Page 1543 - 1560 **DOI:** *https://doij.org/10.10000/IJLMH.115916*

INTERNATIONAL JOURNAL OF LAW MANAGEMENT & HUMANITIES

[ISSN 2581-5369]

Volume 6 | Issue 5

2023

Adjudication and Alternative Dispute Resolution: A Reasoning on The Future of Commercial Dispute Settlement

KEMI AKINLADE[1] AND CHARLES OLUWAGBEMILEKE ADEGBOLA[2]

ABSTRACT

Commercial dispute is sui generis (of its own kind). It may even become complicated in a matter involving cross-border transactions. Yet, commercial disputes are unavoidable as commercial activities are basic in any human community. The rise in international commercial activities has also culminated in a rise in commercial disputes both locally and globally. Adjudication has been the most adopted means of dispute resolution over the years. Unfortunately, the courts are becoming more and more congested by the day. In Nigeria, other factors such as strike actions, inadequate funding, uncertainty in administration of justice, among others, have also slowed down the pace of justice dispensation. Also, in international commercial disputes, disputants are often skeptical to submit to foreign jurisdictions. In view of the peculiarities of commercial dispute, the demand for an efficient means of commercial dispute settlement is more pressing than ever. It is a fact that disputants are beginning to adopt other means of dispute resolution other than adjudication and more attention is recently being paid to Alternative Dispute Resolution (ADR). This paper explores adjudication and ADR as mechanisms of disputes settlement and reasons on the future of commercial dispute settlements in Nigerian law and internationally.

Keywords: *Commercial Dispute, Adjudication, Alternative Dispute Resolution, International Commercial Dispute.*

I. INTRODUCTION

Dispute is a fact of life and it is categorically unavoidable in any human community.[3] In the family, workplace, business hub, social gathering and other relations, disputes arise due to different factors.[4] Particularly in the context of commercial transactions, disputes are more likely to ensue. While the term 'dispute' is commonly used, it has no definitive meaning. It has

[1] Author is an LL.M Candidate at Lead City University, Ibadan, Nigeria.
[2] Author is an LL.M Candidate at Lead City University, Ibadan, Nigeria.
[3] A.A Theresa and B.L Oluwafemi "Method of Conflict Resolution in African Traditional Society" African Research Review, Vol 8(2), Serial No. 33 2014 138-157
[4] A.A Muhammed "Inter-group Conflicts and Customary Mediation: Experience from Sudan in African." Journal on Conflict resolution Vol.2, No.2, p.13

 [ISSN 2581-5369]

been defined by authors from diverse perspectives. In legal parlance, a dispute is a conflict or controversy, especially one that has given rise to a particular lawsuit.[5] It is worthy of note that the meaning of conflict transcends lawsuits. Particularly in today's reality, where there are multiples means of dispute resolution. A dispute may be outrightly resolved without instituting any proceeding in court.

Generally, the increase in cross-border transaction has culminated in a surge in international commercial disputes.[6] Similarly, commercial disputes are increasing locally as a result expanded scope of business transactions. Until recently, the Courts were usually seen as the most formal platform for dispute resolution. It is therefore not surprising that the courts are getting more and more congested thereby resulting in delay in dispensation of justice. There is a natural need to facilitate access to justice and to eliminate, or at least, reduce to the barest minimum, the delay in the dispensation of justice. The reason for this not farfetched. Disputes, when not properly managed, could culminate in a state of anarchy, hence the requirement for efficient means of dispute in any human community. This need is even more pressing with respect to commercial dispute. Whether local or international commercial dispute, unresolved or protracted disputes may result in negative economic and political repercussions, such as strike, international economic sanctions and others.

The general attitude of adopting adjudication as the primary means of dispute resolution is indeed beginning to change. Others techniques of dispute resolution which were formerly seen as only complementary to adjudication are beginning to gain patronage. Today, Alternative Dispute Resolution (ADR) is progressively gaining momentum both locally and internationally. Institutions are continuously emerging to offer alternative dispute resolution services[7], ADR is being offered in tertiary institutions as a whole course of study at different levels of education and nations are amending their laws to foster alternative dispute resolution.[8]

As noted earlier, commercial dispute is of its own kind and therefore requires particular attention. For example, in a dispute over perishable goods, time is of essence, in order to ensure that the course of justice is not defeated. In a maritime dispute, there is no doubt that special skills are required to properly handle same. Aside the nature of the dispute, the value of money

[5] Black's Law Dictionary, 11th Edition, West Publishing Co, 2004

[6] Mahesh Koolwal and Eeshan Atray "International Commercial Arbitration: Resolving International Commercial Disputes And Preserving Business Relationship" Ilkogretim Online - Elementary Education Online, 2020; Vol 19 (Issue 4): pp. 5471-5477

[7] Examples include, The International Centre for Dispute Resolution (ICDR) established by American Arbitration Association in 1996 to administer international arbitration proceedings, WIPO Arbitration and Mediation Center established in 1994 and so on

[8] The High Court of Lagos State Civil procedure Rules 2012 provides for mandatory ADR.

 [ISSN 2581-5369]

or other property involved may also sometimes necessitate settling of the dispute timeously. The current reality of dispute resolution further proves that law indeed is not static.

This paper adopts a qualitative approach in exploring adjudication and ADR and also reasons on the future of commercial dispute resolution both in Nigeria and in international community.

II. METHODS OF DISPUTE RESOLUTION

Traditionally and universally, litigation is the primary way of dispute resolution, until recently.[9] The awareness and promotion of mechanisms of dispute resolution outside the confines of the court have greatly increased today. Moreso, significant attention is now being paid to other mechanisms of dispute resolution collectively referred to as Alternative Dispute Resolution (ADR). As the Supreme Court of Nigeria noted in Eugene Nnaekwe Egesimba v. Ezekiel Onuzuruike[10] parties have the right to determine how to settle their disputes. In the international community, ADR is increasingly being adopted for the settlement of disputes. And it is a requirement under some federal and state laws in Nigeria for parties to try the use of alternative dispute resolution in resolving their disputes as a pre-condition to commencing litigation.[11]

Without a doubt, a good understanding of the types, suitability and benefits of these means of dispute resolution is important to enable parties make informed decisions, especially in the matter involving commercial dispute.

The general means of dispute resolution are;

- Adjudication
- Alternative Dispute Resolution

(A) Adjudication as a means of dispute settlement

Adjudication, more popularly called litigation, is a process of judicially deciding a case.[12] It involves lawsuits or judicial proceedings before a competent court of jurisdiction. Under the Nigerian legal system, adjudication is accusatorial and adversarial in nature.[13] Under this system, the court is advised to be detached from the cases of the disputants and to maintain a neutral stand. In some countries, such as France, Saudi Arabia, Italy and so on, the system is

[9] O.J Olujobi, A.A Adeniji, O.A Oyewumi, and A.E Oyewumi "Commercial Dispute Resolution: Has Arbitration Transformed Nigeria's Legal Landscape?" Journal of advanced research in Law and Economics Volume IX, Issue 1(31), Spring 2018

[1010] (2002) LPELR - 1043 (SC)

[11] Lagos State High Court (Order 25, High Court of Lagos State (Civil Procedure) Rules 2012), the Federal Capital Territory Abuja High Court (S. 259 of the 1999 Constitution of the Federal Republic of Nigeria) and Rivers State High Court, provide for settlement of non-contentious commercial disputes through ADR measures

[12] Black's Law Dictionary, 1th Edition, West Publishing, United State of America, 1990

[13] J.O Asein "Introduction to Nigerian Legal System" Ababa Press Limited 2005 p.7

 [ISSN 2581-5369]

inquisitorial. In such jurisdictions, the court is actively involved in investigating the cases before him.[14]

The place of litigation in dispute settlement cannot be overemphasized. Litigation is the most widely used means of dispute resolution around the world, until recently. It has been used to settle both local and international disputes.[15] Article 2 paragraph 3 of the United Nations Charter implores all members to settle their international dispute by peaceful means in such a manner that international peace and security and justice are not endangered[16]. Part of the efforts to foster peace around the world is the establishment of international courts specially for the resolution of international dispute. These courts attend to international disputes, whether private or public and also local disputes, where appropriate. Some international courts around the world are:

- International Court of Justice.[17]
- European Court of Human Rights[18]
- ECOWAS Court of Justice[19]
- African Court on Human and Peoples' Rights[20]
- International Criminal Court.[21] and so on

Every nation has its own legal system, and the judiciary is an indispensable part.[22] The core of the judiciary is the formal resolution of disputes in the societies. In Nigeria, the primary statute on litigation is the Constitution itself which establishes and provides for the jurisdiction of the major courts in the country. Other important legislations on litigation include the Civil and Criminal Procedures rules of the various courts and other Acts and Laws of the National Assembly and State Houses of Assembly respectively.

Whether in local or international context, litigation is a highly formal means of dispute resolution. Some of the inherent advantages of litigation are discussed below:

a. Litigation is a thorough means of dispute resolution

Litigation is not only formal; it is also a thorough means of dispute resolution. It is generally based on rules and procedures. Litigation requires skill, hence a party or his legal representative

[14] supra
[15] An example of international dispute is Democratic Republic of The Congo V Uganda (2005) ICJ Rep 168
[16] UN Charter
[17] The Headquarters is in Hague, Netherlands
[18] The headquarters is in Strasbourg, France
[19] The headquarters is in Abuja, Nigeria
[20] Established under the African Charter on Human and Peoples' Rights
[21] The Headquarters is in Hague, Netherlands
[22] CFRN, Chapter VII provides for the Judiciary

 [ISSN 2581-5369]

must not only have a case on merit but must also be able to skillfully present the case before the court. For instance, under the Nigerian law, admissibility and relevance of documents is determined based on strict principles of law. It is not sufficient that a document is relevant, it must also be properly presented, with respect to content and form, before it can be admissible. Section 84 of the Evidence Act for example, states the principles for the admissibility of documentary evidence.

b. Litigation can proceed even without the cooperation of the other party

Unlike in other means of dispute resolution where the cooperation of both parties is indispensable for the effective resolution of a dispute, litigation can proceed and can be effectively determined even without the cooperation of one of the parties. For instance, a party may be aware of the existence of a matter against him in the court and decide not to partake in the matter. This may not stop the court in continuing with the matter or giving judgment on the matter, so far essential conditions, such as service of notice, service of pleadings or any other condition stipulated by the applicable law have been complied with. In the case of Macwan Pauls Ltd. V Labayyco Ventures Ltd & Ors[23] the court expatiated on default judgment and observed that default judgment may arise from default of appearance or defense. In essence, even if a party willfully fail to attend a proceeding initiated against him, his lack of cooperation would not prevent the proceeding from taking place.

c. Litigation is broad and permit a wide range of matters

Litigation is almost unlimited in scope. It covers a wide range of special and general matters including but not limited civil matters, criminal matters, commercial disputes, enforcement of fundamental human rights and so on. There are also matters that can also be only be decided by a formal court: such election petition, matrimonial causes, citizenship, tax matters and so on. In such a matter, only the court clothed with jurisdiction can decide a dispute and other means of dispute resolution are excluded by implication. In Esso Petroleum and Production Nigeria Limited & SNEPCO v NNPC[24] the Court of Appeal in Nigeria upheld the non-arbitrability of tax matters in Nigeria. This position is supported by the provisions of the Nigeria Constitution which confers exclusive jurisdiction on the Federal High Court in tax and tax related matters[25]

d. Litigation guarantees a final determination of a dispute

The term "Res Judicata" means final judgment on the merit[26] it is only through litigation that a

[23] (2021) LPELR-52951(CA)
[24] Appeal No. CA/A/507/2012 (unreported)
[25] See CFRN, section 251
[26] Black's Law Dictionary, ibid at 1567

 [ISSN 2581-5369]

matter can be totally laid to rest. Matters resolved by other mean of dispute resolution can subsequently be brought before the court, even if the court would uphold the decision appealed against. However, once the apex court possible in any matter decides on the matter, it becomes res judicata. For instance, the Court of Appeal is the apex court in a governorship electoral dispute in Nigeria, once a governorship election petition comes before this court and the it is decided, such a matter becomes res judicata. No further proceedings can be instituted with respect to that case.

While litigation is quite acceptable, factors such as delay, poor funding of the judiciary, strike actions and others, have continually slowed down the pace of justice dispensation in Nigeria. Also, in international dispute, researchers usually come to the conclusion that parties are reluctant to submit themselves to litigation in foreign jurisdiction[27] This is due to a number of reasons, such as the enforceability of the foreign judgment, difference in legal and cultural practices, uncertainty in the administration of justice and so on. It is common therefore to see parties to an international dispute resort to litigation only as a last resort in international disputes.

(B) Alternative dispute resolution (ADR) as a means of dispute settlement

ADR is an all-encompassing nomenclature used to describe all other means of dispute resolution aside litigation. It is broad and inexhaustible. ADR is so broad that it is practically impossible to discuss all that it entails in a single article. At best, the most widely used means of ADR can be discussed. There is no gainsaying that dispute resolution, through the processes of ADR, has become universally acceptable and is being promoted both in the local and international communities. ADR is fast becoming an inevitable part of dispute settlement mechanisms in the 21st century.[28]

Some commonly used methods of ADR include the following:

- Arbitration

This is a process whereby a dispute arising between two or more parties is settled by a tribunal chosen by them.[29] It involves the voluntary submission of the dispute between parties to a person or body chosen by them for a binding decision. In Nigeria, arbitration means commercial arbitration, whether or not administered by a permanent arbitral institution[30] The primary legislation on Arbitration in Nigeria is the Arbitration and Conciliation Act[31] other landmark

[27] ibid
[28] Albert Fiadjoe "Alternative Dispute resolution: A Developing world Perspective" Cavendish Publishing Limited 2004
[29] Misr (Nig) Ltd. V Oyedele (1996) 2 ALR 57
[30] ACA, s57
[31] ibid

 [ISSN 2581-5369]

rules in international arbitration include, United Nations Commission on International Trade Law (UNCITRAL) Arbitration Rules, The UNCITRAL Model Law, The Geneva Protocol of 1923, the Washington Convention of 1965, The New York Convention 1958, and so on.

One crucial factor in arbitration is that, the decision of the arbitral tribunal is binding.[32] Article 34(2) of UNCITRAL Rules[33] provides that

All awards shall be made in writing and shall be final and binding on the parties. The parties shall carry out all awards without delay.

In other words, an arbitral decision is as binding as the decision of a court and can be so enforced.

Arbitration as a means of dispute resolution can take different forms as dicussed below:

a. Domestic Arbitration

Domestic arbitration is one which is carried out under the domestic law of a country. This type of arbitration is most suitable where the parties are either citizens or residents of the relevant country or where the cause of action arises in that country or the subject matter of the arbitration proceedings is in that country. In Nigeria, the primary legislation on arbitration is the Arbitration and Conciliation Act[34] example of prominent case submitted for domestic arbitration under the Nigerian law include IPCO (Nigeria) Limited v Nigerian National Petroleum Corporation[35]

b. International Arbitration

International arbitration does not necessarily mean that the parties involved are citizens of different countries. Rather, the subject matter extends beyond the border of a country or parties themselves have agreed to submit to rules of international arbitration.[36] The subject matter of international arbitration may one which is to be performed in more than one country. It is however worthy of note that international arbitration occurs mostly between states and corporations.

c. Ad hoc Arbitration

This type of arbitration is set up after a dispute has risen. There is no previous agreement to submit to arbitration, however parties decide to opt for arbitration after a dispute has risen. Ad

[32] ACA S51
[33] 2021
[34] Cap A18 Laws of the Federation of Nigeria (LFN) 2004
[35] [2017] UKSC 16 On appeals from: [2015] EWCA Civ 1144 and 1145
[36] See The International Solution to International Business Disputess, ICC Publication No 301 (1977), 19 (copyright ICC 1983)

 [ISSN 2581-5369]

hoc arbitration is common in disputes involving individuals.

In ad hoc arbitration, the parties make arrangements for selection of their arbitrators, the designation of rules, applicable law, procedures and administrative support.[37] Where the parties exhibit cooperation and commitment to amicable settlement, ad hoc proceedings can even be more flexible, cheaper and faster than an arbitration proceeding administered managed by third party institution.

d. Institutional Arbitration

Institutional arbitration is one in which arbitration proceedings is organized, managed and supervised by an already established arbitration institution.[38] This type of arbitration is commonly used in international disputes. Some of the prominent international arbitration institution include World Intellectual Property Organization (WIPO)[39], International Chamber of Commerce (ICC)[40], The International Centre for Settlement of Investment Disputes[41] London Court of International Arbitration (LCIA)[42], American Arbitration Association (AAA)[43] and so on

- Conciliation

This procedure involves the use of independent person or person appointed by the mutual consent of parties to bring about the settlement of dispute by consensus or other persuasive means. Conciliation is usually carried out by a governmental or administrative body in Nigeria.[44] Except where conciliation arises as a legal requirement, the consensus of the parties is the basis for appointing conciliators. Unlike in arbitration where the arbitral decision is binding, the decision in conciliation is only persuasive.[45] The proceedings in conciliation are similar to arbitration proceedings, however, a conciliator only facilitates settlement between parties. The terms of settlement are based on the consensus of the parties[46]

The relevance of conciliation in dispute settlement is recognized international. In December

[37] Edlira Aliaj "Dispute resolution through ad hoc and institutional arbitration" Academic Journal of Business, Administration, Law and Social Sciences IIPCCL Publishing, Tirana-Albania Vol. 2 No. July 2016
[38] Edlira Aliaj "Dispute Resolution Through Adhoc and Institutional Arbitration" Academic Journal of Business, Administration, Law and Social Sciences, Tirana-Albania Vol. 2 No. 2 July 2016
[39] WIPO is a specialized agency of the United Nations created in 1967
[40] ICC was founded in 1919, the headquarters is in Paris, France
[41] ICSID was established in1966. It is a multilateral and specialized institution specialized in legal dispute resolution for international investors
[42]LCIA is a world leading arbitration institution headquartered in London
[43] AAA is a not-for-profit organization providing arbitration services. It is headquartered in New York
[44] This is particularly so when conciliation arises as a legal requirement. Such as the requirement under s8 and 9 of the Nigerian Trade Dispute Act Cap T8, LFN 2004
[45] See ACA, section 42S
[46] Ujwala Shinde "Conciliation as an Effective Mode of Alternative Dispute Resolving System" IOSR Journal Of Humanities And Social Science (JHSS), Volume 4, Issue 3 (Nov. - Dec. 2012), PP 01-07

 [ISSN 2581-5369]

1980,

The General Assembly of the United Nation adopted Rules of Conciliation through a Resolution. It also recommended the use of the Conciliation Rules in international commercial dispute. The model law prepared by United Nations Commission on International Trade Law (UNCITRAL), on International commercial Arbitration has been adopted by most countries. Similarly, the International Chamber of commerce (ICC) has promulgated the ICC Rules of optional conciliation in which rules are set out for the amicable settlement

- Mediation

This a voluntary process whereby a third party assists two or more parties, with their consent, to prevent, manage or resolve a conflict by helping them to develop mutually acceptable agreements[47] The mediator first meets with the parties separately and then brings them together to work out a settlement for themselves. The mediator has a general duty to understand the context of conflict, the actors are; the larger context and sources of power and leverage.[48] He can neither suggest the terms of settlement to the parties nor compel them to reach a settlement. In Nigeria, the Judiciary has greatly encouraged parties to use mediation in various aspects like family disputes, construction disputes, disputes between shareholders in company matters and disputes relating to building management.[49] Moreso, judges are being trained in Mediation processes and court rules are being amended to accommodate mediation processes.

Mediation is a leading means of dispute settlement in United States. The country has a separate agency, known as the Federal Mediation and Conciliation Service (FMCS)[50], focused primarily on mediation. FMCS has become reputable for preventing disruptions in the flow of interstate commerce through efficient mediation services.[51] Although mediation has no binding force, however the FMCS has demonstrated that even persuasive techniques of mediation are constructive and productive in commercial disputes settlement.

- Negotiation

This is perhaps the cheapest and most flexible mechanism of ADR. Unlike other ADR mechanisms, negotiation does not require the participation of any third party. Parties come

[47] United Nations Guideline for Effective Mediation (2012) p.4
[48] Amy L. Smith and David R. Smock "Managing a MEDIATION PROCESS" United States Institute of Peace Washington, D.C. Handbook 2008
[49] On Monday 29th March 2021, the President of the Court of Appeal officially launched the Court's Mediation Center.
[50] The (FMCS) was created by the Labor Management Relations Act, 1947 (29 U.S.C. 172).
[51] See Federal Mediation and Conciliation Service Fiscal YEAR 2021 Performance and Accountability Report (PAR) available on https://www.fmcs.gov/wp-content/uploads/2021/12/FMCS-2021-PAR-002.

together themselves to settle their dispute amicably.[52] This can be done directly by the parties or indirectly through their representative. No strict procedures are required, parties determine their own processes and procedures. It is however important that the negotiated agreement be reduced into writing.

Harry, Thomas and Alexander(2015)[53] described a 3-level circle procedure for a typical negotiation. That is:

a. Early Stages: This is the initial stage of a traditional negotiation where parties develop their respective cases and proposals for settlement.

b. Middle Stages: this is where parties meet together to give serious considerations to the different proposals. Parties may adopt different techniques based on the desired goal. The Best Alternative to Negotiated agreement (BATNA) and the Worst Alternative to Negotiated Agreement (WATNA) prepares and guide the parties' approach to negotiation processes.

c. Final stages: This is where parties come to conclusion. Negotiation may terminate at the point where parties are unable to reach reasonable conclusions. On the other hand, where parties are able to reach a consensus, they would put their agreement into writing, and this makes it binding on the parties.

- Mini-Trial

In a mini-trial, a third party who is often a former judge or individual versed in the relevant law is the individual who oversees a minitrial. The disputants present summaries of their cases before the judge who determines the merit of each case. The rationale behind a minitrial is to educate parties about the merit of their cases. With this, they can be better prepared to successfully engage in settlement discussions. A third party who is often a former judge or individual versed in the relevant law is the individual who oversees a minitrial. That judge (former judge) is responsible for explaining and maintaining an orderly process of case presentation and usually makes an advisory ruling regarding a settlement range, rather than offering a specific solution for the parties to consider.[54]

[52] Mnookin, Robert, "Alternative Dispute Resolution" (1998). Harvard Law School John M. Olin Center for Law, Economics and Business Discussion Paper Series. Paper 232.

[53] Katz, Harry C., & Kochan, T. A., & Colvin, A. J. S. (2015). The negotiations process and structures [Electronic version]. In Labor relations in a globalizing world (pp. 79-101). Ithaca, NY: ILR Press, an imprint of Cornell University Press. Retrieved [insert date], from Cornell University, ILR School site: http://digitalcommons.ilr.cornell.edu/articles/1040

[54] See US Legal "Mini-Trial Distinguished from other forms of ADR" available on https://arbitration.uslegal.com/mini-trials/mini-trials-distinguished-from-other-forms-of-adr/

III. NATURE OF COMMERCIAL DISPUTE

The term 'commercial' means all relationship of a commercial nature[55] It involves the supply or exchange of good and services, for considerations determined by the parties. Simply put, commercial dispute is a dispute resulting or accruing from commerce or exchange[56] Commercial dispute is indeed of its own class. Commerce is inherently complex[57] and often times, it requires ample understanding, skills and experience to proffer adequate resolution. While some types commercial transactions are basic, others could be quite complicated, requiring more skills and understanding. For instances, ordinary buying and selling in a grocery shop may not be as complicated as a transaction involving a hire purchase agreement or an international agreement for transfer of technology. It follows also, that commercial disputes sometimes become complex. It is on this basis that the resolution of commercial dispute sometimes requires an ample understanding of the sphere of commerce involved, the tradition and practices and such other relevant factors.

With respect to the parties, commercial disputes usually involve a blend of people, whether locally or international[58] The reality of globalization, liberalization of markets, bilateral and multilateral agreements, has opened more windows for commercial interactions, and invariably, greater potential of commercial disputes. Locally and internationally, men of different descents, upbringing and beliefs have commercial dealings. And with the help of the internet, accessibility today is almost unlimited. There is perhaps little or no limitation in commercial transactions all over the world. This further makes an effective commercial dispute resolution technique sine qua non for greater economic growth and peace among nations of the world.

As commerce is an essential aspect of a nation's growth, an efficient means of commercial dispute settlement is crucial to unlocking economic potentials of a nation[59] Moreso, when investors are assured of efficient means of settlement of dispute at all times, their confidence would increase and thus contributing to a nation's economic growth through increased foreign investments.

The nature of commercial dispute can be summarized as follows:

- Commercial dispute is sui generis

[55] Arbitration and Conciliation Act (ACA), cap A18, LFN 2004 S57
[56] The Black Law Dictionary defines commercial as "resulting or accruing from commerce or exchange"
[57] Peter Fenn "Commercial Conflict Management and Dispute Resolution" Spon Press 2012
[58] H.I Ugorji and L.C Opara "Arbitration in Place Of Litigation For The Settlement Of Commercial Disputes In Lagos Nigeria: A Discourse." Commercial Law Journal, November 2020
[59] ibid

 [ISSN 2581-5369]

The term "sui generis" is a Latin phrase which connotes "special kind"[60] it also means peculiar or special. It is commonly used in some commercial transaction such as intellectual property transactions, bailment, technology transactions are others[61] The existence of multiple and diverse statutes governing different aspect of commercial transaction further underscores its peculiarity. In Nigeria, some significant statutes on commercial transaction include Sales of Good Act 1893[62], Hire Purchase Act[63], Statute of fraud 1677, Companies and Allied Matters Act[64] and so on. With respect to international commerce, prominent treaties exist in form of Free Trade Area (FTA)[65], Economic Partnership Agreement (EPA)[66], Preferential Treaty Agreement (PTA) and so on. The General Agreement on Tariff and Trade is a cogent multi-national commercial treaty in international commerce. Even after its succession by the World Trade Organization, the original text of GATT is still operative under the WTO framework.[67]

- Efficient Settlement of commercial dispute is key to sustainable Investment Environment

The existence of an efficient means of dispute settlement is at the core of international commercial transaction. [68]. Saad Ahmad (et al)[69] in recent research concluded that there is a link between the inflow of Foreign Direct Investment and settlement of dispute. It was found that when International Investment Agreements (IIAs) contain provisions for Investor-State Dispute Settlement (ISDS), they tend to increase the likelihood of FDI more than when IIAs does not contain any ISDS provisions. Also, in Bilateral and Multi-lateral Trade Agreements, dispute settlement is always regarded as sacrosanct, even as nations encourage trade liberalization. Among other, the World Trade Organization Dispute settlement system captures the Provision of "security and predictability to the multilateral trading system" as its main objective. These agreements do not call for resolution of commercial disputes but also expeditious resolution. Part of the efforts towards expeditious resolution is the establishment of special court, tribunals

[60] Black's Law Dictionary, ibid at 1734
[61] Moni Wakesa "What Is Sui Generis System Of Intellectual Property Protection?" The African Technology Policy Studies Network, Kenya
[62] The Sales of Goods Act is a Statute of General Application which has been adopted in Nigeria
[63] Cap H4, LFN 2004
[64] Act No.3 2020
[65] The African Continental Free Trade Area (AFCFTA) is an example of prominent FTA
[66] An example of EPA is the EU-ECOWAS Economic Partnership available at https://data.consilium.europa.eu/doc/document/ST-13370-2014-ADD-1/en
[67] See the World Trade Agreement Series
[68] See WTO's "Understanding On Rules And Procedures Governing The Settlement Of Dispute" available on www.wto.org/dispute
[69] Saad Ahmad, Ben Liebman and Heather Wickramarachi "Disentangling the Effects of Investor-State Dispute Settlement Provisions on Foreign Direct Investment" EConomics Working Paper Series 2, Office of Industry and Competitiveness Analysis, U.S. International Trade Commission, 2022 available https://www.usitc.gov/publications/332/working_papers/alw_isds_itcwp.pdf

 [ISSN 2581-5369]

or other bodies which deal with certain commercial disputes. In Nigeria, the Federal High Court and the National Industrial Court for examples are special courts in industrial and labour matters, and commercial transaction in at the central of this.[70] Matters involving custom and excise duties, export duties foreign exchange, bill of exchange and so on are brough before the Federal High Court and matters such as settlement of investment dispute, matters arising from free zone in the federation or any part thereof as well as other industrial matters are brough before the National Industrial Court. In the international community, the International Center for Settlement of Investment Disputes (ICSID) plays a crucial role in resolving investment disputes as may be submitted to it. The recent African Continental Free Trade Area also contains ample provision on dispute settlement which incorporating adjudication and alternative Dispute resolution.[71].

- It may become complex and thus requiring skills and experience

With respect to special courts and tribunals for instance, some of the requirement sometimes include years of cognate experience or considerable knowledge in the area of specialization of the court or tribunal. For example, section 254B of the Nigerian constitution provides that a person shall not be qualified to hold the office of a President of the National Industrial Court unless he has been so qualified to practice as a legal practitioner in Nigeria and has been so qualified for a period of not less than ten years and such a person must possess considerable knowledge and experience in the law and practice of industrial relations and employment conditions in Nigeria.

- Commercial dispute settlement can be domestic or international.

Commerce is connecting factor for people and nations around the world. Commercial disputes can therefore arise between nationals among themselves or between nationals and non-nationals. This makes it sacrosanct for nations on their own and the international community as a whole to ensure adequate means of dispute settlement. This is no doubt, crucial to the sustaining peace and progress, both locally and internationally.

IV. INTERNATIONAL COMMERCIAL DISPUTE

The world War I[72] and World War II[73] were two major events in the history of globalization.

[70] See The Constitution of the Federal Republic of Nigeria, sections 251 and 254 on the Federal High Court and National Industrial Courts.
[71] See Protocol On Rules And Procedures On The Settlement Of Disputes under AFCFTA
[72] See John Mueller "Changing attitudes Towards war: The Impact of the First World War" British Journal of Political Science, Vol 21, Issue 1,p 1-28
[73] Walzer Michael World War II: Why Was This War Different? *Philosophy & Public Affairs*, Vol 1, Autumn 1971, p 3-21

Aside the physical destructions caused by the wars, the economic damage, particularly as experienced by Europe, Asia and America cannot be overemphasized. Among other things, nations began to see for themselves the necessity for peace, economic growth and general development. This realization contributed significantly to the establishment of some crucial international bodies to maintain this common cause. Some of such international institutions with primary commitment to economic goals are the International Monetary Fund (IMF), International Bank for Reconstruction and Development (succeeded by the World Bank), International Trade Organization (ITO) later replaced by General Agreement on Tarff and Trade (GATT) and World Trade Organization (WTO).[74] Others are the United Nations, International Court of Justice, the World Bank and so on. By Article 1(2) of the United Nation (UN) Charter, the UN commits itself to achieving international cooperation in solving international problems of an economic. Article 38 of Statute of the International Court of Justice (ICJ) stipulates that the court shall have the function of deciding in accordance with international law such disputes as are submitted. The Permanent Court of Arbitration[75] is another institution committed to the resolution of disputes among nations. There are also different other institutions which have subsequently emerged and are committed to economic goals. Since the gradual reconciliation of nations around the world, economic activities have continually increased. Through international trade and cross-border exchanges of goods and services, the rebuilding and reviving the world economies have been significantly achieve and today international commerce is a crucial strategy of economic development.[76]

Consequent to these international commercial activities is a surge in international commercial dispute[77] The need for expeditious resolution of international commercial dispute is more pressing than ever. Among others reason, the political and economic tension international commercial disputes are indeed undesirable. It is worth of note that the world is not unprepared for this. There are various international institutions which have been established with the primary purpose of resolving international commercial disputes. Also, most international agreement, especially on trade and commerce usually include the method of dispute settlement.

(A) Settlement of international commercial dispute

The settlement of international commercial dispute is indeed crucial to maintaining sanity in the

[74] These bodies are commonly referred to as the Bretton Wood Institutions.
[75] PCA was established in 1899 under the Hague Peace Convention
[76] Sen Sunanda "International Trade Theory and Policy: A Review of the Literature" Levy Economics Institute Working Papers Series No. 635, November 2010. Available at SRN: https://ssrn.com/abstract=1713843 or http://dx.doi.org/10.2139/ssrn.1713843
[77] Andrew Zagartzb "Resolution of International Commercial Disputes: Surmounting Barriers of Culture Without Going to Court" Ohio State Journal of Dispute Resolution Vol 13:2, 1998

 [ISSN 2581-5369]

sphere of international commercial activities. Interestingly, unlike in domestic commercial dispute where litigation is mostly adopted, arbitration has been the most widely adopted method of resolving international commercial dispute[78] The reasons for this are not farfetched. First, the different countries that may be involved may have entirely different legal systems. The uncertainty and unpredictability of the outcome under domestic legal system sometimes accounts for why disputants are skeptical to summit to litigation in a foreign country. Also, international courts do not usually entertain individuals as parties before them.[79] These factors naturally facilitate greater use of arbitration in international commercial dispute

It is thus not surprising that even though there are currently many international institutions offering arbitration service, more and more organizations are still emerging. For example, the New York International Arbitration center (NYIAC) was established in 2012, the Shanhai International Arbitration Canter (SHIAC) was established in 2013, Astana International Financial Centre was established in 2018, the international Arbitration center was established in 2019.

It is worthy of note that the use of arbitration, although prevalent, does not prevent the use of other means of dispute resolution. In fact, the recently decided the cases of Certain Property (Liechtenstein v. Germany) and Frontier Dispute (Burkina Faso/Niger) by International Court of Justice bothered on restitution of commercial properties and commercial activities in border region respectively.[80] Hence, the use of other means of dispute resolution are still very active.

V. THE FUTURE OF COMMERCIAL DISPUTE RESOLUTION

The future of commercial dispute resolution, without doubt, rest on the means of dispute resolution which is more efficient, more timeous and more flexible. According to Andrew Sagartz[81], litigation is the least appealing method of resolving international commercial disputes. As also stated in World Bank index, a key factor in economic growth is the "ease of doing business", part of which, arguably, is the effective resolution of commercial dispute.[82]. Among others, the advantages of ADR include the following:

- It is cost-efficient

[78] Bobette Wolski "Recent Developments In International Commercial Dispute Resolution: Expanding The Options" Bond Law Review, Vol. 13 [2001], Iss. 2, Art. 2
[79] See the Statute of International Court of Justice
[80] See Summaries of Judgment, Advisory Opinions and Orders of the International Court of Justice 197
[81] Andrew Sagartz "Resolution of International Commercial Disputes: Surmounting Barriers of Culture Without Going to Court" Ohio State Journal on Dispute Resolution [Vol. 13:2 1998]
[82]Andreas Baumgartner "Commercial Dispute Resolution: Unlocking Economic Potential Through Lighthouse Projects" available on Brill.com

Some ADR mechanism are quite cheap to undertake. For instance, where parties adopt negotiation or mediation as the means of dispute resolution, they tend to spend less than when they opt for litigation, which is mostly undertaken on their behalf by lawyers. The mediator need not be a professional, and since he does not make decisions for parties, parties can agree on a person well respected by them to facilitate their dispute resolution. This will no doubt help them to reduce cost.

- It protects confidentiality

Cout trials are generally public in nature.[83] Litigation does not protect confidentiality; it is mostly a public hearing. On the other hand, ADR enable parties to protect their confidentiality by having a private procedure not usually conducted in the public.

- Helps to preserve relationships

The preservation of business relationships is one of the primary reasons parties pt for ADR in dispute resolution. The adversarial legal system naturally put parties to a dispute in an 'win-lose' position, where each party tries to win the matter by all means. In ADR the primary focus is not usually to win necessary, but to resolve dispute efficiently. It can be a win-win for both parties.

- It is flexible

ADR is flexible. Parties by themselves decides matters such as the procedure, the time frame, the third party to be involved and so on. ADR is party-friendly

- It is less formal than court proceedings

The Court are strictly guided by laws, rules and procedure. Litigation is therefore a strictly formal means of dispute resolution. ADR on the other hand is less formal, rules are procedure are at the mercies of the parties, because parties can decide which rules they want to be applicable or otherwise. It enhances private sector development by creating better business environment[84]

On the other hand, parties to commercial dispute are becoming increasingly dissatisfied with respect to the cost, time and effort required in resolving dispute in the court. Litigation is generally known to be rigid, costly and time consuming. For example, the popular case of Madukolum v Nkemdilim[85] took six (6) years before the final decision was given by the

[83] Section 36 of the Nigerian Constitution provides for public hearing of matters before the Courts.
[84] Alternative Dispute Resolution Center Manual: A Guide for Practitioners on Establishing and Managing ADR Centers. The World Bank Group 2011
[85] (1962) FSC

 [ISSN 2581-5369]

Supreme Court of Nigeria. This was a dispute over land and payment of rent. Perhaps, it would have taken a shorter period and lesser effort if parties adopted an alternative means of dispute resolution.

As the reality of the inadequacy of the courts system alone to cater for the need of commercial disputants began to dawn on everyone, both the local and international communities are beginning to take steps to encourage the use of ADR. Various UN bodies have endorsed the use of mediation and arbitration for the resolution of commercial disputes. The United Nations Commission on International Trade Law (UNCITRAL) has promulgated model laws for domestic adoption and adaptation of UN member states. Also, the International Chamber of Commerce (ICC) rules[86] include model contract language for commercial arbitration in international and domestic markets. Bilateral trade and investment treaties and free trade agreement are also creating an international legal context and even new ADR mechanisms[87]

In Nigeria, the primary statute with provision on ADR is the Constitution of the Federal Republic of Nigeria[88] Section 19(d) provides for "respect for international law and treaty obligation as well as the seeking of settlement of international disputes by negotiation, mediation, conciliation, arbitration and adjudication". Although, this provision is not justiciable on its own, together with other statutes and international treaties, it can become justiciable. Other such statutes include Arbitration and Conciliation Act[89] Federal High Court Act[90] Consumer Protection Council Act[91] Industrial Inspectorate Act[92] Trade Disputes Act[93] All these provides for a method of ADR before a final resort to litigation.

The provision the of High Court of the Federal Capital Territory, Abuja Civil Procedure Rules 2004 Order 17(1) is quite authoritative. It provides

A Court or judge, with the consent of the parties, may encourage settlement of any matter(s) before it, by either (a) Arbitration; (b) Conciliation (c) Mediation; or (d) any other lawfully recognized method of dispute resolution

Indeed, ADR is the order of the day.

VI. CONCLUSION

[86] ICC "INCOTERMS 2000," has been endorsed by UNCITRAL
[87] WTO's Dispute Settlement Body is also promoting ADR.
[88] CFRN 1999 as amended
[89] ibid
[90] Cap. F12, LFN 2004
[91] Cap C25, LFN2004
[92] Cap. I8, LFN2004
[93] Cap. T8, LFN2004

 [ISSN 2581-5369]

It is clear from the aforesaid that the benefits associated with alternative dispute resolution constitute the reason for the recent momentum ADR is gaining. In an era of increased globalization and commercialization, the need for another efficient means of dispute resolution outside the court is more pressing than ever. The trends in both the local and international communities have also proved this further. ADR therefore holds the future of commercial dispute resolution. Perhaps the Nigerian judiciary is becoming more aware of this and thus the effort by the judiciary to accommodate and foster ADR processes. Judges are being trained on ADR procedures. International bodies are also working in synergy to promote the use of ADR. Finally, it is worthy of note, that ADR is not a replacement of adjudication. Parties would still have to resort to the courts where ADR proves abortive. Moreover, not all disputes can be settled by means of ADR. It is clear however, that ADR has come to stay.

*****

 [ISSN 2581-5369]