection Council Act

Among others, though the Council has power to apply to court to prevent the circulation of any product which constitutes an imminent danger or public hazard,[238] it also supervises the activities of state committees. Although the Act came into force in 1992, the provision relating to state committees was not implemented until 2000/2001, when the first state committees were inaugurated. After a long break, the implementing authority (the CPC) resumed the exercise in 2005 and has so far established seven, additional committees in different states.[239] But this is far from meeting the ever increasing needs of consumers in the 36 states and the FCT.

The State Committees are empowered to receive inquiries into the causes and circumstances of injuries, loss or damage suffered or caused by a company, trade association or, individual and where appropriate, recommend to the Council the payment of compensation by the offending person to the injured consumers.[240]

The committees adopt the system of negotiation, mediation and conciliation.[241] Each State Committee is composed of representatives of designated ministries and agencies. The Committee is a non-judicial alternative compensation scheme. The advantage of this procedure is that the consumer does not have to go through the rigours of litigation to obtain redress. He can simply lodge his complaints with a State Committee. But this does not preclude a consumer from taking redress in court for any substandard or defective product.

It is also worthy of note that the services of the Council and State Committees are rendered to the consumers free of charge as the Act does not prescribe any fee to be paid to register complaints either orally or in writing. No mediation, arbitration or conciliation fee is also charged.

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[238] Section 4
[239] www.CPC.gov.ng Accessed on /18/1/2012 Web.
[240] Sections 5 & 6
[241] Section 8

9.1.2 Nigerian Communication Commission (NCC) and ADR

The NCC knowing that dispute can be enormously disrupt the communication sector and that effective dispute resolution in the sector is increasingly central to successful deployment of modern information infrastructure initiated a landmark move that offered a user friendly dispute resolution mechanism for the telecommunication industry. The guidelines were made applicable to small claims of not more than one million ₦1,000,000.00.

Acting under its inherent powers under the enabling Act,[242] NCC in September 2004 came up with the NCC Dispute Resolution Guidelines which among other things provides for payment of registration fee for any complaint or dispute filed before the mediators and arbitrators.[243] It also includes codes of ethical conduct for mediators and arbitrators. The Act provides that the Commission has the duty to protect and promote the interest of consumers against unfair practices including but not limited to matters relating to tariffs and charges for and the availability and quality of communication services equipment and facilities.[244] The Commission, also has the function of examining and resolving complaints and objections filed by consumers and dispute between licensed operators, subscribers or any other person involved in the communications industry using such dispute resolution methods as the commission may determine from time to time including mediation and arbitration.[245]

The Act empowers the Commission to resolve dispute between persons who are subject to this Act regarding any matter under this Act or its subsidiary legislation.[246]

A pertinent question has been raised by scholars on the issue of funding of the ADR mechanism by NCC instead of disputants or consumers who are already indigent paying

[242] Section (8)(2) Nigerian Communication Commission Act 2003.
[243] Schedules of fees to the guidelines and Section 1(8). Nigerian Communication Commission Act
[244] Section 4 (1)(b). Nigerian Communication Commission Act
[245] Section 4 (1)(p). Nigerian Communication Commission Act
[246] Section 73-79. Nigerian Communication Commission Act

registration fees.[247] This argument was premised on the fact that under Article 8(4) of the European Commission Framework Directive, regulators must act to promote the interests of the citizens of the European union by ensuring a high level of protection for consumers in their dealing with suppliers, in particular by ensuring the availability, of simple and inexpensive dispute resolution procedures carried out by a body that is independent of the parties involved.

This section guarantees provision of ADR mechanism to consumers at no cost while it is also contended that in Romania when any dispute is referred to the regulator, the parties are offered the chance to resolve the dispute through a mediation scheme which is sponsored but not administered by the regulatory authority.

India has a similar system where the telecom dispute settlement and appellate tribunal (TDSAT) was established in 2000 by an amendment to the Telecom Regulatory Act of India 1997.[248] This step separates the dispute resolution process from regulatory process in India. This is recommended for Nigeria so as to ensure fairness, neutrality and cost friendly resolution of disputes.

9.1.3 Settlement of Investment Disputes in Nigeria

Investment disputes differ remarkably from other commercial cooperative disputes, in that it involves an enterprise and not merely its products. The very existence of the enterprise must be threatened by the issue leading to the dispute, usually resulting from an action of Government/Regulatory Agency.[249] For example, the revocation of operating licence of telecom operator by Nigeria Communication Commission constitution investment dispute over cancellation of distributorship contract between the telecom operator and its franchise dealer

[247] Obegolu Emeka, NCC should set up Responsive Dispute Resolution System. The Nation, 17 January 2012 p.35 Print.
[248] *Ibid.*
[249] Ogbuanya N.C.S., *Essentials of Corporate Law Practice in Nigeria*, Lagos: Novena Publications Ltd, 2010 p. 657 Print.

amounts to commercial dispute and the dispute over accrued dividend of the preferential shareholder of the telecom company is a corporate dispute.

Investment disputes also involve disputes arising from diverse selection of economic activities, ranging from the infrastructural concession, production, exploration of mineral resources and distribution. It usually relates to an investment project substantial and relatively of long or medium term with assumption of risk on both the host government and investor.

9.1.4 Investment Dispute Resolution Procedure under the Nigerian Investment Promotion Commission (NIPC) Act

The Nigerian Investment Promotion Commission Act provides the legal framework for resolution of investment disputes between an investor (local/foreign) and any level of government in Nigeria. Although litigation is not foreclosed, the effective dispute resolution provided for under the NIPC Act forward alternative dispute resolution (ADR) and arbitration.

By Section 26(1) NIPC Act, where a dispute arises between an investor and Government of the Federation in respect of the enterprise, all effort shall be made through mutual discussion to reach an amicable settlement. Otherwise, the appropriate mode of resolution of the investment dispute depend on whether it is local or foreign investor and the existing mode of dispute resolution that may be reserved in any bilateral or multilateral agreement between Nigeria and the Government of any of the disputing foreign investor.

a. Nature of Dispute Covered by Dispute Resolution Procedure under the NIPC Act[250]

- The dispute must involve any level of Government in Nigeria – Local, State or Federation.
- The dispute must involve the business enterprise; the investment. Thus, it must be investment dispute.

[250] See Section 26(1) NIPC Act.

- The dispute may involve local or foreign investor.

b. How to Resolve Investment Dispute under the NIPC Act.[251]

- The first step is to exhaust alternative dispute resolution (ADR) option to amicable settlement, which can be by the parties doing direct negotiation or indirectly, through their appointed negotiators or through mediation.
- If the amicable settlement falls within the reasonable time, the aggrieved has an option to resort to Arbitration.
- If the aggrieved party opts for Arbitration, if it is a local investor, the rules or arbitral procedure under the Arbitration and Conciliation Act Cap.A18 LFN 2004 shall apply.
- If the dispute involves a foreign investor, if there is any bilateral or multilateral agreement on investment protection to which the Federal Government and the country of which the investor is a national and parties, then the Dispute would be resolved within the framework of such Agreement.
- If there is no Bilateral or Multilateral agreement on investment protection covering such foreign investor, the dispute would be resolved in accordance with any other national or international machinery for the settlement of investment dispute agreed on by the parties. Example of such dispute resolution mechanisms are contained in the UNCITRAL Conciliation Rules 1980 and rules of Lagos Regional Centre for International Commercial Arbitration, established under the Auspices of the Asian-African legal Consultative Committee in cooperation with Nigerian Government,[252] as well as other Institutions/Organizations involved in Alternative Dispute Resolution, such as the Chartered Institute of Arbitrators (London), Nigeria Branch,

[251] See Section 26(2) NIPC Act.
[252] See Regional Centre for International Arbitration Act Cap. R5 L.F.N 2004.

Negotiation and Conflict Management Group (NCMG) and Centre for Dispute Management and Resolution administered by Nocs Consults and ADR Practice Group International.[253]

- In the event that the parties disagree on the particular mode of settlement of the investment dispute and the foreign investor and the Federal Government failed to agree on the method of dispute settlement to be adopted, the parties must use the International Centre for Settlement of Investment Dispute Rules.[254] (ICSID) Rules.

These steps are clearer explanation of the provisions so as to cover investment disputes that may involve other level of governments and foreign investors. The Federal Government can intervene to advise on the mode and where the foreign investor disagrees with the federal government, then ICSID Rule applies. In the case where the federal government is a party with the foreign investor, they can directly discuss and where they disagree, ICSID Rule shall apply. This would obviate the apparent difficult a narrow interpretation of the provision would occasion.

The Nigeria Shippers Council's resort to alternative dispute resolution instead of litigation has reduced the cost of doing business in Nigerian ports. The move has led to the saving of not less than ₦200 million by the Council. It is reported that between April and December 2011, the Council received a total of 66 complaints, resolved 54 to save over ₦800 million, $93, 000 and other currencies.[255]

[253] See http://www.nocsconsults.com; www.adrpracticegroup.org. Web.
[254] See Section 26(3) NIPC Act.
[255] NSC Dispute Resolution Reduces Cost at Ports. *ThisDay*, 13th July 2012 p.26 Print.

9.1.5 Dispute Resolution Mechanism under Cooperative Societies Law in Nigeria

The cooperative society's law of various states in Nigeria makes provision for settlement of disputes outside the court or judicial system. In this discussion, one shall use the Kwara State Cooperative Law as a model.

The law makes elaborate provisions on the procedure to settle disputes relating to cooperative societies matter. By that law, if any dispute touching the business of a registered society arises.[256]

(1) a. Among members, past members and persons claiming through members, past members and deceased members; or

b. Between a member, past member or person claiming through a member, past member or deceased member and the society, its committee or any officer, agent or servant of the society; or

c. Between the society or this committee and any officer, agent or servant of the society; or

d. Between the society and any other registered society, such dispute shall be referred to the registrar for decision.

(2) A claim by a registered society for any debt or demand due to it from a member, past member or the nominee, heir, legal personal representative or estate of the deceased member, whether such debt or demand be admitted or not, shall not be deemed to be a dispute touching the businesses of the society within the meaning of subsection (1).

(3) The registrar shall on receipt of such reference:

[256] Section 57 of Cooperative Societies Laws Cap.41 Laws of Kwara State 2007. See also Section 44 Cooperative Societies Law Cap.C15 Laws of Lagos State 2003, Section 53 Cooperative Societies, Laws of Enugu State Cap.28 Laws of Enugu State 2004 and Section 56 of Cooperative Societies Law of Adamawa State Cap.36 Laws of Adamawa State 1997.

a. Decide the dispute; or

b. Subject to the provisions of any regulations, refer it for disposal to an arbitrator.

(4) Subject to the provision of any regulations, the registrar may withdraw any reference transferred under paragraph (a) of that subsection.

(5) The registrar may of his own motion or on the application of a party to a reference reverse any decision there on by an arbitrator to whom it was referred

(6) Any decision given by the registrar under:

a. Paragraph (a) of subsection (3) or under subsection (5) shall save as otherwise provides in subsection 7 be final.

b. Any decision given by the arbitrator under paragraph (b) of subsection (3) shall, save as otherwise provided in subsection (5) be final.

c. The decision shall on application of the party in whose favour it is given be enforced by any court which would have jurisdiction in civil suit, between the parties to the dispute to give a judgment for the payment of the amount awarded or where the decision does not relate to the payment of money, he gives a similar decision in the same manner as if the decision had been a judgment for decision of such court.

(7) Any party aggrieved by any order of the registrar made under provision of subsection (5) or (6) may appeal to the Commissioner within thirty days from the date of such order and decision of the Commissioner shall be final and conclusive.

The law empowers the Registrar or Commissioner to refer a case to the High Court on question of law by way of case stated, on application to Chief Judge, Chief Judge may refer the case to any High Court judge.[257]

From the above provisions of law, the cooperative society's laws in Nigeria prefer dispute resolution mechanism by the Registrar of Cooperative or Director of Cooperative or the Commissioner for Cooperative matters in form of mediation or arbitration than court process. This accounts for little or no reported cases on cooperative society's dispute in Nigeria.

9.1.6 Interfaith Mediation Centre, Kaduna

This centre is also known as Interfaith Mediation Centre of Muslim Christian Dialogue Forum – IMC/MCDF. The Centre was started by former enemies, Imam Mohammed Ashafa, a Muslim cleric and Pastor James Wuye a Christian minister. It is a non-governmental, non-partisan, non-profit making faith based organization. Its mandate is to promote and facilitate the use of faith based approach in conflict prevention. It also has the mandate to mediate and encourage dialogue among youths, women, religious leaders and the government to inculcate and promote the culture of self respect and acceptance of diversity of each others cultural, historical and religious inheritances.

IMC also cooperated with organizations with similar objective at local and international levels.

The organization began in 1995 in Kaduna and it is registered with the Corporate Affairs Commission, Abuja, Nigeria. For over a decade IMC has provided high quality services that have assisted public agencies and communities in conflict intervention, mediations and mitigation including training of youths, women and religious leaders in conflict management and

[257] Section 58 of Cooperative Societies Law of Kwara State – also Section 57 Cooperative Societies Law of Adamawa State 1997 which has similar provision on case stated on question of law which by extension is that of laws and Enugu. Similar to that of Enugu Cooperative Societies Law

trauma counseling. In the recent past, IMC has used its unique interactive capacity with government to serve as in-house technical adviser and has facilitated the signing of the famous Kaduna Peace Declaration of religious leaders and the Shendam Peace Accord in Plateau state.

It has also recommended faith based initiative for conflict prevention and peace building at the United Nations headquarters in New York. The core values that drive the organization are accountability, mutual respect across religious beliefs, responsibility, empowerment and team work. The aspiration of the organization is the re-affirmation of the Biblical and Quranic affirmations of the common bond of the human family. It also designs flexible process to bring about solutions that are creative, fair, efficient and durable.[258] But the organization has been hampered by fund, therefore its effect has not been felt in Nigeria.

Other institutional and specialist ADR mechanism in Nigeria include Construction Industry Arbitrators of Nigeria, Maritime Arbitrators of Nigeria, Centre for Peace in Africa, etc.

Presently, there is a call for the Banking, Insurance and the Taxation practitioners to also embrace the use of ADR for timely and effective facilitation of their transactional disputes resolution. The same call goes to the Association of Chambers of Commerce and Industry in Nigeria.

9.2 APPLICABILITY OF ADR IN CRIMINAL MATTERS IN NIGERIA

9.2.1 African Customary Criminal Law and ADR

This aspect is divided into two. We shall first look at African customary criminal law and later consider ADR and criminal law in contemporary Nigeria. Reconciliation is the overriding aim of the African judicial process, including criminal justice administration.[259] The purpose is the maintenance of group solidarity, cohesion and social equilibrium. The process of

[258] www.IMCnigeria.org. Accessed on 20/1/12 Web.
[259] Karibi W.A.G., *Ground Work of Nigerian Law*, Nigeria Law Publications Lagos, 1986 P. 16 Print.

reconciliation and, consequently, reconstruction of relationships between the criminal and the victim, does not stop at the point of adjudication. No offence is too grievous to foreclose reconciliation, not even murder. The traditional judicial organs, being an outgrowth of the people, were accepted and respected and so were the decisions of the Oba and his Chiefs, the quarter heads and family heads (in ascending order of appeal) whenever they adjudicated "disputes" within the chiefly societies. Conversely, the age-grade associations were the primary judicial organs in the horizontal or republican African societies. Since there were no formalized courts entrusted with judicial matters, adjudication (essentially dispute resolution) was merely another level of social interaction and existence.[260]

According to Dr. Taslim Elias, the purpose of the traditional criminal justice system is the restoration of social equilibrium negatively affected by the crime. Such reconciliation invariably involved the victim of crime.[261]

Restitution, compensation, restoration and apology, as common verdicts of customary adjudicatory organs, ensured the healing process. Fines were usually imposed to offset the cost of the gathering and to compensate the victim for any financial or economic losses.

Thus, like Africa's reconciliation philosophy, the modern restorative justice movement upholds the idea that punishment alone cannot mend the torn fabric of society and that there is therefore a need for informal mechanisms to be introduced in criminal matters whereby the parties with a stake in a particular offence come together to resolve collectively how to deal with aftermath of the offence and its implications for the future.[262]

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[260] Onisubiks A.O. *African Thought Religion and Culture* Snapp Press 1991 P. 44; Okafor F.U. Igbo Philosophy of Law, Fourth Dimension Publishers, Enugu, 1992 P. 45 Print.

[261] T.O. Elias Traditional form of Public Participation In Social Defence international reserve of Criminal Police No.27 (1969) pp.18-24 Print.

[262] Price M., Penalizing Crime, Mediating Produces Restorative Justice for Victims and Offenders, available at http://www.worp.com. Web accessed on 12-3-2013 Omale D.J.O., Restorative Justice and Alternative Dispute

But the reconciliation and restorative justice concepts understand the necessity for a process of renewal of damaged personal and communal relationships because both share a common focus on the victim of a crime and the need to assuage his hurt, physical, psychological and economic. Both recognize that the process of heading cannot be complete without equal participation in the criminal justice system by the victim and the offender. It is based on an impeccable logic since a crime is not only against the individual victims but also an infraction of social ethics and an offence against the state, the sanction to quicken the process of communal healing.

Under a restorative justice programme and traditional reconciliation process, the offender and victim are brought face to face in mediated circumstances that lead to the offender showing remorse to gain the forgiveness of the victim.

The traditional philosophy of reconciliation through the methodology of compensation, restitution and restoration has been sorely compromised by extant criminal law, as we noted earlier.[263] Howe can this negative trend be reversed? We proceed to consider the need for normative and institutional restructuring in the next segment.

9.2.2 ADR in Administration of Criminal Justice in Nigeria: Any Possibility?

A form of ADR in criminal justice administration in the modern Nigeria is compounding of offences under the penal and criminal codes and recently, the introduction of plea bargain, which had been seriously criticized as unconstitutional and illegal for not being backed by any written law.[264] Plea bargain was introduced by EFCC in the high profiles cases handled by the Commission. The EFCC claimed to have power to go into plea bargain under Section 14(2) of

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Resolution: An Analytical Discourse on the Concepts for African Professionals, International Journal of Advanced Legal Studies and Governance Vol. 2 No.1 p.102 Print.

[263] *Aoko v. Fagbemi and Anor* (1961) 1 All NLR 400 and *Tefi v. Uba* (1987) NWLR (Part 110) 707.

[264] Ibidapo-Obe A. & Abayomi W. Concept Publiation Lagos 2004 P. 71.

the EFCC Act 2004 which allows for compounding of offences. While others believe that Section 180(1) of the Criminal Procedure Act permits plea bargain.

The pertinent question is, is compounding of an offence the same as plea bargain? It is submitted that they are not the same because plea bargain is an elaborate criminal concept and procedure that is wider in scope and philosophy than compounding of offences and therefore it needs legislative backing to be applicable in Nigeria. It must be noted however, that both compounding of offences, and plea Bargain operate like settlement or alternative dispute resolution which seeks to be fair to all disputants and sustain business or foster relationship.

Plea Bargain is a process whereby an accused person and the prosecutor enter into negotiation towards an agreement under which the accused will enter a plea of guilty in exchange for a reduced charge or a favourable sentence recommended to the judge by the prosecutor.[265] The plea Bargain process is quite similar to the pretrial settlement of civil cases. Its major advantages relate to the opportunities which if offers to decongest the criminal courts and hence expedite justice. There are simply not enough judges, prosecutors or defence counsel to operate a system in which most accused persons go through a full blown trial without unnecessary delays.

However, it must be stated here that only Lagos State has through criminal legislation effectively introduced plea bargain into its administration of criminal justice in the state.[266] Plea bargain could be described as negotiation of criminal charge, negotiation as we recall, is an important alternative dispute resolution (ADR) tool that brings disputants face to face in order to negotiate a settlement. Where plea bargain occurs in pretrial sessions as is often the case, this is consistent with ADR which usually occurs outside the mainstream judicial system. Again, when

[265] *Ibid.*
[266] Criminal Justice Administration Law of Lagos State 2008.

plea bargain agreement is presented to court for ratification, this could be said to be in the nature of a submission to mediation, whereby, a third party is brought in to moderate the dispute. Even though the judge is the mediator in a plea bargain we should note that at this stage, he is not wearing his full garb as a judge but that of a mediator or adviser as he merely makes suggestions and inputs to encourage the prosecutor and the offender to find a resolution, it is only when he is called upon to now pass a sentence that his decision becomes binding, in the same manner as that of an arbitrator in arbitration dispute or when a mediated dispute is filed in a court as consent judgment.

9.2.3 ADR and Traditional Institutions in Civil Disputes

In the pre-colonial era, the traditional legal system was hinged on alternative dispute resolution. Then resolving dispute conflicts and disputes was identified in hierarchical options: first the disputants try to resolve their matters by themselves, this is the same as negotiation, when this option fails, they seek assistance of their senior kinsmen this is known as mediation, if this option fails too, dispute was taken to the Headman of the neighbourhood or clan in which the disputants live, this is known as neutral evaluation/mediation. In the eventuality of the matter not being resolved, it was then referred to a high chief of king or paramount ruler for a binding decision. This is known as arbitration.[267]

Ibidapo-Obe and Williams[268] opined that despite rapid urbanization, eighty five percent of the African population still resides in the rural community. When conflicts occur, as they are bound to do in any human society, their instinctive recourse is to the traditional system. Such recourse to traditional conflict resolution mechanism is mostly by choice but it is also profitable because of the problematic modern systems. For instance, they continued, the courts are far away

[267] Opeyemi, O., Judicial System, Any Alternative in ADR. *ThisDay*, Vol. 14, No. 5209, 27 July 2009 p. 54 Print.
[268] Ibidapo-Obe and Abayomi W. Arbitration in Lagos State: A synoptic Guide, P. 157 Print.

from their communities, court procedure is inscrutable and confusing for the rural folk who are estranged by the foreign language and personnel who man it. Customary arbitration according to them is a more attractive alternative, as it promotes reconciliation and restored peaceful relationships within the community.

Describing customary arbitration in practical term, they classify it into chiefly or cephalous societies and acephalous societies. Minor and domestic disputes are addressed by family head, if this fails, it goes to the sub-quarter head and later to quarter head and it will finally go to the Oba-in-Council.[269] This is mostly prevalent in Yoruba land of Western Nigeria.

In acephalouss or republican African societies, the predominant agencies of customary arbitration are the elders sitting formally as council of elders or as nominated elders to adjudicate over a particular dispute. This is also peculiar to Eastern part of Nigeria. Some cases are ended by apology.[270]

They concluded that the nature of the final award depends on the arbitral panel and the dispute being adjudicated. Awards of restitution were made where appropriate, together is the payment of fines or compensation in money or in livestock[271] and for crimes, awards of fines, compensation, banishment, slavery were possible.[272]

They noted, however, that modern laws have purportedly stripped the traditional tribunals of their criminal jurisdiction since most crimes defined in the Criminal or Penal Codes are triable only by the regular courts.[273] Attempt to try those cases by traditional ruler could amount to trial by ordeal or screening offenders.

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[269] *Ibid.*
[270] *Ibid.*
[271] *Ibid.*
[272] *Ibid.*
[273] *Ibid.*

CHAPTER TEN

10.1 THE PROBLEMS OF INSTITUTIONALIZING ADR IN THE NIGERIAN LEGAL SYSTEM

ADR has a series of problems militating against institutionalizing it in Nigeria legal system. For a long time, ADR has been a neglected area. ADR, particularly arbitration matters taking place in Nigeria are very few, irregular and generally, widely unknown. Our arbitration laws have unpopular provisions which are also unconstitutional and unacceptable to foreign investors and people using ADR. Additionally, it should be noted that our legal practitioners are not versed in ADR matters. We will now consider these problems seriatim.

10.1.1 Lack of Efficient and Pragmatic National Courts:

The national courts have very important role to play in ADR. The Arbitration and Conciliation Act of Nigeria made provision for the courts to play important roles in ADR process. Unfortunately, most of our judges, with respect, are not knowledgeable in ADR processes and the resultant effect is that delay often results. The lawyers appearing before the judges are not skillful in ADR as most of them lack the basic knowledge and philosophy of ADR process.[274] This often lead to impeachment of good arbitral awards on very flimsy reasons as was done in the case of Alhaji Albishir and sons v. B.U.K.[275] where the alleged misconduct was not proved and the Court of Appeal still impeached the arbitral award. The Nigeria court system is very slow on issues in respect of ADR. Application for impeachment or enforcement last for six to seven years in the court. For example in Taylor Woodrow v. S. F. GmbH[276] the application which was filed in 1991 was only disposed of in 1993, in K.S.U.B.B. v. Franz Construction Co.

[274] Nwakoby and Anyogu, *op cit*, p. 153.
[275] (1996) 9 NWLR (pt. 470) P. 37.
[276] (1993) 4 NWLR (pt. 286) P. 127.

Ltd,[277] the application for enforcement of an arbitration agreement took 11 years to dispose of as the matter went up to the Supreme Court. In Commerce Assurance Ltd v. Alli[278] an application for the enforcement of an award and challenge thereto lasted six years. This is a very serious problem as speed is the essence of ADR.

10.1.2 Unfamiliarity with ADR and general lack of information and materials on ADR

Most of our judicial officers and legal practitioners are unfamiliar with the details of Arbitration and Conciliation Act which is the legislative enactment of this country. Unfortunately, with respect, this group of ignorant judicial officers, legal practitioners and professionals are also unfamiliar with the details of international instruments and conventions and the international background from which most of them were concluded.[279] Some of our judges see international law as a legal system unconnected and irrelevant in any practical situation. Some judges are rather contemptuous of everything to do with international law in national courts, which they doggedly regard as unreal and mythical in nature. Others, though greatly impressed by its provisions are unfamiliar with it and as such avoid rendering any decision on the basis of its provision.[280] This explains why in most cases of international commercial arbitration, particularly with respect to arbitral awards, our courts have determined the issues involved as if no law exists in Nigeria on the matter.[281] The unfamiliarity of some judges and legal practitioners with international instruments and legal materials such as the New York Convention, ICSID, and the UNCITRAL Model law is a very big and serious setback in ADR. The working materials are scarce and the very few ones available, expensive as most of

[277] (1990) 4 NWLR.
[278] (1986) 2 NWLR P. 404.
[279] Nwakoby and Anyogu *op cit.* p. 156.
[280] *Ibid.*
[281] *M.S.S. Line v. Kano Oil Miller* (1974) NNLR *I.A.C, Topfer Inc. New York v. John Edokpolor* (1965) All NLR P. 292

them have foreign origin. The few Nigerian materials which have Nigerian background were written in the general sense.

10.1.3 The Limited Scope of National Legislative Enactments on ADR in Nigeria

The first Arbitration Act of Nigeria was the product of colonial government in Nigeria and after the independence of Nigeria not much was done to bring the provision of these colonial enactments into reality with the current English arbitration provisions. The Arbitration and Conciliation Act cap A18 LFN 2004, borrowed almost its provisions from the UNCITRAL Model Law which those who enacted the Nigerian Act committed legislative blunder.[282] The law should have been adapted to our local situations. If this had been done, the Act would have covered customary arbitration, family settlement, custody cases and other matrimonial relieves.

In the same legislation, we have two conflicting sections, that is, sections 4 and 5 on the same subject matter.[283] The provisions of section 7 (4) of the Act are unconstitutional as they violate the provisions of sections 241 and 242 of the 1999 Constitution of Nigeria (as amended).[284]

In section 30, there is no limitation within which to impeach an award for reasons of misconduct.[285] In section 32 the grounds for refusal of recognition and enforcement were not provided for.[286] Section 34 of the Act is a violation of the unlimited jurisdiction of the high court on matter before them.[287] Section 54 of the Act which implemented the New York Convention is not only limited in scope but a total breach of the treaty obligations which assumed when we deposited our declaration on the New York Convention to the United Nations Secretary General

[282] *Nwakoby and Anyogu op cit*, p. 157.
[283] *Ibid.*
[284] *Ibid.*
[285] *Ibid.*
[286] *Ibid.*
[287] *Ibid.*

in 1970. Section 54 of the Act provides that the New York Convention shall apply only to differences arising out of legal relationship which is contractual. When the provision of section 54 of the Act are compared with the declaration deposited by Nigeria in 1970 the breach will be crystally clear.[288] The declaration by Nigeria on the same which was deposited to the Secretary General of the United Nations reads thus:

> In accordance with paragraph 3 of Article 1 of the New York Convention already set out, the Federal Republic of Nigeria declares that it will apply the Convention on the recognition and enforcement of awards made only in the territory of a state party to this Convention and to differences arising out of legal relationships, **whether contractual or not, which considered as commercial** under the laws of the Federal Republic of Nigeria.[289]

If the national legislation as contained in section 54 of the Act is limited in scope and a breach of the treaty obligation on the part of Nigeria, Cap I120 Laws of the Federation of Nigeria 2004 on ICSID implementation are inchoate and inelegant.[290] The procedure for the registration of ICSID awards at the Supreme Court was not provided and the Chief Justice of Nigeria has taken no step to make the procedure for the same as section 1 (2) of the Act impose the responsibility of determining the applicable procedure on the Chief Justice of Nigeria. Section 51 of the Arbitration and Conciliation Act which removed the requirement of reciprocity in the enforcement of international arbitral awards in Nigeria is contrary to both international public policy and the provision of cap F35 Laws of the Federation of Nigeria 2004 which requires that before an international award or foreign judgment could be enforced in Nigeria, there must be an

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[288] *Ibid*

[289] *M.S.S. Line v. Kano Oil Miller* (1974) NNLR 260 *I.A.C, Topfer Inc. New York v. John Edokpolor* (1965) All NLR P. 292.

[290] *Ibid*

evidence that the country in which the award was made accords reciprocal and favourable treatments to awards and judgments made in Nigeria.[291]

10.1.4 Problems of Plea of Sovereign Immunity in ADRT in Nigeria

The enforcement of domestic and international awards made pursuant to some ADR conventions are subject to the plea of sovereign immunity based on public policy. This makes it rather difficult for investors and users of ADR to consider patronizing Nigeria as a venue for any form of ADR as the Nigerian government (Federal, State and Local government) often plea the provisions of sovereign immunity to defeat the arbitral award made against them. For example, Article 55 of ICSID Convention surrenders measures of execution to domestic rules of immunity. This is a serious setback in ADR conducted pursuant to ICSID Convention.[292]

10.1.5 Lack of Uniform Rules in ADR in Nigeria

Nigeria has a federal legislative enactment on ADR. Beyond that Act, we have the state laws on the same subject matter. The federal legislation is the Arbitration and Conciliation Act whereas the state laws on the matter are to be found in the various state laws. We also have the High Court Rules of various High Courts of the states in Nigeria. The problem inherent in this practice is that different time limits are provided for the same exercise. Whereas the limitation period for impeaching an award is three months as in Section 29 of the A.C.A, some of the states provide for fifteen or thirty days.[293] The Supreme Court of Nigeria has decided in Ras Pal Gazi Const. v. Federal Capital Development Authority,[294] that courts should not convert the awards made by arbitrators into their own judgments, but in Order 29 Rule 14 of the High Court Rules of Anambra State, the law requires that the award of arbitrators appointed by the courts must be

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[291] *Ibid*.
[292] *Senegal v. SOABI* (1994) ICSID Rep P. 164, *BB v. GPR Congo* (1993) 1 ICSID P. 368.
[293] *Nwakoby and Anyogu op cit*, p.158.
[294] (2001) 10 NWLR (Pt. 722) P. 559.

filed in court and in which case, before it can be enforced against the unsuccessful party, the court must pronounce on it.

CHAPTER ELEVEN

11.1 ADR IN GLOBAL PERSPECTIVE

It is pertinent at this junction to consider ADR in other lands so as to be able to evaluate the effectiveness and practice of ADR in these countries and to compare and contrast the situations in these countries with Nigeria. In this connection, we shall look at ADR in Britain, America, Canada and Australia, we shall also examine ADR in India, South Africa, Ghana, Kenya, Tanzania, Gambia and Ethiopia.

Following the Woolf's report of 1986 on the use of ADR in Britain, Access to Justice Act was enacted. This was followed by New Civil Procedure rules which made mandatory reference to ADR and Preaction Protocols with emphasis on settlement of disputes through mediation. Proportional dispute Resolution Teams were set up while small claim mediation programme was launched in 2005.

The United States of America is noted for being the pioneer in the new wave or movement on ADR globally today. In America, there are five categories of ADR namely: Arbitration, Mediation, Negotiation, Collaborative law and Conciliation. As part of American Bar Association, the section of ADR exists with over 13,000 members which is reported to be the largest in the world. The Body trains its members through seminars, conferences and workshops. ADR Air force is another department including the Department of Veteran Affairs and Navy Department. There is the International Institute for Conflict prevention and Resolution New York and Office of Dispute Resolution for Acquisition, a statutory body for settlement of contractual disputes. Other notable ADR bodies are the National Arbitration Forum, North America Free Trade Area Dispute Settlement Procedure established in 1982, United States

Federal Government Gateway ADR, United States Department of Health and Human Services ADR Division.

The United States enacted the Uniform Act 1955 applicable in 35 States in America which about 49 States have Arbitration statutes.[295]

The ADR Institute of Canada has about 1700 members providing professional services nationally and internationally through 60 business organisations who are members of the Institute. There are others like ADR Institute of Ontario, ADR Institute of Manitoba, ADR Institute of Sasche Chewan and ADR Institute of Atlantic Province.[296]

The ADR in Australia is a new Phenomenon. There is a functional lecture for Effective Dispute Resolution. There is also in existence National Alternative Dispute Resolution Advisory Council. This Council is in control of ADR in Australia, and it recommends high level of education for ADR practitioners. The Mediator Codes of Conduct put together by the Law Society of South Australia also serves as a guide. However, in Arbitration, there is the Institute of Arbitrators and Mediators of Australia. The Institute has not been accredited yet but plans are on the way to accredit it. The legal framework is covered by International Arbitration Act 1974. Each Sate territory has uniform Commercial Arbitration Act dealing with domestic Arbitration. These are the New South Wales Commercial Arbitration Act 1984, Queen's Land Commercial Arbitration Act 1990, South Australian Commercial Arbitration Act 1986, Western Ausbitralian Commercial Arbitration Act 1985, Tasmania Commercial Arbitration Act 1986 and New Zealand Arbitration Act 1996.[297]

In India, the available typologies of ADR are: Mediation, Negotiation, Collaborative law, Arbitration, Conciliation and Ombudsman. The First legislation in India was Arbitration Act

[295] www.hg.org/adr.html Web. accessed on 31-8-2011
[296] www.adr.canada.cal. 31/8/11 Web.
[297] www.caslon.com.any.adr.profile/html. 31/8/11 Web.

1940 which was followed by Arbitration Act 1940 which was followed by Arbitration and Conciliation Act 1996. This piece of legislation was based on UNCITRAL Model Law. There is also the Legal Services Act 1987 and 1987 and the Code of Civil Procedure 2002. Section of 89 of the Code was amended to incorporate Conciliation, Mediation, Pre-trial settlement and mini trial in all civil proceedings.

Justifying the need for ADR in India, it was pointed out that there were over 2.5 million pending court cases in 2006, with less than 15,000 judges. According to statistics, India has 10.5 Judges per 1 million people, while Britain has 50.9 Judges per million, 57.1 Judges per million in Australia, while 75.2 Judges per million in Canada, and 107 Judges per million in U.S.A. In India today, the ADR is driven by India Council for Arbitration, India Council for ADR and India Institute for Arbitration and Mediation. The types of ADR being practiced in India are Fast Track Arbitration, Neutral Listener Agreement, Rent a Judge and Final Offer Arbitration.[298]

The South Africa Law Commission established by the South African Law Commission Act of 1973 undertook research to study and investigate all areas of law in order to make recommendation for the development of improvement, modernization and reform of law in South Africa. Under this programme ADR was recommended and approved for civil practice and family mediation. Since that time several types of ADR processes have been in use in South Africa. The pioneer organisation that promoted ADR in Africa is the Arbitration Foundation of South Africa (AFSA) followed by the Alternative Dispute Resolution Association of South Africa. These organisations are non-governmental organisations. Thus in South Africa ADR moves from outside to inside the government. ADR is seen as part of good governance in South Africa.[299]

[298] www.adr.india.org. 31/8/11 Web.
[299] www.saflii.org>safili; www.arbitration.co.za. Web. Accessed on 31-8-2011

In line with the five years strategic plan of the judicial service, ADR programme, the ADR Secretariat continued to undertake activities, aimed at ensuring the effective implementation of the ADR has been found to be faster, cheaper, restoring strained interpersonal relationship between parties in dispute and providing win-win outcomes after dispute resolution. It has also offered the general public and especially individual disputes who are unable to afford the expensive courts and attorney's fees and charges, an enhanced access to justice in the various participating countries. Data available shows an average settlement rate of 47% of cases mediated in lower courts in Accra in 2008.

Further, the ADR programme has gained some popularity and acceptance among user groups and stakeholders and continues to be a preferred choice of dispute resolution for some disputants. Since about 90% of total number of cases filed in the judicial service through the lower courts, the ADR programme aims at reaching a lot more vulnerable and poor persons in especially lower income community by focusing the ADR more on the lower courts.[300]

Kenya Judiciary led ADR Legal Reform Committee to a new Civil Procedure Rules to accommodate ADR in 2003. The Chartered Institute of Arbitrators Kenya branch is the major body championing the drive for ADR in Kenya.[301] In Tanzania, the Yaounde Declaration of Common Wealth Telecommunication Organisation established a Dispute Resolution Protocol in 2003. Tanzania also joined United States of America Open Sky Agreement in order to strengthen the growth of ADR in the country.[302] While in the Gambia, ADR is prevalent in houses, communities and villages. The General Assembly of the Gambia passed ADR Act in 2005. ADR in modern form was officially launched on 12th August 2008.[303]

[300] www.judicial.gov.gh/index.php. Web. Accessed on 31-8-2011
[301] www.disputeresolutionkenya.pdf/ Web. Accessed on 31-8-2011
[302] www.globaljustice.com.programme/tan. Web. Accessed on 31-8-2011
[303] Obsever.gm>africa>Gambia. Web. Accessed on 31-8-2011

The Ethiopian Arbitration and Conflict Centre was established in August 2004 to facilitate the use of ADR in Ethiopia with support from Canada. The Centre practices only arbitration and mediation. The Ethiopian Arbitration and Conflict Centre is now proposing a comprehensive draft legislation on ADR and financial subsidiary is given to any Ethiopian Student conducting research in ADR by Ethiopian government. ADR is applicable to marriage, divorce, succession and contracts in Ethiopia.

CHAPTER TWELVE

THE MULTI-DOOR COURT HOUSE CONCEPT AS A VIABLE ADR OPTION FOR NIGERIA

12.1 DEVELOPMENT AND EVOLUTION OF THE MULTI-DOOR CONCEPT

A cursory glance at the court systems of most countries readily reveal that one of their greatest weakness is that cases too numerous to be adequately handled are filed daily. This inevitably leads to problems in obtaining trial dates which results in delay in the process of obtaining justice. It is against this backdrop that the concept of the multi-door court house was developed.

A multi-door court house is a dispute resolution centre designed to involve courts and communities in discovering ways to offer citizens alternatives to court room trials for resolving dispute.[304] The multi-door court house was introduced to reduce the concentration on litigation as the only method of resolving disputes in the courts. This is achieved by annexing a centre of dispute resolution to the conventional courts. Thus the courts do not merely present litigation as the only avenue or "door" open to disputants, but also present other "doors" like early neutral evaluation, mini-trial, mediations and arbitrations, etc. At a multi-door courthouse, each matter is screened to determine the most suitable mode of resolution and sent through an appropriate "door" for resolution.[305]

It is from this relationship that the tag "court-annexed" ADR derives. Bringing ADR into the domain of the courts in this manner gives it all the more force, especially where the enforceability and compellability of the courts is concerned. In most cases where court-

[304] Akin Ibidapo-Obe and Abayomi Williams Arbitration in Lagos State, A Synoptic Guide. Concept Publication Ltd, Lagos 2010, p71. Peters, D. Alternative Dispute Resolution (ADR) in Nigeria – Principles and Practice, 2004, Lagos, Dee-Sage Nig. Ltd, p. 165 Print.

[305] Aina, K. The Multi-Door Courthouse Concept, A Review (Unpublished), p. 11 Print.

connected ADR is being practiced, judges mandatorily require disputants to attempt the resolution of their grouse before the case comes before the judge. According to Brook, LJ, in the much celebrated British case of *Dunnet v. Railtrack Plc*,[306] "…parties and their lawyers may have to face uncomfortable cost consequence if they turn down out of hand the chance of ADR when suggested by the court."

In that case, Ms. Dunnet had sued Railtrack Plc which had replaced a field gate on her property without a lock causing four of her horses to be killed by a train after straying through the open gate. Ms. Dunnet lost the suit and appealed. The appeal judge, Schiemann LJ, recommended mediation but the respondent refused on two different occasions. Ms Dunnet lost the appeal on merit, but the court declined to award Railtrack Plc the cost of their appeal because they had refused the recommendation of ADR. Thus it was established that parties should seek to resolve disputes out of court, especially when recommended by the court and that a refusal to mediate, where mediation offered a more realistic prospect of a resolution of the dispute, could result in that party being penalized in costs.

This involvement of the court in suggesting or mandating ADR goes a long way in achieving the purposes of ADR in a more formalized manner. Increasingly, court-mandated ADR is becoming a pre-requisite to initiating litigation, especially in the United States of America and Britain. In a number of instances, certain categories of cases are sent wholesale to ADR. For example, in California, USA, all child custody cases must first be mediated before resort can be made to litigation by any of the parties.[307]

[306] (2002) 2 ALL ER P. 850

[307] Aina, K. The Lagos Multi-Door Courthouse- A Guide, op. cit. p. 5 Print.

Even in Nigeria, according to the new Lagos State Civil Procedure Rules, parties are expected to demonstrate efforts made at settlement before proceeding to litigation.[308] However, it is argued that ADR ought to be wholly voluntary and that the courts could recommend ADR as an alternative to full court trials, but that they should not compel parties to submit to ADR or penalize them when they do not, whether as part of the multi-door courthouse concept or not. The consensus in general, notwithstanding, is that the courts should direct the exploration of the matter via ADR where the judge finds it to be applicable in the resolution of a particular dispute according to its facts.[309]

In *Shirayama Shokusan v. Danovo Ltd*,[310] it was said that the court demonstrated both the will and the power to direct parties to mediation even when one of the parties was not willing. The court based its reasoning on the promise that the case management powers conferred on the court entitled it to order ADR even against the wishes of one party and that nothing confined such power to where both parties wanted to mediate. Blackburn, J., said:

> "I take the view that the court does not have jurisdiction to direct ADR even though one party may not be willing to have the dispute submitted to ADR…I am not impressed by the argument that making an order of this kind, with opposition by one side, risks breaching…privilege in any way."[311]

[308] Aina K., Ibid at p.5; Adeleke M.O. Lagos State Multidoor Courthouse, An Appraisal. Law, Politics and Development, edited by Dave Ajetomobi NBA Ikeja 2010 p. 317 Print.
[309] Aina, K., op cit, p. 9.
[310] (2003) EWHC P. 3006.
[311] Ibid.

12.2 ORIGIN AND HISTORY OF MULTI-DOOR COURTHOUSE AND ITS RECEPTION INTO NIGERIA

In the late sixties, the United States of America began to pay more attention to the resolution of dispute by alternative means. This came about due to the alarming increase in cost of litigation, rising court costs and increasingly heavy cost which brought frustration to disputants.[312]

Eventually, in 1976 at the Pound Conference in Minnesota, U.S.A., Professor Frank Sander presented the revolutionary concept of the "multi-door courthouse" as a means of decongesting the courts and providing effective alternative methods of resolving disputes in the country's failing judicial system. He insisted that a courthouse ought to have many "doors" and that people ought to be able to choose what form of dispute resolution might best fit their needs. For example, through one door, they might get a trial, through another door, just information-or-perhaps mediation, or a neutral case evaluation. In other words, the Multi-door courthouse is a systematic means of providing ADR to the public and a method for streamlining the way courts operated.[313] This concept was first implemented in Washington D.C., Texas and Oklahoma in 1985.[314]

In Nigeria, the judiciary has also suffered greatly in the hands of case overloads and overtime, the personnel and finances of the courts have been highly insufficient in effecting all the cases brought before them. Thus the concept of the multi-door courthouse was most welcome.

The multi-door court house concept was brought into Nigeria as a private initiative which later gained the support of the ministry of justice. In November 2001, the Negotiation and

[312] Peters, D. op. cit. p. 167.
[313] Aina, K., op. cit. P. 43
[314] Ibid.

Conflict Management Group (NCMG) under the leadership of Kehinde Aina[315] approached the ministry of justice and the Lagos state Judiciary for partnership in establishing the Lagos multi-door courthouse (LMDC). The LMDC was eventually launched at the high court premises on Thursday June 11, 2002 with the financial grant of ₦6, 035, 092 from, the U.S. Embassy.[316]

The Lagos multi-door courthouse was established as a multi-faceted ADR centre which, as a first in Nigeria, offers courts users a viable, cost effective and time saving alternative to resolving disputes of diverse nature. Now, instead of the single "door" of litigation known in all courts of Nigeria, the LMDC provides these three other supplementary "doors" as part of the court system: mediation, neutral evaluation, and arbitration.[317]

The overriding objective of the LMDC as contained in its practice Direction[318] is to: "Enlarge resources for justice by providing enhanced, timely cost-effective and user friendly access to justice for would-be and existing plaintiffs and defendants."

[315] He is a partner in the law firm of Aina, Blankson and Co. He is also Executive Director of the NCMG and Director of the Lagos Multi-door Courthouse.

[316] Aina, K., Justice Reform in Africa – The Nigerian Multi-Door Courthouse Approach as a Case Study, p. 4, Peters, D. Alternative Dispute Resolution (ADR) in Nigeria – Principles and Practice, Lagos, Dee-Sage Nig. Ltd, 2004 p. 171 Print.

[317] Peters, D. Ibid at p.46.

[318] The Lagos Multi-door Courthouse Practice Direction (Pursuant to section 274, Constitution of the Federal Republic of Nigeria, 1999, as amended).

CHAPTER THIRTEEN

13.1 THE LAGOS MULTI-DOOR COURTHOUSE

The multi-door courthouse is a product of government and civil society co-operation. The Lagos Multi-Door Courthouse was initiated by a non-governmental organization specializing in Alternative Dispute Resolution (ADR) – Negotiation and Conflict Management Group (NCMG) headed by Kehinde Aina, a lawyer.[319] It is the first court connected ADR Centre in Africa.

With commendable doggedness and fervor, the NCMG had been able to interest the Lagos state governor to commit ideologically and materially to this unique ADR project.[320]

Normally, to justify their nomenclature as Alternative Dispute Resolution (ADR) centers, arbitral institution strive to maintain an independent identity apart from and outside the litigation forum. Why then has the LMDC hinged its identity and processes to the existing court system, naming itself as a "Multi-Door courthouse"? Section 1(2) describes the LMDC as "a court-connected Alternative Dispute Resolution center with its offices located within the High Court of Lagos and any other suitable location…"[321]

Perhaps, the answer is best given by the Nigerian initiator of the Multi-Door courthouse:

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[319] Akin Ibidapo-Obe and Abayomi Williams op cit., in his speech at the official launch of the LMDC on Tuesday, June 11, 2002, Print. M. Kehinde Aina noted: "The road to events of today began in 1995. Having spent most of my early practice years in courtrooms, it became crystal clear to me that the justice system was in a desperate need of an overhaul. I envisioned a comprehensive justice centre where both the consumers and providers will be collaborators and co-creators of a streamlined and agile process. I dreamt of a faster case flow management system where parties are not left impoverished and embittered. I fantasized about a legal regime where an apology would seem as a useful tool rather than an admission of guilt; a system where disputants could problem-solve and search for a common ground within the backdrop of integrity, understanding and human decency. My dream was to create a nexus for peace, fairness and an effective administration of justice in our dear country, Nigeria"- LMDC Brochure.

[320] "The LMDC Law was promulgated in 2007 to create a legal framework for the operation of the LMDC and the proper environment for the fulfillment of its overriding objective."-LMDC Brochure.

[321] The Negotiation and Conflict Management Group (NCMG), pioneers of the Multi-Door Court House concept in Nigeria, had in October 2003 replicated the multi-Door courthouse in Abuja – the Abuja Multi-Door Courthouse (AMDC); the Kano Multi-Door Courthouse was also replicated after the model and states of the federation are currently at various stages of replicating the Multi-Door Courthouse in their state – LMDC Brochure.

> The MDC is a court-connected ADR programme which a comprehensive approach to dispute resolution. The concept posits that the ideal courthouse is a multi-faceted dispute resolution center which offers disputants a number of options or "doors" in resolving their disputes. Hence, instead of just one door leading to the courtroom, such a comprehensive justice center would have many doors through which disputants might pass to get to the most appropriate dispute resolution process. Litigation thus becomes only one chance among such other doors labeled mediation, arbitration, med-arb, mini-trial and case evaluation.[322]

Another good substantial government patronage in financing, staffing and administration, the LM DC states in section 2(a) that it is "an independent, non-profit body corporate with perpetual succession." How far the LMDC can maintain this independence will depend on the faith and commitment of the government and civil society partners.[323]

13.1.1 Function of the LMDC

The function of the Lagos Multi-Door courthouse are predicated on the need to create alternative mechanisms to the delay, cost and frustration of the extant courts system, and thereby promote the growth and effective function of the justice system.

Specifically, the LMDC is charged with the function of applying mediation, arbitration, neutral evaluation, and any other ADR mechanisms in the resolution of such disputes as may from time to time be referred to the LMDC from the High Court of Lagos and other states, and the Federal High Court. Pursuant to Section 3 of Lagos Multi Door Courthouse Law, referral of

[322] K. Aina: "The Multi-Door courthouse". Being a paper delivered at a 2-day workhouse on conflict and the mediator's role in conflict management, April 28, 1997 Print.
[323] Ibid.

cases may also come from private persons, corporations, public institutions and other ADR institutions, or by direct intervention.[324]

Now, how may the High Court of Lagos State refer to the LMDC? The answer may be found in section 16 of the LMDC Law which deals with the role of the courts. The Lagos High Courts are all mandated to encourage ADR to the LMDC in order to facilitate just and speedy resolution of such cases.

It is submitted that such reference *suo motu* by the court cannot be outside the consent of the parties. In other words, it is doubtful if the High Court of Lagos can compulsorily order the parties to go to arbitration at the LMDC. This is despite the provisions of section 16(1) (e) of Lagos Multidoor Courthouse Law 2007 that, in controlling and managing effectively its proceedings, the court may issue orders which would encourage parties to explore settlement at the LMDC, whenever one of the parties in court is willing to do so.

In our respective view, this could offend the constitutional stipulation of fair hearing[325] and unlimited jurisdiction of the high courts.[326] Referral from private individuals and institutions should form the bulk of the work of the LMDC.

[324] See Section 36 of the Constitution of the Federal Republic of Nigeria, 1999 (as amended).

[325] See Section 251 for Federal High Court jurisdiction and Section 272 for State High Court jurisdiction. See, additionally Section 6 for Judicial Powers of the Federation, and Section 272 on jurisdiction of the High Court in fundamental human right cases.

[326] The Governing council of the LMDC comprises: Hon. Justice Opeyemi Oke as chairman; Hon. Justice Oluwatoyin Ipaye and Hon. Justice RIB Adebiyi, as ADR judges represented in the governing council; Mr. Supo Sashore, SAN, Attorney General and Commissioner for Justice, Lagos State; Chairman, Nigerian Bar Association (Lagos State), Dr. Erastus Akingbola, Former President, Chartered Institute of Bankers as representative of the private sector; Prof. Yemi Osibanjo, SAN, as person whose membership will assist with the promotion of ADR as a concept and LMDC as an institution; Mr. Kehinde Aina, Executive Director of the Negotiation and Conflict Management Group (NCMG), initiators of the LMDC; Mrs. Caroline Etuk, Director of the LMDC and Ms. Adeyinka Aroyewun, Secretary to the Governing Council and Deputy Director, LMDC. The Lagos Settlement Week Information Brochure, p. 11.

13.1.2 Organs of the LMDC

The organs of the LMDC are the governing council, (headed by a chairman who is assisted by a vice-chairman), the director LMDC, the secretary, the center Manager, the principal registrar, and other cadre of staff as may be appointed by the director with the approval of Council.

The governing council is established under section 5 of the LMDC Law and charged with the general supervision of the LMDC, vetting and approval of the annual budget, approval and remuneration of staff appointments, and development of the structure of LMDC. Under section 6 the governing council, consists of nine members[327] appointed by the chief judge of Lagos state.[328] Unlike the board of director of Lagos Court of Arbitration (LCA) who are appointed by the executive (the governor upon the recommendation of the State Attorney-General), it is a purely judicial power, exercisable by the Chief Judge.

The Council is presided over by the chairman, two ADR judges, the attorney-general, the chairman of the NBA, (Lagos and Ikeja branches in rotation), a representative of the Negotiation and Conflict Management Group (NCMG) and the director of the LMDC, one representative of the private sector and one person who in the opinion of the Council will help to promote ADR and LMDC as an institution. With five government (judicial) nominees as members and whole Council being appointed by the Chief Judge, the "independence" of the LMDC may be more idealistic than realistic. But then that is the nature of the LMDC. Government participation, it is presumed, would ensure its continuity as an 'institution.'

[327] Section 9(a) of LMDC Law, 2007.
[328] Section 6(b).

There is a minor confusion on the total number of members of the Council introduced by Section 7(2) of the LMDC law. The section provides that "The member of the Council shall not exceed nine (9) at any given time, including the chairman, vice-chairman and secretary".

If the secretary is included then the membership comes to ten (10) which contradict section 7(2).[329] It is doubtful whether the secretary is a member of the council in the strict sense or an ex-officio performing an administrative role. Be that as it may, the chairman of the LMDC is appointed by the chief judge upon the recommendation of state judicial service commission (JSC) from two nominations by "a reputable Alternative Dispute Resolution (ADR) organisation." Thus, with regard to the appointment of the chairman, the chief judge is in fact restricted to the nomination by the ADR organisation of a member of the judiciary.[330] It is suggested that the LMDC statute should have specified the NCMG as the nominating ADR institution instead of leaving it to conjecture. It seems only logical to make that deduction, bearing in mind that it is the only ADR organisation named in the LMDC law and it is in fact describe in section 31 of the statute as the "non-governmental organisation which initiated and founded the LMDC." But this is not to preclude the fact that any other non-governmental organization interested in ADR can spring up later and is qualified to nominate a member.

The Chairman of the government council, under section 6(2), holds office for a maximum tenure of six years of three years' per term. He is expected to be a renown professional in ADR of twenty years experience.[331] It is not clear whether the high qualification of the chairman has been moderated by section 7(i)(a) LMDC Law of Lagos State which merely requires that the

[329] The present chairman of the governing council is Hon. Justice Opeyemi Oke.

[330] The provision raises the possibility that the chairman of the governing council was initially conceived as a non-judicial ADR person. However, the present arrangement seems more reasonable in order not to subject a sitting judge to the authority (chairmanship) of perhaps a "lay" professional.

[331] Surely, this periodic report to the Chief Judge is better facilitated if the Chairman is under the direct statutory and administrative control of the Chief Judges.

chairman "shall be a seasoned professional with considerable experience in Alternative Dispute Resolution." Our suggestion is that both sections be read cumulatively to ensure a chairman of the highest quality, standing and experience is appointed for the position.

The duty of the chairman is to preside over the meeting of the Council which is expected to hold at least twice a year at the instance of the chairman. Should the chairman omit to call the requisite meeting, five members of the Council can vote that a meeting be convened. The chairman of Council is expected to report to the Chief Judge "periodically" on the activities of the LMDC.[332] Since no specific period is stipulated, it may be assumed that annual reports will at least be expected. Section 9(1)(c) LMDC Law of Lagos State additionally stipulates that the Chief Judge may "receive regular update on the activities of the LMDC from the Governing Council, including reports of its financial and overall activities." Such "regular update" will obviously depend on specific requests from the chief judge in that regard.

The Governing Council shall also have a Vice-Chairman appointed by the Council from amongst its members who shall be a university graduate with not less than ten years' experience in ADR practice and with relevant qualifications in ADR. The use of the word "appoint" here appears to be a misnomer, in our respectful view, because it relates more to a direct official act by a statutory authority. 'Elect' or 'select' might be a better word, since the Council members are choosing one of their own to the position of vice-chairman. It is suggested that one of the non-government representatives such as - the NBA chairman, the representative of the private sector, the private ADR person (representative of the Negotiation and Conflict Management Group

[332] The position of vice-chairman is currently being occupied by a second ADR judge in the person of Hon. Justice Ipaye. Our suggestion, of course, does not detract from her individual merit.

(NCMG)-should fill this position as a counterpoise to, or a check and balance of, government representative.[333]

The vice-chairman is entitled to a single three-year term (unlike the chairman's possible two terms), but he may retain his ordinary membership of the Council, if renewed, for a second term of three years.[334]

Members of the Governing Council of the LMDC may be removed accordance with Section 8(1):

> By two-thirds majority of the members of the Council after consultation and recommendation of the chief judge… the Council by a majority vote shall after consultation with the interests(if any) represented by that member recommend to the chief judge that such member be removed.

With respect, there is a palpable disconnection or contradiction between the two quoted paragraph of section 8(1): firstly, is the vote of Council by two-thirds majority (paragraph one) or simple majority (paragraph two)? Given the small number of members (nine), a simple majority ought to suffice. The concept of two-thirds majority is better deployed in a larger pool of membership. Section 8(1) of the LMDC Law of Lagos State should be amended to stick to simple majority.

Secondly, the phrase "after consultation and recommendation of the chief Judge…" is, with respect, inelegant. If what is clearly meant is that the Governing Council should consult the "constituency" of the Council member intended to be removed (not the Chief Judge) before making its recommendation to the Chief Judge, who then actually exercises the power of removal of the member, then this should properly be articulated in the law.

[333] See: Section 7(4) of the LMDC Law, 2007, Ibidapo-Obe and Williams, Op. cit.
[334] The present Director of the LMDC is Mrs. Caroline Etuk. Use of 'he' is obviously generic.

The grounds of removal of a Council member include misconduct, absence from meeting, inability to perform the functions of his office (presumably due to poor physical or mental health) and conviction for a fraudulent act. Other organs of the LMDC below the level of the Governing Council are the director, secretary, centre manager and principal registrar. These classes of officers are appointed by the Governing Council and are career staff of the LMDC.

The director of the LMDC is chief Executive officer of the organization responsible for its day-to-day management.[335] He should have ten years' experience in ADR with competent managerial skills. He must be a university graduate and he has tenure of five years, renewable for a further term of five years. Incidentally, the director is not required to be a lawyer unlike the secretary to the council. This is rather odd as the director, as chief executive of a "quasi-judicial" organization; daily interacting with lawyers, need to belong to the legal profession to attract the respect often reserved by lawyers to their "professional colleague". A contrary view could be that ADR practice should, where possible, be loosened from the apron strings of the legal profession in order to allow it to grow into its own specialty and also to demonstrate that ADR is not an exclusive preserve of lawyers.

The position of secretary[336] of LMDC is non-executive, somewhat ministerial and should be kept as such.[337] However, to require the secretary to be a lawyer whilst the director is not may create an opportunity for conflict of power and functions. Perhaps, if both are required to be lawyers, such conflict may be minimized. In any case, section 6(4) (c) authorizes the director to assign duties to the secretary as he or the Governing Council determines. One may quickly add

[335] Currently occupied by Mrs. Adeyinka Aroyewun.

[336] Apparently, the LMDC management is not thinking along the same line as the secretary is also designed as deputy director of LMDC-see: settlement week: information Brochure, p. 11.

[337] See Section 15(4) of LMDC Law, 2007.

that the position is not an exclusive preserve of lawyers. Although inferiority complex can also lead to conflict.

Also, there appears to be an overlapping of functions in the posts of LMDC centre manager and Principal Registrar in sections 12 and 13 respectively. Both officers, it would seem, perform the same general functions, save that the centre manager manages the LMDC "facilities" whilst the principal Registrar manages the dockets to ensure efficient case flow management.

Ibidapo-Obe and Williams suggested that both offices be merged into the position of Centre Manager and the post of Principal Registrar nomenclature contradicts the supposed quasi-non-governmental status of the LMDC and also invokes the spectre of the normal court system.

The LMDC needs to have its own unique organs distinguishable and separate from the usual court organs at the operational level. However, for the purposes of service delivery, remuneration and pension, the Centre Manager may conveniently be placed on the level of a Principal Registrar of the High Court.

13.1.3 The ADR Judges

The Chief Judge of Lagos State is directed by section 15 of the LMDC to designate and appoint not less than three (3) serving judges of the High Court as 'ADR judges.'

To "designate" or "assign" or "appoint" serving judges to ADR duties, it may be argued, implies a temporary secondment, whereas what is needed is to build a corps of ADR judges who will specialized in ADR methods and constantly and consistently develop their skills for more effective delivery of ADR. This could be done, even as ADR judges are kept within the judicial hierarchy and retain their normal emoluments and prerequisites.

Consistent with this viewpoint, the chief judge needs to identify suitable serving judges who are interested and specially devoted to ADR or appoint fresh ADR-oriented persons as ADR

judges *ab initio* based on such interest and requisite ADR qualifications. All ADR judges should belong to the Governing Council instead of the two judges currently required to be members by virtue of section 7(1) (b).

A contrary viewpoint may however be that all the judges should be allowed in appropriate rotation to act as ADR judges and thus garner the skill and experience that would be relevant even in their normal adjudication.

Apparently, the ADR judges would have their own "regular" courts and chambers within the High Court/LMDC premises as is normal with mainstream judges.[338] However, it is suggested that the nomenclature should reflect ADR sensibilities: instead of "Court" perhaps "auditorium"; instead of "chambers", perhaps simply "offices" of the ADR judges. The ADR judges will seat on disputes as may be referred to them by the Chief Judge upon reference from the presiding judges of the High Court ("Referral Judges").

Since the arbitration duties of the ADR judges are shared with a *panel of neutrals* from which arbitrators may be constituted to seat on dispute, one could have argued that arbitration practitioners, and not ADR judges, should be allowed exclusive jurisdiction over cases at the LMDC. However, the logic of their appointment or retention manifests when one considers their other duties, namely the coercive power "to make orders and give directive where any of the parties to an action at the LMDC refuses or neglects to appear before the LMDC as required."

The ADR judges are also required to enforce, as a consistent judgment of the High Court of Lagos State, any settlement, agreement or memorandum of understanding duly signed by the parties and filed at the LMDC.[339] Does this imply that the awards of the arbitrators empanelled to

[338] See Section 19 of LMDC Law, 2007. See also, Order 39 Rule 4 (3) of the High Court of Lagos (Civil Procedure) Rules 2007 which states that "an award made by an arbitrator may by leave of a judge be enforced in the same manner as judgment or order of the Court."

[339] See Lagos Multi-door Courthouse Brochure, p. 11.

sit on a dispute may not be enforced? No, argues the LMDC in its brochure: "…another interesting extension of the enforcement provisions is section 4 (1) (b) of LMDC Law of Lagos State which allows terms of settlement and memoranda of understanding reached by other ADR organisation to be filed at the LMDC and endorsed by the ADR judge to be consent judgment of the High Court of Lagos state." In other words, the procedure is an alternative means of enforcement where the dispute had been consensually resolved and an award based thereon only for a party to then resile.

13.1.4 The "Doors" of the LMDC

Unlike the "traditional" litigation route, the LMDC provides five possible tracks or doors to the resolution of disputes through the recognized ADR "media" of mediation, arbitration, conciliation, early neutral evaluation and hybrid processes.

Mediation at the LMDC "is a voluntary, private and informal process in which a neutral third party, the mediator, helps disputants reach a mutually accepted agreement." The mediator does not render a decision but guides the parties in reaching an agreement to be encapsulated in written terms of settlement endorsed by the ADR judge or referral judge.

The second door of arbitration is a process controlled by a single arbitrator or panel of arbitrators who hands down an award after hearing the presentation of their claims and defence by the disputants.

A third option of dispute resolution mechanism is the Early Neutral Evaluation; a preliminary neutral appraisal of the relative merits of the opposing position. Such a neutral may be a retired judge or an experienced lawyer. A report is produced thereafter which is a prediction of the likely results of litigation. This is expected to nudge the disputants further on the path of realistic resolution.

Finally, the LMDC is able to adopt and adapt these various processes as may be appropriate to each dispute.

13.1.5 Initiating ADR at the LMDC

All disputes submitted to the LMDC are individually screened and an appropriate ADR process chosen for its resolution. The initiating party files a Request Form A and files same at the LMDC with four copies of a Statement of Issues.

Thereafter, a Notice of Referral is sent to the other part (or parties) along with a Form which the other party submits to LMDC Mediation called the "Submission Form" (Form No. 2). A copy of the applicant's (initiator's) Statement of Issues is attached to the Notice of Referral, and Submission Form. The responding party is expected to return the duly completed Submission Form together with his Statement of Response within a period of 7 days.

Upon receipt of the Statement of Issues of the Claimant and the Statement of Response of the respondent, the Registrar of the LMDC proceeds to assign the matter to a Dispute Resolution Officer (DRO) who appraises the matter to determine the appropriate door of resolution.

The Dispute Resolution Officer thereafter invites the parties to a Pre-session meeting to explain the ADR process and procedure. A possible Mediator is allowed to be selected from a Panel of Neutrals who are professionals and certified arbitration practitioners. Thereafter, parties sign two other forms 4 and 5: Confirmation of Attendance and Confidentiality Agreement respectively.

Administrative fees and session fees are payable at the LMDC. Administrative fees are payable by all parties to disputes before the LMDC, be they corporate, community, professional firm, foundation or individual, without exception. It is a deposit towards logistic and administrative service session fees depending on the type of dispute and resolution process

chosen. Fees payable may be reviewed in line with the imperatives of access to justice and *probono* policy. Action can be commenced at the LMDC in any of these three ways: walk-ins, court referrals and direct interventions.

Under Article 2 (a) of the *Practice Direction on Mediation Procedure*, any party to a dispute may initiate mediation, arbitration or any other ADR processes by writing to the Director of the LMDC or by visiting the LMDC. Secondly, ADR at LMDC could be initiated by the presiding judge in a matter already in litigation or in the course of Pre-trial conference. The judge does so by a referral of the dispute to the LMDC.

The LMDC may, as third initiating procedure, through its Director and, where public interest is involved, approach the disputing parties with a view to assisting in the resolution of their dispute. Where a third party initiates arbitration at the LMDC and the other party fails to respond or submit to ADR, the ADR judge is empowered to require the attendance of the defaulting party before him to explain the reasons for their omission or neglect to respond; the ADR judge makes such orders or gives such directives as may be appropriate.

In our respectful opinion, it is doubtful whether the full implementation of this procedure may not lead to an abridgment of the constitutional protection of fair hearing in Sections 36 (6) (a) (b) and 42 of the 1999 Constitution (as amended). These sections cumulatively guarantee access to the courts in the resolution of any dispute.

13.1.6 Enforcement of LMDC Awards

Surely, the awards of non-ADR judges are equally capable of enforcement, considering the combined effect of Sections 4 (6), 16 (1) (i) and 19 (2) LMDC Law of Lagos State.

Section 4 (6) of the LMDC law provides that a settlement or other memorandum duly signed by disputing parties endorsed by either ADR judge, or any other person as may be

directed by the Chief Judge, shall become binding and enforceable under the Sheriff and Civil Process Act[340] or any other legislation in force. Section 16 (1) (i) also directs that the Chief Judge ensures "the adoption and enforcement of terms of settlement and award reached at the LMDC in the same manner as a judgment or order of the court. Under section 19 (1), awards and agreements signed by an ADR judge or any other person shall be deemed to be enforceable under the Sheriffs and Civil Process Law.[341] Subsection (2) of section 19 further provides that Arbitration awards shall be enforced as provided for in the Arbitration and Conciliation Act (ACA).[342]

While it is gratifying that arbitral awards should be enforceable, we wish to re-iterate our earlier suggestion that an independent enforcement procedure outside the regular court system should be considered. An enforcement department, duly empowered by statute and attached to the Lagos Court of Arbitration (LCA), or the LMDC, would ensure the subsistence of ADR as an independent procedure and a true "alternative" dispute resolution mechanism in Lagos State. It would also free the judgment execution system of the courts which is already overburdened.

The LMDC law is an important step in bringing arbitration to the direct attention of lawyers and within their professional turf, as it were. There is no doubt that the lawyers are a prime target for education in arbitral processes. Many lawyers have hitherto perceived arbitration as a direct challenge to their livelihood. The multi-door courthouse concept allays their fears and reassures them that arbitration is merely one "door" out of many or the resolution of all manner of disputes while litigation remains an option, several attractive for dispute-resolution are being offered to disputants and an astute lawyer is able to elect which of these varied methodologies is better suited to the dispute at hand.

[340] Cap. Section 6 LFN 2004
[341] Cap. Section 6 Vol. 7 Service Issue 3, Laws of Lagos State, 2005.
[342] Cap. A 18 LFN 2004

The involvement of an ADR non-governmental organization in Multi-Door Courthouse project implies civil society participation in justice delivery and is to be commended. The Multi-Door Courthouse idea has contributed immensely to reducing congestion of the courts, particularly in the United States and there is no reason why such a result should not accrue from the Lagos State project or any other state that adopts the system.

13.2 THE CASE PROCESS AT LMDC

The process of receiving a case and seeing the same through to resolution is broken down into four (4) stages:

I. Initiation of the case

II. Submission to ADR

III. Intake screening/Referral

IV. Fees

13.2.1 Stage 1: Initiation

At the LMDC, cases can be initiated in any of the three (3) following ways:

- By walk-ins: Any one of the disputing parties or both parties with or without their counsel may initiate mediation, arbitration or any of the other "doors" by writing to the Director of the LMDC or by simply walking to the ADR centre.
- By court referrals: The presiding judge on any case before the court before or during litigation may refer parties to the ADR centre when the circumstances of the case show potential resolution via ADR.

- By direct intervention: The LMDC may, through its director, in cases where the public interests is high or when the interest of the disputing parties require it, approach the parties with a view to assisting the east and amicable resolution of their dispute.[343]

13.2.2 Stage 2: submission to ADR

According to LMDC Practice Direction, actions are commenced upon the filing of a duly completed form (form 1) by any of the statement issues, which briefly describe the factual and legal issues in the dispute including the interest of the party. Other relevant documents of huge importance may be submitted along with the request form. After a week, the LMDC will send a Notice of Referral to the other party along with a submission form (form 2) and a memorandum to parties (form 3).

The party receiving these documents is expected to fill the submission form, thereby submitted the dispute to the LMDC. He is expected to forward the Request form 2 with four (4) copies of his statement in response to the Registrar of the LMDC within seven (7) days.[344]

13.2.3 Stage 3: Screening/Referral

Intake screening:

When the statement of issues of both parties are received, the Registrar of the LMDC allocates the file to a Dispute Resolution Officer (DRO) who shall exchange the statements with the parties and may then invite them for preliminary meeting or screening. This intake screening session is designed to first diagnose the dispute. An individual screening conference is set up in appropriate cases. This conference is confidential in nature and there is no report made on the court file or to the judge (when the case has been referred by court). The confidentiality of the ADR process is protected by statutes and this promotes frank and honest discussion of both the

[343] The Multi-Door Courthouse-Brochure, p. 7.
[344] Ibid

legal and non-legal issues of the dispute. This conference involves information exchange with a view to problem solving and resolution. The screener gathers information relevant to an understanding of the nature and dynamics of the case. If parties make a short and informal uninterrupted presentation of the legal issues of the case; the procedure they want followed; interests sought and any other details they desire. Sometimes common ground and cases for further settlement discussions are established at this time. This process enables the participants to practically access the peculiar needs of their case.[345]

The parties are introduced to the working of the multi-door courthouse and ADR in general and this review of the process and protocol of the programme helps to carry along the parties at every stage. A skillful screener helps to uncover the underlying concerns of the parties and identifies what is required to resolve the matter.

A large number of cases are straight forward, but most are complicated by concerns, hidden emotions and resentments. The common obstacles to resolution of disputes include no communication or poor discovery and underlying issues of power or control either from the clients or the counsel.[346]

13.2.4 The Referral

When the dynamics of the case and impediments to its settlement have been duly examined, the screener reviews the full range of "doors" available, discusses the scheduling procedures and then makes a recommendation. The key to maximizing the potential of the programme is to identify the needs and status of the case progressively and determine and design the best approach to removing the obstacle to amicable resolution of the dispute. When the recommendation as to what process or "door" to follow has been made, the parties may wish to

[345] Aina, K., ADR in Africa: The Prospect for the Multi-Outdoor Courthouse Concept, Unpublished Paper p. 9 Print.
[346] Ibid p. 10.

leave the ADR process and go for litigation or settle among themselves, or they may continue with one of the available options. This decision must be mutual between the parties. Then a Neutral is assigned to cases on the basis of their expertise, availability and personal suitability, according to the facts of each case. The parties are sent a confirmation notice and biographical information of the Neutral assigned.[347]

13.2.5 Stage 4: Fees

Once the statements of issues and the settlement in Response are filed, the parties are required to make a deposit of a non-refundable administrative fee with the LMDC. After screening, the parties each deposit with the LMDC such fees as may cover the cost of the mediation/arbitration sessions and all other appropriate expenses of the proceedings as may be prescribed by the scale of fees approved by the Registrar.[348]

Also, the walk-in cases and other cases are not referred by the court, the cost of using the LMDC rooms or hiring other venues will be equally shared by the parties except otherwise agreed between them. The payments for the mediation/arbitration sessions are to be paid not less than 14 days prior to the session. Whenever any portion of the deposits made by the parties is not utilized, they shall be refunded. Where a session is cancelled, cancellation fees shall be paid by the party canceling the session.

Lastly, in part-fulfillment of its desire to bring access to justice to all the LMDC provides pro-bono services to a review fees payable by any party that meets the requirements set by the pro-bono committee.[349]

[347] Ibid. P. 11.
[348] The Lagos Multi-Door Courthouse - Brochure, p. 8.
[349] Ibid. p. 13.

13.3 THE "DOORS" OF THE LMDC

The LMDC has three "doors" available to clients at present. They are: mediation, early neutral evaluation and arbitration.

13.3.1 Door One: Mediation

In this process, a neutral third party (the mediator) helps the parties in the dispute to communicate their positions on the issues of the dispute and explore possible solution or settlements.[350]

This mediation session begins with an initial joint meeting between the parties and the mediator. Here the procedures and rules concerning each party'[s opportunity to speak, order of presentation, decorum, caucuses and confidentiality are outlined. After clarification and preliminary deliberations have been made, the mediator could request to meet each party in private caucuses to explore possible options of resolving the case and determining the posture of each party as touching these options.

Once common ground is achieved, a joint session is convened. The mediator narrows down the differences between the parties and highlights the progress that has been made on both sides and presents the offers in a bid to reach an agreement. The settlement is put in writing in terms of settlement and is duly signed by the parties.[351]

13.3.2 Door Two: Early Neutral Evaluation

Early neutral evaluation offers an impartial assessment of the strengths and weaknesses of the case. This process is conducted by a retired or serving judge, seasoned lawyer of repute or an expert in a particular field.[352] The evaluator assists the parties in settlement negotiations

[350] Ibid. p.12.
[351] Ibid.
[352] The Lagos Multi-Door Courthouse – Brochure, p. 9.

and/or renders an oral advisory opinion as to the settlement value if the parties ask him to. This process is most effective in some civil cases and just like mediation, is confidential.[353]

13.3.3 Door Three: Arbitration

It is a process where a third party (the arbitrator) presides over a forum where the issues referred to him/her are presented in a near-court hearing manner where legal arguments are presented and at the end of the hearing of the case, presentations of both parties a binding and enforceable award.[354]

This session begins with a preliminary meeting with both parties in attendance. Here a number of issues will be determined which include; the anticipated length of time for the process, the mode of arbitration (by hearing or documentation) and other pertinent procedural issues. Sequel to this meeting, the pleadings of both parties, along with all necessary documents will be filed. Upon conclusion of the arbitration proceedings, an award will be given by the arbitrator in accordance to the Arbitration and Conciliation Act.[355]

13.3.4 The Question of Enforcement of ADR Agreement

Most of the cynicisms concerning ADR in Nigeria border on whether or not ADR decisions are enforceable. Many rashly conclude that ADR in Nigeria amounts to a wild-goose chase. On the contrary, ADR decisions especially those reached via the instrumentality of the multi-door courthouse are highly enforceable, indeed, as enforceable as the decision of the courts.

When parties to a dispute reach an agreement and the terms of settlement are drafted with the assistance of the mediator, the terms of settlement are forwarded to the referral judge for endorsement in the case of court referred matters while for walk – in matters, the ADR judge (the

[353] Ibid.
[354] Aina, K. Justice Reform in Africa, p. 10.
[355] Cap. A 18 LFN 2004.

chief judge of the Lagos state) endorses such agreement as an enforceable consent judgment.[356] Once filed at the court registry, it becomes an enforceable judgment of the court as good as a ruling of a judge in court following litigation.

13.4 THE FUTURE OF THE LAGOS MULTI-DOOR COURTHOUSE

From its inception on June 11, 2002, the LMDC has gained increasing support from the rank and file of the judiciary of the country and the populace in general. The great enthusiasm and acceptance being demonstrated by the bench towards the court connected ADR initiative shows the LMDC as a veritable vehicle of positive change in Nigeria.[357] The establishment of the Abuja Multi-Door Courthouse at the High Court of the Federal Capital Territory, Abuja in November 2003 transformed the court-connected ADR concept into a beautiful bride sought after by all the states of the federation. Indeed, the highly esteemed former Justice of the Nigerian Supreme Court, Honourable Justice Kayode Eso was of the profound hope that by the year 2015, every state High Court should have a court-connected ADR Centre.[358]

Although the LMDC did not begin full operations until six months later, its first matter to be resolved came in on December 15, 2002. Between 2002 and 2004, the LMDC received a total of 420 enquiries. The court referred a whopping number of 82 cases – which goes to highlight the faith and support of the Lagos High Court of the LMDC. Of these 82 cases, 17 were resolved amicably, 39 were of the time still ongoing and have been resolved one way or another. Sadly, a total of 26 cases referred did not submit to ADR and probably opted for conventional court litigation.[359]

[356] The Lagos Multi-Door Courthouse – Brochure, p. 11
[357] NCMG NEWS (A Quarterly Newsletter of the Negotiation and Conflict Management Group), First Quarter, 2007, p. 1 Print.
[358] Ibid.
[359] Aina, k.; The Multi-Door Courthouse Concept: A Review, pp 16-18 Print.

It is encouraging to note that 57 cases came into the LMDC by mere walk-ins. This also shows just how much the court-connected ADR initiative has caught on with the public and general citizenry. Of the 57 cases, 27 refused to submit, 13 were concluded and 17 were ongoing at the time of the computation of the records between the 2002 and 2004.[360] Obviously, looking back over the last five years will yield much more encouraging results.

Perhaps one of the most renowned of the case resolved at the LMDC is the 17 year land dispute involving a former Vice President of Nigeria, Chief Alex Ekwueme, which was eventually referred to the LMDC. Over the 17 years, the former Vice President will fly into Lagos to be in attendance only to have the adjourned time and time again. Upon the filing of the case of the LMDC, mediation was recommended and on the due date, the parties and their consultant got to the LMDC at 10am. By 8:30pm on the same day, the parties had signed the terms of settlement and shook hands for the first time in 17 years.[361] The strength of ADR process is shown thus to be most viable.

The need to amend the practice Direction is rife, in light of the spate of refusal to submit to ADR. After all, parties do not have the liberty to choose whether to respond to a court summon or subpoena. An element of compellability should be included in the practice direction of the LMDC so that it has the power to compel parties to come to it, if there is no consensus as to the "door" to pursue or in the process of mediation, however, the parties could subsequently be allowed to move unto the "door" or arbitration or even resort to litigation. But one must hasten to add that the element of voluntariness will be lost if parties are compelled to embrace ADR and it will also negate the constitutional rights of compelled parties.

[360] Ibid.

[361] Although ADR and the LMDC function under codes of strict confidentiality, the parties had granted their consent to the publicizing of this particular case. Courtesy, The Lagos Multi-Door Courthouse

Seminars and workshops are conducted by the LMDC and the NCMG to further educate and reorient both members of the bar and the public to the aims, purposes and processes of ADR in the revamping of the nation's judiciary. These seminars are highly effective as they remove the last strains of resistance in the minds of individuals who are wholly or partly ignorant of ADR and the multi-door courthouse concept and their benefits. Most of the resistance by some individual members of the bar has been the supposition that ADR would eventually reduce the relevance clientele and eventual income of lawyers in the country. In refuting the claims, the officers of the LMDC posit that, to the contrary, lawyers who educate themselves in ADR and train themselves to negotiate, mediate or arbitrate are those who will become more highly sought after eventually because ADR and multi-door courthouse have come to stay.

The advantages and prospects of LMDC are too numerous to exhaust. Increased access and fairness in justice has been achieved and continues to be pursued. The LMDC promises speedy and most efficient dispensation of justice in Lagos and invariably all over Nigeria and this have increased the public satisfaction of the public in Lagos State with the justice system. Relationships like those in the case involving the former Vice President salvaged and the possibility of future business relations between disputing parties are increased. One near silent advantage of this project is the fact that it increases foreign investment because the difficulty in obtaining swift and fair justice in the country has served as a major setback in terms of foreign investment. Sir Henry Brooke of the British Court of Appeal is quoted as saying, "if Nigeria is to continue to attract direct foreign investment, it has got to instill in its legal system disputes resolution processes.[362]

[362] NCMG NEWS, op. cit. p. 8

The NCMG has also initiated mediation scheme the Court of Appeal known as the Court of Appeal Mediation Programme (the CAMP).[363] Such laudable projects working their way to the top of the country's judiciary are bound to have positive impacts on the delivery of justice in Nigeria and mark her out as a champion of ADR and revolution in justice systems in Africa. In fact, the Lagos Multidoor Courthouse was recently recognized by the Centre for Effective Dispute Resolution by an award for excellence. LMDC defeated six other organizations from the United Kingdom, Russia and Kenya to win the coveted prize.[364]

The LMDC project that started as a humble dream in the hearts of a few and has the potential to reroute the future of the Nigerian judiciary and should be given the requisite support in implementing their projects all over the country.[365]

13.5 ABUJA MULTIDOOR COURTHOUSE

Abuja Multidoor Courthouse is another court connected Alternative Dispute Resolution centre established by the High Court of Federal Capital Territory. It was commissioned on the 13th day of October 2003 by the then Chief Justice of Nigeria, thus becoming the second Court Connected Alternative Dispute Resolution Centre in Africa after Lagos Multidoor Courthouse established by the High Court of Lagos State on the 4th of June, 2002.[366]

The Abuja Multidoor Courthouse is a product of the commitment of the Chief Judge of the Federal Capital Territory in pursuit of an effective administration of justice in the Federal Capital Territory. The Multidoor concept refers to the Alternative doors for the resolution of

[363] Aina, K., The Multi-Door Courthouse Concept. A Review, p. 18 Print.
[364] www.lagosmultidoor.org/index.php 16-12-11 Web.
[365] Ibid.
[366] www.fcthighcourt.gov.ng/index.php 16-12-11 Web.

dispute at the court house. Presently, the facilities available at the Doors are early neutral evaluation, mediation and arbitration.[367]

The objectives of the Abuja Multidoor Courthouse are:

(a) To provide enhanced, timely and cost effective access to justice which could reduce or eliminate citizens' frustration;

(b) To supplement the avenues for justice by making available additional doors through which disputes could be resolved;

(c) To develop the managerial judges concept to design how best settlements could be achieved among litigants and to utilize the immense resources of retired judges through services in mediation, arbitration and other ADR mechanisms.[368] However, it must be noted that the Abuja multidoor courthouse has not been backed up by any legislation by the National Assembly.

The operational procedure at the Abuja Multidoor Courthouse is similar to that of Lagos Multidoor Courthouse being operated by practice direction on mediation procedure issued by the Chief Judge of the Federal Capital Territory.[369] As at Nov 2010, the court has successfully handled 70 cases.

[367] Ibid.
[368] Ibid.
[369] The Abuja Multi-door Courthouse Mediation and Arbitration Rules 2003.

CHAPTER FOURTEEN

14.1 LAGOS STATE CITIZENS' MEDIATION CENTRE (CMC) LAW

That the Citizens' Mediation Centre is the first statutory institutionalization of Alternative Dispute Resolution (ADR) in the legal system of Nigeria outside the customary law and commercial arbitration praxis is a testimony to the open, insightful and responsive nature of the Lagos State Government to issues of access to justice by the common people. The initial (2003) version of the law[370] has now been repealed and completely replaced by the Citizens' Mediation Centre law of 28 May, 2007.[371]

The centre is a private sector initiative and ownership, kick-started statutorily and institutionally by the Lagos State Government. While the Lagos Multi-Door Courthouse (LMDC) is an initiative of a civil society organization into which the government bought and invested materially and infrastucturally, citizen mediation centre is not court connected like the LMDC and has a limited scope of operation.

14.1.1 Functions of the CMC

The CMC is a totally government inspired, initiated, sponsored and administered ADR programme aimed at resolving civil disputes at the communal level informally, speedily and cheaply.[372] Section 18 (1) of the CMC law stipulates that the CMC shall run on grants from the government and donations and endowments from local and international organizations.[373] The chief executive officer of the CMC is to be seconded from the state ministry of justice by the Attorney-General and belongs firmly in the pensionable cadre of the state civil service.

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[370] Citizens Mediation Centre Law Cap. 79 Laws of Lagos State, 2003

[371] The CMC Law came into effect on May 28, 2007.

[372] Section 2 CMC Law.

[373] Section 18 (2) (a) (b) CMC law.

The CMC has benefited immensely from the financial institutional support from the Department of International Development (DFID) of the British council under its Security Justice and Growth Programme.

It is important to stress that the fact that the major funding and institutional support come from the government, does not make the CMC a mere extension of government or its surrogates. Indeed, the CMC law emphasizes that the centre "shall be independent and impartial in the conduct of its cases."[374] Service as a mediator at a CMC should be seen as an important assignment deserving of utmost seriousness.

The target audience of the CMC is made quite plain in the statute.[375] It is aimed at dispute resolution at this grass root level. Indeed, the CMC is required by its Governing Council to be located in every local government co-ordinated from the CMC head quarters.[376] Thus, it is the people taking charge of an important area of their communal-life dispute resolution – in which they themselves are active participants. The CMC targets the disempowered group, particularly within the society. In section 15 (1) of Citizen Mediation Centre Law of Lagos State, the reference is to "women, children and disabled persons"[377]

It is no surprise that the services of the CMC are rendered freely with support given to ensure attendance and participation of disputants. The CMC has clearly adopted the cheapest and most unencumbered ADR procedure requiring no legal representation or participation but direct mediated engagement of the parties, leading ultimately to an acceptable and amicable solution.

Unlike the Lagos Court of Arbitration (LCA) and the Lagos Multi-Door Courthouse (LMDC), the CMC clearly states the nature of the disputes over which it may exercise jurisdiction – debt recovery, family disputes, rent disputes, employer and employee matters.[378]

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[374] Section 17 CMC law.
[375] Section 16 (1) and (2) CMC Law , the CMC is currently located in six centres in Lagos, Alausa, Allen Avenue, Ikeja, Ikorodu, Onikan and Yaba.
[376] Statistical Data provided by the CMC indicates that 76% of complainants are actually male, whilst only 24% are females.
[377] Ibidapo-Obe and Williams, Op. cit.
[378] Section 4 CMC Law.

Since it is not as if these disputes could not be taken to Lagos Court of Arbitration or the Lagos Multi-Door Courthouse, the key factor would be the question of monetary jurisdiction. As it stands, CMC disputes are of the monetary quantum which would normally be handled by the Magistrate Courts, whereas large claims that which normally is located within the unlimited jurisdiction of High Courts can be better accommodated at the LCA and LMDC, even as the LCA expectedly specializes in commercial disputes of an international character.

14.1.2 Organs of the CMC

The operational and supervisory organs of the CMC are The Governing Council; the separate offices of the Co-ordinating Directorate and Centre Directorates; the Secretary; and the Mediators.

The Governing Council of the CMC is the supervisory organ.[379] It consists of seven persons and at least four of whom must be legal practitioners. They are the chairman of the Governing Council, the Director of the CMC and two other legal practitioners versed in mediation and ADR. The other members of the Governing Council are two other persons knowledgeable in mediation and ADR and two representatives of appropriate non-governmental organizations. Certainly, the presence of four experienced lawyers in the Council would ensure that its processes conform to basic principles of law and legality whilst retaining its communal justice flavor.

[379] Section 4 CMC Law. The chairman of the Governing Council of the CMC, Mr. Aina Salami, noted in its Annual Report for 2008 that: "The steady geometric growth of the CMC has emphasized how far a government policy formulated to meet the relevant needs of the people can go in the face of overwhelming reception by the people who are the beneficiaries of such policy."

The members of the governing council are appointed by the Governor on the recommendation of the state Attorney-General and Commissioner for Justice. They hold office for a period of four years, renewable for a further term of four years.[380]

Generally, the Council members are expected to be persons versed in ADR concepts and practices. At least two of its members (both directors) are civil servants, whilst the remaining five persons are expected to be independent and persons of sound judgment and good character sourced from relevant non-governmental organizations and the local community.

The chairman of the Council is required to be a legal practitioner of not less than 15 years standing with considerable knowledge of ADR.[381] He is the only governing authority chairman of any of the three Lagos State ADR institutions who is required to be a legal practitioner in addition to being experienced in ADR practice.

The council is enabled in section 6 (2) of Citizen Mediation Centre Law of Lagos State to hold formal Council meetings, ad hoc meetings and meetings with local and international non-governmental organizations. It is mandatory for the Council to meet at least four times in any given year. The Chairman of the Council presides at the meeting, or in his absence any member appointed by those present. The quorum of a council meeting is four persons.[382]

14.1.3 Functions of the Governing Council

The functions of the Council are general in nature: to assess satisfactory delivery of mediation services; ensure capacity building; foster relations with local and international non-governmental organizations (NGOs); assess publicity activities of the CMC and formulate guidelines for reform.[383]The Chairman and Council members may be removed for lapse of term;

[380] Section 4(2) CMC Law.
[381] Section 6 (2) CMC Law.
[382] Section 6 CMC Law.
[383] Section 4 (6) and (7) CMC Law.

upon resignation addressed to the Governor; or upon inability to discharge the functions of his office due to mental or physical incapacity, gross misconduct or conviction over a fraudulent act.[384]

The Council may remove any of its members by simple majority votes of its members. This compares with the two-thirds majority required to remove a member of the Board of Directors of the LCA or member of the Governing council of the LMDC. The council is serviced by a secretary selected by council from within it or appointed as a staff of CMC. The latter would seem preferable.

Two key members of the Governing Council of CMC are the Director of the Directorate of the CMC and the Director of the Centre.[385] The creation of two directorates of similar nomenclature but different functions may cause some conflict: would the "Director of the Directorate for Citizens' Rights" be allowed to deal only with staff matters? Even then, this function may overlap with responsibility of the Director of the CMC to control and discipline his staff.

Incidentally, apart from the creation of the Director of the Directorate of the CMC, there is no elaboration in the CMC law of the functions or mode of appointment of the Director of the Directorate of the CMC.[386] Perhaps in the arcane world of the civil service, the functioning of this position is well known. However, to avoid any conflict or overlap, its function need to have been elaborated in the statute.

In contrast, the position of the Director is not only duly established[387] as a member of Council but Section 8 CMC Law clearly stipulates that the Director shall be appointed by the

[384] Section 8 CMC Law.
[385] Section 4 (2) (b) CMC Law.
[386] Section 4(2)(c) CMC Law.
[387] Section 8(2) CMC Law

Attorney-General and Commissioner for Justice of the State from the Ministry. The Director of the CMC is the only Chief Executive of a Lagos State ADR institution to be appointed directly by the executive arm of government. The Executive Secretary of the LCA and the Director of the LMDC are appointed directly by the Governing authorities of both institutions.

The Director of the CMC, according to Section 8(2), is also the only chief executive of the three Lagos State ADR institutions required to be a legal practitioner in addition to being a person knowledgeable in ADR practices.[388] The CMC law stipulates that a member of CMC Council shall hold office for a term of four years renewable for a further four year term; this stipulation applies to the Director of the Centre, as well as other members of the Governing Council.[389] The CMC law provides also that there shall be mediators who shall provide ADR services.[390] The mode of appointment or selection of the mediators is not stated but it is submitted that it should be within the competence of the Director of the Centre under Section 8(1) and (3) with the approval of the Governing Council to compile a Register of Mediators with appropriate input from the Local Government Councils concerning local government centres.

The Director is charged with the day to day running of the CMC[391] whilst the Governing Council is empowered to appoint from time to time "such legal and other support staff as may be required for efficient performance of the centre under the CMC law.[392] Though mediators are required to have the requisite training as ADR practitioners, they are expected to be ordinary folks discharging a civic responsibility as best as they could, applying common sense and a sense

[388] Section 4(5) CMC Law
[389] Section 10(1) CMC Law
[390] Section 8(1) CMC Law.
[391] Section 8(3) CMC Law
[392] Section 10 CMC Law. CMC Officials participated in the 2009 Special Mediation Accreditation and Certification Training Programme organized by the Institute of Chartered Mediators and Conciliators (ICMC). Some officials of the CMC also attended a Seminar on Mediation and Arbitration at the International Law Institute, Washington DC, in April 2009.

of social justice and equity. Their function is to mediate a dispute in absolute good faith and impartiality.[393] Mediation is a community-controlled dispute resolution process shorn of all legalisms and based on expedient, cost-effective and time-saving process of adjudication.

14.1.4 Mediation Procedure

Mediation at the CMC is commenced by a complaint. A complaint is a "direct" complaint by an aggrieved party at the CMC.[394] It is submitted that this could be written form or could be made orally to case officers or other appropriate staff of the CMC.

Clearly, legal representation is not envisaged by the CMC law and should be discouraged because of lawyers' penchant to formalize and complicate matters. The fact that the mediation process is expected to be free should be helpful. Indeed, the CMC law provides that the CMC is "a non-adversarial forum for mediation and settlement of disputes.[395] This may be compared with the adversarial underpinning of the arbitration process whereby the claimant files his claims, the defendant files his defence (often with professional assistance), and the arbitral panel makes a binding award. What emerges from the CMC is an amicable settlement, encapsulated in a memorandum of Understanding (MOU) or Terms of Resolution.[396]

This underscores the main distinction between the CMC on the one hand and the LCA and the LMDC on the other. The former is a "people's court" (*Agborandun or Gboromiro*) in the local language translating to "My Advocate" or "My Counsellor" whereas the latter is an "executive" ADR process, is for business professionals and middle-class persons. Consequently,

[393] Section 13(1) CMC Law.
[394] Section 2 CMC Law.
[395] Section 14 CMC Law.
[396] In terms of cases handled by the CMC in 2008, there were a total of 13,137 cases reported in all the six CMCs. 4,662 cases were fully resolved. Some 99% of the cases treated by the CMCs were walk-in complaints. Only 1% wrote formal petitions.

arbitral proceedings attract considerable fees for payment of arbitrators and the use of arbitration facilities which is not the case at the CMC where services are free.[397]

Thus, whereas settlement of disputes before the CMC is commenced informally by a complaint, the jurisdiction of the LCA and LMDC are invoked by formal Notices of Arbitration or referrals from the courts and other institutions. Referrals of cases may be made to CMC by concerned non-governmental organizations where necessary or appropriate.

The insistence on local or international certification of mediators could however negate the communal and "reasonable man" standards of justice expected to be deployed at the CMC. Many otherwise intelligent, honest and ordinary persons may not have such formal certification as mediators.

Consequently, such formal certification, while it should be encouraged, should not be an indispensable qualification to serve as a mediator, the chief skill of which is a sense of justice and equity. Instead, a standard short training and induction programme should be put in place by the CMC, at which basic required ADR skills are imparted to persons to be appointed into the pool of mediators. Above all, the greatest qualification should be integrity and good citizenship. Such an opinion is not to belittle the need for professionalism but to enhance mediation delivery. However, such certified professionals should see the CMC as an avenue to render their services *probono publico* as their contribution to grass roots justice delivery.

Accredited or certified mediators could also be used as training cadre to pass down their skills by practical mediation and educational programmes mounted on the platform of the CMC and tailored to its needs and programmes.

The matter of funding the CMC is critical to its success. Unlike the LCA and LMDC, the CMC does not render professional or institutional services for which it charges fees nor does it

[397] Section 10(3) CMC Law.

charge for the use of its facilities. Consequently, the CMC relies, largely on state government subvention or grants. This position is laudable and should continue. International and local NGO liaison is also critical if the CMC is to access international funds and endowment with communal justice focus.

The heavy patronage of the CMCs in operation in Lagos State demonstrates that the yawning gap in justice delivery at the grass roots level is being filled. Conceptually, the CMC Law represents a giant leap in operationalising ADR at the grassroots. However, more needs to be done to expand its coverage so that all local government areas in the state have at least one CMC to cater for dispute resolution needs of the masses.

The subject areas of CMC operation have carefully chosen to cover possible areas of dispute, but the statistics of the CMC for 2008 show that the emphasis should be on the most common dispute areas of tenant and landlord which constitute 90% of disputes brought to the CMC. Family disputes constitute only 3%, inheritance dispute 2% and juvenile matters 1%. The implication of this statistics is that family matters may not be suited for resolution at the CMCs. In all, the centre has mediated in 15,939 cases, out of which 7,141 have been resolved.[398]

This is not surprising because of the existing customary law mechanisms for resolving such disputes by family heads, quarter heads or the Oba-in-Council. These traditional agencies are guided by customary law precepts in the resolution of such disputes and their jurisdiction and authority in this regard should be maintained.

With respect, it is in our view inappropriate to now attempt to mount training programmes in dispute resolution methods for these traditional rulers/authorities as the CMC recently did in March 2010. The operational paradigms are quite different from those of

[398] The Attorney General of Lagos State, Mr. Ade Ipaye, gave this statistics in *The National Mirror* of 12th April 2012, p.8 Print.

traditional dispute resolution. As we have said earlier, traditional resolution is based on customary law whereas urban dispute resolution is governed, albeit loosely, by relevant statutes such as landlord and tenant laws. They are two different streams which should not be allowed to mix, like Equity and the law that flow in the same channel but do not mix.

14.2 KWARA STATE CITIZENS' MEDIATION AND CONCILIATION CENTRE

The Citizens' Mediation and Conciliation Centre of Kwara State was established sequel to the enactment of Kwara State Citizens' Mediation and Conciliation Centre Law of 2008. Section 1 of the Law established the Centre while Section 2 of the Law incorporates the Centre. Section 3 clearly slated that the Centre shall serve as a Mediation, Conciliation and Settlement of disputes between parties who voluntarily agree to the Mediation and Conciliation of their disputes by mediators.

The law provided that the centre shall have power and function to settle disputes by way of mediation and conciliation voluntarily submitted to its jurisdiction arising from civil matters including landlord and tenant matters, employer and employee matters, domestic and family matter, debt related matter, industrial accidents or accidents at work, domestic accident, fatal accident, breach of agreements and contracts, compensation, human rights protection and any other civil matter brought before the centre and which in the opinion of the Director of such nature that can lawfully be resolved by way of compromise that is, mediation and or conciliation and that which the council may approve from time to time.[399]

The Centre is also to assist disputing parties to appear before the centre for the settlement of their disputes; encourage and facilitate the submission of disputes arising from civil matters to the jurisdiction of the Centre,[400] ensure the settlement of disputes within the shortest time

[399] Section 4(a) of Citizens' Mediation and Conciliation Centre law of Kwara State 2008
[400] Section 4(b)

possible, provide mediation and conciliation facilities and or services to interested parties, persons, institutions, associations and organizations who voluntarily submit their disputes to the jurisdiction of the centre, publicize its services and facilities, provide free dispute resolution option, encourage parties to register terms of settlement before the court to enable enforcement and do such other things as may be related to its functions.[401]

It is crystal clear from the provisions of this law that the Citizens' Mediation and Conciliation Centre of Kwara State has a limited jurisdiction to mediate on and conciliate but cannot arbitrate. It can only mediate or conciliate on any dispute submitted to it voluntarily by the disputing parties and that the centre is not court house like that of Lagos and Abuja. The centre is also aimed at mediating and conciliating disputes arising between members or among indigent residents of Kwara State.[402] The cause of action must have occurred in the state.[403] The centre is fully funded by the government of Kwara State although there is provision for grants and aids or gifts from individual, institutions and organizations to the centre.[404] The Centre is to provide free services to the disputing parties.[405]

The law creates a Governing Council[406] and a directorate charged with the day to day management of the centre.[407] The executive secretary of the centre is to be appointed by the Governing Council.[408] The duty of the Governing Council is to monitor the performance of the

[401] Section 4 (c – i) of Citizens' Mediation and Conciliation Centre law of Kwara State 2008

[402] Section 23(1) of Citizens' Mediation and Conciliation Centre law of Kwara State 2008
[403] Section 23(2) of Citizens' Mediation and Conciliation Centre law of Kwara State 2008
[404] Sections 25 and 26 of Citizens' Mediation and Conciliation Centre law of Kwara State 2008
[405] Section 4(g) of Citizens' Mediation and Conciliation Centre law of Kwara State 2008
[406] Section 5 of Citizens' Mediation and Conciliation Centre law of Kwara State 2008
[407] Section 13 of Citizens' Mediation and Conciliation Centre law of Kwara State 2008
[408] Section 15 of Citizens' Mediation and Conciliation Centre law of Kwara State 2008

centre, develop a capacity building policy for mediators, foster relationship between the centre and private or other Government establishments etc.[409]

The Director of the Centre shall be a legal practitioner of not less than 10 years at the bar and who has relevant training in Alternative Dispute Resolution. He shall be appointed by the Governor on the recommendation of the Attorney General and shall be the Chief Accounting Officer of the Centre.[410]

The law also provides that there shall be mediators who shall provide mediation and conciliation services at the Centre.[411] The Mediator shall assist the parties to resolve their disputes, be an impartial facilitator who is acceptable to all parties, protect the integrity of the proceedings, elicit good faith from the participants, give direction to the mediation and settlement process, remain neutral and impartial at all times, empower the parties to make their own decisions.[412] The mediator shall be a person trained by a local or international mediation institution or body.[413]

A mediation or conciliation process shall be initiated by way of a complaint at the centre[414] or by referral. This could be oral or in writing. All parties must be present before mediation commences.[415] The mediator has power to issue letters of invitation to all relevant parties[416] and mediation and conciliation commences when all parties attend and voluntarily submit to the process.[417] The Centre may prepare a Memorandum of Understanding between the

[409] Section 11 of Citizens' Mediation and Conciliation Centre law of Kwara State 2008
[410] Section 13 of Citizens' Mediation and Conciliation Centre law of Kwara State 2008
[411] Section 19(1) of Citizens' Mediation and Conciliation Centre law of Kwara State 2008
[412] Section 19(2) of Citizens' Mediation and Conciliation Centre law of Kwara State 2008
[413] Section 19(5) of Citizens' Mediation and Conciliation Centre law of Kwara State 2008
[414] Section 21 of Citizens' Mediation and Conciliation Centre law of Kwara State 2008
[415] Section 20(2) of Citizens' Mediation and Conciliation Centre law of Kwara State 2008
[416] Section 21(2) of Citizens' Mediation and Conciliation Centre law of Kwara State 2008
[417] Section 21(3) of Citizens' Mediation and Conciliation Centre law of Kwara State 2008

disputing parties to represent the settlement of dispute and it must be signed by all the parties to the dispute.[418]

The memorandum shall represent full and final settlement of the dispute between the parties and its terms shall be enforceable in a court of law against parties to the dispute and their personal representatives in case of death of either party.[419]

The memorandum shall be binding upon the endorsement by a magistrate or judge appointed by the Chief Judge of the State and shall be enforceable in court of law.[420] Any memorandum of understanding may by leave of a judge be enforced in the same manner as a judgment or order of court and shall have the same effect.[421]

There may be established such members of branches of the Centre in the Local Government Areas of the State as the Council may direct from time to time. All branches established shall be coordinated by the Centre.[422]

The law also empowers the Centre to borrow money to prosecute its functions and the Centre must ensure it pays all the monies borrowed.[423]

The Governing Council is expected to submit annual reports of the activities of the Centre to the Governor through the Attorney General. This report must contain the audited account of the Centre and an estimate of the expenditure and income of the Centre for the succeeding year.[424]

The Kwara State Citizens' Mediation and Conciliation Centre law is the second in Nigeria modeled after that of Lagos State with some modifications. Whereas that of Lagos is

[418] Section 22(1) of Citizens' Mediation and Conciliation Centre law of Kwara State 2008
[419] Section 22(2) of Citizens' Mediation and Conciliation Centre law of Kwara State 2008
[420] Section 22(2)d of Citizens' Mediation and Conciliation Centre law of Kwara State 2008
[421] Section 22(3) of Citizens' Mediation and Conciliation Centre law of Kwara State 2008
[422] Section 35
[423] Section 34
[424] Section 33

charging minimal fees for its operation, that of Kwara is established to provide free services for indigent residents of Kwara State. The mandate of the Centre also includes protection of human rights. Whereas the Lagos Citizens' Mediation Centre Law limits the jurisdiction of the Centre to the jurisdiction of magistrates in the State. There is no such limitation in Kwara State Citizens' Mediation and Conciliation Centre Law. However, since the targeted patrons of the Centre are the indigent residents of Kwara, the disputes before the Centre may not involve huge amount beyond the jurisdiction of District Courts in Kwara State and where it does, the Centre still has jurisdiction to handle the disputes.

14.3 ADR ACROSS THE STATES IN NIGERIA

Since the introduction of ADR into the Nigerian Legal System in Modern form in 2002, the growth and development of ADR has been so slow that only few states have embraced it. These states are Lagos, Kwara, Kaduna, Abia, Kano, Enugu and Abuja, the Federal Capital Territory representing less than 10% of 36 states. It is also worthy of note that of all these states only Lagos and Kwara have enacted enabling law and created the institutional framework while the other four states are still in the embryonic stage or still driven by private sector initiative like the Eastern Mediation Centre, Enugu which is a product of collaboration among Chambers of Commerce and Industry, Nigerian Bar Association Enugu Chapter and International Federation of Women Lawyers Enugu Chapter while the Abuja Multidoor Courthouse is also a product of collaboration among the Negotiation and Conflict Management Group, High Court of Federal Capital Territory and Nigerian Bar Association, Abuja Chapter. This trend is not good enough for the much clamoured Foreign Direct Investment in Nigeria.[425] Prospective foreign investors want to be sure of legal and institutional framework on ground for their business interest to

[425] Agbonika A.A., Investment Arbitration: Nigerian Dimension; *Confluence Journal of Private and Property Law*, Vol.3 part.2 2010 p.48 Print.

prosper and flourish.[426] They also want to be sure of the reliability and efficiency of the justice delivery system in Nigeria including Alternative Dispute Resolution mechanism that meets global best practices.[427]

[426] Obiozor, C.A., Foreign Investment Arbitration in Nigeria; An Inceptive to Economic Development *ABU J.P.IL*., Vol.1 No.2, 2008 p.107 Print.

[427] Idehen, Stella, Dispute Settlement Mechanisms of the World Trade Organization: impact and challenges on developing members. *Bi-Annual Journal of Public Law*, Vol.3 No.2, 2010, p.1 Print.