JICAM
JANADA INTERNATIONAL CENTRE FOR ARBITRATION & MEDIATION

NEWLETTER VOL 3, NUMBER 1 ISSN NO: 2672-4294

i-Resolve

JANADA INTERNATIONAL CENTRE FOR ARBITRATION AND MEDIATION (JICAM) HOLDS MAIDEN EDITION OF ITS INTENSIVE ARBITRATION TRAINING PROGRAMME

A cross-sectional view of training faculty among whom are Chief Joe-Kyari Gadzama, OFR, MFR, SAN, C.Arb, Prof. Paul Idornigie, SAN C.Arb and Mrs. Diane Okoko, FCIArb, the General Manager, Mr Samuel Fagade, MCIArb and participants on Day 1 of the JICAM Arbitration training 2022.

Janada International Centre for Arbitration and Mediation (JICAM) on 8th and 9th April, 2022 held its maiden edition of its 2-day hybrid intensive Arbitration training programme aimed at educating trainees on the rudiments and key elements of Arbitration as well as setting the course for a career pathway in Alternative Dispute Resolution(ADR). The training programme was anchored by the JICAM Governing Council/Faculty Members: Hon. Justice Ibrahim Auta Rtd (OFR) (Chairman, Governing Council), Chief Joe-Kyari Gadzama SAN, OFR, MFR, C.Arb, (Chairman, Board of Trustees), Prof. Paul Obo Idornigie SAN, C.Arb, FNIALS, Mrs Diane Okoko FCIArb (UK), Prof. Ike Ehiribe C.Arb, QDR, Dr Fidele Masengo PhD and Mr Samuel Fagade Esq, MCIArb (UK) (Registrar, Governing Council).

FROM THE GENERAL MANAGER'S DESK

SAMUEL KAYODE FAGADE, ESQ. MCIArb. (UK)

An industry shift is upon us in the legal profession! Many clients are getting disillusioned with the time wasting and win-lose risks posed by litigation. More clients are seeking viable alternative dispute resolution mechanisms that save time and dispense justice to aggrieved parties. Based on this growing demand for Alternative Dispute Resolution (ADR) methods, it has become expedient to begin to prepare budding lawyers and practicing lawyers alike to embrace this positive disruption. There is an urgent need to hone the alternative dispute settlement skills of legal practitioners, thereby expanding the career scope of lawyers to accommodate Arbitration and Mediation as time effective avenues for dispute settlement.

The two-day intensive training programme **(ARBITRATION 1.0 Cohort 1)** held at the aesthetic Hon. Justice S.M.A. Belgore Conference Hall, JICAM, was organized to awaken the consciousness of lawyers, law students, entrepreneurs and other industry stakeholders to the need to build competency in the realm of ADR. Two main things the training succeeded in achieving were to inculcate in every participant the need to explore ADR as a viable means of resolving dispute and the need to develop the skill set required for effective alternative dispute resolution.

The training programme commenced with an opening session facilitated by Prof. Paul Idornigie SAN, C.Arb. entitled, **Background to Arbitration – General Overview.** Mrs Diane Okoko FCIArb (UK) anchored the second lecture: **Appointment, Jurisdiction & Powers of the Arbitrator.** The following day Prof. Ike Ehiribe delivered a lecture on **Preliminary Meetings and Interlocutories,** while Prof. Idornigie SAN, C.Arb delivered a lecture on **Setting out the Case prior to the Hearing and Essentials of an Award.** Dr Fidele Masengo PhD (General Secretary, Kigali International Arbitration Centre) wrapped up the training by speaking on Costs and Interests. Participants could testify that it was indeed an outstanding and insightful training experience. Certificates of Participation were awarded to all participants and the training programme closed with a tour of the Centre. We thank all participants and Board members for coming.

Prof. Idornigie, SAN, C.Arb addressing the participants

Training participants having lunch in the JICAM food court

Mrs Diane Okoko FCIArb addressing training participants on Day 1 of the Maiden JICAM Arbitration training

Prof. Idornigie, SAN, C.Arb presenting certificate of participation to training participant

Training participants led on a tour of JICAM facility by the General Manager/ Host, Mr Samuel Fagade MCIArb

Group photograph with training faculty Prof. Idornigie, SAN, C.Arb and General Manager JICAM, Mr Samuel Fagade MCIArb

FEEDBACKS FROM PARTICIPANTS

"The training was educative and insightful. As expected, I learnt a great amount of what I believe to be the basic essentials of arbitration"

- Okoh Michael

"It was a very rich training with first class experts in the field of Arbitration. I learnt a lot and I am highly motivated. It was a time well spent."

- Martina Kukah

"I like the fact that experienced professionals cared to share their wealth of experience with us at such a low price. More importantly, it wasn't a boring theoretical session. Life experiences were told and words that our generation can easily understand and flow with were used especially by Prof. Idornigie. The cheerful mood of the speakers is very heartwarming. The host is also very approachable too."

- Justina Lysias Pepple

"The training was extremely insightful and educative. I almost feel like a chartered arbitrator."

- Ufuoma Phoebe

"It was a wonderful training and presentation"

- Nwadike Chisom

WATCH OUT FOR

ARBITRATION 2.0

BECOME A MEMBER AT JICAM

MEMBERSHIP BENEFITS

When you join the Janada International Centre for Arbitration and Mediation (JICAM) Centre, you will gain access to some of the finest and world's most competent and experienced alternative dispute resolution (ADR) professionals. You will be joining a truly global institution.

JICAM is committed to promoting ADR and the benefits it brings to society and economies across the world. We support our members at every step of their ADR career journey offering:

- Opportunities to build skills and achieve career goals through learning, mentorship and insightful publications.
- Opportunities to connect and network at events and discussion forums.
- A voice for our members, representing the profession on the key issues when it counts.
- Guidance to help our members adapt as the world changes and ensure ADR practice reflects the society and environment it represents.

Here are just some of the advantages of becoming a JICAM member:

- Build your network through our international and inclusive community of members
- Develop your career, knowledge and skills through JICAM's:
- professional certifications and ongoing learning, delivered by experienced practitioners.
- global events, from webinars and seminars through to lectures and conferences.
- mentoring programme, connecting experienced practitioners with aspiring ADR professionals.
- Unlock eligibility to join the illustrious JICAM Panel of Neutrals
- Promote your skills and experience through JICAM's Membership Directory and by submitting papers for publication in our academic journal
- Keep up-to-date with industry news and views through:

-i-Resolve: our newsletter publications
-i-Settle: our quarterly online magazine
-Pronto-Arbitration: The Journal of International Arbitration, Mediation and Dispute Management

THOUGHT LEADERSHIP

- Creating a better standard of ADR practice through our conferences and events, training courses and discussion groups
- Regular electronic and hardcopy newsletters: Members will receive ADR related news on the development and application of international commercial arbitration and also within Nigeria and West Africa. A forum will be provided to publish Members' papers for peer review Arbitration journal - peer reviewed papers on the latest academic thinking in ADR
- Media liaison - raising the profile of the Centre, its members and ADR PROFESSIONAL SUPPORT
- Free advice on all aspects of arbitral law and practice Online Library - access to archived copies of the JICAM Arbitration Journal, summaries of the training events and newsletters
- Courses - education for those seeking to refresh ADR knowledge and skills

Membership application fee is ***$100*** while the annual Membership subscription fee is ***$50 for individual category; $100 for corporate entities (or up to 4 persons in a group).***
Membership is valid for twelve (12) months after payment of membership fees has been confirmed
Account Name: Janada International Centre for Arbitration and Mediation
Bank Name: Zenith Bank
DOLLAR: 5070942258 **SWIFT CODE:** ZEIBINGLA **NAIRA:** 1015987689

ADMISSION REQUIREMENTS FOR THE JICAM PANEL OF INTERNATIONAL AND DOMESTIC ARBITRATORS/MEDIATORS.

1) Admission to the JICAM Panel of Arbitrators/Mediators shall be by invitation by the JICAM Governing Council as advised by the, Board of Trustees, Management or Panel Convening Committee upon a duly supported application presented to JICAM.

2) Other prospective Candidates who are capable of satisfying the requirements listed in Clause 3 below, are welcome to forward an application for panel listing to the General Manager, JICAM.

3) Candidates wishing to apply must demonstrate by credible and verifiable evidence an appropriate level of expertise and experience in international and or domestic arbitration/mediation and shall be of good standing and character certified by the professional body of the respective candidate's primary profession. At the very least, prospective Candidates will be required to satisfy the minimum standards as listed in the below paragraph.

4) All Candidates in any event shall forward such applications with the following qualifications and or experience namely:

a) A tertiary education to first degree level;

b) At least 10 years post - qualification experience;

c) At least Fellowship from the Chartered Institute of Arbitrators based in London or any comparable professional arbitration/mediation institution; (For Mediators - evidence of certification and accreditation following a forty –hour training programme)

d) Experience as an arbitrator/mediator in five or more cases

e) Evidence of at least two commercial arbitral awards/ case scenarios completely anonymised; and

f) Two references from either a Judge of the High Court of Justice and above and or an arbitrator of at least Fellowship status;

g) Copy of current identification document with passport photograph; and

h) All professional certificates and or relevant documents must be evidenced by duly notarised/ certified copies.

5) JICAM reserves the right, in its discretion to admit or refuse the admission of any Candidate to the Panel applied for. In the exercise of its discretion JICAM shall have due regard for the prospective Candidate's qualifications, experience, knowledge and the number of arbitrators/mediators currently on JICAM's Panel of arbitrators/mediators.

6) Admission to the Panel is for a fixed term only. Any subsequent renewal shall be subject to satisfactory payment of specified subscriptions. JICAM also reserves the right in its absolute discretion to remove any

Candidate from the Panel at any time and to renew the panel enrolment for another term subject to satisfactory proof of CPD requirements.

7) All prospective Candidates shall complete and send the application form, accompanied with an up to date curriculum vitae (CV) highlighting essential parts of the CV that demonstrates the appropriate level of arbitration/mediation experience as aforesaid for the Panel or Panels applied for.

8) All prospective Candidates must clearly indicate whether the application is for the international Panel or Domestic Panel or both. In the event that a prospective candidate intends to apply for both the international and Domestic Panel of Arbitrators or Mediators, one of the anonymised arbitral awards or case scenarios specified in Clause 3(e) and 3(d) above must be the outcome of an international dispute and or case scenario.

9) All prospective Candidates' applications shall also be accompanied by a non-refundable processing fee of USD 200.00 or the equivalent in NGN at the prevailing exchange rate plus VAT at the prevailing rate and addressed to the General Manager JICAM at Plot 1805, Damaturu Crescent by Kado Way off Ahmadu Bello Way, P.O. Box 20304 Garki 2 Abuja, FCT Nigeria or to the email address at enquiries info@jicam.org.

10) Payment of the above fees can be made by cheque, bank deposit or bank transfer to the following bank account:

Account Number: 1015987689
Account Name: Janada International Center for Arbitration and Mediation.
Bank: Zenith Bank Plc

PDF format of the JICAM admission requirements can be accessed online via this link:
http://jicam.org/index.php/admission-requirements

Access to Justice: Exploring the Use of Alternative Dispute Resolution (ADR) Systems

By

Prof Paul Obo Idornigie, SAN, PhD, FCIArb (UK), FCIS (London)

Head, Department of Commercial Law

Nigerian Institute of Advanced Legal Studies Abuja, Nigeria

Introduction

I would like to thank the Administrator, National Judicial Institute (NJI) for giving me this opportunity to share my thoughts on this topic. I would also like to thank the NJI for the theme of this Workshop – Promoting Judicial Performance Through Innovations and Reforms. With colonial rule came the English-type court system. Prior to colonial, we had our indigenous methods of resolving conflicts that focus on settlement and reconciliation or mediation or conciliation rather than adjudication. These traditional systems are still in use in rural communities today. However, it has become clear world-wide that not all disputes are amenable to the judicial process of litigation.

It is not that there is something wrong with litigation per se but the judicial process tends to transform social, political and economic disputes to legal disputes. Not only are some problems ill-suited to a proper or full resolution through the adversarial process, the process may accentuate and exaggerate the conflict rather than resolve it. Thus the search for alternatives or appropriate dispute resolution processes can be seen as a search to properly locate adjudication and in particular judicial adjudication on the continuum of dispute resolution mechanisms instead of regarding it as the principal means.

In this presentation, we do not intend to delve into conceptual and jurisprudential polemics as to what is (or is not) Alternative Dispute Resolution (ADR) but adopt a working definition. Our position is strengthened by the fact that in almost all High Court (Civil Procedures) Rules today, there is provision for either reference to arbitration or adoption of the ADR processes. More fundamentally, evaluation of judicial performance now takes it account cases disposed off by using the ADR processes. Even for Legal Practitioners, the Application Forms for elevation to the status of Senior Advocate of Nigeria (SAN) also include cases disposed off through the ADR processes.

There is no doubt that ADR processes can eliminate delays in courts and reduce the heavy burdens of the judges. However, there are challenges. The judges, the lawyers and parties must make deliberate effort to make the processes work. All the parties involved in the processes must appreciate how they work and learn to abide by outcomes from the processes. Availability of information technology has also enhanced the processes.

In this presentation, we shall focus on access to justice and explore ways of determining which dispute resolution mechanism is to be adopted for a particular dispute. In other words, how to establish a nexus because a dispute and a process and determine which is most appropriate. We will also briefly examine the components/contours/ landscape of ADR.

Access to Justice

The literature on 'Access to Justice' is legion. For the purpose of this presentation, I will focus on the reforms in the United Kingdom. The late 1990s saw the civil justice system in the UK go through enormous revolution on a scale not seen since the great reforms of the 1870s. This again was in response to the perceived need for fundamental change, highlighted with unanswerable persuasiveness by Lord Woolf's monumental work, **Access to Justice** [Interim Report 1995 and Final

Report 1996] and then implemented in a remarkable short time by the Civil Procedure Rues (CPR) 1998 and the Access to Justice Act, 1999. These changes represented not merely a consolidation and a rationalisation of a messy system but truly a change in the culture of litigation itself.[1]

As the Lord Chancellor in 1998, Lord Irvine of Lairg, said in his foreword to the CPR: **'We should see litigation as the last and not the first resort in the attempt to settle a dispute'** and he confirmed the intention of the CPR by noting '. . . **the changes introduced in April [1999] are as much changes in culture as they are changes to the Rules themselves'**.

We in Nigeria, also expect our judges to change in culture as the rules of procedure change. For instance, where a party fails to mediate or arbitrate in circumstances where these processes are the most appropriate but opt for litigation, the successful party can be denied costs in situations where costs ought to be awarded.

Lord Woolf took the view that the basic principles that should underpin an accessible civil justice system are that it should be:

- **just** in the results delivered;
- **fair** and seen to be so, by ensuring equal opportunity to assert or defend rights, giving adequate opportunity for each to state or answer a case, and treating like cases alike;
- **proportionate**, in relation to the issues involved, in both procedure and cost;
- **speedy** so far as reasonable;
- **understandable** to users;
- **responsive** to the needs of users;
- **certain** in outcome as far as possible;
- **effective** through adequate resources and organization.[2]

The aim of the reform in the United Kingdom was to change the whole approach to civil litigation from a wasteful adversarial mind-set to one focusing and encouraging settlement rather than trial of disputes. **The overriding objective of the CPR is active case management. This will enable the court to deal with cases justly**. This, in turn, ensures equal footing for parties, saving expense, dealing with cases proportionately in terms of the amount involved, dealing with cases expeditiously and fairly and optimally allotting the court's resources.

Similarly **actively managing cases** involve encouraging the parties to cooperate with each other in the conduct of the proceedings, identifying issues early and dealing with them promptly, **encouraging the use of alternative dispute resolution and facilitating the use of such procedure**, helping parties to settle the whole or part of a case and fixing timetables or otherwise controlling the process of the case.

Lastly the CPR introduced three more related concepts which have revolutionized thinking and practice over strategy, timing and tactics among litigators, namely,

- **Pre-action conduct** – this gives the courts powers to make orders for costs as a more effective incentive for responsible behavior and a more compelling deterrent against unreasonable behavior.
- **Pre-action protocols** – gives guidance as to what best practice is before proceedings are issued – what alternative is better than litigation and if any, parties to agree on the form to adopt bearing in mind that litigation should be the last resort.
- **Pre-action offer to settle** – offers to settle, dealing with both monetary and non-monetary proposals can be made before issue of proceedings by any party, and which, if not accepted, can have adverse costs and interest consequences for the offeree.

With the reform in the UK, there is serious pressure on parties to consider settlement through ADR or before court proceedings are issued.

Alternative Dispute Resolution (ADR)

Alternative Dispute Resolution (ADR) has assumed centre stage as a dispute resolution mechanism. Paradoxically, writers and scholars are divided on what exactly the acronym means[3]. First, there are

jurisprudential and conceptual questions as to whether it is alternative to litigation or mediation or settlement or conciliation or reconciliation. Secondly, there is also the issue of whether the acronym includes 'arbitration'. Thirdly, what is the philosophy behind ADR? Lastly there is the issue of what the letters in the acronym stand for. Thus what does letter "A" in the acronym stand for? Does it stand for 'alternative', or 'appropriate' or 'amicable'? If it stands for 'alternative', the next question is alternative to what? Is it alternative to litigation or settlement?

Karl Mackie and Others posited that as a field, ADR evolved for differing motives and with different emphases and that:

> ……the most common classification is to describe ADR as a structured dispute resolution process with third-party intervention which does not impose a legally binding outcome on the parties. Mediation is the archetypal ADR process falling within this classification.[4]

This clearly excludes 'arbitration' because arbitration imposes a legally binding outcome on the parties. We submit that from a Eurocentric perspective, that the letter "A" is alternative to litigation. This was alluded to by Blake, Browne and Sime[5] thus:

> The term 'alternative dispute resolution' or 'ADR' does not have an agreed definition. … There are also debates as to whether the term 'alternative dispute resolution' should be used at all. Options are only really 'alternative' if the use of litigation is seen as the norm, but statistics show that most cases settle rather than going to court for decision, so that settlement rather than litigation is actually the norm. Also many cases use a mixture of court procedure and ADR rather than relying solely on one 'alternative'. For such reasons it has been argued that it may be more accurate to talk of 'appropriate dispute resolution'. Rather than be drawn into such debates, we take the pragmatic view that 'ADR' is a term generally accepted as covering alternatives to litigation. ..

However, the learned authors of the ADR Principles and Practice have now changed their position thus:

> It is now widely accepted – including by the authors of this work – that arbitration, contractual adjudication and other forms of dispute determination by a third party are also forms of ADR. The view that ADR is (or should be) alternative to all forms of third party determination and should embrace only non-adjudicatory processes is no longer seriously propounded.[6]

From an Afro-centric view, it is alternative to settlement and not litigation. Despite the controversy, it would seem therefore that ADR now has an inner core of settled applications and a fringe of unsettled applications. Within this inner core include, negotiation, mediation, conciliation, mini-trial or executive tribunal, structured settlement conference, med-arb, expert evaluation and non-binding appraisal. The fringe will include all of the above and arbitration. However, for the purpose of this presentation, we will include 'arbitration' as part of ADR.

Reform of the High Court (Civil Procedure) Rules

The older High Court (Civil Procedure) Rules have always provided for reference to arbitration. However, most if not all High Court (Civil Procedure) Rules now provide for Arbitration and ADR.[7]

Although most states have reformed their High Court (Civil Procedure) Rules, I have found a challenge imposed either by the Arbitration Law of the State or the High Court Law of that State. It is noteworthy than other than Lagos State, all other states of the Federation are still applying the Arbitration Law of 1914. The provisions of this Law are replicated in the various High Court Laws. For instance under the High Court Laws,

- ✓ there is special case for the opinion of the court
- ✓ court may modify or correct an award
- ✓ court may make order as to costs
- ✓ court can remit award for reconsideration

These are not arbitration friendly provisions. The level of interference by the courts should be as discussed below and as provided in section 34 of the Arbitration and Conciliation Act.

Since 2006, there has been a Uniform Arbitration and Conciliation Bill. It is this bill that Lagos State passed into the Arbitration Law, 2009 and other states have failed to do. We hereby urge all states to update and reform their arbitration laws as well as the High Court Laws.

Akin to this is whether ADR should be made mandatory or optional. In the Preamble to the Lagos State High Court (Civil Procedure) Rules, they have made ADR mandatory. Globally there is no consensus on this, that is, whether to make ADR optional or mandatory.

The Arbitration and Conciliation Act has provided for references to courts without indicating the procedure to be adopted – by way of motion on notice of ex parte application. The Federal High Court Rules have done very well in this regard. It is hoped that all other Rules of Court will provide for the procedure to apply for the reliefs sought under the Arbitration and Conciliation Act.

Arbitration

Arbitration is a private form of adjudication outside the court system, in which the parties can select the arbitrator or arbitral tribunal and in which the procedures are intended to be less formal and more flexible than those of the litigation. The consequence of this agreement is that the arbitral award will be final, binding and conclusive.

Arbitration starts by way of a private agreement between the parties which can be concluded any where; continues by way of private hearing which can also be conducted anywhere but ends with an arbitral award that has public consequences. This is so because an arbitral award is enforced like a court judgment. The private agreement can be a clause in a contract or a separate agreement. The arbitral proceedings are usually regulated by Arbitration Rules[8]

Arbitration is anchored on fundamental principles -

- ✓ Principle of party autonomy,
- ✓ Principle of arbitrability,
- ✓ Principle of separability,
- ✓ Principle of judicial non-intervention and
- ✓ kompetenz-kompetenz

Clearly the determination of the jurisdiction of the arbitral tribunal is not a matter that the Nigerian courts have jurisdiction over. The maxim is: competenz-competenz. Thus any initial jurisdictional challenge should be addressed to the arbitral tribunal and not the court. It is when a ruling or award is made and a party is aggrieved that an application can be made to the court to set aside the award on the grounds that the arbitral tribunal lacks jurisdiction. This is very clear in section 12(1) of the ACA which provides thus: **"An arbitral tribunal shall be competent to rule on questions pertaining to its own jurisdiction and on any objections with respect to the existence or validity of an arbitration agreement"**.[9] Similarly, in section 12(3) and (4) of the ACA, when such jurisdictional challenge is raised, the arbitral tribunal has a choice between ruling on the objection as a preliminary question or in an award on the merits and such ruling shall be final and binding. Courts cannot, therefore, compel the arbitral tribunal to give the ruling.

Arbitration also has significant features

- ✓ The agreement to arbitrate – the foundation stone (note investment treaty and statutory arbitration)
- ✓ May be a clause or a submission agreement; may be ad hoc or institutional
- ✓ Form of agreement – in writing
- ✓ Formalities, confidentiality and privacy
- ✓ Choice of arbitrators – distinguishes arbitration from litigation. Consider number, method of appointment, qualification, challenge procedure, role of court

- ✓ The decision of the arbitral tribunal – distinguishes arbitration from mediation – final, binding, conclusive and generally non-appealable but can be set aside
- ✓ Technical evidence
- ✓ Grounds for setting aside
- ✓ Enforcement of the award, procedure and correction of award
- ✓ Costs

Role of Judges/Courts

In the 80 jurisdictions that have adopted the United Nations Commission on International Trade Law (UNCITRAL) Model Law on International Commercial Arbitration[10], only 5 did not list the issues on which court assistance is required. The usual matters requiring court's assistance are:

a) Section 2, ACA – Arbitration agreement irrevocable except by agreement or leave of court.
b) Sections 4 and 5, ACA – Stay of Proceedings – what are the conditions precedent? Is the grant mandatory or optional?
c) Section 7, ACA – Appointment of Arbitrators – what is the exact role of the court in this regard? Is the decision of the court appealable?
d) Sections 9 and 10, ACA – Challenge of Arbitrators/Failure or impossibility to act.
e) Section 13, ACA – Interim measure of protection.
f) Section 23, ACA – Power of court to order attendance of witness.
g) Sections 29 and 48, ACA – Application for setting aside an arbitral award – what are the grounds under section 29 and 48?
h) Section 30, ACA – Setting Aside in case of misconduct by arbitrator and removal of an arbitrator – what amounts to misconduct?
i) Sections 31 and 51, ACA – Recognition and enforcement of award – what must be exhibited?
j) Section 52 ACA - Grounds for refusing recognition and enforcement[11]

In the Analytical Commentary on the Model Law[12] it was stated that the effect of the provision is **"to exclude any general or residual powers given to the courts in a domestic system which are not listed in the model law"**. In addition to the advantage of providing clarity of law, which is particularly important for businessmen especially foreign investors, the provision is meant to accelerate the arbitral process in allowing less of a chance for delay caused by dilatory court proceedings.

In Cetelem v Roust[13], the Court of Appeal (English) held that this provision is ***'intended to ensure that the powers of the court should be limited to assisting the arbitral process and should not usurp or interfere with it'***. It is a well established principle of English law that section 1(c) of the English Arbitration Act ***'makes it clear that the general position is that there is no inherent common law jurisdiction of the court to supervise arbitration outside the framework of the Arbitration Act 1996'.***[14]

Unfortunately, the Arbitration and Conciliation Act does not provide for how these applications are to be made – motion ex parte or on notice? This is where the High Court (Civil Procedure) Rules should be reformed to indicate the procedure.

Mediation/Conciliation

In most standard works on ADR, the key area is mediation/conciliation and not arbitration. To be a good mediator, skills in negotiation are relevant. In most texts and jurisdictions, **conciliation and mediation are used interchangeably though mediation has become the preferred term.**[15] Indeed in the UNCITRAL Model Law on International Conciliation "conciliation" is defined as **"a process, whether referred to by the expression conciliation, mediation or an expression of similar import, whereby parties request a third person or persons ("the conciliator") to assist them in their attempt to reach an amicable settlement of their dispute arising out of or relating to a contractual or other legal relationship"**.[16]

Sometimes mediation is understood to involve a process in which the mediator is more pro-active and evaluative than in conciliation but sometimes

the reverse usage is employed. The common feature between the two is that the resolution of disputes is by consensus and is entirely a decision of the parties and not of the third party neutral, i.e. the conciliator or mediator.

In both cases, a neutral is appointed by the parties. The neutral's role involves assisting the parties, privately and collectively, to identify the issues in dispute and to develop proposals to resolve me. **Quite unlike an arbitrator, the mediator/conciliator decides nothing and awards nothing**. Consequently, the mediator/conciliator is not bound to observe the strict rules of natural justice. **In carrying out his functions, he is like a shuttle diplomat: he "caucuses".**

The settlement of a dispute usually starts with negotiation. It is when this fails that mediation is adopted. Mediation is not only a flexible process but offers more opportunities beyond the exchange of money or other tangible things. **Because it focuses on the needs and interests of the parties, feelings, egos and business considerations are given prominence in the settlement process**. In Nigeria, the legal instruments regulating mediation/conciliation of commercial disputes is the Arbitration and Conciliation Act[17] and the various High Court Laws.

Mediation can be used for the following:

a) Civil and Commercial Matters
b) Divorce and Family Matters
c) Neighbourhood and Community Matters
d) Industrial Matters
e) Environmental Matters
f) Restorative Justice – mediation in criminal matters – victim/offender mediation

Role of Courts - One striking difference between mediation and arbitration is the fact that there is no express provision for intervention by the domestic court in the case of mediation.[18] However, the settlement agreement can be the basis of litigation.

One of the major potential disadvantage of mediation is the possibility that the time and money spent in the proceedings will be in vain if the parties do not reach a settlement. **We submit that the attractiveness of this process would be greatly increased if a settlement reached during the proceedings would have executory force so that a party to the settlement would not be compelled to litigate in order to achieve what has been agreed upon. One way of obviating this difficulty is by making the mediator an arbitrator so that the arbitration proceedings will be limited to recording the settlement in the form of an arbitral award on agreed terms as provided in** Article 34(1) of the UNCITRAL Arbitration Rules[19].

We further submit that our laws be amended so that such settlements reached are enforceable by treating them as an arbitral award on agreed terms. Fortunately Article 14 of the UNCITRAL Model Law on International Commercial Conciliation provides that an enacting state may insert a description of the method of enforcing agreements or refer to provisions governing such enforcement. This has been done in states where we have Multi-door Courthouses or ADR Judges. In such situations, the settlement is registered and enforceable like a court judgment.

Negotiation

Jurisprudentially, negotiation is not an ADR process. However whoever is involved in ADR processes must be very conversant with theories of negotiation and skills, strategies and styles involved in negotiation. This is so because negotiation is a process involving discussions, concessions, compromises, communications, persuasion and bargaining. **It is a process in which the parties to the dispute meet to reach a mutually acceptable resolution. In Successful Negotiation**;[20] it is defined as "the process we use to satisfy our needs when someone else controls what we want". **Thus negotiation normally occurs because one has something the other wants and is willing to bargain for it**. To be effective, the parties should be willing to change their positions as a consequence of the negotiation.

Negotiation can be done by the parties themselves or through representatives. The representatives are not neutrals but negotiate with one another. The parties retain power to agree on terms but when representatives are used, the parties have little control over the process although they have control over the outcome. Generally negotiation involves giving up something in order to get

something in return. It is usually the first stage in the dispute resolution process. One fundamental attribute of the ADR paradigm is that it is consensual. It also empowers the powers to control the process and outcome – depending on the process adopted. In this presentation, I do not intend to go into the Theories of Negotiation.

Other Dispute Resolution Mechanisms

These include:

a) **Evaluation –** Independent neutral makes an evaluation of the case, usually its merits or some aspect, which is not binding on the parties but helps them in their decision-making.

b) **Early Neutral Evaluation -** a form of evaluation in which the neutral evaluator makes an early assessment of the merits to help parties narrow and define issues, also helps promote efforts to settle. If it is court-annexed, it seeks to reduce pre-trial costs and delay by requiring the parties to confront the strengths and weaknesses of their cases at an early stage through the assistance of a skilled neutral. Early neutral evaluation combines elements of mediation and non-binding court-annexed arbitration.

c) **Neutral Fact-Finding Expert –** Neutral expert is appointed by the parties to investigate issues of fact, technicality or law, produces a report, helps towards settlement and if agreed, the report may be used in adjudication.

d) **Mini-Trial (Executive Tribunal or structured settlement negotiations) –** Lawyers for the parties present their cases to a panel comprising the parties and a neutral. The neutral helps clarify the issues and evaluate the merits, and may also have a mediatory role. No binding determination is made, but the process helps the parties evaluate realistically. The goal is for the parties to reach a mutually satisfactory resolution. Mini-trials are tailored to the needs of the participants and many embody a number of dispute resolution processes. The parties can agree that the opinion of the neutral will be binding or merely advisory. Thus neutrals can act as mediators or arbitrators.

e) **Med-Arb –** begins as mediation. If the parties do not reach an agreement, they proceed to arbitration which may be performed either by the person who mediated or by another. This process is subject to the consent of the parties.

Concluding Remarks

ADR is not a new phenomenon. It is a confluence with many tributaries. However, it has assumed prominence in dispute resolution mechanisms. For the mechanisms to work, the parties – the judges, lawyers and users should appreciate how the various methods work. On the part of the judges, they should manage cases actively and urge parties, where appropriate, to adopt any of the ADR processes.

States are urged to reform their High Court Laws and pass the Uniform Arbitration and Conciliation Laws. This will pave the way for the further reform of the High Court (Civil Procedure) Rules. It is recommended that in reforming the rules, the procedure for applying for all the various reliefs in the Arbitration and Conciliation Act should be provided for. The rules cannot be reformed if the laws have not been reformed. I do not intend to delve into the controversy as to whether 'arbitration' is on the Exclusive or Concurrent Legislative List.

We are not advocating that litigation should be abandoned. What we are saying is that parties to a dispute and their lawyers should know the best 'door' to take. They should know when to go to or out of court.

Where it is clear to judges that a matter could have been mediated or arbitrated and a party refuses to

adopt any of these mechanisms, costs should be denied where they ordinarily ought to be given.

I will end this presentation by posing a question – what is the effect of the Limitation Laws on the ADR processes (Arbitration, Mediation/Conciliation /Negotiation)? Do the processes stop time from running?

Thank you for your attention.

END NOTES

[1] Karl Mackie & Others *The ADR Practice Guide: Commercial Dispute Resolution* (3rd Edn, Tottel Publishing, 2009) 3

[2] Karl Mackie & Others ibid at 55

[3] Susane Blake, Julie Browne and Stuart Sime *A Practical Approach to Alternative Dispute Resolution* (2nd edn, Oxford University Press 2011) 5.

[4] Karl Mackie and Others (n1) 8. See also Kehinde Aina, *Dispute Resolution* (NCMG International and Aina Blankson LP) 2012; Kehinde Aina, *Commercial Mediation: Enhancing Economic Growth and Courts in Africa* (NCMG International and Aina Blankson LP) 2012; P O Idornigie 'Re-thinking Business Disputes Resolution: The Mediation/Conciliation Option' in *Ambrose Alli University Law Journal, Vol. 1, 2002 No. 1, 48; P O Idornigie 'Overview of ADR in Nigeria' in Arbitration: The International Journal of Arbitration, Mediation and Dispute Management,* Vol 73, No. 1, February 2007 73; and P O Idornigie 'Alternative Dispute Resolution Mechanisms' in A F Afolayan and P C Okorie (eds) *Modern Civil Procedure Law* (Dee-Sage Nigeria Limited 2007) 563.

[5] Blake, Brown and Sime (n 3).

[6] Brown & Marriott (n 4) 2.

[7] See the Preamble and Order 3, Rule 11 of the Lagos State High Court of Lagos State (Civil Procedure) Rules, 2012; Order 17 of the High Court of the Federal Capital Territory, Abuja (Civil Procedure) Rules, 2004; Order 29 of the High Court of Delta State (Civil Procedure) Rules, 2009 and Order 52 of the Federal High Court Rules, 2009

[8] See the London Court of International Arbitration, Arbitration Rules of 2014; the International Chamber of Commerce, Arbitration Rules of 2012; the International Centre for Dispute Resolution (a division of the American Arbitration Association), International Dispute Resolution Procedures, 2014; the World Intellectual Property Organisation, WIPO Arbitration Rules, 2014; the Stockholm Chamber of Commerce, Arbitration Rules, 2010; the Vienna International Arbitration Centre, Arbitration Rules, 2013; the Singapore International Arbitration Centre, Arbitration Rules, 2013; the Arbitration Foundation of Southern African, Arbitration Rules and Clauses, 2014; the Institute of Arbitrators & Mediators, Arbitration Rules, 2014; the ADR Institute of Canadian (ADRIC) Arbitration Rules, 2014; he UNCITRAL Arbitration Rules, 2010; the London Maritime Arbitrators Association, The LMAA Terms 2012; and the Court of Arbitration for Sports, Court of Arbitration for Sport Rules, 2012.

[9] See *Statoil (Nig) Ltd v NNPC* (2013) 14 NWLR (Pt 1373) 1 and *Nigerian Agip Exploration Limited & Anor v NNPC* (Unreported CA/A/628/2011), Judgment delivered on 25 February, 2014. Cf *The Shell Petroleum Development Company of Nigeria Limited v Total E & P Nigeria Limited & Anor* (Unreported CA/L/331M/2015, Judgment delivered on 21 December, 2015

[10] Peter *Binder International Commercial Arbitration and Conciliation in UNCITRAL Model Law Jurisdictions* (3rd ed, London: Sweet & Maxwell, 2010) pp 538-539

[11] All the sections are those in the Arbitration and Conciliation Act (ACA).

[12] United Nations document A/CN.9/264, Art 5, para.2

[13] (2005) 1 WLR 3555 at 3571. See also the position of the House of Lords in *Lesotho Highlands v Impreglio SpA, per Lord Wilberforce* (2006) 1 AC 221 – 'it has given to the court only those essential powers which I believe the court should have'.

[14] David St John Sutton *and Others, Russell on Arbitration* (21st edn Sweet & Maxwell 2003) 345

[15] In the case of industrial relations, 'conciliation' is a preferred term. See section 7 of the Trade Disputes Act, Cap T14, Laws of the Federation of Nigeria, 2004

[16] See United Nations General Assembly Document No. A/RES/57/18 of 24 January, 2003 (hereinafter referred to "the UNCITRAL Model Law on International Commercial Conciliation"). It should be noted that the National Assembly will have to pass the Model Law into law before it becomes operative. What is today the Arbitration and Conciliation Act was also derived from the UNCITRAL Law on International Commercial Arbitration, UN Document No. A/40/17 of 11 December 1985

[17] See sections 37-42 and 55 of the Arbitration and Conciliation Act and the Conciliation Rules set out in the Third Schedule to the Act . See also Orojo J O and Ajomo (n 3) 336

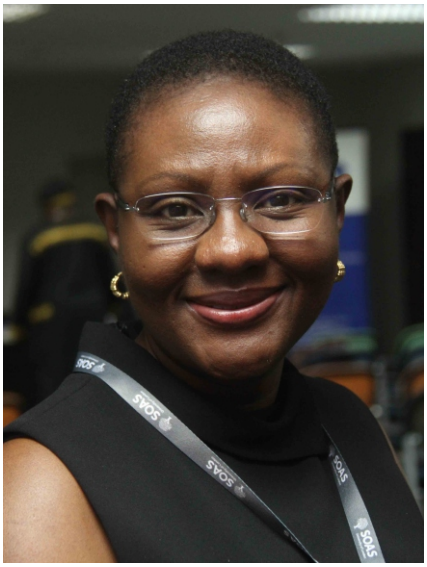
[18] See section 34 of the Arbitration and Conciliation Act which gave limited empowers to domestic courts to intervene in arbitral proceedings

[19] See also Arbitration Rules, 1st Schedule to the Arbitration and Conciliation Act

[20] Maddeux R *Successful Negotiation* (2nd Edn, 1999) p 5. See also Halpern A *Negotiating Skills* (London: Blackstone Press Ltd, 1992) p 3

NEWLY APPOINTED NEUTRALS

The following were appointed to join the JICAM Panel of Neutrals in 2022:



Prof. Emilia Onyemma, FCIArb, SFHEA

Emilia Onyema is Professor of International Commercial Law at SOAS University of London. She is qualified to practice law in Nigeria, as a Solicitor in England & Wales and Fellow of Chartered Institute of Arbitrator. She teaches international commercial arbitration and international investment law; convenes the SOAS Arbitration in Africa conference series; and leads the Arbitration in Africa biennial survey research project. She co-published the African Promise and founded the Arbitration Fund for African Students charity. In her arbitration practice, she has experience as presiding, co and sole arbitrator in international commercial arbitration.

Mrs. Chinwe Uwandu, FCIArb, FICMC Dipl.Carb.

Chinwe Philomena Uwandu retired from the service of the Federal Government of Nigeria in January 2020. In the course of her career as a Government Legal Advisor, she counseled the Federal Republic of Nigeria, its Agencies, and Overseas Missions on a diverse and complex range of legal issues. She also represented Nigeria at bilateral and multi-lateral meetings at sub-regional, regional, and international levels, and participated in the negotiation and preparation of bilateral and multi-lateral treaties, and other agreements.

NOTABLE PROVISIONS IN THE JICAM ARBITRATION RULES, 2020

- The Rules govern both Ad hoc and institutional arbitration – Preamble

- Unless parties have agreed on an appointing authority, JICAM shall act as the appointing authority – Article 8 (2)

- Where it is impracticable to hold an oral hearing, the tribunal, with consent of the parties, may conduct a virtual hearing. If a party unreasonably withholds consent to conduct a virtual hearing, the arbitral tribunal is empowered to order for a virtual hearing – Article 35 (5)

- There is an expedited procedure for resolving disputes which ensures the timely resolution of disputes – Article 33 and Appendix 2

- A party in need of urgent preservatory and/or special measures prior to the Constitution of an arbitral tribunal may make an application to the General Manager of JICAM for such measures and the appointment of an emergency Arbitrator – Article 9

- Place of arbitration includes a virtual place- Article 22 (4) (b)

PDF format of the JICAM Arbitration Rules can be accessed online via this link: http://jicam.org/index.php/rules-law/arbitration-rules

OUR SERVICES

1. Appointing Authority
2. Fund Managers
3. Hearings
4. Secretarial/Administrative Services
5. Case Management
6. Video Conferencing (Cisco Webex/Zoom, etc.)
7. Transcription
8. Recording Services
   (360 Systems' New Instant Replay2, Networked Digital Audio, 1000 Audio Cuts at your fingertips, Instant Sound Effect, Instant Music)

OUR FACILITIES

1. Hearing Rooms
2. Conference/Seminar Hall
3. Arbitrators' Retiring Room
4. Claimants'/Respondents' Meeting Rooms
5. Waiting Room/Lounge
6. Food Court (The Dome)
7. Library/Resource Room
8. Individual HP pro display desktop for Tribunal Secretary/Registrar
9. Wireless tabletop microphones
10. Interactive Digital Display Screen
11. Projector Screen
12. Shelving units
13. High Speed Internet Connection/WiFi
14. 18-Seater Bus
15. 24-Hours CCTV
16. Spacious car park with security

Contact Us

Plot 1805, Damaturu Crescent By Kabo Way, Off Ahmadu Bello Way, Garki II, Abuja, FCT, Nigeria.

+234 (0) 805 663 9921
+234 (0) 901 425 8316

info@jicam.org

Management

Samuel Kayode Fagade, MCIArb. (UK)
General Manager
+234 (0) 708 888 4995

@JicamCentre
@JICAM

Hearing Room

Board Room

Waiting Room/Lounge

Library/ Resource Room

Arbitrators' Retiring Room

Conference Hall

Food Court (The Dome)

Mediation Room

TESTIMONIALS

Awesome place, great service. Very friendly and helpful staff. We had no regrets using the facility and we will definitely be back. Mr. Dem Livingstone was especially helpful and friendly, he deployed his technical abilities with diligence. He is really great at what he does.

- Ife Olaleye

It is a good start with the belief that it will improve with time.

JICAM is a top-notch arbitration and mediation centre with a beautiful and cosy ambience, comfortable facilities and state of the art equipment. I find the centre very ideal for seasoned activities like arbitration and mediation proceedings. I love the house-keeping and security arrangements. The staff are courteous and very helpful. I shall certainly be glad to use JICAM Premises in future. Thank you.

- Mrs. Chinwe Uwandu

The facility is cosy and convenient for mediation meetings and any other similar events.

The customer support was satisfactory as they attended promptly to requests.

- Jerry Akaazua

The centre is well organized

- Mrs. Omotere Eva

JICAM GOVERNING COUNCIL

Hon. Justice Ibrahim N. Auta, OFR, FCIArb. (Rtd)
Chairman, JICAM Governing Council

Chief Joe-Kyari Gadzama, OFR, MFR, SAN, C.Arb.
Chairman, Board of Trustees

Prof. Paul Idornigie, SAN, PhD, FCIS, FCIArb, C.Arb. (UK)
Member, JICAM Governing Council

Prof. Ike Ehiribe, FCIArb, C.Arb, QDR
Member, JICAM Governing Council

Mrs. Diane Okoko, FCIArb. (UK)
Member, JICAM Governing Council

Dr. Masengo Fidele, FCIArb. (UK)
Member, JICAM Governing Council

African Arbitration Association Conference
12th-14th October, 2023

International Bar Association Conference
29th October- 3rd November, 2023

ICC Africa Annual Conference
1st-2nd June, 2023

JICAM Arbitration 2.0
August 2023