NATIONAL OPEN UNIVERSITY OF NIGERIA

SCHOOL OF LAW

COURSE CODE: LAW 517

COURSE TITLE: ALTERNATIVE DSPUTE RESOLUTION I

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TABLE OF CONTENT

COURSE GUIDE Course Title: Alternative Dispute Resolution Course Code: Law 517

Credit Units: 28 Units

GENERAL INTRODUCTION

The term Alternative Dispute Resolution (ADR) is used generally to describe the different methods and procedures used in resolving dispute either as alternatives to the traditional dispute resolution mechanism of the court system or in some cases supplementary to such mechanisms. Alternative Dispute Resolution comprises various approaches for resolving disputes in a non-confrontational way, ranging from negotiation between the two parties, a multi-party negotiation, through mediation, consensus building, to arbitration and adjudication. ADR can also refer to everything; from facilitated settlement negotiations in which disputants are encouraged to negotiate directly with each other prior to some other legal process, to arbitration systems or mini-trials that look and feel very much like a courtroom process.

This course material will examine the concept of ADR and the various range of ADR methods by which disputes can be resolved, the kinds of disputes that can be resolved through ADR, the benefits of referring disputes to ADR and limitations to the ADR process.

COURSE AIMS

This course will provide student with the basic knowledge of the concept of ADR. It examines the concept of ADR as an alternative to the conventional means of settling disputes in Nigeria; litigation. The course seeks to make students understand the different methods by which disputes can be resolved, the kinds of disputes that can be resolved through ADR, the benefits of referring disputes to ADR and limitations to the ADR process. In essence the course aims to challenge students to appreciate the nature of ADR. In particular to: examine applications of ADR techniques, provide students with a comparison with court-based dispute resolution.

HOW TO USE THE STUDY MATERIAL

Students are advised to read relevant modules of this study material before reading the set textbooks and other materials. This will provide students with an overall view of the topic. Students are to note that this study material is not a substitute for set textbooks, cases and other reading materials referred to in each module.

Case -Law.

This study guide, like any textbook on any aspect of the law, makes references to important judicial decisions as well as to some statutory enactments. There is still a dearth of cases in this aspect of the law because the concept of ADR is still a relatively new concept that is gradually getting entrenched in our legal framework.

COURSE OBJECTIVES

At the completion of this course, you should be able;

- To understand the concept and nature of ADR
- To know the difference as relating to the various ADR systems.
- To understand the characteristics of a good ADR process, to assess the relative advantages and disadvantages of ADR over Litigation in the settlement of disputes.
- Recognize issues and problems in the various stages of international arbitration and alternative dispute resolution;

- Identify the leading national and international arbitration institutions that provide services and fora for the resolution of a dispute;
- Summarize the various methods available for the effective and efficient resolution of international commercial disputes; and
- Evaluate agreements and clauses for alternative dispute resolution.
- To understand the concept of alternative dispute resolution (ADR)
- To discuss the reasons why ADR is essential to the administration of justice in Nigeria
- To discuss the various types of ADR mechanisms and processes.
- To appreciate the place of ADR in conflict resolution between individuals, communities and
- To identify the limitations confronting the settlement of disputes through the ADR process.
- To point out areas that needs to be improved upon un order for the outcome of the processes to be enforceable.

STUDY UNITS

There are sixteen study units in this course as follows;

MODULE 1

Unit 1 – Definition, Meanings and Features of ADR

Unit 2 -Purpose of ADR

Unit 3 Advantages of ADR Unit 4 Limitation of ADR

MODULE 2 MEDIATION

UNIT 1 Mediation

UNIT 2 Conciliation

MODULE 3 ARBITRATION

UNIT 1 Nature of Arbitration

UNIT 2 Sources of Arbitration Law

UNIT 3 Contents of arbitration Agreement

UNIT 4 Arbitration Institutions

MODULE 4 NEGOTIATION

Unit 1 M e a n i n g of Negotiation

Unit 2 N e g o t i a t i o n Strategies

Unit 3 S o u r c e s of Power in Negotiation

Unit 4 N e g o t i a t i o n Processes

MODULE 5 OPTIONS AND PROCESSES OF ADR

Unit 1 Other forms of ADR

Unit 2 Mechanisms for the practice of ADR

COURSE MARKING SCHEME

The table lays out how the course marking is done.

Tutor Marked Assessment	30% of Course marks
Final Examination	70% of Overall Course marks
Total	100% of Course marks

MODULE 1 TUTOR MARKED ASSIGNMENT

Define the term ADR

List the advantages of ADR

Discuss the purpose of ADR and limitations to the use of ADR.

MODULE 2 TUTOR MARKED ASSIGNMENT Discuss the features of mediation.

Discuss, giving examples of situation when mediation will not be applicable. Discuss conciliation as a means of settling disputes between parties.

MODULE 3 TUTOR MARKED ASSIGNMENT

Discuss other limitations to arbitration.

List the features of arbitration and discuss.

MODULE 4 TUTOR MARKED ASSIGNMENT What is negotiation?

Discuss the types of negotiation methods you have learnt about

Discuss the tricks used in negotiations

List and discuss the sources of power in negotiation

Discuss the phases of negotiation processes known to you.

MODULE 5

Discuss the objectives of the multi door courthouse.

Discuss the options open to citizens at the multi door courthouse.

MODULE 1 INTRODUCTION TO ALTERNATIVE DISPUTE RESOLUTION (ADR)

INTRODUCTION

Unit 1

Definition and nature of ADR

Unit 2

Purpose of ADR

Unit 3 Advantages of ADR

Unit 4 Limitation of ADR

UNIT 1

CONTENTS

1.0 INTRODUCTION

Alternative Dispute Resolution (ADR).

Disputes are inevitable facts of life. Different commercial, legal and even social expectations can be sources for disagreement. Genuine differences can concern the meaning of contracts terms, the legal implication for a contract and the respective rights and obligations of the parties. Extraneous factors and human frailties, whether through mismanagements or over expectation, will also interfere with contractual performance. For example, a major area of dispute is failure to pay or wish not to pay for goods bought and therefore a party is seeking an excuse or justification to refuse to pay all or part of the

contract price.

Litigation is the most recognized and established form of dispute resolution system in Nigeria and even in the world today. All other systems have come to assume secondary roles and have become alternatives to the court system. Thus, the concept of ADR therefore comprises a wide variety of processes, which can be fashioned to meet the specific needs of parties in resolving disputes; each process being an alternative to litigation. These processes can be used singly or in combination with others but the fundamental characteristics is that they all focus on bringing disputing parties together, diffusing adversarial negotiations through an impartial third party and mutually agreeing on terms of settlement, whether in managing community tensions, landlord and tenants frictions or resolving multi-million Naira disputes.

An inquiry at the gradual development of ADR in Nigeria has shown that the process of Litigation has become more and more time consuming, expensive and unduly cumbersome because of the considerable rise in the number of cases in our court which have led to congestion and delay in their resolution.

Some disputes are sensitive and confidential in nature and disputants may prefer settlement in private to one in public glare of court. In addition, the complexity of court litigation tends often times towards increase in costs which disputants are naturally anxious to reduce. On the other hand, there may be claims involving small sums, which may not be worth the cost of litigation. All these have led to the development of alternative methods of resolving disputes. As earlier stated Litigation process was and is still unduly expensive in the long run and especially prolonged as a result of judicial technicalities embedded in litigation in Nigeria. Unnecessary and frequent delays in judicial proceedings have great adverse effects on the administration of justice in Nigeria. This situation is brought about by the congestion of cases in the courts arising from among other factors, unnecessary adjournments leading to unusual long time duration in deciding an otherwise simple case.

Lawyers have also not helped matters as they are in the habit of delaying cases especially whenever they discover that the pendulum is swinging in favour of their

clients. They resort to legal tactics which in one way or the other frustrate the court from deciding the matter expeditiously. In a survey of cases completed by the Supreme Court of Nigeria between 1999 and 2005 the Lagos State Ministry of Justice came up with the following interesting statistics:

Years	Land Case	Other Civil Matters	Criminal Matters
1999	13.6 Years	13.8 Years	8 Years
2000	18 Years	11.7 Years	7.3 Years
2001	19.4 Years	12.6 Years	9.9 Years
2002	21.5 Years	11.3 Years	12.2 Years
2004	16 Years	14.2 Years	9.5 Years
2005	21.7 Years	15.5 Years	12.5 Years

As the Ministry puts it:

Taking together a total of 208 Supreme Court judgments surveyed, we found that it took an average of:

18 Years (from year of commencement) to finalize land cases

14 Years (from year of commencement) to finalize other civil cases

10 Years (from year of commencement) to finalize criminal cases

The same survey shows that;

It took an average of six years for contested cases to move from filing to judgment.

What is the value of a judgment that comes after eighteen years of brilliant and robust advocacy, when some of the parties may have died or when interest may have changed? What also is the real and actual value of a judgment if after paying lawyers tons of money and dissipating so much emotion; time and energy going to court for about two decades, the judgment finally came several years after? An investment dispute in particular and business dispute in general cannot wait for eighteen years to be efficiently and

meaningfully resolved. The outcome will be a sheer waste of time, money, energy, emotions and other valuable resources of all the parties directly or indirectly involved including the supposedly victorious party, except of course, the lawyer.

In the world of human interactions and commercial transactions disputes generally arise between parties as a result of disagreements. When these disputes arise, the need to resolve them as quickly as possible often arises and the common method employed by disputants is litigation in court. Disputes arise in contracts of sales, construction, employment, banking, insurance, etc. Litigation simply proves inadequate in the resolution of such disputes.

Differences arising from on -going personal relationships get complicated when litigation is resorted to because of the obvious win-lose nature of litigation. Court judgments identify clear

winners and outright losers. The winner becomes a triumphant champion, the loser naturally does everything to undermine the judgment or wait for another day to take his pound of flesh.

Litigation is a win/lose means of dispute resolution. Such mode of resolving disputes is no longer fashionable especially at a time when the whole world is opening up, when the world has become a global village, when we consciously want to position our national economy as a destination point for foreign investments. We cannot afford not to have a fast and efficient means of dispute resolution. The in-thing is win/win means of resolving disputes.

It is because of the limitations of litigation, some of which the posers above highlights, that focus is now being placed on ADR in most contemporary jurisdictions a s means of resolving disputes. So what is this ADR and what is it all about? The meaning of ADR, its essence, advantages and limitations are examined in this module.

2.0 OBJECTIVES

At the end of this unit, you should be able to:

i) Define ADR

ii) Mention some of the techniques / forms of dispute resolution

iii) Indicate the need for ADR

iv) Explain the advantages of ADR techniques

v) Identify situations / disputes which for now ADR techniques are not applicable

3.0 MAIN CONTENT

3.1 What is ADR?

Before we look at the definition or the meaning of ADR, it is pertinent to look at the advent of ADR. The history of dispute resolution probably goes back to the dawn of time. Humans have been negotiating and settling disputes formally and informally well before historical journals recorded human endeavor in the field of dispute resolution. The inherent desire of humans to resolve conflicts means that dispute resolution is one of the oldest disciplines known to mankind. The formalization of ADR was arguably brought about by an American Litigation lawyer called Eric Green, who first used the term ADR in an article entitled "settling large case litigation: an alternative approach". See (1978) 11 Loyola of Los Angeles L. Rev 493. Green was instructed on a large scale commercial dispute involving the alleged infringement of certain patent devices. Legal proceedings had been commenced, Green estimated that both parties had spent several hundreds of thousands dollars during the two and half years of preparation for the hearing of the case for which a date had not been set at the time they were looking out for an alternative method of resolving the dispute, without recourse to litigation. The parties agreed to run a "mini-trial" that involved the two parties attending a two-day 'information exchange" chaired by a neutral third party advisor, who was a former judge. The information exchange was to present each party's version of the dispute. The third party's neutral's role was to moderate proceedings and not to effect a compromise of the dispute. Certain rules as to the proceedings were agreed upon by the parties. After two days settlement was reached that saved parties in excess of US$1M in further litigation costs and possibly years of anxiety waiting for a hearing and judgment. Green's approach went on to become what we now know as alternative dispute resolution.

ADR is a term often used to describe a wide variety of dispute resolution mechanisms that are short of or alternative to full scale court processes. ADR also refers to the set of

mechanisms a society utilizes to resolve disputes without resort to costly adversarial litigation. It is an approach designed as a substitute to the rigorous and time consuming litigation approach to dispute settlement. It is also described as an alternative to adversarial process such as litigation that results in win/lose outcomes.

K. Aina Esq in giving a meaning to the acronym stated that;

> ' …..the letters stand for Alternative dispute Resolution, a new approach to dispute processing. It refers to a range of mechanisms designed without the need for formal judicial proceedings. In other words ADR are those mechanisms which are used in resolving disputes faster and fairer without destroying ongoing relationships. …."

ADR can be described as an effort to arrive at mutually acceptable decisions. It involves the application of methods, procedures and skills designed to achieve an agreement that is

satisfying and acceptable to all parties.. It offers a more conciliatory means, quicker and less expensive platform for resolving disputes in contrast to the procedures of seeking justice and fairness or even redress, in a law court. More importantly, ADR mechanism is flexible, promotes and protects the privacy of aggrieved parties, creates calm and friendly atmosphere for parties to discuss, agree and disagree before reaching amicable and endorsable agreement. Today, the application of ADR to resolve conflicts are becoming more and more preferred than litigation in various fields and works of life. It is employed to settle contractual disputes in employment and labour laws, marriage and divorce issues and also in consumer protection and product liability cases. ADR is not alien to Nigeria customs and traditions. In traditional Yoruba and Igbo villages and towns, ADR is commonly employed to resolve cases among communities, families, people or groups. The aggrieved individual or parties consult the community head(s) or even the king where applicable. The community head in turn invites the other party (ies) to a meeting at a set date and place, when and where the parties meet in order to resolve issues. This method of conflict resolution has resolved major conflicts and brokered peace where war, protest, or fracas would have resulted. ADR mechanism promotes dialogue and preserves relationship where possible. Moreover, it is worthy of note that,

different conflicts may require different ADR approach. For instance, family conflicts can be resolved via methods which are at variance to community conflicts, also marriage disagreements or issues of divorce and child custody are resolved differently from disputes relating to extended family, likewise in commercial transactions etc.

Some forms of ADR:

Over the years, several alternatives have been found to litigation. ADR may be classified into two, mainly Binding and Non-binding ADR. Non-binding ADR includes Negotiations, Mediation, Conciliation and neutral Evaluation. These methods of ADR are mainly consensual and reconciliatory. Binding ADR includes Arbitration, Mini-Trial Expert Determination of Issues and Mediation-Arbitration which is also known as Med-Arb.

1. **Early Neutral Evaluation (ENE)**:

This is a technique whereby an impartial senior lawyer or retired judge or magistrate may evaluate the likely outcome of a case if it were to proceed to trial. This is expected to lead to more realistic negotiation between the parties, without any influence on the path or process of negotiation, nor any binding judgment imposed.

2. Mediation:

This process involves a neutral third party whose intervention facilitates communication and negotiation between the disputing parties to foster a mutually agreed settlement between them. It is a voluntary private dispute resolution process in which an impartial third party assists parties to reach a negotiated settlement. The process and the outcome are non- binding. The mediator is actively involved in the negotiation process but, unlike a judge or arbitrator, he has no power to impose a settlement, rather he assists in shaping solutions to meet the parties' mutual interests and achieve reconciliation.

3.Conciliation:

It is a process by which one or more independent person(s) is selected by the disputing

parties to facilitate a settlement of their dispute through a particular procedure. Essentially the role of the conciliator is facilitative. The process and outcome are also non- binding. Like mediation, agreements reached in conciliation amounts at best to gentleman's agreement.

4. **Expert Determination. (ED)**:

This process is also known as Valuation. Expert determination is a voluntary process in which a neutral third party, who is usually an expert in the field in which the dispute arises gives binding determination on the issues in dispute. A dispute may be referred to an expert determination either by means of a term in a pre-existing agreement or on an ad-hoc basis. This type of ADR is very common in Europe and some commonwealth jurisdiction and it is particularly well established in the construction industry.

5. Negotiation:

A process whereby two or more parties seek to reach a consensual agreement. There may be no third party involvement. The principals usually act for themselves or have their legal representatives' act on their behalf. There are usually no rules of procedures imposed on such procedure.

6. Mini- Trial:

A process whereby information is exchanged before a panel comprising of representatives of the disputants who are authorized to reach an agreement. Usually there will be an impartial third party who with the rest of the panel will hear both sides of the disputes and chair a question and answer sessions with all the participants after which the panel will seek to negotiate a settlement.

7. Arbitration:

An Arbitration is the ' reference of dispute or difference between not less than two parties, for determination after hearing both parties in a judicial manner by a person or persons other than a court of competent jurisdiction'. In other words, 'arbitration' is a term

applied to an arrangement for taking and abiding by the judgment of a selected person in some disputed matter rather than take it to an established court of justice. The arbitrator can thus be regarded as a private judge; who determines controversies between two or more disputing parties.

8. Mediation - Arbitration:

This is a two-step dispute resolution process involving both mediation and arbitration, In Med-arb parties try to resolve their differences through mediation, and where mediation fails to resolve some or all the areas of the dispute, the remaining issues are automatically submitted to binding arbitration. The process uses a neutral party who is skilled in both procedures.

3.2 **The Purpose of ADR**

So many reasons has been advanced for ADR in the introduction, paragraph, however it is very obvious that one of the major reason why ADR is gradually becoming a household approach to dispute resolution is because of the delay suffered by Litigants in the normal court system. Most importantly is the reason that ADR creates the avenues and platforms for amicable resolution of *already existing or intending* conflicts or disputes in such a way that it is quick, cost less and at the same time does not infringe on the rights and privacy of the parties. However, disputes can be defined as a lack of compromise between parties. Disputes can also be said to arise when parties fail to reach satisfactory bargain over an issue. Invariable the parties are unwilling to concede to each other without the right benefit. When such phenomenon arises, the process of ADR is set up either through facilitating a resolution, i.e. by bringing the parties to acknowledge and appreciate their differences and therefore reach a mutually beneficial conclusion, or by providing the parties with a mutually binding decision, i.e. through the establishment of rights and commitments.

In addition to the aforementioned, other purposes of ADR include:

-To serve as alternative to litigation

- It is used to create a ‘win-win’ situation between parties by providing resolutions that the parties agree and are happy with

- Its process involves the use of negotiation skills to achieve and develop agreement that are beneficial to parties
- It is designed to engage in constructive and unambiguous dialogue to fashion out a path to resolution
- Tailored resolutions to disputants needs
- Speedy and informal settlement of disputes
- Increased satisfaction and compliance with the resolutions in which the parties themselves has participated.

-It is meant to be voluntary, flexible and used to serve the parties interest

3.3. Characteristics of ADR

- Informality: ADR processes are less formal than the traditional court process. In most cases the rules of procedures are flexible, without formal pleadings, extensive written documentations and rules of |evidence. This informality is what is attractive and appealing to disputants, who may be intimidated by or unable to participate in more formal system.
- Equity/Fairness: ADR mechanisms are instruments for the application of equity rather than the rule of Law. This is so because each case is decided by a third party or negotiated between disputants themselves based on principles and terms that agreeable and fair in the particular case rather than on uniformly applied legal standards.

- Direct Participation: Another major characteristic of ADR is the direct participation of disputants in the process and designing of the settlement. This allows for an opportunity for reconciliation between parties and an atmosphere for result oriented, quick and cheap dispute resolution

3.4 Advantages of ADR

The advantages of ADR have been variously mentioned in the discourse presented in previous sections. However as a way of capturing some of the important ones, the

advantages which employing alternative dispute resolution serves include the following:

1. Flexibility and Simplicity of Procedures: ADR rules and procedures are flexible and simple and also easily adaptable to various types of dispute. Parties are empowered to conduct such a proceedings in such a manner as it considers appropriate so as to ensure fair hearing.

2. Quicker Decision Making: ADR procedures saves time, as going through traditional court of law to resolve cases involves procedures that are time consuming. The processes of obtaining evidence, presenting the evidence, preparing witnesses and the defense proceedings takes time. This time involvement has been attributed to delayed justice in some quarters. Procedures of ADR is notably quicker in reaching decisions.. The parties involved in the dispute have the control over the speed at which a resolution is reached in contrast to cases decided in a court of law.

3. Reduced Cost: The cost of seeking the services of a legal practitioner, obtaining evidence and processing such evidence, etc. may be enormous when compared to the cost of resolving disputes via the alternative dispute resolution methods.

4. Issues resolved through the alternative dispute resolution methods/techniques end up bringing satisfaction to aggrieved parties. The parties at the end of the day come to a common ground whereby each is happy with the outcome. This may not be the case for matters resolved in a law court, where one wins and the other lose. One of the parties is happy about the final decision of the judges while the other is left aggrieved. Some time, the aggrieved party looks for opportunity for further litigation, through appeals in higher court of law. Issues of appeal do not suffice in alternative dispute resolution has each party reaches a mutually beneficial agreement that satisfy their aspirations.

- Preservation of Good Business and Personal Relations: Where the parties have good business relations which they wish to preserve ADR improves and sustains cordial relationship among parties. When disputes are resolved through means provided by alternative dispute resolution, the parties are left happy and they can continue to develop existing relationship. Most time,

alternative dispute resolution fosters better understanding among parties and individuals. This is because, during the process of dispute resolution, the cause(s) of disagreement are presented and an understanding is fashioned out through bargaining which is based on the interests of the parties.

- Privacy: Where the subject matter of the dispute is sensitive, for an example an invention or technical know-how details / trade secrets, which parties may not want exposed to the public, or where the exposure or disclosure of the facts would be detrimental to a party, ADR maintains the privacy of the parties as against the conventional settlement through court.

6. ADR provides platform for informal and less confrontational means of dispute resolution. It avoids placing the label "wicked enemy" on the other party but rather creates a friendly atmosphere for dispute resolution. The parties own the decision and therefore would be committed to maintaining it.

3.5. Limitations of ADR

ADR is limited in some instances irrespective of its advantages. Some of its limitations include:

1) Inability to decide criminal matters
2) Its adoption may also at times be limited by cost most especially when a party to a dispute cannot employ the services of a qualified ADR practitioner
3) Time to resolve a dispute may also be a limitation. In order for some disputes to be resolved for a win/win situation, the resolution may have to be concluded within stipulated time. However, when parties fail to agree, the resolution procedure drags on.
4) Due to the voluntary nature of ADR, a party may refuse to accept what is termed as the best resolution and therefore, refuse to comply with the mandate of the award.

4.0 CONCLUSION

From the foregoing it can be safely posited that the concept of ADR in the resolution of disputes have come to stay. The growth of the ADR process has been enhanced as a

reason of the fact that the time, money and energy input to litigation is often not worth the while on the long run.

5.0 SUMMARY

Considering the advantages of ADR, individuals, corporate bodies, organizations, governments and even the courts of law have come to realize that the only way to decongest the courts and to allow for settlement of disputes amicably is through the various ADR processes.

6.0 TUTOR MARKED ASSIGNMENT

i) Define the term ADR

ii) List the advantages of ADR

iii) Discuss the purpose of ADR and limitations to the use of ADR.

7.0 REFERENCES / FURTHER READING

Orojo, J.O and Ajomo, M.A. 1999. Law and Practice of Arbitration and Conciliation in Nigeria, Mbeyi and Associates, Lagos.

Redfern, A. Hunter, M. Blackaby, N and Partasides, C. 2004. Law and Practice of International Commercial Arbitration, 4th edn., Sweet and Maxwell, London.

Spencer, D, 2002. Essential Dispute Resolution, Cavendish Publishers, Sydney, Australia.

MODULE 2 MEDIATION UNIT 1 Mediation

UNIT 2 Conciliation

5.0 Tutor Marked Assignment

6.0 References/ Further Reading

1.0 INTRODUCTION

Mediation as an ADR process is one of the mostly used of the processes in Nigeria. It can be court-directed or voluntary decision of the parties to mediate. Mediation can be best described as an interest based- negotiation under the guidance of a third party. This process involves a neutral third party whose intervention facilitates communication and negotiation between the disputing parties to foster a mutually agreed settlement between them.

2.0 OBJECTIVES

After the student has studied this unit, student must be able to discuss and point out the importance of mediated disputes, features, advantages and the shortcomings of the process.

3.0 MAIN CONTENT

3.1 Development of Mediation

The growth of mediation as an alternative method of resolving conflicts between parties have grown tremendously in recent years on a global level. The European Union is trying to make sure that it leaves no stone unturned by making sure all Directives on Mediation in civil and commercial matters are put into practice and effect compliance by 21 May,2011.Many countries have embraced the concept of court- annexed or court-regulated mediation i.e. Bulgaria, China, Germany etc. In the Nigeria traditional societies, mediation has always being a tool for settling disputes peacefully between disputing parties, it was also a tool for preserving cultural norms and traditional values. The adage is “the elder is always right”, the younger ones must always accept the words of the elders. The advent of colonization brought the court system, urbanization relegated the traditional mediation into the background, though customary ADR is still recognized in the Nigeria Legal System.

In the case of ***Okpwuru V Okpokam (1998) 4 NWLR*** (pt 90) 554 at 586, the Honorable

Justice Oguntade observed thus;

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

Mediation as an Alternative Dispute Resolution (ADR) mechanism in Nigeria has developed into a structured process and within a legal framework. The Arbitration and Conciliation Act Cap A18, Laws of the Federal Republic of Nigeria (LFN) 2004, an adoption of the UNCITRAL Model Law in International Commercial Arbitration was enacted in 1988, (Nigeria adopted the Model Law in 1988).

In Nigeria both at the State and Federal level, the recognition that the courts alone cannot serve the purpose of satisfying settlement of commercial disputes amidst conflicting parties, have necessitated efforts to ingrain into the legal system, a framework for alternative dispute resolution. The Nigerian Legal System recognizes and encourages settlement of disputes via ADR mechanisms such as Mediation. There some provisions in various State High Court Laws (for e.g. see Section 24 High Court Rules of Lagos State, Section 29 High Court of Rivers State 1999 and Section 22 High Court of Bornu State Cap 63 laws of Bornu State 1994) which promotes and encourages Mediation as a tool for resolution of disputes and restoration of relationship of parties and avoids it as being prejudiced by a "battle" before a court or tribunal.

The Lagos State Civil Procedures Rules of 2012 which is an amendment to the 2004 Civil Procedures Rules makes settlement of disputes by means of ADR almost compulsory. Under the 2004 Rules disputing parties are required to consider alternative means of settling the issues between then and where they are desirous of doing so. The 2012 provide that that all originating court processes shall be screened for suitability for ADR and referred to the Lagos State Multi- Door1Courthouse. (See Order 3 Rule 11) The idea of the Multi-Door Courthouse in Nigeria reputed for being the brain child of the Negotiation and Conflict Management Group (NCMG) in conjunction with the High

Court of Lagos established the Lagos Multi- Door Court House

(LMDC) in 2002 through private-public sector partnership initiative. This model refers to the various alternatives available at first instance to the LMDC and to consider appropriate dispute resolution channel including mediation, arbitration etc. Mediation is a popular method used at the Lagos Multi-Door Courthouse due to its advantages.

In addition to Lagos State, the Federal Capital Territory, Abuja and Kano State has replicated the Multi-Door House concept, other States are in the process of incorporating Multi-door Court House ADR into their laws.

The LMDC Laws sets out statutory objectives to:

1. provide alternative dispute resolution as a means to ensure access to justice and act as an appendage to litigation in settling of disputes.
2. reduce delays and frustrations that attend litigants in the normal court process.
3. serve as a platform to promote ADR in Lagos state.
4. enhance the growth and effectiveness of the justice system through ADR methods.

3.2 Mediation defined

Mediation is the process in which parties involved in a dispute meet jointly and

separately in confidence with a neutral and independent outside party to explore and decide how the dispute between them will be resolved. In Mediation, a neutral third party (the mediator) assists the parties in a dispute to communicate their positions on issues and to

explore possible solutions or settlements. The mediator does not give an evaluation or opinion of the case, but rather prompts the parties to assess their relative interests and positions and to evaluate their own cases by the exchange of information, ideas, and alternatives for settlement.

Allan Goodman in his book, Basic Skills for a New Mediator, defined Mediation as a

voluntary, non-binding and private dispute resolution process in which a trained neutral person helps the parties try to reach a negotiated settlement.

According to J.M Haynes "Mediation is a process in which a third person helps the participant in a dispute to resolve it. The agreement resolves the problem with a naturally acceptable solution and is structured in a way that helps maintain the continuing relationship of the people involved"

3.3 Features of Mediation

The definition proffered by Goodman gives an insight into what the features of mediation are;

- Voluntary
- Non-binding
- Private
- Neutral mediator
- A simple process of settlement negotiated by the parties
- Interest based procedure

Voluntary

The consensus between parties to a dispute is important to initiating the mediation. It is entirely voluntary and non-coercive as parties are free to decide whether to agree in the initiation of the process and the termination thereof. Often, mediation may be organized by parties on judicial recommendation (court ordered mediation)or it may be statutorily recommended. Sometimes

court ordered mediation may provide a party or both parties with no option but to be involved in the mediation and come out with a negotiated settlement of their dispute. For example under the Matrimonial Causes Act, Section 111 provides for the obligatory duty of the court to adjourn proceedings to allow for possible settlement of the parties to the marriage unless the proceedings are such a nature that it would not be appropriate to do so. Any of the parties that refuse to mediate stands to bear the consequences, which may be pecuniary. This may be in form of a fine especially for any party that is absent at the hearing, during which the appropriate channel for the process is determined

(Article 13b LMDC Practice Direction). This may be in form of a fine especially for any party that is absent at the hearing, during which the appropriate channel for the process is determined (Article 13b LMDC Practice Direction). See Supreme court cases ***of Owoseni V Faloye (2005) 14 NWLR (Pt 946)719, 740 and Aribisala V Ogunyemi (2005) 6 NWL (Pt921) 212*** "Where a statute prescribes a legal line of action for the determination of an action be it an administrative matter chieftaincy matter, or a matter for taxation, the aggrieved party must exhaust all remedies in that law before going to court"

Voluntary

Mediation is voluntary and all parties are required to participate. If a party decides to abandon the process, then the purpose is defeated.

Non-binding.

The process of mediation does not bind any of the parties in dispute and does not impose any obligation on them to settle. Settlement depends on the participation and agreement of parties involved. The mediator can only persuade the parties in dispute to resolve their differences amicably through the process. If parties decide not to settle, then the issues will be resolved through litigation. If settlement is achieved by the parties, the terms of settlement will form part of an enforceable contract, and an enforceable judgment of the high court, if it is a court annexed process. ***See Njoku v. Ikechukwu (1992) 2 ECSLR 199***, per Ikpeazu J.S 19 LMDC law and article 17 LMDC PD: Order 39 r.4(3) High Court of Lagos (Civil Procedure) Rules 2004, s. 11 Sheriff and Civil Process Law.

Private

The process of mediation is private and confidential as to limits imposed by the law; In mediation, the parties cannot be compelled to disclose information that they prefer to keep confidential. If, in order to promote resolution of the dispute, a party chooses to disclose confidential information or make admissions, that information cannot be provided to anyone outside the context of the mediation. Mediation's confidentiality allows the parties to negotiate

more freely and productively, without fear of publicity. Parties can in mediation disclose information, express views, make suggestion, offer concessions, without fear that such could restrict them charting a different course should matters proceed to trial. If the mediation process fails, a party is at liberty to formalize an offer made during mediation as an offer which would carry the usual cost iimplication.

Neutral Mediator

The neutrality of the mediator is the hallmark of the Mediation process. The ability of the parties to trust and repose confidence in the mediator is paramount to the success of the whole process of mediation. Such mediator must be non- partisan and neutral in all aspects of the process, must not be a person interested in issues in dispute, not related or connected to any of the parties through whatever means to avoid bias.

The mediator must not have any interest in any of the parties, otherwise an objective intervention would be compromised. *Rules 6(a) of the Abuja Multi-door Court House Rules* provides that *"No person shall serve as a mediator in any dispute in which that person has any financial or personal interest in the*

result of the mediation except with the written consent of the parties"

Parties may agree to employ a prospective mediator who had past relationship with either party but this must be disclosed or known to the parties see Rule 6(b) of the *Abuja Multi-door Court House Rules.*

The Parties must bestow enough authority on the mediator to perform his duties. The mediator should not let emotions or sentiments intrude into the process which can undermine the credibility of the process. In other words, he must be disinterested in the dispute and must not be invested

with authority to take any decision, instead the power to make decisions lies with the disputants.

The Parties' Settlement

Parties involved in the disputes share power in the decision making process. The disputants are in control of the settlement. Settlement is attainable only when parties

agree to resolve their differences through the mediation process and they are saddled with the responsibility of fulfilling the terms of the agreement.

The process seeks to create an atmosphere where parties to dispute are able to reach an agreement that is fair and maximize the interest of all. The flexibility of the process create avenue for exchange of ideas and opportunity to parties to properly address issues at stake before reaching a settlement.

An Interest –based Procedure

Parties in Mediation can be guided by their business interest. Therefore parties are free to choose an outcome that is oriented as much to the future of their business relationship as to their past conduct. When parties refer to their interest and engage in dialogue mediation often results in a settlement that creates more value than would have been created if the underlying dispute had not occurred.

3.3 **When Mediation will not be an option**

With recent developments in the administration of justice through ADR processes the courts may impose sanctions on parties that reject or refuse to attend the mediation process. Any party that unreasonably fails to mediate may likely be sanctioned by the court. In line with this, when can a party refuse to mediate?

The party refusing to mediate would have to show that mediation would have no reasonable prospect of success. In the case of ***Hasley v. Milton Keynes General NHS Trust (2004) EWCA Civ 576; (2004) 1 WLR 3002, t***he England and Wales Court of Appeal was more sympathetic to parties that refused to mediate. This case is now a landmark case on whether the mediation route should be followed, and it now provides a clear checklist of when a party is justified in refusing mediation.

The court, whilst recognizing the benefits of mediation, stated that not every case is suitable, it was stated obiter, and that to force the parties to mediate would create an obstacle in the way of access to justice. The court ruled that a party who refuses ADR may be said to have acted reasonably if any of the following factors applied:-

- The nature of the dispute, since some cases are not suitable for ADR

- The merits of the cases, since a party who reasonably believes he has an unassailable case may be justified in refusing ADR, whereas who unreasonable holds that view may not
- The extent to which alternatives to a trial have already been tried, though the court di observe that mediation often succeeds where other methods fail.
- The cost of ADR is another factor which the court will consider. In many cases the cost is modest, especially as against the cost of a lengthy trial, but in low value disputes, the cost of ADR may be disproportionate

- The damaging effect of delay caused by a stay for ADR, especially when a trial date is imminent.
- Whether ADR has a reasonable chance of succeeding
- Whether and how robustly, ADR has been encouraged by the court.

However in contrast, in the case of ***Hurst V. Leeming (2002) EWHC 1051 (Ch); (2003) 1 Lloyd's Rep 37***. Mr. Leeming won the proceedings, but Mr. Hurst submitted that he should not be ordered to pay Mr. Leeming's costs because Mr. Leeming refused to submit to mediation twice, although he was invited to do so by Mr. Hurst. Mr.Leeming gave five reasons why he refused to mediate:

the legal costs already incurred in meeting the allegations and the threat of proceedings;

the seriousness of Mr. Hurst's allegations of professional negligence;

lack of substance in Mr Hurst's claims;

lack of any real prospect of a successful outcome of the mediation; and Mr. Hurst's obsessive character.

The judge said that the heavy legal costs already incurred were not a reasonable ground for refusal, but merely a factor to be taken into account in the mediation. The fact that the allegations of professional negligence were serious and that Mr.Leeming thought he had a

very good case were also not good reasons to reject mediation. The critical factor according to the judge was whether the mediation had any real prospect of success, judged objectively rather than subjectively. The judge decided that in the circumstances of this case, the mediation had no such prospect of success. Lightman J in the case suggested that to escape a sanction for refusal, the refusing party would have to show that mediation would have no reasonable prospect of success.

In Hasley, the Court of Appeal stated that, to deprive a successful party of all or part of its costs, or to impose a sanction on an unsuccessful party, he otherwise must show the party has behaved unreasonably in failing to mediate.

Factors to determine whether or not a party's decision not to mediate is unreasonable or Otherwise are:

- The nature of the dispute;

- Value of the case; for example in the English case of ***Egan v Motor Services (Bath) Ltd 174*** the English Court of Appeal gave a very strong endorsement to the use of mediation at an early stage in a case, particularly where litigation costs were more likely to be disproportionate to the amount in dispute. In Egan, the amount in dispute was only £6,000 but the parties between them had spent in the region of £100,000 on the litigation, including the appeal. Ward LJ stated that he regarded the parties as "completely cuckoo" to have engaged in such expensive litigation with so little at stake. In support of mediation, Ward LJ stated:

"*The cost of... mediation would be paltry by comparison with the costs that would mount from the moment of the issue of the claim. In so many cases, and this is just another example of one, the best time to mediate is before the litigation begins. It is not a sign of weakness to suggest it. It is the hallmark of commonsense. Mediation is a perfectly proper adjunct to litigation. The skills are now well developed. The results are astonishingly good. Try it more often."*

- Efforts of the parties at resolving the issues on hand through other means of dispute resolution and level of success;

- Whether the costs of the mediation would be unnecessarily high;

- Whether any foot-dragging in setting up and attending the mediation would have been detrimental to the process; and
- Whether there is any indication as to the success of the outcome of the mediation p

Mediation as an ADR method will not be suitable in the following cases:

1 Where the onus lies on the court to decide issues of law and construction, which can impact the relationship between the parties far beyond the parties present contractual relations into the future.

2 In a situation where the parties want the court to decide on a recurrent point of law such that the decision will be established as a reference point for future decisions.

3 When confidence is eroded as a reason of criminal accusations against an individual or group of persons, mediation cannot be seen in the future as credible in such an instance where the person(s) will be involved.

4. Instances in which a party seeks some injunctive relief to shield his position.

5 C**o**nsidering the fact that the cost of mediation can sometimes be prohibitive, especially when the sum to be mediated compared to mediation cost is relatively insignificant.

3.4 **Advantages of Mediation**

1. The mediator can kick start and enhance communication between parties and restore communication between estranged parties, breaking down all barriers that may hinder the smooth resolution of disputes.
2. The parties by the ingenuity of the mediator can help parties discover areas of common interests and thus reach settlements that enhance interests of all parties involved.

3. Mediation is flexible as there are no set rules or binding laws except those that the parties agree amidst themselves, they set the rule of the process and the voluntary nature of the process gives it the credibility and integrity on any agreement reached because the parties are in charge.
4. Mediation is cost effective in that the whole process is not cumbersome in relation to litigation. The parties call the shots as to how fast the disputes can be resolved as it saves cost of paying lawyer fees, filing fees and all the fees that accompany litigation.
5. It is reconciliatory to the parties because it takes away animosity and suspicion and brings about openness and amicable resolution of disputes. This helps parties to preserve relationships and even open up new opportunities for enhanced future relationship (business or otherwise).

Shortcomings of Mediation Procedure:

The confidential nature of mediation process gives no room for a culture of precedent development. Due to the fact that mediation outcomes are not published in public domain there is no mechanism to measure the effectiveness of mediation as an ADR process.

The mediation process is enhanced:

- When parties understand the issues in dispute and maintain objectivity at resolving the issues.
- The parties are not rigid, willing to give and take for amicable settlement
- They do not view their resolve to mediate as a sign of weakness.

MEDIATION AND LITIGATION

Mediation offers a process by which two parties work towards an agreement with the aid of a neutral third party. Litigation, however, is a process in which the courts impose

binding decisions on the disputing parties in a determinative process operating at the level of legal rights and obligations.

These two processes sound completely different, but both are a form of dispute resolution. Litigation is conventionally used and conventionally accepted, but Mediation is slowly becoming more recognized as a successful tool in dispute resolution.

In saying this, there are distinct differences between the two processes. Mediation claims to resolve many of the problems associated with litigation, such as the high costs involved, the formality of the court system and the complexity of the court process. Mediation, unlike litigation does not create binding agreements unless the parties consent to it and the Mediator has no say in the outcome.

4.0 CONCLUSION

Mediation as a method of alternative dispute resolution has been around for a very long time. Due to the globalization of commercial transactions and the opportunity to parties for harmonious settlement of disputes arising from such transactions, the mediation process is becoming more popular.

5.0 SUMMARY

In this unit you have learnt about the growth of Mediation, the features, advantages and the possible shortcoming to such approach.

6.0 TUTOR MARKED ASSIGNMENT

Discuss the features of mediation according to Goldman.

Discuss giving examples of situation when mediation will not be applicable.

7.0 REFERENCES

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UNIT 2 Conciliation

1.0 Introduction

2.0 Objectives

3.0 Main Content

3.1 Conciliation Defined

3.2 Conciliation Agreement

3.3 Types of Dispute For Conciliation

4.0 Conclusion

5.0 Summary

6.0 Tutor Marked Assignment

7.0 References/ Further Reading

1.0 INTRODUCTION

Conciliation as a means of settling disputes though recognized by the Act has not been of much use compared to other processes.

2.0 OBJECTIVES

At the end of this unit students must be able to discuss conciliation as a means of settling disputes.

3.0 MAIN CONTENT

3.1 Conciliation

Conciliation is another dispute resolution mechanism that involves building a positive relationship between parties of disputes. It is the process of bringing parties in dispute together, with whose consent a third party is brought in to settle the dispute. Conciliation is a method of settling disputes by consensus rather than adjudication. The conciliator in this instance will draw up and propose the terms of an agreement designed to represent what in his view is a fair compromise of the dispute, after having discussed the case with the parties.

The Arbitration and Conciliation Act provides for right to settle disputes by conciliation. Sections 37- 55 stipulate detailed provisions for conciliation. Provision of Section 37 of the Act confers right to settle dispute by conciliation. It empowers the conciliator to explore opportunities for the settlement of disputes before him. The Arbitration and Conciliation Act provides as follows:

"Notwithstanding the other provision of this Act, the parties to any agreement m ay seek amicable settlement of any dispute in relation to the agreement by conciliation under the

provision of this part of the Act"

Conciliation and Mediation

In Nigeria, conciliation and mediation are used interchangeably even for the purpose of Arbitration and Conciliation Act. As a general rule, conciliation is essentially governed by the decision of the parties. But it is also governed by the statutes as operative in Nigeria where there are statutory provisions on conciliation. "Conciliation" sometimes serves as an umbrella-term that covers all mediation and facilitative and advisory dispute-resolution processes. Neither mediation nor conciliation process determines an outcome, both share many similarities. For example, both processes involve a neutral third-party who has no enforcing powers.

One significant difference between conciliation and mediation lies in the fact that conciliators possess expert knowledge of the domain in which they conciliate. The conciliator can make suggestions for settlement terms and can give advice on the subject-matter. Conciliators may also use their role to actively encourage the parties to come to a resolution. In certain types of dispute the conciliator has a duty to provide legal information. This helps any agreement reached to comply with any relevant statutory framework pertaining to the dispute. Therefore, conciliation may include an advisory aspect. On the other hand, mediation works purely facilitative: the practitioner has no advisory role. Instead, a mediator seeks to help parties to develop a shared understanding of the conflict and to work toward building a practical and lasting resolution.

Conciliation Agreement

Parties to an agreement may decide that disputes arising therefrom shall be settled by conciliation. See Sections 37-42 of ACA 2004. The conciliation clause only needs to be inserted in the substantive agreement. The clause may read that, "if any dispute or difference shall arise between the parties to this agreement from or in connection with this agreement or its performance, construction or interpretation or otherwise, the parties shall endeavour to resolve it by agreement through negotiation conducted in good faith. If they are unable to agree, the issue shall, in the first instance, be dealt with by conciliation, the conciliator may be chosen jointly by them. Sometimes it may be agreed that the conciliator be appointed by a special body or person. In case the conciliation process fails provision may be made for the dispute to be referred to

arbitration.

Types of dispute for Conciliation

a .Commercial Disputes: These kind of disputes may arise in any field of commercial endeavour including those arising from corporate disputes, franchise, agency, Intellectual property, industrial and labour disputes

b. Family Disputes: Conciliation is confidential in nature and is particularly suitable for the settlement of disputes between husband and wife in matters relating to separation, granting custody of children, property and finance. Although, this method of ADR is yet to be fully embraced in Nigeria

c. Community and Neighborhood Disputes
Communal disputes are often very volatile and can arise in various ways. Disputes can arise from use of land or water. It can also be religious, ethnic or racial. Issues involving demands for compensation for environmental damages resulting from the exploitation of crude oil can be settled amicably through conciliation.

d. International Disputes
International Disputes arising between parties from different countries, or disputes arising between sovereign states who will not like to negotiate directly with the other country for reasons of prestige.

The option of the parties to conciliate may arise at any time in the course of resolving their differences. It may be chosen as the first step in resolving a conflict or it may be employed at the stage where negotiations have failed between the parties. Where talks in a negotiation become deadlocked, parties may decide to conciliate, in which the unbiased view of the conciliator will be given to the parties to arrive at a settlement.

4.0 CONCLUSION

As seen from the line of discussions it can be safely deduced that the use of conciliation as an alternative means of settling disputes in this country is not really popular. But it is certain that as the times go by the process will attain greater use by the courts and disputants alike.

5.0 SUMMARY

The conciliation process involves the consent of parties in dispute to a consented settlement by a third party chosen by them to settle their differences by giving them options that will lead to a settlement.

6.0 TUTOR MARKED ASSIGNMENT

Discuss conciliation as a means of settling disputes between parties.

7.0 REFERENCES/ FURTHER READING

Orojo, J.O and Ajomo, M.A. 1999. Law and Practice of Arbitration and Conciliation in Nigeria, Mbeyi and Associates, Lagos

Redfern, A. Hunter, M. Blackaby, N and Partasides, C. 2004. Law and practice of International Commercial Arbitration, 4th edn., Sweet and Maxwell, London

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MODULE 3 ARBITRATION

UNIT 1 NATURE OF ARBITRATION

CONTENTS

1.0 INTRODUCTION

Dispute resolution abounds, but arbitration no doubt is the most used ADR mechanism both domestically and internationally. The process of arbitration is used between parties to resolve disputes arising out of commercial/contractual agreements, without the formalities of litigation

and regular court procedures. The enhancement of relationship between conflicting parties gave rise to the growth and development of Arbitration as an alternative means of settling disputes. This form of dispute settlement has become very popular because it reduces time and cost which would have been wasted in the process of litigation.

2.0 OBJECTIVE

In this unit you will learn the following;

1. The definition of Arbitration
2. The historical Perspective of Arbitration
3. The features of Arbitration
4. Forms of Arbitration

5. Advantages and disadvantages of arbitration

3.0 MAIN CONTENT

3.1 DEFINITION

The various attempts to define Arbitration have sought to reflect the evolving general understanding of arbitration. Arbitration is a procedure for settlement of disputes between parties to a contract without recourse to the court of law. It is a private arrangement by parties to submit disputes to one or more uninvolved and impartial persons to resolve the points of disagreement. The decision of the arbiter is final and binding on the parties.

Definitions of Arbitration:

•*The Shorter Oxford English dictionary (3rd Edition 1969)*: "Uncontrolled decision" "The settlement of a question at issue by one to whom the parties agree to refer their claims in order to obtain an equitable decision"

•*Saunders (ed) Words and Phrases Legally Defined: "the reference of a dispute or difference between not less than two parties for determination after hearing both sides in a judicial manner by a person other than a court of competent jurisdiction"*

•Halsbury's Laws of England has defined arbitration as:
"*a process used by agreement of the parties to resolve disputes. In arbitration, disputes are resolved, with binding effect, by a person or persons acting in a judicial manner in private, rather than by a national court of law that would have jurisdiction but for the agreement of the parties to exclude* it."

The Arbitration Act does not contain definition of arbitration. The Supreme Court of Nigeria in the case of ***NNPC V LUTIN INVESTMENT Ltd (2006) 12 NWLR (pt 96) at page 504***, in defining arbitration relied on the definition by Halbury's Laws of England. Also in the case of ***CN Onuselogu Ent. Ltd V Afribank (Nig) Ltd (2005) 1 NWLR (pt 940) 577***, the Court of Appeal

defined arbitration in the following terms:
"An arbitration agreement is where two or more persons agree that a dispute or potential dispute between them shall be resolved and decided in a legally binding way by one or more impartial persons in a judicial manner, upon evidence put before him or them"
From the foregoing definitions, Arbitration is a procedure in which a dispute is submitted, by agreement of the parties, to one or more arbitrators who make a binding decision on the dispute. In choosing arbitration, the parties opt for a private dispute resolution procedure instead of going to court.

1.2 HSTORICAL PERSPECTIVE ARBITRATION
Arbitration as a way of resolving disputes pre-dates formal courts; popular in Egypt, ancient Greece and Rome. Under English Law; the first Law on it was Arbitration Act 1697 and the first recorded judicial decision on it was in English in 1610. Weakness of early arbitrations at Common Law was that either party to a dispute could withdraw the arbitrator's mandate right

before delivery of the award, if it appeared to be going against him. (Rectified in the 1697 Act.) In the first part of the twentieth century, many countries including France and USA began to pass laws, sanctioning and promoting the use of private adjudication, as alternative to the perceived inefficient court systems. Growth of international trade further promoted the process of arbitration in the resolution of disputes among merchants; this led to what is known as international commercial arbitration; a means of dispute resolution under International Commercial Contracts. Today, arbitration occurs online, that is, online Dispute Resolution (ODR). ODR proceedings entail filling of claims online, with the proceedings taking place over the internet and judgments rendered based on the documentation.

3.3 MAJOR FEATURES OF ARBITRATION

a) An alternative to court/Litigation.. The most obvious fora for settlements of disputes are the court. It is not surprising when the phrase "we shall meet in court" is often used by disputing parties Courts exist and are maintained by the State to provide a dispute settlement services for parties. It is a manifestation of State power and the responsibility of the State to ensure that the courts exist and that appropriately qualified judges are appointed to hear and determine cases brought before them. Arbitration is not a national court procedure. When parties agree to arbitrate they remove their relationship from the jurisdiction of the court.

b) Informal procedures: parties to arbitration must have agreed to terms that the procedure will be informal and would be devoid of the complexities of court procedures in matters of litigation. The ultimate goal is to keep the process simple.

b) Parties choose the arbitrator(s): the parties can select a sole arbitrator together. If they choose to have a three-member arbitral tribunal, each party appoints one of the arbitrators; those two persons then agree on the presiding arbitrator. Alternatively, the parties who choose an Arbitration institute the institute can suggest potential arbitrators with relevant expertise or directly appoint members of the arbitral tribunal. The institute maintains an extensive roster of arbitrators from seasoned dispute-resolution generalists to highly specialized practitioners and experts covering the entire legal and technical spectrum of intellectual property.

c) Impartial and Knowledgeable Neutrals to serve as arbitrators: There are varied interests and fields in human endeavor from which disputes may arise. Based on this, it is of utmost importance that only experts knowledgeable in the subject matter and points of disputes should arbitrate. This gives opportunity for a proper decision to be arrived at. It is also necessary that the arbiters should share no interest in the rancor.

d) Final and Binding Awards that are enforceable by law: The opinion of consent to arbitrate is based on the fact that the eventual outcome of resolution is final and binding.
This is pursued as long as the parties are satisfied at the point of resolution. More so, the parties agree that the document(s) bearing the resolution agenda is binding and could be used as evidence.

e) Consensual: Arbitration can only take place if both parties have agreed to it. In the case of future disputes arising under a contract, the parties insert an arbitration clause in the relevant contract. An existing dispute can be referred to arbitration by means of a submission agreement between the parties. In contrast to mediation, a party cannot unilaterally withdraw from arbitration. There must be consensus between the parties to an arbitration agreement. It is trite that without agreement on the side of both parties there cannot be a valid arbitration agreement.

- **TYPES/FORMS OF ARBITRATION**

There are two types of Arbitration:

1. Voluntary Arbitration
2. Compulsory Arbitration

Voluntary Arbitration is a binding, adversarial dispute resolution process in which the disputing parties choose one or more arbitrators to hear their dispute and to render a final decision or award after an expedited hearing. Voluntary arbitration implies that the two contending parties, unable to compromise their differences by themselves or with the help of mediator or conciliator, agree to

submit the conflict/ dispute to an impartial authority, whose decisions they are ready to accept. In other words, under voluntary arbitration the parties to the dispute can and do refer voluntarily any dispute to arbitration before it is referred for adjudication. This type of reference is known as "voluntary reference", for the parties themselves volunteer to come to a settlement through arbitration machinery.

The essential elements in voluntary arbitration are:

§ The voluntary submission of dispute to an arbitrator.
§ The subsequent attendance of witnesses and investigations.
§ The enforcement of an award may not be necessary and binding because there is no compulsion.

§ Voluntary arbitration may be specially needed for disputes arising under agreements.

Compulsory Arbitration is a non-binding, adversarial dispute resolution process in which one or more arbitrators hear arguments, weigh evidence and issue a non-binding judgment on the merits after an expedited hearing. The arbitrator's decision addresses only the disputed legal issues and applies legal standards. Either party may reject the ruling and request a trial de novo in court.

Compulsory arbitration is one where the parties are required to accept arbitration without any willingness on their part. When one of the parties to an industrial dispute feels aggrieved by an act of

the other, it may apply to the appropriate government to refer the dispute to adjudication machinery. Such reference of a dispute is known as "compulsory" or "involuntary" reference, because reference in such circumstances does not depend on the will of either the contending parties or any party to the dispute. It is entirely the discretion of the appropriate government based on the question of existing dispute, or on the apprehension that industrial dispute will emerge in particular establishment.

Under compulsory arbitration, the parties are forced to arbitration by the state when:
§ The parties fail to arrive at a settlement by a voluntary method

§ When there is a national emergency which requires that the wheels of production should not be obstructed by frequent work-stoppages

§ The country is passing through a grave economic crisis

§ There is a grave public dissatisfaction with the existing industrial relations

§ Public interest and the working conditions have to be safeguarded and regulated by the state.

Compulsory arbitration leaves no scope for strikes and lock-outs; it deprives both the parties of their very important and fundamental rights.

3.3.2 Forms of Arbitration

Customary Arbitration: the Supreme court of Nigeria in the case of **Ohiaeri V Akabeze (1993) 2 NWLR (pt 221)**1 defines Customary arbitration as:

> "*An arbitration in dispute founded on the voluntary submission of the parties to the decision of the arbitrators who are either the chiefs or elders of their community, and the agreement to be bound by such decision or freedom to resile where unfavorable"*

This type of arbitration is not covered by the Arbitration and Conciliation Act. It is conducted in accordance with the customs, trade and usages of a particular community or group of people. Customary arbitral awards are not enforceable in the same manner as ordinary arbitral awards.

The enforcement of an award under the customary arbitration depends on whether it satisfies certain conditions laid down by the courts. The courts are always wary in holding that a particular customary arbitration has extinguished a party's right to litigate on a matter. Apart from the fact that the arbitrators might be largely illiterate, personal or family prejudices and alliances may operate to the detriment of one of the parties

to the dispute. In ***Ohiaeri V Akabeze (supra) Akpata JSC*** stated the rational for the caution by the courts in the following words:

> " *It is a common feature of customary arbitration in a closely knit community that some of the arbitrators, if not all, not only have prior knowledge of the facts of the dispute, but also have their prejudices and varying interest in the matter*

and are therefore sometimes judges in their own cause and are likely to prejudge the issue"

A valid customary arbitration shall therefore contain at least five ingredients to wit:

That there had been a voluntary submission of the matter in dispute by both parties to an arbitrator or arbitrators;

That there has been an agreement by the parties either expressly or by necessary implication that the decision of the arbitrators would be accepted as binding and final

That the arbitration was conducted in accordance with the custom of the parties or their trade or business;

That the arbitrator or arbitrators reached a decision and published an award and

That the decision or award was accepted by the parties at the same time it was made. This also means that none of the parties resiled from the decision or award. See the cases of ***Agu V Ikewibe (1991) NWLR (pt 180)3085, Eke V Okwaranya (2001) 4 Sc (pt 11)***

Domestic Arbitration: this refers to arbitration between parties who are residents of the same country. These parties have commercial contracts which guide their businesses in that country. Any disagreement resulting from operating the contracts can be resolved via domestic arbitration.

3. **International Arbitration:** This is in converse to domestic arbitration. It is international in nature and occurs when the parties to an arbitration agreement have their business in different countries. It could also be the case when the cause of arbitration agreement traverses beyond the borders of a country.
4. **Institutional Arbitration:** It arises where parties agree as stated in their agreement that in the case of future disputes, the resolution procedure will be subject to the rules of a named arbitration agency or institution. Such arbitration agencies include the International Chamber of Commerce

(ICC) in Paris, American Arbitration Association (AAA), The Regional Centers for Arbitration in Kuala Lumpur, Cairo and Lagos.

5. **Ad hoc Arbitration**: Ad- hoc arbitration has been statutorily defined section 63(1) of the Lagos State Arbitration Law, 2009 as:

"a proceeding that is not administered by an institution or other body and which required the parties themselves to make their own arrangements for selection of arbitrators and for designation of rules, applicable Law, procedures and administrative support"
This arises in a situation where parties in their contract agreement do not refer to arbitration rules of commercial arbitration agency but is entered into after a dispute has arisen. As the name implies, this type of arbitration does not adhere to any standing rules. Parties to this type of arbitration usually establish their own rule of procedure that may be made to fit facts of dispute between them as the disputes arises.

6. **Document only Arbitration:** This is a form of arbitration in which the arbiters rely only on the documents presented by the parties in resolving the dispute. Examples of where this is usually used are in commodity agreements, consumer disputes and in construction contracts.

3.5 A R B I T R A T I O N INITIATORS

There are various ways by which arbitration are initiated. This could be by party consent to arbitration, order of court, or by statutory mandate (Compulsory Arbitration). That by statutorily mandate refers to the situation in which it has already been pre-agreed that disputes arising from relationship will be settled via arbitration. However, arbitration by party consent is different from the other two mentioned earlier because it is flexible and designed to suit the purpose and convenience of the parties involved.

3.6 ADVANTANGES OF ARBITRATION

The rights conferred on parties to choose their arbitration tribunal that will settle their dispute is an advantage because the liberty to appoint persons on the tribunal belongs to them. In addition, various other advantages are associated with arbitration. These include

1. Privacy: Parties have the privilege of keeping their secrets intact. At times, the purpose in arbitration is to protect the sensitive interest of the parties from filtering to the public.

2. Liberty to choose venue for arbitration: Parties are at liberty to choose a venue that is convenient for both parties.

3. Power as to choose law: As regards disputes to be settled by arbitrators, parties have the power to decide the applicable law bearing in mind their convenience and protection of mutual interest

4. Dispute resolutions are achieved in time: Issues creating disagreements between the parties are quickly resolved. This gives parties the opportunity to resolve conflicts without going through the burden of time wasting as may be the case of litigation due to unavoidable court procedures.

5. Cheap: all things being equal arbitration proceedings is a cost-effective process unlike the simplicity and flexibility that are associated with arbitration procedure may save time and money. This is in contradiction to litigation where several adjournments, injunctions etc. are coped with before a judgment is reached

6. Finality of decision: It is a general rule that the decision of an arbitration panel is final and binding upon the parties and no appeal lies in this instance.

3.7 LIMITATIONS OF ARBITRATION

1. Arbitration expenditure may be high

Arbitration may not necessarily be a cost saving alternative to resolving disputes than litigation. First, arbitrator's fees and expenses must be paid by the parties which can be substantial. Depending on the arbitral institution (if one is used), administrative fees and expenses may be high especially if fees are assessed in reference to amount in dispute. Fees will also be paid on other facilities needed to facilitate a smooth arbitral process which adds to the cost of arbitration. These myriad of fees can make arbitration really exorbitant.

2. Inability to join Parties

There are millions of different contracts from which disputes may arise and parties resolve to arbitration. Issues arising may range from simple to complex ones. A construction contract for

example can be very knotty when dispute arise where several aspects of the contract have different parties executing them. In such a situation special provisions need be inserted in the arbitration clause to resolve such disputes, otherwise it may be impossible for the arbitral tribunal to consolidate the disputes since it has no statutory power to do so.

3. Independence of Awards

Decisions reached in arbitration proceedings are confidential which makes it difficult to have precedents to follow when there are similar facts and issues in dispute to which arbitrators can refer. Since the system of precedents is not applicable in arbitration, each award stands on its own.

4. Limited Powers of Arbitrators

Arbitrators are limited in the powers they can exercise in the course of resolving disputes between parties. Such powers as vested in the courts to compel attendance of a party or witness cannot be exercised by arbitral tribunal. Where it is necessary to enforce an award immediately, the arbitration tribunal cannot enforce except after registration in court.

4.0 CONCLUSION

The use of arbitration as a means of settling disputes between parties, most especially commercial disputes arising from contractual transactions has been on the rise in recent times. Partly due to the fact that parties to such disputes are willing to protect their corporate image and ensure a quick and less laborious means of settling disputes arising from their transactions.

5.0 SUMMARY

In this unit you have been intimated with arbitration as an alternative means of dispute resolution, the definition, features, types, forms, advantages and limitations of arbitration.

6.0 TUTOR MARKED ASSIGNMENT

List the features of arbitration and discuss.

REFERENCES /FURTHER READING

Orojo, J.O and Ajomo, M.A. 1999. Law and Practice of Arbitration and Conciliation in Nigeria, Mbeyi and Associates, Lagos

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UNIT 2 SOURCES OF ARBITRATION LAW

CONTENTS

1.0 INTRODUCTION

This unit introduces and intimates you with the growth and development of the Arbitration legislation in Nigeria.

2.0 OBJECTIVES

After you must have studied this unit in conjunction with other recommended texts and materials, you must be able to discuss the development of arbitration legislation in Nigeria.

3.0 MAIN CONTENT

3.1 NIGERIAN ARBITARATION LAW & RULES

3.1.1 Commercial Arbitration in Nigeria

Arbitration Ordinance 1914 based on English Arbitration Act, 1889 was the first statute on Arbitration in Nigeria. It was reenacted as Arbitration Ordinance Act cap 13, Laws of the Federation of Nigeria and Lagos 1958, applicable to Northern, Western, Eastern Regions, Federal Territory of Lagos and Southern Cameroun. The 1958 Act was limited to domestic arbitration but as a colony of Britain before Independence in 1960, Nigeria was covered by the New York Convention and became a signatory to the New York Conventions in 1958. Nigeria adopted the Convention by Section 54(1) of the Arbitration and Conciliation Act (ACA) of 1988.

The Arbitration and Conciliation Decree 1988 was the first indigenous statute on Arbitration. This Decree was enacted during the military administration of General Badamosi Babangida,. This became the reference article guiding arbitration practices in Nigeria. The ACA 1988 later became Arbitration and Conciliation Act Cap 19, Laws of the Federal Republic of Nigeria (ACA), 1990. The ACA, 1988 was reenacted as The Arbitration and Conciliation Act Cap A18, Laws of the Federal Republic of Nigeria (ACA), 2004 to provide a unified legal framework for fair and efficient settlement of commercial disputes by arbitration and conciliation and made applicable the Convention on Recognition & Enforcement of Arbitral Awards 1958 (New York Convention) to Awards made in Nigeria or any contracting State on International commercial arbitration.

However, it is worthwhile to mention that the rules guiding the operation of arbitration in

Nigeria can be divided into two major sources. These sources according to literature are the common law and doctrine of equity on one hand and statutes on the other hand. The common law and doctrine of equity was in operation during the colonial era. It provides guiding rules where such are missing in statutes. Complimenting the common law and doctrine of equity are the rules and regulations applicable to specific trade. These trade rules and regulation, at times referred to as trade usages, are information resources that aid arbitration when there are no provision to reach decision in statutes or common law and doctrine of equity. The follow up sections to this section are used to focus on the common law and doctrine of equity, and other rules that govern and forms sources of arbitration laws and rules in Nigeria.

3.1.2 Statutes

Statutes here refer to the laws of a nation. It serves to guide the operation of citizens and residents and provides means for delivering equity, justice and judgment. The Nigerian Arbitration law is therefore a derivative of local and foreign statues. An example of local statutes is the Arbitration and Conciliation Act 1990. The New York Convention 1958 and Uncitral Model Law 1985 are examples of foreign statutes

3.1.2 Common law and doctrine of equity

The common law and doctrine of equity is a formation of the colonial masters in Nigeria. It relates to the English Common law and doctrine of equity which is in operation in Britain. This forms the basis by which equity and justice are pursued and achieved in Nigeria during the British control of Nigeria economy. Today, this has become ancillary to the Nigerian Law and rules. It becomes important when the existing national laws and rules lack provision for resolving particular unanticipated issues.

3.1.3 Trade usages

These are the rules and regulations that directly apply to specific trades. Different trades may have different guiding rules and regulations. These trade rules and regulation guides the process of arbitration and aid in making appropriate decision that are in tandem with the law while

simultaneously agreeing with the trade rules. Construction Industry Arbitration is promoted by the Construction Industry Arbitration Association of Nigeria.

Under this, services of professionals in the construction industry can be engaged if expertise is needed by arbitrators –for expert advice or expert witnesses.

3.2 DEVELOPMENT OF ARBITRATION LEGISLATION IN NIGERIA

Refer to the history of Commercial Arbitration as enumerated in 3.1 above.

In addition, outcome of arbitration legislation in Nigeria is not very popular because of the secretive nature of arbitral proceedings. However, few arbitration laws that exist form the guiding policy for reaching major decisions. One major statute is the Arbitration and Conciliation Act, 2004. Older versions are the Arbitration Act, 1914 and the Arbitration and Conciliation Decree 1988. Another is the New York Convention, 1958. Moreover, the United Nations Commission on International Trade Law (UNCITRAL) has developed arbitration law called the Arbitration Rules. This forms a major source for the development of the provisions of the Arbitration and Conciliation Act. Therefore, the UNCITRAL greatly influence the existing Arbitration and Conciliation Act of the nation. Further, information on the mentioned national arbitration acts can be found in the reference quoted at the end of this module. However, information on the U NCITRAL Arbitration Rules is partly provided after this section and also in the reference. Another arbitration law developed by UNCITRAL is called the UNCITRAL Model Law of International Commercial Arbitration. It is used to regulate international commercial arbitration. It is further discussed below and also in the reference.

3.2.1UNCITRAL Arbitration Rules:

Established by The United Nations Commission resolutions on International Trade Law (UNCITRAL) in 1966 to harmonize and unify the Law of International Trade, its objectives are to promote the New York Convention and provide a unified approach on steps to take in ad-hoc arbitrations; thus the Arbitration Rules, adopted on the 28th of April, 1976 were drafted and approved by the United Nations in 1976. It is a major arbitration law developed by an organ of the United Nations and adopted by the United Nations General Assembly in 1976. The aim of the law is to provide

acceptable and simple rules and regulation to guide international arbitration. This is done with an interest to provide level playing field for arbitration practices everywhere in the world.

The most important advantage of this rule, apart from its being suited to be applicable to different countries, is its flexibility. This provides opportunity for its adjustability to meet required arbitration needs.

3.2.2 UNCITRAL Model laws of International Commercial Arbitration

The UNCITRAL Model Law of International Commercial Arbitration was adopted by the United Nations General Assembly in June 1985. The following policy formulations were adopted under this law:

a) That there should be liberalization in International Commercial Arbitration procedure. The parties under this policy are given the power to choose the means of their dispute resolution.
b) That there should be baseline rules that will ensure equity and fairness in deciding the disputes.
c) There should be the establishment of provisions which will enforce final arbitration decisions and also clarify controversial issues when they arise
d) That means should be provided to resolve difficult international commercial arbitration, no matter the complexities of the disputes and disagreements.

THE NEW YORK CONVENTION

The Convention on the Recognition and Enforcement of Foreign Arbitral Awards, also known as the "New York Arbitration Convention" or the "New York Convention," is one of the key instruments in international arbitration. The New York Convention applies to the *recognition and enforcement of foreign arbitral awards* and the *referral by a court to arbitration.*

The Convention is on the recognition and enforcement of foreign arbitral awards. It is strictly not designed for domestic awards. It has been enacted in Nigeria in the 2nd Schedule to the Arbitration and Conciliation Act.

Prior to the advent of the Convention, there had been the 1923 Protocol and Arbitration Clauses, that is, the Geneva Protocol and the 1927 Convention on the Execution of Foreign Arbitral Awards, that is, the Geneva Convention which were produced by the then League of Nations and as brought about by the ICC.

The New York Convention however, has made improvements on its predecessors. Under the New York Convention, an enforceable award need only be binding and not final as required under the 1927 Convention. The New York Convention takes priority over the Arbitration and Conciliation Act in cases of conflict between the two.

Objectives

Recognizing the growing importance of international arbitration as a means of settling international commercial disputes, the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the Convention) seeks to provide common legislative standards for the recognition of arbitration agreements and court recognition and enforcement of foreign and non-domestic arbitral awards. The term "non-domestic" appears to embrace awards which, although made in the state of enforcement, are treated as "foreign" under its law because of some foreign element in the proceedings, e.g. another State's procedural laws are applied.

The Convention's principal aim is that foreign and non-domestic arbitral awards will not be discriminated against and it obliges Parties to ensure such awards are recognized and generally capable of enforcement in their jurisdiction in the same way as domestic awards. An ancillary aim of the Convention is to require courts of Parties to give full effect to arbitration agreements by requiring courts to deny the parties access to court in contravention of their agreement to refer the matter to an arbitral tribunal.

THE ARBITRATION AND CONCILIATION ACT 2004

The Act is the current law on both domestic and international commercial arbitration and conciliation in Nigeria. It is an offshoot of the UNCITRAL Model Law, the UNCITRAL Arbitration Rules and the New York Convention all discussed above.

OBJECT OF THE ACT

The advent of the British colonial rule led to the 1914 delineation of the Nigeria State into the Northern and Southern Protectorates. With regards to the development of arbitration law in Nigeria in that year, an Arbitration Ordinance was passed which made from the English Arbitration Act 1889. The Ordinance was called Arbitration Ordinance 1914. Paragraph (2) of section 1 made the pioneering law applicable to "*the Northern, Western and Eastern and to Lagos and the Southern Cameroon as if they were each a Region".*

The above development seems to still linger till today in the various states, that is, the states out of those regions still have their different Arbitration Laws.

However, the enactment of the Arbitration and Conciliation Act, which came into effect in March 1988, now puts the validity of these laws into question. What the Arbitration and Conciliation Act seems to have been passed to do is to provide a unified legal framework on the law of arbitration in the entirety of the Nigerian states with respect to the settlement of commercial disputes through arbitration.

Section 58 of the Act provides that the Act shall apply throughout the federation. In effect, the arbitration laws of different states have by implications been repealed. It is noteworthy to point out that the Act was promulgated as a Decree during a military era where and when the characteristic suspension and modification held sway. Thus, by the Constitution (Suspension and Modification) Degree No 107 of 1993, the Act was made superior and any law not in conformity with the Act, being a Decree of the Supreme Military Council, was null and void. Thus, the provisions of the Act should prevail.

Obviously, all these have gone with the military era and pursuant to the provisions of Section 1 (i) of the 1999 Constitution of the Federal Republic of Nigeria, the Constitution is supreme and its provisions shall have binding force on all authorities and persons throughout the Federal Republic of Nigeria.

The Arbitration and Conciliation Act and the state Arbitration laws are existing laws pursuant to the provisions of Sections 315 (1) (a) and (b) respectively. However, the Act being an Act of the National Assembly and on the strength of the doctrine of covering the field will be superior to the state Arbitration Laws where there is a conflict. Section (45) of the 1999 Constitution provides:

" If any enacted by the House of Assembly of a state is inconsistent with any law validly made by the National Assembly, the law made by the National Assembly shall prevail and that other law shall to the extent of the inconsistency by void".

Where the National Assembly enacts a law on a subject matter in respect of which the states' Houses of Assembly are constitutionally capable of making law, the fact that the National Assembly had enacted a law in respect of such a subject makes such a law superior to the state law which has been made in respect of the same subject matter. Thus, the Arbitration and Conciliation Act must prevail over the state laws on the same subject.

In ***AG Ogun State V. AG Federation (1982) 3 NCLR 166*** th***e*** Supreme Court per **Fatayi Williams JSC** on the doctrine of covering the field held that:

"where identical legislations on the same subject matter are validly passed by virtue of their constitutional power to make laws by the National Assembly and a state House of Assembly, it would be inappropriate to invalidate the identical law passed by the State House of Assembly on the ground that the law passed by the National Assembly has covered the whole field of that particular subject matter. To say that law is inconsistent in such a situation would be in my view sufficiently portray clarity or precision of language."

The case of ***CG DE Geophysique V Etuk [2004] 1 NWLR (Pt.853)2,*** is a clear – cut demonstration of the prevalence of the Arbitration and Conciliation Act over the Arbitration Law Cap 12 Laws of Cross Rivers State which applied to Akwa-Ibom State.

In that case, the Court of Appeal held that Section 7 (1) (b) of the Arbitration Law of Cross-Rivers State was inconsistent with the Arbitration and Conciliation Act and the latter must prevail in the face of such inconsistency.

It however remains to say that the implied repeal of state laws is without prejudice to other arbitration agreements entered into before the promulgation of the At under the moribund state laws which will be continually enforced intra vires of Section 6 (i) (b) and (c) of the interpretation Act which provides that the arbitration clause in the agreement governed by a state law does not run contrary to the provision of the Arbitration and Conciliation Act. Also, where the arbitration is not commercial the state laws may apply if parties so choose.

Section 35 of the Arbitration and Conciliation Act demands a cautious reading. It provides:

This Act shall not affect any other law by virtue of which certain disputes:

- *May not be submitted to arbitration; or*

b) May be submitted to arbitration only in accordance with the provision of that or another law.

This provision does not save arbitration laws of the states so as to make them run concurrently with the Act but forbids the parties from taking certain matters to arbitration, which they may not by virtue of public policy or express exclusion of disputes in such areas by statutes. This section also gives room to submission to arbitration in certain areas of life in accordance with the provision of certain statutes which may give laid down procedures for such arbitration. This is known as statutory arbitration.

Section 11 of the Petroleum Act 1969

The Petroleum Act makes provision for the exploration of petroleum products from territorial waters and continental shelf of Nigeria and vests the ownership of, and all on-shore and off-shore revenue from petroleum resources derivable there from in the Federal Government and for other matters incidental thereto.

Arbitrations under the Arbitration and Conciliation Act are purely commercial. Section 57 of the Act defines commercial to include all relationships of a commercial nature including leasing, licensing, exploitation agreement or concession, etc. Thus, license and mining lease and so on will qualify as commercial agreement under the Petroleum Act.

4.0 CONCLUSION

From the foregoing it can be safely established that the emergence and the growth of the Nigeria Arbitration Law and Rules have its roots from diverse sources.

5.0 SUMMARY

The Nigerian arbitration Laws have come a long way,. Its growth and development can be traced to1914 during colonial rule. Other sources include: Statutes, Common Law and Doctrine of Equity, Trade Usage etc.

6.0 TUTOR MARKED ASSIGNMENT

Discuss the growth and development of Arbitration Laws in Nigeria

REFERENCES / FURTHER READING

Orojo, J.O and Ajomo, M.A. 1999. Law and Practice of Arbitration and Conciliation in Nigeria, Mbeyi and Associates, Lagos

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Velima Publishers

http://www.newyorkconvention.org/

UNIT 3 ARBITRATION AGREEMENT

CONTENTS

1.0 **INTRODUCTION**

In general, an arbitration agreement provides the basis for arbitration. It is defined as an agreement to submit present or future disputes to arbitration. The validity of an arbitration agreement is premised on its ability to meet the requirement of the Law, falling short of the requirements renders the agreement invalid or void as the case may be.

2.0 **OBJECTIVES**

The underlying objective of this unit is to intimate you with:

a. T h e requirements of a valid arbitration agreement
b. The contents of an arbitration agreement

3.0 MAIN CONTENTS

3.1 VALIDITY OF ARBITRATION AGREEMENT

As important as the processes of arbitration is, the outcome is what every party looks forward to. The conclusion reached is what all interested parties to the matter are willing to have, understand, keep and also remember for as long as the relationship exist. Information relating the outcome of an arbitration process is a major tool and an excellent resource material. It can become an important rudder that guides future deliberations, relationships or interactions. At times, the outcomes of arbitration are instruments that maintain, protect and control relationships along family lines, community linkages, national/international cooperation and trade links. It also helps maintain inter -tribal relationships. For instance, arbitration results between two family disputes over landed property (ies) can aid in guiding future family relationship along the lines of their land ownership. When the outcome of the arbitration is transmitted to family lines after the very owners, the beneficiaries also maintain the results of the arbitration. In such a way, the relationship is kept for as long as there are reasons for linkage and interaction on such matter.

In line with the aforementioned, there is therefore a need to validate and make permanent the outcome of arbitration. Various means exist to validate arbitration agreement. First and foremost, for an arbitration to be valid, the parties must have pre- agreed on arbitration.

Requirements for a valid Arbitration agreement:

The parties must have a written consent to arbitrate. The Arbitration and Conciliation Act has a mandatory provision in Section 1 as to the formalities of an agreement made

under it on the choice of the party (party autonomy) thus making both oral and written formalities of the agreement valid. See Sections 1 (1) ACA

Other validation rules include:

b) The outcome of the arbitration must be in writing: According to the United Nations regulation on arbitration, every arbitration agreement must be in writing. It is also a mandatory requirement that arbitration under the **Arbitration and Conciliation Act 1990** must be in writing. Section 1 (2) of the Act states that "Any reference in a contract to a document containing an arbitration clause constitutes an arbitration agreement if such contract is in writing and the reference is such as to make that clause part of the contract"

Furthermore, if reference in a contract is made to arbitration document, such contract constitutes an arbitration agreement, provided the contract is in writing. It is worthy of note also, that an arbitration agreement cannot be revoked once intention of the parties is clearly expressed except by agreement of the parties or by leave of the court of competent jurisdiction. Moreover, sometimes a party to arbitration is a corporate organization. When this arises, the agreement must be written and presented under a seal. Other forms of presenting the written agreement are contained in section 1 (1) (a) to (c) of the Arbitration and Conciliation Act

c) There must be an established legal relationship between the par ties to arbitration: Before parties can consent to arbitration, the cause of disputes must be such that have to do with predefined relationship between them. This predefined relationship is the contractual agreement that exist between the parties. The contractual relationship must therefore be the reason behind dispute. The issues that cause disputes from contracts are mostly linked to the breach of the contracts and these forms the main reason for arbitration procedures.

d) The dispute must be such that can be subject to arbitration: This in essence means that the cause of such dispute must not be criminal, liquidation etc.

3.1.1 Autonomy and Independence of an Arbitration Clause

An arbitration agreement may be inserted into the contract between the parties or the arbitration agreement may be documented separately. In a situation where the agreement is

inserted into the contract, it is understood in law to be an independent contract.

The court decided on the legal import of such a clause in the case *of* ***Heyman v. Darwin Ltd (1942) A.C 356 at pp. 373- 374*** .In that case the court decided that an arbitration clause is different from other clauses because it is the agreement of both parties that if any conflict should arise between them in the performance of the contract they will have recourse to the arbitration tribunal.

The ACA has no provision as to how an arbitration clause should be couched but the attitude of the court has been to give effect to the construction of an intention to arbitrate where this can me from the parties agreement. See ***C. N Onuselogu Ent. Ltd V Afribank (Nig) Ltd (2005) NWLR at 580. In ADC V LGN (2002)2 SC*** it was held by the apex court the term in the clause that:

'any dispute shall be finally and exclusively settled by arbitration ……' rules out any other means of settling such dispute".

In a situation where the contract is abandoned, the arbitral clause will still be applicable to the parties for the purpose of determining claims arising from the breach of contract. But in an instance where the arbitration clause is illegal, it will therefore be void. Section 12(2) of the Act reiterates the independence of the arbitration clause from the main contract.

3.2 CONTENT OF ARBITRATION AGREEMENT

3.2.1 Capacities of Parties to engage Arbitration

The question as to what qualifies parties to engage arbitration to resolve disputes is very important to the subject of alternative dispute resolution. Not everyone that bears grudge or is dissatisfied about certain issues can use arbitration to resolve such disagreement or dissatisfaction. For instance, if company A is dissatisfied with company B over certain business issues, they may be able to engage arbitration to resolve the issues. However, doing this will require the measure of their ability to do so. This measure is based on the proviso

that the two companies have subsisting contract and they have resolved to arbitrate if disagreement arise. If on the other hand, the contract precludes their consent to arbitrate or there is no business contract at all, the parties cannot arbitrate.

Another important point that must be checked before arbitration is the legal capacity of the parties. This is one of the requirements of a valid contract. Parties to a contract must have legal capacity to enter into the contract. Otherwise such a contract is invalid. The significance of this lies in the ability of the parties to service the outcome (award) of the arbitration. That is, in the event of enforcing an award, the party against whom the award is subject must not be incapacitated to comply with the terms of enforcement. This position is captured in Section 52 (2) of the Arbitration and Conciliation Act 1990. The concept of incapacitation refers to the inability of the person or party to comply with the terms of the contract. This could mean the person to be a minor, a person of unsound mind or a bankrupt.

3.2.2 The Reference

An Arbitration Agreement is the basis for parties' ability to refer disputes between them to arbitration. The reference must be worded in a way that is devoid of ambiguity and must rest enough authority with the arbitrators so that they can resolve issues in dispute without having to flout the rules. It is suggested that a reference to arbitration be all encompassing so as to cover all the points for resolution between the parties. If the clause is written referring to disputes and differences alone, this may not resolve matters between the parties especially where there is an undisputed claim. Parties must ensure that reference is constructed in such a way that the disputes, differences and claims are covered for all points to be arbitrated upon. When disputes arise as to the existence of a contract between the parties, it cannot be established by using clauses like 'arising out of the contract' or "arising under the contract".

At common law a claim that is not disputed cannot be subject of arbitration; such can only be subject of litigation. ***In London and Northwest Railway Company v. Jones (1915)2 K.B 35*** it was held that where a claim is partly admitted, the claimant is entitled to judgment on the admitted point, and may go to arbitration for the remainder.

Disputes that arise after the appointment of an arbitrator cannot come under the jurisdiction of such arbitrator but where provision is made in the agreement to cover all transaction without limitation of time; such will come under the arbitrator's authority.

An arbitration agreement may contain the ***Scot v. Avery*** clause. The import of the clause is that disputes between parties to a contract will first be subject to arbitration. Parties to a contract may conclude between themselves that prior to any action being initiated in court the parties will

first resort to arbitration.

Another crucial clause is the ***ATLANTIC SHIPPING Clause*** which makes provision to the effect that parties may be barred from arbitration if they do not arbitrate within a given period. These clauses when included in arbitration clause will enhance prompt initiation of arbitral proceedings.

3.3.3 Arbitrators

An Arbitration agreement is a comprehensive and an all- encompassing document that stipulate matters relating to:

a. The number of Arbitrators that will administer the procedure will be indicated in the Arbitration agreement; it may be a single arbitrator or three according to the discretion of the parties. Section 6 of the Act

b. Appointment of Arbitrator: Parties may jointly appoint a single arbitrator, and th e parties may resolve to appoint three. In this instance each of the party will appoint an arbitrator and the third will be jointly appointed by the parties. Section 7(1)

c. The authority of the Arbitrators must be clearly defined.

d. Preference for the venue where an Arbitration proceeding will be conducted is factored on the proximity of the venue to the parties which must have been provided for in the Arbitration. In a situation where the place of meeting is not stated in the agreement, then reference will be made to section 16 ACA, 2004 for direction. It provides :

16(1) – "Unless otherwise agreed by the parties, the place of the Arbitral proceedings shall be determined by the Arbitral Tribunal having regard to circumstances of the

case, including the convenience of the parties"

Furthermore, Subsection 16(2) provides;

"Notwithstanding the provisions of this subsection (1) of this section and unless otherwise agreed by the parties, the Arbitral Tribunal may meet at any place it considers appropriate for consultation among its members for hearing witnesses, expert or the parties or for inspection of documents, goods or other properties".

e. There must be an indication as to the law regulating the contract in the Arbitration clause. Ordinarily, the Arbitration procedure is regulated and administered by the law operative in the place of Arbitration.

f. The procedure for conducting an Arbitration procedure is embodied in the Arbitration clause. It could be ad hoc or institutional. The provision should contain issues relating to startup of the Arbitral process, pretrial meeting, term of reference or settlement of issues, pleading and other documentation, hearing & evidence, award and cost.

g. Language by which the arbitration will be conducted should be indicated in the agreement since parties may be of different nationalities especially in an international arbitration. Where there is no provision as to this effect in the agreement. The provision of Section 18(1) of the ACA will be resorted to for guidance.

4.0 CONCLUSION

The validity of an arbitration agreement is dependent on observing and obeying the principles governing the procedure, failure to comply with the rules and principles can render the agreement invalid.

5.0 SUMMARY

In this unit you have learnt about the requirements and the contents of a valid arbitration agreement.

6.0 TUTOR MARKED ASSIGNMENT

a. Discuss the contents of an arbitration agreement.

b. What are the requirements of a valid arbitration agreement?

REFERENCES / FURTHER READING

Orojo, J.O and Ajomo, M.A. 1999. Law and Practice of arbitration and conciliation in Nigeria, Mbeyi and Associates, Lagos

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UNIT 4 ARBITRATION INSTITUTIONS

CONTENTS

1.0 INTRODUCTION

The growth in industries and the corporate world in general has enhanced the use of arbitration in settling disputes arising from commercial transactions between companies, corporations, individuals etc. These have heralded the birth of arbitration institutions. These institutions aid the arbitration process in no small measure. Some professional bodies act as arbitrators in matters in their various professions, while some offer their services for a particular type of dispute, region; others are concerned with resolving all kinds of commercial

disputes e.g. Chattered Institute of Arbitrators, Nigeria.

2.0 OBJECTIVE

At end of this unit, students will learn about the Arbitration institutions, their functions and

objectives and also be able to identify Arbitration clauses in other institutions' constitutions

3.0 MAIN CONTENT

3.1 DOMESTIC ARBITRATION INSTITUTIONS

The term domestic in Arbitration is only used to refer to nature of Arbitration and place of Arbitration. It has no reference to the citizenship of either parties to a dispute or of the arbitration panel. A domestic Arbitration is referenced when the parties to a commercial dispute are simultaneously doing business in the same country while operating a business contract in that country. For instance, if two parties have business relationship in a country and the contract binding their relationship was intended to be operated in the same country of business dealings, the dispute arising out of such contractual transactions will be a subject of domestic arbitration. Therefore, a domestic arbitration institution is an institution which oversees, regulates and guides arbitrators and arbitration processes in a country while at the same time it is domicile in that country. In most developed countries, there are institutions that specialize in domestic arbitration and ADR while others specializes in international arbitration. In the UK, in particular, there are several domestic arbitration institutions but the ones that are most relevant in Nigeria is the Chartered Institute of Arbitrators. This and some other arbitration institutions are highlighted below.

3.1.1 Chartered Institute of Arbitrators

The Chattered Institute of Arbitrators founded in 1915 was granted a Royal Charter in 1979. It has members drawn from different professions including building, engineering, law, insurance, banking, etc. The Institute has a wide coverage of members in about 75 countries of

the world, including Republic of Ireland, Nigeria, Kenya, New Zealand, etc. Basically, the institute was established to perform regulatory functions and also act as guide and standardization for arbitrators and arbitration procedures the various functions are highlighted below.

Functions of the Chartered Institute of Arbitrators

The functions which the Chartered Institute of Arbitrators serve to perform include:

1) Training and accreditation of arbitrators in all member countries

2) Promote and facilitate resolution of disputes by arbitration

3) Provide facilities for other forms of alternative dispute resolution processes e.g. mediation and reconciliation.

4) Set standards for arbitration and issues guidelines and procedures to be adopted

5) Regulates the activities of professional arbitrators by publishing codes for the conduct of arbitrators in respect of national disputes and in specialist areas

6) It publishes general arbitration rules

3.1.2 Nigerian Branch of the Chartered Institute of Arbitrators

The Nigerian branch of the Institute of Chartered Arbitrators, an offshoot of Chartered Institute of Arbitration was established in March 1998, but became operational in 1996. The Nigeria Branch has the same objectives and functions as those of the umbrella body. The Nigerian branch in order to enhance its set objectives carries on series of conferences, seminars and workshops to enlighten users and update practitioners of arbitration. It advises users in selecting arbitrators and setting up arbitration panels.

3.1.3 Association of Construction Arbitrators

The association was formed to oversee activities of construction arbitration. It was

founded in 1997

3.1.4 Other professional Associations

Some other professional associations existing in the country may also make provisions for arbitration in their various guidelines and codes of practice. Such Associations may include Nigerian institute of Architects (NIA), the Council for the Regulation of Engineering profession in Nigeria (COREN) etc.

3.2 Objectives of Arbitration Institution

- Provision of arbitration services which include: acting as appointing authorities
- Capacity building which involves training of arbitrators
- Supervising the arbitration process and procedure
- Producing the governing rules of arbitration
- Accreditation of arbitration panels

4.0 Conclusion

From the foregoing it is evident that the practice and profession of arbitration in a country is subjected to regulations of arbitration institutions. These institutions, mentioned in preceding sections, and other such institutions promote and enhance the practice of arbitration.

5.0 Summary

In this unit, the awareness of students has been drawn to some of the available arbitration institutions. Their knowledge about the regulatory functions of these institutions has also been enhanced.

6.0 Tutor Marked Assignment

Having gone through the lessons in this unit, each student should pick a professional

institution or organization and go through their regulatory laws to discover the contents or clauses of arbitration (if any). The student is therefore required to highlight and discuss the clauses.

References/ Further Reading

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MODULE 4

NEGOTIATION

Unit 1 Meaning of Negotiation Unit 2 Negotiation Strategies

Unit 3 Sources of Power in Negotiation

Unit 4 Negotiation Processes

UNIT 1

M E A N I N G AND SCOPE OF NEGOTIATION

CONTENTS

7.0 References / Further Reading

1.0 INTRODUCTION

Negotiation is a daily occurrence that happens without a second thought on the part of the parties. In daily life negotiation happen between husband and wife, parents and their children, the housewife negotiating stuffs by haggling in the market place, to the very complex negotiations

that go on in business circles, between states and the nations of the world.As much as it is part of daily life, the nitty-gritty of negotiation needs to be understood, and skills sharpened especially when it gets to the formal and more advanced settings of commercial negotiations.

2.0 OBJECTIVES

It is expected that by the end of this unit, you should be able to:

- To define negotiation
- To discuss the styles in negotiation
- Discuss advantages and disadvantages of negotiation if any.

3.0 MAIN CONTENT

3.1 Definition of Negotiation

3.1.1 What is Negotiation?

Negotiation is a problem-solving process in which two or more people voluntarily discuss their differences and attempt to reach a joint decision on their own on their common concerns. In other words, Negotiation is a process by which two or more parties reach an agreement on matters that require a decision between them. The decision on the subject matter of the negotiation is taken by the two parties themselves and not by a third party.

A thorough definition of Negotiation is provided by M. Ansley in his book Negotiating Conflicts: Insights and Skills for Negotiators and Peacemakers (11991, South Africa Juta & co,pp 91-92) where Negotiation was defined as:

'A verbal interactive process by which two or more parties who are seeking to

reach

agreement over a problem or conflict of interest between them and which they seek

as far as possible to preserve their interest but to adjust their views and positions in

the joint effort to achieve agreement"

From the above definition it can be stated that the general attributes of Negotiation are:

- It involves more than one party
- It involves a joint agreement on the outcome
- It requires the movement of party's position and interest
- It usually empowers the user by providing self-determination
- It is non-interventionary (there is no third party involved)
- It is often less expensive form of dispute resolution and
- It allows parties themselves to control the process and outcome.

Negotiation involves only the parties to a dispute. When a dispute arises between two or more parties, they may decide to settle it themselves without involving a third party. It may come to play in resolving conflicts, structuring commercial agreements, and managing social relationship to mention a few. It may also involve domestic transaction such as banking, commercial or property transaction. Negotiation can also be international in nature spanning transactions in crude oil, imports of industrial goods and services.

Characteristics of a Negotiation

Negotiation is:

Voluntary: No party is forced to participate in a negotiation. The parties are free to accept or reject the outcome of negotiations and can withdraw at any point during the process. Parties may participate directly in the negotiations or they may choose to be represented by someone else, such as a family member, friend, a lawyer or other professional.

Bilateral/Multilateral: Negotiations can involve two, three or dozens of parties. They can

range from two individuals seeking to agree on the sale of a house to negotiations involving diplomats

from dozens of States (e.g., World Trade Organization (WTO)).

Non-adjudicative: Negotiation involves only the parties. The outcome of a negotiation is

reached by the parties together without recourse to a third-party neutral.

Informal: There are no prescribed rules in negotiation. The parties are free to adopt whatever rules they choose, if any. Generally they will agree on issues such as the subject matter, timing and location of negotiations. Further matters such as confidentiality, the numbers of negotiating sessions the parties commit to, and which documents may be used, can also be addressed.

- **Confidential:** The parties have the option of negotiating publicly or privately. In the government context, negotiations would be subject to the criteria governing disclosure.

Flexible: The scope of a negotiation depends on the choice of the parties. The parties can determine not only the topic or the topics that will be the subject of the negotiations, but also whether they will adopt a positional-based bargaining approach or an interest-based approach.

Advantages of Negotiation

- In procedural terms, negotiation is probably the most flexible form of dispute resolution as it involves only those parties with an interest in the matter and their representatives, if any. The parties are free to shape the negotiations in accordance with their own needs, for example, setting the agenda, selecting the forum (public or private) and identifying the participants. By ensuring that all those who have an interest in the dispute have been consulted regarding their willingness to

participate and that adequate safeguards exist to prevent inequities in the bargaining process (i.e., an imbalance in power between the parties), the chances of reaching an agreement satisfactory to all are enhanced.

- Like any method of dispute resolution, negotiation cannot guarantee that a party will be successful. However, many commentators feel that negotiations have a greater possibility of a successful outcome when the parties adopt an interest-based approach as opposed to a

positional-based approach. By focusing on their mutual needs and interests and the use of mechanisms such as objective standards, there is a greater chance of reaching an agreement that meets the needs of the parties. This is sometimes referred to as a "win-win" approach.

- Negotiation is a voluntary process. No one is required to participate in negotiations should they not wish to do so.
- There is no need for recourse to a third-party neutral. This is important when none of the parties wants to involve outside parties in the process, e.g., the matter to be discussed or the dispute to be resolved may be highly sensitive in nature.
- Unlike the outcomes of certain adjudicative processes, e.g., the courts, the outcome of a negotiation only binds those parties who were involved in the negotiation. The agreement must not, of course, be contrary to the law or illegal (e.g., an agreement to commit a crime would be illegal and thus void for public policy reasons).
- Assuming that the parties are negotiating in good faith, negotiation will provide the parties with the opportunity to design an agreement which reflects their interests.
- Negotiations may preserve and in some cases even enhance the relationship between the parties once an agreement has been reached between them.
- Opting for negotiation instead of litigation may be less expensive for the parties and may reduce delays.
- . **Disadvantages of Negotiation**
    - A particular negotiation may have a successful outcome. However, parties

may be of unequal power and the weaker party(ies) may be placed at a disadvantage. Where a party with an interest in the matter in dispute is excluded or inadequately represented in the negotiations, the agreement's value is diminished, thereby making it subject to future challenge. In the absence of safeguards in the negotiating process, the agreement could be viewed by a participant or others outside the process as being inequitable, even though the substance of the agreement may be beyond reproach.

- A successful negotiation requires each party to have a clear understanding of its negotiating mandate. If uncertainty exists regarding the limits of a party's negotiating authority, the party will not be able to participate effectively in the bargaining process.
- The absence of a neutral third party can result in parties being unable to reach agreement as they be may be incapable of defining the issues at stake, let alone making any progress towards a solution.
- The absence of a neutral third party may encourage one party to attempt to take advantage of the other.
- No party can be compelled to continue negotiating. Anyone who chooses to terminate

negotiations may do so at any time in the process, notwithstanding the time, effort and money

that may have been invested by the other party or parties.

- Some issues or questions are simply not amenable to negotiation. There will be virtually no chance of an agreement where the parties are divided by opposing ideologies or beliefs which leave little or no room for mutual concessions and there is no willingness to make any such concessions.

- The negotiation process cannot guarantee the good faith or trustworthiness of any of the parties.

- Negotiation may be used as a stalling tactic to prevent another party from asserting its rights (e.g., through litigation or arbitration).

Negotiation may also take place in both civil and criminal matters. Plea bargains are

agreements between defendants and prosecutors where defendants agree to plead guilty to some or all of the charges against them in exchange for concessions from the prosecutors. These agreements allow prosecutors to focus their time and resources on other cases, and reduce the number of trials that judges need to oversee.

In plea bargains, prosecutors usually agree to reduce defendant's punishment. They often accomplish this by reducing the number or severity of the charges against defendants. They might also agree to recommend that defendants receive reduced sentences. The provision for Plea bargaining in Nigeria has made it possible for accused persons in Nigeria to enter into negotiations with the prosecutions example is the Administration of Criminal Justice Law of Lagos State. The plea bargain process has been applied in some of the cases prosecuted by the Economic and Financial Crimes Commission (EFCC), especially the high profile cases.

For instance, former Inspector General of Police, Tafa Balogun who converted billions of Naira belonging to the Police Force for personal use was handed a six-month jail term for each of the eight counts brought against him as well as a fine of N 500,000 for each count. The terms were however to run concurrently while the judge also ordered that the 67 days he spent in detention during the trial should be deducted.

The money laundering case of former Governor Dipreye Alamieyeseha of Bayelsa State was resolved via plea bargain as he forfeited some of the assets believed to be fraudulently acquired in order to escape a stiff sentence. Other examples are former Edo State Governor Lucky Igbinedion and former Managing Director of Oceanic Bank Plc, Mrs. Cecilia Ibru.

Negotiation may take any of these three modes: (i) face to face communication (ii) telephone (iii) written communication.

Negotiation is a skill that needs to be acquired and developed. Also it is an art that needs to be perfected for effectiveness and achievement of purpose. Before a decision is taken as to whether a matter should be resolved by negotiation or by other processes, the Best Alternative to Negotiated Agreement (BATNA) must be taken into consideration.

3.1.2 DETERMINING YOUR BEST ALTERNATIVE TO A NEGOTIATED AGREEMENT (BATNA)

In negotiation theory Best Alternative to a negotiated Agreement could be defined as the course of action that will be taken by a party engaged in negotiations if the talks fail and no agreement can be reached. It could also be defined as the true measure by which you should judge any proposed agreement. It is the only standard which can protect you both from accepting terms that are too unfavorable and from rejecting terms it would be in your interest to accept.

It is the alternate plan when the talks/negotiation starts to wobble out of control. It can also be ones' trump card to make the deal happen to one's advantage, or to take a walk from it altogether.

Where parties fail to reach an agreement in a negotiation, several alternatives are available to them. The most preferable of the alternatives is called the Best Alternative to a Negotiated Agreement (BATNA). The option for BATNA is however due to the fact that what was desired when negotiation was employed will not (or did not) provide the result expected (proving a failed negotiation process). This therefore means that, the moment a best alternative to a negotiated agreement is found, the alternative becomes the option that brings limit to discussion. This limit will therefore be the worst case scenario. No one will invariably be willing to go below the BATNA.

In accessing your BATNA which require skills and preparation, the focus must not be on pecuniary gains. Factors such as the time required to strike the deal, risk, tolerance and relationships must be considered. A more tasking aspect is the ability to gain information on the best alternatives available to the other party. This requires hard work. The ability to know the BATNA of the other party is crucial so as to enable the negotiator determine the offers that are acceptable in the process of bargaining.

Moreover, assessment of the BATNA of both sides aid in foreknowing if there is any possibility of agreement between parties to a negotiation and also lead to determining whether there is much room to bargain or little. While considering the BATNA of the

parties involved in a negotiation, it is possible to determine a point of connection (or agreement) between the parties. This point of connection is known as the Zone of Possible Agreement (ZOPA). Based on this, a ZOPA is achieved when there is an overlap of the bottom line position. For instance, in negotiating for the awards of maintenance of children in a divorce suit, the mother's bottom line may be N12, 000 per month while the father's bottom line may be N8000. Due to the large difference in the parties' requests, it can be concluded that there is no ZOPA. However, if the father's bottom line (i.e. the amount he is willing to part with) is N15, 000 per month, and the mother' bottom line (i.e. the amount she is willing to receive) is N12, 000, and then a Zone of Possible Agreement (between N12000 and N15000) exist.

When there is a proper evaluation of BATNA, the possibility of coming out of a negotiation with good award is strong. Inability to determine ones BATNA and that of the other party can lead to an outcome that is below what the best alternative could provide.

3.2 METHODS OF NEGOTIATION

There are different methods that are open to Negotiators. The one most often adopted is influenced by personality. The methods of Negotiation have been classified into three distinct forms which are soft, firm and hard.

3.2.1 SOFT METHOD OF NEGOTIATION

In negotiating a deal, some negotiators prefer to adopt procedures that are friendly and accommodating. They tend to carry out the process to reach an award in such a way that the relationship and interaction is kept intact. The aim is to avoid hurting the other party while at the same time undue privileges may be given unawares. To avoid some of the common problems associated with bargaining over positions, negotiators who take a soft approach treat the participants as friends, seeking agreement despite great cost, and offering concessions as a way to create or preserve a positive relationship with the other side. A soft bargainer behaves transparently, sharing their bottom line, which can leave

them vulnerable to a hard bargainer who is competitive.

Advantages;

- its tactful and conciliatory
- Conclusion is quickly reached
- A fair conclusion is usually arrived at which is agreeable to both parties
- It builds up good reputation and image

Though this method is welcoming, it on the other hand has its disadvantages. Such disadvantages include:

- the failure to get a fair deal
- the possibility of manipulation by the other side
- the acquisition of a reputation for being soft
- reaching agreements that are below the best outcome that could be and
- a reluctance to walk away from the table

3.2.2 HARD METHOD OF NEGOTIATION

This is a direct opposite to the soft method. This style of bargaining is hard and uncompromising. It is an adversarial, competitive bargaining that assumes that the opponent is an enemy to be defeated, rather than a partner to be worked with cooperatively. The negotiator starts up high and concedes piecemeal. It is forceful and tends to compel the other party to submission.

It makes unrealistic demands and very few concessions. It causes bluffs, misleads and tries to outmaneuver the other side. Hard method of Negotiation which works on the psychology of the other party and tries to wear them down. It is ultimately designed to achieve victory at the

expense of the other party. The snag will be when the other party too puts up a diehard stance which may bring the negotiation to a stalemate. Negotiation will eventually break down as parties maintain the hard stance and a breakdown in communication is inevitable. This could prove a lose-lose situation. Notwithstanding all these, Hard Negotiation method has the its advantages among these are;

- walking away with better substantive deal
- taking initiative in negotiation
- not yielding to manipulation from the other side and
- gaining a tough reputation

The disadvantages of Hard negotiation methods are;

- prevention from reaching a mutually beneficial deal
- failing to take advantage of the full range of possibilities on the table
- creation of misunderstandings
- infliction or damage to relationship
- non-sustainability of solutions arrived at and
- poisoning the atmosphere for future negotiations.

3.2.3 FIRM/PRINCIPLED METHOD OF NEGOTIATION

Contrary to the two methods of negotiation highlighted above is a method which stands in

between. It is an approach for highly skilled negotiators. The negotiators employing this method are resolved in their request while considering the interest of the opposing party. They are well determined to get the best deal out of the discussion. It is the most preferred method.

4.0 CONCLUSION

Negotiation as an alternative dispute resolution process has been around for a long time.

Those in the field of practice or those aspiring to be professional negotiators must be willing to learn by training, and enhance their practice by adopting the mix of the forms of negotiation for optimal result. It is worthy of note that styles and strategy may change in the course of negotiation, and more than a method may be combined in order to achieve set goal.

5.0 SUMMARY

In this unit we have discussed negotiation as an ADR technique. We have defined what negotiation is and the styles of negotiation and how the combination of styles can help the negotiator achieve desired result.

6.0 TUTOR MARKED ASSIGNMENT.

What is negotiation?

Discuss the types of negotiation methods you have learnt about.

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UNIT 2 NEGOTIATION STRATEGIES

CONTENTS

1.0 INTRODUCTION

This unit will be focused on the approaches to negotiation and the tactics employed by negotiators at the bargaining table in order to have a favourable and successful process.

2.0 OBJECTIVES

At the end of the unit, you should be able to:

1. Explain the negotiation strategies

2. List and discuss the tactics used in negotiation

3.0 MAIN CONTENT

3.1 NEGOTIATION STRATEGIES

Negotiations strategies are the methods negotiators use to achieve their real objectives in order to reach an agreement on the matter under negotiation. There are two types of negotiating strategies:

- Competitive
- Co-operative

3.1.1 COMPETITIVE APPROACH

The competitive approach which is also called the positional approach is characterized by a win/lose tactics. It occurs where parties take a stand and are not ready to shift or concede to the other. In this approach, the parties maintain an attitude and position of winner takes all. To be able to achieve their goals, parties resort to scheming in order to gain an advantage over the other

The approach creates competition between the parties. This strategy is inimical and usually produces an outcome that leaves a bitter taste in the mouth of the defeated party. The characteristics of this approach make it unsuitable for parties that are willing to maintain their relationship beyond the life of the dispute. The approach may also lead to a lose/lose situation where the parties are strong on their position and are unwilling to give in to each other. Where this happens, the relationship between the parties may be sore and over.

ADVANTAGES OF COMPETITIVE APPROACH

- The winner takes all
- Gives the winner a sense of fulfillment

DISADVANTAGES

- Puts a strain on relationship (family, commercial etc)
- Loss of future opportunities that can emanate from the party that lost out in the negotiation
- There may be a deadlock where the other party also decides to take a stand where both parties lose.

3.1.2 C O O P E R A T I V E APPROACH

The cooperative approach which is also called the problem solving approach is characterized by a win/win tactics. The negotiators are desirous of having a peaceful settlement of disputed issues in such a way that both parties gains at the end. The parties seek to work out a bargain that is profitable to all concerned. Moreover, in order to adopt the win/win strategy, negotiators need to:

a) Draw a line of difference between the parties and the problem to be solved. By this, issues are resolved and personalities of parties are preserved.
b) Pay close attention to the purpose they set out to achieve, and not maintain an unyielding stance that can jeopardize the whole process.

Display ingenuity in devising several alternatives by which the process can be successfully negotiated.

- Decide that the result of negotiations be based on some objective yardstick that is measurable

Parties that resolve from the beginning of negotiations to allow for a fair and equitable process with objectivity in focus by adopting the collaborative strategy are able to have successful negotiation without straining future relationship. It is worthy of note that the strategy to adopt will be dependent on the nature of transaction and circumstance.

3.2 NEGOTIATION TACTICS

Negotiation is viewed by many as a must win, nothing short of win is acceptable. To many it is a do or die affair, win by whatever means. With this mindset negotiators are prone to use every kind of trick in the achievement of their goals which are often unethical. Based on this, negotiators employ different tactics to achieve, at times, their selfish goals. These tactics are discussed below.

3.2.1 Promise

This tactic is premised on the offer of the future benefits as a trick to secure immediate concession (if you sell this to me at a cheaper price, then I will be buying from you and bring you more customers). Many times negotiators find themselves in a situation where they are promised future deals if concession can be granted in present transaction. As much as future deals are desirable the present must not be sacrificed on the altar of a future deal that may never materialize.

3.2.2 Bloated negotiating team

This trick is intended to harass and intimidate the opponent. This trick is played out by overwhelming the opponent by the number of negotiators in a team. This can be done by bringing in experts in all the relevant fields of the negotiation process. However, a well-informed negotiator with adequate preparation will not be daunted by the number on the opposing side.

3.2.3 Threats

A party may issue threats to intimidate the other party and thereby resort to making hasty decisions that can be detrimental to his case. This happens especially in a situation where the party issuing threats have an advantage/information over and above the other party. A professional negotiator will weigh the threat and the consequence that will attend to non -

compliance. The use of threat will not achieve its purpose when the party being threatened is able to decode the other party. This eventually becomes detrimental to the negotiator issuing the threat.

3.2.4 Extreme initial position

The extreme initial position is a tactic commonly used by competitive negotiators by setting the initial stakes high and expecting the other party to make an offer that will fall within the range of acceptable position. This tactics works more where the other party is not well prepared for negotiations. When the necessary information is not harnessed to know the options available and how to respond, the party becomes vulnerable to the antics of the other party. The danger in this position is that party may view the other party as unserious and may respond in an outrageous manner. This situation makes the parties far away from arriving at a consensus. Negotiating for a property, the assignor may fix a price that is very high and if
the buyer is not aware/ informed of the worth of such property in the area may eventually pay more than the property is worth.

3.2.5 Psychological ploy

This trick is often devised by negotiators on their opponents to secure favorable concessions for themselves even if it is detrimental to the other party. The psychological ploy can be used in various ways, like feigning ignorance or lack of competence. A party in opposition negotiation may use this trick to gather information not available to him in order to strengthen his negotiation. The psychological ploy tactic can also manifest in a situation where in the team of a negotiating party one of the team acts as a mediator. This ploy is devised in the situation where by all other members are unyielding and difficult in their demand but this fellow plays the devil's advocate breaking the truce between his team and the other party to reach a negotiated agreement where ordinarily there would not have been. The kind of agreement reached in this instance is to the advantage of the mediator's team

3.2.6 Deadline

Negotiators will always seek to close a deal in no time by issuing deadlines. When deadlines are issued, it pressures the other party into taking a not well thought out decision, especially if such depends on the outcome of the negotiation to take other decisions. For instance, if a man owes a bank and he has a property he wishes to sell to offset the debt. The other party may have information that might be used to rush him into decision and which will not be favourable to him. Therefore before rushing to meet a deadline, a negotiator should weigh the consequences of not meeting the deadline. He should be faced in determining what in real terms will be the price to pay for losing this deal as against other options. A negotiator should be wary of issuing deadlines that he does not intend to follow up, which labels him as unserious and lacking integrity.

3.2.7 Lack of authority

It may take months for parties in negotiation to come to an agreement and when parties are getting ready to seal the deal, a party may then declare he has power to negotiate but not make final decision, therefore may need to resort back to his principal or some authority to approve or ratify the agreement. This tactic often is a plot to buy time to have a further deliberation or review the offer made by other. It is advisable at the beginning of negotiations that the issue of authority is cleared by both parties.

3.2.8 Nibble

Nibble is a tactic that can be used by a party on whom an advantage has been conferred. It is like an Oliver Twist asking for more. This trick comes to play after parties have concluded negotiations and a party brings up a request for an additional concession which may look intangible but ordinarily would not be conceded if it was brought up during negotiation.

4.0 CONCLUSION

From the foregoing it is important that a negotiator be adequately prepared before going to the bargaining table. Being able to recognize the opponent's approach and ability to decipher the tactics employed by the other party per time and means of avoiding falling into the trap is important for a successful negotiation.

5.0 SUMMARY

In this unit you have learnt about the types of negotiation strategies and the tricks employed by negotiators to gain an upper hand in bargaining, howbeit unethical. The negotiation strategies are competitive and co-operative. The tricks employed include, promise, bloated negotiating team , threats, nibble etc. to achieve their goals.

6.0 TUTOR MARKED ASSIGNMENT

Discuss the tricks used in negotiations

7.0 REFERENCES /FURTHER READING

Fisher, R. Ury, W and Paton, B 1991. Getting to yes: Negotiating agreements without giving in, 2nd edn., Penguin Books, New York

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UNIT 3 S O U R C E S OF POWER IN NEGOTIATION CONTENTS

1.0 INTRODUCTION

The context of power in negotiation is the ability to exercise control over the outcome of discussions between the parties during negotiation. It is a power play that can sway the process on the part of the negotiator that can play it well.

2.0 OBJECTIVE

After studying this unit student should be able to discuss the relevance of power and the sources of power in negotiation.

3.0 MAIN CONTENT

3.1 SOURCES OF POWER IN NEGOTIATION

Sometimes there are some factors that lead negotiation to a particular predetermined end. These factors have power to control the process of negotiation and thereby bring the deal in the favour of the party with such power. This power may be real or imagined. The power is real when a party is in direct possession of what it takes to direct the deal to conclude in his desire. It is imaginary when the other party feels or thinks, his opposing party is capable of leading the deal in his direction of interest. There are however several sources of power in negotiation. These sources include:

3.1.1 Competition

Competition here refers to the commodity in question. This arises when a party has sole right and ownership of what is desired by other parties. The scarcity involved in the commodity drives the negotiation in favor of the owner. This is similar to a monopolistic market, where there is one seller and many buyers. The fluctuation of the price of such commodity is also the prerogative of the owner. He can deliberately manipulate the negotiation to his favour. However, where there are competing commodities or several owners of similar commodities, the direction of negotiation can be partly controlled by both the buyers and sellers. This is similar to the law of demand and supply in which when there is

scarcity of supply while there is surplus in demand, the price is high and vice versa.

3.1.2 Legitimacy

In negotiation, legitimacy is another source of power. The validity placed on items, commodity or transaction may influence the negotiation. For instance, a NAFDAC approved drug or food item will easily attract buyers to negotiation. This official approval will also sometimes affect the

price tag as against another original product without a NAFDAC approved number. Another

example is a titled land with appropriate Certificate of Occupancy. Such property can attract better negotiation than one without a title. Other forms of legitimacy apart from the official, regulatory or professional authority are the legal and institutional authorities. While legal authority is rigid, institutional/organizational authority is flexible and can be negotiated.

3.1.3 Information

Information is another strong source of negotiation. The amount of information available to a party on a deal will put the party at advantage. The available but scarce information can become the wheel of manipulation in a negotiation, most especially when the other party is unaware of such viable information. More so, when a party has prior k knowledge about the interest of the opponent in a negotiation the party is put in an advantage. Such information can be useful in directing the course of negotiation.

3.1.4 Precedent

Cases in court are based on strategic precedents. The outcome of a decide d case can be used to determine the case at hand. This is also similar to negotiation. The current practice in a business can be used as a negotiating factor to decide on a transaction. Where this is the case, it is concluded that precedents around the business is being used to make appropriate decision.

3.1.5 Time

Business deals are always timely. The gauge of time is an important factor in striking a deal. Some businesses depreciate with time while some others appreciate. When time constraints are placed on a deal, the parties in negotiation are pressured to end the deal before the set time. For instance, in Europe, football players transfer period are always bounded by time. Whatever negotiation that would be is fixed within the time limit. It is required that all negotiations must be concluded before the deadline. Most times, negotiations close to deadline are always hurried and this many at times influence the outcome.

3.1.6 Investment

The investment power in negotiation works like a golden handcuff. It is used to get the opponent to make commitment at the beginning of a deal. A party who has invested so much in a business will be very unwilling to part with the business just because of his huge investment, even though he is no more willing to continue with the business. The size of such investment may be used by negotiators to persuade the other investor to make larger concessions in the future and to hold down his interest. The reasoning behind this is that with the investment made, the party will feel a sense of loss to rescind the transaction. On the long run even when faced with a situation that he would not have ordinarily consented to he will be unwilling to relinquish the transaction because of the investment at stake.

4.0 CONCLUSION

Having discussed what power is in negotiation, a negotiator must understand his source of power and be able to use it to his advantage, and likewise he must be able to identify the opponent's source of power so as to be able to counter them when it will be to his own disadvantage.

5.0 SUMMARY

A negotiator must fully understand the power play in negotiation to be able to have a favourable concession and a successful negotiation.

6.0 TUTOR MARKED ASSIGNMENT

List and discuss the sources of power in negotiation

7.0 REFERENCES/ FURTHER READING

Fisher, R. Ury, W and Paton, B 1991. Getting to yes: Negotiating agreements without giving in, 2nd edn., Penguin Books, New York

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UNIT 4 NEGOTIATION PROCESS

CONTENT

1.0 INTRODUCTION

In this unit you will learn about the phases in negotiation and how important it is for a negotiator to be adequately prepared for, and thoroughly understand the dynamics of each

of the phases.

2.0 OBJECTIVES

After studying this unit you should be able to discuss and apply the negotiation processes in a real life situation

3.0 MAIN CONTENT

3.1 THE NEGOTIATION PROCESS

The negotiation process can be divided into four stages

a. Preparation

b. Opening Phase

c. Bargaining Phase

d. Closing Phase

3.1.1 Preparation

The saying goes that he who fails to prepare is planning to fail. Developing good plans and preparation are important to the success of any negotiation. A negotiator must have a mental picture of what he plans to achieve and set out an articulate agenda to guide the process.

As events unfold in the course of negotiation, methods and strategies may change but the agenda in place guides and helps the negotiator from deviating from the substance of negotiation. It is necessary for a negotiator to do his homework well, gather all relevant information and have thorough understanding that is necessary about the transaction before going into mainstream of negotiation.

During preparation the following issues need to be considered:

- A negotiator must know the other options open to him and that of the opponent in

the

course of negotiation if they fail to reach a consensus. In all the options open to a negotiator, the best of the options on the scale of preference is called the Best Alternative to Negotiated Agreement (BATNA).This helps in knowing and assessing the limit of negotiation award.

- Get to meet the parties: the opposing negotiator and the corporate entity or individual he represents, get enough information about their background and personal traits.

iii. Be able as a negotiator to put your emotions in check, lest your apparent weakness or strength that h

iv. Be able to meet to know the benefits the parties are aiming at and be able to make

concessions wi

v. Review your plans and tactics, and prepare for how to respond and manage surprises that s

vi. Be proactive, think ahead, and envisage circumstances that may warrant digressing from your agenda and how not to be derailed from achieving your end goal.

vii. A negotiator must not get emotionally entangled, maintain a clear thought and objective view point.

viii. The power play can be vigorous with each party doing all that is possible to tilt the balance to his own favour; in this a negotiator must be vigilant and pay close attention to what is going on at the bargaining table.

ix. Detail your bargaining work plan, determine your upper and lower limit, and also develop negotiation work plan detailing the bottom line, acceptable and the ideal positions.

3.1.2 Initiation

The initiation stage is first in line before the bargaining stage in negotiation. This stage is very crucial because on it rests the success or failure of the whole process. At this stage each of the parties will state their case, establish the real facts, and state the main issues to be addressed in the negotiation.

The parties present their problems from their different points of view in accordance to the needs the parties wants addressed. At this stage also there should be no display of emotions in stating the problem at this stage, there is a need to thread softly and be cautious of just marshaling your position on the matter because it poses the danger of each party maintaining their own position rather than seeking opportunity for mutual gains.

In addition, parties should state clearly and have a thorough understanding of issues in dispute. This helps the parties to focus on the issues. By establishing the real facts parties will separate the supporting facts from conclusion and test all assumptions. Where parties intend to adopt the collaborative strategy, the initiation stage is the time to set the tone, check for common grounds between the parties to agree on.

Who should open discussion may become a problem. There are different ways to resolve the problem which include considering the subject matter of the transaction, the custom of the trade may indicate who starts up the discussion. The venue of the meeting may determine the one who takes the first shot. Negotiation may be opened by the party hosting, or from whose instance the meeting is convened. The person with a weak case can allow the other party to open discussion to be able to ascertain whether the other party is aware of the weakness. Where a party has limited information, the onus of starting discussion maybe shifted to the other party which may also help gather information from the other party.

3.1.3 Negotiation

This is the phase where all the preparations of the parties come to the test. The negotiation stage is also called the bargaining phase. This is where the parties'

bare issues and analyze their options. Here they agree on points noted at the preliminary stages. Also, the negotiation phase is one for persuasion on both sides to accept offers and counter offers by either party. It is a time to influence the other party to come into agreement .The success of this phase is based on the strategy adopted by the parties in bargaining. Where the competitive strategy is adopted then parties will play the power game by using different kinds of tactics to make the opponent accept their position. The tactics include but not limited to extreme initial position, use of threat, deadline, and nibble.

In a situation where parties adopt the collaborative strategy, the bargaining phase should be used to discover, synchronize and decide options that will meet the respective needs of the parties. In order to do this, negotiators must understand the three elements at play in negotiation;-

A. Subject Matter – this relate to the problems on which an agreement is sought.
B . Standpoint – this is stance of parties on the issues to be resolved.
C. Interest- Interest refers to the fundamental concern and prospects of the parties that would be affected by the agreement in the transaction.

At this stage, the communication skills of a negotiator comes in handy, he must know how to use them to maximize his benefit.

It is not uncommon in the course of negotiation for the parties to have a stalemate situation, where in the course of negotiation a party remains keen on his point not to shift position. Even when parties have adopted the win-win strategy, this does not totally negate a stalemate situation. This happens especially where parties fail to agree on the appropriate means of solving the problems identified or even where one of the parties in the course of negotiation decide to adopt the win-lose strategy.

3.1.4 Concluding phase

This is the climax. Both parties would have discussed and reached a conclusion on pertinent issues in the transaction. At this stage parties must ensure that all queries and objections raised at the bargaining phase are addressed. At this point the pertinent issues

are resolved, details of the agreement are modified, and all necessary for an enforceable agreement have been dealt with. Previous agreement are reviewed and possibly exchanged between the parties for modification or correction. Parties reach an overall and final agreement and reduce their agreement into writing. They may both agree on the form of documentation. There are specific instances where the form of documentation is prescribed.

5.0 CONCLUSION

Having learnt the processes involved in bargaining you must be able to know the requirement in each stage of the process for effective bargaining.

6.0 SUMMARY

The negotiation process is divided into four stages; preparation, opening, bargaining and the closing phase. It is not uncommon to find out in some other texts that the bargaining phase is further divided.

6.0 TUTOR MARKED ASSIGNMENT

Discuss the phases of negotiation processes known to you.

7.0 REFERENCES/FURTHER READING

Fisher, R. Ury, W and Paton, B 1991. Getting to yes: Negotiating agreements without giving in, 2nd edn., Penguin Books, New York

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MODULE 5 PROCESSES OF ADR

Unit 1 MECHANISMS FOR THE PRACTICE OF ADR

1.0 Introduction

2.0 Objectives

3.0 Main Content

3.1.1 Objectives of Multi-door Courthouse

3.1.2 Options at the Multi-door Court house

*3.1.3*Merit of Multi-door Courthouse

3.1.4 Practice and Procedure at the Multi-door Courthouse

*3.2C*itizens Mediation Center

4.0 Conclusion

5.0 Summary

6.0 Tutor Marked Assignment

7.0 References/ Further Reading

CONTENT

1.0 INTRODUCTION

This unit is aimed at introducing the student to the mechanisms for the practice of .ADR.

2.0 OBJECTIVES

The student at the end of this study unit must be able to understand the objectives, functions and the process applicable at the multi-door courthouse.

3.0 MAIN CONTENT

MULTI-DOOR COURT HOUSE

A multi-door courthouse is a court connected Alternative Dispute Centre which offers

different forms of alternative dispute resolution processes. It is a concept instituted to augment and support available resource for access to justice.

3.1.1 OBJECTIVES OF MULTI-DOOR COURTHOUSE

1) To provide support to the regular court in the resolution of disputes and dispensation of justice

2) To harness and utilize the vast human and legal resource resident with retired justices through service in mediation, arbitration and other alternative dispute resolution process.

3) To provide quick access to justice, reduce or eliminate the frustration of litigants at regular courts by resorting to ADR

4) Model and develop the executive judge notion and plan how best settlement could be achieved among litigants

3.1.2 OPTIONS IN MULTI-DOOR COURTHOUSE

1) EARLY NEUTRAL EVALUATION

An experienced lawyer, retired judge or a dispute resolution specialist are experts that sit to consider the relative strength and weakness of each parties position, analyse the likely result of the process and advise the parties accordingly.

2) MEDIATION

A voluntary and informal process in which an unconnected third party called the mediator helps parties to amicably resolve their dispute by arriving at a mutually beneficial agreement. The mediator does make decision rather the parties decide the terms of agreement.

CONCILIATION

Conciliation is presided over by a neutral third party, who if in the circumstance can contribute his opinion as to the merit of the dispute and give recommendation or advice to the clients.

ABITRATION

The arbitration process of ADR involves a third party referred to as arbitrator who presides over a dispute and has the power to give a binding and enforceable "Award."

3.1.3 MERITS OF MULTI-DOOR COURTHOUSE

1) Confidentiality is ensured, document, statement and pieces of evidence tendered during ADR sessions at multi-door courthouse are confidential and protected from disclosure for all purpose.

2) It is hence an amicable settlement of dispute and promotes relations between parties rather than aggression and animosity.

3) The time spent in ADR process is relatively lower to the time wasting, energy consuming and emotion sapping process of regular courts.

4) It helps reduce congestion and will on the long run help rid the court of the long list of cases that besiege our courts.

5) The multi-door concept helps parties to choose the process suitable to advance their cause and meet their needs

3.1.4 PRACTICE AND PROCEDURE AT THE MULTI-DOOR COURTHOUSE

Order 25 Rule (1)(2)(C) of the High Court (Civil Procedure) Rules of Lagos State 2012, makes provision for the promotion of amicable settlement of cases or adoption of ADR. Section 24 of the High Court Laws of Lagos State 2003 also provides that in any action, the court may promote reconciliation among the parties thereto, encourage and facilitate the amicable settlement thereof. This can be done by referring dispute to ADR at the multi-door Courthouse.

In Lagos Practice Direction of 24-02-04, made pursuant to section 274 of the 1999 Constitution prescribed practice procedure at ADR sessions at the Lagos multi-door

courthouse Mediation Procedure Rules 2004. Parties that opt for arbitration will be governed the Multi-Door Courthouse Arbitration Procedure Rules 2004.

In Abuja , Practice Direction 19/11/03 made pursuant to section 259 of 1999 Constitution prescribes practice procedures in Alternative Dispute Resolution session at the Abuja Multi-Door Courthouse mediation proceeding, while the Abuja Multi-Door Courthouse Arbitration Procedure Rules (2002) govern Arbitration Proceedings at the Abuja Multi - Door Courthouse.

3.2 CITIZENS MEDIATION CENTER

*The Citizens Mediation Center at the Ministry of J*ustice Alausa*, Ikeja, Lagos* is worthy of note. There the citizens of Lagos state have free access to the resolution of their disputes through mediation at the center. Issues ranging from landlord/tenant issues, employment, compensation matters, family, inheritance/land matters and monetary claims are mediated upon between parties at th*e* centre. The State government is to*;* decongest the courts, promote the ADR process and ensure that citizens have quick access to justice. The saying goes that justice delayed, is justice denied.

4.0 CONCLUSION

In other climes, the ADR options have been in use for a long time and has gained wide acceptance. Parties that have disputes are being encouraged first to submit to Arbitration or Mediation or use any Alternative Dispute Resolution Procedure. The growth and recognition of these procedures have increased, thereby prompting the Courts to first subject parties to negotiate. In ***Dunnet v. Railtrack Plc (2002) 1 WLR 2434 at 2436-7,*** the defendants though won the case was denied the cost in the Court of Appeal because it refused invitation to mediate. The Court said:

"*Skilled Mediators are now able to achieve results satisfactorily to both parties in many cases which are quite beyond the power of lawyers and Courts to achieve. A Mediator*

may be able to provide solutions which are beyond the powers of Court to provide"

The English Court enforced an ADR clause without much ado, in ***Cable & Wireless v. IBM, (2002) EWHC 2059 (com.ct).*** The parties had entered into a ten year agreement which contained the following ADR provision:

"*If the matter is not resolved through negotiation, the parties shall attempt in good faith to resolve the dispute or claim through an Alternative Dispute Resolution (ADR) procedure as recommended to the parties by the Centre for Dispute Resolution. However, an ADR procedure which is being followed shall not prevent any party from issue proceedings."*

A dispute arose and C & W commenced judicial proceedings without first attempting an ADR procedure. IBM applied for a stay of action in order to enforce the ADR procedure. The Judge ordered a stay of judicial proceeding pending ADR.

In ***Hurst v. Lemming C.P. Rep. 59,*** the Judge described ADR as being "at the heart of today's Civil Justice System" and although on the particular facts, it was held that the defendant's refusal to mediate was reasonable. Although, defendant had satisfied the court, that mediation has no real prospect of success in the instant case.

5.0 SUMMARY

In the course of discussions it is very clear that the courts and would be litigants ordinarily will prefer to settle their disputes by ADR. This is because any of the processes can be cheaper, faster and often ensure amicable settlement of disputes. Thus, only where such procedure fails or where the matter is exclusive to the jurisdiction of the courts will such not be referred to ADR.

TUTOR MARKED ASSIGNMENT

Discuss the objectives and options of the multi door courthouse.

7.0 REFERENCES/FURTHER READING

Orojo, J.O and Ajomo, M.A. 1999. Law and Practice of Arbitration and Conciliation in Nigeria, Mbeyi and Associates, Lagos

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Redfern, A. Hunter, M. Blackaby, N and Partasides, C. 2004. Law and practice of international commercial arbitration, 4th edn., Sweet and Maxwell, London;