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Arbitration, International Mediation, and the Widening of the Alternative Dispute Resolution Space: Bloated Expectations or a Matter of Time

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Abstract: It is undisputable that dispute does arise from almost every transaction in people's lives. Consequently, court procedures –litigation- have been developed over the years to ensure there is fairness and justice in resolving disputes arising from such transactions. Well recognized and praised at first, however, litigation got to be extremely difficult as it could not protect parties' privacy and ensure confidentiality. Moreover, it became incredibly expensive, consumes time and could not provide for a win-win resolution of disputes among other challenges. Thus, ADR became the hope of a common man and last resort for dispute settlement. Although, it remains unclear if Alternative Dispute Resolution (ADR) is as age long as litigation. Nevertheless, ADR could be said to have been resorted to in order to mitigate, water-down and limit the hardship caused by litigation. Today, the globe is at the sojourn oscillating between the relevance of ADR over litigation and vice versa. Hence, a prerequisite to understand whether expanding the space of Alternative Dispute Resolution are bloated expectations or a matter of time. In this paper, arbitration and international mediation will be discussed starting from their historical background and importance. Also, this paper will further examine whether widening the space of Arbitration, International Mediation and ADR in general are bloated expectations or a matter of time.

Keywords: Arbitration, Mediation, International Mediation, Alternative Dispute Resolution (ADR), Dispute Resolution Mechanisms, Bloated Expectations, Matter of Time

1. Introduction

The Cornell Law School defined Alternative Dispute Resolution (ADR) as any method of resolving disputes without litigation [6]. It is a variety of non-judicial process for resolving conflict. ADR typically includes; arbitration, mediation, negotiation, conciliation, private judging, neutral expert finding, min-trial, summary jury trial, and moderate settlement conferences [7] among others.

Alternative Dispute Resolution dated back and has been used successfully for hundreds if not thousands of years [8]. It has several motivating concerns including; efficiency, flexibility, party empowerment, tailoring of outcomes and sometimes privacy and avoidance of precedent for subsequent cases [9]. In fact, the various mechanisms that constitute ADR have been thousands years of age, some originating from principles propounded by Confucian. The principles were for promotion of harmony and community rather than individual justice. Then, the principles were applied in Asian countries and throughout Africa, where community elders listened to narratives of dispute from parties and helped negotiate solutions favorable to both parties, for the purpose of preserving community peace [9].

The modern Alternative Dispute Resolution emerged in the late 1960s [7]. Due to hardship and societal non-satisfaction of modern ways of achieving individual justice – overcrowded courts, high cost and delay- some American judges and scholars provided alternatives to court (mediation, arbitration and others). This was to facilitate quicker and cheaper settlement out of court. Thus, leading to the creation of the "Multi-Door Courthouse" [9].

Today, Alternative Dispute Resolution mechanisms are being applied to diverse and different transactions, conflicts and disputes including divorce and commercial/consumer

transactions and disputes [10]. Some of these transactions require expertise in the subject-matter and thus spawning new hybrid mechanisms such as consensus building.

Alternative Dispute Resolution mechanisms do not in all cases tend to erase court processes. However, ADR is more preferable because it could solve problems faster, costless, avoid stress of court proceedings, maintain and preserve relationship between conflicting parties, confidentiality and achievement of mutual agreement [11]. This is why the World Intellectual Property Organization (WIPO) identified that ADR mechanisms have added advantages of; a single procedure –where dispute could be resolved in a single sitting-, party autonomy, neutrality, confidentiality, finality of awards and enforceability of awards [12].

Although, ADR has been criticized on many grounds, which are possible drawbacks to its applicability. The first ground is that there is no public scrutiny of cases moved to ADR [44]. Also, there is no applicability of judicial precedent. In addition, there are certain disputes unsuitable for ADR such as criminal matters or human rights abuses [7]. There is sometimes lack of commitment by parties and there is limitations to fact finding within ADR. It is also said that some lawyers are often reluctant to recommend ADR to clients due to unfamiliarity with the procedures involved [7].

As a result, there is need for widening the space of Alternative Dispute Resolution which is only a matter of time rather than bloated expectations.

2. Arbitration

Arbitration is a form of Alternative Dispute Resolution, where there is private determination of a dispute by independent third party [13], who makes a final binding decision after hearing both sides based upon agreed rules governing the process and how it works. Arbitration has been effectively used as a dispute resolution tool for millenniums, though not formally as it is today. It has deep roots especially in variety settings of international and commercial contexts [14]. History identified its proponent luminaries from King Solomon and George Washington to Rodger Goodell at the time where arbitration existed on uneasy tension with the court of law –which was hostile and unsupportive of alternative resolution of disputes privately- [14].

Early 20th century was a watershed for arbitration, as laws and policies were made to support and enforce arbitration agreements [14]. Therefore, making arbitration become prevalent in commercial, consumer, family, property and professions fields today as a form of dispute resolution. Parties' right to refer to arbitration depends on existence of an arbitration agreement between them, which is always provided for when undertaking contractual agreement [15]. This is usually by the parties agreeing to refer any dispute which might arise in the contract to a neutral third party to decide their rights and obligations. Although, parties might after dispute has arisen enter into an arbitration agreement to bring the dispute before an independent third party to resolve such.

Unlike other forms of Alternative Dispute Resolution, arbitration is common said to be 60% litigation. This is because arbitration award is binding on the parties like decision of a court. It could only be challenged under exceptional circumstances –where the parties did not validly agree to refer to arbitration- [16]. In a situation, where agreement is reached in arbitration proceeding, such agreement is called an arbitral award or a settlement. The terms of the settlement, where it is in writing could be enforced as a court's decision by agreement between the parties through a consent judgement. Where consent judgement is given, parties could only challenge such by an appeal to a higher court, with the leave court as held in Ayilara v. Federal Ministry of Works (2013) LPELR 20772 CA.

There are general principles guiding arbitration. The main of objective is to obtain a fair resolution of disputes brought before a neutral third party without unnecessary delay or expenses. Also, parties are given the free will to decide how the dispute should be resolved, save for the safeguard of public interest [13]. Arbitration is of two types; institutional and ad-hoc. In institutional arbitration, the dispute is decided by an arbitration tribunal and the institution performs specific administrative functions –such as serving of briefs-, which varies from one institution to another. While in ad-hoc proceedings, the tribunal assumes administrative functions or delegate such to a third party [16].

Arbitration has many benefits, which made it to most times be resulted to, especially by companies. Some of the advantages and benefits are; flexibility and control, speed, low cost, simplified rules of evidence, privacy and confidentiality, arbitrator selection, finality among others. Countries around the global have laws and rules governing arbitration. For instance, arbitration proceedings in Nigeria are governed and regulated by the Arbitration and Conciliation Act 1988 [3], which is the principal law on arbitration in the country.

Internationally, arbitration is the most preferred form of Alternative Dispute Resolution in solving cross-border disputes [17]. In measuring the significance of arbitration in resolving dispute over litigation, the Queen Mary University of London carried out a survey. In this survey, an overwhelming majority of the respondent groups chose arbitration as the most preferred method of resolving cross-border disputes, 31% supports arbitration to be used alone, while 59% picked arbitration in conjunction with other ADR mechanisms [17].

Indeed, arbitration has been internally referred to as an area of globalization per excellence by multinational companies as it is most preferred means of dispute resolution. This could also be attributed to the fact that international arbitration brings parties, legal practitioners and arbitrators from different and distinct legal backgrounds together in resolving contractual disputes. Over the last decade, arbitration has experienced growth and expanded tremendously in both commercial and investor-state disputes [18].

Despite significant differences among disputing companies or parties, arbitration has helped in avoiding inequalities as it

is a neutral system far from the parties individual local or national regulations [18]. The major laws that are basically aiding the generalization and expansion of arbitration internationally are the *United Nations Commission on International Trade Law (UNCITRAL) Model Law on International Commercial Arbitration of 1985 [1] and the Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958 [2]*.

Arbitration institution such as; the International Court of Arbitration of the International Chamber of Commerce (ICC), the American Arbitration Association (AAA), the International Institute for Conflict Prevention and Resolution (CPR), the London Court of International Arbitration (LCIA), the Swedish Chamber of Commerce (SCC) and the International Centre for the Settlement of Investment Disputes (ICSID) from host of others have played important roles in making arbitration the most preferred means of settling international disputes by multinational companies and others. These companies have helped in providing efficiency, finality and enforceability of arbitration awards in any part of the world [18].

3. International Mediation

Mediation is a form of Alternative Dispute Resolution, where a neutral third party known as a mediator helps parties to reach a negotiated settlement of their dispute. Parties have control over the decision to settle and the terms of agreement [19]. Basically in mediation, a mediator only assist the parties in negotiating their dispute to reach a settlement and agreement favorable to both parties.

Mediation is entirely voluntary and the mediator does not decide for the parties, but rather encourage them to negotiate settlement. Mediation is informal and more relaxed than litigation or an arbitration. All communications provided in mediation proceedings would be allowed to be used in subsequent court proceedings or arbitration [20]. Thus, mediation has the characteristics of voluntariness, privacy and confidentiality, change of focus (encouraging parties to forget the past and focus on the future) and user-friendliness [21].

According to Vukovic, the concept of international mediation generally refers to mediation activities conducted by various actors, having the aim of managing international conflicts based on interstate (between countries) or intrastate (between government and groups in a state) levels [22]. Internationally, mediation has evolved with civilization and has spanned through history in dispute resolution.

Starting from the diplomatic efforts by emissaries in Greek cities in creating a truce between the Aeolian league and Macedonia in the first Macedonian war in 209BC, the decree by Pope Alexander VI providing influence for Portugal and Spain in 1493 to the 1978 president Jimmy Carter's effort in providing long-standing peace between Egypt and Israel, mediation has helped so far in resolving conflicts and provide long-lasting peace [23].

Conflict management in the international settings has been conducted by many actors, using varieties of Alternative Dispute Resolution mechanisms. Axiomatically, mediation has been the most used form of conflict management by numerous actors including international and regional organizations. A study carried out on formal management of conflicts showed that within 1945 and 1995, 3,737 various management of conflict efforts –mediation, arbitration, conciliation, negotiation and others- were identified. Out of which, over 2,100 involved mediation, among which regional organizations and the United Nations engaged in about 1,300 of these efforts [24].

International mediation is used often by the United Nations and regional organizations due to its flexibility, allowing disputing parties to gain and retain control on the outcome of the process. Moreover, considering the goals of mediation, which are to stop violence and hostility, negotiate a settlement (political sometimes), and reduce fatalities, it is and would be more preferable as an Alternative Dispute Resolution mechanism. For instance, mediation initiatives were successfully used to engage and ensure regional peace by ECOWAS in the civil war in Liberia in 1989 and in Sierra Leone in 1991 [24] due to its flexibility and user-friendliness.

In the commercial settings, numerous arrangements were disrupted by the Covid-19 pandemic that brought the world nearly to a standstill and access to court almost became an unrealistic hope. Recourse was therefore made to Alternative Dispute Resolution and particularly mediation, because it was seen as a pandemic-proof dispute resolution mechanism [25]. This could also be attributed to the fact that mediation provides parties with procedural agility and intuitive responsiveness, thus offering freedom within the regulatory framework. As a result, commercial parties have the opportunity of negotiating with adverse parties in negotiating and arriving at a sensible commercial outcome, while preserving business relationship and preventing future disruption of businesses [26].

Moreover, mediation services are now increasingly offered online internationally and a core part of mixed-mode of dispute resolution forms such as; arb-med-arb, and other multi-tiered dispute management protocols [27]. The International Dispute Resolution Survey: 2020 final report (the "Singapore International Dispute Resolution Survey") identified that hybrid process (for instance arb-med-arb) has encouraged the use of mediation globally as arbitration provides threat of hard sanctions after a resolution is reached in mediation proceedings. Thus, acting as an effective incentive inducing parties to reach settlement [28].

4. Widening the Space of Alternative Dispute Resolution

4.1. Bloated Expectations

Despite the impact and extent to which Alternative Dispute Resolution has helped and is aiding in settlement of disputes, critics have it that ADR is a bloated expectation and would have no opportunity of developing with time. To begin with, some scholars between 1984 and 1992 expressed concern

about the impacts of non-formalized and private dispute resolution mechanisms (ADR). They arrived at a conclusion that where people of unequal power are involved in ADR, the people with lesser power tends to be suppressed and abused by decision-makers influenced by those with upper hands to the disputes [29].

Concerns have also been raised that ADR would only be bloated expectations as it is not possible for it to serve as equity to litigation. This is because some people believed that in determining the legitimacy of ADR outcomes, it only provides second-class justice [30]. Hence, it is only people who could not afford litigation and are certain that they would lose in court particularly when they are at fault, that sometimes prefer private resolution. Another reason being that ADR encourages comprise [30]. Although, comprise is a good way of settling some disputes, however in serious justice conflicts and case of intolerable moral differences, comprise is not an option as the issues mean too much to the parties.

Another reason ADR is criticized to have bloated expectations is that it does not have the capacity of improving legal systems by providing landmark decisions as did by courts in litigated cases. This is attributed to lack of judicial precedent or judicial made laws in ADR proceedings. Thus, no evolution of any point of law, especially in disputes which might have strong effects on public interest.

In addition, ADR is said not to have the capability of providing adequate justice. It has been identified that in the process of resolving disputes in efficient manner, ADR involves in practices including artificial dividing of awards between parties and overshadowing justice that avoids thorough analysis of disputes [31]. Therefore, it has created very few instances, where resolution from ADR's mechanisms have not been controversial. For instance, mediation proceedings were criticized to have less concern for points of law and protection of the legal rights of the parties involved [31], once a win-win settlement is reached. However, the introduction of the *Singapore Convention on Mediation* has proved this otherwise.

Moreover, ADR particularly mediation and arbitration have been flawed to provide limited remedies. Apart from monetary awards, it is always difficult for ADR mechanisms to grant interim remedies such as an order of specific performance or injunctions without support from courts.

Regardless of the criticisms against Alternative Dispute Resolution, giving it picture of bloated expectations, global trends and developments have shown that ADR has a bigger future. Today, companies, countries, regional and international organizations, corporate bodies and individuals prefer ADR mechanisms as means of resolving and settling conflicts over litigation. Therefore, widening of Alternative Disputes Resolution space is a matter of time.

4.2. Problems of Litigation

Litigation, by definition is a formal general public process, which resolves disputes through a court of law with a judge and jury or both. There are strict rules governing its proceedings as imposed by law. Recently, ADR is becoming the global choice for settlement of disputes and this is attributed to the fact that litigation has failed in many respect to meet the demands and expectations of adverse parties to dispute. Litigation is always expensive, considering the legal fees from obtaining the service of an attorney to other costs that would arise during the course of litigation. The cost depends on the length of the trial, which is usually a long process starting from pre-trial to the final determination of the suit. According to a research carried out by Duke university study [32], it states that for every dollar spent in litigation, 40% went to paying awards or settlements, while the remaining 60% is the litigation cost.

Depending on the complexity of each suit, cases take several years in litigation before it is finally resolved. For instance, in Nigeria, there are records of cases that have lasted decades before they were finally determined by the court. The case of *Ariori v. Elemo* [4] first instituted in 1960, reached appeal court in 1975 before it was finally determined by the Supreme Court of Nigeria in 1983, taking a total of 23 years. Also, the case of *Emeka Nwana v. Federal Capital Development Authority* [5] filed in 1989 and finally determined in 2007. Whereas with the creation of Lagos Multi-Door Courthouse, similar issues as in these cases were resolved with hours [33]. This is one of the reasons, people and companies prefer private settlement over taking cases to court which is not ideal, particularly if such cases involve matters of urgency.

Another downside of litigation is that it breeds hostility and intensity between conflicting parties. At all cost, legal representatives of disputing parties always make sure that all other alternatives have been fully exhausted before bringing an action before the court. This is because it is often very difficult to overcome animosity that could occur in trial and would be very challenging for parties to preserve any sort of relationship, once judgement is given.

In addition, taking cases to court attracts public attention due to availability of court's documents to the general public [34]. There are instances, where parties would prefer anonymity, but litigation would never be able to preserve such standard. Therefore, disputing parties particularly in matrimonial causes would choose Alternative Dispute Resolution over litigation.

4.3. A Matter of Time

Over the years, Alternative Dispute Resolution has been seen as a sensible, cost-effective and better way businesses, corporations, organizations, and people stay away from court and any kind of litigation that frustrates both the winner and the loser. Companies around the globe have now mastered how to use ADR effectively and are benefiting from it. This could be attributed essentially on the predictability benefits of private resolution of conflicts and assuasive outcomes that preserve, prolong and improve relationship.

Leading third world multinational companies such as Chevron and Toyota give ADR top priority, even in cases they know they are right. They realized that ADR saved

immense time, money, relationship and dealings with other companies over litigation. For instance, Chevron expended 25,000 dollars within three to five years on ADR based mediation and they realized they would have expended an estimated amount of 700,000 dollars if an outside counsel was involved and 2.5 million dollars if the cases had been taken to court [35]. Also, Toyota Reversal Arbitration board at United States for settling disputes between companies on sales credits and allocation of cars brought a significant decrease in cases from 178 in 1985 to three in 1992 [35]. In addition, since 1994, AT & T Global information Solutions have declined tremendous in instituting an action in court. It was as a result of its commitment to ADR, which the numbers of lawsuits that it had pending in United States dropped from 263 in 1984 to 28 in 1993 and only 9 in 1994 [35].

Alternative Dispute Resolution tends to expand not within the international forum alone, but countries' specific. Majority of people in African countries have lost faith in their national justice system and they now perceived ADR comfortably falls under the notion of their traditional justice. For instance, the first mediation week in Ghana in 2003, had over 300 cases pending in courts in Accra settled within five days, with 90% of participants expressing satisfaction with the reached outcome [36]. This inspired another mediation sitting in 2007, where over 155 commercial and family cases were resolved within 4 days. In 2008, over 2,500 cases pending in court were resolved through ADR in the country [36]. This landmark achievement greatly influenced the enactment of the ADR legislation in the country in 2010, which is the most comprehensive in Africa [36].

In 2002, the pioneering Lagos Multi-Door Courthouse [45] was created and subsequent upon its creation, ADR centers such as Citizen Mediation Centers have emerged in the country. The Lagos Multi-door Courthouse is the first African court-connected Alternative Dispute Resolution center with indigenous dispute settlement practices [33]. Disputants prefer going to these centers over courts due to its flexibility and user-friendliness. An average of 200 cases are mediated at these centers monthly with settlement range within 60 to 80% [33]. Therefore, expanding the space of Alternative Dispute Resolution is a pursued endeavor in the country. This is evident by the replica of the Lagos Multi-Door Courthouse in over 14 states and the Federal Capital territory; Abuja in resonant with indigenous practices and culture [33]. Efforts at generating publicity and widening the space of ADR was made in the country in 2009. There in, over 100 pending commercial cases were decided within 5 days in the first mediation week and over 98% of the disputants showed satisfaction with the resolution reached [33].

The impact of the covid-19 outbreak on Alternative Dispute Resolution and the world in general has made it evident that widening the space of ADR is now and has been in motion rather than being a matter of time. The social distancing syndrome and sit-at-home order placed on individuals by government during the pandemic made access to courts difficult. The threshold opened the door for ADR as the last hope of a common man. The Ministry of Justice at the People's Republic of China issued a guideline for public legal service in preventing the epidemic and controlling work's resumption and enterprises production at the time of the outbreak. This guideline actively supported and promoted internet arbitration in moving the country's economy into the right direction [37] and it has been expanding as a form of dispute resolution in the country ever since.

Also, the United Kingdom government issuance of guidance on responsible contractual behavior in the performance and enforcement of contracts impacted by the Covid-19 emergency encouraged resolution of contractual disputes through mediation, negotiation and other Alternative Dispute Resolution mechanisms that fast-track settlement [38].

International institutions have contributed in widening the ADR space. The ICC International Court of Arbitration and ICC International Centre for ADR Guidance Note on Possible Measures aimed at mitigating the effects of the Covid-19 pandemic issued in 2020 further prompted the use of arbitration as a means of private settlement [38].

In addition, a notable permanent change brought by the pandemic as said in the words of Lord Burnett, the Lord Chief Justice of England is that "there will be no going back to the pre-COVID-19 era" [39]. Therefore, development brought to ADR during the pandemic made it undisputable that ADR is not a vacuum of bloated expectation but a catalyst, which space is expanding worldwide. As a result of the pandemic, simpler dispute resolution mechanisms such as Online Dispute Resolution (ODR) have emerged and tend to be more proactive and reliable.

Online Dispute Resolution has increasingly made the presence of ADR felt. It encompasses mechanisms such as; online mediation, online arbitration, smart contracts and blockchain arbitration. ODR is a technology incorporated form of ADR, which involves inter-disciplinary field of dispute resolution that augments and complements traditional ADR methods.

This is actualized with technology tools to simplify and facilitate the resolution of disputes and achieve better outcomes in terms of cost, speed, convenience and efficiency [46]. The entire structure and process involved in ODR from initial filing, presentation of evidence, appointment of neutrals, hearings among others are conducted online [46]. It is an online equivalent of ADR and future of private dispute settlement.

The world is now progressing into the fourth industrial revolution characterized by high-level advancement in technology, particular interconnectivity and smart digital revolution, hence Online Dispute Resolution is now at the forefront of the world and with time, would widen and evolve as the only preferred means of dispute resolution.

Based on statistics, investments on blockchain by venture-capital funding into blockchain startup companies worldwide as at 2020 was 2.3 billion US dollars, and worldwide spending on blockchain solutions in 2021 is at 6.6 billion US dollars [40]. What this is buttressing is that smart contracts is the future and disputes from smart contracts looms and settlement mechanisms that would be preferred is ODR,

particularly blockchain arbitration.

Blockchain arbitration is a dispute settlement tool, which is essentially arbitration that uses technology for resolving issues that might ensue from smart contracts –entirely written in codes-. This technology has an incorruptible ledger for recoding financial transactions and values. Examples of this blockchain arbitration created so far is the CodeLegit and Kieros [33]. With time, these mechanisms would be largely in use as more users are entering into the blockchain transactions, particularly cryptocurrencies. It would also help resolve problematic aspects of choice law, if eventually modification is made to international conventions that guide Alternative Dispute Resolution to cover blockchain arbitration.

At present, the applicability of Alternative Dispute Resolution mechanisms are generally limited to issues such as; family dispute, commercial transactions, probate and administrative estates, maritime disputes and auxiliary matters including custody, landlord-tenant's disputes and small claims [41]. Based on public policy and interest, ADR has been made not applicable to matters such as; electoral disputes, criminal matters, matrimonial cases (particularly dissolution of marriage), interpretation of laws and cases of urgency seeking immediate injunction or relief [42].

With time, ADR tends to move into unexplored horizons by widening its scope to cover these areas of public interest. Fortunately, there has been steps into the right direction as countries like India are currently trying to make ADR applicable to criminal matters beyond just plea-bargaining [43].

5. Conclusion

Apparently, no system is the perfect gentlemen for all societies and the world at large. This is why Alternative Dispute Resolution as a dispute resolution mechanism is not with flaws. Although, the setbacks of Alternative Dispute Resolution have ensued several criticisms and thus widening its space is said to be bloated expectations. Conversely, Alternative Dispute Resolution is the future of dispute resolution. Paying attention to its relative advantages over litigation ranging from flexibility, user-friendliness, cost effectiveness to defeat of delays from host of others, ADR has been the most preferable choice of settling disputes between conflicting parties. Moreover, the impact of Covid-19 outbreak is a doppelganger crossing the “t”s of litigation (discouraging people’s interest in bringing cases before the court) and dotting the “i”s of Alternative Dispute Resolution (promoting people’s preference for ADR). In addition, technology advancement with rapid transition into the fourth industrial revolution -characterized by digitalization- has depicted the fact that as technology is the future of the world, Alternative Dispute Resolution is the future of dispute resolution. Also, considering the emergence of new mechanisms of ADR such as; Online Dispute Resolution (ODR), it is certain that widening the space of ADR has surpassed bloated expectations but a matter of time, which has already begun.

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