

ALTERNATIVE DISPUTE RESOLUTION AS AN AFFIRMATIVE ACTION STRATEGY FOR TIMELY RESOLUTION OF DISPUTES, POST COVID-19 IN NIGERIA

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Abstract

The COVID-19 pandemic has disrupted access to justice, resulting in an upsurge of disputes due to the inability of parties to perform contractual obligations. The locked courts have also generated a backlog of cases. Measures adopted, such as remote hearings of cases and scheduled physical court sittings, have been limited to urgent and time bound matters. How long would litigants be expected to wait to have their disputes resolved in a court of law? Is litigation the best way to resolve COVID-19 related commercial and contractual disputes considering our overburdened courts? This paper adopts the doctrinal methodology in examining the questions whether Alternative Dispute Resolution (ADR) can strategically address the backlog of cases generated by COVID-19 lockdown. It examines the imperative for affirmative action requiring litigants to adopt ADR for the resolution of their disputes. It reviews the approach of a public-private initiative - COVID-19 ADR Initiative (CADRI) - which advocates for ADR intervention in Nigeria and Africa. The outcome of the study will contribute to the reform of administration of justice policy and access to justice during and post emergencies in Nigeria.

Keywords: Alternative Dispute Resolution, Access to justice, Africa, COVID-19, CADRI, Nigeria

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5. INTRODUCTION

The COVID-19 global pandemic has necessitated governments all over the world to take some measures to curtail some civil rights and liberties of their citizens as one of the proven measures that can be adopted to stem the spread of the corona virus in avoidance of personal contacts or social distancing.³ This has resulted in many unforeseen situations such as, in some cases, total lockdowns of the territory; restriction of internal movements and a ban on public gatherings, including the courts. The latter in particular causing disruptions in access to justice.⁴

The administrative system of justice delivery in Nigeria and even globally is already overburdened and one of the likely aftermaths of the pandemic will be an upsurge in the number of disputes the courts will have to deal with, mostly as a result of the inability of parties to perform their commercial and other obligations. The locked courts have also generated a serious backlog of cases.⁵

In order to deal with some of these issues, the Nigerian judiciary, through the various Heads of Courts, introduced some measures such as practice directions for remote hearings of cases and limited/scheduled physical court sittings for urgent and time bound matters. Section 6(6) of the 1999 Nigerian Constitution of the Federal Republic of Nigeria empowers the judiciary to determine matters and this it does through the court system. It is legitimate to ask the question that: when

- 3 These are measures put in place by the World Health Organisation (WHO) to prevent the spread of the novel corona virus to be adopted by all nations in their fight against the pandemic. It recommends that persons maintain at least 1-meter (3 feet) distance between yourself and others. Why? When someone coughs, sneezes, or speaks they spray small liquid droplets from their nose or mouth which may contain virus. If you are too close, you can breathe in the droplets, including the COVID-19 virus if the person has the disease. Available at <https://www.who.int/emergencies/diseases/novel-coronavirus-2019/advice-for-public?gclid=EALalQobChMIh86YifH56QIVh-N3Ch30AA2VEAAYASAAEgJuqfD_BwE> (accessed 28 December 2021).
- 4 Law360Staff, "Coronavirus: The Latest EU Court Closures and Restrictions" Available at <<https://www.law360.com/articles/1253873/coronavirus-the-latest-eu-court-closures-and-restrictions>> (accessed 20 December 2021).
- 5 Atake, A, Godwin Omoaka, Igwe, V. and Adekunle, I., "Commercial Disputes and Access to Court: Till COVID-19 Do us Pass?" Available at <<https://www.templars-law.com/wp-content/uploads/2020/04/Templars-Thought-Leadership-COMMERCIAL-DISPUTES-AND-ACCESS-TO-COURT-TILL-COVID-19-%E2%80%98DO-US-PASS%E2%80%99.pdf>> (Last accessed 24 December, 2021).

the courts are closed, how long would litigants be expected to wait to have their disputes resolved in a court of law? Would this not likely result in loss of confidence in the judiciary and shift the mindset of parties toward resorting to self-help which is adverse to civility and democracy? Such a situation will ultimately have the undesirable, yet avoidable, consequence of breakdown of law and order in society.

There is therefore a need to put in place a structure and system that can quickly target and effectively resolve the generated backlog of cases as well as others that arise from the inability of parties to fulfil their obligations especially contractual/commercial. The goal is to ensure that the desire of citizens for a prompt, efficient and effective system of dispute resolution without resort to self-help is guaranteed and strengthened. There must be a balance between the containment measures being issued and the need for efficient and prompt administration of justice.⁶

This paper therefore examines the question whether Alternative Dispute Resolution which has been mainstreamed in several jurisdictions as an acceptable model for resolution of diverse types of disputes will be effective in addressing the backlog of cases already generated by the inability of courts to regularly sit and determine disputes for several months. It also discusses whether there should be need for affirmative action to require litigants to adopt ADR services for the resolution of their disputes. The paper further reviews the approach of CADRI (COVID-19 ADR Initiative), a public-private initiative which is advocating for such ADR intervention.

6. EFFECTS OF COVID-19 ON SPEEDY ACCESS TO JUSTICE IN NIGERIA

There is no sphere of human life that has not felt the impact of COVID-19 Pandemic. This section of the paper, examines the effect of COVID-19 on speedy access to Justice. It is apposite to note that

6 Majemite, E. A. and Kalu, O. "The COVID-19 Directives of the Chief Justice of Nigeria and State of the Judiciary" Available at <<https://punuka.com/the-COVID-19-directives-of-the-chief-justice-of-nigeria-and-state-of-the-judiciary/>> (accessed 24 December 2021).

sections 6(1)(2)(3) of the 1999 Constitution of the Federal Republic of Nigeria vest the judicial powers of the Federation/States in the Courts enumerated under section 6(5) thereof. Section 6(6)(b) guarantees the right of access to Court for persons who are aggrieved to ventilate their grievances. Thus, the Courts were created primarily, to adjudicate over disputes with a view to dispensing justice timeously. However, several factors have made the speedy dispensation of justice very difficult if not impossible. One of the methods adopted by the government in response to the COVID-19 pandemic was lockdown of persons within national and state boundaries. This led to the lockdown of courts and invariably lockdown of ongoing cases as well as lockdown of cases that could not be filed as litigants and lawyers could not access the court as before.

In Nigeria, on the 23rd day of March 2020, the Chief Justice of Nigeria (CJN), Justice Tanko Muhammad, directed the suspension of judicial activities in courts nationwide for two weeks. The CJN in a statement by the spokesman for the Supreme Court, Dr. Festus Akande, said the need to urgently halt court sittings was informed by the glaring threat of the COVID- 19 pandemic. On April 6th, 2020, and following expiration of the initial 14-day closure directive, the CJN extended the closure of the courts indefinitely, save "to dispense matters that are urgent, essential or time bound in line with our extant laws."⁷ In similar fashion, the Chief Judge of Lagos State, the nation's commercial capital, made a notice on 30th March, 2020, suspending all courts' activities till further notice. The only exempted cases, according to the circular, were remand/bail applications relating to terrorism, armed robbery, homicide and other non-bailable offences, which were to be heard on Mondays, Wednesdays and Fridays between the hours of 10.00am and 1.00pm each day.⁸

7 Ademolekun, D., "COVID-19 and the Nigerian justice sector: A case for virtual dispute resolution. Available at <<https://www.thecable.ng/COVID-19-and-the-nigerian-justice-sector-a-case-for-virtual-dispute-resolution>> (accessed 24 December 2021).

8 Adeolekun D. "COVID-19 and the Nigerian Justice Sector: A case for Virtual Dispute Resolution" Available at <<https://www.thecable.ng/COVID-19-and-the-nigerian-justice-sector-a-case-for-virtual-dispute-resolution>> (accessed 24 December 2021).

During the lockdown period, only a few criminal cases and urgent matters are heard in court. Therefore, cases of tenancy, employment, finance, domestic violence, family matters, child custody, contractual disputes, medical and insurance disputes, etc. will be kept in abeyance. How then are litigants supposed to obtain redress? For example, a child in the custody of a wrong guardian will continue to be therein and also quarantined until the pandemic lifts. Similarly, a bad tenant will hold the landlord's house to ransom even after his tenancy has expired, what about the person made to endure domestic violence at the hands of the partner or family member because the courts are closed to such matters? The effect of this cannot be overemphasised as justice delayed is justice denied.⁹ The terrible consequence of this limited or restricted access to justice, if not denial, is likely resort to self-help which, in modern days, is being discouraged. Self-help portends serious catastrophic outcome and cannot guarantee decency of approach and peaceful outcome. This notwithstanding, the continuous lockdown of courts, is foisting this unpalatable option on litigants who may not be patient enough.

As the pandemic unfolds, heads of judiciaries globally are constantly weighing options in order to make the best decisions. At the Africa regional level, Justice Sylvain Oré, President of the African Court on Human and Peoples' Rights issued a statement on 23 March 2020 suspending the 56th Ordinary Session of the court and making "non-essential" staff work remotely, while "essential" staff work on rotation to promote social distancing. At the Africa sub-regional level, Justice Edward Asante, President of the Economic Community of West African States Court of Justice, also issued a communiqué suspending court hearings.¹⁰ It is therefore safe to conclude that the pandemic led to lockdown of courts resulting in delay of filing and hearing of cases in Nigeria and other parts of the globe where necessary infrastructures that cushion the lockdown are absent. Thus, this culminates in delay

9 Aluko, O. "COVID-19 Pandemic and Limited Access to Law and Justice" Available at <<https://esq-law.com/COVID-19-pandemic-and-limited-access-to-law-and-justice/>> (accessed 20 November 2021).

10 J Dawuni. The Gendered Face of COVID-19: Women and Access to Justice. Available online at <<https://www.unodc.org/dohadeclaration/en/news/2020/04/gendered-face-of-COVID-19-women-and-access-to-justice.html>> (last accessed 20 November 2021).

of justice and most likely resort to self-help where the disputants are too impatient to wait for cessation or easement of lockdown.

Another issue that has cropped up as a strategy to ensure continued access to justice in the midst of COVID-19 is the adoption of virtual or remote hearings – even though the constitutionality or otherwise of the same is still controversial in Nigeria. This is particularly so because section 36(3) of the 1999 Constitution requires court proceedings as well as the delivery of judgment to be held in public as was held in *Edibo v. The State*.¹¹ It has been contended that virtual court hearing through the various visual platforms necessitated by COVID-19 does not fulfil the requirement of publicity unless and until the Constitution is amended accordingly going by the Supreme Court decision in *Oviasu v. Oviasu*.¹² In *Nigerian-Arab Bank Ltd. v. Barri Engineering Nig. Ltd.*¹³ where the judgment was delivered in the Judge's chambers, the Supreme Court nullified it as failing to meet with the public requirement. Others contend that the online proceedings satisfy all attributes of natural justice and fair hearing as long as there is opportunity to access the remote hearings through technology.¹⁴ It is worthy to point out that these decisions were reached during a period of normalcy and the court was not faced with a debilitating situation like it has experienced under lockdown. Perhaps, if these cases were to be decided under the prevailing COVID-19 lockdown situation, the court might be persuaded to reason otherwise or more liberally.

The challenges associated with virtual hearings in Nigeria are multifaceted, ranging from infrastructure deficit, epileptic internet network, lack of manpower, and so on, posing great challenges to access to justice.¹⁵ Despite the inherent challenges confronting virtual

11 [2007] 13 NWLR (Pt. 1051) 306.

12 (1973) 11 SC 315.

13 [1995] 8 NWLR (Pt. 413) 257.

14 Pinhero, K. "Is Constitutional Amendment Required for Virtual Court Hearings in Nigeria?" Available at <<https://thenigerialawyer.com/is-constitutional-amendment-required-for-virtual-court-hearings-in-nigeria-by-kemi-pinheiro-san/>> (accessed 8 June 2021). He stated that virtual hearings relate to how courts carry out their functions and therefore a matter of procedure. Thus not a constitutional matter.

15 Onanuga, A. "Why Virtual Proceedings is Legal, Constitutional by Falana" Available at <<https://www.thenationonline.net>> (accessed 1 June 2021).

hearings in Nigeria, the constitutional uncertainty of the same further exacerbates the strains on access to justice.¹⁶

Notwithstanding the above, it is our contention that virtual hearings pass the test of hearing in public. In fact, which other hearing, if any, can be more public than virtual hearing? The most public space with the longest distance being a swipe or click on an internet enabled device is the World Wide Web (WWW). It is our contention that what makes a place public is the ability of free access to members of the public who might want to access the place and not merely naming a place as such.¹⁷ The advantage of the WWW in gathering people cannot be compared to offline physical gathering. Platforms such as zoom, have the capacity to accommodate as many as five hundred to one thousand participants. It is highly doubtful if there is any courtroom in any part of the world that is capable of accommodating this number at a sitting.

The argument that there is restricted access to virtual hearing platforms does not accord with logic or common sense in the face of the need to secure the integrity of such proceedings. The devastating activities of cyber hackers and stalkers to virtual proceedings is a negative reality which must be frontally confronted and conquered. The use of user name and password in virtual hearings is analogous to the door or security checks at the entrances of some courts which is to guarantee the security of all persons attending the proceedings. Thus, such, is not a strange phenomenon as the activities of unscrupulous persons, have made this a *sine qua non*. Once the password and user name are broadcasted to the public just like the hearing notice is usually served

16 Awomolo, A. "Virtual Court Hearing does not Pass the Test for Proceedings Conducted in Public; there is Need for Constitutional Amendment" available at <www.barristerng.com/virtual-court-hearing-does-not-pass-the-test-of-proceedings-conducted-in-public-there-is-need-for-constitutional-amendment> (accessed 1 June 2021).

17 During COVID-19 lockdown, the Supreme Court of Canada heard the following cases: *Owners, Strata Plan LMS 3905 v. Crystal Square Parking Corporation* (B.C.) (Civil) (613) 995-4330; *Her Majesty the Queen v. Sivaloganathan Thanabalasingham* (Que.) (Criminal) (613) 995-4330; *Cheung Wai Wallace Li v. Her Majesty the Queen* (B.C.) (Criminal) 2020 SCC 12 / 2020 CSC 12. See generally <https://www.scc-csc.ca/case-dossier/remote-virtuel/hearings-audiences-eng.aspx>.

(although only on the parties to the dispute), such service is service to the whole world.

Another important point to note is that the appellate courts decisions in which the Chambers of Judges have been held not to constitute public place in consonance with the Constitution, never took into cognisance, virtual hearing. In fact, it was never raised nor argued and it is our contention that, given the prevailing progressive judicial interpretation stance of the appellate courts, virtual hearings do not stand the risk of being declared unconstitutional. This is not denying the obvious challenges associated with the process going by the peculiarities of Nigeria. Therefore, it is expedient for the government and other stakeholders in the justice administration sector to put in place a workable virtual hearing architecture so that the virtual court hearings can blossom in Nigeria in response to the demands of the new normal. While it may be desirable to amend the Constitution to explicitly countenance virtual court hearings, we submit that it is not expedient to do so as progress and liberal constitutional interpretation can resolve and dissolve all fears and agitations. When one considers the tediousness, capital intensity of constitutional amendment and the timeframe of achieving same vis-à-vis the need for expeditious adjudication of disputes post COVID-19, it becomes more glaring that liberal judicial interpretation is the most practicable leeway out of this quagmire.

Moreover, section 36(4) of the 1999 Constitution of the Federal Republic of Nigeria permits the Court to dispense with the requirement of sitting in public in the interest of defence or public safety and health. Unarguably, the COVID-19 Pandemic is a matter of public health and safety which should ordinarily require the suspension of public sittings. In recent times, there has been no other health concern with more momentum than COVID-19 which has justified its being declared a pandemic. So, on this alone, measures adopted to curtail its spread and disastrous outcome are justified and do not run afoul of the publicity of court proceedings requirement.

Nevertheless, this pandemic has exposed the weakness in our legal system where technology still plays a very minor role in legal

proceedings. Otherwise, it will only make sense that a practice directive be issued to our various courts to start taking proceedings via electronic means (for example, zoom, Skype and other sources of secure video conferencing interfaces) to resolve disputes. Some time ago, there was a move towards getting email addresses of lawyers practicing in Nigeria tied to the Supreme Court as a first step towards digitalising Nigeria's adjudicatory system. While no one may know the fate of that, clearly the delay of having our court systems fully digitalised is doing a great havoc to our legal system.¹⁸ While most countries in Africa, in coping with the challenges lunged at them by COVID-19 may not be able to renovate because there is no existing structure, there is need to innovate.

7. THE BENEFITS OF ADR IN DISPUTE RESOLUTION POST COVID-19

The ordinary benefits of ADR processes when applied to dispute resolution post COVID-19 cannot be overemphasised.¹⁹ Generally, ADR is considered to have the benefit of speed, fostering of relations, privacy and confidentiality, informality and flexibility and a win-win outcome.²⁰ These benefits have accounted for the accelerated growth and wide acceptance of ADR as a supplement to litigation.²¹ These benefits are discussed below to make a case for affirmative ADR action for the settlement of disputes post COVID-19, particularly commercial and contractual disputes, as continuance of the business relationship after settlement of the dispute can only be best guaranteed through ADR.²²

The pandemic has already impacted many businesses - some have folded up, some had nothing to do for many months and could not

18 *ibid*

19 Ekpenyong, E. "Nigeria: The Rise of Alternative Resolution Mechanisms in Nigeria" Available Online at <<http://www.mondaq.com/Nigeria/x/308626/Arbitration+Dispute+Resolution/The+Rise+of+Alternative+Resolution+Mechanisms+In+Nigeria>> (accessed 29 May 2020).

20 Bagudu, R.O. "The Concept and Elements of Arbitration" 1, *International Journal of Business Law* (2014) at p. 100-112.

21 Ezejiolor, G. *The Law of Arbitration in Nigeria* (Ikeja: Longman, 2005) at p. 3.

22 Eyongndi, D.T. "Espousing the Conundrum of Finality and Bindingness of Arbitral Awards" 2(2) *University of Maiduguri Journal of Private and Property Law* (2018) at pp.151-152.

generate income, many had to lay off staff. These companies may have had relationships over many years, and it is better to preserve such relationships.²³ ADR, particularly negotiation and mediation, have the potential of preserving business relationships as it guarantees a win-win outcome which is practically impossible with litigation.²⁴ It is generally believed that no two parties return from court and continue to be friends but this is not the case with ADR as the proceedings are usually devoid of the toxicity associated with litigation thereby fostering relationships.²⁵ The fact that a dispute occurred due to the pandemic (for instance, where the pandemic renders fulfilment of commercial or contractual obligation impracticable by rendering the affected party financially incapacitated) should not bring an end to business relationships; this is achievable with the deployment of ADR.²⁶ Parties could negotiate (through either the instrumentality of negotiation or mediation) a settlement that is mutually beneficial and can lead to the survival of both businesses rather than laying blame and insisting on liability from an already adversely affected business entity.²⁷

On the issue of speed, it has been argued and rightly so that COVID-19 has already led to delay in adjudication and once it ceases, there is bound to be an overwhelming influx of cases despite the already overburdened court docket.²⁸ ADR gives parties the opportunity for speedier resolution of their disputes post COVID-19.²⁹

23 Moneke, E. U., "Strengthening the Legal Framework for the Recognition and Enforcement of Arbitral Awards in Nigeria" (2018) 9 (3) *The Gravitas Review of Business and Property Law* 18.

24 Obiora, A. A. "Courts and Arbitration: Friends or Enemy" (2018) 3(2) *Chukwuemeka Odumegwu Ojukwu University Law Journal* 81.

25 Ajogwu, F. *Commercial Arbitration in Nigeria: Law and Practice*. (Lagos, Mbeyi and Associates (Nig.) Ltd., 2013) 140.

26 Ajetunmobi, A.O. *Alternative Dispute Resolution and Arbitration in Nigeria: Law, Theory and Practice*. (Lagos, Princeton and Associates Publishing Co. Ltd., 2017) at p. 105.

27 Odiri, E.R. "Alternative Disputes Resolution" Being a Paper presented at The Annual Delegates Conference of the Nigerian Bar Association at Le Meridien Hotel, Abuja on 22nd – 27th August, 2004. Available online at <<http://www.nigerianlawguru.com/articles/arbitration/ALTERNATIVE%20DISPUTE%20RESOLUTION.htm>> (last accessed May 28, 2020)

28 Oweazim, S. O., "The Status and Impact of a *Functus Officio* Arbitrator in Settlement of Disputes" (2017) 4(1) *Nasarawa Journal of Public and International Law* 171.

29 The Supreme Court of Nigeria in *Mainstreet Bank Capital Ltd. v. Nigerian Reinsurance Corporation Plc.* [2018] 14 NWLR (Pt. 1640) 423 acknowledged that speedier resolution of dispute is one of the advantages of ADR.

The technicalities that plague litigation culminating in dilatory tactics are totally eliminated in ADR proceedings.³⁰ The parties, the neutral third party and their counsel, adopt a case management schedule which makes provision for the possible duration of the proceedings unlike the Court where the Judge is in charge.³¹ In adopting the case management schedule, the time the proceedings will last is usually given prominent consideration and the shortest possible time is agreed upon. The formality of Court proceedings, from unnecessary objections, frivolous adjournment from the parties or indisposition of the *judex* and vexatious interlocutory appeals, sometimes up to the Supreme Court, makes court proceedings take longer than necessary. In fact, unscrupulous litigants would exploit the right of appeal via interlocutory appeal on a technical issue all in a bid to frustrate the speedy resolution of a case to the chagrin of both the court and the other party. As frustrating and "unethical" as this shenanigan is, it is the reality unpleasantly confronting litigation in most parts of Africa and particularly in Nigeria where adversarial adjudication is practiced.

At present, the justice delivery legal architecture in Nigeria lacks the checks and balances to guide against unnecessary delays which is a disservice to disputants in whose claim, time is of the essence.³² Particularly in commercial or contractual disputes where time is of the essence and not a luxury which the disputants have, speedy resolution becomes imperative which, unfortunately, cannot be achieved through litigation.³³ However, in ADR, particularly mediation, negotiation or even arbitration, the parties enjoy autonomy which enables them to set a possible time frame within which the proceedings can be

30 Orojo, A.J. and Agomo, M.O. *Law and Practice of Arbitration and Conciliation in Nigeria*. (Lagos, Mbeyi and Associates (Nigeria) Ltd., 1999) at p. 4. See also Akeredolu, E.A. *Duel to Death or Speak to Life: Alternative Dispute Resolution for Today and Tomorrow*. – 7th Inaugural Lecture of Ajayi Crowther University, Oyo held on Thursday, 11th January, 2018., 48-49

31 Uchenna-Nnodum, J.T. "International Commercial Arbitration Adrift? An Analysis of the Conduct of International Commercial Arbitration outside the Confines of a National Legal System" 11(1) *Journal of Arbitration* (2016) at pp. 221-222.

32 Ipaye, O. A., "Understanding and Application of Alternative Dispute Resolution (ADR) system in the Magistrates Courts", Being a paper delivered at the Training Workshop for Newly Appointed Magistrates organised by the National Justice Institute, July 2016) 4

33 Ekwenze, S.M.A. *Judicial Intervention in Nigerian Arbitration Practice* (Enugu, SNAAP Press Nigeria Ltd., 2011) 2.

conducted and concluded.³⁴ This autonomy enables them to eliminate unnecessary delay.³⁵

Furthermore, ADR ensures privacy and confidentiality.³⁶ As argued above, one of the challenges confronting virtual litigation proceedings in the wake of COVID-19 is the constitutionality of the proceedings due to the requirement of publicity of proceedings.³⁷ This concern is totally eliminated where parties adopt any of the ADR mechanisms for the settlement of their disputes,³⁸ as the issue of public place does not arise.³⁹ The need to privately settle post COVID-19 disputes in an atmosphere where confidentiality is guaranteed cannot be overemphasised as it enables the disputants to stay away from the preying eyes of the public with its attendant difficulties.⁴⁰ Only the parties, their legal representatives and neutral third parties (arbitrator, mediator or negotiator) have access to the proceedings and members of the public, except witnesses summoned, cannot attend the proceedings.⁴¹ This feature of privacy and confidentiality enables the parties to speedily settle their dispute as the pressure of wanting to prove a point in public is extinguished giving opportunity for honest

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- 34 Eyongndi, D.T. and Oluwadayisi, A. O. "An Appraisal of Section 34 of the Arbitration and Conciliation Act and the Role of the Court in Arbitral Proceedings in Nigeria" 5(1) *Rivers State University Journal of Public Law* (2018) at p. 108-114.
- 35 Ahiamunnah, P. N. "Emerging Trends in the Enforcement of International Commercial Arbitral Awards" 1(1) *ABUAD Journal of Public and International Law* (2015) at p. 13
- 36 Eyongndi, D.T. and Ojuade, O.O. "Legal Analysis of the Conundrums of Privacy and Confidentiality in International Commercial Arbitration: A Comparative Perspective" (9)1 *Ebonyi State University Law Journal* (2018) at p.166-168.
- 37 Awomolo, (no. 12) *Op. cit.*
- 38 Chukwuemerie, A. I. "An Overview of Arbitration and the Alternative Dispute Resolution Methods (ADRs)" *A Journal of the Civil Litigation Committee of the Nigerian Bar Association*, Lagos, Pearls Publishers (2010) at p.116.
- 39 Ibe, C.E. "Commercial Arbitration Practice in Nigeria: The Scope and Extent of Party Autonomy and Derogations therefrom in Arbitral Proceedings under the Nigerian Arbitration and Conciliation Act" 1(1) *Journal of Commercial and Property Law* (2009) at p. 1.
- 40 Section 36 (3) of the 1999 Constitution of the Federal Republic of Nigeria Cap. C23 LFN 2004 makes it mandatory for court proceedings to be held in public as well as delivery of judgments.
- 41 Peters, D. *Arbitration and Conciliation Act Companion*, (Lagos: Dee-Sagee Nig. Ltd., 2006) at p. 465.

and frank negotiations.⁴² Parties are also free to choose their venue,⁴³ and of course they are also free to choose remote hearings.

Furthermore, the formality and flexibility of ADR makes it most suitable for the settlement of COVID-19 disputes especially commercial and contractual related disputes.⁴⁴ One suffocating attribute of court is the strict and regimented nature of the proceedings. The apparel of both the lawyer and the *judex* as well as the conversation style embellished by confusing and mind boggling legal jargons, totally excommunicates the disputants from the disputes with everyone, poised to be the winning party.⁴⁵ Thus, wining as against resolution of the dispute becomes the centre of gravity.⁴⁶ It is therefore imperative for lawyers to support the ADR option for the speedier and cheaper resolution of disputes post COVID-19 and not maintain a negative attitude towards it.⁴⁷

In view of the above benefits, it is submitted that, as a matter of policy, the heads of courts in Nigeria and indeed Africa should take urgent steps to direct that parties should adopt ADR as a first resort in the resolution of their disputes post COVID-19. Some states such as Lagos, already have provisions in their civil procedure rules for intake screening and referral of appropriate disputes to the ADR track.⁴⁸ This

42 Ananaba, P.C. "Commercial Arbitration: How Expensive? Rethinking the Cost Advantage" in Nweke, V. E., *Adjudication and other Strategies of Conflict Resolution in Nigeria: Essays in Honour of Hon. Justice Chukwuenye Ichebgo Uriri* (Port-Harcourt: Pearls Publishers International Ltd., 2016) at p.148.

43 See generally Akeredolu, E. A. "The Potentials and Limitations of Mediating Business Disputes in Nigeria" 6 *University of Ibadan Journal of Private and Business Law* (2011) 9-19.

44 Elejo, E., "The Growth of Alternative Dispute Resolution (ADR) in Nigeria" in Elejo, E. (ed) *Alternative Dispute Resolution and some Contemporary Issues: Essays in Honour of Hon. Justice Ibrahim Tanko Muhammed* (Kaduna: M. O. Press and Publishers Ltd., 2010) 426.

45 Diram, A. H. "Alternative Dispute Resolution (ADR) and the Quest for Effective Access to Justice in Nigeria" (2020) 4(2) *Obafemi Awolowo University Law Journal*, 508.

46 Oddiri, E. R., *Alternative Dispute Resolution*. Being a paper presented at the Annual Delegates Conference of the Nigerian Bar Association on the 22nd – 27th day of August, 2004 held at Le Meriden Hotel, Abuja.

47 Nwakoby, G. C. (2020) 4(2) *Obafemi Awolowo University Law Journal*, 508. Nwakoby G. C. and Aduaka, E. C. "Obstacles Facing International Commercial Arbitration" (7)3 *Journal of Law and Conflict Resolution* (2015) at p. 15.

48 See Orders 27 (On Case Management conference and Scheduling); 28 (On ADR proceedings); 59 (Fast Track) of the High Court Civil Procedure Rules 2019

system should be further strengthened and enforced.⁴⁹ Other states which do not yet have such a structure would need to amend their rules or issue a practice direction to give effect to such affirmative ADR action.⁵⁰ An alternative approach would be to expand the dispute resolution space beyond the courts – a private public collaboration - to adopt ADR as a first resort.⁵¹ One organisation has already set in motion such collaboration and this will be discussed in the next section.

8. THE COVID-19 ADR INITIATIVE (CADRI)

Sometime in March, 2020 two ADR experts and practitioners, Mrs. Funmi Roberts and Mr. Fagbohunlu, SAN brought together a team of dispute resolution professionals⁵² to examine the possibility of building consensus about using ADR as an intervention strategy to resolve commercial and contractual disputes that are likely to arise as a fall out of the COVID-19 pandemic and measures taken to safeguard public health amidst it. The team was also to make proposals on what approaches to adopt to ensure that stakeholders in the justice sector key-in to whatever measures are deemed necessary to mainstream the application of ADR to COVID-19 related disputes. A core component of this approach is to advocate and sensitise individual lawyers, law firms, public and private organisations and corporations to undertake to use ADR as a first resort in the resolution of their disputes – in particular, contractual and commercial COVID-19 related disputes. This section of the paper will further examine the rationale, objectives,

49 Eyongndi, D. T. "Arbitrator's Misconduct as a Ground for Setting Aside Arbitral Award in Nigeria: A Review of NITEL v. Okeke and TES Inc. v. Chevron (Nig.) Ltd." (2018 & 2019) 9(1) *Ahmadu Bello University Journal of Commercial Law* 15-171.

50 Borokini, A. A., "Is ADR the Death of Litigation" (2006) 4(2) *Fountain Quarterly Law Journal* 43.

51 Akanbi, M. M., Abdulrauf, L. A. and Daibu, A. A., "Customary Arbitration in Nigeria: A Review of Extant Judicial Parameters and the Need for Paradigm Shift" (2015) 6(1) *Afe Babalola University Journal of Sustainable Development Law and Policy*, 201.

52 The authors are members of the core team. Some of the other members include Dr. John Oluwole A. Akintayo, Mrs Nike Olorugbagbe, Mr. Tolu Olatunji, Mrs. Abimo Olayiwola, Mrs Funmi Iyayi (LACIAC), Mr. Tomiwa (LACIAC), Mrs Anu Gade (Oyo State Multi-Doors Courthouse, OYSMDC), Mrs. Suliat Salaudeen (OYSMDC), Mrs Bukola Haastrup-Ashagidigbi (Funmi Roberts & co) and Anu Raji, (Funmi Roberts & co).

scope and strategies adopted by CADRI in advocating for affirmative action by using ADR as the first resort to resolve contractual and commercial COVID-19 related disputes.

8.1 The Rationale and Objectives of CADRI

CADRI is not an institution but a service which is being administered through existing arbitral and other ADR institutions. It is designed to specifically support African businesses in view of the adverse economic impact the COVID-19 pandemic has had on the African and global economies. According to the Vision bearers, 'no one would be affected by any dispute that emerges as a result of any action or inaction taken in response to COVID-19 who would not have also suffered personal and economic losses.'⁵³ They queried—

... whether 'those who have to enforce their rights as a result of COVID-19 related circumstance should be subjected to the analogue vagaries of our anachronistic and slow-wheeled civil justice system? It is this question that birthed the COVID-19 ADR Initiative (CADRI). It is a drive to improve access to justice so that the pains and aches of COVID-19 does not have to breach known boundaries and incur into the justice delivery space in the dawn of the new reality.'⁵⁴..... Civil courts, which are already bursting at the seams with large dockets, would also have to contend with an increase in the number of disputes that will arise as a result of COVID-19 pandemic and the attendant lockdown. Although in some jurisdictions, these courts are able to continue their services through virtual proceedings, this is not possible in others as the necessary infrastructure to support virtual proceedings is lacking or inadequate. In some jurisdictions, there is uncertainty about the constitutionality of virtual court proceedings..... All these lead to uncertainties and litigants would no doubt suffer considerable delay in civil courts.'⁵⁵ the most appropriate ADR mechanism, the COVID-19 ADR Initiative (CADRI) is a platform created to provide speedier, cheaper and effective resolution of COVID-19

53 See the Visioners statement at <<https://cadri.org.ng/>> (accessed 4 December 2020).

54 *Ibid.*

55 See <<https://cadri.org.ng/about-us/>> (last accessed 4 December 2020).

related commercial and contractual disputes. CADRI's overriding vision is to support sustainable economic growth by assisting businesses to overcome challenges in dealing with COVID-19 commercial and contractual related disputes. Its mission is to provide access to speedy and affordable dispute resolution services for settling such disputes. CADRI collaborating partners are able to offer ADR alternatives to litigation, in person, or by virtual proceedings. They are cheaper, faster and enable parties to put closure to disputes so that they can focus on getting their lives and businesses back on their feet. In some cases, they help restore the relationship of the parties or business partners.⁵⁶

In this regard, it was sought to create a CADRI Panel of Neutrals (the Panel) whose mandate would be to resolve COVID-19 related commercial and contractual disputes, not only for those who can afford to pay for those services, but also to offer pro bono ADR services to those eligible for such assistance, under set criteria.⁵⁷ It was an open invitation to ADR practitioners worldwide to contribute to the fight against the effect of COVID-19 by joining the CADRI Panel of Neutrals. Members of the Panel will increase access to justice by:

- a) Committing skills and expertise to assist parties in resolving COVID-19 related commercial and contractual disputes referred to them by collaborating CADRI partners;
- b) Committing to provide pro bono services for eligible cases using set criteria, and to deploy these free services for at least 2 negotiation or mediation sessions, if either of them are determined to be best suited to resolve the disputes;
- c) Committing to accept professional fees based on the scale of fees of the collaborating CADRI partners where the attempt at settlement exceeds 2 sessions of pro bono services, which would mean transiting from pro-bono to fee-paying services.

⁵⁶ *Ibid.*

⁵⁷ Available online at <<https://cadri.org/ng/adr-practitioners/>> (accessed 4 December 2020).

8.2 Subject and Territorial Scope of CADRI

CADRI is set up to deal with COVID-19 related commercial and contractual disputes. Such disputes are described as follows:

- i. Disputes which have arisen as a result of the COVID-19 pandemic.
- ii. Ongoing litigation that is delayed as a result of COVID-19 and which the parties agree to submit for resolution through CADRI.
- iii. New disputes, whether arising from the COVID-19 pandemic or not, which parties do not wish to process through the courts because of delays that will be caused by the COVID-19 pandemic.⁵⁸

In other words, the CADRI scheme also applies only to the following four categories of cases:

Category 1: Disputes that have arisen as a result of the impact of the COVID-19 pandemic on contractual or other obligations, where both/all parties have agreed to resolve such disputes under the CADRI scheme.

Category 2: Ongoing litigation cases which are delayed because of the impact of the COVID-19 pandemic on courts' operations, and which the parties have agreed to stay and submit for resolution under the CADRI scheme.

Category 3: Prospective litigation cases that will be delayed due to the impact of the COVID-19 pandemic on courts' operations, which both/all the parties have agreed to submit for resolution under the CADRI scheme rather than by litigation.

Category 4: Prospective cases where at least one of the parties is a business established in an African country and both/all the parties have agreed to resolve the dispute under the CADRI scheme rather than under a previously agreed dispute resolution method.⁵⁹

The above shows that the CADRI subject scope is restrictive – family disputes, human rights, land and tenancy matters, and other civil disputes are excluded. It is submitted however that this is not a minus

58 Available online at <<https://cadri.org.ng/faq/>> (accessed 4 December 2020).

59 Available online at <<https://cadri.org.ng/faq/>> (accessed 4 December 2020).

for the scheme as other platforms and the court system may adopt an approach which embraces these other civil disputes.

On the question of the rules and procedure adopted by CADRI, it should be noted that CADRI is not running alone. It is a platform created to link disputants with resources for faster and cost-effective dispute resolution services. Thus, the services are being rendered by CADRI collaborating partners, which for now are Lagos Chamber of Commerce International Arbitration Centre (LACIAC), International Centre for Arbitration and Mediation, Abuja (ICAMA) and Oyo State Multi-door Courthouse. It is the rules and procedures of the collaborating partners that would guide proceedings. ADR judges will come in when disputes referred to mediation or negotiation have been successfully resolved and the ADR judges will sign the settlement agreement under the procedure of the Multidoor Courthouse in that jurisdiction.⁶⁰ In furtherance of the CADRI objectives, the fees to be charged for the services rendered are lower than the regular fees of the collaborating partners.⁶¹

With regard to the territorial scope, CADRI is intentional. Being an ADR practitioners' platform, it has a global reach and outreach – depending on the jurisdiction where the dispute arose and particularly as remote hearings are acceptable, it can be administered from anywhere in the world. Once there is an acceptable and available neutral in any of the collaborating institutions, there is no restriction on national boundaries.

8.3 The CADRI Delivery Platforms

CADRI is delivered on four platforms i.e. *the Pledge, service delivery, legislation and impact assessment*. With regard to the pledge, this is a cardinal feature of the scheme. CADRI urges law firms and lawyers to sign the pledge online, committing to advise clients to resolve COVID-19 related commercial and contractual disputes through the ADR services offered by a CADRI collaborating partner. The CADRI pledge also enjoins lawyers and law firms to work with their clients to

60 Available online at <<https://cadri.org.ng/faq/>> (accessed 4 December 2020).

61 Available online at <<https://cadri.org.ng/about-us/>> (accessed 4 December 2020).

participate in the ADR proceedings in good faith. Corporate entities are also encouraged to sign the pledge to commit to resolving COVID-19 related commercial and contractual disputes through ADR as the first resort. It is only if none of the non-adjudicatory or adjudicatory ADR processes do not resolve the disputes that resort will be had to litigation.⁶²

Service delivery by CADRI participating collaborating partners is significantly dependent on the modification of their rules and procedures. To aid the actualisation of the 4th CADRI platform, which is impact assessment, collaborating partners will keep records along an independent stream. Currently, the collaborating partner in Oyo State, Nigeria is the Oyo State Multi-Door Courthouse, Ibadan, in Lagos State, the Lagos Chamber of Commerce and Industry Arbitration Centre (LACIAC), Lekki, Lagos and in Abuja the ICAMA.⁶³

In furtherance of the CADRI objectives, the fees to be charged for the services rendered are lower than the regular fees of the collaborating partners. The first 2 (two) sessions would be rendered by the mediator or negotiator free of charge where one of the parties to a dispute is adjudged to be indigent, and mediation or negotiation is deployed to resolve the dispute. Both parties would however pay administrative fees.⁶⁴

On legislation, the State Houses of Assembly or appropriate parliament are encouraged to pass requisite legislation to support CADRI using the CADRI Model Law as a template.⁶⁵ Some important highlights of the model law include the duration of the law which is put at two years' post COVID-19 subject to extension by the relevant authorities; the establishment of a state ADR Centre where it does not already exist to implement the scheme, and most importantly the directive to the High court of the state to refer all COVID-19 related disputes filed in the court to be referred to ADR. The law also imposes a duty on counsel and the court registrar to draw the attention of the litigant to

62 Available online at <<https://cadri.org.ng/about-us/#>> (accessed 4 December 2020).

63 Available online at <<https://cadri.org.ng/about-us/#>> (accessed 4 December 2020).

64 *Ibid.*

65 *Ibid.* The template is attached at the end of this paper.

the existence of the directive to adopt ADR. Failure on the part of counsel to so inform the client would lead to personal cost against such counsel. It also provides for a 'freeze' of the limitation law of the state from 15th March, 2020 to a time declared by the Executive as a period of health emergency.

On Impact Assessment, this would be an annual assessment of CADRI by professionals to measure its effectiveness and values so that lessons learned would help to sustain and improve on service delivery for greater impact.⁶⁶

9. CONCLUSION AND RECOMMENDATIONS

COVID-19 has disruptively invaded the world and has blown unsolicited and spiteful wind into every sphere of human endeavour, exposing the vulnerabilities in many systems, including the judicial system. COVID-19 has also ushered in unprecedented disputes through sequestration of the ability of persons and businesses alike to fulfil their obligations. The lockdown of courts has led to delay in administration of justice, denial of access to court and selective admittance of disputants to ventilate their legal grievances. It is obvious that traditional litigation plagued by various challenges particularly infrastructural deficit, constitutional constraints and human manoeuvring, is inadequate to satisfy the yearnings for speedy, cheaper, friendlier justice delivery.

ADR is a veritable and appropriate supplement to litigation given its various benefits and it is particularly best suited for settling COVID-19 and post-COVID-19 commercial, and contractual related disputes which have occurred and are bound to occur. The CADRI platform was conceived to make available to disputants, speedier, friendlier, flexible and cheaper settlement of disputes. This initiative is a welcome development which is worthy of affirmative action just like ADR in general.

66 *Ibid.*