A CONSIDERATION OF ALTERNATIVE DISPUTE RESOLUTION UNDER THE LAGOS STATE HIGH COURT (CIVIL PROCEDURE) RULES 2012

INTRODUCTION

Disputes are a common feature of human affairs. By their very nature, human beings are built to agree and disagree. It is in this regard that, by necessity, several dispute resolution measures have been established over the years. While some may consider violence as a form of resolving conflicts, it may generally be agreed that violence does not always solve the problem. More often than not, violence escalates the dispute and leaves lifetime scars on the dramatis personae. It is based on this that the world has come up with a spectrum of dispute resolution methods that best suits the society. This spectrum of dispute resolution methods involves both adjudicative and consensual channels. Basically, the adjudicative channel comprises of litigation and arbitration.[1] On the other hand, the consensual channel is usually considered to include negotiation, conciliation and mediation.[2]

The conventional dispute resolution method is litigation. Any dispute resolution method other than litigation is classified as Alternative Dispute Resolution (ADR). In this respect, the Black's Law Dictionary defines ADR as "[a] procedure for

[1] This usually involves a third party who is conferred with recognizable amount of adjudicatory authority over the disputants. He sits as a judge or arbitrator, receives evidence from the disputants as well as legal argument and makes a pronouncement thereon. In litigation, the pronouncement is called judgment while in arbitration, it is called an award.

[2] For the classification, see *Blaney McMurtry LLP*, Advantages and Disadvantages of Dispute Resolution Processes <http://www.blaney.com/sites/default/files/other/adr_advantages.pdf> last visited on March 1, 2016.

settling a dispute by means other than litigation, such as arbitration or mediation"[3]. However, the general trend in the world is to make litigation less attractive while encouraging disputants to embrace ADR in the resolution of disputes. This is due to the cumbersome, expensive, time-consuming and adversarial nature of litigation. Unlike ADR that aims at a mutually agreed resolution, litigation is usually a win or lose affair for the litigants. It is common knowledge that litigation leaves acrimony in its wake. It is in this vein that the *Lagos State High Court (Civil Procedure) Rules, 2012* has put in place commendable ADR measures aimed at quick and just dispensation of justice.

This paper shall, primarily, focus on the operation of ADR under the *Lagos State High Court (Civil Procedure) Rules, 2012 (hereinafter referred to as "the 2012 Rules")*. It delves into the practicability of ADR under the Lagos State High Court civil procedure regime and suggests ways of improving same.

CONCEPTUAL CLARIFICATION: ALTERNATIVE DISPUTE RESOLUTION (ADR)

As noted in the introductory part, the Black's Law Dictionary defines ADR as *"[a] procedure for settling a dispute by means other than litigation, such as arbitration or mediation"*. It encompasses non-litigation dispute resolution. The authors of the Fourth Edition of Halsbury's Laws of England define ADR thus:

> "Alternative dispute resolution ('ADR') is a term for describing the process of resolving disputes in place of litigation and includes mediation, conciliation, expert determination, and early neutral evaluation."[4]

[3] Black's Law Dictionary, 8th Edition, page 86.
[4] Halbury's Laws of England, Fourth Edition (Reissue) Lord Mackay of Clashfern, 2(3), page 5, para. 4.

According to Stephen J. Ware,

> "ADR can be defined as encompassing all legally permitted processes of dispute resolution other than litigation. While this definition (or something like it) is widely used, ADR proponents may object to it on the ground that it privileges litigation by giving the impression that litigation is the normal or standard process of dispute resolution, while alternative processes are aberrant or deviant. That impression is false. Litigation is a relatively rarely used process of dispute resolution. Alternative processes, especially negotiation, are used far more frequently. Even disputes involving lawyers are resolved by negotiation far more often than litigation. So ADR is not defined as everything-but-litigation because litigation is the norm. Litigation is not the norm. ADR is defined as everything-but-litigation because litigation, as a matter of law, is the default process of dispute resolution."[5]

The foregoing core part of Stephen J. Ware's description of ADR is that litigation is the default process of dispute resolution.

FORMS OF ALTERNATIVE DISPUTE RESOLUTION

The ADR mechanism is a generic term that describes different non-litigation methods of resolving disputes such as Arbitration, Early Neutral Evaluation, Negotiation, Conciliation, Facilitation, Mediation and Hybrids such as Med-Arb, Lit-Med etc.

ARBITRATION

[5] Stephen J. Ware, Alternative Dispute Resolution 1.5, at 5-6 (2001) (quoted in Black's Law Dictionary, Eight Edition, page 86).

The **Arbitration and Conciliation Act, Cap A18, Laws of the Federation of Nigeria, 2004** simply defines arbitration as a commercial arbitration whether or not administered by a permanent arbitral institution. This definition is merely descriptive. Hence, the need to make recourse to clearer expositions. In this respect, Ogbuagu, JSC defined the term "arbitration" thus:

> "…an arbitration is the reference of a dispute or difference between not less than two parties for determination, after hearing both sides in a judicial manner by a person or persons other than a court of competent jurisdiction."[6]

A similar definition to that of His Lordship can be found in Halsbury's Laws of England where arbitration is described thus:

> "Arbitration is a process used by the agreement of the parties to resolve disputes. In arbitrations, disputes are resolved, with binding effect, by a person or persons acting in a judicial manner in private, rather than by a national court of law that would have jurisdiction but for the agreement of the parties to exclude it. The decision of the arbitral tribunal is usually called an award."[7]

Arbitration may arise in three different ways, which are:

i. By agreement of parties through the insertion of an arbitration clause in their agreements
ii. By order of court with or without the consent of the parties.
iii. By Statute.[8]

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[6] NNPC v. Lutin Invest. Ltd. [2006] 2 NWLR (part 965) 506 at 542, paras. G-H.
[7] Halbury's Laws of England, Fourth Edition (Reissue) Lord Mackay of Clashfern, 2(3), page 2, para. 1.
[8] An instance of this is contained in section 9 of the Trade Disputes Act, Cap. T8, Laws of The Federation of Nigeria, 2004, Vol. 14 (Updated to 31st December, 2010) which established an Industrial Arbitration Panel.

As noted in the introductory part, although usually considered as a form of ADR, arbitration falls under the adjudicative channel of dispute resolution together with litigation. By its nature, arbitration is an alternative dispute resolution technique that is usually rooted in agreement of parties. The dispute is assigned to a neutral person or panel as agreed by the parties to whom both sides make their representations. The arbitrator studies all the materials presented and he gives a binding decision at the end of the day. The arbitrator is usually an expert in the area of the dispute. The end point of a successful arbitral proceeding is the making of an "award". In simple terms, an arbitral award is the final decision of an Arbitration panel. It can be loosely compared with the final judgment of a court as it differs from interlocutory court orders. An arbitral award must possess certain qualities, which include that it must follow submission, it must have a time limit, it must dispose of all matters effectively and it must be legal and possible.

The foregoing clearly confirms that arbitration bears more similarities to litigation than other forms of ADR. It is adjudicative in nature and the "win-or-lose" syndrome applies to it as it applies to litigation. This must have informed the position of the authors of the *Fourth Edition of Halsbury's Laws of England* that it is erroneous to classify arbitration as a form of ADR. According to them:

> "It is not unusual for arbitration to be classed as a form of ADR, but this is potentially misleading. In many important respects arbitration has more in common with court-based litigation than with the

> forms of ADR… Unlike arbitration, none of these forms of ADR have statutory basis."[9]

It is also worthy to note that in the Nigerian clime, arbitration may be as expensive as litigation or even more expensive. Experience has shown that only persons of means can afford the cost of arbitration. It is based on this that contracting parties in Nigeria appear to be jettisoning arbitration in favour of mediation or other affordable dispute resolution forms.

EARLY NEUTRAL EVALUATION (ENE)

Here, parties to a dispute submit the dispute to a neutral evaluator for the purpose of evaluating the case to determine the strength and weakness of each party's case. It helps to clear any unrealistic expectations a party may have with regard to the dispute and streamline it accordingly. A successful evaluation will usually lead to an amicable settlement of the dispute.

NEGOTIATION

Negotiation is preventive in nature as it seeks to avoid a degeneration of the parties' differences into a conflict. It entails a voluntary discussion between the parties aimed at achieving a mutually acceptable agreement. No third party is involved at this stage. As a matter of fact, negotiation has proven to be a very effective tool in avoiding dispute escalation and promoting good relationship among the parties.

CONCILIATION

Conciliation is an advisory form of ADR also referred to as an evaluative process. This is because it involves

[9] Halbury's Laws of England, Fourth Edition (Reissue) Lord Mackay of Clashfern, 2(3), page 5, para. 4.

> "a neutral and independent third party, actively assisting the parties in reaching a mutually acceptable agreement. The third party may evaluate the positions of the parties, advise the parties as to the facts of the dispute and recommend options for the resolution of the dispute."[10]

Conciliation bears similarities to mediation in that they both involve a neutral and independent third party to assist them in reaching a mutually acceptable negotiated agreement. However, in mediation, the third party plays a more domineering role (though not determinative). A core ADR element is that despite his domineering role, the conciliator is not in a position to impose a settlement.[11]

MEDIATION

Mediation is facilitative in nature.

In a joint session, the mediator meets with the parties in dispute. He explains the process to the parties, carries out an assessment as to whether mediation is suitable for the situation and ensures that the parties are willing to participate in the mediation for the purpose of arriving at a mutually acceptable agreement.

Next, the mediator holds a caucus with each party privately to discuss their individual positions and understand their own underlying needs and interests. The mediator treats as confidential any information provided by a party unless the party consents to the dissemination of the information to the other party.

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[10] Law Reform Commission of Ireland, Consultation Paper Alternative Dispute Resolution, July 2008, page. 49 <http://www.lawreform.ie/_fileupload/consultation%20papers/cpadr.pdf> last visited on March 1, 2016.

[11] Law Reform Commission of Ireland, Consultation Paper Alternative Dispute Resolution (supra).

After the caucuses, the mediator will try to establish common grounds between the parties and further facilitate an enabling environment for a mutually acceptable agreement. The mediator then puts the agreement in ink. After the parties' approval of the written agreement, he will have the parties sign same accordingly.

It is pertinent to note that there are other forms of ADR that have not been considered in this paper. Also pertinent is the need to state that apart from negotiation, arbitration and mediation appear to be the popular forms of ADR within the Nigerian legal system (particularly Lagos).

NEED FOR ADR

ADR is viewed as dispute resolution processes engendering amicable resolution. It is in this vein that the 2012 Rules make "*amicable resolution of disputes by use of Alternative Dispute Resolution (ADR) mechanism*" as one of the overriding objectives of the Rules.[12] This leads to the reasonable suggestion that the 2012 Rules consider ADR a more viable option of dispute resolution when compared to litigation. This may be due to the fact that over the years, it has become a matter of relatively general consensus that litigation does not pose the solution for all disputes. One particularly worrisome aspect of the process of litigation is the potential for delay. This problem is so endemic that sometimes a simple preliminary point of contention in a matter can take years to resolve. One sad example of this trend can be seen in the case of ***Society Bic SA. V Charzin Industries Ltd.*** where Rhodes-Vivour, J.S.C held thus:

> "This is an interlocutory appeal from the decision of Hunponu-Wusu J of a Lagos High Court where His Lordship

[12] See Paragraph 1(c) of Preamble to the *Lagos State High Court (Civil Procedure) Rules, 2012*.

ruled that the State High Court has jurisdiction to hear the plaintiff/respondents claims. This suit was filed in 1995. Nineteen years ago. It took nineteen years to resolve the simple issue of jurisdiction. This case would have to be sent back to the High Court for hearing the main suit."[13]

In a similar vein, as far back as 1989 in Australia, Kayleen M Hazlehurst noted thus:

> "*The legal system is adversarial. It divides parties into `winners' and 'losers' and encourages them to maximize their position vis-a-vis their opponent. Win/lose, attack/counter attack litigation which typifies the legal system, can permanently damage relationships and severely reduce the health, financial resources and quality of life of litigants.*
>
> *Judicial and legal traditions depersonalize the dispute and place it beyond the control of disputants. The adversary process involves the participants in cross-examination and in the provision of evidence, but effectively excludes them from final decision-making.*
>
> *Including certain facts as evidence and excluding others is a pervading principle of our justice system. Litigants leaving the court, particularly those who lose, often have an overwhelming sense of injustice and frustration. They feel that their side of the dispute was circumscribed by the court and they did not 'have their say'.*
>
> *Embittered court battles following family breakdown over custody of children, maintenance arrangements, and the distribution of property, make amiable settlement extremely difficult. Long ranging feuds between extended families have occurred after separation and divorce.*

[13] [2014] 4 N.W.L.R [Pt 1398] 497 at 541-542 para H-C.

The costs of going to court, not only in legal fees, but in loss of time, employment, and peace of mind can be catastrophic. Tensions seldom subside through court action, and they are often increased….

Alternative Dispute Resolution Services… provide an option to expensive and often divisive litigation, and to the legally binding win/lose situation of adjudication."[14]

It is in the spirit of the foregoing that the 2012 Rules have sought to make litigation a matter of last resort only.

LITIGATION AS A LAST RESORT UNDER THE 2012 RULES

In Lagos State, by virtue of the provisions of the Lagos High Court (Civil Procedure) Rules, 2012 (hereinafter referred to as "the 2012 Rules"), litigation has been officially relegated to a matter of last resort. In this respect, other settlement options must have been explored (or seen to have been explored) before resort to litigation. This is one of the major core values of the 2012 Rules as embodied in its Preamble. It provides thus:

"1. The overriding objectives of these Rules shall be as follows:

(a) to promote a just determination of every civil proceeding;

(b) to construe these Rules to secure simplicity in procedure, fairness, in administration, elimination of unjustifiable expense and delay, efficient and speedy dispensation of justice.

(c) ***amicable resolution of disputes by use of Alternative Dispute Resolution (ADR) mechanism***.

[14] Kayleen M Hazlehurst, "Violence, Disputes and Their Resolution", published in Violence Today, a publication of the Australian Institute of Criminology, December 2009.

2. (1) The Court shall further the overriding objective by actively managing cases.

(2) Active case management includes:

a) mandating the parties to use an (ADR) mechanism where the Court considers it appropriate and facilitating the use of such procedure;

b) assisting the parties to settle the whole or part of the case;

c) fixing timetables or otherwise controlling the progress of the case;

d) giving directions to ensure that the trial of the case proceeds quickly and efficiently;

e) 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;

i. that he has made attempt at amicable resolution of the dispute through mediation, conciliation, arbitration or other dispute resolution options;

ii. that the dispute resolution was unsuccessful, and that by a written memorandum to the Defendants, he set out his claim and options for settlement; and

iii. ***that he has complied as far as practicable, with the duty of full and frank disclosure of all information relevant to the issues in dispute.***

3. Parties and their Counsel shall help the Court to further the overriding objectives of these Rules." [Emphasis mine]

As can be seen above, one of the three overriding objectives of the 2012 Rules is "***amicable resolution of disputes by use of Alternative Dispute Resolution (ADR) mechanism.***"[15]

To further ensure the achievement of this overriding objective, the Preamble requires the Claimant and his legal practitioner to comply with the requirements of Pre-action Protocol. Paragraph 2(2)(e)(i) of the Preamble specifically require the Claimant to show that he "***made attempt at amicable resolution of the dispute through mediation, conciliation, arbitration or other dispute resolution options***". Furthermore, he is required to show that the attempt at amicable resolution failed, and he set out his claims and options for settlement in a written memorandum to the defendant(s).[16]

It is pertinent to note that Order 1 rule 2(3) of the 2012 Rules defines Pre-action Protocol thus:

> ***"Pre-action Protocol" means steps that parties are required to take before issuing proceedings in court as set out in Form 01 to these Rules"***

This definition further confirms that litigation is a last resort. Officially, attempts at ADR have to be made before a party issues proceedings in court. Form O1 is a Form on oath that accompanies the writ of summons or originating summons wherein the claimant confirms that he complied with the Pre-action Protocol requirements; made unsuccessful attempts to settle the matter out of court; and served on the defendant a written memorandum setting out his claims and options for settlement before instituting the suit.

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[15] Paragraph 1(c) of the Preamble to the 2012 Rules.
[16] Paragraph 2(2)(e)(ii) of the Preamble to the 2012 Rules. This written memorandum is best described as a "letter before claim" or "letter of claim".

To further underscore the importance of attempts at ADR as a condition precedent to the institution of an action, Order 3, rule 2(1)(e) and rule 8(2)(d) of the 2012 Rules make Form O1 a mandatory process that must accompany a writ of summons and originating summons respectively. Proof of Pre-action attempts at ADR is, therefore, condition precedent[17] to the institution of a suit under the 2012 Rules. By virtue of Order 5, rule 1(1) of the 2012 Rules, failure to show proof renders the action a nullity.[18]

Emphasising the need for attempts at ADR before coming to court, ***Alogba, J in Suit No LD/192/2013: Nitol Textiles Manufacturing Co. Nig. Ltd. v. Coastal Services Nigeria Ltd. (delivered on June 19, 2013)*** held thus:

> *"However what the law requires it to state or show that it has done that which is a condition precedent to*

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[17] On effect of failure to comply with condition precedent, see ***Adegbenro v. Akintilo [2010] 3 NWLR (Pt. 1182) Pg.541 at 562 paras.*** A-C where Ogunbiyi, J.C.A. (as he then was) held thus:

> "The law is that when an action is commenced and there is non-compliance with a stipulated precondition for setting the legal process in motion, the suit instituted in contravention of the condition precedent is incompetent and the court is equally incompetent to entertain the suit."

See also Rhodes-Vivour, JSC in ***Ugwuanyi v. Nicon Ins. Plc*** **[2013] 11 NWLR (Pt. 1366) Pg. 546 at 611 and 612 paras.** H-C.; and **Madukolu v. Nkemdilim (1962) 2 NSCC, p. 374 at 379** where **Bairamian, F.J**. stated that failure to fulfill a condition precedent to the exercise of jurisdiction robs a court of competence.

[18] Order 5, rule 1 of the 2012 Rules provide that: "*Where in beginning or purporting to begin any action there has, by reason of anything done or left undone, been a failure to comply with Order 3 Rule 2 or Order 3 Rule 8, the failure shall nullify the action.*" Since Form O1 (Statement of Compliance with Pre-action Protocol) is specifically listed in Order 3 Rule 2 or Order 3 Rule 8, the, the Lagos State High Court has, on several occasions, held actions to be nullity on account of failure to show proof of compliance with Pre-action Protocol requirements. See the Ruling of Obadina, J in *Suit No: LD/506LM/2015: between Mrs. Olubukunola Osomo v. Gov. of Lagos State & 2 Ors*. (delivered on February 2, 2016); the Ruling of Alogba, J. in Suit No LD/192/2013: Nitol Textiles Manufacturing Co. Nig. Ltd. v. Coastal Services Nigeria Ltd. (delivered on June 19, 2013); and the ruling of Ighile, J. in *Suit No. BD/1100LMW/15: Dr. Lateef Seriki-Abass & Ors. v. Wasiu Seriki-Abass & Ors* (delivered on February 8, 2016).

invoking the jurisdiction of this court inter-alia includes proof that an attempt at amicable settlement by any of the Alternative Dispute Resolution modes has been made, I even say that a call by an intending Claimant, to a Defendant to be, to come to a round table and have the dispute talked over (even) in such simplistic parlance) would satisfy that requirement of attempt to settle amicably before coming to court.

Learned Counsel for the Claimant referred to that attempt here as being by letter dated 19th march, 2013, howsoever a careful perusal of that letter, more particularly the last paragraph thereof shows that it is not or cannot in any manner be construed as an extension of an olive branch or call on the Defendant to try to talk matters over.

Quite candidly Learned Claimant's Counsel conceded, when I asked her to read the same paragraph in open Court just now, that it does not amount to a call for a settlement.

In clear terms it is rather a warning, stay off our land or we sue you to Court.

That is not the pre-action dictated by the Rules, it is rather Come let us see how we can amicably resolve this problem" in whatever manner that could be done.

For failing to do so therefore, the Claimant failed to comply with a condition precedent to instituting this action in Court as dictated by the PREAMBLE NO 2(2E) High Court of Lagos State Civil Procedure Rules 2012. Accordingly this suit is incompetent and is hereby struck out."

The spirit behind this approach is to make litigation less attractive to potential litigants by promoting early settlement

of disputes. As noted by the learned authors of the Blue Book, 2013, Practical Approach to The High Court of Lagos State (Civil Procedure) Rules 2012:

> "Pre-action protocol is intended to ensure that a sincere effort at settlement of civil dispute is made at the earliest possible stage among potential parties to a civil litigation before resort to litigation is made. Where disputes cannot be resolved at this stage, parties would have streamlined the material facts in dispute while the chaff would have been discarded and only the grain retained. It will also aid the court to actively and effectively manage cases with a possibility of quick and just determination of the case."[19]

It may be argued that the 2012 Rules do not constitute pre-action novelty with the Nigerian judicial system in view of the provisions of Order 4, rule 17 of the High Court of The Federal Capital Territory, Abuja (Civil Procedure) Rules, 2004 which provides thus:

> "*A certificate of pre-action counseling signed by Counsel and the litigant, shall be filed along with the writ where proceedings are initiated by counsel showing that the parties have been appropriately advised as to the relative strength or weakness of their respective cases and the counsel shall be personally liable to pay the costs of the proceedings where it turns out to be frivolous.*"

Although the foregoing is put in place to eschew institution of frivolous actions, it can hardly qualify for a pre-action attempt at ADR. Here, counsel is only required to advise his client on the

[19] *Muiz Banire, Ajibola Basiru & 'Kunle Adegoke*, The Blue Book, 2013, Practical Approach to The High Court of Lagos State (Civil Procedure) Rules 2012 (Third Ed.) at page 37. For a more comprehensive reading of the jurisprudential consideration of Pre-action Protocol, please refer to The Blue Book, 2013, Practical Approach to The High Court of Lagos State (Civil Procedure) Rules 2012, page 36 to 40.

strength or weakness of the case; there is no requirement to attempt settling the matter out of court or communicating with the defendant for the purpose of settling before instituting the action. There cannot be ADR unless the other party is involved.

It must be noted that the universal application of Pre-action Protocol requirement to every suit instituted under the 2012 Rules may not be in the best interest of dispute resolution generally. In situations of extreme urgency where an injunctive relief is all that will stop the potential defendant from foisting a *fait accompli* on the court or stop the destruction of the *res*, compliance with the Pre-action Protocol requirement may turn out to be a Frankenstein monster that defeats the purpose of its creation. Another worthy example is where the action stands on the threshold of statutory bar. [20] Here, unfortunately, compliance with Pre-action Protocol may shut the door of litigation forever, thereby, depriving the potential claimant of the last minute opportunity to keep the action alive.[21]

ORDER 3, RULE 11: SCREENING FOR ADR

Another ADR measure the 2012 Rules put in place to further the overriding objective is as contained in Order 3, Rule 11. It provides thus:

> "*All Originating Processes shall upon acceptance for filing by the Registry be screened for suitability for ADR and referred to the Lagos Multi Door Court House or other*

[20] Under section 2(a) of the Public Officers Protection Law of Lagos State, Cap P26, Laws of Lagos State of Nigeria, 2003 which provides that:

> "the action, prosecution, or proceeding shall not lie or be instituted unless it is commenced with three months next after the act, neglect or default complained of, or in case of a continuance of damage or injury, within three months next after the ceasing thereof…."

[21] For a fuller critique of the general application of Pre-action Protocol under the 2012 Rules, please read The Blue Book, 2013 (supra) at page 38 to 40.

appropriate ADR institutions or Practitioners in accordance with the Practice Directions that shall from time to time be issued by the Chief Judge of Lagos State."

The effect of this provision is that even where the Claimant has provided evidence of compliance with the Pre-action Protocol requirement, the court is still at liberty to, compulsorily, refer the matter to ADR. Under Order 3, rule 11 of the 2012 Rules, as a constituent of filing originating processes, the Registry will screen the case to determine if it is one worthy of litigation or ADR. Where deemed suitable for ADR, the Registry will affix a stamp on the face of the process with the inscription "SCREENED FOR ADR". The screening exercise is administrative in nature.

Experience has shown that litigants do not feel favourably disposed towards being compelled by the court to abandon litigation in favour of ADR. The average Nigerian is litigious in nature, and ADR is not a litigant's definition of "being in court". Furthermore, Lagos lawyers have not warmed up to ADR. Most lawyers still consider ADR an alien concept and would employ every trick in the book to let their client's file find its way back to court.

Furthermore, ADR is not free. Regrettably, some litigants consider it unwarranted expenses being forced on them by the court to unjustly enrich the persons that run the ADR centres. They question why they would have to pay a penny more after paying filing fees at the point of instituting the matter. A panacea for this will be to build the cost of ADR into the filing fees immediately after it is screened for ADR. In effect, a litigant will not know the cost of filing until after the originating process has been screened. The only downside to this is that the Claimant may be the only people bearing the cost of

the ADR as against the norm of having both sides share it. The current practice is a case of double jeopardy in terms of costs payable for the process.

Another point rendering compulsory ADR unpopular is the fact that when a litigant comes to court, he is submitting to a judge or magistrate. He does not want to defer to an entity that lacks the actual judicial power. Therefore, he would do all within his capacity to go before a judge. This may explain why the pre-trial settlement provisions Case Management Conference under Order 25 has enjoyed some measure of success.[22]

Order 25, Rule ADR

The fact that a case is not screened suitable for ADR does not necessarily mean that it will not be referred to an ADR body at a later point in time. By Order 25, rule 2(l) of the 2012 Rules, at the Case management Conference, one of the appropriate actions the Judge may take is to make referrals to the Lagos State Multi-Door Courthouse or other relevant ADR bodies. Unlike the administrative referral under Order 3, rule 11, referral under Order 25 is purely judicial. It is the judge that does this "screening" and determines whether it s an ADR worthy case or one that should be allowed to swim or sink in the waters of litigation.

Upon the coming into force of the 2012 Rules, some entities believed that the Rules were designed to ensure that all cases would be referred to ADR.[23] This assumption is quite erroneous. Although there is hardly any accurate data, in practice, since

[22] The fact that the judge of the High Court presides still affords some comfort to the litigant and encourages them to cooperate accordingly.

[23] See Herbert Smith Freehills, "New Lagos High Court Rules make ADR compulsory"<http://hsfnotes.com/adr/2012/09/22/new-lagos-high-court-rules-make-adr-compulsory/>

coming into force of the 2012 Rules, more cases have made it to litigation than ADR. Furthermore, most of the cases referred to ADR find their way back to litigation.

Suitability of ADR

Despite the drive of the 2012 Rules in steering potential litigants towards ADR, its suitability remains heavily in doubt. Based on practical experience since the official institution of ADR in the 2004 Rules, ADR has, more often than not, turned out to constitute an additional layer of expenses on litigation.[24] As rightly observed by the Law Reform Commission of Ireland,

> "The Commission considers it important to reiterate that the potential benefits of mediation and conciliation, including the cost and time effectiveness of the processes, must be balanced against the reality that mediation and conciliation can also be seen as an additional layer on civil litigation where it does not lead to a settlement and that every step along the way drives up the costs of litigation."[25]

The fact that ADR is largely not determinative means that parties can always resort to litigation after going through the entire ADR process. Furthermore, even in the case of arbitration that is considered determinative, we see a lot of cases where parties go back to court to challenge the award.

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[24] According to he Honourable Warren K. Winkler Chief Justice of Ontario in a speech titled: "Access to Justice, Mediation: Panacea or Pariah?", opponents of meditation consider it to be mediation to be '"soft justice," nothing more than an additional layer of costs in the litigation stream and a process fundamentally at odds with the role of the court as decision maker.' <http://www.ontariocourts.ca/coa/en/ps/speeches/access.htm> last visited March 1, 2016.

[25] Law Reform Commission of Ireland Report: "Report Alternative Dispute Resolution: Mediation and Conciliation" 2010, page 10, paragraph 1.11 <http://www.lawreform.ie/_fileupload/reports/r98adr.pdf> last visited on March 1, 2016.

Although one may argue that in view of the provisions of Order 25, rule 6(1)&(2), measures have been put in place to deal with recalcitrant parties,[26] these measures only relate to filing of Statement of Case and response thereto. Order 25, rule 6 does not elevate ADR to the determinative level of litigation. What happens where a party becomes recalcitrant after he files his statement of case or the response thereto (as the case may be)? To say that Order 25, rule 6 has the effect of compelling the parties participate throughout the ADR process and accept the decision as binding will mean that the ADR under the 2012 Rules does not aim to achieve a mutually acceptable agreement. In other words, it would transform it to litigation under the guise of ADR. Generally, voluntariness is at the core of ADR.

It is safe to say that, as things are, ADR is not an end to litigation. In Nigeria, it has not come close to being an attractive alternative to litigation.

[26] Order 25, rule 6(1)&(2) provide thus:
(1) Where a case is deemed suitable for ADR under Order 3 Rule 11 or has by directives been referred to ADR under Order 25 Rule (2)(1) above, the ADR Judge shall in case of recalcitrant parties consider and give appropriate directives to parties on the filing of Statement of Case and other necessary issues.
(a) The Claimant shall file his Statement of Case within fourteen (14) days of the Order of the Judge.
(b) The Defendant shall file his response within fourteen (14) days of service of the Claimant's Statement of Claim.
(2) Where a party fails to comply with the directives and/or orders of the ADR Judge or fails to participate in ADR proceedings the Judge shall:
(a) in the case of the Claimant dismiss the Claim;
(b) in the case of the Defendant enter Judgment against him where appropriate.