

ALTERNATIVE DISPUTE RESOLUTION PRACTICE IN NIGERIA AND THE EFFECT OF COVID-19 PANDEMIC*

Abstract

The current pandemic has impacted almost all facets of human existence to the extent that even time itself has been split into pre and post Covid-19 periods. We now remember nostalgically how things were done prior to the pandemic; strive to cope with the new realities occasioned by the outbreak; and imagine how things will be in the post Covid-19 world. The Dispute Resolution space is one of those areas of our existence that has been impacted by the pandemic. Our justice system was out to a complete halt and as a result, pending cases went from bad to worse. This paper therefore examined the impact of the lockdown on our justice system and how mediation experts used technology to enhance our traditional Alternative Dispute Resolution (ADR) mechanisms in a bid to bridge the gap. The study found that despite the impact of the pandemic, mediation practitioners and institutions including national courts have devised creative ways of continuing dispute resolution proceedings through the instrumentality of Online Dispute Resolution (ODR). The study strongly recommended that the Arbitration and Conciliation Act be amended to give room for the regulation of ODR.

Keywords: Alternative Dispute Resolution, Covid-19 Pandemic, Online Dispute Resolution, Lockdown

1. Introduction

The COVID-19 pandemic in Nigeria is part of the worldwide pandemic of coronavirus disease 2019 (COVID-19) caused by severe acute respiratory syndrome coronavirus 2 (SARS-CoV-2). It started sometime in December, 2019; and the Wuhan seafood market in Eastern China initially was identified as the source.¹ The first confirmed case in Nigeria was announced on 27 February 2020, when an Italian citizen who works in Nigeria had returned on 25 February from Milan, Italy through the Murtala Muhammed International Airport, fell ill on 26 February and tested positive for the virus.² The case was treated successfully by the Nigeria Centre for Disease Control (NCDC) who proceeded to discharge the patient after declaring that he had tested negative after treatment.³ The Lagos State Government declared that a total lockdown would commence on the 26th of March 2020 and the Federal Government followed suit on 30th March 2020 declaring a total lockdown in Lagos, Abuja and Ogun State. Nigerians began to stock food, water, medication and organizations began to put in measures in a bid to effectively carry on their businesses remotely. However, there has been an increase in confirmed cases and consequent mortality. As at 14th May 2021, the NCDC reported a total number of 165,702 cases, 7,224 active cases, 156,412 discharged cases and 2,066 deaths so far.⁴ Ever since, our way of life as we knew it had changed. For over a year now we've really been missing those magical interactions that make the justice system and management so unique, and such an exciting industry to work in. Physical interactions which we needed to carry out our dispute resolution obligations have been limited/restricted; thus, social distancing has become the new norm and thus putting a clog in the wheels of our justice system. His Lordship, Honourable Dr. Justice I.T. Muhammad, CFR, the Honourable Chief Justice of Nigeria (CJN) and Chairman of the National Judicial Council issued Circular Ref No: NJC/CIR/HOC/II/629 dated 20th March 2020. This was the first official response of the Nigerian judiciary to the COVID 19 pandemic. In this Circular addressed to all relevant stakeholders and

* **By Chinemelum Nelson ARINZE-UMOBI, PhD**, Lecturer, Department of Public and Private Law, Faculty of Law, Nnamdi Azikiwe University, Awka, Anambra State, Nigeria. Tel: +2348060913355. Email: cn.arinze-umobi@unizik.edu.ng nelsonzelo@gmail.com

***Ifeyanyi Tagboo OKONKWO**, Legal Officer, Registry Unit, Nnamdi Azikiwe University, Awka, Anambra State, Nigeria. Tel: +2348032399756. Email: cn.ti.okonkwo@unizik.edu.ng

¹Wikipedia, 'Covid-19 pandemic in Nigeria' available at https://en.wikipedia.org/wiki/COVID-19_pandemic_in_Nigeria, accessed on 14th May 2021.

²NCDC, 'FIRST CASE OF CORONA VIRUS DISEASE CONFIRMED IN NIGERIA', available at <https://ncdc.gov.ng/news/227/first-case-of-corona-virus-disease-confirmed-in-nigeria>, accessed on 14th May 2021.

³Ifeoma Adediran, 'Coronavirus: Two foreigners in Nigeria test negative', *Premium Times March 3, 2020*, available online at <https://www.premiumtimesng.com/regional/ssouth-west/379976-coronavirus-two-foreigners-in-nigeria-test-negative.html>, accessed on 14th May 2021.

⁴ Report is available at <https://covid19.ncdc.gov.ng/report/>, accessed on 14th May 2021.

constituents⁵, the CJN directed that the public officers abide by the precautions advised by the National Centre for Disease Control (NCDC) and Federal Health Authorities and ensure their management and staff do the same.⁶

Subsequently, vide Circular Ref No: NJC/CIR/HOC/II/631 dated 23rd March 2020 and addressed to all Heads of Court and Federal and State Judiciaries, the CJN suspended all court sittings for an initial period of 2 weeks, effective 24th March 2020, except in matters that are urgent, essential or time bound according to extant laws.⁷ Invariably, with the lack of clarity in interpretation of this directive and urgent health concerns, those judges who sat mostly focused only on fundamental rights cases or criminal cases involving the liberty of a person. Admiralty matters involving the arrest of vessels were also considered urgent in the Federal High Courts.⁸ On the expiration of the initial 2week suspension period, the CJN issued Circular Ref No: NJC/CIR/HOC/II/656 dated 8th April 2020 again addressed to all Heads of Court and Federal and State Judiciaries and extended the suspension of court sittings till further notice, to the exception of matters that are urgent, essential or timebound according to extant laws.⁹

2. The Effect of the Lockdown Directives on Dispute Resolution

It is not in doubt that these directives are well-intentioned and in the overriding interest of public health. However, it would seem that that these directives did not just achieve lockdown but also led to complete halting of justice delivery. In mirroring Federal and State executive lockdown measures, rather than being more introspective, the directives issued failed to recognize justice delivery as an essential service to all Nigerians and to bring in same to the attention of the executive authorities. However, upon further deliberations, the Nigerian judiciary took steps to ensure justice delivery in the wake of the lockdown of the courts. The Chief Justice of Nigeria constituted a committee in order to ensure that courts continue to work in the era of social distancing. The committee, headed by Supreme Court Justice Bode Rhodes-Vivour, (CFR), issued remote court seating guidelines that have been approved by the Chief Justice, making remote hearings part of the Nigerian judicial system.¹⁰ The first remote court proceeding in Nigeria was conducted in the Lagos High Court when judgment was delivered virtually for the first time in Nigeria pursuant to the Lagos State Judiciary Remote Hearing of Cases COVID-19 Pandemic Practice Directions.¹¹ Though a welcomed innovative measure, it was not sufficient as litigation was not the only affected form of dispute resolution. Currently, the High Court Civil Procedure Rules of some Nigerian states for example Lagos State and Oyo State, now has specific legislation enjoining High Court judges to encourage parties to use ADR and the ‘multi-door courthouse’ schemes in settlement of disputes. Lawyers are also required to make the availability of ADR and the multi-door courthouse known to clients.¹² These events resulted in the promotion of ADR squarely into the forefront as the primary method of conflict/dispute resolution processes and Lawyers/Mediation experts quickly transitioned to resolving disputes via online platforms such as Zoom, Google Meet etc.

3. How has COVID-19 Impacted the Litigation & Dispute Resolution?

Courts across the globe have rapidly adapted to COVID-19 protocols. They have found new ways to hear cases before them. As restrictions are relaxed in Nigeria, litigants are now faced with a significantly altered dispute resolution landscape. In order to decongest the courts and maintain social distancing, access to courtrooms in most States of the Federation is restricted to one counsel per litigant. The counsels must maintain social distancing in their sitting arrangement. Many courts now conduct virtual hearings, in which the Judge and some parties are present in the courtroom while others attend virtually.

⁵The Secretary of National Judicial Council, the Administrator of the National Judicial Institute, the Secretary of the Federal Judicial Service Commission and the Secretary of the Body of Benchers.

⁶ Adedoyin Rhodes-Vivour, Conflict Resolution in the Time of COVID-19--Voices from Seven Continents of the World: Africa, available online at <https://www.mediate.com/articles/rhodes-7voices-africa.cfm>, accessed on 14th May 2021.

⁷ *Ibid.*

⁸ *Ibid.*

⁹ *Ibid.*

¹⁰ *Ibid.*

¹¹ *Ibid.*

¹²Sofunde Osakwe Ogundipe & Belgore, “Dispute Resolution in Nigeria”, online article available at <https://www.lexology.com/library/detail.aspx?g=3616a8a7-bcf5-44e4-9710-219059d34605>, accessed on 6th November 2020.

The courts provide parties, the public and the media with login details for virtual hearings.¹³ This is a drastic change from the requirement that parties and counsels must be physically present at court proceedings. Electronic processes have been widely adopted and used as a means of filing and serving processes of court. Before now only the National Industrial Act and its rules make provision for this technology. However, the High Courts of some states started test running electronic filing system in their jurisdiction, but the COVID-19 restriction has sped up the process. Electronic filing and service is now an integral part of the justice delivery system in many jurisdictions in Nigeria. There has been an increased awareness in settling commercial disputes amicably. Financial pressure caused by the pandemic has made many litigants to be more willing to settle disputes to avoid long and expensive court proceedings. Settlements are currently being achieved through virtual meetings, mediation and informal discussions between counsels and the litigants. Nevertheless, in spite of the increased use of technology in court proceedings, in many jurisdictions, courts are yet to embrace this innovation. This has increased the backlog of cases in those jurisdictions and made litigants to believe more in ADR mechanisms, especially, mediation and arbitration to promptly resolve their disputes.

4. ODR as a way to go for ADR Practice in Nigeria

Alternative Dispute Resolution (ADR) is simply a process of initiating alternative methods and procedures of resolving a civil or commercial dispute without resorting to litigation. The following are the main methods of alternative dispute resolution methods available for settling disputes in Nigeria:- Negotiation, Mediation, Conciliation and Arbitration. In recent times, both legal practitioners and judicial officers have come to appreciate the role which ADR (with particular reference to Mediation) play in the dispute resolution process. Mediation offers both parties the opportunity to resolve their conflict in a non-adversarial way so as to maintain their relationship in future. The year 2020 was undoubtedly a challenging year for many businesses and individuals. The pandemic made parties to a dispute more interested in employing ADR mechanisms to resolve their disputes.¹⁴ Mediation involves the appointment of a neutral middleman to facilitate a discussion between the parties and their legal representatives. It offers parties the chance to put their respective positions privately to each other in a confidential and conciliatory manner away from the public, so that the mediator can try to settle the dispute. Often, the mediator has a more specialist background befitting of the technical dispute than a Judge at conventional courts.¹⁵ In the wake of the lockdown measures put in place due to the Covid-19 pandemic, mediators resorted to Online Dispute Resolution (ODR) in a bid to bridge the gap. Virtual mediation will become the mainstay of resolving disputes even when things return to normal. This is because virtual mediations have led to improved efficiencies and prevents parties from needing to travel long hours to attend proceedings.¹⁶ This reduces stress and anxiety for participants. Whilst there was a general reluctance to engage in anything "virtual" in the pre-COVID era, there will be a marked change in how dispute resolution is dealt with in a post-COVID world.

5. What is ODR?

Online Dispute Resolution (ODR) is a fast-rising class of alternative dispute resolution that is taking advantage of the escalation of internet usage and its availability.¹⁷ It is the form of dispute resolution process that caters for dispute resolution via the internet or some virtual form of communication that allows dispute resolution without the physical presence of both parties in a dispute in the same location.¹⁸ ODR techniques are already being deployed around the world in resolving a wide range of disagreements arising from e-commerce, from quarrels amongst citizens to conflicts between individuals and the state. ODR is essential in Nigeria because it primarily involves ADR processes largely supported by the speed and convenience of Information and Communication Technology (ICT)

¹³ E Ekpeyong & J Otakpor, 'Nigeria: Effect Of COVID-19 Pandemic On Litigation And Dispute Resolution In Nigeria In 2021', available online at <https://www.mondaq.com/nigeria/arbitration-dispute-resolution/1053048/effect-of-covid-19-pandemic-on-litigation-and-dispute-resolution-in-nigeria-in-2021?>, accessed on 14 May, 2021.

¹⁴ *Ibid.*

¹⁵ *Ibid.*

¹⁶ *Ibid.*

¹⁷ O Adesewa, "Online Dispute Resolution (ODR) in Nigeria: Intricacies, Challenges and Prospects", online article available at <https://www.digilaw.com.ng/2019/02/24/online-dispute-resolution-odr-in-nigeria-intricacies-challenges-and-prospects/>, accessed on 19th May 2021.

¹⁸ *Ibid.*

and the internet which are eminently suited to the needs of e-commerce.¹⁹ The adoption and application of ODR will afford the parties a number of different ADR methods such as negotiation, mediation, and arbitration, which is modified for online use and confers a number of advantages not available through traditional ADR.²⁰ In-person ADR is often promoted as a faster and cheaper alternative to litigation. By offering arbitration, mediation and negotiation online, ODR advances these benefits even further. Both ADR and ODR minimize cost and save²¹ time through simplified procedures and lower attorney fees. But in addition, online dispute resolution does not require parties to travel, which results in extreme savings. Though costs vary depending on the type of technology used and the timeframe required, ODR services are generally far cheaper than traditional litigation and notably less expensive than in-person ADR.²²

6. ODR Ethical Standards and Principles

With the rapid growth of ODR in a number of sectors it is vital to establish ethical standards to undergird the design, structure, practices, and implementation of global online dispute resolution systems. Taken together they are intended to provide a touchstone for best practices, rules, qualifications, and certification efforts for online dispute resolution processes and practices. The International Council for Online Dispute Resolution (ICODR) believes that quality Online Dispute Resolution (ODR) programs must be:

Accessibility: ODR must be easy for parties to find and participate in and not limit their right to representation. ODR should be available through both mobile and desktop channels, minimize costs to participants, and be easily accessed by people with different physical ability levels.

Accountability: ODR systems must be continuously accountable to the institutions, legal frameworks, and communities that they serve.

Competent: ODR providers must have the relevant expertise in dispute resolution, legal, technical execution, language, and culture required to deliver competent, effective services in their target areas. ODR services must be timely and use participant time efficiently.

Confidentiality: ODR must maintain the confidentiality of party communications in line with policies that must be made public around a) who will see what data, and b) how that data can be used.

Equality: ODR must treat all participants with respect and dignity. ODR should enable often silenced or marginalized voices to be heard, and ensure that offline privileges and disadvantages are not replicated in the ODR process.

Fair/Impartial/Neutral: ODR must treat all parties equally and in line with due process, without bias or benefits for or against individuals, groups, or entities. Conflicts of interest of providers, participants, and system administrators must be disclosed in advance of commencement of ODR services.

Legal: ODR must abide by and uphold the laws in all relevant jurisdictions.

Secure: ODR providers must ensure that data collected and communications between those engaged in ODR is not shared with any unauthorized parties. Users must be informed of any breaches in a timely manner.

Transparent: ODR providers must explicitly disclose in advance a) the form and enforceability of dispute resolution processes and outcomes, and b) the risks and benefits of participation. Data in ODR must be gathered, managed, and presented in ways to ensure it is not misrepresented or out of context.

7. Conclusion

In closing, it is trite that the Covid-19 pandemic has changed everyone's personal and professional lifestyles; the administration of justice, not being left out. As a result, it is imperative that the Nigerian judicial system faces the reality of the new normal on ground and invest in relevant ICT infrastructure to key into Online Dispute Resolution. The rapid growth of ODR in the last few years is evidence that ODR is an effective method for resolving disputes than the traditional litigation. The obvious advantages of ODR need not be restated. Consequently, the study strongly contends that the Arbitration and Conciliation Act be amended to give room for the regulation of ODR.

¹⁹ Aashit S, 'Using ADR to Resolve Online Disputes', (2004) *Richmond Journal of Law and Technology*, 10(3), 1-14.

²⁰ Ayinla L. A. & Oniyide .T. "Juridical Perspective on the Regulation of Online Dispute Resolution in Nigeria", online article available at <https://www.iuiu.ac.ug/journaladmin/iujm/ArticleFiles/94594.pdf>, accessed on 26th October 2020.

²¹ ICODR Standards, available online at <https://icodr.org/standards/>, accessed on 19th May 2021.

²² Jennifer Pinsof, "The Future of ODR: The Promise of Advancing Technology", *Michigan Technology Law Review*, online article available at <https://mtlr.org/2015/10/the-future-of-odr-the-promise-of-advancing-technology/#:~:text=The%20Disadvantages%20of%20ODR&text=ODR%20creates%20an%20electronic%20record,settlements%20are%20harder%20to%20reach>. Accessed on 18th November 2020.