LEGAL AND HISTORICAL FRAMEWORKS OF ALTERNATIVE DISPUTE RESOLUTION IN NIGERIA

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Abstract

Alternative Dispute Resolution as a settlement of dispute options has come to stay in Nigeria. Litigation has been the traditional method of resolving disputes in Nigerian. As a result of many disadvantages associated with litigation, Alternative Dispute Resolution has gained grounds as alternative to the conventional court system of settlement of disputes. In this article, we are going to look at the legal and historical development of Alternative Dispute Resolution in Nigeria. Such issues like the meaning of Alternative Dispute Resolution, historical development of Alternative Dispute Resolution, history of Alternative Dispute Resolution in Nigeria, Legal framework for Alternative Dispute Resolution in Nigeria and mode of application of Alternative Dispute Resolution in Nigeria will be examined.

Introduction

Concern over cost and delays in litigation procedures together with increasing globalization have led to more flexible means of resolving disputes which provide alternatives to court-based litigation governed by the law and procedure of a particular State or country.[1] Disputes are generally an inevitable part of human interaction. They may be domestic, international, civil, commercial or economic in nature. Litigation has been the traditional method of resolving disputes, which may arise as a result of default (sometimes unintended) by a party. However, Alternatives to Litigation were developed because of attendant problems associated with litigation.

What is ADR?

The term "Alternative Dispute Resolution" (ADR), is used generally to describe the methods and procedures used in resolving disputes either as alternatives to the traditional dispute resolution mechanism of the court or in some cases supplementary to such mechanisms.[2]

Apart from the fact that businessmen and women now prefer private resolution of their disputes to exposure to the machinery available in the glare of the regular courts, there is the advantage that settlement through ADR avoids what can be best described as brinkmanship and acrimony, which often times arise in litigation. It reduces hostility and antagonism; but most importantly, ADR saves business relationships and encourages a continued cordiality between the parties. These are made largely possible because the procedure provides greater room for compromise than litigation.

ADR may be conveniently categorized into two groups for the purpose of this monograph namely: (1) the binding ADR and (2) the non-binding ADR. Binding ADR includes arbitration and other adjudicatory ADR methods. It can be said that the use of arbitration has been long established in Africa even though it is right to admit that it has not obtained its optimum usage within the continent and especially in Nigeria. The same applies to other binding ADR methods like Mini-trial, Expert Determination of issues and mediation-arbitration, otherwise known as Med-Arb. The non-binding ADR, *inter-alia*, includes negotiation, mediation or conciliation and neutral evaluation. These methods are mainly consensual and reconciliatory.

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1 Paul Mitchard, International Arbitration and Disputes Resolution Directory, 1997, A summary of Dispute Resolution Options", p.3.

2 MaCarthy Jerry, ADR, the solution," Sweet and Maxwell, London, 1982, p.6.

Historical Development of ADR

ADR is nothing new. This informal quasi-judicial system is as old as civilization. Different forms of ADR have been in existence for thousands of years.[3] The Holy Bible recorded how Jesus strongly encouraged if not out rightly prohibited Christians from taking their disputes to the more book of Mathew, Jesus said," woo to you, teachers of the law...you have neglected the more important matters of the Law-Justice, mercy and faithfulness".[4]

Likewise, Jesus also taught his followers that it is best to avoid litigation altogether by going beyond the letter of the law saying "if someone wants to sue you, and take your tunic, let him have your cloak as well."[5] Moreover, Jesus taught that even when legal disputes cannot be avoided, every Christian should "settle matters with adversary who is taking him or her to court, even if it means reaching settlement on the way to the court house.[6]

Similarly, in his first letter to Corinthians, Apostle Paul wrote that "those who resort to taking their neighbours to court never win in the eyes of God, regardless of the verdict because, the very fact that Christians have lawsuit among one another means that both parties are defeated already."[7] Thus, because the teachings of Jesus and various authors of the New Testament passionately urged Christians to forgive one another, stay out of court, and passionately resolve their disputes in the least formal way possible, the Christian approach to dispute resolution over the years has traditionally focused on Mediation and Negotiation rather than arbitration or litigation.[8]

In Britain, the firm Arbitration (a form of ADR) Act was passed in 1698 under William III. This was an Act for rendering the award of arbitrators more effectual in all cases for the final determination of controversies referred to them by merchants and traders, or others. In 1854, Common Law Procedure Act expressly empowered courts to remit an award for consideration by the arbitrators. Its aim was to stay (stop) an action in court if the parties had agreed to take the dispute to arbitration. Effectively, the Arbitration Act 1910 gifted a number of modern steps to be taken to agree disputes between the parties as follow; the parties shall appoint arbitrators or court may also appoint arbitrators if the parties fail to do so; decide the disputes informally, arbitrators shall make an award, or settle the dispute by mediation, compromise or any other manner; court pass a decree in terms of the award or found that the decision was made properly, and Arbitration Tribunal shall be competent to appoint expert or legal advisor to submit report to it for a specified question or appoint assessor for assisting it on technical matters.

Later in Arbitration Act 1950, there was a consolidation of the Arbitration Acts 1889 and 1934. It included the power of a court to stay actions where there was an applicable arbitration agreement. In addition, the Arbitration Act, 1975 gave effect to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards.

History of ADR in Nigeria

ADR is not new to Nigeria but deeply rooted in our culture. In fact, the ADR processes were in practice in Nigeria even prior to the Colonial era. Our traditional societies settled disputes by referring them to the elders and other respected members of the society. The pre-colonial Nigeria era was constituted by settlements, communities, families, villages, hamlets, and most especially kingdoms and empires such as the Oyo empire, the Borno empire, and the Igbo communities. These kingdoms and communities

3 MaCarthy Jerry,*0p Cit* at 39.
4 Mathew 23:23.
5 Mathew 5:40.
6 Mathew 5:25.
7 1 Corinthians 6:7.
8 Peacemakers Ministries, Our Distinctive and statement of faith,available at http://www.hispeace.com/html/org.htm accessed on December 16, 2020.

were not without conflicts; rather their disputes and challenges were adequately settled without litigation. In most cases, the disputes were referred to elders or other bodies set up for that purpose. In Okpuruwa v. Okpokun,[9] the Honourable Justice Oguntade JCA (as he then was) observed thus:

> In the pre-colonial times and before the advent of the regular courts, our people had a simple and inexpensive way of adjudicating over disputes between them. They referred them to the elders or a body set up for that purpose. The practice has over the years become strongly embedded in the system that they survive today as customs.

Negotiation and Mediation have been integral parts of the traditional African decision making process. Traditionally, the elders play special roles such as managing public affairs, keeping the peace, serving as judges and looking after community welfare.[10]

The invasion of Nigeria by the British authority witnessed the introduction of the English type of courts for dispute settlement. The introduction of these courts notwithstanding, the existing traditional means of disputes settlement were not jettisoned but co-existed with the court adjudicative of dispute settlement. These systems are recognized by the courts provided processes. Today, cases are still settled outside the courts through the local system provided the cases are civil. The introduction of the modern ADR process in the administration of justice in Nigeria is geared towards addressing the challenges associated with court litigations. Today, there is a growing trend to formalize and popularize the use of these mechanisms as viable alternatives to litigation. There is no doubt that recourse to this mechanism in view of the economic and political conditions of the masses in this country will enhance peoples' access to justice.

Legal Framework for ADR in Nigeria

In recent times, an ever-increasing plethora of laws, Acts, Rules and Guidelines have begun to make viable provisions to aid and enhance the adoption of ADR and also stipulate clear-cut procedures to follow when ADR methods are adopted, especially in relation to disputes which arise out of commercial interactions. It is thus essential to highlight and examine some of the various innovative provisions for ADR proceedings under the various Rules of Court.

Constitution of the Federal Republic of Nigeria 1999 (as amended)

Section 36 of the Constitution of the Federal Republic of Nigeria 1999(as amended) guarantees a fair hearing within a reasonable time by a court or other tribunal established by law and constituted in such manner as to secure its independence and impartiality. This is the section of our Constitution that enables Tribunals established by Law apart from the regular court to determine the civil rights of Nigerian citizens fairly and impartially.

The Arbitration and Conciliation Act

This is the principal legislation that makes provisions for arbitration in Nigerian as an ADR mechanism. This Act enacted internationally accepted provisions for the conduct and regulation of arbitration. Section 34 of the Act[11] provides that " a court shall not intervene in any matter governed by this Act except where so provided for in this Act"[12]

This section ousted the jurisdiction of court in arbitration matters except as the Act itself permits. This provision is vital to avoid unnecessary judicial intervention which will defeat the purpose of arbitration as an ADR Mechanism.

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9 (1998) 4 NWLR (Pt. 90) 554 at 586.

10 Charlse Clarke, African Practices before Colonialism, lbadan, Spectrum Publishers,1999,p.17.

11 Arbitration and Conciliation Act.

12 Modeled according to Article 5 of UNCITRAL Model Law.

Section 2 of the Act[13] provides for the enforcement of arbitration agreements. The section provides that arbitration shall be irrevocable except by agreement of parties or by leave of court or a judge. This section is in tandem with the perception in the International Business World that agreeing to arbitrate secures a minimum of rights and reduces surprises.

Section 4 of the Act[14] is very crucial in ADR development in Nigeria. The Section requires a court before which an action subject to arbitration agreement is brought to stay the court's proceedings except the agreement is *null* and *void*. By virtue of this provision, such court shall stay its proceedings and refer the parties to arbitration tribunal where they belong by virtue of an arbitration clause in an agreement governing the transaction that gave rise to the disputes between them. Section 31 of the Act[15] provides for relevant consideration by a court while staying its proceedings.

National Industrial Court of Nigeria Civil Procedure Rules 2017

The National Industrial Court of Nigeria (Civil Procedure) Rules 2017 makes provisions for an "Alternative Dispute Resolution Centre." Order 24 of the Rules[16] provides thus:

(1) The President of the Court or a Judge of the Court may refer for amicable settlement through Conciliation or Mediation any matter filed in any of the Registries of the Court to the Alternative Dispute Resolution Centre (hereinafter referred to as the Centre) established within the Court premises pursuant to Section 254 (c) (3) of the 1999 Constitution. [17]

(2) The Centre shall endeavor to take all necessary steps to conclude the Mediation or Conciliation process with respect to matters referred to it within twenty-one (21) working days of the date the process commences provided that an extension often (10) working days may be granted by the President of the Court or a Judge of the Court on request if the Mediation or Conciliation process(s) is/are not completed within twenty-one (21) working days.

(3) Upon receipt of the report of an amicable settlement of a matter from the Centre, the Court shall cause hearing notices to be issued and served on the parties and their Counsel, if any, for the adoption of the settlement agreement as the Judgment of the Court.

(4) (1) where parties to any Mediation or Conciliation process are unable to settle their dispute amicably, the Director of the Centre shall submit a report to that effect to the President of the Court or the Judge of the Court who made the referral without the record of the Mediation or Conciliation session(s).

Federal Capital Territory High Court (Civil Procedure Rules, 2018

One radical improvement made by the 2018 Abuja Rules is the substantial provision for the procedural framework of ADR. In contrast, under Order 17 of the 2004 Abuja Rules, there was only little provision for ADR and it was discretionary and subject to the consent of the parties. However, under the new 2018 Abuja Rules, the scope of ADR is wider. Not only that, it is now the court or judge's duty bound to encourage settlement of matters *via* ADR, but there are also elaborate provisions for the procedural framework. Where a matter is suitable for ADR, the Judge shall by enrolment Order refer the case to the Abuja Multi-Door Court House (AMDC) for resolution within 21 days except otherwise ordered by the Court. Where a party refuses to submit to ADR and loses the case in court, he shall pay a penalty as may be determined by the Court. The court or judge shall, on the application of parties enroll the terms of settlement both in heading and content reached at the Abuja Multi-Door Court as consent judgment; such terms shall thereupon have the same force and effect as a judgment of the court. It should

[13] Arbitration and Conciliation Act.
[14] *Ibid*.
[15] *Ibid*.
[16] National Industrial Court of Nigeria (Civil Procedure) Rules 2017.
[17] Constitution of the Federal Republic of Nigeria 1999 (as amended).

be noted that under the 2018 rules, an application to enforce an award on an arbitration agreement or order may be made *ex-parte*, but the court hearing the application may order it to be made on notice.

High Court of Lagos State (Civil Procedure) Rules 2019

The High Court of Lagos State (Civil Procedure) Rules 2019 lays down a very comprehensive procedural structure of ADR in Lagos State. Order 28[18] provides for Alternative Dispute Resolution (ADR) proceedings and states thus:

1. When pleadings are deemed closed; the case shall be referred to Lagos Multi-Door Courthouse or other appropriate ADR institutions or practitioner;
2. Upon the directive of the judge in sub-rule (2) of this rule, the claimant shall, within fourteen (14) days file his statement of claim and the defendant shall file his response within 14 days of service of the statement of claim;
3. Any judgment given under rule (3) above may be set aside upon an application made within 7 days of the judgment or such other period as may be allowed by the ADR judge.

Court of Appeal Rules, 2016

Sequel to the Court of Appeal Rules, 2016, the Court of Appeal Mediation Rules, 2018 gives a framework for conducting settlement by Mediation in the Court of Appeal. By Rule 1, Court of Appeal Mediation Centre was established to use Mediation or other ADR mechanisms to resolve disputes speedily; all appeals will be screened to determine their suitability for settlement through Mediation.

Once an appeal is filled, the Court of Appeal should within 21 days of filing, *suo motu*, or by parties' application refer the appeal to the Mediation centre for resolution.[19] By Rules 5 of the Court of Appeal Mediation Rules, 2018, all appeals referred to the Mediation centre must be resolved within 3 months. This is to emphasis the objective of the centre as an avenue for speedy resolution of disputes even though the mediator can apply for extension of time.[20]

The Mediation under the rules are confidential and parties executes confidentiality agreement to that effect. The fact that under the rules, parties are not under any obligation to settle all issues makes for flexibility and avoids suspicion.

Mode of application for Alternative Dispute Resolution

An application in any ADR proceedings under these rules shall be by motion on notice. The originating motion, as provided under this Order shall-

(a) State in general terms the grounds of the application;
(b) Where the motion is founded on evidence by affidavit, it shall be accompanied by a copy of the affidavit as intended to be used; and be supported by a written address.

Conclusion

Not minding the various improvement of ADR generally, there still exist a number of hindrances to its full-scale adoption by commercial disputants in Nigeria. One of such hindrances is the lack of legislation to regulate other ADR practices apart from arbitration.

With the exception of the Lagos High Court Civil Procedure Rules and the Federal Capital Territory, Abuja High Court Civil Procedure Rules which came into force in 2019 and 2018 respectively, all other major legislations on Arbitration and ADR are old. For instance, the

[18] High Court of Lagos State (Civil Procedure) Rules 2019.
[19] Rule 5 of the Court of Appeal Mediation Rules, 2018.
[20] Rule 20 of the Court of Appeal Mediation Rules, 2018.

Arbitration and Conciliation Act which is the most important legislation on Arbitration was enacted as far back as 1990 thus, such a law can hardly reflect the current trends in the society.

The issue of lack of adequate legislation to cover other forms of ADR is very worrisome. From the title of the Arbitration and Conciliation Act, it can be seen that the Act only makes relevant provisions for merely Arbitration and Conciliation amongst the plethora of ADR options which exist. There is, therefore, a need for the Parliament to create a Legislation that would encompass all relevant ADR forms.

Also, there is need for legislators to look beyond commercial disputes for our Arbitration practice in Nigeria by considering a legal framework to accommodate other forms of disputes to our arbitration system.

Finally, it has been discovered that our practice of Alternative Dispute Resolution in Nigeria lacks a vibrant awareness mechanism, which means that laypersons lack a proper understanding of how the arbitration system operates and how it is practiced. Perhaps, it is due to the fact that the 1999 Constitution (as amended) doesn't in specific terms make provisions for the adoption of Arbitration as a dispute resolution mechanism.

There is always room for further integration of Alternative Dispute Resolution in Nigeria into the formal justice system through recognition under the Nigerian Constitution or laws clarifying their relationship with the State enforcement apparatus. Such steps would increase disputants' confidence in the process and reassure them that participation in Alternative Dispute Resolution is equivalent to having their "day in Court"