

EXAMINATION OF THE LEGAL AND INSTITUTIONAL FRAMEWORK OF ALTERNATIVE DISPUTE RESOLUTION (ADR) IN NIGERIA

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Introduction

The object of this monograph is to critically examine the legal and institutional framework of ADR. We shall look at the concept of ADR and thereafter examine the legal framework of ADR. We shall conclude the article by examining the legal and institutional framework of ADR. This will go a long way in proper understanding of the role of ADR in settlement of disputes.

The concept of ADR

ADR is an acronym for Alternative Dispute Resolution. According to Wikipedia, "Alternative Dispute Resolution or External Dispute Resolution (EDR), typically denotes a wide range of dispute resolution processes and techniques that act as a means for disagreeing parties to come to an agreement short of litigation: a collective term for the ways that parties can settle disputes, with the help of a third party.¹ It refers to a variety of processes that help parties resolve disputes without trial.

ADR may be described as a spectrum of informal procedures for resolving disputes-ranging from negotiation, to non-binding third party intervention,² to binding third party intervention,³ outside the formal circuit of the courtroom.⁴ Although the use of ADR has faced some resistance in the past,⁵ today many lawyers in different jurisdiction across the world function as dispute resolve spending much of their professional lives helping their clients settle disputes through ADR methods. There are a number of studies⁶ that have indicated a strong settlement culture in the United States and the U.K and the reluctance of lawyers to have to go to trial.⁷ ADR processes can be tailored to diverse kinds of conflicts. Disputes, parties and transactions, some requiring expertise in the subject matter (such as scientific and policy disputes) and spawning new hybrid processes such as consensus building, which engage multiple parties in complex, multi-issue problem. More than anything else, ADR is becoming the first port of call for resolution of every type of dispute, from business disputes to labour management disputes, and to interpersonal disputes. ADR, more than anything else, seeks to address one fundamental question. What is the best way for people to deal with their conflicts, grievances and differences?

The scope of ADR

ADR is generally classified into at least four types: negotiation, mediation, collaborative law, and arbitration.

Negotiation

This is a consensual dispute resolution process whereby parties in a dispute come together to discuss directly or indirectly, the matter in dispute between them in order to agree on the form of any joint action which they might take in the resolution of the dispute: Essentially, negotiation allows

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¹ Australian Securities and Investments Commission -Complaints resolution schemes.

² Such as mediation.

³ Such as arbitration.

⁴ Gem, H. Judging Civil Justice Cambridge University Press, 2009. p. 80.

⁵ Redfern M., The Element in the Room should pre-litigation Mediation be mandatory? leadr kon gres, Brisbane, Austria, 2011.

⁶ See Sarat A. and Feistiner W., Divorce Lawyers and their clients, Oxford: Oxford University Press, 1995.

⁷ Barbieri; G.L., Alternative Dispute Resolution Centre Manual: Guide for practitioners on Establishing and Managing ADR Centres.

two or more parties to accomplish by agreement what no single party could, or would want to do alone.

Mediation

This is also a consensual dispute resolution process, though it involves a neutral third party called a mediator who helps the disputing parties to make decisions and reach agreements on matter of dispute between them. It is worthy of note that the mediator does not decide the case, but helps the parties communicate so they can try to settle the dispute themselves. Mediation may be particularly useful in the following areas: family members, neighbourhood, and community quarrels, business partners, divorce and custody cases, medical malpractice, auto-mobile accident cases, etc.

Collaborative Law

Collaborative law, also known as collaborative practice, divorce or, family law is a legal process enabling couples who have decided to separate or end their marriage to work with their collaborative professionals including collaboratively trained lawyers, coaches and financial professionals in order to avoid the uncertain outcome of court and to achieve a settlement that best meets the specific needs of both parties and their children without the underlying threat of litigation.⁸ It is a problem-solving process that gives divorcing parties and their lawyers a way to end a marriage and restructure families without the stress, delay and expense of litigation.

Arbitration

A dispute resolution process where a neutral person called an "arbitrator" hears arguments and evidence from each side and then decides the outcome. Arbitration is less formal than a trial and the rules of evidence are often relaxed. Arbitration could be binding or non-binding.

Legal framework of ADR

The legal framework of ADR is divided into three:

- i. Customary law Arbitration
- ii. Domestic statutory framework
- iii. International obligations under various international instruments.

Customary Law Arbitration

Customary law as stated in the case of *Oyewunmi v. Ogunesan*⁹ is the organic or living law of the indigenous people of Nigeria regulating their lives and transactions. It is organic in that it is not static, it controls the lives and transactions of the communities subject to it and it is the mirror of the culture of the people and imports justice to the lives of the people. "The basic aims of dispute resolution in customary law are reconciliation, peace and the assuagement of feelings that might otherwise dislocate social cohesion and solidarity. Customary law arbitration has judicial recognition.¹⁰

In *Okpuruwa v. Okpokan*¹¹ Oguntade JCA observed:

during the pre-colonial times when regular courts had not been there, Nigerians surely had a simple and cheap method of adjudicating over disputes occurring among them. The parties were usually referred to elders or a body set up for that purpose.

⁸ <https://en.m.wikipedia.org>.

⁹ (1990) 3 NWLR (Pt. 137) 182.

¹⁰ See *Onwusike v. Onwusike* (1962) ENLR 10.

¹¹ (1998) 4 NWLR (Pt. 90) 554 at 586.

Domestic Legal Framework

The advent of judicial development in dispute settlement has necessitated putting in place proper legal framework for arbitration and ADR in Nigeria, hence the Arbitration Ordinance of December 31, 1914. Today, there are Federal and States laws and rules regulating the practice of ADR, in Nigeria.

The Principal Federal Legislation is the Arbitration and Conciliation Act, 2004. This Act provides "a unified legal framework for the fair and efficient settlement of commercial disputes by arbitration and conciliation; and to make applicable the convention on the Recognition and Enforcement of Arbitral Awards (New York Convention) to any award made in Nigeria or in any contracting State arising out of International commercial arbitration.

Moreover, the Civil Procedure Rules of the various States equally provide a veritable legal framework of ADR in that they encourage and facilitate settlement of ADR. For instance, Order 4 of the High Court of Anambra State (Civil Procedure) Rules, 2019, provides for "interface with ADR."

Order 4, Rule 8 (c)¹² Provides:

Case Evaluation shall be conducted on every substantive suit begun by Writ of Summons by the DCR (Evaluation) in the presence and with active participation of the parties and their legal practitioners to determine if the matters are to be dealt with in the High Court by litigation or is suitable to be transferred to AnMDC.

Order 4, rule 8(f)¹³ provides

that at the end of the interface with ADR, the DCR (Evaluation) shall make a report. The report should state whether any of ADR options are preferred.¹⁴

Still with reference to the domestic legal framework, there is the Nigerian investment Promotion Commission (NIPC) Act.¹⁵ This Act¹⁶ deals with investment promotion in Nigeria with specific provision for the resolution of disputes arising between an investor and any government of the Federation or any agencies of government, through arbitration.

There is yet the Multi-Door Court House (MDCH) which is a court initiated court-centered dispute resolution mechanism. As a State managed ADR process, it is usually set up to provide facilities for the resolution of (Civil) disputes within the court premises; thereby providing a range of alternative means for the disposition of those disputes, short of court trial.

International Legal Framework

This refers to legal framework of non-domestic origin or nature. For example, the United Nations Commission on International Trade Law (UNCITRAL), the New York Convention, and International Centre for Settlement of Investment Dispute (ICSID), etc. UNCITRAL was established by the United Nations General Assembly to enable United Nation to play a more active role in reducing or removing legal obstacles to the flow of International trade. The preamble to the resolution noted divergences from the laws of different States in matters relating to International trade and this constituted obstacles to the development of world trade.

¹² High Court of Anambra State (Civil Procedure) Rules, 2019.

¹³ *Ibid.*

¹⁴ See also the preamble to the High Court of Lagos State (Civil Procedure) Rules 2012 which encourages an "amicable resolution of disputes by use of Alternative Dispute Resolution (ADR) mechanism."

¹⁵ Law of the Federation of Nigeria, 2004.

¹⁶ *Ibid.*

The aim of the New York Convention is to ensure the enforcement of arbitration awards worldwide.

ADR contract clause

ADR contract clause is a clause in an agreement by which the contracting parties agree to attempt to resolve any disputes between them by the use of one or more ADR processes.¹⁷ The clause may specify, a particular

ADR Procedure, such as mediation or leave the parties to agree on one as and when a particular dispute arises.

The inclusion of ADR clause in a contract obliges the parties to resolve their dispute through ADR. In other words; ADR clause is legally enforceable. *In Cable and Wireless Plc v. IBM United Kingdom Ltd*,¹⁸ Colman J. upheld an ADR clause in a commercial contract. One of the parties sought to bypass the ADR clause by starting litigation in England; on the party's application, the court granted a stay of proceedings, thereby effectively forcing the claimant to pursue the claim through the agreed dispute resolution process.

To summarize, this segment of this monograph, it is clear that the following provide the legal framework of ADR (i) customary law (in Africa), (ii) Statues, (iii) Common Law; (iv) International Conventions (v) International Treaties (vi) Express agreement of the parties.

Institutional Framework of ADR

Institutional Framework of ADR refers to the institutions, organizations, or bodies that drive the ADR processes. These bodies, organizations or institutions help to provide the necessary platform, and support for ADR. They encourage and facilitate the operation and utilization of ADR mechanisms. Some of these Arbitral institutions include:

(1) *The International Centre for Settlement of Investment Dispute (ICSID)*

The ICSID is an International arbitration institution established in 1966 for legal dispute resolution and conciliation between investors and States. It has its headquarters in Washington, D.C, United States. It is a member of the World Bank group. Its availability to investors and States helps to promote International investment by providing confidence in the dispute resolution process.

(2) *The International Court of Arbitration of the International Chamber of Commerce (ICC)*

The ICC International Court of Arbitration is an institution for the resolution of International Commercial disputes. It operates under the auspices of the International Chamber of Commerce. It was founded in 1923. It consists of more than 100 arbitrators from roughly 90 countries.

(3) *The London Court of International Arbitration (LCIA)*

The LCIA was founded in 1892 and is based in London, United Kingdom and provides the service of International arbitrators. It is universally recognized as one of the World's leading arbitral institutions.

(4) *The International Centre for Dispute Resolution (ICDR)*

The ICDR was established in 1996 as the International division of the American Arbitration Association (AAA). The ICDR is one of the most recognized and prominent providers of international dispute resolution services in the world.

¹⁷ Abdulsalam O. Ajetunmobi, *Alternative Dispute Resoulution and Arbitration in Nigeria, Law, Theory and Practice*, Princeton & Associates Publishing Co. Ltd, 2017, p.52.

¹⁸ (2002) 2 ALLER (Comm) 1041.

(5) *The United Nations Commission on International Trade Law (UNCITRAL)*

The UNCITRAL, established by the United Nations General Assembly plays an important role in developing that framework in pursuance of its mandate to further the progressive harmonization and modernization of the law of international trade by preparing and promoting the use and adoption of legislative and non-legislative instruments in a number of key areas of commercial law.

(6) *Permanent Court of Arbitration (PCA)*

The PCA, established by treaty in 1899, is an inter governmental organization, providing a variety of dispute resolution services to the international community. It is located in Hague, Netherlands. Other International Arbitration institutions include the Stockholm Chamber of Commerce (SCC); the Swiss Chambers Court of Arbitration and Mediation (SCCAM); the German Institute for Arbitrations (DIS); the World Intellectual Property Organization) Arbitration and Mediation Centre (WIPO) in Geneva; the American Arbitration Association (AAA) etc. At the continental level, there is the Cairo Regional Centre for International Commercial Arbitration established by the government of the Arab Republic of Egypt in conjunction with the Asian-African Legal Consultative Committee (AALCC) in 1979. The Cairo Centre offers specialized services to settle trade and investment disputes, through arbitration. It offers advice to parties to international commercial and investment contracts, with regards to drafting these contracts, promote arbitration and other ADR techniques in the Afro-Asian region.

At the national level, there is the Lagos Regional Centre for International Commercial Arbitration established by the Nigerian Government in collaboration with the Asian-African legal Consultative Committee.

Conclusion

From the foregoing, both the legal and institutional framework of ADR have become highly developed and diversified. The result will be that investors fear are being allayed as any trade or commercial dispute that may arise will be fairly and expeditiously settled.