THE ALTERNATIVE DISPUTE RESOLUTION OPTION: TIPS FOR YOUNG LAWYERS

By

Prof Paul Obo Idornigie, SAN, PhD, FCIS, FCIArb (UK)
Chartered Arbitrator
Director of Research
Nigerian Institute of Advanced Legal Studies
Abuja, Nigeria
Email: prof@paulidornigie.org or paul.idornigie@gmail.com
Website: http://paulidornigie.org
Twitter: @paulidornigie

Introduction

I would like to thank JK Gadzama LLP for the opportunity to share my thoughts on this topic. I must state that I am not surprised that the law firm is continuing its mentoring programme. For anybody associated with the law firm, the founder is a man with an unquenchable thirst for jurisprudence, knowledge, scholarship and continuing legal education. In this presentation, I will try to be less jurisprudential, conceptual, philosophical, but practical. That way, I can relate with my young audience. I must warn, however, that I have been given a topic that is jurisprudentially and conceptually controversial, but appears ordinary to the uninformed. Essentially, what we will be interrogating is when the Alternative Dispute Resolution (ADR) option should be adopted. Simply put, the ADR option should be adopted in commercial transactions. It should also be adopted for divorce and family mediation, community mediation, restorative justice, environmental mediation and employment disputes. Lastly we will look at ADR in criminal matters.

Since I am addressing young lawyers, I will try to identify areas where litigation may not be the appropriate forum. Unfortunately, legal training

is essentially geared towards litigation and not the other options. This was alluded to by Chief Justice Warren Burger thus:

> [t]he notion that ordinary people want black-robed judges, well-dressed lawyers and fine panelled courtrooms as the setting to resolve their disputes is not correct. People with problems, like people in pain, want relief, and they want it as quickly and inexpensively as possible[1]

What kind of reliefs can we get from other processes other than litigation? This is the thrust of this presentation.

What is ADR?

ADR has assumed centre stage as a dispute resolution mechanism. Paradoxically, writers and scholars are divided on what exactly the acronym means.[2] First, there are jurisprudential and conceptual questions as to whether it is alternative to litigation or mediation or conciliation or reconciliation or settlement. There is also the issue of whether the acronym includes 'arbitration'. Lastly, there is the issue of what the letters in the acronym stand for. Thus, what does letter "A" in the acronym stand for? Does it stand for 'alternative', or 'appropriate' or 'amicable'? If it stands for 'alternative', the next question is alternative to what? If we are able to agree on what 'alternative' stands for the next question is what is a dispute? When does a dispute crystallize? What is the meaning of 'resolution of a dispute'? If we accept the acronym as it is, what is the philosophy behind it and what are the contours? **Above all, the challenge is how should disputes be categorized, analyzed and processed?**

[1] Our Vicious Legal Spiral, 16 Judges J. 23, 49 (1977)

[2] Susane Blake, Julie Browne and Stuart Sime, *A Practical Approach to Alternative Dispute Resolution* (2nd edn, Oxford University Press 2011) 5. See also Paul Obo Idornigie, *Commercial Arbitration Law and Practice in Nigeria* (NIALS Press 2015) 28.

I will endeavor not to bore my young audience with jurisprudential polemics. However, there is a huge debate as to what ADR means and its contours. Be this as it may, in examining the meaning of ADR, it is imperative to analyze each element in the acronym. This was alluded to by Brown and Marriott thus:

> Analyzing each of the three elements of ADR – "alternative", "dispute" and "resolution" – is instructive, not as a semantic exercise, but rather to examine what the process fundamentally involves. In doing so, it is important to bear in mind that ADR is a generic and broad concept, covering a wide range of activities and embracing huge differences of philosophy, practice and approach in the dispute conflict field.[3]
>
> …….
>
> The term "alternative" in ADR has generally been understood to refer to the alternatives to litigation. Arbitration was originally widely included as part of ADR. However, as arbitration has entered the mainstream of dispute resolution processes, and in the light of its adjudicatory nature, the current tendency has shifted away from regarding arbitration strictly as ADR and has tended to limit this term to consensual processes. Practice, however, varies quite extensively in this regard and many still see arbitration as ADR.[4]

In the words of Karl Mackie and Others:

> There are many positive reasons for adopting Alternative Dispute Resolution (ADR) processes as a means of trying to

3. Henry Brown and Arthur Marriott, *ADR Principles and Practic*e (3rd edn, Sweet & Maxwell 2011) 2.
4. Ibid 20.

> resolve civil disputes. However, it is probably true that initial enthusiasm for ADR stemmed primarily from a negative source – dissatisfaction with the delays, costs and inadequacies of the litigation process, particularly in the United States where ADR first developed. UK lawyers for many years had tended to dismiss ADR as a phenomenon specific to the United States. Companies in the United States were seen as more litigious. They were faced by claimants whose cases were funded by lawyers paid by substantial contingency fees. Trials were in courts where liability and damages were often determined by jury, and there was no prospect of recovering legal costs from an opponent in the event of victory. Indeed, much of the same features distinguish the civil justice system in the United States from the United Kingdom even today. [5]

The term ADR does not have an agreed definition. This was alluded to by Blake, Brown and Sime thus:

> The term 'alternative dispute resolution' or 'ADR' does not have an agreed definition. … There are also debates as to whether the term 'alternative dispute resolution' should be used at all. Options are only really 'alternative' if the use of litigation is seen as the norm, but statistics show that most cases settle rather than going to court for decision, so that settlement rather than litigation is actually the norm. Also many cases use a mixture of court procedure and ADR rather than relying solely on one 'alternative'. For such reasons it has been argued that it may be more accurate to talk of

5. Karl Mackie and Others, *The ADR Practice Guide: Commercial Dispute Resolution* (3rd edn, Tottel Publishing 2007) 3.

s‘appropriate dispute resolution’. Rather than be drawn into such debates, we take the pragmatic view that ‘ADR’ is a term generally accepted as covering alternatives to litigation.[6]

Conversely, Karl Mackie and Others[7] interrogated the jurisprudential basis of the acronym. In trying to answer this question, Karl Mackie and Others posited that as a field, ADR evolved for differing motives and with different emphases and that:

> (t)he most common classification is to describe ADR as a structured dispute resolution process with third-party intervention which does not impose a legally binding outcome on the parties. Mediation is the archetypal ADR process falling within this classification.

This clearly excludes ‘arbitration’ because arbitration imposes a legally binding outcome on the parties. This view is not shared by the learned authors of the *ADR Principles and Practice* thus:

> It is now widely accepted – including by the authors of this work – that arbitration, contractual adjudication and other forms of dispute determination by a third party are also forms of ADR. The view that ADR is (or should be) alternative to all forms of third party determination and should embrace only non-adjudicatory processes is no longer seriously propounded.[8]

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6 Blake, Browne and Sime (n 2) 5

7. Karl Mackie and Others (n 3) 8. See also Kehinde Aina, *Dispute Resolution* (NCMG International and Aina Blankson LP) 2012; Kehinde Aina, *Commercial Mediation: Enhancing Economic Growth and Courts in Africa* (NCMG International and Aina Blankson LP) 2012; P O Idornigie ‘Re-thinking Business Disputes Resolution: The Mediation/Conciliation Option’ in *Ambrose Alli University Law Journal*, Vol. 1, 2002 No. 1, 48; P O Idornigie ‘Overview of ADR in Nigeria’ in *Arbitration: The International Journal of Arbitration, Mediation and Dispute Management*, Vol 73, No. 1, February 2007 73; and P O Idornigie, ‘Alternative Dispute Resolution Mechanisms’ in A F Afolayan and P C Okorie (eds), *Modern Civil Procedure Law* (Dee-Sage Nigeria Limited 2007) 563.

8. Brown & Marriott (n 3) 2.

For purposes of this presentation, I will assume a working definition of ADR and focus on the contours. I will resist the temptation to adopt the position of the learned authors of *Russell on Arbitration* thus:

> Alternative dispute resolution is regarded, by English practitioners as any system of dispute resolution which is non-binding. By "non-binding" is meant that the parties are under no obligation to comply with any decision or determination resulting from the process, if indeed there is one.[9]

It is submitted that given our legal history, arbitration in Nigeria should be seen as not included in the ADR procedures. Orojo and Ajomo share this view. After discussing the arguments for and against classifying arbitration as an ADR process, Orojo and Ajomo opines thus:

> … it is submitted that arbitration is in a curious position when discussing ADR processes. It is basically a form of adjudication, though like ADR properly so-called, it is also an alternative to litigation. The difference ... stems from the fact that, in mediation or conciliation, the parties retain the responsibility for and control over the dispute to be resolved and they do not transfer decision-making power to the mediator, whilst in an arbitration, the arbitrator has responsibility for controlling the process and making a binding award. In the light of the above, it is submitted that arbitration should be left out of the ADR process.[10]

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9. David St John Sutton, Judith Gill and Matthew Gearing, *Russell on Arbitration* (23rd edn, Sweet & Maxwell 2007) 47.

10. JO Orojo and MA Ajomo *Law and Practice of Arbitration and Conciliation in Nigeria* (Mbeyi & Association (Nig) Limited 1999) 5. See also Dixon 'Alternative Dispute Resolution Developments in London (1990) 4 Intl Construction L Rev 436 at 437 where he stated thus: *Arbitration presents an alternative to the judicial process in offering privacy to the parties we well as procedural flexibility. However, it is nonetheless fundamentally the same in that the role of the arbitrator is judgmental. The function of a the judge and the arbitrator is not to decide how the problem resulting in the dispute can most readily be resolved so much as to apportion responsibility for that problem.*'

Arbitration has consensual and adjudicatory elements. The consensual elements are manifested in the principle of party autonomy while the adjudicatory elements are manifested in the nature and effect of arbitral awards. Although arbitral awards are meant to be final, binding and conclusive, in practice, they are seen as the first step to litigation. In this regard, there is generally tension between users and practitioners. The question is why resort to arbitration when the award will be challenged in court? We submit, therefore, that in the context of dispute resolution process, 'arbitration' should be seen as *sui generis* as it is both consensual and adjudicatory. Another view, is whether 'arbitration' is part of the ADR processes or not depends on the definition of ADR – whether a range of dispute resolution processes that add to litigation or a dispute resolution process that is non-binding.

Philosophy Behind ADR

In terms of **philosophy** behind ADR, this position has been aptly elucidated upon thus:

> Unlike litigation, which has the single object of providing procedures to decide disputes based on the principles of law and rights, and in some very limited circumstances equity, there is no single philosophy underpinning or motivating ADR. Rather, a number of different ideas, rationales and considerations have influenced its development, some overlapping and some inimical to the others.[11]

The philosophy of ADR includes:

11. Brown & Marriott (n 3) 29.

- ☐ Negotiated settlement is more beneficial than contentious judicial proceedings.
- ☐ Traditional African society – dispute a social disequilibrium .
- ☐ ADR enhances or preserves personal and political relationships that might be damaged by the adversarial process.
- ☐ Settlements more creative, satisfactory and lasting than those imposed by court or 3rd party.
- ☐ A forum in which parties are helped to adopt a problem-solving approach in order to find a win-win outcome.
- ☐ Cost-saving and saving the judicial system from overload.
- ☐ Issue of appropriateness of forum is central – diverse kinds of disputes involving varying circumstances and parties with a range of differing concerns and interests require different procedures and approaches.
- ☐ Consensual – tailor-made to suit the parties.
- ☐ Adopting ADR – not sign of weakness but appreciation of diverse tools.
- ☐ An attempt to pre-empt future disputes by providing for the process in advance – ADR Clause/Pledge.

The Instruments Regulating Arbitration and ADR

There are various soft and hard laws/rules regulating arbitration and ADR. They include:

- ✓ 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards
- ✓ 1965 Convention on the Settlement of Investment Disputes Between States and Nationals of Other States

- ✓ UNCITRAL Model Law on International Commercial Arbitration, 1985 as modified in 2006
- ✓ UNCITRAL Model Law on International Commercial Conciliation, 2002
- ✓ UNCITRAL Arbitration Rules, 2010 as modified in 2013
- ✓ UNCITRAL Conciliation Rules, 1980
- ✓ Arbitration Act, 1996 (UK)
- ✓ Arbitration Law, Lagos State, 2009
- ✓ Arbitration and Conciliation Act, 2004 (Nigeria)
- ✓ ADR Act 1998 (USA)
- ✓ ADR Act, 2005 (The Gambia)
- ✓ ADR Act, 2010 (Ghana)
- ✓ ADR Act, 2017 (Pakistan)
- ✓ Multidoor Courthouse Laws in Lagos, Cross River, Delta and Kwara States
- ✓ Various High Court (Civil Procedure) Rules – Federal, FCT, Lagos, etc. The High Court of the Federal Capital Territory (Civil Procedure Rules), 2018 would seem to combine provisions on Multi-door Courthouse and ADR Processes.[12]
- ✓ Mediation Rules, Supreme Court

Support by the Holy Books

It is interesting to observe that the Holy Books support ADR. Our Lord and Savior, Jesus encouraged settlement thus:

> 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

[12] See Order 2, Rule 7 and Order 19 of the Rules

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.[13]

In Genesis 18:23-33 – Negotiation and Mediation at the City of Sodom and Gomorrah and Abraham the Negotiator (also known as Intercessor)

- And Abraham came near and said, “Would you also destroy the righteous with the wicked”.
- Suppose there were 50 righteous people in a city would you destroy the whole city and not leave the 50 – will spare all for their sake.
- Suppose there were 5 less than 50, will you destroy all of the city for lack of 5
- If I find 45, I will not destroy the city
- What of 40 or 30 or 20 or 10 are found to be righteous, I will not destroy the city for the sake of the righteous.

The Holy Quran 49:9 emphasizes Negotiation and Mediation/Conciliation thus:

- And if two parties or groups among the believers fall to fighting, then make peace between them both
- But if one of them rebels against the other, then fight you all against the one that which rebels till it complies with command of Allah
- If he complies, then make reconciliation between them and be equitable
- Verily, Allah loves those who are equitable.

To underscore the importance of ADR, Matthew 18:15-17 deals with ‘a Sinning Brother’ thus:

[13] Matt 5:25-26

- If your brother offends you, go and tell him without a third party and if he listens you have regained him
- If he fails to listen, take one or two persons so that in the mouth of 2 or 3 witnesses every word may be established
- If he neglects to listen, report to the church and if he neglects to listen to the church, let him be unto thee as a heathen man and a publican (tax collector).

And yet mediators have a special place in Heaven: Matt: 5:9 – (The Beatitudes) - blessed are the peacemakers for they shall be called the children [sons] of God – Sermon on the Mount – mediators admired biblically [peace-making is the family business: 'I must be about my Father's business']

The Contours of the ADR

ADR can be seen as a confluence with many tributaries. What are these tributaries?

- Some ADR writers divide all dispute resolution processes (traditional and alternative) into three primary categories:
  - Negotiation
  - Mediation/Conciliation
  - Adjudication (Litigation and Arbitration)
- Others a spectrum of processes with litigation at one end and negotiation at the other end – control of process by parties.
- Other processes and forms include unilateral action, private judging, expert determination/appraisal, arb-med, med-arb, Ombudsman, early neutral evaluation, mini-trial (executive tribunal), and court annexed arbitration, Dispute Resolution Board (DRB) or Dispute Adjudication Board (DAB).

- Broadly, all processes can be divided into two: adjudicatory and consensual and the hybrid combinations in between them.

We must observe that the category of disputes amenable to ADR are not closed. ADR principles are now extended to criminal cases – restorative justice – victim-offender mediation and can be used for pre-election disputes. The reform of the civil procedure rules and establishment of multi-door courthouses have enhanced the status.

Despite the controversy as to what ADR is or is not, it is settled that at the core is 'mediation'. Again this raises the question as to whether there is a difference between mediation and conciliation. In the UNCITRAL Model Law on International Commercial Conciliation,[14]

> conciliation" means a process, whether referred to by the expression conciliation, mediation or an expression of similar import, whereby parties request a third person or persons ("the conciliator") to assist them in their attempt to reach an amicable settlement of their dispute arising out of or relating to a contractual or other legal relationship. The conciliator does not have the authority to impose upon the parties a solution to the dispute.

Although most practitioners in this area draw a line between mediation and conciliation, we are guided by this definition. We submit that the use of ADR processes as mainly represented by mediation should not be made mandatory but optional otherwise the consensual nature of the

14. General Assembly Resolution 57/18 of 19 November, 2002. See Official Records of the General Assembly, Fifty-seventh Session, Supplement No. 17 (A/57/17), Annex I.

process will be defeated.[15] We believe that the ADR processes should be encouraged.[16]

Other than litigation, we will now examine the options open to you in your legal practice. This will require training and re-training and belonging to appropriate professional bodies like the Chartered Institute of Arbitrators, United Kingdom.

Arbitration – the neutral is privately chosen by the parties or a body agreed by them - proceedings end in an arbitral award that is final and binding. It starts by way of private agreement between the parties, continues privately in an atmosphere anchored on the principle of party autonomy and ends in an award that has a public effect. It has the same 'baggage' like litigation in terms of resolving the conflicts or settling the dispute. Additionally, arbitration has its own challenges – is it constitutional or ousts the court's jurisdiction? Why do parties bother to resort to arbitration when the final award will be challenged in court? Is arbitration cost-effective? Are arbitrators impartial and independent? However, arbitration is anchored on fundamental principles –

- Principle of party autonomy
- Principle of arbitrability
- Principle of separability
- Principle of minimal judicial intervention

15. In this regard, we do not share the position in the Preamble to the Lagos State High Court (Civil Procedure) Rules, 2012 which provides, among others, in Preamble 2(1) and (2), page xx that the Court shall further the overriding objectives by actively managing cases. Active case management includes (a) mandating the parties to use an (ADR) mechanism where the Court considers it appropriate and facilitating the use of such procedure. Compare Order 2, Rule 7 of the High Court of the FCT Rules, 2018 that provides that all originating processes should be screened for suitability for ADR and where it is considered appropriate the Chief Judge may refer the case to the Abuja Multidoor Courthouse or other appropriate ADR institution or legal practitioners.

16. See Order 19 of the High Court of the Federal Capital Territory (Civil Procedure Rules), 2018 and Order 52 of the Federal High Court Rules, 2009.

- Principle of kompetenz-kompetenz (the competence of the arbitral tribunal to rule on its own jurisdiction)

The font of arbitration is the arbitration agreement – a clause or submission agreement. You should not forget to include such a clause in your commercial transactions. Indeed, section 16(26) of the Public Procurement Act, 2007 provides that all procurement contracts should contain provisions on arbitration as the primary form of dispute resolution.[17] The agreement is enforceable by way of stay of proceedings while the award from arbitral proceedings is enforceable like a court judgment.

Conciliation/Mediation – may be evaluative or facilitative but does not produce a binding outcome. Evaluative – has no authority to make any decisions but uses skills to assist parties to negotiate settlement terms and arrive at their own resolution. The neutral may express some view on merits of the issues (rights-based). Facilitative – similar to evaluative save that the neutral does not express a view in any way or challenge parties' perceptions (interest-based). Is it worth resorting to conciliation/mediation, when the conciliator/mediator decides nothing and awards nothing? However, it will usually end in a Settlement Agreement which is enforceable especially in states with Multi-door Courthouse Laws. Mediation, conciliation and arbitration are at the heart of industrial disputes.[18]

[17] See also section 26 of the Nigerian Investment Promotion Commission Act, Cap N117, LFN, 2004.
[18] See the Trade Disputes Act, Cap T08, LFN, 2004 and the National Industrial Court Act, Cap N155, LFN, 2004.

Executive Tribunal or Mini trial - this is a structured settlement negotiation in which each party's advocate puts his best case to a forum which consists of decision makers from each side with power to settle the dispute and a neutral party after which the executives meet to endeavour to resolve their differences. But is it not a waste of time if the parties cannot settle and eventually go for arbitration or litigation?

Med-Arb – starts by way of a mediation but when a settlement is reached or parties cannot agree, the mediator becomes an arbitrator. This is subject to the agreement of the parties. How do you ensure that the mediator does not take advantage of privileged information and use it in the arbitration phase? Again assuming the award is challenged, has time not been wasted in resorting to this forum? There can also be in **Arb-Med.**[19]

Dispute Resolution Board – prevents disputes from arising. It is usually set up at the beginning of a project, for example, construction site, to address issues that may arise at the site and either make recommendations or takes decisions. What happens if the recommendations are not acceptable and the dispute moves from prevention to resolution? Has time not been wasted?

Private judging – where a court refers a case to a referee privately chosen by the parties to decide some or all of the issues, or to establish any facts.

[19] Arb-Med was used in the dispute between the Federal Government and Global Infrastructure in respect of Ajaokuta Steel Company Limited.

Early Neutral Evaluation – independent neutral makes an evaluation of the case, usually its merits or some aspect, which is not binding on the parties but helps them in decision-making.

Expert Determination – parties appoint an expert, to consider issues and make a binding decision or appraisal without necessarily having to conduct an enquiry or hearing.

Negotiation – no neutral involved; representatives of the parties or the parties negotiate with one another. Parties retain the powers to agree. **I urge all young lawyers to acquire negotiation skills because the skills are needed in all dispute resolution processes. You also bear in mind that you negotiate in the shadow of law.**

Ombudsman (Public Complaints Commissioner) – independent neutral appointed by the State deals with public complaints against maladministration.

We can see, therefore, why it is difficult to define and analyse ADR. The processes have their challenges. **However, as a young lawyer you must know when to go to court or go out of court. In other words, you must know what tool to deploy at all times. We will now look at how you deploy the tools.**

What are Commercial Transactions?

We stated earlier that we can adopt ADR processes in commercial transactions. What are commercial transactions? This can be ascertained from Article 1(1) of the UNCITRAL Model Law on International Commercial Arbitration which provides thus:

> [c]ommercial" means all relationships of a commercial nature including any trade transaction for the supply or exchange of goods or services, distribution agreement, commercial representation or agency, factoring, leasing, construction of works, constructing, engineering licensing, investment, financing, banking, insurance, exploitation, agreement or concession, joint venture and other forms of industrial or business co-operation, carriage of goods or passengers by air, sea, rail, or road.[20]

We must bear in mind that international arbitration is different from international commercial arbitration. Commercial arbitration also embraces investor-state arbitration. This is the divide between public law and private law.

This word 'commercial' is usually interpreted expansively and consistently with the 1958 New York Convention which in Article 1(3), provides thus:

> [a contracting state] may also declare that it will apply the Convention only to differences arising out of legal relationships, whether contractual or not, which are considered as commercial under the national law of the State making such declaration.

In your practice, therefore, once you are faced with disputes in commercial transactions, think of the ADR options and not litigation. Indeed in drafting commercial transactions provide for resolution of disputes by ADR processes as appropriate.

[20] See also section 57(1) of the Arbitration and Conciliation Act, Cap A18 LFN, 2004.

What are the Other Transactions?

At the core of ADR is mediation. Mediation can be used for the following:

- ✓ Civil and Commercial Mediation
- ✓ Divorce and Other Family Mediation
- ✓ Neighbourhood and Community Mediation
- ✓ Restorative Justice and Practices
- ✓ Workplace and Employment Dispute Resolution
- ✓ Environmental and Public Issue Mediation

ADR in Criminal Matters

Generally, crimes are not arbitrable. However, where offences are compoundable, settlement can be reached. The following enactments provide for compounding of offences or plea bargaining:

- ✓ Section 41 of the National Parks Act, 2004[21]
- ✓ Section 186 of the Customs & Excise Management Act, 2004[22]
- ✓ Section 14(2) of the Economic & Financial Crimes Commission Act, 2004[23]
- ✓ Section 63 Corrupt Practices and Other Related Offences Act, 2004[24]
- ✓ Sections 270-277 of the Administration of Criminal Justice Act, 2015.

Similarly while the focus of the criminal justice system is essentially retributory, with victim-offender mediation, the focus is restorative, known

[21] Cap N65, LFN, 2004
[22] Cap C45, LFN, 2004
[23] Cap E1, LFN, 2004
[24] Cap C31, LFN, 2004

as restorative justice. Thus instead of focusing on the accused person only, the focus should also be on the victim. Restorative justice combines concerns for the victims of crime, the rehabilitation of offenders and the notion of appropriate reparation – compensation, apology and community service. Instead of the belief that crimes are against the state, focus is shifting to the injury to the victim and the community and by aiming for restitution rather than punishment as a primary goal.

Establishing a Nexus Between a Dispute and a Process

Instead of focusing on what ADR means, perhaps the focus should be on determining which particular process fits a particular dispute. This will assist in determining the appropriate dispute resolution process. On the surface, there is nothing wrong with the traditional dispute resolution process as represented by the judiciary. After all there are no better ways of rigorously testing facts, witness credibility and evidence than the adversarial setting of a court room. While it is conceded that there is nothing inherently wrong with using adjudication and the judiciary, there is much wrong with using adjudication to solve all problems. As succinctly put by Emond:

> The judicial process tends to transform social, political and economic disputes into legal disputes. Not only are some problems ill suited to a proper or full resolution through the adversarial process, the process may accentuate and exaggerate conflict rather than resolve it.[25]

Consequently, the search for appropriate dispute resolution procedures can be seen as a search to properly locate adjudication and in particular

25. D P Emond, 'Alternative Dispute Resolution: A Conceptual Overview' in DP Emond .(ed) (n 9) 4.

judicial adjudication on the continuum of dispute resolution mechanisms instead of regarding it as the principal means. The search for a nexus represents a search for a more limited role for adjudication and to remedy some of its obvious inefficiencies. In the final Access to Justice Reports of 1995 and 1996, Lord Woolf took the view that the basic principles that should underpin an accessible civil justice system should be:

- **jus**t in the results delivered;
- **fair** and seen to be so, by ensuring equal opportunity to assert or defend rights, giving adequate opportunity for each to state or answer a case, and treating like cases alike;
- **proportionate**, in relation to the issues involved, in both procedure and cost;
- **speedy** so far as reasonable;
- **understandable** to users;
- **responsive** to the needs of users;
- **certain** in outcome as far as possible;
- **effective** through adequate resources and organization.[26]

The aim of the reform was to change the whole approach to civil litigation from a wasteful adversarial mind-set to one focusing and encouraging settlement rather than trial of disputes.

Qualities of An Arbitrator and ADR Practitioner

There are certain qualities that an Arbitrator or an ADR Practitioner must have. They include:

- Knowledge of the Law – municipal and international
- Knowledge of the law and practice of arbitration and ADR processes

26. Karl Mackie & Others (3).

- Knowledge of the Subject Matter, for example oil and gas
- Relevant qualification and experience
- Independence
- Impartiality
- Integrity
- Capacity to manage conflicts and managing the process
- Capacity to listen, observe, question and summarize

It should be noted that the skills required in arbitration may be different from that in mediation, for example, being an adjudicator and a facilitator. Continuing legal education of this type is imperative.

Conclusion

In this mentoring programme, the attempt has been to discuss what is and what is not ADR. We have not attempted to discuss any particular process – arbitration, mediation, conciliation, Dispute Resolution Board, mini-trial, among others in detail. The focus has been on examining the meaning of ADR, the philosophy behind it and its contours. Similarly, we have attempted to identify where this option is appropriate.

As we have observed, there are jurisprudential and conceptual issues. However, we are in good company. This was alluded to Brown and Marriott thus:

> It is sometimes surprising to outsiders how particular beliefs can share fundamental principles and convictions and yet can have internal divisions, where elements of those beliefs conflict, sometimes irreconcilably, with one another. In religion, differences of belief exist within the different branches

> of Christianity, Islam and Judaism, usually based on historic events or interpretations of sacred text. In politics, “the left” and “the right” are not homogenous groupings with a single focus, but each not uncommonly comprises a number of different organisations and parties which, despite a common underlying belief, have fundamental differences between one another on some detailed issue of principle[27].

ADR replicates some of these challenges in that although more fundamental principles are shared by all the models and groups of practice, there are also some differences of opinion, within its proponents and practitioners. However, ADR provides a wider range of possibilities than the words ‘Alternative Dispute Resolution’ may imply. Perhaps we can find an answer in Lewis Caroll’s Humpty Dumpty[28] where he discussed semantics and pragmatics with Alice:

> "I don't know what you mean by 'glory,' " Alice said.
>
> Humpty Dumpty smiled contemptuously. "Of course you don't—till I tell you. I meant 'there's a nice knock-down argument for you!' " "But 'glory' doesn't mean 'a nice knock-down argument'," Alice objected.
>
> "When I use a word," Humpty Dumpty said, in rather a scornful tone, "it means just what I choose it to mean—neither more nor less." "The question is," said Alice, "whether you *can* make words mean so many different things." "The question is," said Humpty Dumpty, "which is to be master—that's all."[29]

[27] Brown & Marriot (n 3) 29.
[28] L Carroll, *Through the Looking Glass* (Raleigh, NC: Hayes Barton Press, 1872)
[29] See also Lord Atkin in *Liversidge v Anderson* (1941) UKHL 1

And so it is with ADR.

Like an uncompleted building or a building site, ADR represents work in progress as categories of disputes amenable to ADR are not closed.

At one time, the thought of someone seeking legal redress especially in civil matters was that of suing and “going to court”. However it has become a notorious fact that disputes, unlike wine do not improve by aging: many things happen to a cause and to parties in a dispute by the simple passage of time. You should know when to go to court or adopt other processes like arbitration, mediation, conciliation, among others. Above all we must bear in mind that we negotiate in the shadow of law.

Thank you for your attention.

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