

INSTITUTIONALISING ALTERNATIVE DISPUTE RESOLUTION IN THE PUBLIC DISPUTE RESOLUTION SPECTRA IN NIGERIA THROUGH LAW: THE LAGOS MULTI DOOR COURT HOUSE APPROACH

*Alero Akeredolu**

Although modern forms of Alternative Dispute Resolution (ADR) had existed in the private sector in Nigeria, it was first introduced into the Public Justice sector through the establishment of the Lagos Multi Door Court House (LMDC) in 2002. Considering the many advantages and potentials of ADR and Court-connected ADR (CCADR), other states in the Nigeria have sought to integrate or implement CCADR. This paper examined the challenges involved in integrating/mainstreaming ADR into the Civil System of Administration of Justice in Nigeria, using the LMDC as a case study and proffering probable solutions to the same. The paper identified some of the challenges to include the lack of a national policy on ADR and CCADR; absence of legislation; under capacity/resources; voluntariness of participation and bad faith participation and cost effectiveness/funding. These challenges were surmounted by the LMDC and this paper showed cases the approaches adopted by the court to overcome these challenges. In particular, it highlights how the promulgation of the LMDC law enhanced participation as it established a legal framework for its operations. The paper also discussed other relevant enactments such as the Lagos State High Court law, the Lagos State High Court (Civil Procedure) Rules, and the LMDC Mediation and Arbitration Practice Directions.

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* Dr.. LLB(Benin), B.L, LL.M, PhD (Ibadan), Senior Lecturer, Department of Public and International Law, Faculty of Law, University of Ibadan, Ibadan, Nigeria. Alero Akeredolu is a Center for Effective Dispute Resolution(CEDR), London accredited Mediator and a Graduate of the Harvard Programme on Negotiation (PON), Mediation Course. Research fields: Alternative Dispute Resolution; Oil and Gas Law; Constitutional Law and Environmental Law.

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INTRODUCTION

A system of civil justice is essential to maintain 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 duties of government.¹ Lord Denning in *Bremer v. South India Shipping Corp, Ltd*² 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.” One of the functions of law over the years has been the continued to strive to evolve an efficient means of resolving disputes in our changing world.

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.³ The civil system of justice which Nigeria inherited via its colonial heritage from the British is what has been broadly described as the adversarial system.

The shortcomings of this system have been highlighted by several scholars. 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 were more about the process rather than the decisions/outcomes themselves.⁴ Honourable Justice Owoade agrees with this statement when he stated these problems to include delay, inadequate infrastructure, court congestion, inadequate court rooms, corruption, case backlogs, insufficient judicial officers, high qualitative and quantitative cost of litigation are some notable problems that scourge the Nigerian judiciary.⁵

Private settlement of disputes outside the court forum has existed

¹ Lord Woolf, Access to Justice, Interim Report on the Civil System Reform. *From* www.dc.gov.uk/index.htm, now available at www.justice.gov.uk (last visited Feb. 25, 2010). *See also* 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.

² AC 909, 917 (1981).

³ FOLBERG, J. *ET AL.*, *RESOLVING DISPUTES: THEORY, PRACTICE AND LAW* 7 (2nd ed. New York, Aspen Publishers 2010).

⁴ Woolf, *op cit.*

⁵ Owoade, M. A., *Global Trends in Court Connected Alternative Dispute Resolution: Quo Vadis the Nigerian Judiciary*, *BEYOND BAR ADVOCACY: MULTIDISCIPLINARY ESSAYS IN HONOUR OF ANTHONY OKOYE MOGBOH*, SAN 700 (Nwexe, C. C., Offiah, A. J. and Mogboh, A .O. Jnr eds., Umuahia, Impact Global Publishers Ltd 2011).

almost from the beginning of human society, with third parties helping people to informally resolve their disputes. Auerbach says the development of commercial arbitration represents the efforts of business to elude lawyers and courts and to retain control over their disagreement.⁶

Dispute resolution processes such as mediation and arbitration have existed in many African societies including Nigeria before the introduction and adoption of the Western concept of litigation.⁷ According to Chukwurah, ADR remains the “modern version of an ancient practice.” It is a transformation 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.⁸

The modern concept of ADR has gained acceptance amongst many commercial ventures in Nigeria who have utilised same mainly as a private dispute resolution process. ADR has remained largely a private parallel system of dispute resolution notwithstanding its many acclaimed advantages. However, some factors militating against the wider use and acceptance of ADR particularly mediation are its essential features of non-bindingness and voluntariness (allowing parties to withdraw at any point of the process) and the fact that its outcomes are not self enforcing.⁹

The Negotiation Conflict and Management Group headed by Kehinde Aina, with the understanding of the theory and practice of CCADR as practised in the USA resolved to advocate and promote ADR in the Nigerian court system. In 2002, the LMDC was inaugurated as a Private Public Partnership venture where ADR would be offered as part of the routine dispute resolution processes available to litigants who seek access to justice in Lagos State.¹⁰

Although the LMDC commenced operations in 2002, the legal

⁶ AUERBACH, J., *JUSTICE WITHOUT LAW?* (New York, Oxford University Press 1983).

⁷ Oke, Hon. Justice Opeyemi, *Alternative Dispute Resolution in Nigerian Legal System: Past, Present and Future*, 1 THE ASSOCIATION OF MULTI-DOOR COURTHOUSES OF NIGERIA: A COMPEDIUM OF ARTICLES ON ALTERNATIVE DISPUTE RESOLUTION 18 (2013).

⁸ Chukwurah, A.O., *Alternative Dispute Resolution (ADR) Spectrum in Sylvester*, READINGS IN PEACE AND CONFLICT RESOLUTION 119, 129 (V.M and Wali, R.C. eds., Ibadan, Stirling-Horden Publishers Ltd 2008).

⁹ The status of a Mediated settlement for example is that of a contract, it is not a “binding decision by a person with authority to compel performance.” Such limitations have profound impacts in a heterogenous society like Nigeria where extraneous factors such as ethnicity and family relationships can overshadow business decisions. Also corruption is prevalent in the Nigerian society creating a perception and an environment of suspicion that the other party may not be participating in the ADR process in good faith and is merely stringing the opponent along to waste time.

¹⁰ Lagos State was until 1979 the Capital of Nigeria and till date it has remained the commercial capital of the Nigerian State. The promoters could not have picked a better jurisdiction as the pilot project state.

framework for its operations was not enacted until 2007 as the LMDC Law.¹¹ The mission of the LMDC as stated in the law is to supplement the available resources for justice by providing enhanced, timely cost-effective and user friendly access to justice.¹²

This paper examines the challenges of integrating ADR into the public justice system/sector and the approach adopted by the LMDC to overcome same. The paper is divided into five parts: The next section discusses the advantages and potentials of CCADR as a premise for advocating its adoption by other jurisdictions. Section three identifies and highlights the challenges experienced by the LMDC in implementing CCADR in Nigeria. In that section, the provisions of LMDC law which addressed the identified challenges, facilitating a better and increased use of ADR as a dispute resolution process as well as other laws which have boosted the acceptance and increased use of CCADR in Lagos State are discussed. Section four highlights and discusses a major inadequacy or gap in the LMDC approach to date and urges a departure from same. The paper concludes with recommendations and advocacy for CCADR to be adopted by more countries to enhance access to justice and engender cohesiveness in the society.

I. ADVANTAGES OF ADR AND POTENTIALS OF CCADR

The difficulties of Professor Pound as far back as 1906 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.¹³

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;¹⁴ it is a private and confidential process, suitable especially for matters which involve

¹¹ Law No.21, Lagos State of Nigeria Official Gazette No 56, Volume 40 of 3rd August, 2007

¹² Oke 21. See Section 2 of the LMDC Law. The overriding objectives of the LMDC are to: enhance access to justice by providing alternative mechanisms to supplement litigation in the resolution of disputes; minimise citizen frustration and delays in justice delivery by providing a standard legal framework for the fair and efficient settlement of disputes through Alternative Dispute Resolution (ADR); serve as the focal point for the promotion of Alternative Dispute Resolution in Lagos State; and promote the growth and effective functioning of the justice system through Alternative Dispute Resolution methods.

¹³ 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 729.

¹⁴ See, Arnold, *op cit.*, in Rao and Sheffield eds., at 34; Schroder W.H Jnr., *Private ADR May Offer Increased Confidentiality*, NAT L.J (July 25, 1994).

business or trade secrets;¹⁵ 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;¹⁶ 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.¹⁷ 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 the dispute started;¹⁸ it potentially produces better results because parties are encouraged not to limit themselves to monetary damages but other creative solutions meet their underlying interests.¹⁹

What then will be gained by introducing ADR into the civil system of justice? First, litigants are given the option of having their dispute assigned to the most appropriate process—it is no more a case of one size fits all. Whether a litigant is coming to court for the first time or his suit is already pending in the courts, the litigant discusses with a court official about a suitable process for resolving his dispute, he/she has an opportunity to contribute to how the dispute should be resolved. According to Sander, the multidoor approach is one way of institutionalising a multifaceted approach to dispute resolution.²⁰

Secondly, private ADR is non-binding, compliance with the settlement agreements reached therefore depend on the good faith of the parties. There is no external enforcement mechanism. Integrating ADR to the court system gives credibility and assurance to the users of these mechanisms that whatever time and other resources spent in ADR sessions will not be in vain. To illustrate, a mediated agreement has the status of a contract simpliciter. It cannot be recognized or enforced by the courts like a judgment or arbitral

¹⁵ *Ibid.*

¹⁶ 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. Available at http://www.Cpradr.org/poll_597.Html (last visited September 17, 2009).

¹⁷ Murdock, A. and Scutt, C.N., *Personal Effectiveness in Epie*, C. *op cit.*, 439, 447 (1999).

¹⁸ 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.*, at 137, 144 and Arnold, *op cit.*, at 33-44.

¹⁹ Murdock, A. & Scutt, C.N. *op cit.*, at 439, 447.

²⁰ Sander, F. E.A. Dispute Resolution within and Outside the Courts, *op cit.*

award. Its execution/implementation therefore depends totally on the good faith of the parties to comply with the settlement agreement.²¹ To this extent, it therefore means that in the event of default by any of the parties, the other would have to seek redress afresh in court. Where mediation is conducted under a court connected or annexed ADR programme, the enabling law would often provide for an oversight by the courts, and for the agreement to be endorsed by an ADR Judge or any other person as directed by the Chief Judge, in which case shall be deemed to be enforceable.²²

Thirdly, the justice system is increasingly becoming inaccessible to ordinary citizens as well as small and medium scale businesses in particular, due to escalating costs and inefficiencies. The costs of taking or defending legal action are steadily rising in almost every jurisdiction. The backlog of cases in many state and federal civil courts is widening the gap between injury and recovery for plaintiffs. Protracted litigation consistently jeopardizes long-standing relationships between suppliers and distributors, insurance companies and their policy holders, and manufacturers and dealers.²³ Moreover, the increasing level and scope of civil litigation are draining the economy and inhibiting businesses' ability to compete in the global marketplace on equal footing. Evidence abounds regarding how ADR procedures can and have settled civil disputes fairly, efficiently, and cost effectively. Court-ordered ADR in America such as the State of Florida has produced high settlement figures, and the Illinois model has on average resolved over 50% of the eligible disputes.²⁴ Integrating ADR into the court system will therefore reduce the crowded court dockets, it will also save participants time and money, and lay the groundwork for increased voluntary ADR use.²⁵ In effect, it enhances the justice delivery role assigned by the constitution to the judiciary.²⁶

²¹ Mediation Advocates claim about 85% voluntary compliance, which is no doubt a good rating. *See generally*, Arnold, *op cit.*, Carr & Jenkins, *op cit.*, and www.cpradr.org/poll-597.

²² By virtue of S. 11 of the Sheriff and Civil Process Law, Judgments of courts may be recovered by levy of execution against the goods, chattels, moveable and immovable properties of the judgment debtor that are found within the jurisdiction of the court. A communal reading of both section 19 of the LMDC Law and section 11 of the Sheriff and Civil Process law implies (even though the LMDC law does not expressly say so), that when a settlement agreement is duly signed by the parties and further endorsed by an ADR Judge or any other person so directed by the Chief Judge, such an agreement becomes a judgment of the High Court of Lagos State and is enforceable as such *i.e.* it has the status of a consent judgment.

²³ Weinzierl, M.E., *Wisconsin's New Court-ordered ADR Law: Why It Is Needed and Its Potential for Success*, 78:583 MARQUETTE LAW REVIEW 604 (1995).

²⁴ *Ibid.*

²⁵ There is however a risk that some courts may want to use the availability of ADR programmes as dumping ground for difficult, unpopular or even "unimportant" cases.²⁵

²⁶ *See* section 6 of the Constitution of the Federal Public of Nigeria.

Furthermore, some litigants and lawyers may have greater confidence in the integrity of an ADR process and the neutral when the ADR services are provided or sponsored by a court than when they are provided in a wholly private setting.²⁷ When the service provider is a public court, for example, there is no occasion for the concerns that have surfaced about the possible influence of large companies that are current or potential sources of considerable repeat business.²⁸

Another benefit of CCADR is with regard to the voluntariness of ADR. Parties cannot ordinarily be compelled to participate in any ADR process. Where ADR is attached to the courts, however, in cases where the court believes that a matter will be best resolved by ADR, it can mandate parties to first try the ADR processes. The mandate is to attend the ADR session, it is not a directive to settle at all costs, thus the rights of a party to return to the courts for a full trial remains unextinguished. Where a party fails to respond to the court directive, it can be sanctioned by the court usually in form of refusal to award costs.²⁹

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.³⁰

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.³¹ There is also 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.³²

There is also evidence that ADR options have increased the public's

²⁷ Folgerg, *op cit.*, at 447.

²⁸ *Ibid.*

²⁹ See GOLAN, D. MEDIATING LEGAL DISPUTES: EFFECTIVE STRATEGIES FOR NEUTRALS AND ADVOCATES 222 (American Bar Association 2009).

³⁰ Folberg, *op cit.*, at 8-9.

³¹ Senft, L.P. and Savage, C. A. *ADR in the Courts: Progress, Problems, and Possibilities Summer*, 108 PENN ST. L. REV 327 (2003).

³² *Ibid.*

trust and confidence in the courts.³³ 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 now knows of at least one alternative to trial, and many of them have first-hand knowledge through participation in that ADR process.³⁴

Nwakoby and Anyogu have correctly identified some of the problems 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.³⁵ Some of these challenges are discussed in the next section.

II. CHALLENGES OF INTEGRATING ADR INTO THE FORMAL JUSTICE SYSTEM

It has been stated earlier in this paper that the LMDC will be used as the case study for examining the challenges of mainstreaming ADR into the public justice sector. It is often been said that most human beings are resistant to change. The same is true with regard to integrating ADR into the existing formal litigation culture/practice of dispute resolution. The LMDC is used as a case study to discuss the challenges that may be experienced by the Judiciary as it seeks to adopt ADR as a routine aspect of its dispute resolution services.

A. *Absence of ADR Policy and ADR Specific Laws*

There are the challenge of the absence of an ADR and CCADR policy both at the national and individual state levels which would have formed the baseline for the introduction of ADR into the court system. The legal framework for the civil system of administration of justice in Nigeria is the constitution, the various high court laws and rules, as well as the magistrate

³³ 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).

³⁴ *Ibid.*

³⁵ Nwakoby, G. And Anyogu, F., *Institutionalising Alternative Dispute Resolution Mechanism in the Nigerian Legal System*, 4(1) UNIZIK LAW JOURNAL 147.

court laws and rules.

The only constitutional reference to ADR is in Section 19 of the 1999 Federal Constitution of Nigeria which in regard to the foreign policy states that:

19. The foreign policy objectives shall be—

...

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

Some have argued that this provision only applies to international obligations of the Nigerian state and that resolution of domestic disputes is vested solely in the courts by virtue of Section 6 of the Nigerian constitution. The courts on their part have however constitutively held that individuals are free to determine how their disputes are settled. Thus, in *Egesimba v. Onuzurike*³⁶, the honourable Justice Karibi-Whyte held that if parties have agreed to refer disputes to a body or institution for determination under agreed rules and guidelines, and accordingly this is done, then the decision is as binding as one from a court and indeed acts as estoppel.³⁷

As at 2002, when the LMDC was inaugurated, the only extant ADR mechanism that had been specifically legislated upon was arbitration vide the Arbitration and Conciliation Act 1988.³⁸ The absence of an ADR policy meant that its adoption and sustainability in a particular state would mostly depend on the persuasion of the administrative head of the court i.e. the Chief Judge. It is also meant that there are no uniform or laid down strategies for developing and adopting ADR into the judicial system. Ad hoc as well as trial and error measures were therefore implemented.

In 2004, however, there were amendments to the High Court Civil Procedure Rules of some states. The Lagos and Abuja High Court Rules in particular were amended to bring them in line with developments in ADR globally. Order 25 Rule 1(1)(c) of the High Court of Lagos State Civil Procedure Rules 2004 provides that upon the application of the claimant, the judge shall cause to be issued to the parties and their legal practitioners (if any), pre-trial conference notices in the prescribed format for the purpose amongst others of promoting amicable settlement of a case or adoption of alternative dispute resolution. Thus, a judge of the Lagos State High court

³⁶ 5 NWLR (Pt. 791) 466 SC (2002).

³⁷ See also the case of *Njoku v. Ikeuchu*, (1972) 2 ECSR 199, where the court held that resort to alternative means of dispute resolution will have the force of law and a binding effect.

³⁸ Cap A18 LFN 2004. The first Arbitration law in Nigeria was the Arbitration Ordinance of 1918.

could direct parties to appear at the LMDC once one of them or the court believes that ADR will be appropriate for the resolution of the dispute.

In 2006 the Office of the Attorney General of the Federation of Nigeria, and the National Committee on the Harmonisation of ADR Laws, in conjunction with the USAID-Nigeria Reforms project, held a National Stakeholders Conference. The aim was to harmonise the Nigerian Arbitration laws and formulate an ADR legislation which would give birth to a uniform national legal framework. The outcome was a draft ADR Bill which is yet to be enacted into law.³⁹

Lagos state thereafter pioneered the enactment of an ADR specific legislation in Nigeria. In 2007, it enacted the LMDC law to give full legal backing to the operations of the already operating LMDC as well as to address some of the challenges already encountered in the LMDC practice and procedure.

In 2012, Lagos State took a very bold step to mainstream ADR by amending its High Court Civil Procedure Rules such that all cases filed in are routinely screened by dispute resolution officers who then assign the cases to the most appropriate dispute resolution process: whether litigation or the ADR track. The relevant section provides as follows:

Paragraph 2 (2) of the preamble to the rules state that:

Active case management includes:

Mandating the parties to use ADR mechanism where the court considers it appropriate and facilitating the use of such procedure.

Assisting the parties to settle the whole or part of the case

Requiring the claimant and his legal practitioner, to cooperate with the court to further the overriding objectives by complying with the requirements of the pre-action protocol to wit:

That he has made attempts at amicable resolution of the dispute through mediation, conciliation, arbitration or other dispute resolution options.

Also relevant is Order 3 Rule 2(1)(e) which provides that:

All civil proceedings commenced by Writ of Summons shall be accompanied by:

...

(e) Pre-action Protocol form 01.

Order 3 Rule 11: Screening for ADR—

³⁹ Elejo, E., *The Growth of ADR in Nigeria in A Compendium of Articles on ADR* 52, 57 (2013).

All Originating Processes shall upon acceptance for filing by the Registry be screened for suitability for ADR and referred to the Lagos Multidoor Courthouse or other appropriate ADR institution or practitioners in accordance with the Practice Directions that shall from time to time be issued by the Chief Judge of Lagos State.

This provision signals a new era in CCADR in Nigeria and in fact meets with the original concept expressed by Professor Sander of a comprehensive justice centre. It is recommended that there should be both a central or national policy as well as state/provisional legislations to support the process. Where a law is already in place, the acceptance and willingness to adapt are better than trying to first use the voluntary route and then legislate later.

B. Voluntary Participation

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.⁴⁰ Most ADR scholars now prefer to refer to ADR as a process continuum where at one end stands direct negotiation with maximum party control over the process and the outcome and at the other end, arbitration with minimum party control over the process and outcomes.⁴¹ 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.⁴² 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.⁴³

One of the ways matters that could come to the LMDC is through walk-ins. The very low levels of awareness and participation in ADR

⁴⁰ KING, M., FREIBERG, A., BATAGOL, B., AND HYAMS, R., NON-ADVERSARIAL JUSTICE (Sydney, The Federation Press 2009). P.89.

⁴¹ Folberg, *op cit.*, at 5.

⁴² *Ibid.*

⁴³ 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.

generally, also translated to a similar low response to CCADR. Not many people were willing to give up the familiar for the unknown, including the legal practitioners. For this latter group, most of their knowledge of ADR was the theory taught in the law school. Unlike litigation where they had experienced trials through participation in chambers and court attachments, the confidentiality of ADR proceedings did not afford this same opportunity of practical observation and participation.

The LMDC also received cases through referrals from the courts and parties had the option of declining. Where parties opted not to try ADR, the case officer had no choice but to return the case file to the referral court. Some litigants merely wrote to the LMDC to say they did not think their case was appropriate for ADR. The problem of course was getting the parties to even try the process at all. For others who came, in most cases, the LMDC staffs were able to explain the process to them and persuaded many to at least try, since they had nothing to lose. Testimonies of the success rates and the time ADR would save were leverage points particularly for cases that had already been pending in court for a long time. At the end of the day, many of such cases settled. The LMDC approached this issue of reluctance to use the process in different ways: by embarking on aggressive awareness campaigns, clear legislative provision authorising referrals and the adoption of settlement week.

Article 4 of the LMDC practice directions on mediation provides that when the respondent in a matter has been served with a notice of referral and refuses to submit to the ADR process within the stipulated time, the ADR judge shall request the refusing party to appear before the court and a refusal to do so will be regarded as contempt of court.⁴⁴

With regard to awareness, the LMDC embarked on strategic seminars and workshops for the legal community on the benefits and suitability of ADR as well as the practice and procedure so that both lawyers and judges knew what to expect going into ADR. The objective was to get these key stakeholders to accept the CCADR concept and get them to recommend same to their clients or at least not dissuade their clients from participating when referred. The LMDC also printed and distributed free of charge diverse publications explaining the rationale and objectives of ADR, the suitability of ADR to different subject areas, how the process works and dividends of the CCADR system.

Furthermore, the LMDC in collaboration with international service

⁴⁴ Etuk, C., *Court Mandated Mediations: Lessons Learned in the Lagos Multi Door Courthouse*, PRINCIPLES OF NEGOTIATION AND MEDIATION, ABUJA: NIGERIAN INSTITUTE OF ADVANCED LEGAL STUDIES 239, 257 (Azinge, E and Ani, C. eds., 2013).

providers like the Centre for Effective Dispute Resolution (CEDR), London, also engaged in capacity building so that more neutrals particularly lawyers would be trained and in the process promote CCADR as a viable and effective dispute resolution process. This intervention also served to allay the fears of some lawyers that ADR was a threat to their fees as it was expounded as an additional or alternative stream of income.

Section 16(1) of the LMDC law when it came into effect in 2007 served as a great impetus to some reluctant judges to actually refer matters to the LMDC. The section provides that:

16(1) It shall be the responsibility of the Judges of the High Court of Justice, Lagos State to further the cause of ADR and give effect to the overriding objectives of the LMDC by:

Controlling and managing effectively proceedings in court and issue orders which would encourage the adoption of ADR methods in dispute resolution, including the mandatory referral of parties to explore settlement at the LMDC whenever one of the parties to an action in court is willing to do so.

The amendment to the Lagos HCCPR in 2012 has further improved the use of the LMDC. As stated earlier, by this provision, all cases filed in the High Court registry are screened and assigned to the most appropriate track whether litigation or ADR.

In 2009, the LMDC introduced the settlement week. It is a week dedicated to resolution of disputes through ADR. Prior to the week, the LMDC staff work with the judges to examine their dockets and see which cases are suited for ADR. Such cases are set down for resolution at the settlement week when the regular courts will not sit. The LSW is a time bound three-hour mediation. The success rates are quite high. The LSW programme has proved useful in getting litigants to use ADR as provided by the courts.

C. Bindingness of Outcomes

Ordinarily, apart from arbitration which results in a binding award delivered by the arbitrator, in all other ADR processes, the parties have to work out a mutually acceptable settlement agreement. The status of such agreement is a contract simpliciter. Even when ADR is conducted under the supervision of the courts, the position is the same. This is a challenge for participants who expressed fears of double costs where a party defaults in his obligations under the new settlement agreement. Section 19(1) of the LMDC law addressed this issue by providing that parties could choose to have their agreements endorsed as a court judgment by an ADR Judge.

Once so endorsed, the agreement has the status of a consent judgment which is one of the strongest types of judgments issued by a competent court as it cannot be appealed against on the merits like an award but only on grounds of duress, denial of fair hearing and such like.

Parties are also made to understand that even in the litigation process you have recalcitrant parties who would default in complying with a valid court judgment. Thus the issue of default in fulfilling obligations entered into in ADR is not peculiar. Where this happens in litigation, the successful party also incurs additional costs to enforce such judgment; this is what happens when it is ADR.

D. Limited Capacity

Arbitration is widely known and recognised in the Nigerian legal system and institutions such as the Nigerian branch of the Chartered Institute of Arbitrators, UK and the Chartered Institute of Arbitrators, Nigeria have been in the business of training professional arbitrators in Nigeria for more than three decades. This was however not the case with other ADR processes like mediation and conciliation. The LMDC recognised that if it was going to make any meaningful impact in reducing the court dockets, it would need trained panel of neutrals to handle the cases referred or walking in to the centre.

The majority of lawyers who are the traditional dispute resolvers could boast of theoretical training in ADR but what of other professionals? One of the acknowledged advantages of ADR is the availability of experts to act as neutrals; such experts had to be trained to be able to serve as the required neutrals in the ADR process. Through grants and collaborations with international agencies, the LMDC conducted trainings both free and fee paying courses for its own personnel as well as others who desired to be trained as neutrals. For a person to be listed as a neutral at the LMDC, he had to have been accredited and certified by a recognised training institution.

E. Bad Faith Participation

A major stronghold expressed by some litigants against ADR is the fact that there is no way of telling when the opposing party is participating in good faith with an actual intention to settle. With regard to CCADR, the same fears were expressed; whilst it is agreed that the fact that the settlement outcome can be endorsed by a judge is a tremendous advantage, the question was what guarantee does a litigant have that the opposing party will not withdraw from the process at any time before settlement?

The fact is that good faith cannot be legislated, yet the LMDC law

made provisions in this regard, at least to show “legislative support”. Section 18 of the law on “role of disputing parties’ regulations” provided that:

The parties shall:

(d) attend the ADR session in good faith without undue requests for adjournments or unwarranted delays and comply with directives from the Court and the LMDC Practice Directions; and

(e) prepare adequately for an ADR Session, be actively involved and be willing to explore various options for settlements.

Although as stated earlier, there is no way the court can tell whether a party is attending in good faith or is being actively involved in the process, the fact that parties can be told that there is “legally” required to participate in good faith was a boost the LMDC needed. Section 17(3)(c) of the law also imposed a legal obligation on counsel to “further the cause of ADR and give effect to the overriding objectives of the LMDC”. This can be interpreted to include advising the client to participate in good faith where counsel has determined that ADR is the more appropriate mechanism in resolving the matter brought to him by the client.⁴⁵

Another way the LMDC approached, this issue was the use of testimonies. The LMDC staff were encouraged even in trainings that while making the opening statement to the parties during a mediation session for example, they should inform the parties of the voluntary nature of the process but emphasise more on the success rates of the centre in assisting parties to actually reach mutually accepted outcomes.⁴⁶ Parties and their counsel are also reminded of their obligations under the law.

F. Funding

One of the crucial challenges of any new programme is how it will be funded. Ordinarily, the public system of administration of justice is funded by the government; they pay the judges and the administrators and maintain the venues i.e. the court premises. With ADR and even CCADR, the parties are expected to bear the cost of the process. Many litigants see this as an unnecessary burden being placed on them, particularly where they did not ask for ADR but were mandated by the judge to use ADR.

⁴⁵ Section 17(2) provides that counsel has a duty to expose clients to alternative methods of dispute resolution and explore with them the most appropriate mechanism in the resolution of matters brought before them.

⁴⁶ The author has participated in training for mediators organized by the LMDC and served as a mediator at the LMDC Settlement week.

Section 21 of the LMDC law provides for the establishment of the LMDC fund to be applied towards the realisation of its objectives and functions. Section 21(2) lists the sums that should be paid thus:

Grants as may be provided by the Government of Lagos State based on the budget presented;

Sums accruing to the LMDC by way of aids, gifts, testamentary dispositions, endowments or contributions by persons or organisations;

Fees paid for services rendered by the LMDC or the utilisation of its facilities; and

Other sums which may from time to time accrue to the LMDC in form of grants, awards or other form of support by private persons, organisations or any other source.

To be self-sustaining, affordable and to maintain a standard of service rooted in independence, quality and professionalism, the Practice and Procedure Rules prescribe a subsidised fee rate for services at the Lagos Multi-Door Courthouse. The fees are in two parts: administrative fees and session fees. The former is a deposit towards logistics and administrative services which could vary depending on the extent of administrative involvement in the particular case; while the latter is payable for sessions are dependent on the category into which the matter falls and the dispute resolution process.⁴⁷

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.⁴⁸ 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.

III. DEPARTURE FROM THE LMDC APPROACH

The major area we would depart from the LMDC approach thus far is the non-application of CCADR to the magistrate courts which in Nigeria can be regarded as the small claims court. Much of the work of the LMDC is targeted at the high court whereas a lot more can be done if ADR is integrated also into the lower courts. It is therefore recommended that ADR

⁴⁷ Article 20 of the MPD, *op cit.*, at 13.

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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 N1,000 per session missed. Failure to pay the default fee is treated as contempt of court and sanctions apply.

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.⁴⁹

CONCLUSION

This paper has discussed the different challenges encountered by the LMDC in integrating ADR into the public system of administration of justice. The paper highlighted how the promulgation of the LMDC Law enhanced participation as it established a legal framework for its operations. The law also provided for the role of the courts, counsel and the parties; mandatory referral of cases, and issuance of orders to encourage resolution of disputes through ADR and through case management and control.

It is hoped that other developing economies may find areas/lessons they can adopt/transplant in their own jurisdictions by understanding the LMDC approach.

⁴⁹ During the Lagos Settlement week, cases are also referred from the magistrate courts, but this cannot significantly affect the dockets of that court, that is why we advocate an integration in a similar manner that the High Court is empowered and connected to the LMDC.