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ALTERNATIVE DISPUTE RESOLUTION AND THE DWINDLING FORTUNES OF ARBITRATION IN NIGERIA: IS FAST TRACK ARBITRATION THE SOLUTION?

Abdulrazaq Adelodun Daibu* & Ibrahim Kayode Adam**

Abstract

The potential benefits of arbitration and Alternative Dispute Resolution (ADR) in relation to prompt disposal of matters is now threatened by some challenges bedeviling their practice and operation in Nigeria. This article examines some of these challenges which have hindered the growth and development of arbitration and ADR as a viable dispute resolution mechanism in Nigeria from different perspectives and found that the adoption of fast track arbitration becomes imperative not only as a solution to the dwindling fortunes of arbitration but also for sustainable growth and development of arbitration and ADR in Nigeria. The article concludes by suggesting ways by which arbitration and ADR could be repositioned for sustainable development in Nigeria.

I. Introduction

Disputes are inevitable in human relations.¹ It usually arises as a result of frequent interaction between people of different backgrounds and peculiar idiosyncrasies.² Disputes could arise through domestic relationship within family or neighborhood, marital disagreements, commercial transactions, communal rivalry, chieftaincy matters, boundary disputes and religious belief

* LL.B, LL.M (Ilorin) BL (Kano); Lecturer, Department of Private and Property Law, Faculty of Law, University of Ilorin, Ilorin, Nigeria E-mail: abdulrazaqdaibu@yahoo.com

** LL.B (Kano), LLM (Ife), BL (Lagos), PhD (IIU Malaysia); Senior Lecturer and Head Department of Business Law, Faculty of Law, University of Ilorin, Ilorin, Nigeria. E-mail: adam_kayus2003@yahoo.co

¹Fagbemi S. "The Doctrine of Party Autonomy in International Commercial Arbitration: Myth or Reality?" *Journal of Sustainable Development Law and Policy*, (2015) vol. 6 No.1 p. 223; Akeredolu A. "Court-connected Alternative Dispute Resolution in Nigeria" *University of Ibadan Law Journal* (2011) vol. 1 No. 1, p.37; Menkel-Meadow C., *Dispute Processing and Conflict Resolution: Theory, Practice and Policy* (2003 Ashgate Publishing Co., Burlington) p.6.

²Akanbi M.M "Contending without being Contentious: Arbitrators, Arbitration and Arbitrability" (University of Ilorin Press, Ilorin. 2014) p.3; Akeredolu A. "Court-connected Alternative Dispute Resolution in Nigeria" p.37-38.

among others.¹ Disputes are traditionally referred to the courts for settlement.⁴ However, the adversarial nature of the court system with its attendant problems such as prolonged trial, undue publicity, technicalities, rigid procedure and insensitivity to the future of parties' relationships have led to the adoption of arbitration and Alternative Dispute Resolution (ADR) mechanisms in Nigeria.⁵ Thus modern contracts and some legislations now make provisions for the use of ADR as first resort mechanism of dispute resolution before litigation. This is to allow disputing parties freedom and opportunity to resolve their disputes amicably in a preferred manner without interference from the state.⁶

ADR is not alien to the Nigerian justice system where it has always been part of the native law and customs of the people and recognized by the Constitution.⁷ The modern ADR mechanisms such as mediation, negotiation, conciliation and arbitration are similar to local modes of resolving disputes in Nigerian pre-colonial communities, albeit under different names.⁸ In fact, there are some

¹Daibu A. A. and Abdulrauf L. A. "Challenges of the Practice of Customary Arbitration in Nigeria" *The Nigerian Juridical Review* (2014) vol.12 p. 106; Orojo J. O. and Ajomo M. A., *Law and Practice of Arbitration and Conciliation in Nigeria* (Lagos: Mbeyi and Associates Nig. Ltd., 1999) p. 1.

⁴Litigation is the conventional method of dispute resolution in most countries Nigeria inclusive. It is a method by which parties exact their rights in courts.

⁵Daibu A. A. "The Lagos State Arbitration Law and the Doctrine of Covering the Field: A Review" *The Gravitas Review of Business and Property Law* (2015) vol.6 No1 p.44; Fagbemi S. "The Doctrine of Party Autonomy in International Commercial Arbitration: Myth or Reality?" p. 223-235; Akanbi M.M. *Domestic Commercial Arbitration in Nigeria: Problems and Challenges* (Lambert Academic Publishing Germany, 2012) p. 32.

⁶Fagbemi S. "The Doctrine of Party Autonomy in International Commercial Arbitration: Myth or Reality?" p. 224-225.

⁷See generally Ayinla L.A. "ADR and the relevance of Native or Customary Arbitration in Nigeria" *University of Ilorin Law Journal* (2009) vol. 5 No. 1 p. 258; Akanbi M. M. *Domestic Commercial Arbitration in Nigeria: Problems and Challenges* p.58; Oba A. A. "Juju Oath in Customary Arbitration and their Legal Validity in Nigerian Courts" *Journal of African Law* (2008) vol. 52 No.1 p. 140 p. 142; Chukwuemerie A. I. "The Internationalisation of African Customary Law" *African Journal of International and Comparative Law* (2006) vol.14 p.140-143; Emiola A. *The Principles of African Customary law* 2nd edition (Emiola publishers Ltd Nigeria 2005) pp.1, 51-73; Idornigie P. O. "Overview of ADR in Nigeria" *Arbitration* (2007) vol. 73 No. 1 p. 75-76; Igbokwe V.C. "Law and Practice of Customary Arbitration in Nigeria: *Agu v. Ikewibe* and Applicable Law issues Revisited" *Journal of African law* (1997) vol. 41 No. 2 p. 201.

⁸Chukwuemeire A.I. "Arbitration and Human Rights in Africa" *African Human Rights Law Journal* (2007) vol. 7 p.109.

suggestions that the modern conception of ADR is a mere restatement of the ancient African traditional methods of dispute resolution.⁹

ADR is of growing preference to parties because it provides a simple, fast and informal avenue for resolution and its mechanisms are now employed to resolve civil disputes outside the formal judicial system with mediators, conciliators and arbitrators performing the roles of conventional judges.¹⁰ However, the major problem hindering rapid development of ADR in Nigeria is lack of understanding of its processes by the majority of the populace, including lawyers who hitherto have not received any formal ADR training. Other problems are dearth of qualified practitioners and lack of awareness by the populace of the advantages of utilizing ADR as a mechanism of dispute resolution.¹¹

II. The Evolution of Alternative Dispute Resolution and Arbitration in Nigeria

As noted earlier, ADR is not an imported concept into the Nigerian legal system. It has always been part of the customs and tradition of most indigenous communities.¹² While customary arbitration driven by local authorities including family heads, village heads or the council of elders in accordance with custom and tradition have been a prominent method of dispute resolution, other ADR

⁹Nwosu K..N. "Criminal Justice Reforms in Nigeria: The Imperative of Fast Track Trials; Plea Bargains; Non Custodial Options and Restorative Justice" p. 5-6 available at <http://www.nigerianlawguru.com/criminal%20law%20and%20procedure/CR> accessed 13th January, 2017; Bello A. T. "Customary and Modern Arbitration in Nigeria: A Recycle of Old Frontiers" Journal of Research and Development (2014) vol. 2 No.1 pp. 50-58.

¹⁰Daibu A. A. "The Lagos State Arbitration Law and the Doctrine of Covering the Field: A Review" p.44; Bukar B. A. "Emerging Trends in Alternative Dispute Resolution: From Mono Door to Multi-Door" Arbitration (2013) vol. 79 No. 1 p. 72; Hogan R "ADR : Adding Extra Value to Law" Arbitration (2012) vol 78 No. 3 p. 247; Orojo J. O. and Ajomo M. A. Law and Practice of Arbitration and Conciliation in Nigeria, p.4; Fagbemi S. "The Doctrine of Party Autonomy in International Commercial Arbitration: Myth or Reality?" p.222.

¹¹Adekoya, F., ADR and the Future of Legal Practice. Luncheon Address at Ilesha branch Law Week Awards held on 28th November, 2003. p. 2.

¹²Oba A. A. "Juju Oath in Customary Arbitration and their Legal Validity in Nigerian Courts" p. 142; Ezejiofor G., The Law of Arbitration in Nigeria (Longman Nigeria Plc. Lagos 1997) p. 22; Emiola A. The Principles of African Customary law pp.1, 51-73; Igbokwe V.C. "Law and Practice of Customary Arbitration in Nigeria: Agu v. Ikewibe and Applicable Law issues Revisited" p. 201.

mechanisms have always existed too.¹³ Parties have mostly tried to resolve their disputes by themselves through negotiation, failing which the assistance of senior kinsmen is sought (mediation). If this second option failed, the matter would be taken to the Head of the neighborhood in which the defendant lived (neutral evaluation/mediation). In the event the matter could not be resolved, it would be referred to a High Chief or the King for a binding decision (arbitration).¹⁴

It is pertinent to note that these hierarchical channels of dispute resolution generally apply in most Nigerian communities. The application of all the above practices is not only to ensure justice but also reconciliation, good neighborliness, stability, peaceful co-existence and social equilibrium within the community.¹⁵ Indeed, the unique feature of the Nigerian traditional ADR system and its simplicity are the reasons why the advent of the modern ADR is viewed as a recycle of the African customary jurisprudence.¹⁶

The existence and validity of ADR in most African customs were given judicial recognition in the case of *Larbi v. Kwasi*¹⁷ where the Privy Council held that customary arbitration was valid and binding on the parties and that it would be repugnant to good sense and equity for a losing party to reject the decision of the

¹³Other traditional methods of resolving disputes include Negotiation, Mediation, Oath taking, Divination, and Trial by ordeal among others. See Emiola A., *The Principles of African Customary Law*, pp. 51-73; Ezejiofor G. *The Law of Arbitration in Nigeria*, pp. 7-12, 27-29 ; Aina, K., "The Multi-Door Courthouse Concept: Taking Lawyers out of the Court: Principle of Negotiation and Mediation" Edited by Azinge, E. & Ani, C. (Abuja) 2012 NIALS Press. p. 264.

¹⁴Aina, K., "The Multi-Door Courthouse Concept: Taking Lawyers out of the Court: Principle of Negotiation and Mediation" p.264.

¹⁵Ibid; Akanbi M. M., Abdulrauf L. A. and Daibu A. A. "Customary Arbitration in Nigeria: A Review of the Extant Judicial Parameters and the Need for Paradigm Shift" *Journal of Sustainable Development Law and Policy* (2015) vol. 6 No.1 pp. 205,207.

¹⁶Gazama, J.K., *Development and Practice of ADR and Arbitration in Nigeria* <http://www.gadzama.com/index.php?s=3> accessed 14th March 2017; Bello A. T. "Customary and Modern Arbitration in Nigeria: A Recycle of Old Frontiers" pp. 50-58; Nwosu K..N. "Criminal Justice Reforms in Nigeria: The Imperative of Fast Track Trials; Plea Bargains; Non Custodial Options and Restorative Justice" p. 5-6.

¹⁷(1952)13 WACA 76.

arbitrator(s) to which he had previously agreed. Similarly in *Mensa v. Akpampong & Ors*¹⁸ the West African Court of Appeal held that a decision reached in customary arbitration was binding on the parties in so far as it was in accordance with native law and custom and therefore, an unsuccessful party was estopped from reopening issues decided therein.¹⁹ Also in *Ohiaeri v. Akabeze*²⁰ similar conclusion was reached.

The advent of the modern ADR came with the colonization of Nigeria.²¹ Hence, the sources of the Nigerian laws of ADR and Arbitration include the customary laws of various Nigerian communities, English Common Law, the local enactments on ADR and Arbitration which incorporated the principles of common law, doctrine of equity and the English statutes of General Application.²²

Statutory arbitration is one of the most suitable means of resolving commercial disputes in Nigeria.²³ It is an alternative method of dispute resolution in which a neutral third party appointed by the parties hear and determine their dispute in a judicial manner after which a binding decision is given in form of an award.²⁴ The

¹⁸(1940) 6 WACA 118.

¹⁹Ariyoosu D.A. "Customary Arbitration As A Dispute Mechanism And Its Operational Frame Work As Estoppel Per Rem Judicatam" University of Ilorin law Journal vol. 5 No.1 (2009) p. 102.

²⁰(1992) NWLR (Pt. 221) 1 at p. 7.

²¹Nigeria was a British colony until 1960 when it got its independence. For a detailed history of the Nigerian historical link with common law, see Olowu D. and Lasebikan F., Sources of Law in Nigeria in Sanni A. ed. Introduction to Nigerian Legal Method (Obafemi Awolowo University Press Limited, Ile-Ife 2006) pp. 245-256; Asein J. O. Introduction to Nigeria legal System 2nd Edition (Ababa Press Ltd. Lagos 2005) pp. 98- 104; Tobi N. Sources of Nigerian Law (MIJ Professional Publishers, Lagos, 1996); Obilade A. O., The Nigerian Legal System (Spectrum Books Ltd, Ibadan 1979) pp. 17-52.

²²The English common law rules, the doctrines of equity and the Statutes of general application on arbitration are also part of the sources of Nigeria arbitration laws because of her colonial historical link with the Britain. See generally Ejiofor. G, The Law of Arbitration in Nigeria, p.15; Gadzama J.K. Development and Practice of ADR and Arbitration in Nigeria; Obilade A. O., The Nigerian Legal System pp. 17-52; Asein J. O. Introduction to Nigeria legal System, pp. 98- 104.

²³Daibu A. A. "Application of the Rules of Natural Justice in Arbitral Proceedings in Nigeria" Ife Juris Review (2013) vol. 1, p. 58-59; Chukwuemeire A.I. "Arbitration and Human Rights in Africa" African Human Rights Law Journal (2007) vol. 7 pp.108- 109.

²⁴Olorunfemi J. O "The Effect of Arbitration Agreement on The Jurisdiction of The Court in Nigeria" Nigeria Journal of Public Law (2009) vol. 2 No. 1 p. 310; Adewuyi T. A. "The Effect of Section 20 of the Admiralty Jurisdiction Act No 59 Of 1991 on International Arbitration Clauses" University of Ilorin law Journal 2006, Vol. 1 p. 1; Ejiofor G., The Law of Arbitration in Nigeria p. 3.

first indigenous legislation on arbitration in Nigeria was the Arbitration Ordinance²⁵ which was later re-enacted as Arbitration Act.²⁶ The law was applicable to the whole country.²⁷ It borders strictly on domestic arbitration as there were no provisions for international arbitration.²⁸ When Nigeria got its independence in 1960, the application of the Arbitration Act was restricted to Lagos, which was then Federal Capital Territory. The three regions had their separate arbitration laws thus; the Arbitration Law of Northern Nigeria 1963, Arbitration Law of Western Nigeria 1959 and Arbitration Law of Eastern Nigeria 1963. The states created out of these regions adopted the laws applicable to their states.²⁹ In 1988, the Federal Government of Nigeria adopted the United Nations Commission on International Trade Law (UNCITRAL) Model Law on International Arbitration through the promulgation of the Arbitration and Conciliation Decree No. 11 of 1988.³⁰ The decree was compiled along with other amendments and included in Laws of the Federation of Nigeria 1990 as the Arbitration and Conciliation Act (ACA).³¹ Although the ACA was promulgated during the military regime as a decree in 1988, it was deemed an Act of the National Assembly by virtue of Section 315 of the Nigerian Constitution. Presently, the principal law regulating statutory arbitration and conciliation arising from written and voluntary agreement to arbitrate in Nigeria is the ACA.³² Recently the Lagos state government enacted its own Arbitration Law on the ground that the ACA could not meet the challenges of contemporary

²⁵Ordinance 16 of 1914. It was an adaptation of the 1889 English Arbitration Act. See generally Daibu A. A. "The Lagos State Arbitration Law and the Doctrine of Covering the Field: A Review" p.45-47; Ezeji for G., The Law of Arbitration in Nigeria p. 15-18; Orojo J.O. and Ajomo M. A. Law and Practice of Arbitration and Conciliation in Nigeria, p. 36.

²⁶Cap. 13, Laws of the Federal Republic of Nigeria, 1958.

²⁷Daibu A. A. "The Lagos State Arbitration Law and the Doctrine of Covering the Field: A Review" p.45-46

²⁸ Ibid.

²⁹Ibid p. 46.

³⁰Ezeji for G., The Law of Arbitration in Nigeria p. 15.

³¹Arbitration and Conciliation Act herein after referred to as the "ACA" Cap 19, Laws of the Federation of Nigeria 1990, which is now Cap A18 Laws of the Federation of Nigeria 2004.

³²The ACA provide for a unified legal framework for the fair, effective and efficient settlement of commercial disputes by arbitration and conciliation and applies throughout Nigeria. See the long title of ACA available at <http://www.nigeria-law.org/ArbitrationAndConciliationAct.htm> accessed 15th march, 2017 see also section 58 thereof.

international standard relevant to the social- economic circumstance of Lagos State.³⁴ The validity or otherwise of the said Lagos State Arbitration Law has been a subject of intense debate³⁴ which is outside the scope of this article

III. Legal Regime of Alternative Dispute Resolution and Arbitration in Nigeria

The major sources of ADR and arbitration laws in Nigeria are the customary law, common law and Nigerian Statutes. Customary law governs the oral and unwritten arbitration agreement.³⁵ The provision of sections 315(3) and 4(b) of the Nigerian Constitution³⁶ as well as section 35(b) of the ACA also buttress the

³⁴Lagos State Arbitration law No.1 which came into force on the 18th May, 2009. See Rhodes-Vivour A. "The Federal Arbitration Act and the Lagos state Arbitration Law: A Comparison" p. 1 available on line at http://www.google.nl/search?client=ms-rim&hl=en&g=lagos+state+arbitration+law&ie=UTF-8&channel=browser&gws_rd=cr&ie=oq2CVOOjBYXkUvGygugP accessed 3^d February, 2017 p; Emilia O. "A Critique of the New 2009 Arbitration Law of Lagos State" Apogee Journal of Business, Property & Constitutional Law (2010) vol. 2 No. 5 p. 1 available on line at <http://eprints.soas.ac.uk/12580/> accessed 27th December, 2016.

³⁵See generally Akanbi M.M. "The Nigerian Arbitration Act 1988 s.58 and the doctrine of covering the field: C.G.de Geophysique v Etuk" Arbitration (2006) vol. 72 No.3pp. 283-2847; Olawoyin A. A. "Constructing the Road to Arbitral Prevalence: The Arbitration Law of Lagos State 2009 in Perspective" International Arbitration Law Review (2015) vol. 18 No.2 pp.34-46; Daibu A. A. "The Lagos State Arbitration Law and the Doctrine of Covering the Field: A Review" p.44.-52; Bamodu G. "A Field not Covered: Arbitration and the Nigerian Constitution" The Gravitas Review of Business and Property Law (2016) vol.7 No2 pp. 36-49; Ikeyi and Amucheazi, Applicability of the Arbitration and Conciliation Act: which Field Does the Act Cover? (2013) 57(1) Journal of African Law 126, 141; Idomgie P. O. "The Doctrine of Covering the Field and Arbitration Laws in Nigeria" Arbitration (2000) vol. 66 No. 3 pp.193 - 198; Chukwuemerie "Commercial and Investment Arbitration in Nigeria's Oil and Gas Sector" (2003) pp. 4-13; Asouzu A. A. Arbitration and Judicial Power' in Nweze C.C. (ed), Justice in the Judicial Process: Essays in Honour of Honourable Justice Eugene Ubaezonu, JCA(Fourth Dimension Pub, Enugu 2002) 362; Orojo J. O. and Ajomo M. A., Law and Practice of Arbitration and Conciliation in Nigeria p. 25; Chukwuemerie A. 'International Commercial Arbitration and the UNCITRAL Model Law under written Federal Constitutions: Necessity versus Constitutionality in the Nigerian legal framework' in Chukwuemerie (ed), Studies & Materials in International Commercial Arbitration (Law House Books, Port Harcourt 2002) p. 103.

³⁶Customary arbitration has been given judicial notice by several decided cases. See Inyang v. Essien 1957(2) FSC 39, Njoku v. Ekeocha (1972) ECSLR 199, Ekwueme v. Zakari (1973)ECSLR 631 and Oline v. obodo 1958(5) SCNLR 298.

³⁷It has been argued that by virtue of section 315(3) and (4)(b) of the Nigerian Constitution, customary law in which customary arbitration derives its basis is an existing law being a body of laws in force before the promulgation of the 1999 constitution. See also Section 122(2) (j) and section 70 of the Evidence Act (Cap E. 14) 2011. Also section 35(b) of ACA envisages that arbitration may be conducted in accordance with such "other laws". It is thus submitted that customary arbitration is not statutory arbitration but arbitration in accordance with customary law. See Daibu A.A and Abdulrauf L. A. "Challenges of the Practice of Customary Arbitration in Nigeria" The Nigerian Juridical Review (2014)vol. 12 p. 104.

existence and validity of customary arbitration under the Nigerian law. In the case of *Agu v. Ikewibe* customary arbitration was recognized and accepted as distinct and different from arbitration under the statute.³⁷

The Nigerian Constitution encourages the use of ADR and arbitration in resolving international disputes as one of the basic foreign policy objectives.³⁸ The Constitution emphasizes the adoption of negotiation, mediation, conciliation, arbitration and adjudication in the settlement of international disputes and treaty obligations.³⁹ Although the Constitution specifically states that such ADR mechanisms as negotiation, mediation, and conciliation shall apply to international disputes, it is submitted that those mechanisms can also be employed in resolving domestic disputes as there is nothing in the entire Constitution to the contrary.

Domestic commercial arbitration is primarily governed in Nigeria by the Arbitration and Conciliation Act (ACA)⁴⁰ which is based on the United Nations Commission on International Trade Law (UNCITRAL Model law) and the New York Convention on the Recognition and Enforcement of Arbitral Award subject to some modifications.⁴¹ Consequently, most written and voluntary domestic arbitration agreements are governed by the ACA, while oral and unwritten arbitration agreements are governed by customary law.⁴² On the other hand, the UNCITRAL Model law and The New York Convention are the major laws governing International commercial arbitration. In addition, almost all High Court (Civil Procedure) Rules in Nigeria have provisions that encourage and, or enjoin parties to explore amicable settlement of their disputes by reference to arbitration, conciliation, mediation and any other recognized forms of ADR.⁴³

³⁷Edu O.K, Effect of Customary Arbitral Awards on Substantive Litigation: Setting Matters Straight.

³⁸Section 19(d) of the Nigerian Constitution.

³⁹Ibid.

⁴⁰Ugonna E A, Legal framework of Arbitration in Nigeria, available online at www.academia.edu/legal accessed on 13th March 2017.

⁴¹See Lagos State Arbitration law No 10 of 2009, Lagos State Multi door court law 2007 that established the Lagos State Multi Door Court House.

⁴²*Agu v. Ikewibe* (1991) 3 (NWLR) (PT 180) 385; *Anyansu v. Ugwuence* (1995) 6 NWLR 255.

⁴³See Order generally Order 18 Rule 1 of the Federal High Court (Civil Procedure) Rules 2009, Order 25 Rule 1(2) (c), (l) and (m) of the High court of Lagos State (Civil Procedure) Rules 2012, Order 33 Rule 2(2) (c) of the Kwara State High Court (Civil Procedure Rules) 2005 and Order 32/33 Rule 2(2) (c) of the Kogi State High Court (Civil Procedure) Rules 2006 among other Rules of Courts.

For instance, as a precondition for accepting a matter for filing in the Lagos State High Court, the (Civil Procedure) Rules 2012 specifically requires that counsel must provide a sworn pre-action protocol form indicating the attempt made to settle the dispute through ADR.⁴⁴ Similar provision is contained in the High Court (Civil Procedure) Rules of the Federal Capital Territory (FCT) Abuja.⁴⁵ The Federal High Court Act also encourages reconciliation in both civil and criminal matters before it.⁴⁶ Also the Economic Financial Crimes Commission (EFCC) Act,⁴⁷ the Administration of Criminal Justice Law of Lagos State (ACJL)⁴⁸ and the recently enacted Administration of Criminal Justice (ACJ) Act⁴⁹ have provisions for plea bargaining which is a form of ADR mechanisms in criminal litigation.

The Lagos multi door court house was established by Lagos State Multi-Door Court Law (LMDCL)⁵⁰ to serve as an alternative dispute resolution centre to enhance access to justice and supplement litigation in the resolution of disputes.⁵¹ The LMDCL does not only encourage arbitration in the resolution of dispute, but also mediation, neutral evaluation and any other ADR mechanism as found appropriate in the resolution of dispute.⁵²

Other relevant provisions include the Rules of Professional Conduct⁵³ by which legal practitioners are obliged to inform clients of the option of ADR mechanism before resorting to litigation. Also, the Matrimonial Causes Act⁵⁴ places a duty on

⁴⁴Order 3 Rule 2 of the Lagos State High Court (Civil Procedure) Rules 2012.

⁴⁵Order 17 (1 a-d).

⁴⁶Section 17, Federal High Court Act, Cap. F12, Laws of the Federation of Nigeria 2004.

⁴⁷See section 14 (2) of Economic and Financial Crimes Commission (Establishment, etc.) Act Cap. E.1 Laws of the Federation of Nigeria, 2004.

⁴⁸See section 76 and of the Administration of Criminal Justice Law of Lagos State 2007 now sections 75 and 76 of the Administration of Criminal Justice (Repeal and Reenactment) Law of Lagos State 2011 in herein referred to as "ACJL" which is the extant procedural law for criminal trials in Lagos State. The law came to force on 8th day of August 2011.

⁴⁹See section 270 ACJ Act.

⁵⁰Enacted 18th May 2007

⁵¹See Section 1(1) and 2(a) and 3(1) of the Lagos State Multi Door Court Law

⁵²Ibid

⁵³Rule 15(d)

⁵⁴Section 11(1a-c)

the court in which a matrimonial cause has been instituted to give room for reconciliation between parties. Some statutes provide for statutory arbitration. Thus, arbitration can arise either voluntarily as provided for in the ACA, or by the order of court as provided in the Rules of Court or by statutes.⁵⁵

VI. Challenges Associated with the Practice of Arbitration and Alternative Dispute Resolution in Nigeria

The development and practice of arbitration and ADR mechanisms in Nigeria are confronted by challenges from different dimensions. This section of the article considers some of the challenges or concerns over its efficient operation from the different segments of the Nigerian society.

(a) Challenges relating to personnel

There is a general lack of awareness on the operation of ADR among the Nigerian populace including lawyers.⁵⁶ In particular, a good number of lawyers have little or no knowledge about ADR mechanisms and its operations and this account for its underutilization.⁵⁷ Until recently ADR and arbitration are not offered as a course at the university and law school⁵⁸ and as a result, lawyers without basic knowledge of ADR sometimes confuse various ADR techniques. Hence, most lawyers prefer litigation to arbitration and ADR because they not familiar with the advantages and other benefits of arbitration and ADR.⁵⁹ Apart from the fact that litigation is time consuming and unpredictable, arbitration and ADR provides a less acrimonious way of resolving disputes than by litigation.⁶⁰

⁵⁵See for example section 9 Trade Dispute Act CAP. T8 Laws of Federation of Nigeria 2004

⁵⁶Akanbi M.M. "Challenges of Arbitration Practices Under the Nigerian Arbitration and Conciliation Act of 1988: Some Practical Considerations" p.331

⁵⁷Ibid

⁵⁸ADR and Arbitration are not part of compulsory /core courses at the university. It was mainly treated as part of civil procedure, Cooperate Law Practice and Law in Practice in Nigeria. Some university now offers ADR and Arbitration as elective course at undergraduate and master's levels.

⁵⁹Siemer D. "Perspective of Advocates and Clients on Court Sponsored ADR" Dispute Resolution, Negotiation and Processes (Little, Brown and Company Law Book Division, 1996) p.423.

⁶⁰Daibu A.A. "The Lagos State Arbitration Law and the Doctrine of Covering the Field: A Review" p.44, 45; Fagbemi S. "The Doctrine of Party Autonomy in International Commercial Arbitration: Myth or Reality?" p. 223.

Even the few who had professional training in ADR and arbitration harbor the general sentiment that ADR limits their control over their clients' cases. Since these lawyers have closer familiarity with their powers under the Rules to manipulate court processes for example by setting the schedules or preparing terms of settlement,⁶¹ they hold strong distrust for ADR which seems to concentrate most of the powers in the mediators, or conciliators, neutral evaluators and arbitrators who largely drive the process without following any strict rule.⁶² ADR procedure is flexible and takes place in relaxed atmosphere which permits or enables free-flowing discussions of subjects including those not directly in issue but by nature necessary for resolving the real issues in dispute contrary to rules of pleadings in civil litigation.⁶³

This unhealthy development cannot be totally blamed on lawyers who by training follow precedents obtained from previous cases or decisions as opposed to ADR where awards and findings are absolutely confidential between arbitrators or mediators and the parties and without any report made available to the public.⁶⁴ It has however been observed that awards of arbitrators, mediators or neutrals can be reported with the permission of the parties. This will not only guide practitioners in the field but also provide information on how to access the workings of institutional ADR centers.⁶⁵

Litigation in addition involves complex procedures including appearances and application of rules of evidence by which each party proves his case and test the

⁶¹A legal practitioner can proceed with his case in default of appearance of the opposing party if there is evidence of service, he can also apply for judgment in default of pleadings, apply for order of discovery and inspection of documents. See Orders 17, 29 and 35 of the Kwara State High Court (Civil Procedure Rules) 2005.

⁶²Cho, F.F "Alternative Resolution vis-à-vis the Legal profession in Nigeria" Ahmadu Bello University Law Journal (2007) vol. 125-26 p. 152.

⁶³Ayinla L. A. et al. "Applicability of Alternative Dispute Resolution and Plea Bargaining in the Nigerian Criminal Justice System" African Nazarene University Law Journal (2014) vol.2 No. 2 p. 174-175; Daibu A.A. "The Lagos State Arbitration Law and the Doctrine of Covering the Field: A Review" pp.44-45.

⁶⁴See Mr Justice Hunter Hong Kong Disputes solutions, The Journal of the Chattered Institute of Arbitration (1992) Vol. 58, No2 p. 10.

⁶⁵Ibid.

case of the other party before addressing the court.⁶⁴ This adversarial approach limits the judge's role in determining the course of event to a mere arbiter.

Furthermore, many lawyers are not able to cope with any process that tends to deprive them of their advocacy skills such as the art of cross-examination and persuasive arguments at the end of a trial. Such lawyers will therefore find it difficult to embrace ADR mechanisms.⁶⁵

Even when parties finally agree to negotiate, a party's reasonable stance may be misconstrued as a sign of weakness by the other.⁶⁶ Thus the tendency is for lawyers appearing for parties to hold back from making concessions so as not to appear too ready to compromise.⁶⁹

The general public and most parties to a dispute perceive lawyers as "legal warriors" paid to fight the cause of their clients, a notion that basically underlies the engagement of legal practitioners.⁷⁰ It is equally notable that lawyers are often employed as last resort when all other attempts have failed. Thus, any suggestion of negotiation to such a client is seen as a sheer waste of time.⁷¹ There is however a great tendency that where such clients agree to settlement, they will resist subsequent demand by the lawyer for payment of his professional fee. This may not be unconnected with the general misconception that a lawyer has played no significant role in bringing about amicable settlement to deserve a fee.⁷² Thus majority of lawyers will hesitate to suggest settlement and rather prefer litigation

⁶⁴<http://www.thalia.de/shopping/produkte/englishche-buecher/111/9783848403769-domestic-commercial-arbitration-in-nigeria.html>. accessed on 19th March, 2017.

⁶⁵Akanbi M.M. "Challenges of Arbitration Practices Under the Nigerian Arbitration and Conciliation Act of 1988: Some Practical Considerations" pp. 330-331.

⁶⁶16Quckm D. Mandatory Mediation: An oxymoron? Examining the Feasibility of implementing a Court-Mandated Mediation program. p 5. www.cardozjcr.com/vol11no2/479-510pdf accessed 14th February 2017.

⁶⁹Ibid.

⁷⁰Ibid; McFarline, J "The new lawyer: Moving from warrior to conflict resolver" ADR Bullentin: vol 10 No.8 pp.180-182.

⁷¹Ibid; 16Quckm D. Mandatory Mediation: An oxymoron? Examining the Feasibility of implementing a Court-Mandated Mediation program. p 5. www.cardozjcr.com/vol11no2/479-510pdf

⁷²McFarline, J "The new lawyer: Moving from warrior to conflict resolver" pp.182-185.

order to earn fees from their clients.”

Furthermore, most mediators and neutral evaluators see saving and or reduction of cost as one of the basic benefits of settlement and thus always insist on a realistic time table for completion.⁷⁴ Lawyers working on hourly fee arrangements will therefore see ADR as an attempt to drive a wedge between them and their client thereby depriving them of their principal means of livelihood. Also the appointment of non-lawyers as neutrals, mediators and arbitrators often time create competence and credibility skepticism for a fair reasonable settlement.⁷⁵ Although this is not absolutely the case, factors which accounted for this include the non-availability of data on neutrals, mediators, conciliators and arbitrators with their areas of specialization, formal training undertaken by them, and standard requirements or qualification for the position in Nigeria.⁷⁶ This challenge especially as regards qualification confronts even the most developed countries like Canada, Britain and states in the United States of America.⁷⁷ Rather than establish well-defined requirements, ADR providers and stakeholders in such countries have by their seeming indifference allowed mediocrity to thrive. As a result, completion of a 40-hour training programme qualifies a person as a mediator.⁷⁸ A commentator observed as follows about mediators in the United States of America: “There are people out there trying to make money any way possible, taking the training and hanging out their shingle as mediator without having a clue of what they are doing.”⁷⁹

The fear expressed by some lawyers is further compounded not only by the fact that legal rights and procedures are often disregarded in mediation exercise, but

⁷⁴Ibid.

⁷⁵Oluyemi L.A.F. “The Competent Mediator,” in Azinge, E. & Ani, C. ed. *Principle of Negotiation and Mediation* (NIALS Press. 2012, Abuja) pp. 58-63.

⁷⁶The Lawyer Turns Peace Maker, ABA Journal, August 1996, pp.61-62; Oluyemi L.A.F. “The Competent Mediator,” pp. 59-61; McFarline, J “The new lawyer: Moving from warrior to conflict resolver” pp.182 - 183.

⁷⁷Aroyewo, A. “Ethical Consideration and Code of Conduct for Mediators” *Principle of Negotiation and Mediation* p.204.

⁷⁸The Lawyer Turns Peace Maker, ABA Journal, August 1996, p. 60.

⁷⁹Ibid; McFarline, J “The new lawyer: Moving from warrior to conflict resolver” p.182-185.

⁸⁰The Lawyer Turns Peace Maker, ABA Journal, August 1996, p. 60.

also by the fact that arbitration awards are usually final leaving the dissatisfied party with no room for appeal.⁸⁰ It is submitted that this approach is not only unfair and unconstitutional but also amounts to investing a mortal with absolute power subject to no form of review.⁸¹

In fact until recently, the practice of ADR especially arbitration and mediation involved people from all sectors of life most of them having nothing to do with the practice of law.⁸² These include such people as tax assessors, accountants, real estate brokers, surveyors and experts in other fields.⁸³ The participation of these persons in the practice of ADR raises some pertinent issues concerning their technical competence.

This ambivalent position of non-lawyers in the practice of mediation or ADR is better demonstrated with the dilemma often faced by such a mediator while providing assurance as to confidentiality of the proceedings. In this regard, they are obliged to explain the legal consequence to parties that by law, their communication during trial is not privileged and thus must be excluded from record of proceedings.⁸⁴

Another problem with the use of ADR mechanism lies in choosing an appropriate process for a particular matter.⁸⁵ The task of selecting or recommending an appropriate ADR mechanism often involves a critical evaluation of the facts and

⁸⁰Section 7(4) of the ACA. see also the case of *Ogunwale v. Syria Arab Republic* (2002) 9 NWLR (Pt.771) 127.

⁸¹Akanbi M.M "Contending without being Contentious: Arbitrators, Arbitration and Arbitrability" p.7.

⁸²Danib A. A. "Application of the Rules of Natural Justice in Arbitral Proceedings in Nigeria" p.58; Akanbi M.M. "Challenges of Arbitration Practices Under the Nigerian Arbitration and Conciliation Act of 1988: Some Practical Considerations" Arbitration p.329; Chukwuemerie A.I. "A Synergy of Opposite: Effective Commercial Justice, Rights and Liberties in African Jurisprudence" in Chukwuemerie (ed.) *Growing The law, Nurturing Justice* (Law house books port Harcourt 2005) p. 193; Butler D.W. and Finsen E. "South Africa" in Cotran and Amissah (eds), *Arbitration in Africa* (1996), p.215.

⁸³Akanbi M.M. "Challenges of Arbitration Practices Under the Nigerian Arbitration and Conciliation Act of 1988: Some Practical Considerations" p.329; Butler D.W. and Finsen E. "South Africa" in Cotran and Amissah (eds), *Arbitration in Africa* (1996), p.215.

⁸⁴Cho F.F. "Alternative Dispute Resolution vis-à-vis the Legal Profession in Nigeria" p.153.

⁸⁵This is generally known as forum selection.

circumstances of each case. For instance, the goals of the parties in making a choice of forum, amenability of the dispute to ADR settlement and the suitability or otherwise of the various ADR mechanisms are to be assessed. These are difficult issues that require lawyers' expertise and sometimes the court, in recommending or selecting appropriate ADR mechanisms for the parties.⁸⁶ Truly, consideration of these factors may often times not lead to a clear-cut answer to forum selection, it however, lends credence to the fact that forum selection raises a difficult question the answer to which ultimately rests not solely on the interests of the disputing parties and their counsel but also a consideration of public interest. Therefore, a proper analysis of the parties' dispute informs selection and recommendation of suitable ADR mechanism. When a process selection is being made, the question likely to be asked is whether public interest will be better served by a court or by ADR irrespective of what the parties think. For example, the referral of child custody disputes first to mediation is required by law in several jurisdictions in the United States of America.⁸⁷ Although, the disputing parents may have no interest in pursuing a better relationship but only desire a vindication for which they prefer the court to mediation, many American States believe that a better relationship between parents serves the public interest to improve the life of the child, hence the mandate for child custody disputes to go first, to mediation.⁸⁸ However, resort to the courts will be preferable if one of the disputant's conducts constitutes a public danger requiring sanction or where the dispute raises a significant question of statutory or constitutional interpretation.⁸⁹

The need for in-depth knowledge of arbitration and other ADR mechanisms on the parts of commercial transaction lawyers cannot be over emphasised. There is need to design an appropriate system prospectively, before disputes arise. Contract drafters should develop tailored arbitration and ADR clauses, and discourage reliance on generic "boilerplate" that postpones many decisions about process until the time of arbitration.

⁸⁶Sanders F. and Goldberge, B "Fitting the Forum to the fuss: A User-Friendly Guide to Selecting ADR Procedure," *Negotiation Journal*, Picum Publishing Co., 1994, p.61.

⁸⁷*Ibid* p. 60.

⁸⁸*Ibid*

⁸⁹Akanbi M.M "Contending without being Contentious: Arbitrators, Arbitration and Arbitrability" p.18-19.

(b) Parties-related Challenges

Recalcitrant parties often times constitute a formidable hindrance to effective application of ADR to resolution of disputes resolution in Nigeria.⁹⁰ In most cases, they would have engaged a number of extra judicial routes to resolve their problems before approaching their lawyers as last resort. In other words, they may already have a predetermined position that litigation is the only way out. Thus, while some people are aware of the frustrating and unsatisfying nature of litigation, others prefer it as the only option for self-vindication, catharsis, and often times an avenue to secure victory against their adversaries. Hence, for a lawyer to suggest ADR to such party, may make him appear to be incompetent and unserious. Infact, where the client heeds the advice to settle through negotiation and the outcome is unsatisfactory, the lawyer -could be seen as having given his client wrong advice.⁹¹

Despite calls for adoption of ADR where necessary and efforts of some state government, institutions and stakeholders, most parties still prefer litigation.⁹² The emphasis given to courts as ideal means of resolving disputes in Nigerian society is too pervasive and deeply entrenched to be easily jettisoned or swept away by the wind of ADR. Even in few cases where parties to a dispute are aware of the existence of ADR mechanism as alternatives to the court system, such mechanisms are often hard to locate because they lack the status of public institutions in many parts of the country. Where a large number of claimants are involved with prospect for multiple suits on almost similar issues, the stimulus for adoption of litigation is stronger due to the possibility of obtaining judicial precedent than for adopting ADR for amicable settlements.

(c) Government related Challenges

Apart from the Lagos state government which blazed the trail by

⁹⁰Siemer, p.426.

⁹¹Cho F.F. "Alternative Dispute Resolution vis-à-vis the Legal Profession in Nigeria" p.157.

⁹²Imam, I., The Legal Regime of Customary Arbitration in Nigeria Revisited. p.12. <http://www.uniolrin.edu.ng/publications/imami/UNIKOGICUSTOMARYARBITRATION2pdf>. accessed on 24th March, 2017.

institutionalizing ADR and arbitration in Nigeria,⁹⁵ other levels of government, the Federal Government, most states of the Federation and other tiers of government appear to lack the political will to promote, encourage or institutionalize the practice of ADR and arbitration in Nigeria.⁹⁴ The attitude of both the federal and some state governments towards the promotion of it has left much to be desired⁹⁵. The result is dearth of institutional ADR or arbitration centers and experienced providers due to which ADR becomes expensive and not readily available to vast majority of Nigerians as disputants have to pay for ADR services as against 'free judicial service' which they are accustomed.

The dearth of enabling statutes and regulatory bodies at both the Federal and State government levels affect the institutionalization and development of the ADR scheme. In this regard, the existing legislations require serious review to meet up with the current best practices.

(d) 'Lawyerization' of ADR Mechanisms

Despite the enormous benefits of ADR mechanism, the "lawyerization" of its processes particularly arbitration has continued to be a great challenge to its effective application.⁹⁶ The challenges relates to appointment of lawyers and retired judges as arbitrators and adoption of adversarial procedures of litigation as well as roles of lawyers as counsel in arbitration.⁹⁷

Arbitration is gradually turning into civil trials as retired judges and lawyers appointed as arbitrators or counsel are affected by their litigious and technical

⁹⁴The Lagos state government took a proactive measure by enactment of the Lagos state Multi-Door Law and Lagos State Arbitration Law 2007 and 2009 respectively. The Lagos State Multi Door Court House was the first in Africa. The measure taken by the Lagos state is providing platforms for the practice and development of various ADR processes in Nigeria.

⁹⁵ADR is now active in Kwara and Delta States. Kwara has a citizen mediation centre similar body also exist in Delta state while Edo State is in the process of instituting ADR.

⁹⁶Cho, F.F. *Alternative Dispute Resolution and Legal Profession in Nigeria: Issues, Problems and Prospects*, (unpublished Ph.D thesis submitted to Ahmadu Bello university, Zaria) 2006. p. 212-218.

⁹⁷Thomas J. Stipanowich, *Arbitration: The "New Litigation"* available at <<http://server05/production/D/DPB/7-3/DPB304.txt>> accessed 26th February, 2017.

⁹⁸Akanbi M.M "Contending without being Contentious: Arbitrators, Arbitration and Arbitrability" p.13

backgrounds.⁹⁸ The consequence is that greater expenses and longer time are spent on unnecessary objections, interrogatories and discovery of documents at the expense of expedited trial of real issues between the parties.⁹⁹

Parties now make extensive submissions including voluminous attachments to the arbitrators than they would ordinarily in regular courts. Conscious of a reputation to protect, the arbitrator is obliged to do a thorough review of the documents which takes a heavier toll on his time and energy than would ordinarily be required if the parties had presented shorter and more precise materials without sacrificing quality. It could be that arbitrators have greater expertise in the issue in contention, so parties dare to submit much more detailed information than they would before an ordinary court. Furthermore, unscrupulous parties may make unreasonable requests for time extension to produce immaterial additional information in a desperate bid to delay the arbitral proceedings. Hence, the complaints that arbitration is fraught with prolonged hearing and high cost which often questions the assumption that it is an alternative in this regard.¹⁰⁰

The criticisms of arbitral and other ADR proceedings have necessitated the need for a reform of the practice of arbitration in order to return arbitration to its former popularity and glory. As an alternative to traditional arbitration, some arbitral institutions have adopted specific sets of rules for fast track arbitration, primarily intended for use in less complex cases.

V. The Imperative of Introducing Fast Track Arbitration to Nigeria

The challenges of arbitration and other ADR mechanisms discussed above require a more innovative approach. Fast track arbitration seems to be a suitable mechanism in this respect. This section of the article therefore examines the nature and significance of fast track arbitration as a dispute resolution

⁹⁸ Thomas J. Stipanowich, *Arbitration: The "New Litigation"*, p.

⁹⁹ David B. Lipsky & Ronald I. Seeber, *the appropriate resolution of corporate disputes- A REPORT ON THE GROWING USE OF ADR BY U.S. CORPORATIONS* pp. 9-14.

¹⁰⁰ Leslie A. Gordon, *Clause for Alarm*, ABA Journal, Nov. 2006, p. 19

¹⁰¹ Redfern A. & Hunter, M. *Law and Practice of International Commercial Arbitration* 2004, p. 6-43.

mechanism in Nigeria.

(a) The Nature of Fast Track Arbitration

Fast track arbitration is not commonly applicable in Nigeria despite the introduction of ADR mechanisms. It is a general characterization for an accelerated arbitral procedure.¹⁰¹ It is a unique system of arbitration with a time frame.¹⁰² Fast track arbitration proceedings usually have a stringent deadline and suitable for both domestic and international disputes.¹⁰³ It may be employed in an ad hoc as well as institutional arbitration.¹⁰⁴ Several important international arbitration institutions offer specific rules for fast track arbitration. Among these institutions are the International Chamber of Commerce (ICC), American Arbitration Association (ABA), International Centre for Settlement of Investment Disputes (ICSID), International Court of Justice (ICJ), Arbitration Institute of the Stockholm Chamber of Commerce, and, most recently, the German Institute of Arbitration.¹⁰⁵ The increase in number of arbitral institutions creating such special rules for expedited proceedings demonstrates the need for speed in arbitral proceedings.¹⁰⁶ The most well-known fast track arbitration cases to date were conducted under the International Chamber of Commerce (ICC) Arbitration Rules.¹⁰⁷

Fast track arbitration is not a distinct kind of arbitration on its own, rather, it professes certain uniqueness by encompassing various forms of expedited procedures without fixed features. However, there is a set of procedural possibilities which in different combinations form recognized features of fast track arbitrations.¹⁰⁸ The key element of fast track arbitration lies in strict time

¹⁰¹Ibid

¹⁰²Fouchard, Gaillard, Goldman on International Commercial Arbitration, 1999, Gaillard & Savage. p. 680.

¹⁰³Ibid

¹⁰⁴Klaus P. Berger, Die ergänzenden Regeln für beschleunigte Verfahren der Deutschen Institution für Schiedsgerichtsbarkeit, 6 Schiefs VZ 105 (2008).

¹⁰⁵For more institutions that have adopted specific rules, see Rudolf Fiebinger & Christian Gregorich, Arbitration on Acid, in Austrian Arbitration Yearbook p.237 (Klausegger, Klein, Kremslehner, Petsche, Pitkowitz, Power, Welser & Zeiler eds., (2008).

¹⁰⁶See Article 32 of the ICC Arbitration Rules which provides for expedited procedures.

¹⁰⁷Irene Wesler & Susanne Wurzer, Formality in International Commercial Arbitration – For Better or for Worse?, in (2008) (Klausegger, Klein, Kremslehner, Petsche, Pitkowitz, Power, Welser & Zeiler eds., p.248

limits. Such time limits apply to the parties as well as to the arbitrators.¹⁰⁹ The parties are afforded relatively short time for the nomination of their respective arbitrator, as well as for their submissions and preparation for the oral hearing.¹¹⁰

The arbitrators upon appointment also have a time limit to hear the parties and issue their award.¹¹¹ The time limit restrictions constitute a challenge as it may lead to a situation in which the losing party may contest the issuance of an award after the time limit has elapsed.¹¹²

Another important element in fast track arbitration is the limitation of procedural steps.¹¹³ For this reason, most specific regulations on expedited proceedings contain restrictions on the number of written submissions as well as limitations regarding the hearing.¹¹⁴ As the drafting of the award itself may take some time in ordinary arbitral proceedings, most rules for expedited arbitrations also provide for expedited arbitral awards. For example, Under Article 35 of the Arbitration Institute of the Stockholm Chamber of Commerce's Rules for Expedited Arbitrations, there is no obligation to include reasons for the award, unless expressly requested by one of the parties.¹¹⁵

However, fast track arbitration is not possible without modern means of communication.¹¹⁶ Communication in the form of email, fax, telephone and video conferences, and any other appropriate means of avoiding unnecessary

¹⁰⁹Redfern A. & Hunter, M. Law and Practice of International Commercial Arbitration 2004, p. 6-43; Fouchard, Gaillard, Goldman on International Commercial Arbitration, 1999, Gaillard & Savage, p. 680.

¹¹⁰Redfern A. & Hunter, M. Law and Practice of International Commercial Arbitration 2004, pp. 7-13.

¹¹¹Fouchard, Gaillard, Goldman on International Commercial Arbitration, 1999, Gaillard & Savage, p. 680.

¹¹²Irene Wesler & Susanne Wurzer, Formality in International Commercial Arbitration – For Better or for Worse?, p. 248.

¹¹³Ibid; Redfern A. & Hunter, M. Law and Practice of International Commercial Arbitration, pp. 6-43.

¹¹⁴Klaus P. Berger, Die ergänzenden Regeln für beschleunigte Verfahren der Deutschen Institution für Schiedsgerichtsbarkeit, 6 Schiefs VZ 105 (2008).

¹¹⁵See Annex to the DIS (meaning) Arbitration Rules, available at http://www.dis.Arb.de/scho/2008_SREP.html accessed 24th February, 2017.

¹¹⁶See Arbitration Institute of the Stockholm Chamber of Commerce, Rules for expedited Arbitrations, available, available at http://www.sccinstitute.com/upload/shared_files/regler/2007-expedited_rules_eng.pdf accessed 28th February, 2017.

formality, is a key factor in the considerably shortened duration of the fast track arbitration proceedings.¹¹⁷ Compared to regular rules, fast track arbitration rules generally involve certain limitations on the scope of the procedure. Some of those main features include a sole arbitrator, limited number of submissions, limited time for filing each submission, limited scope of the submissions, an express possibility not to have a hearing, an express possibility for the arbitrator not to provide reasons in the award and very short time limit for the arbitrator to issue an award among others.¹¹⁸

(b) The Importance of Fast Track arbitration in Nigeria

There are numerous advantages of fast track arbitration. The first and main advantage of fast track arbitration is that parties are assured a speedy procedure. In fact, this originally was one of the key ideas of arbitration.¹¹⁹ However, as identified above, arbitration has proved not to be as fast as anticipated when it comes to disposal of cases. The greatest advantage of fast track arbitration is that decisions are rendered within weeks or, at the very most, months.¹²⁰ It is, therefore, much faster in relation both to a normal arbitration procedure and traditional court proceedings.¹²¹ Usually fast track arbitration compel the parties to submit their position in a straight forward way at the very beginning, thereby showing the other party what the conflict is all about. Sometimes, this facilitates an early amicable settlement of the real issues in dispute.¹²²

Another advantage of fast track arbitration is possibly wider range of party

¹¹⁷See commercial Arbitration at its Best: Successful Strategies for Business Users 35-62 (Thomas J. Stiphaowich & Peter H. Kaskell eds., 2001) [hereinafter COMMERCIAL ARBITRATION AT ITS BEST] (delineating the issues the drafter of an arbitration clause should consider in crafting effective arbitration procedures).

¹¹⁸www.cdr-news.com accessed 26th February, 2017.

¹¹⁹See Fouchard, Gaillard, Goldman on International Commercial Arbitration, p. 680; Rudolf Fiebinger & Christian Gregorich, Arbitration on Acid, p. 237.

¹²⁰Redfern A. & Hunter, M. Law and Practice of International Commercial Arbitration, p. 8-15.

¹²¹Ibid.

¹²²Tribunal Federal (Bundesgericht), Feb 8, 1978, Chrome Resources S.A. v. Leopold Lazarus Ltd. In XI Yearbook Commercial Arbitration 541 (1986) (Switzerland). 48) OLG Schleswig, March, 30, 2000, docket no. 16 schH 5/99, in 46 RIW 709 (2000) (Germany).

autonomy.¹²⁷ If the parties have prior agreement regarding what they expect from a future arbitration, they can quite freely determine the conduct and duration of the proceedings.¹²⁸ In this respect, however, we may easily contend with the fact that, quite often, the arbitration clause is added at a time when the parties are far too exhausted or simply unwilling to prescribe specific rules or procedures to be applied in the event of a dispute. In sum, there is more party influence on the course of proceedings if clear rules are agreed upon by the parties. Even the right to be heard or the question of due process may be influenced by what the parties negotiate beforehand.¹²⁹

One other key factor for success of fast track arbitration is the possibility and the will of the arbitrators to devote nearly all of their time to the pending arbitration. Therefore, there is a need to find arbitrators who are prepared to do this. In any event, parties will benefit from arbitrators who are truly experts, both with respect to the facts and the law and who therefore are conscientious professionals able to assimilate the key issues and significant information from the filings.

Furthermore, fast track arbitration results lower costs to all parties involved. Fewer submissions, stricter time limits, shorter hearings, more efficiency in the procedure all contribute to minimal costs.¹³⁰ However, there are some hidden risks. There is a chance for instance that, in fact, fast track arbitration is not as cost-saving as it appears. One must consider that in order to keep to short deadline, lawyers and arbitrators have to be retained nearly full-time. Notwithstanding the above highlighted benefits of fast track arbitration, it also has some challenges as examined below:

(c) Challenges and Prospects of Fast Track Arbitration

As noted earlier, one of the basic benefits of fast track arbitration is speedy disposal of disputes within a specified period of time. Ironically this benefit,

¹²⁷Fagbemi S. "The Doctrine of Party Autonomy in International Commercial Arbitration: Myth or Reality?" pp.223-224.

¹²⁸Redfern A. & Hunter, M. *Law and Practice of International Commercial Arbitration*, p. 8-14.

¹²⁹On the importance of the principle of party autonomy in arbitration, see Fagbemi S. "The Doctrine of Party Autonomy in International Commercial Arbitration: Myth or Reality?" pp. 226-229.

¹³⁰Fouchard, Gaillard, *Goldman on International Commercial Arbitration*, p. 680.

which makes an excellent avenue for parties that seek a quick solution to a pending contractual dispute (e.g., price adaptation clause), constitute a challenge. This is because its speed makes it unsuitable for certain technical disputes that require the calling of expert witnesses or submission of factual questions to tribunal-appointed experts.¹²⁷ Fast track arbitration also is not suitable for complex disputes or multi-party proceedings.¹²⁸

Fast track proceedings frequently operate without any expert, this is a potentially serious disadvantage where the arbitrators lack experience in the parties' business or the factual questions of the case.¹²⁹ Of course, while parties can compensate for this by appointing technical experts as arbitrators, but as noted earlier, technical experts are usually not trained to deal with legal intricacies, including the application of the tight fast track procedural rules.¹³⁰ Similarly, submitting private expert opinions and counter-expert opinion may be problematic especially where there is no specific law or rules regulating their admission.¹³¹

Fast track proceedings usually entail a lower degree of proof because the specified time limit may not give room for extensive evidentiary procedures, such as written witness statements, examination in chief, cross-examination and expert opinions. In some cases, this may mean that there is no oral hearing at all as a tribunal may dispense with hearing as long as there are other means of adducing evidence.¹³² In this circumstance, written witness statements of witnesses must be prepared and submitted to arbitrator(s) on short notice.¹³³ In *Panhandle* case,¹³⁴ the award was delivered within two and a half months from

¹²⁷ John M. Townsend, *Drafting Arbitration Clauses: Avoiding the Seven Deadly Sins*, available at \\server05\productn\D\DPB\7-3\DPB304.pdf accessed 18th February, 2017.

¹²⁸ Ibid.

¹²⁹ DEPAUL BUSINESS & COMMERCIAL LAW JOURNAL (2004) Vol.7:401. p. 450.

¹³⁰ Ibid.

¹³¹ [www.cpradr.org/portals/0/fast track.jun06.pdf](http://www.cpradr.org/portals/0/fast%20track.jun06.pdf) accessed 24th September 2019.

¹³² See the *Panhandle* case, cited above, where the arbitrators accept their nominations based on the fact that the arbitration is to be concluded within the Christmas holidays.

¹³³ Ibid.

¹³⁴ The notorious fast track arbitration case of *U. S. v. Panhandle Eastern Corporation* 672 F. Supp 149 (D. Del. 1987) was decided under the ICC Rules.

the request for arbitration and even more remarkably within two and a half weeks of the constitution of the arbitral tribunal. In that case, the parties had stipulated that, in the event of a dispute, certain issues concerning the determination of the price in a long-term gas supply contract is to be resolved by arbitrators within two months from the request for arbitration. The parties later agreed to an extension of time to make its submissions. All parties respected all deadlines assiduously.¹³⁵ The case shows that arbitration may achieve faster results than state court proceedings, and that the cooperation of the parties is *sine qua non* to achieving the goal of fast track arbitration.

Similar experience in *Formula One Racing*¹³⁶ decided under ICC Arbitration Rules where the arbitral tribunal had to decide an issue regarding the paint of formula One racing cars within a time of approximately one month. As in the Panhandle case, both parties were interested in a prompt decision and therefore parties cooperated well,¹³⁷ exchanged submissions within 7 days interval and the arbitral tribunal finalized its draft award within 48 hours of the hearing.¹³⁸

These two cases show that it is also possible to conduct fast track arbitration efficiently without detailed rules for expedited procedures. However, in both cases, all participants including both parties were very cooperative and interested in the speedy settlement of the disputes.

Another major challenge of fast track arbitration is that it requires meticulous and demanding preparations from parties. Files and documents must be carefully examined and scrutinized within very limited time in preparing points of claim or defence as the case may be. Parties' lawyer or representative must be familiar with the fact, law, and other strategies involved in the process from the onset. It is preferable full-time staff on both sides are assigned these tasks. If managers or

¹³⁵Ibid.

¹³⁶Formula one race is sporting weekend events that usually take not less three days. It is also called Grand Prix. See formula1.com/en/championship/races/2017.html assessed 8th July, 2017.

¹³⁷Hans smith, A Chairman's Perspective, Fast-Track-Arbitration: Different Perspectives, 3 ICC Bulletin (1992) p. 17.

¹³⁸Ibid.

ward members are important witnesses on account of their knowledge of key information, scheduling issues may arise by mutual compromise in order to secure their attendance. It is to be noted that for fast track arbitration, the actual work will usually have to be started well before the proceedings are initiated. As a consequence, it is vital for the parties to find lawyers and arbitrators with enough time. This may seem a small problem at first, but may become crucial because the best experts usually do not "sit around" without work. On the contrary, the schedules of sought-after attorneys and arbitrators are usually so full that they cannot seriously promise to meet all of the demands that fast track procedures require.

From the identified challenges discussed above, the question to be asked is whether fast track arbitration is necessary despite its shortcomings and whether it is amenable to the law and practice of ADR in Nigerian?

The introduction/application of Fast track arbitration in Nigeria is long overdue notwithstanding its challenges and criticisms. The benefits of fast track arbitration outweigh its challenges. However, there are factors to put in place to ensure a successful, effective and efficient fast track proceeding and a valid award in Nigeria.

Firstly, parties must ensure that fast track arbitration is unequivocally stated as the mode for resolving dispute arising in the contract. This is because once a dispute has arisen; it is usually difficult for the parties to agree on the procedural rules for the arbitration. Furthermore, it is advisable to provide for flexibility in terms of the application of the rules so that, once a dispute arises, the arbitration rules best suited for the case will be applied.

Successful conduct of any arbitration and fast track arbitration in particular depends on the cooperation of the parties, their counsel and the tribunal.¹³⁹ Hence mutual cooperation devoid of any element of distrust is indispensable for successful fast track arbitration.¹⁴⁰ Therefore, parties and their counsel or

¹³⁹Redfern A. & Hunter, M. Law and Practice of International Commercial Arbitration p. 12.

¹⁴⁰Ibid.

representatives must work towards a swift resolution of their dispute.¹⁴¹ Furthermore, commercial lawyers and business men should be encouraged to familiarize themselves with ADR mechanisms and embrace fast track arbitration in particular as an interesting option to be kept in mind whenever an arbitration clause is to be negotiated and drafted as an efficient and quick approach to resolving trade and investment disputes.¹⁴²

The need for in-depth knowledge of arbitration on the parts of commercial transaction lawyers in Nigeria cannot be over emphasised. There is need to design an appropriate system prospectively, before disputes arise. Contract drafters should develop tailored arbitration clauses, and discourage reliance on generic "boilerplate" that postpones many decisions about process until the time of arbitration.

VI. Conclusion and Recommendations

This article examined the historical evolution of the ADR and arbitration in Nigeria. It also analyzed the legal regime of ADR and arbitration practices as well as the challenges of ADR and arbitration in Nigeria. The article reveals that the challenges bedeviling the current practice of ADR particularly arbitration resulting into its dwindling fortunes necessitated a call for fast track arbitration as more efficient, timely and effective alternative. The article further considers the challenges and prospects of fast track arbitration and found that the future of arbitration in Nigeria greatly depends on the stakeholder's political will to overcome the identified challenges and many others that could hinder its effective practice and development. This article suggests recommendations stated below as a panacea to overcoming the dwindling fortunes of arbitration for a better, efficient and sustainable practice of arbitration in Nigeria:

There should be more public awareness and enlightenment on arbitration mechanisms and its benefits in resolving disputes among business men, judges, lawyers and the general public. This will enable the general public have sufficient

¹⁴¹Fouchard, Gaillard, Goldman on International Commercial Arbitration, pp. 681-682.

¹⁴²Redfern A. & Hunter, M. Law and Practice of International Commercial Arbitration, pp. 11-12.

knowledge to make informed decisions in choosing appropriate and suitable arbitration options. It will equally guide lawyers and judges on their role in legal proceedings to encourage parties to seek amicable resolution of disputes. It must be noted that a lot have been achieved in this respect, as arbitration has been inserted into the curriculum of higher institutions of learning including the Nigerian Law School. This effort should be extended to the establishment of Students' Conflict Resolution Centers by every university at the faculty level, to be manned by students under the supervision of some lecturers. This imbues in the students the attribute of dialogue in solving problems and inculcate in them ADR skills and techniques for constructive tackling of day to day problems.

Mass sensitization of the general public in both the print and electronic media and the distribution of pamphlets concerning the basics of fast track arbitration and its benefits will also be of great help in promoting arbitration and ADR in Nigeria. The government should set up standard institutions where persons can be trained in the art of arbitration, fast track arbitration and other ADR mechanisms as career mediators or neutrals and arbitrators. Most ADR and arbitrations centres are established and own by private institutions and therefore quite expensive for majority of the Nigerian populace. It is proposed that there should be a two-year intensive training programme after a first degree in any field of study after which successful candidates should be given licenses to practice as arbitration practitioners and or ADR providers. They can either be made to open their own private ADR centers or be employed by government to run the court connected dispute resolution centers. These developments will certainly repose the confidence in arbitration and the justice sector.

Furthermore there is the need to institutionalize arbitration practices for sustainable development. To achieve this all stakeholders including the government, the bar, the bench and the general public must work together to promote the values and benefit of arbitration and encourage members of the public to resort to same where need be. Stakeholders must also organize seminars and conferences in the field of arbitration and its contemporary developments such as fast track arbitration.

Continuing legal education for lawyers and judges on arbitration and ADR should be made compulsory. After a series of such education, license should be given to deserving persons after which they can fully act as arbitrators, mediators and neutrals etc.

It is commendable that the High Court Rules in most jurisdictions now insist that lawyers must show proof that ADR mechanisms have been tried to no avail before the case is accepted for filing. Judges should be encouraged to refer appropriate cases to arbitration and other ADR mechanisms or use the mandatory pre-trial conference opportunity to encourage parties on amicable resolution of their disputes.

There is no professional or ethical law or rules in form of code of conduct regulating the practice of arbitration and other ADR mechanisms in Nigeria. Code of conduct or ethical standards is supposed to be the bedrock of any profession as we have for legal practitioners and medical doctors. They essentially promote honesty, integrity among other virtues. It is recommended that there should be a standard ethical rules or code of conduct that will regulate arbitration practitioners and ADR providers in discharging services to the public. Finally, fast track arbitration should be encouraged as one of the options in ADR by parties to commercial, investment and other transactions because of its enormous benefits more so when the basic principles of the regular arbitration applies albeit in greater proportion for accelerated and prompt proceedings. Parties, ADR institutions, legal practitioners, government and other stakeholders are therefore enjoined not only to give necessary support for efficient practice and development of fast track arbitration in Nigeria but to also institutionalize it for sustainable practice of arbitration in Nigeria.