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# Resolving the Juridical Tangle on the Concept of Conciliation under the Nigerian Arbitration and Conciliation Act

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## Abstract

The Nigerian Arbitration and Conciliation Act, which was enacted twelve years before the UNCITRAL Model Law on Conciliation was made in 2002, provides for conciliation as a means for parties to seek amicable settlement of their dispute. This paper adopts doctrinal research method by relying on relevant literature and the critical examination of existing provisions of the Nigerian Act on the concept of Conciliation which is yet to be modified to conform to contemporary development addressed under the UNCITRAL Model Law on Conciliation 2002 as amended under the Singapore Convention, 2018, the Reform Bill, State uniform Model Law and the Lagos Guidelines on Mediation which governs mediation at the Lagos Court of Arbitration. It finds that conciliation is not defined under the Nigerian Act. It is used in a restrictive sense when compared with the wider definition of conciliation under article 1(3) of the UNCITRAL model law on Conciliation as adopted in section 67(3) of the Reform Bill which defines conciliation to include mediation and other ADR concepts of similar import. This paper points out that conciliation or mediation has been part of Nigeria's traditional system and suggests that ADR be integrated into the Nigerian Criminal Justice System.

**Keywords:** Conciliation; Mediation; Negotiation; Nigerian Arbitration and Conciliation Act; Reform Bill; UNCITRAL Model Law

## 1. Introduction

Conciliation is an alternative dispute resolution method whereby the parties invite an independent and impartial third party to assist them to settle their dispute amicably. Unlike an Arbitrator, the third party, usually referred to as the conciliator, has no power to impose a decision on the parties. As a result, Conciliation depends on cooperation and the will of the parties to succeed.

Conciliation is a specie of Alternative Dispute Resolution[1] mechanism which focuses on collaborative problem-solving measures where disputants retain ownership, not only of the dispute but also the solution.[2] It enables flexibility in the settlement process that takes account of

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[1] ADR.

[2] Brenda Branch, "ADR/Customary Law", World Bank Institute Distance Learning for Anglophone Africa, November 6, 2003, available at http://www.gobookee.org/ebook/adr-customary-law-presentation-by-brenda-brainch-dispute-3eb040, accessed 18 December 2021; See also Alessandra Sgubini, Mara Prieditis & Andrea Marighetto, "Arbitration, Mediation and Conciliation: Differences and Similarities from an International and Italian Business Perspective", August 2004, available at https://www.mediate.com/articles/sgubiniA2.cfm, accessed on 18 December 2021

factors other than the subject matter of dispute by focusing on interests and needs, thereby enabling disputants to rebuild relationships.[3]

Many ADR specialists believe that ADR processes must remain flexible to avoid the descent into rules and rigidity that have undermined the reputation and effectiveness of litigation and even arbitration[4], ADR has become a useful tool for dealing with cross-border, cross community and multiparty disputes.[5] It can be designed to meet a wide variety of different goals which may relate to improvement of the administration of justice and settlement of disputes to promote economic restructuring or management of conflict or tension within the society.[6]

To achieve this objective, most countries, including Nigeria, have given statutory backing to ADR in the form of either mediation or conciliation. Sections 37 – 42 of the Nigerian Arbitration and Conciliation Act,[7] which was enacted twelve years before the United Nation Convention on Trade Law[8] Model Law on Conciliation[9] was made in 2002, provides for conciliation as a means for parties to seek amiable settlement of their dispute.

The general principles upon which the UNCITRAL Model Law on Conciliation is based include:

a. To promote conciliation as a method of dispute settlement by providing internationally harmonized legal solutions to facilitate conciliation that respects the integrity of the process and promoting active party involvement and party autonomy.

b. To promote the uniformity of the law.

c. To promote frank and open discussion of parties by ensuring confidentiality of the process, limiting disclosure of certain information and factors raised in the conciliation in other subsequent proceedings subject only to the need for disclosure required by law or for the purposes of implementation or enforcement.

d. To support developments and changes in the conciliation process arising from technological developments, such as electronic commerce.[10]

The UNCITRAL Model Law on conciliation 2002 has been replaced with the United Nations Convention on International Settlement Agreements Resulting from Mediation, 2018 otherwise known as Singapore Convention on Mediation.

This paper critically examines existing provisions of the Nigerian Act on the concept of Conciliation which is yet to be modified to conform to contemporary development addressed under the UNCITRAL Model Law on Conciliation as amended under the Singapore Convention 2018. This is with a view to ascertain the adequacy or otherwise of existing legislative framework in meeting the standard set by the Model Law on Conciliation as amended under the

[3] Branch, *ibid*.
[4] *Ibid.*
[5] *Ibid.*
[6] *Ibid.*
[7] Cap A18, Laws of the Federation of Nigeria (LFN), 2004, herein after, Nigerian Act.
[8] UNCITRAL
[9] UNCITRAL Conciliation Model Law, 2002.
[10] Guide to Enactment and Use of the Model Law on International Commercial Conflict, 2002, hereinafter, "Guide to Enactment", para 41.

Singapore Convention 2018. Corresponding provisions of the proposed Arbitration and Conciliation (Repeal and Re-Enactment Bill) 2017[11], State uniform Model Law and the Lagos Guidelines on Mediation which governs mediation at the Lagos Court of Arbitration[12] have also been analysed in order to make suggestions that will improve the law where necessary.

## 2. Right to Settle Dispute by Conciliation

Section 37 of the Nigerian Act provides that:

> *Notwithstanding the 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 part of this Act.*

This provision prescribes conciliation as method for amicable settlement of any dispute subject to the agreement of the parties. This provision has been modified under section 67(1) of the Reform Bill in the following words: "The parties to any dispute of a commercial nature may seek amicable settlement of their dispute by conciliation under the provisions of this part of the bill". Even though section 37 of the Nigerian Act does not contain similar provisions to section 67(1) of the Reform Bill, article 1(1) of the Conciliation Rules to the Nigerian Act provides that the Conciliation Rules apply to conciliation of disputes arising out of or 'relating to a contractual or other legal relationship…' The Reform Bill does not define the term 'contractual or other legal relationship' but instead defines 'commercial' to mean:

> *All relationships of a commercial nature whether contractual or not, including any trade transaction for the supply or exchange of goods or services, distribution agreement, commercial representation or agency factoring, leasing, construction works, consulting, engineering licensing, investment financing, banking, insurance, exploitation agreement or concession, joint venture and other forms of industrial or business cooperation, carriage of goods or passengers by air, sea, rail or road.*[13]

This definition is a repetition of the definition of 'commercial' in section 57(1) of the Nigerian Act and it has its origin in article 1 of Geneva Protocol of 1925, except that the Reform Bill adds "whether contractual or not" which is absent under section 57(1) of the Nigerian Act ostensibly to conform with the instrument of ratification deposited by the Federal Republic of Nigeria when acceding to the New York Convention which declares that Nigeria will apply the Convention to "differences arising out of legal relationships, whether contractual or not, which are considered as commercial under the laws of the Federal Republic of Nigeria". This addition in the Reform Bill still needs to be amended to reflect that the dispute referred to under section 67 of the Bill is commercial, whether contractual or not. Again, it is doubtful whether the term "or other legal relationships" under section 67 (3) of the Reform Bill will include disputes arising outside commercial contracts such as family and community disputes.

Article 1(2)(a) of the Singapore Convention presents a clearer picture of the position when it states that

[11]Hereinafter 'Reform Bill'.
[12] Lagos Court of Arbitration Mediation Guidelines, 2011, hereinafter, "Lagos Mediation Guidelines".
[13] This has been retained under Reform Bill, section 87.

> *"This Convention does not apply to settlement agreements: (a) Concluded to resolve a dispute arising from transactions engaged in by one of the parties (a consumer) for personal, family or household purposes; (b) Relating to family, inheritance or employment law."*

Section 67(2) of the reform Bill has been inserted to give the parties the right to render inapplicable the provisions of the proposed Act relating to conciliation in the following words: "The parties are free to agree to exclude the applicability of this Part of the Bill".

The Nigerian Act does not define conciliation unlike the UNCITRAL Model Law on Conciliation which defines conciliation as

> *A process whether referred to by the expression conciliation, mediation or an expression of similar import, whereby parties request a person or persons ('the Conciliator) to assist them in the attempt to reach an amicable settlement of their dispute arising out of or relating to a contractual or other legal relationship. The conciliator does not have the authority to impose upon the parties a solution to the dispute.*[14]

The absence of this type of definition under the Nigerian Act shows that the distinctions usually drawn between Conciliation and other ADRs other than arbitration such as mediation, med-arb, mini-trial, etc., are still important and that conciliation is used in a restrictive sense to exclude these other afore-mentioned ADRs.

Section 67(3) of Reform Bill adopts the definition of conciliation under the UNCITRAL Model Law on Conciliation when it seeks to provide that:

> *For the purpose of this Act, "Conciliation" means a process whether referred to by the expression Conciliation or an expression of similar import, whereby parties request a third person or persons ("the Conciliator") to assist them in their attempt to reach an amicable settlement of their dispute arising out of or relating to a contractual or other legal relationship. The Conciliator does not have the authority to impose upon the parties a solution to the dispute.*[15]

Article 2(3) of the Singapore convention provides that "'Mediation' means a process, irrespective of the expression used or the basis upon which the process is carried out, whereby parties attempt to reach an amicable settlement of their dispute with the assistance of a third person or persons ("the mediator") lacking the authority to impose a solution upon the parties to the dispute."

Apart from substituting conciliation with mediation, the Singapore convention retains the definition under the UNCITRAL Model law 2002 and section 67(3) of the Reform Bill "in an effort to adapt to the actual and practical use of the terms and with the expectation that this change will facilitate the promotion and heighten the visibility of the Model Law. This change in terminology does not have any substantive or conceptual implications".[16]

[14] UNCITRAL Model Law on Conciliation, article 1(3).
[15] Reform Bill, section 67 (3).
[16] See preamble to Singapore convention

As noted above, the subject matter of conciliation under the Nigerian Act appears to be limited to commercial disputes which is the scope covered by the UNCITRAL Model Law on Conciliation which the Reform Bill adopts especially as it relates to International Commercial Conciliation. The use of Conciliation or ADR has foundations under native law and custom.

Compounding of offences and the concept of plea bargain have also featured in some economic crimes statutes such as section 14(2) of the Economic and Financial Crimes (Establishment) Act,[17]section 186 of the Customs and Excise Management Act,[18] and Administration of Justice Law.[19] It has therefore been suggested that ADR be integrated into Nigerian Criminal Justice System.[20]

There is a difference between section 67(1) of the Reform Bill and its corresponding section 60 under the Draft Uniform State Arbitration and Conciliation Model Law 2006[21] which provides that:

> *Notwithstanding the other provisions of this Law, the parties to any dispute of a commercial nature may seek amicable settlement of their dispute by conciliation, or any other alternative dispute procedure under the provisions of this part of this Law.*

This provision did not only expressly declare the nature of dispute as "commercial", it also states that the dispute can be amicably resolved by "any other alternative dispute" without adding the necessity for the intervention of a third person. This implies that negotiation between the two parties is recognized while arbitration is excluded since the Reform Bill expressly states that the third person cannot impose upon the parties a solution to the dispute.

## 3. Conciliation

Orojo and Ajomo[22] are of the view that mediation and conciliation are generally used as if they are interchangeable and that historically, in private dispute resolution, a conciliator was seen as someone who went a step further than the mediator as the conciliator would draw up and propose the terms of settlement but that in practice, the two terms seem to have merged, although common law lawyers tend to speak of 'mediation' while civil law lawyers speak of 'Conciliation'.

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[17] No.1, 2004.

[18] CEMA Cap. C45, *LFN2004*, section 186.

[19] Law No.10, Laws of Lagos State, 2007.

[20] G.O.S Amadi, "Using Arbitration and ADR in Resolving Criminal Cases in Africa: Breaking New Grounds", Paper Presented at the International Workshop on the "The Role of Arbitration and ADR in Poverty Alleviation and Access to Justice for the Poor in Africa", Hilton Hotel, Nairobi, Kenya, June 26-28, 2007; Don John Omale, Understanding Restorative Justice: *A Handbook for Criminal Justice Stakeholders* (Enugu: Trinity Bit Publishers, 2005); I.F. Akande, "The Need for Alternative Dispute Resolution (ADR) in the Nigerian Criminal Justice System" in Ibrahim Ahamd (ed) *Alternative Dispute Resolution and Some Contemporary Issues:* Essays in Honour of Hon. Justice Ibrahim Tanko Mohammad CON (Kaduna: M.O. Press & Publisher 2010) pp.306-320; ChukwunweikeAnukenyiOgbuabor, "*Alternative Dispute Resolution and Restorative Justice in Nigeria's Criminal Justice System*", Ph.D Seminar Paper, Faculty of Law, University of Nigeria, September, 2012).

[21] Based on the Report of the National Committee on the Reform and Harmonization of Arbitration and ADR Laws in Nigeria which proposed a Draft Uniform State Arbitration and Conciliation Model Law 2006 for the adoption of the State. Hereinafter, "States Model Reform Bill".

[22]Joseph OlakunleOrojo and Michael A. Ajomo, *Law and Practice of Arbitration and Conciliation in Nigeria*, (Lagos: Mbeyi& Associates (Nig.) Ltd., 1999), p.9

In order to get out of this 'definitional tangle' and other aspects of the reform Bill, this paper recommends the modification and incorporation of article 1.2 of the Lagos Mediation Guidelines, 2011 which provides that:

> *In order to reserve the flexibility of the mediation process, the LCA Guidelines shall not be unduly prescriptive. They should be construed and interpreted in a liberal manner to produce a just, efficient, expeditious and cost-effective process of resolving disputes by mediation between parties.*

The new section may then insert:

> *In order to preserve the flexibility of the Conciliation process, the relevant provisions of this Act to conciliation should be construed and interpreted in liberal manner to produce a just, efficient, expeditious and cost effective process of resolving disputes by conciliation between parties.*

Members of the conciliation body, apart from being independent and impartial, must be objective, fair and just, giving consideration, among other things, to the rights and obligations of the parties, the usages of the trade concerned and the circumstances surrounding the dispute including any previous business practices between the parties in their attempt at amicable settlement of the dispute between the parties.[23]

In conducting the proceedings in a manner considered as appropriate, the conciliation body is to take into account the circumstances of the case, the wishes the parties may express, including any request by a party that the conciliator should hear oral statements and the need for speedy settlement of the dispute.[24]

The conciliation body may at any stage of the conciliation proceedings, make proposal which need not be in writing or accompanied by a statement of the reasons for a settlement of the dispute.[25]Under the LCA Mediation Guidelines, there is a provision for pre-mediation meeting where the parties shall meet with the mediator, enter to have necessary arrangements for the mediation proceedings which shall include the form, time and date for exchange of case summaries and key documents. Such a pre-mediation meeting may hold through correspondence, telecommunications or any other means agreed between the parties and the mediator and communicated to the Executive Secretary of the LCA. After the discussions at the pre-mediation meeting, which shall be confidential, the Executive Secretary shall ensure that the parties and the mediator enter into an LCA Mediation Agreement to be approved by the Executive Secretary before the mediator can conduct the mediation proceedings.[26]

Upon the appointment of conciliators, the conciliators may request each party to deposit an equal amount as an advance for the costs of conciliation which they expect will be incurred and during the course of proceedings, the conciliators may request supplementary deposits in an equal amount from each party and if the required deposits are not paid in full by both parties within

[23]Conciliation Rules to the Arbitration Act, article 7(1) & (2).
[24]*Id,* article 7(3).
[25]*Id,* article 7(4).
[26]Generally LCA Mediation Guidelines, articles 7 and 8.

thirty days, the conciliators may suspend the proceedings or may make a written declaration of termination of the parties effective on the date of that declaration.[27]

Upon termination of the conciliation proceedings, the conciliators render an amount to the parties of the deposits received and returns any unexpended balance to the parties.[28] This is also not provided for under Part Two of the Nigerian Act and is therefore subject to the agreement of the parties. The parties bear equally the costs of conciliation unless the settlement agreement provides for a different apportionment while all other expenses incurred by a party are borne by that party. The costs of conciliation include only the fee of the conciliation body which shall be reasonable in amount; the travel and other expenses of the conciliators and that of witnesses requested by the conciliation body with the consent of the parties; and the cost of any assistance rendered by an appropriate institution or person in connection with the appointment of conciliators or any administrative assistance by a suitable institution or person.[29] This is not contained in the main provisions under Part Two of the Nigerian Act. This implies that the parties can vary this rule on costs by agreement in accordance with article 1(2) of the Conciliation Rules.

Under the LCA Mediation Guidelines, the costs of the mediation, other than legal or other costs incurred by the parties themselves, shall be determined from time to time by the LCA and the parties shall pay the fees within the time limit prescribed by the Executive Secretary in equal proportion as agreed by the parties and the LCA may require the parties to deposit an equal amount as an advance payment towards the cost of mediation which shall include the LCA fees, the fees of the mediator and the costs of experts and interpreters, if any.[30]

## 4. Expressions of Similar Import

After the expressions mention of conciliation, the new definition added "an expressions of similar Import". This appears to be wide in scope and it is therefore necessary to identify similar expression that can be accommodated under the provisions on conciliation which have not been expressly taken care of under the Nigerian Act.

### 4.1 Negotiation

Negotiation is a consensual bargaining process in which the parties attempt to reach agreement on disputed or potentially disputed matter.[31] It is similar to two judges trying to reach agreement on how to decide a case when compared to a court proceeding.[32]While mediation can be referred to as assisted negotiation, conciliation is said to be 'non-binding arbitration.

Negotiation can arise in any communication between two or more actors directed to achieving a joint decision. Almost every dispute resolution process is preceded by more or less, intense negotiation between the respective parties. As such, some commercial contracts contain highly sophisticated 'multi-tier' dispute resolution sections which require the parties to reach a

[27] Conciliation Rules, article 18(1) – (3).
[28] *Id,* article 18(4).
[29] Conciliation Rules, article 17.
[30] LCA Mediation Guidelines, article 19.
[31] A. Garner (ed), *Black's Law Dictionary*, 8th edn. (St. Paul, Minn; West Group, 2004), p.1064.
[32]Roser Fisher and William Ury, *Getting to Yes* (Random House Business Books, 1999) p.36.

settlement of their disputes by going through consecutive steps of different private dispute resolution processes.[33]

Kelvin Nwosu identifies four phases disputing parties are expected to pass through in the process of negotiation. The parties use the preparation phase to gather information, analyze and distil them. This is with the aim of setting the strategic framework for the 'event' stage. The parties highlight their positions and streamline the issues for discussion during the opening phase and during the bargaining phase they deploy communication skills to persuade the other side to agree to their proposals. This is better achieved with trust, candour and openness in communication so that they can explore the opportunity of mutual gains in the negotiations. Parties generally tie up any loose ends as well as summarize and formalize the agreement reached at the closing phase.[34]

Dele Peters submits that one of the most important attractions of conciliation as a dispute resolution mechanism is that since the decision is actually reached by the parties themselves and not imposed by a third party, enforcement is not only likely but that parties are more likely to preserve the good relationship between them. This is as opposed to arbitral or judicial proceedings which are largely rancorous. Peters however adds that where conciliation fails, the implication is that time and money must have been wasted.[35] This is so because the conciliator(s) cannot impose a final and binding decision on the parties.[36]

Negotiation is a species of conciliation but it however, only involves the parties "talking to each other". It has been defined as an informal, voluntary, unstructured and usually private process through which parties to a dispute can reach a mutual agreement for the resolution of their differences. It can therefore be preferred as the fastest, least expensive, most private, least complicated and most party-control oriented process.

The primary objectives of negotiations are to achieve their bargaining roles and to avoid being exploited in the process.[37] Five basic rules have been advanced to assist the parties in either responding competitively and or cooperatively. The first is that the party should respond promptly and politely to a request for information which one is already obligated to share by limiting the risk to an issue the party can afford to lose and thereby send a cooperative signal without jeopardizing major issues. The second rule is that if the other party misinterprets this cooperation as a sign of weakness, the party can now respond competitively to all competitive moves in order to send a signal to the other party that only cooperation, rather than competition, can be beneficial to both parties. The third rule is that once the other party now realizes that nothing can be gained through competition, by now embracing cooperation, both parties should now forgive and overlook their previous competitive dispositions so as to ensure that progress is made in the negotiation. This will also instil the confidence of cooperation which would enable both parties to risk being 'short-changed' at the end of the day. And the fifth rule is that both

[33] Klaus Peter Berger, *Private Dispute Resolution in International Business: Negotiation, Mediation, Arbitration*, Vol. III: Handbook (The Netherlands: Kluwer Law International, 2006) preface, at p.V.
[34] Kelvin Nwosu, "Advanced Negotiations (The Process)", in Alternative Dispute Resolution (ADR) Negotiation, Mediation, Arbitration Hybrid Processes, Professional Foundation Course Materials, Part II, 2008, pp. 1-15 at 15.
[35] Dele Peters, "Dispute Resolution Mechanisms", *Fountain Quarterly Law Journal*, August, 2004, Vol.1, No.1, pp.1-17 at 9.f
[36] *Ibid.*
[37] *Id,* at p.10.

parties should be flexible and dynamic in their approach in order to avoid any form of rigidity that can lessen the potential for arbitration.[38]

The best method of negotiation is however the integrative approach whereby, even though the parties appreciate their divergent conflicting but reconcilable interests, they see themselves as 'collaborative problem solvers'. Both parties therefore, separate themselves from the problem and thus, endeavour to create as many options as possible for their mutual gain and benefit by focusing on their interest rather than their positions.

The inclusion of such methods as negotiation under the States Model Law is a welcome development. As noted, negotiation is the first preferred option among other ADRS and it should be incorporated into the Reform Bill.[39]

This is necessary because negotiation is the most flexible, informal and party-directed method being the closest to the parties' circumstances and control and can be geared to each party's own concerns. However, negotiation may fail because of previous poor relations, intransigent positions of the parties, neither party being prepared to lose face and the fact that a party cannot be pressured against its wishes from adopting an unreasonable position.[40]

### 4.2 Mediation

Mediation can be more effective than simple negotiations because the mediator works with the parties to effect a compromise either by suggesting grounds of agreement or forcing them to recognize weaknesses in their cases and the mediator may evaluate the merits of the parties' cases in a non-binding manner.[41]

In their own submission, Barrett and Barrett aptly explained the difference between negotiation, mediation and arbitration in the following words:

> *The most basic form of ADR is negotiation; at its core, two people simply talk about a problem and attempt to reach a resolution both can accept. It follows that mediation started when two negotiators, realizing they needed help in this process, accepted the intervention of a third person. If the third party was asked to make a decision in the hands of some arbitrary mechanism, the process was arbitration.*[42]

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[38] R.J. Cordian. "Bargaining in the Dark: The Normative Incoherence of Law Dispute Bargaining", 51 *Maryland Law Review*, (1992), p.1 at 57; R. Fisher & S. Brown, "Getting Together Building Relationships that Gets to Yes" (Boston: Houghton Mifflin, 1988), pp.197 – 202 all cited in Peters, above note 34, at pp.10-11.

[39] Due to the informal nature of Conciliation, the multitude of similar techniques which are commonly referred to as conciliation, negotiation and the danger resulting therefrom that unsuspecting parties might find themselves in the scope of application of the Conciliation law necessitates an encompassing definition as the Reform Bill seeks to do – Guide to Enactment at para. 32.

[40] Julian D.M. Lew, Loukas A. Mistelis& Stefan M. Kröll, *Comparative International Commercial Arbitration*, (The Netherlands: Kluwer Law International, 2003) p.4.

[41] *Id,* at p.14.

[42] Jerome T. Barrett & Joseph P. Barrett, A. *History of Alternative Dispute Resolution*, (USA: Jossey-Bass, 2004) p.2-6, cited in L.A. Ayinla, "ADR and the Relevance of Native or Customary Arbitration in Nigeria", (2009) *UILJ* Vol.5 No.1, pp.254-264 at 254.

It is profitable here to also explain mediation, med-arb and mini-trial which have all been accommodated to give conciliation a broader meaning under the Reform Bill or mediation under the Singapore convention.

The mediator explores a wide range of acceptable options to facilitate or evaluate the interest and rights of the parties as a yardstick to proffer solutions to the problems or disputes between the parties and thereby avoid a zero-sum approach typical of adjudicatory process.

### 4.3 Mini-Trial

Mini-trial is a non-adjudicatory form of evaluative mediation which assists disputing parties to gain a better understanding of the issues in dispute in order for them to enter into settlement negotiations on a more informal basis. It takes the form of a short presentation of the issues by the respective in-house lawyers of the parties who now sit together on the opposite side of the table facing both disputants.[43]The disputants literally become the 'jury', assisted by a neutral expert who may be a former judge or some other person with authority in the field of the dispute selected as 'neutral adviser' to elucidate any problems which may arise during presentation so that they can thereafter retire to negotiate a settlement. This will enable them view the dispute in a better perspective and helps them settle in a more dispassionate manner.[44] Otherwise referred to as executive tribunal, it is more formal than a mediation but more streamlined than an arbitration or trial.[45]

### 4.4 Mediation/Arbitration (Med-Arb)

Here, parties agree that if mediation fails, the dispute will be resolved by arbitration and the mediator is converted into an arbitrator which is a common phenomenon in arbitrations in China. This process has given serious misgivings in view of the confidential and prejudicial information relied on during the mediation process. This is because the mediator could be compromised to then convert himself into an arbitrator to make a decision on the merits and this may discourage parties from being open and frank with the mediator for fear of being prejudiced at the arbitration stage.[46]

The parties are then free to submit the dispute to arbitration in accordance with any agreement between them or take any action in court as they deem fit if the parties do not agree with the terms of settlement submitted by the conciliation body.[47] And the legal rights of the parties will not be affected by anything in connection with the conciliation proceedings in any submission to arbitration or any action taken under section 42(3) of the Nigerian Act.[48]

Where the parties further submit to arbitration, the initial Conciliator may be appointed as the arbitrator especially if within the course of conciliation a relationship of trust has developed between the Conciliator and the disputants. According to Brown and Marriot when commenting on Med-Arb

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[43]Orojo&Ajomo, above note 21, at p.10.
[44]*Ibid*.
[45]"Executive tribunal or 'mini-trial' **Practice notes". LexisNexis, available at** https://www.lexisnexis.co.uk/legal/guidance/executive-tribunal-or-mini-trial **last accessed 22 December 2021**
[46] Hill, "MED-ARB New Core or Switch?" 13 *Arb Int*. 105 (1997); Motiwal, "Alternative Dispute Resolution in India", 15(2), *J. Int'l Arb*117 (1998) cited in Lew *et al*, above note. 22 chapter 1, at p.14.
[47] Nigerian Act, section 42(3).
[48]*Id,* section 42(4).

> *This offers the advantages, real or perceived, that first, the process will produce a resolution, one way or another; secondly, that parties perhaps try harder to be reasonable and resolve the matter during the mediation (conciliation) phase; and thirdly, that if adjudication is required, there will be no loss of time or cost in having to re-acquaint a new neutral with the facts of the case and the issues between the parties.*[49]

It has also been observed that the merger of the problem-solving model and the transformation model of mediation would enhance self-empowerment, mutual human understanding and dispute settlement which are all necessary to promote individual happiness with peaceful coexistence and harmony within the society.[50]

### 4.5 Other ADR Mechanisms

These include early neutral evaluation which is often used by parties to resolve their disputes arising from commercial transactions by referring their differences to a neutral evaluator through a confidential evaluation session who considers each side's position and renders an evaluation of the case.[51]

An independent panel of impartial professionals which provide guidance to resolve project issues and mitigate their impact during an active construction project customarily meets with the project participants on a regular basis to discuss project status and concerns but which does not act as a decision maker unless the parties' contract outlines a procedure for the board to formally hear and resolve disputes is often referred to as dispute resolution board.[52]

The common denominator among the foregoing processes is the non adjudicatory feature as opposed to adjudication which entails the binding decision of the adjudicator in the resolution of the dispute.[53]

## 5. Conclusion

Negotiation entails direct discussion and communication between the parties for the purpose of resolving their differences. It has not developed a coherent theoretical base and an accepted set of core features which enable it to be differentiated from rival processes.[54]Negotiation may not involve a third party but it requires the cooperation of the parties as the process entails a 'give and take' approach for it to succeed. The success of negotiation also depends on the personality, skill, knowledge and experience of the parties. Negotiation may fail due to lack of trust, undue emotional attachment to the subject matter of disputes, lack of openness and sometimes due to

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[49] Henry J. Brown and Arthur L. Marriot, *ADR Principles and Practice,* (London: Sweet and Maxwell, 1993), p.275 cited in Orojo&Ajomo, above note 21, at p.11.

[50]Ugochinyelu C.N. Okolo, "Is the Mediator a Therapist? A Critique of the Role of the Mediator in Bush and Folger's Transformative Model of Mediation", *Law and Policy Review*, Vol.4, (2012), pp.37 – 52, at p.52.

[51]Jennifer Allison "Alternative Dispute Resolution Research: Early Neutral Evaluation" October 9, 2020 https://guides.library.harvard.edu/c.php?g=310591&p=2078483 last accessed 23 December, 2021

[52] "Dispute Resolution Board" Thomson Reuters Practical Law. Available at https://uk.practicallaw.thomsonreuters.com/3-551-1886?transitionType=Default&contextData=%28sc.Default%29 lastaccessed 23 December, 2021

[53]"Adjudication", ODACC. Available at https://odacc.ca/en/adjudication-process/ last accessed on 23 December, 2021.

[54]*Id*, at p.38.

inability of the parties to appreciate their differences, shift ground and proffer solution. Where negotiation fails, an impartial third party may intervene to facilitate resolution of the dispute. Conciliation is not defined under the Nigerian Act. It is used in a restrictive sense when compared with the wider definition of conciliation under article 1(3) of the UNCITRAL model law on Conciliation as adopted in section 67(3) of the Reform Bill which defines conciliation to include mediation and other ADR concepts of similar import.

Again, section 60 of the States Model Law defines conciliation as including any other form of alternative dispute resolution methods, thereby incorporating negotiation which, as earlier pointed out, is the best preferred option of ADR. This paper points out that conciliation has been part of Nigeria's traditional system and it has been employed to settle disputes arising from criminal offences similar to the growing phenomenon of employing compounding of offences and plea bargain on economic crimes in Nigeria. Conciliation or mediation is collaborative, affordable and less combative and this paper therefore recommends the adoption of the wider meaning ascribed to conciliation or mediation under the UNCITRAL Model Law on conciliation or the Singapore convention respectively in order to incorporate other ADR Processes.