

Managing Landlord and Tenant Relationship: The ADR Option.

Larry Chukwu, Senior Lecturer Faculty of Law University of Abuja, Abuja.

INTRODUCTION

Every terrestrial being has to contend with the twin problems of food and shelter.¹ For human beings, food is a product of some activity on land, using “land” in a wide sense of including not only the solid part of the earth's surface, but also the space covered by waters. As for their shelter, it is usually (at least in modern times, if not before) embedded in some sort of structure on land, otherwise known as “building”.² To engage in an agricultural activity or secure housing accommodation, therefore, one needs to acquire some interest in land or at least obtain the permission of another who has acquired an interest in land.

One of the universally recognized means of acquiring an interest in land is the leasehold device, from which arises a landlord and tenant relationship. Indeed, landlord and tenant relationship is as old as human existence. The Biblical account of the origin of man reveals that after creating Adam, God put him in the Garden of Eden as a tenant. Seeing that Adam was lonely, God made him a companion in the person of Eve. Thus, landlord and tenant relationship antedates husband and wife relationship, parent and child relationship and other human relationships. As tenants in the vineyard of God, Adam and Eve covenanted not to pluck a certain fruit from the orchard. Upon their breach of the covenant, God forfeited their lease!³

Over the years, the leasehold has become a very important, nay the most versatile, mechanism for creating an interest in land. Its

¹ The right to satisfy these two basic needs together with the rights to have clothing and medical care constitute the core of fundamental human rights: see Art. 25 of the Universal Declaration of Human Rights 1948; Art. 11 (1) of the International Covenant on Economic, Social and Cultural Rights 1966. Shorn of those cardinal rights, the much-hallowed right to life will be meaningless.

² Which has been statutorily defined as “any structure whether of temporary nature or not erected or made on, in, over or under any land: s.96 Lagos State Urban and Regional Planning Board Law, Cap. L52 Laws of Lagos State 2003.

³ The Holy Bible, Genesis 2 vs. 7-24, 3 vs. 1-24.

prominent feature lies in “the ability to make rights and obligations 'run' with the land” thus making it “ideal for use by landowners wishing to generate an income from their land whilst ensuring that its character and value are maintained”.⁴ In Nigeria, the leasehold has become the only legitimate method of creating interests in property since the emergence of the Land Use Act in 1978. This is because the largest interest that a person can have in land today is a right of occupancy, which, despite conflicting judicial and academic opinions,⁵ is analogous to a leasehold interest. And any interest in land created out of a right of occupancy will invariably be leasehold. Indeed, one can hazard the view that the Land Use Act has practically reduced all property owners in Nigeria to the status of tenants.⁷

In the landlord and tenant relationship, as in any other human relations, a dispute is bound to arise. In the event of a dispute, if the parties cannot resolve it by themselves, their usual recourse is litigation. In most cases, however, litigation is an ill wind that blows nobody good. Rather than assist in managing the landlord and tenant relationship, more often than not, the courts assist in terminating it.

⁴ See Dixon, M., *Land Law*, 2nd ed. (London: Cavendish Publishing Ltd., 1996), p.128. See also Lawson, F.H., *Introduction to the Law of Property* (London: Oxford University Press, 1958), p.118.

⁵ Now Cap. L5 *Laws of the Federation of Nigeria* (LFN) 2004.

⁶ See *Majiyagbe v. Attorney-General* [1957] NRNLR 158; *Savannah Bank Nig. Ltd. v. Ajilo* [1989] 1 NWLR (Pt. 97) 305 at 328; *Osho v. Foreign Finance Corp.* [1991] 4 NWLR (Pt. 184) 157 at 192. And see Omotola, J.A., *Essays on the Land Use Act 1978* (Lagos: University of Lagos Press, 1984), p.15; Smith, I.O., *Practical Approach to Law of Real Property in Nigeria* (Lagos: Ecowatch Publications, 1999), pp. 314-315; Ilegbune, C., “Land Ownership Structure under the Land Use Act, 1978” (2003) 23 J.P.P.L. 24 at pp. 37-38.

⁷ It is arguable that the status of the holder of a right of occupancy granted by the Governor is even inferior to that of a tenant in the English sense for the mere reason that s.14 of the Land Use Act accords to such a holder exclusive possession of the land against all persons except the Governor. A tenant enjoys exclusive possession against all persons including his landlord: see notes 9 & 10 *infra*. Conversely, the interest of a deemed holder of a right of occupancy under s.34 or s.36 of the Land Use Act is arguably larger than that of a tenant in that the former seems to ensure in perpetuity: see Chukwu, L.O.C., “Practical Implications of Deemed Grants under the Land Use Act”, in Smith, I. O. (ed.), *The Land Use Act – Twenty-Five Years After* (Lagos: Department of Private & Property Law, University of Lagos, 2003), chapter 7.

Therefore, opinion is globally shifting towards other methods of resolving disputes in preference to litigation. The utilization of these alternative means of resolving disputes in a landlord and tenant relationship is the focus of this article.

This work is structured into three parts. Part I examines the nature and incidents of landlord and tenant relationship, identifying the nature of disputes commonly associated with such a relationship and the options for resolving such disputes. Part II deals with the central theme of the work, i.e., alternative dispute resolution mechanisms. The meaning and classification of ADR, the modus operandi of ADR processes and the pros and cons of the ADR option are discussed in this part. Part III contains the concluding remarks.

LANDLORD AND TENANT RELATIONSHIP

Nature of Landlord and Tenant Relationship

A landlord and tenant relationship arises from the creation of a lease or tenancy of premises. In order to understand the nature of the relationship, therefore, one must first understand the meaning of a lease or tenancy.⁸ Perhaps, it is instructive to note that there is no practical difference between the meanings of “lease” and “tenancy”. Both terms are commonly used interchangeably and indiscriminately. Under the Anglo-Nigerian law, a lease is created where one person (called the lessor or landlord) gives another person (called the lessee or tenant) the right of exclusive possession of the former's premises for a term at a rent.⁹ It is the right of exclusive possession that basically distinguishes a tenant from a licensee or lodger.¹⁰

⁸ Tenancies under customary law are not contemplated within the scope of this discourse. For the nature and incidents of customary law tenancy, see, e.g., *Oshodi v. Dakolo* [1930] 9 N.L.R. 13 at 26; *Aghenghen v. Waghoreghor* [1974] 1 S.C. 1 at 8; *Abioye v. Yakubu* [1991] 5 NWLR (Pt. 190) 131. And for the nature of arbitration under customary law, see *Ufomba v. Ahuchogu* [2003] 4 SCNJ 231; *Onyenge v. Ebere* [2004] 6 SCNJ 126; *Ezejiofor, G., The Prerequisites of Customary Arbitration* (1992-93) 16-18 J.P.P.L. 19.

⁹ *Street v. Mountford* [1985] A.C. 809 at 818, per Lord Templeman.

¹⁰ *Paulina Umezurike v. George* [1973] 3 CCHC 62; *Westminster C. C. v. Clarke* [1992] 2 A.C. 288.

Moreover, a lease must have a definite term commencing on a certain date.¹¹ Most leases originate in a contract between the prospective landlord and tenant. The contract is executed by the granting of a lease usually in writing under seal.¹² Where, however, a formal lease is not executed as agreed, if such a contract satisfies all the conditions for a decree of specific performance,¹³ a court of equity will treat the agreement to create a legal lease as having created an equitable lease between the parties on the same terms as the negotiated (but unexecuted) legal lease.¹⁴

Whether it is a legal or an equitable lease, however, it creates a relationship of landlord and tenant. Again, all leases arising by way of contract¹⁵ usually contain covenants whereby the landlord and tenant promise to do, or not to do, certain things in relation to the demised premises.¹⁶ It is their failure to observe or perform these covenants that usually leads to a dispute necessitating recourse to either litigation or any of the alternative dispute resolution mechanisms.

It is, perhaps, pertinent to note at the outset that most leasehold covenants are enforceable between the original landlord and tenant as well as between them and any assignees of the lease or reversion. Accordingly, in this work, any reference to landlord and tenant includes, where the context so admits, their respective assignees.

¹¹ *United Bank for Africa Ltd. v. Tejumola & Sons Ltd.* [1988] 2 NWLR (Pt. 79) 662; *Prudential Assurance Co. Ltd. v. London Residuary Body* [1992] 2 A.C. 386.

¹² See s.1 Statute of Frauds 1677 & s.3 Real Property Act 1845; s.77 (1) Property & Conveyancing Law. As exceptions, however, a periodic tenancy or a tenancy for not more than three years may be created orally or by a document that is not under seal: see s.2 Statute of Frauds 1677 & s.3 Real Property Act 1845; s.77 (2) (c) & s.79 (2) Property & Conveyancing Law.

¹³ See Chukwu, L.O.C., "Specific Performance of Estate Contracts: The Gulf between the Current English and Nigerian Laws" [2003] 22 J.P.P.L. 113.

¹⁴ The doctrine of *Walsh v. Lonsdale* [1882] 21 Ch.D. 9.

¹⁵ An equitable lease may arise by operation of the doctrine of proprietary estoppel: see *Taylor's Fashions Ltd. v. Liverpool Victoria Trustees Co. Ltd.* [1982] Q.B. 133.

¹⁶ Even where there is no express provision in the lease, certain covenants are implied by law: see Megarry & Wade, *The Law of Real Property*, 6th edn. (London: Sweet & Maxwell, 2000), p. 646.

USUAL COVENANTS IN A LEASE

In their celebrated work, Megarry and Wade¹⁷ stated the covenants and conditions that are always “usual”¹⁸ in a lease as follows:

- (a) On the part of the landlord –
a covenant for quiet enjoyment in the usual qualified form, i.e. extending only to the acts of the lessor or the rightful acts of anyone claiming from or under him.
- (b) On the part of the tenant –
 - (i) a covenant to pay rent;
 - (ii) a covenant to pay tenant's rates and taxes, i.e. all rates and taxes except those which statute requires the landlord to bear;
 - (iii) a covenant to keep the premises in repair and deliver them up in repair at the end of the term;
 - (iv) (if the landlord has undertaken any obligation to repair) a covenant to permit the landlord to enter and view the state of repair;
 - (v) a condition of re-entry for non-payment of rent, but not for breach of any other covenant.

In addition to the above, other covenants that are often inserted in leases include covenants to insure the premises against fire, covenants against assignment or sub-letting, covenants against alteration of the demised premises, covenants restricting the user of the demised premises, covenants not to allow nuisances and proviso for forfeiture or re-entry for breaches of any covenant whatsoever.

COMMON CAUSES OF DISPUTES BETWEEN LANDLORD AND TENANT

It is neither possible nor desirable, in an article such as this, to attempt an exhaustive catalogue of all the issues that are wont to arise in a landlord and tenant relationship. Though infinitely varied, the sources of controversy are almost invariably linked with the failure of either or both of the parties to observe or perform their covenants

¹⁷ Ibid at p. 884.

¹⁸ See *Hampshire v. Wickens* [1878] 7 Ch.D. 555.

(express or implied) under the lease. Thus, the commonest issues that may arise between landlord and tenant are as follows:

- (a) Rent – delayed payment by tenant, arbitrary increase by landlord, mode of payment (cash or cheque), rent review mechanisms, etc.
- (b) Payment of service charges and utility bills.
- (c) Payment of insurance premiums, rates, taxes and outgoings – whose responsibility, criteria for apportionment in the case of shared responsibility, etc.
- (d) User of the premises – alteration of structure or user, failure to repair and keep the premises in good sanitary condition, acts of nuisance or waste, prohibited uses, etc.
- (e) Option to renew – conditions for the exercise of option, mode of exercise, terms of renewal, etc.
- (f) Assignment, sub-letting and transfer of possession – landlord withholding consent unreasonably, tenant assigning or sub-letting without landlord's consent, failure of assignee or sub-tenant to perform covenants contained in the head lease, etc.
- (g) Landlord's failure to repair and maintain structure of premises and common parts.
- (h) Landlord derogating from his grant or unlawfully interfering with tenant's quiet possession.

OPTIONS OPEN TO LANDLORD AND TENANT IN DISPUTE

In the event of a dispute between the landlord and tenant, they have basically two options. One is that they may adopt an adversarial, win-lose approach in resolving the dispute. This will mean their having to resort to litigation or arbitration. At the end, the court or arbitrator(s) will hand down a decision in favour of one party and against the other. The other option is for them to adopt a non-adversarial or collaborative, win-win approach. This option entails having recourse to any of the other alternative dispute resolution mechanisms.¹⁹ Both parties may end up getting substantially what they want and neither party will lose completely.

There are, however, situations where the aggrieved landlord or tenant is faced with what can be best described as “Hobson's choice”. He

¹⁹ See Allison, J.R., “Five Ways to keep Disputes out of Court”, Harvard Business Review Jan-Feb 1990 (Reprint 90101), p. 2.

either goes to court right away or he will be ruined! Take for instance, where an unreasonable landlord, as a means of getting even with a tenant whose rents are grossly in arrears, threatens to remove the roof or outer doors of the building or where a tenant, frustrated by the landlord's incessant disturbance of his quiet possession, is about to remove the landlord's fixtures and fittings and move out of jurisdiction. Prudence and conventional wisdom dictate that the tenant (in the first example) and the landlord (in the second example) should, as a matter of urgency, seek the intervention of the court, which can use its coercive powers to restrain the other party from committing the threatened act. Having secured a court order, the effect of which will be to maintain the status quo ante pending the determination of the substantive dispute, the parties thereafter have the option either to proceed to trial or open negotiations with a view to settling the matter out of court.

Similarly, where the issue in controversy involves a recondite question of law or the interpretation of a particular statute or clause in the lease, it is imperative that the parties should seek judicial opinion. If there is no contentious issue of fact involved, the landlord or tenant may take out an originating summons,²⁰ which is an expeditious process designed for non-contentious litigation.

The essence of adopting the litigation option in the above instances is that the decision of the court will not only be final and binding on the parties, but also serve as a precedent in future cases. There are, however, many drawbacks of litigation, for which reason it is often advisable for the landlord and tenant to explore the ADR option first and take to litigation only as a last resort.

THE ADR OPTION

Meaning of ADR

The acronym "ADR" stands for "Alternative Dispute Resolution", which has been defined as "any method of resolving an issue susceptible to normal legal process by agreement rather than by an

²⁰ See, e.g., Or. 3 Rr. 5 & 8 High Court of Lagos State (Civil Procedure) Rules 2004.

imposed binding decision”.²¹ The prominent feature of ADR processes is that they draw their legitimacy and efficacy from the consensus of the parties, unlike the litigation process. There are two aspects of this consensus element. First, both parties must agree to go by ADR for it to be initiated and, secondly, they have to agree to be bound by the final outcome. It is the second aspect that seems to take arbitration outside the scope of ADR, for an arbitral award does not depend on the agreement of the parties for its binding force. However, in this discourse, ADR is used in a sense that encompasses all alternative means of resolving disputes other than litigation.

FORMS OF ADR

ADR processes may be classified broadly into two. One is akin to litigation in that it is adversarial and judgmental in nature. This type of ADR is known as arbitration. The other class of ADR processes is non-adversarial and non-judgmental. This class includes negotiation, mediation and conciliation. There is also a hybrid category loosely referred to as “med-arb”.²² This is a dispute resolution process whereby the parties agree from the outset that a neutral should first try to mediate on the dispute but if mediation fails in whole or in part, the remainder of the dispute should be arbitrated upon by the same or a different neutral.²³

ARBITRATION

Arbitration is the private judicial determination of a dispute by an independent third party, who may be either a sole arbitrator or a tribunal composed of a number of arbitrators. It is a condition precedent to the commencement of the arbitral process that the parties have an arbitration agreement in writing.²⁴ This can be in

²¹ See the Glossary of ADR Terms published by the Academy of Experts, London in www.academy-experts.org republished in the Negotiation & Dispute Resolution Journal, Vol. 1 No. 1, 2004, pp. 119-122.

²² For a similar view, see Yakubu, J. A., “The Interplay of Adjudicatory Functions between Arbitral Tribunals and the Courts with Respect to Arbitral Proceedings”, in Kanam, S. M. G. & Madaki, A. M. (eds.), *Contemporary Issues in Nigerian Law* (Private Law Department, Ahmadu Bello University, Zaria, 2006), p. 179 at 183; Ajibola, B., “Recent Developments in Arbitration and ADR in the African Continent”, in Amasike, C. J., *Arbitration & Alternative Dispute Resolution in Africa*, (Abuja: Dr. C. J. Amasike & Associates, 2005), p. 11.

²³ See the Glossary of ADR Terms, *supra*.

²⁴ See s. 1 Arbitration and Conciliation Act (ACA), Cap. A18 LFN 2004. By s.31 (2) (b) ACA, one of the two documents that a party applying for the

form of either an arbitration clause contained in their initial contract or lease or an ad hoc arbitration agreement entered into when a dispute has arisen between them. Thus, in general,²⁵ arbitration is founded upon a consensual or voluntary arrangement between the parties. Where there is an arbitration agreement, the courts will usually uphold arbitration as the prime method of resolving any dispute between the parties falling within the purview of such an agreement. However, where one party, in defiance of the arbitration agreement, initiates proceedings in court, the court may stay such proceedings, provided the other party applies in limine for a stay before taking any steps in the proceedings.²⁶

In *The Owners of the M.V. Lupex v. Nigerian Overseas Chartering & Shipping Ltd.*,²⁷ the Supreme Court of Nigeria, overturning the decisions of the lower courts, ordered a stay of proceedings in a suit instituted at the Federal High Court, Lagos during the pendency of an arbitration earlier commenced in London pursuant to an arbitration clause contained in the charter-party contract between the parties. The court observed that the mere fact that a dispute is of a nature eminently suitable for trial in a court is not a sufficient ground for refusing to give effect to the parties' agreement to refer such a dispute to arbitration.²⁸ The underlying policy consideration for staying court proceedings pending reference to arbitration is that the parties have to honour an

enforcement of an arbitral award must supply to the court is the original arbitration agreement or a duly certified copy thereof. See also *Commerce Assurance Ltd. v. ALL* [1992] 3 NWLR (Pt. 232) 710 at 721-722.

²⁵ For statutorily imposed arbitration, see e.g. Trade Disputes Act, Cap. T8 LFN 2004; Investments and Securities Act, 2007.

²⁶ See ss. 4 & 5 ACA. See also *Kano State UDB v. Fanz Construction Co. Ltd* [1992] 4 NWLR (Pt. 142) 1 at 28. For the type of evidence required to support an application for stay of proceedings pending reference to arbitration, see *The M.V. Panormos Bay v. Olam Nigeria Plc* [2004] 10 CLRN 77 at 85.

²⁷ [2003] 15 NWLR (Pt. 844) 469.

²⁸ *Ibid* at p.491. See also *Re An Application by the Phoenix Timber Co. Ltd. (Appeal of V/O Sovfracht)* [1958] 1 Lloyd's Rep. 305 at 308; *Kurobo v. Zach - Motison (Nig.) Ltd.* [1992] 5 NWLR (Pt. 239) 102 at 117; *Fawehinmi Construction Company Ltd v. Obejiemi Awolowo University* [1998] 6 NWLR (Pt. 553) 171.

agreement that they have freely and validly entered into. The court should not allow a party to such an agreement to “approbate and reprobate”.²⁹ However, in apparent recognition of the primacy of the policy of holding the parties to their arbitration agreement as well as the notoriously dilatory process of securing an order of stay of court proceedings in Nigeria, the lawmakers provided in section 4(2) of ACA that arbitral proceedings may be commenced or continued and an award may be made by the arbitral tribunal while litigation over the same dispute is still pending.

Where, however, the party who has commenced an action in court shows to the court's satisfaction that he would suffer injustice if the proceedings are stayed or that he will not obtain justice from the arbitral tribunal or that the agreement between the parties is null and void, inoperative or incapable of being performed, the court may refuse to stay the proceedings.³⁰ Moreover, if the defendant in the suit has entered an unconditional appearance and filed his pleadings or taken any other steps in the proceedings, he will be taken to have waived his right to ask for a stay of proceedings pending arbitration.³¹

ADVANTAGES OF ARBITRATION

EFFICIENCY – The arbitration process is simpler and less cumbersome than the litigation process. The hearing is devoid of technical rules of procedure and evidence.³² More significantly, an arbitral tribunal deals with one matter at a time as opposed to the

²⁹ See Akpata, E., *The Nigerian Arbitration Law in Focus*, (Lagos: West African Book Publishers, 1997), p. 28.

³⁰ *The Owners of the M.V. Lupex v. Nigerian Overseas Chartering & Shipping Ltd.*, supra at p. 490.

³¹ See *Confidence Assurance Ltd v. The Trustees of Ondo State College of Education Staff Pension Fund* [1999] 2 NWLR (Pt. 59) 373. Contrast *Usi Enterprises Ltd v. Kogi State Government & 2 Ors* [2004] 11 CLRN 116 at 130, where it was held that in a suit filed in the undefended list, the defendant, by merely entering an appearance and filing a notice of intention to defend the suit, cannot be said to have waived his right to apply for a stay of proceedings pending reference to arbitration where by the said notice he raised the issue of the plaintiff's failure to submit the dispute to arbitration before proceeding to court.

³² Arbitral tribunals are not bound by rules of pleading and evidence. Indeed, s.1 (2) of the Evidence Act, Cap. E14 LFN 2004 expressly states that the Act is inapplicable to arbitral proceedings.

usual debilitating caseload of the regular courts in Nigeria. All these factors combine to save time and make the process more efficient than litigation.

CHOICE OF ARBITER – The arbitral process offers the parties the autonomy to name either the arbitrator(s) or the authority to appoint them.³³ Accordingly, where the dispute (actual or potential) is of a technical or commercial nature, the parties should appoint an arbitrator who possesses the requisite expertise, which a judge is unlikely to have.³⁴ Or they may name an arbitral institution or professional body³⁵ to appoint the arbitrator(s). An expert serving as an arbitrator will no doubt turn his professional skills to good account in evaluating the evidence and arriving at a just decision. For example, in a dispute between landlord and tenant over the revision of rent or valuation of the premises for insurance purposes, it will be wise to appoint an estate surveyor as an arbitrator.³⁶

More importantly, allowing the parties to choose the arbitrator(s) helps in minimizing objections on the grounds of bias or personal interest on the part of the arbitrator(s). Should it become necessary, in any event, such objections could be raised or the arbitrator(s) challenged³⁷ by a party without the slightest fear of reprisals. By contrast, litigants have no right to choose the judge that will preside over their case. And what's more, they have to always tread

³³ See s.7 ACA.

³⁴ E.g. the Regional Centre for International Commercial Arbitration, Lagos; the Institute of Construction Industry Arbitrators. Every arbitral institution has a panel of arbitrators from which it can nominate an arbitrator or a neutral on request.

³⁵ E.g. the Nigerian Bar Association; the Nigerian Institution of Estate Surveyors and Valuers; the Nigerian Institute of Architects.

³⁶ Note, however, that there is a distinction between the surveyor acting as an expert and as an arbitrator. An arbitrator can only take into account evidence put before him by the parties, disregarding his own knowledge. By contrast, an expert can rely on his own knowledge as well as information put before him by the parties. It is therefore more difficult to challenge an expert's decision than it is an arbitrator's: See *Niki Tobi JSC in MEPC Plc* [1991] 2 E.G.L.R. 103.

³⁷ See sections 8 & 9 ACA.

cautiously in raising objections on the grounds of the perceived incompetence, bias or personal interest of the judge in the matter lest they be cited for contempt of court.

CONFIDENTIALITY – A major advantage of all ADR proceedings or conferences is that they are conducted in private, unlike court proceedings that are normally conducted at the full glare of the public.³⁸ Most disputants will, of course, prefer not to wash their dirty linen in public if they have a choice. Holding arbitration in camera, therefore, gives the parties the leeway to ventilate their grievances without undue restraint. Landlord and tenant relationship is often a very close one, especially where the parties are co-occupiers of the same premises. Accordingly, they will know so much about each other that if they open up in the course of trial in court, they make themselves vulnerable to predatory news hounds, law enforcement officers, tax officers, etc.

CONVENIENCE – Hearings are arranged flexibly at times and venues to suit the parties, arbitrators and witnesses. Arbitration can take place even at night and on a public holiday or weekend. Besides, if such incidents as power outage, riot, flooding, etc., occur at the venue of arbitration, it can be moved elsewhere without considerable difficulty. By contrast, such vagaries are some of the notorious causes of unending adjournments and delays in our courts.

FINALITY – An arbitral award is final and binding on the parties, there being no right of appeal in arbitration.³⁹ This is an advantage in the sense that it avoids the unnecessary prolongation of disputes. *Interest reipublicae ut sit finis litium*: it concerns the state that lawsuits be not protracted. The court, however, has limited powers to set aside an arbitral award on the ground that:

³⁸ S. 36 (3) of the Constitution of the Federal Republic of Nigeria 1999 stipulates that the proceedings of a court or tribunal relating to the determination of a person's civil rights and obligations shall be held in public.

³⁹ See s. 7 (4) & s. 34 ACA. But see *Ogunwale v. Syrian Arab Republic* [2002] 24 WRN 94, where Chukwuma-Eneh, J.C.A. (as he then was) stated thus: "...without going flat out to declare the provisions of section 7 (4) and 34 [ACA] unconstitutional, it is enough to say here that they cannot override the clear right of appeal conferred on the appellant by section 241 (1) of the 1999 Constitution".

- (a) the award contains matters beyond the scope of the submission to arbitration;⁴⁰ or
- (b) the arbitrator has misconducted⁴¹ himself or that the award has been improperly procured.⁴²

The English case of *Williams v. Wallis & Cox*⁴³ affords a good illustration of the power of the court to set aside an arbitral award on the ground of the arbitrator's misconduct. In that case, L & T entered into a seven-year lease of a farm. T covenanted, inter alia, to keep the demised premises "in as good and tenantable repair and condition as they now are" and to deliver them up to L at the expiration of the term "in such good and tenantable repair and condition as aforesaid...". At the expiration of the lease, T claimed to be entitled to compensation for improvements and L claimed against T in respect of breaches of covenants. These claims were referred to arbitration. T alleged that the arbitrator refused to admit evidence tendered by T as to the condition of the premises at the commencement of the tenancy. Upon the arbitrator making an award, T applied to the court to set aside the award on the ground that the arbitrator had misconducted himself by rejecting the evidence as alleged.

The court of first instance held that even if it was established that the arbitrator had rejected the evidence, that would not be misconduct so as to entitle T to have the award set aside. On appeal to the Divisional Court, it was held (reversing the earlier decision) that rejection of material evidence by an arbitrator would constitute "misconduct" on his part entitling the aggrieved party to have the award set aside. In the words of Atkin, J., misconduct on the part of an arbitrator "does not really amount to much more than such a

⁴⁰ S. 29 (2) ACA.

⁴¹ For what amounts to "misconduct" by the arbitrator, which will justify the setting aside of an award, see *Williams v. Wallis & Cox* [1914] 2 K.B. 478 at 484, 485; *Taylor Woodrow of Nigeria Ltd. v. S.E. GMBH* [1993] NWLR (Pt. 286) 127; *African Reinsurance Corp. v. Aim Consultants Ltd.* [2004] 11 CLRN 107 at 115; *Kljco Nig Ltd v. N.N.P.C.* [2004] 3 WRN 135.

⁴² S. 30 (1) ACA.

⁴³ *Supra*.

mishandling of the arbitration as is likely to amount to some substantial miscarriage of justice.⁴⁴

DISADVANTAGES OF ARBITRATION

COST – Compared to litigation, arbitration, especially a large-scale one, can be quite expensive to the parties. In the case of litigation, the remuneration of the judge and judicial personnel and the costs of the facilities and materials used by the court are all paid by the State. Litigants pay only but token fees for filing and service of processes, enrolment of orders, certified true copies of documents, *etc.* In arbitration, the parties have to pay the arbitrator's fees and expenses as well as other costs of the arbitral proceedings. An Arbitrator is often a private professional practitioner of high repute who should have very high demands on his time, energy and skills. When such a reputable professional agrees to serve as an arbitrator, he is entitled to, and usually will, charge a substantial fee. However, when the arbitration costs are offset against the multifarious costs involved in lengthy litigation,⁴⁵ it will be seen that arbitration can sometimes be cost effective.

NO APPEAL – It has earlier been stated that the fact that an arbitral award is final and not appealable is an attractive feature of arbitration. Paradoxically, it is this feature that also makes arbitration sometimes unattractive. Inasmuch as the courts have limited powers to set aside an arbitral award, they are always loathe to exercise such powers except where the circumstances are compelling,⁴⁶ which, at any rate, must be within the narrow confines stipulated by statute. Thus, where the arbitrator makes a mistake or gives an award that is against the weight of evidence, the losing party may have no recourse.

PARTIAL RELIEF TO EACH PARTY – Because an arbitrator is not bound by the rules of pleading and evidence, and he is often predisposed to make decisions based on fairness, he may give an award that gives no complete relief to either party, but rather grants each party only part of what he claimed. A typical illustration can be found in the Holy Bible⁴⁷ where two women came before King

⁴⁴ *Ibid* at p.485; see also *per* Lush, J. at p.484.

⁴⁵ These costs include wasted man-hours, depreciation in the value of the subject matter of litigation, increased legal fees, opportunity costs, *etc.*

⁴⁶ See *Foti v. Akese* [1930] 1 W.A.C.A. 1; *African Reinsurance Corp. v. Aim Consultants Ltd.*, *supra*.

Solomon with a dispute over a newly born baby, which each claimed as hers. Solomon asked for a sword and, in a rather simulated decision,⁴⁸ ordered that the baby be split into two for each claimant to take one half. Such is the way of arbitrators!

NEGOTIATION

In the context of landlord and tenant relationship, the term “negotiation” can be used in two senses – first, as a prelude to their initial contract for a lease and, secondly, as a means of resolving any dispute arising in the course of their relationship. This writer had, in an earlier discourse,⁴⁹ dealt with negotiation in the first sense. It is negotiation in the second sense that falls within the scope of the present work.

By and large, in whatever sense the term is used, to “negotiate” means to have formal discussions with someone in order to reach an agreement with them.⁵⁰ Negotiation may be adversarial (win-lose negotiation) or collaborative (win-win negotiation).⁵¹ Where the nature of the dispute is such that either party must win or lose in the end, it is a win-lose negotiation. The essence of negotiation in such a situation is for either party to persuade the other to drop his position.

To give an example, a landlord and his tenant are co-occupiers of a residential block of two flats. The landlord lives in the upper flat while the tenant occupies the ground flat. Because of the notoriously recurrent power cuts in Nigeria, the landlord installed a 25-KVA generator for his sole use. The decrepit generator, which the landlord

⁴⁷ 1 Kings 3 vs. 16-28.

⁴⁸ That simulation of an award, however, elicited the intended reactions from both women, which enabled Solomon to ultimately determine the true mother of the baby to whom he awarded it and thereby earned for himself a reputation as the wisest king ever.

⁴⁹ Chukwu, L.O.C., “Guides on the Negotiation of Leases, Tenancies and Assignments”, in Nwosu, K.N. (ed.), *Legal Practice Skills & Ethics in Nigeria* (Lagos: DCON Consulting, 2004), chapter 14.

⁵⁰ *Cambridge International Dictionary of English* [1996], pp. 947-948.

⁵¹ See Epie, C., “Alternative Dispute Resolution: Understanding the Problem-Solving (Win-Win) Approach in Negotiations”, *Negotiation & Dispute Resolution Journal*, Vol. 1 No. 1[2004], p. 71.

acquired second-hand, emits loud noise, noxious fumes and vibrations. The tenant finds this unbearable and so he wants the landlord to remove the machine, which is installed right by the tenant's bedroom window. Suppose the generator has no capacity to serve both apartments, there is no other space left in the premises to move the generator, nothing can be done to improve its efficiency owing to its old age and the landlord cannot afford a replacement. In such a scenario, it is obvious that any negotiation between the landlord and tenant will be a win-lose situation.

In reality, however, such extreme situations, where all the odds are against a possible compromise, are rarer than frequent. Behind every dark cloud there is always a silver lining. Thus, a skilful and well-informed negotiator will always find a window for a win-win negotiation. The essence of a win-win negotiation is to reconcile interests so that each party *shifts* his position. A win-win negotiation is "the art of seeking agreement to the maximum advantage of all concerned".⁵² In our last example, suppose the generator is a sound 50-KVA, there is ample space in the premises and the landlord would not mind extending the service of the generator to the tenant if the latter will be paying a service charge. In such a scenario, there is room for a win-win negotiation. The parties may negotiate and agree on a reasonable service charge for the tenant to share in the service of the generator. In addition or in the alternative, the landlord may agree to mitigate the nuisance by moving the generator further away from the tenant's apartment and possibly reducing its fumes and noise levels.

MEDIATION AND CONCILIATION⁵³

If it is obvious from the outset that the parties cannot resolve their differences by negotiation or, having commenced negotiations, they have reached a deadlock, then they may have to bring in a neutral third party to assist them in reaching an agreement. The third party may be either a mediator or a conciliator. Thus, mediation and conciliation are essentially negotiation that includes a third party. Both terms are often used indiscriminately. However, there are technical differences between their meanings, as can be discerned

⁵² Murdock, A. & Scutt, C.N., *Personal Effectiveness*, 2nd edn. (Oxford: Butterworths-Heinemann, 1999), p.139.

⁵³ ACA makes provisions for conciliation but not for mediation: see Part II & Schedule 3 ACA.

from the following definitions proffered by the Academy of Experts, London:⁵⁴

CONCILIATION – A without prejudice non-binding dispute resolution process in which an independent third party (“neutral”) assists the parties to settle their difference but may, if necessary, deliver his opinion as to the merits of the dispute.⁵⁵

MEDIATION – A without prejudice non-binding dispute resolution process in which an independent third party (“neutral”) assists the parties to settle their difference but does not advise them of his own opinion as to the issues and merits of the dispute.⁵⁶

As mediation and conciliation are offshoots of negotiation, they share in the essential attributes of negotiation, which have been discussed earlier. Thus, as in the case of negotiation, mediation or conciliation can also take place in either a win-lose or win-win situation. To revisit the Biblical illustration given earlier, the maternity dispute between two women that was brought before King Solomon for adjudication was a typical win-lose case. Therefore, even if the women had gone for mediation or conciliation, the outcome would still have been the same; one woman would take the baby while the other would lose it. The only difference is that if Solomon had acted as a mediator, he would not have been entitled to give his own opinion and, if he had acted as a conciliator, his opinion would not have been binding.⁵⁷

⁵⁴ *Op. cit.*, note 21.

⁵⁵ A conciliator may be required to make a “recommendation” as to how the dispute should be settled if agreement cannot be reached by the parties during the process. In some contracts, the parties agree that a conciliator’s recommendation is binding unless challenged within a stated period: *ibid.*

⁵⁶ See also Moore, C., “How Mediation Works”, in Lewicki, R.J. *et al* (eds), *Negotiation – Readings, Exercises and Cases*, 2nd edn. (Boston, Ma: Irwin, 1993), p. 445.

⁵⁷ *Cf.* s.42 ACA.

COURT-ANNEXED ADR

This means any ADR process that the parties may be required or advised to undertake by the court or any ADR facility that is offered by the court. The ADR process may take any of the forms already discussed. As a means of reducing their caseload as well as courtroom tension, the courts globally have begun to encourage litigants and their solicitors to explore the ADR option. This is the current practice in England, especially in the Commercial Courts.⁵⁸ Indeed, it has been reported that the number of claims brought before the Commercial Courts *per annum* reduced drastically from about 2,700 in 1996 to about 1,200 in 2001 as a result of active encouragement of ADR in deserving cases.⁵⁹

In keeping with this global trend, the Lagos Multi-Door Courthouse was set up in 2002. It was the first of its kind in Nigeria. Soon after, the Abuja Multi-Door Courthouse emerged in 2003. It is called “multi-door” in that an intending litigant, upon approaching the court, will be advised that there are multiple doors open to him within the court system. In an appropriate case, he would be encouraged to explore the ADR option first and, if it fails, he can proceed with litigation.

ADVANTAGES OF NON-ADVERSARIAL ADR

A fortiori the non-adversarial ADR processes enjoy most of the advantages of arbitration earlier discussed. These include efficiency, expedition, confidentiality, convenience and potential for having the benefit of expert opinion and, in most cases, cost effectiveness.⁶⁰ In addition, they have the following unique advantages:

⁵⁸ See Cresswell, J., *Practice Statement (Commercial Cases: Alternative Dispute Resolution)* [1994] 1 W.L.R. 14; Waller, J., *Practice Statement (Commercial Cases: Alternative Dispute Resolution) No. 2* [1996] 1 W.L.R. 1024-1026. See also *Okpuruwu v. Okpokam* [1988] 4 NWLR (Pt. 90) 544.

⁵⁹ See Obayomi, W., “Raising Standards in Litigation Management”, *Negotiation & Dispute Resolution Journal*, Vol. 1 No.1, 2004, p.98, relying on the chart contained in *The Economist*, October 26, 2002, p.38.

⁶⁰ See Cho, F., “An Appraisal of Litigation as a Mechanism for Dispute Resolution in Nigeria”, in Kanam, S. M. G. & Madaki, A. M. (eds.), *Contemporary Issues in Nigerian Law* (Private Law Department, Ahmadu Bello University, Zaria, 2006, p. 314.

CONTINUING RELATIONSHIP – Whilst the adversarial processes (including litigation and arbitration) look to the past conduct of the parties, the non-adversarial ADR processes look to their future relationship. The approach in negotiation, mediation or conciliation is not to pass judgment or apportion blames, but rather to use the dispute that has arisen as a basis for fashioning the terms of a mutually respectful and enjoyable relationship. In a landlord and tenant relationship, once the parties are in court, the relationship is on the brink of total collapse. Scarcely could any Nigerian landlord bear the thought of his tenant dragging him to court. Whoever wins the case, the tenant's days in the demised premises are numbered.

POSSIBILITY OF OBTAINING RELIEF WHERE OTHERWISE IMPOSSIBLE – ADR processes, especially in the non-adversarial mould, enable the parties to obtain reliefs where it would be impossible to do so by the litigation process. For example, where a lease for more than three years or an assignment (either of which is required to be in writing under seal) is created orally or by simple writing⁶¹ or one of the parties was at the time of creation of the lease an infant⁶² or a person of unsound mind,⁶³ the landlord and tenant will be unable to enforce their rights under the lease by litigation. In such a situation, the only way out is for the parties to have recourse to the ADR processes. More significantly, the ADR processes do not accommodate the usual jurisdictional objections on such grounds as the relief or amount claimed, territorial jurisdiction of the court or judicial tribunal,⁶⁴ limitation of action, inappropriate originating process, *etc.*

⁶¹ See *supra*, note 14.

⁶² At common law, a lease created by an infant is voidable: *Edward v. Carter* [1893] A.C. 360.

⁶³ At common law, a lease created by a person of unsound mind is binding on him unless the lessee knew of his insanity at the time of creating the lease: *Molton v. Camroux* [1848] Exch. 17.

⁶⁴ See Uzodike, E.N.U. & Chukwu, L.O.C., "Jurisdictional Scope of the Rent Control & Recovery of Residential Premises Edict 1997 of Lagos State", in Uzodike (ed.), *Report of a Workshop on the Rent Control and Recovery of Residential Premises Edict (No. 6) 1997*, (Faculty of Law, University of Lagos, 1999, p. 61.

In the notorious case of *United Bank for Africa Ltd. v. Tejumola & Sons Ltd.*,⁶⁵ the parties had agreed on all the essentials of a lease except one, that is, the commencement date. The landlord proceeded to execute, at considerable expense, the multifarious renovations and alterations required by the proposed tenant. Thereafter, the proposed tenant withdrew from the transaction. The Supreme Court held (overturning the judgments of both the Court of Appeal and the trial court) that, as an essential element of a lease had not been settled, the transaction was still in the negotiation stage; hence the prospective landlord was not entitled to any relief. Certain *dicta* of the learned Justices of the Supreme Court, however, indicate that their Lordships were not oblivious of the fact that the result of their decision was unfair to the plaintiff/respondent, yet they had to go by the clear principles of law. For instance, Agbaje, J.S.C.⁶⁶ (who delivered the lead judgment) had this to say:

It will appear that the plaintiff at all stages of the negotiations for the lease with which we are concerned in this appeal acted for itself. It is doubtful that it ever sought, let alone obtained, the advice of a legal practitioner in the matter. Perhaps if it had done the latter, it would have been warned of the risk of meeting demand after demand from the defendant in the absence of a concluded agreement for a lease. It turned out that the plaintiff unwittingly took this risk which eventually materialized, as this judgment has shown, with the plaintiff incurring losses for which the defendant cannot be made legal (*sic*) liable. The stage at which the negotiations for an agreement for a lease had reached in this case raised high hopes in the plaintiff that a concluded agreement would finally be arrived at...In fact it was when all of the objections raised by the defendant had been disposed of by the plaintiff at some cost that the defendant called off the negotiations. The law says the defendant can do so with impunity. But I do not think it will be too much to expect if the defendant having regard to all the circumstances of this case decides to absorb *ex gratia* some of the losses

⁶⁵ [1988] 2 NWLR (Pt. 79) 662.

⁶⁶ *Ibid* at p.684. See also *per* Nnamani, J.S.C. at p.691 and *per* Nnaemeka-Agu, J.S.C. at p.702.

which the plaintiff had undoubtedly suffered in the transaction.⁶⁷

The point to note is that if the parties in that case had explored the ADR option, using competent and skilled solicitors as negotiators or mediators, they could have either saved the inchoate transaction from falling through or agreed on a fair compensation to be paid to the prospective landlord for the huge expenses that the proposed tenant had suffered it to incur.

Indeed, even after holding that the plaintiff/respondent had no remedy, both at law and in equity, the learned Justices of the Supreme Court still bent over backwards to advise that counsel for both parties should put their heads together to see how justice could be done. In essence, their Lordships advised the parties to go for post-litigation ADR. Such advice, coming, as it were, from the apex court, buttresses the point that disputants can, by utilizing the ADR processes, obtain relief even where it is impossible to do so by the judicial process.

OPPORTUNITY FOR EACH PARTY TO TEST THEIR CASE

Non-adversarial ADR processes offer the parties the opportunity to test the strengths, weaknesses, theories and strategies of their respective cases. The Holy Bible⁶⁸ admonishes any king going to encounter another king in war to first take steps to ascertain the strength of his adversary. If he sees that his adversary has twice the strength of his own army, he should sue for peace. It is in recognition of the benefits of such pre-assessment of relative strengths and weaknesses that ADR practitioners, in their characteristic dynamism and flexibility, have continued to fashion new ADR mechanisms, such as the early expert or neutral evaluation, executive hearing, _{etc.}⁶⁹ _

By way of illustration, L increases the yearly rent of his residential flat at Ikoyi, Lagos State from ₦800,000 to ₦1,500,000. T offers to

⁶⁷ Emphasis mine.

⁶⁸ Luke 14 vs. 31-32.

⁶⁹ See the *Glossary of ADR Terms*, *supra*, note 21.

pay ₦1,000,000, which L rejects. L gives T a notice to quit at the end of the current yearly term, which is barely two months away. T believes that if the matter goes to the Rent Tribunal for determination of the standard rent, L cannot get away with the increase. In such a situation, an early expert evaluation (using, for instance, a skilled property lawyer) will enable each party to test the strength of his case. L will discover that the quit notice is insufficient and so no action can be founded upon it. T will discover that the premises lie outside the scope of protected tenancies under the applicable legislation⁷⁰ and so L is free to charge rent as he pleases. Both parties can then take an informed decision whether to embark on a likely futile legal battle or shift their respective positions, *e.g.*, by splitting the difference between the amounts demanded and offered.

DRAWBACK OF NON-ADVERSARIAL ADR

NON-COMPELLABILITY OF PARTIES – The most obvious drawback of ADR processes is that they are voluntary, not obligatory. A person who is sued in court has no choice but to enter an appearance. If he fails to do so, the case will go on in his absence and the plaintiff may obtain judgment in default of appearance.⁷¹

In the case of ADR, one party may decline *ab initio* from participating in the proceedings or, having participated initially, he may withdraw at will. The position with regard to arbitration somewhat differs from the other ADR processes in that a party to an arbitration agreement may be compelled to take that option. All the same, it is on such a party's own volition that he had entered into the arbitration agreement in the first place. Flowing from the voluntary nature of ADR, therefore, the party who holds the aces in a particular case may be unwilling to take that option and there is nothing the other party can do to compel him.

ENFORCEMENT – As a result of the non-binding nature of most ADR processes, the implementation of the agreement reached in any case depends on the will of both parties. Where the goodwill is lacking, their only recourse will still be litigation, which they had wanted to avoid in the first place. Even in the only ADR process that has a binding force, *i.e.* arbitration, the enforcement of an award will

⁷⁰ See Uzodike, E.N.U. & Chukwu, L.O.C., *op. cit.*, note 64 at p.64.

⁷¹ See Or. 10 High Court of Lagos State (Civil Procedure) Rules 2004; Or. 15 Federal High Court (Civil Procedure) Rules 2000.

still require the court's assistance.⁷² Thus, where one party refuses to be bound by the outcome of the ADR proceedings, thereby making litigation inevitable, the parties are worse off in the sense that all the time, energy and costs wasted in the ADR process would have been in vain.

CONCLUSION

We have endeavoured to demonstrate that in the resolution of most disputes arising in a landlord and tenant relationship, the ADR option is preferable to litigation. Parties going to court are poised to *fight*; while disputants going for the ADR option are determined to *settle*. Litigation, especially in the Nigerian socio-cultural milieu, leaves a sour taste in the mouths of the parties even after it has ended. Their relationship can hardly be the same again. In most cases, indeed, litigation sounds the death knell of the landlord and tenant relationship.

Except for short term or *ad hoc* lettings, a landlord and tenant relationship will usually last for a good number of years. In many instances, both the landlord and tenant are co-occupiers of the same or contiguous premises. The relationship is, therefore, so close that litigation, with its oft-attendant enmity, will not be in their best interests. Whatever disputes arising in their relationship can, in most cases, be better handled by employing the ADR processes. As has been demonstrated in this discourse, the advantages of the ADR option over litigation are enormous.

Conveyancers should, therefore, always insert arbitration clauses in leases and tenancy agreements. Solicitors acting for disputing landlords and tenants should always explore ADR first and resort to litigation only in extreme cases where, even with their best endeavours, ADR proves ineffectual. Equally, the courts should, in

⁷² See s.31 ACA. See also Asouzu, A.A., "Arbitration and Judicial Powers in Nigeria" (2001) *Journal of International Arbitration*, 18(6), 617 at 633; Yakubu, J. A., *op. cit.* Indeed, s.32 ACA provides that any of the parties to an arbitration agreement may request the court to refuse recognition or enforcement of the award.

keeping with the global trend as earlier observed,⁷³ encourage disputing landlords and tenants to have a shot at ADR.

⁷³ See Court-Annexed ADR, *supra*.