THE IMPERATIVE OF MINI-TRIAL IN THE RESOLUTION OF DISPUTES IN THE NIGERIAN TELECOMMUNICATIONS INDUSTRY

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ABSTRACT

The world has truly become a global village, and a necessary tool for this is communication, of which telecommunication is a key facilitator. Consequently, stakeholders in the telecommunications industry (which include the government, industry regulator, service providers, and users of telecommunications services and facilities) have engaged themselves in several activities. Consumers complain about inadequate services, while the industry regulator frowns at operators' non-compliance and violations of regulations guiding telecommunications operations. Service providers are always at loggerheads over interconnectivity indebtedness. These are issues necessitating legal and regulatory frameworks for dispute resolution mechanisms in the industry. The government has enacted laws. Besides, the industry regulator has also made regulations and guidelines pursuant to the powers conferred upon it by law for the resolution of telecommunications disputes. The cumbersome nature and long process of litigation, with its attendant exorbitant financial commitment, are worrisome. The available Alternative Dispute Resolution (ADR) processes also appear to be inadequate. This article seeks to discuss Alternative Dispute Resolution (ADR) processes recognized by Nigerian law, particularly as provided for in the Nigerian Communications Act 2004 and the Arbitration and Conciliation Act 2004, in resolving telecommunications disputes. ADR processes and the recognized mechanisms in Nigeria are discussed. The article therefore discusses the imperative of the relevance of mini-trials and other ADR processes that are yet to be explored in Nigeria but that are functional, in view of the yawning towards ensuring a practical application of ADR in the Nigerian telecommunications industry.

Key Words: Alternative Dispute Resolution, ADR Processes, Telecommunications, Mini-Trial

INTRODUCTION

The revival and adoption of ADR in Nigeria and in various jurisdictions of the world is a global developmental paradigm shift in the resolution of disputes. It is a fact that in Nigeria a few processes are being used in the resolution of disputes despite the myriad of available ADR processes. Likewise, the lackadaisical attitude of lawyers and the general public is not encouraging enough in strengthening the application and practice of the adopted processes. This has portrayed arbitration and conciliation overstressed.

However, the Nigerian Communications Act[1] makes provisions for dispute resolution processes in the Nigerian telecommunications sector. As it is spontaneous that disputes could ensue between two or more telecommunications operators such as, disputes arising from failure to pay interconnect indebtedness,[2] refusal to allow interconnection,[3] interconnection charges or failure to respect interconnect agreements. It could be between consumers and operators such as disputes arising out of drop calls, inability to recharge, network congestion, billing and rate, defamatory letter demanding for payment of bill, illegal use of telephone line,[4] failure to connect, mast related issues, misleading advert, defective equipment,[5] *et cetera.* It could also be between the operators and regulatory authority, such as disputes arising out of interconnect rate determination,[6] fixing of interconnection pricing in interconnection between dominant operator and competing operators,[7] propriety of issuance of particular licences,[8] determination of compensation payable to subscribers for poor quality of service,[9] failure to comply with

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[1] Of 2003, which is now embodied in *Cap N 97 Laws of the Federation of Nigeria (LFN) 2004*

[2] The Economic and Financial Crimes Commission sometime questioned some operators over billions of interconnect fees allegedly owed to NITEL by other telecommunications operators while other telecommunications operators also alleged that NITEL owed them for interconnection to their respective networks. See Punch Newspaper (Nigeria 05 July, 2005) 36 and Punch Newspaper (Nigeria 16 June, 2005) back page.

[3] By virtue Section 96 of the Nigerian Communications Act and Regulation 1(1) of the Telecommunications Networks Interconnection Regulations 2007, a licensed telecommunications operator is obliged to allow interconnection with other telecommunications operators on terms and agreements.

[4] See *NITEL v Prof. Emmanuel Akande Tugbiyele* (2005) 2 CLR, 87

[5] See Consumer Inquiries and Complaints, published by NCC <htpp://www.ncc.gov.ng/> accessed on 30 August, 2010.

[6] See *NCC v. MTN* (unreported) Appeal No. CA/A/25/2004; *Econet Wireless Nigeria Ltd v. NCC* (2004) 1 TLR, 42, *Econet Wireless Nigeria Ltd v. NCC* (unreported) Appeal NO. CA/A/83/2004, *Econet Wireless Nigeria Limited v NCC* (2004) 1 TLR, 17, *Econet Wireless Nigeria Limited v NCC* (NO.2) (2004) 1 TLR, 24

[7] See *Telecom Corporation of New Zealand Ltd v Clear Communications Ltd* (2004) 1 TLR, 54.

[8] See *Bluechip Communications Co. Ltd v. NCC* (unreported) Appeal No. CA/108/M/2004, *Bluechip Communications Ltd v. NCC* (2004) 1 TLR, 23.

[9] See *Celtel & Anor v. NCC* (unreported) Suit No: FAC/L/CS/909.

regulator's directives,[10] contravention of provisions of the law, rules and guidelines, whether a wholly owned subsidiary of a licensee is bound to obtain separate licence[11] *et cetera*.[12] Disputes could also be between government and operators such as enacting laws which are *ultra vires* or unconstitutional.[13]

This article therefore, looks at the classes of dispute processes, examines the preferred ADR processes in Nigeria and the need to explore the potentials of mini-trial as one of the useful and effective dispute resolution mechanism in the Nigerian telecommunications industry for a just, cheaper and faster resolution of disputes as against the burdensome adversarial litigious process presently obtainable in Nigeria.

AN ANALYSIS OF DISPUTE RESOLUTION PROCESSES

Dispute resolution processes are generally categorized into adjudicatory and consensual or binding and non-binding processes. Moreover, dispute resolution processes either traditional or alternative are categorized into three primary categories as in negotiation, mediation and adjudication.[14] The categorization is not closed,[15] as such it is divided into primary and hybrid processes.[16] However, a careful categorization of ADR thus encompassed primary ADR processes (negotiation, mediation/conciliation and arbitration), the secondary ADR processes (private judging and mini trial) and hybrid processes (expert determination, med-arb, ombudsman and summary jury trial).[17] The list

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[10] See Schedule to Nigerian Communications Commission Enforcement Regulations 2004 http://www.ictregulationtoolkit.org/en/Publication.1354.html accessed on 20 July, 2010.

[11] See *Emtel (Mauritius) Ltd v Ministry of Telecommunications & Ors* (2005) 2 CLR 50.

[12] A person may be liable for fine for non-compliance with the NCC's directives or guidelines.

[13] See *Lagos State Government & 4 Ors v. Registered Trustees of Association of Licensed Telecoms Operators of Nigeria (ALTON)* (unreported) Appeal No: CA/L/769/2007.

[14] Goldberg, Stephen, Eric Green & Frank Sanders, *Dispute Resolution* (Boston/Toronto: Little Brown & Co, 1985), at 7 cited in Henry Brown and Arthur Marriot, *ADR Principles and Practices*, (London : Sweet and Maxwell,1993), p.18, see also Henry Brown and Arthur Marriot, *ADR Principles and Practices*, (London : Sweet and Maxwell, 2nd edn., 1999), pp. 15-16 and Paul Idornigie, "The Role of Arbitration and ADR in Attracting Foreign Investment in Africa," in *Arbitration & Alternative Dispute Resolution in Africa,* edited by C. J. Amasike (Abuja: The Regent Printing & Publishing Ltd, 2005), p. 157.

[15] It was categorized by writers into six as in negotiation, mediation, the judicial process, arbitration, administrative and legislative processes. See Brown and Marriot, *ADR Principles and Practices*, (London: Sweet and Maxwell, 2nd edn., 1999), p. 16.

[16] The primary processes are negotiation, adjudication, mediation or conciliation and Hybrid processes (mini-trial, med-arb, neutral fact-finding expert, early neutral evaluation and court connected arbitration). See Brown and Marriot, *ADR Principles and Practices*, (London: Sweet and Maxwell, 1993), pp. 18-20

[17] Syed Khalid Rashid, *Alternative Dispute Resolution in Malaysia*, (Malaysia: Kulliyyah of Laws IIUM, 2006), pp. 13-14.

is not conclusive as there are other forms of ADR as highlighted elsewhere.[18] An inquiry into the commonly used ADR processes in Nigeria shows that the primary ADR processes are negotiation, mediation/conciliation and arbitration. Though, the recognition of mediation under the Act[19] appears controversial as shown in this paper.

However, the Nigerian Communications Act is the current principal law regulating the telecommunications industry in Nigeria. Other statutory instruments, regulations and guidelines on telecommunications derive their validity from the Act which empowers the NCC to make and enforce subsidiary legislations as may be necessary to give full effect to the provisions of the Act.[20] The Act also empowers the commission to issue directions in writing to any person regarding the compliance or non-compliance with any license conditions or provisions of the Act or its subsidiary legislations.[21] Thus, by Section 73 of the *Act:*

> The Commission shall have powers to resolve disputes between persons who are subject to this Act (**“the parties**”) regarding any matter under this Act or its subsidiary legislation.

The above quoted provision is in the nature of administrative remedy which must first be exhausted before a party can approach a court of law. In the exercise of its powers to resolve disputes between the disputing parties, it is observed that the commission has the unfettered discretion to resort to any ADR process in resolving disputes connected with telecommunications. ADR thus encompasses the following:

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[18] See Susan Patterson & Grant Seabolt, *Essentials of Alternative Dispute Resolution*, (Dallas Texas: 2nd ed., 2001), p. 8-20, see also J. O. Orojo, and M. A. Ajomo, *Law and Practice of Arbitration and Conciliation in Nigeria*, (Lagos: Mbeyi and Associate Ltd., 1999), p. 4.

[19] The Nigerian Arbitration law is known as the Arbitration and Conciliation Act, Cap. A18 Laws of the Federation of Nigeria, 2004 (Hereinafter referred to as ACA 2004).

[20]See the combined effect of Sections 4 (1), 70, 99 and 120 of the Nigerian Communications Act. Thus, in exercise of its powers under the Act, the commission issued the Telecommunications Network Interconnection Regulations 2003 which was later repealed by the Telecommunications Networks Interconnection Regulations of 2007, pursuant to Section 99 of the Act; the Universal Access and Universal Service Regulations 2007, pursuant to Sections 70 and 120 of the Act; the Nigerian Communications (Enforcement Processes, Etc) Regulations of 2005 pursuant to Section 70 of the Act; the Interconnection Rate Determination made on 2nd December 2003 with commencement date as 1st January 2004, the Competition Practices Regulations 2007 pursuant to Sections 70 and 100 of the Act .

[21] Section 4 (1) of the Nigerian Communications Act.

RECOGNITION AND APPLICATION OF NEGOTIATION

Negotiation is usually the first process adopted in the resolution of disputes. It is the *primus inter pares* - first among equals.[22] It is the basic form of ADR which has at its core simple talk about a problem with an attempt to reach a resolution.[23] It is the process adopted to communicate on a daily basis either in commerce or everyday life to agree and reconcile a dispute or disagreement[24] that may not need a third party.

It is definitely an indispensable ADR step that is fundamental to all consensual ADR process towards a satisfactory dispute resolution.[25] It is a process used to get what we need that is being controlled by someone else through bargaining.[26] The procedure and the necessary step together with the *modus operandi* to achieve optimal negotiation are discussed elsewhere.[27] Thus, negotiation as a process precedes all forms of dispute resolution (be it ADR processes or otherwise) because it involves discussions, concessions, communications, persuasions, bargaining and compromise[28] in reaching the desired resolution. It therefore offers a social process of joint decision making by the disputants or their representatives. The process is characterized by an exchange of information that produces an acceptable outcome achieved through compromise because realistic options are evaluated in order to arrive at a mutually agreed resolution of a dispute.[29]

The question, whether negotiation is recognized or provided for under the Arbitration and Conciliation Act? Is answered in the negative[30] but the fact remains that negotiation is used as a prelude and it stands at the forefront of dispute resolutions processes. Although the Nigerian Communications Commission (NCC) has powers to resolve disputes arising out of telecommunications services, the law provides that an

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[22] Henry Brown and Arthur Marriot, n. 16 p. 18

[23] Jerome T. Barrett, Joseph P. Barrett, *A History of Alternative Dispute Resolution*, (USA: Jossey-Bass, 2004), p. 1.

[24] Henry Brown and Arthur Marriot, n. 16 p. 18

[25] See further discussion on negotiation approaches and procedure, J. O. Orojo, & M. A. Ajomo, n. 18 pp. 7-9.

[26] Brown and Marriot, n. 16 p. 18

[27] See Ross P. Buckey, "Cross-Cultural Commercial Negotiations" *Alternative Dispute Resolution Journal*, Vol. 6 (1995): pp. 179-186, see also William McCarthy, "In Theory The Role of Power and Principle in Getting to Yes" *Negotiation Journal*, (January, 1985): pp. 59-66, and the views expressed by Roger Fisher , "Beyond Yes" *Negotiation Journal*, (January, 1985): pp. 67-69.

[28] See for this line of argument, Paul Idornigie, n. 14 p. 157.

[29] Bayo Ojo SAN, 'Dispute Resolution Mechanism in the Telecom Sector' *Journal on Communications, Law and Policy* Vol. 1, (2006) p. 2

[30] The recognition of negotiation under the ACA 2004 is uncertain but the Constitution of the Federal Republic of Nigeria 1999 in s. 19 (d), made reference to it in the settlement of international disputes.

attempt shall first be made by the parties to resolve any dispute between themselves through negotiation before the involvement of the commission.[31] In a bid to protect the subscribers of telecommunications network and services and ensure quality of service, the commission also welcomes complaints from subscribers regarding the conduct or operation of licensed telecommunications service providers. In order to achieve this purpose, the commission has the power to:

> establish procedures or guidelines for the making, receipt and handling of complaints of consumers regarding the conduct or operation of licensees and may, in its discretion, institute alternative dispute resolution process for the resolution of the complaints or disputes provided that the licensee's dispute resolution procedures shall first have been exhausted by the consumer without resolution of the complaint before presentation of the complaint to the commission.[32]

Thus, where a complaint is by consumers against a licensee, the complaint will first be lodged and dealt with by the relevant licensee.[33] Where disputing parties are able to settle their dispute amicably, the matter does not go to NCC. But where parties could not settle, the matter is taken to NCC for resolution. Where a complaint is lodged with NCC by a consumer of telecommunications service without initially contacting the operator for resolution, the NCC will forward the complaint to the operator concerned for resolution.[34]However, where the complaint is by one licensee against another licensee for an alleged breach of a consumer code, the complaint will be lodged directly with the NCC and where such complaint is lodged with a licensee without evidence that the complaint has been lodged with the commission as well, the licensee must forward a copy of the complaint to the NCC.[35] In effect negotiation stands out.

RECOGNITION AND APPLICATION OF MEDIATION AND CONCILIATION

Mediation and conciliation are both of long historical antecedents and both processes are used within different traditional settings, specifically, in Asia and Africa

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[31] Section 74(1) of the Nigerian Communications Act.

[32] Section 105 (2) of the Nigerian Communications Act.

[33] See Code 53 of the Nigerian Communications Act General Consumer Code of Practice Regulations 2007.

[34] Ibid. This is otherwise known as consumer complaint. It could be industry complaint where the complaint is made by one licensee against another licensee for an alleged breach of a Consumer Code or complaints by a group representing consumer interests against a licensee. See Code 54 (1) of the Nigerian Communications Act General Consumer Code of Practice Regulations 2007. See also Section 105 (2) of the Nigerian Communications Act.

[35] Code 54 (2) of the Nigerian Communications Act General Consumer Code of Practice Regulations 2007.

with particular reference to Nigeria.[36] Mediation is one of the oldest means of settling disputes in China, Japan, Hong Kong, Singapore and Malaysia.[37] Both are well known dispute resolution mechanisms in most cultures and legal systems.[38] They are practically recognized consensual dispute resolution mechanisms in every community.[39] The two processes complement negotiation with a major dividing line of the presence of either a mediator or a conciliator who facilitates. The decision of the facilitator that acts as mediator or conciliator is not binding on the parties.

It is pertinent to ask whether the two processes are the same and is it so under the Nigerian Law? It should be pointed out from the outset that they are similar going by the different analysis of their form offered by different scholars. It is argued, mediation is the invitation by the parties of a neutral third party to join negotiation without conferring on him any power to impose a solution on the parties. The third party is otherwise known as a facilitating intermediary[40] who cannot make a binding decision[41] but may propose a designed settlement to the parties.[42] Macfarlane pointed out that mediation is a process that aims to facilitate the development of consensual solutions by the parties which is overseen by a mediator (a non-partisan party) having derived his authority from the consent of the parties to facilitate the negotiations. The decision-making power or the legitimacy of the mediator does not exceed what he is afforded by the parties to the mediation.[43] However, conciliation is described as the intervention of a conciliator to build a positive relationship between disputing parties. This involves the resolution of dispute between parties through the assistance of a conciliator (who may take a more proactive role).[44] It is argued that the two processes may be used interchangeably while at the same time used differently. It was observed that:

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[36] Ayinla, L. A., "Alternative Dispute Resolution (ADR) in Nigeria: A Critique of Getting to the Tipping Point," *Confluence Journal of Jurisprudence and International Law*, Kogi State University, Anyigba Nigeria, Vol. 2 (2009): pp. 68-69

[37] Nora Abdul Hak, "Family Mediation in Asia: A Special Reference to the Law and Practice in Malaysia" *IIUM Law Journal* Vol. 15, No. 1 (2007) pp. 121-122.

[38] Holtzmann H., "Dispute Resolution in Europe under the UNCITRAL Conciliation Rules", in *The Peaceful Settlement of International Disputes in Europe* (Hague Academic Workshop, 1990), p. 296, see Amazu A. Asouzu, *International Commercial Arbitration and African States, Practice, Participation and Institutional Development*, (Cambridge: University Press, 2001), p. 15.

[39] J. O. Orojo, & M. A. Ajomo, n. 18 p. 9

[40] Syed Khalid Rashid, n. 17 p. 15.

[41] Brown and Marriot, n. 16 p. 19

[42] Susan Patterson & Grant Seabolt, n. 18 p. 11

[43] Julie Macfarlane, "The Mediation Alternative" *Rethinking Disputes: The Mediation Alternatives,* edited by Dr. Julie Macfarlane, (London: Cavendish Publishing Co., 1997), p. 2

[44] Brown and Marriot, n. 16 p. 272. See also Syed Khalid Rashid, n. 17. P. 4

> Conciliation is a term sometimes used interchangeably with mediation, and sometimes, used to distinguish between one of these processes (often mediation) involving a more proactive mediator role, and the other (conciliation) involving a more facilitative mediator role; but there is no consistency in such usage.[45]

The observation of Holtzmann[46] that the Webster's Unabridged Dictionary[47] includes the word 'mediation' in defining 'conciliation' and uses 'conciliation' to define 'mediation' shows the usage of the two processes interchangeably. It is viewed that mediation and conciliation is used interchangeably and synonymously[48] but it is argued that a fine line of distinction exists between the two in that a conciliator plays a more proactive role, compared to a mediator. As such a conciliator may suggest the best way to settle a dispute to the parties which is not binding on the parties.[49] In the light of the above, there appears an inconsistency in the difference in the two concepts but the consensual nature of the two processes is never in doubt.

It is pertinent to state that in Nigeria under the present ADR regime the word mediation is not recognized or used, otherwise the word conciliation is given recognition. The Arbitration and Conciliation Act specifically provides for the right to settle dispute by conciliation.[50] Besides, the whole of Part II of the Act is devoted to conciliation and as such no mention is made of mediation. It is provided:

> Notwithstanding the other provisions of this Act, the parties to any agreement may, seek amicable settlement of any dispute in relation to the agreement by, conciliation under the provisions of this Act.[51]

It is deducible from the above provision that parties to any agreement may seek amicable resolution of dispute in relation to their agreement by conciliation. It is

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[45] Brown and Marriot, n. 16 p. 19.

[46] H. Holtzmann, n. 38 p. 296.

[47] 3rd Edition, 1976, see Amazu A. Asouzu, n. 38 pp. 19-20.

[48] See Henry Brown and Arthur Marriot, n. 16 p. 19, Idornigie O. P. n. 14 p. 49 and J. O. Orojo & M. A. Ajomo, n. 18 p. 337.

[49] Syed Khalid Rashid, n. 17 p. 16. In this regard Orojo argued that sometimes, a conciliator is more leading than a mediator, but this is not an inflexible rule since parties are free to make a choice as to the nomenclature. J. O. Orojo & M. A. Ajomo, n. 18 p. 10. Likewise Article 7 of the UNCITRAL Conciliation Rules, S. 55 and Article 7 of the Third Schedule of the Arbitration and Conciliation Act Cap. A18 Laws of the Federation of Nigeria 2004 are in line with the proposition that a conciliator may make proposals for the settlement of a dispute.

[50] Formerly S. 37-42 and 55 of Arbitration and Conciliation Act, *Cap.19 LFN. 1990* now S. 37-42 and 55 of Arbitration and Conciliation Act, *Cap. A18 Laws of the Federation of Nigeria, 2004*.

[51] S. 37 of the ACA 2004.

submitted that there is no clear-cut demarcation between conciliation and mediation in Nigeria.[52] It suffices to say that mediation is not mentioned. In effect, the most favoured and regulated processes in Nigeria are arbitration and conciliation with particularly reference to commercial disputes. The short title of the Act supports this assertion. It is observed that the shortcoming was noticed nationally and its correction was one of the purposes for setting up a national committee on the reform and harmonization of Nigeria's arbitration and ADR laws.[53]

RECOGNITION OF ARBITRATION AND CUSTOMARY ARBITRATION

Arbitration is recognized under the present legal regime. The Arbitration and Conciliation Act regulates arbitration in Nigeria. The Act "provide a unified legal framework for the fair and efficient settlement of commercial disputes by arbitration and conciliation; and to make applicable the Convention on the Recognition and Enforcement of Arbitral Awards (New York Convention) to any award made in Nigeria or in any contracting state arising out of international commercial arbitration." [54] Besides, customary arbitration is in active practice in Nigeria and regulated by customary law, this is extensively discussed elsewhere.[55] But the Act does not expressly recognize customary arbitration except to the extent of an allusion that it is recognized indirectly. This sort of recognition is obscured. This reference to its recognition is seen in S. 35 of the ACA which provides:

> This act shall not affect any other law by virtue of which certain disputes-
> a) may not be submitted to arbitration; or
> b) may be submitted to arbitration only in accordance with the provisions of that or other law.[56]

This provision, particularly S.35 (b) above had been argued to be in recognition of other form of arbitration, that is, customary arbitration. Igbokwe submitted that reference to 'the provisions of that or other law' includes customary law and customary

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[52] Eunice R. Oddiri, "Alternative Dispute Resolution" Paper presented at Nigerian Bar Association Annual General/ Delegate Conference Abuja, 22nd -27th August, 2004, p. 5

[53] See, The Discussion Paper of the National Committee on the Reform and Harmonisation of Nigeria's Arbitration and ADR Laws, (2006), www.alukooyebode.com/ADR/INDEX%20FOR%20THE%20DISCUSSION%PAPER.pdf (accessed 10 March, 2009).

[54] This is the long title to the ACA 2004.

[55] Virtus Chitoo Igbokwe, "The Law and Practice of Customary Arbitration in Nigeria: *Agu v. Ikewibe* and Applicable Law Issues Revisited," *Journal of African Law,* Vol. 41 (1997): pp. 201-214. See also Ayinla L. A, "ADR and the Relevance of Native or Customary Arbitration in Nigeria (Africa): A Critique of Its Nature and Allied Legal Issues", *The Jurist*, An Annual Publication of the Law Students' Society University of Ilorin, Vol. 14, (2009): pp. 250-263

[56] S. 35 of ACA 2004

arbitration.[57] Customary arbitration has been further complimented by the Supreme Court of Nigeria having validated the existence and constitutionality of customary arbitration as practiced in Nigeria.[58]

Arbitration as a dispute resolution mechanism is of long historical antecedent which has grown considerably since the New York Convention of 1958 for the settlement of international dispute in international trade.[59] Arbitration offers a forum where the parties present their case to an impartial arbitrator or panel of arbitrators who renders a specific award.[60] The authority of the arbitrator and the procedure largely derived from the agreement of the parties.

It is a private mechanism for the resolution of disputes that take place in private based on the agreement between two or more parties to be bound by the decision (award) to be rendered by the arbitrator (s) according to law (as agreed by parties) after a fair hearing, such decision being enforceable at law.[61] It may be arbitration tribunals which are private courts of one or more arbitrators to whom is transferred by agreement the power of decision in relation to civil legal disputes in place of state courts.[62]

In Nigeria, the meaning adopted by the court is that arbitration is the reference of a dispute or difference between not less than two parties for determination, after hearing both sides in a judicial manner, by a person or persons other than a court of competent jurisdiction. Although an arbitration agreement may relate to present or future differences, arbitration is the reference of actual matters in controversy.[63] Arbitration is therefore, a mechanism for the settlement of disputes by which the parties are bound by

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[57] Virtus Chitoo Igbokwe, "The Law and Practice of Customary Arbitration in Nigeria: *Agu v. Ikewibe* and Applicable Law Issues Revisited," *Journal of African Law,* Vol. 41 (1997): p. 206.

[58] See generally the cases of *Okere v. Nwoke* (1991) 8 NWLR (Pt. 209) p. 317, *Ege-Simba v. Onwuzuruike* (2002) 15 NWLR (Pt.791) p. 466 & *Agu V. Ikewibe* (1991) 3 NWLR (Pt.180) p. 385. See also A.A.Kolajo, Customary Law in Nigeria Through the Cases, (Ibadan: Spectrums Books Limited, 2000), pp. 219-234.

[59]Henry Brown and Arthur Marriot, n. 16 p. 49.

[60] Susan Patterson & Grant Seabolt, n. 18 p. 11.

[61] Henry Brown and Arthur Marriot, n. 16 p. 49.

[62] Schwab, Schiedsgerichtsbarkeit (3rd ed, 1979), p. 1 cited in Henry Brown and Arthur Marriot, n. 16 p. 50.

[63] See the case of *K.S.U.D.B V. Fanz Construction Co.* (1990) 4 NWLR (Pt. 142) 1 at 32, Halsbury's Laws of England, 3rd ed. Vol. 2, p. 2 was adopted in the Nigerian case of *Misr Nig. Ltd. v. Oyedele* (1966) 2 ALR COMM 157. See also Giaus Ezejiofor, *The Law of Arbitration in Nigeria,* (Ikeja: Longman, 1996), p. 3.

the award of the arbitrator(s) whose decision is binding having derived his force from the agreement of the parties which is legally enforceable by the court.[64]

It is pertinent to note that arbitration is not extensively defined in the Act but only provides that "arbitration means commercial arbitration, whether or not administered by a permanent arbitral institution."[65] Arbitration is adjudicatory and binding in nature but a less formal arrangement and procedure is adopted which distinguishes it from litigation.

The development of arbitration in Nigeria dates back to 1914 when the first legislation on arbitration was introduced into Nigeria. The Arbitration Act of 1958[66] established an arbitral framework[67] for the first time in Nigeria. Although the Act has been criticized[68] but credited as good and useful[69] for information on the development of arbitration and ADR in Nigeria. The Act was subsequently updated and adopted the UNCITRAL Model law on International Commercial Arbitration likewise it incorporates the UNCITRAL Arbitration Rules and Conciliation Rules. Thus, it is the current law regulating arbitration in Nigeria having been re-enacted as the Arbitration and Conciliation Act, Cap. A18, Laws of the Federation of Nigeria, 2004.

In the same vein, the Nigerian Communications Commission has the function of:

> examining and resolving complaints and objections filed by and disputes between licensed operators, subscribers or any other person involved in the communication industry, using such dispute-resolution methods as the

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[64] A. A. Asouzu, "The Arbitration and Conciliation Decree (Cap 19) as a Legal Framework for Institutional Arbitration: Strength and Pitfall," *Lawyers Bi-annual*, Vol. 2, No. 1 (June 1995): p. 3. See also J. O. Orojo, and M. A. Ajomo, n. 18 p. 3.

[65] See S. 57 (1) of the ACA *Cap. 19 LFN 1990 now Cap. A18 LFN 2004*. It was observed that for non-arbitrators this section is not helpful for failure to give a definite meaning of the term arbitration. See C.J. Amasike, "The Fundamentals and Overview of Commercial Arbitration in Nigeria", in *Arbitration & Alternative Dispute Resolution in Africa,* edited by C. J. Amasike (Abuja: The Regent Printing & Publishing Ltd, 2005), p. 20-21. He therefore offered a definition that arbitration is a process for the settlement of disputes between persons [parties] who had previously agreed to be bound by the decision [award] of the umpire [arbitrator] appointed by them and whose decision shall be final and binding.

[66] Arbitration Ordinance (Act), C*ap. 13 Laws of the Federation of Nigeria and Lagos 1958*. Each of the Regions also adopted the Arbitration Law.

[67] Amazu A. Asouzu, n. 38 p. 121.

[68] Ibid, p. 121, Ephriam Akpata, *The Nigerian Arbitration Law in Focus,* (Lagos: West African Books Publishers Ltd., 1997), p. 3, J. O. Orojo, and M. A. Ajomo, n. 18 p. 3, and Andrew Chukwuemerie, "Salient Issues in the Law and Practice of Arbitration in Nigeria," <http://www.eupjournals.com/doi/pdf> (accessed 19 January, 2009), pp. 5-7.

[69] Andrew Chukwuemerie, n. 68 p. 6.

> Commission may determine from time to time including mediation and arbitration.[70]

The above provision is clear that arbitration and mediation as dispute resolution mechanisms are veritable tools in resolving disputes connected with telecommunications. The qualification, however, is that before disputes can be resolved by the Commission, the parties must have made an attempt to resolve the dispute between themselves through negotiation.[71] This, no doubt, is a statutory intention to have disputes resolved by alternative dispute resolution rather than a court of law.

The foregoing shows the powers of the commission and an aggrieved party to any dispute arising out of telecommunications can only approach the commission for resolution of the dispute after he might have attempted to settle same between the disputing parties to no avail.

To further buttress this point, when a party is still dissatisfied with the decision of the commission, the party may still apply to the same Commission for review of its decision.[72]

The position is as aptly captured by Nyako J. in *Nationwide Action against Corruption & Anor v. NITEL Ltd & 3 Ors*[73]as follows:

> The issue as it appears to me is whether a person can seek judicial remedy before seeking the resolution of the dispute by the commission? The NC Act as I had ruled in the Econet case and the MTN cases (citation to be supplied) envisages only judicial review as the form that litigation concerning communication matters would take. This is clear from provision (sic) 86 of the Act.
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> The procedure to be followed before a matter is due for judicial review includes those set down in section 73-78 of the Act, section 73 is very clear that the commission has the resolving power. The wording in section 75(1) "-and requested by either or both parties to intervene therein" appears to be the issue. To my mind this bit cannot be read in isolation.
>
> The first thing the law requires to disputing parties is to trying (sic) resolving the dispute before first involving the commission section 74(1). It is only when this fails that section 75 (1) will come into play.
>
> There is no ambiguity in these provisions. An aggrieved person has only judicial review as his remedy before the court and by virtue of section 138 only the Federal High Court has jurisdiction to entertain this. However before a party can approach the court for judicial review, they must have first attempted to resolve the dispute between themselves when this fails, they could then either both or one of the

[70] Sections 4(1) and 76 (1) of the Nigerian Communications Act.

[71] Section 74(1) of the Nigerian Communications Act.

[72] Sections 86-88 of the Nigerian Communications Act.

[73] (2005) 2 CLR 76, 85-86.

parties request the commission to intervene and if still dissatisfied, then the decision of the commission could be subject to judicial review.74

In Nigeria, therefore, the law allows parties to ventilate their grievances through arbitration or conciliation for resolution of disputes connected with telecommunications.

The crucial issue is: if the commission commits a wrong against a telecommunications operator or subscribers, how can the same commission arrive at a fair and just decision if the matter must be resolved by the commission?
It is humbly submitted that the principle of *nemo judex in causa sua*[75] is applicable in all its ramifications in dispute resolution process. Hence, this appears to be a shortcoming in the legislative process which needs urgent legislative attention as the commission should not be a judge in its own cause.

As part of its efforts at enhancing and achieving its set aims and objectives, and pursuant to its powers to make and publish regulations and guidelines necessary to give full effect to the provisions of the Nigerian Communications Act, the NCC made Dispute Resolution Guidelines in September 2004[76] which provides procedure for arbitration and conciliation in resolving telecommunications disputes involving an amount not exceeding one million naira and the dispute does not involve complicated issue of law.[77] It is the duty of the NCC to appoint arbitrator for the parties and proceedings are conducted based on documents and not on oral evidence.[78]A party wishing to commence arbitration under the guidelines must have exhausted all dispute resolution procedures laid down by the service provider without resolution of the complaint.[79]

Although the NCC Dispute Resolution Guidelines do not make reference to the Nigerian Arbitration and Conciliation Act or the UNCITRAL Model Law on Arbitration for dispute resolution in telecommunications, it is submitted that where parties have entered into an agreement having arbitration clause, the arbitration clause must be respected and adhered to.

OTHER ADR PROCESSES YET TO BE RECOGNISED

It is observed that ADR encompasses primary ADR processes (negotiation, mediation/conciliation and arbitration), the secondary ADR processes (private judging and mini trial) and hybrid processes (expert determination, med-arb, ombudsman and summary jury trial) and even the dispute avoidance board or dispute review board

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[74] See also the following cases: *Blue-Chip Communications Co. Ltd v Nigerian Communications Commission* (2004) 1 CLR 23, 44; *Econet Wireless Nig. Ltd v NCC* (No 2) (2004) 1 TLR 42 , 52.

[75] That is, no one should be a judge in his own cause. See Ayinla, L. A. Fair Hearing: Is It a Magic Wand to Cure All Ills in All Milieus? *University of Ilorin Law Journal.* (2006) Vol. 2, No. 1, pp. 48-65,

[76] The guideline was made pursuant to the powers conferred on NCC under Sections 4 (p) and 75 (2) of the Nigerian Communications Act.

[77] See NCC Dispute Regulation Guidelines 2004, Explanatory Notes.

[78] Ibid, pp. 3 - 5.

[79] Ibid, p. 3

otherwise referred to as the (DAB or DRB). However, it should be stated that this list may not necessarily be exhaustive. It is a fact that of all the available ADR processes that may be adopted, only arbitration and conciliation is mentioned by the Act. In actual fact Arbitration seems to be the most popular ADR process in Nigeria. There is therefore, a general assumption in Nigeria that ADR is simply arbitration. This is clear from the position of the committee on the harmonization of the laws on ADR in Nigeria in pointing out the recognition of just a very few of ADR processes. The wrong perception and impression on ADR is actual than presumed. Although, some High Court Rules[80] and ADR Centre Rules[81] recognize other ADR processes, however, the use of Mini-Trial and mediation among other useful and meaningful ADR processes is still very low if non-existent in Nigeria.

These unexplored secondary and/or hybrid ADR processes that have been adopted and applied successfully in other jurisdictions if adopted in Nigeria may bring about benefits to the country in term of access to justice, improvement in the use of ADR in Nigeria and the entire justice delivery system by way of avoiding litigation in situations where ADR stands to serve a better purpose.

MINI-TRIAL

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[80] See the High Court of Lagos State (Civil Procedure) Rules 2004 which provides in Order 25 Rule 1, that:

> (1) Within 14 days after close of pleadings, the claimant shall apply for the issuance of a pre-trial conference Notice as in Form 17.
>
> (2) Upon application by a claimant under sub-rule 1 above, the judge shall cause to be issued to the parties and their legal practitioners (if any) a pre-trial conference notice as in Form 17 accompanied by a pre-trial information sheet as in Form 18 for the purpose set out hereunder:
>
> (b) Giving such directions as to the future course of action as appear best adapted to secure its just, expeditious and economic disposal

(c) *Promoting amicable settlement of the case or adoption of alternative dispute resolution.* (Emphasis Added). See also Order 33 Rule 2 (C) of the High Court of Kwara State (Civil Procedure) Rules 2005 and the clear provision of the High Court of the Federal Capital Territory Abuja Civil Procedure Rules 2004. Particularly Order 17 Rule 1 (a-d) of The High Court of the Federal Capital Territory Abuja Civil Procedure Rules 2004, that:

> 1. 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 lawful recognized method of dispute resolution

[81] See S. 3 (1) of the Lagos Multi-Door Courthouse Law, 2007. That allowed the application of mediation, arbitration, conciliation, neutral evaluation and any other ADR mechanism considered suitable.

In Nigeria, the benefit of mini-trial is yet to be explored unlike in the United States where the advantages of mini-trial have been tapped. Experience has shown that in the United States the two most popular and important ADR processes have been mediation and "mini-trial."[82] The process (mini-trial) contrary to what readily comes to mind as suggestive of trial as known in litigation or the adversarial system of justice. Mini-trial[83] does not involve or connote trial in the actual sense but a structured settlement process designed flexibly to serve the purpose of the parties to achieve resolution.[84] Mini-trial is a useful mechanism in the resolution of high stake business or commercial disputes where expeditious and confidentiality of the resolution of the dispute involved is required. Mini-trial is better referred to as executive tribunal.[85]

In Mini-trial, the parties enjoy and still retain the power to negotiate a set of rules that regulates the process. The process eliminates all unnecessary side distractions that could elongate the resolution process. The time for preparation is kept short as well as the time for discovery. It therefore encourages expedited hearing which may be concluded within two days. The process is a tripartite arrangement (conducted by a 3 (three) member panel that consists of a neutral assessor appointed by the two representatives of the parties who have the express authority of their principal to settle the dispute. The parties meet to negotiate a settlement, and in case no meaningful settlement is achieved the assessor thus gives his opinion on the merit of the case and his role comes to an end. The two representatives of the parties take over further negotiations from here and they are guided by the earlier assessment given by the neutral third party assessor.[86]

The significance of mini-trial as a process affords the parties the opportunity to have the opinion of a neutral assessor having heard both parties, particularly on the merit of the case involving the parties.[87] The parties are therefore motivated to consider settlement of the matter having known the likely outcome of the case in case a law suit is instituted.

Mini-trial is in most cases a successful process. Empirical data have shown that the settlement rate of mini trial is beyond ninety-five percent.[88] The outcome of a survey conducted by the American Bar Association reveals that:

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[82] John Kendall, *Expert Determination*, (London: Pearson Professional Ltd, 2nd ed., 1996), p. 3-4

[83] It has been observed that this name does not really convey the meaning of the process as such it is not a trial but a non-binding ADR process. See Henry Brown and Arthur Marriot, *ADR Principles and Practices*, (London: Sweet and Maxwell, 1999), p. 362.

[84] See George Applebey, "ADR and the Civil Justice System" in *A Handbook of Dispute Resolution*, edited by Karl J. Mackie (London and New York: Routledge and Sweet and Maxwell, 1991), p. 34

[85] See Henry Brown and Arthur Marriot, n. 83 pp. 362-363. Redfern argued that Mini-trial is similar to mediation in that the resolution is by agreement rather than a judicial decision or arbitral award. See Alan Redfern and Martin Hunter, *International Commercial Arbitration*, (London: Sweet & Maxwell, 3rd ed., 1999), p. 36. It is described as conference, see John Tyrril, "Construction Industry Dispute Resolution – A Brief Overview" *Australian Dispute Resolution Journal*, (1992 August) p. 180.

[86] See George Applebey, n. 84 p. 35 for a detailed enumeration of the features.

[87] Henry Brown and Arthur Marriot, n. 83 p. 363

[88] Ibid, p. 370

Of 19 Lawyers and a former Judge who had participated in mini-trials reflected that 24 out of 28 cases using this process had ended in settlement, with 16 of the 19 lawyers satisfied with the process and enthusiastic about using mini-trial again.[89]

It is no gainsaying that mini-trial as a process would serve a better purpose where technical and complex issues are involved that could best be resolved by someone who is an expert Assessor. Besides, the presence of the top executives of the company or corporations who have the authorization to resolve or explore the possibility of a negotiated settlement to get the issues resolved is virtually an added advantage.[90]

However, in Nigeria where a number of business disputes involving big companies are common phenomenon, mini trial may be a useful mechanism in resolving them, although its benefits have not been explored. It is arguably correct to say that in Nigeria some of the laws or court rules on ADR provide that "any other lawful recognized method of dispute resolution"[91] may be adopted but there is no any unequivocal mention of "mini-trial" which is imperative to put it beyond par adventure. This inadequacy was one of the observations of the Report of the Committee on ADR set up by the Federal Government of Nigeria. The committee stated that:

> In the Arbitration and Conciliation Act 1988, the only method provided for is Conciliation. However, there are other well known forms of ADR, such as Mediation, Mini-trials and Med-Arb.[92]

Thus, mini-trial deserves to be introduced into the main stream of the ADR processes in Nigeria and in resolving telecommunication disputes. Doing so is as well a way of improving awareness on ADR and a pragmatic approach to strengthening the application of ADR in Nigeria. This will as well afford the practice in U.S., where two top executives of two different companies or corporations could be brought together in one venue with the sole aim of listening to presentation on the strength and weakness of the disputes or issues involved in their presence. This definitely provides an opportunity

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[89] See Lewis D. Barr, "Whose Dispute Is This Anyway?: The Propriety of Mini-trial in Promoting Corporate Dispute Resolution," *Journal of Dispute Resolution (Missouri)* vol. 1987, p. 134 referring to "The Effectiveness of Mini-Trial in Resolving Complex Commercial Disputes: A Survey" published in 1986 by the American Bar Association's Litigation Section, ADR Sub-committee cited in Henry Brown and Arthur Marriot, n.52 p. 370.

[90] Susan Patterson & Grant Seabolt, *Essentials of Alternative Dispute Resolution*, (Dallas, Texas: Pearson Company, 2nd ed., 2001), p. 11.

[91] See for example Order 17 Rule 1(a-d) of the High Court of the Federal Capital Territory Abuja Civil Procedure Rules 2004. See also Ayinla, L. A., "Alternative Dispute Resolution in Nigeria: A Critique of Getting to the Tipping Point," *Confluence Journal of Jurisprudence and International Law, Faculty of Law, Kogi State University, Anyigba Nigeria,* vol. 2 (2009) pp. 64-74.

[92] See the Discussion Paper of the National Committee on the Reform and Harmonisation of Nigeria's Arbitration and ADR Laws, (2006), pp. 7-8. <www.alukooyebode.com/ADR/INDEX%20FOR%20THE%20DISCUSSION%PAPER.pdf> (accessed 10 March, 2009).

to weigh the danger involved in outright trial of the case, due to the fact that a former judge or seasoned and experienced lawyer would have served as the assessor to give opinion on the likely outcome of the dispute if a court's verdict is to be given based on his knowledge of adversary trial.[93] This opinion therefore, has the potential of guiding the parties into a compromise or settlement together with the advantages of privacy, flexibility and an expedite process.[94] The parties concentrate on the most important issues and at the end it simply converts a lawyer's dispute into a business person's dispute[95] with the possibility of combining any other ADR processes like mediation to achieve settlement.[96]

CONCLUSION

It is shown that scholars are of the view that mediation and conciliation may be used interchangeably but they have not been consistent on the two being synonymous. Nonetheless, they are both consensual processes that are used interchangeably and differently. The common and recognized ADR processes in Nigeria are arbitration and conciliation going by the Act. The will of Chief Gani Fawehinmi clearly attests to the acceptability of ADR and particularly shows preference for arbitration (against litigation) as one of the fast and amicable means of resolving dispute. To limit ADR processes to arbitration and conciliation *simpliciter* is not adequate. Thus, the need to explore other mechanisms becomes imperative. There are other useful and meaningful ADR processes like mini-trial and mediation among others which if adopted will serve better purpose particularly in the resolution of business disputes in which high stake is involved. One of the easiest ways of doing so is to choose or incorporate a clause authorizing the use of any of these processes in our agreement. Similarly, when considering amendments to arbitration laws generally and arbitration in telecommunications in particular, recognition should be accorded mini-trial as a form of dispute resolution mechanism. Other ADR processes, especially mini-trial, should be explored to exploit the myriad benefits of ADR for an expedited, flexible, cheaper, private and harmonious dispute resolution.

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[93] Alan Redfern and Martin Hunter, n. 85 p. 36, see also Stephen B. Goldberg, Frank E. A. Sander & Nancy H. Rogers, *Dispute Resolution, Negotiation, Mediation and Other Processes*, (New York: Aspen Publishers Inc., 3rd ed., 1999), p. 285-286

[94] Its fastness is evident in the Multi-million dollars case of *Telecredit Inc. v. TRW Data Systems Inc.* C.D. Cal. No. CV 74-1127-RF (1977), in which settlement was reached in 30 minutes after close of Mini-trial presentations. See Tom Arnold, "The Mini-Trial," in *Alternative Dispute Resolution What It Is and How It Works*, edited by P. C. Rao & William Sheffield (New Delhi: Universal Law Publishing Co., 2006), p. 302.

[95] Tom Arnold, n. 94 p. 302-304.

[96] Richard H. Mclaren & John P. Sanderson, *Innovative Dispute Resolution: The Alternative*, (Canada: Carswell Thomson Professional Publishing, 1995), p. 228-229.