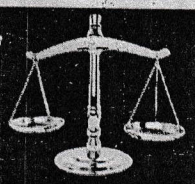
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COURT-CONNECTED ADR AND INDUSTRIAL CONFLICT RESOLUTION: LESSONS FROM OTHER JURISDICTIONS

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Abstract

In any modern society, the court is vested with judicial powers. The traditional modu operandi is litigation which is essentially adversarial and confrontational. It is als bedevilled with inordinate delays, technicalities, procedural and evidential rules an high cost of litigation. In the quest for speedy and amicable resolution of conflict th Alternative Dispute Resolution (ADR) mechanism was introduced into the Nigeria legal system. The usefulness of ADR in the settlement of workplace related conflic need not be over emphasised, as the whole world is inter connected and now a glob village. Speedy resolution of conflict in industrial and commercial matters in any poli is a comparative advantage for such polity in international trade. This treatise shall loo at the concept of court connected ADR in resolving conflict with special emphasis in th workplace, its usefulness or otherwise, practises in other jurisdictions and mal appropriate recommendations.

Keywords Alternative Dispute Resolution, Conflict, Arbitration, Adjudicatio Mediation, National Industrial Court.

1. Introduction

The following are identified as causes of disagreements in commercial transactio based on the literature survey[1]: Misunderstandings usually occur because of po communication, values differences between people, professionals and skills; Peo often have unrealistic expectations. The client wants speedy completion and a qua product at a low price. The contractor may want more time, a more reasona quality and maximum price; Emotions play a role, the ability to handle stress cau dispute. A person's self-esteem (or lack of it) can also cause disputes. Factors un this heading include languages, dynamics, geography, childhood experien upbringing and religion; Education levels and both structured and unstructu learning can have an influence on conflict; there are many differences betw projects. From one project to the next there are different building teams, diffe

[1] Botha, H. 2000 *Conflict in the Construction Industry*. Bellstone Training (International) Limited, Lond

financiers and different designers; Changes to plans, deadlines, payment dates, and so on, can cause disputes.

Dispute could arise due to the delay caused by the weather, a Sub contractor, the bank or a third party; parties often inadequately define quality. High quality may mean different things to a plasterer and to the project director or project manager. One must use objective standards to define materials and workmanship. One must precisely describe what one requires. A client may specify a much higher standard than what he really wants while wanting a lower price and so on. A jurist[2] of no mean status posited that workplace conflict in Nigeria may be due to any or a combination of the followings: the absence of National Labour Policy; lack of respect for the terms of collective agreements reached between employers and employees; frequent recourse to industrial action such as strike by labour union ; inadequate labour law ;lack of skilled manpower by the regulatory agencies and institution; lack of discipline and honesty on the part of the leadership of the labour union and administrators alike(allegation of non remittance of check off dues, sit tight leadership, lack of accountability, dictatorial tendencies); poor labour inspection culture. When such dispute arises it is ideal that it is resolved promptly, at reasonable cost with a view to continue the existing relationship. It behoves on the judiciary to resolve disputes and conflict in the society.

One of the pillars that hold the fort of the state is the judiciary. Speedy, efficient and fair dispensation of justice is a sine quanon for a stable, just and developed (or developing) society. Actually, it was regarded as the last hope of the common man in Nigeria. This made Gladstone, commenting on the British experience to state that 'National injustice is the surest road to national downfall'[3]. The judiciary should serve as the institution that rescues the citizens from the recklessness and arbitrariness of the executives and the lawlessness of the legislature.

The reputation of the judiciary has however been tainted with corruption[4], unduly long delay in rendering verdict[5], high handedness of judges, interference from the

2 Hon Justice Babatunde A Adejumo Building Effective Conflict Management Mechanism for Sustainable development in Nigeria being a Paper presented at the 7th edition of the National Labour Relations Summit organised by the Micheal Imoudu National Institute For Labour Studies, Ilorin on Nov 17th 2011.

3 Cited in M.O. Adeleke Lagos State Multi Door Courthouse: An Appraisal p 317. Essay in honour of B.R. Fashola

4 Justice Kayode Eso Commission on Judicial Reforms found 28 Judges of Superior Courts culpable of offences ranging from low productivity to corruption The report was submitted in 1994; it was considered later by National Judicial Council, it was not acted on by the Abacha Government that inaugurated the committees. Some of the indicted Judges continued in office, others retired while the rest died.. Also four judges serving on the panel of Akwa Ibom election petition tribunal were investigated, found guilty of corruption and eventually dismissed- Reported in "Nigeria Muse" of 28/12/06 in http://www.nigerianmuse.com/essay assessed on 24/03/12 . In a related case two justices of the Court of Appeal took ₦15 million and ₦12 Million and gave judgement in favour of their patron whilst the third judge refused the bribe and gave the dissenting judgement. The case was investigated and the guilt of the two judges was established. The National Judicial Council recommended their dismissal for corruption and abuse of office. The President acting under Section 292 CFRN 1999 dismissed the two Justices on 3rd May, 2005 Reported in http://www.nli.org/notes.

executive[6] and similar vices. This has contributed in no small measure to make the cost of litigation prohibitive, time consuming and emotionally traumatising. Thus making the citizens to either forgo their rights or resort to self help. In the quest to decongest the court, re invent the judicial system and ease commercial transactions, among other things, the Nigerian state has introduced and the court connected ADR. The idea of ADR is not foreign to the Nigerian traditional system[7] but the ability of the Nigerian traditional institution to carry out this function is hampered by the growing cosmopolitanism of the hitherto indigenous and homogenous society, corruption and the dwindling respect for the traditional institutions.

The Concept of ADR

Pretorius[8] refers to three major categories of dispute resolution, which are:

- Dispute resolution processes involving private decision-making by the parties themselves.

This category would include negotiation and mediation.

- Dispute resolution processes involving private adjudication by third parties.

Arbitration would fall into this category.

- Dispute resolution processes involving adjudication by public authority. This category would include administrative decision-making and formal litigation before the courts

Alternative Dispute Resolution (ADR) includes practices, techniques and approaches for resolving and managing conflicts short of, or alternative to, full-scale court process.[9]

The variety of ADR models found in developed and developing countries may be described in two fundamental ways: *basic* ADR processes, which include negotiation, conciliation, mediation, and arbitration; and *hybrid* ADR processes, in which specific elements of the basic processes have been combined to create a wide variety of ADR methods (for instance, mediation is combined with arbitration in

5 Wakino v Ade John (1999) 9 NWLR (pt.619) p. 403 -the case took 11 years in the high court due to series of adjournment., Lasisi Atanda V Ajani (1989) 3 NWLR 511, the case took 10 years to reach the Supreme Court which ordered a trial de novo: Ugo V Chukwu Obikwe (1989) 1 NWLR 566, After 18 years the supreme court ordered a trial de novo .R. Ariori & ors V Elemo & Ors (1983) 1 SC NLR 1. -the case took twenty two years (22) years to reach the apex court Supreme Court, which ordered a trial de novo by the High Court.

6 See for instance the saga of Justice Salami reported in http://saharareporters.com/article/justice-salami-saga-%E2%80%93-story-rooster-and-fox-ayo-turton downloaded 10-06-2012.

7 Agu v Ikewibe (1991 3 NWLR (pt 180)385; Ohiaeri v Akabeze (1993) 2 NWLR (pt 221) 1; Okere v Nwoke (1991) 8 NWLR; Awosile v Sotunbo 1992 5 NWLR (pt 243) 514; Ojibah v Ojibah 1991 5NWLR (pt 191) 296;

8 Pretorius, P. (1993) *Dispute Resolution*. Juta & Co. Ltd., Cape Town, South Africa p 133.. see also C. Bvumbwe and D.W. Thwala *(2011)* An Exploratory Study of Dispute Resolution Methods in the South African Construction Industry *International Conference on Information and Finance IPEDR vol.21 (2011) © (2011) IACSIT Press, Singapore*

9 Alternative Dispute Resolution Practitioner's Guide March 1998. Technical Publication Series Center for Democracy and GovernanceBureau for Global Programs, Field Support, and Research U.S. Agency for International Development Washington, D.C. 20523-3100. See also footnotes 11- 26.

med-arb.). Hybrid ADR processes may also incorporate features found in court-based adjudication; for example, the mini trial mixes an adjudication-like presentation of arguments and proofs with negotiation.

Background ADR terms and concepts:[10]

Court-connected ADR: ADR processes that are linked formally to the governmental justice system; such ADR activities are authorized, offered, used, referred by, or based in the court system. Court-based programs and court referrals to private ADR services are covered by this term. Agreements arising out of court-connected ADR may be enforceable as court orders. ***Court-annexed ADR:*** ADR programs or practices authorized and used by the court system.

Facilitation: Refers to a process by which a third-party neutral helps the parties reach consensus on disputed issues. "A mediator is a facilitator; an arbitrator is not."

Impartiality/Neutrality: When discussing the third party intervener, ***impartiality*** refers to the third party's disinterestedness in the dispute— s/he has no personal stake or interest (financial or otherwise) in the situation. On the other hand, a ***neutral*** third party has no inclination one way or another regarding the dispute or the disputants. It may be said that finding an impartial third party is easier than finding a neutral one.

Mandatory / Voluntary: These terms refer to how disputes enter ADR processes. If the parties are compelled to use ADR (by the court or statute, for example), then the use is ***mandatory***. If the use is based wholly on the consent of all the parties, then it is ***voluntary***.

Nonbinding / Binding: Where the disputants are required to accept and respect the outcome of the ADR process, such as third party opinions, that process is ***binding***. ADR outcomes that are advisory only are a feature of ***nonbinding*** processes. As a rule, disputants are not bound by an outcome or resolution in ADR, unless they agree to be bound. (There are exceptional situations of mandatory binding arbitration.)

2. Definitions of ADR Models

Basic ADR Models

Negotiation: The most common form of dispute resolution, negotiation is the process by which the parties voluntarily seek a mutually acceptable agreement to resolve their common dispute. Compared with processes involving third parties, generally negotiation allows the disputants themselves to control the process and the

[10] " Center for Public Resources/CPR Legal Program. 1993. *Judge's Desk book on Court ADR.*. New York: Federal Judicial Center.p 31

solution. Examples: Nicaragua— negotiation training[11] ; South Africa — negotiation of community disputes; Indonesia— environmental conflict[12].

Conciliation: A process in which a third party meets with the disputants separately in an effort to establish mutual understanding of the underlying causes of the dispute and thereby promote settlement in a friendly, un antagonistic manner. Often the first step, and at times sufficient, to resolve disputes. Examples: South Africa Case Study— Commission for Conciliation, Mediation, and Arbitration; Bolivia Case Study; Colombia— Bogota Chamber of Commerce centres[13]; U.S.A.—historically used in some labour disputes as a step prior to arbitration; India— People's Courts "Lok Adalat"[14]; Japan— auto accident victims and insurance companies[15]

Mediation: A voluntary and informal process in which the disputing parties select a neutral third party (one or more individuals) to assist them in reaching a mutually-acceptable settlement. Unlike a judge or arbitrator, the mediator has no power to impose a solution on the disputants; instead, the mediator assists them in shaping solutions to meet their interests. The mediator's role and the mediation process may vary significantly, depending on the type of dispute and mediator's approach. Mediators can employ a wide-range of techniques, for example, assist parties to communicate effectively and to develop a cooperative, problem-solving attitude; identify parties' underlying interests; identify and narrow issues; transmit messages between parties; explore possible options for agreement and the consequences of non-settlement. Examples: South Africa—Independent Mediation Service of South Africa (IMSSA), victim-offender mediation; Sri Lanka—Mediation Boards; Indonesia— environmental disputes[16] ; Malaysia— inter-ethnic disputes[17] , India— civil and criminal cases[18] ; USA— community mediation[19], mandatory civil case

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11 Lytton, Timothy and Centeno Rivas, Salvador. 1998. "La Resolución de los Conflictos en Nicaragua." In DPK Publication (William Davis, ed.)

12 Moore, Christopher and Santosa, Mas Achmad. 1995. "Developing Appropriate Environmental Conflict Management Procedures in Indonesia: Integrating Traditional and New Approaches," *Cultural Survival Quarterly*, Fall 1995, pp. 23-29.

13 DPK Consulting (1994)

14 Whitson, Sarah Leah. Spring 1992. "'Neither Fish, Nor Flesh, Nor Good Red Herring' Lok Adalats: An Experiment in Informal Dispute Resolution in India," *Hastings International and Comparative Law Review*, vol. 15, no. 3, pp. 391-445

15 Moriya, Akira. 1997. Out of Court ADR in Japan (unpublished).

16 Moore op cit

17 Othman, Wan Halim. 1996. "Community Mediation in Malaysia: A Pilot Program for the Department of National Unity" in eds. Fred E. Jandt and Paul B. Pedersen, *Constructive Conflict Management: Asia-Pacific Cases*, pp. 29-42. Thousand Oaks, London and New Delhi: Sage Publications.

18 Kassebaum, Gene. 1989. *ADR in India: The Lok Adalat as an Alternative to Court Litigation of Personal Injury and Criminal Cases in South India*. Working Paper Series 1989-5. Honolulu: University of Hawaii at Manoa, Program on Conflict Resolution (PCR).

19 McGillis, Daniel. July 1997. *Community Mediation Programs: Developments and Challenges*. Washington, DC: US Department of Justice. National Institute of Justice.

mediation in North Carolina[20]; Bangladesh Case —community mediation based on indigenous practice.

Arbitration: An adjudicatory dispute resolution process in which one or more arbitrators judge issues on the merits (which may be binding or non-binding) after an expedited, adversarial hearing, in which each party has the opportunity to present proofs and arguments. Arbitration is procedurally less formal than court adjudication; procedural rules and substantive law may be set by the parties.

In **court-annexed arbitration**, one or more arbitrators, usually lawyers, issue a non-binding judgment on the merits after an expedited, adversarial hearing. The arbitrator's decision addresses only the disputed legal issues and applies legal standards. Either party may reject the non-binding ruling and proceed to trial; sometimes, cost sanctions may be imposed in the event the appellant does not improve his/her position in court. This process may be mandatory or voluntary. Examples: USA— used in federal and state courts, mainly in small and moderate-sized tort and contract cases, where the costs of litigation are often much greater than the amounts at stake; Japan— appellate ADR[21] (***Private (v. court-annexed) arbitration*** may be "administered"— managed— by private organizations, or "non-administered" and managed by the parties. The decisions of arbitrators in private arbitration may be *non-binding* or *binding*. ***Binding arbitration*** decisions typically are enforceable by courts and not subject to appellate review, except in the cases of fraud or other defect in the process. Often binding arbitration arises from contract clauses providing for final and binding arbitration as the method for resolving disputes. Examples: South Africa Case — IMSSA; Thailand— commercial arbitration[22] .

2.1 Examples of Hybrid ADR Models

A wide variety of hybrid models have emerged in developed and developing countries. Below are some examples of hybrids found connected to courts in commercial and government settings

Appellate ADR: Appellate court programs use mediation in mandatory, pre-argument conferences in cases that appear most likely to settle; mediators are typically staff attorneys or outside lawyers. Example: USA— common in federal and state appeals courts.

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20 Clarke, Stevens H.; Ellen, Elizabeth D.; McCormick, Kelly. 1995. *Court-Ordered Civil Case Mediation in North Carolina: An Evaluation of Its Effects, Prepared for The North Carolina Administrative Office of the Courts*. Chapel Hill, NC: State Justice Institute, Institute of Government, University of North Carolina at Chapel Hill.

21 Iwai, Nobuaki. 1991. " Alternative Dispute Resolution in Court: The Japanese Experience," *Journal on Dispute Resolution*, vol. 6, no. 2.

22 Worawattanamateekul, Nacha. 1996. "Arbitration in Thailand" in eds. Fred E. Jandt and Paul B.Pedersen, *Constructive Conflict Management: Asia-Pacific Cases*, pp. 183-187. Thousand Oaks, London and New Delhi: Sage Publications.

Early Neutral Evaluation (ENE): A court-based ADR process applied to civil cases, ENE brings parties and their lawyers together early in the pre trial phase to present summaries of their cases and receive a nonbinding assessment by an experienced, neutral attorney with expertise in the substance of the dispute, or by a magistrate judge. The evaluator may also provide case planning guidance and settlement assistance; in some courts, it is used purely as a settlement device and resembles *evaluative mediation.* Example: USA— developed during the mid-1980s in the San Francisco federal court, ENE is now used in the U.S. in state and federal courts.

Fact-Finding: A process by which a third party renders binding or advisory opinions regarding facts relevant to a dispute. The third party neutral may be an expert on technical or legal questions, may be representatives designated by the parties to work together, or may be appointed by the court.

Judge-Hosted Settlement Conference: In this court-based ADR process, the settlement judge (or magistrate) presides over a meeting of the parties in an effort to help them reach a settlement. Judges have played a variety of roles in such conferences, articulating opinions about the merits of the case, facilitating the trading of settlement offers, and sometimes acting as a mediator. Examples: USA— This is the most common form of ADR used in US federal and state courts; Japan—judge as neutral may implement three ADR procedures[23]

Med-Arb., or Mediation-Arbitration: An example of multi-step ADR, parties agree to mediate their dispute with the understanding that any issues not settled by mediation will be resolved by arbitration, using the same individual to act as both mediator and arbitrator. Having the same individual act in both roles, however, may have a chilling effect on the parties participating fully in mediation. They might believe that the arbitrator will not be able to set aside unfavourable information learned during the previous mediation. Additional related methods have evolved to address this problem:

In **Co-Med-Arb,** different individuals serve as neutrals in the arbitration and mediation sessions, although they both may participate in the parties' initial exchange of information. In ***Arb-Med***, the neutral first acts as arbitrator, writing up an award and placing it in a sealed envelope. The neutral then proceeds to a mediation stage, and if the case is settled in mediation, the envelope is never opened.

Mini trial*:* A voluntary process in which cases are heard by a panel of high-level principals from the disputing sides with full settlement authority; a neutral may or may not oversee this stage. First, parties have a summary hearing, each side

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[23] Jardine Elizabeth (1996). "Alternative Dispute Resolution in the Japanese Court System" in *Australian Dispute Resolution Journal.*

presenting the essence of their case. Each party thereby can learn the strengths and weaknesses of its own case, as well as that of the other parties. Second, the panel of party representatives attempts to resolve the dispute by negotiation. The neutral presider may offer her opinion about the likely outcome in court.

Court-based mini trial: a similar procedure generally reserved for large disputes, in which a judge, magistrate or non judicial neutral presides over a one- or two- day hearing like that described above. If negotiations fail, the parties proceed to trial. Examples: Used in some US federal districts[24].

Negotiated Rule-Making, Regulatory Negotiation or "Reg-Neg": Used by governmental agencies as an alternative to the more traditional approach of issuing regulations after a lengthy notice and comment period. Instead, "agency officials and affected private parties meet under the guidance of a neutral facilitator to engage in joint negotiation and drafting of the rule. The public is then asked to comment on the resulting, proposed rule. By encouraging participation by interested stakeholders, the process makes use of private parties' perspectives and expertise, and can help avoid subsequent litigation over the resulting rule."[25]

Ombudsperson: An informal dispute resolution tool used by organizations. A third party "Ombudsperson" is appointed by the organization to investigate complaints within the institution and prevent disputes or facilitate their resolution. The Ombudsperson may use various ADR mechanisms (e.g., fact-finding, mediation) in the process of resolving disputes. Examples: Japan— Civil Liberties Bureau[26]. In Lagos,' Gboromiro' and 'Mo gbe jo mi de' are quite popular variant used in conflict resolution.

Private Judging: A private or court-connected process in which parties empower a private individual to hear and issue a binding, principled decision in their case. The process may be agreed upon by contract between the parties, or authorized by statute (in which case it is sometimes called "***Rent-a-Judge***").

Settlement Week: Typically, a court suspends normal trial activity for the week and with the help of volunteer lawyers, mediates long-pending civil cases. Mediation sessions may last an hour or two. Unresolved cases go back on the court's docket. Examples: USA— used more widely in state than federal courts.

Summary Jury Trial: A flexible, voluntary or involuntary non-binding process used mainly to promote settlement in order to avoid protracted jury trials. After a short

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24 CPR Institute for Dispute Resolution, "The ABCs of ADR: A Dispute Resolution Glossary," Center for Public Resources/CPR Legal Program. 1993. *Judge's Desk book on Court ADR.*. New p 25 New York: Federal Judicial Center. *Alternatives*, vol. 13, no. 11, pp. 147-151.

25 CPR (1993), p. 149. Op cit.

26 Rosch, Joel. 1987. " Institutionalizing Mediation: The Evolution of the Civil Liberties Bureau in Japan," *Law and Society Review*, vol. 21, no. 2, pp. 243-266.).

hearing in which the evidence is provided by counsel in abbreviated form (but usually following fixed procedural rules), the mock jury gives a nonbinding verdict, which may then be used as a basis for subsequent settlement negotiations.

Summary Bench Trial: Like summary jury trial, except that presiding neutral provides an advisory opinion.

Two-Track Approach: Used in conjunction with litigation, representatives of disputing parties who are not involved in the litigation conduct settlement negotiations or engage in other ADR processes. The ADR track may proceed concurrently with litigation or during an agreed-upon hiatus in litigation. Examples: USA and Japan— useful when litigation has become acrimonious or when suggestion of settlement would be perceived as a sign of weakness[27].

2.1 Advantages of ADR

The followings are the advantages that ADR has over litigation:

Reducing the cost to parties: Many poor cannot access the formal legal system because they cannot afford to pay the registration and representation fees necessary to prosecute cases in the courts. Since cost is probably the largest barrier to formal dispute resolutions for many people in developing countries.

Reducing the formality of the legal process: Several studies indicate that the formality of court systems intimidates and discourages use[28]. In India and Bangladesh, for example, the court requirement of legal representation is both costly and intimidating for people who may not be comfortable interacting with lawyers from a different caste or class. In these and other countries, users of ADR programs have expressed a preference for submitting cases to mediators who are local residents and understand the local community. In Sri Lanka, users expressed their satisfaction at having their "stories" heard in an informal process. All of these factors contribute to greater usage of and preference for informal processes.

Overcoming the barrier of illiteracy In some countries, access is effectively denied because the formal system requires a level of literacy that many in the country do not possess. In these countries, the formal legal processes are especially intimidating for large numbers of illiterate citizens. In Bangladesh, the Madaripur Legal Aid Association was originally established to provide assistance and representation for the poor and illiterate. Their services are now dominated by their mediation program, in part because they found mediation to be more effective and accessible for this part of the population. ADR programs can be designed to rely on oral representations.

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27 Jardine op cit

28 ADR Practitioners Guide footnote no 13.

Oral agreements may be enforced by traditional means of community peer pressure, eliminating the need for written documentation or formal enforcement mechanisms.

Serving rural populations and geographically dispersed locations: Access may be impaired because the courts are located far from the homes of those who need them. One advantage of ADR programs is the ability to set them up with relatively little cost to local communities. The lok adalat ("people's court") system in India succeeded in reaching a large part of the population because they were located in villages[29]. Similarly, the Mediation Boards in Sri Lanka are distributed throughout rural villages, as well as larger cities and towns. In China, more than one million People's Mediation Centres are located in villages and serve parts of the population that could not easily reach existing courts[30]

Counteracting discrimination and bias in the system When courts are systematically biased against particular groups, such as minorities or women, ADR programs can sometimes help provide some measure of justice. In Bangladesh, for example, women are often poorly protected by the courts. The MLAA mediation program has recruited women to serve on mediation panels in the village mediation program. Women who have used the system believe that they receive better protection and more compensation from this system than from the formal court system. In many circumstances, however, ADR will not improve access for discriminated against populations and may, some argue, even worsen their situation. Informal dispute resolution services may offer "second-class" justice to users, particularly minorities and women who may be subject to bias in ADR programs as well as in the formal judicial system. Informal dispute resolution systems are ineffective at changing policy and systemic injustices since they deal with individual cases and do not establish legal precedent[31]. Where, as in Bangladesh, the ADR program design is able to address the issue of bias through recruitment of minority mediators and thorough training, justice can be improved for these disadvantaged group.

The United Nations Office of drugs and crime[32] listed the advantages[33] thus:

- Strengthens judicial modernization efforts
- Delay reduction by unclogging courts
- Increases access to justice for the poorest disputants
- Reduces costs of justice for all users
- Preserves, improves or restores relationships among disputants

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29 see Whitson(1992) op cit.

30 see Jandt and Pederson,(1996) op cit.

31 See Whitson, 1992. Op cit

32 The United Nations Office of drugs and crime training manual on Alternative dispute Resolution and restorative justice for Nigerian Judges (Oct 2007)

33 188,002 labour cases were settled at the CCMA in the nine provinces between 2006-2010. Source: CCMA Statistics Information Handbook 2010

- Supports economic development by reducing transaction costs of disputes and increasing certainty of investments
- Increases satisfaction of the users
- the confidentiality of the proceedings is also an attraction
- Reducing public expenditures for courthouse facility expansion[34]

3. The Origin of the "Multi-Door Concept"[35]

At the 1976 Pound Conference about public dissatisfaction with the justice system, Professor Frank E.A. Sander of the Harvard Law School offered an innovative approach that could ease the growing demands on courts throughout the country. Calling the concept the multi-door courthouse, Professor Sander envisioned one large courthouse with multiple dispute resolution doors or programs. Cases could be diagnosed and referred through the appropriate door for resolution. The programs could be located inside or outside of the courthouse, and could include, but would not be limited to, litigation, conciliation, mediation, arbitration, and social and governmental services. Since then, countries most especially those embracing the common law, had started to look for a way out of the status quo. These countries, notably the United Kingdom, Canada and the United States of America evolved the concept of a "Multi-Door Courthouse", (as enunciated by Prof. Sander) whereby different aspects of resolution of disputes other than the traditional method of adversarial contest could be under the umbrella of a single courthouse. According to the final report of the Massachusetts Futures Commission; which was set up to address the difficulty plaguing the American Justice System: "adjudication alone would not be adequate to accommodate the next century's wide variety of disputes and disputants". The Commission advocated a system in which consumers of the public justice system would have convenient access to a wide variety of methods for resolving their disputes. Some of those remain adjudicatory in nature, such as trials and arbitration. Others rely on agreement between the parties, like mediation, case evaluation, and various forms of facilitated but nonbinding settlement processes. The report further noted that the courts would take an active role by assisting the parties in choosing the most appropriate method. The system would be characterized not only by wide range of dispute resolution methods but a respect for consumer's choice. The Lagos Multi-Door Courthouse embodies these principles.

4. Instruments encouraging ADR under the Nigerian jurisprudence

Apart from the traditional system that encourages the practise of ADR; various Nigeria rules also encourage the practice. Some of these rules are as follows:

Constitution of the Federal Republic of Nigeria, 1999
Section 19(d): Foreign policy objectives:

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34 A.A OKHAREDIA(2011) op cit. p 23
35 See generally Kehinde Aina on www.ainablankson.com

The foreign policy objectives shall be –

- (d) respect for international law and treaty objectives as well as the seeking of settlement of international disputes by negotiation, mediation, conciliation, arbitration and adjudication

Arbitration and Conciliation Act, Cap. A18, Laws of the Federation of Nigeria LFN 2004

- Part I – Arbitration – Sections 1 to 36
- Part II – Conciliation – Sections 37 to 42
- Part III – International Commercial Arbitration and Conciliation --Sections 43 to 55
- Part IV – Miscellaneous – 56 to 58
- First Schedule – Arbitration Rules
- Second Schedule – Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958
- Third Schedule – Conciliation Rules

Federal High Court Act, Cap. F12, LFN 2004

Section 17: Reconciliation in civil and criminal cases

- In any proceedings in the Court, the Court may promote reconciliation among the parties thereto and encourage and facilitate the amicable settlement thereof.

Matrimonial Causes Act, Cap. M7, LFN 2004

- Section 11: Reconciliation
- Section 30: Petition within two years of marriage

Consumer Protection Council Act, Cap C25, LFN 2004

Sections 2 and 5

Environmental Impact Assessment Act, . E12, LFN 2004

Section 26 and 33

Trade Disputes Act, Cap. T8, LFN 2004

Sections 4,6,8 and 9

National Health Insurance Scheme Act, Cap. N42, LFN 2004

Section 26

Nigerian Co-Operative Societies Act, Cap. N98, LFN 2004

Section 49

Petroleum Act, Cap. P10, LFN 2004

Section 11

Public Enterprises (Privatisation and Commercialisation) Act, Cap. P38, LFN 2004 Sections 27, 28 & 30

National War College Act, Cap N82, LFN 2004
Section 5

National Boundary Commission, Etc. Act, Cap. N10, LFN 2004
Sections 3 and 6

Energy Commission Of Nigeria Act, Cap. E10, LFN 2004
Section 5

Minerals And Mining Act, Cap. M12, LFN 2004
Sections 76 and 255

National Office For Technology Acquisition And Promotion Act, Cap. N62, LFN 2004
Section 4

Nigerian Communications Commission Act, Cap. N97, LFN 2004
Section 4

Nigerian Dock Labour Act, Cap. N103, LFN 2004
Section 2

Nigeria Export Processing Zones Act, Cap. N107, LFN 2004
Section 4

Advisory Council On Religious Affairs Act, Cap. A8, LFN 2004
Section 3

Nigerian Investment Promotion Commission Act, Cap. N117, LFN 2004
Section 26

International Centre for Settlement of Investment Disputes (Enforcement of Awards) Act, Cap. I20, LFN 2004
Section 1

Regional Centre For International Commercial Arbitration Act, Cap. R5, LFN 2004
Section 4

Rules of Professional Conduct (Rpc) for Legal Practitioners, 2007
Rule 15 and 47

Administration Of Justice Commission Act, Cap. A3, LFN 2004
Section 3

Lagos, FCT High Court Rules High Court of Lagos State (Civil Procedure) Rules 2004 Order 25

High Court of the Federal Capital Territory, Abuja Civil Procedure Rules 2004 Order 17

Also in **Owoseni vs. Faloye** [36] and **Aribisala vs. Ogunyemi** [37] the Supreme Court held that Where a statute prescribes a legal line of action for the determination of an action, be it an administrative matter, chieftaincy matter, or a matter for taxation, the aggrieved party must exhaust all the remedies in that law before going to court.

4.1 Multi Door Courthouses in Nigeria

The Lagos State Judiciary establishes The Lagos Multi-Door Courthouse (LMDC) as the first court-connected ADR centre in Africa.[38] Subsequently, the concept was replicated in the judiciary of Abuja and presently, at least thirteen judiciaries in Nigeria that have shown interest in its replication[39]. The overriding objective of the MDC is as contained in the Lagos Multi-Door Courthouse Practice Direction namely to:"enlarge resources for justice by providing enhanced, timely cost-effective and user-friendly Access to Justice for would be and existing plaintiffs and defendants". Hence, instead of litigation being the "mono-door" for the resolution of disputes, the MDC has three supplementary doors by which disputes can be resolved, namely; early neutral evaluation, mediation and arbitration.

4.2 The Concept of MDC: How It Operates

The key feature of the MDC proceedings is the initial procedure, which is in two stages:

Intake Screening and Referral and Intake Screening upon the receipt of the disputing parties' Statement of Issues, the ADR Registrar shall exchange the Statements between the parties and invite them 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). Experienced multi-door courthouse staffs conduct 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 the latter, 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

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36 [2005] 14 NWLR (Pt 946) 719, 740

37 [2005] 6 NWLR (Pt 921) 212

38 See generally Kehinde Aina op cit

39 There is also Institute of Dispute Resolution in Delta State.

information exchange with the goal of problem-solving and dispute 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.

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

The South African Government and the use of ADR

The South Africa experience of the ADR systems shows that it can be used as a substitute for a poorly functioning formal dispute resolution system which can also be adopted as part of a widespread reform process[40]. Prior to and during the transition in government, many NGOs, financed by numerous donors, undertook ADR efforts for a variety of purposes throughout South Africa. One of the earliest and most effective NGOs was the Independent Mediation Service of South Africa (IMSSA), which started in the early 1980"s to focus on resolving labour-management disputes. After the establishment of IMSSA, the African Centre for the Constructive Resolution of Disputes (ACCORD), the Vuleka Trust, the Community Law Centre, the Wilgespruit Fellowship Centre, the Community Dispute Resolution Trust (CDRT), the institute for Multi-party Democracy (MPD), and the Community Peace foundation (CPF), among others, implemented a variety of training, mediation, and community reconciliation programmes to help manage and control community tension, resolve neighbourhood disputes, train community leaders in negotiation and conflict management techniques and establish neighbourhood justice centres. After the transition of power from the apartheid government to democratic government, the new South African Government saw the above ADR programmes as models for new governmental dispute management. The Commission for Conciliation, Meditation, and Arbitration (CCMA) was established to resolve labour dispute in a workplace environment. The CCMA was patterned after the success of IMSSA and its

40 A.A Okharedia the Emergence of Alternative Dispute Resolution in South Africa: a lesson for other African Countries a paper presented at the 6th IIRAAFRICAN Regional Congress of Industrial Relations, Lagos Nigeria, Jan. 24-28. 2011

operational activities were influenced by a similar ADR system in Australia where it has been a huge success in resolving labour dispute. In South

Africa, the CCMA has been very useful in resolving labour disputes and much attention will be given to the role of the CCMA in dispute resolution in the remaining part of this paper. This is due to the fact that our focus is on the industrial dispute resolution. Apart from CCMA there are other specialized ADR programmes which includes: (a) the local community courts established by Department of Justice (b) the family mediation boards which is to help in resolving local family disputes, (c) the National Land Reform Mediation Panel to help resolve disputed land claim; and several other national and state agencies which are considering their own dispute resolution mechanisms that totally exclude the normal litigation process.

The Structure, Functions and the Process of the CCMA in Dispute Resolution

The Commission for Conciliation Mediation and Arbitration (CCMA) was established in 1995 mainly to replace the previous system of statutory conciliatory bodies that proved ineffectual, costly and complicated[41]. The CCMA seeks to remedy these shortcomings by providing for conciliation and arbitration in a number of issues, thus freeing the all-important resources of the Labour Court to deal with and resolve the more serious and involved issues such as strikes action, unfair dismissal, retrenchments and discriminatory practices in workplace environment. Some individuals are of the opinion that the pressures previously placed in the formal judicial system have now simply been shifted onto the CCMA, which already has a backlog of outstanding issues. Coupled with staffing and time constraints, the pressure and backlog result in important issues such as unfair dismissals and misconduct issues sometimes taking months to be resolved. Moreover, because employees in most cases need only assert unfair dismissal, and employers are required by the South African Labour Relations Act 55 of 1995 as amended (2002) to provide the proof needed to establish whether the dismissal was fair, the CCMA is laid open to the possibility of rash and frivolous charges of unfair dismissal being brought before it, according to Robert Venter[42]. Venter argues that this in turn, slows the process, and perhaps even leads to a dilution of the seriousness of other allegations that warrant greater attention. The CCMA is an independent juristic person with jurisdiction in all the provinces of South Africa. The Commission maintains an office in each province and as many local offices as it considers necessary. The CCMA is governed by a governing body nominated by National Economic Development and Labour Council (NEDLAC) and appointed by the Minister of Labour.

41 ibid

42 Venter, Robert, (2003), Labour relations in South Africa. Cape Town: Oxford Southern Africa. p:522.

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41 ibid

42 Venter, Robert, (2003), Labour relations in South Africa. Cape Town: Oxford Southern Africa. p:522.

The governing body consists of the Director of the CCMA, appointed by the Commission and 10 members appointed by the Minister of Labour. The Director manages and directs the activities of the CCMA and supervises the Commission staff. The ten members nominated by NEDLAC consist of an independent chairperson and nine other members. Organised labour, organised business and the State propose three members each. The governing body appoint adequately qualified persons as commissioners on either a full-time or a part-time basis for a fixed term. When making these appointments the governing body must have due regard to the need to constitute a Commission that is independent, competent, representative in respect of race and gender. The governing body determines the remuneration and other terms and conditions of appointment of the commissioners and prepares a code of conduct for the commissioners.

The CCMA, it plays a central role in the statutory dispute-resolution process. All disputes not handled by private procedures or accredited bargaining councils or agencies must be referred to it for conciliation or mediation before they can be referred to arbitration or adjudication. It is funded by the state but an independent body. . The CCMA may also accredit private agencies to perform any or all of its functions. Its main functionaries are commissioners and senior commissioners. The functions of the CCMA are set out in section 115 of the Labour Relations Act 66 of 1995 as amended 2002 (LRA):

1. The CCMA must:–

a) Attempt to resolve, through conciliation, any dispute referred to it in terms of the above Act;

b) If a dispute that has been referred to it remains unresolved after conciliation, arbitrate the dispute if –

i. This Act requires arbitration and any party to the dispute has requested that the dispute be resolved through arbitration; or

ii. All the parties to the dispute in respect of which the Labour Court has jurisdiction consent to arbitration under the auspices of the CCMA;

c) Assist in the establishment of workplace forums in the manner contemplated in chapter V of the LRA.

d) Compile and publish information and statistics about its activities.

2. The CCMA may –

a) If asked, advise a party to a dispute about the procedure to follow in terms of this Act;

b) If asked, assist a party to a dispute to obtain legal advice, assistance or representation;

c) Offer to resolve a dispute that has not been referred to the CCMA through conciliation;

d) Conduct, oversee or scrutinise any election or ballot of a registered trade union or registered employers" organisation if asked to do so by that trade union or employers' organisation;
e) Publish guidelines in relation to any matter dealt with in this Act; and
f) Conduct and publish research into matters relevant to its functions.

In respect of a dispute which is of a mutual interest between a trade union and employees, on one hand, and an employer on the other hand, one of the parties has the right to refer it to CCMA. As soon as the dispute is referred to CCMA, a commissioner must be appointed to attempt to resolve the dispute within 30 days through „conciliation", which may include mediation, fact-finding, and advice. At this stage, commissioners have no prescriptive powers, other than to subpoena persons for questioning, to inspect documents and enter premises. Prior to commencing with conciliation, however, the Commission is required to establish that it has Jurisdiction by determining, inter alia, whether the dispute had been referred within the prescribed time limit, and whether the dispute arose after the commencement of the LRA. While provision is made for the offence of contempt of the CCMA, Commissioners cannot themselves convict and punish persons for it, but must proceed by way of application to the Labour Court. If a dispute cannot be settled by conciliation, the CCMA must appoint a commissioner to arbitrate. The arbitrator maybe the same as the one who conducted the conciliation process, unless one of the parties objects. The parties may choose their arbitrator from a list, and request a senior commissioner in complex cases. The application for arbitration must be made within 90 days of the date of which the certificate was issued. Non-compliance with this time limit can, however, be condoned on good cause shown by the party requesting extension of time. Arbitration proceedings are meant to be relatively informal and employee parties are entitled to be represented, if they so wish, by legal practitioners or union officials, while employers can appear in person or be represented by a lawyer or employers" association official.

However, consent of all parties and the leave of the Commissioner are required for a party to be represented by a legal practitioner in the case of disputes arising from dismissals for misconduct or incapacity. In a situation where one party does not wish to permit the other to be represented by a legal practitioner, commissioners still have the power to permit such representation, provided they take into account the following issues: the nature of the questions of law raised by the dispute; its complexity; the public interest; and the comparative ability of the opposing parties to deal with the arbitration. Labour Court has held that the central question to be considered by commissioners is whether it would be unreasonable to permit a party to continue without legal representation.

During the arbitration process, the commissioner arbitration is expected to conduct arbitration in a manner which the arbitrator considers „appropriate" in order to determine the dispute fairly and quickly and to deal with the substantial merits of the dispute with the minimum of legal formalities[43]. Unless the parties agree otherwise, arbitration amounts to a complete rehearing of the matter[44]

The parties are, subject to the discretion of the Commissioner, entitled to give evidence, call witnessed, question the witnesses of other party and address concluding arguments to the commissioner. However, the commissioner cannot use his discretion to disregard the rules of natural justice. The failure of the commissioner to exercise his discretion judiciously will subject the award to review, and, if the court so decides, the matter can be send back to the CCMA to be heard by another commissioner.

An arbitration award must be issued the commissioner within 14 days of the conclusion of hearing. An award can be made only in the following terms-

An award can be made only in the following terms

- Compensation – where the employer is required to pay certain amount of the employee or employees.

- Re-employment – where the employer is required to take the employer back to work on any position the employer feel is good for employee, it could be a position lower than the previous position of the employee before the dispute occurred.

-Re-instatement – where the employer is required to give the employee his former position and not a position lower than the former position of the employee before the dispute occurred.

The Issue of Legal Representation at CCMA

The issue of legal representation at CCMA is a vexed one. The LRA as amended in 2002 and the CCMA, rules that there is no absolute right to legal representation at any stage of the proceeding arising from incapacity and misconduct dismissal. In terms of the CCMA Rule 25(1)(a) it states clearly that legal representation is not allowed at conciliation stages, while in terms of CCMA Rule 25(1)(c), legal representation is generally allowed at arbitration stage except in the case of incapacity and misconduct dismissals. The bone of contention with regard to Rule 25(1) (c) is that legal representation is generally allowed at all cases in arbitration except in the case of incapacity and misconduct whereas in the Labour Court, Labour

43 section 138 (I) of LRA
44 *Gibb v Nedcor Ltd* (1997), 12 BLLR 1580 (LC).

Appeal Court, High Court, the Supreme Court of Appeal and Constitutional Court legal representation is allowed in the case of incapacity and misconduct. Those who argued against the above rule based their argument on inconsistency in its application. They argued that all the courts should speak with one voice on whether to allow legal representation in the case of incapacity and misconduct. Among those who support the view that this inconsistency must be rectified is the Law Society of South Africa (LSSA). The Law Society of South Africa has challenged the constitutionality of the CCMA

Rule on the following grounds:
(i) rule 25(1)(c) is ultra vires; and
(ii) the exclusion of the right to legal representation in rule 25(1)(c) constitutes unfair discrimination against members of the legal profession

The LSSA asserts that the CCMA"s refusal to allow parties the right to be legally represented at misconduct and incapacity arbitrations, while allowing representation by trade unions, employer organisations and in-home legal advisers, amounts to unfair discrimination against members of the legal profession. Those who support the view that the rule is fine and it should be left as it is, argued that legal representation in the case of misconduct and incapacity if allowed would make the process very legalistic and expensive and that a high degree of legal representation would both undermine endeavours to resolve these disputes expeditiously and tilt the balance unfairly in favour of employers.

Aspects of Guatemala's ADR -

- Guatemala's 20 language groups and indigenous majority emerged from revolution and civil war violence with no trust in public institutions[45]
- ADR, as part of a major effort at judicial modernization, created a new way to resolve civil, criminal, land tenure, family and community disputes non violently and without recourse to expensive, outdated, delay-ridden litigation
- Guatemala began offering **court-annexed mediation centres**, in the languages of the local people, respectful of their customary laws and norms, but also connected to the formal justice system
- Massive effort to initiate mediation centres throughout the country at **new Centros** de Administration de Justicia, especially in remote, under-served parts of the country, and via **'mobile courts'** (refitted buses) with a justice of the peace in one room and a mediator in the other, moving from neighbourhood to neighbourhood according to a posted schedule

[45] The United Nations Office of drugs and crime training manual on Alternative dispute Resolution and restorative justice for Nigerian Judges (Oct 2007 . se e also Alvero Castellanos 2000 July Alternate Dispute Resolution in Guetamala.

5. NIC and the proposed Court-Annexed ADR Centres.

The Constitution of the Federal Republic of Nigeria (Third Alteration) Act, 2010 (herein after Third Alteration Act) constitutes a watershed in the history of the National Industrial Court of Nigeria in that it ushered in a number of radical innovations on the structure, powers, status and jurisdiction of the Court. One of the innovative provisions of the Third Alteration Act is Section 254(c) (3) which provides that the NIC may establish an Alternative Dispute Resolution Centre within the Court premises on matters within her jurisdiction[46]. This is a Court-connected (annexed) ADR. The Court is about to give effect to this provision by establishing an ADR Centre within the Court premises[47]. The National Industrial Court (NIC) was established as a specialized labour court empowered to adjudicate on labour related matters. The NIC has exclusive jurisdiction to the exclusion of any other court to adjudicate on workplace related issues. There are plan in place to design and start ADR pilot scheme in the court premises starting with Lagos and Abuja.[48] One envisages that the Court could adopt the multi door concept model, using experienced personnel who will refer the parties to the appropriate ADR door or litigation; or the Court make provisions in its rule for compulsory submission to ADR, and that litigation commences on the failure of ADR to resolve the matter. Once an agreement is reached through conciliation, mediation or arbitration or a hybrid model, the terms of settlement is then drawn and signed by the parties and the facilitator. The signed memo is then filed before the Court and treated as consent judgement enforceable against the parties.**io of Case**

6. Concluding Remarks

The treatise has shown that ADR embraces conciliation, mediation and arbitration process of dispute resolution. The most appropriate type or form of ADR for a particular case depends upon the needs of the parties to the dispute. In some cases ADR has advantages over litigation but not all cases could be solved by ADR. ADR would be most useful in resolving employees/ employers relationship especially dismissal and termination whereby the employee has no means of financing litigation[49]. In South Africa, today, alternative dispute resolution has now emerged as a mechanism to avoid the normal court litigation process. In South Africa, the statistics from CCMA show that a total number of 13,118 cases were referred to CCMA in the month of February 2010[50]. This shows that for a year the total number of cases referred to CCMA would be 157,416[51]. 188,002 labour cases were settled at

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46 See also section 7(3) of National Industrial Court Act (2006)

47 Hon Justice Babatunde A Adejumo. Building Effective Conflict Management Mechanism for Sustainable development in Nigeria being a Paper presented at the 7th edition of the National Labour Relations Summit organised by the Michael Imoudu National Institute For Labour Studies, Ilorin on Nov 17th 2011

48 Ibid p 19

49 The rationale for advocating ADR in recent time can be attributed to factors listed above

50 A.A. Okharedia (2011) op cit. p 23

51 ibid

the CCMA in the nine provinces between 2006-2010.[52] With this large number of cases, the CCMA has helped to reduce the number of cases that would have been referred to the Magistrate and High Courts. The establishment of CCMA has helped greatly in the dispensation of justice timeously[53]. Without doubt, the improvement of the status of the NIC by making it a superior court of record is salutary and so is the introduction of the ADR mechanism. The lesson to learn from the South Africa and the Guatemala experience are as follows: integrity of the operators is very important; the Nigerian model should allow legal practitioner for any party wishing to be so represented so as not to be embroiled in the South African controversy; legalese and technicalities should be eschewed; the evidence presented and facts admitted at the ADR should be inadmissible at the Court if ADR process failed, in order to prevent parties fishing for evidence; Provision should be made for illiterates and semi illiterates to present their oral evidence in their mother tongue and effort should be made to assign judges and ADR practitioners that speak the indigent and illiterate persons' mother tongue to their case; also effort should be made to establish ADR centres in all the six geo political zones, taking into consideration the intensity of commercial activity in the respective locality; participation in court connected ADR should be enhanced through conduct standards for parties and their advisers with cost sanctions for non compliance with applicable standard of 'good faith', 'reasonable endeavour', 'genuine effort' to settle. We may also have specialized boards or court connected ADRs for different sectors as in South Africa to ensure that the workload of the courts are reduced and that justice is done.

52 Source: CCMA Statistics Information Handbook 2010
53 ibid