

THE NIGERIAN JURIDICAL REVIEW

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**NIGERIAN JURIDICAL REVIEW
VOLUME 10 (2011 – 2012)**

To be cited as (2011-2012) 10 Nig. J. R.

ISBN

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The Journal welcomes articles in any area or related subjects for publishing considerations. Articles and correspondence should be forwarded to:

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Nigerian Juridical Review,
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**Published by
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University of Nigeria,
Enugu Campus**

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DEVELOPING A STATUTORY FRAMEWORK FOR ADR IN NIGERIA*

Abstract

This article aims at examining the role of Alternative Dispute Resolution (ADR) mechanisms in the resolution of commercial disputes and strongly advocates for the enactment of laws to harmonize and facilitate the operations and use of these mechanisms in settling disputes in Nigeria. It was discovered that only arbitration and conciliation have got statutory framework in Nigeria. The practical implication of this state of affairs is that the use of other forms of ADR in Nigeria is not legally organized, coordinated and harmonized leading to a lacuna in the resolution of commercial disputes at the Federal level. The article demonstrates in a unique manner the importance of having a legislative framework for all forms of ADR in settling disputes and suggests practical ways to achieve this legislative framework.

1. Introduction

Dispute or conflict is part and parcel of human life, and must always be present. But they have to be resolved in such a manner as to ensure peace, stability, harmony and progress in all aspects of human society. The basic means of dispute resolution is through mutual negotiation, failing which the intervention of a third party ensues. A third party is either approached by the disputants or he intervenes *suo motu* (on his/her own accord) to help resolve the dispute. With the passage of time, this gave rise to court system and Alternative Dispute Resolution (ADR).

Alternative Dispute Resolution mechanism is a basket of procedures outside the traditional process of litigation or strict determination of legal rights.¹ It may also be elucidated as a range of procedures that serve as alternatives to litigation through the courts for the resolution of disputes, generally involving the intercession and assistance of a neutral and impartial third party.²

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¹ O. Agbakoba, "Need for National Arbitration Institution in Nigeria", in O. D. Amucheazi and C. A. Ogbuabor (eds.), *Thematic Issues in Nigerian Arbitration Law and Practice* (Onitsha: Varsity Press Ltd., 2008), pp. 1-8 at 2.

² P. O. Idornigie, "Alternative Dispute Resolution Mechanisms", in A. F. Afolayan and P. C. Okorie, *Modern Civil Procedure Law*, (Lagos: The Dec-

This mechanism exists in different forms like arbitration, mediation, conciliation, negotiation, mediation-arbitration (med-arb), mini-trial, etc.

The good thing about ADR is its ability to give each party a sense of being right. People naturally dislike being told that they are wrong. This view is supported by some learned authors who maintain that while in any dispute, one party may be right and the other wrong, there could also be some element of right on each side; or one party may be morally right and another legally right; or genuine differences of perception or concepts may allow each to be right from different vantage points.³ ADR is as old as human history. Jesus Christ who lived more than two thousand years ago spoke in favour of settlement out of court. He said:

If someone brings a lawsuit against you and takes you to court, settle the dispute with him while there is time, before you get to court. Once you are there, he will hand you over to the judge, who will hand you over to the police, and you will be put in jail. There you will stay, I tell you, until you pay the last penny of your fine.⁴

Also in the Holy Koran, there is a similar teaching by Prophet Mohammed.⁵

The emergence of ADR has also been described as a legal transplant. This is because “the ADR movement that has recently developed in modern societies has been described as a return to a simple model of dispute settlement used in the past and in modern non-Western societies.”⁶ In Nigeria, only arbitration and conciliation have received statutory backing at the Federal level,⁷ whereas all the other forms of Alternative Dispute Resolution are gradually taking hold as means of resolving disputes.⁸ This is still mostly at the State level but even at that, the provisions of the

Sage Nigeria Ltd., 2007), pp. 563-585 at 563.

³ P. B. Kestner, R. D. Hyde, J. M. Johnson, *et al*, “Alternative Dispute Resolution: An ADR Primer”, *The Association Standing Committee on Dispute Resolution Journal*, Vol. III (1989), p. 63.

⁴ *Good News Bible*, Mt. 5:25 & 26; Lk. 12; 58 & 59.

⁵ *The Holy Koran*, Surah 49, Al-Hujurat verse 9 & 10.

⁶ E. Grande, “Alternate Dispute Resolution, Africa and the Structure of Law and Power: The Horn in Context” *Journal of African Law*, Vol. 43, No. 1 (1999) pp. 63-70 at p. 63.

⁷ See the Arbitration and Conciliation Act, Cap. A18, *Laws of the Federation of Nigeria* 2004.

⁸ Although in some States in Nigeria for example Lagos State, recourse to Alternative Dispute Resolution is provided for.

Laws or Rules of courts on Alternative Dispute Resolution mechanism is still nebulous and devoid of any meaningful contribution to the effective advancement of Alternative Dispute Resolution Mechanism. It is therefore necessary at this juncture to explicitly state that the purpose of this article is to examine the possibility of creating a proper legal framework for each aspect of all the forms of ADR systems that are in popular usage in Nigeria in an Act of the National Assembly. This no doubt will inject an effective and efficient ADR mechanism into the Nigerian legal system.

2. ADR and Arbitration: The Controversy

It is necessary to analyze the controversy surrounding arbitration as an ADR mechanism before dwelling on the crux of this work. Alternative Dispute Resolution seems to have abandoned arbitration as an integral part of the mechanism. Opinions differ considerably about whether to classify arbitration as ADR or not. This is because arbitration shares the features common to both ADR properly so-called and litigation. In one camp are those who think that arbitration should not be grouped with other forms of ADR.⁹ Prominent among this group are Redfern and Hunter. For them, arbitration would have been included in ADR if the latter is used in a wide sense of methods of resolving disputes other than those adopted by the courts. But for the fact that ADR is not always used in this wide sense, arbitration is not included in ADR.¹⁰ In support of their view, the authors quoted Carroll and Dixon stating that:

Arbitration presents an alternative to the judicial process in offering privacy to the parties as well as procedural flexibility. However, it is nonetheless fundamentally the same in that the role of the arbitrator is judgmental. The function of the judge and the arbitrator is not to decide how the problem resulting in

⁹ See H. Brown & A. Marriott, *ADR Principles and Practice*, (2nd edn., London: Sweet & Maxwell, 1999), p. 20; A. A. Asouzu, *International Commercial Arbitration and African States: Practice, Participation and Institutional Development*, (Cambridge: Cambridge University Press, 2001), p. 13 – where the author says that arbitration started first as part of ADR but later differs from ADR because of maturation of arbitration and popularization of ADR and J. Orojo and M. A. Ajomo, *Law and Practice of Arbitration and Conciliation in Nigeria*, (Lagos: Mbeyi & Associates (Nigeria) Ltd. 1999), pp. 4-5.

¹⁰ A. Redfern and M. Hunter, *Law and Practice of International Commercial Arbitration*, (4th edn., London: Sweet & Maxwell, 2004), pp. 36 – 37, para. 1-71.

the dispute can most readily be resolved so much as to apportion responsibility for that problem.¹¹

For this school of thought, therefore, although arbitration is a great alternative to litigation, nevertheless, it is not ADR *strict sensu* (in a strict sense) because it is judgmental and imposes a decision on one of the parties. There is therefore a winner-loser phenomenon. Arbitration is closer to litigation in its method than it is to ADR. An agreement to arbitrate is enforceable by the courts, whereas an agreement to enter into an ADR process will not be so enforced. However, in Australia, the court has held that agreement to conciliate could be enforced where it has the certainty necessary for legal enforceability.¹² The judge defined what is enforced as “not cooperation and consent but participation in a process from which cooperation and consent might come”. There is yet no such rule of law in English or Nigerian legal systems. Arbitration is governed by the applicable law whereby its process and outcome are pre-determined in accordance with an objective regulatory standard. In ADR, for example, mediation, the process and outcome are determined solely by the will of the parties.

In arbitration, a party's task is to prove his case and convince the arbitral tribunal that he is right; whereas in other forms of ADR, the task is to convince or compromise with the other party since the outcome must be accepted by both parties. While an arbitrator is empowered to make a binding award, in other forms of ADR like mediation, a mediator has no power to make a binding decision. The procedure adopted in arbitration is different from that obtained in other forms of ADR. Arbitrators must act in accordance with the rules of natural justice, that is to say, they must hear both parties together and at the same time. On the other hand, mediators are free to see the parties independently and privately, and because of the duties of confidentiality, may not even disclose to one party what they have been told by the other.¹³

On the other side of the camp are those who see arbitration as ADR because of the attributes it shares in common

¹¹ Carroll and Dixon, “Alternative Dispute Resolution Developments in London”, *The International Construction Law Review*, [1990 Pt. 4] 436 at 437.

¹² *Hooper Baillie Associated Ltd v. Nation Group Pty Ltd* (1992) 28 NS WLR 194.

¹³ See R. Bernstein, *Handbook of Arbitration Practice*, (3rd edn., London: Sweet & Maxwell, 1998), para. 11-06.

with them, which are absent in litigation.¹⁴ These features *inter alia*, are party autonomy in the choice of arbitral tribunal,¹⁵ convenience of the parties in the choice of time and venue for the proceedings, informality in its conduct, privacy and cordiality of the parties, during and after the resolution of the dispute which makes the relationship to continue unsoiled.

It is the nature of arbitration that puts it in its present curious state and rightly so. It has developed over the years with legislative interventions which formalized it to its present status. However, because arbitration has some features of ADR properly so-called, and some others of litigation, this peculiarity marks it out distinctly as a unique form of dispute resolution machinery with advantages outweighing disadvantages. We therefore classify arbitration as ADR - a special type of ADR, and place it topmost in the list of ADR methods on account of the reasons given in this work. Variety is the spice of life. It is a healthy development that there should be different types of ADR so that people could have the freedom to make their choice from a wide range of available options. This feature of multiple choice is the major reason why we advocate for the use of arbitration and other forms of ADR in the management of various disputes which arise regularly on account of human interactions. It is praiseworthy to note that this has been introduced in Nigeria by the concept of Multi-Door Courthouse in Lagos and Abuja.

3. The Provisions of Law on Alternative Dispute Resolution Mechanisms in Nigeria

There is definitely a clear legal roadmap on how to deploy arbitration and conciliation in the resolution of disputes in Nigeria. The law vis-à-vis arbitration is as outlined in section 1(1) of the Arbitration and Conciliation Act thus:

Every arbitration agreement shall be in writing contained in a document signed by the parties or in an exchange of letters, telex, telegrams or other means of communication which

¹⁴ See A. F. Afolayan and P. C. Okorie, *Modern Civil Procedure Law*, (Lagos: Dee-Sage Nigeria Ltd., 2007), p. 564 – where the authors while admitting that there are many features which distinguish arbitration from ADR, nevertheless maintained that arbitration will be considered as part of ADR in their book.

¹⁵ Although it can be said that this autonomy in the choice of arbitral tribunal is extinguished in institutional arbitrations, there still exists some degree of that autonomy in that the parties are presumed to know the *modus operandi* [mode of operation] of a particular arbitration institution before they choose to arbitrate under it.

Developing a Statutory Framework for ADR in Nigeria

E. O. Ezike

provide a record of the arbitration agreement or in exchange of points of claim and of defence in which the existence of an arbitration agreement is alleged by one party and not denied by another.

Also any reference in a contract to a document containing an arbitration clause constitutes an arbitration agreement if such contract is in writing and the reference is such as to make that clause part of the contract.¹⁶ Consequently in the case of *Continental Sales Limited v. R. Shipping Inc.*¹⁷ the Court of Appeal explained how arbitration should be commenced in the following terms:

Where the arbitrator or arbitrators are bound to be appointed by the parties, arbitral proceedings are commenced in respect of a matter when one party serves on the other party or parties notice in writing requiring him or them to appoint an arbitrator or to agree to the appointment of an arbitrator in respect of that matter.¹⁸

Thus, it is certain that under both case law and statute, arbitration has a very definite legal guideline on its commencement, hearing and rendering of an award. With respect to conciliation, section 38 of the Arbitration and Conciliation Act stipulates that: "A party who wishes to initiate conciliation shall send to the other party a written request to conciliate under the provisions of this Part of this Act". The Arbitration and Conciliation Act went further to make elaborate provisions on conciliation.

The poser presently is: besides the erudite adumbration of pundits on the other types of Alternative Dispute Resolution mechanisms, what is the legal procedure or legal anchorage of those Alternative Dispute Resolution mechanisms in Nigeria? Scholars are apt to commend the Rules of Courts that encourage recourse to Alternative Dispute Resolution Mechanism. No matter how commendable these Rules are, if they do not vividly outline the procedure for attaining the needed resolution of acrimonious relationship, their usefulness may be greatly limited. Most recent of these Rules is Order 16 Rule 1(1) of the Court of Appeal Rules 2011 which provides that:

¹⁶ Arbitration and Conciliation Act, section 1(2).

¹⁷ [2012] 23 WRN 151.

¹⁸ *Ibid.*, p. 169 lines 30-40. This is exactly the provision of the English Arbitration Act 1996.

At any time before an appeal is set down for hearing, the court may in appropriate circumstances upon the request of any of the parties refer the appeal to the Court of Appeal Mediation Programme (CAMP); provided that such appeal is of purely civil nature and relates to liquidated money demand, matrimonial causes, child custody or such other matters as may be mutually agreed by the parties.

With utmost respect and irrespective of the fact that the programme is tagged Alternative Dispute Resolution,¹⁹ it is not at all alternative dispute resolution. In *Adeosun v. Governor of Ekiti State & Ors.*,²⁰ the Supreme Court held that an appeal is an invitation to a higher court to find out whether on proper consideration of the facts placed before it and the applicable law, the lower court arrived at a correct decision.²¹ The Court of Appeal reiterated this position in *Udeh v. Nwankwo*²² when it held that an appeal is not a new action but a continuation of the subject matter of the appeal and is for the purpose of inviting the appellate court to find out whether, on proper consideration of the facts placed before it, and the applicable law, the lower court or tribunal arrived at a correct decision.²³ It is incontrovertible from the foregoing that Alternative Dispute Resolution cannot be found in whatever guise at the appellate level. Thus the provision of Order 16 of the Court of Appeal Rules 2011 does not by any stretch of imagination tantamount to Alternative Dispute Resolution.

Order 16 of the Court of Appeal Rules 2011 is better situated within the fringe of out-of-court settlement. In the case of *Cadbury Nigeria Plc. & Ors v. Securities and Exchanges Commission & Anor.*,²⁴ the Court of Appeal defined out-of-court settlement as the settlement and termination of a pending suit arrived at without the courts participation.²⁵ Thus, any form of settlement obtained at the appellate level is not an alternative to court litigation and thus cannot be eligible to be properly called

¹⁹ See Court of Appeal Rules 2011, Or. 16 R. 1(2).

²⁰ [2012] 24 WRN 1.

²¹ *Ibid.*, p. 35 lines 5 – 10. See also the cases of *Oredoyin v. Arowolo* [1989] 4 NWLR (Pt. 114) 172 at 211 and *Iweka v. SCOA* [2000] 7 NWLR (Pt. 664) 325.

²² [2012] 32 WRN 29.

²³ *Ibid.*, pp. 45 line 45. See the cases of *Agboola v. UBA Plc.* [2011] 31 WRN 1 and *Osuji v. Ekeocha* [2009] 52 WRN 1.

²⁴ [2011] 16 WRN 63.

²⁵ *Ibid.*, p. 76.

an alternative to dispute resolution. Therefore the provision of Order 16 does not constitute a legal framework for the advancement of Alternative Dispute Resolution mechanism.

Besides the Court of Appeal Rules 2011, there are other Rules of Court that have advocated for the utilization of Alternative Dispute Resolution Mechanisms in the settlement of disputes. Order 25 Rule 2(c) of the High Court of Lagos State (Civil Procedure) Rules 2004 provides that pre-trial Conference should be explored before a matter goes into full hearing for the purpose of promoting amicable settlement of the case or adoption of Alternative Dispute Resolution. Order 17 of the High Court of the Federal Capital Territory, Abuja Civil Procedure Rules 2004 provides that: "A judge with the consent of the parties may encourage settlement of any matter(s) before it, by either arbitration, conciliation, mediation or *any other lawfully recognized method of dispute resolution*".²⁶ The underlined brings the problem under study to the front burner. Besides arbitration and conciliation, there is no other form of Alternative Dispute Resolution mechanism that is statutorily recognized under a federal legislative framework in Nigeria. This has exposed the imperative and indeed urgent need to have a legal framework for the other ADR mechanisms other than arbitration and conciliation in Nigeria.

Assuming without conceding that these rules put on the toga of an enactment and the judge finally succeeds in getting the parties to concede to mediation, negotiation or even facilitation, what is the procedure for the commencement of these processes? How will the outcome of the process be treated? Are the parties going to be bound or will the outcome of the exercise be a mere appeal to their conscience to tow the path of peace? These issues are nebulous and are attributed to lack of clear and ascertainable legal framework on ADR mechanisms in Nigeria.

4. The Need for a Legal Framework for ADR

By legal framework we mean legislation - law and rules that will guide the use of these processes, just as we already have arbitration laws, arbitration rules, conciliation laws, and conciliation rules. A legal framework here is meant to be a set of laws or rules of law that is used as an anchorage for the effective operation of Alternative Dispute Resolution mechanism in Nigeria. As already noted, only two aspects of ADR – arbitration and conciliation – have received legislative backing in Nigeria. This is unacceptable in the light of the impact ADR is making on

²⁶ Emphasis supplied.

the Nigerian society. There is therefore the urgent need to provide a legislative framework for the other forms of ADR as has been achieved in some jurisdictions.²⁷ This can be done either by incorporating mediation, negotiation, med-arb, mini-trial, etc into the Arbitration and Conciliation Act, or by enacting a fresh piece of legislation altogether.

5. Arguments for and against Institutionalizing ADR

Some may argue that institutionalizing non-binding ADR options will ossify them thus rendering them unattractive as they will thereby lose their flexibility.²⁸ They also argue that it was because arbitration was institutionalized by legislation that it has been hijacked by judicial process.

We think otherwise. Providing a formal framework for ADR especially mediation will enhance its operations for the following reasons:

It will provide uniform rules for its application. This will in turn make it more attractive for both local and foreign investors. It will promote greater use of ADR as the Law and Rules will encourage the use thereof, and sometimes make the use mandatory if circumstances so allow.

It will not remove the flexibility of ADR, as some people fear. Like Conciliation Rules already established²⁹, statutory backing for mediation will not only preserve the nature and essence of mediation as a non-binding ADR process, but will also enhance its operation by creating a conducive legal environment. The courts will be brought in very minimally only for areas where their services are inevitably needed in order to do justice and realize the intention of the parties. It will not be far-fetched to envisage abuses when ADR becomes widely accepted and used. A form of judicial control will become imperative to safeguard against such abuses.

The above suggestions are in line with the earlier thesis that arbitration occupies a special place among ADR systems. Arbitration has not been hijacked by the judicial process which then makes it to become another form of litigation except in name. It has been argued elsewhere by the present writer that ADR

²⁷ See for example the United States Uniform Mediation Act 2001 which is a legal framework for Mediation and was enacted with the principal purpose of harmonizing similar State laws; the Mediation Act of Trinidad and Tobago 2004; the Australian Mediation Act 1997 and the Commercial Mediation Act 2010 of Ontario, Canada.

²⁸ See Redfern and Hunter, *op. cit.* p. 45 para. 1-94.

²⁹ See Arbitration and Conciliation Act, *op. cit.*, note 7. Part II of the Act is on Conciliation. Schedule 3 is Conciliation Rules.

process needs the help of the court to fully realize its objectives.³⁰ What is urged is that court's interventions should be as minimal as possible in order to retain party autonomy, informality and flexibility which are the hallmarks of ADR. Legislative framework and the court's necessary intervention will not destroy these options as ADR process.

Progress in this line of thought has already been made in both foreign and local jurisdictions. In UK, civil litigation has undergone radical changes as a result of the review of the Civil Procedure Rules under the chairmanship of Lord Woolf. One of the major reforms introduced by the new Civil Procedure Rules of April 1999 is the development of active case management which includes encouraging the parties to use ADR procedure if the court considers it appropriate.³¹ Sanctions are normally imposed on parties who should have taken the benefit of ADR mechanisms but failed to do so, and case law has equally followed the new procedure.³²

In the United States, Congress in 1998 enacted the Alternative Dispute Resolution Act, with respect to the use of alternative dispute resolution processes in the United States District Courts.³³

In Nigeria, certain jurisdictions have gone a step further in institutionalizing and enabling a proper framework for ADR. In Lagos State, for instance, the legislature did this by enjoining the courts to promote reconciliation and amicable settlement of disputes before them.³⁴ Also, High Court Rules provide for a Pre-Trial Conference, in which the Judge issues a pre-trial conference notice in Form 17 for the purpose of, among others, promoting amicable settlement of the case or adoption of alternative dispute resolution.³⁵ In Abuja, it is mandatory to include a pre-action

³⁰ See E. O. Ezike, "The Validity of Section 34 of the Nigerian Arbitration and Conciliation Act", *The Nigerian Juridical Review*, vol. 8 (2000 – 2001), pp. 142-143.

³¹ English Civil Procedure Rules, 1999, r. 1.4(e).

³² See *Dunnett v. Railtrack Plc* (2002) WLR 2434, where the Court of Appeal refused to make a cost award against Miss Dunnett who had been unsuccessful in her action against Railtrack Plc both at first instance and on appeal on the ground that Railtrack had refused her earlier offer to mediate the dispute. See also *Cable & Wireless Plc v. IBM United Kingdom Ltd* (2002) EWHC (Ch.) 2059.

³³ See "Alternative Dispute Resolution Act 1998" available at < http://www.epa.gov/adr/adra_1998.pdf> (last accessed 21 October 2010).

³⁴ See section 24 of the High Court Laws of Lagos State 2003.

³⁵ Order 25, Rule 1 (1) (c) of the High Court of Lagos State (Civil Procedure) Rules, 2004.

counseling certificate while commencing a civil action in the High Court of the Federal Capital Territory.³⁶

Some form of ADR has also been applied in criminal matters. Compounding of offences is provided for in a few federal enactments. In Section 41 of the National Park Service Act,³⁷ the National Park Service has the power to compound offences.³⁸ Also, the Births, Deaths, etc. (Compulsory Registration) Act³⁹ empowers the Registrar-General to compound offences, and the commission to make regulations for the compounding of offences.⁴⁰ Also, the Customs and Excise Management Act⁴¹ provides that the Board may stay or compound any proceedings for an offence.⁴²

This trend of introducing some form of alternative dispute resolution in criminal cases is also seen in anti-graft statutes. The Economic and Financial Crimes Commission Act⁴³ provides that the Commission may compound any offence punishable under this Act by accepting such sum of money as it thinks fit not exceeding the maximum amount to which that person would have been liable if he had been convicted of that offence.⁴⁴ Also, the Corrupt Practices and Other Related Offences Act⁴⁵ empowers the Independent Corrupt Practices and other Related Offences Commission to issue a certificate of indemnity to a witness upon full disclosure of things he has been lawfully asked, and such certificate shall be a bar to any proceedings in respect of the things disclosed.⁴⁶

³⁶ Order 4 Rule 17 of the High Court of the Federal Capital Territory (Civil Procedure) Rules 2004 provides that A certificate of pre-action counseling signed by Counsel and the litigant, shall be filed along with the writ where proceedings are initiated by counsel, showing that the parties have been appropriately advised as to the relative strengths or weakness of their respective cases, and the Counsel shall be personally liable to pay the costs of the proceedings where it turns out to be frivolous.

³⁷ Cap. N65 LFN 2004.

³⁸ But this is without prejudice to the powers of the Attorney-General of the federation under section 174 of the Constitution of the Federal Republic of Nigeria 1999.

³⁹ Cap. B9 LFN 2004.

⁴⁰ *Ibid.*, s. 45 and 49 respectively.

⁴¹ Cap. C45 LFN 2004.

⁴² *Ibid.*, section 186.

⁴³ Cap. E1 LFN 2004.

⁴⁴ *Ibid.*, section 13(2).

⁴⁵ Cap. C31 LFN 2004.

⁴⁶ *Ibid.*, section 63.

State legislatures are also adopting the trend of introducing some form of ADR in criminal justice. Section 26 of the Magistrate Court Laws of Lagos State provides that “in criminal cases, a Magistrate may encourage and facilitate the settlement in an amicable way of proceedings for common assault or for any other offence not amounting to felony and not aggravated in degree, on terms of payment of compensation or other terms approved by him.”

In the North, the Criminal Procedure Code, in section 339, makes detailed provisions for the compounding of offences. Subsection (1) of the section provides that the offences punishable under the sections of the Penal Code described in the first two columns of Appendix C of the Criminal Procedure Code may subject to the subsequent provisions of this section, be compounded by the persons⁴⁷ mentioned in the third column of that Appendix. Some of the offences⁴⁸ may be compounded without the leave of the court at any time before the accused person has been convicted by the court or committed for trial to the High Court, while other offences⁴⁹ may be compounded before the accused person has been convicted by a court or committed for trial, only with the consent of the court which has jurisdiction to try the accused person for the offence or to commit him for trial.⁵⁰

However, in the Southern states, the Criminal Code expressly forbids the compounding of offences⁵¹. Section 127 provides that:

Any person who asks, receives, or obtains, or agrees or attempts to receive or obtain any property or benefit of any kind for himself or any other person upon any agreement or understanding that he will compound or conceal a felony, or will abstain from, discontinue, or delay a prosecution for a felony, or will withhold any evidence thereof, is guilty of an offence.

The introduction of compounding of offences is a progressive and therefore a welcome development considering the number of

⁴⁷ These persons are those who bear the direct consequence of the act constituting the offence, for example, the person to whom hurt is caused, or who is defamed, or who is compelled to labour etc.

⁴⁸ These are offences mentioned in Part I of Appendix C of the CPC. They include causing hurt, criminal trespass, defamation, criminal intimidation, adultery, among others.

⁴⁹ The offences mentioned in Part 11 of Appendix C of the CPC. They include causing grievous hurt, house trespass to commit an offence punishable with imprisonment, unlawful compulsory labour, among others.

⁵⁰ CPC section 339 (5).

⁵¹ Especially felonies.

criminal cases pending before the courts in Nigeria. It is our humble view that the South should borrow a leaf from the North in this regard. We also advocate applying ADR in the prosecution of as many offences as possible. A visit to some of the prisons in Nigeria will clearly show that our courts are over-crowded with cases, and the need to provide a legal framework for ADR settlement of minor criminal cases becomes very apparent. In some of these prisons the number of detainees awaiting trial outnumbers those serving their sentences. Many detainees have actually stayed longer than the maximum period they would have served if found guilty. And of course, there is no gainsaying the fact that a good number of them are innocent, that is to say, that if they had been tried, they would have been found not guilty of the offences as charged.⁵² For these types of people, the judicial system has woefully failed them. They have not got the justice they truly deserve. Some of them die in detention and others finally get freedom, not from the courts, but from the prerogative of mercy following a politicized and orchestrated tours of the prisons by either the president, the governor or the Chief Judge of a State. If ADR is applied to criminal matters surely many of these detainees would not be in prison because there would have been an amicable settlement of the offence. This is known as 'victim-offender mediation. The advantage of this is the pacification of the offender by assuaging his emotional feelings.

Happily, the Nigerian Legislature is in the process of amending the Arbitration Act. This is a golden opportunity to provide for the needed legal framework for all forms of ADR especially for mediation. It is suggested that there should be two Acts on ADR in the country. One will cover only arbitration while the other will cover mediation, conciliation and all the other forms of ADR which are in popular usage. To this effect, the section on conciliation in the present Act, should be excised and joined with the other forms of ADR to produce the second Act. The first Act shall be called Arbitration Act, while the second

⁵² A visit to some of our prisons puts forward this issue of delay in justice delivery so forcefully and in such a practical language that elicits the deepest pity ever imagined in the consciences of human beings. For example, in Kuje Prison at Abuja, the Capital of the Federal Republic of Nigeria, the prison capacity is for 320 inmates, but the actual inmates there number 474, out of which only 40 are convicted while a whooping number of 434 are still awaiting trial. In Medium Kirikiri Prison, Lagos, Nigeria, its capacity is 704 whereas the actual number of inmates is 1,163 out of which 1,061 are awaiting trial. A very pathetic case is in Onitsha Prison, (Onitsha is in the Eastern part of Nigeria) where a detainee is still awaiting trial for 29 years because of an allegation that he stole 750,000.00 naira (an equivalent of 5,000 dollars).

shall be called Alternative Dispute Resolution Act. Or, in the alternative, a single piece of legislation can still be retained by expanding the present Act to include mediation and all the other forms of ADR in popular usage, and shall be called Arbitration and ADR Act.

6. Other Things Necessary for Institutionalizing ADR in Nigeria

6.1. Supremacy of ADR Provisions

It shall be provided in the new Act/Acts that its/their provisions shall take precedence over any other law on the same subject that is in conflict with its/their provisions. This will remove uncertainty in the law which hitherto has existed because of the provisions of various State laws and High Court rules on ADR that are in conflict with some provisions of the principal Act. For example, whereas section 29 of the Arbitration and Conciliation Act provides for a limitation period of 3 months for impeaching an award, some of the State laws and High Court Rules provide for 15 or 30 days.⁵³

6.2. Need for Greater Awareness:

6.2.1. Concept of Multi-door Courthouse:

Entrenching an effective ADR mechanism in the country can only come through awareness of its existence and usage. To this end, the concept of multi-door courthouse in some States in Nigeria is highly commendable. Multi-door courthouse concept is a court of law in which facilities for ADR are provided. It is an integration of ADR with the court system in which disputants have the choice of other ADR processes that may be appropriate for a particular case. This concept recommends the channeling of disputes for settlement to different *fora* such as specialized tribunals. The approach gives room for screening and referral. This is the approach adopted in the Pilot Projects in Cambridge Massachusetts, Tulsa, Oklahoma, Houston, Texas and Washington DC.⁵⁴ Based on certain criteria, the screening clerk of the court will determine for the litigant which process fits a dispute. So far in Nigeria only Lagos, Kano, Kwara States and

⁵³ See for example, , Anambra State High Court Rules, Order 29 Rule 13; Benue State High Court (Civil Procedure) Edict, Order 19 Rule 13(2); Plateau State High Court (Civil Procedure) Rules, Order 19 Rule 13; High Court of the Federal Capital Territory, Abuja (Civil Procedure) Act, Order 19 Rule 13(2).

⁵⁴ W. O. Egbewole, "ADR and International Commercial Transactions", *Modern Practice Journal of Finance and Investment Law (MPJFIL)* Vol. 3 No 4 (1999), pp. 685-686.

Abuja the Federal Capital Territory operate the scheme. We urge that all the States of the Federation should adopt the concept and practice and afford their citizens the opportunity of a multi choice in dispute resolution in their courts.

6.2.2. Introduction of ADR into the University Academic Curriculum.

Presently, only very few universities in Nigeria offer ADR in their course content. University authorities are urged to include its study in their curricula especially for such disciplines as Law, Medicine, Management, Engineering and Environmental studies. In the law faculties, it may not be necessary to make it a compulsory course, as it is not a core law subject. Suffice it that it be offered as an elective and surely, majority of the students would study it.⁵⁵

6.3. Need for Virtual Library

There is a dearth of literature on the subject in the country. Local materials are very few. Foreign materials are also scarce and where available are very expensive to procure. However, there is a way out which is internet facilities and virtual library. There are lots of materials on ADR on the World Wide Web. Many web sites offer free and downloadable materials on ADR and these can be found using any internet search engines.⁵⁶ Besides the free materials, access to richer and more authoritative materials can be obtained by subscription. Individuals and faculties can, and are seriously urged to subscribe on-line for virtual library. Indeed, it has become imperative for all faculties in the universities to go online in order to supplement the poor library holdings in our higher educational institutions. Institution/faculty/corporate subscription is cheaper than private subscription. Subscription to virtual library will give the staff and students access to journals, texts, periodicals and other publications which cannot be got locally. This has to be considered as a priority in this information technology age.⁵⁷

6.4. Law Reform

The Arbitration and Conciliation Act contains typographical,

⁵⁵ In the Faculty of Law, University of Nigeria, Enugu Campus, where it is offered as an elective, about 80% of law students freely choose to study it every year.

⁵⁶ E.g. Google, Yahoo, etc.

⁵⁷ Examples of bodies that offer virtual library and other services are LexisNexis and JSTORE.

draftsman's and substantive errors that need to be amended. A lot of ink has flown from learned authors in calling for these amendments.⁵⁸ Efforts should therefore be made to amend sections 4, 5, 7, 12, 30, 32 and 54. Inelegant sections and provisions should be re-drafted. The Legislature should come out with an elegant and standard arbitration and ADR Acts/Act which at least should take care of and amend all the sections and provisions that have been pointed out by writers as indicated above.

7. The Draft Federal Arbitration and Conciliation Bill and the Proposed Uniform State Arbitration and Conciliation Bill

It is praiseworthy to note that finally, there is an ongoing process to amend the arbitration and conciliation laws of Nigeria. A national committee set up in 2005 came out with two draft bills as enunciated above. The committee also introduced an innovation – the Arbitration Claims and Appeals (Procedure) Rules.⁵⁹ The Uniform State Arbitration and Conciliation is for the States of the Federation. Some States have promulgated their Arbitration Laws.⁶⁰ The draft Federal Bill is yet to be passed by the National Assembly. The State Arbitration Laws that have come into force

⁵⁸ See for example, G. Ezejiolor, "The Nigerian Arbitration and Conciliation Act: A Challenge to the Courts", *Journal of Business Law*, (1993), p. 82; A. A. Asouzu, "Arbitration and Judicial Powers in Nigeria", *Kluwer Law International*, Vol. 18, No. 6 December 2001, p. 635; Ndukakkeyi, "The Courts and Arbitral Process in Nigeria", [1997]ADRLJ, p. 319; C U Mmuozoba, "The Law Courts and Arbitral Tribunals under the Arbitration and Conciliation Act, 1990: Some Neglected Questions and Suggested Answers", *The Nigerian Law & Practice Journal*, Vol. 6, No. 1 (March 2002), p. 96; G. C. Nwakoby, "The Courts and Arbitral Process in Nigeria", *Unizik Law Journal*, Vol. 4, No. 1, p. 31; G. C. Nwakoby, "The Constitutionality of Sections 7(4) and 34 of the Arbitration and Conciliation Act", *Nigerian Bar Journal*, (2003), Vol. 1, No. 3, p. 355; Paul O. Idornigie, "The Default Procedure in the Appointment of Arbitrators: Is the Decision of the Court Appealable?" (2002) *68 Arbitration*, p. 397 at 402.

⁵⁹ These are to regulate applications to court in arbitration matters. They are contained in Third and Second Schedules of the Federal and Uniform States Arbitration and Conciliation Bills respectively.

⁶⁰ On 18 May 2009, Lagos State of Nigeria enacted two new arbitration laws: the Lagos Arbitration Law (Law No. 10 of 2009), which applies to all arbitration with Lagos as the seat, unless the parties have expressly agreed otherwise, and the Lagos Court of Arbitration Law (Law No. 8 of 2009) which establishes the Lagos Court of Arbitration. See "Nigeria enacts two new arbitration laws" (13 August 2009) available at <<http://arbitration.practicallaw.com/8-386-8895>> (last accessed 21 October 2012).

and the draft Federal bill yet to be passed have, to a large extent taken care of the shortfalls in the current Arbitration and Conciliation Act. The drafters of the bills have indeed taken cognizance of the much ink that have flown as regards the lacunae in the current Act and have addressed them.⁶¹

8. Suggestions for the Nigerian Legislature on ADR

The answers the Legislature will give to the following questions will help in shaping the new ADR Act: Should there be court's intervention?⁶² If yes, when and how shall the court intervene? Should the courts be empowered to encourage or compel the use of ADR as we have seen in Lagos and Abuja?⁶³ Should there be pre-action protocols or pre-trial conferences as obtains in Lagos State Civil Procedure Rules? Should there be sanctions in the event of a default or an act or step contrary to the proposed Act? Could the settlement or agreement arising out of mediation be converted to arbitral award on agreed terms?⁶⁴ Should we adopt or modify the provisions of the Australian Legal Profession Reforms

⁶¹ The offending sections 4, 5, 7, 12, 30, 32 and 54 (as pointed out above), have been amended. Some innovations introduced in the new bills are: (1) general principles and scope of application which states *inter alia* that the object of arbitration is to obtain a fair resolution of disputes by an impartial tribunal without unnecessary delay and expense – section 1 (a) – (d); (2) appointment of a sole arbitrator if the parties are silent on the number of arbitrators – section 6(3); (3) provision of an umpire – section 8; (4) immunity of arbitrator – section 15; (5) power of court to grant interim measures – section 18 and a greatly enlarged provisions on interim measures in line with the 2006 amendment on the Model Law on interim measures. These cover sections 18 to 28 of the new bills; (6) application of statutes of limitation to arbitral proceedings – section 33; (7) powers of the arbitral tribunal to grant remedies – s. 36; (8) consolidation and concurrent hearing of arbitral proceedings – section 38; (9) power of the arbitral tribunal to award interest, exercise a lien over its award until fees are paid, and order security for costs – sections 44, 47 and 51 respectively. It should be pointed out that Lagos is ahead in this law reform. The Lagos State Legislature has gone ahead to replace words regarded as archaic with modern terminology. Such words as “null and void” in section 12(2) of the current Act were replaced with “invalid, non-existent or ineffective” – section 19(2) of Lagos State Arbitration Law, etc. Lagos State Arbitration Law also permits non-Nigerian to be appointed as arbitrator – section 8(3)(i).

⁶² See Arbitration and Conciliation Act, *op. cit.*, note 7, section 34.

⁶³ See above para. 5.

⁶⁴ See Arbitration and Conciliation Act, *op. cit.*, above n 7, s. 25 and *UNCITRAL Arbitration Rules*, Art. 34.

Act, 1993⁶⁵ providing for statutory mediation, or the English Civil Procedure Rules,⁶⁶ already discussed, or the American Public Law 105-315?⁶⁷

9. Conclusion

This article has attempted to explain the various types of ADR and showcased their advantages over litigation. The national courts are overwhelmed with multifarious problems ranging from frequent and unnecessary adjournments, harsh and unfriendly technicalities, and over-strict formalities to delays and high cost of litigation. ADR provides an alternative, and legal practitioners and other professionals are urged to employ its services in resolving their clients' disputes. To better achieve this, there is a serious need to clothe all forms of ADR with legislative garbs so as to put them in a deliverable state for effective use in the country. Providing them with legal framework promotes their ease of use and will assure local and foreign investors that commercial disputes can be resolved quickly and amicably. In arguing for a proper legal framework, it allays the fears of some people that to do so would ossify ADR as a non-binding settlement mechanism.

It should not, by any stretch of imagination be understood that we hereby advocate a complete dismantling of the entire court system. By no means! Of course no reasonable and sensible person will advocate that. The court system has come to stay and it is an indispensable tool in the administration of justice world over. What we are strongly canvassing for here is that because of the shortcomings of the court system, it needs some assistance. There is the need to offer a table of multiple choices in dispute

⁶⁵ See "Review of the Legal Profession Act Final Report" Chapter 12.11 available at <http://www.lawlink.nsw.gov.au/report/lpd_reports.nsf/pages/ncpf_exec> (last accessed 21 October 2010).

⁶⁶ See Department for Constitutional Affairs, Civil Procedure Rules (1 October 2010).

⁶⁷ See "Alternative Dispute Resolution Act Now the Law of the Land" (Dec 03, 1998) available at <<http://www.khlaw.com/showpublication.aspx?Show=728>> (last accessed 21 October 2010). On 30 October 1998, President Clinton signed into law the Alternate Dispute Resolution Act, Public Law 105-315. The Act replaces the Federal Judicial Code Arbitration provisions with alternative dispute resolution (ADR) provisions and authorizes the Federal Judicial Center and the Administrative Office of the United States Courts to assist district courts to establish and improve ADR programs. This is the type of action we advocate for the Nigerian government to adopt and implement.

resolution so that people can have a variety to choose from. In other words, there should be an alternative to litigation. This alternative to litigation should be strongly anchored in the Nigerian legal system. The surest way to do this is by providing a proper and formal legal framework for its use.

The Nigerian Arbitration and Conciliation Act should be amended to correct all forms of errors therein contained and to streamline the law on arbitration. It should also be expanded to include provisions for all the other forms of ADR. Alternatively, a new piece of ADR legislation should be enacted.

There is the need for greater awareness to be created about the existence and use of ADR in the country. We have also suggested the ways this can be done, by the inclusion of the study of ADR in all the tertiary institutions in the country, by the use of virtual library to augment the weak local library holdings, by organizing seminars, training and symposia on ADR, by the adoption of the concept of multi-door courthouse in all the States of the Federation. If these suggestions are implemented, there is no doubt that Nigeria will be more conducive, friendlier and a more attractive environment for the family, social, political and commercial life to thrive.