A COMPARATIVE APPRAISAL OF THE PRACTICE AND PROCEDURE OF COURT-CONNECTED ALTERNATIVE DISPUTE RESOLUTION IN NIGERIA, UNITED STATES OF AMERICA AND UNITED KINGDOM

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DEDICATION

- To the Almighty God, Jehovah, the owner of my life

- To the bone of my bone, Kolawole Oluwapelumi Akeredolu

- To my wonderful children: Anuoluwapo, Olufeoluwa and Oreoluwa

and

- To Professor Ademola Yakubu of blessed memory, my first supervisor.

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ABSTRACT

Court-connected Alternative Dispute Resolution (CCADR) or Multi Door Courthouse (MDC), adopted by two Nigerian States and the Federal Capital Territory, is the integration of Alternative Dispute Resolution (ADR) into the court system to facilitate access to justice. Several studies have examined the operations of the three MDCs in Nigeria, but studies on their practice and procedure in Nigeria compared with those in the United States of America (USA) and the United Kingdom (UK) have not been undertaken. This study, therefore, examined the practice and procedure of existing MDCs in Nigeria, and compared same with those in the USA and UK to identify the inadequacies in Nigerian laws.

The study adopted the theory of Access to Justice. The provisions on dispute resolution in the Constitutional Statutes of Nigeria, the USA and the UK were examined. Three High Court laws, three High Court (Civil Procedure) Rules and three practice directions on the procedure for MDCs were examined. Fifty-seven cases (17 Nigerian, 11 American and 29 British) and relevant legal texts on the practice of ADR were purposively selected. These were subjected to interpretive and comparative analyses.

The MDCs were introduced into the judiciaries of Lagos and Akwa-Ibom States, and Abuja (as LMDC, AKMDC and AMDC respectively) through the amendment of the existing High Court Laws and Civil Procedure Rules to encourage referral of cases to ADR. This was the same approach adopted in the USA and the UK. Specific ADR Rules and Practice Directions were enacted to support the process; only Lagos had enacted an MDC law which was consistent with the practice in the USA and the UK. The courts' supervisory procedure varied: LMDC operated as private-public collaboration, and the staff was not affiliated to the State judiciary; the AKMDC and AMDC were integrated with the State judiciary, manned by judiciary staff and subject to the same supervision as that of the regular judicial staff. This was also the predominant procedure in small claims courts in the USA and the UK. The CCADRs in all the countries had trained ADR personnel who conducted the ADR process but also maintained ad hoc 'accredited' neutrals. They all recognised pre-trial referrals, and, where not expressly stated in the Rules, allowed referrals after trial had commenced. In all the countries, settlement outcomes were contracts simpliciter which, once endorsed by an ADR judge, became a judgment of the court. The USA and UK practice differed from

Nigeria's in terms of mandatory participation by disputants based on amounts claimed and the annexation to their summary trial courts.

The operations of the Multidoor Court house in Lagos and Akwa-Ibom States and the Federal Capital Territory of Nigeria are similar in terms of annexation and voluntariness, but differ in respect of their engagements of neutrals. They all diverge from the practice in the USA and the UK with regard to non-voluntariness of participation. For better access to justice through MDCs in Nigeria, there must be automatic referrals to ADR.

Key words: Access to justice, Court-connected alternative dispute resolution, Legal practice and procedure, Nigerian judiciary, USA and UK judicial systems

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- The International Chamber of Commerce ADR Rules

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- Western District Michigan Local Court Rules
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- Western District Oklahoma Local Court Rules
- Western District Texas Local Court Rules
- Wisconsin Supreme Court Order No. 93-13.

ABBREVIATIONS

Law Reports

2ND Cir.	2nd Circuit
7TH Cir.	7th Circuit
9th Cir.	9th Circuit
AC	Appeal Cases
All ER	All England Reports
All ER (Comm)	All England Reports(Commercial)
Cons LR	Constitutional Law Reports
EWCA Civ	England and Wales Court of Appeal (Civil)
ECSLR	East Central State Law Report
L.T	Law Times
NCLR	Nigerian Constitutional Law Report
NWLR	Nigerian Weekly Law Report
S.Ct.	Supreme Court
SC	Supreme Court Report
SCM	Supreme Court Monthly
US	United States Law Report
WLR	Weekly Law Report
WRN	Weekly Report of Nigeria

CHAPTER ONE

INTRODUCTION

1. Introduction

Abraham Lincoln, a former President of the United States once said: *Discourage Litigation. Persuade your neighbours to compromise whenever you can. Point out to them how the normal winner is often the loser - in fees, expenses and waste of time. As a peacemaker, the lawyer has a superior opportunity of being a good man. There will still be business enough.*[1]

In the process of interacting with one another, disputes are bound to arise. One of the major functions of law, therefore, is to provide reliable and objective systems for members of the society to resolve their disputes. These dispute settlement systems which differ from one society to another are from time to time evaluated and assessed with the goal of introducing reforms that can improve the system. Integrating Alternative Dispute Resolution (ADR) into the court system as done in jurisdictions such as the United States of America and the United Kingdom is one approach that those societies have adopted to improve their systems of dispute resolution. Nigeria (beginning with Lagos State and the Federal Capital Territory), has started taking steps to introduce ADR into the court system. The focus of this research therefore, is to examine why and how ADR should be implemented in the Nigerian Civil System of Administration of Justice.

Man has in the past, and it continues till date tended to by nature, settle disputes/differences by resorting to violence[2] Conflict is human and ubiquitous, human diversity with our varied needs and desires makes it a given that conflict is bound to arise.[3] The term conflict has been described rather than defined by scholars. Thomas refers to it as 'the processes that begin when one party perceives that the other has negatively affected or is about to negatively affect

[1] Abraham Lincoln, former President of the United States, in Partridge, M.V.B. (2009). *Alternative Dispute Resolution – An Essential Competency for Lawyers*. New York: Oxford University Press. P.152.

[2] In his treatise 'The Leviathan; Hobbes asserted that man was individualistic in nature and that in this state of mind the individual inclination of Man is more often inclined towards violence in everyday struggle for survival. For more on Hobbes views see, Malcolm, Noel, (2002), *Aspects of Hobbes*, (New York: Oxford University Press, p. 33-34; Macpherson, C.B, (1962) *The Political Theory of Possessive Individualism: Hobbes to Locke*, (Oxford: Oxford University Press. Many wars have been fought and continue to be fought because countries have been unable to amicable settle their disputes.

[3] Menkel-Meadow, C.(2003). *Dispute Processing and Conflict Resolution: Theory, Practice and Policy*. Burlington: Ashgate Publishing Co. P.6

something that he or she cares about.'[4] Olowu describes it as 'a perceived incompatibility of goals: what one party wants, the other party sees as harmful to its interests.'[5] Although conflict can cause distress and is usually viewed negatively, it can function in positive ways. Conflict may motivate an individual to take action and change a situation in ways that improve one's life and better fulfil one's self-interests.[6] Conflict and its contrary phenomenon, peace, are not random, unexplained incidents, but are created and can be influenced.[7]

Conflict is dealt with in different ways by different societies and as societies change, so also their method of resolving disputes evolve. In some societies, when rules are broken and the breach is not the subject matter of feud, social order is often maintained by a series of unorganised sanctions such as ostracism, ridicule, avoidance and denial of favours. Among the Yurok Indians for instance, these were supplemented by go-betweens who acted in a positive but non-judicial way in disputes. Their role was primarily that of diplomats.[8] Among the Lyhya tribe of western Kenya, the elders intervene and perform a similar role. In such societies, the emphasis is on reconciliation of the parties as much as resolution of a particular dispute since there is a need for continuing contact between the parties.[9]

A dispute is defined as 'to quarrel, argue, to question the truth of, to fight hard for.'[10] Some scholars have argued that there is a difference between ending a dispute and resolving a dispute. For example, where an object is the subject of a dispute between two people, taking the object away from both *ends* the dispute. To *resolve* the dispute, however, would involve deciding who is entitled to the object and on what terms as against the other.[11]

In most societies today, the formal system of resolving disputes makes it necessary to first discover the true facts. This is referred to as the 'trial' method of dispute resolution as opposed to 'proof. The proof system was what operated in the middle ages, where discovery of

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[4]Thomas,K.(1992)'Conflict and Negotiation Processes in Organisations.' *Handbook of Industrial and Organisational Psychology*. Eds. Dunnette, M. and Hough, L. Canada : Consulting Psychologists Press. P.303

[5] Olowu, S. (2001). Conflicts and Conflict Resolution. *Ife Psychology* Vol. 9.3: P.119

[6] Folberg, J. *et al*., (2010). *Resolving Disputes: Theory, Practice and Law.* 2nd ed. New York: Aspen Publishers, p. 26

[7] Ani, C.C.(2012) Anatomy of Conflict in Azinge, E. And Ani, C.C. eds. *Principles of Negotiation and Mediation*. Lagos: Nigerian Institute of Advanced Legal Studies. P.1

[8] Farrar and Dugdale. (1984) *Introduction to Legal Method.* 2nd ed. London: Sweet & Maxwell, p. 5.

[9] *Ibid*

[10] *The New Webster's Dictionary of Contemporary English*, International edition, (2004), New York: Lexicon Publications Inc. P.273

[11] See, for example, Akindipe & Sanni (2006). Fact finding and Dispute Resolution in Sanni, A. Ed. *Introduction to Legal Method* 2nd ed. Ife: OAU Press Ltd. P.137-138

facts did not play any role at all, rather what existed were 'ordeals'.[12] During that period, disputants were subjected to ordeals such as burning of their hands by hot iron, if the hand did not fester, then that proved his innocence.[13] In Biblical times, especially among the Jews, a man who suspected his wife of unfaithfulness would make a report to the priest who would write curses on a scroll and wash them into bitter water (being a mixture of dust from the temple floor and holy water in a clay jar) and give the woman to drink. If her stomach swells and she miscarries, this proves her guilt, but if she is innocent she will conceive and bear children. [14]

African tradition tells of making a woman who is suspected of killing her husband to drink the water used to bathe the deceased, she is expected to die within a given period, and if she survives, she is innocent. Fayemi states that the communal structure of traditional Yoruba societies did not foreclose the insurgence of conflicts; that in traditional Yoruba societies, conflicts are usually managed such that they do not degenerate into violence and armed conflicts.[15] The early intervention of the *agba* (elders) in reconciling the disputing factions usually save conflict situation from escalating into violent situations. Whenever there is disputes between individuals and different parties, primacy is given to restoring the relationships, soothe hurt feelings and to reach a compromise on how to improve future relationships.[16] Reconciliation of conflicts is usually seen as a social responsibility by the elders, and this accounts for the Yoruba proverbially saying that *agba ki wa loja kori omo tuntun wo* (an elder cannot be in the marketplace and allow the reign of chaos). A person who watches while tension mounts between children, adults, groups and any warring parties is not seen as socially responsive. This social responsibility is voluntarily done, and as well as, institutionalised in different ways. For instance, when there is conflict between or among the co-wives in a household, the elderly male or female members intervene, and if they do not succeed, the matter is taken to the *Olori ebi* (head of the compound). Where the reconciliatory attempt of the *Olori ebi* (head of the compound) failed, the matter is then taken-up to a higher authority, which is the office of the *Baale* (head of clan).[17] According to Chukwurah, ADR remains the 'modern version of an ancient practice.' It is a transformation

[12] See generally, Baker, *Introduction to English History.* 2nd ed.
[13] *Ibid*
[14] The Holy Bible, Numbers 5 v 11-29
[15] Fayemi, A.K. (2009). "*Agba* (elder) as Arbitrator: A Yoruba socio-political model for conflict resolution" - A review of Lawrence O.Bamikole. *Journal of Law and Conflict Resolution* Vol. 1(3), pp. 060-067, August, 2009 Available online at http://www.academicjournals.org/JLCR © 2009 Academic Journals
[16] *Ibid*
[17] *Ibid*

in the traditional style of conflict resolution. It is not alien to Africans; the only difference is the improved and modernised mode of its implementation.[18]

According to Sanni,[19] such techniques worked because they were acceptable to the parties.[20] Dissatisfaction with such subjective processes, however, is what led to the search for objective standards or norms/procedures which would be respected and obeyed by disputants. Procedural justice is, therefore, about the ways provided by society for persons in conflict to be able to talk and struggle with each other about how to move forward even when they disagree.[21]

Basically, at least three strategies could be identified to resolve conflict: might, right and problem solving.[22] Might depends on force to achieve its purposes. For example in some parts of Nigeria, it is not uncommon for some landlords to remove fixtures in a tenanted property to force a recalcitrant tenant to vacate or government officials demolishing 'illegal structures' without formal notice to the occupiers. 'Right' relies on some recognised authority to decide. It determines who is right and who is wrong; the final outcome is victory for one party and defeat for the other. Both are adversarial in nature. Unlike the first two strategies, problem solving is a collaborative approach to dispute resolution. Rather than seeing the conflict as a battle, parties view it as a problem and decide to talk about it to explore possible ways of resolving it in a mutually satisfactory manner.[23] This is the focus of ADR mechanisms.

1.1 Background to the Study

Lord Denning in *Bremer v. South India Shipping Corp, Ltd*[24] remarked that 'every civilised system of government required that the State makes available to all its citizens a means for the just and peaceful settlement of disputes between them.' A system of civil justice is essential to maintaining civilised society, for law provides the basic structure for commerce and industry to operate, safeguards rights of individuals, regulates their dealings with each other and enforces

[18] Chukwurah, A.O. (2008). Alternative Dispute Resolution (ADR) Spectrum in Sylvester, V.M and Wali, R.C. Eds. *Readings in Peace and Conflict Resolution.* Ibadan: Stirling-Horden Publishers Ltd. p.119 at p129
[19] Sanni, *op cit*, p.137
[20] The Nigerian Criminal Code however prohibits trial by Ordeal. See, S. 207 of the Criminal Code, Cap C38, LFN, 2004
[21] Menkel-Meadow,C. *op cit*. P.5
[22] See, Ury, W.M, Brett, J.M, and Goldberg, S.B. 1988. *Getting Disputes Resolved: Designing Systems to Cut the Costs of Conflict*. San Francisco: Jossey-Bass. Pp 3-9
[23] Epie, C. (2004). Alternative Dispute Resolution Skills: Understanding the Problem Solving (Win/Win) Approach in Negotiations. *Legal Practice Skills and Ethics in Nigeria.* Nwosu, K.N. Ed. Lagos: DCONconsulting. P.439 at 447.
[24] (1981) AC 909, 917

duties of government.[25] One of the functions of law over the years has been the continued strive to evolve an efficient means of resolving disputes in our changing world. The methods which law has evolved can broadly be classified as adjudicatory (or adversarial) and non-adjudicatory.

The adjudicatory method is otherwise referred to as litigation. Access to courts to remedy wrongs and enforce legal rights is central to most democracies and has for many decades remained the main dispute resolution mechanism globally.[26] It is a formal process requiring that disputants and the witnesses appear before courts or tribunals established by law to resolve their dispute.[27] It is a finely tuned system of civil justice.[28] The civil system of justice which Nigeria (and many other nations of the world including the United States, Australia, and New Zealand) inherited via its colonial heritage from the British is what has been broadly described as the adversarial system.

'To many people, but particularly to those who work in it, the adversarial system is a successful set of procedures, practices and institutions that have underpinned a well-functioning social democratic society by maintaining the rule of law and separation of powers. It is a system whose strengths lie in the concepts of the independence of the bar and bench from governments, the autonomy of the parties, the power of examination and cross-examination to elicit facts and in the fact that courts are open to scrutiny and that court officers are disinterested parties in often hotly contested and sensitive disputes.[29] As a product of evolutionary, inductive and individually-oriented common law, it is a system that has adopted the pragmatic view that the observance of law rather than the attainment of justice is a more achievable goal for any community'.[30]

The laws of many countries in the world originate in those of England and France. Legal systems based on the laws of England are typically described as belonging to the Common law tradition, while those based on the laws of France as belonging to the Civil or Roman law tradition. Structurally, the two legal systems operate in very different ways: civil law relies on professional judges, legal codes, and written records, while common law relies on

[25] Lord Woolf, Access to Justice, Interim Report on the Civil System Reform. Retrieved Feb. 25, 2010, from www.dc.gov.uk/index.htm now available at www.justice.gov.uk
[26] Folberg, *op cit*, p.7
[27] Sanni, *op cit*, p.138
[28] Folberg, *op cit*, p.7
[29] Paragraph 1.121, Australian Law Reform Commission Report, 2000. referred to in Michael, King *et al.* 2009. *Non-Adversarial Justice.* Sydney: The Federation Press. P.1
[30] *Ibid*

lay judges, broader legal principles, and oral arguments.[31] The common law system greatly relies on oral argument and evidence, while in civil law systems; much of the evidence is recorded in writing. Trials play a much larger role in a common law than in a civil law system. Common law systems, at least in the last century, have generally relied on heavily incentivised state prosecutors, who are separate from judges, especially in the criminal cases.

In civil law systems, in contrast, judging and prosecution are generally combined in the person of the same judge. Finally, although this distinction is less clear-cut, common law systems generally rely to a greater extent on the precedents from previous judicial decisions than do the civil law systems.[32] In civil law systems also, most evidence is collected prior to the trial by a judge-inquisitor, hence the trial plays only a secondary role of going over this evidence publicly. The surprises and revelations of a common law court room play no role in this process.[33]

Adversarialism is, however, increasingly being questioned, by the practitioners themselves[34] as well as by the users of the process. Over time, members of the public and in particular the international business community became frustrated and dissatisfied with the litigation process and sought for other alternatives, giving rise to the non-adjudicatory method, otherwise referred to as ADR.[35] Broad economic, demographic, social and technical factors account for the shift from public resolution of disputes via the court system to private dispute resolution.

Until recently,[36] ADR processes have always operated exclusively outside the formal court system such that its effectiveness depended to a large extent on the good faith of the parties both for implementation and enforcement of agreed settlements. In pursuit of reform of the civil justice system of England and Wales, Lord Woolf observed that most of the problems and complaints about the civil court system in common law countries worldwide

[31] Glaeser, E.L, and Shleifer, A. (2001). *Legal Origins, National Bureau of Economic Research Working paper No. 8272.* Retrieved Sept. 29, 2010 from www.nber.org/papers/w8272 P.3
[32] *Ibid*, p.26
[33] *Ibid*, p.27
[34] A lot of the initial work on ADR was sponsored by the Bar Association including establishment of pilot projects.
[35] The Centre for Effective Dispute Resolution (CEDR) *Mediator Handbook: Effective Resolution of Commercial Disputes.* 4th ed. 2004. London: CEDR. P.9
[36] Though Arbitration has been in existence even from the 19th century according to some scholars, the modern ADR movement is usually traced to the 1976 American Bar Association (Pound) Conference.

was more about the process rather than the decisions/outcomes themselves.[37] Such complaints include the fact that the process was too expensive (legal fees, cost of prosecuting claims from start to finish, cost of human hours spent preparing for cases, the fact that costs could exceed the value of the claim and the like), the process is slow (cases could go on for an average of five years) and it is also complex (with too many complexities often seen as deliberately set up by the bar and bench to protect their trade without regard to their client's interests); all of which results in inadequate access to justice and an inefficient and ineffective system.[38]

The same observation was made by the Australian Law Reform Commission about the Australian civil justice system.[39] The Americans must have experienced the same problem because the theme for the American Bar Association Conference in 1906 was on the causes of popular dissatisfaction with the civil administration of justice system. Professor Roscoe Pound, a renowned jurist, philosopher, botanist, former Dean of the University of Nebraska and later Dean of Harvard Law School delivered a paper in this regard.[40] It is noteworthy, that, it was at another American Bar Association conference held in 1976 that Professor Frank Sander while examining the same theme of Dissatisfaction with the system of administration of justice, expounded the idea of a Comprehensive Dispute Resolution Centre (also referred to as the Multi Door Court House) to stem the tide.[41] The Multi Door Court House (MDCH) concept[42] seeks to integrate ADR options into the court system, as a way of discharging the main constitutional function of the judiciary which is the determination of disputes between members of society.[43]

In their search for solutions, the Americans, Australians and the British alike envisioned and recommended a new judicial landscape where litigation will be seen as a last rather than a first resort if no appropriate options were available, as well as a conscious affirmative action on the part of the courts to encourage the use of ADR before filing a court process and afterwards.[44] In

[37] Woolf, *op cit*
[38] *Ibid*
[39] *Op cit*, n.28
[40] The 1976 ABA Conference was named after him and is commonly referred to as 'the Pound Conference.'
[41] Sander, F.E.A. (1979). Varieties of Dispute Processing. *The Pound Conference: Perspectives on Justice in the Future*. Eds. Levin, A.L. and Wheeler, R.R. Proceedings of the National Conference on the Causes of Popular Dissatisfaction with the Administration of Justice. Minnesota: West Publishing Co. P.69
[42] According to Sander, this term was invented by the editors of the American Bar Association Magazine. In reporting Professor Sander's paper at the conference they drew a court house with many doors on the back cover and termed it 'Multi-door courthouse', the name has stuck since then. See Mariana Hernandez-Crespo, 'The Transcript : A dialogue between Professors Frank Sander and Mariana Hernandez-Crespo. Exploring the Evolution of the Multi-door courthouse,' in *University of St. Thomas Law Journal*, Vol. 5.3: P.665
[43] See, S. 6 of the Nigerian Constitution, 1999
[44] Woolf, *op cit*

Cowl v. Plymouth City Council,[45] Lord Woolf delivered a clear and unconditional reminder to those involved in public law cases that trial litigation should be the last resort. He said, '*the importance of this appeal is that it illustrates that, even in disputes between public authorities and the members of the public for whom they are responsible, insufficient attention is paid to the paramount importance of avoiding litigation whenever this is possible. Particularly in the case of these disputes both sides must by now be acutely conscious of the contribution alternative dispute resolution can make to resolving disputes in a manner which both meets the needs of the parties and saves time, expense and stress.'*

The very same problems sought to be addressed by introducing ADR into the courts in America, England, and Australia and even in civil law countries are the very same problems being experienced in the Nigerian civil system of justice. Similarly, both the practitioners and the end users of the process are complaining of frustration. Kehinde Aina, one of the foremost promoters of the Multidoor court house in Nigeria cites these same reasons for advocating court connected ADR.[46] Past and present Chief Justices of the Federation and State Chief Justices have at different fora expressed the same frustrations and a belief that the system can be helped by integrating ADR into the mainstream of the civil justice system.[47]

According to Chandra, 'it is not that the challenges presented by these factors have gone un-responded. In fact all the wings of government – the executive, the legislature and the judiciary itself - have taken measures to up-date the administration of justice. Laws are being reformed, infrastructure streamlined and the judicial process activated.[48] He observed, however, these endeavours are bound to be inadequate because there is need to think and evolve procedures, other than the normal judicial process, which may lend themselves to resolution of these new classes of disputes in a more satisfactory manner.'[49]

The concept of a comprehensive justice centre or MDCH has been interpreted and implemented in different ways by different courts and jurisdictions. In the Federal courts of the USA, what the law requires is that all federal district courts establish an ADR

[45] See, *Cowl and Others v. Plymouth City Council*. *The Times.* January 8, 2002. per Lord Woolf LCJ . Also see, (2001) EWCA Civ 1792.
[46] Aina. K. The Lagos MDCH – One Year After. NCMG Working Paper Series: Paper presented at the Workshop on 'The LMDCH: The Procedure and Promise. Held in Lagos on Sept. 30, 2003
[47]The Hon Justices Uwais and Belgore, both former Chief Justices of Nigeria and Hon Justice Gunmi Chief Judge of the Federal Capital Territory are strong advocates in this regard
[48] Chandra S. (2010) reprint. ADR: Is Conciliation the best choice? *Alternative Dispute Resolution: What it is and How it Works.* Eds. Rao, P.C. and Sheffield, W. New Delhi: Universal Law Publishing Co. Pvt. Ltd. Pp.82-83
[49] *Ibid*

programme.[50] Presently, the different jurisdictions operating the Multidoor court system in Nigeria do so from different legal foundations. So far only the Lagos Multidoor is backed by legislation,[51] others operate under Practice Directions of the Chief Judge of the State [52](which incidentally is how the Lagos MDCH started). From the introduction of the Lagos Multidoor court house in 2000, there has been similar programmes adopted by other States, [53] the Federal Capital Territory and even the Court of Appeal.[54] There are calls from many quarters, ADR practitioners, academia,[55] the domestic and even the international business community, for adoption of such programmes nationwide.[56]

This thesis will examine whether there is justification for Court Connected ADR (CCADR) in Nigeria and if yes, what model should be adopted. Though it is too early to evaluate CCADR in Nigeria, the argument of this thesis is that based on the successes of similar CCADR programmes, the result is likely to be favourable. The study will compare the practice and procedure for implementing ADR in the US, UK and Nigeria. The main focus shall be to determine whether they can inform Nigeria's developing jurisprudence and practice in this area of law.

1.2. Statement of the problem

Some states in Nigeria have begun to introduce ADR as part of the civil system of justice; while others are considering doing so. ADR advocates agree that litigation is not suitable for all disputes (the reverse is also true that not all disputes are suitable for ADR). They also recognise that the very essence of ADR as a voluntary and flexible process raises its own questions and limitations particularly as regards enforcement. It is for these reasons that the advocates of court connected ADR seek to gain the best of both worlds by integrating ADR into the existing system of

[50] See, the Dispute Resolution Act, 1998

[51] The LMDC Law, Law No 21, LASG Official Gazette No 56 of 3rd Aug 2007, Vol .40. The commencement date is 18th May 2007

[52] See, for example, the practice direction by the Chief Judge of the Federal Capital Territory, Abuja.

[53] Multi-door courts have been established in Kwara, Akwa- Ibom, Rivers and Kano States.

[54] The Court of Appeal on 9th November, 2005 when Hon. Justice Umaru Abdullahi, CON was the President, established a Court of Appeal Mediation Programme (CAMP) based on a proposal by the Negotiation and Conflict Management Group, to give parties the option of mediating their disputes even at the appeal stage

[55] Coker, S.A, Adeleke, M.O, Olaseeni, O.A. (2008). An Appraisal of Alternative Dispute Resolution as an Antidote to delay of Judicial Proceedings in Nigerian Courts in *Issues in Justice Administration in Nigeria, Essays in Honour of Hon. Justice S.M.A. Belgore, GCON (CJN Rtd)*. Lagos: VDG Intl Ltd. P.101 at 104.

[56]The US, World Bank, European Union and similar international institutions have sponsored or are sponsoring projects on access to justice in Nigeria, a major component of which is affirmative use of ADR Procedures in all aspects of the justice system. The Nigerian Bar Association has in its recent Annual Conferences had with ADR issues and in particular the Section on Business Law at its Annual summits has ADR sessions. Individuals (such as Kehinde Aina, Kevin Nwosu, Paul Idornigie, Dele Peters), have being advocating for ADR among legal practitioners and the general public alike through seminars, workshops and other awareness creating activities.

administration of justice. The present challenge, therefore, is how to implement court connected ADR to incorporate procedural norms necessary to satisfy fundamental fairness, without sacrificing the flexibility that gives ADR its force; and at the same time preserve access to public adjudication that has made the judiciary so invaluable as an institution.

Litigation has for over many centuries now been the major form of dispute resolution mechanism in the public domain or sector; it is however plagued with many difficulties (as discussed in greater detail in latter sections of this sub-head) leading to a shift particularly by private businessmen towards alternatives such as arbitration and mediation. ADR has been tried and tested successfully for about four decades in some developed countries, especially the USA and this has led to its integration into the public dispute resolution system? With regard to Nigeria, the questions likely to be raised are whether the country should follow in the steps of its more advanced counterparts in integrating ADR into the court system – to offer disputants more options of resolving their disputes? If the answer is yes, then the legal problems arise as to whether or not the existing laws provide adequate legal framework for its implementation or there is need to amend such laws or enact new laws entirely.

To provide further details, it is submitted that, the administration of justice is usually the primary function of the judiciary or judicature, comprising the court system and the judicial personnel that administer justice in these courts.[57] Article 10 of the Universal Declaration of Human Rights (UDHR, 1948) states that everyone is entitled in full equality, to a fair and public hearing, by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him.[58] Article 14 of the International Covenant on Civil and Political Rights (ICCPR, 1966) also states that all persons shall be equal before the courts and tribunals and that in the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law. In the same vein, section 6 of the Nigerian Constitution vests the judicial power of the Federation and the States in the courts and extends to all matters between persons, or between government or authority and to any persons in Nigeria, and to all actions and proceedings relating thereto, for the determination of any question as to the civil rights and obligations of that person.[59]

[57] Asein, J.O. (2005). *Introduction to Nigerian Legal System.* 2nd ed. Lagos: Ababa Press Ltd. P.169
[58] On December 10, 1948 the General Assembly of the United Nations adopted and proclaimed the Universal Declaration of Human Right. Retrieved Oct. 13, 2001 from www.un.org/en/documents/udhr
[59] The Constitution of the Federal Republic of Nigeria, 1999, Cap C23, LFN 2004

In *Zekeri v. Alhassan*[60] Muntaka-Coomassie, JCA (as he then was) held that 'in a democratic society as ours, where rule of law prevails, the court is the hope of the common man. It plays an important role in the interpretation of the Constitution, protects the rights of citizens from encroachment by any organs of government, and generally has the inherent jurisdiction to determine cases between persons and persons and government.'

Civil procedure is the process by which a person whose legal rights and interests are adversely affected may have recourse to the courts of law for the resolution and determination of the controversy or dispute. It consists mainly of rules of practice and procedure applying to conflicts involving disputes in which legal rights and legal duties are in issue. It is the technical rather than the substantive aspect of law.[61] The judicial system provides for appellate review to ensure that the law is applied correctly and procedural rules are properly followed. However, litigation with all of the procedural protections is slow, costly and relatively inflexible. The process is also centred on lawyers, restricting the roles and expression of the disputing parties. The remedies available through adjudication are limited to what a court can enforce.[62]

Shapiro opines that, courts all over the world generally present themselves as the first and foremost agencies of authoritative decision making but the way preparation for the decision is arranged differs from one jurisdiction to another. In the Civil law countries, the court takes an active role as well as the burden for preparation whereas in Common law jurisdictions the court is a potent/real but passive backdrop where the parties through their counsel take the burden of preparing for an adversarial trial at their own pace.[63] The adversarial system of 'trial' has been referred to as 'a battle of adversaries' or 'legal combat,'[64] 'one party presses its view that he is right and the other side is wrong, and all resources are geared at establishing that position.[65] This position in Lombard's words is that "winning isn't everything, it is the only thing'.[66]

Private settlement of disputes outside the court forum has existed almost from the beginning of human society, with third parties helping people to informally resolve their disputes. Auerbach

[60] (2002) 52 W.R.N 119 (CA) at 141
[61] Asein, *op cit*, p. 296
[62] Folberg, *op cit*, p.7
[63]Shapiro, M. (1981). *Courts: A Comparative and Political Analysis.* Chicago: University of Chicago Press. P.243
[64] Coltri, L. (2010). *Alternative Dispute Resolution: A Conflict Diagnosis Approach*. Boston: Prentice Hall.
[65]Partridge, M. *op cit*, 150
[66] Cited in Patridge, *ibi*d. This is also the bias in the curriculum for training of lawyers at the Nigerian Law School. See generally, Fabunmi, J.O. and Popoola, A.O. 1989. Legal Education in Nigeria: Problems and Prospects. *Journal of Law and Politics in Africa, Asia and Latin America.* Pp 34 – 55.See also Owoade, M.A and Ajai, O.O. 1989. Legal Education in Ife: 1962-1987. Omosini, A. and Adediran, M.O. Eds, *Great Ife: A History of Obafemi Awolowo University Ile-Ife, 1962-1987,* Ife: University of Ife Press.

comments that even as far back as the 17th Century there has been a persistent counter tradition to legalism. He refers to equitable processes based on reciprocal access and trust among community members all through American history such as the Dedham - a 17th Century Christian Utopian community, the Quakers in Philadelphia, followers of John Humphrey Noyes at Oneida, a 19th century commune, immigrant communities such as the Chinese in San Francisco, the Scandinavians in Minnesota, and even the Chamber of Commerce businessmen. He says the development of commercial arbitration represents the efforts of business to elude lawyers and courts and to retain control over their disagreement.[67]

It is worthy of note that, the concerns, dissatisfaction and complaints about the effectiveness of the civil system of administration of justice, dates as far back as the Shakespearean times. In the play, King Henry VI, the king declares 'the first thing we do, let us kill all the lawyers'.[68] Roscoe Pound, a legal scholar delivered a paper in 1906 on the causes of popular dissatisfaction with the civil administration of justice calling for reforms. [69] The major reasons advanced for the dissatisfaction have been that the system was too expensive, sometimes costs of prosecuting a claim could exceed the amount claimed; it was too slow with cases often dragging on for years unresolved; too unequal, in favour of the wealthy litigant who could afford the costs; too uncertain, it is difficult to predict litigation costs, the total length of time it will take to conclude the proceedings inducing fear; too incomprehensible to many and too adversarial, the rules of court were often ignored by the parties and unenforced by the courts.[70] The diverse calls for reform and the search for alternatives brought forth the ADR movement. ADR processes were advanced as being able to solve the dual problems of reducing the expenses and delay of litigation on the parties as well as to relive the overcrowded court dockets resulting from new and complex causes of action.[71]

The decisive moment for legalisation of informal alternatives came in 1976 at the ABA National conference on the causes of popular dissatisfaction with the administration of justice in honour of Professor Pound. At that conference, Professor Sander advocated for the courts

[67]Auerbach, J. 1983. *Justice without Law?* New York: Oxford University Press.
[68]William Shakespeare, King Henry the Sixth, Part II, (Act IV, Scene II)
[69]Pound, R. The Causes of Popular Dissatisfaction with the Administration of Justice, A paper read at the American Bar Association Conference, August 29, 1906 reproduced in *The American Law Review* (1866-1906); Sept/Oct 1906, 40, American Periodicals Series Online, p.729
[70]See generally, Woolf, Access to Justice - Final Report on the Civil Justice System Reform
[71]Ward, E.(2006) Mandatory Court Annexed ADR in the US Federal Courts: Panacea or Pandemic? Proceedings of the Conference on Transatlantic Perspectives on ADR. Held July 26-28, 2006 in London

to reinvent themselves from being social regulators which to him they were unsuited for, to comprehensive justice centres. His model envisioned courts where complaints of parties were examined by an appropriate dispute resolution officer and a recommendation was made about the most suitable process(s) for resolving same.[72] Professor Frank Sander, at the conference proposed that courts offer parties a range of dispute resolution processes and help them select that which is appropriate, rather than offering them a one size fits all adversarial process. Since that time there has been debates about the integration of hitherto private dispute resolution processes into the mainstream civil system of justice.[73]

In Nigeria, the history of the court system has been no different. According to Orojo, with the economic, social and political development of the country, there was considerable rise in the number of cases in our courts which made the process of litigation more and more time-consuming, expensive, technical and unduly cumbersome.[74] Honourable Justice C.O Oputa (Justice of the Supreme Court of Nigeria) also has this to say about court litigation and its attendant problems in Nigeria:

> Today the administration of justice in our courts suffers from two major constraints, namely delay and expense. If it takes seven to ten years to determine a case, a prospective litigant may decide not to go to court at all but one thing which frightens litigant away from the courts is inordinate expense which has to be incurred with the result that a very large proportion of our countrymen are as it were priced out of our legal system[75]

Honourable Justice Owoade agrees with this statement when he said the problems of the judicial systems are well documented and, in legal terms, have been judicially noticed. Delay, inadequate infrastructure, court congestion, inadequate court rooms, corruption, case backlogs, insufficient judicial officers, high qualitative and qualitative cost of litigation are some notable problems that scourge the Nigerian judiciary.[76] On the dockets becoming congested, recent statistics of cases before the Hon. Judges of the High Court of Lagos State (which already has a court annexed

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[72] Sander, Varieties, *op cit*

[73]See generally, Friedman, L.M. (1985). Total Justice; Resnik, J.(1982). Managerial Judges. 96 *Harv L. Rev*. 376; Resnik, J.(1986). Failing Faith: Adjudicatory Procedure in Decline, 53 U. *CHI. L Rev*. 496; Galanter, M.(1996). Real World Torts: An Antidote to Anecdote .55 *MD. L. Rev* 1093, 1101 – 02; Weinstein, J.B.(1989). After fifty years of the Federal Rules of Civil Procedure: Are the Barriers to Justice Being Raised? 137, *U. PA L. Rev*. (1901, 1909)

[74] Orojo, J.O. and Ajomo, M.A. (1999), *Law and Practice of Arbitration and Conciliation in Nigeria*, Lagos: Mbeyi & Associates (Nigeria) Limited. p.2

[75] Oputa, C.A. (1989) *Human Rights in the Political and Legal Culture of Nigeria*, (Nigeria: Law Publication) p. 25.

[76] Owoade, M.A. (2011) Global trends in Court Connected Alternative Dispute Resolution: Quo Vadis the Nigerian Judiciary. Nwexe, C.C., Offiah, A.J. and Mogboh, A.O. Jnr eds. Beyond Bar Advocacy: Multidisciplinary Essays in Honour of Anthony Okoye Mogboh, SAN. Umuahia: Impact Global Publishers Ltd. P.700

ADR centre) for the fourth quarter of 2009 is illustrative. It had a total number of cases brought forward from the 3rd quarter of 2009 i.e.12,547; total number of cases assigned in the last quarter of 2009 i.e. 2,108; total number of matters disposed of by the courts in the last quarter of 2009 i.e. 1,825; total number of pending cases on court docket as at December 2009 i.e. 13,376. This is a 12.5% settlement rate of the Lagos court system.[77]

Honourable Justice Akinsanya commenting also on the dockets of the Lagos State courts remarked that at the time (2002), there were about fifty five judges in the state judiciary and that the average number of cases assigned to each judge per week is about 120 -150 cases.[78] She recalled having an average of seventy-four cases on Mondays which were 'call over' days, and an average of fifteen to sixteen cases on other days of the week when trials could be conducted. In her experience, she stated that it is impossible even with the best effort of the Judge to cover half of the cases.[79] This can be contrasted also with recent statistics from the Lagos and Abuja MDCHs. In Lagos, during the Settlement week in 2009, Referral Courts were 34, the Cases referred was 235, from which 145 cases were admitted after screening. Cases that proceeded to mediation were 83, out of which 37 settled. This is a settlement rate of 46.3%.

For the Abuja MDCH, Hon. Justice Goodluck gave the following data for the 2008/2009 legal year: total number of cases filed at the MDCH was 70. Of this number, 52 were walk-ins while 18 were referred from the courts. The MDCH disposed of 41 of these cases leaving 29 pending.[80]

Apart from the crowded dockets, another problem with the present court system is delay in final disposition of cases. Cases can take as much as three to five years at the court of first instance and for a case that goes all the way to the Supreme Court, it can last no less than ten to fifteen years.[81] The case of *Ariori v. Elemo*[82] illustrates the point. The case which was a

[77] Arowoyeun, Y. (2010). The Lagos Settlement Week (LSW) Process, Actors and Challenges. A paper delivered at the 1day Training of Lagos Settlement Week Mediators at the Lagos Multi Door Courthouse, Igbosere, Lagos, on 2nd November, 2010. This was contrasted with the LSW 2009. The statistics are: Referral Courts -34; Cases referred -235; Cases admitted after screening -145; Cases Mediated -83; Cases Settled -37. This is a settlement rate of 46.3%.

[78] Akinsanya, D.F. (2002) Promoting the Use of ADR Processes: The Role of Judges. *Induction Course for newly appointed Judges and Kadis in Nigeria.* National Judicial Institute. Ibadan: Spectrum Books Ltd. P.47

[79] *Ibid*

[80] Hon. Justice O.O. Goodluck (2010) An Overview of the Modus Operandi of the Multi-Door Court Houses. *Alternative Dispute Resolution and Some Contemporary Issues.* Ed. Ibrahim, A. Zaria: Advocate Chambers, Faculty of Law, Ahmadu Bello University. P.281

[81] On the adverse impacts of delay in the working of the judicial system in Nigeria and approaches for combating same see, Amadi, J. (2009) *Enhancing Access to Justice in Nigeria with Judicial Case Management:*

land dispute lasted fifteen years at the trial court. By the time it was ripe for hearing at the Supreme Court, the court held that the inordinate delay in the trial court had occasioned a miscarriage of justice. It ordered a trial *de novo*. By that time, the case was twenty years old.[83] In *Rossek & Ors v. ACB Ltd & Ors*,[84] an order of retrial was made after fifteen years of litigation spanning the trial and appellate courts. Also in *Ogbuyinya v. Okudo*,[85] the case took approximately thirty-two years before it was resolved at the Supreme Court. According to Akanbi, if time, money and energy are to be saved, it is beyond any shadow of doubt that litigation as the only dispute resolution mechanism is not only insufficient, but is indeed in some cases inappropriate.[86]

ADR per se is said to have many benefits such as its flexibility, it can be tailored to suit the specific needs of the dispute and the parties;[87] it is a private and confidential process, suitable especially for matters which involve business or trade secrets;[88] it is effective particularly if cost is calculated to include both direct cash payments for example, the litigators fees as well indirect costs such as time spent in preparation and prosecution of claims;[89] it saves time, essentially because the parties and the third party neutral dedicate time to address the dispute and there is little or no competition with other disputes.[90] Other arguments about the benefits of ADR also include the fact that relationships are preserved or at least, left in no worse position than when

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an Evolving Norm in Common Law Countries, (Nigeria: Centre for African Law and Development (CALD), Monograph Series, 22nd March, 2009);

[82] (1981) 1 SC

[83] See also, the cases of *Olaleye v. NNPC* cited in Akper, P. (2002). Promoting the Use of ADR Processes in Court. What is ADR and Practical Exercises on Negotiation and Mediation. A paper delivered at the Conference of All Nigeria Judges of the lower courts organised by the National Judicial Institute. Lagos: MIJ Publishers, p.145; and *Eperokun and Ors v. University of Lagos*, (1986), NWLR p.152. For comprehensive discussion of the challenges facing the administration of justice and the court system in general in Nigeria see, Nlerum S. Okogbule, "Access to Justice and Human Rights Protection in Nigeria: Problems and Prospects", *SUR-International Journal on Human Rights*, Vol. 2, No. 3, (2005), pp. 99-106; Chukwudifu A. Oputa, (1992) *In the Eyes of the Law*, (Lagos: Friends Law Publishers), p. 50.

[84] (1993) 8 NWLR (Pt. 312) 382

[85] (1990) 4 NWLR (Pt. 146) 551

[86] Akanbi, M.M., *Kwara Multidoor Courthouse: An Idea Whose Time Has Come.* Being a paper delivered at the formal inauguration of the Committee on the proposed Kwara Multidoor Courthouse at the High Court of Kwara State on Tuesday, 29th July, 2008.

[87]See, Arnold, *op cit*, in Rao and Shefield eds. p. 34; Schroder W.H Jnr. (1994) Private ADR May Offer Increased Confidentiality. *Nat L.J* July 25, 1994

[88] *Ibid*

[89] There are however commentators on the other side who contend that ADR is not cheaper. According to Reuben, independent statistics documenting the promised benefits of ADR are almost non-existent, because of the 'secrecy' of the proceedings, and non-availability of records for researchers to examine. See, Reuben, The Dark Side of ADR, Feb (1994) *Cal. Law*, 54. The Centre for Public Resources (CPR) Institute for Dispute Resolution claims that for a 5 year period ending in 1995, 652 companies using CPR panellists' reported a total cost savings of over $200 million with an average cost savings of more than $300,000 per company. Retrieved September 17, 2009 from http://www. Cpradr.org/poll_597. Html.

[90] Murdock, A. and Scutt, C.N. 1999 Personal Effectiveness in Epie, C. *op cit*, p.439 at 447.

the dispute started;[91] it potentially produces better results because parties are encouraged not to limit themselves to monetary damages but other creative solutions that meets their underlying interests.[92]

Notwithstanding the many advantages of ADR, it does have its own problems and limitations arising from its very nature as a voluntary and flexible process. In particular, the issue of enforcement of ADR settlement agreements (it does not have the force of a court judgment and in cases of default recourse has to be made again to the courts) has limited its acceptance. Court connected ADR therefore seeks the best of both worlds by giving settlement the benefit of judicial enforcement. This has been more so particularly for the Mediation process because court connected mediation gives the parties the benefit of making their settlement agreement the judgment of the court which can be enforced like a regular court judgment.[93]

Where Mediation is conducted under a court connected or annexed ADR programme, the enabling law would ordinarily provide for an oversight by the courts. If a law suit is pending before mediation proceeding is commenced, some jurisdictions provide that the court can enter the mediated agreement as a consent judgment of the court. Where there are no pending court proceedings, the pertinent issue is whether it is possible for the courts to entertain a request that a mediated agreement be made the judgment of court?[94]

Court ADR has been implemented in different forms; in some jurisdictions only one process such as mediation is made available to parties while in others several ADR options are available. Also in some jurisdictions, pursuing an ADR option is a pre-condition to a court trial whilst in others it is not

[91] Akindipe and Sanni. Litigation is oftentimes acrimonious in character. It is viewed by many including some lawyers as a 'legal fight' instead of resolving a dispute. Arnold, again comments that with ADR you can preserve ongoing relationships, licensor – licensee relationships, Joint – venture relationships etc that litigation inevitable destroys. See Akindipe S.O. & Sanni A. *op cit*, 137 at 144 and Arnold, *op cit* p. 33-44

[92] Murdock, A. & Scutt, C.N. *op cit*, p.439 at 447.

[93]Section 19(1) of the LMDC Law provides that upon the completion of an ADR proceedings, settlement agreements which are duly signed by the parties shall be enforceable as a contract between the parties and when such agreements are further endorsed by an ADR Judge or any other person as directed by the Chief Judge, it shall be deemed to be enforceable under Section 11 of the Sheriff and Civil Process Law. See S 4(1)(b) and 15(5) of the Lagos Multi-door Courthouse law, 2007 which provides that terms of settlement and memorandum of understanding reached by other ADR organisations can be filed at the LMDC and endorsed by the ADR Judge to become the consent judgment of the High court of Lagos State.

[94] The Colorado International Dispute Resolution Act for example provides that in respect of International ADR proceedings, parties or their counsel if it is so stipulated in their agreement can apply to the court for approval of their agreement and if approved, it becomes enforceable as an order of court. See, Colorado Rev. Stat. Ann. Para 13-22-308. Some jurisdictions provide that an agreement reached in mediation should be entered as an arbitral award See Article 18(3) of the Arbitration Rules of Korean Commercial Arbitration Board; Article 12, Rules of the Mediation Institute of the Stockholm Chamber of Commerce. See also, Fabunmi, J.O. and Ajai, O.O. 1988. Execution of Judgments and Means of Enforcement Available to a Court in Nigeria. 32 Journal of African Law, pp 164 - 181

mandatory. The choice of a particular model raises its own difficulties of implementation, for example where ADR is made a condition to court trial, one question at least that will arise is whether it is proper to ask such litigant to pay for a process he did not voluntarily opt for. Another question that may arise is whether such a litigant can be compelled to participate in the proceedings or whether a mere formal appearance at such ADR process is sufficient to satisfy the requirement of the law. Further questions that can also arise depending on the model adopted is whether all types of civil disputes will be referred to ADR or designated ones such as family disputes, land matters and the like; whether regular judges can participate in the ADR process or a panel of neutrals will be established; whether judges can refer matters *suo motu* or only with consent of the parties.

Nwakoby and Anyogu identified some of the problems of affecting the institutionalisation of ADR in Nigeria to include lack of pragmatic ADR centres in Nigeria, lack of efficient and pragmatic national courts, unfamiliarity with ADR and general lack of information and materials on ADR, the limited scope of national legislative enactments on ADR in Nigeria, problems of plea of Sovereign immunity in ADR, lack of adequate ADR publicity and lack of uniform rules on ADR.[95]

The present challenge, therefore, is whether or not to offer CCADR as part of the civil system of justice in Nigeria and if so, how to implement such CCADR in a manner that incorporates the procedural norms necessary to satisfy fundamental fairness without sacrificing the flexibility that gives ADR its force; and at the same time preserve the access to public adjudication that has made the judiciary so invaluable as an institution.

1.3. Research Aims and Objectives

The overall aim of this study was to examine the practice and procedure of court connected alternative dispute resolution (CCADR) in Nigeria and compare same with what obtains in the United States and England to obtain some guidance for Nigeria in the implementation of its own CCADR.

The specific objectives of the study were to:

i. Examine the legal framework for the implementation of CCADR in Nigeria, to determine the extent of their similarities and differences if any;

ii. Examine the law and practice on the implementation of CCADR in the United States and

[95] Nwakoby, G. And Anyogu, F. Institutionalising Alternative Dispute Resolution Mechanism in the Nigerian Legal System. *Unizik Law Journal*, Vol.4, No.1. p.147

England to identify any areas of similarities with what operates in Nigeria: in order to identify areas where the law and practice in these foreign jurisdictions can influence the Nigerian legal framework;

iii. Identify the gaps, inadequacies or limitations in the extant Nigerian laws on CCADR that may adversely affect its implementation; and

iv. Flowing from (i) - (iii) above, to determine whether or not to extend CCADR to all States in Nigeria, and make recommendations for a suitable CCADR model to be adopted.

1.4. Significance of the Study

The administration of civil justice is very important to the enjoyment of fundamental rights of citizens. It is for this reason that this sector is constantly undergoing evaluations for the purpose of reform and improvement in the workings of the system. Preliminary discussions with the implementers of CCADR in Nigeria reveal that in States where same has been adopted, it has basically been by persuasion of the relevant head of court such as the Chief Judge or President of the Court of Appeal as the case may be. There is no government policy whether at the State or Federal level with respect to CCADR. The study will therefore have implications for policy makers and will contribute to the literature in this developing field. Existing data also show that no comparison has been made among America, UK and Nigeria. This makes this study a unique one and a worthwhile venture.

According to Roberts, in England the official recognition that the sponsorship of settlement was an explicit objective of the public justice system came only in the 1990s when it appeared in the Heilbronn/Hodge Report of 1993 and then in the interim version of Lord Woolf's Report.[96] In the latter, settlement was presented as the primary objective of the courts with adjudication relegated to an auxiliary fallback position.[97]

Following the ABA Pound Conference, different jurisdictions pursued their civil justice reforms in different ways, but in all, the central themes were based on better access to justice and ADR formed a central part of recommendations to make the civil system more effective.[98] Scholarly literature on the advantages and disadvantages of adopting 'Settlement' as a core component of

[96]Roberts, S. and Palmer, M. (2005). *Dispute Processes: ADR and the Primary Forms of Decision Making.* 2nd ed. Cambridge: Cambridge University Press

[97] Woolf, *op cit*

[98] See generally, the Australia Law Reform, Canada Law Reform, United Kingdom and Wales law reform and the New Zealand Law reform.

the court functions have continued unabated, as have evaluative research on the effectiveness or otherwise of court connected ADR. Interestingly, both sides of the debate anchor some part of their discussion on the theme of access to justice.

According to McClelland,[99] an effective and accessible civil justice system should be one where people are best able to resolve their disputes quickly, efficiently and fairly, using the most appropriate method for their particular circumstances; that access even to appropriate information about processes and increasing the opportunity to resolve disputes early either in or outside the court are important drivers for access to justice.

ADR is essentially a private and confidential process whereas one of the pillars of the civil system of justice is public access. In *Scott v. Scott*[100] the court held that justice must not only be done but be seen to be done. This rule about public access is not absolute, however, because in *McPherson v. McPherson*[101] it was held that the exceptions from public hearing is permitted, only if the ends of justice or the administration of justice would be rendered impracticable by the presence of the public, does not include the saving of time and money (acclaimed benefits of ADR). Dehn cites *A.G v. Leveller* where Lord Diplock commented that if the way the courts behave cannot be hidden from the public ear and eye, this provides a safeguard against judicial arbitrariness or idiosyncrasies and maintains the public confidence in the administration of justice. [102]

Lord Woolf has asserted that genuine access to justice requires people to be able to understand how the legal process works and that the proceedings working properly is a vital guarantee that justice will be done; that it can be seen to work properly helps to ensure that justice will be seen to be done. He, therefore, recommended *inter alia* a new judicial landscape where litigation would be avoided wherever possible; the courts would provide information on ADR and impose financial penalties to motivate settlement.[103] In discussing the Woolf report, Roberts[104] observed that since the 1980s civil justice reforms sought to co-opt the ADR label. He however contends that settlement negotiations need not follow the route of the civil process neither should there be active involvement of the courts in sponsoring settlement.

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[99] Hon. Robert McClelland, Attorney General of Australia in a Speech to the Multidoor court house Symposium on July 27th, 2009 at the old parliament house, Canberra
[100] (1913) AC 417
[101] (1936) AC 177 at 202
[102] Dehn, C. QC. (1995). The Woolf Report: Against Public Interest? *Reform of Civil Procedure, Essays on Access to Justice.* Eds. Adrian Zuckerman & Ross. Oxford: Cranston Clarendon Press.
[103] Woolf Interim Report
[104] Roberts, S. and Palmer, M. *op cit*

Cappelleti and Garth[105] commenting on the links between Access to justice and the enjoyment of other rights stated that in the eighteenth and nineteenth centuries, the concept of access to justice meant essentially the aggrieved individuals right to litigate or defend a claim without necessarily addressing whether he had the capacity to recognise that right or the means to prosecute or defend same. Modern society and its view of this right has been transformed by several factors including population expansion and the complexity of society which moved from a focus on individual to collective rights such as right to work, right to health and right to education. Affirmative action on the part of the State was necessary to enjoy these new rights so access to justice gained popular attention, which is how to equip individuals with the capacity to enjoy these substantive rights. Thus to them effective access to justice can be seen as the most basic human right of a modern egalitarian legal system which purports to guarantee and not merely proclaim the legal rights of all. Within the context of the importance of ADR, Woolf's proposals that people should understand how the legal system works and courts should actively provide information on ADR options would fit into Cappelleti and Garth's notions of access to justice i.e. the capacity of parties to recognise their rights and enjoy same.

This study is, therefore, important at the policy level, because an ineffective justice system may lead to breakdown of law and order and even indirectly underdevelopment of the economy where there is no confidence in the system. This study will benefit policy makers in determining whether or not ADR should be fully integrated into the public system of justice.

Again, Nigeria is a developing nation which to a large extent still depends on foreign capital investments, and the system of justice delivery is an important factor to be considered by these investors in deciding whether or not to come to Nigeria. Recommendations on improving the system of administration of justice through ADR which this research focuses on will be beneficial to policy makers. The challenge of achieving an effective dispute resolution mechanism must, therefore, be pursued both for policy and academic reasons.

On the academic front, the issue of effective dispute resolution remains topical as an issue of access to justice; and a proper understanding of CCADR would contribute to the effectiveness of the judicial system. Furthermore, some ADR procedures have already been introduced in the High Courts of at least three states of the federation, the FCT High court and the Court of Appeal, and there are calls to extend same to the remaining States. The existing projects

[105] Cappelleti, M and Garth, E.G. (1978). *Access to Justice, Vol.1 A World Survey.* Milan: Sijthoff & Noordhoof, pp. 6-9

should, therefore, be subjected to critical academic study to evaluate and assess whether it is actually the expected 'messiah' of the justice reform sector, as well as to provide constructive suggestions for any identified problems.

In Australia, England, New Zealand and some States in America, qualitative and evaluative studies were actually carried out before the decision to adopt ADR as part of the civil system of justice reform. Recommendations made thereafter were focused on domestic implementation, bearing in mind lessons learnt from other jurisdictions.[106] In its implementation of CCADR programmes in Nigeria, does the existing legal and institutional framework show that Nigeria took into consideration literature in the field which voices concerns on the different ways CCADR has been implemented elsewhere and problems that arose therefrom? Studies on the administration of justice can, therefore, never be over- emphasised. The above shows the significance of this study and also the motivation for embarking on same.

1.5. Research Questions

The major question this research examined was: Why and how should ADR be integrated into the existing Nigerian Civil System of Administration of Justice?

Flowing from this main question are the following sub-questions:

i. What were the justifications and challenges of integrating ADR into the Civil System of Administration of Justice in Nigeria?

ii. What are the existing legal and regulatory framework for CCADR in Nigeria? Is it sufficient or adequate to support the implementation of CCADR in Nigeria?

iii. In what ways can the Nigerian legal framework benefit from the USA and UK approaches?

1.6. Research Methodology

Legal research is a process.[107] It consists of a series of steps by which someone attempts to solve a legal problem. These steps are gathering and analysing the facts of the research problem; identifying the legal issues the facts raise; organising the issues for effective research and finding, reading (i.e. evaluating) and updating the law.[108] This study examined the practice and

[106] This was the approach adopted by the Woolf Commission in England
[107] Wren, C.G. and Wren, J.R. (1988). The Teaching of Legal Research. 80 *Law Library Law Journal*
[108] Ibid

procedure of CCADR in Nigeria and compared same with the practice in the USA and UK with the goal of improving the Nigerian legal framework.

According to Reitz, the comparative method in legal research involves explicit comparison of two or more legal system to determine the precise ways they are similar or different bearing in mind the possibility of functional equivalence. [109] He submits that this should not be done in the conventional way of describing the features of each of the legal system being compared in different chapters but rather by comparing each subhead or section that is, the similarities and differences of a particular subtheme in the jurisdictions being compared should be placed side by side.[110] This study followed that pattern, that is, the different research questions addressed in each of the three jurisdictions was stated side by side so that it will be easy to discern areas of similarities and differences. To do this, the legislation, case law as well as scholarly literature in this field in the three jurisdictions was analysed.

The main method explored in this study was comparative. The study relied on both primary and secondary data on the implementation of CCADR in the selected jurisdictions. The materials derived from these sources were subjected to an in-depth content analysis. The results of evaluative studies on the impact of CCADR on the justice system of these jurisdictions was analysed to answer the question whether Nigeria should adopt CCADR. Furthermore, the different models and designs already in operation in the select jurisdictions were examined to determine what model would be most suitable for the Nigerian system. The primary data used include the Constitutional instruments of the three jurisdictions, principal and subsidiary legislation, Court Rules, Practice Directions, Case law and other relevant documents. The secondary data relied upon include journal articles, law texts, government and non-governmental commissioned reports.

The different States which have commenced implementation of CCADR in Nigeria have adopted different approaches to same. The study therefore first undertook a review of the legislation and practice in these States to determine their similarities and differences if any. This revealed the present status of CCADR in Nigeria. Thereafter the study examined the CCADR approaches in the US and UK to identify those similar to the Nigerian position; these identified similar practices was then compared with the Nigerian legal framework to identify any gaps in

[109] Reitz, J. How to do Comparative Law. *The American Journal of Comparative law* Vol.46.4 (Autumn, 1998), Retrieved on 8/4/2010 from www.jstor.org/stable/840981
[110] *Ibid*

the law and practice. The benefits, challenges or limitations of the different approaches were also examined.

Based on the problems identified, recommendations were made for a model approach which States in Nigeria that are already implementing or are desirous of implementing CCADR in the future can adopt. There will thus be similar CCADR laws and practice in all jurisdictions in Nigeria as is currently being adopted for the High Court Uniform Civil Procedure Rules. The existing CCADR in Nigeria studied are the Multi-Door Courthouses of Lagos, Akwa-Ibom, and the Federal Capital Territory.[111]

1.7. Justification for Comparisons

As indicated earlier, one of the aims of comparative studies is to make proposals for reform of domestic law and practice. This is one of the goals of this study.

Scholars have identified the beneficial purposes of such comparisons to include that it proposes reform for domestic law,[112] drafting new or amending existing legislation, and achieving uniformity among legal systems. Also as stated by Sacco, as other sciences, the aim of comparison must be the acquisition of knowledge, therefore as a legal science; comparative legal research must seek the knowledge of the law. [113]

Access to justice is a central theme of human rights globally and integrating ADR into the mainstream system of civil justice is beginning to gain widespread acceptance as an effective means of improving citizens' access to justice.[114] There is much to be gained from analysing the implementation of the concept of court connected ADR in other jurisdictions so that approaches which have proved successful can be adapted in a national environment while at the same time avoid mistakes made by its predecessors.[115] Again, the universality of the right of access to

[111] Multi-door Courthouses exist in Kwara, Rivers and Borno States (called Borno Amicable Settlement Centre)..
[112] Woolf, *op cit*
[113] Rodolfo, S. 1991. 'Legal Formants: A Dynamic Approach to Comparative law', *The American Journal of Comparative law*, Vol.39, No.l (Winter, 1991), www.istor.org/stable/840981 assessed 8/4/2010, p.
[114] Goodman, A. And Hammerton, A. (2010). Reprint. *Mediation Advocacy.* Delhi: Universal Law Publishing Co. Pvt. Ltd, p.xvi. The authors here stated that with the introduction of the new Civil Procedure Rules in 1999, mediation in England and Wales was transformed from a minority pursuit to an integral part of the pre-trial process and one that any party to litigation cannot afford to ignore.
[115] According to Lord Woolf, As long as the necessary care is exercised before translating the results experienced in other jurisdictions to what could be achieved here, there can be no doubt that there is an immense amount which would be of value to our court system which can be obtained by studying the initiatives in other jurisdictions. While what may be possible in the immediate future in this country may be limited, it is of great importance that we keep abreast with what is happening abroad, particularly in the United States, Australia and Canada

justice means that in interpreting similar provisions, decisions of other jurisdictions may serve a persuasive function.

The reason for choosing the US and England as the countries to be used in comparison differs. With regard to the choice of the US, this is done primarily because the idea of the court connected ADR originated from there, and also because there have been continued evaluations on the part of the judiciary, the bar and independent stakeholders on the implementation of same.[116] Both Nigeria and the US also have the similar constitutional and political structures i.e. the Federal system of governance which may have implications on the implementation of policies in both countries.

With regard to Britain, the Nigerian common law legal system is historically linked to that of England and both countries continue to maintain a close relationship. Decided cases in England are still of persuasive authority in Nigeria today. In 1995 Lord Woolf was commissioned by the Lord Chancellor to make recommendations for reform of the civil system of justice. In his report he spoke of the lack of empirical data on the civil system of justice generally so he had to initiate a research programme which gave him the benefit of an overview of what was being done in other jurisdictions. Importantly, he expressed the desire that the implementation of the proposed reform will be monitored and research considered. He has since been taken up on this by both governmental and non-governmental agencies, thus creating empirical data for the field.[117] Since his reforms were based on consideration/evaluation of the experiences of other jurisdictions, it would be safe to assume that care was taken to learn from the concerns and criticisms identified in such jurisdictions. Hopefully, its own implementation should be better and provide even more recent implications for comparative study.

1.8. Expected outcome of the study

The focus of this research is to improve the access to justice of Nigerian citizens through the implementation of court connected ADR, by drawing from the experiences of other

[116] See, Freyer, D.H. (2010) reprint. The American Experience in the Field of ADR. *ADR: What it is and How it Works*. Eds. Rao, P.C. and Sheffield, W. Delhi: Universal Law Publishing Co. Pvt. Ltd. Here the author referred to the broad based advocacy in the 1970s for the increased use of ADR that was 'officially' recognised by the American Bar Association (ABA) in 1976 when it established a special committee on minor disputes (now called the Dispute Resolution Section). P.109. In 1988, Congress formally authorised ten pilot courts in Arizona, Middle Georgia, Western Kentucky, Northern New York, Western New York, Northern Ohio, Western Pennsylvania, Western Virginia, Utah and Western Washington to conduct mandatory court annexed arbitration programmes. See the Judicial Improvements and Access to Justice Act of 1988, 28 USC in Rao, *op cit*, p. 111

[117] See, RAND, Research finds much good, little bad from high stakes, court annexed arbitration. *9 Alternatives*, p.4 (January 1991)

jurisdictions which have implemented such programmes over a long period of time and which have been consistently monitoring and improving their approach.

To this end, therefore, this study is expected to make suggestions and recommendations for the policy and legislation on the implementation of CCADR in Nigeria considering the challenges experienced by other jurisdictions and measures they have adopted to overcome same. This will impact on the citizen's right of access to justice.

Existing data shows that little academic research work has been undertaken in respect of CCADR in Nigeria and in particular no comparison has been done on the implementation of court ADR in the three select jurisdictions. The International Development Association of the World Bank sometime in 2008 sponsored a pilot project which aimed at improving the investment climate by developing ADR mechanisms to facilitate the adjudication of commercial disputes involving Micro, Small and Medium Enterprises.[118] The pilot states are Abia, Kaduna and Lagos.[119] This research work will, therefore, contribute to knowledge in the field of public law and fill the existing gap in the literature.

1.9. Scope and limitations of the study

The goal of this study is to draw lessons from the US and UK for the practice and procedure of court connected ADR in Nigeria. Therefore, the study will not conduct an extensive study of conflict prevention or management generally; rather it will concentrate on the modern attempts to introduce the hitherto exclusively private ADR system of resolution of disputes into the public arena. Also, this study does not deal with existing customary systems of dispute resolution, but focuses directly on the 'borrowed' concept of the Multi-door court house.

Also, this thesis whilst acknowledging that there will be likely implications on human resources and personnel who would implement CCADR, does not discuss same, as the scope of this study is limited to an analysis of the legal framework.

One of the limitations of this study is the non-availability of adequate and relevant literature in the English system in the period before the Woolf report. As stated earlier, Lord Woolf had to initiate/undertake his own research to determine the suitability or otherwise of adopting court ADR. This limitation, however, extends only to the period before the Woolf report, and the enactment of the new Civil Procedure Rules in 1999. Since the commencement of the

[118] Retrieved on December 12, 2010 from www.adrcenter.com/international/cms/?page_id=71
[119] *Ibid*

implementation of the reforms, stakeholders have been monitoring same and subsequently generating data sufficient to justify the study.

With regard to Nigeria, even though the CCADR has been adopted in at least three States, there is lack of adequate literature in the field. This limitation may not significantly affect the research since its purpose is to make recommendations for the Nigerian system. Nonetheless, to fill the gap, internal evaluations conducted by the existing court programmes in the implementing states will be used to ascertain the Nigerian position.

1.10. Structure of the thesis

This thesis has five chapters. This section constitutes Chapter One. Chapter Two will review the literature in the field. It will discuss the historical background on the development of ADR generally and CCADR in particular as well as the rationale and benefits of same. The justification and challenges of court connected ADR will also be examined in order to lay the premise for the research. It will also provide an overview of the different ADR options. The different models adopted for the implementation of ADR in the three jurisdictions together with their advantages and disadvantages will also be highlighted.

In other not to assume without justification that court ADR works, Chapter Three will examine the issue of whether or not CCADR works in the jurisdictions where it has been implemented using research results of scholars in the field. This may justify or nullify the need for the adoption of CCADR in more States of Nigeria. It also reviews the practice and procedure in some courts in the USA and UK.

Chapter Four examines the legal and institutional framework for implementing CCADR in Nigeria, highlighting the state of CCADR in Nigeria as it is. It also evaluates and analyses comparatively the way forward for CCADR in Nigeria drawing on the approaches discussed in the Chapter Three i.e. the legal landscape of CCADR in the US and the UK.

Chapter Five which concludes the study will discuss the implications of findings made in Chapter Four. It draws on the approaches in the USA and the UK to identify areas where the Nigerian law can be improved and make recommendations in respect of the law and policy. It also suggests areas for further research.

1.11. Conceptualisation of Key terms and Concepts

There are several key words in this thesis that requires explanation from the outset. These include the terms Alternative dispute resolution and the different processes that constitute same i.e. Negotiation, Arbitration, Mediation, Conciliation and such similar processes; Multi-door Court house, Court Connected ADR. The central theory of this study is Access to Justice, this is also discussed below.

1.11.1 Alternative Dispute Resolution

The first question about ADR is alternative to what? Usually, the answer is that it is an alternative to the adversarial system of dispute resolution i.e. litigation. This was the original sense in which the term was understood but today its meanings are broader. The letter 'A' in the acronym ADR is itself subject to different interpretations; some describe it as Amicable,[120] Appropriate and such like. The distinctive feature, however, which is common to all definitions, is that it refers to processes that are outside the court system.

Black's Law dictionary defines ADR as procedures for settling disputes by means other than litigation such as arbitration and mediation. [121] Such procedures which are usually less costly and more expeditious are increasingly being used in commercial and labour disputes, divorce actions and other disputes that would likely otherwise involve court litigation. The term "alternative dispute resolution" has been used to refer both to procedures and to institutional structures for dispute resolution. In its forum sense, it invokes the panoply of dispute resolution institutions that do not involve the courts, including intra-industry treaties to arbitrate disputes, administrative agency ombudsperson services, contractual agreements to arbitrate disputes, and others. In its procedural sense, it invokes dispute resolution tactics that depart from the litigation norm - mediation, summary jury trials, mini-trials, judicial referral of cases to magistrate judges and settlement masters - whether employed by the courts or by extrajudicial dispute resolution bodies. ADR refers to a variety of techniques, each implicating different levels of privatization.[122]

[120] See, the International Chamber of Commerce ADR Rules
[121] *Black's Law Dictionary*. 9th ed. Garner, B.A. ed. (2009). Minnesota: Thomas Reuters. P.91
[122] Weinstein, J.B. (1996). Some Benefits and Risks of Privatization of Justice through ADR. *11 Ohio St. J. on Disp. Resol* 241. P.3-4

The term alternative dispute resolution has many connotations. Often it describes any extrajudicial procedure through which private parties agree to resolve legal disputes.[123] This view agrees with that provided by Orojo and Ajomo that ADR describes 'the methods and procedures used to resolve disputes either as alternatives to the traditional dispute resolution mechanism of the court or in some cases as supplementary to such mechanism.[124]

In this study, the term ADR is used to refer to methods of resolving disputes other than litigation in a court of law.[125]

1.11.2 Negotiation

Negotiation is the process of communication used to get something we want when another person has control over whether or how we can get it. If we could have everything we wanted, materially and emotionally, without the concurrence of anyone else, there would be no need to negotiate. Because of our interdependence, the need to negotiate is pervasive.[126] *Black's Law Dictionary* defines Negotiation as 'a consensual bargaining process in which the parties attempt to reach agreement on a disputed or potentially disputed matter. It usually involves complete autonomy for the parties involved, without the intervention of third parties.[127] It entails discussion, communication or exchange of ideas between parties amongst whom a dispute has arisen, with a view to reaching an agreement.'[128] Parties are free to engage experts, agents or representatives such as Lawyers, Engineers, Accountants and such

[123] Dayton, K. (1991). The Myth of Alternative Dispute Resolution in Federal Courts, *76 Iowa Law Review*889 at 897. See also Owoade, M.A. 2008. Alternative Dispute Resolution and Election Petition Cases. Being paper delivered at the *3rd Negotiation Conflict Management Group African ADR Summit*, in Lagos on November, 2008.

[124] Ojomo and Ajomo, op cit, p.4. See, Aina, K., Alternative Dispute Resolution. *Nigerian Law & Practice Journal, Vol.2, No.1, March 1998*, p.169 where he refers to ADR processes as participatory processes, where the disputing parties themselves are directly involved in efforts towards finding a common ground or mutually acceptable solution.

[125] For an extensive discuss on various ADR processes, see, Brown, S., Cervenak, C. and Fairman, D., (1998) *Alternative Dispute Resolution Practioners Guide*, (Washington, DC: Centre for Democracy and Governance, Technical Publication Series, 1998). Agarwal, V. (2001) Alternative Dispute Resolution Methods, in *Alternative Dispute Resolution Methods*, (Geneva: United Nations Institute for Training and Research, UNITAR, Document Series No. 14, 2001), pp. 3-14. See also, Ladan, M.T., Alternative Dispute Resolution in Nigeria: Benefits, Processes and Enforcement. Paper delivered at the NIALS Government Legal Advisers Workshop, August, 1998, p.200 where he ststes that ADR is a useful shorthand expression as long as it is understood to refer to a system of multi-option justice in which a wide range of dispute resolution processes are available to parties in the public justice system.

[126] Folberg, *op cit*, p.25

[127] *Black's Law Dictionary*, *op cit*, p.1136

[128] Nwaneri, A.C. (2010). An Appraisal of the ADR Processes in Nigeria. *Alternative Dispute Resolution and Some Contemporary Issues, Legal Essays in honour of Hon. Justice Ibrahim Tanko Mohammed, CON*. Ed. Aliyu, I.A. Zaria: Faculty of Law, Ahmadu Bello University. P.346 at 351

like to negotiate on their behalf; it does not change the fact that the process is still inter parties. According to Chukwurah, it is usually the first step in most ADR.[129]

Negotiation can, therefore, be described as a process where parties to a dispute discuss and communicate with each other, without the assistance of a third party on how to resolve issues in dispute between them with the goal of reaching a mutually acceptable agreement.[130]

1.11.3 Mediation

Inter-party negotiation may not always succeed; when it fails parties may then seek the assistance of a neutral third party to facilitate their negotiation. Mediation is a process of assisted negotiation in which a neutral person helps people to reach an agreement.[131] Brown and Marriot define it as a voluntary, non-binding and private dispute resolution process in which a neutral person helps the parties try to reach a negotiated settlement.[132] It can also be defined as a process which has its goal as being a process of assisting or facilitating negotiation where the mediator controls the process and the parties the outcome.[133] It is a private process where a neutral third party called a Mediator helps the parties discuss and tries to resolve the dispute.[134]' Ojielo,[135] describes Mediation further as 'the intervention in a negotiation or a conflict of an acceptable third party who has limited or no authoritative decision-making power, but who assists the involved parties in voluntarily reaching a mutually acceptable settlement of issues in dispute. CEDR[136] defined Mediation as a 'flexible process conducted confidentially in which a neutral person actively assists parties in working towards a negotiated agreement of a dispute or difference, with the parties in ultimate control of the decision to settle and the terms of the resolution.' *Black's Law Dictionary* again

[129]Chukwurah, A.O. (2008). Alternative Dispute Resolution (ADR) Spectrum in Sylvester, V.M and Wali, R.C. Eds. Readings in Peace and Conflict Resolution. Ibadan: Stirling-Horden Publishers Ltd. p.119 at 122

[130] Akeredolu, A.E.(2011). Court-connected Alternative Dispute Resolution in Nigeria. Vol.1, No.1, Oct. 2011, *Unib.law Journal,* p. 37 at 47.

[131] Folberg, J. et al, *op cit*. P.249

[132] Brown and Marriot. (1999). *ADR Principles and Practice.* 2nd ed. London: Sweet and Maxwell, p.127 at 131

[133] Ogungbe, M.O. (2003). Arbitration and Mediation – When is Either Better Suited for Dispute Resolution. *Nigerian law: Contemporary Issues.* Ed. Ogunbe, M.O. Benin-City: College of Law, Igbinedion University. P.312 at 315

[134] Coker, S.A, Adeleke, M.O, Olaseeni, O.A. (2008). An Appraisal of Alternative Dispute Resolution as an Antidote to delay of Judicial Proceedings in Nigerian Courts. *Issues in Justice Administration in Nigeria, Essays in Honour of Hon. Justice S.M.A. Belgore, GCON (CJN Rtd) op cit*, p. 101 at 104

[135] Ojielo, M.O., *op cit* p. 76

[136] *op cit* p.26

defines it as 'a method of nonbinding dispute resolution involving a neutral third party who tries to help the disputing parties reach a mutually agreeable solution.'[137]

Flowing from all the above, Mediation can conveniently be described as a process wherein a third party who has no interest in a dispute, assists the disputing parties to work together to create mutually satisfactory terms of agreement that resolve their existing dispute.[138]

1.11.4 Conciliation

In some jurisdictions, the term Conciliation is used interchangeably with Mediation. Where the terms are used distinctively, the meanings ascribed to each are sometimes used *vice versa*. Thus in some jurisdictions, the process described as Conciliation, is that in which the neutral third party neutral has power to propose terms of settlement for the consideration of the parties, whilst a Mediator does not have such powers. Others may refer to the former process as mediation while defining conciliation as assisted or facilitative negotiation. Section 37 of the Arbitration and Conciliation Act[139] provides that parties to any agreement may seek amicable settlement of any dispute in relation to the agreement by conciliation under the provisions of the Act. It does not however define the Conciliation.

It is submitted that there is and should be a distinction between conciliation and mediation; Conciliation is in my view, the process where the third party neutral has power to evaluate the dispute and prescribe for the parties' terms which seem to him appropriate to resolve the dispute in a fair and amicable manner though the parties retain the final authority to decide whether or not to accept the terms proposed. Mediation is facilitative process wherein the neutral third party assists the parties to collaboratively settle their differences, but he has no power to make proposals for settlement.

1.11.5 Arbitration

Orojo and Ajomo define Arbitration as a procedure for settlement of disputes under which the parties agree to be bound by the decision of an arbitrator whose decision is, in general, final and legally binding on both parties.[140] It has also been defined as a reference to the decision of one or more persons, either with or without an umpire, of some matter(s) in difference

[137] *Black's Law Dictionary*. *op cit,* p.1070 -1071
[138] Akeredolu, A.E. op cit, p.48
[139] Cap A18, LFN, 2004
[140] Orojo and Ajomo, *op cit*, p.3

between the parties.[141] It has again been described as a simple voluntary procedure chosen by parties who want a dispute determined by an impartial judge of their own mutual selection whose decision based on the merits of the case they agree in advance to accept as final and binding.[142] The case of *MISR(Nig) Ltd. v. Oyedele*[143] referring to Halsbury's Laws of England, defined Arbitration as the reference of a dispute between not less than two parties for determination, after hearing both sides in a judicial manner by a person(s) other than a court of competent jurisdiction. *Black's Law Dictionary* defines it as a method of dispute resolution involving one or more third parties which is usually agreed to by the disputing parties and whose decision is binding.[144] Candide-Johnson and Shasore have described it as when two or more persons agree that a dispute or potential dispute between them must be decided in a legally binding way by one or more impartial persons in a judicial manner on the basis of evidence put before him, her or them.[145] Arbitration can, therefore, be described as a private, voluntary procedure which two or more parties agree to use to resolve their dispute, wherein the arbiter is neutral, the decision is based on the merits and it is final and binding between the parties.

1.11.6 Mini Trial

Ani, has described Mini-trial as a private consensual proceeding, where counsel for each party to a dispute makes a truncated presentation of his or her best case before the top official with settlement authority for each side and usually, also, a neutral third-party advisor.[146] It can be and has been described as evaluative mediation where the parties are assisted to gain a better understanding of the issues in dispute, thereby enabling them to enter into settlement negotiations on a more formal basis.[147] The neutral third party may be a former judge or a person with authority in the field of the dispute.[148]It is a flexible, non-binding process where each side presents a shortened version of its case to party representatives who have settlement authority with a neutral third party presiding. After the hearing which is informal, with relaxed rules of evidence and procedure, the parties meet with or without the neutral to

[141] See, David St. John, Judith Gill and Matthew Gearing. 2007. *Russell on Arbitration*. 23rd ed. London: Sweet and Maxwell. P.5
[142] Elkouri, F. and Elkouri E. *How Arbitration Works.* 4th ed. Washington DC:BNA Books.
[143] (1966) 2 ALR(Comm.)157
[144] *Op cit*, 119
[145] Candide-Johnson, C.A. and Shasore, O. (2012*) Commercial Arbitration Law and International Practice in Nigeria.* South Africa: LexisNexis. P.27
[146] Ani, C.C. op cit, P. 36-37
[147] Orojo and Ajomo, *op cit*, p.10
[148] *Ibid*

negotiate a settlement.[149] Rao describes it as a non-binding process in which the disputing parties are presented with summaries of their cases to enable them to assess the strengths, weaknesses and prospects of their case and then an opportunity to negotiate a settlement with the assistance of a neutral adviser.[150] In the context of this study, therefore, it can be described as an ADR process wherein parties or their counsel present the merits of their case to a joint session of both parties (in the case of a corporate body, represented by officers who have settlement authority) with a neutral third party presiding, for the purpose of assisting the parties to negotiate a settlement.

1.11.7 Summary Jury trial

This is similar to the mini trial, the distinction, however, being that in this case, there is a proper jury selected to listen and give a non-binding verdict or decision on the dispute whereas in the mini trial the parties themselves are the jury. It is usually used in fairly large cases that are likely to involve long jury trials with the goal of promoting settlement in trial-ready cases.[151] With a judge presiding, attorneys for both parties present their case to the jury relying mainly on exhibits and their submissions. The jury deliberates and delivers their verdict. Thus a summary jury trial is an ADR process where parties' representatives present their case to a jury for evaluation and non-binding decision on the merits for the purpose of facilitating settlement of the dispute.

1.11.8 Early Neutral Evaluation (ENE)

ENE is a non-binding process designed to improve case planning and settlement prospects by giving litigants an early advisory evaluation of the case.[152] A neutral evaluator with expertise in the subject matter of the dispute, holds confidential sessions with each party, clarifies issues, identifies strengths and weaknesses of the parties' positions, and gives a non-binding assessment of the values or merits of the case.[153] ENE is a process where at an early stage of the dispute or a law suit, parties are provided with a candid appraisal of the case by an experienced neutral or intermediary who is well experienced in the subject matter of the case.[154] In some jurisdictions ENE is referred to as Rent-a-judge.[155] It is called ENE because

[149] Folberg, *op cit*, p.739
[150] Rao, P.C. (2010) Reprint. Alternatives to Litigation in India, in Rao and Sheffield, *op cit*, p.26
[151] *Ibid*
[152] *Ibid*, p.738
[153] *Ibi*d
[154] Goodluck, *op cit*, p.270
[155] *Ibid*, p.271

it is invoked at early stages of the dispute otherwise it can be referred to as 'Neutral Evaluation' *simpliciter*. It can be said, therefore, that ENE is an ADR non-binding process in which a third party neutral who has expertise in the subject matter of a dispute, at the early stage of the dispute, hears the merits of the case and gives his best judgment on the merits in the form of an advisory verdict.

1.11.9 Med-Arb

This is a procedure which combines sequentially, mediation and, where the dispute is not settled through mediation within a period of time agreed in advance by the parties, arbitration. In Med-Arb which is an abbreviation for 'mediation arbitration' attempt is first made to resolve a dispute by agreement through mediation, and if that fails, then it proceeds to a binding arbitration.[156] It is Mediation (facilitative or advisory) followed by arbitration (binding or non-binding).[157] This double barred process, offers parties the opportunity to participate in a mediation with the understanding that if they are unable to reach a settlement, the process will shift to arbitration.[158] This hybrid process is applicable when parties agree to resort to arbitration if mediation does not end in a negotiated settlement.[159] It is a hybrid process where parties agree in advance to first mediate within a given period and if no settlement is reached to proceed to arbitration.

1.11.10 Court Connected ADR or Multi-Door Court House

Throughout this study, the above terms are used interchangeably, though the preferred is CCADR. The MDCH has been described as a court connected or court annexed ADR mechanism which gives the parties different doors or routes to resolving their disputes.[160] It can also refer to a courthouse or dispute resolution centre designed to encourage courts and communities to find ways to offer citizens alternatives to courtroom trials for resolving disputes.[161] Chukwurah describes the Multi-door courthouse as a court of law in which facilities for ADR are provided; the formal integration of ADR into the court system. It is not the ADR section in the court premises, rather it is the official recognition and availability of

[156] Orojo and Ajomo, *op cit*, p.11
[157] Ani, C.C. op cit, p.32
[158] Ibid
[159] Goodluck, *op cit*, p. 271
[160] Koleoso, O. 2010. An Appraisal of the Law and Procedure of the Abuja Multi-Door Court House, in Aliyu Ibrahim ed. *op cit*, p.384
[161] Kanowitz, L. (1985). Cases and Materials on Alternative Dispute Resolution, American Casebook Series, West Publishing Co, St. Paul Minnesota, cited in Afolayan A.F. and Okorie P.C. (2007). *Modern Civil Procedure Law* Lagos: Dee-Sage Nigeria Ltd. P.586

ADR processes as part of the justice delivery system in a particular jurisdiction.[162] MDCH is a concept whereby ADR processes are recognised and made part of the court system in a way that persons who approach the courts for resolution of their disputes are no longer availed of the litigation process alone but can take advantage of other options in deserving cases with their claims assigned for resolution through the ADR processes.[163] The key feature of the MDCH is the initial procedure: intake screening and referral.[164] Here disputes would be analysed according to various criteria to determine what mechanism or sequence of mechanisms would be best suited for the resolution o f the problem.[165] Thus, CCADR can be defined as an approach to dispute resolution wherein the courts routinely offer disputants ADR as part of its options for resolution of their disputes.

1.11.11 The Concept of Access to Justice

Blacks define access as an opportunity or ability to enter, approach.[166] The courts are the universally accepted institutions constitutionally empowered to adjudicate between citizens or between the state and citizens whenever duties and obligations are in dispute.[167] Access to courts therefore, implies opportunity to approach the courts for redress. Thus, one essential-possibly the essential-feature of a really modern system of administration of justice must be its effective, and not merely theoretical, accessibility to all.[168] It is of little value to have a system of judicature with carefully formulated guarantees, if none but the rich can afford to make use of it. The question then is how can justice be made accessible to all? In civil cases, the contest is regarded as one between two or more parties, whether they are individual citizens, corporations or the government, theoretically equally resourced and empowered.[169]

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[162] *Op cit*, 128

[163] Nwaneri, A.C. (2010). An Appraisal of the ADR Process in Nigeria, in Aliyu Ibrahim ed. *op cit*, p.384

[164] Sander, F.E.A. (2010) reprint. Dispute Resolution Within and Outside the Courts – An Overview of the US Experience. in Rao and Sheffield, *op cit*, p.130

[165] *Ibid*

[166] Garner, B.A.ed (2009). Blacks Law Dictionary, 9th ed. West Publishing Co, St. Paul Minnesota, P.14

[167] Section 6 of the Constitution of the Federal Republic of Nigeria provides that: **6.** (1) The judicial powers of the Federation shall be vested in the courts to which this section relates, being courts established for the Federation. (2) The judicial powers of a State shall be vested in the courts to which this section relates, being courts established, subject as provided by this Constitution, for a State. (6) The judicial powers vested in accordance with the foregoing provisions of this section - (a) shall extend, notwithstanding anything to the contrary in this constitution, to all inherent powers and sanctions of a court of law, (b) shall extend, to all matters between persons, or between government or authority and to any persons in Nigeria, and to all actions and proceedings relating thereto, for the determination of any question as to the civil rights and obligations of that person;

[168] Cappelletti, M., Fundamental Guarantees of the Parties in Civil Litigation: Comparative Constitutional, International, and Social Trends *Stanford Law Review*, Vol. 25, No. 5 (May, 1973), pp. 651-715 available at http://www.jstor.org/stable/1227903 Accessed: 21/04/2010 12:58

[169] King, M. Et al.(2009). Non-Adversarial Justice. Sydney: The Federation Press. P.2

This assumption that there is equality between the parties, however, is in reality or practice farfetched and unwarranted.

The right of access to justice from various jurisdictions indicates that the right is more than mere right of access to the court but also related to the rule of law. Dicey had stated that, the Rule of law means *inter alia*, equality before the law, or equal subjection of all classes to the ordinary laws of the land.[170] One theory that flowed from this was the 'Procedural justice theory which recognises the administration of laws with certain procedural safeguards (due process). The Access to Justice Movement[171] arose therefore as the historic response to criticism of liberalism and the rule of law. Such criticism, in its extreme expressions, maintains that the traditional civil and political liberties are a futile promise, indeed a deception for those who, because of economic, social and cultural reasons *de facto*, have no capacity to accede to and to benefit from those liberties.[172] The access movement then undertakes to analyse and to search for the ways to overcome the difficulties or obstacles which make civil and political liberties non-accessible to so many people. With specific regard to civil procedure, there are three basic obstacles to overcome. First is the economic obstacle, that is, the poverty of many people who, for economic reasons, have no or little access either to information or to adequate representation. Here the access movement, in its 'first wave,' has become the proponent of, and has focused its research interests on, such devices as legal aid and advice. The second obstacle (the 'second wave' in the access-to-justice movement) is the organisational obstacle. The third obstacle, most directly involved with alternative dispute resolution in a technical sense, is procedural, because it means that in certain areas the traditional, ordinary types of procedure are inadequate.[173]

Despite the recognition of access to justice as a human right, going beyond procedural rights in many jurisdictions of the world, including Nigeria,[174] the exact nucleus of the term 'access to justice' and the compass of its component parts remains nebulous or hazy in many jurisdictions. While 'access to justice' has attracted considerable support, and has featured in

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[170] Cited in Mowoe, K.M., (2008) Constitutional Law in Nigeria. Lagos: Malthouse Press Limited,. P.17

[171] See generally, King et al, op cit, p.3

[172]Cappelletti, M. (1993), Alternative Dispute Resolution Processes within the Framework of the World-Wide Access-to- Justice Movement.*The Modern Law Review*, Vol. 56, No. 3, Dispute Resolution. Civil Justice and Its Alternatives (May, 1993), pp. 282-296 Published by: Blackwell Publishing on behalf of the Modern Law Review Stable URL: http://www.jstor.org/stable/1096668 Accessed: 23/06/2010 01:33 pg 283 - 284

[173] Ibid

[174] In Nigeria for instance, the Supreme Court in *Global Excellence Comm. Ltd. v. Duke* [2007] 16 N.W.L.R. (Pt. 1059)22a 48 recognized "access to court" as a constitutional right, and in *Gov. of Bendel State v. Obayuwana* (1982) 3 NCLR 206, *Kolo v. A-G. Fed.*[2003] 10 N.W.L.R. (Pt. 829) 602, *A-G Ogun State v. Coker* [2002] 17 N.W.L.R. (Pt. 796) p. 304, *Ainabebholo v. E.S.U.W.F.M.P.C.S. Ltd.* [2007] 2 N.W.L.R. (Pt. 1017) 33 and *Bakare v. A-G., Fed* [2009] 5 N.W.L.R. (Pt. 152) 516, this right was reiterated.

recent legal reforms in the UK and elsewhere, it has not featured prominently in the good governance agenda in developing countries. Repeated studies of access to justice have shown that two factors predominate in determining whether people are able to use available legal remedies. The first, and by far the most important, is access to financial resources. Hiring lawyers and using legal institutions can be very costly in themselves, but also entail opportunity costs, which for the poor usually mean time away from income-generating activities. The second factor usually identified is institutional skill – the ability to understand and use the system.[175]

It has been stated for instance that the term can be employed in three ways; the possibility of the individual to bring a claim before a court and to have the matter adjudicated upon; in a limited sense, the right of an individual, to have his claim heard and adjudicated upon in accordance with the standards of principles of fairness and justice, and in a very restrictive sense, to signify legal aid for those in need, which otherwise will result in their inability to access judicial remedies owing to the often prohibitive cost of legal representation and administration of justice.[176]

Some forms of ADR and settlement policies provide the potential, if not yet the reality, of greater access to justice. If a variety of ways of resolving disputes becomes available, not all parties will line up for the same processes or choose the same dispute resolvers or rule enunciators. Indeed, some judges have welcomed their roles as "social justice bureaucrats" or "public problem solvers," helping parties choose an appropriate process or becoming more active in case handling and settlement.' If properly monitored and regulated, these new processes offer the potential of making more, rather than less, justice available, both in terms of processes available and the variety of outcomes that may be achieved.[177]

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[175] Anderson, M.R., Access to Justice and Legal Process: Making Legal Institutions Responsive To Poor People in LDCs. Paper for Discussion at WDR Meeting, 16-17 August 1999. Available at http://siteresources.worldbank.org/INTPOVERTY/Resources/WDR/DfiD-Project- Papers/anderson.pdf. Accessed 2/2/2013

[176] See Francioni, F, "The Right of Access to Justice under Customary International Law", in Francesco Francioni (ed.), *Access to Justice as a Human Right*, (Oxford: Oxford University Press, 2007), p. 1.

[177] Menkel-Meadow, C. Whose Dispute Is It Anyway?: A Philosophical and Democratic Defense of Settlement (In Some Cases). 83 *Geo L.J.* 2663 (1994-1995). Content downloaded/printed from HeinOnline (http://heinonline.org) Wed Apr 21 12:33:22 2010. On the examination of challenge of access to justice in Nigeria, for example, see among others Open Society Justice Initiative, *The Socioeconomic Impact of Pretrial Detention*, (New York, Open Society Foundations, 2011); National Human Rights Commission, *National Prison Audit 2009*, (Abuja, National Human Rights Commission, 2010); *Report of the National Working Group on Prison Reforms and Decongestion*, , (Abuja, Federal Republic of Nigeria 2005); Brems E. and Adekoya, C.O., "Human Rights Enforcement by People Living In Poverty: Access to Justice in Nigeria", Vol. 54 No. 2 (2010) *Journal of African Law*, pp. 258-282; Adekoya, C.O., *Poverty: Legal and Constitutional Implications for Human Rights Enforcement in Nigeria*, unpublished Ph.D. Thesis submitted at University of Ghent, Belgium, on 17th December, 2008; United Nations Office on Drugs and Crime, *Assessment of the Integrity and Capacity of the Justice System in three Nigerian States: Technical Assessment Report*, United Nations, New York, 2006 p.

Most of the debates about access to justice have traditionally assumed that the main problem is insufficient or inadequate access to lawyers (thus the advocacy for legal aid) and as such a solution would be to make their services more broadly available.[178] However, is it more lawyers that is needed or more justice that is required? What the public (Americans) need is a way of handling legal needs that is timely, fair and affordable particularly for pro se litigants.[179] Different strategies that have been adopted to address these needs include reducing the necessity for legal intervention and assistance; initiatives to reduce costs and increase the effectiveness of legal procedures and services as well as increasing the individual's capacity to identify and afford appropriate legal assistance and dispute processes.[180] Dispute resolution processes also need to be effective for the public that it seeks to serve. Courts need to be redesigned to improve their responsiveness to individual litigants and create more user-friendly legal processes.[181]

Some jurisdictions have embarked on reforms aimed at the courts to implement specialised 'holistic,' 'therapeutic, 'or 'community,' courts and alternative dispute resolution proceedings to deal with cases such as domestic violence, misdemeanors and juvenile offences.[182] At common law and even in non-common law jurisdictions, the right of access to court is accorded a prime position and the case law established a preference for construing narrowly laws seeking to restrict access to courts.[183]

In *Golder v. United Kingdom*,[184] the European Court held that "The "right to a court" is not absolute. It may be subject to limitations permitted by implication because the right of access by its very nature calls for regulation by the State, regulation which may vary in time and in place according to the needs and resources of the community and of individuals." Such limitations or restrictions must however not restrict or reduce the access left to the individual

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21 and A. A. Adeyemi, "The Impact of Corruption on the Administration of Justice in Nigeria", in I.A. Ayua and D.A. Guobadia (eds), *Political Reform and Economic Recovery in Nigeria*, Nigerian Institute of Advanced Legal Studies, Lagos, 2001.

[178] Rhode, D. Access to Justice: Connecting Principles to Practice (2003-2004) 17 *Georgetown J. Legal Ethics*, P.369

[179] Ibid

[180] Ibid, P.399

[181] Ibid, P.404

[182] Ibid, P.404

[183] See Elliot, M., *The Constitutional Foundations of Judicial Review* (London, Hart Publishing, 2001), pp. 213-214, where the author cited these UK cases, *Anisminic Ltd. v. Foreign Compensation* [1969] 2 AC 147; *R v. Secretary of State for the Home Secretary ex parte Fayed*, [1998] 1 WLR 763. See *Global Excellence Comm. Ltd. V. Duke* [2007] 16 N.W.L.R. (Pt. 1059)22a 48 on the protection of the right of access to court and *A-G Ogun State v. Coker* [2002] 17 N.W.L.R. (Pt. 796) p. 304 on the attitude of the court in interpreting critically, strictly and narrowly any law that oust or purports to oust the jurisdiction of court, based on the legal maxim *fortissime contra preferenties.*

[184] Supra at para 38.

in such a way or to such an extent that the very essence of the right is impaired.[185] The Court held further in that case that while the State enjoys a certain margin of appreciation in the means to be used in securing the right of access to a court, the court is to ensure that such means are in conformity with the rights protected.

Essentially, the general goals of the MDCs are to provide citizens with easy access to justice reduce delay and provide links to related services, making more options available through which disputes can be resolved.[186] Through the MDCs, it was widely hoped that citizens would find justice more readily available.[187]

1.12 Summary

In this chapter we have stated that the problems associated with litigation is what has led to the rise in advocacy for ADR and in particular that the successes of private ADR has led to the further demand that the dividends be extended to the public sector through the introduction of the MDCH concept. The chapter also discussed the concept of Access to justice which has been one of the fundamental premises for seeking to integrate ADR into the public sector. The Key terms used in the study have also been defined.

The focus of this research is whether CCADR should be adopted in Nigeria as has been done in the USA and UK and in doing so, what legal and infrastructural framework would Nigeria need to put in place. By undertaking a comparative study, the thesis will draw lessons from the USA and UK that will be beneficial for the implementation of CCADR in Nigeria.

Subsequent chapters will examine different aspects of the research question by tracing the development of CCADR in the three jurisdictions under review; examine the different approaches to CCADR in the USA and UK as well as the supporting legal framework for the practice and procedure. Three of the existing MDCH operating in Nigeria are also examined in comparison with the USA and UK to determine areas of similarities and areas in need of reform. The key words in the study have also been defined to put them in context and form the basis for the discussions in subsequent chapters.

In order to answer the question whether CCADR should be adopted in Nigeria, it would be necessary to examine the historical background and reasons for the growth of same, as well

[185] See *Philis v. Greece*, Judgment of 27 August 1991, Series A no. 209, p. 20, para. 59. See also *Kreuz v. Poland*, Judgment of 19 June 2001 para 54.
[186] Azzato, L. The Muti-door Courthouse Approach: A look across the threshold. Cited in Aina, K. The Muti-door Courthouse Concept: Taking Lawyers out of the Court? In Azinge and Ani ed. Op cit P.263
[187] Ibid, P. 264

as the challenges if any of implementing/integrating ADR into the public system of administration of justice. This is the subject of the next chapter.

CHAPTER TWO

DEVELOPMENT OF COURT CONNECTED ALTERNATIVE DISPUTE RESOLUTION

2. Introduction

According to Hampshire, 'there will always be conflicts between conceptions of the good, moral conflicts, both in the soul and in the city, there is everywhere a recognised need for procedures of conflict resolution, which can replace brute force and domination and tyranny.[188]

Literature review entails assessment of all relevant works that have been done by other scholars in the area of inquiry, indicating their strength and weakness.[189] A review could be approached chronologically, so that the trends in the development in the area of research could be followed.[190] Though at least one scholar has opined that literature review is not ordinarily a part of a legal thesis,[191] in light of the definition stated earlier, in this chapter, therefore, the literature review would trace the developments in the area of ADR in the US, UK and Nigeria followed by discussions on developments on CCADR. This chapter will address the questions where did the concept of CCADR come from? What are the justifications for and the challenges of implementing CCADR as well as the methods/approaches used so far to implement CCADR.

2.1 Historical overview of the growth and development of ADR and CCADR

The idea that parties to a conflict should strive to resolve it among themselves while avoiding unnecessary legal quibbling is not a new concept that has only emerged in the recent debate on deregulations.[192] Alternative methods of conflict resolution which do not involve adjudication have always been popular though more so in some countries than in others.[193] These alternatives though varied have a common thread running through all of them i.e. the

[188] Hampshire, S. *Justice is Conflict'*, cited in Menkel-Meadow, C. (2003) *Dispute Processing and Conflict Resolution: Theory, Practice and Policy*, Hampshire, England: Dartmouth Publishing Company Ltd and Burlington, USA: Ashgate Publishing Company Ltd. p.5.
[189] Trafford, V. and Leshem, S. (2008) *Stepping Stones to Achieving your Doctorate*. Berkshire: Open University Press. P.67
[190] Olayinka, A.I and Oriaku, R.O (2006) Writing a PhD Thesis. *Methodology of Basic and Applied Research*. 2nd ed. Olayinka, A.I. *et al*, Eds. Ibadan: The Postgraduate school, University of Ibadan. P.256
[191] Omorogbe, Y. (2008) Scholarly Writing in Law in Olayinka, A.I., Popoola, L. and Ojebode, A. Eds. *Methodology of Basic and Applied Research:Proceedings of a Workshop*. Ibadan: The Postgraduate School, University of Ibadan. P.201 at 203
[192] Six Constraints and Preconceptions of Mediation: Does Mediation change the common interpretative framework (paradigm) in Private Law? http://www.ssrn.com/abstract=905528
[193] *Ibid*

desire to avoid polarisation and litigation. There is the acknowledgment of legal rights but it is not the only focus, rather there is room for other viewpoints and amicable settlement. According to socio-legal scholars Felstiner, Sarat, and Abel, the process by which harm becomes disputes that might push a person to pursue legal redress is a sequence of 'naming, blaming and claiming.'[194] Naming is a subjective reaction of a person in recognising that he has been harmed and he wants to do something about it. He may feel that the harm is too great or that it is one too many which should not be ignored. Blaming is where the person harmed identifies the wrong- doer responsible for the harm. Claiming is when the person harmed decides to request that the wrongdoer remedy the wrong. The request can be accepted in which case no dispute evolves, if it is rejected however, the wrong ripens into a dispute which needs to be resolved whether by some informal means or through the court system.[195] ADR supplements litigation in the adjudicatory process, it does not supplant it, it is therefore not suited to all disputes;[196] thus litigation continues to be a viable dispute resolution mechanism.

2.1 .1 Brief History of Formal Dispute Resolution

In the previous chapter, ADR was explained as alternative to litigation. In tracing the history of alternative dispute resolution, it is, therefore, important to first discuss howbeit briefly the history of the adversarial system. Menkel-Meadow among other scholars had done such a review and she stated that at some early point in human history, when two parties had a dispute with each other they sought assistance from a third party. So was born the almost universal notion of the dispute 'triad', whether a judge, mediator, conciliator, or whole community 'moot' or group, in which disputants sought to avoid violence and conflict among individuals at least (group, tribe, clan, and nation-state conflict is another matter), by having some 'third party' intervention, either to decide who was in the wrong or to conciliate and seek a more consensual and joint resolution.[197]

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[194] Felstiner, W.L.F., Abel, R.L and Sarat, A. (1980). The Emergence and Transformation of Disputes: Naming, Blaming and Claiming. 15 *Law and Society Rev* 631.
[195] *Ibid*
[196] Wahab, O. E., ADR and International Commercial Transactions. Vol. 3, No.4, *Journal of Finance and Investment*, 1999, p.683.
[197] Menkel-Meadow, C. Is the Adversary System Really Dead? Dilemmas of Legal Ethics as Legal Institutions and Roles Evolve. http://www.ssrn.com/ssrn_11746485_code98428.pdf. See also Goldberg, S., Green, E. and Sander, F., (1985). *Dispute Resolution.* Boston: Little, Brown and Coy; Goldberg, S., Sander, F., Rogers, N. and Cole, S. (2007) *Dispute Resolution: Negotiation, Mediation and Other Processes*. New York: Aspen Publishers

She comments further that the history of human dispute resolution is perhaps thousands of years old with twists and turns in human progress and legal procedural complexity and the good and bad behaviour of disputants and their representatives, whether family members, bribed witnesses, or formally sanctioned legal representatives. We are told by legal historians and anthropologists that this form of triad is almost universal—whether the third party acted to decide and compel or to conciliate and seek consensus is not so universal. Also, that in Roman practice, parties had to agree on both the norms to be applied to their dispute and the judge to decide the issues or the dispute could not proceed in juridical channels. This put the 'loser' in the position of having chosen both the rule and the person responsible for his 'loss' and is a form of consensual, if decisional, justice.[198]

Consent within compulsion is so strong that much early English law was focused on ways to compel parties to attend legal proceedings because of an early belief that to adjudicate without the presence of an accused wrongdoer was somehow unfair and unjust.[199] The sixth century is also when English legal history begins because the first written records of codes and laws date from then, albeit with modern scholars debating whether these early codes are derived from Augustinian Christian principles or the customary rules of pagan kings. There is evidence of fixed rules (fixing of 'blood money' in graduated scales of penalties in lieu of more violent revenge of blood feuds), attributed to the teachings of the Christian church that mercy and 'penitential' were better than on-going feuding (and feudal/futile) violence.

Decision-makers were often combinations of secular (kings men or royal representatives) and spiritual leaders (high ranking Church officials), at least when high-ranking disputants were involved. There is also some evidence of what we would today call 'process pluralism' in that there were choices about proceeding in adjudicative ('public') or arbitrated (more 'private' and peer-directed) fora and third party decision-makers (whether individual spiritual or secular leaders or community or folk assemblies) often encouraged post-decisional

[198] Menkel-Meadow, C. *ibid*

[199] Early Anglo dispute processing is both contested by anthropologists and legal historians and varied, with both secular and religious traces. At the level of community and tribal dispute resolution before the Norman Conquest, there are traces of formal Roman law and procedures (with some evidence of formal hearings), Celtic and Druid 'native priest judges', and Teutonic customs (from invading forces from the North and East), co-existing with Anglo-Saxon practices resembling community arbitration and adjudication. Dispute processing varied by community and region, with conquering Anglo-Saxons and Romans pushing Celts back into the western and northern regions of the British Isles. With the arrival of St Augustine in the sixth century, Christian church practices supplanted what we would consider both secular and more 'spiritual' forms of dispute resolution.

settlement negotiations before decisions were formalised.[200] Though perhaps tainted by modern sensibilities, some legal historians have suggested that, as in present times, important public and political matters were dealt with in public fora and business, transactional and some property matters were more likely to be dealt with in private for a (especially where speed and the inability to wait for more public officials to arrive was key).[201]

Trial by 'combat' or more *mano à mano* confrontations between individuals (the medieval joust or the more 'modern' Continental and American 'duel') were more often focused on private wrongs (honour, property rights, infidelity), as well as treason and disloyalty, with some of the same 'judicial' principles—God would protect and 'save' the righteous one or his 'champion' or gladiator (acting as representatives for those who could not fight for themselves, for example women and the disabled or those who could pay for more agile strongmen). Thus, early dispute processes reflect human variability, a mixed trust in communitarian, spiritual or religious, and secular aristocratic or royal authority. With wrongs to correct and private rights and disputes to determine, humans developed 'processes,' 'ordeals' and fora for determining a brittle, if needed, truth, even before rules and codes of substantive duties and responsibilities were more fully developed. Whatever the 'law' (that comes later); humans began to recognise that some 'orderly' process was better than unrestrained violence and escalation of individual disputes to more dangerous group and tribal fights. (Of course, at the same time as these more 'humanising' processes were developing, major battles—tribal, royal, and religious—continued (and continue). We are nothing if not multifarious as a species).[202]

In 1215 the Lateran Council prohibited clergy from participating in ordeals and, in a way, secular justice was 'born' (or 'reborn' depending on whether one views these process developments as cyclical or linear). Some historians date the English criminal trial to this development. On the civil side, oath swearers, or 'compurgators' (who were neighbours and supporters of claimants) shifted from 'witnesses' to the first juries who actually found facts and decided matters on the basis of their knowledge of the parties and facts arising before the

[200] Menkel-Meadow, C. *op cit*
[201] *Ibid*
[202] These more 'orderly', but often still violent, processes were as much of an entertainment or 'sporting event' then as some trials are now. The development of greater wealth and increased commerce (with more 'things' to protect and live for) encouraged at least the more propertied few to recognise that there was a greater need both for more predictability of rules for commercial interaction (the development of law) and for more orderly processes involving less killing. Perhaps one of the most important evolutionary developments in human legal process was a growing uneasiness with letting God 'intervene' in human disputes (or perhaps some growing recognition that ordeal results did not always match up with what people thought was right and true).

dispute. Jurors were, in early use, questioned by judges about what they knew and thus served an almost hybrid function of witness and fact-finder (in a time when judges were more active than at present). By the fourteenth century jurors had become fact-finders, based on sworn evidence in court, presented by witnesses other than themselves and were eventually sequestered and required to reach a verdict unanimously. Jurors eventually became fact-finders only, after asking questions of witnesses, or engaging in their own investigations, leaving the development and interpretation of the law to the judges.[203]

The evolution of human legal procedure may, therefore, not be linear but cyclical. First, there was violence and self-help. Actually, there is still a lot of violence and self-help. There is also a great deal of dispute avoidance or we just couldn't get through the day. Imagine if we sought to dispute or 'litigate' everything that upset us all day long. The courts have traditionally served as public fora for the peaceful resolution of disputes between private parties. Certainly not every issue or dispute between two parties becomes a legal case. Only that a relatively small proportion of "eligible" disputes reported by individuals are translated into legal cases.[204] The nature of the relationship between the disputants affects the manner in which they approach a problem and the terms in which they define it. Resource inequalities produce differences among parties in disputing capability In addition; the community political culture may affect the degree of combativeness with which citizens approach dispute situations and their orientation to legal action.[205]

Private law cases typically arise from social and economic relations. As societies develop, existing relationships are altered and new ones formed, creating the potential for change in private litigation activity. Industrial development and increased complexity in social and economic interactions produce greater need for the development of a consistent system of legal relationships and legally defined rights. As these relationships and rights develop, the law and legal institutions become increasingly relevant to and utilized in the day-to-day and long-range activities of a community.[206] Historically, therefore, the law developed as the first alternative to violent resolution of disputes.[207]

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[203] *Ibid*
[204] McIntosh, W. 150 Years of Litigation and Dispute Settlement: A Court Tale. *Law & Society Review*, Vol. 15, No. 3/4, Special Issue on Dispute Processing and Civil Litigation (1980-1981), pp. 823-848. http://www.jstor.org/stable/3053513. Accessed: 25/03/2011 05:08
[205] *Ibid*
[206] *Ibid*
[207] Chukwura, A.O.(2008) Alternative Dispute Resolution Spectrum. Sylvester, V.M. and Wali, S.C. eds. *Readings in Peace and Conflict Resolution*. Ibadan:Stirling-Horden. P.119 at 120

2.1.2 Development of ADR in the United States of America

Formal mechanisms of private dispute resolution are also longstanding; arbitration in commercial settings and mediation by community leaders have provided effective means of conflict management for centuries. During the first half of the twentieth century, large-scale collective bargaining disputes encouraged the development of professional mediation, and some courts began experimenting with mediation in the I950s to resolve minor criminal and family disputes.[208]

In the 1960s, local communities established neighbourhood justice centres to provide facilitative dispute resolution services for neighbours, families, tenants, and consumers. In the I970s, jurists began to voice concerns about the rising costs and increasing delays associated with litigation, and some envisioned cheaper, faster, less formal, and more effective dispute resolution in such alternatives as arbitration and mediation. As the use of ADR mechanisms grew, proponents viewed them as promising vehicles for an array of agendas. Jurists hoped ADR would relieve docket congestion, while litigators - especially repeat players in the insurance and securities industries - were attracted to its promise of cheaper, faster resolution of claims that raised no new issues of law.[209] Community development advocates hoped ADR would provide broader access to dispute resolution for those unable to afford traditional litigation.

In the I980s, social scientists, game theorists, and other scholars showed how ADR mechanisms could facilitate settlement by dealing proactively with heuristic biases through the strategic imposition of a neutral third party. Meanwhile, process-oriented ADR advocates emphasized that problem-solving approaches would yield remedies better tailored to parties' unique needs and that the more direct involvement of disputants would encourage greater compliance with outcomes and help rebuild ruptured relationships. Some supporters lauded ADR for its potential to restore a culture of civility to the legal system.[210]

Alternative Dispute Resolution emerged and received momentum in the 1980s as part of the efforts of the U.S. Environmental Protection Agency to explore less costly and inclusive

[208] Developments in the Law: The Paths of Civil Litigation Source: *Harvard Law Review*, Vol. 113, No. 7 (May, 2000), pp. 1752-1875. http://www.jstor.org/stable/1342448. Accessed: 08/02/2010 12:37
[209] *Ibid*
[210] *Ibid*

approaches to environmental conflict resolution.[211] It was dubbed “alternative” because its moral, philosophical and procedural roots marked a departure from the letter and spirit of traditional dispute resolution mechanisms such as litigation, public hearing, administrative hearing or rule making and voting. It was believed to be a workable alternative to the inherent constraints of the traditional dispute resolution system

Even as jurists debated the merits of the budding ADR movement, contractual arbitration and, later, mediation developed as preferred methods of dispute resolution in major areas of law practice, especially commercial and employment law, as well as the administration of mass insurance claims and class action torts. ADR mechanisms nurtured in the neighbourhood justice centres of the 1960s emerged by the late 1990s as the darlings of the business world for their cost efficiency and facilitation of continuing business relationships.[212]

In a 1997 Price Waterhouse survey of the "Fortune 1000" companies, nearly all of the 530 respondents had used some form of ADR, and ninety percent classified ADR as a "critical cost control technique." Private ADR vendors and law firms' and ADR practice groups began to market their services more widely.[213] The community dispute resolution movement in the United States began in the late 1960's. An overload of minor criminal and civil disputes were clogging the legal and justice systems, disputes that in earlier days had been resolved by families, communities and local civic interventions. Discussions were taking place throughout the country about ways to address this new social development. In non-legal fields, mediation and arbitration had been used since the 1930s to settle labor/management disputes.

The civil rights movement, with its nonviolent activism, shed still more light upon alternative ways of communities resolving problems. Gradually the concept emerged of training volunteers to handle community disputes, thus strengthening the problem-solving ability of the civic sector of society while reducing the court's time on these matters. The reports of the 1965 Presidential Commission on Law Enforcement and the Administration of Justice documented the counties' overburdened judicial system. This helped to build consensus on the need for experimentation and reform both in and outside the court system. Independent

[211] Ogbaharya, D. *Alternative Dispute Resolution (ADR) in Sub-Saharan Africa: The Role of Customary Systems of Conflict Resolution (CSCR).* Paper Presented at the 23rd Annual International Association of Conflict Management Conference Boston, Massachusetts. June 24 – 27, 2010
[212] *Ibid*
[213] *Ibid*

community dispute resolution centres with various sponsorships and funding sources began to come into existence.

In 1968, the American Arbitration Association (AAA) and the federal Law Enforcement Assistance Administration (LEAA) collaborated to create the National Center for Dispute Settlement in Washington D.C., which became the prototype for later dispute resolution models. Major programmes were launched by LEAA in 1976, including the Neighborhood Justice Centers Program with pilot programs in Los Angeles, Atlanta and Kansas City, the San Francisco Community Board Programme (which later was a pioneer in school peer mediation programmes), the Boston Urban Court Program etc.

The cause of this so-called litigation explosion has been the subject of intense debate. The list of proffered reasons includes the growing diversity and size of the American population, a heightened level of litigiousness among Americans, an increase in the number of judicially and statutorily created rights and a broadening of the definition of the class of people entitled to enforce those rights, expanded discovery, excessive lawmaking, and an increase in crime and criminal prosecutions (especially drug-related offenses).[214] Katherine Stone has also reviewed the history and development of ADR in the US, that since colonial times, religious groups, voluntary associations and other small sub communities have eschewed the formal judicial system and established their own dispute resolution mechanisms to resolve disputes between members.[215] To her, the recent popularity and proliferation of alternative dispute resolution is to a large extent a response to widespread dissatisfaction with the civil justice system.

Since the 1970s, there has been widespread public talk of a crisis in the civil justice system, a crisis caused by excessive delay, expense, inflexibility, and technicality. These factors, as claimed by many she says, undermine the ability of the legal system to provide justice, and instead offer parties a judicial process that is too little, too late, and at too much expense. It is also claimed that court congestion and expansive discovery rules make litigation excessively

[214] Carr, C. A. and Jencks, M.R. The Privatisation of Business and Commercial Dispute Resolution: A Misguided Policy Decision. *Kentucky Law Journal*, Volume 88, Number 2, pp. 183-243 (1999-2000). See also, See, Friedman, L.M. Total Justice (1985); Horowitz, D.L. The Courts and Social Policy (1977); Mann, B.H. Neighbours and Strangers: Law and Community. Early Connecticut 101-36 (1987); Manning, B. Hyperlexis: Our National Disease, 71 *NW. U. L. REV*. 767 (1977); McCree, W. H. Jr., *Bureaucratic Justice: An Early Warning*, 129 U. PA.L. REV. 777, 794-96 (1981); Judith Resnik, Managerial Judges, 96 *HARV. L. REV*.376 (1982); Judith Resnik, Failing Faith: Adjudicatory Procedure in Decline, 53 U. *CHI. L. REV*. 494 (1986).

[215] Stone, K. Alternative Dispute Resolution, University of California, *Los Angeles School of Law, Public Law & Legal Theory Research Paper Series*, Encyclopedia of Legal History, Research Paper No. 04-30. Available at the Social Science Research Network Electronic Paper Collection: http://ssrn.com/abstract=631346

time-consuming, arduous and expensive for the parties.[216] She also refers to arguments by others that litigation involves excessive technicality which relegates law to the experts and makes it impossible for ordinary citizens to know their rights or to conduct their affairs and the social progressives argument that the excessive expense of litigation, due to excessive technicality and high lawyer fees, makes the judicial system inaccessible to the poor. They also claim that the legal process dehumanises participants, terminates human relationships instead of affirming them, and therefore destroys families and undermines sources of community.[217]

Stone states that high ranking members of the legal profession and corporate bar have also expressed a critique of the civil justice system in recent decades. They claim there is a 'litigation explosion' in which plaintiffs' attorneys win excessively large jury verdicts in tort litigation at the expense of the corporate welfare. Chief Justice Warren Burger pointed to rapidly expanding case filings and swelling judicial caseloads that, he contends, were indicia of the excessive litigation that was harming society, distracting individuals from their normal pursuits and diverting businesses from productive activities. Many others expressed the view that the American society is an overly litigious one. They point to the vast private resources that are spent on lawyers and vast public resources that are spent on judges, clerks, stenographers, jurors, and the other personnel who staff the burgeoning 'lawsuit industry.'

These critics see ADR as a way for courts to reduce their dockets. Both private and court - mandated ADR take cases away from judges and place them before alternate decision-makers. If ADR expands and we are able to de-legalize many of our disputes, they claim, all of society would be better off.[218] In 1976, Chief Justice Warren Burger convened the National Conference on the Causes of Popular Dissatisfaction with the Administration of Justice, known as the Pound Conference to commemorate the 70th anniversary of Roscoe Pound's 1906 speech to the American Bar Association in which Pound made a powerful plea for judicial reform. To her, the Pound conference is considered the founding moment of the modern ADR movement.[219]

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[216] *Ibid*
[217] *Ibid*
[218] *Ibid*
[219] See, Brazil, W.D. Court ADR 25 Years After Pound: Have We Found a Better Way? 2002.*18 Ohio State Journal on Dispute Resolution* 93, where the author comments that Professor Sander's seminal speech a quarter of a century ago launched the undertakings that the national conference on court ADR was convened to appraise. His tireless work since then is responsible for so much of what has been gained. As so many people who work in this field fully appreciate, Professor Sander is the spiritual father of court ADR and it will remain

In his 1976 Keynote Address, Chief Justice Burger discussed the problems with the judicial system, particularly the problems of delay, high costs, and unnecessary technicality, stating that 'Inefficient courts cause delay and expenses, and diminish the value of the judgment. Small litigants, who cannot manipulate the system, are often exploited . . . by the litigant 'with the longest purse.' The Chief Justice made several suggestions for reform, including giving a greater role to ADR.[220] Harvard Law Professor Frank E. A. Sander proposed that courts be transformed into 'Dispute Resolution Centers', in which "the grievant would first be channeled through a screening clerk who would then direct him to the process (or sequence of processes) most appropriate to his type of case." The Dispute Resolution Centers would have a separate room for screening, mediation, arbitration, fact finding, malpractice, a civil court, and an ombudsman. Sander contended that his proposal for a "multi-door courthouse" would inject greater flexibility, efficiency and fairness into our legal system.

In the immediate aftermath of the Pound Conference, she records that the American Bar Association Committee on Dispute Resolution recommended that three jurisdictions set up pilot multi-door courthouse programs. These have since been expanded to over 100 state and federal courthouses that now offer multi-door options. In addition, since the 1970s, many state and federal courts began to experiment with court-annexed arbitration systems in which litigants were offered, or in some cases required, to take their claims to an arbitrator before getting a hearing before a judge. The practice spread rapidly so that, as of 1998, one-quarter of the 94 federal district courts and one-half of all state courts have either mandatory or voluntary arbitration programs as part of their judicial process. In addition, 51 federal district courts have court-annexed mediation, and 48 reports that they offer summary jury trials as an ADR option. And 14 federal districts have early neutral evaluation programs. In all, three-

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forever in his debt. Zemans agrees that the 1976 National Conference on the "Causes of Popular Dissatisfaction with the Administration of Justice" focused on promoting mechanisms of alternative dispute resolution to address a wide range of perceived ills in the American justice system and that this conference is often cited as having launched what has become the very extensive alternative dispute resolution movement in and outside the courts and in the legal academy. See, Zemans, F.K. Pound Revisited. Summer, 2007, 48 *S. Tex. L. Rev*. 1063. See also, Lande, J. A. *Guide for Policymaking That*
Emphasizes Principles, and Public Needs Alternatives to High Costs of Litigation, Vol. 26 No. 11, Dec.2008 where the author also stated that the 1976 Pound Conference, held in St. Paul, Minnesota, often is considered a landmark—the birthplace of the modern alternative dispute resolution movement. It is where Harvard Law School Prof. Frank Sander proposed the creation of multi-door courthouses, with multiple dispute resolution options. Since then, ADR has become institutionalised in the courts, legal profession, government, business, and other organizations.

[220] *Ibid*

quarters of federal district courts now authorize one or more forms of ADR, as compared to a small handful in the late 1970s.[221]

The use of ADR has also grown dramatically in the private domain. Stone further provides some statistics in this regard. She stated that the American Arbitration Association had 92,000 arbitration requests filed in 1998, an increase of 21 % over those filed in 1994. The Center for Public Resources, an organisation formed by the general counsels of 500 major corporations and law firms to promote the use of alternative dispute resolution, obtained pledges from 4000 corporations to explore ADR options before resorting to litigation. Also, JAMS, a for-profit ADR provider that utilizes primarily retired judges to hear arbitration cases, has offices in 30 cities and handled over 20,000 cases in 1996.

The use of industry-specific arbitration systems and international arbitration systems has also expanded dramatically. For smaller disputes, over 350 neighborhood justice centers have been established to offer mediation services for such matters as landlord-tenant, consumer-merchant or neighbour - neighbour disputes.[222] In addition, she refers to the fact that numerous federal and state agencies now utilise ADR procedures to handle their caseloads. The Equal Employment Opportunity Commission, the U.S. Department of Labor, state human rights departments, and local consumer protection departments are some of the government agencies that have begun to utilise mediation and arbitration to resolve claims.

In 1990, Congress enacted the Administrative Dispute Resolution Act, which requires federal agencies to consider ADR in settling disputes. In the 1980s, the U.S. Supreme Court held that arbitration agreements applied not only to parties' contractual disputes but also to their statutory disputes. In a series of cases, it held that disputes concerning violations of the Sherman Anti-Trust Act, the Racketeer Influenced and Corrupt Organisations Act (RICO), the 1933 and 1934 Securities Acts, and the Age Discrimination in Employment Act were all amenable to arbitration.[223] The result of these decisions is that arbitration clauses are now frequently found in contracts between consumers and corporations and between non-union workers and their employers. When disputes in these cases arise, parties do not have access to

[221] *Ibid*
[222] *Ibid*
[223] *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985); *Shearson/ American Express, Inc. V. McMahon*, 482 U.S. 220 (1987); Shearson/American Express, *supr*a. (1934) (Securities Exchange Act of 1934); *Rodriguez De Quijas v. Shearson/ American Express, Inc*, 490 U.S. 477 (1989) (Securities Act of 1933); *Gilmer v. Interstate/ Johnson Lane Corp.*, 500 U.S. 20 (1991).

the civil justice system but instead are required to take their cases to private tribunals that have often been designed by the stronger party and imposed on the weaker one.[224]

Kovach has also provided her perspective on the development of ADR in the US. According to her, during the first decade of ADR's growth, experimental projects and programs emanated from the 1976 Pound Conference.[225] This development took two separate but related paths. One path was in the direction of community mediation; that is, the use of centres for mediation or resolutions of disputes before cases are filed. Social movements of the sixties, coupled with the desire to address civil unrest and allow citizens to have a greater exercise of democracy, led to community mediation and the creation of neighbourhood justice centres.[226]

While some of these centres were in existence prior to the 1970s, the Pound Conference provided additional impetus for the community mediation movement by devising an explicit plan calling for the creation of experimental "neighbourhood justice centres. The matters mediated were often termed 'minor' disputes, usually involving monetary amounts that were of nominal value. These centres, now commonly named 'Dispute Resolution Centres', are intended to keep smaller cases out of court, thereby decreasing the delay and expense for larger pending matters.[227]

Some philosophical components of early mediation initially accompanied implementation of the community mediation process. Nevertheless, in many instances, these community centres were connected to the legal system. In some cases it was the criminal justice system, while in others it was small claims courts. In retrospect, this connection was likely a necessity, or at least clearly helpful to the continued existence of these programs. For example, in the criminal context, individuals who were barred from filing a complaint because of lack of evidence or other procedural difficulties could be referred to the centres for mediation. Although community centres had some characteristics of privatisation, such as

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[224] Stone, *op cit*. For other relevant articles on ADR development in the US, see W. Burger, Isn't there A Better Way? *Annual Report on the State of the Judiciary*,(1982); The papers from the conference, known as the Pound Conference, reported at *70 F.R.D. 79*, (1976); 3 See, Carrie Menkel-Meadow, What Will We Do When Adjudication Ends? A Brief Intellectual History of ADR, 44 *UCLA L. REV*. 1613 (1997); Warren E. Burger, Agenda for 2000 A.D. -- A Need for Systemic Anticipation, *70 F.R.D. 83, 92* (1976). Frank E. A. Sander, Varieties of Dispute Processing, *70 F.R.D*. 111, 131 (1976).

[225] Kovach, K.K. Privatisation of Dispute Resolution: In the Spirit of Pound, but Mission Incomplete: Lessons Learned and a Possible Blueprint for the Future - Centennial Reflections on Roscoe Pound's The Causes of Popular Dissatisfaction With The Administration of Justice, Summer, 2007, *48 S. Tex. L. Rev. 1003*

[226] *Ibid*

[227] *Ibid*

confidentiality, other critical aspects were public, such as the process of getting to the mediation table. The second path, to or from the civil courthouse, was no different. Even though a number of references were made to a wholly private system during the 1976 conference, the idea was not readily explored.[228]

2.1.3 Development of ADR in the United Kingdom

According to Mistelis, significant reforms to state judicial systems have emerged throughout England and Wales over the past decade. These 'access to justice' reforms have come to shore with the wave of liberalisation and privatisation of public services that swept the western world as well as the so-called emerging markets of the late 20th century. The United Kingdom has been one of the driving forces of such reforms in Europe.[229]

Lord Woolf has remarked that throughout the common law world there is acute concern over the many problems which exist in the resolution of disputes by the civil courts. The problems are basically the same. They concern the processes leading to the decisions made by the courts, rather than the decisions themselves. The process is too expensive, too slow and too complex. It places many litigants at a considerable disadvantage when compared to their opponents. The result is inadequate access to justice and an inefficient and ineffective system. [230] He stated further that the problem is also not a new one and there have been many attempts to address it. Since 1851 there have been some 60 reports on aspects of civil procedure and the organisation of the civil and criminal courts in England and Wales.[231]

One report on the civil justice system as a whole was the Civil Justice Review which was established in February 1985 with the terms of reference: 'to improve the machinery of civil justice in England and Wales by means of reforms in jurisdiction, procedure and court administration and in particular to reduce delay, cost and complexity.' It made many recommendations, most of which remained unimplemented up till the Woolf report. [232] The General Council of the Bar and the Law Society in July 1992 set up a joint independent

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[228] *Ibid*
[229] Mistelis, L. (2003). ADR in England and Wales: A successful case of Public Private Partnership. *ADR Bulletin*: Vol. 6: No. 3, Article 6. Available at: http://epublications.bond.edu.au/adr/vol6/iss3/6. According to Akomolede, I., in Europe, ADR methods had long been recognised as early as the middle ages as the common trend then was for maerchants who travelled on an itinerant basis on business preffered to take their dispute to arbitration. Akomolede, I., An Overview of Alternative Dispute Resolution (ADR) in the Dispensation of justice in Nigeria. *Ondo State Law Journal, Vol.1, No. 2, 2005*, p.169.
[230] Woolf Interim Report, available at www.dca.gov.uk and at www.justice.gov.uk
[231] *Ibid*
[232] *Ibid*

working party to re-examine the flaws in the court system. Its terms of reference were: 'to undertake a radical review of the business of the civil courts and to make recommendations for the more efficient disposal of civil cases in keeping with public needs and expectations.' The committee reported in June 1993. The Heilbron/Hodge report concentrated on "key aspects for reform". In doing so, it demonstrated a consensus among the barrister and solicitor members that the way in which litigation was conducted was in urgent need of reform. It accepted a need for a change of culture and a radical reappraisal of the approach to litigation by all those who participate in legal proceedings. One of the underlying themes of the report was that the philosophy of litigation should be primarily to encourage early settlement of disputes.[233]

The Right Honourable the Lord Woolf was appointed by the Lord Chancellor on 28 March 1994 to review the then current rules and procedures of the civil courts in England and Wales. The aims of the review were: to improve access to justice and reduce the cost of litigation; to reduce the complexity of the rules and modernise terminology; to remove unnecessary distinctions of practice and procedure. He identified the key problems facing civil justice today as cost, delay and complexity. A number of surveys of costs were carried out specifically for the Inquiry.[234]

The Woolf report proposed for an enhanced role for ADR and this led to some developments such as a pilot mediation scheme at Central London County Court and for pilot mediation and arbitration schemes at the Patents County Court as well as an ADR pilot scheme conducted by Bristol Law Society. There was also the publication by the Lord Chancellor's Department of a plain English guide on ADR entitled 'Resolving Disputes without Going to Court', designed to make members of the public more aware of methods of resolving disputes which do not involve litigation. He also proposed an emphasis on the importance of ADR through

[233] *Ibid*

[234] The initial report of a major survey conducted by the Supreme Court Taxing Office with the assistance of Professor Hazel Genn confirms that disproportionate cost is most severe at the lower end of the scale where the costs for one side alone equal or exceed the value of the claim in half the cases looked at, while in higher value cases average costs are a much lower proportion of the value of the claim. Other surveys have confirmed these findings. Professional indemnity insurers in construction cases generally consider that, of money paid out, more than 50 per cent is accounted for by costs rather than compensation. A survey by consulting insurance brokers, Griffiths and Armour, found that the situation was worse than this overall impression: in fact £1 of construction-related compensation generated £5 of costs. In personal injury cases, the Supreme Court Taxing Office survey suggests that, on average, costs on one side represent nearly 50 per cent of claim value, although costs were significantly higher than this in many cases, particularly smaller value claims. A survey of 281 cases by a firm of solicitors acting for plaintiffs in personal injury cases found average costs of £836 for the 217 cases under £1,000 where the damages recovered were on average £694. For the 64 cases over £1,000, the costs were £1,267 for average damages of £1,389.

the court's ability to take into account whether parties have unreasonably rejected the possibility of ADR or have behaved unreasonably in the course of ADR.[235]

Most importantly however the new rules which he proposed and which were subsequently enacted as the Civil Procedure Rules (CPR) which came into effect on 26 April 1999. The CPR implemented the changes recommended by Lord Woolf's 'Access to Justice' Report and provided wide support for ADR.[236] The new CPR not only encourage parties to settle their disputes by recourse to ADR, they also discourage parties from litigating small claims by introducing the principle of proportionality, according to which litigation costs should be ideally lower than the amount in dispute.[237]

2.1.4 Development of ADR in Nigeria

The dispute resolution process of many traditional communities in Nigeria applies many concepts of ADR with a twist. For example, it is not uncommon to find that when dispute arises, parties gather before the village or family head to try to resolve same.[238] The intervener will invoke prayers for productive proceedings, refer to the importance of relationships and give the disputants an opportunity to have their say. The resolution however focuses on reconciliation not fault finding.[239]

According to Ojielo, the main difference between this system and modern ADR is that the intervener can switch between roles as negotiator, mediator and arbitrator.[240] Chukwumerie has commented that arbitration, conciliation, mediation and negotiation were firmly entrenched in the old traditional African societies and were part and parcel of the people's life, though not called by these English names.[241] It would be appropraite to discuss herein some traditional dispute processes in Nigeria while the next section will examine the growth of the modern ADR in Nigeria.

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[235] *Ibid*
[236] Mistelis, *op cit*
[237] *Ibid*
[238] Sheppard, M. (2003). *ADR and the Legal Practice in Nigeria*. Paper presented at the workshop on 'The Multi Door Courthouse: The Procedure and Promise' on September 30, 2003 at the High Court Premises, Lagos. Lagos: Negotiation and Conflict Management Group. P.23. See the views of Owasanoye, B., (2001) *Dispute Resolution Mechanisms and Constitutional Rights in Sub-Saharan Africa, in Alternative Dispute Resolution Methods*, Edited by UNITAR (Geneva: United Nations Institute for Training and Research, UNITAR, Document Series No. 14), p. 15 that ADR processes are much more similar to dispute resolution processes in Africa than litigation which can even be considered as alien to the African culture.
[239] ibid
[240] Ojeilo, *op cit*
[241] Chukwumerie, A. I. Arbitration and Human Rights in Africa. (2007) 7 *African Human Rights Law Journal*, p.103 at 109

2.1.4.1 Traditional Dispute Resolution in Some Nigerian Communities

According to Akinwale, an arena of violent conflicts due to the matrix of social inequality and the state attempts to undermine the power of traditional social control systems.[242] Traditional methods of social control such as communal solidarity, traditional oaths, rewards, vigilantes, informal settlements, checks and balances, decentralisation, effective communication and good governance remain strong and have been informally used successfully for conflict management in many communities in Nigeria.[243] Afrobarometer's survey in 2002involving 2 190 Nigerian men and women selected across 29 states within the six geo-political zones in August 2001 showed that Nigerians prefer informal modes of conflict resolution.[244]

The idea that ADR could be a powerful reform tool in developing countries may well have emerged from the ideals of some of the original campaigners for ADR, who were predominantly anti-state and pro-community empowerment.[245] They sought justification in the popular, community-based or rural traditions of their own societies; but they also drew inspiration from what they saw as the virtues of traditional approaches to dispute settlement in African and some Asian societies. These were praised for emphasising consensus and socially-sanctioned compromise; hence ADR became linked with rhetoric of 'harmony law.'[246] This strong 'communitarian' strand in the ADR concept underpins a strong tendency in many of the justice sector reform programmes adopted by donors to equate ADR with customary forms of justice or chiefs' courts, an equation which has become widely adopted by African advocates of ADR themselves. An ideal of African village justice – the 'meeting

[242] Akinwale, A.A. 2009. Integrating the Traditional and the Modern Conflict Management Strategies in Nigeria. SSRN Paper No 63323-122033-1, p.123. Available at www.ssrn.org. Accessed 18/06/13
[243] Ibid, p.137
[244] Afrobarometer 2002. Violent social conflict and conflict resolution in Nigeria. Briefing Paper No. 2. Available from: www.afrobarometer.org>' [Accessed 4 July 2009].
[245] In European and North American states, the ADR concept is based on three main assumptions: (a) Disputes are about individual rights and agreement between the individual parties, which is appropriate in urban societies where one cannot assume a 'community public' with an interest in social harmony or groups which will somehow police the settlement between the parties. (b) ADR will be monitored so as to ensure fair procedure, and should not lead to denial of the right to trial under the law (Ryan 2000:1869). (c) ADR is based on finding a neutral mediator who will help the parties to bargain freely to reach an agreed settlement without pressure or intimidation – an assumption which has provoked much criticism from those who argue that ADR enthusiasts too often ignore differences in status and power between the parties. (Nader 2001).
[246] See generally: Brown, H.J. and A.L. Marriott (1999). ADR Principles and Practice. London, Sweet & Maxwell.; Nader, L. (2001). Thinking about Law and Development – The Underside of Conflict Management – In Africa and Elsewhere. IDS bulletin 32(1): 19-27; Silbey, S.S. and A. Sarat (1989). Dispute processing in law and legal scholarship: From institutional critique to the reconstitution of the juridical subject. University of Denver Law Review 66(3): 437-498.

under the tree' in which a dispute is resolved through a search for community consensus – is often cited as a basic inspiration for ADR in Africa.[247]

Several authors has discussed and contrasted the dispute resolution systems of different traditional societies in Nigeria. This section will discuss the process for two different people groups of Nigeria, Ikwerre and the ibos. Ogoloma appraised the traditional settlement of dispute amongst Ikwerre Ethnic Nationality in Rivers State, Nigeria.[248] He states that the Ikwerre ethnic nationality system of settlement of dispute is based upon the family group and, it follows a horizontal pattern. Each family had its own recognized head that has certain powers, privileges and responsibilities.[249] A number of family groups are related to one another through the blood line that formed a kindred. Each village consist of a number of kindred's, each of them again are related to one another in one form or the other. In Ikwerre land, the ―Government‖ of the village are carried on by all the family heads which basically is comprised of men folk alone. Elders, as they are called, seats together with the chiefs and Owhor holders.

The concept of Traditional Dispute Settlement among the men of Ikwerre ethnic nationality is highly concentrated around traditional system of native court as laid down by the ancestors. The preliminary stage involves a process by which a case can be established for hearing. It includes Summoning (Otuomu) which is the first stage of instituting a case against someone in the traditional way. It is done in the home of a family head, a village Chief, the paramount ruler, or the chief in council. Summoning fees and other requirements: At the second stage, the complainant is expected to pay a certain amount that may be agreed in respect of the case. It is paid according to the weight of the matter on ground; usually traditional drinks. Thereafter a message or letter of invitation to the other party. Owhors holders and elders to decide the venue, whether it will take place at the Chiefs residence or the village meeting hall call ―Obiri, the palace of the paramount ruler or the venue of the native court as the case may be.

The beginning of the hearing of the case is the day that has been set aside by the judges or elders to entertain hearing of the case from both parties in the case. The requirement for

[247] Amannor, K.S. and Ubink, J.M. 2008. Contesting Land and Custom in Ghana: State, Chief and the Citizen. Leiden: Leiden University Press. P.133 - 135
[248] Ogoloma, F.I. Traditional Settlement of Dispute Amongst Ikwerre Ethnic Nationality in Rivers State, Nigeria: An Appraisal. *African Research Review.* Vol. 7 (1), Serial No. 28, January, 2013:61-72. Available at http://dx.doi.org/10.4314/afrrev.v7i1.5. Accessed 18/06/13
[249] ibid, p.63

hearing from both parties is highly esteemed. The complainant is given opportunity to air his grievances or complaints and then questions from the other party, the chiefs, Owhor holders and elders the audience is allowed. This is immediately followed by narrating of statement by the other party who does everything possible in his defensive statement to clear himself of the allegation as the case may be but lying is not permitted. Thereafter, he is questioned by the complainant, the observers and the chiefs, Owhor holders and elders. The way questions are thrown at him and the way he answers them determines his sincerity in the matter.

In order that justice and fair play may prevail, the chiefs, Owhor holders and elders are expected never to be biased or take sides since they serve as the judges. The chiefs and elders will maintain credibility by setting up an adhoc investigative and evaluating committee. Members of the committee are drawn from amongst the chiefs, Owhor holders elders and some observers who are not members of the affected families. Their number may be between 10 to 15 persons. They carefully and critically examine the statement of the parties and evidences available so as to arrive at a fair justice. In land disputes, they also visit the sites of the disputed land.

In pronouncement of judgments, the judges (the chiefs, Owhor holders, elders etc), in many instances especially in the cases of settling the issues of patrimony, alimony, and paternity and other conflicts, dialogue and negotiations are adopted in resolving the matters. In some disputes, the parties agree to settle outside the purview of the courts. This is so when an influential person wades in to settle the matter. Sometimes consensuses are arrived at amongst the feuding parties before the Day of Judgment. In certain other instances like land matter or chieftaincy cases, the court acts as the arbitrator and their pronouncement is binding. In the case of ugly situations in the environment like rape, kidnapping, etc, a libation to the goddess of the land and the ancestors are made against these ugly happenings. Violators always meet with mysterious, severe and untold happenings to them. The goddess of the land and the ancestors are highly respected. No one tries to ignore invocations or libations made to them.

Before pronouncement of judgment or final decision, both parties are addressed. They are asked if they will be satisfied with the decision and judgment that will be pronounced without taking offence. They will also ask them whether any of the parties to the conflict have anything to say. For there could be out of court settlement just as in the conventional court. Where they answer in the affirmative, the final judgment or decision is pronounced on both

parties by one appointed by the chiefs, Owhor holders and elders. If the atmosphere is tensed up, they may decide to postpone the pronouncement of the judgment till a more suitable date and time when they feel that tension has been reduced. In order to ensure that non of the parties denies or break the terms of agreement or judgment, a covenant of peace is sealed between the two parties in the presence of all witnesses. It sometimes involves exchange of pleasantries or sharing of common drinking, water, or libation to signify acceptance of judgment and willingness for peaceful coexistence.

Uwazie examined the different uses of the various forms of Ibo 'indigenous justice' as well as their connections with each other and with the State legal system.[250] To him, indigenous justice includes native or village disputing mechanisms that lack the support or institutional characteristics of the State legal system.[251] This indigenous system is generally characterised by native or lay participation and is less bureaucratic, it relies on unwritten, oral and flexible precedents or rules.[252] In his opinion, one striking feature of the traditional Ibo political and legal system was the virtual absence of centralized authority as legal arrangements remain largely decentralised. He identified six indigenous legal institutions i.e. the family head, village tribunal, umuada, age grade, title men and the oracles.[253]

He noted that the family heads' role as a mediator does not necessarily mean that he is a 'neutral' third party but more *unbiased* and *disinterested.* His reputation and authority derive from fair decisions and he also has both economic and political interest in maintaining social harmony.[254] Matters affecting outsiders or threatening to disrupt a family are usually referred to the Amala, the village tribunal. It deals with common affairs of the village and intra-village disputes.[255] Decisions reached by these mechanisms are often binding on the parties by mutual consent.

2.1.4.2 Modern ADR in Nigeria

ADR though not widely practiced in Nigeria is fast gaining popularity and acceptance as an alternative to adjudicatory procedure.[256] Some Nigerian statutes and organisations have

[250] Uwazie, E.E. (1994). Modes of Indigenous Disputing and Legal Interactions Among the Ibos of Eastern Nigeria. *Journal of Legal Pluralism*. Pp 87 – 103.
[251] Ibid, p.88
[252] Ibid
[253] Ibid, p.89
[254] Ibid, p.91
[255] Ibid
[256] Abubakar, M.D. Hon. Justice (2010). Alternative Dispute Resolution and Restorative Justice: Challenges and Prospects in Nigerian Courts. Aliyu, I.A ed. *Alternative Dispute Resolution and some Contemporary Issues,*

incorporated ADR especially arbitration; these include the Constitution,[257] the Consumer Protection Council,[258]the Petroleum Act.[259] The High court rules of many states now also support same.[260] The initial use of ADR was therefore primarily because of statutory requirements. There has however also been an increase in private initiative interest in the practice of ADR as can be seen in the establishment and existence of organisations devoted to offering diverse forms of training and resources in ADR.[261] Some of such institutions include the Negotiation Conflict and Management Group, the Institute for Dispute Resolution, DCON Consulting, Settlement House and the Association of Professional Negotiators and Mediators. Private law firms also offer services in ADR, supplementing the institutional services provided.[262]

Even though section 6 of the 1999 Constitution vests judicial powers on the courts, the courts themselves have not hesitated to consistently hold that individuals are free to determine how their disputes are resolved. In *Egesimba v. Onuzuruike*,[263] the Honourable Justice Karibi-Whyte, JSC, held that where parties voluntarily submit their disputes to a body or institution for resolution, then the decision of such entity is as binding as one from a court and indeed acts as estoppel. A much earlier case, *Njoku v. Ikeuchu*[264] also held in similar terms that resort to ADR will have the force of law and a binding effect. Arbitration came into Nigeria as part of the received English law with the enactment of the Arbitration Ordinance of 1914 it remains one of the most adopted and utilised form of ADR in Nigeria. The reason may be the fact that it has statutory backing.

In *Ogun State Housing Corporation v. Ogunsola*,[265] the court held that parties having agreed to refer their dispute to a referee or arbitrator; it would amount to jumping the queue for any of them to institute legal proceedings in court without first making such referral in line with

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Essays in Honour of Hon. Justice Ibrahim Tanko Mohammed, JSC. Zaria: Advocate Chambers, Faculty of Law, Ahmadu Bello University. P. 282 at 286.

[257] See, section 19(d) which states that negotiation, mediation, conciliation, arbitration and adjudication shall be resorted to in seeking settlement of international disputes.

[258] See, section 2(a)of the Consumer Protection Council Act

[259] See, section 11 of the Petroleum Act

[260] See, for example, Order 25R 1(2)(c) of the Imo State High Court Civil Procedure Rules, 2008;section 18 of the High Court Act, Vol 27, LFN, 1990 in respect of Abuja and Order 4R 17 and Order 17 of the Abuja High Court Civil Procedure Rules.

[261] Nwaneri, A.C. (2010). An Appraisal of the ADR Process in Nigeria. in Aliyu, I.M. ed.p.346

[262] Eleojo, E. (2010). The Growth of Alternative Dispute Resolution in Nigeria in . Aliyu, I.M. ed.p. 426 at 430

[263] (2002) 5 NWLR (Pt. 791) 466

[264] (1972) ECSLR 199

[265] (2002)12 NWLR (Pt. 780) 116 CA

their agreement. Many contracts in Nigeria now provide for ADR prior to or in place of litigation.[266]

The first institutional use of ADR in Nigeria was by the National Maritime Authority.[267] The oldest form of arbitration in Nigeria is however the construction industry.[268] The reason for this is the peculiarity of the industry contracts which are largely standardised and each of these standard forms contain provision for settlement of disputes by arbitration.[269]

According to Oyekunle, the Nigerian society has over the years indulged in over use of litigation processes for the resolution of most categories of disputes so much so that family disputes which were originally solved by elders, became court actions between both nuclear and extended families.[270] The business community was also getting dissatisfied with the length of time and the prohibitive costs of resolving disputes between their partners and associates.[271] Business dispute could last for five or more years due to 'unjustifiable reasons such as electricity failures, absence of counsel, ill-equipped courts, absence of judges due to other judicial or tribunal assignments' which led to frequent and prolonged adjournments of already congested court lists.[272] As a result, this sector sought alternatives which were in the main limited and *ad hoc*. The industry growth skyrocketed in the 1990s which saw increased activity and utilisation particularly in the area of arbitration. For example, the Nigerian branch of the Chartered Institute of Arbitrators was formed in 1996, Association of Arbitrators was formed in 1997, and the Regional Centre for International Commercial Arbitration was established in Lagos in 1999.

2.1.5 Development of CCADR in the United States of America

The practice of ADR in the US has coalesced into two realms: the private (or "contractual") sphere, in which parties agree to submit disputes to non-judicial fora of resolution, and the judicial (or "court-annexed") sphere, in which litigants engage in ADR through the court system, sometimes at their option and sometimes as mandated by statute or local rule.[273]

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[266] Sheppard, M. *op cit*, P.7
[267] *Ibid*
[268] Orojo, *op cit*, p.59
[269] *Ibid*
[270] Oyekunle, T.(2003). The Lagos Multi-Door Courthouse and the Bar: A Success Story. Paper presented at the workshop on 'The Multi-Door Courthouse: The Procedure and Promise' on September 30, 2003 at the High Court Premises, Lagos. Lagos: Negotiation and Conflict Management Group. P.4
[271] *Ibid*
[272] *Ibid*
[273] Developments and Law, *op cit*

Private ADR receives only limited judicial review, as courts presume that participation in arbitration is consensual and as mediated settlements is consensual by definition. In contrast, the results of court-annexed arbitration are rarely binding, and though good-faith participation in court-annexed mediation may be compelled, parties are not required to reach agreement.[274]

According to a 1996 study of the federal courts by the Federal Judicial Centre and the Centre for Public Resources, mediation is the most prevalent form of court-annexed ADR. In I996, over half of all federal district courts provided mediation services, generally in-house or in cooperation with an external ADR provider. Although outcomes in court-annexed mediation remain consensual, courts often compel participation by certain claimants. Court-annexed mediation is common in family law cases**.**[275] According to Plapinger and Stienstra, in the US, experimentation with CCADR—which in the federal courts encompasses arbitration, mediation, early neutral evaluation, settlement week, case valuation, and summary jury trials—began more than twenty years ago (in 2011 it is now about thirty five years).[276]

In the district courts, the first mediation and arbitration programs date from the 1970s. Innovations of the 1980s include the summary jury trial and early neutral evaluation. Additional expansion of ADR occurred in 1988 when Congress authorised ten district courts to implement mandatory arbitration programs and an additional ten to establish voluntary arbitration programmes (28 U.S.C. $$ 651–658).[277] A further impetus to ADR came with passage of the Civil Justice Reform Act of 1990 (CJRA), which requires all district courts to develop, with the help of an advisory group of local lawyers, scholars, and other citizens, a district-specific plan to reduce cost and delay in civil litigation (28 U.S.C. $$ 471–482).

ADR is one of the six civil case management principles recommended by the statute.[278] With the Civil Justice Reform Act and its encouragement of district-wide examination, ADR took on a programmatic character, rather than relying on the initiatives of individual judges as in earlier ADR efforts. Evidence for the growing institutionalisation of ADR within the courts can be seen in the formal rules and procedures adopted by the courts, which usually apply to the court as a whole and has replaced the individual judge-based procedures of the past. While generally leaving to the judge's discretion whether ADR should be used in an

[274] *Ibid*
[275] *Ibid*
[276] Plapinger, E. and Stienstra, D. (1996). *ADR and Settlement in the Federal District Courts: A Sourcebook for Judges & Lawyers*. New York: Federal Judicial Centre and CPR Institute for Dispute Resolution
[277] *Ibid*
[278] *Ibid*

individual case, the rules spell out the procedures to be followed once a case has been referred. Additionally, a number of courts have developed ADR brochures that are given to parties at filing to alert them to the court's ADR options. A body of judicial decisions about various components of these ADR programs is also emerging.[279]

According to Bernstein, the ADR movement received extensive press attention and was hailed as a solution to crowded dockets and an inexpensive panacea for the ills of an overly litigious American society. Pointing to the rapid growth of private ADR providers and studies purporting to show a high level of lawyer and client satisfaction with these alternative processes, States, joined by the Federal government, began passing laws requiring parties to participate in an ADR process as a precondition to judicial resolution of their dispute.[280]

In 1978, Congress authorised the creation of the first three federal district court-annexed arbitration programmes. The programmes required parties to participate in mandatory non-binding court annexed arbitration ("CAA") hearing as a precondition to obtaining a trial. The programs received strong support from then Attorney General Griffin Bell, who believed that compulsory court-annexed arbitration programs would 'broaden access for the American people to their justice system and provide mechanisms that will permit the expeditious resolution of disputes at a reasonable cost.'[281]

In 1985, Congress funded eight additional CAA pilot programs. In 1988, it authorized continued experimentation with mandatory CAA and provided funding for ten voluntary CAA pilot programmes. The Civil Justice Reform Act of 1990 was for 'expanding and enhancing the use of alternative dispute resolution.' The Act directed each federal district court to complete a cost and delay reduction plan and to specifically consider the possibility of instituting court connected ADR programmes. As of February 1992, thirty-two of the thirty-four federal courts that had completed their plans which either endorsed or adopted some type of court-connected ADR. In addition, the Federal Courts Study Committee, which was created to develop a long-range plan for the Federal judiciary, including assessments involving alternative methods of dispute resolution, recommended that Congress 'broaden

[279] *Ibid*
[280] Bernstein, L. Understanding the limits of Court-Connected ADR: A Critique of Federal Court-Annexed Arbitration programs. 1993, *University of Pennsylvania Law Review* Vol. 141, No. 6, p.2169
[281] *Ibid*

statutory authorisation for local rules for alternative and supplementary procedures in civil litigation, including rules for cost and fee incentives.[282]

Again, according to Kovach, the second path, to or from the civil courthouse, was no different. Even though a number of references were made to a wholly private system during the 1976 conference, the idea was not readily explored. In all likelihood, there are several reasons why the courts were targeted when implementation of mediation use was considered. For one, a majority of the participants, as well as those delegated to make these 'improvements' were lawyers. The legal system was their frame of reference, and as such, it is likely that assumptions were made that this 'new system' of dispute resolution was to be part of the courthouse. What was discussed and specifically stated at the 1976 Pound Conference was a system apart from the then current legal system, yet it seems to have been interpreted as 'a part of' that system - a likely result of assumptions that favoured legal system based approaches. In addition, as a response to expressed concerns about courts and court reform, ADR, and mediation in particular, were seen as a panacea to resolve court centred issues, particularly cost and delay.[283]

By the mid-1980s efforts were underway to establish a 'multi-door courthouse.' Perhaps the primary reason lawsuits were targeted was because - to recall Sander's quote of why robbers rob banks – 'that's where the money [was].' The courthouse was where the cases were, and to a degree, still are today. But comments at the 1976 Pound Conference suggested the design of a mechanism to transfer cases out of the courthouse to a separate entity. Professor Frank Sander is often credited with suggesting court renovation to provide multiple dispute resolution processes, commonly referred to as the 'Multi-door Courthouse.' That, however, was not his proposition. Rather, his idea called for a separate entity that offered a plurality of processes housed specifically in 'a centre.' Yet, for a number of reasons, this structure was interpreted as a redesign of the courthouse. Throughout the last century, most civil cases have been resolved by settlement. [284]

When Frank Sander first proposed the multi-door courthouse in 1976, there were no state offices of dispute resolution, no ethical requirements that lawyers advise their clients of alternatives to litigation, and no explicit authorisations for courts to refer cases to ADR. As of

[282] *Ibid*
[283] Kovach, *op cit*
[284] Senft, L.P. and Savage, C.A. ADR in the Courts: Progress, Problems, and Possibilities Summer, 2003, 108 *Penn St. L. Rev*. 327

June 30, 2003, there were thirty-five state offices of dispute resolution, a number of states have ethical requirements that lawyers advise their clients of alternatives to litigation, and many states have explicitly authorised their judges to refer cases to ADR.[285] Many states mandate arbitration for certain types of cases as well. Florida, the state that has institutionalised ADR in its courts to the greatest degree, estimates that more than 113,000 cases were referred to ADR by the courts in 2001. The federal district courts are required to offer at least one ADR process and all of the federal appellate courts have in-house ADR programmes.[286]

Court-annexed ADR is not a single process or programme; rather, it encompasses many different varieties, variations, and "flavours" of ADR mechanisms. ADR in the federal courts includes arbitration, mediation, early neutral evaluation, summary jury trial, mini-trial, judicial settlement conference, and additional iterations, such as med-arb.[287] We might categorise the programmes in different ways as well. Some of the programmes are voluntary; some are mandatory. Whether a programme is voluntary or mandatory fundamentally affects the operation of that programme and how it is perceived by the participants.[288] Another categorisation might focus on the extent to which the programmes resemble traditional litigation. Programmes can be placed on a continuum where one end point is a traditional judge or jury trial and the opposite end point is transformative party directed "appropriate" dispute resolution.[289] All of the court-annexed ADR programmes, except for mediation (and arguably much of the mediation conducted under court auspices), have characteristics of the typical litigative, adversarial process-or as described by one commentator, "alternatives to the courtroom that resembled the courtroom . . . ."[290]

Some mediation programmes are mandatory; some are voluntary. Some litigants receive the services of a mediator from the court without cost; some litigants pay for mediation at market prices or at reduced prices. Some mediators are court staff; others are volunteers or private providers. Some mediation sessions are limited to a single short session; others, especially those for which litigants pay, may continue as needed. Some mediators use evaluative

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[285] *Ibid*
[286] *Ibid*
[287] Ward, E. (2007). Mandatory Court-Annexed Alternative Dispute Resolution in the United States Federal Courts: Panacea or Pandemic? Vol. 81 *St. Johns Law Review* 77 at 84
[288] *Ibid*
[289] *Ibid*
[290] Kenneth F. D. (2001).The Future of Court-Annexed Dispute Resolution Is Mediation, 5 T.G. *Jones L. Rev.* 35, 40

techniques; some mediators favour facultative or transformative approaches. Many mediation sessions operate as settlement conferences. Variations occur among districts, and within districts, raising concerns that the process may not provide equal treatment to all litigants.[291] This is particularly of concern because ADR processes that result in settlements provide no opportunity for review and most programs do no more than perfunctorily attempt to assess mediators' skills or performance.[292]

The wide variety of programmes, dockets, and local legal cultures makes comparability of program assessments across courts extremely difficult and unreliable. The problem is compounded because terminology describing programmes is inaccurate and misleading.[293] Different jurisdictions choose one or more of the programmes, vary the procedures to suit local cultures and preferences and resources, and offer an ADR menu. A further complication is that even within individual districts there may be tremendous variation in how programs are utilised. Some judges are more comfortable with one type of ADR over others; parties or their counsel may be more familiar or comfortable with a particular type of ADR; sometimes cases are assigned to a particular ADR process automatically.[294]

2.1.6 Development of CCADR in the United Kingdom

Lord Woolf in a 1995 Interim Report, stated that the courts had an important role in providing information about ADR and encouraging its use in appropriate cases. This encouragement was strengthened in the 1996 Final Report, which stated that the *court will encourage the use of ADR at case management conferences and pre-trial reviews, and will take into account whether the parties have unreasonably refused to try ADR or behaved unreasonably in the course of ADR*[295]. Since 1999, under the new Civil Procedure Rules (CPR), judges may order a break in proceedings for the parties to attempt to settle their dispute by mediation or some other form of dispute resolution process. In addition, a failure to co-operate with judicial suggestions regarding mediation can result in cost penalties being imposed on the recalcitrant party.[296] The emphasis on ADR in court rules was reinforced by

[291] See, for example, Stephan Landsman, ADR and the Cost of Compulsion, 57 *Stan. Law. Rev.* 1593, 1619 (2005),
[292] ibid
[293] See, *e.g.*, Wayne D, Brazil, Should Court-Sponsored ADR Survive?, 21 *Ohio St, J. of Disp, Resol,* 241, 249 (2006); Hensler,D.R. Suppose It's Not True: Challenging Mediation Ideology, 2002 J, *Disp, Resol*, 81, 94
[294] *Ibid*
[295] The Rt Hon the Lord Woolf, *Final Report to the Lord Chancellor on the Civil Justice System in England and Wales*, HMSO, July 1996. *Op cit*
[296] CPR R1.4 (2) and CPR R26.4. Factors to be taken into account when deciding costs issues include "the efforts made, if any before and during the proceedings in order to try and resolve the dispute." (Parts 1 and 44

the publication of nine pre-action protocols,[297] each of which encourages parties to attempt to settle their dispute, including by consideration of ADR, before beginning court proceedings. An update of the Civil Procedure Rules was made to include the requirement that parties to any dispute should follow a reasonable pre-action procedure intended to avoid litigation, before making any application to the court. This should include negotiations with a view to settling the claim and, again, cost penalties can be applied to those who do not comply.[298]

Government policy on ADR in England during the late 1990s and turn of the 21st century rather lagged behind judicial enthusiasm and activism. In its landmark White Paper, *Modernising Justice* published in 1998,[299] the government made clear that it was seeking to improve the range of options available for dispute resolution and that it would consider the contribution that ADR could make to the civil justice system, including mediation, arbitration and ombudsman schemes.[300] With the Access to Justice Act 1999, when reform of the legal aid system offered the government an opportunity to manifest its commitment to supporting the growth of ADR. Under the 1999 Act, the Community Legal Service Fund (administered by the Legal Services Commission) replaced the old legal aid scheme and introduced a new set of rules governing eligibility for legal aid support. The rules (contained in the Funding Code and Funding Code Guidance December 2003 R11)[301] include the cost of mediation within the legal aid system and a condition that an application for legal aid for representation may be refused if there are ADR options that ought to be tried first.

2.1.7 Court Connected ADR in Nigeria

Only a brief history of CCADR will be given in this section as the detailed workings of existing multi door court houses in Nigeria is undertaken in chapter four. The first State to

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Civil Procedure Rules). Full text of CPR incorporating 42nd update available at ww.dca.gov.uk/civil/procrules_fin/menus/rules.htm.

[297] Protocols lay down guidance for parties about attempts to settle the dispute and disclosure of documents. There are currently nine protocols covering: Construction and Engineering Disputes; Defamation; Personal Injury Claims; Clinical Disputes; Professional Negligence; Judicial Review; Disease and Illness Claims; Housing Disrepair Cases; Possession claims based on Rent Arrears. The full text of the protocols is available at: http://www.dca.gov.uk/civil/procrules_fin/menus/protocol.htm.

[298] Genn, D.H., Fenn, P. Mason, M. *et a*l. (2007). Twisting arms: Court referred and Court linked mediation under Judicial pressure. *Ministry of Justice Research Series* 1/07 May 2007.

[299] Lord Chancellor's Department, 1998. Available at http://www.dca.gov.uk/consult/access/mjwpindex.htm

[300] Genn, D.H., Fenn, P. Mason, M. *et al. op cit*

[301] The 2005 Legal Services Commission Funding Code and Guidance is available at: www.legalservices.gov.uk/civil/guidance/funding_code.asp Under Criterion 5.4.3, .*an application for funding may be refused if there are complaint systems, ombudsman schemes or forms of alternative dispute resolution which should be tried before litigation is pursued.*. In essence, this means that citizens hoping for public funding for representation in non-family civil actions must have attempted mediation or be able to show why it was not possible to do so.

introduce court connected ADR centre in Nigeria and in Africa was Lagos State. Professor Osinbajo comments that a diagnostic survey was carried out in year 2000 concerning what was regarded as an inefficient, slow and corrupt civil system of administration of justice.[302] One of the outcomes was the establishment of a Citizens Mediation Centre for settlement of small claims and the CCADR to deal with complex cases.

The Lagos Multi-Door Courthouse (LMDC) was launched on June 11, 2002 as collaboration between a private Non-Governmental organisation Negotiation and Conflict Management Group, the United States Embassy (D&G Program), the law firm of Aina, Blankson & Co and the Lagos State High Court of Justice.[303] The principal promoter of the LMDC project, Kehinde Aina, stated that he was inspired by the 'multi-door concept espoused by Professor Frank Sander of the US. The LMDC operated without an enabling law until May 2007 when the Lagos State Multi-Door Courthouse Law was passed into law.[304] It has as one of its primary objectives, to 'enhance access to justice by providing timely and cost effective alternative mechanism to supplement litigation in the resolution of disputes.'[305] The ADR processes offered at the LMDC includes mediation, early neutral evaluation, and arbitration.

A year after the establishment of the LMDC, the Abuja Multi-door Courthouse was established.[306] According to Hon Justice L.H. Gunmi, Chief Judge of the Federal Capital Territory, explaining the vision behind the center, stated that, the 'dream is to build a comprehensive justice delivery system, a system where every dispute will have a mechanism suited to its resolution. A system flexible enough to cater for emerging challenges of the internet, yet ascertainable enough to imbue users with confidence in its efficacy.'[307] On November 19, 2003, the Honourable Chief Judge signed into law the Practice direction of the Abuja Multi-door Courthouse (AMDC) as the procedural framework for the operation of the AMDC.[308] The mission of the AMDC is to 'supplement the available recourses for justice by providing enhanced, timely, cost effective and user friendly access to justice; whereas one of

[302] Osinbajo, Y. Getting the Justice Sector Reform on the Political Agenda: The Lagos Experience, Being a paper presented at the British Council Conference in Nairobi, Kenya on 21-22 November, 2006.
[303] Aina, K. The Lagos Multi-Door Court house – One year after. Being a paper presented at the workshop on 'The Multi-Door Courthouse: The Procedure and Promise' on September 30, 2003 at the High Court Premises, Lagos. Lagos: Negotiation and Conflict Management Group. P.2
[304] www.lagosmultidoor.org. See, the LMDC Law,
[305] Section 4, LMDC Law
[306] It came on board formally on October 31, 2003
[307] http://www.thisdayonline.com/archive/2004/10/12/20041012/awo7.html accessed 12/10/2010
[308] Goodluck, *op cit*, p.259

its main objectives is to supplement the avenues for justice by making available additional doors through which disputes can be resolved.[309]

Notwithstanding the challenges, the CCADR/ Multi-door court house concept is fast gaining its foothold in Nigeria since the establishment of the LMDC in 2002. Its rippling effect is manifested by the proliferation of same in Kano, Borno, Akwa-Ibom and Anambra. Other judiciaries which are in the process of establishing a CCADR or its variant include Abia, Kaduna and Cross River.[310]

2.2 ADR: Panacea or Anathema (Solution or Abomination?

Weinstein comments that in some areas, with the approval and encouragement of government and other policy-making bodies, the business of justice is being encouraged to leave the courts for alternative forums.[311] He however, believes that this privatisation of dispute resolution must be considered in the context of the fundamental public commitment to provide substantive justice on an equal basis to all people. To him, one must not close the courthouse door to those who need the courts' protections. More justice, better administrated, is what both proponents of new and old forms should seek. [312]

What therefore are the concerns about ADR in the civil justice system? Widespread privatisation of dispute resolution has the potential to stunt the common law's development, as entire areas of law are removed from the courts; deprive the public of important information, such as news of a product's harmful effects; deny plaintiffs the therapeutic benefit of having their "day in court;" degrade constitutional guarantees of the right to a jury trial; and prevent public debate and consensus-building in cases with national public policy implications.[313]

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[309] *Ibid*, p.259-260
[310] *Ibid*, p.279
[311]Weinstein, J.B. (1996). Some Benefits and Risks of Privatisation of Justice Through ADR. 11 Ohio St. J. on Disp. Resol. 241
[312] *Ibid*
[313] On other drawbacks of ADR, see, e.g., Stienstra & Willging, Alternatives to Litigation: Do They Have A Place in the Federal District Courts?, at 14-16; Roehl, J.A. Private Dispute Resolution, in Court Reform: Implications of Dispute Resolution 128, 133 (Conference Proceedings for the Ohio State University College of Law 1995); Haig, R.L. & Caley, S.P.How Clients Can Use Federal Court ADR Methods to Achieve Better Results, 5 *Fed. Litig. Guide Rep*. 193, 194 (1994); Weinstein, Warning: Alternative Dispute Resolution May Be Dangerous to Your Health, *Litigation.*, Spring 1986, at 5. *See also, e.g.*, Brown, H. Antitrust in Arbitration, *N.Y. L.J.*, Sept. 28, 1995, at 3 (discussing the split in cases where the public policy in favour of arbitration may dilute the antitrust policy).

One hallmark of a system of democratic government has been that private individuals, including the disadvantaged or less powerful segments of our society, have access to the political and legal processes, and that governmental decision making is open to public scrutiny.[314] Before permitting traditional court functions to be supplanted by private dispute resolution approaches, it is useful to reflect on the central role of the courts in society's dispute resolution system of the past and the reasons for preserving that centrality in the future. One of this is establishing norms of behaviour.

A theorist has explained that the law serves two functions: to influence behaviour in accordance with established norms of what is acceptable behaviour and to provide standards of enforcement for the bureaucratic state.[315] For law to serve its function as giving expression to enforceable behavioural norms, it must be made publicly for all to see. This is true both of substantive lawmaking through common law development and of adjudication in individual cases.[316] Members of the public must know what the law is if they are to predict the probable outcomes for acting a certain way, and modify their behaviour accordingly. The need for public law-making and enforcement is especially important in a pluralistic society. A basic familiarity with the principles, if not specific proscriptions and admonitions, can be assumed. Custom and formal law, intertwined, can be counted on to normalise an individual's behaviour.[317] The courts also enforce correct behaviour. Without strong communities, or strict adherence to religious law, the legal system must be all things to all people.[318] Increasingly, society depends on the secular legal system to tell us how to live. Enforcement of behaviour comes increasingly from the courts, rather than from religion, the family, or the community.[319]

Procedures, jurisdictional rules, and other seemingly neutral devices that affect people's ability to use the courts are part of a complex set of social relations. Any device - whether

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[314] Law and Public Policy Committee of the Society of Professionals in Dispute Resolution (1993) Public Encouragement of Private Dispute Resolution: Implications, Issues and Recommendations; Reprinted in Elizabeth Plapinger *et al.* eds. *Judge's Deskbook on Court ADR*. New York: Centre for Public Resources. P.87

[315] Engel, D.M. (1980) Legal Pluralism in an American Community: Perspectives on Civil Trial Court. *AM. B. Found Res. J.* 425.; See also, Galanter & Cahill, (distinguishing between law's "specific effects" (effects on (the parties) and its "general effects" (effects on a larger audience).

[316] *Ibid*

[317] Weistein, *op cit*

[318] See, Timothy P. Terrell & James H. Wildmin, Rethinking "Professionalism, 41 *Emory L.J.* 403, 422 (1992). The authors note that: 'the legal system embodies our last remaining vestige of a sense of "community"--of shared values and expectations. All the other dimension of our lives--race, religion, education, the arts, regional loyalty, and so on--divide us as much as they join us together because they are based on matters of "substance" on which we so often disagree.

[319] *op cit*

ADR or changing informal litigating procedure - that makes it more difficult to get into court, has a substantive effect on how people see their rights in the real world.[320] Acting as neutral umpires, courts traditionally have had to look out for parties who lack the resources or the capacity to protect their own interests in the face of a better-funded or more-informed adversary.[321] In every case, the judge has an obligation to do what he or she can to ensure that mismatching of resources will not skew the substantive result. If a judge believes that the factual record has not been well presented, he or she can turn to magistrate judges and appointed special masters to develop it. If a party fails to provide a good brief on the law, the judge can turn to law clerks and potential amicus for research to supplement the briefings.[322]

Arbitrators, especially those drawn from industry panels, may not feel the same responsibility to produce a full factual and legal record. Alternatively, they may lack access to resources to make up for imbalances.[323] The problem is more than academic, as the experience of dispute-resolution in the securities industry demonstrates.[324] Corporations and businesses who are familiar with the "ins" and "outs" of the federal and state arbitration laws have engaged in 'strategic behaviour' that put consumers at a disadvantage. For example, brokerage firms have long drafted customer contracts providing that disputes would be arbitrated and that New York law would govern. Consumers on their part are ignorant of the law (never found in the small print) that New York law forbids arbitrators to award punitive damages.[325]

The U.S Supreme Court, in *Mastrobuono v. Shearson, Lehman Hutton, Inc.*[326] however refused to apply the New York law on punitive damages to one such contract, holding that there was insufficient evidence to find that the petitioners intended to give up their right to

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[320] Weinstein, J.B. (1989). After Fifty Years of the Federal Rules of Civil Procedure: Are the Barriers to Justice Being Raised? 137 *U. PA. L. REV*. 1901, 1922. See also, Weinstein, J.B. (1988). The Fiftieth Anniversary of the Federal Rules of Civil Procedure and Erie, 54 *Brook. L. Rev.* 12, 28.

[321] Committee on Long Range Planning, Judicial Conference of the United States, Proposed Long Range Plan for the Federal Courts (2d printing. 1995). The Judicial Conference explained: Private forums should be encouraged, but the federal courts must not shed their obligation to provide public forums for disputes that need qualities that federal courts have traditionally provided, including at a minimum a neutral and competent decision-maker and the protection of weaker parties' access to information and power to negotiate a dispute. Court supervision of ADR programmes may be the only means of ensuring satisfaction of those conditions in some cases, although referral to private dispute resolvers may well serve as part of a court-supervised program. At p.66

[322] Weinstein, *op cit*

[323] *Ibid*

[324] See generally, Norman S. Poser, *When ADR Eclipses Litigation: The Brave New World of Securities Arbitration*, 59 Brook. Law. Rev. 1095 (1993); Floyd Norris, *What to Do About Broker Arbitrations?*, N.Y. Times, Jan. 23, 1996, at D1.

[325] Donovan, K. *The Arbitration Question: Why No Punitive Awards?*, Nat'l L.J. New York, Jan. 23. 1995, at B1

[326] 115 S. Ct. 1212 (1995); See also, Greenhouse, L. *Court Backs Investors on Damage Awards*, N.Y. Times, Mar. 7, 1995, at D5.

such damages.[327] The fact that members of arbitration panels are often drawn from industry management increases potential unfairness to the consumer. Contracts of adhesion reflecting imbalances in power and knowledge between the parties are routinely invalidated by the courts.[328]

ADR is believed by many to be the most promising bridge over the gap between legal needs and affordable services. There is the risk, however, that as the rich move out of the courts to private dispute resolution forums, only criminals and the poor will be left in the courts, thus, reducing the effective power of these institutions over all society. A recent news report confirms the immediacy of the threat that increased resort to ADR will result in creation of "a two tier system of justice."[329] According to the report, California's "three strikes law" is forcing diversion of civil judges to criminal trials to handle the increased caseload.[330] With the public resources to handle civil cases shrinking, some are predicting that one day only the rich will have recourse to civil litigation - by hiring private judges as provided for under California law. One can imagine without much difficulty a future in which wealthy litigants will use private ADR while government will have little incentive to fund the public courts to which the poor and powerless will be consigned because such constituents lack political clout.[331]

Another problem with extrajudicial dispute resolution is that no one may be monitoring the disclosures made during a process with an eye to the public's interest and welfare.[332] The

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[327] The Court explained that: as a practical matter, it seems unlikely that [the investors in the case] were actually aware of New York's . . . approach to punitive damages, or that they had any idea that by signing a standard-form agreement to arbitrate disputes they might be giving up an important substantive right" when they agreed to be bound by New York law.

[328] Weistein, *op cit.* See, *e.g., Prudential Insurance Co. v. Lai*, 42 F.3d 1299 (9th Cir. 1994), *cert., denied*, 116 S. Ct. 61 (1995) (employees not bound by signed agreement to arbitrate discrimination claims where they did not knowingly forego statutory remedies in favor of arbitration); Holmes, S.A. Employers' Ability to Require Bias-Case Arbitration is Curbed, *N.Y. Times*, Dec. 23, 1994, at A28 (discussing *Prudential*); *cf.* Blackman, (discussing recently filed case, *Duffield v. Robertson, Stephen & Co.*, that raises Seventh Amendment due process and right to jury challenges). State laws requiring full notice of possible arbitration clauses in consumer contracts are appropriate. *See, e.g., Casarotto v. Lombardi*, 886 P.2d 931 (Mont. 1994) (notice must be placed on front page); *Stephens v. American International Ins. Co.*, 66 F.3d 41 (2d Cir. 1995) ("anti-arbitration" provision in Kentucky statute governing insurer liquidation valid). See also, Harold Brown, Application and Limits of Alternative Dispute Resolution, *N.Y. L.J.*, Jan. 25, 1996, at 3, 6 (limits on federal pre-emption of state legislation protecting against "arbitration surprises").

[329] Haig, R.L. & Caley, S.P. How Clients Can Use Federal Court ADR Methods to Achieve Better Results. 5 *Fed. Litig. Guide Rep.* 193, 194 (1994) at 194

[330] Butterfield, F. '3 Strikes' Law in California it Clogging Courts and Jails. *N.Y. Times*, Mar. 23, (1995), at A1, B11.

[331] *Ibid*

[332] See, *e.g.*, Daragahi, B. Environmental ADR, *N.Y. L.J.* Sept. 8, 1994, at 5. See generally, Schroder, W.H. Jr., Private ADR May Offer Increased Confidentiality, *NAT'L L.J.*, July 25, 1994, at C14. Parties in a civil case may always sign a nondisclosure agreement when they settle, but the judge may reveal the proceedings in the

amenability of ADR to developing resolutions in which discovery, admissions of liability and damages remain undisclosed is seen by some to be part of ADR's attraction.[333] The problem is not endemic to extra-judicial resolution; any time a case is settled, there may be attempts to keep under seal a good deal of the information that surfaces in discovery. There may be a public interest in having the information revealed. In a products liability suit, for example, the potentially negative health effects of a particular pharmaceutical may not yet have been publicized. The courts themselves are not always sufficiently cognisant of their obligation to society to prevent the privatisation of vital information which affects the public welfare.[334] At least in the courts, judicially supervised procedures must be followed before documents and judgments will be placed under seal, and documents can be unsealed later if the need arises. These protections, while institutionalised in the court system, may be lacking in the context of extrajudicial dispute resolution.

What are the responses of ADR proponents to these canvassed issues? According to Edwards, there are those who subscribe to the ADR movement because they view efficient and inexperienced dispute resolution as an important societal goal, without regard for the substantive results reached.[335] To him, if the ADR movement prominently reflects such thinking then it is unclear whether it is a panacea for, or is anathema to, the perceived problems in our traditional court systems.[336] Again, popularity and public interest are not sure signs of a quality endeavour; the ADR movement in particular is ill-defined and the motives of some adherents are questionable. Some have joined the ADR wagon without regard for its purpose or consequences, because they see it as a fast (and sometimes interesting) way to make a buck.[337] From another arises the worry that a growing fashion for mediated

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interests of public policy. *See id.* (discussing cases); *cf.* Anderson, C. Sealing Order Granted for Partial Settlements. *N.Y. L.J.,* Aug. 9, 1994, at 1 (granting protective order concerning amounts paid in partial settlement of repetitive stress injury suit, citing public policy in favour of settlement).

[333] See also, Resnik, J. Whose Judgment? Vacating Judgments, Preferences for Settlement, and the Role of Adjudication at the Close of the Twentieth Century. 41 *UCLA L. REV*. 1471, 1494 (1994). Professor Resnik explains that "express rights of public access have not accompanied the more recent creation of court-sponsored settlement negotiations and alternative dispute resolution techniques." *Id.* She asserts that in the absence of legislation stating otherwise, court-annexed arbitration awards "become judgments of the court and . . . fall under general rules of public access to court records.

[334] Weinstein, Individual Justice, at 66.

[335] Edwards, H.T. Alternative Dispute Resolution: Panacea or Anathema? (1986). *Alternative Dispute Resolution,* p.668 at 669

[336] *Ibid*

[337] *Ibid*

negotiations may operate to the disadvantage of weaker parties where significant imbalances of power are present.[338]

2.3 Overview of Array of ADR Processes

ADR is an eclectic array of dispute processes rather than one eclectic process. The different processes share certain overlapping goals such as efficiency and fairness; as well as essential features such as the presence of a neutral impartial intervener.[339] They nonetheless remain distinct and the rules, approaches and strategies applicable to each process also remain different. The meaning of the different ADR concepts were clarified in chapter one and will not be repeated here; what follows in this section therefore is a review of the essential characteristics as well as a brief expose on what to expect in two of the major process i.e. mediation and arbitration.

2.3.1 *Arbitration*: *Principles and Procedural Framework*

This is the only ADR process where the third party neutral not the parties decide the outcome of the dispute. Arbitration can, therefore, be described as a private, voluntary procedure which two or more parties agree to use to resolve their dispute, wherein the arbiter is neutral, the decision is based on the merits and it is final and binding between the parties[340] Ordinarily, a distinct feature of ADR processes is that the neutral controls the process while the parties control the outcome, the reverse is the case for arbitration. The arbitral process has its origin in ancient times arising from disputes between maritime litigants. Informal merchants' courts and the early admiralty courts were enjoined to develop a dispute-resolution mechanism that could dispense justice swiftly, literally "between the tides", so as to ensure that commercial activity in an environment that necessarily depended on strict deadlines was not hampered. Thus, the entire rationale behind arbitration has been the idea of

[338] Roberts, S. Alternative Dispute Resolution and Civil Justice: An Unresolved Relationship, *The Modern Law Review*, Vol. 56, No. 3, Dispute Resolution. Civil Justice and Its Alternatives (May, 1993), pp. 452-470. http://www.jstor.org/stable/1096678 Accessed: 08/02/2010 12:32

[339] Love, L.P. and Kovach, K.K. ADR: An Eclectic Array of Processes Rather than One Eclectic Process. *Journal of Dispute Resolution*, Columbia, 2000, No.2, p.295

[340] Akeredolu, A.E. (2012) Attitude of the Nigerian Supreme Court to Commercial Arbitration in Retrospect: 2001-2010 *Journal of Law and Conflict Resolution* Vol. 4(5), p. 77, November 2012 .Available online at http://www.academicjournals.org/JLCR. The case of *MISR (Nig) Ltd. v. Oyedele* [(1966) 2 ALR (Comm.) 157] referring to Halsbury"s Laws of England, defined arbitration as the reference of a dispute between not less than two parties for determination, after hearing both sides in a judicial manner by a person(s) other than a court of competent jurisdiction. In *NNPC v. Lutin Investments Ltd* (2006) 1SCM 46 at 72) the Supreme Court per Ogbuagu, JSC also adopted this definition.

haste – that disputes are determined speedily and, hopefully, cost-effectively.[341] A key element of arbitration, as compared with trial, is that it is a private process, defined by contract.[342]

The tribunal is chosen by, or on behalf of, the parties who may also establish the procedures to be adopted by the tribunal. The decision of the tribunal is final and legally binding on the parties, but is to be made in the light of the evidence and arguments submitted to the tribunal by the parties. A valid award may be recognised and enforced by the courts.[343] While these elements are to be found in practically all arbitrations, arbitration is not a homogenous product. The nature of a particular arbitration will be influenced by matters such as the size and character of the dispute and the location and identity of the parties to the dispute. Arbitration clauses are frequently incorporated in contracts such as building contracts, deeds of lease, deeds of partnership, insurance policies and deeds of sale.[344]

2.3.1.1 *The Arbitration Framework: Contractual and Legal Standards*

A complaint often heard about arbitration is that it can be as cumbersome and complex as going to court, and it can be just as time consuming and costly. The objective of arbitration procedures ordinarily is to simplify the process, to make it faster and less complex, while at the same time retaining all the elements necessary for a fair and equitable resolution of the dispute.[345] Arbitral proceedings may be commenced by any one of three ways: by statute, order of court and by agreement of the parties.[346] The practice involves a lot of rules reflecting both the private contractual foundation of arbitration as well as public laws. It includes the agreement to arbitrate,[347] the arbitration procedural rules, arbitration statutes, international conventions, substantive law applicable to the merits of an arbitrated dispute and ethical rules.[348]

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[341] Ash, M. *The Status of Arbitration in South Africa: An Update.* Available @ www.taxtalk.co.za, p.15, accessed 25/9/09
[342] Folberg, *op cit* p.6
[343]Schulze, C. (2005). International Commercial Arbitration: An Overview. *Codicillus.* Volume 46, No 2. Unisa Press pp 45 at 46
[344] *Ibid*
[345] Wilkinson, H.J. Boardroom Procedure for Arbitration. *Canadian Arbitration and Mediation Journal*, Fall 2007. A publication of the ADR Institute of Canada, Inc. Vol. 16 No.1, p.27
[346] Ojielo, *op cit*
[347] See generally, Fabunmi, J.O. 2009. Common Provisions in International Contracts in Fabunmi, J.O. Ed. Themes on Jurisprudence and International Law; Essays in Honour of Professor Ayodele Ajomo. P. 53-57
[348] Folberg, *op cit* p.557-558

The Agreement to Arbitrate – Generally speaking, binding arbitration is a creature of a private contract and the arbitration clause would usually provide directions as to the rules for the process. It will also identify the procedures and supporting administrative framework (if any) as well as the law to be applied by the arbitrators. An arbitration agreement is a contractual undertaking by two or more people to resolve disputes by the process of arbitration, even if the disputes themselves are not based on contractual obligations.[349] Some arbitration agreements cover the barest minimum obligations while others may be very detailed depending on the subject matter. It is better however for the agreement to cover issues such as procedural rules, number of arbitrators and selection of same, time lines for concluding the process where time is of the essence, commencement of the proceedings and similar issues.

Today, most arbitrations are usually conducted under specified rules or procedures similar to court rules. Arbitration rules and procedures have been developed and published by private and public institutions to provide guidance or support for the arbitration process.[350] These are usually lengthy and as such are only incorporated by reference in the arbitration agreement. The rules will address issues such as: the filing of an arbitration demand and other pleadings, what constitutes notice for procedural purpose, methods of choosing arbitrators including procedures for challenging appointees), prehearing conferences, elements of the hearing, arbitral wards and remedies and procedures for publication or clarification of awards.[351] Where an arbitration agreement provides for certain steps to be taken prior to commencing arbitration proceedings, particularly where couched in mandatory terms, they must be complied with.[352] Where the contract is silent on steps to be taken, the provisions of the applicable arbitration statute will apply.[353]

Stages of Arbitration – The nature of the parties' agreement and whatever rules they have adopted (if any) will influence the specific features of an arbitration process. Invariably,

[349] Sutton, D.S., Gill, J. and Gearing, M. (2007). *Russell on Arbitration*, 23rd ed. London: Sweet and Maxwell, p. 29. See, Section 6 of the Arbitration Act of England which defines the arbitration agreement as an agreement to submit to arbitration present or future disputes (whether they are contractual or not).
[350] Some of such institutions include American Bar Association, International Chamber of Commerce, The Center for Effective Dispute Resolution, UK, Judicial Arbitration and Mediation Services, London Court of International Arbitration, Lagos Court of International Arbitration, Regional Centre for International Commercial Arbitration, Lagos.
[351] Folberg, *op cit*, p.567
[352] See, for example, the case of *J.T. Mackley & Co Ltd v. Gusport Marina Ltd* [2002] EWHC 1315 where amongst other things, failure to comply with a condition precedent rendered the arbitration notice invalid.
[353] For example, S.14 of the English Arbitration Act provides that the arbitration must be commenced by service of a notice of arbitration on the other party.

however, most arbitration processes begin with the filing of a demand and other pleadings and the appointment of arbitrators.[354] The arbitrator(s) will often begin planning for the process by engaging the parties in prehearing meetings or phone/email/video conference discussions to develop timetables, flesh out procedures, develop an agenda and set the stage for all that will follow.[355]

Prehearing Conference/Preliminary Meeting – While there is no legal requirement for a preliminary meeting, most arbitrators find it useful to have such a meeting at the very earliest stage of the reference. Some arbitration institutions actually contemplate same in their rules. To illustrate, the CPR Non-Administered Arbitration Rules direct arbitrators to hold a 'pre-hearing conference for the planning and scheduling of the proceeding.' Also, Article 18 of the International Chamber of Commerce Rules provides that 'as soon as it has received the file from the Secretariat, the Arbitral Tribunal shall draw up, on the basis of documents or *in the presence of the parties* and in the light of their most recent submissions, a document defining its Terms of Reference.'[356] The preliminary meeting gives the parties an opportunity to meet and obtain directions from the tribunal on the future conduct of the reference.[357] The tribunal may also wish to consider certain substantive issues at the preliminary meeting, such as questions of jurisdiction or applicable law. Other matters to be dealt with include clarifying any terms in the agreement as to how the reference is to be conducted, seat of the arbitration, evidential rules, whether interim measures are appropriate, what documents need to be provided, use of experts, location of the hearings, administration of the reference, fees and deposits, confidentiality restrictions, framework for information exchange and discovery, setting ground rules for the hearing, nature of hearing (e.g. whether documents only or whether to adopt boardroom style hearing etc.) and any other specific issue arising from the nature of the dispute.[358] The outcome of the hearing is a procedural order issued by the arbitrators setting forth a timetable and other elements of the 'arbitration plan' as agreed by all the participants.

The Procedure – Pleadings or other written statements are not useful in all arbitrations. For example in a commodity arbitration where the dispute is on quality, it may be pointless to

[354] *Ibid*, p.584
[355] *Ibid*
[356] In shipping cases, such meetings are generally not part of the proceedings. See generally, Harris, B. 'Procedural Reform in Maritime Arbitration' [1995] *A.D.R.I.J.* 18
[357] Sutton, *et al. op cit*, p.232
[358] See, Folberg, *op cit* 587, Sutton, *op cit*, 233-234, Mustill and Boyd, *op cit* 314- 316

order pleadings. In other cases, a written statement may help clarify the issues.[359] The arbitrator may order any of these four options: order full pleadings as would be done in a high court trial; or order parties to deliver a full written statement of their case (which would include the statement of facts as well as arguments and evidence, with copies of relevant documents attached; or delivery of brief informal letters setting out each parties' case; or hold oral discussions with the parties to agree on the issues to be determined and make a written record of same.[360]

The hearing – Arbitration hearings though formal are more flexible than a court trial. It may be held around a conference table even though it features some of the basic elements of a trial. Though the tribunal is expected to have read the parties statements, the hearing would ordinarily commence with opening statements by the parties.[361] This will be followed by introductory evidence, examination and cross examination of witnesses, testimony under oath, closing statements and arguments. [362] It is worthy of note that formal rules of evidence do not apply,[363] thus hearsay or other evidence otherwise inadmissible in a court hearing may be considered by the arbitrators. The tribunal may ask questions of the witnesses during the course of the evidence or after the parties have completed their questioning.[364] Where the arbitrators have asked questions, parties are usually given opportunity to ask any further supplemental questions as failure to afford such opportunity to the parties could potentially give rise to a challenge that parties were not given full opportunity to present their case.[365]

Depending on what was agreed, the proceedings may be brought to a close either by parties making oral closing submissions or agreeing to exchange written post-hearing submissions or by the tribunal formally declaring same as closed so that no further submissions will be entertained).[366] A tribunal has discretion however, whether or not to hear fresh evidence after

[359] Mustill and Boyd, *op cit* 318
[360] *Ibid*
[361] See, Folberg, *op cit* 592, Sutton *op cit*, 261-262 Mustill and Boyd, *op cit* 346- 367
[362] *Ibid*
[363] Most arbitrators would however err on the side of admitting evidence because an award can be set aside on ground that the arbitrator mis-conducted himself by refusing to hear or admit relevant evidence. See Mustill and Boyd, *op cit* 352
[364] Sutton, *et al*, *op cit* 263
[365] See, sections 33 and 68(2) of the English Arbitration Act, 1996
[366] See, for example, *Margulead Ltd v. Exide Technologies* [2005] 1 Lloyds Rep.324; Art. 22.1 ICC Rules specifically requiring the tribunal to declare the proceedings closed once the parties have a reasonable opportunity to present their case.

proceedings have been closed but before publication of the award. Such evidence will be allowed particularly if it is material and could not have been produced earlier.[367]

Once proceedings are closed, the tribunal will ordinarily publish its award on the date agreed after which the tribunal becomes *functus officio* and the reference is terminated. The tribunal may however be able to correct clerical errors or mistakes or clarify an ambiguity.[368] It can also make additional awards in respect of any claim presented during the hearing but not dealt with in the award.[369] A court has power to also remit matters back to the tribunal for a decision.[370] Where parties have not agreed otherwise, the tribunal would usually state the reason for an award; this has also been confirmed in some arbitration statutes.[371] The effect of an award is that between the parties to the reference and parties claiming through or under them, the award is conclusive as to the issues with which it deals, unless and until there is a successful challenge or appeal against the award.[372] An award is final and binding on the parties and their privies,[373] it does not bind third parties except that party agrees or had agreed to be so bound.[374]

2.3.2 *Mediation: Principles and Procedural Framework*

The Centre for Effective Dispute Resolution (CEDR) defines Mediation as a flexible process conducted confidentially in which a neutral person actively assists parties in working towards a negotiated agreement of a dispute or difference, with the parties in ultimate control of the decision to settle and the terms of the resolution. [375] A distinct feature of the process is that the third party facilitator does not decide the outcome; rather the parties are in full control of the outcome. Unlike the arbitrator, the mediator has no decision-making powers and may not impose a binding settlement or finding on the parties.[376] The next section discusses what a mediation session would ordinarily look like.

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[367] See, *J.H. Rayner & Co v. Fred Drughorn Ltd* [1924] 18 Lloyds Rep. 269
[368] See, section 57 of the English Arbitration Act,
[369] See also, section 5793)(b) of the English Act
[370] See, sections 68(3)(a) and 69(7)(c) of the English Act and section 28 of the ACA.
[371] See, section 52(4) of the EAA and section 26 of the ACA
[372] See, Sutton, *et al, op cit* 333
[373] See, section 58(1) of the EAA and section 31 of the ACA
[374] See, *Jackson v. Henderson, Craig & Co* [1916] 115 L.T. 36
[375] The Centre for Effective Dispute Resolution (CEDR) Mediaton Handbook, Effective resolution of commercial disputes, 4th edition ,(2004), London: CEDR, p.26
[376] Schulze, *op cit*

2.3.2.1 *The Mediation Framework*

We had said earlier that mediation is a flexible process i.e. it can be designed and redesigned to suit a particular dispute. Notwithstanding, there are some clearly recognised phases of mediation namely Preparation phase, Opening phase, Exploration phase, Bargaining phase and the Concluding phase.[377]

Preparation Stage - For mediation to work successfully, the parties must start the process in a frame of mind that is open to development in the desired direction.[378] In many cases however, parties, will attend with a degree of hostility, suspicion and reservation about the Mediation and the Mediator.[379] It is therefore vital from the beginning to create an environment where parties feel free and safe to explore possibilities of settlement without risk. Once a Mediator is appointed, he makes contact with the parties or their lawyers to discuss some process arrangements and/or clarify some content aspects. Some parties and mediators may request a pre-mediation meeting. The purpose is to ensure that the parties understand the process and that parties are in a position to prepare well for the mediation.

Matters to be discussed at the preparatory stage includes whether all the parties have agreed to mediation[380] (the best evidence of this is an agreement to mediation duly signed by all the parties); whether parties will be accompanied by their lawyers or advisers (this will impact on the venue and other welfare arrangements) and whether or not a party will be unrepresented. Also, it is important to confirm whether someone with authority to settle will be present or available at the mediation session(s); whether legal proceedings are already underway and would be stayed during mediation and whether there are other time constraints. Whether or not the parties have experienced mediation before will also be discussed. The cost of the mediation i.e. the mediator's fees, administrative and welfare expenses are also discussed and agreed as well as mode of payment. The date for the mediation is thereafter fixed as well as the venue taking into consideration the convenience of the parties.[381]

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[377] Akeredolu, A.E. (2011). The Potentials and Limitations of Mediating Business disputes in Nigeria. Vol. 6, *Univ. of Ibadan Journal of Private and Business Law*,p.1 at 11-12

[378] *Ibid*, p. 18

[379] *Ibid*

[380] The Mediation Agreement is the foundation of the mediation process; it sets down the conditions under which the mediation will take place including confidentially, authority to settle, immunity of the mediator and privilege.

[381] Akeredolu, A.E. (2012). Mediation: What it is and how it Works. *International Journal of African Studies*, ISSN 1451-213X Issue 5 p.47 at 52. available at http://www.eurojournals.com/African.htm

Between the date when the Agreement to Mediate is concluded and the date of mediation, the parties usually through their solicitors would send to the mediator and each other their written submissions – this is a *case summary* (of the fact and issues) along with supporting documents. This will give the mediator a clear idea about the content and context of the dispute. Where necessary the mediator can seek clarification or query anything about the dispute but such communication whether oral or written must be made known to all the parties in order not to compromise the mediator's neutrality.

Opening Phase - This is the day of mediation. The parties and their representatives/advisers would arrive and be met by the mediator. Parties are usually kept apart where practicable until the first joint session. The mediator would ordinarily have a very brief initial private meeting with the different parties to confirm that the Mediation Agreement has being signed, that the persons with authority to sign are present and that everyone is comfortable and ready to proceed. Once the mediator is sure that everyone is ready he will bring the parties together for the first joint session.

The First Joint Session -The purpose of this session is to set the tone for the mediation; establish the mediator's role and authority emphasise the ground rules and outline how the day would play out. In setting the tone, the mediator encourages participation, respect and productive interaction. The mediator explains his role as a facilitator not judge - he can challenge and test positions, ideas and options, but he is not responsible for the solution. He also explains the principles and objectives of mediation to the parties to emphasise his role as neutral and the voluntariness of the process i.e. its being confidential and without prejudice (anything said or seen within the process will remain confidential even in the event that no agreement is reached and litigation has to be commenced). As part of the ground rules the mediator makes it clear that parties should act with courtesy and respect and avoid interruptions. Parties would be regarded to confirm their acceptance of these rules and make a commitment to participate in good faith. The mediator also explains in broad outlines how the mediation session will be conducted - that there would be private meetings with each party, intermediate joint sessions or team meetings (e.g. with only the lawyers) as appropriate.

After the mediator's opening remarks, the parties would be invited to make their *opening statement*. The parties would have been told about this before hand and it is wisdom for the lawyer to prepare the statement ahead for maximum effect. Just like in a court session, it is

usual for the claimant to speak first – it is often recommend by most mediators that parties themselves rather than their representatives make the opening statement. The lawyer needs to understand this and not take offence.

In some other jurisdictions, there is a 'new, professional skill of representing clients in mediation.'[382] Such trained personnel may also present the client's case. The mediator would have informed the parties on the suggested length of time for each party's opening.

After the parties speak, some mediators find it useful to set some kind of agenda for the day i.e. with the contribution of parties list what areas will need to be addressed during the mediation in order to reach a resolution. Depending on the circumstances, the mediator might then decide to continue in joint session or break for private sessions with each party.

Exploration Phase - In order for the mediator to truly identify underlying interests and assist parties to modify previously stated firm positions, time is required. Some lawyers believe that immediately after the opening phase parties should move straight to bargaining – this may not be very helpful – it is better to take the time to clarify at the exploration stage what the parties want to achieve. This stage is usually the 'caucus' or private meetings with the parties and will involve among others an opportunity to express emotions, distinguish real from apparent issues, identify each party's needs as opposed to wants and rights, uncover hidden agendas and reappraisal of risks (Best Alternative to a Negotiated Agreement [BATNA]/Worst Alternative to a Negotiated Agreement [WATNA]). The private meeting gives each party the opportunity to talk freely with the mediator about all aspects of the case having confidence in the mediator's neutrality and confidentiality of the meetings.

It is common for the mediator to set some time lines i.e. indicate how long each private session will last so that fairly equal amounts of time are spent with each party. A lawyer who understands the mediator's goals and objectives will be able to cooperate with him and with each other to the mutual benefit of the parties. It is at this stage also that the mediator tries to overcome existing barriers/obstacles to a constructive bargaining. Such barriers could be emotional (anger, hatred, suspicion, anxiety, greed etc) perceptual (how parties perceive the facts – which may be wrong and distort the overall picture), adversarial (dogmatic insistence on legal rights and duties) and positional bargaining (trying to maintain inflexibly a starting position which is wholly favourable to him).

[382] Stone, *op cit*

While the above may be regarded as negative aspects to be overcome, there are some positive issues that must be emphasised/reinforced to the parties at this stage. It includes focusing on the parties' interests' not positions, shifting from battle mode to a realisation that the dispute is their *common* problem, which needs to be jointly solved, generating options for mutual benefit and evaluating same. Parties will also discuss broadly what forms they expect resolution of the dispute to take. All these occur in private sessions, on a shuttle basis – i.e. the mediator going back and forth between the parties.

Bargaining Phase - This stage starts when parties are ready to discuss terms of settlement in details. Broad ideas mentioned at the exploratory stages are now developed in terms of actual figures, specific time lines and practical arrangements. Bargaining can be done in private meetings and indeed most often entirely so, while in other circumstances it can begin in private meetings and conclude in joint meetings. It is flexible.

Whilst most mediation sessions end with settlement, there are cases where bargaining reaches a deadlock. The mediator will use his skills to see how best to break this and help the parties continue the process.

Concluding Phase - The goal of all mediation is to achieve a negotiated agreement which satisfies the parties, deals with all the issues in dispute, is workable and minimises the possibility of future dispute. Where parties are agreed on terms of settlement, the mediator will convene a final joint session of all parties and their representatives to give effect to this agreement. Even where the mediator is a lawyer, it is the proper function of the legal representatives of the parties to draw up legally binding documents – where parties are not legally represented this role may fall on the mediator. The purpose of the settlement agreement is to have a legally enforceable contract in the event of a breach.

2.4 Essential Features of the Spectra of ADR Processes

ADR is used in contrast to litigation, among the ADR processes themselves there are even greater varieties. Some ADR processes are less adversarial than others: they have been classified into facilitative, advisory, determinative and hybrid processes distinguishable by the varied role played by the dispute resolution practitioner.[383] Most ADR scholars now prefer to refer to ADR as a process continuum where at one end stands direct negotiation with maximum party control

[383] King, M., Freiberg, A., Batagol, B., and Hyams, R.(2009) *Non-Adversarial Justice.* Sydney: The Federation Press. P.89

over the process and the outcome and at the other end, arbitration with minimum party control over the process and outcomes.[384] There are however many similarities within the continuum; that is the focus of this section. Some of the similarities include voluntariness, flexibility, confidentiality, party control or participation and collaboration.[385]

Voluntariness- The ordinary means by which parties submit their dispute to ADR is voluntary agreement. This may be before the dispute arises i.e. as part of a matrix contract or it may be by voluntary submission after the dispute has arisen.[386] This feature is still extant even where as part of a court – connected ADR programme, parties are 'mandated' to explore ADR settlement. While some have argued that mandatory ADR is a contradiction in terms, others have taken the view which in my opinion is the better view, that, the mandatory nature of court ADR where prescribed applies only to order parties to try ADR, it does not compel the parties to participate. It can be argued therefore that this is still in substantial compliance with the essential nature of ADR as a voluntary process.[387]

Flexibility: One of the hallmarks of ADR processes is its flexibility. Parties are free to design any of the existing processes to suit their interest- for example; it may modify what is ordinarily described as mediation or conciliation. On the other hand, it may adapt any of existing laws or rules to meet their expectations, or even design a process from scratch.[388] There is nothing like precedent[389] that is why some hybrid processes have evolved; for example med-arb arose from the desire of parties to try collaborative settlement while at the same time prescribing upfront that if it fails arbitration will be resorted to. Again, some practitioners are now advocating for arb-med i.e. to allow parties who are already in arbitration to mediate.[390]

Privacy/Confidentiality: Unlike litigation which is conducted in the public except in special cases,[391] the reverse is the case for ADR; the rule is that all ADR proceedings are confidential.[392]

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[384] Folberg, *op cit*, p. 5

[385] Nwaneri, A.C. 2010. An Appraisal of the ADR Processes in Nigeria. *Alternative Dispute Resolution and Some Contemporary Issues, Legal Essays in honour of Hon. Justice Ibrahim Tanko Mohammed, CON*. Ed. Aliyu, I.A. Zaria: Faculty of Law, Ahmadu Bello University. P.346 at 356-358

[386] *Ibid*

[387] In some jurisdictions, it is a fact that there are some penalties prescribed where a party fails to participate in good faith: in such cases, the ADR cannot be said to be voluntary.

[388] There are institutions that provide ADR services that have rules for different ADR processes which parties can adopt with or without modifications. Examples are the UNCITRAL Model rules for Arbitration and Conciliation, the International Chamber of Commerce ADR Rules, the London Court of International Arbitration Rules, etc.

[389] Nwaneri, *op cit*, 358

[390] See, Candide-Johnson, C.A and Shasore, O. *op cit*, pp. 230, 231

[391] See, for example, section 36(3) of the 1999 Constitution of the Federal Republic of Nigeria.

[392] See, *Gunter Henck v. Anre* 7 Co. Cie, (1970), 1 Llyods Rep. 235. Candide-Johnson and Shasore have

The confidentiality extends to the entire proceedings (i.e. statements made therein) as well as the third party neutral who facilitates or adjudicates. Thus an arbitrator or mediator cannot be called to give evidence of what transpired at the mediation or arbitration.[393] The parties are however at liberty to agree to make a part of or the whole proceedings public.

Party Control/Driven: Parties are the primary drivers of ADR process. They dominate and decide key issues, such as, how, what, where, duration and role of neutrals (if any).[394] Even in arbitration proceedings which is the most 'adjudicative ADR process, party control is still emphasised even by the regulatory statutes. For example, in the Arbitration and Conciliation Act[395] it is not uncommon to find the phrase 'unless a contrary intention is expressed therein by the parties' or 'the parties may by agreement' or 'subject to any contrary agreement by the parties.'[396] In all other ADR processes, parties are very much in control especially of the outcome – the third party neutral does not decide the dispute but facilitates settlement whether by assisting parties to communicate effectively[397] or by giving a non-binding decision which will assist the parties to negotiate a settlement.[398]

Collaborative: The basic problem in a dispute is not in conflicting positions, but in the conflict between each side's needs, desires, concerns and fears (collectively referred to as interests).[399] In ADR processes, parties are encouraged to reach a settlement of their dispute by focusing on their interests (i.e. the what, and why) of their positions (what they want).[400] Parties collaborate; focusing on their interests and future relationships to find a workable solution to their dispute in a manner that satisfies the interests of all the parties.[401] The idea is that if parties avoid sticking to their original positions and instead shift their attention to the interests underlying these positions, they can find ways of satisfying those interests. They can generate a variety of options, some of which provide higher value for both parties.[402]

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commented that in some jurisdictions like Australia and Sweden, the confidentiality requirement has been watered down holding that in the absence of an express confidentiality clause in the contract; there is no legal obligation to maintain privacy of the proceedings. *Op cit*, p.8,9

[393] Folberg, *op cit*, p. 483. See, California Civil Code 1122, 703.5 which states that mediators cannot testify at all.

[394] Nwaneri, *op cit*, p.357

[395] Cap A18, LFN, 2004

[396] See, sections 22, 24 and 28 of the Act

[397] For example mediation

[398] For example Neutral evaluation or Non-binding arbitration

[399] Fisher, R and Ury, W. (1991) *Getting to Yes: Negotiating Agreement Without Giving In.* Patton, B. Ed. 2nd ed. (New York: Penguin Books) p.40

[400] *Ibid*, p.41

[401] See, Nwaneri, *op cit*, p.357

[402] Murdock, A. & Scutt, C.N. Personal Effectiveness, (1999) in Epie, C. 'Alternative Dispute Resolution Skills:

2.5 The Rationale and Benefits of CCADR:

It is certainly interesting that one of the difficulties Pound recognised in the legal system was its adversarial and contentious nature. He specifically noted the difficulties produced by the "sporting theory of justice," and called for change. Participants in the Pound Conference also expressed this sentiment. Other benefits of institutionalisation include increased public awareness of alternatives to litigation and growing sophistication regarding appropriate alternative processes among lawyers and judges. Parties can choose the dispute resolution process that best meets their interests.[403] There is evidence that ADR options can lead to more efficient use of resources by the courts, savings of time and money by litigants, and reduced levels of subsequent litigation. Mediation in particular enjoys consistently high satisfaction rates by participants.[404]

Both litigation and settlement are worthy of celebration, and both are worthy of critical examination. Litigation and settlement do not merely co-exist. Instead, litigation and settlement have come to depend on each other in order to function properly.[405] The rules of civil procedure contemplate, and even encourage, settlement behavior at virtually every stage of litigation. Similarly, the prospect of litigation today shapes both settlement outcomes and settlement behaviours.[406] It may therefore not be possible to be wholly "for" one and "against" the other, given these intersections.

Although CCADR processes vary greatly, they share some common elements. CCADR is intended to: relieve each attorney from being the one to initiate settlement discussions, provide stimulus or requirement for attorneys to explore settlement early, promote or require involvement of key decision makers, use attorneys as neutrals to augment judicial resources, provide more flexibility than formal adjudication and avoid involving the judge who will preside at trial if there is no settlement.[407]

Understanding the Problem Solving (Win/Win) Approach in Negotiations', in *Legal Practice Skills & Ethics in Nigeria*, Nwosu, K.N. ed. 2004, DCONconsulting, Lagos, p.439@447.

[403] Senft, L.P. and Savage, C.A. ADR in the Courts: Progress, Problems, and Possibilities Summer, 2003, 108 *Penn St. L. Rev.* 327

[404] *Ibid*

[405] Moffitt, M. (2009). Three Things to Be Against ('Settlement' Not Included) *Fordham Law Review.* P.3

[406] *Ibid*

[407] Folberg, *op cit* p.8-9

2.6 Justification and Challenges of Integrating ADR into the Court System

The features, rationale/benefits of CCADR have been discussed earlier in this chapter. Those are some of the justification for CCADR. In addition, there can be little doubt that court-connected mediation has been successful in achieving widespread institutionalisation in the nation's courts. But widespread institutionalisation alone does not constitute success.[408] Instead, pronouncements of success should be grounded in the achievement of goals that enable institutions to better fulfill their missions. Therefore, policy makers considering the adoption of alternative processes must first answer questions such as: what are the core missions of the institutions that will use these processes? What improvements are to be achieved through the institutionalisation of new, alternative processes? At what points could the institutionalisation of new, alternative processes actually threaten an institution's ability to fulfil its core mission? How can the potential improvements and threats be measured? what monitoring and evaluation mechanisms will be put in place to take these measurements and who will be responsible for taking responsive action and how can such action be ensured?[409]

2.6.1 Justification for CCADR

The features, rationale/benefits of CCADR have been discussed earlier in this chapter. These are the justification for CCADR. In addition, evidence suggests that ADR options can lead to more efficient use of resources by the courts, savings of time and money by litigants, and reduced levels of subsequent litigation. Mediation in particular enjoys consistently high satisfaction rates by participants.[410] There is also evidence that ADR options have increased the public's trust and confidence in the courts.[411] Through mandatory referrals to ADR by the courts, the public has become more aware of alternatives to litigation. Each and every party and lawyer involved in the increasing number of cases referred to mediation by the courts

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[408] McAdoo, B and Welsh, N.A.(2004) The Lawyer's Role(s) in Deliberative Democracy: A Commentary by and Responses to Professor Carrie Menkel-Meadow: Look Before You Leap and Keep on Looking: Lessons from the Institutionalisation of Court-Connected Mediation. *Winter, 2004, 5 Nevada. Law .Journal.* 399

[409] *Ibid*

[410] Shack, J.E. *Saves What? A Survey of Pace, Cost, and Satisfaction Studies of Court-Related Mediation Programs*, Paper Presented to the Mini-Conference on Court ADR 2 (April 4, 2002)

[411] Brazil, W.D. Court ADR 25 Years After Pound: Have We Found a Better Way?, 18 *Ohio St. J. on Disp. Resol.* 93 (2002). See also, Roselle Wissler, Court-Connected Mediation in General Civil Cases: What We Know from Empirical Research, 17 *Ohio St. J. on Disp. Resol.* 641 (2002); see generally, Della Noce, *et al.*, Assimilative, Autonomous, or Synergistic Visions: How Mediation Programs in Florida Address the Dilemma of Court Connection, 3 *Pepp. Disp. Resol. L.J.* 1, 13 (2003).

now knows of at least one alternative to trial, and many of them have first-hand knowledge through participation in that ADR process.[412]

2.6.2 The Challenges of CCADR

Along with the proponents of ADR, there are a substantial number of critics who question whether alternative dispute resolution provides better justice than the civil justice system. Critics contend that while the expansion of ADR has given some an opportunity to resolve their disputes in an inexpensive fashion, some uses of ADR have proven to be a tool to disenfranchise vulnerable parties. Courts occasionally have refused to enforce the results of ADR proceedings that were as one-sided or unfair as to be unconscionable or inconsistent with fundamental due process. The challenge today is to determine which types of procedures are appropriate for different types of disputes and to design informal procedures that retain the essential attributes of due process that our civil justice has developed over the past many hundreds of years.[413]

Some scholars have identified institutionalisation as one of the dangers ahead of ADR. Comparing ADR to equity, it is argued that annexing ADR into the court system will take away its essential features of flexibility and individualised justice. According to Main, for centuries the Anglo-American legal system administered justice through the systems of Law and Equity. The Law courts ensured uniformity and predictability, while courts in Equity tempered the law to the needs of the particular case. Although there was considerable tension between the two regimes, they were also symbiotic. Over time the Law courts adopted many of the best practices of Equity.[414]

Meanwhile, efforts to crystallize the jurisdiction of Equity introduced complexity and procedural technicalities that turned that system into a *jus strictum* differing little from the Common Law. With each system looking increasingly like the other, Law and Equity were merged into a single system in a wave of reforms in the late nineteenth and early twentieth centuries. The reformers envisioned a unified procedural apparatus that would permit judges to jointly administer the substance of both law and equity. However, an important ingredient of the jurisprudence of Equity was displaced by the procedural merger: a merged system offered no recourse from the procedural apparatus itself when the unique needs of a particular

[412] *Ibid*
[413] Stone, *op cit*
[414] Main, T.O. (2005). ADR: The New Equity *University of Cincinnati Law Review*. Vol. 74:329

case demanded a different procedure. Moreover, the substance of equity lost much of its vitality in the merged system.[415] The system of ADR stands in this breach created by the merger of Law and Equity.

ADR offers an alternative system for relief from the hardship created by the substantive and procedural law of formal adjudication. Moreover, the freedom, elasticity, and luminance of ADR bear a striking resemblance to traditional Equity, offering relaxed rules of evidence and procedure, tailored remedies, a simpler and less legalistic structure, improved access to justice, and a casual relationship with the substantive law. Alas, the dark side of ADR is also reminiscent of Equity: unaccountability, secrecy, an inability to extend its jurisdictional reach beyond the parties immediately before it, and certain vulnerability to capture by special interests.[416] The reincarnation of equity through ADR illustrates a pervasive dialectic between law and equity. Conflict between the goals of certainty and individual justice has created an ambivalent attitude in the law toward equity, to which the law is attracted by reason of the identification of equity with a general sense of justice, but which the law ultimately rejects because of the law's concern for certainty. Hence, a vibrant system of Equity mediated the strict law until it, too, became bound and confined by the channels of its own precedents and the technicalities of its own procedures. ADR emerged, in turn, as the equitable alternative. And the pattern repeats: the remarkable popularity of ADR leads inevitably, albeit ironically, to reforms that would constrain that very system.[417]

Nolan-Haley also shares the same view. She compares mediation, one of the more common ADR process (though it can apply to all the others) to equity and highlights the dangers of merging law and equity. In her view, there are historic parallels between mediation and equity that are relevant in shaping our present ideas about justice. Mediation, like equity, was conceived of as justice without law. Mediation she says further, also offers the possibility of individualised justice, which may be in tension with strict legal justice. Just as equity moderated the rigidity of the common law by integrating fairness and moral values into the judicial process, mediation offers fair alternatives to legal values and judicial decision-making.[418] Though scholars may disagree on the meaning of fairness in mediation, substantive and procedural fairness remain its primary and enduring values. Numerous professional codes require mediators to insure that agreements are fair according to

[415] *Ibid*
[416] *Ibid*
[417] *Ibid*
[418] *Ibid*

prevailing social standards. Scholars have suggested ways of promoting fairness in mediation, and parties participating in mediation express satisfaction with such fairness in the process. Finally, just as equity offered relief from harsh pleading and procedural rules that operated to deny disputants justice in the common law courts, mediation offers relief from the rigidity of a rules-bound justice system. It provides opportunities for individualized justice through the exercise of party self-determination and the expression of dignitary values.

While we may differ on the extent to which self-determination is over-valued and the extent to which procedural justice is undervalued in current versions of court mediation practice, these principles nonetheless support a framework for the realisation of individualised justice in mediation. The profile of mediation that emerges from what I have described as the *de-facto* merger of law and mediation in the formal legal system is a departure from the traditional understanding of mediation as a relational process. This departure diminishes the potential for achieving individualised justice.[419] She also refers to another aspect of mediation "decadence" relating to the uniqueness of mediation as a dispute resolution process.

Mediation offers a distinctive conception of justice that is, like equity, the face of mercy. As a process, it has the capacity to acknowledge the emotional, psychological, and spiritual needs of parties, including the need to reconcile, to forgive, and to be forgiven. This aspect of individualised justice is in danger of being lost as mediation becomes a predominantly rule-bound process so blended in the legal system that its relational underpinnings evaporate. With the demise of the relational emphasis in mediation, apology and forgiveness become merely perfunctory actions. As scholars have argued in other settings, the possibility of apology and reconciliation are "cheap grace" without relational understandings. Her final "decadence" inquiry looked to the past.

Historically, there have been costs associated with blending mercy and justice, not the least of which is that something tends to be lost in the process. In the case of equity, the fair and "equitable" became consumed by rules. In the case of mediation, the fair and relational are consumed by rules and by an instrumentalist conception that views mediation simply as an efficient tool in the administration of justice, devoid of the intrinsic values that brought it to

[419] *Ibid*

court in the first place.[420] One of the leading critics of court-annexed ADR is also one of the key proponents of the use of ADR.

The former Chief Justice of the New South Wales Supreme Court, Sir Laurence Street has argued that because of the sovereign nature of the judiciary, that is, the judiciary's exclusive right to decide cases, ADR cannot form an alternative system of dispute resolution.[421] He comments that 'we cannot, for example, countenance any alternative parliament or legislature; we may provide, and, indeed, we do provide, additional or delegated mechanisms whereby to legislate or regulate. . . And so it is with the judicial branch of government, the court system; we recognise the need for, and we provide, additional mechanisms to assist the court system in the fulfillment of its sovereign dispute-resolving function. But these mechanisms are not, and cannot be recognised as alternative, in the true sense of the word, to the court system.[422]

In noting that the role of the court system is to decide cases by applying the rule of law, Sir Laurence suggested that judges should not be called upon to solve every dispute between citizens. Sir Laurence raised a number of important issues: the fact that the judiciary has a sovereign quality about it that means its sole role is to decide cases; in deciding cases, the judiciary is the custodian of the rule of law and must decide cases by applying it. ADR does not involve the process of applying the law. By virtue of the aforementioned point, ADR should not be an alternative to the application of the rule of law[423]

When the public system of justice no longer functions effectively, there are powerful incentives to create private systems of justice. Private systems of justice, which today often are referred to as Alternative Dispute Resolution (ADR) procedures; hold a strong attraction, particularly when compared with a decrepit public court system.[424] Nevertheless, "justice" is an inherently public activity, as this analysis is designed to demonstrate. Because of the fundamentally public nature of the justice to be administered, a system of private justice worthy of the name must substantially replicate important characteristics of the public system**.**

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[420] *Ibid*
[421] Reviewed extensively in Spencer, D. Mandatory Mediation and Neutral Evaluation: A Reality in New South Wales. Available at http://ssrn.com/abstract=1262094
[422] *Ibid*
[423] *Ibid*
[424] Hazard, C. Jr. and Scott, P.D. The Public Nature of Private Adjudication *Yale Law & Policy Review*, Vol. 6, No. 1 (1988), pp. 42-60 available@: http://www.jstor.org/stable/40239272. Accessed: 08/02/2010 12:36

Worries about court-linked schemes of 'alternative dispute resolution' have been widely articulated, notably in North America. These falls into two broad categories: those anticipating that general harm will come to the polity if the integrity of adjudication is damaged through judges' involvement with ADR; and those forecasting that disadvantage will be suffered by individual litigants or particular classes of litigant if judicial authority is lent to informal processes.[425]

Looking at the first of these worries, the argument is that judicial authority can be compromised if judges involve themselves, or even are perceived by the public to be involved in, the sponsorship of settlement through the management of negotiations. Historically, common law judges have presented themselves as remote, authoritative superiors with a rather narrow function in hearing argument and then formulating and imposing a decision. They have not on the whole become involved in the management of negotiations, or shown much eagerness to sponsor settlement. The authority which courts necessarily enjoy in the context of adjudication could be weakened if roles become blurred through judges being drawn into managerial activity and they' strive to encourage settlement.[426]

The contemporary experiments in English courts with threshold procedures directed towards achieving settlement potentially compromise the integrity of adjudication. Whether this harm is realised will depend upon the direction in which these novel procedures develop. If they crystallise into a distinct, relatively autonomous phase in litigation, prior to 'the trial,' in which specialist personnel attempt to orchestrate settlement at a distance from the court, the compromise of judicial authority seems unlikely. But the harm envisaged may well materialise if these procedures become an integral part of the trial, with court personnel actively involved in the pursuit of settlement.[427]

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[425] Roberts, S. Alternative Dispute Resolution and Civil Justice: An Unresolved Relationship. *The Modern Law Review, Vol. 56, No. 3, Dispute Resolution. Civil Justice and Its Alternatives (May, 1993), pp. 452-470* www.jstor.org/stable/1096678. Accessed: 08/02/2010 12:32

[426] *Ibid*. There is a specific problem where the form of settlement-directed intervention involves the judge seeking to act as a mediator when a dispute first comes before the court. Facilitatory mediation demands a posture of the intervener, and a relationship between the intervener and disputants, quite different from those prevailing where the third party is authorised to make an imposed decision. It remains unclear whether it is feasible to shift back and forward between these two roles, even if it is understood that no intervener may exercise more than one role in a particular dispute. See also: *A Handbook of Dispute Resolution: ADR in Action.* (1993). London: Routledge. p 281.

[427] ibid

There are other concerns in particular with regard to the courts' use of mediation. The definition of what process is being provided is unclear. While what is being called "mediation" in the courts may encompass the interest-based, problem-solving, or relational approaches, which mediation advocates envisioned fifteen or twenty years ago, the combination of increased participation by lawyers and the close connection with litigation of court-referred mediation cases is leading to the increased "legalisation" of mediation.[428] Court referred clients often believe the desired outcome that propelled them to court initially will be met. Their misplaced assumptions about the type of process being ordered and the degree of court oversight can lead to disappointment with the process, the outcome, and the courts in general. Similar disappointment can result if promises that mediation is "faster, cheaper, and better" are not met. Perhaps most dangerous, the blurring of boundaries in the court's roles can lead to confusion and leave room for the possibility of coercion.[429]

Another primary goal for courts in offering mediation and supporting mediation programs is efficiency.[430] Related to that goal of efficiency is how the courts can best utilise their limited resources to most expeditiously and fairly dispose of cases on their docket. Efficiency is a strong motivator for promoting processes that increase the numbers of settlements before trial. An unbridled focus on short-term efficiency, however, can have harmful results for litigants and for society. Most notably, short-term efficiency can breed lack of quality and the use of various coercive tactics to effectuate settlement. Coercion in social institutions leads to disrespect of such institutions, malcontent, and erosion of democratic ideals.[431]

There is another troubling double bind that mediation in the courts presents. When the courts mandate mediation as part of the court experience, litigants believe someone is going to protect their rights. Often this someone, in the eyes of the litigants, is the mediator, regardless of whether or not the litigants are represented. As a result, litigants often tend to take a more passive role in the court-ordered mediation process. When the mediator appropriately refuses to be judgmental and appropriately refuses to take a side, this confuses the litigants.[432]

Many court-connected or court-annexed mediation programs rely on rosters of mediators or sub-contract for their mediation services with outside provider organisations. Requirements

[428] Senft, L.P. and Savage, C.A., *op cit*
[429] *Ibid*
[430] Thoennes, N. (2002) Mediating Disputes Including Parenting Time and Responsibilities in Colorado's 10th Judicial District: Assessing the Benefits to Courts. *Center for Policy Research*
[431] Senft, *op cit*
[432] *Ibid*

for being approved for many court rosters are minimal. Forty or sixty hours of mediation training and observations of two or three mediation sessions, do not, in and of themselves, ensure that a person could be relied upon to mediate competently and consistently. At this time, most courts have few means in place for knowing a mediator's mediation skills and/or for knowing if the rostered or otherwise approved mediator is mediating or conducting an ADR or traditional settlement conference. Mediator rosters and subcontracts with various mediator providers may give court mediation administrators a false sense of security and may give mediation consumers such as attorneys and litigants widely inconsistent experiences.[433]

Using mediation as a guide, Carrington identifies at least four problems of CCADR. The first is that a court connected mediator has no means to induce settlement between parties who did not choose to mediate.[434] Secondly, because of the importance of the mediator, court ordered mediation invites abuse by an aggressive party. This can occur because the worth of a mediator to the court is measured by his or ability to bring the parties together.[435] Third is that the prospect that official mediation may actually delay settlement in some cases – i.e. in some cases parties otherwise inclined to accept a settlement offer will await a scheduled mediation conference to see if it improves their bargaining position.[436] Fourth is the question of who will bear the costs of administering court annexed mediation – a cost traditionally borne by private parties.[437]

2.7 Summary

It is not possible to turn back the clock, nor would it be in the interest of the public and the courts to do so. What is in the interest of the public and the courts is to note the benefits resulting from the institutionalisation of ADR in the courts, explore the problems that have arisen in connection with the courts' administration of and embrace of mediation in particular, and propose some possibilities for addressing some of these problems.[438]

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[433] *Ibid*
[434]Carrington, P. D. ADR and Future Adjudication: A Primer on Dispute Resolution. 1996 Vol. 15. *The Review of Litigation*, p.484
[435] *Ibid*, p.494
[436] *Ibid*
[437] *Ibid*, p.495
[438] Senft, L.P. and Savage, C.A. ADR in the Courts: Progress, Problems, and Possibilities Summer, 2003, 108 Penn St. L. Rev. 327

CHAPTER THREE

A REVIEW OF COURT CONNECTED ADR IN THE UNITED STATES OF AMERICA AND THE UNITED KINGDOM

3. Introduction

There are at least three different kinds of reform motivating contemporary ADR – which consciously seek to liberate certain personal or institutional relationships from what they perceive to be the oppressions of law. [439] Others have a desire to enforce the law, but with less or no involvement of fully trained professional, adversary lawyers. Still others intend to engage the services of fully trained lawyers, but hope to economise on the amount of their services employed by abbreviating, simplifying or bypassing formal procedures.[440]

There are different ways of integrating court connected ADR into the civil system of justice depending on what is prescribed in the particular legislation. Different jurisdictions also adopt different models. In this chapter, the different models adopted by the Federal and State courts in the United States as well as the High courts and County courts in England will be examined. Each jurisdiction will have to determine whether, when, and how to integrate ADR into the litigation process. Options range from leaving ADR outside the court system and making it entirely voluntary, to integrating it into trial procedures and mandating that the parties participate prior to trial.[441] A review of empirical studies on the efficacy or otherwise of CCADR in these two jurisdictions will also be undertaken.

3.1 CCADR Practice and Procedure in the United States of America

The United States being a Federation operates different models both at the federal and State levels. Under the U.S Constitution, the judiciary has the authority to decide the constitutionality of federal laws and other disputes.[442] The District courts are the trial courts of the Federal Court

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[439] Carrington, P.D. (1995-1996) ADR and Future Adjudication: A Primer on Dispute Resolution. 15 *Rev. Litig.*485 accessed through Heinonline on 9/10/10

[440] ibid

[441] Sherman, E.F. (Jul., 1994), A Process Model and Agenda for Civil Justice Reforms in the States. *Stanford Law Review*, Vol. 46, No. 6 pp. 1553-1587.http://www.jstor.org/stable/1229165 Accessed: 25/02/2010 16:33

[442] http//www.uscourts.gov/FederalCourts/UnderstandingtheFederalCourts/FederalCourtsInAmericanGovernment.aspx, accessed 20/8/2012

system and they have jurisdiction to hear almost all category of federal cases.[443] Some of the more common models are discussed below.

3.1.1 The Federal CCADR Programme

In 1978, Congress authorised the creation of the first three federal district court-annexed arbitration programmes.[444] The programmes required parties to participate in a mandatory non-binding court-annexed arbitration ("CAA") hearing as a precondition to obtaining a trial. The programmes received strong support from then Attorney-General Griffin Bell, who believed that compulsory court-annexed arbitration programmes would 'broaden access for the American people to their justice system and . . . provide mechanisms that will permit the expeditious resolution of disputes at a reasonable cost.'[445] In 1985, Congress funded eight additional CAA pilot programmes.[446] In 1988, it authorised continued experimentation with mandatory CAA[447] and provided funding for ten voluntary CAA pilot programmes.[448] The Judicial Improvements and Access to Justice Act[449] sets out the basic structure of federal CAA programmes, but gives each district the authority to adopt local rules specifying important programme features.[450] Suits for predominantly money damages that fall below a particular amount in controversy, which, depending on the district, ranges from $ 50,000 to $ 150,000 and do not involve federal constitutional claims or conspiracies to interfere with civil rights, must be submitted to non-binding arbitration before a trial can be requested.[451] In some districts, the parties or the trial judge may make a motion to exempt the case from arbitration where "the objectives of arbitration would not be realised (1) because the case involves complex or novel legal issues, (2) because legal issues predominate over factual

[443] http//www.uscourts.gov/FederalCourts/UnderstandingtheFederalCourts/FederalCourtsStructure.aspx, accessed 20/8/2012

[444] Bernstein, L.(1993) Understanding the Limits of Court-Connected ADR: A Critique of Federal Court-Annexed Arbitration Programs. 141 *University of Pennsylvania Law Review*, P. 2169. The three districts were the Eastern District of Pennsylvania, the Northern District of California, and the District of Connecticut. The District of Connecticut discontinued its programme in 1982, citing disproportionate administrative costs. However, it continues to experiment with other forms of ADR such as "using special masters to facilitate settlement, binding and non-binding mediation and mini-trials, judicially supervised settlement conferences, and summary jury trials."

[445] Statement of Griffin B. Bell, U.S.Attorney General at the Court-Annexed Arbitration Act of 1978: Hearings on S.2253 before the Sub-committee on Improvements in Judicial Machinery of the Senate Comm. on the Judiciary, 95th Cong., 2d. Session 21,(1978).

[446] Meierhoefr, B.S. (1990) Court-annexed Arbitration in Ten District Courts, Federal Judicial Centre, P.14

[447] See, 28 U.S.C. $ 651(a) (1988).

[448] See, 28 U.S.C $ 658.

[449] Public Law. No. 100-702, 1988 U.S.C.C.A.N (102 Stat.) 4642 (codified as amended in scattered sections of 28 U.S.C.).

[450] See, 28 U.S.C. $ 651, 1988 U.S.C.C.A.N. (102 Stat.) at 4659 (codified at 28 U.S.C. $ 651 (1988))

[451] See, 28 U.S.C. $ 652 (1988).

issues, or (3) for other good cause.'[452] In most districts the maximum amount in controversy is a jurisdictional limit, not a cap on the damages an arbitrator can award.[453]

Hearings are conducted by either a single arbitrator or a panel of three arbitrators chosen from a volunteer pool of lawyers.[454] Hearings take place 80 to 180 days after the filing of the answer and decisions are rendered shortly thereafter.[455] In some districts, hearings are open to the public, in others, they are closed.[456] The amount of pre-arbitration discovery permitted[457] and the types of pre-trial motions decided prior to the hearing are governed by local rules, subject to certain constraints imposed by Congress.[458]

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[452] 28 U.S.C. $ 652(c); see also, W.D. OKLA. LOC. CT. R. 43(E). This rule is typical of most programs. The Middle District of North Carolina also provides for an exemption when "mandatory arbitration will not likely accomplish the purpose of these rules." M.D.N.C. LOC. CT. R. 602(b). The most common ground for requesting exemption, however, is that the amount in controversy exceeds the jurisdictional limit.

[453] See, for example, D.N.J. LOC. CT. R. 47(C)(4), which provides that the arbitrator can award more than the $ 100,000 jurisdictional limit as well as punitive damages. Similarly, neither the Northern District of California nor the Middle District of Florida imposes a limit on the amount the arbitrator can award.

[454] In some districts the clerk's office chooses the arbitrators. In others, the parties participate in their selection. See, M.D. FLA. LOC. CT. R. 8.03(a) (giving the parties 20 days to select, by agreement, "not more than three certified arbitrators," and noting that if they fail to do so the selection is made by the clerk's office); M.D.N.C. LOC. CT. R. 603(a)(4) (giving the parties 15 days to "select an arbitrator from the list of arbitrators maintained by the clerk . . . or [allowing them to] select any other person, whether or not an attorney, on the basis of that person's expertise or experience").

[455] Although not all districts have a rule specifying the length of time an arbitrator has to render a judgment, the emphasis of the programmes is on speed. For example, Congress directs the arbitrators to file their awards "promptly after the arbitration hearing is concluded." See 28 U.S.C. $ 654(a) (1988). The Western District of Michigan provides that "[t]he arbitrator shall endeavour to announce the award to the parties immediately upon conclusion of the hearing, but in any event shall file the award . . . not more than ten . . . days following the close of the hearing." W.D. MICH. LOC. CT. R. 43(i)(1); see also, W.D. OKLA. LOC. CT. R. 43(O)(1) (same).

[456] All of the local district court rules dealing with the CAA pilot programs are silent on the question of whether or not non-parties have a right to attend arbitration hearings. However, most districts have an informal policy regarding access to arbitration hearings. In the Eastern District of Pennsylvania, the Middle District of North Carolina, and the Eastern District of New York, where the CAA programme is viewed as an alternative to a trial rather than as a settlement device. See, Barbara Meierhoefer, *op cit*

[457] All CAA programmes seek to reduce litigant costs by limiting pre-arbitration discovery in some way -- most commonly by imposing strict discovery deadlines. See for example, E.D. PA. LOC. CT. R. 8(4)(A) (stating that parties have "(90) days . . . from the date the answer was filed to complete discovery unless the judge to whom the case has been assigned orders a shorter or longer period"); M.D. FLA. LOC. CT. R. 8.03(a), 8.04(a) (noting that parties have 20 days to choose an arbitrator, and if they fail to agree, the clerk selects one, with the hearing held within 90 days thereafter); M.D.N.C. LOC. CT. R. 603(a)(3), (d) (establishing "a 90 day deadline for the conduct of discovery which must be completed in a diligent and expeditious fashion"); N.D. CAL. LOC. CT. R. 500(5)(a) (providing that the arbitration hearing must be held 20 to 120 days after referral to the program); W.D. MICH. LOC. CT. R. 43(g) (limiting discovery to "one hundred and twenty . . . days from and after the last responsive pleading"); W.D. MO. LOC. CT. R. 30(E)(1) (stating that both parties have 120 days to complete discovery and cautioning that the standards for granting an extension of this period are very strict); W.D. OKLA. LOC. CT. R. 43(G)(1), (4) (attempting to limit discovery more directly by providing that only "[c]ritical discovery necessary for purposes of meeting the goals of an arbitration hearing shall be completed prior to the hearing," which is normally held "prior to the discovery cut-off date scheduled for the trial case"); W.D. TEX. LOC. CT. R. CV-87(f)(1) (providing that the "hearing shall begin no later than sixty (60) days after the filing of an answer"). Two jurisdictions also have rules limiting post-arbitration discovery. M.D.N.C. LOC. CT. R. 603(d) provides that "[e]xcept in exceptional circumstances, no additional discovery will be permitted when a trial de novo has been demanded after an arbitration award." Combined with the district's 90-day deadline for the conduct of discovery, the CAA programme appears to be largely a discovery control tool. See, M.D.N.C.

At the arbitration hearing, the Federal Rules of Evidence do not apply.[459] Arbitrators may permit the introduction of any credible non-privileged evidence, including hearsay. The arbitrators are not required to issue written or oral findings of fact or conclusions of law, and at least one district prohibits them from doing so.[460] A few districts encourage live testimony, while others discourage it, providing by local rule that "the presentation of testimony shall be kept to a minimum, and that cases shall be presented to the arbitrators primarily through the statements and arguments of Counsel."[461] One district bans live testimony altogether and requires that "[a]ll evidence shall be presented through counsel who may incorporate argument on such evidence in his or her presentation." Some programs limit the length of the hearing.[462]

Good faith participation in the arbitration hearing is required of both the parties and their counsel.[463] Most districts require parties to be present at the hearing,[464] and some districts

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LOC. CT. R. 603(a)(3); see also, W.D. MO. LOC. CT. R. 30(K)(1) (stating that post-arbitration discovery is only permitted on motion accompanied by a very specific statement of what is sought and a proposed scheduling order).

[458] See, 28 U.S.C. § 653(b) (1988). The statute provides: [a]n arbitration hearing under this chapter shall begin within a time period specified by the district court, but in no event later than 180 days after the filing of an answer, except that the arbitration proceeding shall not, in the absence of the consent of the parties, commence until 30 days after the disposition by the district court of any motion to dismiss the complaint, motion for judgment on the pleadings, motion to join necessary parties, or motion for summary judgment, if the motion was filed during a time period specified by the district court. The 180-day and 30-day periods specified in the preceding sentence may be modified by the court for good cause shown.

[459] See, *e.g.*, M.D.N.C. LOC. ARB. R. 606(g) ("The arbitrator shall weigh all evidence presented upon assessment of its relevance and trustworthiness. The Federal Rules of Evidence shall not apply, except for rules concerning privilege or protection."); see also, N.D. CAL. LOC. CT. R. 500(5)(c) ("[T]he arbitrator shall be guided by the Federal Rules of Evidence, but shall not thereby be precluded from receiving evidence which he considers to be relevant and trustworthy and is not privileged."); W.D. TEX. LOC. CT. R. CV-87(f)(4)(a) (same).

[460] See, *e.g.*, W.D. TEX. LOC. CT. R. CV-87(g)(2) (providing that the award need only "state clearly and concisely the name or names of the prevailing party or parties and the party or parties against which it is rendered, and the precise amount of money or other relief, if any, awarded").

[461] See, for example, N.D. CAL. LOC. CT. R. 500(5)(c) (noting that "attendance of witnesses may be compelled"). M.D. FLA. LOC. CT. R. 8.04(d); see also, W.D. MICH. LOC. CT. R. 43(h)(5) (providing that although witnesses may testify, "[i]t is contemplated that presentations will be made in summary fashion"); W.D. MO. LOC. CT. R. 30(H)(5) (providing that "[t]he presentation of testimony should be kept to a minimum").

[462] See, W.D. MICH. LOC. CT. R. 43(h)(5) (providing that "[e]ach party shall be allowed a maximum of 2 $^{1/2}$ hours for the presentation of its case"); W.D. OKLA. LOC. CT. R. 43(I)(2) (giving each side one hour to present its case).

[463] See, W.D. OKLA. LOC. CT. R. 43(I)(2) (providing that "failure to participate in good faith may constitute default"); D.N.J. LOC. CT. R. 47(E)(3) (giving the judge the right to impose sanctions for failure to meaningfully participate in the arbitration hearing); E.D. PA. LOC. CT. R. 8(E) ("In the event, however, that a party fails to participate in the trial [before the arbitrators] in a meaningful manner, the court may impose additional sanctions, including but not limited to the striking of any demand for a trial de novo by that party."); W.D. MO. LOC. CT. R. 30(L) ("If a party fails to participate in the arbitration process in a meaningful fashion, the Court may impose appropriate sanctions, including but not limited to an entry of judgment by the Court upon the arbitrators' award.").

[464] See, for example, M.D. FLA. LOC. R. 8.04(d) ("Individual parties or authorised representatives of corporate parties shall attend the arbitration hearing unless excused in advance by the arbitrators for good cause shown.");

require the presence of a person with full settlement authority.[465] Although the authority of the court to order a person with settlement authority to be present at an arbitration hearing has yet to be definitively established, a panel of the Seventh Circuit has upheld a district judge's authority to order a person with full settlement authority to be present at a settlement conference.[466] In some districts, if either the non-attendance of a party or the preparation and presentation of counsel is deemed not to constitute "participation in a meaningful way" in the arbitration process, the court can impose monetary sanctions and/or strike a party's demand for a trial *de novo* ("trial"). The court's authority to strike a party's demand for a trial has been upheld by several district courts,[467] but has not yet been considered by any court of appeals.

After the arbitrator has rendered an award, which may, depending on the local rule, include costs, each party has thirty days to request a trial.[468] When a party requests a trial, the case is restored to its original place on the docket and treated as if it had never been arbitrated; neither the record of the hearing, if made, nor the arbitrator's decision are admissible at

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M.D.N.C. LOC. CT. R. 606(f) (requiring parties to be present at the arbitration hearing unless excused in "exceptional circumstances").

[465] See, for example, W.D. MICH. LOC. CT. R. 43(h)(4) ("Each individual who is a party shall attend the hearing in person. Each party which is a corporation, governmental body, or other entity, including an unnamed party, shall be represented at the hearing by an officer or other person with complete settlement authority."); W.D. OKLA. LOC. CT. R. 43(I)(1)-(2) ("In addition to lead counsel . . . a person with actual settlement authority must . . . be present for the hearing. This may not be counsel (except in-house [sic] counsel). . . . Other interested parties such as insurers or indemnifiers shall attend and are subject to the provisions of this Rule.").

[466] See, G. *Heileman Brewing Co. v. Joseph Oat Corp.*, 848 F.2d 1415 (7th Cir. 1988) (en banc); see also *Lockhart v. Patel*, 115 F.R.D. 44, 46, 47 (E.D. Ky. 1987) (discussing, in an opinion filed after the case had been settled, the court's authority to strike the defendant's pleadings as a sanction for failing to obey an order that a person with full settlement authority attend a settlement conference and concluding that the authority existed, since the "exigencies of modern dockets demand the adoption of novel and imaginative means [such as] . . . compulsory arbitration, summary jury trials, imposing reasonable limits on trial time, or, as here, the relatively innocuous device of requiring a settlement conference [to be] attended by the clients as well as the attorneys").

[467] See, for example, *New England Merchants Nat'l Bank v. Hughes*, 556 F. Supp. 712 (E.D. Pa. 1983), where the court struck the defendant's request for a trial after concluding that (1) the defendant received notice of the arbitration hearing, (2) the defendant never requested a continuance, (3) neither the defendant nor counsel nor any witnesses on her behalf appeared at the arbitration hearing, (4) defendant gave no reason for her failure to appear, and, in contrast, (5) the plaintiff appeared at the hearing, presented evidence, and was awarded a recovery. In *Block v. T.G.& Y Stores Co.*, No. 87-0490-CV-W-9, 1989 U.S. Dist. WL 23202, at * 1 (W.D. Mo. Feb. 22, 1989), the court struck the defendant's request for a trial on the grounds that he had failed to meaningfully participate in the arbitration hearing. The court noted that "[w]ithout an enforceable requirement that litigants participate meaningfully in the arbitration process, the goals of the arbitration program are threatened. . . . Essentially, arbitration would be a default proceeding, a meaningless proceeding preparatory to a district court trial." Similarly, in *Gilling v. Eastern Airlines*, 680 F. Supp. 169 (D.N.J. 1988), the court imposed sanctions on a corporate defendant litigating against an individual plaintiff for failure to participate in a CAA hearing in good faith. It noted that the purposes [of the program] are thwarted when a party to the arbitration enters into it with the intention from the outset of rejecting its outcome and demanding a trial de novo. Rather than reducing the cost and promoting efficiency in the system, such an attitude increases the costs and reduces the efficiency. Furthermore, such conduct can serve to discourage the poorer litigant and diminish his or her resolve to proceed to final judgment.

[468] See, 28 U.S.C. § 655(a), (1988).

trial.[469] In the pilot districts, trial *de novo* request rates range from forty-six to seventy-four percent of arbitrated cases. Some districts have disincentives to requesting a trial. Most districts require the party requesting a trial to post a bond with the court in the amount of the arbitrators' fees and costs which, depending on the district and the number of arbitrators, can range from $ 125 to $ 450 for the typical case. Although complex cases often cost substantially more to arbitrate, most districts put a cap on the amount of the bond a party can be required to post in order to obtain a trial.[470] If the party requesting the trial improves his position at trial, this bond is returned to him; if he fails to do so, it is retained by the court.[471]

In the past, some districts had a rule requiring the party requesting a trial to pay his opponent's post-arbitration attorneys' fees and/or costs if he failed to improve his position at trial.[472] The authority of courts to enact such local rules in the absence of congressional authorisation was a question of some dispute. In 1988, Congress decided that pending further study by the Federal Courts Study Committee, such provisions should not be part of the pilot programmes.[473] However, in its 1990 report, the Committee recommended that Congress authorise the pilot districts to experiment with fee and cost-shifting provisions,[474] common features of many state CAA programmes.[475]

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[469] No public record of the arbitration is made, but most programs permit a party to make a record at his own expense if it is done in an unobtrusive manner and a copy is provided to his opponent free of charge. See, for example, M.D.N.C. LOC. CT. R. 606(c); N.D. CAL. LOC. CT. R. 500(5)(d); W.D. MICH. LOC. CT. R. 43(a)(6); W.D. OKLA. LOC. CT. R. 43(5); W.D. TEX. LOC. CT. R. CV-87(f)(5).

[470] For example, in the Middle District of North Carolina, $800 is the maximum bond that can be required. See, M.D.N.C. LOC. CT. R. 604(d) (describing the calculation of the maximum permissible arbitration fees and costs); see also E.D. PA. LOC. CT. R. 8(7)(E) (setting the maximum bond at $ 75 per arbitrator).

[471] See, Meierhoefer, CAA in Ten District Courts, *op cit* at 40 Table. 3I (summarizing the disincentives to requesting a trial de novo). In some districts, the court retains the authority to return the bond if the trial was requested "for good cause." 28 U.S.C. § 655(2)(B) (1988); See also M.D. FLA. LOC. CT. R. 806(d).

[472] The Northern District of California had a post-arbitration cost-shifting rule. See, Meierhoefer, CAA in Ten District Courts, *op cit* at 134. The Western District of Michigan had a rule providing that attorney fees could be shifted if the party requesting a trial did not obtain a trial judgment 10% more favourable than the arbitration award. The Western District of Oklahoma had a similar rule but both costs and fees were shifted. See, Meierhoefer, CAA in Ten District Courts, op cit..

[473] Federal Courts Study Act, $ 102(b)(2)(A), Pub. L. No. 100-702, 1988 U.S.C.C.A.N. (102 Stat.) 4644, 4644 (codified at 28 U.S.C. $ 331 (1988)).

[474] See, Federal Courts Study Comm., *op cit,* at 81.

[475] For example, in the Arizona state court-annexed arbitration programme, when a party requests a trial: If the judgment on the trial *de novo* is not more favourable . . . [than] the arbitration award, the court shall order the deposit [of the arbitrator's fees posted at the time the trial was requested] to be used to pay, or that the appellant pay if the deposit is insufficient, the following costs and fees, unless the [c]ourt finds on motion that the imposition of costs and fees would create such a substantial economic hardship as not to be in the interests of justice: (i) To the county, the compensation actually paid to the arbitrator; [and] (ii) To the appellee, those costs taxable in any civil action together with reasonable attorneys' fees as determined by the trial judge for services necessitated by the appeal. ARIZ. UNIF. R. P. 7(f); see also, COLO. REV. STAT. ANN. 13-22-405 (West 1990) (requiring a party who rejects an arbitration award and fails to improve his position at trial by 10% to "pay all of the costs, including attorney fees and arbitrator fees, of the arbitration proceeding not to exceed one

If a trial is not requested within thirty days of the arbitration decision, the decision is entered as the judgment of the court and has the same force and effect as a trial judgment.[476] It cannot, however, be appealed.[477] The pilot programmes also permit litigants in any civil action or in any adversarial bankruptcy proceeding to voluntarily submit their case to arbitration.[478] In some districts, when cases are submitted to the programme with the parties' consent and a trial is requested, the court may assess costs… and reasonable attorney fees against the party demanding trial *de novo* if . . . such party fails to obtain a judgment, exclusive of interest and costs . . . which is substantially more favourable to such party than the arbitration award, and . . . the court determines that the party's conduct in seeking a trial *de novo* was in bad faith.[479]

Although all districts permit parties to voluntarily submit disputes to arbitration either for free or at a minimal cost,[480] litigants rarely choose this option,[481] for example, in Michigan, where CAA has been available since 1978 and cases submitted to the programme by consent are subject to a post-arbitration fee and cost-shifting rule.[482] In the Northern District of California where voluntary CAA has also been available since 1978, but cases submitted to the program

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thousand five hundred dollars"); FLA. STAT. ch. 44.303(5) (1989) ("The party having filed for a trial de novo shall be assessed the arbitration costs, court costs, and other reasonable costs of [his opponent] . . . if the judgment upon the trial de novo is not more favourable than the arbitration decision."); CAL. CIV. PRO. CODE $1141.21 (West 1993) (describing the consequences for a party failing to improve on the arbitration award after requesting trial de novo); HAW. ARB. R. 26 (giving the court the discretion to impose "[r]easonable costs and fees (other than attorney's fees) actually incurred by the party but not otherwise taxable under the law . . . [as well as c]osts of jurors . . . [and a]ttorneys' fees not to exceed $ 5,000," when the party requesting trial fails to improve his position at trial by 15% of the arbitration award); MICH. CT. R. 2.403(O)(1)-(4) (describing fee and cost-shifting consequences of demanding a trial after participation in Michigan's mandatory mediation programme).

[476] See, 28 U.S.C. § 654(a) (1988).

[477] *Ibid.*

[478] *Ibid* $ 652(b)

[479] $ 655(e)

[480] In most districts, parties who accept the arbitration award do not have to pay an arbitration fee to the court. In the District of New Jersey, however, parties must agree to pay the arbitrators $ 150, and in the District of Texas they must agree to pay the arbitrators a reasonable fee. See, Meierhoefer, Court-annexed Arbitration in the District of New Jersey; *op cit*, Meierhoefer, Court-annexed Arbitration in the Western District of Texas, Federal Judicial Centre, 16 (1989).

[481] For example, during the first two years of Court-annexed Arbitration in the Middle District of Florida, only two cases were submitted to the programme by consent, and voluntary participation "is expected to remain uncommon." Meierhoefer & Seron, Court-annexed Arbitration in the Middle District of Florida. *op cit.* In the Middle District of North Carolina, arbitration by stipulation (consent) occurs infrequently, see, Meierhoefer,, Court-annexed Arbitration in the Middle District of North Carolina., *supra* at 19, and during the first year that a Court-annexed Arbitration program operated in the Eastern District of New York, only two cases were voluntarily submitted to the programme. See, Meierhoefer, Court-annexed Arbitration in the Eastern District New York., *see also* Meierhoefer, Court-annexed Arbitration in the Ten Dist. Cts. *op cit.* (reporting that "voluntary alternative programmes in other jurisdiction have been notably unsuccessful in attracting cases").

[482] See, W.D. MICH. LOC. CT. R. 43(j)(4).

by consent are not subject to a post-arbitration fee and cost-shifting rule, voluntary participation in the CAA programme is also rare.[483]

3.1.2 CCADR in Some States in the USA

The Federating States in the USA have independent/different CCADR programmes. The next section will examine the programmes of the State of Wisconsin, Northern District of California, Colorado, Delaware, Georgia and Washington DC seriatim.

3.1.2.1 Wisconsin State CCADR Programme

Under Wisconsin state law, the state Judicial Council is authorised to advise the Wisconsin Supreme Court as to 'changes which will, in the council's judgment, simplify procedure and promote a speedy determination of litigation upon its merits.'[484] The Judicial Council petitioned for a state-wide court-ordered ADR system, which was adopted by the Wisconsin Supreme Court[485] with slight modifications. Wisconsin state statutes were amended to create section 802.12, which is Wisconsin's new ADR law.[486] The law established a policy of encouraging ADR as an alternative to litigation.[487] Under the new law, state judges are authorised to order ADR in civil disputes at any stage of the litigation process and to compel the plaintiff and defendant to personally participate in the settlement process along with their legal representatives.[488] Further, the law directs the parties to select a procedure and provider of the ADR service.[489] However, if the litigants are unable to select a procedure or provider or both, the court may make those determinations for them, as well as direct payment of the fees and expenses of the provider.[490] The new ADR law provided for a number of binding and non-binding settlement procedures from which the parties can select.

3.1.2.2 Northern District of California CCADR Programme

In 1982, then Chief Judge Robert F. Peckham appointed a task force to develop procedures to reduce pre-trial costs and delays for litigants in the Northern District of California.[491] A

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[483] *Ibid*
[484] Wis. STAT. $ 758.13(2)(a) (1993-94).
[485] Wis. STAT. $ 751.12 (1993-94).
[486] Wis. Sup. Cr. Order No. 93-13, 180 Wis. 2d xv (1994)
[487] *Ibid*
[488] *Ibid.* at xvii (creating Wis. STAT. § 802.12(2)(a))
[489] *Ibid* at xvii-xviii (creating Wis. STAT. § 802.12(2)(b))
[490] *Ibid* at xviii (creating Wis. STAT. § 802.12(2)(c),(d))
[491] See, Brazil, W.D. A Close Look at Three Court-Sponsored ADR Programmes: Why They Exist, How They Operate, What They Deliver, and Whether They Threaten Important Values, *1990 U. Chi. Legal* F . 303 at 306

subcommittee identified major sources of pre-trial cost and delay as: complex and unclear pleading practice that often confuses the real substance of the dispute; lawyers' and parties' failure to assess their case thoroughly and dispassionately at an early stage; clients' and attorneys' unrealistic expectations of success; clients' feelings of alienation from the legal process; poor and indirect communication between the litigation parties; and attorneys' reluctance to raise the possibility of settlement out of fear of being perceived as weak.[492] The subcommittee therefore designed an Early Neutral Evaluation (ENE) process to encourage each party to confront and analyse its own situation early in the suit and to enable each litigant and lawyer to hear the other side present its case. The process was also intended to help the parties identify the real areas of agreement and dispute and to help them develop an approach to discovery that would focus immediately on the central issues and disclose the key evidence promptly.

In addition, ENE was intended to offer all counsel and litigants a confidential, frank, and thoughtful assessment of the relative strengths of their positions and the overall value of the case. Finally, the committee also hoped that ENE would provide the parties with an early opportunity to try to negotiate a settlement.[493] The court established a pilot ENE programme in 1985. An early study of the pilot programme revealed promising results.[494] Based on the apparent success of the experimental programme, the court further expanded and refined the ENE programme in 1988 and again in 1989.

On the design of the ENE programme, except where a waiver was granted by the court, every party in a case assigned to ENE must attend the ENE session; together with the attorney who will be lead counsel should the case go to trial. If a party is a corporation, it must be represented at the session by a person (other than outside counsel) who has authority both to enter stipulations and to bind the party to the terms of a settlement.[495] Prior to the ENE session, each side must submit to the neutral a statement identifying session participants, major disputed issues, and any discovery that would be a necessary prelude to meaningful

[492] *Ibid*, p.331-334
[493] See generally, Levine, D.I. (1989) Northern District of California Adopts Early Neutral Evaluation to Expedite Dispute Resolution, 72 Judicature 235
[494] Levine, D.I., (1987) Early Neutral Evaluation: A Follow-up Report, 70 Judicature 236
[495] Rosenberg, J.D and Folberg, H.J. (Jul., 1994), Alternative Dispute Resolution: An Empirical Analysis. Stanford Law Review, Vol. 46, No. 6 pp. 1487-1551 available @ http://www.jstor.org/stable/1229164. Accessed: 26/04/2011

settlement discussions. The session is expected to last approximately two hours, during which the following events are expected to take place:

- The evaluator explains the purposes of the program and outlines the procedures.
- Each side in turn presents a 15-minute opening statement, either by counsel, client, or both, without interruption from the evaluator or the other party. The statement presents the side's case and legal theories and describes the supporting evidence.
- The evaluator may then ask questions of both sides to clarify issues, arguments, and evidence, to fill in evidentiary gaps, and to probe for strengths and weaknesses.
- The evaluator identifies the issues on which the parties agree (and encourages them to enter stipulations where appropriate) and also identifies the important issues in dispute.
- The evaluator adjourns to another room to prepare a written case evaluation. The evaluation assesses the strengths and weaknesses of each side's case, determines which side is likely to prevail, and establishes the probable range of damages in the event the plaintiff wins.
- The evaluator returns to the ENE conference room, announces that s/he has prepared an informal evaluation of the case, and asks the parties if they would like to explore settlement possibilities before she discloses the evaluation to them. If either party declines the offer to begin settlement discussions, the evaluator promptly discloses her written assessment. If, on the other hand, both sides are interested in working on settlement, the evaluator facilitates these discussions.
- If the parties do not hold settlement discussions or if discussions do not produce a settlement, the evaluator helps the parties develop a plan for efficient case management. This aid may include scheduling motions or discovery that would put the case in a position for rapid settlement or disposition.
- After the ENE session, the parties may agree to a follow-up session or other activity. With the consent of the court, the parties may engage the evaluator for additional sessions on a compensated basis.[496]

[496] *Ibid*, p.1490 -1491

On the selection of cases for the ENE programme, under the court's General Order 26,[497] there is an automatic system of assignment set forth. There were eighteen different categories of cases identified,[498] and on filing a claim each counsel is expected to state on the cover the category of the suit. The Order 26 system automatically refers every even numbered case to ENE. The category of cases include: Insurance, Miller Act, Negotiable Instruments, Stockholder Suits, Other Contract, Contract/Product Liability, Motor Vehicle, Motor Vehicle/Product Liability, Other Personal Injury, Personal Injury/Product Liability, Other Fraud, Antitrust, Employment, RICO, Copyright, Patent, Trademark, Securities/Commodities/ Exchange.

Cases administratively assigned to ENE may by petition in writing of the Attorney to the court, have their cases removed from the ENE programme. The Magistrate Judge will grant such petitions upon a showing of good cause. Cases not automatically assigned to ENE may nonetheless enter the programme by stipulation among the parties with approval of a judge, or by referral from the judge assigned to the case, either at a party's request or *suo motu*.[499]

3.1.2.3 Colorado CCADR Programme

The Office of Dispute Resolution (ODR), located in the Colorado Judicial Branch, was created by statute in 1983. The Colorado Dispute Resolution Act, Colorado Revised Statutes section 13-22-301 *et seq*., established ODR to assist Colorado's courts in implementing alternative dispute resolution (ADR) programmes and in providing services to the public.[500] The statute originally contemplated only mediation, but was later amended to include other types of ADR. ODR's most visible service is its mediation programme, providing mediation for domestic relations, dependency and neglect, civil, probate, and juvenile cases. Mediation services are provided by 32 mediators state-wide. ODR mediators are independent contractors, engaged based on sufficient training, experience, knowledge of the courts, and knowledge and skills demonstrated in performance-based interviews which include mediation simulations. ODR presently has programs which provide services in 18 judicial districts, and

[497] Northern District of California Amended General Order No. 26 (Jan.1, 1990). 18. General Order 26 excludes from administrative assignment to ENE: cases subject to the court's mandatory nonbinding arbitration programme (contract and tort cases involving not more than $150,000 exclusive of punitive or exemplary damages, interests, and costs), class actions, cases that principally seek injunctive relief, cases in which one or more of the parties is proceeding in proper, and declaratory judgment actions in which the only parties are insurance carriers, sureties, or bonding companies. Id
[498] *Ibid*
[499] Rosenberg and Folberg, *op cit*. p.1491
[500] See, http://www.courts.state.co.us/Administration/Unit.cfm?Unit=odr. Accessed 12th January, 2012.

is in the process of hiring local mediators to serve the Twenty-Second Judicial District (Cortez and the Four Corners area) and the Nineteenth Judicial District (including Greeley). Some districts do not generate adequate revenues to cover their expenses; in essence, these districts are subsidised through funds generated in more profitable districts. The Office of Dispute Resolution (ODR) exists to establish and make available dispute resolution programmes and services within the Colorado Judicial Branch. Through its sixty-plus contract mediators and neutrals, ODR offers mediation and other services across the state. ODR also provides information about dispute resolution in Colorado and nationally, and coordinates training for judicial officers and court staff.[501] The Colorado Dispute Resolution Act, Section 13-22-305, C.R.S., requires the Director to establish rules, regulations and procedures for all dispute resolution programmes. The "dispute resolution services" referred to in the ODR Manual include mediation and other ancillary forms of dispute resolution as provided in Section 13-22-313, C.R.S.[502]

ODR Central is housed within the State Court Administrator's Office ("SCAO") in Denver and is responsible for the oversight of dispute resolution services throughout the Colorado Courts. General responsibilities of the central office include:

- Managing state funds to provide mediation and other dispute resolution services to indigent parties
- Managing federal grant funds to provide mediation and other dispute resolution services for parents access and visitation issues
- Maintaining statistics about mediation and other dispute resolution services provided by ODR Neutrals state-wide
- Overseeing the contracting process of ODR Neutrals to provide quality services in all judicial districts
- Communicating with judicial officers, court staff and the community at large regarding specific needs and issues related to ODR services

[501] *Ibid*

[502] http://www.courts.state.co.us/userfiles/File/Administration/Executive/ODR/PP2011/ODR_PP_Part_I_Program_Description_and_Mission_2.pdf

- Providing educational opportunities for professional development and best practices to ODR Neutrals, judicial officers, court staff, and the community at large
- Developing and implementing programmes and referral processes between ODR Neutrals and agencies such as local Child Support Enforcement (CSE) offices, Child Welfare programmes, etc.
- Cooperating with other departments of State to provide quality education programmes
- Participating in Court Improvement and Best Practice Court Teams across the state
- Cooperating with other dispute resolution organisations in planning annual state-wide ADR Conference.[503]

ODR's first multi-door courthouse, a pilot programme in Arapahoe County in the Eighteenth Judicial District, has been in operation since December 1995. The multi-door concept arose out of the realisation that litigation is not an appropriate first choice for resolving many disputes. Instead, parties are offered a range of alternatives, including mediation, arbitration, and case evaluation. Senior judges assist with case "screening," or matching a particular case to an appropriate dispute resolution process. ADR services are provided by ODR and by the private sector. ODR is exploring possibilities for establishing additional multi-door courthouses in interested judicial district. ODR Neutrals are independent contractors who sign a Contract for Personal Services and are chosen according to a prescribed procedure.[504] The ODR has a Referral Coordinator whose main functions include:

- Serves as first point of contact to the public for inquiries regarding ODR services
- Refers and/or assigns cases to mediators based on the location and case type
- Communicates with Neutrals and parties regarding status of fee waivers
- Processes fee waivers
- Collects and provides data for statistical reporting

503 http://www.courts.state.co.us/userfiles/File/Administration/Executive/ODR/PP2011/ODR_PP_Part_IA_Responsibilities_ODR_Central.pdf

504 http://www.courts.state.co.us/Administration/Unit.cfm?Unit=odr

- Provides administrative support as needed.[505]

A person participating in District Court Civil mediation will be asked to send the mediator a confidential settlement statement, complaint or answer, and Rule 26 disclosures 10 days before the first session. If the mediation concerns domestic relations or juvenile matters, a current "Affidavit with Respect to Financial Affairs" must be brought to the first session if child support, maintenance or property division is at issue. Also required are a complete copy of state and federal income taxes for the most recent three years, pay stubs for the most recent three months, and any available information relating to pension, retirement, or profit sharing plans. In addition to the above requirements, for post-decree cases, each party must also provide a copy of the Separation Agreement and, if there are children of the relationship, the Parenting Plan. For all mediations, it is advised that parties have met with their attorney prior to the first session, so that they know what to expect, and what the law says about their issues.[506] At the request of the parties, the mediator will provide a Memorandum of Understanding (MOU) which reflects the parties' agreements. The MOU can then be submitted to the court, with the consent of all parties, at which time it can become a court order. For example, in domestic cases, if the court approves the agreement, it can become part of the permanent orders. Mediation is a voluntary process, in which a trained neutral mediator helps to facilitate your agreements. Parties may be required to attend mediation, but are not required to reach agreement. If full agreement is not reached, the remaining issues will be decided by the court. An agreement signed by both parties can be enforceable as a contract. In order to be sure it is enforceable, it is recommended that a party have an agreement reviewed by an attorney before signing. An agreement can become an order of the court if it is stipulated to and entered as part of a separation agreement, decree of marriage dissolution or other order.[507]

3.1.2.4 Delaware State CCADR Programme

In 1987, Superior Court officially adopted a trial Alternative Dispute Resolution (ADR) Programme. The programme demonstrated its success and met its initial goals which resulted in Superior Court's Administrative Order on ADR, effective on April 10, 1991. Since that

505 http://www.courts.state.co.us/userfiles/File/Administration/Executive/ODR/PP2011/ODR%20PP%20Part%20IA_1_c_Specific%20Duties%20of%20ODR%20Staff_Referral%20Coordinator.pdf

506 http://www.courts.state.co.us/Administration/Unit.cfm?Unit=odr

507 Ibid, http://www.courts.state.co.us/userfiles/File/Administration/Executive/ODR/PP2011/ODR%20PP%20Part%20I_C_1_Responsibilities%20of%20ODR%20Neutrals_relationship%20to%20judicial%20department.pdf

time, the Court has continued to expand its ADR Programme to reduce delay, to make the court process more accessible to the public, and to improve predictability in calendar management. Both the Court and the Bar have worked diligently, in a cooperative effort, to develop processes to manage and monitor pending civil cases as well as to develop and implement alternative methods of dispute resolution.[508]

Effective January 1, 1992, the Court adopted Civil Rule 16.2 which established an ADR Voluntary Mediation Programme in Superior Court. Rule 16.2 was to be in effect for one year, at which time the Superior Court was to review the process and make recommendations on the possible permanent addition of court mediation to its established ADR Program. The one year mediation programme was designed and implemented as a pilot project in New Castle County. Based on its success and the subsequent steady increase in the referral of pending cases to the mediation programme, Rule 16.2 became permanent on January 29, 1993.

In its continued effort to improve and expand the alternative dispute resolution programme, the Court and the Delaware Bar Association's ADR Section, jointly reviewed Civil Rules 16.1 and 16.2 and recommended some changes. Subsequently, the two rules were merged into one rule and the ADR Programme was expanded to include an additional third alternative ADR process - Neutral Assessment. The Court's Neutral Assessment form is frequently called Neutral Evaluation, Early Neutral Evaluation or Case Evaluation in other jurisdictions. Effective July 1, 2002, the Court's Multi-door ADR Programme was merged into one rule, Civil Rule 16.1 and Rule 16.2. were deleted effective March 1, 2008, Superior Court adopted sweeping changes to its compulsory ADR programme. Civil Rule 16.1 was repealed and Civil Rule 16 was amended to require mandatory ADR in every civil case (unless expressly excluded by the rule or by the Court). The revision simplified the process for attorneys and the court system, including such things as the removal of trial *de novo* fees and the twenty-day deadlines for appeals from arbitration orders, and much more.[509]

Today, nearly 90% of all cases which are filed never see the inside of a courtroom; those cases which have merit are usually settled for a mutually acceptable amount. Under the amended Civil Rule 16, every civil case is subject to compulsory ADR. Compulsory Alternative Dispute Resolution allows the format of ADR to be agreed upon by the parties.

[508] http://courts.delaware.gov/Superior/ADR/adr_history.stm
[509] *Ibid*

ADR may include, but is not limited to, non-binding or, if agreed to by the parties, binding arbitration, mediation or neutral case assessment. If the parties cannot agree on the ADR format, the default format shall be mediation unless otherwise ordered by the Court.[510]

All civil cases are referred to compulsory ADR based on Superior Court Civil Rule 16.1 (Rule) unless the claimant's counsel certifies in good faith on the complaint, counterclaim, or cross-claim that damages are in excess of $100,000 exclusive of cost and interest. The Rule covers all civil cases in which monetary damages are sought, and in which the non-monetary claims are nominal. In all ADR actions, the plaintiff selects a form of ADR - arbitration, mediation or neutral assessment-on the Case Information Sheet (CIS Form) when a complaint is filed. Then each defendant, in the initial pleading filed, may accept or reject the plaintiff's ADR selection. If the defendant does not reject the plaintiff's choice of ADR, the court schedule's the selected ADR form. If a defendant rejects the plaintiff's choice of ADR, the Court schedule's mandatory arbitration.[511]

Before the change went into effect, cases involving less then $100,000 were subject to a practice called alternative dispute resolution, in which the disputing parties tried to resolve the lawsuit without a trial. Usually, the disputing parties would use a practice called arbitration, in which a third, neutral party decided the case. This decision could or could not be binding. Proceedings often were delayed by scheduling conflicts among attorneys. This in turn prevented litigants from resolving their issues. Under the change, judges will assign schedules in which the dispute resolutions must take place. This will apply to almost all civil lawsuits. To help resolve the disputes, attorneys use Arbitration, which many attorneys have used and can be compared to a mini-trial; Mediation, in which a neutral party helps settle the case by offering possible solutions; or Neutral Assessment, in which the third party evaluates the case for the litigants and reports what would work. Cases exempt from the rule include mortgage foreclosure, recovery of property wrongly taken and wage attachments.

It is estimated that more than 1,000 cases per year will now be required to go into a form of alternative dispute resolution. The Court expected the majority of these cases will go initially to mediation. While the disputing parties may decide what plan they want to use to resolve their case, the court will assign mediation if the litigants cannot decide. These alternative methods were designed to clear the backlog of civil cases and allow the court to focus its

[510] http://courts.delaware.gov/Superior/ADR/adr_choice.stm
[511] *Ibid*

limited resources on more complex matters that do not easily lend themselves to alternative resolution, in a timely manner. The new rule also allows the court to set deadlines in an attempt to dispose of the case more efficiently; something that was not happening under the previous rule.[512]

ADR Practitioners include the arbitrator, mediator, neutral case assessor or any other Practitioner engaged by the parties to facilitate ADR. In the event the parties cannot agree on an ADR Practitioner, they shall file a joint motion with the Court within thirty (30) days of the issuance of the scheduling order requesting that the Court appoint an ADR Practitioner for the parties. The Court may impose sanctions upon a party or both parties if it determines that the parties have not attempted to agree upon an ADR Practitioner in good faith.[513]

The parties shall pay the ADR Practitioner in accordance with the allocation and amount of fees established by the ADR Practitioner and agreed to by the parties or ordered by the Court. The ADR Practitioner may apply to the Court for sanctions against any party who fails to comply with the terms of engagement established by the ADR Practitioner and agreed to by the parties.[514] The ADR Practitioner may not be called as a witness in any aspect of the litigation, or in any proceeding relating to the litigation in which the ADR Practitioner served, unless ordered by the Court. In addition, all ADR Practitioners, when serving as an arbitrator, mediator or neutral assessor, shall be immune from civil liability for, or resulting from, any act or omission done or made while engaged in ADR, unless an act or omission was made or done in bad faith, with malicious intent, or in a manner exhibiting a willful, wanton disregard of the rights, safety, or property of another. Each ADR Practitioner shall remain bound by any confidentiality agreement signed by the parties and the ADR Practitioner as part of the ADR.[515]

3.1.2.5 Georgia State CCADR Programme

The court-connected ADR system was created in 1993 jointly by the Georgia Supreme Court and the State Bar of Georgia. There were two goals for the system: to help the judiciary handle more cases with fewer resources; and to offer litigants lower-cost, faster and effective ways to resolve their differences without resorting to trials. The Court - ADR system benefits: the taxpayers – by reducing the need to pay for more judges, staff and courtrooms as

[512] http://courts.delaware.gov/superior//ADR/adr_delaware.stm#d2
[513] http://courts.delaware.gov/Superior/ADR/adr_practitioner.stm#sel
[514] *Ibid*
[515] *Ibid*

Georgia's population grows, saving millions of dollars a year; the Litigants – by offering effective, empowering alternatives to litigation that save them time, money and energy; the Attorneys – by giving them more tools to satisfy their clients' needs and by reducing overcrowding in the courts; the Judges and Juries – by clearing dockets so they can concentrate their efforts on cases that require their services; and the Courts – by helping the judiciary use its resources more efficiently.[516] Existing Georgia laws related to ADR are the Georgia Constitution, Article VI, Section IX,, Paragraph 1; the Georgia Court-Connected ADR Act; the Juvenile-Court Supervisory Fee; Child Abuse Reporting law and the Georgia Arbitration Code.

Article VI, Section IX, Paragraph 1 of the Constitution of the State of Georgia provides that the judicial system shall be administered as provided in this Paragraph. Further that not more than 24 months after the effective date hereof, and from time to time thereafter by amendment, the Supreme Court shall, with the advice and consent of the council of the affected class or classes of trial courts, by order adopt and publish uniform court rules and record-keeping rules which shall provide for the speedy, efficient, and inexpensive resolution of disputes and prosecutions. Each council shall be comprised all of the judges of the courts of that class.

Paragraph 15-23-10 of the Georgia Court-Connected ADR Act provides for determination of need as prerequisite to establishment of programme. No alternative dispute resolution programme shall be established for any court unless the judge or a majority of the judges of such court determine that there is a need for such programme in that court. The funding mechanism set forth in this chapter shall be available to any court which, having determined that a court-annexed or court-referred alternative dispute resolution program would make a positive contribution to the ends of justice in that court and has developed a programme meeting the standards of the Georgia Supreme Court's Uniform Rule for Alternative Dispute Resolution Programmes. Pursuant to the standards set forth in the Georgia Supreme Court's Uniform Rule for Alternative Dispute Resolutions Programmes, the funding mechanism set forth in this chapter shall be available to court programmes in which cases are screened by the judge or by the program director under the supervision of the judge on a case-by-case basis to determine whether: the case is appropriate for the process; the parties are able to

[516] http://www.godr.org/index.php?option=com_content&view=article&id=57&Itemid=41

compensate the neutral if compensation is required; and a need for emergency relief makes referral inappropriate until the request for relief is heard by the court.[517]

Section 9-9-2 (c) of the Georgia Arbitration Code[518] provides that this part shall apply to all disputes in which the parties thereto have agreed in writing to arbitrate and shall provide the exclusive means by which agreements to arbitrate disputes can be enforced, except the following, to which this part shall not apply:

1. Agreements coming within the purview of Article 2 of this chapter, relating to arbitration of medical malpractice claims;

2. Any collective bargaining agreements between employers and labour unions representing employees of such employers;

3. Any contract of insurance, as defined in paragraph (1) of Code Section 33-1-2; provided, however, that nothing in this paragraph shall impair or prohibit the enforcement of or in any way invalidate an arbitration clause or provision in a contract between insurance companies;

4. Any other subject matters currently covered by an arbitration statute;

5. Any loan agreement or consumer financing agreement in which the amount of indebtedness is $25,000.00 or less at the time of execution;

6. Any contract for the purchase of consumer goods, as defined in Title 11, the "Uniform Commercial Code," under subsection (1) of Code Section 11-2-105 and subsection (1) of Code Section 11-9-109;

7. Any contract involving consumer acts or practices or involving consumer transactions as such terms are defined in paragraphs (2) and (3) of subsection (a) of Code Section 10-1-392, relating to definitions in the "Fair Business Practices Act of 1975";

8. Any sales agreement or loan agreement for the purchase or financing of residential real estate unless the clause agreeing to arbitrate is initialed by all signatories at the time of the execution of the agreement. This exception shall not restrict agreements between or among real estate brokers or agents;

[517] Code 1981, § 15-23-10, enacted by Ga. L. 1993, p. 1529, § 1; Ga. L. 1997, p. 874, § 5.
[518] Code 1933, § 7-301, enacted by Ga. L. 1978, p. 2270, § 1; Code 1981, 9-9-80; Code 1981, 9-9-1, as re-designated by Ga. L. 1988, p. 903, $ 1.)

9. Any contract relating to terms and conditions of employment unless the clause agreeing to arbitrate is initiated by all signatories at the time of the execution of the agreement;

10. Any agreement to arbitrate future claims arising out of personal bodily injury or wrongful death based on tort.[519]

3.1.2.6 Washington DC CCADR Programme

The Multi-Door Dispute Resolution Division (Multi-Door) helps parties settle disputes through mediation and other types of appropriate dispute resolution (ADR), including arbitration, case evaluation and conciliation. Cases are referred through the appropriate door for resolution. The goals of a multi-door approach are to provide citizens with easy access to justice, reduce delay, and provide links to related services, making more options available through which disputes can be resolved. The Multi-Door Dispute Resolution Division of the D.C. Superior Court assists parties to reach agreements that meet their interests, preserve relationships, and save time and money. Mediators and dispute resolution specialists are trained at Multi-Door to serve in a wide range of cases, from civil to small claims, to family.[520]

There is a Community Information and Referral Center at the Multi-Door Division which has trained Dispute Resolution Specialists to assist residents of the District of Columbia to find the best way to resolve their disputes. Areas addressed include consumer complaints, merchant, home improvement, auto repairs, landlord-tenant dispute: security deposit, repairs, complaint involving a neighbour: dogs, loud noises, trees and property, family dispute: custody, visitation, child support, divorce, spousal support, property. What happens is that an intake interview is conducted whether by phone or in person to help determine how a party wishes to resolve a dispute, including:

- conciliation of appropriate disputes over the telephone
- mediation between the parties with a mediator
- information about other Multi-Door programmes, such as family mediation

[519] (Code 1933, § 7-302, enacted by Ga. L. 1978, p. 2270, § 1; Ga. L. 1979, p. 393, § 1; Code 1981, 9-9-81; Code 1981, 9-9-2, as re-designated by Ga. L. 1988, p. 903, § 1; Ga. L. 1997, p. 1556, § 1.). See also (Code 1933, § 7-302, enacted by Ga. L. 1978, p. 2270, § 1; Ga. L. 1979, p. 393, § 1; Code 1981, 9-9-81; Code 1981, 9-9-2, as re-designated by Ga. L. 1988, p. 903, § 1; Ga. L. 1997, p. 1556, § 1.)

[520] http://www.dccourts.gov/dccourts/superior/multi/index.jsp

- referral to agencies or services in the community that addresses the specific need[521]

Any dispute may be taken to the Community Information and Referral Programme and family disputes may be taken to the Family Mediation Programme. Those who have civil or small claims issues often first file with the Court before participating in mediation.[522] An attorney is not needed to participate in Multi-Door programmes. However, attorneys often participate in civil mediation, arbitration, and case evaluation.

The court mediators do not give legal advice to parties, do not represent them in Court, and do not make reports to the Court about the discussions that take place in mediation sessions. If a party therefore chooses to have the assistance of an attorney in its matter, the mediator assigned to the case will explain how the attorney can be integrated into the ADR process.[523] The Multi-Door's services are free to anyone who lives in the District of Columbia. Parties are expected to make a good-faith effort - including attention, thought and self-reflection - to resolve their dispute in a manner that considers everyone concerned.

If parties are unable to reach a resolution of their issues through Multi-Door, the mediator assigned to the case will talk with them about possible next steps as it is believed that though the ADR process gives many parties the best opportunity to reach a satisfactory, sensible and lasting resolution to their disputes, it is not the best forum for everyone.[524] The Court-ADR has different services including the Child Protection Mediation, Civil Mediation and Case Evaluation Programme, the Small Claims Mediation Programme and the Judicial Arbitration programme.

Child Protection Mediation (CPM) is a free service where parents and other caretakers meet with all parties involved in their legal case in respect of child abuse or neglect. A specially trained mediator will facilitate a discussion between guardians, social workers, attorneys, foster parents, and other concerned individuals who are involved in the case. The mediator is neutral and non-judgmental. The role of the CPM mediator is to guide a large group discussion which may result in an agreement. The discussion in mediation is centered on the best interest of the child(ren) and resolving the court case. The programme accepts case referrals at any stage of the proceedings from the initial hearing up to and through adoption. Issues that may be discussed in CPM include: Abuse, Neglect, Guardianship, Permanency,

[521] http://www.dccourts.gov/dccourts/superior/multi/community.jsp
[522] http://www.dccourts.gov/dccourts/superior/multi/faq.jsp
[523] *Ibid*
[524] *Ibid*

Custody, Adoption, Visitation, Placement options, Child's wishes, Additional services, Legal issues or Case plan[525] There is also the *Civil Mediation and Case Evaluation Programme*. In the Mediation section, a trained mediator assists parties to communicate their positions and interests, and explore settlement options. The mediator does not give an evaluation or opinion. The mediator helps formulate a mutually acceptable agreement between the parties to a case. The mediation date is mailed to the parties approximately sixty (60) days prior to mediation and each party is responsible for submitting a Confidential Settlement Statement (CSS). If mediation is rescheduled, a new CSS must be filed with the new date noted. The mediator will call the parties approximately two weeks before the mediation to discuss their view of the case, the status of any negotiations, and any obstacles to settlement. Parties are informed to prepare for a two-hour mediation session. Follow-up sessions are available as needed. If parties reach an agreement in mediation, the mediator will help write it and it may be immediately submitted to the court as settlement once all parties have signed it. If no agreement is reached in mediation, a pre-trial date will be set by Multi-Door staff.[526]

In respect of Case evaluation, a mediator-evaluator helps parties identify the issues in dispute and provides an opinion of the settlement value of the case, the likelihood of liability, and probable range of damages. The steps for case-evaluation is similar to that of mediation stated above, except that parties are informed to prepare for a single session which may last up to two hours. The mediator-evaluator will provide a non-binding opinion at the end of the session. Parties can continue settlement negotiations or request mediation after the evaluation session.[527]

The *Small Claims Mediation Programme* provides trained mediators to handle matters on the day of trial. All mediation sessions are confidential. Most cases are assigned to mediation at the discretion of the judge. Parties do not need an attorney to participate in small claims mediation. Once in mediation, sessions generally last an hour. Mediation is confidential. However, credible threats of violence and reports of abuse to children or elders are an exception to this rule. Agreements reached in mediation are enforceable but do not create a formal judgment. Agreements reached in mediation will be approved by the Mediation Supervisor and entered into the Court record. All parties receive a copy of the agreement and do not need to return to the courtroom. If no agreement is reached, parties will go before the

[525] http://www.dccourts.gov/dccourts/superior/multi/child.jsp
[526] http://www.dccourts.gov/dccourts/superior/multi/civil.jsp

judge for the next step in their case, which could be a hearing on a motion, judicial arbitration, or a trial.

In the *Judicial Arbitration programme*, the judge conducts the arbitration. It is different from a trial because: all parties must agree to participate in arbitration; a judgement is entered only if the party does not abide by the terms of the judicial arbitration; the parties do not have the right to appeal the decision after it has been made. The parties cannot withdraw from arbitration once it begins. [528] During the initial scheduling conference in a civil case, the judge, parties and attorneys may select arbitration as the best forum for reaching a settlement. In this process, a trained arbitrator is given the authority to manage the case for approximately 120 days. Arbitrators may be selected from a list available in the courtroom. Arbitrators oversee discovery and decide all motions after a case is assigned to them, conduct evidentiary hearings, and render decisions. If the parties choose binding arbitration, the arbitrator's award is converted into a judgement of the Court. If the arbitration is non-binding, the parties must file a timely request for a trial de novo or the arbitrator's award is converted into a judgement of the Court. These motions for a trial are filed, in person or by mail.[529]

3.2 Evaluation of Court Connected ADR in the USA

As the advantages of ADR to civil litigants and those involved in family disputes became increasingly clear over the last several years, and court backlogs increased substantially, state and federal courts began exploring and incorporating mediation, arbitration, and other settlement procedures directly into their scope of power. As of 1992, over 1200 state court-sponsored ADR programmes were identified in the United States.[530] Over one-third of the Federal court districts had implemented some form of ADR by 1990 including, in some jurisdictions, authorising judges to order litigants to use some form of ADR in an effort to settle their dispute.[531] The Civil Justice Reform Act of 1990[532] is seen by many legal scholars and observers as one of the primary catalysts of the courts' rising use of ADR.[533]

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[527] ibid
[528] http://www.dccourts.gov/dccourts/superior/multi/small.jsp
[529] http://www.dccourts.gov/dccourts/superior/multi/arbitration.jsp
[530] Shaw, M.L. 1994. *Courts Point Justice in a New Direction*, NAT'L L. J., April 11, , at Cl.
[531] *Ibid* at C16
[532] 28 U.S.C. §§ 471-482 (1993).
[533] Mazadoorian, H.N. 1994. Practice Experience is Solid Evidence of ADR's Effectiveness, *NAT'L L.J.*, Apr. 11, at C10

Resnik warns that the marriage of the courts and ADR, like most marriages, will transform both parties.[534] ADR, which its originators envisioned as constantly expanding in its forms and variations, will find itself uncomfortably constrained in its courtly new home where the premium will be on cheap, reliable methods of settlement, and mediation and settlement conferences will be preferred to arbitration. In the end, Resnik fears, the claimant may face the worst of both worlds--a diminished opportunity to litigate *and* a punier selection of alternatives to litigation.[535]

3.2.1. Empirical Findings on the implementation of CCADR in the United States

As the twentieth century draws to its end, we can observe the melding of ADR into adjudication, and then the narrowing of ADR and its refocusing as a tool to produce contractual agreements among disputants. The focus is shifting from adjudication to resolution.[536] Rosenberg and Folberg conducted an empirical research by reporting on a quantitative and qualitative study of the ADR programme of the United States District Court for the Northern District of California.[537] The Northern District is one of six courts designated as demonstration districts in the Civil Justice Reform Act of 1990 (CJRA).[538] Prior to the enactment of the CJRA, the Northern District had generated significant national interest in its design and use of an ADR procedure known as early neutral evaluation (ENE).[539] Pursuant to the CJRA, the court retained the authors to evaluate its mandatory ENE programme and suggest improvements.[540] Their most important findings include the following:

- Approximately two-thirds of those who participated in the mandatory ADR program felt satisfied with the process and believed it worthy of the resources devoted to it

[534] See, Resnik, J.(1995) Many Doors? Closing Doors? Alternative Dispute Resolution and Adjudication, 10 *Ohio St. Journal.on Dispute Resolution.* 211at 261
[535] *Ibid* at 255
[536] Ward, P.M. 1997. ADR and the Courts: An Update. 46 *Duke L.J.* 1445
[537] Rosenberg, J.D and Folberg, H.J. (Jul., 1994) Alternative Dispute Resolution: An Empirical Analysis. *Stanford Law Review,* Vol. 46, No. 6 pp. 1487-1551 available @ http://www.jstor.org/stable/1229164. Accessed: 26/04/2011 16:02
[538] 28 U.S.C. 471 note (Supp. IV 1992) ("The United States District Court for the Northern District of California… shall experiment with various methods of reducing cost and delay in civil litigation, including alternative dispute resolution, that such district courts and the Judicial Conference of the United States shall select.").
[539] See generally, Brazil, W.D. 1990. A Close Look at Three Court-Sponsored ADR Programmes: Why They Exist, How They Operate, What They Deliver, and Whether They Threaten Important Values, U. *CHI.L EGAL F*. 303, 331-34.
[540] 28 U.S.C 471 note (Supp. IV 1992) ("The Judicial Conference of the United States... shall study the experience of the district courts under the demonstration programme.").

(dissatisfaction with the programme resulted primarily from dissatisfaction with the particular neutral assigned to the case);

- While the percentage of parties who reported saving money approximately equalled the percentage who reported that the process resulted in a net financial cost, the net savings were, on average, more than ten times larger than the cost of an ENE session;
- Approximately half the participants in the programme reported that participation decreased the pendency time of their cases;
- The majority of parties and attorneys reported learning information in the ENE session that led to a fairer resolution of their case; and
- The ENE process varied significantly from case to case and from neutral to neutral and the most important factor in determining the success of the process in any one case was the individual neutral involved.[541]

Another evaluation was conducted by Bingham and Wise[542] focusing on implementation of the Dispute Resolution Act, 1990 in federal departments and agencies.

3.2.2 Analysis of the Implementation of Court Connected ADR in the United States

We have discussed the different models of CCADR adopted by the Federal and State Courts in the US. In this section, we would highlight some similarities and conflicts (if any) in these models. This analysis will be done under the following headings: mode of commencement of the programs, relationship with existing statutes and civil procedure rules, type of programme offered i.e. whether voluntary or mandatory or both; types of cases dealt with, array of ADR options offered, relationship to the Courts (i.e. in terms of reporting, cost shifting, the time of payment of fees, neutrals, time of referral; level of supervision) as well as the status and enforcement of ADR settlement agreements.

Commencement of programmes - One common feature in respect of how the Federal and State Courts integrated ADR into the court system in the US is the use of pilot programmes. In the case of the Federal Courts, it started with one pilot Scheme then increased to ten. The pilot programmes were then evaluated and the findings led to amendments in the existing

[541] Rosenberg and Folberg, *op cit*, p.1488-1489

[542] Bingham, L.B., and Wise, C.R. (July, 1996) The Administrative Dispute Resolution Act of 1990: How Do We Evaluate Its Success? *Journal of Public Administration Research and Theory*. Vol. 6, No. 3 pp. 383-: http://www.jstor.org/stable/1181666 .Accessed: 04/12/2011 13:21.

legislation and Civil Procedure Rules to accommodate the results of the testing process. State courts followed the same process, usually trying out a pilot or demonstration programme in one court first before adopting same state-wide with appropriate legislation and amendment to the existing Civil Procedure Rules (CPR).

Relationship with Extant Legislation - Another common feature of the US models is the fact that CCADR programmes were integrated through amendments of existing CPR. Such amendments encouraged and empowered the courts to refer and order matters to ADR especially mediation. The CPR therefore in all cases formed the bedrock and catalyst of the court connected programmes in terms of administrative and supervisory structure. Separate ADR specific rules were put in place to guide how cases could be referred to ADR by the courts, the time frames for conduct of such processes, consequence of refusal to explore ADR, the types to ADR process to be offered by the Court and who would conduct the process.

Type of Programmes Offered - The Federal Courts began by offering mandatory non-binding court annexed arbitration before a trial could be requested. Depending on the range of monetary damages which could sometimes be between $50,000 and $150,000 maximum, parties were mandated to explore non-binding arbitration. In the State Courts, the emphasis was on 'mandatory' mediation. Parties were by default, depending also on the range of monetary damages claimed, referred to mediation. A process common to both the Federal and State mandatory programmes was the 'Opt Out' procedure. Parties who were mandated to arbitrate or mediate could 'opt' out of the process on grounds specified in the relevant Rules.

Relationship with the Courts - This will be discussed in terms of reporting, costs, neutrals, time of referral, and the level of supervision exercised by the courts over their programmes.

(i) *Reporting***: -** In the US CCADR schemes, when courts refer matters to ADR, the rules provide in some cases that where settlement fails, the neutral should make a report on the file on why 'things fell apart.' In other cases, the neutral is only required to note on the case file that settlement could not be reached without giving reasons. The latter was to avoid any bias when the matter went to trial.

(ii) *Costs*: - One major area of divergence concerning ADR programmes offered in Courts is the issue of who bears the cost of the ADR process. These costs include administrative fees as well as the cost of the neutral facilitating the process. In the Federal district Courts, during

the pilot programmes, the neutrals were usually volunteers and so no fees were paid. The same is true of courts till date that use volunteer neutrals. Where however the ADR processes are undertaken by professionals who were certified by the Court, their fees had to be paid. In the majority of the cases, the parties had to pay the neutrals fees except in small claims. In such cases, the courts fixed a pro rata fee payable to the neutrals depending on the amount of damages involved. In other courts, the court pay in full or a part of the neutrals fee for conducting the ADR sessions.

There is also the issue of cost-shifting i.e. where a party has unreasonably refused to explore amicable settlement, even when he is victorious at the trial, the courts may refuse to award any costs or reduced courts if in its opinion, the result obtained at the trial could have been reached through an ADR procedure.

(iii) *Neutrals*: - There are at least four different options observed in the US programs: the courts ask for volunteers to conduct the ADR session in their court annexed programme or in some cases the court pays a token on a pro rata basis to the volunteers. In other programs, the Judges are themselves trained as ADR professionals and are involved directly in conducting the ADR processes. In such cases if there is no settlement a different Judge conducts the trial. In yet other schemes, the courts maintain a roster of accredited neutrals and parties who are referred to ADR may appoint to anyone on the roster to facilitate resolution of their dispute. Usually, in these cases, parties themselves bear the cost of the neutral's fees often based on a pro rata fee schedule fixed by the Court.

(iv) *Time of Referral:*- Both the Federal and State Courts all encourage parties to explore ADR before trial. In most courts it is a perquisite to requesting for trial. The CPR also provides for Judges to order or refer matters pending in their courts to an appropriate ADR process that the Court deems suitable. This of course is also before trial commences. Nothing in the Federal or State rules provide for referral to ADR after trial has commenced even through in the litigation process, parties are free to settle out of Court and file their terms as consent judgment of the court.

(v) *Level of Supervision* - The level of supervision exercised by the courts over the ADR processes both in the Federal and State Courts are minimal. The type of supervision also differs. In Courts where mediation is the default process, the main concern of the courts is usually to ensure that the mediators are suitably accredited – once thus is ascertained and such mediator is added to the Court roster, the conduct of the ADR process itself is left

completely to his discretion and control. This is also true for neutral evaluators. The courts also conduct evaluations of their programmes in order to determine the effectiveness of the neutrals as well as the process either through commissioned investigators or using feedback forms.

Types of Cases Facilitated - Only Civil cases are referred to Alternative Dispute Resolution. In the case of the Federal Cases, Civil claims which involve constitutional issues or fundamental rights of citizens were statutorily exempted. In State courts, these matters are also exempted in practice. Both the Federal and State Courts also adopt or use the range of the amount claimed in the suit as a criteria or factor for determining whether or not to refer a matter to ADR. This gives the wrong impression that complex cases involving huge sums of money are not suitable for ADR. This may however be misleading as can be seen from international trade and commercial disputes involving millions of dollars that have been successfully mediated or resolved by or arbitration.

ADR Options Offered - Not every court can afford to make available all the available spectra of ADR in its annexed programme. In the Federal pilot programmes arbitration was offered while in the state programmes mediation was the default option. Most Courts however offered at least three options i.e. Neutral Evaluation, Mediation and Non-binding arbitration.

Status and Enforcement of ADR Settlement Agreements - Most of the Court annexed programs in the US emphasise that any settlement reached through ADR is a contract between the parties simpliciter. The Rules however provide, especially for mediated settlement agreements that the parties may request that their agreement be made the judgment of the court. In such cases, parties who exercise such option would usually be taken before the relevant Judge who is free to question them in order for the court to ascertain that parties voluntarily entered into the agreement. Where the court is satisfied about the voluntariness of the agreement, it enters same as the judgment of the court. Thereafter the agreement is enforceable like any other judgment of the regular court.

3.3 CCADR Practice and Procedure in the United Kingdom

In the UK, although the Supreme Court Rules and the County Court Rules (the predecessors to the Civil Procedure Rules) did not promote ADR, the courts started to do so from about the mid 1990s onwards.[543] The Commercial and the High Court required lawyers to consider with their

[543] Blake, S., Browne, J., and Sime, S. (2011) *A Practical Approach to Alternative Dispute Resolution.* New

clients the possibility of resolving the dispute with mediation, conciliation or otherwise and to ensure that parties were fully informed as to the most cost-effective means of resolving their dispute.[544] The Woolf Reforms culminating in the Civil Procedure Rules 1998 are however the direct driving forces behind the growth and use of ADR in the UK.

The approach of UK courts to ADR has been to encourage parties to use same through a variety of means including special court guides which contain guidance relating to the use of ADR; encouraging counsel to discuss, explore and consider with the parties suitable ADR procedures for the resolution of their disputes before litigation;[545] pre-action protocols which introduced some steps as reasonable pre-action conduct which parties should follow before issuing proceedings.;[546] Case Management ADR Orders i.e. where the courts as part of its powers to manage its docket, it may at a pre-trial or case management conference order parties to consider ADR;[547] granting stay of proceedings for parties to comply with a pre-agreed ADR process or an ADR Order of court,[548] and a willingness to uphold and enforce ADR clauses in

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York: Oxford University Press. P.76 para. 5.02

[544] *Ibid.* See also, Practice Note: Commercial Court: Alternative Dispute Resolution (1994) 1 All ER 34; Practice Note (Civil Litigation: Case Management (1995) 1 All ER 385.

[545] See, for example, the Admiralty and Commercial Courts Guide.8th ed. (2009); Chancery Guide (October 2009, amended April 2010); the Queens Bench Division Guide (2007) and the Technology and Construction Court Guide (2nd ed. Revised October 2010).

[546] The CPR introduced some steps as reasonable pre-action conduct which parties should follow before issuing proceedings. There are about 11specific protocols in relation to personal injury claims, road traffic accidents, disease and illness claims, clinical negligence, housing disrepair, defamation, judicial review, professional negligence, construction and engineering disputes, possession claims based on rent arrears and possession claims in respect of mortgage arrears. Where there is no specific protocol, the Practice Direction Pre-Action Conduct applies. The pre-action practice direction states: 'Starting proceedings should usually be a step of last resort, and proceedings should not normally be started when a settlement is still actively being explored. Although ADR is not compulsory, the parties should consider whether some form of ADR procedure might enable them to settle the matter without starting proceedings. The court may require evidence that the parties considered some form of ADR (see paragraph 4.4(3)).' This means that you may need to provide evidence to the court that you have thought about whether some form of ADR might be helpful. The practice direction gives four types of 'ADR' as an example: Discussion and negotiation, Mediation, Early neutral evaluation and Arbitration. See, http://www.adrnow.org.uk/go/Section_10.html and also Blake, *et al, op cit,* p.80, para. 5.19

[547] Courts may at any pre-trial review or case management conference which the parties attend, order parties to consider ADR. In *Halsey v. Milton Keynes General NHS Trust* (2004) 1WLR 3002 at para. 32, the Court of Appeal approved the use of such orders as the strongest form of encouragement yet falling short of compulsion. Courts are required to 'actively manage cases', and the Civil Procedure Rules state that this means 'encouraging the parties to use an alternative dispute resolution procedure if the court considers that appropriate, and facilitating the use of such procedure.' This means that a judge may suggest that you should try mediation if he or she thinks it might help in your case. The judge can't force you to use mediation if you don't want to. If you agree, the date of your court hearing may be postponed so that mediation can take place. *Civil Procedure Rules Part 1.4* http://www.adrnow.org.uk/go/Section_10.html

[548] The courts in the following cases stayed proceedings where same was commenced before the agreed ADR procedure: *Cape Durasteel Ltd v. Rosser & Russel Building Services Ltd* (1995) 46 Con LR 75; *Herschel Engineering Ltd v. Breen Property Ltd* (2000) 70 Con LR 1; *DGT Steel & Cladding Ltd v. Cubitt Building & Interiors Ltd* (2007) BLR 371. In *Channel Tunnel Group Ltd v. Balfor Beatty Construction Ltd* (1993) the pre-agreed ADR process was expert determination; the court granted the stay. The court also in the DGT Steel case considered the following guidelines for granting a stay pending ADR thus: the extent to which the parties had complied with any pre-action protocols, whether the dispute is suitable for the chosen ADR process, the ADR

contracts.[549] Also the courts have encouraged ADR by their continued willingness to order costs against a party who unreasonably refused to explore ADR at the early stages[550] and promotion of court mediation[551] (See Table 1 below on the powers of courts with respect to facilitating ADR), through its court connected or annexed ADR schemes.

Table 1

ALTERNATIVE DISPUTE RESOLUTION: THE COURT'S POWERS

PART 3

3.1 Scope of this Part

(1) This Part contains the court's powers to encourage the parties to use alternative dispute resolution and to facilitate its use.

(2) The powers in this Part are subject to any powers given to the court by any other rule or practice direction or by any other enactment or any powers it may otherwise have.

3.2 Court's duty to consider alternative dispute resolution

The court must consider, at every stage in proceedings, whether alternative dispute resolution is appropriate.

3.3 When the court will adjourn proceedings or a hearing in proceedings

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costs compared to litigation and whether a stay would further the overriding objectives of the CPR.

[549] Most contracts for services, insurance and construction contracts now contain ADR clauses specifying a particular ADR method for parties to adopt in resolving their disputes or specifying a variety of processes that need to be exhausted in turn before litigation can be commenced. The court in *Cable and Wireless Plc v. IBM United Kingdom Ltd* (2002) 2 All ER (Comm) 1041, upheld an ADR clause that did not specify a particular procedure; it required the parties to use an 'ADR procedure as recommended to the parties by the Centre for Dispute Resolution.'

[550] The court in *Union Discount v. Zoller* (2002) 1WLR 1517 was willing to award damages for breach of an ADR clause and to assess damages on the basis of the amount which the expert (contractually agreed by the parties) would have awarded if he had determined the dispute. See also, the case of *Sunrock Aircraft Corp Ltd v. Scandinavian Airlines System Denmark-Norway-Sweden* (2007) 2 Lloyd's Rep 612

[551] The court also encourage the use of ADR through some court based mediation schemes such as the Small Claims Mediation Scheme, the Court of Appeal Mediation Scheme, the National Mediation Helpline (which has now been replaced by an online listing of mediation service providers) and Early Neutral Evaluation Schemes. See, Blake, *et al, op cit* p.90 para..5.58. The most important case on using ADR is the The Halsey Case 2004. The judgment offers guidance on how courts should approach ADR, including the statement that 'all members of the legal profession who conduct litigation should now routinely consider with their clients whether disputes are suitable for ADR'.
The judgment makes two key things clear: Courts cannot compel parties to use mediation or another form of ADR, as this would be contrary to article 6 of the European Convention on Human Rights; and Courts can deprive a winning party of the costs of the case, if they have unreasonably refused to consider mediation or ADR. It is up to the losing party to show that the winning party was unreasonable. http://www.adrnow.org.uk/go/Section_10.html

(1) If the court considers that alternative dispute resolution is appropriate, the court may direct that the proceedings, or a hearing in the proceedings, be adjourned for such specified period as it considers appropriate –

(a) to enable the parties to obtain information and advice about alternative dispute resolution; and

(b) where the parties agree, to enable alternative dispute resolution to take place.

(2) The court may give directions under this rule on an application or of its own initiative.

(3) Where the court directs an adjournment under this rule, it will give directions about the timing and method by which the parties must tell the court if any of the issues in the proceedings have been resolved.

(4) If the parties do not tell the court if any of the issues have been resolved as directed under paragraph (3), the court will give such directions as to the management of the case as it considers appropriate.

(5) The court or court officer will –

(a) record the making of an order under this rule; and

(b) arrange for a copy of the order to be served as soon as practicable on the parties.

(6) Where the court proposes to exercise its powers of its own initiative, the procedure set out in rule 4.3(2) to (6) applies.

(By rule 4.1(7), any direction given under this rule may be varied or revoked.)[552]

In the UK, the county court, often referred to as the small claims court, deals with civil matters, such as: claims for debt repayment, including enforcing court orders and return of goods bought on credit, Personal Injury, Breach of contract concerning goods or property, Family issues such as relationship breakdown or adoption, Housing disputes, including mortgage and council rent arrears and re-possession.[553] The High Court deals with higher level civil disputes within three divisions: the Queen's Bench Division, the Chancery Division and the Family Division, and deals with other jurisdictions including the Administrative

[552]Family Procedure Rules, Part 3, p.1, April 2011. Available at http://www.justice.gov.uk/courts/procedure-rules/family/pdf/parts/Web_part_03.pdf

[553] http://www.justice.gov.uk/about/hmcts/courts

Court.[554] Each of these courts have their own CCADR schemes which are discussed in subsequent sections of this paper.

3.3.1 Her Majesty's Court Service (HMCS) Small Claims Mediation Scheme

Schemes for mediating small claims were first piloted in Exeter and Manchester courts.[555] Under the Exeter model, district judges referred suitable cases to solicitor mediators who gave the parties a 30minute mediation appointment to explore settlement; whereas in Manchester, there was an in house court mediator who met face-to-face with the parties in 1hour appointments. Later the scheme developed to allow the mediator 'meet' with the parties by telephone. The Small claims Mediation Scheme established by HMCS in 2007 - 2008 followed this in-house mediation model as developed. It is a free service for defended small claims cases. The small claims track provides a simple and informal way of resolving disputes. A party can do this without a solicitor. A leaflet provided by the court tells parties about the sort of cases that are likely to be allocated to it and about how cases in the small claims track will be handled. Form N149 Allocation questionnaire (Small claims track) asks whether a party would like to use the free small claims mediation service provided by Her Majesty's Courts Service, to help facilitate or settle the claim with the other party. The Small Claims Mediation Service is a free service set up to help court users who currently have an ongoing small claims case.[556] However, since mediation is a voluntary process, it should be noted that mediation will only take place if both (all) parties agree. The Small Claims Mediator is able to settle the majority of disputes over the telephone without the need for either party to attend court. Alternatively, if a party prefers, a face-to-face mediation may be arranged in the court premises. If a party feels uneasy about meeting or speaking to the other side in the dispute, the mediator can make special arrangements to prevent this happening.[557]

In order for the judge to decide whether a claim qualifies as a 'small claim,' as well as the party's view and that of the defendant, the judge will take into account: the amount in dispute which should not be more than £5,000; the type of claim - these will usually be consumer claims (e.g. goods sold, faulty goods or workmanship), accident claims, disputes about ownership of goods, and disputes between landlords and tenants about repairs, deposits, rent arrears, and so on, but not possession; the amount and type of preparation needed to be able

[554] *Ibid*
[555] Blake, *et al*, *op cit* p. 255 para 14.22
[556] http://www.smallclaims.me.uk/smallclaims_forms/ex307.pdf
[557] *Ibid*

to deal with the case justly (the judge will have in mind that this procedure is intended to be simple enough for people to conduct their own cases without a solicitor's help, if they wish). The claim should require only minimal preparation for the final hearing, for example, cases in the small claims track will not normally involve a lot of witnesses or difficult points of law.

Cases going to the county court are ordinarily divided into three levels: Small claims (claims under £5,000 for most cases, or under £1,000 for housing disrepair and personal injury); Fast track (claims between £5,000 and £15,000) and Multi track (claims over £15,000). It is recognised that many cases which are taken to the county courts could be resolved through Mediation.[558] It is therefore the UK government policy to encourage all court users to think about mediation before making an application to court, and courts have the power to suggest mediation as a way of resolving suitable disputes. Mediation is NOT compulsory in courts in the UK. In small claims, the court will offer free mediation once the claim form is submitted to the court. A claimant can choose whether or not to use this, and still have the right to have a judge hear the claim. In claims over the small claims limit, the court can also impose cost penalties if a party unreasonably refuses to mediate. Generally, in fast track and multi track cases, the loser pays the winner's legal costs.

If a party refuses to mediate, and the judge thinks this is unreasonable, such party may not be able to claim legal costs from the other side, even if the case was won. There are however additional costs for mediation in cases that are not small claims.[559] A party is not required to attempt mediation beforehand, and some claimants have faced practical or financial difficulties or delays in accessing mediation for court claims above the small claims limit. In England and Wales, reasonable mediation costs, including legal help in preparing for mediation, the mediator's fee, and any administrative charges, can be covered by Legal Aid if a party is eligible. In Scotland and Northern Ireland, the costs of civil mediation are not covered by Legal Aid, although in Scotland legal advice and assistance may be available in relation to legal work in preparing for mediation.[560]

In small claims cases, the timescale for the mediation will depend on how busy the mediation officer is in the court area. Normally the court will give the party information about the small claims mediation officer as soon as an application is put in, and ask the party to get in touch with him or her. The officer will then speak to the party and the other side, and see if they can

[558] http://www.adrnow.org.uk/go/SubPage_13.html assessed 02/03/2012
[559] *Ibid*
[560] *Ibid*

broker an agreement over the phone, or arrange a face-to-face meeting if that is needed. This should all happen while the party is waiting for the date of hearing. This means that if the party's' reach an agreement the court can be notified and the hearing cancelled. If parties are unable to agree on a solution, then the hearing will go ahead. On the average, the timeline for cases that settled through mediation was 5 weeks; cases which went to a hearing took around 14 weeks.[561]

In fast- and multi-track cases, the court will give the party a leaflet about the Civil Mediation Directory, or the party can contact the helpline direct even before putting in an application to the court. The helpline staff will answer any questions a party may have about how mediation works, and put the party in touch with a local mediation provider approved by the Ministry of Justice. The local mediator will contact the other party, and, if they are willing to try mediation, make all the arrangements for the mediation to take place. How long this takes will depend on how smoothly this process goes. In some courts, the date of the hearing is set, and the mediation takes place while waiting for that date. As with the small claims process, this means that if parties reach an agreement, they can notify the court and cancel the hearing. If parties are unable to agree on a solution, then the hearing will go ahead without any delay. In other courts a hearing date is not fixed if the parties are going to try mediation; this means that a hearing fee will not have to be paid at that stage.

If no agreement is reached, or the mediation does not take place, then a date is fixed for the court hearing, and the hearing fee paid. Mediation in fast- and multi-track cases (cases above £5,000) arranged through the Civil Mediation Directory[562] is subsidised by the government and by the mediation providers. Fast-track claim mediations are £300 per party for three hours, and multi-track claims are £425 per party for four hours. VAT will need to be added to these fees, and the total cost will depend on the value of the claim, and the time taken for the mediation appointment.[563]

Mediation in the UK is voluntary, so a party is not forced to mediate. But it is now fairly common for judges to suggest mediation, if they think the case is suitable. Judges do have the power to penalise a party on costs if they unreasonably refuse to consider mediation, so if a party has a good reason for refusing mediation, this will need to explain it to the judge. When an application is made to the court, a party will receive an *Allocation questionnaire*. This will

[561] *Ibid*
[562] www.civilmediation.justice.gov.uk
[563] *Ibid*

ask whether the party would like to try mediation, and whether the party would like the court to put him in touch with the *Civil Mediation Directory* to make arrangements. In some courts, the judge may suggest that the party try mediation, or may even 'refer' the case to mediation.[564]

From June 2008, all court areas in England and Wales have had a full-time mediation officer based in one of the county courts, who can offer advice and information about mediation to small claims court users. The officer can also provide telephone mediation, or a face-to-face mediation appointment, if both parties agree.

The advice and the mediation are free, once the small claims application fee has been paid. When a party makes a small claims application to the court, s/he will receive a *Small claims allocation questionnaire*. This will ask whether the party would like to try mediation. If both parties agree, the hearing date may well be stayed (postponed) and the small claims mediation officer will be in touch to make arrangements. If the judge thinks mediation might be suitable even if both parties haven't ticked the box on the allocation questionnaire, s/he may suggest that the mediation officer should contact both parties anyway to discuss whether mediation could help. In this case the hearing date is likely to be set so that there is no delay if mediation does not work out. When this scheme was piloted in Manchester during 2005-06, a high proportion of cases settled at mediation - well over three quarters of those that mediated reached an agreement. The good news was that in virtually every case, the agreement was complied with, and there were no problems with enforcement. The bad news was that the mediated settlements were on average about half of the original claim.[565]

In England and Wales, anyone applying to court for their divorce proceedings must first attend a meeting with a mediator to see whether mediation is suitable for them, the case, and all the circumstances. This is called a Mediation Information and Assessment Meeting (MIAM). A party will be expected to contact a mediator, and there are a number of ways to do this: approaching a mediator or local mediation service directly; a party's solicitor can refer to mediation or the court might refer parties to mediation.[566]

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[564] Some judges can be quite forceful about this; thus the party may want to take up the suggestion, but if s/he feels on reflection that mediation is not right for the case, the party will need to explain why to the judge in order to avoid possible cost penalties. Once the helpline has put the party in touch with a local mediation provider, the mediator or their administrator will contact both parties and arrange a mediation session. This may take place in a room in the court, at the mediator's premises, or even at a local hotel.

[565] www.civilmediation.justice.gov.uk

[566] http://www.adrnow.org.uk/go/SubPage_53.html assessed 06/03/2012

If both parties are willing to attend together then the Mediation Information and Assessment Meeting (MIAM) will be held with both of them and the mediator, but a party can ask for separate meetings with the mediator. At this meeting, the mediator will explain what mediation is and help the party think about whether it is suitable for the case. At that meeting, the mediator and the parties must sign what is called Form FM1 to confirm that the parties have attended a MIAM, or to confirm the parties have not attended and the mediator has decided the case is not suitable for mediation. There are only a few specific reasons that the mediator can give as to why mediation is not suitable, including that one party not being willing to attend a MIAM. The requirement to attend a MIAM doesn't mean that parties have to mediate – parties are only required to meet with a mediator to discuss whether mediation is suitable.

There are exceptions to this requirement that all applicants for divorce must attend a MIAM. These include where there has been domestic violence that resulted in a police investigation or civil proceedings; bankruptcy; and if the other party can't be located. Also, where the matter is urgent or where social services have been involved because of child protection issues, such party will not be required to attend a MIAM to consider mediation. In addition, if a party has contacted three mediators close to home (within 15 miles) and no mediator can offer a MIAM within 15 days, this would also mean there is no requirement to attend a MIAM.[567]

Once parties have decided to go ahead, mediation might begin with some form of intake procedure - either face-to-face or on the phone. This is a chance for parties to talk further to the mediator about what is involved in mediation. If a party is going to have this intake meeting in person, she can choose whether to go along with her ex, or to go on her own. Where financial issues are in dispute, some mediators will ask the parties to complete a form giving information about income, expenditure and assets before the first appointment. The mediator will then meet with the parties together at joint sessions.

The number of sessions needed depends on the complexity of the dispute and the number of issues that the parties would like to resolve.[568] There is flexibility within this structure, however, and mediators will have different ways of using it. For instance, where there are

[567] *Ibid*
[568] *Ibid*

several issues to be dealt with it might be appropriate to work on one issue at a time, rather than all at once, and so build agreements one by one.[569]

The scheme has been adjudged successful as evident from its several awards such as the 2008 European Crystal Scales of Justice Award for innovative court practice, the CEDR sector award and second place in the Guardian Public Service Awards. The government consistently monitors the progress of the scheme via its annual pledge reports.[570]

3.3.2 The Central London County Courts Pilot Scheme

Central London County Court was the first court in England to establish a court-based mediation scheme. This was first piloted in 1996, and ran for ten years. The mediation was provided by approved commercial mediators at a subsidised cost for all fast- and multi-track cases (cases above £5,000), and took place in small rooms on the court premises. From 2007, all county court mediation in England and Wales is organised through the Civil Mediation Directory, not through individual courts.[571]

The Central London County court mediation schemes were two different processes – the voluntary and the compulsory. The Voluntary pilot scheme was established in 1996 to cater for claims above £3,000 (three thousand pounds). The scheme offered a three-hour mediation to parties in the court premises between 4.30pm and 7.30pm. Parties were required to pay an administrative fee of £25 each; this was later increased to £100. This pilot scheme lasted from 1998 to 2007 when the focus shifted to mediation through the National Mediation Helpline.[572]

The Compulsory pilot scheme on the other hand commenced in 2004 and ran till March 2005. Here cases were automatically referred to mediation except one or both of the parties objected giving reasons for same. Where there is no objection, proceedings were stayed for an initial period of two months to allow mediation to take place.[573] All cases automatically referred except cases on the small claims track, cases involving children, protected persons or other groups of persons exempted from paying court fees and cases where a court has granted

[569] http://www.adrnow.org.uk/go/SubPage_53.html
[570] The reports can be accessed at www.justice.gov.uk. According to the 2007/2008 report 3,745cases were referred to mediation, out of these, 2,527 (67.5%) settled at the mediation. In 2008/2009 there was an increase in the referred cases – 9,240 out of which 6,675 settled i.e. 72%
[571] http://www.adrnow.org.uk/go/SubPage_53.html
[572] See, Genn, H. DCA Research paper 5/98. She conducted a review of the scheme and found that even though it was underutilised, it had a high success rate.
[573] See, the CPR, PD 26B para 1.1 and 5. See also, Blake, *et al*, *op cit* pp. 254 – 255 para 14.18 and 14.19

an interim injunction.[574] As a result of the court's decision in *Halsey v. Milton Keynes General NHS Trust*[575] the court could no more override a party's' objection and compel mediation.

3.3.3 Commercial Court Mediation

Since 1993 the Commercial Court has been identifying cases regarded as appropriate for ADR. In such cases Judges may suggest the use of ADR, or make an Order directing the parties to attempt ADR. If, following an ADR Order, the parties fail to settle their case they must inform the Court of the steps taken towards ADR and why they failed. Thus although the Court's practice is non-mandatory, ADR Orders impose substantial pressure on parties.[576]

According to a study by Professor Genn, *et al*, during the first three years reviewed in the study, the annual number of ADR Orders issued was about 30. There was a substantial increase toward the end of the period, with some 68 Orders being issued in the final six months. This was the result of one or two judges significantly increasing the number of Orders issued. ADR was undertaken in a little over *half* of the cases in which an ADR Order had been issued. However, the figures suggest *increasing* use of ADR towards the end of the review period, supporting evidence from elsewhere of a developing interest in the use of ADR among commercial litigants. Of the cases in which ADR was attempted, 52% settled through ADR, 5% proceeded to trial following unsuccessful ADR, 20% settled some time after the conclusion of the ADR procedure, and the case was still live or the outcome unknown in 23% of cases. Among cases in which ADR was *not* attempted following an ADR Order, about 63% eventually settled. About one fifth of these said that the settlement had been as a result of the ADR Order being made. However, the rate of trials among the group of cases *not* attempting ADR following an ADR Order was 15%. This compares unfavourably with the five percent of cases proceeding to trial following unsuccessful ADR.[577]

The most common reasons given for not trying ADR following an ADR Order were that: the case was not appropriate for ADR. the parties did not want to try ADR, the timing of

[574] See, CPR, PD 26B para2.
[575] (2004) 1 WLR 3002
[576] Genn, H. Court-based ADR Initiatives for Non-Family Civil Disputes: The Commercial Court and the Court of Appeal, available at http://webarchive.nationalarchives.gov.uk/+/http://www.dca.gov.uk/research/2002/1-02es.htm
[577] *Ibid*

the Order was wrong (too early or too late) and lack of faith in ADR as a process in general. ADR Orders were generally thought to have had a positive or neutral impact on settlement. A small minority believed that the Order had hindered settlement. Orders can have a positive effect in opening up communication between the parties, and may avoid the fear of one side showing weakness by being the first to suggest settlement. Experience of *successful* ADR following an ADR Order was overwhelmingly positive. The factors most valued were the skill of the mediator, the ability of ADR to get past logjams in negotiation, the opportunity to focus on the strengths and weaknesses of cases, and client satisfaction. There was also a perception that successful mediation avoids trial costs, leading to substantial savings for clients. When ADR was *unsuccessfully* attempted in compliance with an ADR Order there was a lower level of satisfaction. Concerns centered on the shortcomings of neutrals, the intransigence of opponents, and the problems caused by pressuring unwilling opponents through an ADR Order to come to the negotiating table. However, some solicitors felt that even in the absence of achieving a settlement, the ADR process had been constructive.[578]

The ADR Order of the commercial court requires the parties to co-operate with one another by exchanging lists each containing the names of three mediators who are able to conduct mediation by the date fixed by the court.[579] If the parties cannot agree, the court will usually select a mediator or provide that the mediator should be selected by an ADR organisation.[580]

3.3.4 The Court of Appeal Mediation Scheme (CAMS)

In 1996/97, the Court of Appeal commenced a voluntary court-based mediation scheme. According to Susan Blake, *et al*, the scheme had a low take off and a less than 50% success rate.[581] In this scheme, the court invites parties to participate. Cases are not individually selected, but, with the exception of certain categories of cases, a standard letter of invitation is sent to parties involved in appeals.[582] Since 1999 parties refusing to mediate have been asked to give their reasons for refusal. If both parties agree to mediate, the Court of Appeal arranges mediations and mediators provide their services without charge. Between November 1997 and April 2000 some 38 appeal cases were mediated following agreement by both sides.

[578] *Ibid*
[579] Blake, S. *et al*, *op cit*, p.257
[580] *Ibid*
[581] *Ibid*, p.256
[582] Genn, H. (2002) Court-based ADR Initiatives for Non-Family Civil Disputes: The Commercial Court and the Court of Appeal, available at http://webarchive.nationalarchives.gov.uk/+/http://www.dca.gov.uk/research/2002/1-02es.htm

In an additional 99 cases *one party* was willing to mediate. When the scheme had the benefit of a full-time manager, there was a significant increase in the proportion of cases in which *both sides* agreed to mediate.[583]

The most common reasons given for refusal to mediate were that: a judgment was required for policy reasons; the appeal turned on a point of law and the past history or behaviour of the opponent. About half of the mediated appeal cases settled either at the mediation appointment or shortly afterwards. Among those cases in which the mediation did *not* achieve a settlement, a high proportion (62%) went on to trial. This suggests that there are special characteristics of appeal cases that need to be considered in selecting cases for mediation. Blanket invitations to mediate, particularly with an implicit threat of penalties for refusal, may not be the most effective approach to the encouragement of ADR at appellate level.[584]

Solicitors' experiences of *successful* mediations in appeal cases were largely positive. However, there were expressions of concern, even among cases that were successfully mediated, about clients' perceptions of being pushed into mediation and sometimes being pressured to settle. Solicitors involved in *unsuccessful* mediations occasionally complained about having felt compelled to mediate, even though there had been little scope for compromise. There was evidence of an occasional mismatch between the mediator's approach to the mediation and the expectations of the parties and their advisers. Although solicitors generally approved of the Court of Appeal taking the initiative in encouraging the use of ADR in appropriate cases, it was felt that there was a need for the adoption of a more selective approach, such as that being used in the Commercial Court.[585]

In 2003, the scheme was revised and became collaboration between the court and the Centre for Effective Dispute Resolution (CEDR) Solve, with the latter bearing full responsibility for the administration of the scheme. CAMS is used for non-family disputes only; in respect of family disputes, the court itself selects a mediator from the Solicitors Family Law Association or the Law Society's Family Mediation Panel or the UK College of Mediators.[586] Some of the key features of CAMS as identified by Blake, *et al,* are as follows:

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[583] *Ibid*
[584] *Ibid*
[585] *Ibid*
[586] Blake, S. *et al, op cit,* p.256

- If a party has selected or the court has recommended that mediation be tried, the court will pass details of the case to CEDR Solve, who will then contact the parties.
- If both parties agree to mediation, they will be sent the names of three suitable mediators, and they must select one from this list. In the event of disagreement, CEDR Solve will make the selection.
- The parties will usually find and pay for the venue.
- The preparation for the mediation and the mediation meeting will follow the same steps as those described earlier,[587] although no witness of fact or expert witnesses are formally called in appeal mediations, although they can attend and give assistance if required.
- The scheme is entirely voluntary and the parties are free to terminate the mediation any time and without giving a reason.
- The mediator's role is to facilitate a settlement of the matter.
- The parties can ask the mediator to offer his opinion on issues that arises in the case, although he may not be willing to do so.
- As condition of entering into the scheme, the parties have to agree not to make any claim in relation to the mediation against the mediator, the court or its officials or CEDR Solve, the administrators of the scheme.
- All discussions in and documents created for the mediation are confidential and 'without prejudice' although, as an exception to this, the mediator will make a short report to the court setting out the date and outcome of the mediation; but the court will not have power to enquire into the events that took place during the mediation.
- If settlement is reached, the agreement would normally be placed on the court record, although the parties can keep the terms of settlement confidential if they wish.
- In non-family cases, the fixed fee for each party is currently set at 850euros plus VAT, although in exceptionally complex cases or high value cases above one million euro, a higher fee may be proposed by CEDR Solve, subject to the approval of the court. The fixed fee covers four hours preparation time by the mediator and meditation meeting of

[587] See, Chapter 2 of this work

five hours duration. Any extension of time for the mediation and any additional fees arising in connection with that, have to be agreed between the mediator and the parties.

- In family cases, the parties can opt for a fixed fee of 850euros, or they can agree to pay the mediator an hourly rate of 170euro per hour plus VAT, based on the mediator's actual preparation and mediation time; but the total fee will be capped at 850euros plus VAT.

- In all cases, parties of limited means who cannot obtain funding from the legal services commission can apply for the fee to be waived.[588]

3.4 Evaluation of CCADR in the United Kingdom

In 1999, Lord Irvine's inaugural lecture to the Faculty of Mediation and ADR recognised that whilst ADR has an expanding role within the civil justice system, 'there are serious and searching questions to be answered about its use.[589] According to Bondy, there is a need to answer the questions: who needs ADR? Do the LSC and the treasury need it to save money? Do the judges need it to save court time and reduce case loads? Or do parties need it to resolve conflicts more satisfactorily? and can all these needs be met without sacrificing quality of decision making and access to justice to other expediencies?[590]

Andrews has opined that mediation is a valuable substitute for civil proceedings.[591] He comments further that, the rise in mediation has significantly eased the court dockets and that the relationship between the courts and mediation is both flexible and relatively detached. The English law has no system of 'mandatory mediation' though they indirectly show a strong encouragement for same by staying court proceedings so that the opportunity for mediation is created. [592] He however raises three major concerns with respect to court based ADR which are: secrecy, the private status of the neutral (no longer a public judge holding tenure but a hired mediator) and the fear that weaker or less astute parties might receive significantly less than they objectively deserve and their substantive rights may be denied or

[588] For a fuller discussion on the development of ADR in England and Wales, See, Mistelis, L.A. ADR in England and Wales: A Successful Case of Public Private Partnership, available at http://qmul.academia.edu/LoukasMistelis/Papers/207133/ADR_In_England_and_Wales_12_Am

[589] Lord Irvine of Laing, the Lord Chancellor Inaugural Lecture to the Faculty of Mediation and ADR Wednesday, 27 January 1999. Available at www.dca.gov.uk/speeches/1999/27-1-99.htm

[590] Bondy, v. Who Needs ADR? in *LAG*, Sept. 2004 and *Judicial Review*, Dec. 2004 available at http://webarchive.nationalarchives.gov.uk/+/http://www.dca.gov.uk/speeches/1999/27-1-99.htm

[591] Andrews, N. Mediation in Modern English Practice, available at http://www.dike.fr/IMG/pdf/Mediation_in_England_by_N_1_._H._Andrews_Cambridge_.pdf. p.3

[592] *Ibid*

reduced. With regard to secrecy, he argues that litigation offers 'equality of arms' in a public forum but the ADR process denies access to interesting aspects of commercial practice and even serious wrongdoing. [593]

The increasing numbers of court-annexed or court-encouraged ADR have led to fewer cases being litigated in English courts. Undoubtedly, the introduction of ADR was not the only reason, as has been described above. The very introduction of the Civil Procedure Rules not only encourages parties to settle their disputes by recourse to ADR, it also discourages parties from litigating small claims, by introducing a principle of proportionality, according to which litigation costs should be ideally lower than the amount in dispute.[594]

3.4.1 Empirical Findings on the Implementation of CCADR in the United Kingdom

Currently ADR systems can be found in the following courts, tribunals and dispute types: Commercial Court and the Technology and Construction Court,[595] Family law disputes,[596] Court of Appeal,[597] Central London County Court,[598] Patents County Court[599] and Employment Tribunals.[600] A search in LEXIS and WESTLAW conducted on 22 February 2006 on cases in UK Courts gave the following returns:

> On WESTLAW there were 683 conciliation, 661 mediation and 155 ADR cases while on LEXIS there were 378 conciliation, 487 mediation and 113 ADR cases. These numbers are far from definitive, as provided that ADR is successful, only very few ADR cases will end in court. The majority of the

[593] *Ibid*, p.5-7

[594] Mistelis, L.A. ADR in England and Wales: A Successful Case of Public Private Partnership, available at http://qmul.academia.edu/LoukasMistelis/Papers/207133/ADR_In_England_and_Wales_12_Am

[595] 81CPR Rule 1.4 available at http://www.lcd.gov.uk/civil/procrules_fin/contents/parts/ part01.htm#rule1_4; See also, http://www.lcd.gov.uk/civil/procrules_fin/menus/ proto-col.htm where protocols are listed: for example, Protocol for the Construction and Engineering Disputes, Pre-Action Protocol for Defamation; Pre-Action Protocol for Personal Injury Claims; Pre-Action Protocol for the Resolution of Clinical Disputes; Pre-Action Protocol for Professional Negligence.

[596] Rules 2.71 to 2.77 of the Family Proceedings Rules 1991; Pilot Scheme organised by the Solicitors Family Law Association in 1998 which has become the national norm as of June 2000. See also, [1997] 3 All ER 768, [1997] 1 WLR 1069, [1997] 2 FLR 304,[1997] 3 FCR 476.

[597] See, Brown, H. and Marriot, A.L. (1999) *ADR Principles and Practice*, 2nd ed. (London: Sweet and Maxwell) at para. A3-002 at 630-1. See also, the more recent [1999] 2 All ER 490, [1999] 1 WLR 1027, 19 April 1999; *Thompson v. Commissioner of Police of the Metropolis (and Hsu v Commissioner of Police of the Metropolis)*, [1997] 2 All ER 762;*Cowl and Others v Plymouth City Council*, Judgment 14 December 2001, reported in *The Times* 8 January 2002, (CA) per Lord Woolf; *Asian Sky Television plc v Bayer-Rosin*, [2001] EWCA Civ 1792.

[598] Genn, H. The Central London County Court / Pilot Mediation Scheme – Evaluation Report, accessible at *http://www.lcd.gov.uk/research/1998/598esfr.htm*

[599] See, for example, *Unilever v. Procter & Gambler*, [1999] 2 All ER 691 per Laddie J.A recent case in the Court of Appeal dealt with trademark issues: *World Wide Fund for Nature (formerly World Wildlife Fund) v. World Wrestling Federation Entertainment Inc.*, 27 February 2002, reported in *The Times* 14 March 2002.

[600] DTI News Release No. P/2001/30 dated 20 July 2001, which announced the review of employment disputes resolution and DTI document entitled Routes to Resolution: Improving Dispute Resolution in Britain, available at http://www.dti.gov.uk/er/individual/et.htm.

> returns are from years1997–2005; one more indication of the quantitative as well as qualitative importance ADR has acquired in recent years. In terms of cases that have attempted mediation and then, not having reached a settlement, proceeded to litigation, more than 50% of such cases end in the Civil Division of the Court of Appeal. The Queen's Bench Division and the Chancery Division are the second largest users with almost19% and 5.5% respectively. Family mediation cases rarely result in litigation and one can conclude that they achieve overall more successful out-of-court settlements. The ADR cases that do not settle and are finally referred to litigation can be further classified according to subject matter.[601]

According to the same Lexis and Westlaw searches, ninety-two cases or 63% were ADR cases relating to socially sensitive areas in the public interest. In particular, thirty-seven were family law cases; thirteen were consumer disputes; three was a community dispute; and thirty-nine were public (administrative) law disputes. Fifty-four cases or 37% were ADR cases relating to financial and commercial disputes. In particular, thirty-one were commercial law disputes; twelve were, at least in part, financial disputes; five were insurance disputes; fifteen were construction disputes; and one maritime law dispute. Sixteen cases or 10.95% were ADR cases with a foreign element relating to the parties or the subject matter of the dispute.[602]

It is compelling that the Court of Appeal has dealt with ninety-one ADR cases in the last few years and that the largest number of cases are of commercial nature. The number of thirty-nine public law cases is also significant. In any event, the 1403 cases, which are reported in Lexis and Westlaw, UK, are cases which for some reason were not finally resolved by conciliation, mediation or another ADR form. They are indicative of the growing number of cases that are now referred to ADR.[603]

Around two thirds of all the county court cases that go to mediation reach an agreement either at the mediation session, or within a couple of weeks of the appointment. In the first year of the small claims mediation schemes running throughout England and Wales, 2007-2008, the agreement rate was about the same (67%) for face to face and for telephone mediation. If an agreement is reached in mediation, where proceedings have been issued in England and Wales, a mediated agreement can be made into a consent order or a Tomlin order by the court. This can then be enforced through the courts. This is not an option in Scotland or Northern Ireland. It is worth noting that in the small claims mediation pilots,

[601] Referred to in Mistelis, *op cit*
[602] *Ibid*
[603] *Ibid*

mediated settlements needed little or no enforcement action. Where no settlement is reached, the parties are free to continue with court proceedings.[604] Both the voluntary and compulsory mediation schemes of the Central London County Court were reviewed by Professors Hazel Genn and Paul Fenn in 2007. Their findings[605] include the following:

- That motivation and willingness of parties to negotiate and compromise significantly affects the success of the mediation, thus for example where parties had objected to mediation originally but were still made to mediate, the settlement rates were lower.[606] The settlement rate in cases where parties initially objected was 48% and where neither party objected, it was 55%.

- That though the number of voluntary mediations increased, there was no corresponding increase in settlement rather there was a consistent drop, raising the possibility that parties were only there to avoid possible costs or other penalties.

- Where mediation took place but settlement was not reached, it increased the overall costs for the parties by as much as £1,000 - £2,000.

- There was a higher rate of objection in personal injury cases.

According to William March,[607] after examining some cases arising from court connected mediation, he drew the following conclusions:

> 'First, it is clear that they wish strongly to encourage the use of mediation by parties. A number of the judgments refer to the possibility of achieving in mediation outcomes that the courts are not empowered to deliver. This is

[604] *Ibid.* The mediation scheme at Central London County Court has been extensively researched by Hazel Genn, who published two research reports in 1998 and 2007. She found that: take-up was very low in the early years of the scheme; fewer than 5% of cases went to mediation; Mediated cases settled sooner than non-mediated cases; but if parties tried mediation and it didn't work, the case took longer and cost more; Cases settled at mediation for much lower amounts than cases which were settled between solicitors, or which went to a hearing. There were very few problems with enforcing mediated settlements – most people did what they had agreed to do; There was a fairly high satisfaction rate – people liked the chance to have their say in person, and to take part in an informal, non-legalistic process; After courts began imposing cost penalties for unreasonably refusing to mediate, more people tried the mediation scheme at Central London County Court, but fewer succeeded in reaching a mediated agreement

[605] Genn, H. And Fenn, P. Twisting Arms: Court referred and court linked mediation under judicial pressure, Ministry of Justice Research Series 1/07

[606] With the case of *Dunnet v. Railtrack Plc* (2002) EWCA Civ 303, (2002) 1 WLR 2434, fear of costs penalties resulted in increase in mediation. Prof. Genn and Fenn however observed that coercing parties to the mediation table brought unwilling parties into the mediation process which ultimately affected the settlement rate. They therefore recommended facilitation and encouragement with appropriate pressure as a more effective means of bringing parties to the process.

[607] Williams, M. (Director and Founder, Conflict Management International, London), (November 2003) *ADR in the English Courts*,

important not only in endorsing publicly the use of mediation, but also in establishing that the process is designed to offer some more than a court's judgment can offer – some "added value", as regards the types of settlements which parties are at liberty to agree to in mediation, compared with the traditional "win or lose" judgments to which the courts must confine themselves. Although this point is obvious to mediators, it is important to re-state publicly. In particular, it is important in emphasising that mediation is not just a chance to settle cases earlier than trial, but to settle them with qualitatively better outcomes than a court can award.

The second conclusion is that mediation in the courts in England and Wales (Scotland has different rules) is coming reasonably close to being mandatory, without actually being so. Parties are free to decline an offer to mediate, but if they do so they must bear the consequences. Policy-makers might view this, correctly in my view, as an indication that if parties want the privilege of using a court system provided by the state and for which the State makes very little charge, they must demonstrate to the State that they have used all appropriate means to resolve the dispute first.

It is, however, questionable how far this policy is succeeding, assuming that success is measured by how many cases are referred to mediation. For any sanction to apply, one party (or perhaps the judge) must offer mediation. In the vast majority of cases, no such offer occurs and the parties are at liberty to ignore mediation. As a result, the number of civil/commercial cases which go to mediation each year is probably less than 2,500,[608] constituting a very small fraction of the number of court proceedings begun each year.

The third conclusion one can draw from the courts' approach so far is that mediation has become an integral part of the litigation system, rather than a parallel but entirely independent process. This integration offers the chance for more structured and formalised cross-referral between the court and the mediation process, and back again if the mediation does not succeed in resolving the case. It carries with it both the endorsement of mediation as a credible process by the courts, and also the chance for the courts to "oversee" the use of mediation, albeit if only in a very general way.'[609]

There are a range of different court-based mediation projects throughout England. There are schemes at county courts in Birmingham, Central London, Guildford, Exeter, South Wales,

[608] This is an estimate. No nationally produced statistics are currently available in the UK. Some organisations provide statistics of their own mediations, others do not. No independent assessment is made of the cases referred directly to mediators (i.e. not through any mediation organisation), which may account for the majority nationally.

[609] The cases examined by him include *Dunnett v. Railtrack Plc* (in Railway Administration) [2002] EWCA Civ 303; *Hurst v. Leeming* [2001] EWHC 1051 (Ch) (judgment given in May 2002); *Societe Internationale de Telecommunications Aeronautiques SC v. Wyatt Co (UK) Ltd and others (Maxwell Batley, Part 20 Defendant)* [2002[EWHC 2401 (Ch); *Leicester Circuits v. Coates Brothers plc* [2003] EWCA Civ 333; *Royal Bank of Canada Trust Corporation v. Secretary of State for Defence* [2003] EWHC 1479 (Ch); *Societe Internationale de Telecommunications Aeronautiques SC v. Wyatt Co (UK) Ltd and others (Maxwell Batley, Part 20 Defendant); Cowl v Plymouth City Council* [2002] 1 WLR 803 (CA) and *Cable & Wireless plc v IBM United Kingdom Ltd* [2002] EWHC 2059 (Comm)

Leeds and Manchester.[610] Webley, *et al* conducted an evaluation of the Birmingham court-based mediation scheme in 2006. Some of their observations, findings and conclusions are stated below.[611] The Birmingham Civil Justice Centre civil (non-family) court-based mediation scheme was launched on 7th December 2001. At the time of the research census in October 2004, 331 cases had been stayed for mediation within the scheme (approximately11% of the cases allocated in the Birmingham CJC during that period). Mediation is available at the court in all types of claim where the sum in dispute exceeds £5,000 and in all housing disrepair cases regardless of the amount claimed. The court provides accommodation for mediations between the hours of 4.30pm and 7.30pm and arranges the introduction of a trained independent mediator. Fees vary according to the sum in dispute and the entirety of the fee is paid to the mediator or mediation organisation.[612]

The largest category of cases stayed for mediation in Birmingham were breach of contract/ debt/ sale of goods cases (50.7% of the 282 cases reviewed), followed by landlord and tenant/ disrepair cases (21.3%), with a relatively small proportion of personal injury cases (7.4%). The largest proportion of cases had a claim value between £5,000 and £14,999(37%). Many cases remained unallocated to a track because the parties had filed their agreement to mediate in the early stages of the case before allocation had taken place. The vast majority of parties in cases stayed for mediation were likely to have legal representation throughout their cases, however, in the few cases in which one of the parties was unrepresented, it was more likely that the unrepresented party was the defendant than the claimant. Claimants and defendants were both totally unrepresented in the same case in 5.7% of cases. Just over a quarter of cases involved companies as both parties (25.9%),followed by cases involving individual claimants against a local authority, health authority, insurance company or other form of body (the vast majority of which are local authorities) (20.6%). The third most frequent configuration of the parties was individuals both as claimants and defendants (18.8%). Ongoing cases had similar profiles as completed ones.[613] All of the defendants and almost half of the claimant respondents whose claims had concluded at mediation were satisfied with the outcome. The remaining claimants expressed dissatisfaction for reasons which related partly to the

[610] Advise Services Alliance, Recent Developments in Alternative Dispute Resolution, Update No. 11, Feb. 2004; available at www.asauk.org.uk.
[611] Webley, L., Abrams, P. and Bacquet, S. (September 2006) Evaluation of the Birmingham Court-based Civil (Non-Family) Mediation Scheme, Final Report to the Department for Constitutional Affairs available at http://westminster.academia.edu/LisaWebley/Papers/92721/Evaluation_of_the_Birmingham_Court-based_Civil_Non-Family_Mediation_Scheme
[612] *Ibid*
[613] *Ibid*

process and partly to the nature of their settlements for example, believing that they had been pressured by time into accepting a lower level of settlement than that to which they thought they were entitled or could have achieved through litigation. Based upon their experiences, overall, parties considered mediation to be a fair process which allowed them to have their say. They were also overwhelmingly positive about the mediators and most made positive comments about the process. Solicitors considered mediation could be fairer than a court hearing as it provided an opportunity for clients to discuss the dispute with their opponent, ask for explanations or apologies and to feel more engaged in the process of arriving at a settlement.[614] They therefore reached the following conclusions, that:

- the mediation scheme at Birmingham operates in an effective and well-organised manner.
- several elements of good practice were identified from the qualitative data. The evidence indicates that the written information provided by the court about mediation to invite parties to use the scheme is sufficiently informative.
- mediators were also broadly satisfied with the provision of documents by the court. Birmingham was particularly praised by mediators as being an exemplary scheme
- generally, parties and solicitors considered the timetabling of their mediation appointment to have been handled efficiently and speedily and none reported difficulties relating to the court administration.
- parties were overwhelmingly positive about the individual mediators conducting their mediations and most made positive comments about the process. All the defendants and almost half of the claimant respondents whose claims had concluded at mediation were satisfied with the outcome.
- overall, parties were in favour of using mediation again, whether or not their dispute had concluded at mediation.
- the quantitative data suggests that any delays in the process appear to relate to delays caused by the parties themselves, rather than the operation or efficiency of the scheme.

[614] *Ibi*d

- the scheme results in prompt referrals to mediation, stays for mediation and mediation appointments.

- overall, there were very few areas for improvement identified and none affected the efficiency of the scheme. However, there was evidence from the qualitative data to suggest that the scheme was regarded by solicitors as more suitable for low value claims because it was more cost effective than litigating these claims, cheaper than independent mediations and time limited. For this reason, the three hour time frame is one factor which contributes to the relatively low number of mediations as a proportion of claims issued at Birmingham. The scheme could be enhanced and extended by addressing this issue and thereby making it more suitable for higher value claims.[615]

Sue Prince conducted an evaluation of the Exeter county court-based mediation in 2004 on behalf of the Civil Justice Council.[616] A limited analysis was made of case files and personal interviews with parties attending hearings at the court. Also all mediation sessions conducted between December 2003 and the end of February 2004 were observed. The purpose was to determine whether the free scheme had met its set objectives of maximising efficiency in the use of judicial resources. His findings were as follows:

- A high proportion of small claims cases referred to mediation settle.

- The proportion of cases which settle is greater if the amount in dispute is at the lower end of the monetary threshold.

- Those mediations which involved heavy emotional or complex personal or family relationship are less successful at time-limited small claims mediation than those where the parties had an interest in resolving the relationship e.g. business dealings

- The scheme has saved a significant proportion of judicial time which can be dedicated to hearing other cases, paper work e.t.c.

- Parties involved in mediations generally felt that it was a useful process

- Parties generally found the medium to be more informal and a better listener than the judge.

[615] *Ibid*
[616] Prince, S. (2004) Court-based Mediation: A Preliminary Analysis of the Small Claims Mediation Scheme at Exeter County Court, A Report prepared for the Civil Justice Council; available at s.j.prince@exeter.ac.uk.

- Mostly, they liked the fact that it was informal, saved time and achieved a result
- There was a perceived need for more information in advance of the mediation
- Responses from parties were very positive a few weeks after the mediation had taken place
- Most thought it was a positive process and 90% were prepared to use mediation again
- A major advantage of mediation is that even if the case failed at the mediation level, the parties were able to benefit from hearing issues put forward by the other side and receiving directions from the judge.[617]

He thereafter made the following recommendations including:

- That further research be conducted to determine whether settlement is the most appropriate basis for measuring the success of the mediation process.
- A greater analysis of the training process of mediators should be conducted to ensure that the mediators are trained specifically for the small claim scheme.
- More information on the scheme should be provided in advance to participants so that they are better able to prepare for the process.
- Judicial selection of cases should be criterion-led so that it is easier to determine whether particular categories of claims are more amenable to mediation than others.[618]

3.4.2 Analysis of the Implementation of Court Connected ADR in the United Kingdom

In section 3.2.2, we had discussed the different CCADR models adopted in the United State under the following headings: mode of commencement of the programmes, relationship with existing statutes and civil procedure rules, type of programme offered i.e. whether voluntary or mandatory or both; types of cases dealt with, array of ADR options offered, relationship to the Courts (i.e. in terms of reporting, cost shifting, the time of payment of fees, neutrals, time of referral; level of supervision) as well as the status and enforcement of ADR settlement agreements. The same criteria will also be used to analyse the United Kingdom CCADR system.

[617] *Ibid*
[618] *Ibid*

Mode of commencement: Just like in the United States, the United Kingdom CCADR programmes also started with pilot programmes. The only difference was that the Woolf Reform had already conducted its own Research and Government had accepted the final report which emphasised Case Management, ADR as a first resort for dispute resolution and Litigation as a last resort. This served as a foundation for the United Kingdom CCADR programmes. Nevertheless, the County Courts still opted to experiment pilot models for its schemes before replicating the 'better' model in other Counties. This model of using pilot programmes to 'test run' the CCADR model sought to be introduced into the civil system of administration of justice is important to ensure that the model being sought to be adopted will be suitable and appropriate to that Court.

Relationship with Extant Legislation: As indicated above, the Woolf Reforms culminated in the enactment of a new Civil Procedure Rules (CPR) in 1998. These Rules became the driving force behind the integration, growth and use of CCADR. The Rules actively encouraged both counsel and litigants to explore ADR early and empowered the Courts to order parties to consider Alternative Dispute Resolution. The Court of Appeal approved the use of such orders in the case of *Halsey v. Milton Keynes General NHS Trust.*[619] The new rules also allowed Courts to stay proceedings in favour of ADR. The CPR provided time frames for conduct of CCADR and consequences of refusal to explore alternative dispute resolution.

Types of Programmes Offered: CCADR in the United Kingdom especially mediation is entirely voluntary. As part of the pilot programme, there were however two tracks for referral to Alternative Dispute Resolution, one was voluntary and the other compulsory (or automatic). In the later, cases were automatically referred to ADR except where one or both parties objected (provided the case does not fall within the small claims track, does not involve children, protected persons or either groups of persons exempted from paying Court fees or where a Court has granted an interim injunction). This compulsory scheme lasted only very briefly particularly after the Court of Appeal held that a Court could not override a party's objections to compel mediation.

Relationship with the Courts: Similar to the United States discuss, this subhead is discussed under the heads of reports, costs, neutrals, time of referral and the level of supervision exercised by the Courts over their programmes:-

[619] (2004) 1WLR, 3002

Reporting:-The UK Commercial Courts mediation schemes require parties to inform the court of steps they have taken towards resolving their dispute through ADR and the reasons why it failed (as appropriate), Also in the Court of Appeal Mediation Scheme, parties refusing to mediate are required to State the reasons why. The mediator is however only required to note the date of the mediation and its outcome.

Costs: - The United Kingdom CCADR provides for payment of some costs of the Mediation. While the small claims courts provide the service free, the scheme is not free in the High Courts. Parties were required to pay administrative fees of up to $100. Parties who were exempted by law from paying Court fees were also exempted from paying this administrative fee when using CCADR. Fast track cases involve fee payments of at least $100 per party per hour for a session of 3hours i.e. $300. Fees are usually *pro rata* to the amount claimed.

Significantly, the Courts have power to 'penalise' a party on costs if they unreasonably refuse to consider mediation. This is thus a strong incentive to litigants to actually make the effort to explore ADR. There is evidence that even in such cases where parties go to mediation for 'fear of losing their costs,' particularly where a skilled mediator is involved, the parties still do settle.

Neutrals: -The same options observed in practice in the United States is also the 'vogue' in the United Kingdom i.e. in some cases, the Courts rely on volunteer Neutrals or in race cases, the Judges become the neutrals themselves or the Court maintains a list of 'accredited' neutrals it can refer the parties to for the conduct of the alternative dispute resolution sessions.

Time of Referral: The CPR provides that ADR should be discussed at the earliest stages i.e. at the point of entry into the Court system, materials are provided to inform litigants about the availability and suitability of ADR to their dispute. Courts are also empowered to stay proceedings in favour of ADR which means even after litigation proceedings have commenced; parties can be referred to ADR. A Judge may also make an ADR Order at Pre-trial or Case Management conference.

Level of Supervision: - This differs from one court to the other depending on the hierarchy of the Court i.e. the County Court, High or Commercial Court or the Court of Appeal. In CAMs programs for example, it is a private-public collaborate: the court depends on its private partner, CEDR Solve to administer the programs with very little supervision. In the County

Courts, the Courts initially depended on volunteer mediator solicitors to meet briefly with the parties – thus the emphasis was on getting the qualified personal and the courts presumed that they will do their job right without any strict supervision.

Types/Array of ADR Options Offered: - The default CCADR programme in the UK is mediation – it is infact the most dominant process in use in the Courts and in the United Kingdom generally. There are also specialised field specific ADR options such as family mediation including divorce. The commercial courts also offer essentially mediation services.

Status and Enforcement of ADR agreements: Again, like in the United States Models, agreements reached in CCADR are contracts but same can be made the Judgement of the Court at the instance of the parties.

3.5 Summary

In this chapter, we have discussed the different ADR models adopted by the Federal and State courts in the United States as well as the United Kingdom. An overview was provided on the structure and operations of the different models. An analysis was also made on the implementation models of the two jurisdictions based on the criteria of mode of commencement of the programs, relationship with existing statutes and civil procedure rules, type of programme offered i.e. whether voluntary or mandatory or both; types of cases dealt with, array of ADR options offered, relationship to the Courts (i.e. in terms of reporting, cost shifting, the time of payment of fees, neutrals, time of referral; level of supervision) as well as the status and enforcement of ADR settlement agreements.

In summary, it can be said therefore that there are substantial similarities in the models adopted in the US and UK particularly in the area of making mediation the preferred default option. The two jurisdictions are also similar with regard to the legal framework for the practice of CCADR in the sense that the Civil Procedure Rules form the bedrock and catalyst for the promotion and implementation of CCADR. Another similar feature is the automatic referral of cases based on the nature of the dispute and the amount of damages being claimed. There is also the supervisory role of the court over the process particularly by ensuring that well trained accredited neutrals are retained for the implementation of the programmes as well as giving parties the option of entering their ADR settlement agreements as consent judgments in the relevant court.

Differences were also noted. There is no consensus about the range of ADR options that the courts should offer to disputants. In some courts, only one option is provided e.g mediation or

non-binding arbitration. This one size fits all of course defeats one of the goals of ADR which is to use the most appropriate process to resolve a dispute. Again, while some courts require full reports in cases where parties are unable to settle with notes by the neutral as to why in his opinion the matter did not settle, other courts only require the neutral to note the fact that no settlement was reached.

These analysis will be compared in the subsequent chapter with the models adopted thus far in implementing court connected ADR in Nigeria, using the Lagos, Abuja and Akwa-Ibom multi door courthouses as examples.

CHAPTER FOUR

THE LEGAL FRAMEWORK AND PRACTICE OF COURT-CONNECTED ADR IN NIGERIA

4. Introduction

In previous chapters, we had examined the rationale for the integration of ADR into the Civil Justice system. Chapter Three examined the different designs and approaches in the US and UK to Court – connected ADR. The very same problems, *inter alia*, of delay, exorbitant costs, complexities of the process amongst others sought to be addressed by introducing ADR into the courts in America, England, and even in civil law countries are the very same problems being experienced in the Nigerian civil system of justice. Similarly, both the practitioners and the end users of the process are complaining of frustration. Kehinde Aina, one of the foremost promoters of the Multi-door court house in Nigeria cites these same reasons for advocating court-connected ADR.[620] Past and present Chief Justices of the Federation and State Chief Judges have at different fora expressed the same frustrations and a belief that the system can be helped by integrating ADR into the mainstream of the civil justice system.[621] According to Chandra, 'it is not that the challenges presented by these factors have gone un-responded. In fact all the wings of government – the executive, the legislature and the judiciary itself - have taken measures to update the administration of justice. Laws are being reformed, infrastructure streamlined and the judicial process activated.[622]

The concept of a comprehensive justice centre or MDCH has been interpreted and implemented in different ways by different courts and jurisdictions. In Nigeria, apart from the multi door courts in the FCT, Lagos and Akwa-Ibom, many more states are gearing up to join the band-wagon of ADR states i.e. Cross Rivers, Abia, Kaduna, Edo, Katsina, Zamfara, Kogi, Bayelsa, Rivers, Kwara and Nassarawa.[623] From the introduction of the Lagos Multi-door court house in 2002 there has been similar programmes adopted by other States,[624] the Federal

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[620] Aina, K. The Lagos MDCH – One Year After. NCMG Working Paper Series: Paper presented at the Workshop on 'The LMDCH: The Procedure and Promise. Held in Lagos on Sept. 30, 2003

[621] The Hon Justices Uwais and Belgore, both former Chief Justices of Nigeria and Hon Justice Gunmi Chief Judge of the Federal Capital Territory are strong advocates in this regard

[622] Chandra S. (2010 reprint). ADR: Is Conciliation the best choice? *Alternative Dispute Resolution: What it is and How it Works*. Eds. Rao, P.C. and Sheffield, W. New Delhi: Universal Law Publishing Co. Pvt. Ltd. pp.82-83

[623] Hon Justice O.O. Goodluck. From the ADR Judge's Desk. *AMDC Newsletter*, Vol. 17, 2nd Issue, 2012, p.2. See also, Aina, K. *The Multi-door Concept in Nigeria: The Journey so far*. He stated that at least thirteen state judiciaries had expressed their interest in setting up multi-door courts. See p.2. available @ www.lagosmultidoor.org

[624] Multi-door courts have been established in Kwara, Akwa- Ibom, Rivers and Kano States.

Capital Territory and even the Court of Appeal.[625] Presently, the different jurisdictions in Nigeria operating the Multi-Door court system in Nigeria do so from different legal foundations. So far only the Lagos Multi-Door is backed by legislation,[626] others operate under Practice Directions of the Chief Judge of the State[627] (which incidentally is how the Lagos MDCH started).

This chapter will examine the legal framework for the practice and procedure of the Lagos, Abuja and Akwa-Ibom Multi-Door Courthouses. We shall examine how CCADR has been implemented in Nigeria so far using the Lagos, Abuja and Akwa-Ibom Multi-Door Courthouses as our case studies. In particular, we shall examine how these centres have been established (their structure/design, their relationship to the courts to which they are connected and the panel of neutrals in these courts); what ADR options are provided and the laws and rules by which these courts operates.

4.1 Court Connected ADR Practice and Procedure in Nigeria

Nigeria operates a Federal system of government, thus there are Federal courts and State courts at the High court level. Each State judiciary is autonomous thus the design and approach to CCADR are different in many ways; though similarities do exist. This section will discuss the three selected CCADR or multi door court houses in Lagos, Akwa-Ibom (State courts) and Abuja (a Federal court). The later part of the chapter will analyse the similarities and differences, comparing same also with the US and UK models.

4.1.1 The Lagos Multi-Door Courthouse

Inspired by the "multi-door" concept enunciated by Harvard Law Professor, Frank Sander at the Pound Conference, the Lagos Multi-Door Courthouse **(**LMDC**)** founder, Kehinde Aina**,** a partner in the law firm of Aina, Blankson & Co., established the Negotiation & Conflict Management Group **(**NCMG**)** in 1996 as a non-governmental organisation to advocate the expansion of ADR in Nigeria and midwife the introduction of the Multi-Door Courthouse concept into the Nigerian Judicial System.[628]

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[625] The Court of Appeal on 9th November, 2005 when Hon. Justice Umaru Abdullahi, CON was the President, established a Court of Appeal Mediation Programme (CAMP) based on a proposal by the Negotiation and Conflict Management Group, to give parties the option of mediating their disputes even at the appeal stage

[626] The LMDC Law, Law No 21, LASG Official Gazette No 56 of 3rd Aug 2007, Vol .40. The commencement date is 18th May 2007

[627] See, for example, the practice direction by the Chief Judge of the Federal Capital Territory, Abuja.

[628] Aina, K. The "Multi-door" Concept in Nigeria: The Journey so far. available @ www.lagosmultidoor.org

Establishment, Objectives and Structure - The LMDC was established on June 11, 2002, as a public-private partnership between the High Court of Justice, Lagos State and the Negotiation and Conflict Management Group **(**NCMG**),** a non-profit private organisation. The overarching objective of the LMDC is to facilitate dispute resolution within the Nigerian Justice System. It is the first court-connected Alternative Dispute Resolution Centre in Africa.[629] His speech at the official launch of the LMDC on Tuesday, June 11, 2002, is most instructive of the purpose underlying its establishment. He commented:

> 'The road to the events of today began in 1995. Having spent most of my early practice years in courtrooms, it became crystal clear to me that the justice system was in desperate need of an overhaul. I envisioned a comprehensive justice centre where both the consumers and providers will be collaborators and co-creators of a streamlined and agile process.'

A high point in the existence of the LMDC came in May 2007 when the Lagos Multi-Door Courthouse Law was enacted. This legislation encapsulates all the ideals of the organisation and provides a legal framework for its operations. By the provisions of the law, the Centre is established to serve as a focal point for the promotion of ADR in Lagos State and to support the growth and effective functioning of the justice system through ADR methods.[630] The LMDC Vision is to be *'the foremost model of a Court Connected ADR Centre in Africa,'* while its objectives are:

- To enhance access to justice by providing, timely and cost effective alternative mechanisms to supplement litigation in the resolution of disputes;
- To minimise citizen frustration and delay in justice delivery by providing a standard legal framework for the fair and efficient settlement of disputes through Alternative Dispute Resolution (ADR);
- To serve as a focal point for the promotion of Alternative Dispute Resolution in Lagos State;
- To promote the growth and effective functioning of the justice system through Alternative Dispute Resolution methods;
- To encourage the concept of a "Managerial Judge" amongst judicial officers towards an effective resolution of disputes, and

[629] *Ibid*
[630] http://www.lagosmultidoor.org/index.php?option=com_content&view=article&id=115&Itemid=54

> to utilise the immense resource of retired judges and senior citizens through services in mediation, arbitration and other ADR mechanisms.[631]

For its effective functioning within the Justice Sector the LMDC has sought to create collaboration with other organisations and stakeholders. The LMDC-NBA forum which was inaugurated in 2007 was established to promote ADR within the legal community and to generate awareness among lawyers of the workings of the LMDC.[632] Collaboration also exists with the Citizens Mediation Centre (CMC), Ministry of Justice, Lagos State so that Memoranda of Understanding reached at the CMC are registered at the LMDC for the enforcement through the machinery of the Lagos High Court.[633] The LMDC is also one of the founding members of the Association of Multi-Door Courthouses of Nigeria, an organisation set up to promote the Multi-Door Courthouse concept, spearhead replications and standardisation of its practice in Nigeria. The LMDC had in recent times partnered with Chartered Institute of Bankers, Nigeria, (CIBN) for the promotion of ADR awareness within the Banking sector.[634]

The ADR Judge - By the provision of section 15 of the LMDC Law three ADR judges are to be designated and appointed by the Chief Judge and their functions will include the endorsement of terms of settlement reached by the parties, addressing of recalcitrant parties and performing an advisory role regarding the administration of the Centre. The ADR Judges are ambassadors of the state judiciary to the LMDC and a liaison between the judiciary and the LMDC. [635] The office of the ADR Judge was created in 2004, by the then Chief Judge of Lagos State, to give expression to the "Managerial Judge" concept, and the public-private synergy epitomised by the establishment of LMDC.[636]

Scope of LMDC Cases - The LMDC handles cases of varying types, including banking, business/commercial, construction, maritime, telecommunication, energy, administrative, civil rights, education, employment, environmental, matrimonial causes, insurance,

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[631] http://www.lagosmultidoor.org/index.php?option=com_content&view=article&id=116&Itemid=55
[632] http://www.lagosmultidoor.org/index.php?option=com_content&view=article&id=118&Itemid=57
[633] *Ibid*
[634] The LMDC facilitated the Entrepreneurial Development Programme which involved an ADR workshop on Dispute Resolution in the Banking Sector: the Multi-Door Approach held on October 14, 2009 at the CIBN House , Victoria Island. At the Roundtable on Proposed Amendment of Banks and Other Financial Institutions Act (BOFIA) 1991 As Amended, held at the Sheraton Hotel on August 2009, the LMDC was invited by its collaborators, the CIBN to make its contributions to the review of the regulatory and operational challenges in the implementation of BOFIA.
[635] http://www.lagosmultidoor.org/index.php?option=com_content&view=article&id=163&Itemid=184
[636] ibid

intellectual property/ technology, labour, personal injury, probate, product liability, professional malpractice/ negligence, real property, securities, and shipping/transportation.[637] While the LMDC's main focus is Commercial ADR and the design and development of sector specific dispute resolution mechanisms for commerce and industry, the LMDC has followed global trends in ADR development like the introduction and growth of Peer Mediation in campuses to equip young people with the techniques of dispute resolution with very keen interest.[638] It is also hoped that in the near future more matters will be mediated in the area of Medical Malpractice Mediation and other forms of professional negligence.[639]

LMDC Doors - The LMDC Doors refer to the alternative doors for resolving disputes available at the LMDC. Instead of the traditional "mono door" of litigation which leads to the courtroom, the LMDC has other alternative and supplementary doors or options, by which disputants can resolve their disputes, namely: mediation, arbitration, early neutral evaluation and the hybrid process.[640] These are discussed below.

> Mediation Door - This is a voluntary, private and informal process in which a neutral third party, the mediator, helps disputants reach a mutually acceptable agreement. Mediation provides great opportunity for parties to actively participate in problem solving and explore interests together. The mediator does not render a decision, but rather, guides the parties in reaching an agreement. At the LMDC, once an agreement has been reached by the parties, the Terms of Settlement are reduced into writing and this constitutes a binding and enforceable contract. For Walk-In matters , if the parties so decide, such an agreement can be endorsed by the ADR Judge and becomes a Consent Judgment of the High Court of Lagos State and enforced as such.[641]
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> Arbitration Door - Arbitration is a simplified means of trial without the technicalities of court-room litigation. In Arbitration, a dispute is submitted to an Arbitral Tribunal for resolution, and the tribunal gives a binding Award which is enforceable by the court. The Arbitral Tribunal may consist of one or more Arbitrators. Arbitration

[637] http://www.lagosmultidoor.org/index.php?option=com_content&view=article&id=120&Itemid=59
[638] *Ibid*
[639] *Ibid*
[640] http://www.lagosmultidoor.org/index.php?option=com_content&view=article&id=122&Itemid=73
[641] *Ibid*

proceedings are governed by the Arbitration and Conciliation Act, Cap A18, Laws of the Federation of Nigeria, 2004.[642]

Early Neutral Evaluation (ENE) Door - Early Neutral Evaluation is a preliminary assessment of facts, evidence or legal merits by a neutral who may be a retired Judge, an experienced lawyer or such person with the requisite background and expertise in a given field of endeavour. The report or assessment of a Neutral Evaluator is not binding, but provides an unbiased evaluation of relative positions, as well as guidance as to the likely outcome if the case were to be heard in court. The process is designed to serve as a basis for further and fuller negotiations or, at the very least, to help parties avoid unnecessary stages in litigation.[643]

Hybrid Door - The Hybrid Door is the creative mix of various ADR mechanisms like mediation, arbitration and neutral evaluation in order to obtain a settlement or resolution that is best suited for the particular case. Some of the Hybrid models of ADR include Arb-Med (Arbitration and Mediation), Med-Arb (Mediation and Arbitration), Med- ENE (Mediation and Early Neutral Evaluation).[644]

Procedure at the LMDC - According to Kehinde Aina, the key feature of the Lagos multi-door court is the initial procedure which is in two stages i.e. the Intake screening and Referral.[645] He describes the process thus:

> 'Upon the receipt of the disputing parties' Statement of Issues, the ADR Registrar shall exchange the Statements between the parties and invite then for a preliminary meeting or screening. An Individual Screening Conference is set up for appropriate cases. This provides a unique opportunity for individual case needs assessment and litigation/ADR management. This is the hallmark of the Lagos Multi-Door Courthouse (LMDC). An experienced multi-door courthouse staff conducts it. It is confidential, with no report made on the court file or to the judge assigned to the case. The confidentiality is protected by statute and promotes frank discussion of both the legal and non-legal issues.
>
> The tone of a screening conference usually differs substantially from status or pre-trial conferences in court. In these, participants tend to be less candid and to maintain their adversarial posture by developing, building and maintaining their positions. The Screening Conference on the other hand, is directed towards information exchange with the goal of problem-solving and dispute

[642] *Ibid*
[643] Ibid
[644] Ibid
[645] See, Aina, K. *Op cit*, p.5

resolution. The process is designed to involve the participants in assessing their case needs from a practical perspective. There are four fundamental components: introduction to the programme and education of the participants in dispute-resolution processes; the gathering of information, including the case facts, procedural history, legal issues, and subjective factors that may impact on the case; the identification of impediments to resolution; and matching the case with an appropriate ADR process and neutral.•

Introduction & Education: The education component continues to play an important role in identifying how different processes may be useful in a particular case, although many lawyers have become much more sophisticated about ADR and have greater understanding of its importance. For those unfamiliar with the multi-door courthouse, the screening process begins with an explanation of the programme and a review of the protocol including confidentiality.

Information Gathering: The screener then gathers information relevant to an understanding of the nature and dynamics of the case. The parties make a short, informal presentation of their perspectives on the legal foundation of the case; the status of the discovery and other procedural matters; legal damages or equitable relief sought; and any previous settlement discussions. In this-adversarial setting, the parties are usually able to hear each others' perspectives in a less defensive way than in court. Sometimes, common ground and the basis for further settlement discussions are established at this time. In addition, the screener tries to elicit information about the subjective, non-legal issues. These can be more elusive to discover.

Identification & Examination of Impediments: A skilful screener helps to uncover the underlying concerns of the parties and to identify what is necessary to resolve the matter. Some cases are straightforward, with standard liability and /or damages issues, but substantial numbers are complicated by concerns, which are harder to determine. Often the parties are not fully aware of the impact of hidden emotions and resentments. Obstacles to resolution can include diverse factors such as lack or failure of communication, poor preparation, no demand or unrealistic expectations, no offer, client control issues, related cases in other courts, discovery delays, contentious relations between the parties and/or attorneys, and underlying issues of power and control. Some of these barriers can be removed simply by identifying them. Others require concrete steps such as hiring an appraiser or delivering documents. Once barriers are removed, settlement negotiations can proceed. Frequently, a well-placed question or observation provides the catalyst for bringing the parties to the settlement table.

Referral

Having examined the dynamics of the case and impediments to its settlement, the screener helps the parties to determine the most appropriate type of intervention. Parties may choose to leave the programme or to continue with one of the available options. A wide range of factors is relevant in choosing the most appropriate ADR process. These include: the nature of the case (for example, debt, employment etc); the number of participants (a two-party 'slip

> and fall' is very different from a multi-party construction case); the relationship between the parties and/or their lawyers; the nature of the relationship between them; the procedural status of the litigation and the relief sought. After a mutual assessment of the case, the screener reviews the full range of dispute resolution options available; discusses the scheduling procedures and makes a recommendation. The litigants and their counsel, however, make the final decisions about whether they want to use ADR and if so, which process they want. A dispute resolution date can then be scheduled and a neutral assigned. Neutrals are assigned from the multi-door courthouse panels and are selected on the basis of their specific expertise, availability and personal suitability, given the dynamics of the case. The parties are sent a confirmation notice and the neutral's biographical data. They must approve the selection. Most importantly, the screener works to set the tone for genuine participation in the process and to establish whatever common ground may exist.
>
> On some occasions, this may be limited to an indication that all parties want to resolve the dispute and are willing to negotiate in good faith to do so. The key to effective use of the programme is to identify the needs and status of the case progressively and fashion the best approach to remove obstacles to resolution.'[646]

Generally, at the LMDC, the ADR process comprises five major stages namely, Case Initiation, Intake Screening, Pre-Session, ADR Session, and Closure stages. This is set out in the LMDC website in full and is reproduced below.

Case Initiation Stage: A matter may be initiated at the LMDC in either of three ways:

Walk-Ins - Any party to a dispute may initiate Mediation, Arbitration, Early Neutral Evaluation or any other ADR service by visiting the LMDC or writing to its Director.[647] Matters from other reputable ADR organisations may be filed at the LMDC for settlement.

Court Referral - The Presiding Judge in a matter already in litigation or in the course of a pre-trial conference may in appropriate circumstances refer parties to The LMDC.[648] Apart from the High Court of Lagos State matters may be referred to the LMDC from the Federal High Courts or Courts of other jurisdictions outside Lagos.

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[646] *Ibid*
[647] See, Article 2 of the LMDC Practice Direction on Mediation Procedure.2008, p.3-4
[648] *Ibid*, p.4

Direct Interventions - The LMDC through the Director may, in circumstances where the public interest or the interest of the disputing parties so demand, approach the parties with a view to assisting in the resolution of their dispute.[649]

To facilitate submission to ADR process, in deserving circumstances, Request Form 1 should be filled and filed at the LMDC by the initiating party, attaching 4 copies of a brief Statement of Issues. Within 7 days of filing a Request Form or receipt of a Referral from the Court, a Notice of Referral is sent to the other party (ies), along with a Submission Form (Form 2), and a copy of the Applicant's Statement of Issues. Within 7 days, the Responding Party is expected to return the duly completed Submission Form (Form 2) to The LMDC, along with 4 copies of a brief Statement in Response.[650]

Intake Screening Stage: The LMDC Registrar evaluates the matter for case classification and allocates the file to a Dispute Resolution Officer (DRO) for Intake Screening. The DRO carefully studies the parties Statement of Issues and Statement in Response, determines the nature of the claim, and the underlying interests as well as the appropriate "door" for possible resolution.

Pre-session Stage: The DRO may upon the approval of the Registrar convene a Pre-Session Meeting where he informs the parties of the “door” recommended for the possible resolution of the matter, the process, the conduct of the parties and their counsel at the sessions. The Neutral, (Mediator, Arbitrator or Neutral Evaluator) considered suitable for the case is recommended by the Registrar from The LMDC Panel of Neutrals to assist in resolving the dispute. A date for the session is scheduled and the DRO provides the parties with a Confidentiality Agreement (Form 5), which is filled and signed by the parties. An ADR Session Notice is subsequently sent to the parties, after the Neutral has completed the Disclosure Form, clarifying his relationship with either of the disputing parties.

Where a party, after being served with the notice of the matter involving him/her, refuses to submit within the stipulated time to Mediation, the DRO shall notify the ADR Judge who may then order the recalcitrant party to appear before him and afterwards make requisite orders and give necessary directives.[651]

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[649] *Ibid*

[650] Article 3 and 4 of the LMDC Practice Direction on Mediation Procedure.2008, p.4

[651] Article 4(c) provides that where a party refuses to submit to mediation and also refuses to appear before the ADR Judge, this will be treated as contempt of court and the judge may make orders including fines, costs or

The Session Stage

The Mediation Session: The Mediation session usually begins with an initial joint meeting between the parties and the Mediator. At this meeting, the procedures and ground rules covering the mediation process, order of presentation, decorum, use of caucuses and confidentiality at the proceedings are presented. After these preliminaries, each party describes how he/she views the dispute. The referring party discusses his/her understanding of the issues, the facts surrounding the dispute, reliefs sought and why. The other party responds by making similar presentations to the Mediator. After a period of clarification and deliberation, the Mediator may meet each party privately (caucuses) to explore resolution options, in confidence. Several separate caucuses may take place. During each caucus, the Mediator clarifies each party's version of the facts, priorities, positions, underlying interests and explores alternative solutions, and seek possible trade-offs. The Mediator does not serve as an advocate but as an "agent of reality." As soon as there is a semblance of common ground, a joint session is convened. Here, the Mediator narrows the differences between the parties; emphasises the progress made and formalises offers to gain an agreement. The Terms of Settlement reached are reduced into writing and signed by the parties.

The Arbitration Session - Any of the parties to a contract may commence an Arbitration procedure where an Arbitration clause is contained in their agreement, and a dispute arises in regard to that agreement. Where there is no prior agreement/clause in the parties' agreement and the parties' desire is to proceed to Arbitration, Consent to Arbitration (Form 10) and a Submission Agreement shall be forwarded to the parties for their signature. In both scenarios, parties shall thereafter meet with the Dispute Resolution Officer (DRO) to discuss issues such as choice of Arbitrator(s) and fees. An Arbitration session begins with a preliminary meeting with all parties in attendance. At this meeting, a number of issues will be determined which include; the anticipated length of time for the whole process, the mode of arbitration (by hearing or documentation) and other pertinent procedural issues. Sequel to this, pleadings will be filed, together with all necessary documents. Parties and the Arbitrator shall convene a meeting towards Settlement of Issues during which time the issues for determination by the Arbitrator shall be identified. Thereafter, the Trial commences, with the presentation of evidence and oral arguments. However, if parties agree to have the issues between them determined via the documents and materials filed only, then, there may be no need for a

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other appropriate terms in the circumstances.

formal hearing. Again, Trial could also be partly oral and partly documentary. Upon conclusion of the Arbitration proceedings, an Award will be given by the Arbitrator. The Award is given within a period not exceeding three months of completion of hearing. The Arbitration proceeding is in accordance with the Arbitration and Conciliation Act, Cap A18, Laws of the Federation of Nigeria, 2004.

The Neutral Evaluation Session - Neutral Evaluation Proceedings are initiated to guide the parties towards resolution. The process is mostly adopted prior to or in the course of a Mediation session with a view to assisting the parties in their negotiation. Neutral Evaluation is conducted by a retired or serving Judge, seasoned lawyer of repute or an expert in a particular field.

Hybrid Sessions: If parties fail to reach a settlement of any or all of the issues in a Mediation proceeding, they may submit such issue(s) to advisory arbitration, binding arbitration or any other ADR process considered suitable

The Closure Stage: If a settlement of the dispute is reached, it shall be reduced to writing and signed by the parties, the neutral and/or parties counsel. In Court-referred matters, the Terms of Settlement signed by the parties is sent back to the referral judge, who adopts same as a Consent Judgment of his/her court. In Walk-In matters, the Terms of Settlement is signed by the parties and endorsed by the ADR Judge and it becomes a consent judgment of the High Court of Lagos State. If the parties are unable to reach a settlement, a Certificate of Inability to Resolve is sent to the referral judge in Court referred matters.

Evaluation: After the settlement or non-settlement of the dispute, The LMDC will issue a questionnaire titled "Feedback Form" to the parties, to assist with its quality control, assessment of the skills of the Neutrals and development of the Centre.

Enforcement: Settlements reached by parties at the LMDC are enforceable. Section 19 of the LMDC Law provides that upon the completion of an ADR proceeding, Settlement Agreements which are duly signed by the parties shall be enforceable as a contract between the parties[652] and when such agreements are further endorsed by an ADR Judge or any other

[652] For a fuller discussion on the enforceability of settlement agreements in the LMDC,see generally, Akeredolu, A.E. (2010). Enforceability of Alternative Dispute Resolution Agreements: What is new under the Lagos Multi-door Courthouse Law? Vol.6, No.1, July 2010, p.201-212

person as directed by the Chief Judge, it shall be deemed to be enforceable as a consent judgment of the High Court of Lagos State.[653]

Order 39, rule 4 (3) of the High Court of Lagos State Civil Procedure Rules also states that an Award made by an Arbitrator or a decision reached at the Multi-Door Courthouse may by leave of a Judge be enforced in the same manner as a judgment or order of Court.

With regards to Arbitration hearings, the Arbitrator or Arbitral Tribunal shall draw up an Award which is automatically enforceable by the courts.

Miscellaneous Matters

Fees: To be self sustaining, affordable and to maintain a standard of service rooted in independence, quality and professionalism, a subsidised fee rate has been devised at the Lagos Multi-Door Courthouse. The fees are in two parts: Administrative fees and Session fees:

Administrative fees: A non-refundable administrative fee shall be paid by every corporate body, professional firm, foundation or individual that brings a matter to or that is brought as a party to the LMDC. This administrative fee is a deposit towards logistics and administrative services which could vary depending on the extent of administrative involvement in the particular case.

Session fees: The fees payable for sessions are dependent on the category into which the matter falls and the dispute resolution process (Mediation, Arbitration or Early Neutral Evaluation) recommended or stipulated in the contract, if any. The specific details of these fees are contained in the Service Booklet of the LMDC. The mediators fees is fixed by the LMDC taking into consideration the amount in dispute, the complexity of the subject matter and any other relevant circumstances of the case.[654]

Cancellation/Default Fee: In the event that an already scheduled session is cancelled by any of the parties or for failure or neglect to attend sessions, such party will be required to pay a cancellation fee or a default fee as directed.[655]

[653] See, Article 17 of the MPD, *op cit*, p.12
[654] Article 20 of the MPD, *op cit*, p.13
[655] http://www.lagosmultidoor.org/index.php?option=com_content&view=article&id=123&Itemid=166. Article 13 (b) of the LMDC Mediation Practice Direction provides a penalty of N10,00 per session missed. Failure to pay the default fee is treated as contempt of court and sanctions apply.

Venue: The ADR Session may be held in any of the ADR Session Rooms available at the LMDC. However, parties may opt for an alternative venue.[656]

Payments: Payments for ADR services are payable in advance.

Pro-Bono and Fee Review Services: In line with its policy of providing Access to Justice for all, the LMDC provides pro-bono services and may, in deserving cases, review the fees payable if the criteria stipulated by the Fee review and Pro- Bono Committee are met by the applying party.

Attendance at the ADR Session: It is of paramount importance that the parties attend the session in person to maximise the effectiveness of the process. Legal representatives are encouraged to accompany their clients, however, parties cannot dispense with appearing at the session by sending their lawyers. The parties attending the ADR session must have full authority, (which shall be required in writing) to make binding decisions in settlement of the dispute, for the ADR session to proceed. The ADR Session may be cancelled if any of the parties in attendance lack the requisite authority to settle the dispute.[657]

Confidentiality of the Proceeding: Statements made and documents produced by the parties at the ADR Sessions including notes, records and recollections of the DRO conducting the intake screening are confidential, without prejudice, and protected from disclosure for any purpose.[658] The mediator cannot be called as a witness, consultant, arbitrator or expert in any arbitration, litigation or any other proceedings whatsoever arising from or in relation to the dispute.[659]

Legal framework – The statutory framework for the LMDC is the LMDC Law, 2007. The Chief Judge of Lagos State pursuant to the Law, made Practice Directions in respect of Mediation and Arbitration. With respect to the Mediation Practice Direction (MPD), the preamble provides that it is made for the administration of mediation matters at the LMDC. Article 1 which deals with the applicability of the rules is instructive; it states:

a) Whenever by mutual agreement or contract, the parties have provided for or agreed to mediate existing or future disputes under the auspices of the Lagos

[656] Article 12, MPD, op cit, p.8
[657] See, Article 10 of the MPD, *op cit*, p.7-8
[658] http://www.lagosmultidoor.org/index.php?option=com_content&view=article&id=124&Itemid=171. See also, Article 15 of the MPD, *op cit*, p.10.
[659] *Ibid*

> Multi-Door Courthouse (LMDC), they *shall be deemed to have made this Practice Direction a part of their agreement.*

This article in effect makes it mandatory to apply the MPD in any and every mediation proceedings conducted by the LMDC. The MPD also applies to matters referred from the courts of Lagos state or any other jurisdiction or organisation. Some salient provisions of the MPD not already referred to are discussed below.

On qualification of the Mediator, article 7 of the MPD provides that such person should have considerable relevant experience in their particular field of ADR practice and dully trained and certified by a reputable and recognised organisation. It further prohibits a person from acting as mediator in a dispute where he has financial or personal interest except with the consent of all parties In this regard the mediator shall disclose any circumstance likely to create a presumption of bias or that may prevent the parties from meeting promptly. The role of the mediator is to 'assist the parties in an impartial manner in their attempt to reach an amicable settlement of their dispute.'[660] Article 9 imposes a duty on the parties to attend the mediation session in good faith, personally or through their authorised representatives, respect the confidentiality of the mediation and cooperate with the mediator and the other party to ensure a speedy resolution of the dispute.

According to Dele Peters, it was the successes of the LMDC that has led to a call for the replication of the concept in other jurisdictions in Nigeria.[661]

4.1.2 The Abuja Multi-Door Courthouse

The Abuja Multi-Door Courthouse (AMDC), is a court connected initiative operating under the auspices of the High Court of the Federal Capital Territory. Established on the 13th October, 2003, the courthouse is designed to complement the Courts conventional dispute resolution concepts.[662] The AMDC is the product of the Abuja High Court Judiciary and the commitment of the Chief Judge, Hon. Justice L. H. Gunmi, to the birth of an effective administration of justice in the Federal Capital Territory (FCT).[663] It was also facilitated by

[660] See, Article 8 of the MPD, *op cit*, p.6
[661] Peters, D. 2004. Alternative Dispute Resolution (ADR) in Nigeria: Principles and Practice. Lagos: Dee-Sage Nigeria Limited.
[662] Hon. Justice O.O. Goodluck, (2010), An Overview of the Modus Operandi of the Multi-Door Court Houses, in Aliyu Ibrahim, ed., *Alternative Dispute Resolution and Some Contemporary Issues*, Zaria: Advocate Chambers, Faculty of Law, Ahmadu Bello University, p.259
[663] Abuja Multi-door Court House Practice Direction (AMDCPD) p. 6

the NCMG.[664] It is premised on the concept of Access to Justice. As stated in its published Practice Direction, *'access to justice means more than access to the Courts, Lawyers and the judicial process. The presence of an Attorney or the existence of a judicial forum do not themselves assure that justice will be done. Providing Access to justice means providing opportunity for a just and timely result.'* The Abuja Multi-Door Courthouse has been established to provide that opportunity.[665] The AMDC mission is 'to supplement the available resources for justice by providing enhanced, timely, cost effective and user-friendly access to justice.[666]

The Objectives are to:-

- To provide enhanced, timely and cost effective access to justice which could reduce or eliminate citizen frustration
- To supplement the avenues for justice by making available additional doors through which disputes could be resolved
- Develop the "Managerial Judges" concept and design how best settlement could be achieved amongst litigants
- To utilise the immense resource of retired Judges through services in mediation, arbitration and other ADR mechanisms.[667]

In essence the AMDC like its counterpart, the LMDC is a court - annexed program that offers a variety of ADR processes. Cases are matched with an appropriate process and neutral.[668] Some of the advantages of using the AMDC as stated in its brochure are: -

i. It saves time and money by producing early settlements. Even where ADR does not produce an immediate settlement it can still produce savings by clarifying or narrowing the scope of the dispute.

ii. Flexibility – ADR offers greater procedural flexibility than litigation. Litigation focuses exclusively on the parties' legal right and responsibilities, while ADR can address legal obligation, it can also take into account a wide variety of non legal

[664] Koleoso, O., (2010), An Appraisal of the Law and Procedure of the Abuja Multi-Door Court House, in Aliyu Ibrahim ed. *op cit*, p.385
[665] AMDCPD, p. 6
[666] *Ibid*, p.5
[667] *Ibid*, p.5
[668] A Guide to the Abuja Multi-Door Court house, Published by the AMDC, p.2

interest and concern such as an interest in preserving a relationship, in having feelings acknowledged or in preserving similar disputes in future. One of the ways ADR can do this is by uncovering and addressing feelings such as anger and hurt which may be fuelling the dispute.

iii. Stress reduction and increased satisfaction - Litigation can be highly stressful for the parties. Lack of control over the process or the outcome, prolonged uncertainty and mounting costs, all contribute to this. Disputant who have used ADR processes such as Mediation are generally satisfied with both the process and the results are more likely to abide by the terms of the resolution because they participated in formulating them.[669]

The Expected Impact of the Operations of the AMDC are:-

i. Access to justice for all

ii. Reduction in the case dockets of Judges

iii. Speedy resolution of disputes

iv. Reduction in parties expenses and time

v. Harmonious coexistence

vi. Accommodation and tolerance

vii. Restoration of pre-dispute relationships

viii. Restoration of business relationships

ix. Public satisfaction with the Justice system

x. Encourage resolutions suited to parties needs

xi. Encourage voluntary compliance with resolutions

xii. Encourages foreign investment[670]

The Legal Framework for the AMDC **-** The procedure and workings of the AMDC are guided by the AMDC Practice Directions 2003[671] (hereinafter referred to as 'AMDC PD')

[669] *Ibid*, p.4
[670] AMDCPD, p.9

enacted by the Chief Judge of the FCT in pursuance of the powers conferred on him by virtue of Section 259 of the 1999 Constitution.[672] The practice direction embodies the rules and regulatory procedures for the workings of the AMDC.[673] Generally speaking, there are no statutory provisions for the operation of the AMDC. The various courts of the FCT have however relied on equivocal provisions alluding to the ADR concept. The different courts in the FCT judiciary are all empowered to promote reconciliation through ADR whether directly or indirectly in their respective constituting laws.[674] These are considered below.

Order 17 Rule 1 of the FCT High Court Civil Procedure Rules 2004 provides for the promotion and adoption of reconciliation and ADR and encouragement of same by the court in the resolution of disputes.[675] It provides for case referral to ADR mechanisms i.e. the presiding Judge may refer matters before it subject to the consent of the parties.[676]

S. 18 of the FCT High Court Law[677] provides that the High Court 'may promote reconciliation among parties by encouraging and facilitating amicable settlement between them.'

Order 13 of the Area Court (Civil Procedure) Rules[678] also empowers the Area Court Judge subject to the consent of parties to refer proceedings before it to arbitration.

S. 26 of the District Courts Act[679] provides that '… so far as there is proper opportunity to promote reconciliation amongst persons whom the Court has jurisdiction, encourage and facilitate the settlement in an amicable way and without recourse to litigation of matters in difference between them…' This provision seems to give very wide discretion to the District Court Judge to promote reconciliation as his powers extend not just to proceedings before him but to 'persons within his jurisdiction.'

Recently, the Chief Judge of the FCT inaugurated a committee on ADR Laws of the FCT with the task of preparing a Bill for upgrading of the AMDC into a juristic and autonomous entity similar to the LMDC. The Committee is also to comprehensively overhaul the existing

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[671] This came into force on 19 November 2003. The LMDC Practice Direction was enacted in 2002
[672] Section 274 of the 1999 Constitution also empowers the Chief Judges of the various States to make similar rules.
[673] Goodluck, *op cit* p. 259.
[674] *Ibid* p. 261
[675] Koleosho, *op cit*, p. 385.
[676] Good luck, *op cit*, p. 261
[677] Cap 510, LFN
[678] Cap 477, LFN
[679] Cap 495, LFN

AMDCPD and the adoption (when necessary) of enabling provisions on the AMDC rules.[680] The AMDC has its own Mediation and Arbitration Rules (2002) annexed to the PD. The AMDCPD will therefore be our focus in discussing the operations, structure and options of the AMDC.

Initiating Cases at the AMDC

The Jurisdiction of the AMDC covers most areas of civil cases such as contract, commercial cases, employment, banking, machine, energy, land/real estate, family disputes or matrimonial causes (excluding divorce), and some minor criminal cases.[681] The AMDC like its Lagos counterpart also has three basic ways by which cases come to it i.e. walk-in, court referred cases and courthouse intervention.[682]

Walk–In: Before initiating legal proceedings or even after doing so, a party may decide to opt for amicable settlement. It can voluntarily present the dispute to the centre for resolution. Parties may also seek the service of the AMDC pursuant to an ADR clause in their contract[683] The AMDC also welcomes walk-in cases when all or one of the parties and their Attorney agree to come to the AMDC.[684]

Court Referrals: As stated earlier, Order 17 of the HCCPR of the FCT empowers Judges to refer matters pending in their courts to be settled by ADR. The obvious choice for such process is the AMDC. The Chief Judge of the FCT at a forum had urged his brother Judges 'to do more in order to encourage ADR within the court system… to strongly consider furthering the overriding objectives of the putting in place of the AMDC by the FCT Judiciary.[685] Article 2.1 of the PD provides thus:

> Actions may be referred to the AMDC by any of the following
>
> a. The presiding Judge ordering and or referring an on-going case to the AMDC.
>
> b. Any of the parties to an Agreement stipulating Mediation, Arbitration or any other ADR process in the resolution of their dispute.

[680] FCT High Court to Upgrade the AMDC. *AMDC Newsletter*, Vol. 16, 1st Issue, 2012.
[681] Koleosho, *op cit*, p. 385-386. Hon. Justice H. L. Gunmi, Chief Judge of the FCT, had in 2009 recommended the use of victim-offender mediation, plea barging and other variants of Restorative Justice as a tool for reforming the criminal justice system in Nigeria. See, AMDC Newsletter, Vol. 11, 2nd Issue, 2009, 'pp 1, 3. See also, AMDC Newsletter Vol. 13, 3rd Issue, 2010.
[682] What kind of Cases Does the AMDC Handle? See, PD p. 12
[683] Goodluck, *op cit*, p. 260
[684] AMDC Guide, *op cit*, p. 3
[685] *AMDC Newsletter* Vol. 16, 1st Issue, 2012

c. Any of the parties to a dispute, their counsel or DCR Litigation at any time prior to or after the filling or commencement of an action in the Court.

d. The Director of the AMDC or the ADR Judge inviting disputing parties to a meeting to explore options towards an amicable resolution of their dispute.

e. Anyone with interest in a dispute and or belief that the AMDC could be beneficial to an on-going dispute or the parties.

It is also possible for the courts to refer cases to the AMDC based on other laws or rules which direct the courts to promote reconciliation in appropriate cases. An example is Section 11 of the Matrimonial Causes Act.[686]

Direct Intervention:- By virtue of Article 2.1(a), the director of the AMDC or the ADR Judge may invite disputing parties to a meeting to explore options towards an amicable settlement of their dispute. According to the ADR Judge of the FCT, the AMDC is designed to intervene on its own volition to conflicts, where it is of the view that it would be in the interest of the overriding public to broker peace through any of its doors, but this facility has rarely been used.[687]

Commencement and Conduct of Cases in AMDC

Like the Lagos MDCH, the key elements of the AMDC proceedings (irrespective of the door/option subsequently adopted) are the intake screening and referral.[688] The AMDC process starts with a screening conference which serves as the primary diagnostic tool to determine the needs of each case.[689] An experienced Dispute Resolution Officer (DRO) conducts the conference which lasts about 30-45 minutes. The conference is confidential and the substance, procedure and dynamics of the case are discussed. The goal is to resolve procedural problems and the suitable dispute resolution process.[690] The DRO would make a recommendation but the parties and their counsel have the final say on how the case should proceed. The process is explained in the PD thus:

1. Intake screening: Upon the receipt of both parties' statements of issues, the ADR Registrar shall exchange the statements of issues between parties and

[686] Cap M -. LFN, 2004. See also, Goodluck, *op cit*, p-260
[687] Goodluck, *op cit*, p. 261
[688] See, AMDC PD, p.17
[689] Guide to AMDC, p. 2
[690] *Ibid*

may invite them for a Pre-session meeting with the Dispute Resolution Specialist (DRS).

A) Introduction and Narration: The DRS explains the ADR process and procedure to the parties. In addition, the DRS provide the parties with the relevant forms and confirm the parties understanding of the procedures at the ADR Centre.

B) Problem identification and clarification: The parties provide the DRS with a summary of the dispute to confirm its conformity with the statement of issues. Thereafter, the DRS clarify issues, identify interests and provide the parties with a synopsis of his understanding of the dispute.

C) Option list: The DRS provides the parties with the AMDC recommended options or processes to be utilised in resolving the dispute.[691]

If the dispute can be instantly resolved, it is settled, otherwise the DRO guides the parties on the appropriate ADR Option.[692] If the parties decide to participate in one of the ADR options, the DRO presents the list of Neutrals and/or assign a neutral based on the subject matter, expertise and the dynamics of the case, subject to the approval of the parties.[693] The parties can also suggest names of acceptable and recognised neutrals or private ADR practitioners.[694] Article 9 of the PD specially upholds the right of parties to use private ADR service providers.

Article 3.3 & 3.4 provides thus:

3.3 After the intake screening (or Pre-session meeting), and the matter is regarded as suitable for ADR and referred to an ADR door, parties are expected to file a Confirmation of Attendance (Form 4) and a Confidentiality Agreement (Form 5). In default of filling Form 4 and Form 5 as required, the case may be struck out from the ADR Centre list, and a Certificate of Default (Form 7) may be issued and placed in the Court's file, without prejudice to the rights of the parties to resume their reconciliatory efforts.

[691] AMDC PD, op cit
[692] Goodluck, *op cit*, p. 262
[693] AMDC Guide, p. 3. See also, p. 12 of the AMDC PD.
[694] Koleosho, *op cit*, p. 387

3.4 In the event that the parties are unable to agree on a neutral, the Director of the AMDC shall provide the parties with further recommendations from which the parties may choose, failing which the process will be terminated and a Certificate of Default (Form 7) issued and placed in the court's file.

If members fail to file form 4 and 5, the matter is struck out of the AMDC'S case list without prejudice to both party's legal rights and interests. A certificate of default is issued.[695]

Article 2.2 provides for the commencement of actions at the AMDC. It provides thus:

a) Actions are commenced at the ADR Centre upon filing of a duly completed Request Form (Form 1) or issuing of a Notice of Referral to counsel for the parties; when the parties are not represented, to the parties themselves.

b) The Request Form should be submitted along with four copies of the Statement of issues, which briefly describes the factual and legal issues in dispute and the interests of the party. In addition any document that is of central importance to the case should be attached in line with the stipulations in the Request Form.

c) Within 7 days of receiving the Request Form (Form 1) and the statement of issues, a Notice of Referral shall be served on the other party or their counsel by the AMDC along with a submission Form (Form 2) and a Memorandum to Parties (Form 3).

d) The party receiving the Notice of Referral and the Memorandum to parties is expected to complete the Submission Form (Form 2) and forward the same to the AMDC within 7 days along with four copies of his/her statement of issues as described in clause 2.2 (b) above.

By paragraph 5 and 6 of the PD, the ADR Registrar schedules a provisional ADR session and sends a notice of same to the Mediator or Arbitrator. The neutral has seven days to indicate his acceptance or rejection of his nomination. If s/he accepts, the Disclosure form is filled and returned to the Registrar.[696] The mediation or Arbitration session is then convened. Where neutral evaluation is diagnosed as the appropriate 'door', Article 4.3 and 4.4 makes provision for this thus:

[695] Goodluck, *op cit* p. 263
[696] PD p.11

4.3. If it is determined in the A.D.R. session that neutral evaluation would be an appropriate step in resolving the dispute, the parties and or counsel with the assistance of the Dispute Resolution Specialist will set out the issues for neutral evaluation in Form 8. The parties will be required to forward to the A.D.R. Centre at least 7 days before the scheduled date for the neutral evaluation session, their argument in support of the issues (s) to be evaluated.

4.4. Upon receipt of Form 8, The A. D. R. Centre will schedule a 45-minute session before a neutral evaluator to consider the issue (s) Presented. In that session, counsel will present the core of the case in the presence of the parties. The neutral evaluator shall within two weeks and not exceeding one month thereafter give a candid assessment of the case.

Article 4.1 of the PD emphasises the importance of attendance by parties in person to maximise the effectiveness of the process. Legal representation does not do away with a party's personal appearance as the ADR session will not proceed in the absence of the parties. Also by article 4.2 of the PD, parties attending the ADR session must have full authority to settle or else the session will not proceed. A party attending on behalf of a corporation or institution must have full authority to take decisions and exercise discretion that would lead to the resolution of the dispute.[697]

The ADR session may be held at the ADR Rooms of the AMDC or at any other appropriate place that is convenient and acceptable to all the parties.[698] Article 5 provides for confidentiality of statements made and documents produced in the ADR session or even at the pre-session screening conferences. These are not admissible in evidence for any purpose. Again by virtue of Article 5.1 (c) ADR neutrals who conduct the ADR sessions are granted conditional immunity.

Their immunity is contingent upon their compliance with the standards set out in the NCMG code of Conduct for Mediators/Arbitrators. The parties sign an agreement in Form 5 indicating their acceptance and commitment to such confidentiality and immunity. Upon referral to any of the ADR sessions, the same shall be administered in accordance with the

[697] Koleosho, p. 388
[698] See, Article 4.8 of the PD.

AMDC Mediation Procedure Rates (2002) or the MDC Arbitrator Rules (2002) as applicable.[699]

Outcomes - ADR sessions often end up in settlement, but some cases don't settle. If parties are able to reach an agreement, the terms are reduced into writing to be signed by the parties and witnessed by their counsel.[700] If the matter was pending before the court, the signed agreement must be filed in the court registry within ten days of the agreement and steps taken to dispose of the action.[701] Where the matter is not a court referral (i.e. a walk – in or direct intervention), parties also have the option of getting their agreement endorsed by the ADR Judge as a consent Judgment of the court.[702] Article 6.3 provides that the settlement agreement is deemed to be an offer to settle which has been accepted within the meaning of Order 30 of the FCT HCCPR or any other rules for the time being in force.

Where parties are unable to reach a settlement, if it is a court referred matter, a certificate of inability to resolve (Form 6) together with the Director's report is put in the courts file.[703] Such cases may then be returned to the general cause list and proceed to trial.[704]

Enforcement: The PD provides that settlement agreements reached at the MDCH can be taken before the ADR Judge to be made a consent judgment of the Abuja High Court.

4.1.3 The Akwa-Ibom Multi-Door Courthouse

The Akwa-Ibom multi-door court house (AKMDC) was established in 2008 as a special court–annexed centre which offers a variety of ADR processes.[705] The practice and procedure of the centre is governed by the AKMDC Rules 2009 made by the Chief Judge of the State. There is a draft AKMDC Law currently before the Akwa-Ibom legislature for enactment.

The Legal Framework: The Akwa-Ibom High Court Civil Procedure Rules 2009 also make room for ADR. Order 25 Rule 2(c) provides that the Judge shall issue a pre-trial conference notice for the purpose of 'promoting amicable settlement of the case or adoption of ADR.'

[699] See, p. 26 of the PD
[700] See, Article 6. 1
[701] *Ibid.*
[702] Article 6.2 of the PD
[703] Article 6.4 of the PD.
[704] See, Article 7 of the PD.
[705] See paragraph 7 which is the interpretation section of the AKMDC Rules.

S.25 of the Akwa-Ibom High Court Law 1955 also makes indirect reference to the use of ADR. It states that 'in civil causes or matters the court may promote reconciliation among the parties and encourage and facilitate amicable settlement.'

The AKMDC Rules 2009 was made by the Chief Judge of Akwa-Ibom State pursuant to S.259 of the Constitution of the Federal Republic of Nigeria. It provides in the Preamble that the Rules are to be followed in all Alternative Dispute Resolution processes in the AKMDC. This will form the basis of discussion in the next section.

Initiating cases at the AKMDC

Orders 3, 4, 5 and 6 of the AKMDC Rules deal with initiating cases at the AKMDC. Like its counterparts i.e. the Lagos and Abuja multi door court house, these can be classified as Walk-ins, and Referrals and direct intervention. Order 3 rule 1 states thus:

> 1. Where there is a prior existing agreement to submit dispute to any ADR process, any party or parties shall send to the Akwa-Ibom Muiti-Door Courthouse a Request for ADR as in Form A, which shall briefly state the nature of the dispute(s) and the value of the claim(s), accompanied by a copy of the Prior Agreement, the documents relied upon, the names, addresses, telephone, facsimile, telex and e-mail address (if known) of the parties to join the ADR, and of their legal representatives (if known).
>
> 2. Where there is a Prior Agreement, the date of commencement of ADR shall be the date on which the Request for ADR is received at the Akwa-Ibom Multi-Door Courthouse.
>
> 3. Parties to a prior agreement to submit their dispute for alternative dispute resolution may file a Joint Request for ADR at the Multi-Door Courthouse.
>
> 4. If the Request for any ADR process is not made jointly by all contracting parties to the dispute, the Multi-Door Courthouse shall immediately send a copy of the Request to the other party or parties and direct that a response to the request must be filed within ten days.
>
> 5. The other party shall, within ten days of receiving such Request, notify the Multi-Door Courthouse in writing whether or not he agrees to the resolution of the dispute.
>
> 6. In the event that the other party either declines to submit to ADR, fails, refuses and or neglects to comply with Order 3 Rule (5) above, the Director shall immediately refer the matter to the ADR Judge and notify the parties in writing accordingly.

This effectively refers to walk-ins i.e. where one party to the dispute or both of them agree to use the services of the AKMDC. This section does not contemplate that legal proceedings

have been commenced at the courts, where it has, the Order 5 will be the appropraite section to be applied.

Order 5 on the other hand deals with Referrals. The Rule provide thus:-

> Referral of matters to the Multi-Door Courthouse may be by any of the following ways:
>
> 1. A judge of the High Court, Federal High Court, and Courts of other jurisdictions outside Akwa-Ibom State, a Magistrate, the Chief Social Welfare Officer or any other officer exercising judicial authority may by order refer an ongoing matter before them to the Multi-Door Courthouse.
> 2. Where the agreement of parties provides for the use of any ADR mechanism, the court will enforce that clause in the agreement and refer the matter accordingly.
> 3. Any of the parties to a dispute or counsel to such parties may at anytime even after filling or commencement of action in the court opt for the use of ADR at the Multi-Door Courthouse.
> 4. The ADR Judge or the Director of the Multi-Door Courthouse, public institutions, corporations and other dispute resolution organisations.
> 5. Anyone involved in a dispute or a person who though not directly involved in the dispute has an interest in the dispute and is of the belief that the services of the Multi-Door Courthouse will be beneficial.

From these provisions (Orders 3 and 5), it can be stated that cases come to the AKMDC by parties themselves opting for ADR and filing their complaints there or by referral from the courts. Order 5(1) is particularly instructive as it allows referral from Courts other than the Akwa-Ibom High Courts to which it is attached and also other Jurisdictions i.e. courts outside Akwa-Ibom State. While this may be 'abnormal' in litigation, it may not be out of place in ADR- this is so because parties choosing ADR are free to choose their venue. The only issue which can arise is with regard to endorsement of settlement agreements reached therein by an ADR Judge: Can it be made a Judgment of the Akwa-Ibom State High Court, if that court does not have jurisdiction to entertain such a dispute in the first instance? It is submitted that since the endorsement by a Judge is optional parties may choose not to take this further step.

Commencement and Conduct of Cases in the AKMDC

Any person(s) shall commence an ADR process by filling a written Request at the AKMDC or by completing a Request form (Form A).[706] Once the case file is complete and the matter is

[706] Order 1(1)

determined to be suitable for ADR, the case is assigned to a Dispute Resolution Officer (DRO).[707] DROs are legal practitioners with ADR skills, appointed by the Judicial Service Commission to handle ADR matters at the AKMDC.[708] The DRO conduct a Pre-conference meeting/intake screening where the process is explained to the parties and their counsel (if any), issues are identified, settlement options are explored and advice is given on the most appropriate ADR Door for the dispute.[709] Once parties agree on the process to be used, the DRO provides the bio-data of recommended Neutrals for the parties to choose from. The parties may however elect to use a neutral not recommended by the DRO.[710] If the matter was referred by the courts, the AKMDC will send a notice to the parties or their counsel and direct them to file brief statements on the nature of the dispute documents they intend to rely on and list of witnesses. Once the case file is completed, the matter is referred to the DRO who conducts the pre-conference meeting/intake screening.[711] Thus if the matter is one that can be immediately resolved, the DRO facilitates the settlement process, otherwise parties are called upon to choose an ADR option and a neutral.

A Respondent who receives notice of the request for ADR is expected to file a response together with the submission form (Form B) within ten days of receipt of same.[712] Where the respondent fails to submit to ADR, the Director of the MDC in his discretion may issue a certificate of Default (Form E) and strike out the matter or refer same to the ADR Judge. This does not however preclude the parties from resuming amicable settlement.[713] Order 22 provides further that where a party refuses to submit to mediation or arbitration at the AKMDC, in order to move the case forward, the matter may be brought before an ADR Judge who upon interaction with the parties may order them to proceed with the ADR process or proceed to the regular courts.[714] Unlike the Lagos and Abuja MDC which have separate rules for mediation and arbitration outside of the Practice direction which regulates practice and procedure thereat, the AKMDC Rules incorporate both its mediation and arbitration rules. In fact these appear to be the only two doors provided for under the rules although Order 28 provides for 'Code of conduct for mediator and Neutrals.'[715] With regard

[707] The DRO is Responsible for all Dispute Resolution at the AKMDC. See, Order 2(2).
[708] See, the interpretation section of the Rules
[709] Order 2(4)
[710] Order 2 (5)
[711] Order 6 (1) & (2)
[712] Order 1 (5)
[713] Order 10 (1)
[714] There are several augments on whether parties can be compelled to use ADR bearing in mind that voluntaries is part of the very essence of ADR.
[715] Again, in Lagos & Abuja MDCH, the code of Conduct/Ethics for Neutrals is contained in a separate

to mediation, once the parties agree with the DRO on their choice of mediator, the matter is referrred to the mediator. By virtue of Order 12, the mediator fixes the date and time of each ADR session. The session may be held at the AKMDC or at any other venue agreed upon by the parties – they would bear the cost of such other venue.

Order 13 gives full details as to how mediation sessions are to be conducted at the MDC. It states:

> The ADR Session
>
> 1. The mediator clarifies the process and establishes ground rules.
> 2. Each party shall present his case starting with the party that initially filed the Request for ADR.
> 3. A party may call witnesses including expert witnesses and present documents to support the case.
> 4. Parties may cross-examine witnesses presented by the other side.
> 5. Mediators may ask the parties and witnesses questions.
> 6. The mediator is authorised to conduct joint and private meetings with the parties. (called Caucuses)
> 7. No formal record or transcript of the ADR sessions will be made without the prior consent of the parties.
> 8. If the parties are unable to reach a settlement at the ADR sessions and if all the parties, or their Representative so request and the mediator agrees, the mediator may produce for the parties a non-binding written proposal in terms of settlement.
> 9. The proposed settlement terms must not attempt to anticipate what a court might order, or set out what the mediator suggests as appropriate settlement terms within the circumstances.

Order 15 obliges the mediator to disclose any conflict of interest. Order 16 defines the role of the mediator. Parties are required to sign a mediation agreement[716] as well as a confidentiality and privacy agreement.[717] Order 20 provides for stay of legal proceedings by the mutual agreement of the disputing parties during an ADR process.

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document.
[716] Order 17
[717] Order 23

Outcomes: Where parties reach an agreement, a settlement agreement is signed by them. By virtue of Order 19, the agreement is binding on the parties and same can be entered into the records of the AKMDC as a 'consent judgment' by the ADR Judge. The interpretation section of the Rules defines 'consent judgment' as the judgment entered by a court, based on the settlement Agreement. If the matter was referred by the courts, then the settlement Agreement is forwarded to the referral court where it shall be entered in the courts record as 'consent judgment.' Order 21 provided for various ways in which mediation proceedings may be terminated thus:

1. The Mediation process shall terminate:
2. By the execution of a statement of agreement by the parties
3. By a written declaration of the mediator to the effect that further efforts at ADR are no longer worthwhile; or
    a. By a written request of a party or parties that ADR process be terminated because further efforts at ADR are no longer worthwhile.
    b. By a joint written request of both parties that ADR process be terminated because further efforts at ADR are no longer worthwhile.
    c. Upon the receipts of a joint request, or upon the written declaration of the mediator, the Director shall terminate ADR processes forthwith, issue and cause the parties to sign a Certificate of Inability to Resolve through ADR as in Form D.
    d. Where request to terminate is made by only one party, the Director shall refer the matter to the ADR Judge.

Costs, Fees & Expenses: All expenses arising from the ADR process i.e. the MDC processing fees, the mediators fee and all other incidental expenses shall be borne equally by the parties except otherwise agreed by the parties.[718] A schedule of fees is provided in the rules. Expenses of witnesses to be called by parties are however borne by them.[719]

Enforcement: Order 36 States that upon the completion of ADR proceedings, a Settlement Agreement which is duly signed by the parties shall be enforceable as a contract between the parties and when such agreements are further endorsed by an ADR Judge, it shall become a Consent Judgment enforceable by law.

[718] Order 24 (3)
[719] Order 24 (1)

Arbitration: Order 37 Rules 1-40 make detailed provisions in respect of the conduct of arbitration proceedings under the MDCH.

4.2 Evaluation of Court Connected ADR in Nigeria

Some of the identified advantages of CCADR in Nigeria include the following:

- Distrust of new and unfamiliar processes can be reduced because of the involvement and oversight of the judiciary;
- A fuller range of choice or doors for resolving disputes are made available to litigants;
- For members of the judiciary, MDCs are a means of decongesting their caseload, allowing them more time to deal with other cases effectively thereby increasing productivity and improving access to justice for litigants;
- Multi-Door Courts (MDCs) provide flexibility in both avoiding and returning to litigation;
- Parties are given the opportunity to arrive at solutions which are mutually and commercially acceptable and which may be beyond the scope of the court to arrive at;
- Agreements can be recorded as judgments of the court and enforced through formal court mechanisms.[720]

The Security, Justice and Growth (SJG) Programme in Nigeria worked to improve, access to, and the quality of safety security and justice for poor people and then livelihoods. To this end, it supported the creation and/or expansion of CCADR centres in Lagos, Abuja and Kano States.[721] It reported some of its findings based on case studies in these different centres. On the LMDC, it reports two different cases which were pending in the courts with respect to intellectual property and land dispute which successfully mediated in the centres brought to an end in the latter case a litigation of 17(seventeen) years at the trial court[722] In the AMDC two cases were also reported in respect of a contract dispute and another a tenancy dispute

[720] Security, Justice and Growth (SJG) Programme, Nigeria (2010). Alternative Dispute Resolution: Multi- Door Courthouse.
[721] *Ibid* p.2
[722] *Ibid*. p.11

involving a senator. These were also successfully resolved.[723] The Kano MDC also reported successes involving a two year dispute over monies owed and a case of nuisance.[724]

In May 2008, the 'Network of Multi-Door Courthouses' was formed with the goal of providing a forum for extant MDCs to come together to shares ideas and experiences as well as promote international best practice procedure in all the MDCs. It will also serve as an advocacy group for the intents of MDCs.

Presently, states that operate a form of CCADR in Nigeria apart from those in focus in this thesis are Kano and Borno (which operates an amicable settlement centre). Other states which are in different stages of adopting CCADR include Rivers, Kwara and Delta.

4.2.1 Empirical Findings on the Implementation of CCADR in Nigeria

In the states in focus in this thesis i.e. Lagos, Akwa-Ibom and the Federal Capital Territory, evaluation of the MDCs have only been conducted internally by the centres themselves. Usually, at the end of each mediation session 'evaluation forms' are given to all participants (parties and their counsel) to fill out describing their experience with the ADR process. The conduct of empirical evaluations of the operations of the extant MDCs such as has been carried out in the US and UK by socio-legal scientist has not happened in Nigeria. The reports available are as a result of personal interviews conducted by the researcher and same was limited to the LMDCH and only in respect of issues such as the number of cases handled by the centre each year since inception and how many were settled. This finding is reproduced below:

Lagos Multi-Door Courthouse Statistics:

SN	PERFORMANCE INDICATORS	2002	2003	2004	2005	2006	2007	2008	2009	2010	2011
1.	No of Mediations filed	4	77	48	41	14	30	63	144	133	128
2.	No of Arbitrations and other ADR matters filed	2	7	6	9	5	5	7	4	5	11

[723] *Ibid.* p.12
[724] *Ibid.* p.13

3.	No of court–referred matters	-	58	17	25	6	3	30	59	50	31
4.	No of walk-in matters	6	23	37	25	13	31	40	89	88	108
5.	No of cases discontinued	2	45	28	15	6	17	21	24	28	15
6.	No of cases resolved	2	17	14	12	4	10	17	46	50	43
7.	No of cases unresolved	2	22	12	23	9	8	32	78	60	81
8.	**Total no of cases**	**6**	**84**	**54**	**50**	**19**	**35**	**70**	**148**	**138**	**139**

4.2.2 Analysis of the Implementation of CCADR in Nigeria

Earlier in this chapter, we had examined CCADR in Nigeria focusing on Lagos, Akwa-Ibom and Abuja MDCH. The approaches, structure and operations of these centres were discussed in detail as well as their legal framework. In this section, the similarities and differences (if any) in these Nigerian case studies will be highlighted. This will also be compared with the US and UK models as appropriate in order to identify gaps and make necessary recommendations. This analysis will be done under the following headings: mode of commencement of the programmes, relationship with existing statutes and civil procedure rules, types of programs offered i.e. whether voluntary or mandatory or both, types of cases coming to the centres, ADR options offered to disputants; relationship to the courts (i.e. in terms of reporting cost shifting, payment of fees, neutrals, time of referral and level of supervision) as well as the status of and enforcement of ADR settlement agreements.

Commencement of Programme: CCADR was introduced into Nigeria by a private not-for profit organisation i.e. the NCMG. They were the primary promoters of the concept and they were able to make proposals which were acceptable to the Lagos Judiciary. Thus the first CCADR in Nigeria, the LMDC commenced as public-private initiative. The preliminary research concerning CCADR was thus conducted by the NCMG and it concluded from its findings that CCADR would be beneficial to Nigeria.[725] The establishment of the Abuja

[725]. The Author could not get access to the proposal to the Lagos State Judiciary which would show the expected

MDC was also facilitated by the NCMG. Whilst the Akwa-Ibom MDC was not established by the NCMG, it however had strong links to the LMDC. Thus unlike the US and UK approach of commencing CCADR by establishing pilot programmes to 'test-run' or experiment in order to determine an appropriate model, the Nigerian Courts have largely depended on the proposals of the private sector drivers. This is not condemnable because, as explained in chapter three of this work when Lord Woolf in the UK embarked on the Civil Justice Reforms, his work relied heavily on initial research of the US models and approaches to come up with a suitable UK approach.

The difference however is that the approaches suggested by Lord Woolf were then subjected to pilot studies or programmes in limited county courts. These pilot programs were then evaluated before they were adopted with necessary modifications. It is worthy of note, that Akwa-Ibom adopted a similar approach, but only in the limited sense that it has delayed enacting a law for its MDC until after it has been in operation for three years. This is a form of 'experiment' to see what worked before legislating same.[726]

Relationship with extant Legislation - A common feature to all the MDCH in focus is that CCADR was introduced into the court system primarily through amendment of existing civil procedure rules. Basically, the CPR was amended to encourage and empower the courts to refer matters to ADR. Specific ADR Rules were however enacted to support the process. Practice Directions were enacted by the Chief Judges of Lagos, Abuja and Akwa–Ibom in respect of their different states. Thus far only Lagos has enacted a law to support the MDCH.[727]

This is somewhat similar to what happened in the US where the local court Rules were amended to include and encourage ADR Although there is also the enactment of the Judicial Improvement and Access to Justice Act of 1988 which specifically provided for voluntary CCADR programmes. Other specific ADR laws in the US include the Colorado Dispute Resolution Act and the Georgia CCADR Act. In the state of Delaware, the CPR was reviewed to adopt CCADR. With respect to the UK, the Woolf reforms led to a total overhaul of the existing CPR and the enactment of a new Civil Procedure Rules 1998.

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benefits/outcomes of integrating ADR unto the Lagos State system of Civil Administration of Justice.

[726] The draft model law is currently before the Akwa-Ibom State Legislature. The content of the Bill was discussed in earlier sections of this chapter.

[727] These have also been discussed in earlier sections of this chapter.

Type of Programme Offered – All the MDCs studied implement a voluntary programme i.e. parties and their counsel are encouraged to participate and/or refer disputes to the MDC. The courts are empowered to refer cases to the MDC, but there is no 'punishment' or 'cost' attached to a refusal to submit to ADR at the MDC. Where a party refuses to submit to a notice of ADR, same is noted on the case file and returned to the referring court. Where it is a walk–in, if the other party refuses to appear, neither the complaining party nor the MDC can compel appearance or attendance. Both in the US and UK court connected programs, there exist some form of 'mandatory' schemes. For example in the US courts, depending on the range of monetary damages, parties could be 'mandated' to explore non-building arbitration. Again in the UK, parties with small monetary claims are required to explore ADR (mediation in particular) in the fast track scheme. The US and UK courts also adopt mandatory programmes with an "opt out" procedure i.e. parties who do not wish to explore ADR would so inform the court stating reasons why they believe ADR is not an appropriate process. Such provisions do not exist in the Nigeria MDCs, under focus.

Relationship with the courts - This is examined in the context of supervision, neutrals, referrals, and costs.

Supervision - In the Nigerian MDCs under discuss, the courts exercise a high level of supervision over the MDCs. The LMDC can be said to have the least court supervision because the centre still operates as private-public collaboration. The LMDC is however independent with its own board – it can sue and be sued. The staffs of the LMDC are not members of the Lagos State Judiciary. The ADR judge however exercises some supervisory roles as it examines disputants before endorsing settlement agreements from the MDC, to ascertain that parties have freely entered such agreements. The AMDC and AKMDC are more integrated with the state judiciary. Indeed, the centres are manned by judiciary staff. They are thus subject to the same supervision as that of the regular courts. In the LMDC, there is a high level of involvement of independent neutrals/evaluators, The AMDC and AKMDC whilst maintaining a list of private neutrals, rely more on their trained Dispute Resolution Specialist/Officers (who are responsible to the Chief Judge) to facilitate settlement. In this light therefore, it is submitted that the AMDC and AKMDC are more closely integrated to the existing judicial infrastructure whilst the LMDC has established itself as a semi-independent centre not directly regulated by the existing judicial structure.

Neutrals – The subject of Neutrals was touched upon in the preceding section. The options identified with regard to neutrals are that all the MDCs under reference maintain a list of 'accredited' neutrals who are trained ADR professionals. They are invited as needed to conduct the ADR sessions and are paid by the MDC from fees paid by the disputants. The MDC also have trained ADR personnel who also engage in the conduct of the ADR process. It is not clear however whether they are separately remunerated for such services or whether it is considered as part of their jobs. In all these courts, the MDC has itself been involved in the training and retraining of their ADR professions to enable them facilitate settlements. In the LMDC, ADR judges who are judges in the regular courts and have been further trained as ADR professionals also conduct ADR sessions. In such cases however, as in the USA and UK, if no settlement is reached, such judges cannot try that case in the regular courts.

Referral - All three MDCs under focus encourage early referral of disputes to ADR. Indeed the CPR requires judges to inquire from the parties at the pre-trial conference if they have explored ADR. The Rules also require judges to order or refer matters pending in their courts to the MDC. All these are pre-trial referrals. There is nothing in the rules providing for referral after trial has commenced – it is submitted however, and in fact that is what obtains in practice that, parties may at any time before judgment is entered, negotiate an amicable settlement which may then be filed as consent judgment of the court. This is similar to what obtains in the US and the UK Courts.

Costs – All three MDCs studied charge both administrative fees as well as professional fees of the Neutral. The administrative fees are usually fixed whilst the fees of the third party neutral is determined *pro rata* the amount of damages sought or claimed. The AKMDC published its fees as part of its rules; the LMDC and AMDC treat this as an administrative matter and inform the parties *ad hoc*. The LMDC makes provisions for pro bono cases where appropriate.

The issue of cost–shifting i.e. where a party who has unreasonably refused to explore ADR early in the dispute is successful at trial, he is nonetheless denied his costs or awarded reduced costs if the result obtained at the trial could have been achieved through an ADR procedure, does not apply in any of the Nigerian MDCs under review.

Scope of cases: - The MDCs in focus do not specifically limit the scope of cases they can handle. One thing that is clear however is that they are all limited to Civil disputes. Unlike the US and UK models which use the amount of money in dispute as criteria in some cases to

determine whether a case should be automatically referred to ADR, none of the Lagos, Abuja or Akwa-Ibom rules have such provisions. It is submitted that while there is no express exclusion of certain types of cases, as discussed in Chapter Two of this work, certain cases such as interpretation of the Constitution are not suited for ADR.

Array of ADR Options Offered: - The Common doors offered to disputant in all the MDCs reviewed are Mediation, Arbitration and Early Neutral Evaluation. There are variations of these three for example Med – Arb i.e. Mediation – Arbitration or ENE – Arb (Early Neutral Evaluation – Arbitration); depending on each individual case. This is similar to the US and UK approach.

Status and enforcement of ADR Settlement Agreements - In all these MDCs, the rules provide expressly that settlement outcomes are contracts between the parties simpliciter. They all however make provision for such agreements to be endorsed by an ADR judge in order to elevate same to the status of a judgment of the high court and be enforced as such. Just as in the US and UK Models, the judge is at liberty to examine the parties to satisfy himself as to the voluntariness of the agreement.

4.3 CCADR in the Federal Courts

While the Federal High Court does not yet have a CCADR programme, the Federal judiciary has taken a bold step in amending the Court of Appeal rules to provide for a reference to ADR. In addition, the third amendment to 1999 Constitution has empowered the National Industrial Court to establish an ADR Center within its premises.[728] The position/ CCADR process in the Court of Appeal is briefly discussed hereafter.

4.3.1. The Court of Appeal Mediation Programme

On November 9, 2006, the NCMG made a presentation to the Presiding Justices of the Court of Appeal on a court connected mediation programme to be administered by the Court of Appeal and to be known as The Court of Appeal Mediation Programme (The CAMP).[729] It however did not become available to parties until 2011, when the Court of Appeal amended its

[728] For a fuller discussion of this subject, See generally, Akeredolu, A.E. (2012): The Proposed Alternative Dispute Resolution Centre of the National Industrial Court of Nigeria: Possibilities and Challenges - *Nigeria Journal of Labour Law and Industrial Relations*. Vol. 6, No. 1, 63 -88

[729] Aina, K., (2009) Med-Arb: A Valuable Settlement Strategy - Essays in Honour of Justice Akinsanya, Justice of the High Court of Lagos State. Available at www.ainablankson.com

rules and in the process introduced the Court of Appeal Mediation programme (CAMP).[730] This is a novel provision in the sense that it applies to the appellate court as distinct from the MDCs discussed earlier in this chapter which operates in the High court of the various States. It is therefore necessary to reproduce the entire order for emphasis:

> **Order 16**
>
> **Court of Appeal Mediation Programme**
>
> 1. (1) At any time before an appeal is set down for hearing, the Court may in appropriate circumstances upon the request of any of the parties refer the appeal to the Court of Appeal Mediation Programme (CAMP); provided that such appeal is of a purely civil nature and relates to liquidated money demand, matrimonial causes, child custody or such other matter as may be mutually agreed by the parties
> (2) The request for Alternative Dispute resolution shall be made in Form 15 in the first schedule to these Rules
> 2. When the Court refers an appeal to the Court of Appeal Mediation Programme, the appeal shall be adjourned to a definite date for the outcome of the mediation between parties
> 3. Without prejudice to the provisions of the foregoing, the parties shall-
> (a) be at liberty at any time during the course of the hearing of an appeal to explore mediation or any other Alternative Dispute Resolution mechanism as considered appropriate in the circumstances towards the resolution of their dispute
> (b) take joint responsibility for all administrative including mediation or arbitration fees associated with the resolution of the dispute: Provided always that such fees shall be equally shared between the parties unless otherwise agreed by the parties or directed by the Court
> (c) co-operate and give due regard to the Court of Appeal Mediation Programme at all times
> 4. Where any of the Alternative Dispute Resolution mechanism adopted is successful, the Court shall adopt the agreement reached by the parties as the judgment of the Court but where such Alternative Dispute Resolution mechanism fails, the appeal shall be set down for hearing.

A review of the above provisions reveals the following:

Type of ADR Process: The rules specifically states in the title that its concern is to provide for mediation; the marginal notes however refer to 'ADR' and also Order 16(2) also speaks of Request for ADR. It is submitted that notwithstanding its name, the intention of the order is actually to establish an ADR programme; it is possible for ADR processes other than mediation to be accommodated in the programme bearing in mind that even in international circles

[730] See, the Court of Appeal Rules, 2011. S.I No. 3 of 2011, No. 18, Federal Government of Nigeria Official Gazette of 4th April, 2011, Vol.98, Government Notice No. 101.

mediation also refers to conciliation. This position is further buttressed by order 16(3)(a) and (b) where it states that the parties are free to 'explore mediation or any other ADR mechanism as considered appropriate' and that parties shall 'take joint responsibility for all administrative, including mediation or arbitration fees.'

Time of referral: By virtue of order 16(1)(1), the time to request for a matter to be referred to ADR is at any time before an appeal is set down for hearing. Form 15 can be used to make such application. From the wordings of order 16 rule (3)(a), it would however appear that parties are at liberty 'at any time during the course of the hearing of an appeal' to explore ADR towards the resolution of their dispute. This appears to be broader than rule 1, which refers to 'at any time before an appeal is set down for hearing.'

Types of Cases: The rules specifically limit the cases that can be referred to the CAMP to civil cases, highlighting in particular liquidated money demand, matrimonial causes, and child custody. There is however, the omnibus term i.e. 'any other matter as may be mutually agreed by the parties.'

Costs and Fees: The rule provides that parties are to bear equally, all administrative costs and fees in connection with the resolution of their dispute through ADR.[731] The parties are however free to agree otherwise and the court also has a discretion to order otherwise.[732]

Outcomes: Order 16 rule 4 states the outcome of a successful ADR process in mandatory terms – 'where any of the ADR mechanism adopted is successful, the court shall adopt the agreement reached by the parties as the judgment of the court. On the other hand, where the process fails, the appeal shall be set down for hearing. This provision is important and serves as motivation or encouragement to the parties to participate in ADR knowing that any settlement reached will have the support of the courts. This is in fact one of the objectives of court-connected ADR.

Comments: Order 16 is still relatively new and as such it may be too soon to evaluate its success or otherwise as the practice and procedure are still unfolding. There are however some early queries that may be raised such as what ADR rules will be applied in the programme? Will separate practice directions be required to guide the practice and procedure of the programme? Where will the ADR sessions be held? Who will be the neutrals? Will they need to be accredited

[731] See, Order 16(3)(b)
[732] *Ibid*

by the court? How closely involved will the courts be, will they exercise any supervisory role over the ADR process?

These are obviously questions that will need to be addressed for a proper implementation of the programme.

4.4 Summary

In this chapter, we examined the legal framework for the practice and procedure of the Lagos, Abuja and Akwa-Ibom Multi-Door Courthouses. We also examined how CCADR has been implemented in Nigeria so far using the Lagos, Abuja and Akwa-Ibom Multi-Door Courthouses as our case studies. In particular, the chapter discussed how these centres have been established (their structure/design, their relationship to the courts to which they are connected and the panel of neutrals in these courts); what ADR options are provided and the laws and rules by which these courts operates. An overview was provided on the structure and operations of the different models. An analysis was also made on the implementation models of the three MDCs based on the criteria of mode of commencement of the programs, relationship with existing statutes and civil procedure rules, type of programme offered i.e. whether voluntary or mandatory or both; types of cases dealt with, array of ADR options offered, relationship to the Courts (i.e. in terms of reporting, cost shifting, the time of payment of fees, neutrals, time of referral; level of supervision) as well as the status and enforcement of ADR settlement agreements. The recent amendment to the Court of Appeal encouraging parties to explore ADR notwithstanding their pending appeals was also discussed.

To summarise, it is observed that there are substantial similarities in the practice and procedure of the three MDCs which may be attributed to the fact that their establishment is being private sector driven. There is similarity in legal framework to the extent that the practice direction forms the basis for the practice and conduct of ADR procedures in these MDCs. This is so even in the case of Lagos which has an enabling Law. Akwa-Ibom has Rules made pursuant to the Constitution to guide its procedure; this is in substantial similarity to the LMDC and AMDC Practice Direction. The three MDCs also provide similar ADR options to disputants, this is again similar to those provided in the US and UK models. The scope of cases handled in these courts is also similar.

There are however some noteworthy differences both between the three Nigerian MDCs on the one hand as well as in contrast to the US and UK models on the other. The major difference in terms of the legal framework is the absence of a 'Dispute Resolution Act or Law.' In the US,

there exists substantive legislation in relation to ADR which then forms the basis for the court rules and practice direction of the courts. The automatic referral and opt out procedure which exists in the US and UK are not available in the Nigerian MDCs considered. In the former jurisdictions, based on monetary criteria, a matter may be automatically referred to court ADR. The issue of cost shifting as a way of encouraging CCADR which obtains in the US and UK models is also not available in the Nigerian MDCs. This may have implications on how parties respond to referrals whether dictated by the rules or when ordered by the court.

Chapter Five which is the next and final chapter will provide a full summary of the thesis and make recommendations on some of the identified gaps considering the analysis made in previous chapters.

CHAPTER FIVE

SUMMARY, CONCLUSION AND RECOMMENDATIONS

5.1 Introduction

This study examined the concept of court connected ADR as it is being implemented in Nigeria, in comparison with the United States and the United Kingdom. An overview of the ADR processes, the rationale and goals of integrating ADR into the civil system of justice in these three jurisdictions is expounded in the thesis. The thesis points out that the issue of access to justice is critical to the enjoyment of fundamental human rights and as such, it has been the anchor for most of the reforms undertaken and still being undertaken in the civil justice system of administration. It emphasises that the court as the arm of government constitutionally entrusted with the determination of the rights and obligations of citizens and government, it has a duty to provide an appropriate, affordable and efficient method of dispute resolution to all those who come within its doors. This is the only way to guarantee access to justice for all.

The study revealed that in the US and the UK, CCADR exists both at the Federal or Central government level as well as in the constituent states. There are supporting policies and enabling statutes for its implementation. However as highlighted in the thesis, these two jurisdictions commenced their programmes with pilot projects which were then evaluated before they were fully adopted with necessary modifications. These pilot projects were supported by the judiciary and justice ministries in these jurisdictions - their subsequent implementation were therefore backed by research. The study pointed out that Nigeria has commenced implementation of CCADAR due to the active promotion of the private sector and in particular, the not –for- profit organisation: 'The Negotiation Conflict and Management Group.' This organisation has been responsible for the introduction and initial (and in Lagos State, the continued) implementation of court connected ADR otherwise known as the Multi-Door courthouse concept.

The main problem which this study inquired into therefore was whether ADR should be integrated into the existing civil system of justice in Nigeria? Is there any justification for CCADR in Nigeria or is this a case of borrowing for borrowing sake? Is there adequate legal and regulatory framework to support the implementation of CCADR in Nigeria? The thesis further explored the issue of how CCADR should be implemented in Nigeria. The reason for

this study was to examine the legal framework for the implementation of CCADR in the different states of Nigeria, to determine the extent of their similarities and differences if any; and contrast this with the law and practice on the implementation of CCADR in the United States and England to identify any areas of similarities with what operates in Nigeria - in order to identify areas where the law and practice in these foreign jurisdictions can influence the Nigerian legal framework and identify the gaps, inadequacies or limitations in the extant Nigerian laws that may adversely affect its implementation. The argument of this thesis was that based on the successes of similar CCADR programmes, the result of implementing same in Nigeria was also likely to be favourable. The thesis compared the legal framework for implementing ADR in the US, UK and Nigeria. The Nigerian system can receive inspiration, develop and improve by looking at other jurisdictions that have mature CCADR systems. Flowing from the above, the thesis sought to determine whether or not to extend CCADR to all States in Nigeria.

The thesis set out to prove the hypothesis that the conditions justifying CCADR in the US and UK also exists in Nigeria and as such CCADR should be integrated into the Nigerian Civil system of administration of justice just as was done in those two countries. For example, the two major reasons for promoting CCADR in the US and UK was the delay experienced in the trial of civil suits. Litigants could wait for as long as ten/fifteen years to have their legal rights determined. With respect of commercial disputes in particular, this did not make sense then neither does it make sense now. This study showed that the situation is no different in Nigeria. The case of *Ariori v. Elemo*[733] illustrates the point. The case which was a land dispute lasted fifteen years at the trial court. By the time it was ripe for hearing at the Supreme Court, the court held that the inordinate delay in the trial court had occasioned a miscarriage of justice. It ordered a trial *de novo*. By that time, the case was twenty years old.[734]

This thesis argued therefore that if empirical studies evaluating the implementation of CCADR in the US and UK show that it has a beneficial impact on the civil system of justice and improved access to justice, if the same is adopted in Nigeria, it will also produce the same effects. The second reason emphasised in the thesis as justification for CCADR is cost. Litigation is a very expensive process not just in monetary terms, but also of time and other

[733] (1981) 1 SC
[734] See also, the cases of *Olaleye v. NNPC* cited in Akper, Peter, (2002), Promoting the Use of ADR to Processes in Court, in What is ADR and Practical Exercises on Negotiation and Mediation, Conference of All Nigeria Judges of the lower courts, National Judicial Institute, MIJ Publishers, p.145; and *Eperokun and Ors v. University of Lagos*, (1986), NWLR p.152

human resources. The study showed that in all three jurisdictions; there are many cases where the cost of prosecuting a claim far outweighs the liquidated amount claimed or the general damages awarded in the event of success at trial. The study further reveald that in the US and UK, the legal framework for implementing CCADR is the Civil Procedure Act/Laws, supplemented by Rules of court. This can be explained by looking at the approach these countries adopted in implementing their programmes – there was widespread, national stakeholder discussions on the advantage or otherwise of adopting CCADR, then there were pilot programmes in specific courts to test different approaches, these programmes were evaluated and the results influenced the amendment of the existing Civil Procedure laws and Rules to incorporate court ADR. When compared with Nigeria, the approach would seem to be more 'business' driven – in the sense that the private industry makes a proposal to the head of a particular court, if he accepts it, it is adopted otherwise like any other bad business deal, it is swept aside. This approach may be a bit flawed and it is argued that this is why CCADR has not had much success in Nigeria like the US and UK.

Even though since the establishment of the first CCADR Centre in Nigeria i.e. the LMDC, there has been much advocacy awareness campaigns, it does not detract from the fact that there is no sense of ownership of the programme by stakeholders including the judiciary and the Nigerian Bar Association. That is why even the LMDC which is situated in a highly commercial city like Lagos has had in its best year only one hundred and thirty-eight cases being handled by the centre. The thesis therefore argued further that the introduction of CCADR in Nigeria is justified and mostly beneficial as it will increase access to justice of citizens but that as long as there is no national consensus or policy on this issue, the goals/desired impact of CCADR on the system of administration of justice cannot be achieved.

In particular, Chapter Four of this thesis analysed how CCADR has been implemented so far in Nigeria using the MDCs of Lagos, Akwa–Ibom and the FCT as case studies. This was also compared with the US and UK approaches to identify gaps as well as any factors that may impact or influence the implementation of CCADR in Nigeria. This Concluding chapter addresses these issues and makes recommendations on how to improve upon the present position and advocate for the adoption of CCADR in all states of the Federation in Nigeria. A summary of the major findings of this thesis is presented in the next part of this chapter.

5.2. Summary of Thesis

The major question posed by this thesis was why and how should ADR be integrated into the existing Nigerian Civil System of Administration of Justice? Flowing from this main question are the following sub-questions i.e. the justifications and dangers of integrating ADR into the Civil System of Administration of Justice in Nigeria; whether there exists adequate legal and regulatory framework for CCADR in Nigeria to support the implementation of court-connected ADR in Nigeria; and ways that the Nigerian legal framework can benefit from the USA and UK approaches. By focusing on these questions, it is expected that there will be an improvement in access to justice of Nigerian citizens through the implementation of CCADR, by drawing from the experiences of other jurisdictions which have implemented such programmes over a long period of time and which have been consistently monitoring and improving their approach.

The specific objectives of this study was to examine the legal framework for the implementation of CCADR in Nigeria, to determine the extent of their similarities and differences if any; examine the law and practice on the implementation of CCADR in the United States and England to identify any areas of similarities with what operates in Nigeria: in order to identify areas where the law and practice in these foreign jurisdictions can influence the Nigerian legal framework and identify the gaps, inadequacies or limitations in the extant Nigerian laws that may adversely affect its implementation. Flowing from the above, the thesis sought to determine whether or not to extend CCADR to all states in Nigeria, and if affirmed, make recommendations for a suitable CCADR model to be adopted in Nigeria.

The thesis approached these questions by first tracing the developments in the field of ADR in the US, UK and Nigeria, The rationale and objectives of integrating this hitherto private method of dispute resolution mechanisms into the public system of administration of justice was also examined and analysed. In particular, the Civil Procedure Laws and Rules of the three jurisdictions which provide the legal framework for the implementation of CCADR was further examined and analysed. Below is the summary of this study:

- The primary reasons for resorting to ADR in the US and UK was the need to reform the Civil system of Justice by eliminating identified gaps and inadequacies of the system - the process became perceived as too expensive, too slow and too complex. It placed many litigants at a considerable disadvantage when compared to their opponents. The result

was inadequate access to justice and an inefficient and ineffective system.[735] The two major drawbacks were however the issues of delay and costs. On the first of these i.e. the length of time litigants had to wait to have their rights authoritatively decided by the courts, it is trite that justice delayed is justice denied, thus citizens were effectively being deprived access to justice. The average time for resolution of cases from the trial to the appellate courts was a minimum of ten years. The other problem with the court system was the issue of the cost of prosecuting cases in the courts. Small claims in particular were affected as there were many instances where the cost of administrative and legal fees far exceeded the monetary claims.

- In Nigeria, ADR existed in many traditional societies as conciliation, mediation and arbitration formed part of the people's culture. The use of modern ADR processes however was initially because of statutory requirements and their inroduction into the Nigerian legal system as part of the received English law. The major drivers and users of the process were however the multinationals, foreign investors and the commercial community. Of course like their counterparts in the US and UK, they had found the court system too slow and not cost effective, thus they also sought for alternatives outside the court system.

- In the US and UK, even though the resort to ADR was as a result of dissatisfaction with the court system, the advocates and users of private ADR quickly found out that that system also had its own limitations. The major limitation was the issue of enforcement of agreements reached in the ADR process. The private sector did not have any machinery for enforcement – the assistance of the courts was therefore required.

- Of great significance also was the introduction of the idea that in order to provide access to justice to all, the courts would have to provide appropriate dispute resolution mechanisms to all who approach its gates – thus the advocacy for CCADR emerged.

- Judicial ADR or CCADR or Multi-Door Courthouse as it is severally described was first introduced in the US. Several pilot programmes were experimented with and evaluated to determine if this was a suitable cure to the inadequacies of the civil system of administration of justice. The majority of the studies reported in favour of adopting CCADR, indeed it was hailed as a solution to the crowded dockets and an inexpensive

[735] Woolf Interim Report, available at www.dca.gov.uk and at www.justice.gov.uk. Visited 28/10/2010

cure of the ills of an overly litigious American society. CCADR has therefore been fully recognised and continues to grow and develop in the US both at the Federal and State Courts

- The UK viewed the developments in the US, examined the studies and evaluations of the implementation of CCADR and decided that it would also be appropriate to introduce same in England and Wales as part of their reform of the civil justice system. Indeed, the UK introduced a whole new dimension to the concept of CCADR by adopting a policy of Settlement as the first resort in dispute resolution and litigation as the last. Parties and the courts were urged to facilitate and promote settlement rather than trial. Emphasis was however on mediation particularly in respect of small claims.

- Nigeria, principally through the effort of the private sector reviewed the developing trend of CCADR in the US, UK and other jurisdictions and made proposals to the different state judiciaries for the adoption of the concept into the civil system of administration of justice with modifications where necessary. Heads of courts who were persuaded by these proposals have collaborated with other stakeholders to establish MDCs in their jurisdictions. These include Lagos, the FCT, Akwa-Ibom, Kano, Borno and Kwara. Other states which are at one stage or the other of adopting the concept include Delta, Cross River and Rivers.

- The challenges of institutionalising ADR include: stunting the growth of the development of the law as entire areas of law such as commercial cases are removed from the courts, preventing public debate and consensus building in cases with national public policy implications, depriving the public of important information such as news of a product's harmful effects, hindering the role of the courts to influence behaviour in accordance with established norms and provide standards of enforcement, restraining the ability of the courts as neutral umpires to look out for parties who lack the capacity or resources to protect their own interests and lack of appropriate supervision particularly disclosures made or that surfaces during discovery. There is also the clear and present danger of the 'alternative' becoming consumed by rules.

- Both the US and UK CCADR are to a large extent geared toward voluntary rather than mandatory programmes. They however used the range of monetary damages claimed as a criteria in determining whether a matter should be automatically referred to ADR or not, rather than waiting for the parties to voluntarily choose ADR. A common approach was

the ‘opt out’ procedure i.e. cases falling within the prescribed monetary range are automatically referred to ADR; if a party who believed its case is not appropriate to ADR, it can opt out by giving reasons for its belief.

- One approach adopted to get disputants to use the ADR processes was the issue of mandatory referrals – the pilot programmes showed that where parties were asked to volunteer for amicable settlement via ADR, they were reluctant while majority of those who were mandated though reluctant were still able to achieve settlement using the process. In courts where ADR was entirely voluntary, its use was limited and thus did not have the desired impact on the court dockets, and cases needed to be sent to ADR, therefore automatic or mandatory referrals became the preferred option. This approach has not been adopted in Nigeria.

- ADR advantages are best experienced when it is resorted to at the earliest stages of a dispute. In the UK approach, state policy declared settlement as the first option for resolution of disputes and litigation as a last resort. This was a great impetus to the use of CCADR.

- With regard to costs, litigants still had to pay for the cost of the ADR sessions – this is so in the US, UK and Nigeria. In the UK, there is a limit to the administrative fees payable, similar to what obtains in respect of filing fees in litigation. In Nigeria, the administrative fees are fixed while the neutrals’ fees are charged *pro rata*. These fees are still regarded as cost effective when compared to the litigation expenses – fees for counsel, discovery, time and such like.

- Both the US and UK have used the issue of costs to try to motivate disputants to try ADR. A party who refuses to submit to ADR may find that even if he is successful at the trial, if in the opinion of the court, the result obtained could have been similarly achieved through ADR, no costs will be awarded. Where he is unsuccessful, punitive costs may also be awarded for ‘wasting the time of the court’ and refusing to submit to ADR.

- The legal status of settlements reached in CCADR remains that of a contract simpliciter. However, in all three jurisdictions, parties have the option of endorsing these settlements as judgments of the respective courts – this provision is particularly effective because it gives the parties confidence to participate in the ADR process, knowing that the court enforcement machinery can be invoked to enforce compliance.

- In Nigeria, there has not been much empirical evaluation or studies of the existing MDCs, this being a task ordinarily for the socio-legal scientist. It is therefore difficult to ascertain the impact that CCADR has had on the civil system of justice so far in the states where it has been implemented. Nonetheless, considering the number of cases filed in a state like Lagos state each year which is estimated at no less than 5,000, if the most amount of cases handled by the LMDC is just 138(one hundred and thirty eight), this is only a drop in a bucket – it has not yet had any significant impact.

5.3. Research Findings

Below is a summary of the research findings as it relates to the research questions:

1. There is both justification for and challenges in integrating ADR into the civil system of administration of justice. The basic problems which confronted the US and UK and led to their adoption of CCADR are the same problems experienced in the Nigerian system of justice. These include delays in obtaining justice as a result of inordinate delay and expense of litigation. There is evidence that ADR options can lead to more efficient use of resources by the courts, savings of time and money by litigants, and reduced levels of subsequent litigation. Mediation in particular enjoys consistently high satisfaction rates by participants.[736] There is also evidence that ADR options have increased the public's trust and confidence in the courts.[737]

   There is however also data showing that some uses of ADR have proven to be a tool to disenfranchise vulnerable parties. Courts occasionally have had cause to refuse to enforce the results of ADR proceedings that were as one-sided or unfair as to be unconscionable or inconsistent with fundamental due process. The thesis also identified institutionalisation in terms of formalisation as one of the challenges ahead of CCADR. Comparing ADR to equity, it was argued that annexing ADR into the court system will take away its essential features of flexibility and individualised justice.

2. An examination of the three extant Nigerian MDCs revealed that CCADR was introduced into the court system primarily through the amendment of existing High Court Civil

[736] Shack, J.E. (April 4, 2002) *Saves What? A Survey of Pace, Cost, and Satisfaction Studies of Court-Related Mediation Programs*, Paper Presented to the Mini-Conference on Court ADR 2

[737] Brazil, W.D. (2002) Court ADR 25 Years After Pound: Have We Found a Better Way?, 18 *Ohio St. J. on Disp. Resol.* 93 See also, Roselle W. (2002) Court-Connected Mediation in General Civil Cases: What We Know from Empirical Research, 17 *Ohio St. J. on Disp. Resol.*641; See generally, Della, N. *et al.* (2003)Assimilative, Autonomous, or Synergistic Visions: How Mediation Programs in Florida Address the Dilemma of Court Connection, 3 *Pepp. Disp. Resol. L.J.* 1, 13

Procedure Rules. Basically, these rules were amended to encourage and empower the courts to refer matters to ADR. Specific ADR Rules were however enacted to support the process. Practice Directions were enacted by the Chief Judges of Lagos, Abuja and Akwa – Ibom in respect of their different states. Thus far only Lagos has enacted a law to support the MDCH.[738]

3. All the Nigerian MDCs studied implement a voluntary program i.e. parties and their counsel are encouraged to participate and/or refer disputes to the MDC. The courts are empowered to refer cases to the MDC, but there is no 'punishment' or 'cost' attached to a refusal to submit to ADR at the MDC.
4. In the Nigerian MDCs, the courts exercise different levels of supervision over the MDCs. The LMDC can be said to have the least court supervision because the centre still operates as private-public collaboration. The LMDC is independent with its own governing board – it can sue and be sued. The staffs of the LMDC are not members of the Lagos State Judiciary. The ADR judges however exercises some supervisory roles as it examines disputants before endorsing settlement agreements from the MDC, to ascertain that parties have freely entered such agreements. They also assist the ADR process by making orders against defaulting or recalcitrant parties. The AMDC and AKMDC are more integrated with the state judiciary. Indeed, these two centres are manned by judiciary staff. They are thus subject to the same supervision as that of the regular judicial staff.
5. The options identified with regard to neutrals are that all the MDCs under reference maintain a list of 'accredited' neutrals who are trained ADR professionals. They are invited as needed to conduct the ADR sessions and are paid by the MDC from fees paid by the disputants. The MDC also have trained ADR personnel who also engage in the conduct of the ADR process. All three Nigerian MDCs under focus encourage early referral of disputes to ADR. Indeed the CPR requires judges to inquire from the parties at the pre-trial conference if they have explored ADR. The Rules also require judges to order or refer matters pending in their courts to the MDC. All these are pre-trial referrals. Though there is nothing in the rules providing for referral after trial has commenced, nonetheless, such referrals occur routinely in practice.
6. The Nigerian MDCs in focus do not specifically limit the scope of cases they can handle. One thing that was clear however is that they are all limited to Civil disputes. The

[738] These have also been discussed in earlier sections of this chapter.

Common doors offered to disputant in all the MDCs reviewed are Mediation, Arbitration and Early Neutral Evaluation. In all these MDCs, the rules provide expressly that settlement outcomes are contracts between the parties simpliciter. They all however make provision for such agreements to be endorsed by an ADR judge in order to elevate same to the status of a judgment of the high court and be enforced as such.

7. The current legal and regulatory framework for CCADR in Nigeria is adequate to support the present approach adopted in the three states discussed, nevertheless there are some identified gaps and areas in need of improvement. For instance the question of how to get parties to actually use the ADR processes attached to the courts is not fully addressed. The Rules of court as they stand presently provides that parties can voluntarily opt for ADR or be refereed by the courts. There is no provision for automatic referrals. Many parties and even counsel are not aware of the operations and benefits of ADR and so may not voluntarily submit to CCADR. The courts also are not routinely referring matters to the ADR process so the potentials of CCADR have not been fully explored.

8. One factor that has helped the growth, development and practice in the US and UK is the existence of a national policy on the integration of ADR into the legal system. This is one area where Nigeria can borrow from the practice in the US and UK and thus improve the effective implementation of CCADR in Nigeria. In the UK, there exists a National Mediation Helpline that encourages disputants to settle their cases amicably.

9. The concept of CCADR in Nigeria has so far been limited to the High Courts to which they are connected; whereas there are a lot of small claims in the Magistrates courts which can benefit from the process as proceedings in the magistrate courts are basically summary procedure. In the US and UK, small claims are particularly targeted by CCADR. Nigeria can benefit from such an approach.

5.4 Conclusion

Flowing from the above findings, it can be concluded that it is desirable that ADR be integrated into the civil system of administration of justice in Nigeria as has been introduced in Lagos and Akwa-Ibom States as well as the Federal Capital Territory, Abuja. ADR has been widely and successfully used in the private sector and integrating it into the public system would impact on the capacity of the courts to fulfill their constitutional role of

providing access to justice for all through the provision of appropriate, affordable and efficient methods of dispute resolution to its end users.

CCADR has come to Nigeria, it is not possible to turn back the hand of the clock, nor would it be in the interest of the public and the courts to do so. What is in the interest of the public and the courts is to note the benefits resulting from the institutionalisation of ADR in the courts, explore the problems that have arisen in connection with the courts' administration of and embrace of mediation in particular, and propose some possibilities for addressing some of these challenges.[739] It is with this view in mind that this study will proffer solutions to some of the identified problems and gaps in the Nigeria approach to CCADR, drawing on the practice in the US and UK.

Both litigation and settlement are worthy of celebration, and both are worthy of critical examination. Litigation and settlement do not merely co-exist, insdeed, litigation and settlement have come to depend on each other in order to function properly.[740] The rules of civil procedure contemplate, and even encourage, settlement behaviour at virtually every stage of litigation. Similarly, the prospect of litigation today shapes both settlement outcomes and settlement behaviours.[741] Although CCADR processes vary greatly, they share some common elements. CCADR is intended to: relieve each attorney from being the one to initiate settlement discussions, provide stimulus or requirement for attorneys to explore settlement early, promote or require involvement of key decision makers, use attorneys as neutrals to augment judicial resources, provide more flexibility than formal adjudication and avoid involving the judge who will preside at trial if there is no settlement.[742]

5.5 Recommendations

This thesis examined and analysed the concept of CCADR as it has been implemented in Nigeria in comparison to that of the US and UK. The various Civil procedure laws and Rules regulating the practice and procedure were reviewed in order to assess the adequacy or otherwise of same. As stated earlier, the results showed that there is justification for the implementation of CCADR in Nigeria because of the delay and exaggerated costs involved in the existing formal dispute resolution system i.e. litigation. The study also showed that there is

[739] Senft, L.P. and Savage, C.A.(Summer, 2003) ADR in the Courts: Progress, Problems, and Possibilities 108 *Penn St. L. Rev.* 327
[740] Moffitt, M. (2009). Three Things to Be Against ("Settlement" Not Included). *Fordham Law Review.* P.3
[741] *Ibid*
[742] Folberg, *op cit,* pp.8-9

a need to improve on the legal framework to support a more aggressive use of CCADR, in order to achieve the goals of CCADR especially the issue of reducing the over bulging court dockets. This is so because where disputants were not motivated to use ADR, they would not voluntarily choose to change – thus even in those states where CCADR is being implemented, there has not been much use of the process. The greatest limitation of private ADR practice and procedure was the lack of enforcement mechanism – this study further revealed that the need to address this issue also led to the promotion of CCADR, to give ADR greater credibility and assure participants that their efforts at settlement will not be in vain. Flowing from the above observations, analysis, findings and conclusion above, the following recommendations become necessary.

1. *Formulation of a National CCADR Policy* - There is currently no national policy framework for CCADR in Nigeria – the Federal and state judiciary as well other stakeholders especially the Nigerian Bar Association needs to have a CCADR Summit to discuss and agree on a uniform policy for implementing CCADR in Nigeria.

2. *Full Integration of ADR into the Court system throughout the Federation* - CCADR should be implemented in all states of the Federation as part of the civil system of administration of justice and for greater access to justice for all citizens. This of course would require the amendment of the High Court Laws as well as the Civil Procedure (Uniform) Rules of the states; first to integrate ADR into the system and also to provide applicable rules. A uniform approach (by way of model provisions) will be best rather than the current position where each state enacts its own laws and rules.

3. *The Need to Implement the Strict Multi-Door Approach/Settlement House* - In adopting a uniform approach, it is recommended that rather than offer just a limited ADR process, the Nigerian courts should implement the 'pure' multi-door concept i.e. litigants are directed to the ADR process best suited to their dispute. A screening officer should work with the parties to determine the process best suited to the dispute. In what can be described as a settlement house, the lines between each ADR process may not be strictly applied, rather the emphasis will be on what works. Thus, if a third party for example has been facilitating settlement (mediation) and it appears to him that evaluative style may be more appropriate (conciliation), he does not need to direct the parties to another door called conciliation – rather, he converts himself to a conciliator and gets the job done.

4. *Amendment of the High Court and Magistrate Court Law and Rules to adopt the Automatic referral Procedure* - To get more out of CCADR, the litigants have to actually try ADR, the problem however is how to get them to do so. If in a commercially aware state like Lagos, the most amount of cases handled by the LMDC in a year is just 138(one hundred and thirty eight), – it cannot have any significant impact. Parties need to be motivated to explore ADR in the courthouse. Just like the US and UK automatic referral approach, it is therefore recommended that the cases with monetary claims up to a maximum of N1,000,000 be referred to ADR. This amount is recommended bearing in mind that the jurisdictional limit of most magistrate courts in Nigeria are on the average of N5,000,000. Alternatively also, the limit in each state could be tied to the jurisdiction of Magistrates – i.e. cases within the jurisdiction of magistrates would be automatically referred to ADR. Parties who think their cases are not suitable for ADR can then opt out.

5. *Introduction of CCADR at the Magistrate Courts* - Thus far CCADR has been tied to the High courts, whereas the magistrate courts deal with majority of small civil claims in most jurisdictions and Nigeria in particular. It is therefore recommended that ADR centres be annexed to magistrate courts in order to actually make an impact on court dockets. Specific magistrates may be designated as ADR magistrates and their daily schedule of duties will be to resolve disputes between parties, the same way their colleagues summarily adjudicate over disputes assigned to them. Pending the amendment of the Magistrates Court Law, the Chief Judge of the State should by practice direction provide for the rules and practice of such ADR courts.

6. *CCADR in Nigeria should be administered as a Private-Public Initiative* - In the UK, the small claims mediation is administered by CEDR Solve, a private ADR service provider. This is also the case with the LMDC. The advantage of this approach is that it frees the court administration to concentrate on other matters and also the issue of bureaucratising the process or over-formalisation requirements would be limited or avoided. It is therefore recommended that other states follow this same pattern.

7. *Consistent Monitoring and Evaluation of the Implementation of CCADR* – As stated in the thesis, the US and UK have put in place structures for periodic monitoring and evaluation of their implementation of CCADR. The research and development unit of the Ministry of Justice in the UK by itself and through commissioned studies are engaged in periodic evaluations of the workings of the court ADR. In the US, the Federal Judicial Centre also

provides oversight and monitoring through its commissioned external evaluations. This unfortunately is not the case for Nigeria. It is recommended that the National Judicial Council and the National Judiciary be mandated to coordinate the monitoring of government policy and implementation of CCADR. These bodies can instigate the discussion for the adoption of a National policy on CCADR, coordinate sensitisation and national awareness and commission evaluative research that would improve the implementation of CCADR in Nigeria.

8. *Awareness Advocacy and Education* - Affirmative and sustained awareness campaigns on ADR, the benefits of CCADR as well as the practice and procedure are recommended. Stakeholders need to be educated and trained on these issues as well, to enable them appreciate and thus participate in CCADR. As stated in the thesis, the curriculum for training of Lawyers is still heavily lopsided in favour of advocacy skills and procedure. This must change – from the undergraduate level, law students must be reoriented to view ADR as a legitimate dispute resolution process which should be explored in all appropriate cases. There is also need for training to equip counsel to discern what dispute mechanisms are best suited to different cases. The National Universities Commission guideline on the required courses for the attainment of the Bachelor of Law degree must be revised to incorporate ADR skills, practice and procedure. There must be continuing legal education for lawyers to address existing prejudices, suspicion and ignorance of the CCADR concept in order to get more disputants to try the process as most clients would trust any recommendation of their lawyers to use ADR.

9. *Collaborations with International Institutions* – Already, in the implementation of CCADR in Nigeria, there has been some collaboration, cooperation and even financial assistance to some of the States who have commenced MDCH. The assistance and collaboration envisaged here is mostly in the form of technical assistance for capacity building and possibly some exchange programmes. Settlement House, Abuja has for some time been involved in such exchange programmes, where Nigerian Judges visit Multi-Door Courts in the US and have opportunity to watch the proceedings. For example, the Department of International Development through its Security, Justice and Growth (SJG) Programme, in order to improve the current legal and regulatory environment for the private sector to both start-up and expand its economic activity, supported the creation and/or expansion of Court-connected Alternative Dispute Resolution centres in Lagos, Abuja and Kano states. This effort was jointly supported by the British Council also.

Towards a nationwide implementation of CCADR, it is therefore recommended that aid and collaboration of institutions in the US and UK be sought to provide for exchange of information in the field of CCADR, models and designs for more effective approaches, innovations, ideas and experience in CCADR. There could also be bilateral summits to discuss problems and prospects of CCADR implementation or creation of joint facilities for research and evaluation of MDCH in Nigeria as well as provision of technical and financial assistance to states for the implementation and development of CCADR in their respective jurisdictions.

5.6 Proposal for a Model of Implementation of CCADR in Magistrate Courts

As noted in Chapter three of this study, the US and UK have implemented CCADR not just in the equivalent of High courts in Nigeria but have indeed targeted small claims. In Nigeria the existing CCADR has focused on the High Courts. We have recommended an earlier part of this chapter that CCADR should be integrated into the Magistrate courts because that is where a majority of the small claims are heard. This section of the thesis therefore makes proposals as to the administrative, legal and other institutional framework that needs to be put in place in the implementation of CCADR in Magistrate Courts. I will highlight only four areas, though this is not exhaustive.

(a) *The Legal framework*: The Magistrates Courts Law should be amended to establish ADR Centres annexed to the Magistrate courts and to also empower the Chief Judge of the state to make rules of practice and procedure for such Centres. This is similar to how the Abuja MDCH operates. The legal framework should provide for some basic essentials such as:

- the administrative and management structure of the centre,
- its relationship to the court in terms of supervision and oversight,
- ADR options that will be available at the centre (We propose mediation only),
- how matters can be initiated at the centre,
- powers of the Magistrates to refer matters pending before them to the centre,
- nature of the disputes that can be referred to the centre,
- the effect of settlement agreements reached at the centre, and

- issues of enforcement, among other similar issues.

We recommend that there should be a Uniform Model Rule at the national level which the federating states can adopt. (The Uniform rules for the state of Massachusetts in the USA are annexed for ease of reference). A uniform law will be more appropraite in view of the ongoing reforms of the High Court Rules, toward adopting a Uniform High Court Civil Procedure Rules

(b) *Designing a system that works*: We have stated above some issues that the legal framework should address. One fundamental issue is the design of the centre. Dispute system design is actually the first phase of the process.[743] For example, Court-connected mediation designs include both court rules established to foster use of mediation and the legal infrastructure to make ADR fit within the context of civil litigation.[744] Issues arising here would include:

- whether the parties will be bound by the rules of the centre or whether rules of other institutions can be adopted,

- whether walk-ins will be available,

- what measure of control would the judiciary retain over processes and neutrals of the centre,

- whether the neutrals would be employees of the court or an independent roster of neutrals will be maintained or both,(we recommend Magistrate Mediators)[745]

- who will bear the costs of ADR especially if referred by the courts.[746]

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[743] Susskind, L.*et al* (1999) The Consensus Building Handbook, p.61- 168. For results on dispute system design in the Federal Courts in the United States, see, the website of the Federal Judicial Centre at www.fjc.gov/newweb/jnet.web.nsf. For similar results on state courts dispute system design, see also the National Centre for State Courts at www.ncsconline.org. Visited 25/4/2010

[744] For a thorough discussion of the Uniform Mediation Act and recent international rule developments, see, Ellen E. D. (2005) *Competing and Complementary Rule Systems: Civil Procedure and ADR: Procedural Rules for Complementary Systems of Litigation and Mediation – Worldwide*, 80 *Notre Dame L. Rev.* 553

[745] In fact, one of the largest workplace mediation programs exists within the Equal Employment Opportunity Commission (EEOC). The EEOC's program uses internal or staff mediators, and it also hires external mediators as independent contractors. Field offices use these staffing models but in addition will assign *pro bono*, or volunteer mediators to some cases. All mediators receive training in both mediation and the laws enforced by EEOC73 and typically use evaluative techniques. *See* Mcdermott, P. (2001). U.S. Equal Employment Opportunity Commission, The EEOC Mediation Program: Mediators' Perspective on the Parties, Processes, and Outcomes http://www.eeoc.gov/mediate/mcdfinal.html (last visited Oct. 7, 2008).

[746] Similarly, the Massachusetts Commission Against Discrimination (MCAD) programme is a state level example of a third-party agency design. In 1995, MCAD agreed on a protocol for resolving discrimination

There has been a tendency in many court designs to take a hands-off approach i.e. after mandating mediation at a certain point in the litigation; courts generally leave the actual process up to private mediators either through disputant choice or a roster.[747] Recently, there have been calls for courts to take a more active role in regulating the systems they have designed.[748] Professor Shestowsky has called for courts to consider disputant preferences for different aspects of process when designing their programs.[749] We suggest that the centre be designed more as a 'settlement centre' which does not designate the different doors; rather, when disputants come in, the neutral should adopt the most appropriate procedure without necessarily stating what particular ADR process is being adopted.

(c) *Jurisdiction:* The monetary jurisdiction of the centre should be the same as the regular civil jurisdiction of each State's magistrate court. For example, in Oyo State the civil jurisdiction of Magistrate courts is N5million naira. So the centre would be able to handle claims that are within that same range.

(d) *Enforcement of Settlement Agreements*: The status of a settlement agreement is that of a contract. Without being specifically empowered, the Centre would not be able to enforce such agreements especially where the parties voluntarily brought their dispute to the Centre without any prior or pending proceeding in the Court. The Magistrate court law should therefore provide in similar terms like that of the LMDC that settlement agreements should be taken before a magistrate, different from the magistrate/mediator who mediated the dispute to be entered as a judgment of the magistrate court.

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claims through mediation and arbitration.84 Initiated in 1996, the ADR programme is voluntary, fee-for-service, and requires parties to have legal representation to participate.85 Mediators in the program use a mix of facilitative and directive strategies. See generally, Arnold, Z. & Michael, D. (1996) *ADR and Employment Discrimination: A Massachusetts Agency Leads the Way*, Disp. Resol. J. 28, 29, 30-31; Kochan, T., Lautsch, B. & Bendersky, C. (2000). *An Evaluation of the Massachusetts Commission Against Alternative Dispute Resolution Program*, 5 Harv. Negot. L. Rev. 233, 274 20 *Harvard Negotiation Law Review* [Vol. 14:1]

[747]Courts will, however, address issues of mediator misconduct. See, Coben, J.R. & Thompson, P.N. (2006) *Disputing Irony: A Systematic Look at Litigation about Mediation*, 11 Harv. Negot. L. Rev. 43, 95–98

[748]See, Thompson ,P.N. (2004*) Enforcing Rights Generated In Court-Connected Mediation-Tension Between The Aspirations of a Private Facilitative Process and the Reality of Public Adversarial Justice*, 19 Ohio ST. J. on Disp. Resol. 509, 514–15*; S*ee also, Welsh, N.A.(2001) *Making Deals in Court-Connected Mediation: What's Justice Got To Do With It?*, 79 Wash. U.L.Q. 787, 831–38 (calling for courts to deliver disputants an experience of procedural justice in court-connected mediation programmes).

[749]See, Shestowsky, D. (2008) *Disputants' Perceptions of Dispute Resolution Procedures:An Ex Ante and Ex Post Longitudinal Empirical Study*, 41 Conn. L. Rev. 63. For excellent syntheses of the procedural justice literature as applied to court-connected dispute resolution, see, Shestowsky, D. (2008) *Disputants' Preferences for Court-Connected Dispute Resolution Procedures: Why We Should Care and Why We Know So Little*, 23 Ohio St. J. On Disp. Resol. 549. See also, Shestowsky, D. (2007) *Misjudging: Implications for Dispute Resolution*, 7 Nev. L. Rev. 487.

5.6.1 The Way Forward: What must be done?

Flowing from the above, in establishing the Magistrate courts CCADR, the following will need to be put in place:

(i) Appointment of at least ten magistrates who have expertise in ADR or will be trained as ADR practitioners especially as mediators. They will sit on a daily basis like any other magistrate but in this instance to mediate walk-in disputes or disputes referred to them by other magistrates.

(ii) Creation of an Implementation committee – It will be necessary for the Chief Judge of the State to appoint a seven member committee that will be directly responsible for the establishment and implementation of the centre. The terms of reference though not exclusive will include issues such as:

- designing a suitable system for the centre in terms of its structure and administration; whether to have an integrated or semi-independent centre;

-producing a suitable draft rule/practice direction to guide the operations of the court;

- identification of staffing requirements for the centre including ADR Magistrates that can exercise day-to-day supervision over the affairs of the centre and other administrative and specialised dispute resolution officers as well as necessary capacity building;

- funding for sustainability of the centre

- identification of necessary affiliations collaborations and cooperation with other ADR organisations both domestic and international and

-creating awareness among all stakeholders through workshops and seminars on the vision, mission, jurisdiction and options available at the centre.

5.7 Lessons for the Unites States of America and the United Kingdom

One of the objectives of this thesis was to identify areas where the USA and UK approaches to CCADR can influence Nigeria's jurisprudence. In the course of the study however, it is observed that these two countries may also have a few things to benefit from the Nigerian Practice and Procedure. One of the areas where the Nigerian approach would seem to be ahead is the trend toward neutrals that are settlement officers – i.e. they are not bound by the 'strict'

caps of ‘am a mediator or am a conciliator, so if conciliation does not work, i will refer parties to another door.’ Rather, the neutral knows he is a settlement officer, if conciliation is not effective, he switches/converts to mediation or whatever other process he feels will achieve the desired goal of amicable settlement of the dispute. This approached is being experimented at the Kwara State multidoor courthouse and therefore formed the basis for recommendation three above.

5.8 Limitation of Study and Area of Further Research

As stated earlier, this study critically examined the justification for introducing CCADR into the civil system of administration of justice in Nigeria as done in the US and UK. The study argues that there is a need to improve on the legal framework to support a more aggressive use of CCADR, in order to achieve the goals of CCADR especially the issue of reducing the over bulging court dockets.

In the first chapter of this thesis, we had alluded to some limitations which might impact on the study. First, the issue of implementation of CCADR is a socio-legal one, this study addresses the legal perspective but there is also the sociological issue of whether CCADR as it is being implemented in Nigeria is effective. This question can only be pursued by the social scientist. Another limitation of this study is the lack of evaluative studies on CCADR in the Nigerian States where it is being implemented. As seen in Chapter Three, this study was able to rely on empirical findings of scholars in respect of the implementation in the US and UK in contrast to Chapter Four dealing with the Nigerian case studies where the literature was scarce. Nevertheless, since one of the objectives of the study was to determine areas where the US and UK approaches could influence Nigerian jurisprudence and implementation, this limitation did not prove to be fundamental to the thesis.

An ineffective justice system may lead to breakdown of law and order and even indirectly underdevelopment of the economy where there is no confidence in the system. It is therefore hoped that the findings of this study will benefit policy makers in reaching an informed decision in determining whether or not ADR should be fully integrated into the public system of justice. In view of its comparative content, it is also hoped that this study will be beneficial to researchers globally with respect to the issues examined herein. Therefore, though this study may not have addressed every issue related to the implementation of CCADR in Nigeria, it is hoped that it has helped deepen the understanding of the subject and provoked other researchers to pursue further studies in this area.

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