MEDIATION AS A TOOL OF RESOLVING DISPUTE IN NIGERIA: ISSUES AND CHALLENGES

BY

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CERTIFICATION

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DEDICATION

This long essay is dedicated to **Olawale Olasanmi Esq. (Deceased).** A colleague, friend and brother that lost his life during the early stage of this programme. It is painful we could not finish this programme together, as you were snatched by untimely death. The memories we shared, especially the first and only lecture we had together remains nostalgic! Continue to rest in peace.

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I sincerely appreciate the efforts of Dr. (Mrs.) A.A Oluwabiyi (my supervisor) towards the completion of this long-essay. The instructions, guidance and patient exhibited during the period of writing this long essay shall never go unrewarded. It is my prayer that she shall reach the apex of her career and enjoy the benefits of her career in sound health. Amen

I am also grateful to my parents for their efforts, especially my father, an Ekiti man that believes the success of man is always measured by his academic achievements. Although, I may have a divergent opinion on your yardstick; however, I promise that if I am to be examined solely by your yardstick, I would not be considered a failure in life. I am not also ungrateful to my mother for always providing me the moral supports and prayers needed for the completion of my studies.

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ABSTRACT

Mediation is an aspect of Alternative Dispute Resolution. However, despite the growth and advantages of mediation, it is still left undermined, especially in Nigeria where there is no specific legal framework for its application, scope, procedure and accreditation of mediators. This is work researched the practice of mediation in other jurisdictions such as South Africa, Canada and Hong Kong, taking cognizance of the loopholes and challenges experienced by some of these jurisdictions and using them as litmus tests to proffer recommendations for the practice of mediation in Nigeria.

The research methodology used in this work is the library research method. The work relied on primary and secondary sources of information.

The work found out that mediation is yet to gain wide acceptance in Nigeria due to many factors, and such factors will continue to debilitate the swift operation of mediation in Nigeria, unless some of the recommendations provided in this work are applied and put into practice.

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ADR	Alternative Dispute Resolution
B.C	Before-Christ
CA	Court of Appeal
CAP	Chapter
JCA	Justice of the Court of Appeal
JSC	Justice of the Supreme Court
LFN	Law of the Federation of Nigeria
NWLR	Nigeria Weekly Law Report
Med-Arb	Mediation-Arbitration
SC	Supreme Court

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CHAPTER ONE

GENERAL INTRODUCTION

1.1 Background to the Study

Mediation is a form of Alternative Dispute Resolution with the distinctive feature of a peaceful resolution of dispute without any form of force or coercion through a process where a neutral and impartial third party called the 'mediator' is invited by the disputing parties to facilitate the resolution of dispute by the self-determined agreement of the disputants. The mediator facilitates communication, promotes understanding, focuses the parties on their interests, and uses creative problem-solving techniques to enable the parties to reach their own mutual settlement/agreement. The mediator is usually jointly procured by both parties and the process is voluntary as parties are not under any obligation to accept the suggestions/recommendations of the mediator.[1]

Alternative Dispute Resolution (ADR) is simply a process of initiating alternative methods and procedures of resolving a civil or commercial dispute without resorting to litigation, which can be expensive, cumbersome, and time-consuming. ADR process and litigation are different concepts, although they can run concurrently to achieve the goal of dispute settlement. Ideally, ADR is usually resorted to before instituting a court action but subject to the circumstances of each case, it can be resorted to before judgment is given on a matter. If litigation is pending and the parties resort to ADR, the terms of the settlement reached by the parties would be brought to court and entered as a consent judgment.[2]

[1] Winifred Idiaru and Olusola Jegede, 'Nigeria: Overview Of Alternative Dispute Resolution Process In Nigeria' (2021) available at <www.mondaq.com/nigeria/arbitration-dispute-resolution/1036840/overview-of-alternative-dispute-resolution-process-in-nigeria > accessed 16 May 2021

[2] *Ibid*

Dispute is inevitable in human relationship and the severity or extent of such disputes varies in each scenario. These disputes can either be family, communal, land, commercial or even disputes between countries. When dispute lingers without a resolution, it could lead to breakdown of law and order.[3] Historically, there was a massive destruction of lives and property after the first and second world wars which automatically affected the socio-economic development of nations. During the Second World War, for instance, about 60 million people died, a new wave of arms race arose and nations like Germany had many property destroyed. The Cold War then came with its manifestations of proxy and quasi conflicts in developing countries of Europe, Africa, Asia and America.[4]

Mediation has been a part of human interaction that has evolved with civilization. A classic case of Alternative Dispute Resolution (ADR) in history can be traced back to Israel. In ancient Israel (around 960 B.C), King Solomon stood as a mediator between two women. The dispute is probably the most famous child custody battle in history.[5] In the scenario mentioned, two women quarrelled over a child's rightful motherhood. King Solomon stepped in and offered a solution that would favour both women equally. This unbiased approach to conflict resolution makes a mediator practically indispensable in cases that get settled out of court. Centuries later, mediators have adopted this technique to settle civil disagreements between Israeli citizens and people of other nationalities. Community mediation centres were set up to resolve the disputes with

[3] O. Oluduro, 'Customary Arbitration in Nigeria: Development and Prospects' (2011) <http://eupjournals.com/ajicl> accessed 16 March 2020

[4] UKEssays, 'Conflicts Are Inevitable In Human Life Politics Essay' (2021) <www.ukessays.com/essays/politics/conflicts-are-inevitable-in-human-life-politics-essay.php?vref=1 > accessed 16 May 2021

[5] J. Vinther & T. Todd, 'The History of Mediation and Why It Is Still in Use Today' (2021) <www.mediate.com/articles/vinther-history.cfm > accessed 27 May 2021

Palestine after Israel declared statehood in 1948. These conflict resolution centres play a significant role in easing political tensions between both countries.[6]

Many scholars believe that mediation dates back to ancient Sumerian society. Sumer was an ancient Mesopotamian civilization that existed from 4500-1900 B.C in what is now known as the Middle East. Back then, a leader of the society given the title of 'Mashkim' weighs the merits of every case before it appears before the court.[7] The Mashkim also assisted conflicting parties to resolve their disagreements by themselves. This role is similar to a modern day mediator. If the Mashkim could not broker peace between two parties, the case was taken to court.[8]

Furthermore, Sharia Law also supports the role of a mediator in conflicts. The rule of thumb is that this mediator must be unbiased and has no stake in the dispute. They should only resolve disputes by suggesting ideas and offering solutions to the disagreeing parties.[9] The decision to accept or reject the mediator's suggestions lies with the specific parties. For other mediation instances in the Middle East, we consider the Prophet Muhammad's life. Many scholars assert that during Prophet Muhammad's early life, tribes warring over the Ka'ba reconstruction chose him as a mediator. The Prophet calmed the storm looming over the tribes by suggesting a solution that accommodated both parties' interests.

Mediation, just like other means of Alternative Dispute Resolution is not a new phenomenon. It is observed that ADR stretches as far back as 1800 B.C., traced to the Mari Kingdom in modern Syria, where mediation and arbitration were used in disputes with other kingdoms.[10]

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[6] *Ibid*
[7] *Ibid*
[8] *Ibid*
[9] *Ibid*
[10] Conrad C. Daly, 'Accreditation: Mediation's Path to Professionalism' (2010) 4 American Journal of Mediation 1

In pre-colonial Africa, disputes were resolved majorly through the intervention of elders or experienced persons who had more knowledge and wisdom than the disputing parties.[11] For example, many societies have a committee of elders, family heads, chiefs or emirs who presided over and sought to resolve disputes between parties. Often, these mediators (especially when they were not leaders within their communities) were chosen for their respectability in society and their knowledge of the laws and customs of the land.[12]

Colonialism in Nigeria distorted the culture, values and customs of Nigerians, these changes still impact the lives of the people till date. The aspect in which this distortion is most noticeable is in the area of administration of justice, especially in the methods or mechanisms for dispute resolution.[13] Litigation is among the innovations brought into the administration of justice in Nigeria through the influence of colonists.

In the past decades, mediation in general has gained increasing acceptance in the legal community. The search for alternative methods of resolving disputes is now a movement. Mediation has been seen by some as a more suitable process than litigation.[14] Proponents of mediation assert that litigation involves debilitating expenses, frustrating delay, and fails to address the emotional needs of the parties.[15] Adversarial tactics often aggravate rather than resolve differences, though an amicable settlement might be in the best interests of both parties.[16] Despite this potential for emotional resolution and for forestalling mounting legal expenses, mediation has not attained the scope of implementation its boosters had expected, especially in

[11] Gary B. Born, *International Commercial Arbitration* (Vol. 1, Kluwer Law International 2009) 54
[12] Templars, 'Mediation in Nigeria' (2019). available <www.lexology.com/library/detail.aspx?g=fb0fe072-267d-4366-bb1e-04a5459997a9 > accessed 27 July 2020
[13] M. Mustapha, L. Abdulrauf and Abdulrazaq Daibu, 'Customary Arbitration in Nigeria: A Review of Extant Judicial Parameters and the Need for Paradigm Shift' <www.ajol.info/index.php/jsdlp/article/download/128024/117574> accessed 2 March 2020
[14] Steven T. Knuppel, 'Promise and Problems in Divorce Mediation' (1991) J. Disp. Resol. <https://scholarship.law.missouri.edu/jdr/vol1991/iss1/9> accessed 16 March 2020
[15] Ibid
[16] ibid

Nigeria where there is no specific legal framework for mediation. Thus, the concept of mediation as a mechanism of resolving disputes is a growing aspect of law, especially in Nigeria.

Despite, the benefits attached to ADR, it was not given a legal framework in Nigeria until the promulgation of the Arbitration and Conciliation Decree of 1988. The Decree became an Act of the Federation of Nigeria by the virtue of codification of all Laws of Nigeria in year 1990.[17] As the title of the Arbitration and Conciliation Act implies, it only covers the legal framework for arbitration and conciliation in Nigeria, leaving mediation out of the puzzle. Hence, there would be no need of understating the challenges of a country that does not have a specific enactment for mediation while using mediation as one of the various means of Alternative Disputes Resolution in its judicial system. This vacuum has led to a lot of challenges in the procedure of mediation, qualifications of mediators, venue of mediation, contents and validity of a mediation agreement.

The vacuum of not having a national law guiding mediation in Nigeria as a federation has led States Government to enact their own mediation laws.[18] This is possible because dispute resolution is not on the exclusive legislative list of Nigerian National Assembly, thereby providing an avenue for States to enact their laws on matters not on the exclusive legislative list. However, the State laws must not be in conflict with the national laws, in which case the national laws have the power of overriding the state laws. This is referred to as the principle of 'covering the field'.[19]

The practice of mediation as a mechanism of resolving disputes in Nigeria have not been a smooth-sailing affair. Practitioners have to rely on common reasoning as the rule guiding their operation in several jurisdictions without a specific law guiding mediation. This practice has its

[17] LFN, CAP A18

[18] Lagos, Kaduna, Ogun, Ekiti States have their own mediation/Multi-Door Courthouse Law which includes mediation as one of the services rendered by the Courthouses.

[19] Adetona v A.G Ogun State(1984) 5 NCLR 299; Saraki v FRN (2016) LPELR-40013 (SC); A.G Federation v A.G Lagos State (2013) 16 NWLR (pt. 1380) 249

negative effect in the promotion of mediation, as it is risky to rely on unwritten rules which are prone to uncertainty.

1.2 Statement of the Research Problem

Mediation practice as evolved over time, we have seen many changes and modifications to the practice of mediation.[20] It has been claimed that mediation has not only a social existence, but also a legal existence.[21] In its social existence, it is a human behaviour that takes place in all areas of society: parents mediate conflicts between children; employers mediate conflicts in their teams; teachers mediate conflicts in schools; and companies seek to refer conflicts to mediation to have access to scarce resources.

According to Petra, mediation in its social existence involves different forms of third party interventions that range from minimum interventions by the mediator, such as establishing the communication between the parties, to a directive intervention that may take the form of an evaluation of alternatives for the settlement or the recommendation of a solution.[22] While it has been observed that a certain stereotype of mediation practice is emerging, the social practice of mediation remains only a vague label for a wide range of dispute resolution activities.[23] The regulatory activities of the last few decades are a sign that mediation is starting to evolve into a legal practice and that the period of experimentation is about to fade out, especially in Nigeria.

One difficulty in mediation research is a lack of clarity of the research subject. Mediation may be broadly described as a form of consensual dispute resolution with the assistance of a third party. However, mediation is not a concise concept and it has a different meaning within and outside

[20] K. Kovach, et.al., 'A Conversation on the Challenges of Mediation Practice' (2020) <www.mediate.com/articles/krivis-challenges.cfm > accessed 27 April 2021
[21] Petra Hietanen-Kunwald, 'Mediation and the Legal System Extracting The Legal Principles of Civil and Commercial Mediation' (DPhil thesis, University of Finland)
[22] ibid
[23] ibid

the legal system.[24] In addition to the ambiguity of the concept, an incoherent use of the terminology within the scholarly and practice field has added to the confusion about mediation and what it actually means. Besides this, mediation is often perceived as a flexible practice, which may take different forms depending on the context, the participants and the field of application. At first glance, mediation is a more suitable research subject for the social sciences than for the legal sciences. In the social sciences, there has been extensive research on conflict resolution processes and mediation. However, in the social sciences, the purpose of the research and the theoretical framework for mediation research has been questioned. For any research that seeks to analyse, categorize and optimize mediation endangers the flexibility of the process and the openness of the decision-making.[25] The heterogeneity of the practice field and the reluctance of some practitioners to open up to the scholarly discourse has added to the lack of transparency of mediation and limited research into it.

Another problem is the unavailability of proper legal structure. There are limited laws on the operation of mediation. Nigeria's most significant law on ADR, which applies to the whole country, is the Arbitration and Conciliation Act, Cap A18, LFN 2004. This law provides for arbitration and conciliation but makes no express provision for mediation.

Nigeria operates a federal system of government with legislative powers vested in both the national and the constituent State levels. Laws in respect of ADR mechanisms, including mediation, can, therefore, be enacted at the federal or state levels. Accordingly, while there are no federal laws specifically governing mediation across the entire country, some of the states that are major commercial centres, such as Akwa Ibom State, the Federal Capital Territory Abuja, Rivers State (Port Harcourt), Delta State, Kano State, Cross River State, Edo State, Enugu State,

[24] Petra (n 21) 8
[25] ibid

Ogun State and, most significantly, Lagos State have laws or rules establishing the existence of ADR.[26]

In Lagos State, for example, the domestic sources of law that relate to mediation include the Lagos State Multi-Door Court Law 2007 and the accompanying Lagos State Multi-Door Court (LMDC) Practice Directions on Mediation, the Citizens Mediation Centre Law 2007 and the Lagos Court of Arbitration's (LCA) Mediation Guidelines 2011. Further, the procedural rules of some state courts also contain sparse provisions on mediation, which generally encourage referrals of disputes before these courts to mediation, among other ADR mechanisms.[27]

There is insufficient information on the relevance of meditation in Nigeria, as there is limited knowledge of the operation of mediation in Nigeria. Considering the enormous benefit of the concept of Alternative Dispute Resolution in dispute settlement in the Nigerian legal system, ADR still seems new and unheard of to many prospective litigants. Many prospective litigants are not aware of the benefits of settling disputes outside customary litigation. This has resulted into little or zero trust in the mediation system, as people still prefer litigation to mediation despite the cost and the rigorous process involved. The courts are still filled with matters that would not have had their way into the cause list but because the proper mechanism of ADR was not explored. Mediation serves various purposes, including providing the opportunity for parties to define and clarify issues, understand different perspectives, identifying interests, explore and assess possible solution, and reach mutually satisfactory agreement, when desired.

Although mediation as a formal concept is still not very popular in all parts of Nigeria, with the developing prominence of ADR mechanisms in general, there is an increase in the awareness and use of mediation as an alternative to litigation, or more commonly, as an initial step before the

[26] Templars (n 12)
[27] *Ibid*

use of other more binding ADR mechanisms, such as arbitration.The majority of the mediation proceedings in Nigeria are court-ordered and not voluntarily initiated by the parties. Nonetheless, mediation has gained increased recognition in the commercial sphere and parties are increasingly making it a compulsory part of their dispute resolution clauses.[28]

Flowing from the foregoing, the main research problem that this study seeks to answer is 'to what extent has the legal frameworks on mediation put in place to ensure dispute resolution?

1.3 Aim and Objectives

The main aim of the study is to critically appraise the practice of mediation as a tool of resolving dispute in Nigeria. The specific objectives of the study are:

i. Examine the concept of mediation;

ii. Investigate the efficiency of mediation practice in Nigeria;

iii. Examine the challenges and hindrance of mediation in Nigeria, and

iv. Make necessary recommendation as solutions to the identified challenges.

1.4 Research Methodology

The study adopts doctrinal approach for legal study. In this way it will rely on both primary and secondary sources of information. The primary sources of information includes international, and regional instruments, national statutes, namely the 1999 Constitution of the Federal Republic of Nigeria (as amended), Arbitration and Conciliation Act, Cap A18, LFN 2004 as well as case laws. The secondary sources of information on the other hand include textbook, articles from journals, newspapers, Commission reports and materials sourced from the internet. All these sources of information shall be subjected to content and contextual analysis.'

[28] Ibid

1.5 Significance of the Study

The study seeks to make us understand clearly the practice of mediation as a tool of resolving dispute in Nigeria. It is clear that litigation is adversarial, which means less regard to fair solution. Court decisions might not be acceptable to either party, which might result in disturbance of commercial relationship. Adjudication of court results in win-lose scenario and not a mutually acceptable decision. Hence, a party who is dissatisfied with the result may seek an appeal following trial. Hence, in the bid to promote peace and foster relationship between parties mediation provides a forum in which parties can resolve their own disputes and strike their own bargain with the help of a third parties.

Therefore, it is very important that at the end of this research, there will be a clear understanding of the concept mediation, the various laws, policies and institutional framework associated to the practices mediation in Nigeria.

1.6 Scope of the Study

The study covers the nature and various form of alternative to dispute resolution especially the use of mediation as a tool for dispute resolution in Nigeria, coupled with the various legal and procedural frameworks for the practice of mediation as a tool of resolving dispute in Nigeria, comparing it with the law and practice of mediation in Hong Kong, South Africa and Canada.

1.7 Limitation of the study

Although the aims of this study will be achieved, it is however undeniable that there are both limitations and delimitations to this study. This work is limited only to the field of alternative dispute resolution especially with mediation and particularly its practice in the Nigeria jurisdiction.

This study has been limited as a result of the time frame within which this study was to be researched and put together, considering the fact that the researcher was tied up attending to several other work that needed equal attention.

There are also limited materials available on mediation, especially as applicable to Nigeria. The researcher is constrained to the limited materials available.

1.8 Structure of the Study

The study is divided into six chapters. Chapter one of the work discusses the general introduction. It contains the background of the study, the statement of the problem, objectives of the study, methodology of the study, significance of the study, scope of the study and plan of the study. Chapter two contains the meaning and scope of Alternative Dispute Resolution (ADR), types and forms of ADR, difference between mediation and other forms of ADR and benefits of ADR. Chapter three discusses the practice and legal framework of Mediation in some selected jurisdictions. Chapter four discusses mediation in selected jurisdictions. Chapter five discusses the issues and challenges of mediation in Nigeria, specifically discussing the aspects which the issues are salient. Chapter six highlights the summary of the various findings in the research work and recommends ways the practice of mediation can be improved in Nigeria.

CHAPTER TWO

Meaning and Scope of Alternative Dispute Resolution (ADR)

2.1.1 Types/Forms of Alternative Dispute Resolution (ADR)

Alternative Dispute Resolution (ADR) is embodies techniques of dispute settlement outside of the government judicial process or court for the purpose of solving disputes by mutual understanding of the conflicting parties. Alternative Dispute Resolution (ADR) is extra judicial exercises which support the judicial system to resolve through alternative ways. It is a win-win process with less expense and within a short period. According to a Justice of the Supreme Court of India, ADR 'is a non-formal settlement of legal and judicial dispute as a means of disposing of cases quickly and inexpensively'[29]

Alternative Dispute Resolution (ADR) is qualitatively distinct from the judicial process of dispute resolution. Disputes are settled through the aid of a neutral third person which generally is chosen by the parties.[30] Alternative Dispute Resolution (ADR) is generally characterized with the proceedings being informal, devoid of procedural technicalities and conducted in the manner agreed by the parties. Similarly, disputes are resolved expeditiously and with less expenses; confidentiality of the subject matter of the disputes are highly maintained; the decision making process of the Alternative Dispute Resolution (ADR) aims at substantial justice, keeping in view the interests involved and the contextual realities.[31] This view is also supported by Peters, who defined referred to ADR as a group of flexible approaches to resolving disputes more quickly and at a lower cost than going through the tedious road of adversarial proceedings.[32]

[29] Md. Aktaruzzaman, *Concept and Law on ADR and Legal Aid* (Dhaka, 2nd edn, Shabdakoli Printers 2008) 9
[30] Ibid
[31] Ibid
[32] Peters, D. Arbitration & Conciliation Act Companion. (Lagos, Dee-Sage Nigeria Limited 2006) 17

ADR aims at rendering justice in the form and content which not only resolves the dispute but tends to resolve the conflict with importance attached to the relationship of the disputing parties.[33]

Black's Law Dictionary defines ADR as 'procedures for settling disputes by means other than litigation.'[34] In essence, it refers to a range of procedures that serves as alternatives to litigation for the resolution of disputes which usually involves the intercession of an impartial third party.

Ireland's Law Reform Commission, in its Constitution defines ADR as:

> ...a broad spectrum of structured processes, including mediation and conciliation, which does not include litigation though it may be linked to or integrated with litigation, and which involves the assistance of a neutral third party, and which empowers parties to resolve their own disputes.[35]

According to Rao, the procedure of Alternative Dispute Resolution (ADR) consists of negotiation, conciliation, mediation, arbitration and an array of hybrid procedures, including mediation and last-offer arbitration, mini-trial, med-arb and neutral evaluation.[36]

The breadth of this definition of ADR constitutes recognition by the Commission of the fact that 'ADR' is an umbrella term for a variety of processes which differ in form and application. Differences include: levels of formality, the presence of lawyers and other parties, the role of the third party (for example, the mediator) and the legal status of any agreement reached.[37] Despite these differences, the Victorian Parliament Law Reform Committee suggests that it is possible to identify some common features relating to the acronym 'ADR'. For example:

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[33] Sarvesh Chandra, 'ADR: is conciliation the choice' P.C Roa ed., *ADR: What it is and How it works*, (Delhi: Universal Law Publishing Co. Pvt. Ltd 2002) 83

[34] Garner. B, Black's Law Dictionary (West Group Publishers 1997) 10; See also Adeola O. Oluwabiyi 'A comparative Legal Analysis of the Application of Alternative Dispute Resolution (ADR) to Banking Disputes (2015) Vol. 38 Journal of Law, Policy and Globalization

[35] Ireland's Law Commission, *Alternative Dispute Resolution: Mediation and Conciliation (Law Com No 98, 2010)* 13

[36] Sarvesh (n 33) 25

[37] Lewis and Mc Crimmon 'The Role of ADR Processes in the Criminal Justice System: A view from Australia'. Paper presented at ALRAESA Conference, Uganda, September 2005 2 www.justice.gov.za accessed 15 April 2020

There is a wide range of ADR processes;

1. ADR excludes litigation;
2. ADR is a structured process;
3. ADR normally involves the presence of an impartial and independent third party;
4. Depending on the ADR process, the third party assists the other two parties to reach a decision, or makes a decision on their behalf; and
5. A decision reached in ADR may be binding or non-binding.

The Ireland's Law Reform Commission recognised in its Consultation Paper that ADR has flourished to the point that it has been suggested that the adjective should be dropped altogether and that 'dispute resolution' should be used to describe the modern range of dispute resolution methods and choices.[38] In the Consultation Paper, the Commission provisionally concluded that, at this stage in its development in Ireland, it remained appropriate to refer to the term 'alternative dispute resolution' as opposed to dropping the use of the adjective 'alternative' or replacing it with another term such as appropriate, additional, amicable or accelerated dispute resolution.[39]

The Ireland's Commission noted in its Consultation Paper that ADR should not been seen as a separate entity from the court-based arrangements for civil justice but rather should be seen as an integral part of the entire system.[40] Similarly, the Victorian Parliament Law Reform Committee in its Discussion Paper on Alternative Dispute Resolution stated that ADR and the formal justice systems are not homogenous, separate and opposed entities. Their relationship is complex and evolving.[41]

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[38] Ireland Commission (n 35)
[39] Ibid at 2.11
[40] Ibid at 2.06
[41] Discussion Paper for the Inquiry into Alternative Dispute Resolution (Victoria Parliament Law Reform Committee, September 2007). http://tex.parliament.vic.gov.au/lawreform/inquiries/ADR/Discussion_paper.pdf accessed 20 April 2020

The Commission concurs with the view that over the last two decades ADR has become a multiple processes, procedures and resources for responding to disputes, all of which supplement the traditional approaches to conflict.[42] A further criticism associated with the term 'alternative' is that 'it is socially and historically inaccurate, bestowing an undeserved primacy on litigation where in reality the majority of disputes have traditionally been resolved without the use of formal legal processes'.[43]

There are several methods of Alternative Dispute Resolution. Some of these will be discuss as follow:

1. Arbitration

Arbitration is a term derived from the nomenclature of Roman law. It is applied to an arrangement for taking and abiding by the judgment of a selected person in some disputed matters instead of carrying it to the established courts of justice. It is a process whereby the parties to a dispute agree to have it settled by an independent third party and to be bound by the decision made by such third party. The agreement may be entered into after the dispute has arisen or it may be included within a contract by way of a clause; which refers any future dispute, which might arise out of the contract to arbitration.[44]

It is a method of resolving disputes between parties without recourse to the law. It is voluntary and the procedures have to be agreed by both sides beforehand. Consequently it requires the goodwill of both sides for the method to work and it also requires trust in the arbitrators who are asked to decide the issue.[45]

[42] Ibid
[43] Ibid
[44] A. Sanni, *Introduction to Nigerian Legal Method* (2nd edn, Obafemi Awolowo University Press Limited 2006) 153
[45] J. A. Kennerley, *Arbitration Cases in Industrial Relations* (1st edition, Pitman Publishing 1994)3

The Supreme Court of Nigeria adopted the definition offered by Halsbury's Law of England, in the case of **Kano State Urban Development Board v. FANZ Construction Ltd.**[46] It was held that arbitration is the reference of a dispute or difference between not less than two parties for determination, after hearing both sides in a judicial manner, by a person other than a court of competent jurisdiction.[47]

Also, the court in ***CN Onuselogu Ent. Ltd v Afribank (Nig.) Ltd***[48] defined Arbitration as where two or more persons agree that a dispute or potential dispute between them shall be resolved and decided in a legally binding way by one or more impartial persons in a judicial manner, upon evidence before him or them. Arbitration is the reference of a dispute or difference between not less than two persons for determination after hearing both sides in a judicial manner by another person or persons, other than a court of competent jurisdiction. The person to whom the dispute or difference is referred to is called the arbitrator or the arbitral tribunal. The word 'tribunal' is used even where there is only one arbitrator.[49]

Arbitration has some semblance to litigation on the basis that a neutral third party hears the disputants' arguments and imposes a final and binding decision that is enforceable by the courts. The proceedings follow laid down procedure by the law. The difference between litigation and arbitration however is that in arbitration, the parties in the contractual agreement have already agreed to the procedure before the dispute arose and the proceedings are also less formal than in a law court. Another major difference is that, unlike court decisions, arbitration offers almost no

[46] (1990) 4 NWLR (Pt 142) 1@32
[47] Ibid
[48] (2005) 1 NWLR (Pt 940) 577
[49] E. A. Marshall, *The Law of Arbitration* (4th edn, Sweet & Maxwell 2001)1

stringent process. Thus, when an arbitration award is made the case is ended and cannot be appealed except on exceptional ground.[50]

Until accepted, it is opened to any of the parties to arbitration to withdraw, but once accepted, a party will not be permitted to go back on his word. In fact in ***The Owners of the M. V. Lupex v. Nigerian Overseas Chartering and Shipping Limited,***[51] the court held, *inter alia* that:

> "The court should not be seen to encourage the breach of a valid arbitration agreement particularly if it has international flavour. Arbitration, which is a means by which contract disputes are settled by a private procedure agreed by the parties, has become a prime method of settling international commercial disputes. A party generally cannot both approbate and reprobate a contract. A party to an arbitration agreement will in a sense be reprobating the agreement if he commences proceedings in court in respect of any dispute within the purview of the agreement to submit to arbitration. Where parties have chosen to determine for themselves that they would prefer any of their disputes to arbitration instead of resorting to regular courts a prima facie duty is cast upon the courts to act upon their agreement."[52]

2. **Conciliation**

Conciliation is the bringing together of disputants with an effort to settle their differences. The main object of conciliation is to achieve an amicable settlement of the dispute with the assistance of a neutral conciliator who is respected by both parties. Unlike in arbitration, a conciliator does not make decision for the parties. Rather the conciliator assists the disputants in reaching an agreed settlement. Conciliator merely proposes solutions for the parties to weigh and consider. One important attraction of conciliation as a dispute resolution mechanism is that since the

[50] E. E. Oni-Ojo and C. Roland-Otaru, *'Alternative Dispute Resolution Strategies for Sustainable Development in Africa: Insights from Nigeria'* (2013) Vol.3 Journal of Management and Entrepreneurial Development 1
[51] (2003) 10 SC 71
[52] *Ibid*

decision is actually reached by the parties' enforcement is likely to be a lot easier.[53] It is a process by which the parties to a dispute, with the assistance of a third party, identify the issues in dispute, develop options, consider alternatives and make efforts to reach an agreement. The conciliator may advise on the content of the dispute or the outcome of its resolution, but not determine the dispute. The conciliator may advise on or determine the process of conciliation by making suggestions for terms of settlement, give expert advice on likely settlement terms and actively encourage the participants to reach an agreement. This conflict resolution mechanism is akin to mediation, as the conciliator assists parties by proposing strategies of resolving the conflict and how they could resolve the dispute. The conciliator is involved and remains neutral throughout the process.[54]

In many jurisdictions, there are no statutory provisions for Conciliation or Mediation. Users adopt what is common practice and what the parties agree on. The rules of some arbitration institutions also provide for conciliation. For example, the I.C.C. has Rules for Conciliation as it has for Arbitration. It is therefore, important that where written provisions are made for Conciliation or Mediation, users should carefully examine the provisions because the basic concepts of these processes may be modified as desired. Sometimes, a Conciliator is more proactive than a Mediator, but this is not an inflexible rule since the parties may make their own provisions and give it the name they wish.[55]

3. **Neutral Fact Finding**

In situations where parties to a dispute cannot agree on the facts or technical expertise is essential to their determination, the parties may employ a third-party to inquire into the underlying

[53] J. D. Peters, 'Application of Alternative Dispute Resolution (ADR) and Restorative Justice (RJ) Systems in the High Courts and Other Courts of Coordinate Jurisdiction' https://nji.gov.ng accessed 15 July 2020
[54] A. A. Rafiu, 'The Institution and Challenges of Alternative Dispute Resolution (ADR) in West Africa: The Case Of Ghana' (LLM Thesis, University of Ghana, 2015) 53
[55] *Ibid*

particulars of a case.[56] Fact finding as a dispute resolution process is often used mostly in the public sector collective bargaining. The Fact Finder does not have the power of either a Judge or an Arbitrator. The Fact Finder only makes recommendation to the parties for the resolution of the dispute between them. An attraction of this mechanism is that it has capacity to pave the way for further negotiations and mediations.[57] This form of Alternative Dispute Resolution may be employed at the outset of a matter or during litigation; indeed, some trial judges may order the parties to appear before a neutral fact-finder to resolve factual issues. In some jurisdictions, a final decision maker, like a trial court judge, may be bound by the neutral fact-finder's determinations.[58]

Fact-finding allows parties or decision-makers entering into a dispute resolution process to obtain neutral findings of fact. A fact-finder, an impartial expert, usually only investigates the matter presented and subsequently files a report which establishes the facts in the matter. If requested by parties or decision-maker, fact-finding can also result in a situation assessment or even a nonbinding recommendation by the third party as to how to resolve the dispute.[59]

4. Early Neutral Evaluation

This is an Alternative Dispute Resolution mechanism whereby an experienced lawyer or retired judge is asked to give a neutral, non-binding evaluation of the likely outcome of a dispute which the parties can then take into account in their assessment of their case.[60] Early Neutral Evaluation may prove helpful where parties are beginning to form entrenched views on the strength of their

[56] M. McManus and B. Silverstein, 'Brief History of Alternative Dispute Resolution in the United State' (2011) 1 (3) *The Cadmus Journal*, P. 103
[57] *Ibid*
[58] *Ibid* P. 103
[59] D. Renken, 'The ABC's of ADR: A Comprehensive Guide to Alternative Dispute' www.mediate.com/articles/renkend.cfm accessed 15 July 2020
[60] P. Girvan,'Thoughts on Alternative Dispute Resolution'. <www.jurisresolutions.com/2017/09/25/thoughts-alternative-dispute-resolution/> accessed 15 July 2018

case.[61] This mechanism offers an impartial assessment of case strength and weakness. The evaluator will assist the parties in settlement negotiations and /or renders an advisory opinion as to settlement value if the parties so request.[62]

The overriding purpose of Early Neutral Evaluation is to make litigation less expensive for parties by reducing pre-trial costs and enhancing pre-trial practice. The third-party neutral will give his/her opinion as to the merits of the case, the strengths/weaknesses of each party's case, what issues each party should be focusing on when doing discovery, what the likelihood of settling would be, etc. The third-party neutral can also give his/her opinion on whom he/she thinks has the better case. Overall, Early Neutral Evaluation attempts to avoid some of the pitfalls of litigation, such as the failure of lawyers and clients to assess their cases early, the uncommunicative pleadings and unnecessary or unfocused discovery, which lead to unnecessary costs and delays.[63]

5. Negotiation

Negotiation can be defined as a bilateral or multilateral process in which parties who differ over a particular issue attempt to reach agreement or compromise over that issue through communication. Bargaining is a common feature of the negotiation process.[64] Negotiation is about communication, which entails dialogue, deliberation and round table conference with the aim of reaching an agreement or settlement over a determined subject or object. It provides the

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[61] *Ibid*

[62] H.D.S. Magaji, 'Promoting Alternative Dispute Resolution through Court Rules: The Borno State High Court (Civil Procedure) Rules 2012 in Perspective' <www.unimaid.edu.ng> accessed 15 July 2020

[63] K. Manes, 'What is the difference between Early Neutral Evaluation and Mediation'. Available at https://lawkm.com/difference-early-neutral-evaluation-mediation/ accessed 15 July 2020

[64] M. H. Alam, 'Alternative Dispute Resolution (ADR): A New Key for Implementing Civil Justice in Bangladesh' (2014) Vol. 19 *Journal of Humanities and Social Science* 90

parties or disputants an opportunity to exchange ideas, identify the irritant point of differences, find a solution and get commitment from each other to reach an agreement.[65]

Negotiation is a voluntary Alternative Dispute Resolution process. There is no third party to facilitate the resolution process or impose a sentence. It is an act of goodwill through back-and-forth communication designed to reach an agreement between two or more parties with some interests that are shared and others that may conflict or simply be different.[66]

Negotiation demands a lot of listening. It works when the parties are ready to listen to each other and come to an agreement or compromise. Negotiation has also a legal dimension. The settlement agreement has certain legal requirement to fulfill for example; it cannot evade tax and in some cases a court approval of the settlement is needed.[67]

Even though negotiation is everyday life experience, dispute negotiation is an art to learn. It is like a science with prediction and experimentation. Most Alternative Dispute Resolution professionals are very good in the art of negotiation. With techniques and understanding they are able to help disputants negotiate well. There are two kinds of negotiation; namely, transactional and dispute or adversarial negotiations.[68]

a. **Transactional Negotiation**

Transactional negotiation is also known as cooperative, interest-based, integrative, value creating, and win-win negotiation. It is based on positive-sum negotiation principle that means negotiation is perceived not as a war to win or lose but a communication to iron out differences and keep relationship going. Therefore, it is cooperative and it is a win-win deal. Transactional negotiation is everyday life experience, with enormous collaboration from the parties involved. It

[65] *Ibid*
[66] T. O. Febiri, 'Basic Introduction to Alternative Dispute Resolution' <www.mariancrc.org> accessed 30 May 2021
[67] *Ibid*
[68] *Ibid*

is mutual dialogue approach to a problem. It seeks to maintain personal relationship with the other party.[69]

Transactional negotiation deals with daily activities like buying and selling of goods and services such as house, ticket, food, employing workers etc. It takes place in all the basic institutions of human life: in marriage, family life, education, industry, government, religion, and business. It is part of everyday life face-to-face, telephone, email, or chat rooms conversation.[70]

b. **Dispute/Adversarial Negotiation**

It is problem solving method which aims at resolving a conflict through communication. Dispute negotiation process entails four general principles, namely: planning and analysis, exchanging information, exchange concessions and compromise, reaching agreement. It can be done by the interested parties themselves or their representatives. Lawyers have a lot to do with negotiation particularly corporate lawyers who negotiate business deals. Government lawyers negotiate with administrative agencies.[71]

Dispute negotiation is 'win-lose' proposition. Dispute negotiation is adversarial and very competitive and that makes negotiation a win or lose contest. It drives on the principle of zero-sum negotiation, which means one enters into negotiation to defeat or win big. In this kind of negotiation, the primary concern of lawyers is negotiation's «validity as well as whether it serves the client's needs and interests.[72]

The aim of lawyers who use this kind of negotiation can be summarized as maximizing settlement for their clients; obtaining profitable fees for themselves; and, outmaneuvering their opponents. This is what makes this type of negotiation competitive and even adversarial.

[69] *Ibid*
[70] *Ibid*
[71] *Ibid*
[72] *Ibid*

Nonetheless, the final decision to settle the dispute rests on the client and not necessarily on the lawyer.[73]

There are different kinds of dispute negotiation. Among them are distributive, integrative, and settlement negotiations. Distributive dispute negotiation is bargaining negotiation which works under zero-sum principle whereby one of the parties focuses on wining over the other.[74]

Integrative dispute negotiation on the other hand, operates on positive-sum. It focuses on satisfying all the parties involved. This is possible only if the parties do not have sharp opposing interest. It may not be possible in certain cases to use positive sum negotiation for fairness or justice.[75]

Finally, settlement dispute negotiation has a tripartite principle. One, there is an agent involved who is mostly a lawyer. Second, is about the sale of a claim by Plaintiff to Defendant under the shadow of the law. Third, there is bilateral monopoly which means there are two parties involved in the negotiation unlike transactional negotiation which is opened to more than two people.[76]

It should be noted however that the different form of ADR is not limited to the above listed

2.1.2 Definition/meaning of Mediation

Mediation is method of dispute resolution, whereby the parties to a dispute work towards resolving their differences with the assistance of a trained third party facilitator - the meditator.[77]

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[73] *Ibid*
[74] *Ibid*
[75] *Ibid*
[76] *Ibid*
[77] K.B. Akanle, 'A Critical Discuss of Mediation as Dispute Resolution Mechanism' (2016) Vol.6 *Ekiti State University Law Journal,* 172

It is a process that employs a neutral/impartial person or persons to facilitate negotiation between the parties to a dispute in an effort to reach a mutually accepted resolution.[78]

The position of the mediator is of a neutral third party who does not have the power to impose a decision on the parties, and cannot force a settlement or dictate the result.[79] They have control over the process, but not over its outcome. Power is vested in the parties, who have control over the outcome: they are the architect of the solution.[80] However, a good mediator can help the parties build their problem-solving skills, which can help them avoid later disputes.[81]

Instead of conducting a negotiation face to face with the other side, the parties do so through a neutral third party whom they select by mutual agreement. Mediation is therefore an assisted and facilitated negotiation carried out by a third party.[82] Unlike the process of facilitation, where the third party merely hosts the parties and encourages them to continue negotiating in a neutral, welcoming environment, the mediator plays a more active role. The mediator not only facilitates but also designs the process, and assists and helps the parties to get to the root of their conflict, to understand their interests, and reach a resolution agreed by all concerned.[83]

The mediator's role is multiple: to help the parties think in new and innovative ways, to avoid the pitfalls of adopting rigid positions instead of looking after their interests, to smoothen discussions when there is animosity between the parties that renders the discussions futile, and in general to steer the process away from negative outcomes and possible breakdown towards joint gains.[84]

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[78] Y. Shamir, 'Alternative Dispute Resolution Approaches and their Application' <www.unesco.org/water/wwap/pccp> accessed 15 July 2020
[79] *Ibid*
[80] *Ibid*
[81] R. A. Stein, *Guide to Marriage, Divorce & Families* (Random House Reference 2006) 223
[82] Shamir (n. 78)
[83] *Ibid*
[84] *Ibid*

The basic feature of mediation is that it is an assisted negotiation. There is no determination of liability in mediation, and any settlement that is reached is not necessarily based on the underlying legal rights or obligations of the parties. Instead, the parties, with the assistance of the mediator, can reach a solution which is tailored to their real needs and interest.[85]

Mediation is a voluntary process. The court can offer strong encouragement to the parties to mediate their dispute, but it cannot compel them to do so. Mediation is a flexible process which is often more suitable for issues which need a fair degree of positive intervention, it can take place before litigation is commenced or it can be a parallel process to it.[86]

The participation of the parties and the mediator is voluntary, thus, the parties and/or the mediator have the freedom to leave the process at any time. The mediator may decide to stop the process for ethical or other reasons, and the parties may decide that they are not satisfied with the process. The agreement, which is reached between the parties, is voluntary; the parties own it and are responsible for implementing it. The agreement is validated and ratified by the courts.[87]

It is pertinent to note that mediation is either rights-based or interest-based. In the former case, the mediator looks to the rights that the disputants would have in court and with that guideline as a bench mark, tries to help the disputants to resolve the dispute within those parameters. For example, in a personal injury claim, such a rights-based mediator might seek to predict the likely outcome in court if the case went to trial, and then use that information to help the parties reach an acceptable settlement. The latter approach focuses on the interests or needs of the parties. Inherent in this approach is the desirability of fashioning a new relationship between the two disputants that will address the general question of future conduct acceptable to both parties and

[85] Akanle (n.77) at 173
[86] *Ibid*
[87] Akanle (n. 77) at 184

that may incidentally yield an acceptable solution to the present dispute. This approach does not necessarily look at what the court might decide if the matter were to go to court. Of paramount importance are the interests or needs of the parties and a solution acceptable to both. In practice, most mediators combine elements of both types of mediation, but the distinction is still conceptually useful. Interest-based mediation has the following characteristics, namely, it looks to the future; focuses on relationships; seeks to restructure relationships; results in accommodative resolution; results in custom-made solutions and has a role for clients.[88]

2.1.3 Difference between Mediation and other Forms of Alternative Dispute Resolution (ADR)

Mediation and Conciliation

The terms mediation and conciliation continue to be used interchangeably in this jurisdiction and the difference between conciliation and mediation is not very clear. While both processes incorporate the principle of self-determination and non-determinative processes, conciliation allows the third party (the conciliator) to advice on substantive matters through the issuing of formal recommendations and settlement proposals. In contrast, mediation requires that the third party (the mediator) address process issues only and facilitate the parties in reaching a mutually acceptable negotiated agreement.[89] It is evident from the foregoing that the fundamental difference between mediation and conciliation is the degree of involvement by the neutral and independent third party in the respective processes.

In its Consultation Paper, the Commission provisionally recommended that when provision for mediation is made in legislative form, it should be defined as ‘’a facilitative, consensual and

[88] S. M. Winnie, ‘Paradigms of Alternative Dispute Resolution and Justice Delivery in Zambia' (LL.D Thesis, University of South Africa 2006) 40
[89] Ireland’s Commission Report (n 33) 17

confidential process, in which parties to the dispute select a neutral and independent third party to assist them in reaching a mutually acceptable negotiated agreement''. While Conciliation should be defined as ''an advisory, consensual and confidential process, in which parties to the dispute select a neutral and independent third party to assist them in reaching a mutually acceptable negotiated agreement''.

Mediation and Arbitration

While the third party (arbitrator) in arbitration plays a proactive role by rendering a binding verdict on the disputing parties, the third party in mediation does not play a proactive role and does not have the power to render verdict.

While arbitration is like a prototype of litigation, mediation is not a formal procedure. It is less formal than arbitration.

2.1.4 Models of mediation

William Donohue, Nancy Burrell and Mike Allen in their article,[90] identified the following models of mediation:

a. The Mediation/Arbitration Model

This model argues that the mediator should structure the eventual outcomes of the session in the event of a deadlock. Using the mediation/arbitration (med/arb) model, the mediator is only a mediator for as long as both parties are able to continue making progress toward a settlement. Then, an arbitration position is assumed when the disputing parties reached a deadlock on some or all issues involved in their negotiation. [91]

[90] William Donohue, 'Nancy Burrell and Mike Allen 'Models of Divorce Mediation' (1989) Vol. 27 Family and Conciliation Court Review
[91] Ibid at 37

Under this model, the mediator's role shifts from active facilitator to actual decision-maker.

b. The Confidentiality Model

The confidentiality model suggests that the goal of mediation, a full discussion of the issues, cannot be met unless the process is confidential. It poses that if mediators are not empowered to make decisions or recommendations in the event of deadlock, the process will be open and the issues can be discussed more fully. Proponents of this model, claim that the confidentiality created by a mediator not having the power to arbitrate if and when negotiations are deadlocked, encourages more open communication. On the other hand, if disputants know in advance that the mediator will be making recommendations or revealing information to the court, disputants entering mediation may not trust the mediator and will subsequently withhold information or attempt to persuade the mediator that their position is superior, thus reducing possible negotiation and compromise.[92]

Lawyers may even caution their clients to carefully monitor the information given at a mediation session, because this information may be used against clients' positions at a subsequent proceeding. The key is that disputants need not fear that mediators will evaluate their interaction if confidentiality is assured. The result should be a more open and frank discussion of the issues.[93]

This model assumes conflicting parties need a secure, non-threatening, neutral forum in which to discuss the issues. Proponents of this mediation model believe any agreement reached should be based on a full consideration of issues and provide the basis for a long-term cooperation between the parties.[94]

[92] Ibid. at 39
[93] Ibid.
[94] Ibid.

c. The Facilitation Model

The facilitation model argues that the mediator's role is that of a facilitator for the disputing parties. The mediator's primary function is to help both parties renegotiate their relationship so that, in the future, they are able to resolve problems jointly. The mediator's goal is to develop a sense of cooperation and trust between the individuals rather than obtain an agreement. A critical assumption of the facilitation model is that any agreement resulting from mediator pressure will not last; good agreements are reached voluntarily and based on a new definition of a relationship defined, reframed and clarified during mediation.[95]

d. The Interventionist Model

Firstly, the interventionist model is philosophically opposed to pursuing whatever topics or issues the disputants wish to discuss. Rather, an interventionist pursues a more directive path by actively creating a process consistent with the mediator's own ideology and sense of morality. The reason for pursuing this more directive path is not to side with one party or the other in the dispute. Built into the interventionist role is the assumption that the mediator is representing a third party interest in the dispute. Divorce mediators often gravitate toward this interventionist stance because most state laws specify any child custody, support or visitation agreement must be in the best interests of the child.[96] This stance of the paramount interest of the child in custody issue is also contained in section 71 of the MCA thus:

Section 71 (1) of the Matrimonial Causes Act and the relevant Section provides as follows:

"in proceedings with respect to the custody, guardianship, welfare, advancement or education of children of a marriage, the court shall regard the interest of those children as the paramount

[95] Ibid at 40, 41
[96] Ibid. at 41

consideration; and subject thereto, the court may make such order in respect of those matters as it thinks proper".

This position above was also reiterated and adopted in the case of *Alabi v. Alabi*, where the court held: 'the welfare of the infant is not only the paramount consideration but a condition precedent for the award of the custody'[97]

As a result, the mediator represents the child during mediation which requires moving disputants toward issues and perspectives the mediator feels the child needs for a proper home environment. While this assumption is similar to the 'med/arb' model in focusing on the structure of the agreement, the interventionist model makes no assumptions about how the mediator responds to deadlocked outcomes. The interventionist position is only process oriented.

Secondly, since the focus of an interventionist-oriented mediation is on the interests of those affected by the dispute, the mediation does not necessarily focus on improving the relationship between the disputants. Certainly, an improved relationship between parents would be in the best interests of the child since such improvements would probably result in less parental fighting. However, the directive nature of an interventionist role often prevents disputants the time and chance to come to realise the complex, underlying relational issues. An interventionist might be interested in helping couples understand their emotions, but only in the context of how those emotions are likely to affect their agreements related to the child. A model of mediation related to this interventionist position is often termed 'muscle mediation'[98]

[97] *Alabi v. Alabi* (2007) 9 NWLR (PT 1039) 295 at 305
[98] See William and others (n. 90) at 41

e. Competence Model

The proponents of this model are of the belief that a communicatively competent mediator is able to effectively time when to intervene, and is able to draw upon a wide range of intervention strategies to increase disputant integration. This model is different than the other four, because it argues that any particular approach to controlling the outcome or the process of mediation is destined to fail if the mediators communicate incompetently.[99]

f. The Compromise Model

This is usually used and found in the context of commercial disputes personal injury disputes. This model concentrates on the parties legal entitlements and previously defined position demands. The mediator actively seeks to establish each party's possible result or outcome at the beginning of the mediation, and then encourages bargaining towards a mutual compromise.[100]

g. The Therapeutic Model

This model tends to define dispute in terms of behavioural, emotional and relationship factors. This is often offered by Psychologist and Counsellors. The major setback of this model is that it usually mixes and confuses the work of mediator with that of social worker and counsellor.[101]

h. The Managerial Model

In this model of mediation, the mediator is an especially skilled person in the area of dispute between the conflicting parties. He offers his expert advice and acts more like an adviser and manager than a typical conventional mediator, as the parties have less control over the

[99] Ibid. at 42
[100] M. Noone, *Mediation-Essential Legal Skills* (London, Cavendish Publishing Limited 1998)
[101] Ibid.

negotiation and the outcome of the mediation. This is the reason it is often referred to as 'non-binding arbitration'. It can also be likened to mediation/arbitration discussed above.[102]

2.1.5 Benefits of Alternative Dispute Resolution (ADR)

Litigation has tremendous benefits to the administration of justice. It is publicly financed and administered, its proceedings are open to the public, it is self-enforcing, decisions are based on law and precedent and are binding on the parties and its rules about process are clearly defined. Yet it is the weakness of litigation that led to the development of the alternatives notwithstanding different attempts at different times to reform the process.[103]

There are a number of important advantages to choosing Alternative Dispute Resolution over litigation. The primary reason why people do not chose Alternative Dispute Resolution is simply a lack of knowledge of it. It is also true, however, that we live in a highly litigious culture, where fighting for one's own personal advantage is recommended and expected by many acquaintances of the parties to the conflict. It is difficult for any person to choose something which is not recommended by friends or family members.[104]

Here, we discuss the reasons why Alternative Resolution is a better alternative to civil litigation, and these are:

1. **Cost effective**: No doubt, Alternative Dispute Resolution mechanism is less expensive than litigation. This is an invaluable advantage, especially today that the cost of litigation in Nigeria has soared to the extent that many litigants can no longer pursue their cases. Many poor people cannot access the formal legal system because

[102] Ibid.
[103] A. Akeredolu, 'Mediation: What Is and How It Works' (2011) Vol. 8 *The Jurist Consult* 46
[104] R. H. Klima, 'What Are the Advantages of Alternative Dispute Resolution' <www.rhklima.com/blog/2014/12/what-are-the-advantages-of-alternative-dispute-resolution.shtml> accessed 25 May 2021

they cannot afford to pay the registration and representation fees necessary to prosecute cases in the courts. This is because payment of legal fees is probably the largest barrier to formal dispute resolutions for many people in developing countries and in particular by the poor in Nigeria.[105] Others have argued still in favour of Alternative Dispute Resolution by contending that not only monetary costs should be calculated but also personnel productivity hours spent in preparation and prosecution of cases, the loss of value of monetary damages which occur as a result of staying too long in the court system.[106]

2. **Overloaded court dockets**: Both lawyers and litigants have a 'litigation mind set' that look to the courts as the only way to resolve disputes even though there are even recognised cultural processes that would perform better. Different reasons espoused for the so-called litigation explosion includes the growing diversity and size of population, increase in the number of judicially and statutorily created rights, lower '*locus standi'* standards for enforcement of rights, increase in crime and criminal prosecution. Those who advocate an increased role for Alternative Dispute Resolution in resolving business disputes point out those courts are congested and inaccessible due to litigation explosion. In the peculiarities of the Nigerian system, one very prominent reason for crowded dockets is the ill-equipped courts. Judges still record proceedings in long hand to that extent there is a limited pace at which the court can actually prosecute cases or even entertain contentious motions.[107]

[105] J. Nwazi, 'Accessing the Efficacy of Alternative Dispute Resolution (ADR) in The Settlement of Environmental Disputes in The Niger Delta Region of Nigeria' (2017) 9 *Journal of Law and Conflict Resolution* 3
[106] Akeredolu (n. 103)
[107] *Ibid*

3. **Privacy and confidentiality**: Often there is much public interest when a case is under litigation and with the media sometimes giving details of court proceedings. However Alternative Dispute Resolution is private and confidential.[108] Alternative Dispute Resolution is attractive to businesses concerned about being forced to reveal one or more of its trade secrets during litigation.[109] The parties involved in the conflict can also sign a Non-Disclosure Agreement (NDA) to ensure the privacy of these discussions. This assurance of confidentiality allows the conflicting parties to focus on the details of the dispute instead of dealing with the concerns regarding their organization's reputation and public image.[110]

4. **Preserving relationships**: Even when a case has been fully litigated, and therefore resolved as far as the law is concerned, relationships are generally broken. The adversarial system is not designed to heal; it is designed merely to end conflict.[111] Alternative Dispute Resolution can offer an opportunity to heal relationships.[112] Litigation however is oftentimes acrimonious in character. It is viewed by many including some lawyers as a 'legal fight' instead of resolving a dispute.[113]

5. **Speed**: Expeditious determination of cases remains one of the attributes of Alternative Dispute Resolution which is unlikely to be available in the courtroom. In Nigeria particularly, litigation is extremely time consuming. It has become a culture that cases must last several years in the courts before they are determined. Some cases have been pending in our courts for more than ten years as a result of certain

[108] Ibid
[109] Klima (n. 104)
[110] P. Chowne, 'Advantages of ADR Over Litigation' < https://prowsechowne.com/advantages-of-adr-over-litigation/> accessed 30 May 2021
[111] Ibid
[112] *Ibid*
[113] Akanle (n 77) at 180

constraints like retirement or transfer of judges handling the cases which have been opened and evidence had been taken. Such cases have to start *de novo.* A case like ***Atanda v. Ajani***[114] took 10 years to reach the apex court which ordered the trial *de novo*, and ***Ugo v. Chukwu Obikwe***[115] took 18 years to get to the Supreme Court which also ordered a trial *de novo.*[116] While the parties wait and other pretrial procedures are undertaken, the underlying conflict remains unresolved. Alternative Dispute Resolution can be started and completed very quickly. There are no obstacles other than simple scheduling.[117]

6. **Attention to needs**: Litigants often have a deep emotional and psychological need to be heard; that is, to be able to say whatever it is which is burdening them. And if they leave the courtroom without the sense that they have been heard, they will often believe that justice has not been done, even if the law has been fully complied with. Judges are limited to receiving into evidence only that which is legally relevant to the precise issues which are before the court. In Alternative Dispute Resolution, one of the first things which happen is that people are allowed to say whatever they need to say, and have the other party heard, without being restricted by rules of evidence or court procedures. This very fact is often the most basic step towards resolution and sometimes restoration of relationships.[118]

7. **Simplicity**: The rules of evidence and the rules of procedure which govern litigation are both complex and limiting. They can be frustrating and can prevent relevant evidence from being received. In ADR these rules do not apply. An experienced and

[114] (1989) 3 NWLR(pt 111) 511
[115] (1989) All N.L.R 566. 3
[116] (n 85) P. 34
[117] *Ibid*
[118] Akeredolu (n 103)

perceptive mediator/arbiter will skillfully direct the proceedings, and anything which the parties strongly believe to be important will generally be allowed.[119]

8. **Jurisdictional convenience**: With the Alternative Dispute Resolution dispensation, the jurisdictional problems of litigation which frustrates litigants are tackled. Access to justice is impaired where the courts are located far from the homes of those who need them. In some states, there is only one Federal High Court while in some states none exists, for instance, there is no Federal High Court in Gombe and Yobe States, and only one in the whole of Rivers State. The after effect is the accumulation of cases which last for years in those courts without being determined. It is unlike the state High Courts that are scattered everywhere in the states and so more proximate and accessible to these litigants than the Federal High Courts. It is on account of this that led Justice Y. Belgore to state that "the Federal High Court has not established a universal presence as the State High Courts". Cases like ***Shell Pet. Dev. Co. v. Isaiah***[120], ***C.G.G. (Nig.) Ltd v. Asaagbara***[121], and ***C.G.G. (Nig.) Ltd v. Ogu***[122] are a few of those cases where the litigants instituted actions at the State High Courts instead of the Federal High Courts as courts of first instance only to be frustrated on appeal for want of jurisdiction after many years of litigation. One advantage of Alternative Dispute Resolution is the ability to serve rural populations and geographically dispersed locations. Once a neutral third party is appointed to settle the conflict, the parties' access is guaranteed. The venue for the sitting of the mediation panel may be determined by the parties to the dispute.[123]

[119] *Ibid*
[120] (1997) 6 NWLR (pt. 508) 238
[121] (2001)1 NWLR (pt. 693) 156
[122] (2005)8 NWLR (pt. 927) 366 at 367
[123] Nwazi (n. 105) at 35

9. **Expertise**: In many forms of Alternative Dispute Resolution it is possible to select a 'dispute resolver' with 'expertise' in the business issue at hand which may be lacking with the judges in the traditional court system. A further advantage of Alternative Dispute Resolution over litigation is the possible expertise of the Arbitrators, which is particularly important in industrial property disputes that often involve complicated technical issues. By using Commercial Arbitration, parties can have an adjudicator who is knowledgeable about both: respective Industrial property laws and about technology. Another reason why business executives reacts negatively to litigation is that they believe that it is not framed in terms of their substantive concerns, which they think are often too complex for the courts. This view was expressed by a utility company executive thus: 'Judges are trained in law, not necessarily in the fundamentals of a particular industry or avenue of commerce'.[124]

10. **Win-win outcomes**: One reason for the rush toward Alternative Dispute Resolution for business disputes is that it has the ability to offer 'win-win' solutions that courts cannot provide. The idea is that if parties avoid sticking to their original positions and instead shift their attention to the interests underlying these positions, they can find ways of satisfying those interested. They can generate a variety of options, some of which provide higher value for both parties.[125]

11. **Voluntariness**: Disputants decide voluntarily to use Alternative Dispute Resolution to resolve their differences. Alternative Dispute Resolution thrives under the principle of self-determination of the disputants to use legally accepted procedure to resolve a conflict other than litigation. No one is coerced to enter into Alternative Dispute

[124] Akeredolu (n 103) at 48
[125] *Ibid*

Resolution. It is a voluntary process unlike litigation where respondents can be subpoenaed to respond to charges or provide evidence in public court of law. Mediation as typical Alternative Dispute Resolution process invites the parties to engage in a potentially creative and collaborative method of problem solving, without forcing a decision on any of the parties. In mediation process, the final decision rest in the bosom of the parties and not a third party deciding for them. In all ADR processes, the parties are those who decide to resolve their conflicts through appropriate dispute resolution method. It is enough for one party to say no to ADR process like mediation and the process may not start or continue.[126]

12. **Flexibility:** Legal and non-legal disputes can be addressed during this process proving it to be more flexible**.**[127] It can be tailored to meet the needs of the case. Its conduct does not follow the strict pattern of the courts.[128] Issues such as the venue, date, time, who should attend, what issues should be discussed are all for each party to decide (sometimes with the help of the mediator). The process can be designed/re-designed to meet the needs and circumstances of the parties and the dispute.[129]

13. **Wide range of possible outcomes:** Litigation is anchored on predictability of outcomes as parties have fixated mindset as to the possible outcomes but with Alternative Dispute Resolution, different creative and innovative solutions can be generated based on the effectiveness of the jaw-jaw process.[130]

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[126] Febiri (n. 66)
[127] K.K. Affrifah, 'Alternative Dispute Resolution as a Tool for Conflict Resolution in Africa – Ghana as a Case Study' (LLM Thesis, University of Ghana, 2015) 58
[128] Akanle (n 77) at 179
[129] Akeredolu (n 103) at 50
[130] S. Sime, S Blake and J. Brown, *A Practical Approach to Alternative Dispute Resolution* (1st edition, Oxford University Press, London 2010)14

14. **Minimum risk:** The risk incurred using Alternative Dispute Resolution processes are really as minimal as possible even where a party has no strong chances of success if such were to be taken to trial. Compromises and concessions are the hallmark of Alternative Dispute Resolution hence it is at all times driven to achieve a "no victor, no vanquished" outcome notwithstanding the strength of the case of each party. On the converse, litigation can be overwhelmingly and unfairly onerous most especially with principles such as "balance of probabilities", or "cost follows event" where the loser end up bearing all the risk.[131]

[131] *Ibid*

CHAPTER THREE
PRACTICE OF MEDIATION IN NIGERIA

3.0 INTRODUCTION

The preference and prevalence of mediation in Nigeria is increasingly amazing, and its potency as a means of resolving disputes among other ADR mechanisms is equally astonishing[132]. The reason for this can be accredited to the fact that there is a formalised procedure entrenched in our system of litigation that negatively affects the just and quick dispensation of justice. Mediation on the other hand has many advantages which includes cost effectiveness, privacy, consensual and is also delay free[133].

3.1 Mediation in Practice

Consequent upon the workload on the Nigerian court system and saturation of cases therein, there is an earnest desire for a speedy, just, modernised and organised dispute settlement mechanism in the country. Thus, mediation in Nigeria is gradually becoming a viable option in resolving disputes within the shortest possible period when compared to litigation. Overtime, the process of instituting an action in court against a party has become more time consuming, cumbersome and highly expensive because it entails cumbersome procedures and stages.

Prior to becoming the 16th President of the U.S.A, Abraham Lincoln gave a notable statement at a lecture to his fellow Lawyers where he was quoted to have said:

> *'Discourage litigation. Persuade your neighbors to compromise whenever you can. Point out to them how the nominal winner is often the real loser — in fees, and expenses, and waste of time. As a peace-maker the lawyer has a superior*

[132] Lukman, A.A, 'Enhancing Sustainable Development by Entrenching Mediation Culture in Nigeria' (2014) Vol. 21 Journal of Law, Policy and Globalization, 19-27, available at <http;www.iiste.org> accessed 27 June, 2021
[133] Brown,H and Marriott, A, *ADR Principles and Processes* (London, Sweet and Maxwell 1993), p.19

> *opportunity of being a good man. There will still be business enough'.*[134]

These processes of dispute resolution were in practice in Africa, specifically Nigeria, prior to the colonial era. Our orthodox society settled disputes by referring to the village's traditional chiefs, elders and other respected members of the society. Thus, in the case of *OKPURUWU v. OKPOKAMO*, Oguntade JCA (as he then was) noted that;

> *'...in the pre-colonial times and before the advent of the regular courts, our people (Nigerians) certainly had a simple and inexpensive way of adjudicating over dispute between them. They referred to the elders or to a body set up for that purpose. The practice has over the years become strongly embedded in the system that they survive today as custom'*[135]

However, in the present day Nigeria, mediation tends to take the form of private mediation or court-annexed mediation. Private mediation entails both parties seeking the assistance of an independent third party who offers his or her services as a professional or expert. Court-annexed mediation revolves around matters which have already been filed in Court, but with directives from Court that parties should resolve the dispute through mediation, hence, directing parties to go to mediation, and whatever mediation settlement agreement is reached by parties is entered as the judgment of the Court.

The Arbitration and Conciliation Act (ACA)[136], is the only principal law regulating Alternative Dispute Resolution, as applicable to the whole Federation. The Constitution of the Federal Republic of Nigeria 1999 (as amended) also indirectly acknowledges mediation as a tool of dispute resolution in Section 19(d) of the 1999 CFRN, which provides for the settlement of international disputes by Arbitration, Mediation, Conciliation, Negotiation, and Adjudication. The said section provides that the foreign policy objectives of Nigeria shall be:

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[134]Available at <www.abrahamlincolnonline.org/lincoln/speeches/lawlect.htm> accessed 1 July, 2021
[135] (1998) 4 NWLR (Pt 90) 554 at 586
[136] Arbitration and Conciliation Act, Cap A18, LFN 2004

' respect for international law and treaty obligations as well as the seeking of settlement of international disputes by negotiation, mediation, conciliation, arbitration and adjudication'.

Although, this provision does not give a full credence to the practice of mediation in Nigeria due to the fact that Chapter 2 of the 1999 Constitution of the Federal Republic is not enforceable. Section 6(6)(c) provides:

'6(6) The judicial powers vested in accordance with the foregoing provisions of this section –
(c) shall not, except as otherwise provided by this Constitution, extend to any issue or question as to whether any act or omission by any authority or person or as to whether any law or any judicial decision is in conformity with the Fundamental Objectives and Directive Principles of State Policy set out in Chapter II of this Constitution.'

Secondly, the said section of the Constitution is referring from foreign objectives, which is different from objectives applicable domestically.

Mediation can be said to have been formally introduced into the Nigerian Legal system with the establishment of the first court connected ADR centre in Africa, the Lagos Multi-Door Courthouse (LMDC) in 2002 as a public-private partnership between the High Court of Justice, Lagos State and the Negotiation and Conflict Management Group (NCMG), a non-profit private organization. The Lagos Multi-Door Courthouse was however statutorily established in year 2007.[137] The main purpose for its establishment was to serve as an avenue for the promotion of ADR in Lagos State and to support the development and functioning of the Judicial System through Alternative Dispute Resolution mechanisms.[138]

The Nigerian Legal System has always recognized the compatibility of ADR with the court system. From the inception of the court system, there have been provisions of law enjoining

[137] See Section 1 of the Lagos Multi-Door Courthouse Law, 2007
[138] See Section 2 of the Lagos Multi-Door Courthouse Law, 2007

Judges to encourage reconciliation between parties. Section 24 of the High Court Law of Lagos State[139] provides thus:

'In any action in the High Court the courts may promote reconciliation among the parties thereto and encourage and facilitate the amicable settlement thereof.'[140]

Section 25 of the same Law also makes provision for reconciliation in criminal cases by encouraging settlement in an amicable in proceedings for common assault or for any other offence not amounting to felony and not aggravated in degree, on terms of payment of compensation on other terms approved by the court.[141]

As it seems, these provisions are not being optimally utilized. This necessitated the inclusion of 'pre-trial conference' in the High Court rules of all States of the Federation. This innovation was encouraged by the need to decongest the Nigerian court system and ensure a more effective and expeditious dispute resolution system. The requirement for a pre-trial conference must be conducted prior to commencement of a trial and after close of pleadings.[142] The rules required the judge to cause to be issued to the parties and their legal practitioners, if any, a pre-trial conference notice. Listed among the purpose of the pretrial conference was promoting amicable settlement of the case or adoption of alternative dispute resolution. Pre-trial Conference also gives the judge the power to take action as may be necessary or desirable to facilitate the just and speedy disposal of the action. Pre-trial conference is ordinarily should be conducted in an informal manner. The judge is expected to descend from his high seat and join counsel and litigants in a form of a round table discourse. Counsel are expected to abandon the traditional wig and black robe all of which aims to create a relaxed atmosphere, which is more conducive to amicable resolution. Judges are therefore playing a role in settlement of disputes through the

[139] CAP H3, Laws of Lagos State 2003

[140] See also section 28 of the High Court Law of Rivers State

[141] 7 See also section 29 of the High Court Law of Rivers State; Section 22 High Court Law of Borno State

[142] Order 25 rule 1. Other states followed suit e.g. Order 33(2)(2) of Kwara State High Court (Civil Procedure) Rules 2005; Order 25 of Rivers State High Court (Civil Procedure) Rules 2006

active participation of parties as against the imposed decisions they would usually render. Upon conclusion of the pre-trial conference, the judge would issue a report and the matter is thereafter transferred to a trial judge in the event the dispute is not settled at the pre-trial conference stage. However, in reality, pre-trial conference is still conducted in a formal manner, where Lawyers still have to appear in the wig and gown. The disputants are mostly secluded from the pre-trial conference because most of the questions are directed to the Lawyers without any confirmation or intervention from the disputants.

Mediation is a popular method used at the Lagos Multi-Door Courthouse due to its advantages, including that of face saving, the absence of an imposed outcome and an assessment of the rights and obligations.

Article 2 of the Lagos State Multi-door Court Practice Direction on Mediation, provides three ways of commencing a mediation process in the Courthouse. These are 'walk-ins' which is by direct application by any of the disputing parties for mediation, Court referrals by an enrollment of order of a Judge and direction intervention by the Multi-door Courthouse.

A settlement agreement entered into once reduced into writing and signed by the parties is forwarded to the referral judge in the case of court referred matters. In respect of walk-ins the ADR judge would endorse a settlement agreement as an enforceable consent judgment.

3.1.1 Mediation Agreement

The mediator, the parties and their representatives in a dispute submitted before a mediation institution in Nigeria, are usually required to execute written mediation agreements before the commencement of the mediation proceedings. At the LCA, this is usually done at the pre-mediation session using a prescribed form[143]. Article 5 of the Lagos State Multi-door Court Practice Directions on Mediation 2004 provides thus:

[143] Article 5 of Lagos State Multi-door Court Practice Directions on Mediation

'The parties, the Mediator and The LMDC will enter into an agreement ("Mediation Agreement") in relation to the confidentiality and conduct of the mediation process.'

Conversely, the main terms of the mediation agreement would typically include:

a) Details of the parties and their representatives for the mediation proceedings;

b) Details of the dates, times and venue of the mediation proceedings;

c) An undertaking by the mediator to conduct the mediation diligently in accordance with the rules of the institution or any rules chosen by the parties, which may have been approved by the management of the institution;

d) Confirmation from the mediator that there is no conflict of interest;

e) An undertaking by the parties to indemnify the mediator of any liability that arises from or is connected to the mediation unless it is caused by his or her fraud or dishonesty;

f) Confidentiality requirements; and

g) Terms of payment of the costs of mediation.

3.1.2 Appointment of Mediators

A mediator is appointed from people with sufficient experience in their field as well as training and certification in the art of mediation. They can be appointed by the parties, or alternatively by a person responsible for such appointment. Although parties typically choose individuals from the panel of neutrals provided by the mediation institution to which they have submitted their dispute, they need not do so. Where parties have agreed in the terms of their contract, or subsequently, to appoint a particular mediator or use another procedure for appointment, they may freely do so.

However, Article 6 of the Lagos State Multi-door Court Practice Directions on Mediation 2004 makes provisions for the appointment of mediators as follows:

a) Upon filing of a request for mediation, The LAGOS MULTI DOOR COURTHOUSE will, subject to the parties' approval, appoint a qualified mediator from its Panel of Neutrals, or alternatively, provide parties with a short list of mediators from its Panel of Neutrals to choose from.

b) There shall be a single mediator appointed unless the parties or The LMDC advise otherwise.

c) If by mutual agreement of the parties, or the contract between them a mediator is named, or a method of appointing a mediator is stipulated, the mediator so named, or the method so stipulated shall be followed.

d) In the event that the parties are unable to agree within 7 days from the date of the notice initiating the mediation, on the choice of the mediator or on any issue concerning the conduct of the mediation, the LMDC will, at the request of either party, decide the issues for the parties having consulted with them.

e) The LMDC is authorized to appoint another mediator if both parties are not satisfied with the appointed mediator or if the appointed mediator is unable to serve or serve promptly.

f) The prospective mediator shall by accepting the appointment, be deemed to make himself/herself available to conduct the mediation expeditiously and professionally.

3.1.3 Duties and Functions of Mediators

The duties and functions of a Mediator are not clearly spelt out in any legislation. However, **Article 8** of the **Lagos State Multi-door Practice Direction on Mediation 2004** makes an attempt at the duties and roles of Mediators as follows:

a) The role of Mediator is to assist the parties in an impartial manner in their attempt to reach an amicable settlement of their dispute. He does not have the authority to impose a settlement on the parties.

b) The Mediator should in his conduct of the mediation process take into account the circumstances of the case, the underlying interest of the parties and the need for a speedy settlement of the dispute.

c) Mediator is authorized to end the Mediation whenever, in the judgment of the Mediator, further effort at mediation would not contribute to a resolution of the dispute between the parties.

d) Mediator may assist the parties in drawing up a Settlement Agreement

3.1.4 Roles of Lawyers in Mediation

Parties are expected to be represented or at least, supported by lawyers in commercial mediation. In mediation proceedings in Nigeria, particularly within the mediation institutions, lawyers are accepted and even expected to be a part of the mediation proceedings. Here, there is a transcendental shift in the Lawyer's role and responsibilities once the mediation begins.

Article 9 of **Lagos State Multi-door Practice Direction on Mediation 2004** provides some of the roles of Lawyers in a mediation process thus:

a) To give regard and ensure clients respect notices, invitations and directives from the LMDC.

b) Ensure the appearance of client at every mediation session.

c) Explore various options available to ensure the speedy conclusion of the mediation process.

d) Respect and ensure the confidentiality of the mediation sessions.

e) Embrace a cultural change and accept an advisory role while parties take the lead role in Mediation sessions.

f) To ensure the client his cooperative during mediation sessions.

Mary Treuthart, in her article[144] classified role of Lawyers in divorce mediation into three parts. These are: When the client has not started mediation; When the client decides to participate in

[144] Mary P. Treuthart 'In Harm's Way? Family Mediation and the Role of the Attorney Advocate' (1993) Vol. 23 Golden Gate University Law Review

mediation; When the client is currently involved in mediation; When the client has already mediated.

1. **When the Client Has Not Started Mediation**
    a. Duty to Describe the Process
    b. Duty to Screen the Case and the Client
2. **When the Client Decides to Participate in Mediation**
    a. Setting the Ground Rules: If the client believes mediation may be appropriate after considering available options and the attorney has screened the case to determine if there is equal bargaining power, voluntary consent, and good faith, and has ruled out insurmountable barriers, like domestic abuse, the attorney and client should discuss and take notes on proposed approaches, as well as pertinent points to bring up or avoid in mediation. It is imperative that the attorney instruct the client not to sign any documents regardless of assurances provided by the mediator or the other spouse, unless counsel is consulted first.
    b. Advising or guiding on selection of a Mediator
    c. Duty to Zealously and Diligently Represent the Client[145]
    d. Duty to Assure Informed Agreements: it means the attorney must articulate the need for thorough, timely, truthful discovery and the advice of an attorney before the client executes any documents. The fact that the parties may be in mediation should not excuse the client from having to answer, or preclude the client from making lawful discovery requests
3. **When the Client is Currently Involved in Mediation**

[145] Rule 14 of Rules of Professional Conduct for Legal Practitioners in Nigeria

The attorney should describe the mediation process and screen the client by employing the same approach used when the client has not mediated. When mediation has stalled or failed, the attorney should move quickly.[146]

4. **When the Client Has Already Mediated**

The client who has previously mediated may come to the attorney after having reached a mediated agreement. The attorney may be concerned about the potential exposure to liability for malpractice if a client subsequently challenges the agreement. The attorney should make an individual decision about whether to accept the reviewing role. After accepting the reviewing role, the reviewing attorney should assess the agreement's merits or flaws from the viewpoint of the client's advocate, and should compare the provisions of the agreement to an attorney assisted negotiated settlement or a judicial determination. If the agreement is the result of overreaching, or if its terms are manifestly unfair, the attorney should consider recommending that the client seek changes through a return to court rather than through further mediation.

The roles and duties above can also be adopted into Nigerian legislation to espouse in full details the various roles of a Lawyer in mediation.

3.1.5 Procedural Rules of Mediation Process

There are generally no rules governing the mediation procedure in Nigeria. However, most mediation proceedings in Nigeria have been noted to involve the following procedures.[147]

1. **Pre-mediation sessions**

Prior to the start of the mediation sessions, the mediator usually engages in pre-mediation sessions with the parties and their representatives. These sessions are to enable the mediator to

[146] Haasken v. Haasken, 396 N.W.2d 253 (Minn. Ct. App. 1986) (ex-wife appealed after a 10-month delay resulting from mediation failure; court refused to give her the benefit of an increase in the value of marital property which had accrued during the delay)

[147] J.O. Akinwunmi: 'How effective is the use of mediation in the resolution of commercial disputes in Nigeria? A case study of the Lagos Multi – Door Courthouse' LLM Thesis (University of South Wales) 2020

determine and understand the basic issues in the dispute. It also gives the mediator an opportunity to determine the structure of the mediation process that would be most suitable for the parties. Additionally, at this meeting, the mediator, the parties and their representatives enter into a mediation agreement, which specifies the terms that will govern the mediation proceedings.[148]

2. **The opening session**

This is the first main joint session between the mediator and the parties to the dispute. At this stage, the mediator will explain the mediation process and his or her role as a mediator. Resolution of relationships may also be attempted in this session before the proper mediation on the issues in dispute begins. The issues in dispute will also be identified, characterised and the parties' priorities will be determined.[149]

3. **Private caucusing**

Private caucusing provides an opportunity for parties to provide important information that they ordinarily would not have provided to the mediator in the presence of the other parties. Private caucusing usually occurs after the first joint session at the opening phase. However, it can occur several times and at any time in the course of the proceedings.[150]

4. **Joint sessions**

At these sessions, the parties attempt to come to a resolution or settlement on the issues in dispute with the guidance and encouragement of the mediator.[151]

5. **Closure**

[148] *Ibid*
[149] *Ibid*
[150] Ibid
[151] Ibid

Where the parties reach a settlement on some or all of the issues in dispute, they will agree on terms and this will be incorporated in a settlement agreement or memorandum of understanding executed by the parties or their authorised representatives.[152]

3.1.6 Enforcement of Mediation Clauses

Primarily, a dispute resolution clause expressly providing for mediation is enforceable under Nigerian Legal system. This is based on the well-grounded principle of Nigerian law that parties are bound by the express terms of their contract and cannot be permitted to unjustifiably derogate from these already agreed terms[153].

Furthermore, judicial pronouncement in Nigeria recognises settlement of disputes through mediation has also supported the growth of Mediation in Nigeria. In ***Egesimba V Onuzirike*[154]*,*** the honourable court held that individuals are free to determine how their disputes are resolved or settled. Significantly, Hon. Justice Karibi- Whyte held that:

> *'if parties have agreed to refer disputes to a body or institution for determination under agreed rules and guidelines and accordingly this is done then, the decision is as binding as one from a court and indeed acts as estoppel.'*

Also, the realisation that Mediation allows for timely resolution which is certainly shorter than litigation or arbitration, as well as cost effectiveness of mediation have contributed to the growth of mediation in Nigeria[155]

Progressively, in modern times, mediation clauses act as a condition precedent to litigation or arbitration. Additionally, having a chance to resolve disputes as soon as possible is certainly preferable to incurring avoidable litigation fees and costs. But what happens if one party ignores the pre-suit mediation requirement or clause and files a complaint in the court for a claim subject

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[152] Ibid

[153] See A.G. Ferrero & Co. Ltd V. H.C. (Nig) Ltd (2011) 13 NWLR (PT 1265) 592., Chukwumah v. SDPC 4 NWLR (PT 289) 512; Union Bank Of Nigeria V. Ozigi (1994) 3 NWLR (PT 333) 385; Ajagbe v. Idowu (2011) 17 NWLR (PT 1276) 422

[154] (2002) 15 NWLR (PT 791) 466

[155] Akinwumi (n. 147)

to a pre-suit mediation requirement/clause? It is believed that the Court would not exercise jurisdiction in such instance and stay the proceeding pending when the parties will exhaust the mediation clause as a conditional precedent. This is the position of the Supreme Court in the case of ***Mainstreet Bank Capital Ltd v. Nigeria Reinsurance Corporation Plc***[156]where it was held pertaining to arbitration thus:

> *'where the party against whom a suit is brought in respect of an agreement having an arbitration clause insists that the arbitration clause between the parties must be complied with, the Court, pursuant to section 5(1) of the Arbitration and Conciliation Act has the power to stay the proceedings before it pending a reference of the dispute to arbitration.*

The power of the court as espoused in the decision above can be exercised by a Judge by invoking the power granted to an ADR Judge in section 23(1)(h) of the LMDC Law of Lagos State which provides that the ADR judge shall recognize and give effect to dispute resolution clauses contained in agreements between parties.

This duty to encourage ADR is contained in all the rules of High Court of States. Judges can use it as a mandate to encourage mediation in Nigeria, especially agreements that contain mediation clauses.

Finally, parties are advised to invoke the pre-suit mediation as soon as possible. Failure to do so on time would imply 'taking step in the matter', as stated in the case of *Mainstreet Bank Capital Ltd v. Nigeria Reinsurance Corporation Plc*[157].

3.1.7 Enforceability of Settlements of Mediation

The practice is that parties file and adopt the mediation settlement agreements in court as their terms of settlement. The court will then enter the agreement as the judgment of the court.

Article 17 of the LAGOS STATE MULTIDOOR COURT PRACTICE DIRECTIONS ON MEDIATION provides that:

[156] (2018) 14 NWLR (pt. 1640) 423
[157] Supra

'Once reduced into writing and signed by the parties, the Settlement Agreement is forwarded to the Referral Judge (court -referred matters) or the ADR Judge (Walk-in & Direct Intervention matters) for endorsement and Section 19 of the LMDC Law, 2007 and Order 39 Rule 4(3) of the High Court of Lagos State (Civil Procedure) Rules, it shall be deemed to be enforceable as a judgment of the High Court of Lagos State under Section 11 of the Sheriffs and Civil Process Law.'

Under the LMDC Law, the mediation settlement agreement is enforceable as an order of the court once it is endorsed by a Judge.

Another way of enforcing mediation involves matters which have already been filed in Court, but with directives from Court that parties should settle the dispute through mediation and in such instance, directs parties to go to mediation, and whatever mediation settlement agreement is reached by parties is entered as the judgment of the Court. This is in line with Section 24 of the High Court Law of Lagos State which provides that in any action in the High Court, the courts may promote reconciliation among the parties thereto and encourage and facilitate the amicable settlement thereof.

3.2 Customary Mediation

The practice of mediation cannot be said to be alien to Nigerian or African societies. What is new however is the imposition of the adversarial system of litigation as a result of the advent of colonialism, which has grossly affected the way we handle disputes and reconfigured the Nigerian and African jurisprudential architecture to that of their British counterparts[158]. The concept of customary mediation is virtually the only method or process of disputes resolution where family heads, emirs, chiefs and even elders within the traditional framework of a particular society are usually consulted to resolve matrimonial, communal or commercial or land

[158] Rhodes-vivour, A *'Arbitration and Alternative Disputes Resolution as Instruments for Economic Reform'* <www.lawguru.com.htl> accessed 29 June 2021

related conflicts[159]. Thus, the Supreme Court in the case of ***Agu v. Ikewibe***[160] reaffirmed that, the most common method of settling disputes in all indigenous Nigerian society is by making reference of the issues in dispute to head of the family, elders in the community for a compromise or solution founded on the submission of both parties, which either of the party is at liberty to reject at any time before a compromise is reached or agreed upon. The Supreme Court reiterated that this one of the most accepted methods of settling disputes in accordance with the customs of various Nigerian societies. Going further, the Court of Appeal in ***Okpuruwu v. Okpokam***[161] per Hon. Justice Oguntade JCA (as he then was) noted as follows:

> *"In the pre-colonial times and before the advent of the regular courts, our people (Nigerians) certainly had a simple and inexpensive way of adjudicating over disputes between them. They referred them to elders or a body set up for that purpose. The practice has over the years become strongly embedded in the system that they survive today as custom."*[162]

Originally, the mediation mechanism is the traditional way of resolving disputes peacefully in agrarian rural based Nigeria. The mediator's authority was hinged on his standing, status and respect accorded to him in the community. In the Nigerian traditional societies, mediation is used as a tool for preserving cultural norms and values. Mediation prevented disputes from festering or lingering, maintained peace and preserved traditional values.

Customary mediation remains an integral part of Nigerian culture and traditions till date, as the intervention of elders who are more experienced and mature than the disputing parties cannot be dispensed.

[159] Lukman (n. 132)
[160] (1991) 3 NWLR (PT.180) 385, SC
[161] (1998) 4 NWLR (pt.90) 554, CA
[162] Ibid at 586

3.3 Mediation in Commercial Disputes

Mediation, like its counterparts of arbitration and negotiation, is classed as an alternative form of dispute resolution (ADR).

Viewing mediation as an instrument in the settlement of dispute in commercial matters, it is important to note that economy and business survival depends on meeting consumer demands, high profits and its relationship with its suppliers. Keeping costs down means everything must run smoothly. In the same breath, it is expected for these costs to spiral out of control, should a company fail to make scheduled payments or should the supplier fail to manufacture goods and deliver them on time. The immediate response would be to search for a lawyer and proceed with litigation. In the end, communications breakdown, business relationships become un-repairable. There is no guarantee that the one party would claim victory over the other or for damage outside the dispute, to be successfully controlled[163].

Mediation is suitable for commercial disputes because it tends to resolve the dispute among the parties without creating any future enemy. A break of relationship between a customer provider and a client would definitely discourage any of the parties from dealing with eachother in the future. However, with mediation process put in place, the dispute could be settled amicably without loss incurred on any of the parties.

3.4 Meditation in Land Disputes

Property law is vast and varied. It focuses on disputes over the creation, ownership, transfer and protection of proprietary interests. It also involves tenancy, ownership, trusteeship and possession of land.

Mediation is often used in property disputes. It is an ideal way for parties to take control of their dispute and reach a decision which is beneficial to both parties. Taking control back from the

[163] Mohammed Saleem Tariq, 'Mediation in Commercial Dispute; is this Workable?' December 2012 <www.mediate.com/articles/TariqS1.cfm> accessed 1 July, 2021

court and thinking of options outside of the usual orders that a court can make is a very attractive option to those involved in property disputes. Mediation is so popular in property disputes that some well-known practitioners in the field set up a specific property mediation service, called 'the Property Mediators'. They explain why mediation in beneficial in relation to property disputes, stating:

> *'Mediation is ideal for property disputes. It addresses your real needs, and allows you and your opponent to create your own solutions in a way that invariably cannot be done by a court. Property mediation will end the uncertainty of litigation, continuing anxiety and horrendous costs. Once the case is settled you will be able to get on with your business and move on with your life.'*[164]

Thus, mediation in land disputes could play an extremely beneficial role mostly in family and communal land disputes

3.5 Mediation in Matrimonial Matters

Family has been seen as the foundation for every developing society and being one of the key relationships in the society, marriage forms the building block of a civilization[165]

According to Casals, divorce mediation can be defined as 'a dispute resolution process in which the spouses are assisted by an impartial and neutral professional (the mediator), in order to analyse the situation arising from divorce and try to reach their own agreement with regard to some or all of the matters under dispute.'[166]

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[164] Laura Tweedy, ' The Positive Impact of Mediation in Property Disputes' 2019 <www.adrodrinternational.com/the-positive-impact-of-mediation-in-property-disputes> Accessed 1 July, 2021

[165] Shaw v Gould (1868) L.R. 3 H.L., 55, 82.

[166] Casals and M. Martin, '*Divorce Mediation in Europe: An Introductory Outline'* (2005) Vol. 92 EJCL http://ejcl.org/92/abs92-2.html accessed 3 June 2021

Divorce mediation is an alternative dispute resolution method where couples are assisted by a trained and skilled third party, who facilitates confidential communication and negotiation between the disputing couple to reach a voluntary and mutually agreeable divorce resolution.[167] The Nigerian legal system does not expressly make provision for divorce mediation and it is not widely practised in Nigeria. However, there was a close attempt at the concept of divorce mediation in Nigeria in section 11 of the Matrimonial Causes Act of Nigeria which provides:[168]

> *'(1) It shall be the duty of the court in which a matrimonial cause has been instituted to give consideration, from time to time, to the possibility of a reconciliation of the parties to the marriage (unless the proceedings are of such a nature that it would not be appropriate to do so), and if at any time it appears to the judge constituting the court, either from the nature of the case, the evidence in the proceedings or the attitude of those parties, or of either of them, or of counsel, that there is a reasonable possibility of such a reconciliation, the judge may do all or any of the following, that is to say, he may-*
>
> *(a) adjourn the proceedings to afford those parties an opportunity of becoming reconciled or to enable anything to be done in accordance with either of the next two succeeding paragraphs;*
>
> *(b) with the consent of those parties, interview them in chambers, with or without counsel, as the judge thinks proper, with a view to effecting a reconciliation;*
>
> *(c) nominate a person with experience or training in marriage conciliation, or in special circumstances, some other suitable person, to endeavour with the consent of the parties, to effect a reconciliation.*
>
> *(2) If, not less than fourteen days after an adjournment under subsection (1) of this section has taken place, either of the parties to the marriage requests that the hearing be proceeded with, the judge shall resume the hearing, or the proceedings may be dealt with by another judge, as the case may require, as soon as practicable.'*

In order to prevent bias, the law went ahead to provide in section 12 that:

[167] Milne & Folberg (eds), *The Theory and Practice of Divorce Mediation*, (1988) 230.
[168] CAP M7, LFN 2004

> 'where a judge has acted as conciliator under section 11 (1) (b) of this Act but the attempt to effect a reconciliation has failed, the judge shall not, except at the request of the parties to the proceedings, continue to hear the proceedings, or determine the proceedings; and, in the absence of such a request, the proceedings shall be dealt with by another judge.'

Notwithstanding the provision above, mediation in divorce dispute is not only adopted in High Courts or multi-door courthouses. Traditional mediation can also be facilitated in customary courts where relatives or friends of the disputing parties act as mediators; however, such mediation is not formal and does not have a defined process of achieving same. Considering these provision of law above, alongside the Multi-door Court House laws, it can be inferred that divorce mediation in Nigeria is only achievable through court-annexed mediation.

The essence of mediation in matrimonial disputes is because the legal system does not openly respond to the emotions experienced by both divorcing parties. These emotions range from disappointment and anxiety to depression, sadness, grief, anger and sometimes to the point of rage.

The process of divorce according to the Matrimonial Causes Act[169] is inadequate and falls short of precision because the Courts and its laws are fixated primarily on objectives of the legal process in deciding issues. The Courts are respectfully inept, and perhaps indifferent at dealing with the spouses' personal (in other words emotional) conflict[170]. According to popular and some professional perceptions, adversarial adjudication makes the process of divorce excessively expensive, painstaking, and difficult[171].

[169] Matrimonial Causes Act, Cap M7, LFN 2004.
[170] T. Carbonneau, 'A Consideration of Alternatives to Divorce Litigation' [1986].6 (4) (2) U.M.L Review Journal, 1119.
[171] Ibid

CHAPTER FOUR

MEDIATION IN SELECTED JURISDICTIONS

4.1 Mediation in South Africa

South Africa, through the influence of the English common law, inherited an adversarial civil justice system with litigation as the primary method of civil dispute resolution.[172] As a result of the practice of litigation, a number of shortcomings such as the highly complex, costly and time-consuming nature of the process, have prevailed over decades in the country's civil justice system.[173] Overburdened court rolls that adversely affect the timely resolution of civil disputes are added to these problems. These shortcomings exclude the middle-class to poorer communities in South Africa from acquiring access to justice.[174] Further pertinent shortcomings include the fact that the adversarial nature of civil litigation adds to the conflict between disputing parties and often results in permanently destroying the relationship between disputants.[175]

Some of the challenges that have faced many countries in Sub-Saharan Africa in the administration of justice can be attributed to the over-reliance on the courts in the resolution of all forms of disputes, even where other forms of dispute resolution would have been more appropriate. South Africa has one of the fastest developing alternative dispute resolution (ADR) systems in Africa.[176] The South African legislature, judiciary and executive, have attempted to remedy the aforementioned shortcomings through the implementation of various initiatives over

[172] Maclons W, Mandatory Court Based Mediation as an Alternative Dispute Resolution Process in the South African Civil Justice System (Unpublished, University of the Western Cape, 2014) 1
[173] Ibid
[174] Ibid
[175] Ibid
[176] Petrina Ampeire, 'ADR in South Africa: A Brief Overview' (2017) available <https://imimediation.org/2017/12/09/adr-south-africa-brief-overview/> accessed August 8, 2021

the years.[177] After the transition of power from the apartheid government to the democratic government, ADR has continued to be effective in addressing labour disputes, family disputes and land claims. Consequently, the South African government established various dispute resolution centres like the Commission for Conciliation, Mediation and Arbitration (CCMA) for the resolution of labour disputes, the National Land Reform Mediation Panel for land disputes, family mediation boards, local community courts and several other state agencies.[178]

There are certain areas of law, which make provision for mediation to be used as a mechanism for resolving disputes between the parties. The compulsory practice of mediation within the field of family law is currently affected through statutes found within this area of law. The Mediation in Certain Divorce Matters Act 24 of 1987[179] is an example of this. This piece of legislation necessitates the compulsory process of mediation.[180] The legislature's rationale for incorporating the process of mediation into legislation stemmed from the critical problem that family law legal practitioners in the past often viewed divorce solely as a legal event. One of the main objectives of the Labour Relations Act 66 of 1995 (LRA)[181] as explained in the preamble of the LRA, is to 'provide simple procedures for the resolution of labour disputes through statutory conciliation, mediation and arbitration' through the Commission for Conciliation, Mediation and Arbitration or through accredited independent ADR services. The central objective of the LRA is promoting healthy industrial relations.

Reality is that most disputes are resolved within a non-legal context by means of informal dispute resolution processes such as negotiation and mediation. Mandatory court-based mediation provides that whenever an appearance to defend is instituted in action proceedings, or

[177] Maclons (n 172) at 50
[178] Petrina (n 176)
[179] The Mediation in Certain Divorce Matters Act 24 of 1987
[180] 'The cost of litigation v Mediation' (2018) available at <www.brandpotgieter.com/2018/07/24/the-cost-of-mediation-vs-litigation/> accessed August 17, 2021
[181] The Labour Relations Act 66 of 1995

a notice of intention to oppose is delivered in application proceedings, the matter must first be referred to mediation in an attempt to settle and resolve the dispute.[182] In the event of the disputants being unable to resolve their dispute or conclude a settlement agreement during the mediation process, the matter is then referred back to the conventional process of litigation to be adjudicated at court, as a defended action or opposed application procedure. The implementation of voluntary court-based mediation may be the answer in settling disputes, which can be resolved without approaching our courts for litigation.[183]

Depending on the nature of the dispute, mediation may assist one in resolving a matter in an amicable manner for both parties, speedily, and in a more cost-effective manner as opposed to dragging the dispute through the lengthy process of litigation, based on the fact that it is the primary method of resolving disputes. Parties are now required to consider mediation for every new matter instituted in a High Court of South Africa[184]. Non-compliance with this new rule could result in a party receiving an 'irregular step' notice - which could significantly delay the finalisation of a matter, and lead to unnecessary costs. Every new action or application must include a notice in which the instituting party either agrees to a referral of the dispute to mediation, or opposes such a referral. The opposing party is also required to file a notice in which it indicates whether it agrees or opposes the referral of the dispute to mediation. If the referral to mediation is opposed by either party, reasons must be provided. The notice shall be 'without prejudice' (i.e. not filed with the registrar); however, a mediation notice may be disclosed to the Court when an order for costs is being considered.[185]

[182] Maclons (n 172) at 54
[183] *Ibid*
[184] See the amended Rule 41A of High Courts of South Africa
[185] Petrina (n 176)

The impact of the parties agreeing to refer the matter to mediation is that the time limits for the filing of further affidavits or pleadings will be suspended. During the mediation process, the parties to the mediation have to comply with various requirements, including entering into an agreement to mediate, filing a minute recording the decision to mediate and filing a joint minute indicating whether a settlement was reached. The mediation has to be concluded in 30 days, unless extended by a judge. If any issue remains in dispute after the mediation, the parties may proceed to litigation.

4.2 Mediation in Canada

In Canada, mediation is a highly effective, successful, and often less costly alternative or addition to the adversarial litigation process.[186] Mediation is 'interest-based' as it explores solutions that meet the needs and interests of the parties, rather than 'rights-based' litigation which focuses solely on the parties' rights, or, rules and the law.[187]

The challenges of justice system, such as cost, delay, complexity and uncertainty are not only common to the Nigerian legal system. The truth is that these are challenges to the justice system all over the world. Canada also had experience of these challenges. The solution to these challenges is the common goal of many countries or jurisdictions.

The 1996 Report of the Canadian Bar Association[188]states that majority of Canadians could not seek civil justice through the predominant method of seeking justice (litigation), hence, there was a need to formulate a consensual alternative method to resolve disputes which would reduce costs and delays. The report recommended that every judicial jurisdiction in Canada should avail disputants the opportunity to use non-binding dispute resolution processes as early as possible in

[186] Kimberly A. Whaley, 'Resolution Of Estate And Trust Disputes: Mediation & Alternative Dispute Resolution In Canada' < https://welpartners.com/resources/WEL-Mediation-IAETL-Tokyo.pdf> accessed 17 August 2021
[187] ibid
[188] Report of the Canadian Bar Association Task Force on Systems of Civil Justice, p. 15-16

the process of litigation.[189]This approach at ADR by the Canadian Bar Association reflects currently in the Administration of Justice in Canada, as some Provinces in Canada have adopted mediation law and rules, while some have even gone ahead to make mediation a mandatory process of dispute resolution. Just like Nigeria, some jurisdictions merely acknowledge or encourage the use of mediation while Lagos State and some other States have made a bolder stance on mediation law or rules.

In Saskatchewan Province, section 54(2) of the Queen's Bench Act mandates a compulsory mediation process after the closing of pleadings in a civil non-family contested matter. The initiatives for the Act was from a pilot programme commenced in 1997 and currently covers about 75% of all actions in the Province.[190]

As of January 1, 2019, the Court of Queen's Bench of Alberta stopped scheduling a trial unless the parties certify that they have participated in a form of dispute resolution such as a judicial dispute resolution or a private mediation. Rule 4.16(1)[191] requires parties to consider and engage in one or more dispute resolution processes outlined in the rule unless the Court waives the requirement.

In Ontario Province, Rule 24.1[192] establishes mandatory mediation for case managed civil, non-family actions. While Rule 75.1 makes contested estates, trusts and substituted decision matters to be subjected to mandatory mediation.[193] The cases mandated for mediation under Rule 24.1

[189] Task Force Report, p.30
[190] Jerry McHale, 'Uniform Mediation Act' (2004) Uniform Law Conference of Canada <htpps://cfcj-fcjc.org/sites/default/files/docs/hosted/17494-uniform_mediation.pdf> accessed 15 August 2021
[191] Alberta Rules of Court, Alta. Reg. 124/2010
[192] Rule 24.1 of the Ontario's Rule of Civil Procedure
[193] Ministry of the Attorney General <www.attorneygeneral.jus.gov.on.ca/english/courts/manmed/notice.php#> accessed 15 September 2021

and 75.1 may only be exempted only if the parties obtain a court order to exempt the matter from compulsory mediation. These rules apply in Toronto, Ottawa and Windsor.[194]

The Ontario Mandatory Mediation Programme started on 4th January, 1999 in Toronto and Ottawa and in Windsor on 31st December, 2002.[195] The aim of the programme is to help parties to settle their cases before they get to trial stage, thereby saving time and cost.[196]

Agreements reached at mediation must be in writing and signed by the parties or their Lawyers. The agreement reached at the mediation is legally binding on the parties. If a party fails to comply with a signed agreement, the other party can move a motion for judgment under the terms of the agreement or continue the legal proceedings as if there had been no agreement.[197] Matters or issues not settled at the mediation stage continue through the litigation process.

This mandatory mediation has been credited to be responsible for the settlement of 90% of cases before it gets to trial stage.[198]

In British Columbia, the approach taken by the Rules of the Supreme Court[199] of the Province can be likened to that of many High Court Rules in Nigeria. The British Columbia Rules provides that parties can apply to court to settle their dispute through settlement conference that provides varieties of ADR and likewise, the Judge can recommend the parties to such settlement conference, which the parties must duly comply with the order of the Judge. The difference between Nigerian High Court Rules and this Rule of the British Columbia is that the apparatus to implement the Rule exist unlike in many situation in Nigerian States where the Rules of Court provides for Multi-door Courthouse but the establishment does not exist in reality.

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[194] Ibid
[195] Ibid
[196] Ibid
[197] Ibid
[198] Ibid
[199] Supreme Court Civil Rules, BC Reg.168/2009

Quebec established a Code of Civil Procedure in 2016 with the intention of improving access to justice, and at the same time providing for a requirement that parties must consider alternate forms of dispute resolution.[200]

The Code provides that private dispute prevention and resolution is voluntary and parties or the Chief Judge or the presiding Judge may request for it at any stage of the proceeding, but before a trial.[201]

The achievement Canada has made on the development of mediation cannot be compared to that of Nigeria. Except Lagos, no other State in Nigeria can boast on the advancement of mediation in Nigeria as any of the Provinces in Canada can boast.

4.3 Mediation in Hong Kong

The Hong Kong Mediation Ordinance was passed on 15th June 2012 and came into force on 1st January 2013. The Ordinance applies when mediation is conducted at least partially in Hong Kong or pursuant to a written agreement to mediate which refers to the 'law of Hong Kong' or 'the Ordinance'[202] It aims to provide a regulatory framework for promoting the use of mediation as a dispute resolution process and protecting the confidential nature of mediation communications.[203] It defines mediation as a 'facilitative process in which one or more neutrals assist disputants to identify the issues in dispute, explore and generate options, communicate with one another, and/or reach a settlement agreement as to the whole or part of the dispute'.[204]

[200] McMillan LLP 'When is Mediation Mandatory? - A Comparative Analysis of Mandatory Mediation Across Canada' <https://mcmillan.ca/insights/publications/when-is-mediation-mandatory-a-comparative-analysis-of-mandatory-mediation-across-canada/?print-posts=pdf accessed 15 August 2021
[201] Ibid
[202] Section 5(1), Mediation Ordinance (CAP. 620). The Mediation Ordinance does not apply to similar processes that are regulated by other Ordinances, see Section 5(2) and Schedule 1
[203] Section 3 of the Mediation Ordinance
[204] Section 4 of the Mediation Ordinance

Further, it prohibits disclosure or admissibility of mediation communications unless in exceptional circumstances or with leave of the court[205]

At present, Hong Kong has not adopted legislation based on the Model Law on International Commercial Conciliation of the United Nations Commission on International Trade Law (the 'Model Law').[206] Although mediation has been taking root in Hong Kong since the turn of the century. There is already some mediation experience in certain commercial sectors in Hong Kong, such as construction, and in certain legal fields, such as family law.[207] The judiciary launched a pilot scheme for family mediation in 2000 and set up a Mediation Coordinator's Office within the Family Court building.[208] With its proven record of helping separating or divorcing couples to resolve their problems without the need for expensive litigation, that Mediation Coordinator's Office continues to operate now, even though the pilot scheme has ended.[209] Similarly, a Mediation Coordinator's Office was established in the Lands Tribunal in 2008 to provide information on mediation to parties who are interested in mediating their disputes[210].

Two milestones in the history and development of mediation in Hong Kong were the introduction of the Civil Justice Reform (the 'CJR') in April 2009 and the implementation of Practice Direction on Mediation in 2010. The CJR set out a number of underlying objectives, which are, among others, to increase cost effectiveness of civil procedure, to deal with cases as

[205] Sections 8-10 of the Mediation Ordinance; See also K Bowers, 'Hong Kong Dispute Resolution Alert - May 2013' <www.hwbhk.com/en/news/all-news/hong-kong-dispute-resolution-alert-%E2%80%93may-2013.html> accessed 17 August 2021

[206] 2002 UNCITRAL Model Law on International Commercial Conciliation <www.uncitral.org/uncitral/en/uncitral_texts/arbitration/2002Model_conciliation.html> accessed August 17, 2021.

[207] Tanner de Witt Solicitors, 'An effective way of resolving disputes in Hong Kong' <www.tannerdewitt.com/practice-areas/mediation.php> accessed August 17, 2021.

[208] Hong Kong Judiciary, 'Family Mediation' <www.judiciary.gov.hk/en/crt_services/pphlt/html/fm.htm> accessed August 17, 2021.

[209] Ibid

[210] Mediate First, 'Mediation Schemes' <http://mediatefirst.hk/page12.html> accessed August 17, 2021

expeditiously as is reasonably practicable, to promote a sense of reasonable proportion and procedural economy, and to facilitate the settlement of disputes.[211] In addition, the civil procedure rules introduced in 2009 place a positive duty on the court to further the underlying objectives by actively managing cases.[212] As part of active case management, the court has to help parties to settle cases and to encourage and facilitate parties to use an alternative dispute resolution procedure where the court considers it appropriate.[213]

While the Civil Justice Reform set out objectives and implemented changes in court rules, the Practice Direction created a framework for mediation. Under the Practice Direction, parties to a dispute must explore the possibility of mediation before pursuing litigation. They are required to file certificates stating that they have been advised about mediation and to indicate whether they are willing to attempt mediation.[214] The court may issue an adverse costs order (i.e a fine) when a party unreasonably refuses to engage in mediation.[215] Although mediation was not made mandatory in the CJR, the court's proactive approach in case management, coupled with the court's discretion to impose adverse cost penalties if it believes a party has acted unreasonably in refusing to mediate, might make parties feel that they are left with no choice but to go through mediation.[216] This has brought about changes in the litigation culture in Hong Kong and the use

[211] Order 1A Rule 1 of the Rules of the High Court <www.legislation.gov.hk/blis_pdf.nsf/6799165D2FEE3FA94825755E0033E532/6001DD4CD77C2F14482575EE002ABDB6/$FILE/CAP_4A_e_b5.pdf> accessed August 17, 2021

[212] Bowers (n 190)

[213] 5 Order 1A Rule 4(2) of the Rules of the High Court <www.legislation.gov.hk/blis_pdf.nsf/6799165D2FEE3FA94825755E0033E532/6001DD4CD77C2F14482575EE002ABDB6/$FILE/CAP_4A_e_b5.pdf> accessed August 17, 2021

[214] Deacons, 'Guide to Hong Kong Civil Litigation And Dispute Resolution' (March 2011) <www.deacons.com.hk/eng/knowledge/knowledge_62.htm#7> accessed August 17, 2021

[215] Paragraph 4, Practice Direction 31 on Mediation (PD 31) <http://legalref.judiciary.gov.hk/lrs/common/pd/pdcontent.jsp?pdn=PD31.htm&lang=EN> accessed August 17, 2021

[216] Department of Justice, 'Report of the Working Group on Mediation' (Department of Justice, The Government of the Hong Kong Special Administrative Region, February 2010) <www.doj.gov.hk/eng/public/pdf/2010/med20100208e.pdf> accessed August 17, 2021

of mediation in Hong Kong as a means of alternative dispute resolution has been reinforced and increasingly favoured.[217]

Mediation activities in Hong Kong existed before the CJR and covered a wide range of contexts. From a review of the impact of recent developments in mediation on the dispute resolution culture, courts, legal practitioners and scholarship, it is clear that mediation gained traction in Hong Kong in the past decade. The CJR and PD31 facilitated the use of mediation as a substitute for litigation and resulted in a proliferation of reform-related activities within the courts and the legal profession. Much remains to be seen as to the long-term impact of mediation in Hong Kong and particularly its contribution to the stated aims of the CJR.

No doubt the future of mediation in Hong Kong will hinge very much on the provision of quality services by mediators. Efforts within the mediation industry are currently underway. The Hong Kong Mediation Accreditation Association Limited[218] was incorporated in August 2012 to administer the Hong Kong Mediation Code[219] with regular reviews, establish a complaint and disciplinary procedure, and formulate accreditation standards for mediators, supervisors, assessors, trainers, coaches, other professionals involved in mediation and mediation training courses. With views sought from different stakeholders and the contribution of legal scholarship, enhanced mediation services will serve Hong Kong in no time.

[217] Bowers (n 190)

[218] Hong Kong Mediation Accreditation Association Limited <http://www.hkmaal.org.hk/en/index.php> accessed 12 July 2013.

[219] Hong Kong Mediation Code <www.doj.gov.hk/eng/public/pdf/2010/med20100208e_annex7.pdf> accessed 12 July 2013.

CHAPTER FIVE

IDENTIFIED ISSUES ASSOCIATED WITH MEDIATION PROCESS IN NIGERIA

5.1. Non-uniformity of Legislation on Mediation

Nigeria is a big polity with different states and laws, but, in spite of these laws, there is no uniformity among the laws on the process of mediation in Nigeria. The main statute regulating the ADR process in Nigeria is the Arbitration and Conciliation Act doesn't expressly provide for mediation or even it mode of operation.[220] However, Section 37 of the Act provides as follows: -

> "Notwithstanding the other provisions of this Decree, the parties to any agreement may seek amicable settlement of any dispute in relation to the agreement by conciliation under the provisions of (Part II) of this Decree."[221]

The various identified issues will be discussed in details in subsequent paragraph

5.1.1. Legislative List of 1999 CFRN

Dispute resolution is not in the Exclusive Legislative List and Concurrent Legislative List of the Constitution of the Federal Republic of Nigeria[222]. The implication of this is that both the National and States House of Assembly can make laws suitable for the resolution of disputes within their jurisdiction. This vacuum also empowers States to make laws on dispute resolution within their various jurisdictions. However, as this opportunity is thrown wide as it seems, the majority of States have not averted their mind to enacting Mediation Law or establishing Multi-Door Courthouse that would accommodate mediation as a means of dispute resolution. Just few States have taken advantage of this opportunity of establishing a Multi-Door Courthouse.[223] The

[220] Cap. A18 Laws of the Federation of Nigeria, 2004
[221] ibid, Section 37
[222] See Second Schedule to the 1999 Constitution of the Federal Republic of Nigeria (as amended) on the Exclusive and Concurrent Legislative List
[223] Lagos, Ogun and F.C.T

Constitution of the Federal Republic of Nigeria, 1999 (as amended) in its entirety did not make any provision regarding or regulating mediation or Alternative Dispute Resolution in Nigeria, which is the best approach due to the fact that dispute resolution is too minute to constitute a Constitutional deliberation. An effort to make dispute resolution a constitutional deliberation would jeopardise one of its benefits of being a speedy means of dispute resolution, as any amendment or technicality arising from the constitutional provision would rather serve as clog instead of wheel of justice dispensation. Therefore, States that are yet to enact laws on mediation or ADR should consider doing same as soon as possible in order to benefit from the positive vacuum left by the 1999 Constitution of the Federal Republic of Nigeria.

5.1.2 Arbitration and Conciliation Act, Cap A18, LFN 2004

The Arbitration and Conciliation Act of Nigeria, as well is silent on the recognition, establishment, processes and procedure of mediation in Nigeria. A cursory look at the Act leads to the fact that there is no provision pertaining to mediation in the Act. The scope of the Act focused mainly on Arbitrations and Conciliation, leaving other means of settling dispute such as mediation and negotiation out of contention.

The Preamble of the Act states:

> *'An Act to provide a unified legal framework for the fair and efficient settlement of commercial disputes by arbitration and conciliation; and to make applicable the Convention on the Recognition and Enforcement of Arbitral Awards (New York Convention) to any award made in Nigeria or in any contracting State arising out of international commercial arbitration'.*

It is obvious from the preamble of the Act that its scope is restricted to Arbitration and Conciliation alone, and any effort to stretch the scope further than how it is encapsulated in the Act would amount to an exercise in futility. Although, it is arguable that as at the period the Act

was enacted, mediation had not gained wide acceptance as it is presently, hence the neglect. However, it is baffling that after mediation has gained prominence in commercial disputes, the National Assembly has not deemed it fit to amend the Arbitration and Conciliation Act of Nigeria in order to accommodate other means of dispute resolution.

5.1.3. Lagos Multi-Door Court House Law.

The Lagos Multi-Door Court House Law, 2007 (LMDC) regulates the affairs of the LMDC as well as its members. The law in its objectives provides that, the establishment of LMDC will ensure fast resolution of matters/disputes as well as minimize delays; it will even aid easy access to justice[224]. The law establishes the body/institution of the LMDC to see to the speedy resolution of disputes before they are taken to the regular courts for litigation. In fact, the law provides that Magistrates[225], Judges[226] and Lawyers[227] should encourage their clients and disputants to have recourse to the LMDC before approaching the regular courts for litigation.

This is a great step towards speedy dispensation of justice as against the general delay parties have in trial in the regular courts, which is couched in the popular maxim that justice delayed is justice denied. More so, it is a means of decongesting the courts of case files. In fact, it ensures that magistrates do not act as mediators in the pre-trial stage but refer matters to the LMDC for resolution[228].

The law as well above other rules this paper have examined, established a body that will sit over the affairs of the LMDC which is called the governing council or the council[229], as used in the

[224] Section 2, Lagos Multi-Door Courthouse Law, 2007
[225] Section 23, Lagos Multi-Door Courthouse Law, 2007
[226] Ibid.
[227] Section 24, Lagos Multi-Door Courthouse Law, 2007
[228] Section 23, Lagos Multi-Door Courthouse Law, 2007
[229] Section 5, Lagos Multi-Door Courthouse Law, 2007

law. The council will see to the affairs of the LMDC[230], even though the LMDC will have its own staff members such as, the Director[231], Deputy Director[232], and Principal Registrar[233].

In addition, this law provides for Panel of Neutrals, to be appointed from various levels of expertise that shall render services at the LMDC according to the needs of the institution[234]. This panel will give expert opinion over any matter that is mediated on or arbitrated upon, as circumstances may determine. This panel of neutrals will be appointed by the parties or by recommendation of the LMDC to mediate on the dispute[235].

Consequently, the law succinctly states that the LMDC shall use any of the ADR mechanisms – Mediation, Arbitration, Early Neutral Evacuation, etc. to resolve conflicts, as well as, sensitize the public about the necessity to resolve their conflicts through any of the ADR mechanisms[236]. Should matters be brought before any regular court, the court will have to appoint Mediator to sit and resolve the matter.

The Law made Awards and mediation agreements binding on the parties thereto[237]. For proper administration, the law empowers the Chief Judge of Lagos State to make practice directions to aid easy administration of the LMDC[238].

The Practice Direction ensures that the parties will enter agreement that the process will be confidential[239]. For speedy resolution of disputes, the Practice Direction directs that the

[230] Ibid.
[231] Section 16, Lagos Multi-Door Courthouse Law, 2007
[232] Section 19, Lagos Multi-Door Courthouse Law, 2007
[233] Section 20, Lagos Multi-Door Courthouse Law, 2007
[234] Section 27, Lagos Multi-Door Courthouse Law, 2007
[235] Art. 6, Lagos Multi-Door Court Practice Direction
[236] Section 3, Lagos Multi-Door Courthouse Law, 2007
[237] Section 4, Lagos Multi-Door Courthouse Law, 2007
[238] Section 39, Lagos Multi-Door Courthouse Law, 2007
[239] Art. 5, Lagos Multi-Door Court Practice Direction

mediation process must not exceed three mediation sessions[240] and for any mediation proceeding missed, without adequate representations and ignoring any fixed sessions owing to the initial absence, the party will pay penalty[241]. This is to ensure compliance with the mediation process. More so, the mediation process is confidential insomuch as the records of the proceedings cannot be issued without the consent of the parties[242]. Meanwhile, the parties are to sign a confidential agreement at the beginning of the process, which agreement shall include the provision that none of the mediators or any member of the LMDC will be called as a witness or consultant or expert in any litigation, arbitration or any other proceeding that bothers on the dispute mediated upon[243]. Also, the proceedings and documents are without prejudice and privileged documents, which cannot be admissible in evidence in the advent of litigation[244].

More so, one of the greatest advantage of the process is that, limitation period is stalled till the end of the process.

Therefore, if the mediator sees that there is a glimpse of resolving the dispute, he shall ensure that the disputes are resolved amicably and the terms of settlement is drafted by the parties or by the mediator on the request of the parties[245], which will terminate the mediation proceedings[246].

Should the terms of settlement be drawn, the parties can seek to enforce it by approaching the ADR Judge, where it is the Judge that refers the matter to the LMDC or by the high court rules on enforcement of mediation agreements in conjunction with the Sheriffs and Civil Processes Act[247].

[240] Art. 12, Lagos Multi-Door Court Practice Direction
[241] Art. 13, Lagos Multi-Door Court Practice Direction
[242] Art. 14, Lagos Multi-Door Court Practice Direction
[243] Art. 15, Lagos Multi-Door Court Practice Direction
[244] Ibid.
[245] Art. 16, Lagos Multi-Door Court Practice Direction
[246] Art. 18, Lagos Multi-Door Court Practice Direction
[247] Art. 17, Lagos Multi-Door Court Practice Direction

Ordinarily, this progressive and innovative law should not be considered as part of the challenges of mediation in Nigeria. The main reason of its consideration among the challenges of mediation in Nigeria is because other States ought to consider Lagos State as pace-setter and domesticate the law within their various jurisdictions. However, the reverse is the case, as mediation is still living in the state of oblivion in many parts of Nigeria.

5.1.4. Rules of Court making provisions for ADR.

Courts are guided by their various rules. The rules of courts vary from one court of one State to the other, save that of the Federal Courts that is uniform. More so, the courts also act as actors in dispute resolution in Nigeria. A quick look at the various rules of courts will inform us about the attitudes of various courts to alternative dispute resolution in Nigeria. Many court rules establish referral to any of the ADR mechanisms, before any civil suit is brought the court. However, majority of these Courts do not have Practice Direction breathing life into the practicability of the Alternative Dispute Resolution.

1. **The High Court of Lagos State (Civil Procedure) Rules, 2019.**

The rules make room for resolution of disputes between the parties to the disputes. The rules provides for a Pre-Action Protocol form 01 to be filled stipulating that parties through their counsel have facilitated a method to resolve the disputes but it has proved abortive, which must accompany the process filed in court, failing which the entire process would be a nullity[248]. The rules ensure that matters are referred to the Multi-Door court house before it is brought before the substantive court for adjudication[249].

[248] Order 5 rule 1 of the High Court of Lagos State Civil Procedure Rules, 2019.
[249] Order 28 rule 1 of the High Court of Lagos State Civil Procedure Rules, 2019.

This provision of the rule encourages an ADR which will definitely decongest the court of case files and length of time taken to prosecute matters in court.

More so, the rules made provisions for the regulations of the proceedings of the various ADR mechanisms, with provisions in force to guide the conduct of parties and that of the ADR judges as well as the responses of these judges to matters brought before them in addition to the court's response after the report is made to them by the ADR judges, which is, to admit the award made as consent judgment or to assign the case to a judge of the court, if it cannot be resolved through the ADR technique[250].

2. High Court of the Federal Capital Territory, Abuja (Civil Procedure) Rules 2018

The Rules supports the need to resolve conflicts through any of the ADR mechanisms. The rule further explains the necessity for filing a certificate of pre-action counselling, as contained in Civil Form 6 of the rules, which is a certificate evidencing that each party solicitor had advised his client of the strength and weakness of his case and the attempt to resolve the disputes, consequently, if the dispute turns out to be frivolous, the Counsel will bear the brunt of the penalty[251].

This provision is different from that of Lagos State, because in the latter, the Counsel will not be liable to bear the brunt of the penalty even if the matters turn to be frivolous.

Should any of the solicitors file a case in court without attaching the certificate, the process will be returned at the registry – place of filing processes.

[250] Order 28 rules 2-5 of the High Court of Lagos State Civil Procedure Rules, 2019.
[251] Order 2 of the High Court of the Federal Capital Territory, Abuja (Civil Procedure) Rules 2018

The court as well, will direct suits filed at the registry to the Abuja Multi-Door Court House to be placed at the appropriate ADR venues[252] or appoint Arbitrators can adjudicate on the matter before the substantive suit begins[253]. Should these methods resolve the disputes; the court will admit the award as terms of settlement and rule on it as its judgment in the suit.

More so, it is the duty of the judge to direct any matter to be resolved by any of the ADR mechanisms. But this rule provides the duration for the settlement of matter at any of such ADR mechanisms chosen as against other rules. Where parties consent that the matter will be resolved by any of the ADR methods, the court shall issue an enrolment of order to the parties and give them 21 days to resolve the matter[254]; and where the court refers the parties to any of the ADR mechanisms, the court shall give the parties 15 days to resolve the matter[255]. But if any party that refuses such referral loses in court, the party shall pay penalty as the court will determine[256].

The rules further provides, as against other rules provides that the Chief Judge shall not only appoint judges to supervise the ADR proceedings[257], but it shall designate a week as settlement week to resolve all pending disputes before the Multi-Door Courthouse in Abuja[258]. More so, Arbitration has been greatly dealt with under the rules, to wit the award made will be entered as consent judgment, where none of the parties bring application for setting aside or reconsideration of the award[259].

[252] Order 2 rule 7.
[253] Ibid.
[254] Order 19 rule 2(1) of the High Court of the Federal Capital Territory, Abuja (Civil Procedure) Rules 2018
[255] Order 19 rule 2(2) of the High Court of the Federal Capital Territory, Abuja (Civil Procedure) Rules 2018
[256] Order 19 rule 2(3) of the High Court of the Federal Capital Territory, Abuja (Civil Procedure) Rules 2018
[257] Order 19 rule 8 of the High Court of the Federal Capital Territory, Abuja (Civil Procedure) Rules 2018
[258] Order 19 rule 9 of the High Court of the Federal Capital Territory, Abuja (Civil Procedure) Rules 2018
[259] Order 19 rule 11 of the High Court of the Federal Capital Territory, Abuja (Civil Procedure) Rules 2018.

The rules ensure adherence to prompt resolution of dispute through any of the ADR mechanisms. Consequently, it is a means of checking parties who are 'professional litigants' – those that wants matters to be in court for decades just to delay the other party or punish them.

3. High court of Ekiti State Civil Procedure Rules, 2020

Order 3 Rule 11 of the Ekiti High Court Rules provides:[260]

> *'All originating Process shall upon acceptance for filling by the Registry shall be screened for suitability for ADR and referred to the Ekiti Multi Door Court house or other appropriate ADR institutions or Practitioners in accordance with the Practice Direction that shall from time to time be issued by the Chief Judge of Ekiti State'.*

It is however worrisome that the Multi-Door Courthouse referred to in the Ekiti State High Court Rules is not yet in existence as at the period this research is conducted. Likewise the Practice Direction in respect of ADR is yet to be pronounced by the Cheif Judge of Ekiti State.

Therefore, from the examination of some rules of court and the Lagos state Multi-Door Law and Practice Direction, it is apparent that the attitudes of the court to arbitration and other ADR methods is supportive as it will hasten quick resolution of matters and reduces the workload of the judges. But only a few deal with mediation as a tool of resolution of conflicts as the Lagos State did. This gap needs to be covered by many states in promulgating laws that sees to the resolution of conflicts in the States.

5.2. Execution of Mediated agreements/Recommendations

Mediation agreements are terms of settlements drafted between parties during the mediation process. This agreement is made between the parties after issues causing dispute have been identified, addressed and resolved. Some agreements will further state the roles each party must play to avoid further occurrence of dispute. These agreements can be brought before the courts of competent jurisdiction for enforcement, but where it is the court that refers it initially, the terms

[260] Order 3 rule 11 of the High court of Ekiti State Civil Procedure Rules, 2020

of settlement will be returned to the court for report and enforcement, and the terms of settlement will be entered as consent judgment binding on the parties[261] which can be enforced by submitting to the provisions of the rules of the High Court of the State as well as that of the Sheriffs and Civil Processes Act[262].

One of the challenges of mediation in the aspect of execution is that in order to execute mediated agreements, such agreements must be seen as contracts existing between the parties which must be binding and enforceable. If the agreement does not meet for the conditions of a standard agreement under the law[263], it would not be enforced by the courts[264]. Likewise, if any of the provisions of the agreement borders on the performance of any condition; the non-performance of such condition would also make the agreement unenforceable and be subjected to litigation because it is the court that would interpret the clause.

Another challenge of mediation in this aspect is that the Court is the last destination for the execution of mediation process. Without the input of court, execution of mediation in Nigeria is impossible. This approach impugns the independence and flexibility of mediation because the parties would be forced to return to the court they were avoiding in the first place.

5.3. Incorporation of Mediation into Litigation Process

Various courts through their rules have integrated the mediation process into their litigation process. This is evinced in some rules of court that is highlighted above, that before any suit is filed at the court, the court will direct the suit to any of the ADR mechanisms or the Multi-Door Court Houses for peaceful resolution, before it becomes subject of litigation.

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[261] Art. 17, Lagos Multi-Door Court Practice Direction;
[262] Section 4, Lagos Multi-Door Courthouse Law, 2007
[263] E.g capacity of the parties, certainty and proper execution
[264] Cathleen Cover Payne, Enforceability of Mediated Agreements, ***JOURNAL ON DISPUTE RESOLUTION*, Vol. 1:2, 386 - 397.**

In a bid to reduce the workload of the courts as well as the litigation lawyers, mediation as a method of Alternative Dispute Resolution, is aimed at achieving this objective[265]. Fusing mediation into the litigation is not a one-off attempt, but it comes along with other methods of ADR with the attempt to resolve dispute between the parties. Most rules of court now, allow matters to be mediated or arbitrated upon before its brought up for litigation[266].

More so, the creation of the Multi-Door Court Houses is a giant stride in infusing mediation into the litigation process. Many cases filed before the registry of various courts in Nigeria, will be directed by the Chief Judge of the state to the Multi-Door Court Houses or arbitration centres, as provided by the rules, but in practice, Lagos State, fulfils this above all other states in Nigeria.

The only challenge this great strides have been facing is manipulation of the rules mandating the exploration of ADR (mediations inclusive) before litigation. In reality, Lawyers issue pre-action forms or pre-litigation questionnaires with misrepresented facts that ADR have been explored before filing the matter in the Court's registry, meanwhile such fact is misrepresented.

5.4. Accreditation and Training of Mediators

Generally, in Nigeria, there is a body that conducts training of mediators in Nigeria. The body registers and trains those that want to be a member of fellow in Nigeria and regulates their activities as well[267]. The body is called, The Institute of Chartered Mediators and Conciliators.

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[265] *Matthias Dawodu*, Mediation Practice in Nigeria, March 16, 2015. Available at: <www.spaajibade.com/resources/mediation-practice-in-nigeria/> accessed August 8, 2021.

[266] For instance, Order 19 of the High Court of the Federal Capital Territory, Abuja (Civil Procedure) Rules 2018, establishes that, any party, who refuses to submit to any of the methods of ADR and eventually loses, will pay penalty, as the court may determine. Reading this provision holistically, it portends that, the court has infuses mediation into the litigation procedure.

[267] <https://mediationbulletin.com/training-on-adr-registry-secretarial-services-4/> accessed August 15, 2021.

This body organizes trainings and seminars for its members within the country to regulate the practice of mediation in the country. [268]

Candidates that want to be registered as a mediator will have to pay a prescribed fee to the body and will take the necessary course as well as attend the induction ceremony after such person passes the examinations required[269]. Once the candidate is inducted into the body, the person is automatically accredited as a mediator in Nigeria.

One of the challenges of this Institution is that it was not established by any statutory law or enactment. It was conceived as a body that by persons that are enthusiast about mediation. A further search on the website of the Corporate Affairs Commission also indicated that it is not a registered entity in Nigeria. It can be made an issue of debate that a body asserting authority over the training and accreditation of Mediators in Nigeria is not a legally recognised institution. This also means that any group of persons can establish an institution with similar objectives. This can lead to proliferation of mediation institutions in Nigeria.

5.5 Lack of Orientation and Awareness towards Mediation

Mediation is an alternative to ADR and it was greatly explored in the agrarian rural based Nigeria before the advent of the colonialism which institutionalized courts system[270]. As time evolves, mediation was in a way institutionalized under the UNCITRAL Model Laws on International Commercial Arbitration, 1988[271]. As years pass by, courts became the main place to resolve conflicts in Nigeria. This has limited the power of litigants to explore other options of resolution of conflicts such as mediation.

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[268] Ibid.

[269] <https://thenigerialawyer.com/icmc-mediation-skills-accreditation-and-certification-training-in-lagos/> accessed August 15, 2021.

[270] Akanle (n. 77) at 185

[271] The law mentioned that where there is dispute, parties can submit to conciliation, which is synonymous to mediation in Nigeria, as Orojo puts it as cited in K.M. Akanle (ibid)

Lack of information about mediation as a means of resolving disputes have restricted the growth of mediation as a means of resolving disputes.[272] Many believe that the courts are the only way of resolving the disputes. More so, courts system besides the people needs to be well informed about the need to infuse the mediation process into their rules[273]. However, many rules of court these days have infused mediation, an ADR mechanism, in their rules for quick resolution of conflicts, as examined above.

More so, many players in the judicial process intentionally or unintentionally refuse to intimate their clients about the need to resolve their disputes through any of the ADR means before litigating, perhaps they fail to see that they can earn their money through mediation as well.

Awareness about mediation can be heightened with the use of media space and engaging in promotional strategies and promoting such in at events and discussion groups with the aim of disabusing the mind of many concerning the mediation and changing the mental code of the people[274]. More so, the need to inform the public about mediation is important as it will help them trust the process[275]. Also, informing the public and the stakeholders[276] about the neutrality of the mediator also helps the people to trust the process[277] as well as the speedy resolution of conflicts in addition to having a 'win-win situation'[278].

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[272] Aleksandra Stoilkovska, Valentina Palevski and Jana Ilieva, '*Awareness about Mediation as an Alternative Form Of Dispute Resolution: Practices in the Republic of Macedonia'* (2015) Vol. 3, No.1, International Journal of Cognitive Research in Science, Engineering and Education (IJCRSEE) p. 21, 22

[273] Ibid p. 22 .
[274] Ibid.
[275] Ibid. p. 23-25
[276] Perhaps institutions and agencies that play key role in resolution of conflicts. E.g the Ministry of Justice and various NGOs.
[277] Ibid. p. 25, 26
[278] Ibid. 22

5.6. Roles and Duties of lawyers towards Mediation.

The traditional role of the lawyer has been to represent the interests of his or her client, by advising the client regarding procedure and substantive law, counselling the client and managing the legal processes for the client. While the lawyer will continue to perform each of these traditional functions in the mediation process, the manner and the context in which those functions are performed will be different. The vital distinction is that mediation is a non-adversarial process, through which each party is encouraged to take responsibility for resolving the dispute.

The mistake most Lawyers make is to assume the role of Lawyer and Mediator at the same time. It must be noted that Mediator is different from a Lawyer in all ramification, where Lawyers assume the role of a Mediator without an express instruction permitting him for such would amount to overreaching of bounds. Roles of Lawyers should be spelt out adequately in order to avoid conflict of interests and roles. The duties and roles of Lawyer should be spelt out for every stage of the dispute resolution.

CHAPTER SIX

SUMMARY, CONCLUSION AND RECOMMENDATIONS

6.1 Summary

This study has been able to examine the practice of mediation as a tool of resolving dispute in Nigeria and other jurisdictions like South Africa, Canada and Hong Kong. Mediation is a form of an alternative dispute resolution with a distinctive feature of a peaceful resolution of dispute without any form of force or coercion through a process where a neutral and impartial third party called the mediator is invited by the disputing parties to facilitate the resolution of the dispute by the self-determined agreement of the disputants. The nature of mediation is to promote/allow for peaceful resolution of dispute and also to foster relationship between parties as oppose to litigation which is adversary in nature. Adjudication of dispute in court results to a win-lose scenario and not a mutually acceptable decision and parties in some instances wound appeal against decision of the court in most occasions.

Mediation, just like other means of Alternative Dispute Resolution is not a new phenomenon. It is observed that ADR stretches as far back as 1800 B.C., traced to the Mari Kingdom in modern Syria, where mediation and arbitration were used in disputes with other kingdoms.[279] In pre-colonial Africa, disputes were resolved majorly through the intervention of elders or experienced persons who had more knowledge and wisdom than the disputing parties.[280] For example, many societies have a committee of elders, family heads, chiefs or emirs who presided over and sought to resolve disputes between parties. Often, these mediators (especially when they were not

[279] Conrad (n 10)
[280] Gary B. Born, *International Commercial Arbitration* (Vol. 1, Kluwer Law International 2009) 54

leaders within their communities) were chosen for their respectability in society and their knowledge of the laws and customs of the land.[281]

In Nigeria today, despite the benefits and advancement in the use of ADR in dispute resolution, there are few laws that provide for mediation. Nigeria most significant laws on ADR, which applies to the whole country is the Arbitration and Conciliation Act[282]. This law provides for arbitration and conciliation but makes no express provision for mediation. Various courts in Nigeria through their rules have integrated ADR processes into their litigation process. For instance Order 28 rule 1of the Lagos State High Court Rules[283] provides that matters are to be referred to the Multi-Door courthouse before it is brought before the substantive court for adjudication and Order 5 rule 1[284] provides that Pre-Action Protocol form 01 to be filled stipulating that parties through their counsel have facilitated a method to resolve the disputes but it has proved abortive, which must accompany the process filed in court, failing which the entire process would be a nullity.

Although mediation as a formal concept is still not very popular in all parts of Nigeria, with the developing prominence of ADR mechanisms in general, there is an increase in the awareness and use of mediation as an alternative to litigation, or more commonly, as an initial step before the use of other more binding ADR mechanisms, such as arbitration. Many prospective litigants in Nigeria are not aware of the benefits of settling disputes through mediation. This has resulted into little faith in the mediation system, as people still prefer litigation to mediation despite the cost and the rigorous process involved. The majority of the mediation proceedings in Nigeria are court-ordered and not voluntarily initiated by the parties. Nonetheless, mediation has gained

[281] Templars (n 12)
[282] Cap A18, LFN 2004
[283] The High Court of Lagos State Civil Procedure Rules, 2019
[284] Order 5 rule 1 of the High Court of Lagos State Civil Procedure Rules, 2019.

increased recognition in the commercial sphere and parties are increasingly making it a compulsory part of their dispute resolution clauses.

6.2 Conclusion

In conclusion, mediation, a tool to judicial re-engineering is employed by the courts to aid speedy dispensation of Justice without clogs. In fact, many jurists have embraced the skill of mediating. Courts have also encouraged alternative disputes settlement which is a quantum leap to Justice delivery in Nigeria. The rules of courts have in no small measure promoted the use of mediation and other means of disputes settlement in Nigeria. A lot a of issues have been identified with the mediation process in Nigeria, which have been explained with practical resolutions proffered to solving the issues out with the aim of ensuring speedy dispensation of Justice,'for Justice delayed is Justice denied'. Although, justice should not be hastened to the detriment of parties. It must be achieved with the interest of the parties in mind. Therefore, mediation is a veritable means of disputes resolution in Nigeria.

6.3 Recommendations

Flowing from the foregoing, the study recommend as follows:

1. There should be an amendment of the scope of Arbitration & Conciliation Act, in order to accommodate mediation or enactment of Mediation and other ADR Act. The Lagos Practice Direction on Mediation can just be adopted as rules or attachment to the proposed amended Arbitration & Conciliation Act, just as National Assembly considered enacting Administration of Criminal Justice Act after Administration of Criminal Justice Law was firstly enacted by Lagos State Government.
2. Other States should consider enacting a Law similar to the LMDC Law of Lagos State & the Chief Judges of these States should issue practice direction on mediation just like

Lagos State. Alternatively, the Houses of Assembly of various States should adopt the LMDC Law and Practice Direction of Lagos as an annexure to the said Law.

3. Multi-door Courthouses should be established in various States with employment of adequate support staff. The MDC should not only exist in rules but in reality.
4. Execution of mediated agreement without having it to be adopted by Court as the judgment of the Court. It should just be referred to bailiffs of High Courts. The only instance court should be involved in mediated agreement is when there is evidence of fraud, intimidation or bias against any of the parties to the mediated agreement.
5. Mediation should be considered as a pre-condition to some categories of litigation e.g divorce, land matter, custody of a child, breach of contract.
6. The Law should provide adequate sanctions for Lawyers or stakeholders that misrepresent fact of consideration of mediation prior to litigation.
7. A body with statutory recognition should be saddled with the responsibility of training & accreditation of mediators.
8. Stakeholders such as Lawyers & mediators should always advise clients on the immense benefits of mediation before an attempt on litigation is made. This would help spreading the awareness on the benefits of mediation.
9. The roles of Lawyers & Mediators should be explicit & well-defined. Both should not be mixed, neither should it be allowed to conflict each other.

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