CHAPTER TWELVE

MANAGING WORKPLACE CONFLICTS THROUGH ALTERNATIVE DISPUTE RESOLUTION IN NIGERIA: LESSONS FROM OTHER JURISDICTIONS

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ABSTRACT

Before the advent of colonialism, customary arbitration and mediation were the norm. Colonial rule introduced common law and statutory arbitration. The observed shortcomings of litigation resulted in the adoption of Alternative Dispute Resolution (ADR) mechanism in the quest for speedy and amicable resolution of conflicts. The usefulness of ADR in the settlement of disputes, especially commercial disputes such as debt settlement, contracts and workplace related conflicts need not be over emphasised. For instance, an employee whose employment has been terminated may be unable to sustain long term litigation due to the loss of his means of livelihood. Thus, ADR leads to speedy and amicable resolution of industrial and commercial conflicts and attraction of foreign direct investment (FDI). The attraction of FDI is easier in any polity where commercial transactions are speedily resolved; and this in turn confers a comparative advantage on such polity in international trade. This chapter therefore looks at the concept of court connected ADR in resolving conflicts with special emphasis on the workplace, the usefulness or otherwise of ADR, its practises in other jurisdictions especially in Australia and South Africa with copious reference to other common and civil law jurisdictions. The chapter thereafter offers appropriate recommendations.

Keywords: Alternative dispute resolution, Industrial conflicts, Commercial transactions, Tax, National Industrial Court of Nigeria

Introduction

The ability to resolve disputes and conflicts amicably, expeditiously and in a cost-effective manner under the law distinguishes a civilised society from a primitive one. Litigation under the Nigerian legal system is essentially adversarial and confrontational; associated with inordinate delays, inadequate infrastructure, court congest on, inadequate court rooms, corruption, case backlogs, insufficient judicial officers, high qualitative and qualitative cost of litigation procedural and evidential rules.[309] When the litigants or the public perceived that justice is not served, the would-be litigants or the dissatisfied litigants may choose to distrust the legal system thereby resorting to self-help[310] or self-denial. In elucidating the issue of self-help or self-denial, Oputa JSC, aptly stated thus 'In theory our constitution in its preamble talks nobly of promoting the good government and welfare of all persons in our country on the principle of freedom, equality and justice. But in actual practise one sees that it is the powerful, the rich, and the dominant class that seem to have all the rights, while only the rights left to the poor, the weak and the downtrodden seem to be the right to suffer in silence, to be patient and wait for their reward in heaven (if they are believers)'.[311]

Botha listed the followings as causes of disagreements in commercial transactions-misunderstandings usually occur based on poor communication, values differences between people, professionals and skills; people often have unrealistic expectations.[312] The client wants speedy completion and a quality product at a low price, while the contractor may require more time, a more reasonable quality and maximum price; emotions play a role, the inability to handle stress causes dispute. A person's self-esteem (or lack of it) can also cause disputes.[313] Factors under this heading include languages, dynamics, geography, childhood experiences, upbringing and religion; education levels and both structured and unstructured learning can have an influence on conflict; there are many differences between projects. From one project to the next there are different building teams, different financiers and different designers; Changes to plans, deadlines, payment dates, and so on, can cause disputes.[314]

A dispute could arise due to the delay caused by the weather, a sub-contractor, the bank or a third party; parties often inadequately define quality. High quality may mean different things to a plasterer and to the project director or project manager. One must use

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[309] MA Owoade, 'Global Trends in Court Connected Alternative Dispute Resolution: Quo Vadis the Nigerian Judiciary' in CC Nwexe, AJ Offiah and AO Mogboh, Jnr (eds), *Beyond Bar Advocacy: Multidisciplinary Essays in Honour of Anthony Okoye Mogboh, SAN* (Impact Global Publishers Ltd 2011) 700.

[310] Ethnic Militias such as Indigenous People of Biafra, Egbesu Boys, Bakassi, Odua Peoples' Congress; Election related violence, Operation *Wet-e*, even coup d'état are linked with injustice.

[311] See the dictum of Hon. Justice CA Oputa 'Human Rights in the Political and Legal Culture of Nigeria' (2nd Idigbe Memorial Lectures Nigeria law Publications Ltd. 1989) 66-67.

[312] H Botha, Conflict *in the Construction Industry* (Bellstone Training International Limited, 2000).

[313] Botha (n 5) above.

[314] Botha (n 5) above.

objective standards to define materials and workmanship. One must precisely describe what one requires. A client may specify a much higher standard than what he really wants while wanting a lower price and so on.[315] The erstwhile President of the National Industrial Court of Nigeria[316] posited that workplace conflict in Nigeria may be due to any or a combination of the followings: the absence of National Labour Policy; lack of respect for the terms of collective agreements reached between employers and employees; frequent recourse to industrial action such as strike by labour union; inadequate labour law; lack of skilled manpower by the regulatory agencies and institution; lack of discipline and honesty on the part of the leadership of the labour union and the administrators (allegation of non-remittance of check off dues, sit tight leadership, lack of accountability, dictatorial tendencies); poor labour inspection culture. When such a dispute arises, it is ideal that it is resolved promptly, at reasonable cost with a view to continue the existing relationship. It behoves on the judiciary to resolve disputes and conflict in the society.

The judiciary is the arm of the state charged with resolution of conflicts; speedy, efficient and fair dispensation of justice is a *sine qua non* for a stable, just and developed (or developing) society. Actually, it was regarded as the last hope of the common man in Nigeria. This made Gladstone, commenting on the British experience to state that 'National injustice is the surest road to national downfall'.[317] The judiciary should serve as the institution that rescues the citizens from the recklessness and arbitrariness of the executives and the lawlessness of the legislature. The reputation of the judiciary has however been tainted with corruption,[318] unduly long delay in rendering verdict,[319] high handedness of some judges, interference from the executive[320] and similar vices. Litigation is therefore time consuming, emotionally traumatising while the cost is prohibitive.

[315]Botha (n 5) above.

[316]Hon Justice Babatunde A Adejumo Building Effective Conflict Management Mechanism for Sustainable development in Nigeria being a Paper presented at the 7th edition of the National Labour Relations Summit organised by the Micheal Imoudu National Institute For Labour Studies, Ilorin on Nov 17th 2011.

[317]MO Adeleke, 'Lagos State Multi Door Courthouse: An Appraisal' in O Orifowomo et al. *Law, Politics and Development, Essay in Honour of Babatunde Raji Fashola SAN* (NBA 2010) 317.

[318]WB Adisa and TA Alabi 'An Empirical Investigation of Court Users' Encounter with Bribery, Judicial Extortion and Corruptive Victimisation' 2021 75(1) *Crime, Law and Social Change* 141-163; see also Justice Kayode Eso's Commission on Judicial Reforms which found 28 Judges of Superior Courts culpable of offences ranging from low productivity to corruption. The report was submitted in 1994; it was considered but by National Judicial Council, it was not acted on by the Abacha Government that inaugurated the commission. Some of the indicted Judges continued in office, others retired while the rest died. Also, four judges serving on the panel of Akwa Ibom election petition tribunal were investigated, found guilty of corruption and eventually dismissed- Reported in "Nigeria Muse" of 28/12/06 in http://www.nigerianmuse.com/essay accessed on 24/03/12. In a related case two justices of the Court of Appeal took ₦15 million and ₦12 Million and gave judgement in favour of their patron whilst the third judge refused the bribe and gave the dissenting judgment. The case was investigated and the guilt of the two judges was established. The National Judicial Council recommended their dismissal for corruption and abuse of office. The President acting under Section 292 (1) 1999 dismissed the two Justices on 3rd May, 2005 Reported in http://www.nli.org/notes.

[319]*Wakino v Ade John* (1999) 9 NWLR (pt.619) p. 403 -the case took 11 years in the high court due to series of adjournment; *Lasisi Atanda v Ajani* (1989) 3 NWLR 511, the case took 10 years to reach the Supreme Court which ordered a trial de novo; *Ugo v Chukwu Obikwe* (1989) 1 NWLR 566, After 18 years the supreme court ordered a trial de novo; *R. Ariori & ors v Elemo & Ors* (1983) 1 SC NLR 1. -the case took twenty-two years (22) years to reach the apex court Supreme Court, which ordered a trial de novo by the High Court.

[320]See for instance the saga of ex-President of the Court of Appeal- Justice Salami reported in downloaded 9th September 2023.

Thus, some of the citizens choose to either forgo their rights or resort to self-help. In the quest to decongest the court, re-invent the judicial system and ease commercial transactions, among other things, the Nigerian state has introduced, and the court connected ADR. The idea of ADR is not foreign to the Nigerian traditional system[321] but the ability of the Nigerian traditional institution to carry out this function is hampered by the growing cosmopolitanism of the hitherto indigenous and homogenous society, corruption and the dwindling respect for the traditional institutions. Similarly, the Bible and the Quran encourage ADR and peaceful resolution of conflicts.[322]

The Concept of Alternative Dispute Resolution

ADR may refer to a range of procedures that serve as alternatives to litigation in the courts for the resolution of disputes, generally involving the intercession and assistance of a neutral and impartial third party.[323] ADR is a group of flexible approaches to resolving disputes more quickly and at a lower cost without formal trial. It is a term, which has become associated with a variety of specific dispute resolution options such as negotiation, mediation, conciliation, mini-trial, case evaluation and a lot of other hybrid mechanisms.[324] Pretorius refers to three major categories of dispute resolution mechanism, which are: first, dispute resolution processes involving private decision-making by the parties themselves; this category would include negotiation and mediation.[325] Second, dispute resolution processes involving private adjudication by third parties such as arbitration. Third, dispute resolution processes involving adjudication by public authority. This category would include administrative decision-making and formal litigation before the courts. ADR includes practices, techniques and approaches for resolving and managing conflicts short of, or alternative to, full-scale court process.[326]

The variety of ADR models found in various jurisdictions may be described in two fundamental ways: basic ADR processes, which include negotiation, conciliation, mediation, and arbitration; and hybrid ADR processes, in which specific elements of the basic processes have been combined to create a wide variety of ADR methods (for instance, mediation is combined with arbitration in med-arb.). Hybrid ADR processes may also

[321]*Agu v Ikewibe* (1991 3 NWLR (pt. 180) 385; *Ohiaeri v Akabeze* (1993) 2 NWLR (pt. 221) 1; *Okere v Nwoke* (1991) 8 NWLR; *Awosile v Sotunbo* 1992 5 NWLR (pt. 243) 514; *Ojibah v Ojibah* 1991 5NWLR (pt. 191) 296;

[322]Matthew Chapter 18 verses 15-16 of the Holy Bible; the Holy Quran Chapter IV (Suratul Nisai) Verse 35.

[323]BA Garner, Black's Law Dictionary (9th ed. West Publishing Co., 2004) 91; EO Ezike, 'Developing A Statutory Framework for ADR in Nigeria (2011-2012) 10 Nigerian Juridical Review 248; PO Idornigie, 'Alternative Dispute Resolution Mechanisms' in AF Afolayan and PC Okorie (eds), *Modern Civil Procedure Law* (The Dec- Sage Nigeria Ltd., 2007) 563-585 at 563.

[324]Goldberg, et al, *Dispute Resolution* 2nd ed., (Little, Brown and Co. 1997).

[325]P Pretorius, *Dispute Resolution* (Juta & Co. Ltd., 1993) 133; see also C Bvumbwe and DW Thwala 'An Exploratory Study of Dispute Resolution Methods in the South African Construction Industry' *International Conference on Information and Finance IPEDR* vol. 21 (IACSIT Press, 2011)

[326]Alternative Dispute Resolution Practitioner's Guide March 1998. Technical Publication Series Center for Democracy and Governance Bureau for Global Programs, Field Support, and Research (U.S. Agency for International Development Washington, DC) 20523-3100.

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incorporate features found in court-based adjudication; for example, the mini trial and adjudication-like presentation of arguments and proofs with negotiation.[117]

Alternative Dispute Resolution -Terms and Concepts

The US Centre for Public Resources listed the different ADR types and terms as follows:[118]

Court-connected ADR: refers to ADR processes that are linked formally to the official justice system; such ADR activities are authorised, offered, used, referred by, or based on the court system. Court-based programmes and court referrals to private ADR services are covered by this term. Agreements arising out of court-connected ADR may be enforceable as court orders. However, not all ADR are court connected. Facilitation refers to a process by which a third-party neutral helps the parties reach consensus on disputed issues. "A mediator is a facilitator; an arbitrator is not." The following are important terms and indispensable attributes of the conciliator or arbitrator, for instance impartiality.

Impartiality/Neutrality: refers to the third party's disinterestedness in the dispute, s/he has no personal stake or interest (financial or otherwise) in the situation. On the other hand, a neutral third party has no inclination one way or another regarding the dispute or the disputants. It may be said that finding an impartial third party is easier than finding a neutral one.

Mandatory/Voluntary: These terms refer to how disputes are referred for ADR processes. If the parties are compelled to use ADR by the court or statute, then the use is mandatory. If the use is based wholly on the consent of the parties, then it is voluntary.

Nonbinding/Binding: Where the disputants are required to accept and respect the outcome of the ADR process, such as third-party opinions, that process is binding. ADR outcomes that are advisory only are a feature of nonbinding processes. As a rule, disputants are not bound by an outcome or resolution in ADR, unless they agree to be bound. However, there are exceptional situations of mandatory binding arbitration such as under the court connected ADR model.[119]

Basic Alternative Dispute Resolution Models

Negotiation: The most common form of dispute resolution, negotiation, is the process by which the parties voluntarily seek a mutually acceptable agreement to resolve their common dispute. Compared with processes involving third parties, generally negotiation allows the

[117] A Akeredolu, 'Institutionalising Alternative Dispute Resolution in the Public Dispute Resolution Spectra in Nigeria through Law: The Lagos Multi Door Court House Approach' 2014 12(104) *US-China Law Review* 106-109.

[118] Center for Public Resources/CPR Legal Program. *Judge's Desk book on Court ADR* (Federal Judicial Center, 1993) 31.

[119] BE Ewulum, 'Alternative Dispute Resolution Mechanisms, Plea Bargain and Criminal Justice System in Nigeria' 2017 8(2) *NAUJILJ* 119-122.

disputants themselves to control the process and the solution. Examples: Nicar negotiation training,[120] South Africa- negotiation of community disputes, Indor environmental conflict.[121]

Conciliation: A process in which a third party meets with the disputants separately i effort to establish mutual understanding of the underlying causes of the dispute and the promote settlement in a friendly, un antagonistic manner. Often the first step, and at tir sufficient, to resolve disputes.[122] Instances include the South Africa Case Study-Commiss for Conciliation, Mediation, and Arbitration; Bolivia Case Study; Colombia- Boge Chamber of Commerce centres,[123] India-People's Courts "Lok Adalat";[124] Japan- au accident victims and insurance companies.[125]

Mediation: A voluntary and informal process in which the disputing parties select a neutr third party (or parties) to assist them in reaching a mutually acceptable settlement. Unlike a judge or arbitrator, the mediator has no power to impose a solution on the disputants; instead, the mediator assists them in shaping solutions to meet their interests. The mediator's role and the mediation process may vary significantly, depending on the type of dispute and mediator's approach. Mediators can employ a wide range of techniques, for example, assist parties to communicate effectively and to develop a cooperative, problem-solving attitude; identify parties' underlying interests; identify and narrow issues; transmit messages between parties; explore possible options for agreement and the consequences of non-settlement. Jurisdictions such as use mediation on specific issues- Indonesia- environmental disputes,[126] Malaysia- inter-ethnic disputes,[127] India- civil and criminal cases,[128] USA- community mediation,[129] and mandatory civil case mediation in North Carolina (USA).[130]

[120] Timothy Lytton and Centeno Rivas Salvador 'La Resolución de los Conflictos en Nicaragua' in William Davis (ed), *La Resolución de los Conflictos en America Latina* (Granica Publication 2007).

[121] Christopher Moore and Mas Achmad Santosa, 'Developing Appropriate Environmental Conflict Management Procedures in Indonesia: Integrating Traditional and New Approaches' 1995 19(3) *Cultural Survival Quarterly*, 23-29.

[122] Ewulum (n 21) 119-122; UJ Orji, 'Law and Practice of Conciliation in Nigeria' 2012 56(1) Journal of African Law 870-108.

[123] Lytton and Salvador (n 22).

[124] Sarah Leah Whitson, 'Neither Fish, Nor Flesh, Nor Good Red Herring' Lok Adalats: An Experiment in Informal Dispute Resolution in India' 1992 5(3) *Hastings International and Comparative Law Review* 391-445

[125] Ibid.

[126] Ibid.

[127] Wan Halim Othman, 'Community Mediation in Malaysia: A Pilot Program for the Department of National Unity' in Fred E. Jandt and Paul B. Pedersen (eds), *Constructive Conflict Management: Asia-Pacific Cases* (Thousand Oaks & Sage Publications, 1996) 29-42.

[128] Gene Kassebaum, *ADR in India: The Lok Adalat as an Alternative to Court Litigation of Personal Injury and Criminal Cases in South India*. Working Paper Series 1989-5 (University of Hawaii at Manoa, Program on Conflict Resolution).

[129] Daniel McGillis, *Community Mediation Programs: Developments and Challenges* (US Department of Justice, National Institute of Justice 1997).

[130] Stevens H Clarke, Elizabeth D Ellen, Kelly McCormick, *Court-Ordered Civil Case Mediation in North Carolina: An Evaluation of Its Effects, Prepared for The North Carolina Administrative Office of the Courts* (Institute of Government, University of North Carolina at Chapel Hill 1995).

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Arbitration: An adjudicatory dispute resolution process in which one or more arbitrators judge issues on the merits (which may be binding or non-binding) after an expedited adversarial hearing, in which each party has the opportunity to present proofs and arguments. Arbitration is procedurally less formal than court adjudication; procedural rules and substantive law may be set by the parties. In court-annexed arbitration, one or more arbitrators, usually lawyers, issue a non-binding judgment on the merits after an expedited adversarial hearing. The arbitrator's decision addresses only the disputed legal issues and applies legal standards. Either party may reject the non-binding ruling and proceed to trial; sometimes, cost sanctions may be imposed. This process may be mandatory or voluntary. For instance, in Japan, appellate ADR[341] that is, Private or court-annexed arbitration may be used to settle disputes between the parties. The decisions of arbitrators in private arbitration may be non-binding or binding. Binding arbitration decisions typically are enforceable by courts and not subject to appellate review, except in the cases of fraud or other defect in the process. Often binding arbitration arises from contract clauses providing for final and binding arbitration as the method for resolving disputes. Thailand for instance provides for commercial arbitration.[342]

Hybrid Alternative Dispute Resolution Models

A wide variety of hybrid models have emerged and been adopted in different jurisdictions. A list of the variants is discussed hereunder:

Appellate ADR: Appellate court programmes use mediation in mandatory, pre-argument conferences in cases that appear most likely to settle; mediators are typically staff attorneys or outside lawyers.

Early Neutral Evaluation (ENE): A court-based ADR process applied to civil cases, ENE brings parties and their lawyers together early in the pre-trial phase to present summaries of their cases and receive a nonbinding assessment by an experienced, neutral attorney with expertise in the area of the law under dispute, or by a magistrate.[343] The evaluator may also provide case planning guidance and settlement assistance; in some courts, it is used purely as a settlement device and resembles evaluative mediation.

Fact-finding: A process by which a third-party renders binding or advisory opinions regarding facts relevant to a dispute. The third-party neutral may be an expert on technical or legal questions, may be representatives designated by the parties to work together, or may be appointed by the court.

[341]Nobuaki Iwai, 'Alternative Dispute Resolution in Court: The Japanese Experience'1991 6(2) *Journal of Dispute Resolution.*

[342]Nacha Worawattanamateekul, 'Arbitration in Thailand. in eds. Fred E Jandt and Paul B Pedersen *Constructive Conflict Management: Asia-Pacific Cases* (Thousand Oaks & Sage Publications 1996) 183-15

[343]CPR 3.1(2)(m) of England & Wales.

Judge-hosted Settlement Conference: this is court-based ADR process, whereby the presiding judge chairs a meeting of the parties in an effort to help them reach a settlement by articulating opinions about the merits of the case, facilitating the trading of settlement offers, and sometimes acting as a mediator. This sort of ADR is commonly used in the USA and Japan.[344]

Mediation-Arbitration (Med-Arb): is a variant of multi-step ADR, whereby parties agree to mediate their dispute with the understanding that any issues not settled by mediation will be resolved by arbitration, using the same individual to act as both mediator and arbitrator. Having the same individual act in both roles, however, may have a chilling effect on the parties participating fully in mediation. They might believe that the arbitrator will not be able to set aside unfavourable information learned during the previous mediation.

Mini Trial: A voluntary process in which cases are heard by a panel of high-level principals from the disputing sides with full settlement authority. First, parties have a summary hearing, each side presenting their case. Second, the panel representing each party attempts to resolve the dispute by negotiation. The neutral presider may offer his opinion about the likely outcome in court.

Court-based Mini Trial: a similar procedure generally reserved for disputes involving large sums of money, in which a judge, magistrate or non-judicial neutral presides over a dispute, concludes and offers his opinion within a few days. If negotiations fail, the parties proceed to trial. This is prevalent in some US federal districts.[345]

Negotiated Rule-making, Regulatory Negotiation or 'Reg-Neg': Used by governmental agencies as an alternative to the more traditional approach of issuing regulations after a lengthy notice and comment period. Instead, 'agency officials and affected private parties meet under the guidance of a neutral facilitator to engage in joint negotiation and drafting of the rule. The public is then asked to comment on the resulting proposed rule. By encouraging participation by interested stakeholders, the process makes use of private parties' perspectives and expertise and can help avoid subsequent litigation over the resulting rule.[346] Ombudsperson: An informal dispute resolution tool used by organisations. A third party 'Ombudsperson' is appointed by the organisation to investigate complaints within the institution and prevent disputes or facilitate their resolution. The Ombudsperson may use various ADR mechanisms, for instance in fact-finding, and mediation in the process of resolving disputes. Instances include the Civil Liberties Bureau in Japan.[347] In Lagos, 'Gboromiro' and 'Mo gbe jo mi de' are quite popular variant used in conflict resolution.

[344]Elizabeth Jardine, 'Alternative Dispute Resolution in the Japanese Court System' 1996 40(4) *Australian Dispute Resolution Journal.*

[345]CPR Institute for Dispute Resolution, 'The ABCs of ADR: A Dispute Resolution Glossary' (Center for Public Resources/CPR Legal Program. 1993); Federal Judicial Center, New Judge's Desk book on Court ADR 1997 13(11) *Alternatives,* 147-151.

[346]Judge's Desk book on Court ADR (n 37)149.

[347]Joel Rosch, 'Institutionalizing Mediation: The Evolution of the Civil Liberties Bureau in Japan' 1987 21(2) *Law and Society Review,* 243-266.

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Private Judging: A private or court-connected process in which parties empower an individual to hear and issue a binding, principled decision in their case. The procedure is agreed upon by contract between the parties or authorised by statute.
Settlement Week: Typically, a court suspends normal trial activity for the week and, with the help of volunteer lawyers, mediates long-pending civil cases. Unresolved cases go back to the court's docket.

Summary Jury Trial: A flexible, voluntary or involuntary non-binding process used in the settlement of disputes in order to avoid protracted trials. After a short hearing in which evidence is provided by counsel in an abridged form, the mock jury gives a non-binding verdict, which may then be used as a basis for subsequent settlement negotiations.

Summary Bench Trial: Like summary jury trial, except that presiding neutral provides an advisory opinion.

Two-track Approach: Used in conjunction with litigation, representatives of disputing parties who are not involved in the litigation conduct negotiations or engage in other ADR processes. The ADR track may proceed concurrently with litigation or during an agreed upon hiatus in litigation. It is used in the USA and Japan when litigation has become acrimonious or when suggestion of settlement would be perceived as a sign of weakness.

Advantages of Alternative Dispute Resolution

The followings are the advantages that ADR has over litigation:

Reducing the cost to parties: Many poor cannot access the formal legal system because they cannot afford to pay the registration and representation fees necessary to prosecute cases in the courts. Since cost is probably the largest barrier to formal dispute resolutions for many people in developing countries.

Reducing the formality of the legal process: Several studies indicate that the formality of court systems intimidates and discourages use.[347] In counties such as India and Bangladesh where there is the caste system for instance, the court requirement of legal representation is both costly and intimidating for people who may not be comfortable interacting with lawyers from a different caste or class. In these and other countries, users of ADR programmes have expressed a preference for submitting cases to mediators who are local residents and understand the local community. In Sri Lanka, users expressed their satisfaction at having their "stories" heard in an informal process. All of these factors contribute to greater use and preference for informal processes.

Overcoming the barrier of illiteracy: In some countries, access is effectively denied because the formal system requires a level of literacy that many in the country do not possess. In these countries, the formal legal processes are especially intimidating for large numbers of

[348] Jardine (n 36).
[349] ADR Practitioners Guide (n 37).

illiterate citizens. In Bangladesh, the Madaripur Legal Aid Association was originally established to provide assistance and representation for the poor and illiterate. Their services are now dominated by their mediation programme, in part because they found mediation to be more effective and accessible for this part of the population. ADR programmes can be designed to rely on oral representations. Oral agreements may be enforced by traditional means of community peer pressure, eliminating the need for written documentation or formal enforcement mechanisms.

Serving rural populations and geographically dispersed locations: Access may be impaired because the courts are located far from the homes of those who need them. One advantage of ADR programmes is the ability to set them up with relatively little cost to local communities. The Lok Adalat ('people's court') system in India succeeded in reaching a large part of the population because they were located in villages.[350] Similarly, the Mediation Boards in Sri Lanka are distributed throughout rural villages, as well as larger cities and towns. In China, more than one million People's Mediation Centres are located in villages and serve parts of the population that could not easily reach existing courts.[351]

Counteracting discrimination and bias in the system: When courts are systematically biased against particular groups, such as minorities or women, ADR programmes can sometimes help provide some measure of justice. In Bangladesh, for example, women are often poorly protected by the courts. The mediation programme has recruited women to serve on mediation panels in the village mediation programme. Women who have used the system believe that they receive better protection and more compensation from this system than from the formal court system. In many circumstances, however, ADR will not improve access for discriminated against populations and may, some argue, even worsen their situation. Informal dispute resolution services may offer 'second-class' justice to users, particularly minorities and women who may be subject to bias in ADR programmes as well as in the formal judicial system. Informal dispute resolution systems are ineffective at changing policy and systemic injustices since they deal with individual cases and do not establish legal precedent.[352] Where, as in Bangladesh, the ADR programme design is able to address the issue of bias through recruitment of minority mediators and thorough training, justice can be improved for these disadvantaged groups.

The United Nations Office of drugs and crime[353] listed the advantages of ADR[354] thus: it strengthens judicial modernisation efforts, reduces cases thus unclogging the courts, increases access to justice for the poor disputants, reduces the costs of justice for all users,

[350] Ibid.
[351] Ibid.
[352] Ibid.
[353] The United Nations Office of Drugs and Crime training manual on Alternative Dispute Resolution and Restorative Justice for Nigerian Judges (25-28 Oct. 2017)
[354] CCMA Statistics Information Handbook 2010 stated that 188,002 labour cases were settled at the CCMA in the nine provinces in South Africa between 2006-2010.

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preserves, improves and restores relationships among disputants. Other advantages are ADR supports economic development by reducing transaction costs of disputes and increasing certainty of investments and increases satisfaction of the users, in addition it reduces public expenditures for courthouse facility expansion.[353]

Legal Instruments Supporting Alternative Dispute Resolution in Nigeria

Apart from the traditional system that encourages the practise of ADR; various Nigerian statutes also encourage the practice. Some of these extant laws are section 19(d) of the Constitution of the Federal Republic of Nigeria, 1999 which provides that the foreign policy objectives shall be:

> (d) respect for international law and treaty objectives as well as the seeking of settlement of international disputes by negotiation, mediation, conciliation, arbitration and adjudication

Other statutes are the Arbitration and Conciliation Act,[354] the Federal High Court Act,[355] Matrimonial Causes Act,[356] Trade Disputes Act,[357] Administration of Justice Commission Act, [358] National Health Insurance Scheme Act, [359] Nigerian Co-Operative Societies Act, [360] Public Enterprises (Privatisation and Commercialisation) Act,[361] National War College Act,[362] National Boundary Commission, etc. Act,[363] Energy Commission of Nigeria Act,[364] and Minerals and Mining Act.[365] Others include National Office for Technology Acquisition and Promotion Act,[366] Nigerian Communications Commission Act,[367] Nigerian Dock Labour Act,[368] Nigeria Export Processing Zones Act[369] and Advisory Council on Religious Affairs Act.[370] Others include Nigerian Investment Promotion Commission Act,[371] International Centre for Settlement of Investment Disputes (Enforcement of Awards) Act,[372] Regional Centre for International Commercial Arbitration Act,[373] Rules of Professional Conduct for Legal Practitioners, 2007,[374] Order 25 of the Lagos High Court Rules High Court of Lagos State (Civil Procedure) Rules 2004 and Order 17 of the High Court of the Federal Capital Territory, Abuja Civil Procedure Rules 2004.

The Lagos State Judiciary is a trailblazer as it establishes The Lagos Multi-Door Courthouse (LMDC) as the first court-connected ADR centre in Africa.[375] Subsequently, the concept was replicated in the judiciary of Abuja and presently, at least almost all the judiciaries in Nigeria that have replicated this gesture.[376] However, our main focus in this chapter is resolution of workplace dispute through the ADR.

In *Owoseni v Faloye*[379] and *Aribisala v Ogunyemi,*[380] the Supreme Court held that where a statute prescribes a legal line of action for the determination of an action, such as the need to explore an alternative dispute resolution mechanism, in an administrative, chieftaincy or other matter, the aggrieved party must exhaust all the remedies or steps provided in that law before going to court. However, it was decided that tax disputes cannot be resolved by arbitration because it is an encroachment on the exclusive jurisdiction of the Federal High Court.[381] Similarly, criminal matters cannot be resolved by ADR.[382] However, Nigerian courts and courts in other jurisdictions have made expansive contribution to ADR awards and jurisprudence. Nigerian courts held that the courts lack the jurisdiction to determine whether or not the findings of the arbitrator and his conclusions are wrong in law.[383] Similarly, the courts cannot set aside awards because there was a lack of or insufficient evidence to support the decision of the arbitrator,[384] thus a wrong finding of facts is not a ground to set aside an award.[385] In addition, the court has no discretion to alter the award[386] and parties choose their arbitrators for better or worse.[387]

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[353] R Ukpong-Umo, I Udobia and A Agwu, 'The Role of Alternative Dispute Resolution in Trans-Boundary Land Dispute: The Case of Ikot Idaha and Osuk Ediene Communities in Akwa Ibom State, Nigeria' 2019 17(2) *The Nigerian Journal of Sociology and Anthropology* 68-78; AA Okharedia, 'The Emergence of Alternative Dispute Resolution in South Africa: A Lesson for Other African Countries A Paper Presented at the 6th IIRA African Regional Congress of Industrial Relations, Lagos Nigeria (Jan. 24-28, 2011) 23.

[354] Cap. A18, Laws of the Federation of Nigeria LFN 2004; Arbitration – ss 1 to 36, Conciliation – ss 37 to 42, International Commercial Arbitration and Conciliation –ss 43 to 55, Miscellaneous provisions– 56 to 58; First Schedule – Arbitration Rules and Second Schedule – Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958; Third Schedule – Conciliation Rules

[355] Cap. F12, LFN 2004, s 17: Reconciliation in civil and criminal cases- In any proceedings in the Court, the Court may promote reconciliation among the parties thereto and encourage and facilitate the amicable settlement thereof.

[356] Cap. M7, LFN 2004; s 11: Reconciliation & s 30: Petition within two years of marriage.

[357] Cap. T8, LFN 2004; ss 4,6,8 and 9.

[358] Cap. A3, LFN 2004, s 3.

[359] Cap. N42, LFN 2004, s 26.

[360] Cap. N98, LFN 2004 s 49.

[361] Cap. P38, LFN 2004, ss 27, 28 & 30.

[362] Cap N82, LFN 2004, s 5.

[363] Cap. N10, LFN 2004, ss 3 and 6. [364] Cap. E10, LFN 2004, s 5.

[365] Cap. M12, LFN 2004, ss 76 and 255.

[366] Cap. N62, LFN 2004, s 4.

[367] Cap. N97, LFN 2004 s 4.

[368] Cap. N103, LFN 2004, s 2.

[369] Cap. N107, LFN 2004, s 4.

[370] Cap. A8, LFN 2004, s 3.

[371] Cap. N117, LFN 2004, s 26.

[372] Cap. I20, LFN 2004, s 1.

[373] Cap. R5, LFN 2004, s 4.

[374] Rule 15 and 47.

[375] See generally K Aina, 'Alternative Dispute Resolution' *Nigerian Law and Practice Journal* 1988 2(1) 171.

[376] There is also Institute of Dispute Resolution in Delta State and other states.

[379] [2005] 14 NWLR (Pt 946) 719, 740.

[380] [2005] 6 NWLR (Pt 921) 212.

[381] *Esso v NNPC* [2016] Appeal No. CA/A/507/2012; see also the decision in the US case of *Esso v NNPC* No. 19-3159 (2nd Cir 2022).

[382] *Kano State Urban Development Board v Fanz* [1990]; see also Anulika Okeke Agatha Exploring Alternative Dispute Resolution for Settlement of Criminal Disputes in Nigeria (Walden University PhD Thesis 2021).

[383] *Baker Marine v Danos* [2001] SC/374/2001.

[384] *Dunlop v Gaslink* [2018] LCN/12384(CA).

[385] Ibid.

[386] *Tulip (Nigeria) Ltd v Noleggioe* [2011] 4 NWLR (pt. 1237) 257.

[387] *Aye-Fenus Enterprises Ltd v. Saipem (Nig.) Ltd* [2009] (pt. 1126) 483.

National Industrial Court of Nigeria and the Court-Annexed Alternative Dispute Resolution Centres

The Constitution of the Federal Republic of Nigeria (Third Alteration) Act, 2010 (herein after Third Alteration Act) constitutes a watershed in the history of the National Industrial Court of Nigeria (NICN) in that it ushered in a number of radical innovations on the structure, powers, status and jurisdiction of the Court. One of the innovative provisions of the Third Alteration Act is section 254(C)(3) which provides that the NICN may establish an Alternative Dispute Resolution Centre within the Court premises on matters within her jurisdiction.[98] This is a Court-connected (annexed) ADR. The Court is about to give effect to this provision by establishing an ADR Centre within the Court premises.

The NICN was established as a specialised labour court empowered to adjudicate on labour related matters. The NICN has exclusive jurisdiction to the exclusion of any other court to adjudicate on workplace related issues. The Court adopts the multi door concept model, using experienced personnel who will refer the parties to the appropriate ADR door or litigation; or the Court make provisions in its rule for compulsory submission to ADR, and that litigation commences on the failure of ADR to resolve the matter. Once an agreement is reached through conciliation, mediation or arbitration or a hybrid model, the terms of settlement are then drawn and signed by the parties and the facilitator. The signed memo is then filed before the Court and treated as consent judgement enforceable against the parties.

Alternative Dispute Resolution in South Africa

The South Africa experience of the ADR systems shows that ADR is particularly useful in resolving industrial conflicts.[99] Prior to and during the transition in government, many NGOs, financed by numerous donors, undertook ADR efforts for a variety of purposes throughout South Africa. One of the earliest and most effective NGOs was the Independent Mediation Service of South Africa (IMSSA), which started in the early 1980's to focus on resolving labour-management disputes. After the establishment of IMSSA, the African Centre for the Constructive Resolution of Disputes (ACCORD), the Vuleka Trust, the Community Law Centre, the Wilgespruit Fellowship Centre, the Community Dispute Resolution Trust (CDRT), the institute for Multi-party Democracy (MPD), and the Community Peace foundation (CPF), among others, implemented a variety of training, mediation, and community reconciliation programmes to help manage and control community tension, resolve neighbourhood disputes, train community leaders in negotiation and conflict management techniques and establish neighbourhood justice centres.

After the transition of power from the apartheid government to democratic government, the new South African Government saw the above ADR programmes as models for new governmental dispute management. The Commission for Conciliation, Meditation, and Arbitration (CCMA) was established to resolve labour disputes in a workplace environment. The CCMA was patterned after the success of IMSSA and its operational activities were influenced by a similar ADR system in Australia where it has been a huge

[98] Also section 7(3) of National Industrial Court Act (2006).
[99] Bendedia (n 47).

success in resolving labour dispute. In South Africa, the CCMA has been very useful in resolving labour disputes and much attention will be given to the role of the CCMA in dispute resolution in the remaining part of this paper. This is due to the fact that our focus is on industrial dispute resolution. Apart from CCMA there are other specialised ADR programmes which includes: (a) the local community courts established by Department of Justice (b) the family mediation boards which is to help in resolving local family disputes, (c) the National Land Reform Mediation Panel to help resolve disputed land claim; and several other national and state agencies which are considering their own dispute resolution mechanisms that totally exclude the normal litigation process.

The CCMA provides for conciliation and arbitration in a number of issues, thus freeing the all-important resources of the Labour Court to deal with and resolve the more serious issues such as strikes action, unfair dismissal, retrenchments and discriminatory practices in the workplace. Some individuals are of the opinion that the pressures previously placed in the formal judicial system have now simply been shifted onto the CCMA, which already has a backlog of outstanding issues, which was due in part to staffing and time constraints; the pressure and backlog result in important workplace issues sometimes taking months to be resolved. Moreover, because employees in most cases need only assert unfair dismissal, and employers are required by the South African Labour Relations Act 55 of 1995 as amended to provide the proof needed to establish whether the dismissal was fair, according to Venter the possibility of frivolous charges of unfair dismissal being brought before the CCMA is high.[100] Venter argues that these frivolous charges in turn, slows the process, and perhaps even leads to a dilution of the seriousness of other allegations that warrant greater attention.

The CCMA is an independent juristic person with jurisdiction in all the provinces of South Africa. The Commission maintains an office in each province and as many local offices as it considers necessary. The CCMA is governed by a governing body nominated by National Economic Development and Labour Council (NEDLAC) and appointed by the Minister of Labour. The CCMA plays a central role in the statutory dispute-resolution process. All disputes not handled by private procedures or accredited bargaining councils or agencies must be referred to it for conciliation or mediation before they can be referred to arbitration or adjudication. It is funded by the state but an independent body. The CCMA may also accredit private agencies to perform any or all of its functions. Its main functionaries are commissioners and senior commissioners. The functions of the CCMA are set out in section 115 of the Labour Relations Act 66 of 1995 as amended 2002 (LRA):

The CCMA is thus involved in all ADR models such as conciliation, arbitration, negotiation, hybrid models and related issues such as the conduct and publication of research into matters relevant to its functions. In respect of a dispute, which is of a mutual interest between a trade union and employees, on one hand, and an employer on the other hand, one of the parties has the right to refer it to CCMA. As soon as the dispute is referred to CCMA, a commissioner must be appointed to attempt to resolve the dispute within 30 days through conciliation, which may include mediation, fact-finding, and advice. At this stage, commissioners have no prescriptive powers, other than to subpoena persons for questioning,

[100] Robert Venter, *Labour Relations in South Africa* (Oxford Press 2003) 522.

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to inspect documents and enter premises. Prior to commencing with conciliation, however the Commission is required to establish that it has jurisdiction by determining, inter alia, whether the dispute had been referred within the prescribed time limit, and whether the dispute arose after the commencement of the LRA.

While provision is made for the offence of contempt of the CCMA, Commissioners cannot themselves convict and punish persons for it, but must proceed by way of application to the Labour Court. If a dispute cannot be settled by conciliation, the CCMA must appoint a commissioner to arbitrate, who may be the person who conducted the conciliation process, unless one of the parties' objects. The parties may choose their arbitrator from a list and request a senior commissioner in complex cases. Arbitration proceedings are meant to be relatively informal and employee parties are entitled to be represented, if they so wish, by legal practitioners or union officials, while employers can appear in person or be represented by a lawyer or employers' association officials.

However, consent of all parties and the leave of the Commissioner are required for a party to be represented by a legal practitioner in the case of disputes arising from dismissals for misconduct or incapacity. In a situation where one party does not wish to permit the other to be represented by a legal practitioner, commissioners still have the power to permit such representation, provided they take into account the following issues: the nature of the questions of law raised by the dispute; its complexity; the public interest; and the comparative ability of the opposing parties to deal with the arbitration. Labour Court has held that the central question to be considered by commissioners is whether it would be unreasonable to permit a party to continue without legal representation. During the arbitration process, the commissioner \arbitrators is expected to conduct arbitration in a manner which the arbitrator considers 'appropriate' in order to determine the dispute fairly and quickly and to deal with the substantial merits of the dispute with the minimum of legal formalities."[91] Unless the parties agree otherwise, arbitration amounts to a complete rehearing of the matter."[92]

An arbitration award must be issued within 14 days of the conclusion of hearing. An award can be made only in the following terms- an award can be made only in the following terms. First, compensation – where the employer is required to pay a certain amount of the employee or employees. Second, re-employment – where the employer is required to take the employer back to work on any position the employer feel is good for employee, it could be a position lower than the previous position of the employee before the dispute occurred. Lastly, re-instatement – where the employer is required to give the employee his former position and not a position lower than the former position of the employee before the dispute occurred.

In terms of the CCMA Rule 25(1)(a) it states clearly that legal representation is not allowed at conciliation stages, while in terms of CCMA Rule 25(1)(c), legal representation is generally allowed at arbitration stage except in the case of incapacity and misconduct dismissals. The bone of contention with regard to Rule 25(1)(c) is that legal representation is generally allowed at all cases in arbitration except in the case of incapacity and misconduct;

[91] s 138 (I) of LRA
[92] *Gibb v Nedcor Ltd* (1997) 12 BLLR 1580 (LC).

whereas in the Labour Court, Labour Appeal Court, High Court, the Supreme Court of Appeal and Constitutional Court legal representation is allowed in the case of incapacity and misconduct. Those who argued against the above rule based their argument on inconsistency in its application. They argued that all the courts should speak with one voice on whether to allow legal representation in the case of incapacity and misconduct. Among those who support the view that this inconsistency must be rectified is the Law Society of South Africa (LSSA).

The Law Society of South Africa has challenged the constitutionality of the CCMA Rule on the following grounds: (i) rule 25(1)© is ultra vires; and (ii) the exclusion of the right to legal representation in rule 25(1)(c) constitutes unfair discrimination against members of the legal profession. The LSSA asserts that the CCMA's refusal to allow parties the right to be legally represented at misconduct and incapacity arbitrations, while allowing representation by trade unions, employer organisations and in-home legal advisers, amounts to unfair discrimination against members of the legal profession. Those who support the view that the rule is fine, and it should be left as it is, argued that legal representation in the case of misconduct and incapacity if allowed would make the process very legalistic and expensive and that a high degree of legal representation would both undermine endeavours to resolve these disputes expeditiously and tilt the balance unfairly in favour of employers.

Alternative Dispute Resolution in Australia

The use of ADR in Australia for the resolution of industrial disputes spans over a century. The current legal mechanism for ADR is the Australia Industrial Relations Commission (AIRC) which has been in existence under various names since 1904. It was however established as an independent national industrial tribunal under the Workplace Relations Act, 1996. It deals with workplace disputes referred under the dispute resolution procedure, disputes related to new collective agreement and other employment related disputes. The Commission acts swiftly and is bereft of the use of undue legality and technicality."[93] AIRC provides different ADR processes such as negotiation, mediation, conciliation, mini-trial, case evaluation and a lot of other hybrid mechanisms. Some courts have compulsory ADR procedures under the Civil Dispute Act 2011. Under this Act, financial matters, property settlement and spousal maintenance are specifically stated as matters suitable for arbitration. Likewise, under section 28 of the Australian Human Rights and Equal Opportunity Commission Act, 1986, ADR is prescribed to rectify the violation of the rights of any person. However, most workplace disputes are dealt with by the AIRC.[94] the Workplace Relations Act, 1996 also provides that ADR processes may be conducted by private individuals subject to the stipulations of the Act.[95]

Concluding Remarks

This chapter shows that ADR embraces negotiation, conciliation, mediation, arbitration and other different mechanisms of conflict resolution. The most appropriate type or form of ADR for a particular case depends upon the needs of the parties to the dispute. In

[93] Mary Anne Noone and Lola Akin Ojelabi 'Alternative Dispute Resolution and Access to Justice in Australia' (2020) 16(2) *International Journal of Law in Context*, 108-127.

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some cases, ADR has advantages over litigation but not all cases could be solved by ADR. ADR could be most useful in resolving workplace relationships, especially issues such as dismissal and termination of employment whereby the employee has no means of financing litigation. In South Africa and Australia, ADR has been useful in resolving disputes timeously and at low costs to the parties.[394] Without doubt, the improvement of the status of the NIC by making it a superior court of record is salutary and so is the introduction of the ADR mechanism. Despite the fact that the enabling statute and court rules encourage ADR as the NICN to wit- 'A Judicial Officer shall always encourage parties before the Court to explore ADR procedures where appropriate,'[395] this is yet to show in practice, as most cases goes to litigation directly.

The lesson to learn from the South Africa and the Guatemala experience are as follows: integrity of the operators is very important; the Nigerian model should allow legal practitioner for any party wishing to be so represented so as not to be embroiled in the South African controversy; legalese and technicalities should be eschewed; the evidence presented and facts admitted at the ADR should be inadmissible at the Court if ADR process failed, in order to prevent parties fishing for evidence. Provision should be made for illiterates and semi-illiterates to present their oral evidence in their mother tongue and effort should be made to assign judges and ADR practitioners that speak the indigent and illiterate persons' mother tongue to their case. The ADR centres established in the NICN should be made more functional and effort should be expended in training both the NICN judges and the administrators of the NICN ADR centres in modern ADR practices. Similarly, participation in court connected ADR should be enhanced through standard and proper conduct for parties and their advisers with cost sanctions for non-compliance with applicable standard of 'good faith', 'reasonable endeavour', 'genuine effort' to settle.[397] Specialised boards or court connected ADRs for different sectors as in South Africa is advocated to ensure that the workloads of the courts are reduced.

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[394] Laurence Boulle 'Managing Workplace Conflict- Alternative Dispute Resolution in Australia' (2006) 8(8) *ADR Bulletin* 1-3.

[395] See div 6 & s. 698 of the Workplace Relations Act, 1996.

[396] Okharedia (n 47) 23.

[397] See paras 6 (g) and 11(b) of the National Judicial Policy, Federal Republic of Nigeria Official Gazette No. 75 Vol. 100 Government Notice No. 193 of 2nd October 2013; see the dictum of the lead judgement in *Ogunleye v Oni* (1990) 2 NWLR (pt. 135) 745.

[398] *Brownlee v Browlee* (Case No. 2008\25274 Unreported); See the dictum of Lewis J in *S v J* (SC) Case No. 695\10 of 19 Nov 2010.