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ALTERNATIVE DISPUTE RESOLUTION

ADR AND INTERNATIONAL COMMERCIAL TRANSACTIONS

BY

WAHAB O. EGBEWOLE*

*"Today the administration of justice in our courts suffers from two major constraints, namely delay and expense. If it takes 7 – 10 years to determine a case, a prospective litigant may decide not to go to court at all. But the one thing that frightens litigants away from the courts is the inordinate expense which has to be incurred with the result that a very large proportion of our countrymen are, as it were priced out of our legal system."*¹

The above succinctly represents the suffering undergone by an average litigant in Nigeria and of course to underscore the fact that this is not peculiar to Nigeria, Honourable Mr. Justice James M. Farley,² in discussing the case of *Re: Olympia & York Developments Limited*³ had this to say:

"The O & Y proceedings were (and still are) complex, the size of the stakes (some \$20 Billion) dictated that many of the matters would be hard fought. However, I do not think it necessary to enlist the services of someone like Cyrus Vance, the former foreign secretary of the United States, to help in resolving very many of the disputes which find their way to court."

This represents the state of affairs in the world and which ordinarily affects the growth of business and kills commercial initiatives. In business, time is money and if a lot of energy, time and money are expended on litigating a

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1. Hon. Justice C. O. Oputa: *Human Rights in the Political and Legal Culture of Nigeria-Nigeria Law Publications* (1989) p. 75.
2. Hon. Justice James M. Farley: *Alternative Dispute Resolution and the Ontario Court Experiment* paper presented at the International Bar Association meeting Lagos, February 27 – 28, 1995, p. 1.
3. (1993)20 C. B. R (3d) 165 (Ont. Gen. Div.) at page 167.

matter which could have been amicably resolved without jeopardising business relationship as ensuring minimum time and cost effective, then, such an approach will definitely recommend itself to an average business person and thus the current craze for ADR.

What Is ADR?

ADR simply means Alternative Dispute Resolution and as the name connotes, it is an approach designed as a substitute to the rigorous and time consuming litigation approach to dispute settlement.

Hon. Justice James M. Farley in his paper, described ADR thus:

“Alternative Dispute Resolution (ADR) described those dispute resolution processes which exist as alternatives to traditional “formal” litigation. The term “ADR” therefore refers to a range of processes designed to aid parties in resolving their disputes without the need for a formal judicial proceeding.”⁴

K. Aina Esq.⁵ in giving a meaning to the acronym had this to say:

“The letters stand for Alternative Dispute Resolution, a new approach to dispute processing. It refers to a range of mechanisms designed to assist disputing parties in resolving their disputes without the need for formal judicial proceeding. In other words, ADR are those mechanisms which are used in resolving disputes faster and fairer without destroying on-going relationships. To fully understand the purport of ADR, let us interpret the acronym ADR as “Appropriate” dispute resolution that way, litigation takes its proper places as being simply one of many other myriad of methods of Dispute Resolution. The alternative mechanisms are thus a supplement to court adjudication, and not supplants to adjudication.”

One unique feature of ADR is the confidentiality of the procedure as disputants have control over the mode, means and the approach. Disputants may decide that a private resolution of their dispute is in the interest of their business and the people involved. This is not possible in

4. Hon. Justice James Farley's Paper p. 2.

5. K. Aina Esq: Alternate Dispute Resolution N. L. P. J Vol. 2 No. 1 p. 169.

court proceedings because as a matter of law, court proceedings are generally held in public except where state security is involved or where the court for some reason felt the proceedings should be in camera.

Types of ADR

In the world today, various forms of ADR have been introduced with the aim of making dispute resolution easier and achieving the best goal possible. These include negotiation which consists mainly of either direct or indirect communication where parties are allowed to discuss in the presence of a neutral third party. There is also the Mini Trial or what **K. Aina** calls the “**executive dialogue**.” It is essentially, what is described as “**hybrid rights interest-based procedure**.” It is used in majority of business disputes where disputants will make a summary of their claims through their counsel to a neutral advisor and the executives of the disputants who possess resolving authority.

We also have Mediation which is carried out with the assistance of a neutral third party. This form fits squarely into traditional African resolution procedure. This form is called “**Turbocharged Negotiator**” because the Mediator has no power to impose sanctions and this differentiates it from Arbitration. The Mediator is called “**agent of reality**” as he will only listen to dispute and endeavour to find a common ground between the disputants who must have failed to find a common ground amongst themselves; after arriving at this common ground, same may be reduced to writing in form of a settlement agreement to be signed by both parties.

Another form of ADR is what is called **Early Neutral Evaluation** where a Judge or a Lawyer with specialised training in the area of dispute gives a legal opinion on the areas of dispute and explores possibility of settlement.

We also have **Summary Jury Trial** which is in form of a court proceeding except that the sitting is more on the facts of the disputed areas and do not take into consideration the purely technical approach of the court. Jury trial is common in the United States of America.

There is also **arbitration** either non-binding or binding which means the determination of a dispute by one or more independent third parties. They are appointed by the parties and have powers to come to conclusions which will be binding on the parties and which is enforceable by the court. Lastly there is what is called the **Multi-Door Approach** which recommends the channeling of disputes for settlement to different fora such as specialised

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 D. C.

Reasons for ADR

So many reasons have been advanced for the Alternative Dispute Resolution. In our opening paragraph, it is clear that one of the reasons why ADR is gradually becoming a household approach in dispute resolution is the delay suffered by litigants in the normal court processes. Equally, litigants will prefer to save money expended on litigation. Although the ADR method could equally be expensive as the people involved now request for fat professional fees but by the time this is juxtaposed with the financial requirement of litigation in court, ADR will still be better.

K. Aina in his paper identified one major reason as:

“Change in the expectation of clients, in the way the law is being practised and in our understanding of conflict. To find relevance in the New World, every practising or would be lawyers must be well informed of this wind of change. Individual and corporate clients are increasingly unhappy with the causalities, untimeliness and divisiveness of litigation and they are on their own seeking out alternative indirect proportion to the unhappiness.”⁶

In Hon. Justice Adams paper,⁷ the following reasons were identified:

- “(a) Lower court caseloads and related public expense;*
- (b) More accessible fora to people with dispute;*
- (c) Reduced expenditure of time and money for parties;*
- (d) Speedy and informal settlement of disputes otherwise disruptive of the Community or the life of the Parties and their families;*
- (e) Enhanced public satisfaction with the Justice system;*
- (f) Tailored resolutions to parties’ needs;*

6. Aina: *Ibid.* at pages 172–173.

7. Honourable Mr. Justice Adam: *Alternative Dispute Resolution and Canadian Court: A time for change* page 14 attached to Hon. Justice James Farley’s paper.

- (g) Increased satisfaction and compliance with resolutions in which the parties have directly participated;
- (h) Restoration of neighbourhood and Community values are more cohesive."

Another view is the one expressed by Paul Emmond that:

*"As well when there is a lapse of time, memories fade or rationalization set in so that what is recounted in court is not what has happened but what must have happened in order to support each side's story. For most litigants, delay means added expenses and for many "Justice delayed is justice denied."*⁸

By virtue of the technical nature of the procedure in our regular and formal court, the litigants are generally not able to comprehend or follow proceedings in such court, more so when they hardly participate in the proceedings. Another reason identified is the fact that the adversarial nature of the court proceedings naturally extends the duration of the dispute resolution process as well as emphasises the positional bargaining which at the end of the day result in generally unsatisfactory verdict of a victor and a vanquished. This state of affairs does not help business relationship and neither assists commercial transaction. It cannot be gain said that given all these reasons, ADR is now set to have a pride of place in dispute resolution. It however need be equally emphasised that notwithstanding this rosy ideals, there are likely to be some short coming for the different approaches, it is pertinent to mention that ADR, if proper mechanisms are not put in place, may create other forms of delay in dispute resolution.

This position is taken in view of cumbersome results being witnessed from the arbitral proceedings as such settlements are still subjects of litigation; Thus, care must be taken so that a disputant may not be a victim of what can be called double jeopardy.

ADR and International Community

The fledging nature of ADR as an approach to dispute settlement has been recommended for use in international commercial transactions and same is gaining ground now.

8. D. Paul Emmond: *Alternative Dispute Resolution: A Conceptual Overview*, Emmond E. D. *Commercial Dispute Resolution* (1989) Toronto, at p. 6.

It has however been opined by Aina that ADR is actually not new in ideal, but the logical expansion of the established practice of it is what is new. One may be tempted to agree with this position but might add that ADR is gradually getting institutionalized in most legal systems in the world as a result of its apparent delay free and cost effective nature. In the United States of America, ADR programs have been established as a court connected designs with a view to ensuring that ADR is made an adjunct of the court system e.g. California Mediation as a process is made a pre-condition to litigation in child custody cases.

Equally in England, there are courts that issue practice directions in pursuance of ADR as well as a number of private outfits which provide ADR services e.g. Center for Dispute Resolution.

In 1989, Canada established an "ADR Centre" where Mediation, Mini-Trial, Early Neutral Evaluation (ENE) were offered to disputants as a process of dispute resolution as against the litigation in the normal courts.

In March 1994 the Ontario court of Justice (General Division) and the Ministry of Attorney General, Ontario announced a two-year pilot project under which court based ADR services are to be offered in the Toronto region. The project is funded by the Ontario Government and the Federal Government by way of the effort of federally appointed General Division Judges. The ADR centre is not attached to the court house physically and this has called for a debate whether or not, it is desirable to attach such centre to the court house. There is equally presently **Middlesex Multi-Door House** in Cambridge, Massachusetts.

In Nigeria, ADR is coming on though not yet institutionalized but the Federal Government in 1988 took a look by promulgating the **Arbitration and Conciliation Act**⁹ as a unified legal framework for the fair and efficient settlement of commercial dispute by arbitration and conciliation and to make applicable the Convention on the Recognition and Enforcement of Arbitral Awards (New York Convention). No doubt, this is a step in the right direction but there is the need for a more concerted effort on the part of the Government to ensure the institutionalization of ADR in line with world trends. When this is done, it will go a long way in reducing the pressure on the courts and perennial delay in the determination of matter by the courts will be reduced if not totally removed.

9. *Cap. 19 1990 Laws of the Federation.*

It should be noted that a few practitioners and commercial outfits are already engaging the use of ADR in settlement of disputes but this is for now a private affair and this will naturally be within a very narrow confinement and can only be broadened if the Government intervenes by way of establishment of a formal outfit.

Conclusion

As Justice Adam puts it¹⁰;

“ADR is an approach to justice whose time has come. The problem afflicting the traditional court system stem from its total dependence on one dispute resolution mechanism.”

Given the benefit that will accrue to the litigants, the court and the entire society at large, the ADR approach has actually recommended itself to any legal system. It need be emphasised that resolution of dispute is no longer a subject of one hitherto almighty formula of litigation in view of the development witness in commercial transactions, the world over. It is no longer conceivable nor fashionable that dispute will be tied down to the rigorous court proceedings of filing a claim, calling the witnesses and cross examining, counsel addressing the court and giving judgement which may need another cumbersome procedure to execute.

It is high time that Nigeria as a nation commended to herself possible ADR initiative which one is sure will go a long way in assisting, in providing solution to the recurring problems of delay in courts as well as promote relationship in business transactions.

10. In page 38 of his paper