

THE RESOLUTION OF CORPORATE GOVERNANCE DISPUTES THROUGH ALTERNATIVE DISPUTE RESOLUTION*

Abstract

The challenges of delay, cost and restrictive outcomes of litigation in Nigeria have made it largely inadequate for the resolution of Corporate Governance Disputes (CGD). Previous studies focused on Alternative Dispute Resolution (ADR) generally as a complement to litigation while glossing over the suitability of ADR for specialized disputes in areas such as corporate governance. This paper therefore, examines the potentials for the resolution of CGD through ADR, and the practice and procedure of specific ADR methods for their resolution, in order to determine their adequacy or otherwise.

This paper adopts the Access to justice and the Stakeholder's theories for the resolution of CGD. The research methodology adopted is doctrinal. Primary sources include the Constitution of the Federal Republic of Nigeria, 1999 as amended, Companies and Allied Matters Act (CAMA), High Court Civil Procedure Rules of Lagos State and the Federal Capital Territory, Federal High Court Rules, National Industrial Court of Nigeria ADR Centre Instrument and Rules 2015, Court of Appeal Rules and the National Code on Corporate Governance (NCCG) 2018. Decisions of Nigerian and foreign courts, government reports and policies are also reviewed. Secondary data including journal articles, legal texts, report of the British Council "Justice for All" Project, newspaper reports, internet materials, and monographs are examined.

The advantages of ADR make it suitable for the resolution of CGD. ADR is applicable to the resolution of CGD, such as, boardroom disputes, employee/employer, intra- employee disputes and shareholder activism. As the Multi Door Court Houses are not widely used despite their potentials, the resolution of Corporate Governance Disputes through Alternative Dispute Resolution in Nigeria is underutilized. The guidelines for the resolution of corporate governance disputes need to be reviewed to include the adoption of Alternative Dispute Resolution.

KEY WORDS: Access to Justice, Stakeholders Theory, Alternative Dispute Resolution, Multi Door Court Houses

Introduction

Disputes and disagreements are in many instances generally an unavoidable occurrence of human interaction. These conflicts are usually initiated as a result of various interactions among peoples as well as commercial and financial based relationships, family and filial inter relationships, group and community events as well as various other social and cultural relationships, foreign activities, religious activities, and other civilian activities. Indeed, they are an unavoidable part of human life, in general interactions among people.¹ This paper discusses a general overview of corporate governance, corporate governance disputes, Alternative Dispute Resolution and the application of Alternative Dispute Resolution to corporate governance disputes as well as the Legal and Institutional Framework for the resolution of corporate Governance Disputes through Alternative Dispute Resolution.

An Overview of corporate Governance

In its corporate governance concepts, the Organization for Economic Cooperation and Development (OECD) provided a definition of corporate governance as ties between the management of a corporate organization as well as the board of directors, its shareholders as well as other parties concerned.² One could also posit that the guidelines for the interaction of the various stakeholders as well as their specific roles and how they are expected to carry it out is provided by corporate governance. Indeed it creates the path way through which objectives as well as the goals of the organization are purposely attained through result driven activities and the means to achieve without compromising the interests of any of the stakeholders.³ Corporate governance describes the allocation of rights and obligations between individual corporate

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¹ See generally, Joseph Olakunle & M.Ayo Ajomo, *Law and Practice of Arbitration in Nigeria*, Lagos, Mbeyi & Associates (1999).

² Organization for Economic Cooperation and Development “OECD Principles of Corporate Governance” (2004) *OECD*

Publication Service Pp 11-15.

³ *Ibid.*

members, for instance the board, executives, Shareholders and other interested parties and shall lay down the regulations as well as the procedure that facilitate the taking of decisions on matters which affect or are likely to affect the company. In doing this, it further sets out the structural guidelines through which the aim as well as the purposes for which the companies are registered could be achieved. These are clearly set out stating the forms through which they can be done collectively as well as sustainably achieve these targets and track success effectively.⁴

Elements of Corporate Governance

An important report⁵ was presented to the OECD in April 1998, explaining the fundamental concepts of corporate governance from the perspective of the private sector. The OECD Corporate Governance Advisory Group for the Business Sector, headed by renowned authority on governance Ira M. Millstein, concentrated on “what ought to be required to raise capital through governance.” The Millstein Report says corporate governance interference by the government will probably be the most successful in raising investment if it focuses on all four main areas of concern:

- a. Fairness: This applies to all stakeholders of the company being treated fairly. Therefore, all interested parties should be treated as fair as possible and their interests should be adequately represented and secured;⁶ it includes guaranteeing the interests of shareholders, including minority and international shareholders. Principle II of the Organization of Economic Cooperation and Development Corporate Governance Rules of Procedure appropriately canvasses for the justice in maintaining that the Framework for Corporate Governance should ensure that all individuals who have shares in the company and which should also include those who have minority shareholdings as well as the external Shareholders shall receive equal treatment. All shareholders need to be entitled to have the chance of seeking fair compensation for the infringement of their rights.

⁴ The Organization of Economic Cooperation and Development: Principles of corporate governance – www.Oecd.org.

⁵ Business Sector Advisory Group Reports to the OECD on Corporate Governance: Improving Competitiveness and Access to Capital in Global Markets.

⁶Osei E, “A Winning Corporate Governance Structure: Basic Components of a Corporate Governance Structure that Supports a Winning Corporate Strategy and Enterprise Value Enhancement,” (2014) 3 (8) *International Journal of Advancements in Research and Technology*.

- b. Accountability: It is this aspect of corporate governance which requires the Board to have a duty and an obligation to clarify or justify the actions of the company and to execute them.⁷ In other words, a structured and consistent corporate and risk management reporting system and an appropriate relationship should be formed by the Board with the auditor of the company.⁸ The Board ought to engage as well as interact at regular intervals with shareholders and indeed any other stakeholder, and offer a fairly balanced and straightforward overview of how the organization achieves its market vision.⁹ The Company ought to ensure consistency of governance roles and accountability, as the boards of directors controlled, and promote collaborative efforts to bring the value considerations of managers, those who have shares in the company, and all other interested parties into line.¹⁰
- c. Responsibility: The directors that form the board ought to take responsibility for supervising the affairs of the company as well as act intentionally and deliberately for the common best interests and happiness of all shareholders and stakeholders.¹¹
- d. Transparency: Stakeholders should be aware of the operations and plans of the company. They should be allowed adequate representation. In the perspective of the stakeholder, no interest should be left unrepresented or substantially unprotected in the company's decision-making processes.¹²

Legal Framework for Corporate Governance in Nigeria

In addition to the Legislation governing corporate organizations in the country, i.e., the Companies and Allied Matters Act,¹³ there are a number of codes regulating issues of corporate governance. In effect, some of which codes are guidelines unique to a particular industry. The codes for corporate governance are in effect in Nigeria varied. These codes include, Code of Corporate Governance in Nigeria 2011 for public companies which was issued by Securities and Exchange

⁷ Ibid.

⁸ Ibid.

⁹ Ibid.

¹⁰ Ibid.

¹¹ Ribstein L, "Accountability and Responsibility in Corporate Governance," (2006) 81 (4) *Notre Dame Law Review*.

¹² Ibid.

¹³ Companies and Allied Matters Act ,2020 No..3.

Commission (SEC) applicable to all public companies registered in Nigeria, Code of Corporate Governance for Banks in Nigeria Post-Consolidation, 2006 which was issued by Central Bank of Nigeria (CBN) and applicable to all banks operating in Nigeria; the Code of Corporate Governance for Licence Pensions Operators, 2008, which was issued by National Pension Commission (PENCOM) and applicable to all Pension Fund Administrators and Pension Fund Custodians operating in Nigeria. Additionally, Code of Good Corporate Governance for the insurance industry in Nigeria issued by National Insurance Commission (NAICOM) and applicable to all insurance re-insurance companies operating in Nigeria. Others are Code of Corporate Governance for Telecommunication Industry, 2014 issued by Nigeria Communication Commission, Nigeria's Code of Best Practices on Corporate Governance 2003, issued by the Securities and Exchange Commission, the Corporate Governance Code for Banks in Nigeria Post – Consolidation 2006, issued by the Nigerian Central Bank, The 2008 Code of Corporate Governance for Licensed Pension Operators issued by the Pension Commission, and the 2009 Code of Corporate Governance for Insurance Industry issued by the National Insurance Commission in Nigeria.

Furthermore, a National Corporate Governance Code (NCCG), which was published and issued by the Financial Reports Council of Nigeria (FRCN) was introduced on 17 October 2016, with the aim of providing for corporate governance rules for both public as well as private companies regulated according to Nigerian laws as well as the public institutions and organizations which operate within Nigeria.

The three codes issued by the FRCN are in particular:

1. The National Code of Corporate Governance for the Private Sector in Nigeria 2016 (Private Sector Code).
2. Public Sector Governance Code in Nigeria 2016 (Public Sector Code).
3. Not for Profit Organizations Governance Code 2016 (Not for Profit Code).

Both the National Code of Corporate Governance for the Private Sector in Nigeria 2016 (Private Sector Code) and the Public Sector Governance Code in Nigeria 2016 (Public Sector Code) became effective on the 17th of October 2016.

The 2018 National Corporate Governance Code: A Nigerian Corporate Governance Code ('the code') was issued by the Nigerian Financial Reporting Council (FRC) on 15 January 2019. The Code sets out key principles for institutionalizing best practices within Nigerian companies. The Code aims to control matters of corporate governance that applies to boards of directors and other members of boards, relationship with the shareholders and other stakeholders, conduct and ethics of business, sustainability and accountability. The expected results of the code's implementation include enhanced corporate credibility, restoring public trust and support, a well-structured and strengthened trade and investment regime and a robust drive for business sustainability.¹⁴

An analysis of these codes reveals the following:

1. They seek to establish codes of governance for the interest of every stakeholder and the effective organization of public companies.
2. An adherence to these codes will avoid the breakdown of corporate governance as well as the emergence of conflicts which are within the context of corporate governance.
3. These codes do not apply to private companies and small scale businesses such as partnerships and SMEs. A slight difference obtains in the 2018 National Code of Corporate Governance, which requires compliance from private companies that are regulated by such bodies as SEC, NAICOM, CBN and organizations regarded as Significant Public Interest.
4. The codes do not provide for the effective resolution of disputes concerning corporate governance through mechanisms of Alternative Dispute Resolution.

An Overview of Corporate Governance Disputes

Those who have interests in the corporate organization are formed by a variety of groups, including shareholders, investors, employees and suppliers and each party comprises a large number of people. This means that the directors should not just have to balance interests among various groups but also the interests must be shared between groups, thus balancing the gains of all stakeholders would also be more difficult to achieve with the involvement of more organizations and individuals. The challenges of conflict of interest balance are multi factorial. Firstly, directors cannot figure out who the parties involved are and as such, they do not know the interests which

¹⁴ Adepolu T, "Comments on the National Code on Corporate Governance" (2018) *A Publication of KPMG Advisory Services* Available at www.home.kpmg/ng/en/home/insights/2019/01/2018-Nigerian_Code_of_Corporate_Governance.html accessed 20 February, 2020.

they should concern themselves with. Secondly, directors are unable to understand the expectations of all stakeholders. In other words, each stakeholder could have different meanings, expectations and benefits attitudes in such a way that it is impossible for directors to ensure fair distribution to stakeholders. It is almost certain that inevitably, there would be disputes and disagreements in the usual way of doing business, for example between the board of directors and the management, between the management and the workforce between the controlling board and the shareholders and, in some other situations, among the shareholders as well. There may also be disputes and disagreements between the company and other external actors such as suppliers and contractors, or even between the business and government or such other regulator.¹⁵

The Resolution of Corporate Governance Disputes

In specific terms, Corporate Governance disputes occur in instances where there are disagreements between the parties in the course related to the performance or failure of not performing expected responsibilities as stated in agreements which have earlier been agreed to by stakeholders in the organization.¹⁶ Common examples of corporate governance disputes that affect the board directly include the following: disagreements between the shareholders of the corporate organization and the organization or its board of directors. Other issues which may trigger disputes include disagreement among those who are members of the Board of Directors. It may further include disputes between the board and the employees on work and other employee related matters.

The Companies and Allied Matters Act¹⁷ is the primary law that governs both business and non - business organizations in Nigeria, and it contains detailed requirements on corporate governance standards in Nigeria. Other regulations and best practices rules produced by various regulators supplement its requirements.¹⁸

There are ways and means to settle these disputes in every civilized society without recourse towards self - help and aggression. One of those means is resorting to the provisions of the rule of law as defined through the administration of justice system of the State. The courts are the

¹⁵ Ibid.

¹⁶ Ibid.

¹⁷ Companies and Allied Matters Act 2020 No. 3.

¹⁸ Adewale A, "An Evaluation of the Limitations of the Corporate Governance Codes in preventing Corporate Collapse in Nigeria," (2013) 7 (2) *IOSR Journal of Business and Management IOSR JMB* 110-118.

constitutionally approved bodies that are in most cases universally accepted to adjudicate between disputes that may arise between citizens or between the state or state actors and people in the expected performance of duties and responsibilities, as well as the curtailment of rights or privileges.¹⁹ Litigation has enormous advantages for justice administration in every society. This is funded and controlled publicly and the public is open to its hearings, it has self-enforcing processes, practices and mechanisms; decisions are predicated on the provisions of law as well as the previous decisions, are binding on all parties concerned, and the procedural rules are clearly laid down. However, the challenges of expenses and delays among other problems experienced in litigation have made access to justice through this platform ineffective and less efficient.

The resolution of Corporate Governance Disputes through Alternative Dispute Resolution

Access to justice systems is being described and related to as being the procedures as well as practices for the creation of effective paths for the resolution of disputes within the framework of the formal legal structure through the use of specialized approaches for instance, mediation, early neutral assessment, arbitration, and a lot of other methodological variations which are planned for facilitating speedy amicable conflict settlement.²⁰

The principle of Access to Justice in the application of its practices and processes ought to provide for legitimate alternatives to the traditional courts as well as civil proceedings and processes through the most suitable mechanism of ADR.²¹ The courts have at various instances expressed support concerning the development of Alternative Dispute Resolution. Examples of such cases are *Onward v MV Matrix*,²² *Aye – Fenus Ltd v Saipem Ltd*,²³ and *Ras Pal Gazi Const v FCDA*.²⁴ The courts spoke against attempts by parties to stall Alternative Dispute Resolution processes. In *Egesimba v Onuzuruike*,²⁵ it was concluded by The Honourable Justice Karibi – Whyte, JSC that “where it is decided by the parties to willingly submit their disputes to a neutral or panel of neutrals or an institution for resolution, then the decision of such entity is as mandatory as one from a judge.”

¹⁹ Section 6 Constitution of the Federal Republic of Nigeria 1999 (As amended).

²⁰William D, Helga T, “Access to Justice and Alternative Dispute Resolution,” (2011) 201 (1) *Journal of dispute resolution* Art 4.

²¹ Ibid.

²² *Onward v MV Matrix* (2010) 2 NWLR (pt1179) 530.

²³ *Aye –Femus Ltd v Saipem Ltd* (2009) 2NWLR(Pt1126).

²⁴*Ras Pal Gazi Const v FCDA* (2001) 10NWLR (Pt. 722) 559.

²⁵*Egesimba v Omuzuruike* (2002) 5 NWLR (Pt. 791) 466.

It is the continuous search for the resolution of disputes at minimal costs and delay that facilitated the development of the concept known as Alternative Dispute Resolution mechanisms (ADR) which essentially includes a plethora of mechanisms conceptualized to facilitate disputing parties in achieving a realistic and acceptable solution of disputes in which they are involved without any form of formal judicial or legal proceedings. The premise of ADR is that a nexus should be established between a dispute that has arisen and an intervention process, to definitively determine the most appropriate or suitable remedy for the amicable resolution of the specific dispute through such guided participation of the various stakeholders to the dispute in the interest of every stakeholder.²⁶ The concept of Alternative Dispute Resolution is that a connection between a dispute and a mechanism should be formed to determine the most suitable solution for the specific dispute.²⁷ The proponents of Alternative Dispute Resolution claim, for many reasons that ADR is in many cases more successful than litigation.²⁸ First, usually speedier and cheaper. It is based on a more direct involvement by the contesters. The majority of ADR systems are based on an integrative approach. They are more cooperative, and less aggressive than court-based adversarial judgment. From the survey study, engaging in an ADR process will often strengthen rather than deteriorate the relationship between those who are the parties in dispute.²⁹ This is a significant advantage in situations when the parties must continue to make contact after a settlement is reached.

Legal Framework for Application of ADR to Corporate Governance Disputes

The application of ADR in Nigeria like other developing countries is an evolutionary phenomenon. Indeed, Alternative Dispute Resolution is yet to be seen as comprehensively incorporated in the legal practices, processes and procedures, though concrete efforts are equally being put in place to give ADR a pride of place and a formidable pedestal in the civil system of justice administration system across the country. In relation to the use of the term legal framework, it means regulations, laws and rules governing the efficiency of the systems. The legal framework could also be a set of

²⁶Idornigie, P.O, “Overview of ADR in Nigeria,” (2007) 73 *The International Journal of Arbitration, Mediation and Dispute Management* 1.

²⁷Ibid.

²⁸ Akeredolu AE, “Institutionalizing Alternative Dispute Resolution in the Public Dispute Resolution Spectra in Nigeria Through Law: The Lagos Multi Door Court House Approach,” (2014) 12 (104) *US-CHINA Law Review* 107-110.

²⁹ Teacher L, “Advantages and Disadvantages of Mediation ADR,” retrieved from www.lawteacher.net /free law essay/contract laws/advantages and disadvantages of mediation –adr—contract 2013 accessed 8 April, 2019.

rules or laws which are used as a pivot and regulation for the successful Implementation of an alternative dispute resolution framework in Nigeria.

The Constitution

The Constitution of the Federal Republic of Nigeria,³⁰ in its provisions on foreign policy objectives provides for the “respect for international law and treaty obligations as well as the seeking of settlement of international disputes by negotiation, mediation, conciliation, arbitration and adjudication.”³¹ This paper posits the application of same ADR principles for the resolution of disputes that may arise in the pursuit of domestic policies.

The Arbitration and Conciliation Act

The Arbitration and Conciliation Act,³² provides guidelines for settling commercial disputes out of court. National Arbitration is statutorily regulated through the Arbitration and Conciliation Act which is built adopting the United Nations Commission on International Trade Law (UNCITRAL) Model Law on International Commercial Arbitration. The Act also provides for the Recognition and Enforcement of Arbitral Awards. The Act implements the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, and adopts internationally agreed and acknowledged model laws concerning the conduct of/and application of arbitration.

The Companies and Allied Matters Act

The Companies and Allied Matters Act (CAMA)³³ is the fundamental Legislation that regulates company formation and operation in Nigeria. Even though CAMA does not directly mention or discuss definitions of corporate governance, there are, however no doubts that it attempts to regulate the activities as well as the expected roles to be performed by the Board of Directors and make recommendation to them with regards to their duties of disclosure and transparency.³⁴

³⁰ See S 19(d) of the 1999 Constitution (as amended).

³¹ Ibid.

³² The Arbitration and Conciliation Act Cap A18 Laws of the Federation of Nigeria 2004.

³³ Companies and Allied Matters Act, 2020 No.3.

³⁴ See S 302- 306 Companies and Allied Matters Act, 2020 No.3.

CAMA³⁵ discusses another pertinent issue that relates to corporate governance as it provides for the removal of directors. This law³⁶ also regulates the powers and the basis of the inter relationship among the business shareholders and the business administrators. Furthermore, CAMA adequately articulates principles for minority shareholder protection.³⁷ It is noteworthy to mention that there are several other provisions of CAMA which regulate corporate governance. However, despite all these corporate governance provisions and potentials for corporate governance disputes, litigation is the only dispute resolution mechanism recommended by CAMA.³⁸ In practice however, parties to corporate governance disputes resolve same through ADR. It is therefore surprising that neither the extant law nor the proposed one³⁹ contains any guideline for resolving disputes concerning corporate governance through mechanisms of ADR. One must however state that commercial disputes and corporate governance disputes are still being resolved effectively through ADR.

The Legal Instrument and Rules of The National Industrial Court Alternative Dispute Resolution Centre (2015)

The official inauguration, on 18 December 2015, of the Alternative Dispute Resolution (ADR) Centre Instrument and Rules 2015 of the National Industrial Court of Nigeria (NICN), marks a huge achievement in the implementation of the purpose for which the court was established as a Specialized Federal Superior Court of record with exclusive jurisdiction in Nigeria over trade, job and labor disputes. It is necessary to observe that the twin documents which form the legal basis for creating and running the ADR Centre, are the NICN ADR Center Instrument & Rules 2015. By S.254C (3) of the Constitution of Federal Republic of Nigeria 1999 (as amended), The Alternative Dispute Resolution Centre of the National industrial Court of Nigeria is founded as the first and only ADR Centre by the Court according to Constitutional requirements. It also takes its source statutorily from Ss.1 (2) (a) and 20 of the Act of the National Industrial Court⁴⁰ granting the authorization of the President of the Court to administer the Court and also to enable the Court

³⁵ S288 Companies and Allied Matters Act, 2020 No.3.

³⁶ See S303-308 Companies and Allied Matters Act, 2020 No.3.

³⁷ See S343-347 Companies and Allied Matters Act, 2020 No.3.

³⁸ Ibid.

³⁹ On Tuesday May 15 2018, the Senate of the Federal Republic of Nigeria passed the CAMA Repeal and Re – Enactment Bill of 2018. The Bill seeks to establish an efficient means of regulating businesses and promote a friendly business climate.

⁴⁰ National Industrial Court Act 2006.

to promote and exploit the different ADR mechanisms. The National Industrial Court has the authority under the Constitution to establish an Alternative Dispute Resolution Centre on the premises of the host court where it is operating. Article 2 of the Statutory Instrument provides that the Centre shall be established with its headquarters at the premises of the Court in the Federal Capital Territory. A remarkable thing about the innovation made by the enabling law is the formation of centers inside each of the six geo-political regions of the nation. In the North Central Region is established The ADR Centre, Abuja, in the North East Region is established the ADR Centre, Gombe in the North West Region is the ADR Centre, Kano in the South East Region is located the ADR Centre, Enugu in the South -South Region is the ADR Centre Warri and the South West Region is the ADR Centre Ibadan.

Institutions that resolve Corporate Governance Disputes through Alternative Dispute Resolution Mechanisms

Regional Centre for International Commercial Arbitration, Lagos

The Regional Centre for International commercial Arbitration, Lagos was founded in 1989 through the participation and sponsorship of the Asian – African Legal Consultative Organization (AALCO). The operations of the centre were ratified by the Treaty of 26 April 1999 in the form of a Headquarters Agreement between the AALCO and the Government of Nigeria. The institute partners with the British Council supported “Justice for All” initiative which supports the resolution of corporate disputes in SMEs through ADR mechanisms.⁴¹In addition, the Centre collaborates with other institutions to train business executives in mediation and negotiation skills to facilitate effective and efficient in-house resolution of corporate governance disputes.⁴²

The Lagos Chamber of Commerce International Arbitration Centre

⁴¹ Justice for All, Nigeria, “Report on Access to Justice and Economic Development in Nigeria,” (2013) Published in *Monitoring Impact A bi* – Annual Publication to monitor the impact of its activities pg 4 [www. British council.org/sites/default/files/2.4_impact_report_sept2013.pdf](http://www.Britishcouncil.org/sites/default/files/2.4_impact_report_sept2013.pdf) accessed 25 May 2019.

⁴² Ibid.

The Lagos Chamber of Commerce International Arbitration Center (LAC IAC) is an independent full-time ADR Center affiliated to the Lagos Chamber of Commerce and Industry. It is an International ADR Center focused on effective alternative resolution of conflicts in Africa.⁴³ The rules of the Center guiding Arbitration are founded upon UNCITRAL Model Act as well as other international best practice guidelines.⁴⁴ This organization could be instrumental in solving the employee connected corporate governance conflicts in SMEs through mediation and other ADR mechanisms.

The Lagos Court of Arbitration

The Lagos Court of Arbitration (LCA) is an international as well as independent organization managed by the private sector forum for commercial dispute settlement by arbitration and any other that is appropriate among the other forms of alternative dispute resolution ADR mechanisms.⁴⁵ The LCA has been developed under the Lagos Court of Arbitration Law, N0 10, 2009 to provide institutionalized arbitration and other services within the context of Alternative Dispute Resolution.

The LCA experience applies to numerous sectors, including oil and gas, banking, transportation, construction, engineering, telecommunication, hospitality, tourism, insurance, etc. The LCA Arbitration Rules and Mediation Guidelines combine international best practices and principles with specifications and needs unique to the industry. The Lagos Court of Arbitration is the institution that coordinates the implementation of initiatives on resolving corporate Governance disputes in SMEs through ADR.⁴⁶

The Multi Door Court House

Corporate governance concerns occur in the activities of small and medium-sized companies in their cooperation with other stakeholders, when such disputes arise and are referred to litigation, a good number of entrepreneurs express some kind of disappointment at the outcome of the

⁴³ Vision statement of the Centre, www.laciac.org accessed 16 July, 2018.

⁴⁴ Ibid.

⁴⁵ Available at www.lca.org.ng accessed 16 July, 2018.

⁴⁶ Ibid.

dispute.⁴⁷ The Justice for All, Nigeria⁴⁸ has been working actively with Multi Door Court Houses and other institutions as well as hubs for alternative dispute resolution in states such as Lagos, Enugu, Kano, Anambra and the FCT to resolve corporate governance related disputes in small and medium-sized companies through ADR.⁴⁹

Advantages of Alternative Dispute Resolution to Corporate Governance Disputes

1. One explanation for ADR to be seen as more and more attractive by the business community in addition to lawsuits is that there are several more cases presently in which the true aim of a legal dispute is not appropriately or perhaps satisfactorily settled by a judgment of the court.⁵⁰ The remedy obtained coming from a trial or tribunal, while legally speaking could have been appropriate, could actually be missing the relevant point of restoring the contractual or the business relationship that could have caused the conflict or disagreement.⁵¹
2. ADR offers an opportunity for the business community to resolve disputes through contractual agreements that are more important to the operation of a corporation than to seek justice as established and provided for by statute. Nowadays, just as from government control to privatization and deregulation appears to be taking place in all facets of life, so does a similar shift from majorly depending on strictly legal rules in the settlement of commercial or contractual disputes involving the use of more flexible Alternative Dispute Resolution (ADR) mechanisms, which, among others, allow the parties to negotiate with each other and seek a common resolution of the subject in dispute.⁵²

⁴⁷ Justice for All, Nigeria, "Report on Access to Justice and Economic Development in Nigeria," (2013) Published in Monitoring Impact A bi – Annual Publication to monitor the impact of its activities pg 4 [www. British council.org/sites/default/files/2.4_impact_report_sept2013.pdf](http://www.Britishcouncil.org/sites/default/files/2.4_impact_report_sept2013.pdf) accessed 25 May 2019. See also www.j4-nigeria.org.

⁴⁸ The Programme is funded by the United Kingdom`s Department for International Development and is Managed by the British Council.

⁴⁹ Justice for All, Nigeria, "Report on Access to Justice and Economic Development in Nigeria," (2013) Published in Monitoring Impact A bi – Annual Publication to monitor the impact of its activities pg 4 [www. British council.org/sites/default/files/2.4_impact_report_sept2013.pdf](http://www.Britishcouncil.org/sites/default/files/2.4_impact_report_sept2013.pdf) accessed 25 May 2019, see also www.j4-nigeria.org.

⁵⁰Guillemen JF, "Reasons for Choosing Alternative Dispute Resolution Mechanisms," in *ADR In Business: Practice and Issues Across Countries and Cultures* Arnold Ingen (ed)Published by Kluwer Law International (2011) pg 13.

⁵¹Eijshouts AJ, "Mediation as Management Tool in Corporate Governance" Arnold Ingen (ed) in *ADR In Business: Practice and Issues Across Countries and Cultures* Published by Kluwer Law International (2011) pg 68.

⁵²Durosaro W.O, "The Role of Arbitration in International Commercial Disputes" (2014) 1 (3) *International Journal of Humanities, Social Sciences and Education (IJHSSE)*.

3. In comparison to traditional courts, remedies are meant to be tailored to the unique circumstances of particular cases as they relate to problem solving rather than litigation remedies.
5. Win – win outcomes: Another explanation for the rush to alternative dispute resolution systems for disputes which have commercial characteristics or nature is the assumption that it can offer solutions for win-win that the courts and litigation are unable to provide in all cases in a satisfactory manner.⁵³ For example, the primary purpose of the plaintiff might be with the view to receive the apology of the defendant as opposed to a monetary compensation. For such a case; the safest solution will be ADR rather than litigation. Mediation and arbitration as ADR processes are frequently used when conflicts occur between the organization and its workers. It may also refer to the settlement of conflicts in the boardroom.⁵⁴
6. Expertise: one of the strongest points of ADR is that it allows the parties the ability to select their adjudicators and select the best ones who are competent in the process in law as well as in the complexities of the specific trade or of region out of which the conflict or disagreement evolved from. For instance, a former member of the Board of Directors may be appointed as a mediator on a subject he knows about. Expert determination as an ADR tool may also be extended to the settlement of disputes between the employer and employees.⁵⁵ Similarly, the Board of Directors carries out activities through Committees that advise the Board on different issues based on relevant skills and expertise of members.⁵⁶ When disputes or conflicts occur in committees, specialists in the areas of conflict are best prepared to settle them.⁵⁷ This could be distinguished from litigation in which parties are not at liberty to choose judges when they go to court and a judge who is not particularly knowledgeable in the area of law that most touches their dispute may be the Judge to hear the matter.

⁵³Akeredolu AE, *Mediation – What it is and How it works* Carenter Associates Ibadan (2011).

⁵⁴ Ibid.

⁵⁵Adesina C, “Merit of Alternative Dispute Resolution (ADR) Over Litigation in Nigeria,” (2012) 7 *University of Ibadan Journal of Private and Business Law*.

⁵⁶Odiase V.O, “National Code of Corporate Governance: A new Regulatory Bench Mark for Nigeria,” (2014) 15 (1) *The Journal of Corporate Governance* 927.

⁵⁷ Ibid.

7. Privacy and Confidentiality: Alternative Dispute Resolution mechanisms are private proceedings of practices and processes that enable companies to settle disputes in a friendly manner without maintaining any form of public record. Alternative Dispute Resolution is desirable for organizations who are worried that they are pressured during conflicts or disputes to reveal one or more of their company secrets in the course of litigation. Companies and Institutions respect ADR's considerations of privacy and confidentiality because they do not want their rivals, clients, suppliers or franchisors to know about their litigation.⁵⁸ This function of ADR would help to protect the confidentiality of Board records and the voluntary disclosure of other sensitive details. This is meant to represent the best interests of all parties.⁵⁹

Specific Application of Alternative Dispute Resolution to Corporate Governance

There is a gradual increase in the connection of commercial and corporate governance disputes to mediation.⁶⁰ Indeed, a large number of these disputes are within the context of issues relating to the context of corporate governance, for instance, disputes between the Board and the defense of minority shareholder rights.⁶¹ Where these disputes occur, it is appropriate that they should be referred to mediation either by the parties themselves or by the courts to bodies such as the Centre for Successful Conflict Resolution (CEDR) or the International Chamber of Commerce (ICC).⁶² Mediation creates an atmosphere that eliminates conflict and facilitates discussion. It helps parties to work towards problem solving rather than position-building and helps to create and maintain positive partnerships that support business partnerships and sustainability.⁶³

⁵⁸Osunkeye O, "Corporate Governance is Gaining Momentum in Nigeria," *Guardian News Paper*, March 25, 2014 at pg 84 and Wednesday March 26, 2014 at pg 58 see [www.ngrguardiannews.com](http://www.ngrguardiannews.com/index.php/news/national_news/154928_corporate_governance_is_gaining_momentum_in_nigeria) index php/news/national news /154928 corporate governance is gaining momentum in Nigeria.

⁵⁹ Ibid.

⁶⁰Schulfer DK, "An Examination of Mandatory Court Based Mediation," (2018) 84 (3) *The International Journal of Arbitration, Mediation and Dispute Management* 229.

⁶¹ Ibid.

⁶² Ibid.

⁶³Bowen AA, "The Power of Mediation to resolve international commercial dispute and repair business relationships," (2005) 60 (2) *Dispute Resolution Journal* 4.

Mini Trials as an ADR tool may in other contexts, including the non-formal sector, mainly helping to bring justice for more persons at a reduced rate as well as more quickly than traditional channels from the government in the workplace.⁶⁴ A school of thought argued that mini-trials, on the basis of their flexibility and informality, are more successful in solving labor-related issues in the Nigerian economy's non-formal industry. The use of alternative dispute resolution strategies such as mini-trials for the settlement of corporate governance related disputes in relation to small and medium-sized enterprises has been recommended.⁶⁵

Another method is known as Expert Determination. This is a consensual dispute resolution mechanism that involves a third party who is neutral; in general, an authority in the area in which the dispute occurs offers a binding ruling on the matter in dispute on the basis of professional judgment. The decision is meant to be binding except as decided at the beginning of the course of decision by the parties that it shall not be. Since the technique is informal, it is easier to adapt expert determination as an ADR tool.⁶⁶ Expert Determination has a wide range of corporate governance disputes applications and they include the following:

- a. Accountants are invited in disputes which occur after the acquisition when buyers and sellers can -not agree on the value of the shares;⁶⁷
- b. Where it is appropriate to understand clauses in an agreement defining rights and responsibilities in labour disputes ;⁶⁸
- c. Disputes concerning remuneration and/or benefits for Board of Directors and/or the compensation and bonus obligations between those who are the shareholders and the compensation committee and the board of directors.⁶⁹

⁶⁴ Broughton, A. and Cox A, *Public sector employers' attitudes to use of Acas collective conciliation*; Acas Research Publications (2012).

⁶⁵ Hayelom AM, "Application of Corporate Principles for the Sustainability and Competitiveness of Small and Medium Enterprises: A Literature Review," (2017) 9 (10) *European Journal of Business and Management* 4.

⁶⁶Royal Institution of Chartered Surveyors (RICS) (2016) *Independent Expert Determination TICS Guidance Note England Wales and Northern Ireland*.

⁶⁷International Chamber of Commerce, ICC Rules for the Administration of Expert Determination Proceedings February 2015.

⁶⁸ Kennedy – Grant T, "Expert Determination and the Enforceability of ADR Generally," A Paper Presented at the Arbitrators and Mediators of New Zealand Inc/Institute of Arbitrators and Mediators Conference Held in Christchurch on 5-7 August 2010.

⁶⁹International Chamber of Commerce ICC Rules for the Administration of Expert Determination Proceedings February 2015.

- d. Disputes between shareholders and boards over perceived business mismanagement or very bad results.⁷⁰
- e. Disputes between management and board members over the company's future vision and operating approaches ;⁷¹
- f. Disputes over the protection of interests of minority shareholders;⁷² and
- g. Negotiation as a mechanism of Alternative Dispute Mechanism would be applicable in the following instances: the settlement of disputes or controversies between a member of the Board of Directors and the Board of Directors.⁷³ There would be no need for any third party–impartial. This feature is relevant when the parties that are involved do not wish that they include in the process, external parties. An example that relates with this is where the issue to be addressed or the conflict to be settled is of a very delicate nature. This makes it possible to settle disputes in the Board as non-members of the Board do not become entitled to access such knowledge.⁷⁴ Negotiation would also extend to the settlement of workplace related conflicts, because conflict issues could be addressed freely without actually revealing the secrets of the company to third parties.⁷⁵

Conclusion and Recommendation

Disputes on corporate governance occur as a consequence of failure to satisfactorily balance the interest of all stakeholders within a corporate organization. Litigation still remains relevant and indeed still being engaged for the resolution of corporate governance disputes when they occur. However, corporate governance disputes are not adequately resolved through litigation as a result of the shortcomings of litigation such as undue delays and expenses, lack of party autonomy, undue publicity the acrimonious nature of litigation

⁷⁰International Finance Corporation (IFC) and Centre for Effective Dispute Resolution (CEDR) Corporate Governance Knowledge Publication (2015) “Board room Disputes: How to manage the good, weather the bad and prevent the Ugly: A practical Guide for Directors.

⁷¹ Lee J, “Intra Corporate Dispute Arbitration and Minority Shareholders Protection: A Corporate Governance Perspective,” (2017) 83 (1) *Arbitration*, 85.

⁷² Ibid.

⁷³International Finance Corporation (IFC) and Centre for Effective Dispute Resolution (CEDR) Corporate Governance Knowledge Publication (2015) “Board room Disputes: How to manage the good, weather the bad and prevent the Ugly: A practical Guide for Directors.

⁷⁴Pillisuk M, “Advancing the Social Psychology of Conflict Resolution, Peace and Conflict,” (2008) 14 (4) *Journal of Peace Psychology* 433-436.

⁷⁵ Ibid.

and the lack of judge's specialization.

The current corporate governance regulatory structure which includes the Companies and Allied Matters Act and the various Codes and Guidelines which contain provisions to regulate corporate Governance do not make provision for the application of Alternative Dispute Resolution mechanisms for the resolution of corporate governance disputes nor do they relate to the resolution of corporate governance disputes in private companies. Alternative Dispute Resolution mechanisms such as Negotiation, Mediation, Expert Determination and Arbitration are particularly suitable for the resolution of Corporate Governance Disputes.

Multi Door Court Houses in conjunction with other ADR Institutions have resolved disputes that occur within the context of corporate governance in Small and Medium Enterprises through Alternative Dispute Resolution mechanisms. Recommendations by the author suggest reforms to the existing Legal and institutional framework for the resolution of disputes relating to corporate governance.

Recommendations

The Review of CAMA and Other Corporate Governance Codes

Apart from the Companies and Allied Matters Act and the National Corporate Governance Code 2018, which regulates private companies in specific regulated industries such as the insurance sector, the other Codes which regulate matters of Corporate Governance do not regulate private companies and Small Medium Enterprises. In addition, like CAMA they also do not have any provision for the settlement of conflicts on corporate governance by engaging any one of the various Alternative Dispute Resolution mechanisms. Thus, this paper recommends the review of CAMA and the codes to incorporate guidelines on ADR and also provide guidelines to facilitate the settlement of conflicts within private companies.

The Multi Door Court Houses

This paper recommends that Multi Door Court Houses are set up in the major commercial cities and capitals of the various states in order to bring ADR services to the rural and less developed communities. The NCMG could also consider the provision of mobile platforms and facilities to

move MDCHs facilities and facilitators to various commercial centres and locations. The recommendation is predicated on the prevalence of SMEs in these areas and the need to help resolve corporate governance disputes in these areas and particularly because of our findings on the activities of MDCHs and SMEs.