

AN APPRAISAL OF THE NEXUS AND DISPARITIES BETWEEN ARBITRATION AND ALTERNATIVE DISPUTE RESOLUTION (ADR)

Abstract

Peaceful resolution of disputes through ADR mechanisms now seems to be the emerging trend. Globally ADR had since been accepted as a viable and veritable means of resolving disputes. However, there have been various arguments and controversies on what constitute ADR and whether it includes Arbitration. In Nigeria for example when ADR is mentioned the general perception and understanding of an average person is reference to Arbitration. Thus, this paper adopts the narrative as well as the comparative analysis to interrogate some perspectives to espouse the nexus, disparities and ultimately determine whether Arbitration is part and parcel of ADR or not. The paper shows and found that both mechanisms are geared toward peaceful and harmonious settlement of disputes.

Key words: Arbitration and ADR, Nexus and disparities, Mediation, Juridical nature of Arbitration and Nigeria.

1. Introduction

Settlement of dispute is a universal phenomenon and plays a vital role in maintaining world peace¹. It has been with mankind from the evolution of man. It is no doubt that some countries like China, India, Italy and United State have claimed that dispute resolution mechanism originated from them². Though, reference of early settlement of international and private disputes are as well found in Sumerian Inscription dating back to 4000BC³. However, dispute has healthy and positive functions, but it poses a problem when it is irrevocable and the primary mechanisms for its management become ineffective and inadequate or go awry and becomes potentially damaging⁴. However, a dispute ordinarily will not exist until a claim is asserted by one party which is disputed by the other party and this is prevalent in contractual agreements. Thus, the existence of dispute is a condition for its resolution. In order to avoid irreconcilable difference, there is a need to set dispute resolution mechanisms in motion to allow for peaceful co-existence of people in their respective communities. Prior to the advent of the conventional way of settling dispute vide (litigation), disputes were majorly resolved through arbitration, mediation and negotiation which are now referred to as alternative dispute resolution. Although, it is argued that arbitration/ADR are new concepts adopted from the colonialist but on the contrary this position is not correct, because before the advent of the colonialism we have our own traditional way of settling dispute which is still applicable till today only that it may not be as formalized as we have it today⁵. Thus, to say that litigation is not the default way of settling dispute as posited by many writers may be right because often times, before any dispute goes to court it would have been subjected to amicable settlement and if compromise could not be reach then it would be referred to court for adjudication. As earlier noted that arbitration and other methods of settling dispute has been in practice but only that it may not be as formalized as we have it now, and it became more of use at early 1950s when some

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¹ See L. A. Ayinla, 'ADR: A Tith towards Practical Application in Nigeria' *Kogi State University Law Journal* Vol. 2&3. 2001, p. 248.

² M. M. Akanbi, *Domestic Commercial Arbitration in Nigeria; Problems and Challenges* (Germany: Lap Lambert Academic, 2012) p 56.

³ Chowdhury and Saharah, *Roy Chowdhury and Saharah on Arbitration* (Eastern Law House Calculatta 1979) p 5. Cited in Akanbi, (n.2) p.56.

⁴ H. Brown and A. Marriot, in *ADR: Principles and Practice*, 2nd ed (London: Sweet & Maxwell, 1999) p 1. See also Thomas F. Crum in *Magic of Conflict* (1987) says that conflict is the interference patterns of energies caused by differences; that provide the motivation and opportunities for change. Conflict; he added is not a contest, and resolving conflict is rarely about who is right, but about the acknowledgement and appreciation of differences.

⁵ E. Akpata, *The Nigerian Arbitration Law in Focus* (West African Book, 1997) p 1 . See also, M. O. Ogungbe , 'Alternative Dispute Resolution and Arbitration's Duty to Act in Good Faith' *Olabisi Onabanjo Law Journal*, Vol 3, 2001, p 188

African Countries began to enact laws on arbitration as a system of dispute resolution⁶. It has undergone a lot of development to attain the arbitration we have presently⁷. The term alternative dispute resolution (here in after referred to as ADR) and arbitration has generated a lot of controversies and brought about a lot of diverse opinions as to whether they are the same or not. It is not a gain saying that when a lay man hears the term ADR the first thing that comes to his mind is arbitration. The question that begs for an answer now is, in the real sense are they the same? In the light of this, this paper will examine the two terms with respect to their practical meaning, the nexus and the differences in the terms.

2. Alternative Dispute Resolution

The practice and popularization of ADR processes such as negotiation, mediation/conciliation and arbitration⁸ cannot be over emphasized. ADR may be adopted to resolve dispute between individuals, governmental bodies, parties in court and even between states, in fact, it is practiced every day⁹. Despite that, ADR has generated a lot of argument as to what it connotes, and what the acronyms stand for and it must be stated here that paradoxically, writers and scholar are divided on what exactly the acronyms mean.¹⁰ Thus, ADR does not have a uniform and agreed definition because of the debate as to whether the word alternative is the most appropriate to be used considering other options available for the letter 'A' in the acronym¹¹. However, from a general point of view, ADR is viewed as an alternative to litigation which is the conventional way of settling dispute. This was equally the position of Blake, Browne and Sime¹² who opined that, rather than be drawn into such debates; we take the pragmatic view that ADR is a term generally accepted as covering alternative to litigation.

ADR has been defined differently by different scholars. Brown and Marriot¹³ defined ADR as a range of procedure that serve as an alternative to litigation through the courts for resolution of disputes, generally involving the intercession and assistance of a neutral and impartial third party. Karl Mackie¹⁴ described ADR as a structured dispute resolution process with third-party intervention which does not impose a legally binding outcome on the parties. ADR is further defined as a structured negotiation process during which the parties in dispute are assisted by one or more third person(s), the 'Neutral', and that is focused on enabling the parties to reach a result whereby they can put an end to their differences on a voluntary basis¹⁵. It is deducible from the above definitions that ADR is centered on

⁶ J. C. Amazike, *Arbitration and Alternative Dispute Resolution in Africa* 1st edn., (Nigeria: Yahan Press Nigeria, 2007) p 1.

⁷ Ibid.

⁸ ADR processes has been categorized into three, the primary ADR processes which comprises of the negotiation, mediation/conciliation and arbitration; the secondary ADR processes which are; private judging and mini- trial and the hybrid processes which are; med-arb, ombudsman and summary trial. See Syed Khalid Rashid, 'Alternative Dispute Resolution in Malaysia; (Malaysia: Kulliyyah of Laws IIUM, 2006) p 13-14. See also Ayinla L. A. and Bilikis A. A. in 'Alternative Dispute Resolution: Exploring the Potentiality of Mini-Trial' *Port Harcourt Law Journal* Vol. 5 No 1. 2013, p 43. See Susan Patterson & Grant Seabolt, 'Essential of Alternative Dispute Resolution' (Dallas Texas: 2nd edn., 2001) at p 8-20, see also J. O. Orojo and M. A. Ajomo, *Law and Practice of Arbitration and Conciliation in Nigeria* (Nigeria: Mbeyi & Associate 1999) p 4.

⁹ ADR processes by which individual communicate on a daily basis either in commerce or everyday life to agree and reconcile a dispute or disagreement that may not even require the involvement of a third party. See Henry B. and Author M (n4) p 18, see also Section 19 (d) of the 1999 Constitution of the Federal Republic of Nigeria as amended, various High Court Rules support the adoption of ADR processes before going into litigation i.e Order 25 of High Court Civil Procedure Rule of Lagos State and so on..

¹⁰ S. Blake, J. Browne, and S. Sime, *A Practical Approach to Alternative Dispute Resolution* (Oxford University Press 2nd ed., 2011) p 5.

¹¹ 'A' sometimes could be referred to 'additional', or 'amicable', and some view that the term 'EDR' is appropriate to mean 'Early Dispute Resolution' or an 'Effective Dispute Resolution' respectively. See J. C. Goldsmith, G. H. Pointon, and A. Ingen-Honz, *ADR in Business, Practice and Issues Across Countries and Cultures* (Kluwer Law International 2006) p 6.

¹² S. Blake, J. Browne, and S. Sime (n.8), see also P. O. Idornigie, *Commercial Arbitration Law and Practice in Nigeria* (Lawlords, 2015) p 28

¹³ Brown and Marriot, (n.4) p 12.

¹⁴ K. Mackie, *The ADR Practice Guide: Commercial Dispute Resolution* (Tottel, 3rd edn., 2007) p 8. See also Kehinde Aina on Dispute Resolution (NCMG International and Blankson LP, 2012), Idornigie P. O., (n.12), p 29.

¹⁵ Goldsmith, Pointon, and Ingen-Honz (n 11)) p 6.

settlement of disputes out of courts by a neutral party or parties without the imposition of a binding decision. However, I am of the opinion that these definitions omit the fact that, it can also be used as a supplement to litigation. In the light of this, I define ADR as the methods and procedures used in resolution of disputes either as alternative to the traditional dispute resolution mechanism or in some cases supplementary to such mechanism for the purpose of reaching an amicable settlement with or without the help of a third party. Having discussed ADR, it is important to examine the discussion on arbitration.

3. Arbitration

In Nigeria, arbitration is governed by Arbitration and Conciliation Act¹⁶ and without doubt has become the principal method of settling dispute in the commercial world at different levels ranging from individuals to states at the international level¹⁷. Despite the popularity of arbitration, there is no generally and an all-encompassing definition of arbitration. However, authors have set out some requirements for what amounts to arbitration¹⁸. Arbitration can be described as a private mechanism for the resolution of dispute which takes place in private pursuant to an agreement between two or more parties, under which the parties agree to be bound by the decision to be given by the arbitrator; such decision is enforceable at law¹⁹. Arbitration is also described as an institution by which the parties entrust to arbitrator, freely chosen by them the task of resolving their disputes²⁰. In addition to that, arbitration is equally an effective way of obtaining a final and binding decision on a dispute or series of dispute, without reference to a court of law²¹. Arbitration can further be explained as a process by which parties who are in dispute agree to submit their disagreement to a person or persons whose expertise or judgment they trust who listen and consider the facts and the arguments and make a binding decision.²²

These definitions set out some of the features of arbitration. Although it is argued that there is no exhaustive definition of arbitration, yet it is a quasi-judicial process of dispute resolution by way of voluntary submission of disputing parties to a neutral third party called an arbitrator to hear and determine the dispute between the parties and make a binding decision which is called an award that is enforceable by court. It must however be stated that before parties can approach an arbitral tribunal, there must have been a prior arbitration agreement that the parties will submit themselves to arbitral tribunal should any dispute arise from the contract²³. Arbitration agreement is the contractual basis for the resolution of disputes by the arbitration processes. It signifies the submission agreement to arbitration in case any dispute arises from the contract. It may be inserted in the parent contract or in another contract ancillary to the main contract called arbitration clause²⁴. Arbitration agreement has also been defined by Nigerian Court of Appeal in *Nigerian Agip Exploration Limited v Nigerian National Petroleum Corporation & Ors*²⁵ as ‘... the reference of a dispute or differences between not less than two parties for determination, after hearing both sides in a judicial manner by a person or persons other than a court of competent jurisdiction; whose decision is general, final and legally binding on both parties appointed by a court, to hear the parties claims and render a decision....’

¹⁶ Arbitration and Conciliation Act, Cap A18 Laws of the Federation of Nigeria, 2004 regulates the practice and conduct of arbitration in Nigeria.

¹⁷ Section 19 (d) of the 1999 Constitution of the Federal Republic of Nigeria as amended.

¹⁸ Mustill & Boyd, *The Law and Practice of Commercial Arbitration in England*. 2nd ed., (1989) p 41. Cited in Brown and Marriot (n.4) at p 49.

¹⁹ Ibid.

²⁰ See S. Schwab, *Schiedsgerichtsbarkeit* (3rd ed., 1979) at p 1. Cited by Brown. and Marriot.(n.4) 49

²¹ F. Ajogwu, *Commercial Arbitration in Nigeria Law and Practice* (Nigeria: Mbeyi & Associate, 2009) p 5.

²² N. Blackaby, C. Partasides, A. Redfern and M. Hunter, *Redfern and Hunter on International Arbitration* (Oxford University Press 5th ed., 2009) at p 1-2.

²³ Idornigie (n13) p 28., E. Azinge and N. Aduba., *Law and Development in Nigeria , 50 Years of Nationhood* (NIALS Press, 2010) p. 94.

²⁴ See D. J. Sutton, J. Kendall and J. Gill, *Russell on Arbitration* (London: Sweet & Maxwell, 21st ed. 1997) p. 27.

²⁵ (2014) 6 CLRN 150,

4. Arbitration and ADR

As earlier discussed, ADR and arbitration are generally used to describe the methods of resolving dispute either as an alternative or supplement to the conventional way of resolving dispute. Thus, some of the similar features are: There is allowance of party autonomy to decide which arbitral tribunal to use and the choice of law to adopt. Parties enjoy privacy during the settlement of dispute and it promotes parties voluntary submission²⁶. There are flexibility and simplicity of the procedure during settlement as against litigation which is purely adversarial in nature. There is cost effectiveness. There is also maximum participation of the parties involved and it allows a quick decision. Quite another is the preservation of existing business and personal relationship.

It is important to say at this juncture, that as much as ADR and arbitration share much features, there are some differences between them. Arbitration is based on contract and requires that the parties have agreed to submit their disputes to the jurisdiction of an arbitral tribunal. Once the parties have agreed to submit themselves under that jurisdiction, the outcome of the decision is binding. ADR is also based on contract which provides that the parties in dispute agree to involve a neutral. However, in mediation the neutral has no jurisdiction to enforce any decision on any party²⁷. In contrast to the process of ADR, arbitral tribunal requires the parties in dispute to delegate the power to determine their legal rights to the arbitrator. Arbitration processes is solely or at least primarily driven by lawyers and the arbitrator and it is adversarial in nature. Conversely, ADR is a voluntary and non-legalistic process, as it is not focused on determining the parties' legal rights but on identifying the basis on which the parties may be willing to settle their dispute voluntarily, consequently, ADR process do not necessarily required the involvement of lawyers though, some form of lawyer involvement may be desirable. Parties can settle the dispute without the need to mirror the parties' legal rights²⁸. In ADR process, no clear winner is expected, the essence of which is that both parties should feel they have meaningfully gained something and at the same time avoided the procedural risks, cost and possible negative approach related to arbitral proceedings. ADR brings the dispute closer to the parties, in that they have control of the proceedings instead of being the subject of a dispute processed by intermediaries. Another notable difference between arbitration and ADR is the power of the arbitrator to act as amiable *compositeurs* which is often in conjunction with the power to decide '*ex aequo et bono*' when the rule permits, that is to decide in fair dealing and good faith²⁹. The outcome of arbitration is determined in accordance with an objective standard of the applicable law while in ADR the outcome of the settlement is determined by the will of the parties and this accounts for why ADR is said to be an interest based procedures³⁰.

In the light of the above, would it be right to argue that arbitration is part of ADR so called? Whether arbitration forms part of ADR or not needs a jurisprudential analysis. Thus, recourse to certain distinct features they may be imperative. Various authors have attempted to address the issue which has resulted in divergent opinions. However, despite these divergent opinions, it is argued that ADR and arbitration are not the same on the ground that the intent of adopting ADR mechanism is for the parties to reach an amicable settlement without any binding outcome, whereas, arbitration is formalized with a binding decision known as award. At best, arbitration can be termed as quasi-judicial as a result of its formality and some similarity it shares with litigation. This is further discussed by making reference to the scholarly works of some authors to show their different view on arbitration and ADR. ADR is a loose term, encompassing various forms and procedures, sponsored by various rules which are generally private dispute resolution methods which parties may choose as an alternative to conventional litigation³¹. The significance growth and increasing complexity of international trade in recent years

²⁶ *Gunter Henck v Anre & co.* (1970) 1 Lloyd's Rep 235.

²⁷ Goldsmith, Pointon, and Ingen-Honz (n 11) p 6.

²⁸ *Ibid.*

²⁹ Brown and Marriot. (n.4) p 59

³⁰ *Ibid.*

³¹ S. C. Benneth, *Arbitration Essential Concepts* (New York: ALM Press, 2002) p 5.

have resulted in arbitration becoming the preferred method of settlement of international commercial disputes³² and its award cut across nations and enforceable³³.

However, before considering the opinions of some legal writers, it important to discuss the juridical nature of arbitration in order to reinforce the disparities between arbitration and ADR:

Juridical Nature of Arbitration

It is ordinarily expected that the resolution of dispute should be as statutorily provided for, which is the basis upon which the legality or otherwise of resolution is premised. Thus, the juridical nature of arbitration is the legal basis upon which arbitration derives its legality. However, the juridical nature of arbitration can be better explained under three theories which are; the jurisdictional theory, the contractual theory and the hybrid theory. These will be succinctly examined below:

Jurisdictional Theory

Under this theory, the state recognizes that some disputes can be resolved by compromise under various laws, customary law, shariah law and so forth. Thus, the state has power to determine what dispute can be subjected to arbitration and it gave the legal backing through ACA and equally delegate power and limits the scope and ambit of arbitration. The jurisdictional theory derives from the complete supervisory powers of states to regulate any commercial arbitration within jurisdiction by giving primary importance to the role of national law in the arbitral process. The theory further posits that, the law of the place of arbitration (*lex arbitri*) supersedes any agreement the parties may have made. It gives primacy to the state sovereignty over the consensual agreement of the parties to the arbitration.³⁴ The premise of jurisdictional theory is that the state law in which arbitration takes place is entitled to approve or disapprove as the case may be the activities that occur within their territory and thus arbitration taking place within their geographical boundaries is subject to their laws that is the *lex fori*³⁵. However, the powers given by the states to arbitrators does not them in status to that of a judge because is it only the state that has the right to administer justice and the state has been able to influenced the arbitral proceedings through the Arbitration and Conciliation Act in various ways³⁶. However, the fault of this theory, could be over reliance on the laws of the place of arbitration and the restriction inherent within this may complicate proceedings and render arbitral proceedings cumbersome, which by necessary implication may not serve the purpose of a speedy arbitration.

Contractual Theory

It is argued under this theory, that international commercial arbitration originates from a valid arbitration agreement between the parties and that arbitration should be conducted in accordance with the consensus *adidem* of the parties. The theory further shows that the consensual agreement of the parties is central to determination of the validity of the arbitration process, without a much consideration for the law of the place of arbitration. The theory is to the effect that the parties to the arbitration should have the freedom to decide the relevant issues within the proceedings, without interference from the state. Contractual theory further shows that that the parties original agreement bestows the arbitration with the characteristics of a contract, within which their dispute should be resolved by arbitration as

³² J. G. Castel, *International Commercial Arbitration; Commercial Dispute Resolution: Alternative to Litigation* (Canada Law Book Inc. 1989) p.122. See also Paul O. Idornigie (n.12) p 28

³³ Section 57 of the Arbitration and Conciliation Act Cap A 18; Laws of the Federation of Nigeria (LFN), 2004.

³⁴ R. Maclean, 'A Critical Examination of the Jurisdictional and Contractual Theories on the Juridical Nature of Arbitration'. Available online at <http://www.unassignment.com/essay-samples/law/the-juridical-nature-of-arbitration-law-commercial-essay.php> accessed 06/07/2016

³⁵ *Ibid.*

³⁶ For instance sections 1(1) & (2) Of Arbitration and Conciliation Act, Cap A18 Laws of the Federation of Nigeria, 2004, provides that the arbitral agreements must be in writing in any form of recognized language while section 1 (3) the said ACA provides that the death of a party does not invalidate the agreement sections respectively. Sections 4 and 5of ACA provide for the order of staying proceedings while the parties have not exhausted the of arbitral proceedings. Section 8 (3) ACA provides that arbitrator can be challenged or replaced if there is a justifiable doubt about its impartiality or independence. Sections 31 and 51of ACA provides for the recognition and enforcement of the award respectively. The court has equally held that arbitrator must act judicially and independent in the case of *Arenson v Arenson* (1977) AC 405 PP 410-411. All these buttress the interference of the state laws in relation to arbitration.

well as allowing them to choose the law that will govern the procedural and the substantive issues in the proceedings. This theory focus more on the parties' autonomy and the choices they have made in the contractual agreement³⁷.

Hybrid Theory

This theory maintains a middle course between jurisdictional and contractual theories which occupy the extreme ends of the arbitration spectrum. The hybrid theory was propounded by professor Surville and further developed by professor Sauser-Hall and it is to the effect that the contractual nature of the arbitration is reflected in private contractual agreement between the parties in setting up the arbitration, whilst the jurisdictional nature of the arbitration is reflected by the fact that the arbitration must be conducted within the confines of the laws of the nation state particularly with reference to validity and enforceability of the awards³⁸. A comparative analysis of the jurisdictional and contractual theories of arbitration shows some shortcomings in both, to the extent that they are not enough to be the premise of the legality of arbitral proceedings. In essence, the imperative of the hybrid theory became necessary for the harmonization of the two will be preferable than choosing only one. In Nigeria, hybrid theory has allowed the court rules on the arbitration and parties autonomous to exist simultaneously. It is important at this juncture, to consider the opinions of some scholars to answer the question whether arbitration is part of ADR or not thus, Goldsmith, Pointon, and Ingen-Honz³⁹ opined that, considering the primary interpretation of ADR, it refers to so called amicable method of resolving disputes, as such, it contrasts not only with litigation but also with arbitration. They further argued that, if a dispute is decided by giving a judgment or an award, it presupposes an imposed solution to the dispute handed down by the arbitral tribunal, more often than not; the decision is enforceable in contrast to all other ADR proceedings. The principle of amicable settlement in nature is that the third party to whom the parties have recourse does not render a decision which is enforceable by a process of execution but simply helps the parties to find or agree to a mutually acceptable solution of a strictly contractual nature⁴⁰. However, this may not be true, if it is a mediation settlement handed down by a mediation centre which is enforceable like the judgment of a court⁴¹. Tercier⁴² in his own view posited that, by a narrower level, ADR refers more specifically to mediation and conciliation in their various forms and argues by making reference to the distinction drawn by the International Chamber of Commerce (ICC) in creating different set of rules for each by separating ADR rules, Arbitration rules and Dispute Board rules respectively. In ADR proceedings, the parties call upon a third party not for a decision, but for assistance in reaching an agreement.⁴³

Furthermore, Orojo and Ajomo⁴⁴ were of the view that, the position of arbitration is curious and dicey when discussing ADR processes. Though, it is also an alternative to litigation. The different between

³⁷ Maclean, (n 34).

³⁸ Maclean, (n 34).

³⁹ Goldsmith, Pointon, and Ingen-Honz (n 11) XXI

⁴⁰ D. I. Efevwerhan, *Principles of Civil Procedure in Nigeria*, 2nd edition (Nigeria: Snapp Press Ltd, 2013) pp 331-332

⁴¹ This is usually referred to as the consent judgment which is binding on the parties. This occurs where both parties agree on term of settlement by reducing same in to writing and ask the court to pronounce their agreement as the judgment of the court. See the cases of Ras Pal Gazi Const. Coy Ltd v. FCDA (2001) 5 SCNJ 234 and *Dana Impex Ltd v. Awukam* (2006) 3NWLR (PT. 968) 544 at 556. This is so under the Kwara State CMCC.

⁴² Goldsmith, Pointon, and Ingen-Honz, *ibid.* See also the comparison between ICC Arbitration and ICC ADR rules which are; (a) While ICC ADR is designed to lead parties with the assistance of a neutral to a settlement of their dispute, it does not guarantee a resolution of the dispute because the parties may not agree to the negotiated settlement at the end. Whereas Arbitration in the other hand does in principle; the dispute will be resolved via an enforceable award of the arbitral tribunal. (b) Parties may realize during the course of an arbitration or during negotiation b4 National Courts, that ADR proceedings might lead them to a settlement thus, they can submit to the ICC Rules during the pendency of the arbitration or litigation and if request the arbitral tribunal to render an award by consent if the ADR procedure results in a settlement agreement and will transform it to enforceable award. (c) ICC Rules specifically provided for arbitrations in the event that the dispute is not resolved through ADR proceedings within 45 days or any agreed extension therefore following the filing of the request for ADR and when parties choose this multi-tiered change, they are assured that the dispute will be finally resolved by arbitration in the event that the ADR proceedings do not yield a settlement.

⁴³ Goldsmith, Pointon, and Ingen-Honz (n11) XXI

⁴⁴ Orojo and Ajomo, *Law and Practice of Arbitration and Conciliation in Nigeria* (Mbeyi & Associate 1999) p 4.

arbitration and ADR so called lies in the responsibility for and control with respect to decision making, while the responsibilities of decision making in arbitration is left with the arbitrator(s). But under mediation and conciliation the parties do not transfer the power to the mediator or the conciliator. Furthermore, the decision (award) of arbitrator is binding and enforceable but this may not be part of the intent of mediation and conciliation or other common ADR mechanisms. Ezejiolor held the view that arbitration can be placed at an advanced stage of dispute resolution that is, if other early dispute resolution mechanisms have failed. Mediation and conciliation are long standing modes of settling disputes, although they are adopted less often than arbitration.⁴⁵ Arbitrators like judges enjoy immunity because policy requires that they should not be harassed by the disputing parties and at the same time, it should disallow a worthless person to entertain arbitral proceedings⁴⁶. Brown and Marriot⁴⁷ argue that ADR and arbitration are generally been understood to refer to the alternative to litigation. Arbitration was originally widely included as part of ADR. However, as arbitration has entered a mainstream of dispute resolution processes, and in the light of the adjudicatory nature the current tendency has shifted away from regarding arbitration strictly as ADR which tend to limit this term to consensual processes. However, Marriot further stated that, it is now widely accepted that arbitration, consensual adjudication and other forms of disputes resolution method determined by a third party form part of ADR. They argued that ADR and any other means of dispute resolution are alternative to litigation and all forms of third party determination should be embraced and whether it is adjudicatory or non-adjudicatory process is no longer seriously propounded⁴⁸. Sutton, Kendall and Gill, the authors of ‘Russell on Arbitration’⁴⁹ held the view that ADR is regarded by English practitioners as any system of dispute resolution which is non-binding is meant that the parties are under no obligation to comply with any decision or determination resulting from the process if indeed there is one.

In Australia and the United States, arbitration is excluded in the definition of ADR, whereas in Canada it is included⁵⁰. Nevertheless, what seems to draw a clear distinction between the two is whether the process is adjudicatory and the decision is final and binding if the process is adjudicatory like conventional litigation, it is not part of the ADR procedures and if the final decision is non-binding then it forms part of ADR procedure⁵¹. However, whether arbitration is ADR is a jurisprudential issue and the search should not be limited to whether arbitration is part of ADR or not but to facilitate the process of amicable resolution of dispute⁵².

Compartmentalization of Both Mechanisms

Arbitration is part of private mechanisms of dispute resolution sequel to the prior agreement between the parties to be bound by the decisions of the arbiter in accordance with laid down principles of law⁵³ similar to that, Alternative Dispute Resolution includes various ways of dispute resolution without any recourse to court adjudication. Usually, ADR can be an alternative to litigation in case involving labor disputes and industrial strike actions⁵⁴. Thus, there appeared a world of difference between ADR and arbitration although both processes are much relevant in the practice of law and resolution of dispute in Nigeria but effort to make distinction between the two terms has been revealed through the argument

⁴⁵ G. Ezejiolor, *The Law of Arbitration in Nigeria* (Nigeria: Longman, 2005) p7

⁴⁶ *Papa v Rose* (1817) L. R. 7 C. P 32; In *Re Happer* L. R. 20 QB 367; see the word of Per Lord Fraser of Tully Belton in *Arenson v Arenson* [1975] 3 WLR at p 841. Where he stated that unless a contract expressly stipulates otherwise, a valuer or an architect is not an arbitrator, since as valuers and certifiers they are not entitled to judicial immunity.

⁴⁷ Brown and Marriot. (n4) p 20.

⁴⁸ A. Marriot, *ADR in Civil and Commercial Arbitration Dispute's in John Tackaberry*, p.449. Cited in Brown and Marriot, .

⁴⁹ See Sutton, Kendall and Gill (n 19) p 47

⁵⁰ M. Pryless, *Assessing Dispute Resolution Procedure* (A Journal of the Chartered Institute of Arbitrators, 106-116). Cited in Idornigie (n.12) p 28. See also B. J. Thomson, *Commercial Dispute Resolution; Alternative to Litigation A Practical Preview in Emond* (Canada Law Book Inc. 1989) at p 89.

⁵¹ Idornigie (n.12).

⁵² Orojo and Ajomo (n.31) p 6.

⁵³ L. A. Ayinla, .The Imperative of an Attitudinal Change About the Practice of Law in Nigeria: A Critique of the Interdependence of ADR and the Judiciary, *Journal of Public and Private Law*, Nnamidi Azikwe University Awka, Anambra, Vol. 5, September 2013, at p 237.

⁵⁴ R. Susan, *Essentials of Alternative Dispute Resolution* (Dallas. Texas 2nd edn. 2001) p 1

of various scholars⁵⁵. Judge Ajibola posited that historically, arbitration was the first alternative dispute resolution mechanism to litigation⁵⁶. Therefore, ADR encompasses arbitration but it is believed that nature and effect of the outcome of arbitration has made it to metamorphose into an independent dispute resolution mechanism⁵⁷. This can be supported by the usual practice of customary arbitration before the colonialism. In addition to this, Asouzu is of the view that arbitration is usually classified as an ADR mechanism and is an alternative to litigation, but the development and the recent practice of ADR coupled with prevalent usage brought about the distinction⁵⁸. The essence of this compartmentalization may be observed in the fact that arbitration is viewed to have become matured and recognized as a separate dispute resolution mechanism with well laid out principles⁵⁹. In addition to this, arbitration is believed as being more closed in many ways with litigation⁶⁰. This is because litigation and arbitration share some similar characteristics like the decisiveness of outcome of arbitration, enforceability of the award through the necessary compelling machinery⁶¹. However, it is important to state that arbitration is quasi-judicial in nature and it cannot take the position of litigation or court system at best it is subject to the parties agreement in accordance with applicable laws⁶². Nevertheless, arbitration is less formal process with the ability to make a speedy decision that has no precedential effect like that of the judgment of the court because each matter has to be decided on its own merit.⁶³ Moreover, the award is given by a neutral person who is not a judge but a person that is voluntary appointed by the parties⁶⁴. It is submitted that a practical approach is to group all the dispute resolution mechanism as ADR except litigation. ADR is seen as a general word that encompasses a wide range of dispute resolution mechanism, which are either partial or complement to litigation or traditional court adjudication of dispute resolution⁶⁵. However, it is important that recognition should be given to ADR including arbitration, due to the advantages such as speedy decisions, is simpler, confidential and more of private judgment. Thus, efforts in this regard have experienced much debates and argument out of which more legislation freeing the process from close supervision by the court⁶⁶.

From the above discussion, the issue is neither here nor there but certain things must be considered. Arbitration like some other ADR mechanisms is also an alternative way of settling dispute since litigation is believed to be the conventional dispute resolution mechanism. However, in order to have a clearer basis for this clarification as to whether arbitration is part of ADR, it is pertinent to know whether arbitration shared any similar features with litigation. There is no gainsaying that arbitration has experienced a lot development both in law and practice and as a result, it shares some features with litigation. The main feature that brings arbitration close to litigation is the binding and enforcement of the arbitral award. Conversely, the scope of ADR does not include making a binding and enforceable decision. However, it is understood that in some cases, the parties in dispute may need a resolution of

⁵⁵ Ayinla, (n.53) p 237

⁵⁶ Judge Bola Ajibola, a former Judge of the I.C.J; Member of the Permanent Court of Arbitration (PCA) and a former Attorney –General of the Federation and Minister of Justice (Nigeria) submitted in all modesty to being the architect of the ACA in the African Continent, in *Arbitration & Alternative Dispute Resolution in Africa*, edited by C. J Amasike (Abuja: The Regent Printing & Publishing Ltd, 2005), p. 11.

⁵⁷ Ayinla (n.53) p. 237.

⁵⁸ A. A. Asouzu, *International Commercial Arbitration and African States, Practice, Participation and Institutional Development* (Cambridge: University Press: 2001) p. 4

⁵⁹ C. Schmittoff, *Extra Judicial Dispute Settlement' Forum Internationale*, No 6, 1985 at 3.

⁶⁰ Aisha, *Quick Reference on Nigerian Law and Practice* (Abuja: Temple Legal Consult, 2006) at 223.

⁶¹ The decision of a judge can be enforced by official coercion or by the executive power of the state. See Gordon Woodman, 'The Alternative law of Alternative Dispute Resolution' in reading in law and society, edited by J. Banfied (Toronto: Captus Press, 1993) at 136-137 while the award of an arbitration may be enforced by an application to the court for the enforcement. See S. 31 of the Arbitration and Conciliation Act Cap A18 Laws of the Federation of Nigeria 2004.

⁶² W. Alex, 'Taking Codes of ethic seriously: ADR and Reconstructive Liberalism' *Canada Journal of Law and Jurisprudence*, Vol. xii No. 2 (July 1999) 301.

⁶³ B. B. Robbert, 'Using Process Observation to Teach Alternative Dispute Resolution to Simulation', *Journal of Legal Education* 37 (1987) p. 46.

⁶⁴ P. H. Gulliver, *Dispute and Negotiations* (New York: Academic Press, 1979) pp. 3-24.

⁶⁵ Ayinla (n.53) p. 238.

⁶⁶ M. J. Karl, *A Handbook of Dispute Resolution* (London: Rutledge, Sweet & Maxwell, 1991) p. 17. See also Sections 4, 5 and 34 of the Arbitration and Conciliation Act Cap A18 Laws of the Federation of Nigeria 2004 respectively.

greater legal force than a mere agreement for example a dispute which concerns or affects rights in general in which an enforceable solution is required or a legal precedent needs to be set. Nevertheless, the question that begs for answer is whether arbitration still form part of ADR mechanism despite its quasi-judicial nature with respect to binding and enforceable effect of the award? The answer is in between the negative and positive in view of the surrounding circumstances. ADR by its natural meaning implies an alternative to litigation, non-adversarial, non-adjudicative and the agreement reached is intended to bind the parties willingly. Furthermore, the outcomes of arbitral proceeding in most times result in a win-lose approach as against the win-win approach originally meant to be achieved under ADR, although the relationship of the parties is still being preserved. This is because the parties present their matter before the arbitrators with evidence with the hope of getting a positive award through an element of contention which has no place under the practical approach of ADR. It must be stated that settlement is still an object of arbitration. In support of this assertion is the UNCITRAL Model Law and the ACA among others, settlement is allowed in article 30 and s.25 of ACA respectively, particularly allow for settlement vide mediation.⁶⁷ In addition to that, the award of an arbitral tribunal is enforceable at anywhere although, it is not automatic because only the court has the power of enforcement⁶⁸. In a situation where, either of the party refuses to honour the award, there would be a need to enforce and that will require a judicial process and as a result, the purpose of adopting arbitration as an ADR mechanism may be questioned but this appears to be the emerging trend in ADR in view of the laws establishing the mediation centres in Nigeria which allows for the enforcement of MOU as judgment of court. Arbitration agreement is futuristic, anticipatory and its draws a line between a present or future dispute compared with the main intent of ADR mechanism which is relevant after the event had happened or on existing issues. Thus, none of the parties under the arbitration clause can approach the court without submitting to arbitral tribunal. In arbitral proceeding, the award must be written and signed but under the ADR there is no requirement that the neutral third party must reduce the terms of settlement in to writing. Although, in mediation and conciliation, the parties might agree to reduce the settlement into writing so that the court may pronounce it as consent judgment or judgment, such agreement is binding on the parties because it constitute contract between them. A clear distinction might be difficult to establish in Nigeria, because Arbitration and Conciliation Act governs arbitration and other ADR processes which makes it a bit uneasy to have a clear distinction between the two practically and pragmatically. In addition, mediation is not even recognized or used in the Act although; it is commonly used interchangeably with conciliation. Besides, the whole of Part II of the Act is devoted to conciliation and as such no mention is made of mediation the Act provides: 'Notwithstanding the other provision of this Act, the parties to any agreement may, seek amicable settlement of any dispute in relation to the agreement by conciliation under the provision of this Act'⁶⁹. Thus, settlement of dispute is put beyond par adventure and vividly encouraged by the Act.

5. Conclusion

The relevance of arbitration and ADR in our contemporary societies cannot be over emphasized and the need to adopt dispute resolution mechanism is imperative to promote peaceful co- existence and achieved amicable settlement of dispute. Thus, this paper has discussed arbitration and ADR as dispute mechanisms and in addition, it has discussed the argument as to whether arbitration is strictly part of ADR or not. In order to espouse the issue, this paper has shown the nexus between arbitration and ADR

⁶⁷ Section 25 of the Nigerian ACA 2004 allows settlement and section 32 of the Malaysian Arbitration Act. Laws of countries like Sri Lanka, India, Singapore, Australia, Canada, the Netherlands among others and rules of arbitration in South Korea, Germany, Slovenia, Hungary, Croatia, Austria, Switzerland, France including WIPO Mediation rules all favoured the use of mediation and arbitration. Tang Houzhi, 'Is There an Expanding Culture that favors Combining Arbitration with Conciliation or Other ADR Procedures?' *ICCA Seoul Arbitration Conference*, (1996), at 102-110. The relevant section in some of the laws are, section 30(1) of the Indian Arbitration and Conciliation Act, 1996, Section 63 of the Singapore Arbitration Act, 2001, Section 2A and 2B Hong Kong Ordinance 1990, Section 51 Arbitration Law of China and Article 65(a) of WIPO. Art. 13 of WIPO Mediation Rules also encourage this combination. See L. A. Ayinla, *The Possibilities and Hindrances of ADR in Nigeria: A Critique* (Germany: Lap Lambert Academic Publishing, 2016) p.108

⁶⁸ Section 57 of Arbitration and Conciliation Act, Cap A18 Laws of the Federation of Nigeria, 2004.

⁶⁹ See Section 37 of Arbitration and Conciliation Act, Cap A18 Laws of the Federation of Nigeria, 2004. See also Ayinla (n.8) p.46

such as party autonomy in dispute resolution, cost effectiveness, preservation of existing relation between the parties and so on. Despite these similar features, it is not in doubt that the two terms also have some differences which are not limited to binding and enforcement of awards, the formality of the arbitral proceedings, and the quasi-judicial nature of arbitration etc. This work has equally discussed the compartmentalization of ADR and arbitration to show the argument on their distinction. Arbitration is shown to be historically, the alternative dispute resolution method before colonialism. However, the contemporary practice of arbitration has shown how it has metamorphosed into an independent dispute resolution mechanism. Arbitration is quasi-judicial in nature and cannot take the place of litigation as it subjects to the agreements between the parties in accordance with the applicable laws. Arbitration is usually seen as a part of the wide range of alternative dispute resolution mechanism which is complementary to the traditional court system dispute resolution. ADR and arbitration should not be competing with each other, rather they need to complement each other in that ADR is more likely to promote the development of arbitration. It must be stated that both mechanisms may produce an enforceable outcome, although ADR is rather a consensual and contractual agreement in nature. Thus, arbitration and ADR are complementary in guaranteeing a final and enforceable solution. The major concern should be how to improve and combine them so as to benefit from the synergy they are capable of offering. Thus, the various arguments have shown the compartmentalization of ADR and arbitration, notwithstanding the various arguments, arbitration has its origin and basic foundation in ADR in view of the fact that it was originally an alternative to litigation.