

## CHALLENGES OF ALTERNATIVE DISPUTE RESOLUTION IN NIGERIA\*

### Abstract

*Alternate Dispute Resolution methods are gradually gaining strong footings in the resolution of disputes arising from corporate contracts within the Nigerian corporate space. While drafting commercial transactions, parties are at liberty to decide whether to include an arbitration clause to suffice as the first method to resort to in the event of a dispute in the course of executing such a contract. This inclination to resort to arbitration to resolve disputes within the Nigerian corporate space has kept litigation at bay in several incidents. The Alternate Dispute Resolution methods are still laced with peculiar features, which call for appropriate comprehension. In this monograph, we are going to look at the challenges facing Alternative Dispute Resolution in Nigeria.*

**Keywords:** Alternative Dispute Resolution, Advantages, Disadvantages, Challenges, Nigeria

### 1. Introduction

Alternative Dispute Resolution (ADR) as the name connotes, is an alternate means of resolving disputes as opposed to the traditional routine of going to Court for the sole purpose of settling disputes. Disputes are inevitable in every relationship; they may be civil, commercial or domestic in nature. In a bid to settle this conflict, the affected parties usually go to court in order to seek redress or to have the issue(s) resolved. These matters could be heard for about two years or more as a result of the complexity of judicial proceedings, copious number of cases to be heard by a single Judge or Magistrate and the financial burden borne by the parties in trying to obtain justice. Alternate Dispute Resolution methods are gradually gaining strong footings in the resolution of disputes arising from corporate contracts within the Nigerian corporate space. In this monograph, we are going to look at the challenges facing Alternative Dispute Resolution in Nigeria

### 2. What is Alternative Dispute Resolution?

For the apparent inconvenience, a need to consider alternative methods of settling dispute arose. According to Dr. Orojo;<sup>1</sup> the term ‘Alternative Dispute Resolution’ is used generally to describe the method and procedures used in resolving disputes either as alternatives to traditional dispute resolution mechanism of the court or some cases supplementary to such mechanism.’ The uniqueness of *arbitration* is the enhancement of relationship between conflicting parties. In *Halsey v Milton Keynes General NHS Trust*,<sup>2</sup> Justice Dyson defined ADR as ‘a collective description of methods of resolving dispute otherwise than the

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<sup>1</sup>Orojo and M. A. Ajomo, *Law and Practice of Arbitration and Conciliation in Nigeria*, (Nigeria: Mbeyi & Associate **1999**) p. 4.

<sup>2</sup> *Halsey v Milton* London, WC2A 2LL.

normal trial process.’ The above are just few definitions of ADR, which portends that a common theme appears to be that ADR is a method or procedure used to resolve disputes. Therefore, Alternative Dispute Resolution (ADR) refers to the different ways people can resolve disputes without a trial. Common ADR processes include Mediation, Arbitration, Conciliation and Negotiation. These processes are generally confidential, less formal, and less stressful than traditional court proceedings. ADR often saves money and speeds settlement. In mediation, parties play an important role in resolving their own disputes. This often results in creative solutions, longer-lasting outcomes, greater satisfaction, and improved relationships.

The importance of ADR is now pivotal to the Nigerian Legal System.<sup>3</sup> Section 19(d),<sup>4</sup> provides for the settlement of disputes by Arbitration, Mediation, Conciliation, Negotiation and Adjudication. Order 19<sup>5</sup> provides for supportive court interventions in arbitral proceedings. High Court Civil Procedure Rules of various States also provide for reference of cases to ADR, for example, Order 19 and 28<sup>6</sup> and Rule 15 (3)(d)<sup>7</sup> mandates Lawyers to attempt an alternative dispute resolution before bringing any matter before the Court for hearing.

Alternative Dispute Resolution is the collective name given to the several methods of dealing with disputes without going to court. The methods used in ADR are negotiation, mediation, conciliation, arbitration, early neutral evaluation, facilitation, mini trials expert appraisal, summary jury trials, mediation-arbitration.

It is expedient to state here that negotiation, mediation, conciliation, neutral evaluation amongst all others, is the non-binding ADR. The effect of a non-binding ADR is that the decisions reached are mainly consensual and the parties can decide not to be bound by them. On the other hand, Arbitration as an ADR mechanism is a binding ADR. In other words, the parties are bound by the decision reached by the Arbitrator.

### **3. Historical Development of ADR**

Alternative Dispute Resolution, as it is known now, originated in England as early as 1066. English citizens held their own informal court to solve private disputes. Often, these informal meetings were led by respected male members of the community. Traditional arbitration involved heads of trade guilds or other dominant authorities settling disputes. The modern innovation was to have commercial vendors of

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<sup>3</sup> 1999 Constitution of the Federal Republic of Nigeria (as amended)

<sup>4</sup> *Ibid.*

<sup>5</sup> Federal High Court (Civil procedure) Rules of Nigeria

<sup>6</sup> High Court of the Federal Capital Territory and Lagos State Civil Procedure Rules, respectively.

<sup>7</sup> Rules of Professional Conduct for Legal Practitioners

arbitrators, often ones with little or no social or political dominance over the parties. The advantage was that such persons are much more readily available. The disadvantage is that it does not involve the community of the parties. When Wool contract arbitration was conducted by Senior Guild Officials, the arbitrator combined a seasoned expert on the subject matter with a socially dominant individual whose patronage, goodwill and opinion were important.

#### **4. Mechanisms of Alternative Dispute Resolution**

Below are brief explanations of some of the mechanisms of ADR:

##### **Negotiation**

Negotiation is an informal bargaining process in which parties in dispute communicate directly to reach an agreement. It involves an interaction between two or more parties; either directly or through their representatives, where the issues surrounding the conflict are deliberated upon, for the purpose of solving the problem and or reaching a joint decision. This process requires thorough preparation, careful listening and an exquisite sense of timing on the part of the negotiator. Negotiation is one of the most common ADR mechanisms used in managing disputes and to reach a consensus under a friendly atmosphere.

##### **Mediation**

Mediation is said to be a facilitated negotiation involving the assistance of a neutral third party whose basic function is to engineer civility, facilitate candid discussions, and help the parties to reach consensual solutions. Its popularity is hinged on the premise that it promotes a win-win scenario where successful settlement leaves each party feeling like a winner. The mediator must be neutral and should ensure that the needs of both parties are met. The mediator is to guide the process as well as help both parties identify and concentrate on their major interests.

##### **Conciliation**

Conciliation is a method of settling disputes by consensus rather than by adjudication. It is the process whereby parties, through a third party identify the disputed issues, formulate options, explore alternatives and then try to reach an agreement. A Conciliator only plays an advisory role in formulating a framework for resolution of the dispute. Hence, the distinguishing factor between Conciliation and Mediation is the degree of intervention and influence of the third party in settling the dispute. The Conciliator goes a step further by drawing up and proposing the terms of an agreement, which in his wisdom, represents a fair settlement after hearing both sides while exploring the opportunity for settlement and helping them reach an agreed settlement.

## **Arbitration**

Arbitration is a simplified process of trial without the technicalities of courtroom litigation; where the parties agree to appoint their own third party neutral known as the Arbitrator. The Arbitrator reaches a decision based on the Law, which will be binding on the parties. The decision reached is referred to as an Award. The case of *MISR Nig Ltd v. Oyedele* defines arbitration as the reference of a dispute between two or more parties for determination after hearing both sides in a judicial manner by a person other than a court of competent jurisdiction. Arbitration is governed by the Arbitration and Mediation Act, 2023.<sup>8</sup> This Act is based on the UNCITRAL Model Law and incorporates the UNCITRAL Arbitration Rules. Also, the Act ratifies and incorporates the New York Convention Rules of 1976, and the Convention on Recognition and Enforcement of Foreign Arbitral Awards of 1958<sup>9</sup> on the recognition and enforcement of Foreign Arbitral Awards. It is an upgrade of the repealed Arbitration and Conciliation Act of 2004.

## **Neutral Evaluation**

A neutral person with subject-matter expertise hears abbreviated arguments, reviews the strengths and weaknesses of each side's case, and offers an evaluation of likely court outcomes in an effort to promote settlement. The neutral evaluator may also provide case planning guidance and settlement assistance with the parties' consent.

## **5. Advantages of Alternative Dispute Resolution**

### **Confidentiality**

All documents disclosed in an ADR process for the purpose of settlement are confidential and cannot be released to any third party without the consent of the parties or by an order of the court. However, in the process of arbitration, for example, confidentiality does have its limits in that it is not always possible to ensure that witnesses maintain confidentiality unless they are required to sign a confidentiality agreement. The ADR procedure also ensures privacy, only the parties involved and their representatives are present at the meeting. ADR helps preserve the privacy of the parties. In litigation, the process must be held in public except under certain conditions thus in private.

### **Cost-effectiveness**

Settling disputes through any of the ADR mechanism is affordable. One of the reasons for this is that parties will agree with their appointed third party on the scope, duration and scheduling of the whole process.

### **Quick Dispensation of Justice**

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<sup>8</sup> The Act.

<sup>9</sup> The New York Convention.

The ADR tribunal is faster than the court in reaching its decision. This is based on the fact that there is no issue of technicalities, the neutral party is available most times and some laws provide a time frame within which a matter should be heard. An example is the Rules of the Regional Centre Lagos. It prescribes a maximum of six months within which to conclude any arbitral proceedings.

### **Flexibility**

The ADR mechanisms are flexible as a result of its informality and simplicity. The parties are opportune to agree to their own procedure hereby reducing costs and delays. Its flexibility allows for the arbitral tribunal to conduct the arbitral proceedings in a manner it deems fair where no rules exist to cover a particular situation.

### **Preservation of existing relationship**

Alternative Dispute Resolution helps to preserve the relationship that was existence between the parties before the dispute arose. It is advisable to make use of any ADR option where the parties have business or personal relations they intend to preserve. The atmosphere is friendly and congenial; the parties can go with their relationship unimpaired as it is not entirely a win-lose situation.

### **Parties' control of process**

The parties to the dispute can determine the Coram. This implies that they determine the mediator or arbitrator or conciliator who will preside over their case.

### **Practical solutions**

The courtroom where litigation is carried out is usually tense. For the lawyers, it is difficult, there are a lot of rules and procedures which must be followed, and also for the layman, and it is extremely difficult. An ADR session is more of a business meeting where coffee can even be served. Hence, the layman is likely to prefer such an environment.

### **Risk management**

It is less risky as it can be a win-win situation for both parties or it may have a preferable outcome, but where they fail to agree, there are provisions of the law for such appointments to be done either by the court or an agency.

However, ADR is less suitable than litigation when there is a need for precedent, a need for court orders, a need for interim orders, a need for evidential rules, a need for enforcement, power imbalance between parties, complexity in the case, the need for live evidence or analysis of complex evidence, the need for expert evidence.

## **6. Challenges of Alternative Dispute Resolution in Nigeria**

In spite of the above advantages of adopting any of the mechanisms of ADR, the process is not without its challenges. Below are the major challenges hindering the growth of Alternative Dispute Resolution in Nigeria. They are:

### **Negative Perception and Attitude of Lawyers or Parties' Representatives**

A major challenge are Lawyers who see Litigation as a means of generating surplus income. They discourage settlement out of court simply because it is not exactly financially beneficial to them. A matter being transferred to the Court will result in the Lawyer obtaining appearance fees, filing fees and other billable services. Hence, we find that clients are wrongly advised by their Lawyers or representatives to resist compromises during ADR proceedings so as to have the matter transferred to the Court for another hearing.

### **Lack of Awareness on the Subject**

ADR has not assumed a significant status in our legal culture as seen in USA or England. This is due to the fact that the benefits derivable from ADR and its successes so far has not been made known to all. This issue will always be a clog to the success of ADR in Nigeria.

### **Non-binding Nature of ADR**

The non-binding nature of ADR such as mediation, negotiation and conciliation sometimes render the proceedings pointless as the parties can still resort to the court to reach a binding decision on their behalf. Because of this, most ADR processes are not result-oriented as parties and lawyers may get into it half-heartedly.

### **Observation**

However, regardless of the challenges mentioned above, the use of ADR is still experiencing growth in Nigeria as evidenced by the provisions of the aforementioned statutes and the establishment of the Lagos Multi-Door Court House.<sup>10</sup> This court house was created for the purpose of settling disputes by ADR. Today, most commercial disputes are resolved through ADR, thereby decongesting the court of a number of cases.

## **7. Conclusion**

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<sup>10</sup> Lagos Multi-door courthouse Established June 11<sup>th</sup> 2002

In conclusion, it is said that the Law is dynamic. As the society evolves, there is always a need for the Law to catch up with its pace. Alternative Dispute Resolution is a process, viewed as a way of improving access to justice for members of the public through its flexible, less expensive and speedy proceedings as opposed to the lengthy and time-consuming court trial. It is only rational that this means of resolving dispute is fully embraced. However, one of the major disadvantages of such process is the situation by which a losing party in the process will institute a court action or file an application in court seeking to set aside the award on grounds of misconduct of arbitrator or an award has been improperly procured or an award contains decisions on matters not submitted to the arbitrator. However, such application must be filed in court within 3 months after the arbitral award has been delivered. The time limit provided by law seems to hinder some of the good work these Alternative Dispute Resolution were brought in to relieve. Applications should be brought similarly to the appeals provided by law for courts of competent jurisdiction.