WHAT IS (AND ISN'T) ALTERNATIVE DISPUTE RESOLUTION (ADR)

By

Professor Paul Obo Idornigie, PhD, FCIS, MCIArb (UK)
Head, Department of Commercial Law
Nigerian Institute of Advanced Legal Studies
Abuja, Nigeria

(Published in Dakas C J Dakas, Akkarren Shaakaa and Alphonsus Alubo (eds) *Beyond Shenanigans: Jos Book of Readings on Critical Legal Issues* (Lagos: Innovative Communications, 2015) pp 560-580).

Introduction

Alternative Dispute Resolution (ADR) has assumed centre stage as a dispute resolution mechanism. Paradoxically, writers and scholars are divided on what exactly the acronym means[1]. First, there are jurisprudential and conceptual questions as to whether it is alternative to litigation or mediation or conciliation or reconciliation. 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? Is it alternative to 'litigation' or 'mediation' or 'conciliation' or 'reconciliation'? 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, analysed and processes?

In examining dispute resolution processes, litigation and arbitration are seen as adversarial, contentious and confrontational. Would it not be better if the parties were to settle their differences in a less confrontational manner? This is so because there are alternatives to litigation and arbitration that are less confrontational. Similarly, the first rule for parties to a dispute is to try to resolve the disputes themselves essentially because they are in a better position to know the strengths and weaknesses of their respective cases. To what extent do parties control the dispute resolution processes?

It is now conventional to have a clause in a contract to the effect that when a dispute arises, attempts should be made to settle amicably through negotiation 'in good faith'. It is only when this process fails, that resort should be had to other dispute resolution

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

processes. This in turn, raises its own problem. What is the meaning of 'good faith'? Who opens the negotiations? Will this not be seen as a weakness on the part of the party opening up the negotiations? How long are the negotiations to last? How far does a party need to go to show 'good faith'? Is it the party obliged to make concessions, even on the matters of principle to demonstrate 'good faith'?[2] We negotiate in the shadow of the law and we generally preface negotiations with 'without prejudice'.

Originally, in traditional African societies, there were no formal places called courts for the resolution of disputes. Disputes which were essentially civil were resolved in the palaces of the Chiefs, Obis, Obas, Emirs and by peer groups like age-grade and societies. Indeed disputes were seen as social disequilibria – the gods are angry and so, efforts should be made to appease them. Subsequently customary/district courts were established to administer either the Moslem Law of the Maliki School or the unwritten customary law. Common civil cases include land disputes, dissolution of marriage, chieftaincy titles, among others. Criminal cases were very few and were more of minor offences than what we have today. Even before 1862 when the British Government made Lagos a British colony or settlement, there were equity courts and consular courts. With the establishment of consular courts to handle trading dispute between Nigerian and British traders, the focus started changing from reconciliation to apportioning blame that is the hallmark of litigation or arbitration. Under Ordinance 3 of 1863, the British Administration introduced English law into the territory with effect from March 4, 1863 and in the same year, the first Supreme Court was established with civil and criminal jurisdiction. It can be argued that in 1863, the criminal justice system changed from restoration to retribution. However, today we now talk of restorative justice as represented by victim-offence mediation.

Afro-centric scholars argue that settlement, reconciliation and restoration were the focus of administration of justice in African societies before the advent of colonialism. In this context, litigation or the English-type courts is an alternative to the traditional African system of settlement, reconciliation and restoration. It is to the Euro-centric scholars that the letter 'A' means alternative to litigation. It is strongly argued that letter 'A' should mean alternatives to settlement, reconciliation and restoration and that ADR is a reinstatement of customary jurisprudence.

We intend to interrogate all these issues in this paper.

Meaning and Evolution of ADR

In the West, the shortcomings of the judicial process led to radical procedural reforms, utilising other alternative dispute resolution (ADR) procedures which may streamline the process, rendering it less costly and permit early and fair settlement. In the words of Karl Mackie and Others:

---

[2] See Nigel Blackaby and Constantine Partasides, *Redfern and Hunter on International Arbitration* (5th edn, OUP 2009) 44

> There are many positive reasons for adopting Alternative Dispute Resolution (ADR) processes as a means of trying to 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. [3]

However by the late 1980s and early 1990s, a more considered recognition grew that ADR was playing an increasingly useful part in the industrialized common law world in overcoming some of the disadvantages of a highly expensive and often rigid adversarial system.

In Africa, it is colonial rule that introduced 'litigation' as represented by the English-type courts. This is so because before the advent of colonial rule, African states had their own system of resolving disputes which is still in force in non-urban areas in Nigeria. Certainly when a traditional ruler is resolving disputes, he generally mediates or conciliates or settles and some times arbitrates but not litigate. Age-grades also carry out similar roles as traditional rulers in Africa.

In examining the meaning of ADR, it is imperative to analyse each element in the acronym. This was alluded to by Brown and Marriott thus:

> Analysing 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.[4]

Indeed Karl Mackie and others[5] 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:

---

3. Karl Mackie and Others, *The ADR Practice Guide: Commercial Dispute Resolution* (3rd edn, Tottel Publishing 2007) 3.
4. Henry Brown and Arthur Marriott, *ADR Principles and Practic*e (3rd edn, Sweet & Maxwell 2011) 2.
5. 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

> (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.

We submit that from a Eurocentric perspective, that the letter "A" is alternative to litigation. This was alluded to by Blake, Browne and Sime[6] 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 '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. ..

The thrust of this presentation is that from an Afrocentric perspective, letter "A" in the acronym is alternative to 'mediation' or 'conciliation' or 'reconciliation'. The reason for this is not far-fetched. This is so because 'litigation' or the 'English-type courts' are western creations whereas reconciliation, mediation or conciliation are at the heart of dispute settlement in Africa. In Africa, a dispute or conflict is seen as a form of social disequilibrium and efforts are usually geared towards restoring equilibrium. Therefore, litigation is an alternative to the traditional modes of resolving disputes in Africa. We do not have any problem with the definition of the word 'dispute' although the challenge is at what point does a conflict become a dispute? Or is there a difference between a conflict and a dispute? Is there a dispute if liability is admitted but payment is not made? Lastly when there are differences or controversies between the parties to a contract, at what point should the dispute resolution process in a contract be invoked.

Is 'resolution' the same thing as settlement, compromise or management or facilitation? This is so because the options for dealing with a dispute may include resolution, settlement, prevention, management, transformation, analysis and intervention. Parties may only want a neutral person to facilitate certain aspects of a dispute, leaving the actual

---

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.

6. Blake, Brown and Sime (n 1).

resolution to themselves or for settlement in another forum or a different time. This is what happens in Early Neutral Evaluation (ENE) where the evaluator works alongside the parties and their lawyers in guiding them through various stages of litigation. Transformation of a dispute can be viewed in two main ways: the transformation of a dispute from an adversarial process into a problem-solving exercise and from rights-based approach into one that includes an interest-based approach; and the reframing of issues so that they can more effectively and easily be addressed and resolved. Thus we also submit that negotiated settlement can be the norm and other processes are alternatives.

Is Arbitration part of ADR?

It is instructive to determine whether arbitration is or is not or ought to be part of these alternatives or whether the search should be on "appropriate" or "amiable" dispute resolution process or the focus should be on 'settlement'. This has agitated the minds of most writers and authors in this area. We feel that ascribing a meaning 'appropriate' to ADR raises to the fore its philosophical or jurisprudential underpinnings. Being a generic acronym, we are reminded by Dias that the meaning and interpretation of a word is a function of linguistic precepts. According to the learned author:

> It is generally accepted that words have an inner 'core' of settled applications surrounded by a 'fringe' of unsettled applications. Problems of interpretation arise in the fringe area. Words may also have more than one usual meaning in which case the context has to resolve which meaning is being considered.[7]

In a rather concurring manner, Freeman in defining 'law' has also postulated that much juristic ink has flowed in an endeavour to provide a universally acceptable definition. After clearing "two confusions" about the definition, namely "naming a thing" and "essentialism" in his analysis of words he opined thus:

> The limits of defining should also be considered from a further view point. To define is strictly to substitute a word or words for another set of words, and these further words may and generally will stand in need of additional explanation. It must, therefore, be borne in mind that when what is to be discussed is a highly complex concept such as "law" the vital and illuminating feature is not so much the form of words chosen as a definition, but the accompanying elucidation of the manner in which those words are to function in all the diverse contexts in which they may be used.[8]

ADR is an acronym for Alternative Dispute Resolution. On the surface therefore, it includes arbitration as arbitration is seen by some writers as an alternative to conventional litigation. Thus, ADR is any process designed or devised to resolve disputes outside the judicial system. In the United States where ADR originated from, some analysts have

---

7. RWM Dias, *Jurisprudence* (5th edn, Butterworth; 1985) 6.
8. MDA Freeman, *Lloyd's Introduction to Jurisprudence* (7th edn, Sweet & Maxwell, 2001) 42.

narrowed the phrase to exclude arbitration whereas in Canada it is included.[9] However, Brown and Marriott defined ADR thus:

> The range of procedures which serves 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. In some definitions, and more commonly, it excludes not only litigation but all forms of adjudication.[10]

Brown and Marriott also added thus:

> 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.[11]

By these definitions "arbitration" is excluded from ADR.

In the words of the authors of *Russell on Arbitration:*

> Alternative dispute resolution is regarded, by English practitioners as any system of dispute resolution which in 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.*[12]*

In consolidating the English position on this, Marriott[13] highlighted the differences between ADR and Arbitration. According to him whilst arbitral awards are enforceable by the courts, mediation which is at the core of ADR is generally unenforceable. Secondly, the object of arbitration is a final and binding award, a binding agreement is by no means an automatic consequence of mediation. Thirdly, while arbitration has a statutory regime regulating it, there is none for meditation. In the UK, the most significant development in this area is the Lord Woolf's reforms proposed and implemented in the 1990s especially the *Final Access to Justic*e reports of 1995 and 1996 and the Civil Procedure Rules, 1998.[14]

---

9. BJ Thompson, 'Commercial Dispute Resolution: A Practical Preview' in DP Emond .(ed) *Commercial Dispute Resolution: Alternative to Litigation* (Canada Law Book Inc 1989) 89.
10. Henry Brown and Arthur Marriott *ADR Principles and Practice* (2nd edn, Sweet & Maxwell, London 1999) 12.
11. Brown & Marriott Ibid at 20.
12. David St John Sutton, Judith Gill and Matthew Gearing, *Russell on Arbitration* (23rd edn, Sweet & Maxwell 2007) 47.
13. A Marriott 'ADR in Civil and Commercial Disputes' in John Tackaberry and Arthur Marriott *Bernstein's Handbook of Arbitration and Dispute Resolution Practice* (4th edn, Sweet & Maxwell 2003) 461.
14. See Karl Mackie (n 3) 55; Brown & Marriott (n 4) viii, and Blake, Browne and Sime (n 1) 3.

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 opined 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.[15]

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.* It can be likened to a bat that is neither a bird nor an animal.

In Australia, arbitration is excluded in the definition of ADR.[16] It would seem therefore that ADR now has an inner core of settled applications and a fringe of unsettled applications. Within this inner core include, negotiation, mediation, conciliation, mini-trial or executive tribunal, structured settlement conference, med-arb, expert evaluation and non-binding appraisal. The fringe will include all of the above and arbitration. Similarly, by using words like "non-binding" or "non adversarial" on the one hand and "adjudicatory" or "adversarial" on the other, we are substituting words for another set of words. Be this as it may, what seems to draw a clear distinction between arbitration and other ADR procedures is whether the process is adjudicatory and the decision, final and binding. If the process is adjudicatory like conventional litigation, it is not part of the ADR procedures. However, if the final decision is non-binding then it is part of ADR procedures. The whole process can be seen as a continuum. At one end of the continuum is negotiation and at the other is litigation. The other dispute resolution processes are in-between.

---

15. 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.*'

16. See M Pryles. "Assessing Dispute Resolution Procedures" (May 1998) in *Journal of the Chartered Institute of Arbitrators*, 106 – 116.

However, the learned authors of the *ADR Principles and Practice* have now changed their position 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.[17]

To this extent, therefore, arbitration is part of ADR processes.

What of Customary Arbitration?

If arbitration is part of ADR processes, is customary arbitration part of it? A cursory look at the various ethnic groups in Nigeria reveal that before the advent of colonial rule, we had our indigenous methods of settling disputes. According to Akpata:

> In the environs of Benin City the Village Head (Odionwere) or the family head (Okaegbe) principally functioned as the arbitrator or the mediator to resolve conflicts or disputes among the people. The parties were also at liberty to request any member of the community in whom they reposed confidence to mediate or arbitrate with the undertaking to abide by his decision.[18]

In the Ibo-speaking part of Nigeria, the age-grade *or amala* performs arbitral functions. Similarly in the Yoruba-speaking parts, the Obas perform arbitral functions.[19] According to Ezejiofor:

> Customary law arbitration is particularly important institution among the non-urban dwellers in the country. They often resort to it for the resolution of their differences because it is cheaper, less formal and less rancorous than litigation. Because the system helps in the promotion of peace and stability within the communities and because it assists in the reduction of pressure on the over-worked regular courts, its employment as a dispute settlement mechanism should be encouraged by all organs of the state.[20]

As observed by Holdsworth:

---

17. Brown & Marriott (n 74) 2. See also A Marriott 'ADR in Civil and Commercial Disputes' in John Tackaberry and Arthur Marriott (n 60) 449.
18. Ephraim Akpata, *The Arbitration Law in Focus* (West African Book Publishers Limited 1997) 1.
19. USF Nnalue, 'Promoting Conflict Resolution through Non-Adjudicatory Process' in (1997) *Abia State University Law Journal* 57. See also *Agu v Ekewibe* (n 5) 407.
20. G Ezejiofor 'The Pre-requisites of Customary Arbitration' in (1992-1993) *Journal of Private and Property Law* Vols 16 and 18 p. 34 and Ezejiofor (n 15) 22.

> …the practice of arbitration therefore, comes, so to speak, naturally to primitive bodies of laws, and after courts have been established by the state and recourse to them has become the natural method of settling disputes, the practice continues because the parties to a dispute want to settle them with less formality and expense than is involved in a recourse to courts.[21]

The above is true of England and Nigeria. Despite the fact that we have embraced the English Legal System, recourse to customary arbitration is still a method of settling disputes especially in rural areas. In land matters, arbitration was used to settle disputes relating to land. Thus, in *Larbi v. Kwasi*[22], the Privy Council held that a customary arbitration was valid and binding and that it was repugnant to good sense for a losing party to reject the decision of the arbitrator to which he had previously agreed. Similarly, in *Mensah v. Takyiampong & Ors,*[23] the West African Court of Appeal held, *inter alia*, that:

> … in customary arbitration, when a decision is made, it is binding upon the parties, as such decisions upon arbitration in accordance with native law and custom have always been that the unsuccessful party is barred from reopening the question decided and that if he tries to do so in the Courts, the decision may be successfully pleaded by way of estoppel.

One distinguishing feature of customary arbitration is that it is usually oral. This takes it outside the ambit of statutory arbitration. From a long line of decided cases it is obvious that arbitration is not alien to customary jurisprudence.[24] It is therefore surprising that Uwaifo JCA held *in Okpuruwu v. Okpokam*[25] that: 'No community in Nigeria regards the settlement by arbitration between disputing parties as part of native law and custom… there is no concept known as customary or native arbitration in our jurisprudence'.

It must be stated that learned Nigerian authors and scholars have dealt extensively with the issue of validity and bindingness of customary arbitration that the entire field has been comprehensively covered.[26] Be that as it may, although the pre-requisites of customary

---

21. *Holdsworth History of English Law* (1964) Vol. XIV p. 187.
22. (1952) 13 WACA 76
23. (1940) 6 WACA 118.
24. See *Ofomata & Ors v Anoka & Ors* (1974) 4 EC.S.L.R 251; *Assampong v Amuaku* (1932) 1 WACA 192; *Inyang & Ors v. Essien & Ors* (1957) 2 F.S.C. 39; and *Foli v. Akese* (1930) 1 WACA 1. See also *Idika & Ors v. Erisi & Ors* (1988) 2 NWLR (Pt 78) 563; *Ojibah v. Ojiba*h (1991) 5 NWLR (Pt 191) 314; *Okere v. Nwoke* (1991) 8 NWLR (Pt 209) 317 and *Begha v. Tiza* (2000) 4 NWLR (Pt 652) 193.
25. Okpuruwu v Okpokam (n 11) 572.
26. Gaius Ezejiofor, *The Law of Arbitration in Nigeria* (Longman Nigeria Ltd 1997) 22; Andrew I Chukwuemerie, *Studies and Materials in International Commercial Arbitration* (Lawhouse Books 2002) 210 210; JO Orojo and MA Ajomo (n 15) 36; CA Candide-Johnson & O Shasore, *Commercial Arbitration Law and International Practice in Nigeria* (LexisNexis 2012) 5 and F Ajogwu *Commercial Arbitration in Nigeria: Law & Practice* (Mbeyi & Associates (Nig) Limited 2009) 9; and C A Oguabor 'Recurrent Issues in the Validity of Customary Arbitration in Nigeria' O Amucheazi & C A Ogbuabor (eds) *Thematic Issues in Nigerian Arbitration Law and Practice* (Varsity Press Limited 2008) 88.

arbitration were, with due respect, wrongly stated in *Agu v. Ikewibe*[27] and *Ohiaeri v. Akabeze,*[28] they were correctly restated in *Awosile v. Sotunbo*[29] as follows:

> (a) voluntary submission of the dispute to arbitration by the parties;
> (b) agreement by the parties expressly or by implication, to be bound by the award;
> (c) conduct of the arbitration according to customary law; and
> (d) publication of a decision which is final.[30]

It is settled in Nigeria that when a customary arbitration award is pleaded, it serves as estoppel.[31]

The Philosophies 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.[32]

It is interesting to observe that the Holy Books support ADR. 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 were50 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

---

27. Agu v Ikwibe (1991) 3 NWLR (Pt 180) 385
28. (1992) 2 NWLR (Pt 221) 1. See also *Okereke v. Nwankwo* (2003) 9 NWLR (Pt 828) 592 where the Supreme Court stated the conditions thus: (a) the disputing parties must submit voluntarily to arbitration; (b) the parties must agree either expressly or by implication that the decision of the arbitrators will be accepted as final and binding; (c) arbitration must be conducted in accordance with the custom of the parties or their trade or business; (d) the arbitrators must reach a decision and publish their award; and (e) the decision or award must be accepted at the time at which it was made. With respect, this last condition is unnecessary if the parties had already agreed either expressly or by implication that the decision of the arbitrators will be accepted as final and binding.
29. (1992) 5 NWLR (Pt 243) 514. See also *Oparaji & Ors v. Ohanu & Ors* (1999) 6 SCNJ 27 at 38.
30. For a detailed analysis of the pre-requisite, see generally Ezejiofor (n 28). See also *Odinigi v. Oyeleke* (2001) 6 NWLR (Pt 708) 12 at 28-29 and *Ndah v. Chianuokwu* (2006) 17 NWLR (Pt 1007) 74 for the conditions for the validity of customary arbitration.
31. See *Assampong v. Amuaka* (1932) WACA 192 at 201 and *Nwankpa v. Nwogu* (2006) 2 NWLR (Pt 964) 251.
32. Brown & Marriott (n 4) 29.

- 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:

- 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']

Other than the blessings of the Holy Books, the philosophy of ADR includes:

- 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 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.

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. We must observe that the category of disputes amenable to ADR are not closed.

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,[33]

> *"*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

---

33. 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.

consensual nature of the process will be defeated.[34] We believe that the ADR processes should be encouraged.[35]

After examining the contours, it is appropriate to examine how the dispute resolution processes work – whether they settle, resolve, transform, manage, or facilitate the resolution of disputes:

Litigation – the neutral is a judge appointed by the State; proceedings end in a court judgment that is binding but does it resolve the underlying conflicts or settle the dispute between the parties or merely dispenses justice?

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. Has the same 'baggage' like litigation in terms of resolving the conflicts or settling the dispute.

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. 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).

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.

Med-Arb – starts by way of a mediation but when a settlement is reached or parties cannot agree, the mediator becomes an arbitrator.

Dispute Resolution Board – prevents disputes from arising. 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.

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.

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.

---

34. 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.

35. See Order 17 of the High Court of the Federal Capital Territory (Civil Procedure Rules), 2004 and Order 52 of the Federal High Court Rules, 2009.

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.

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.

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.[36]

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

---

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

- **effective** through adequate resources and organization.[37]

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.

On the other hand, Michael Pryles, has scholarly assessed all dispute resolution procedures.[38] He posed the following questions, namely:

(a) Why are some techniques used rather than others?
(b) What is the most appropriate procedure to resolve a particular dispute?
(c) How can the various procedures be improved?

While acknowledging that no one dispute resolution procedure is superior to all others, he asserted that there are instances when one procedure is more appropriate than the other. Regrettably, the determination of which dispute procedure should be used in a particular case is complicated by the fact that the choice, for example, an arbitration clause or ADR clause is often made before a dispute arises. This is so because it is when an agreement is drawn up that an arbitration clause or ADR clause is included in the contract without knowing the type of dispute that may eventually arise. However, one way of evaluating dispute resolution procedures to establish a nexus is by reference to certain criteria which will highlight the benefits and detriments, strengths and weaknesses of the procedure. The first criterion according to Pryles[39] focuses on the nature of the tribunal or its personnel. Thus, there is the need to consider the integrity of the personnel, the impartiality of the tribunal, its appropriateness and expertise. It is expected that if this criteria is met, the decision of the tribunal will be fair and correct. We share this view.

In addition to the tribunal itself, one other way of establishing a nexus is commercial consideration. Under this criterion, speed and cost feature prominently though they may overlap. Mediation developed in response to the slow speed of litigation and in particular the high cost while litigation and arbitration are now considered as fairly expensive though arbitration offers opportunity for flexibility. The parties may agree to any one or more of the following:

- reduce or dispense with discovery of documents
- reduce or eliminate pleading
- implore strict limits like guillotine
- dispense with hearing and have arbitration on documents only.

These are all ways of ensuring that arbitral proceedings are held expeditiously.

The third criterion is effectiveness of the procedure. What should be considered here is whether the result will be binding and enforceable. Arbitration results in an award and

37. Karl Mackie & Others (3).
38. See M Pryles (n 16) 116-117
39. Pryles, *ibid*

litigation in judgments. Both are binding. However mediation is non-adjudicative and consensual in nature. A court exercises the judicial powers of the state[40] and its judgments are enforceable by using execution process though this is easier in domestic cases than in international transactions. The enforceability of an arbitral award is the same as that of a court judgment especially for countries that have signed the 1958 New York Convention. The settlement terms of a mediation cannot easily be enforced as a party can renege.

Finally, there are other considerations like maintenance of the existing relationship and confidentiality. This criterion suites mediation more than litigation or arbitration. A mediation results in a "win/win" situation as opposed to litigation/arbitration that results in "win/lose" situation. Although, if arbitration is properly conducted it will result in a "win/win" situation. Litigation/arbitration adopts the adversarial procedures and court proceedings are generally held in public. This destroys harmony and confidentiality. For some purposes, arbitration can be consensual.

These criteria are then applied to litigation, mediation and arbitration to assess their various strengths and weaknesses. This evaluation will establish a nexus between a dispute and a process. For example, if it is a straightforward case bordering on points of law, then litigation is ideal. However, where it is a complicated one based on facts or mixed law and facts and the prime consideration is effectiveness, then litigation or arbitration is preferable to mediation. Where the prime consideration is to establish a legal precedent and decision according to law, litigation is preferable. Where speed, maintenance of continuing business relationship and harmony is desirable, then mediation will be more appropriate. Where confidentiality, specialist tribunal and technical expertise will be required then arbitration will have more advantages than litigation. Lastly, where the dispute is international, arbitration assumes qualitative leap over litigation. The result of all these is that instead of talking of "alternatives" to litigation, we will be talking of "appropriate" dispute resolution processes.

Conclusion

In this presentation, 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.

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

40. For example, see section 6 of the Constitution.

> 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[41].

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[42] 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."[43]

And so it is with ADR.

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

---

[41] Brown & Marriot (n 4) 29.
[42] L Carroll, *Through the Looking Glass* (Raleigh, NC: Hayes Barton Press, 1872)
[43] See also Lord Atkin in *Liversidg e v Anderson* (1941) UKHL 1