EXPLORING ALTERNATIVE DISPUTE RESOLUTION MECHANISMS IN RESOLVING COMMERCIAL AND LABOR DISPUTES: COMPARATIVE ANALYSIS OF NIGERIA AND THE UNITED STATES

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ARTICLE DETAILS

ABSTRACT

Whenever conflict arises, what comes next is how to resolve such conflict in order to promote progress and stability. There is now a global paradigm shift, especially in the business sphere, from the overburdened and protracted court system of dispute resolution to more flexible, less expensive and more expedient alternatives to litigation. From a comparative study approach on the situations of commercial and industrial disputes in Nigeria and in the United States, it is observed that while the United States has gone far in tapping the goldmines of Alternative Dispute Resolution (ADR) mechanisms in resolving commercial and labor rifts in the country, ADR in Nigerian business sector is yet to be fully utilized. Although noticeable challenges were discovered in the course of the comparative study, it can be concluded safely that ADR processes are the appropriate means of resolving most commercial and labor disputes while few of those disputes that raise issues of illegality and fraud, among others, should be pursued through litigation.

KEYWORDS

ADR Mechanisms, labor, commercial, comparative analysis, Nigeria, United States

1. INTRODUCTION

Every civilized system of government required that the state makes available to all citizens living in that state, means for the just and peaceful settlement of disputes between them. A just and peaceful settlement demands expediency and satisfaction which in most cases, are mostly missing in commercial and industrial litigation (Akanbi, 2015). Delay in the disposal of conflicting claims is indeed a primary enemy of justice and peace in any community. In particular, trade and labor disputes have drastic and negative impacts on the economy of any nation. Once such labor disputes arise and culminate in strike, the economy suffers. In commercial disputes where time is so essential, the lengthy period takes to ventilate a matter in Nigerian courts, has frustrated many litigants to abandon their pursuits while others seek alternative means of resolving their grievances (Akeredolu, 2011).

The analysis by Assistant United States Attorneys (AUSAs) of civil cases reveals that the use of ADR processes can be an efficient and effective procedural solutions to the challenges of time and costs associated with "going to court" without sacrificing quality justice on the altar of quick solution to business and labor rifts. During a period under review, 65% of cases were settled when ADR was used and only 25% of cases were settled when it was not in use (Akinbode and Ebeolu, 2017).

Typically, investors and businessmen prefer ADR to litigation. This is not really surprising because the litigation process in Nigeria is characterized with frustrating delays and businesses are keen to avoid such delays and avoid the attendant costs, fees and expenses involved in litigation (American Arbitration Association, 2023). Therefore, finding a reliable, expeditious and satisfactory dispute settlement mechanism that is less expensive, reasonable fast and accessible to people, becomes imperative. Litigation has proven to be largely ineffective in resolving peculiar nature of labor and commercial disputes and this has prompted the need to explore other dispute resolution options like arbitration, mediation and conciliation.

The exploration of ADR mechanisms in Nigeria and most especially in the United States, is highly commendable. Except in few instances where a claim might not be decided satisfactorily through ADR because of certain features that are embedded in it, so far, ADR processes have help in achieving better results in the quick and efficient disposition of labor and commercial disputes (Ammer, 1997). Continuous study of the intricacies of the use of ADR processes in Nigeria and United States in line with the peculiarities of commercial and labor disputes in both countries, will aid the full utilization of ADR towards a sustainable business environment and a progressive national economy, especially in Nigeria.

This paper will discuss the meaning of disputes in light of commercial and labor issues. It will further explains the need to resolve labor matters and business rifts through ADR mechanisms rather than litigation as the former tends to ensure quick and satisfactory dispensation of justice among the disputing parties. ADR as a conceptual framework will be
analyzed together with its prominent mechanisms (Ansley, 1991). Next, this paper will look into the situation of labor and commercial issues in Nigeria and the United States. To what extent is ADR mechanisms successful in the amicable resolution of commercial and labor disputes in both countries? Have Nigeria and the United been able to utilize the prospects of ADR mechanisms in their respective business sectors? Are there lessons one can learn from the other? Are ADR processes suitable for all commercial and labor disputes? Are there ways that ADRs structures can be developed particularly in Nigeria, in order to achieve economic sustainability and growth? Answers to the above questions are explained in this paper with some recommendations proffered in the conclusion of this work (Attiola and Dugeri, 2023).

2. NATURE OF COMMERCIAL/LABOR DISPUTES AND THE NECESSITY FOR ADR

2.1 Disputes
Disputes are inevitable in any given society which is mostly caused by differences in individuals’ perception, values, inclinations, ideas, goals, etc. According to Ammer, disputes is basically an assertion of opposing claims, views or disagreement usually as to rights that especially one that is subject of proceeding for resolution (Augustine, 2020). Foskett notes that an actual dispute will not exist unless and until a claim is asserted by one party which is disputed by the other. Dispute may be defined as a class of conflict which manifest itself in a distinct and justiciable set of issues capable of resolution by negotiation, mediation or any other dispute resolution mechanisms involving a neutral third party.

2.2 Labor disputes
According to Bankole, a dispute could be said to be a labor dispute if the purpose is legitimate and is in furtherance of lawful interests of workers. Labor disputes is also defined as a dispute between an employer and his employees over payment, working conditions and other employment related matters (Bankole, 2022). It can come in form of strike, lockout or picketing. Labor disputes, industrial/employee conflicts and trade strike are mostly used as the laboratory used to test the success of concepts. In the case of NWL LTD v WOODS, the court held that employment disputes include matter of safety and comfort of a worker. Akinbode and Ebeloku argued that some of the labor disputes in Nigeria are but not limited to victimization and intimidation of workers or union officials, refusal or delay in payment of salaries and allowances of workers, non-implementation of collective bargaining agreements, among others (Akinbode and Ebeloku, 2017).

2.3 Commercial disputes
In the normal course of day to day business activities, disputes are unavoidable. Parties may disagree as to their individual rights and obligations in a business agreement in no matter well drafted it is. As such, commercial dispute is a disagreement between two of more business partners regarding the supply of goods and services. It is also a disagreement relating to commercial activities between two or more business stakeholders. Generally, these disputes arise from or relating to contractual terms and conditions, fiduciary duties as well as intellectual property rights (Noun, 2023). The resolution of such commercial disputes need not to be costly and acrimonious as they may be settled through court proceedings or alternative dispute resolution.

Indeed, when commercial or labor disputes through alternative means of dispute resolution cansave time and money while preserving valuable industrial and business relationships This is because, over the years, litigation has proven not be suitable for commercial and labor disputes settlement in terms of fees and effectiveness (Festus, 2022). Winker Cj posited correctly that, “if litigants of modest means can not afford to seek their remedies in the traditional court system, they will be forced to find other means to obtain relief. Some may simply give up out of frustration. Should this come to pass, the civil justice system as we know it will become irrelevant for the majority of the population. Our courts and the legal profession must adapt to the changing needs of the society.

3. ADR and its Importance
The origin of the Alternative Dispute Resolution (ADR) is said to have started in 1970 when it was launched in United States at a national conference sponsored by the American Bar Association where there were discussions on the causes of popular dissatisfaction with the administration of justice (through litigation) and workable solutions proffered (Foskett, 1985). As a concept, ADR is an all-encompassing term which refers to the various multiple non-judicial methods of handling conflicts between parties. Although ADR does not result in court precedent, it is a collection of techniques to take disputes out of court for them to be settled more quickly and more economically.

In various quarters, there may be attempts to give an appropriate definition of ADR but just like any other legal and theoretical concept, there is no generally acceptable definition of ADR. According to Black’s Law Dictionary, ADR is defined as procedure for settling disputes by means other than litigation such as arbitration and mediation (Frank and Stephan, 1993). ADR is also regarded as a set of practices and techniques that aims resolution of legal disputes outside the courts for the benefits of all disputants. In addition, ADR are methods and procedures used in resolving disputes either as alternatives to the traditional dispute resolution mechanism or in some other cases, supplementary to such mechanisms.

The major ADR processes include negotiation, conciliation, mediation and arbitration. Others are early expert evaluation, mini-trial, expert determination, multi-door courthouse and other hybrid types:

3.1 Negotiation
It is one of the ADR mechanisms that is less formal whereby parties meet in good faith to address the issues in contention between them with the goal of reaching a mutual resolution with or without lawyers or neutrals. It involves a verbal interactive process by which two or more parties who are seeking to resolve their conflicts by adjusting their views and positions so as to reach an amicable agreement (Garner, 2009). It also assists the parties to know the Best Alternative to a Negotiated Agreement (BATNA) which is the alternate plan when the negotiation starts to get out of hand and gives the party the opportunity to know when to walk out of the negotiation if it becomes unfavorable thereby resulting to other applicable ADR mechanisms.

3.2 Conciliation
It is another ADR process whereby one or more independent person(s) are selected by the disputing parties to help in facilitating a settlement of their disputes through that procedure. The essence of conciliation lies in the meeting together of the contending parties to a dispute together with whose consent, a third party is brought into the dispute in order to resolve it satisfactorily between the parties.

3.3 Mediation
It is an informal ADR process whereby a neutral third party called the mediator, who intervenes in the dispute in order to resolve the dispute amicably. Mediation is often regarded as “soft justice”, but it is useful in highly polarized disputes where the parties have either been unable to initiate a productive discussion and settlement of the dispute, or where the parties engage in dialogue but have reached a seemingly insurmountable impasse (Hyacinth and Leonard, 2020). Then, the mediator intervenes, who is an impartial and neutral third party who has limited or no authoritative decision-making power but who assists the disputing parties in voluntarily reaching a mutually acceptable settlement of issues in dispute.

3.4 Arbitration
It is a private judicial determination of issues arising from a dispute, by an independent third party who may be sole arbitrator or a tribunal of a number of arbitrators. Arbitration is found upon a consensual agreement which may have been agreed upon before the dispute arises. During the arbitral proceedings, the disputing parties surrender their decision making power to the arbitrator(s) but retain the control over the process (Jonathon, 2023). The decision and award made by the arbitral tribunal is binding and may be enforced in the same manner as court judgments.

4. NIGERIA AND THE UNITED STATES IN EXPLORING THE BENEFITS OF ADR FOR LABOR AND COMMERCIAL DISPUTES RESOLUTION: A SITUATIONAL REPORT AND COMPARATIVE APPROACH

4.1 Brief History of ADR in Nigeria
Right from the pre-colonial Nigeria, traces of ADR can be seen in ways different communities in Nigeria resolved their disputes. ADR is not alien to customs and traditions prevalent in Nigeria. In traditional Yoruba and Igbo societies, ADR is commonly used to resolve cases among people, families, villages or communities (Larry and Kevin, 2023; Lawyers, 2023). The aggrieved person nominate the village heads or even the king about
the dispute who will then invite the other party(ies) to agree on when where the disputing parties will meet in order to resolve the contending issues between them. This method conceptualizes into customary arbitration as well as mediation approach of ADR.

After the advent of colonialization, the legal regime of ADR began to evolve gradually. Various laws on ADR processes were enacted into law such as Arbitration Act of 1914, Arbitration and Conciliation Act 1960, now repealed with Arbitration and Conciliation Act 2023 as the extant law on ADR processes in Nigeria (LisA, 2009). Also, a number of foreign treaties were signed into law to promote the exploration of ADR processes in Nigeria which include the Convention on the Recognition and Enforcement of Foreign Arbitral Awards and the Arbitration Rules of the United Nations Commission on International Trade Law (UNCITRAL).

4.2 Legal Frameworks for the Operation of ADR in Nigeria

To start with the fountain of all laws in Nigeria, Section 19(d) of the Constitution of Federal Republic of Nigeria 1999 as amended provides that, “the foreign policy objectives shall be – (d) for international law and treaty obligations as well as seeking settlement of international disputes by negotiation, mediation, conciliation, arbitration and adjudication”.

With regards to arbitration-one of the ADR mechanisms, Section 1(1) and (2) of Arbitration and Mediation Act 2023 provide:

“(1) the objectives of this part is to promote fair resolution of disputes by an impartial tribunal without unnecessary delay or expenses

(2) parties to a dispute are at liberty to decide the means by which their dispute may be resolved, provided they adhere to measures that are necessary to promote peaceable existence and protect public interests”.

Section 4(1), (2), (5), 6, 7, 8 and 9 of the Trade Disputes Act is another legal framework regulating the use of ADR mechanisms in labor and trade disputes resolution in Nigeria.

An ADR provision is also contained under Section 151(1) of Federal Competitor and Consumer Protection Commission (FCCPC) Act 2018 which provides thus, “the commission may collaborate with, facilitate or otherwise support any of the following activities carried out by a consumer protection group – (e) alternative dispute resolution through mediation or conciliation”.

In fact, in the light of encouraging the use of ADR mechanisms before litigation, Rule 15 of Rules of Professional Conduct for Legal Practitioners 2007 contains the provision that, “in his representation of his client, a lawyer shall not – (d) fail or neglect to inform his client of the option of Alternative Dispute Resolution mechanisms before resorting to or continuing litigation on behalf of his client.” Even when the matter has been taken to court, Order 3 Rule 11 of Lagos State Civil Procedure Rules 2012 provides that, “all originating court processes shall be screened for suitability for ADR and referred to the Lagos State Multi-Door Courthouse”.

The Supreme Court of Nigeria held in Oyowoseni v Faloye and Arisibala v Oguyemi that “where a statute prescribes a legal line of action for the determination of an action, the aggrieved party must exhaust all the remedies in that law before going to court”.

With the above legal frameworks of ADR under the Nigerian laws, “whether Nigeria been able to explore ADR to achieve an expedient yet efficient justice delivery system in the commercial and labor sectors of the country?” is a question now begging for an immediate answer.

4.3 The Use of ADR Mechanisms in Resolving Commercial and Labor Disputes in Nigeria: Any Success?

It is worthy to note that in Nigeria, there is now a paradigm shift from the traditional court system of dispute resolution to ADR mechanisms that offers amicable settlement of disputes. Oghogho Akpata aptly said that “arbitration is fast becoming best practice for resolving commercial disputes. As businesses learn more about the advantages of it compare with court judgements -including the fact that arbitral awards can be enforced globally – they are gradually becoming more open to it”. Uzoama Azikwe also posited that “arbitration as an ADR mechanism has gained widespread acceptance in Nigeria, largely due to commercial activity and the inflow of foreign direct investment”. Businessmen are tiling towards ADR especially in respect to their international commercial agreements because ADR fosters and preserves business relationships while resolving the disputes amicably within a limited timeframe with less cost (Minawa, 2023; Moore, 1991). In the same vein, most formal employment agreements contain clauses that make provisions that ADR mechanisms should be employed first whenever a dispute arises before the case is taken to court.

Although, Nigeria is now appreciating the importance of ADR mechanisms in commercial and labor dispute settlement, litigation is still widely used. Many Nigerians have the wrong notion that judgements from ADR processes are not binding and not effective in establishing their rights. Lack of belief in ADR outcomes and ignorance about the workings of ADR mechanisms together with inadequate ADR experts are some of the factors that affect ADR in Nigeria particularly in the industrial sector. A very good example is the incessant ASUU strike over years lasting for several months thereby causing disruption of academic calendars and retardation of educational progress of the country. Surprisingly, ADR mechanisms were employed right from the onset of the dispute which keep resulting in deadlock. Particularly the ASUU strike of 2022 that prolonged for several months and it was not until the intervention of National Industrial Court of Nigeria when the case was brought before the court, that the dispute between ASUU and Federal Government of Nigeria was temporarily resolved till it was finally disposed off in May 2023 (Naughton, 1990; Nikolai, 2023). The message that 2022 ASUU strike revealed is the most effective method of resolving the dispute as the court was able to solve what negotiations had failed to do in that regards. Whereas, that is not correct. Litigation is not the best means, except in very few cases, in resolving labor and commercial disputes because of the attending negative effects of litigation on commerce and trade.

On Wednesday 20th September 2023 at the swearing-in ceremony of nine newly appointed justices of the Court of Appeal held in Abuja, the Chief Justice of Nigeria, Kayode Arowolo lamented about the pathetic situation in Nigeria on the excessive use of litigation for dispute resolution and the need for ADR when he said:

“We are constantly on our toes and the dockets are ever rising in response to the challenges of the time. This underscores the undisputed fact that Nigeria continuously ranks among the most litigious countries in the world. I strongly believe it is high time we began to imbibe the culture of less litigation and more of alternative dispute resolution mechanisms so that our courts can be freed of unnecessary burden and depletion of both human and material resources”.

4.4 ADR in Commercial and Labor Sector of the United States: An Appraisal

ADR is greatly advanced in the United States ADR operates at all levels in the United States in both micro and macro commercial activities as well as major labor issues. Local, state and federal courts in the United States have experimented numerous ADR processes and institutionalized their approaches such as the multi-door courthouse concept evolved from the 3-door courthouse concept. The multi-door courthouse concept evolved from the research works by Professor Frank Jander of Harvard Law School in the United States, who strongly believed that courts should offer various settlement approaches that best suit the disputes being adjudicated; and that not all cases were best resolved by an adversarial court process. The multi-door courthouse concept has been adopted by the courts and institutionalized as a new concept of dispute resolution (Sunday, 2023). Hence, courts should offer multiple doors through which disputing parties may come in seeking effective, low cost, fair and expeditious means of resolving their grievances.

The formalization of ADR as a concept and mechanism for settlement of disputes, was arguably brought about by an American litigation lawyer called Eric Green. He was said to be the first person to used the term ADR in an article. As a means of dispute resolution, Green assisted the parties of a large-scale commercial dispute involving the alleged infringement of certain patent devices in reaching an amicable settlement and save them of loss of one million US dollars if the litigation was pressed further (United Nations Office on Drugs and Crime, 2023). The parties involved had earlier spent several hundred thousand dollars during the two and half years of preparation for the hearing of the case before they decided to look for an alternative method of resolving the dispute where they agreed to run a mini-trial that involved the two parties attending a two-day “information exchange” arrangement chaired by a neutral third party advisor who was a then former judge. Just after two days, an amicable settlement was reached and the parties were saved from loss of time, energy and resources on litigation.

Civil societies in the United States have initiated the need to find an alternative to the complex, expensive and time-consuming court system of dispute resolution (United Nations Office on Drug and Crime, 2023). Hence the establishment of the Joint Commission on Alternative Dispute Resolution in 1970 in order for the commission to research and implement alternative dispute resolution methods in the framework of judicial
settlement of disputes while a federal law regulating the use of alternative dispute resolution was adopted in 2001.

The primary legislation on labor matters in the United States is the federal National Labor Relations Act (NLRA) 1935. Section 7 of NLRA gives employees the statutory right to "engage in...concerted activities for the purpose of collective bargaining or other mutual aid or protection" while Section 8(a)(1) makes it an "unfair labor practices for an employer to interfere with, restrain or coerce employees in the exercise of the rights guaranteed in section 7." It is important to note that there is no private right of action in the violation of NLRA because all alleged violations must be filed as a "charge" with the National Labor Relations Board (NLRB).

In a situation where a union and employer have concluded a Collective Bargaining Agreement (CBA), there is usually a "labor arbitration" clause embedded in it which involves private arbitration by a neutral third party to process alleged violation of the CBA and see its resolution. In addition, the right to challenge the employer’s conduct belongs to the union and the worker (employee) is generally not a party to CBA and thus does have the right to initiate a grievance in that regard (Usma, 2023). When the resolution has been reached, arbitrator’s decisions can only be appealed on a very few limited grounds of appeal, including lack of due process, among others. In most cases, it is extremely difficult to challenge the decision of arbitrators as their awards are enforced by the courts except if they were obtained fraudulently.

Also, arbitration, a form of ADR, has been found to cost less than litigation, most especially for employers. However, critics have attacked the equity of arbitration on many grounds, particularly in respect to employment disputes. A major ground is that since employers generally pay for most of the arbitration fees and are repeat players in the system, a number of arbitrators are seen to be biased in order to be chosen in future cases. Some evidence by the New York Times investigation back up this assertion and this investigation includes interviews with certain number of arbitrators who described being feeling burden to the company that had appointed them for the arbitration process. In fact there was an instance of an arbitrator who awarded US$1.7 million to a plaintiff against the employer who appointed that arbitrator, and was never chosen to hear an employment case thereafter. Whereas, an arbitrator who knew how to play his game, was able to handled 400 cases involving the same management law firm.

4.5 Towards a Sustainable ADR Regime in Nigeria and the United States

After having analyzed the legal regime of ADR in Nigeria and in the United States, it is observed that, notwithstanding the noticeable flaws in the use of ADR, the various ADR forums provide the appropriate and suitable settlement of labor and commercial disputes. Improving the effectiveness of ADR mechanisms through the provision of adequate ADR experts and government-supported means of promotion the benefits in the use of ADR processes which can be in form of enactment of laws that will cover the scope of ADR in all-encompassing manner as well as enforcement of ADR clauses in business agreements.

Although there are arguments among scholars and commentators that there is insufficient empirical research about the efficacy and success of ADR as compared to litigation, there is no doubt that litigation, except in few cases, is not suitable for commercial and labor disputes settlement owing to the peculiarities of both issues. Therefore, Abraham Lincoln advised rightly as follows: "discourage litigation. Persuade your neighbor to compromise whenever you can. Point out to them how the nominal winner is often a real loser...in fees, expenses and wastage of time".

5. CONCLUSION AND RECOMMENDATIONS

Whether it is litigation or ADR mechanism, both aimed at achieving settlement of disputes. The time frame to achieve that aim might be unnecessarily long at the end, disputes are resolved. Due to the peculiarities of commercial and labor disputes being before the courts they are subject to many court processes and slowing down economic growth of the country. As explained above, in few cases where one or both of the disputants are dishonest, obvious unequal bargaining power, failure of the ADR processes, litigating such case will then be the last option.

Nonetheless, the foregoing recommendations are made in a bid to promote the exploration of ADR mechanisms for settlement of commercial and labor disputes in Nigeria and the United States as well as to improve the standard quality of settlement through ADR. They include:

1. ADR mechanisms should maintain their voluntary characteristics and any attempt to make it mandatory without any purposeful intent should be frowned at.
2. Proper orientation of businessmen on the benefits of ADR and that not every dispute warrant saying, “we shall see in court”;
3. Proper documentation of ADR proceedings in order to assist researchers in studying the pros and cons of ADR and how to improve the system;
4. ADR should be the first option and not the last resort whenever commercial or labor dispute arises so as to save time, money and energy;
5. Harmonization and synergy among the various ADR mechanisms through encompassing legislations; and
6. Continuous advocacy and awareness programs about the positive impacts of ADR mechanisms in dispute resolution through seminars, symposia, media outreachs among others.

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