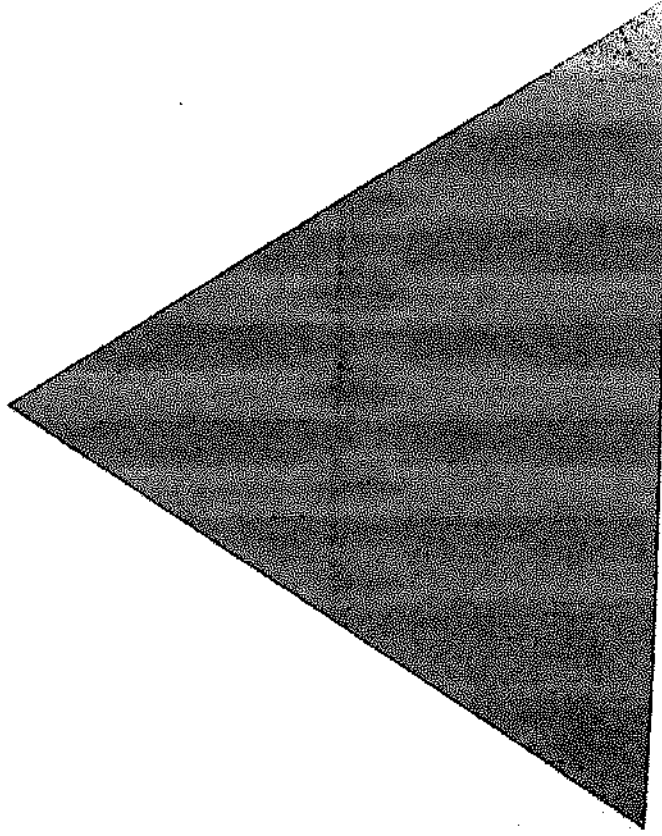


PRINCIPLES OF NEGOTIATION AND MEDIATION



Edited by
Epiphany Azinge
Chinyere Ani



NIGERIAN INSTITUTE OF ADVANCED LEGAL STUDIES

PRINCIPLES OF NEGOTIATION AND MEDIATION

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The fact that conflict is a constant feature of human existence is not perplexing; settlement of conflict in a manner that would engender lasting peace and harmony in any relationship remains a challenge to the uninitiated in Alternative Dispute Resolution (ADR) processes. ADR is rapidly growing in popularity, and preference for it is the reason that it provides alternative ways of resolving conflicts away from the regular litigation, which is fraught with various drawbacks. Negotiation and Mediation are two key ADR processes, which are mainly preferred. ADR in general and Mediation in particular received a boost with the establishment in 2002 of the Lagos State Multi-Door Courthouse (LMCD). The LMCD is the first Court-connected ADR Centre in Africa. The Federal Capital Territory (FCT) Abuja and other states like Abia, Akwa-Ibom, Kaduna and Kano have established their Multi-Door Courthouses, while several other states are at different levels of establishing theirs. These Multi-Door Courthouses have provided the platform for the practice of various ADR processes.

Many current legislations and agreements in Nigeria and beyond require that ADR should be the first option in settling any dispute arising therefrom before recourse to litigation. However, the major shortcomings of ADR is the lack of understanding of the processes by the majority of the populace, including lawyers who hitherto did not receive any training on ADR, dearth of qualified practitioners as well as lack of comprehensive texts on the subject that is tailored to meet our very peculiar condition.

This book, *Principles of Negotiation and Mediation*, being the first of its kind in Sub-Saharan Africa, fills that gap. It is a brilliant and comprehensive collection of essays reflecting a wide range of viewpoints and opinions on the practice of Negotiation and Mediation. It includes a number of aspects deliberately intended to provide readers with insights into the practice of Negotiation and Mediation. This book aims at imparting on the

reader, problem solving skills, whilst also serving as a practical manual for both beginners and practitioners in the area of Negotiation and Mediation. The language in the text is very lucid, hence, the readers will immensely benefit from this book.

This book contains thirteen innovative and reflective Chapters on various aspects of Negotiation and Mediation written by leading experts in Negotiation and Mediation. To the casual reader, it will be inspiring because of its practical exposition and simplicity of style. ADR Practitioners will be astonished by the book's depth of detail and density. The chapter topics in this unique book were carefully selected to cover important areas such as: Anatomy of Conflict, Bringing Parties to Settlement: The Role of the ADR Judge, Confidentiality in Mediation Proceedings, Practical Skills in Mediation, Court Mandated Mediation: Lessons Learned in the Lagos Multi-Door Courthouse, Dynamics of International Conciliation, Ethical Considerations and Code of Conduct for Mediators, Gender and Cultural Issues in Negotiation and Mediation, Mediating Workplace Dispute, Mediating to resolve Family Conflicts, Online Negotiation and Mediation, The Competent Mediator and The Multi-Door Courthouse Concept: Taking Lawyers out of the Courts?

The authors of the Chapters of this book are contemporary, seasoned ADR practitioners, judges and ADR teachers. These are outstanding individuals, brought to bear their practical experiences in the areas of Negotiation and Mediation in their various chapter contributions.

I recommend this invaluable resource to practitioners in the field of ADR, researchers, lawyers, students and anyone interested in learning the rudiments and advanced techniques of dispute resolution.

Professor Epiphany Azinge, SAN, PhD, LL.D
Director-General
 2012

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ONLINE NEGOTIATION AND MEDIATION

By

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and

Oluwaseye O. Ayinla

Introduction

In this chapter we shall examine the law and practice of online dispute resolution (ODR) with particular emphasis on the processes of negotiation and mediation in an online or virtual environment, and with special focus on Nigeria and the West African region. To do this, we shall give a brief account of the development of online dispute resolution (ODR) in general, examine its current law and practice and give an insight into the future of ODR as it affects negotiation and mediation in Nigeria. This book on the principles of Negotiation and Mediation comes at a very opportune time in Nigeria with the increased awareness, promotion and use of alternative dispute resolution mechanisms in the resolution of various types of disputes; the spread of the use of the Multidoor Court House scheme in various Courts in Nigeria;¹ and the ever increasing

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1. The Multidoor Court House Scheme now operates in Lagos, Abuja, Kano, Calabar, with plans to extend this process to Awka, etc. See http://www.cedr.com/?location=/library/articles/20091105_271.htm, and also Blankson A, "The "Multi-door" Concept in Nigeria: the journey so far" available at <http://www.ninablonkson.com/pdftemp/pdf>

cost of dispute resolution through litigation before national courts and cross border arbitration.² Therefore the promotion of negotiation and mediation as effective, cheaper and less time consuming dispute resolution mechanisms, when compared to litigation and arbitration.³

Traditionally, these various dispute resolution mechanisms are conducted through the medium of face-to-face or offline. It is arguable that the processes of negotiation and mediation are particularly suited to face-to-face meetings since other indicators of body language, and psychology among others may equally be at play in addition to the factual matrix and legal principles relevant to negotiating the issues in dispute between the parties.⁴ However with the developments in telecommunication and information technology in general, the environment for communication between the participants in these dispute resolution mechanisms has moved either in total or partially from a physical face-to-face one to a virtual or online one. This, we believe is the future of dispute resolution mechanisms as their practitioners and disputants embrace and integrate such technological advancements to their practice. This is in consonance with the fact that in most transactions in our daily lives, a basic knowledge of the use of computers and access to the worldwideweb has become indispensable for effective and efficient operation in today's world. Practically all areas of human interaction and endeavour can now be conducted both face-to-face or offline and in a virtual or online environment. The various mechanisms of alternative dispute

ABC.DRG.%20THE%20MULTI%20DOOR%20CONCEPT%20THE%20JOURNEY%20SO%20FAR.pdf visited 27 September 2011.

2. This includes both monetary and time costs, and for cross border litigation, the additional difficulties of different legal systems, language, enforcement of judgments, among others.
3. See Ogunyannwo S.: *The Effective Mediator*, HMB Publishers Lagos, 2005.
4. See for example, *The Effective Mediator*. *ibid.* at pages 44-48

resolution have not been left out. This is why this chapter is relevant.

The American Bar Association Task Force on E-Commerce and ADR defines ODR as follows:

ODR is a broad term that encompasses many forms of ADR and court proceedings that incorporate the use of the internet, websites, email communications, streaming media and other information technology as part of the dispute resolution process. Parties may never meet face to face when participating in ODR. Rather, they might communicate solely online.⁵

This raises the important question of whether ODR is relevant only to transactions concluded online. A wide and robust definition of ODR (as above) implies its application where the procedure for the resolution of disputes implicates the use of any electronic or telecommunication media, so for example where as part of the dispute resolution process, participants use telephone or video conferencing, electronic mail or meet in a virtual environment. This clearly will implicate practically all procedures of dispute resolution, including litigation where at least communications are sent through electronic mail and in some cases documents and relevant forms are downloaded from the provider's website and attached to emails for despatch to the parties. This definition in our view is too wide and fails to capture the distinct nature of ODR. In the light of our convictions, we limit our description of ODR to those dispute resolution

5. Kaufmann-Kohler G. & Schulz T: *Online Dispute Resolution: Challenges for Contemporary Justice*, Kluwer Law International, 2004, at page 7.

mechanisms where the procedure is fully conducted in a non face-to-face or virtual environment. These will include either documents only procedures where the parties and neutrals dispense with a face-to-face meeting; where all negotiations between the parties are conducted through electronic mail, telephone or video conferencing without any face-to-face meetings; and virtual meetings conducted strictly in an online environment.

There are various types of dispute resolution mechanisms which disputants may have recourse for the resolution of their disputes. Examples of such dispute resolution methods include negotiation, mediation, early neutral evaluation, expert determination, adjudication, arbitration and litigation, or a combination of any of these methods. This chapter focuses on two of these various means by which disputes or differences may be resolved. These are: negotiation and mediation. The processes of negotiation and mediation are alternatives to litigation before state courts and arbitration before private tribunals, which are adjudicatory forms in which the judge or arbitrator makes a binding decision for the parties. One common theme that noticeably runs through the chapters of this book is the location of power over the dispute resolution. This lies with the disputing parties since they make the decisions themselves, either directly (party negotiation) or with the assistance of a neutral third person (mediation).

We shall divide this chapter into five sections. In section one, we shall examine the concepts of negotiation and mediation as dispute resolution mechanisms and in section two and three we shall examine the incidence of ODR as affects negotiation and mediation, while in sections four and five we shall explore the advantages and disadvantages of ODR. In our conclusion, we shall examine the viability of online dispute resolution platform for negotiation a:

mediation within the West Africa or Ecowas region and examine the critical question whether Nigeria as a developing economy is ready for the regime of online dispute resolution. Our focus on Nigeria is because Nigerian businesses maintain a major presence in the West African markets and are also involved in major cross border commercial transactions. This is particularly important as Nigerian businesses are fast becoming investors in these other jurisdictions.⁶ We also make references to some relevant resources available online along with a review of relevant and accessible literature on ODR and briefly examine some ODR regimes and their platforms as examples of the operating environment for ODR which may be studied by corporations or entities wishing to engage in providing ODR services either for internally generated disputes or as an open platform for use by the public at large.

Negotiation and Mediation as dispute Resolution Processes *Existence of a Dispute*

Disputes can arise at any time in connection with any type of transaction, human relationships or interactions. So for example a dispute can arise between spouses, business partners, consumers, businesses, government/state and its agencies, and any combination of these actors, to mention some common examples. It is important to note that before we can speak of negotiation and mediation as forms of dispute resolution, there must be a dispute or disagreement in place. It is this dispute that the disputants seek to resolve through the process of negotiation or mediation. So the pre-eminent question that arises here is: what is a dispute? When can a dispute be said to have arisen between parties? The answers to these questions are very important since as already noted if

6. See for example the volume of investments by Nigerian nationals and companies in Ghana. The Gambia, Benin Republic.

there is no dispute between the parties in the first place, there cannot be talk of dispute resolution. The Supreme Court of Nigeria in *Plateau State & Another v. AG Federation & Another*,⁷ defined the word 'dispute' as, 'the act of arguing against, controversy, debate, contention as to right, claims and the like or on a matter of opinion'.⁸ Therefore we can only speak of dispute resolution when a contention, controversy or difference as to a (legal) right which needs to be resolved arises. The definition by the Supreme Court can be qualified to clarify its reference to disputations as to 'legally enforceable' rights. This gives context to our discussion on the nature of issues that can be negotiated or mediated as examined in this chapter. Clearly individuals can have disputations over practically any matters however we shall only focus on those issues that give rise to legally enforceable rights and obligations.⁹ The subject matters covered will include disputes arising out of contract, tort (delict), commercial, labour, and administrative transactions. In addition to the nature (subject matter) of the dispute, such dispute and the disputants need to be clearly defined otherwise recourse to any form of dispute resolution may be premature.

7. *Plateau State & Another v. AG Federation & another* [2006] 3 NWLR (pt 967) 346 at pp 429-430. The Supreme Court referred to and followed the following cases in its judgment: *AG Bendel State v. AG Federation* (1982) 3 NCLR 1; *AG Federation v. AG Abia State* (2001) 11 NWLR (pt 725) 689; *AG Federation v. AG Imo State* (1983) 4 NCLR 178; *Ebhodaghe v. Okoye* (2004) 18 NWLR (pt 905) 472.

8. See Roberts S. & Palmer M.: *Dispute Processes: ADR and the Primary Forms of Decision-Making*, 2nd ed., CUP, 2005, pages 79-80 for a review of the theories examining the definition of disputes.

9. This is primarily because in the literature on ODR, it is disputations that may equally be resolved before a court of law that are negotiated or mediated.

Nature of Disputes

The possibilities of the nature or subject matters of disputes that may arise are endless. This has been narrowed down by our definition of disputes above to those matters that implicate legally enforceable rights and obligations which private persons may freely dispose of. Therefore any matters, apart from criminal matters that are committed against the state, which is within the power of a legal or physical person to resolve may be settled by negotiation and mediation.¹⁰ Notice the new phrase 'within the power of the individual' mentioned in this sentence. As we analyse the two dispute resolution processes, we shall see that the concept of *power* or *authority* takes a central role. Power here refers to the ability to agree a legally binding settlement over the dispute. It is a complete waste of time and resources for parties with no authority or power to resolve the issues in dispute to try to negotiate a settlement or even embark on a negotiation or mediation dispute resolution process. This is for the simple reason that such parties will not be in a position to make any realistic and enforceable offers or counter-offers or contribute meaningfully to the conversation on moving the resolution of the dispute forward and worse, such parties cannot enter into a settlement of the dispute. This then defeats the whole purpose of the negotiation or mediation exercise which is geared towards resolution of all or some of the issues in dispute and commitment on performing the agreement reached during the resolution exercise. So clearly the central role the balance of power or authority plays in these two processes is self evident and cannot be overemphasised.

10. Note that there are generally matters which parties are not permitted within a national law to settle outside of the court system. Such matters can be said not to be arbitrable for purposes of arbitration proceedings. However such matters may be subjected to negotiation and mediation proceedings since the outcome of such processes are not regarded as having a *res judicata* effect.

Though we mentioned above that crimes generally do not fall within the purview of matters of which legal or physical persons can enter into negotiation or mediation processes in the resolution of disputes arising therefrom, there may be an exception in the pursuit of restorative justice. If we take for example the crime of theft or causing grievous bodily harm, it may be useful for purposes of community cohesion that victim and offender have an opportunity to discuss the incident in a safe environment.¹¹ In such situation the process of mediation (for example transformative mediation) may be applied, not necessarily for the 'settlement' of the dispute, but for the healing of the victim of the crime and the restoration of cohesion in the community in which the crime happened. So clearly mediation in this sense may be applied in another role - that of restorative justice. Recourse to this process will not prevent the crime being punished by the state (under a different cause of action) but it gives the victim the opportunity to be offered (by the perpetrator of the crime) and to receive an apology over what happened. This may be the only direct compensation the victim of the offence may receive apart from the satisfaction of seeing the criminal punished and possible civil compensation. The discussion in this chapter does not encompass or include this role that mediation may possibly play in the criminal justice system.

In most jurisdictions around the world, most civil disputes may be resolved outside of the court system. This being the case, such disputes may also be resolved through the processes

11. See Izuora O. & Oguakwa KGB (eds.): *Peace-building Through Mediation*, Abuja: Abujapep Editions Ltd, 2005, which is a collection of papers delivered at the inaugural lecture series of Mediators & Advocates of Peace at the Nicon Hilton Abuja on 28 April 2005. In the resolution of community related disputes and certain forms of restorative justice, transformative mediation may be used and for which see, Bush RAB & Folger JP.: *The Promise of Mediation*, 2nd ed., Jossey-Bass, 2005.

of negotiation or mediation. This is so even though these two mechanisms of resolving disputes may result in a non-binding settlement which may or may not be evidenced in writing. This raises the question whether such settlement agreement has any binding legal force of its own, so that where one party reneges on the agreement, the other party will have a legal cause of action to enforce the terms of the settlement agreement. In most jurisdictions, the settlement agreement concluded in a negotiation or mediation process amounts to a legally enforceable contractual agreement which a competent court can enforce in the same manner as the terms of any contract.

This effectively means that there is the possibility for either party to renege on performing the terms of the settlement agreement, which is an undesirable result. However, it is important to note that there is no empirical data on the rate of default while anecdotal evidence is to the effect that compliance rates are very high since it is the parties themselves who reach the agreement and agree to be bound by the outcome of the process, whether it is negotiation or mediation. In comparison to a judgment of the court (result of litigation) or a valid arbitral award (result of an arbitration) this is however limited in its efficacy since this binding settlement is based on contract and can only be enforced as a contract.¹² Thus the settlement agreement the parties sign at the end of the negotiation (negotiated settlement) or a mediation or conciliation can be enforced as a contract in a court of law. This is unlike in litigation or arbitration of disputes where the judgment or final award is binding with *res judicata* effect, so that effectively for arbitral awards, except on very limited

12. The court will enforce its judgments and the arbitral award through its mechanisms, so the victor in such processes is not dependent on the goodwill for performance of the other party to the dispute, which evidently gives better confidence to disputants opting for litigation or arbitration.

jurisdictional and procedural grounds, the decision cannot be revisited.

Another preliminary issue is whether having recourse to negotiation or mediation as a means of dispute resolution, contravenes the provisions of the Federal Constitution of Nigeria which guarantees all citizens of Nigeria access to the courts in the vindication of their legal rights. Section 36(1) of the 1999 Constitution provides:

In the determination of his civil rights and obligations, including any question or determination by or against any government or authority, a person shall be entitled to a fair hearing within a reasonable time by a court or other tribunal established by law and constituted in such manner as to secure its independence and impartiality. [Emphasis added].

The relevant question here is whether the negotiation or mediation process qualifies as a court or other tribunal under the Constitution. The Supreme Court in *Bil Construction Co. Ltd v. Imani & Sons Ltd & Shell Trustees Ltd (a Joint Venture)*,¹³ held that section 33(1) of the 1979 Constitution (which is in the same terms as section 36(1) 1999 Constitution) on fair hearing conferred on every citizen who had any grievance the right of access to the courts and left the doors of the courts open to any person with the desire to ventilate his grievances and compelled the court that would determine the rights of such persons to accord the person a fair hearing.

13. *Bil Construction Co Ltd v. Imani & Sons Ltd & Shell Trustees Ltd (a Joint Venture)* [2006] 19 NWLR 1.

It is our opinion that by opting to resolve their dispute through the process of negotiation or mediation, the parties have not thereby opted out of section 36(1) of the 1999 Constitution. This is because the parties can still litigate or arbitrate their dispute if they are unable to reach a settlement or agreement that is satisfactory to all parties to the dispute. The parties may reach agreement on some of the issues in dispute. This does not in any way confer on those issues the status of *res judicata* so that by operation of the principle of issue estoppel, the parties may be estopped from litigating the same matters. It is also possible that the parties may not reach agreement over any or some of the issues but may by participating in the process of negotiation or mediation get a better understanding of the issues in dispute between them. This again has no legal effect on the dispute or the rights of the parties to litigate or arbitrate the same dispute. This of course raises the question whether negotiation and mediation are pre-conditions or prerequisites to litigation or arbitration. It is our opinion that the processes of negotiation and mediation are not pre-requisites to litigation or arbitration, though the parties can agree on this, for example where their dispute resolution agreement provides for an escalated process. However, where the parties have not agreed on such a clause or agreement, each dispute resolution process is a stand-alone mechanism.

The goal of any dispute resolution mechanism is the resolution of the eventuating dispute so that in practice parties will usually commence with the non-adjudicatory processes of negotiation and mediation and if they are able to reach settlement, then that will bring the dispute to an end upon the satisfaction and performance of whatever settlement terms or agreement they reach. Failure to perform of course implies that the dispute remains unresolved and any party may commence litigation before the courts or where there is an

arbitration agreement, commence arbitration. It therefore follows that for any type of dispute (except crimes) the parties may negotiate or mediate a resolution and participation in such processes does not deprive or negatively impact on their right of access to the courts or tribunals as guaranteed by the Constitution of the Federal Republic of Nigeria.

For purposes of clarity, we shall however focus our discussions and examples in this chapter to civil and commercial disputes. Now that we have clarified the place occupied by negotiation and mediation on the ladder of the various dispute resolution mechanisms available to parties in dispute, we shall now examine the processes of negotiation and mediation in an online environment.

Negotiation

The word, 'negotiate' when used as a verb, means 'to arrange for or bring about by discussion and settlement of terms'.¹⁴ The key words here are *discussion* and *settlement*. It is important to note that our definition does not indicate the person or persons participating in the discussion or settlement. It is our view that this is primarily because the range of possible actors that may be involved in negotiations is varied and also that negotiation does not only take place in dispute resolution. In the context of this chapter, when a dispute arises and parties decide to discuss, hold a conversation or talk with a view to reaching a settlement on all or some of the issues in dispute, such parties can be said to be involved in the process of negotiation as a dispute resolution mechanism. It is in this

14. It comes from the Latin *negōtiāus* (past participle of *negōtiārī* to trade) for which see <http://dictionary.reference.com/browse/negotiate> accessed 20 July 2011.

sense of negotiation as a mechanism of dispute resolution that the word is referred in this chapter.¹⁵

In support of this view, Roberts and Palmer have described the basic features of negotiation to include, "processes of communication, involving the exchange of information, potentially leading to common understanding and joint decision-making".¹⁶ Thus where a dispute eventuates between two or more persons (physical or legal), these persons may decide to meet and discuss the issues each may have identified as the matters in dispute. The discussion at such a meeting is aimed at 'exchanging information' and settling the dispute with the active involvement of each party. It is this exchange of information that progresses the discussion, aids the communication of the parties and leads to a common understanding and possibly clarification and resolution of all or some of the issues in dispute. The outcome of this process of communication may lead to better understanding of the reasons behind the actions and decisions taken by the parties, resolution of the issues in dispute, apologies or recant given, offers for remedy made or a further breakdown in communication such that the parties may decide to pursue other processes of dispute resolution. One such other process is mediation which introduces a third party neutral.

Mediation

The dispute resolution process of mediation involves the presence of a neutral third party who may perform various roles ranging from a passive facilitator of communication to an evaluative neutral, who suggests solutions and strongly nudges the parties towards a settlement of the dispute. In neither of

these roles does the mediator make the decision for the parties. The parties always retain power over the resolution of the dispute unlike the national judge or arbitrator who acts in an adjudicatory role so power over the dispute resolution process is transferred from the parties to the judge or arbitrator who then interprets the dispute and makes a decision over the dispute which is then imposed on the parties and enforced through the machinery of the state. In alternative dispute resolution literature, the negotiation/mediation communication is graphically represented as between the disputants while litigation/arbitration, the parties each communicate with the judge/arbitrator.¹⁷ Therefore in the mediation process, parties work at negotiating a mutually acceptable outcome through the mediator.

In the online dispute resolution processes of negotiation and mediation, practitioners and providers try to replicate face-to-face processes as closely as is practicable, so that parties negotiate in a safe and secure virtual environment while the mediator engages with the process, all in the same online environment.¹⁸ Thus one primary question ODR providers grapple with is whether the virtual platform they provide the conduct of negotiation or mediation effectively and efficiently meets these requirements. This leads us to examine briefly the procedures adopted in the dispute resolution processes of negotiation and mediation in a face-to-face environment, following which we shall analyse some online regimes for ODR to enable us to determine whether this same objective is met in our examples. We shall then examine the advantages and disadvantages of ODR.

17. See for example, Roberts & Palmer: *Dispute Processes*, *ibid.*, at pages 174.

18. See for example, Ponte L. M & Cavenagh T. D.: *Cyberjustice: Online Dispute Resolution (ODR) for E-Commerce*, Pearson Prentice Hall, New Jersey, 2005, page 19.

15. This is in recognition of the fact that negotiations take place every second of the day over every decision individuals or legal persons make.

16. Roberts & Palmer. *Dispute Processes*. at page 89.

Procedure for Face-to-Face Negotiation

The procedure for conducting face-to-face negotiation vary and can be envisioned on a sliding scale with the parties sitting around a coffee table discussing the issues in dispute with each other at one end of the scale to the inclusion of their team of advisors, sitting around a conference table, again discussing the issues at the other end. Each party does some basic preparatory work or exercise before attending a negotiation process to resolve the disputes. Such preparatory exercise includes: identifying and drawing up a list of issues which from each party's respective perspective are the issues in dispute; the outcomes it hopes to achieve in participating in the negotiation process; and its negotiating threshold which effectively includes the issues on which it can and those it cannot make concessions. It is usually at this preparatory stage that it may become clear to the parties that there is really no dispute or they may get a better picture of what the dispute is all about. Approaching and analysing the issues at this early preparatory stage also has the added advantage of focusing each party's mind on the core issues of difference and convergence and those of importance in their relationship. This has the effect of narrowing the issues to be discussed at the negotiation.

Negotiation therefore involves communication, which should lead to joint decision-making. From the literature on negotiation as a process of dispute resolution, conditions that need to be present for negotiation to take place include: the parties finding a medium of communication that will allow free flow of messages between them and making adequate preparations before attending the negotiation process.¹⁹

19. See Fisher R, Ury W & Patton B. 2nd ed. *Getting to Yes*. Random House, 1992; Roberts & Palmer. *Dispute Processes*. *Ibid.* pages 113-115.

Procedure for Face-to-Face Mediation

Mediation practitioners have recognised various stages in this dispute resolution process. The key factor here is that differentiates mediation and negotiation is the presence of the third party neutral known as the mediator.²⁰ The mediator acts in a facilitative or evaluative mode. His primary role is to assist the parties in their conversation towards a better understanding of the issues in dispute with a view to reaching settlement. This clearly shows that to perform this function effectively, the mediator needs to maintain a neutral position between the parties. In face-to-face mediation processes, the mediator is depicted as one who shuttles between the parties carrying messages between them especially when they break out into caucuses.²¹ Evidently the mediator may become privy to certain information or disposition of the parties unknown to each other, so that another aspect of his neutrality involves his ability to maintain confidence. The mediator in practice also makes suggestions to the parties, the substance of which may have been informed by discussions during such caucuses. The various online mediation platforms currently available tend to replicate the face-to-face mediation process and procedure. Thus these platforms create virtual rooms where each party can lodge its documents and meet with its members or the mediator to the exclusion of the other parties to the dispute. This is in addition to the provision of virtual rooms for general meetings and lodgement of documents for access by all parties. This general description appears to suggest that only

20. For the attributes of the mediator, see for example, the list in, *The Effective Mediator*, *op cit.*, at pages 142-144.

21. Caucusing takes place when the mediator discusses with one party in absence of the other party.

22. See for example Squaretrade.com at <http://www.squaretrade.com/ipa> and E-bay at <http://pages.ebay.com/services/buyandsell/disputeres>, accessed 27 September 2011.

mediation processes are based on documents-only proceedings. This is misleading especially with the availability of video and voice conference calls services so that parties can also hold oral meetings online.²³

On the types of disputes that are predominantly resolved through ODR, these are commercial and consumer disputes. Even in this milieu there is the commercial transaction that is between businesses and consumers (B2C) on which most of the literature on online dispute resolution concentrate, or those between businesses (B2B). The examples of ODR providers we reference in this chapter primarily resolve consumer related (so B2C) disputes. As it relates to consumers, we are of the opinion that within the Nigerian commercial terrain, the milieu of B2C online transactions is a major growth area with no publicly accessible documented information on the resolution of disputes generated thereunder. However this should not make a discussion of the B2C dispute resolution regime premature. Our conclusion below is informed by the current use by consumers of online medium for buying and selling, use of non-cash based payment methods and consumer confidence in such tools, the average consumer's computer use literacy level, availability of and speed of internet facilities for use by consumers, and the legal regime for consumer protection available in Nigeria (as an example of a developing economy) along with the effectiveness of obtaining legal redress before the courts (which includes speed, cost of access and confidence in the judicial process).

Ponte and Cavenagh are of the view that the rapid growth of online business transactions and the inevitable disputes arising therefrom brought about the emerging field of Online

Dispute Resolution (ODR).²⁴ Though it was the initial intentment that ODR apply solely to online business transaction, however it soon came to be realised that ODR could also be applied to offline business transaction. In agreement with this view, it is obvious that with the dawn of the internet and growth of electronic communication, businesses have maintained a presence on the internet through either providing a full range of services on their own independent websites or some limited service on other general websites.²⁵ In addition various online-based linkages and efficient online search engines make shopping and transacting businesses online rather the norm than the exception.²⁶ This statement however is true in developed economies where the vast majority of the population have access to the internet and the speeds of these networks create an enabling environment for transact businesses online.²⁷ The final framework is the provision of methods of making secure payments for purchase or transactions made online. Banks have been very active in this area especially with ensuring security of electronic payment transactions and personal details of payee. Commercial transactions in online environments thus basically replicate face-to-face transactions which also include dispute resolution processes arising from such transactions. It is desirable for such disputes to be resolved in an online

24. Ponte & Cavenagh, *Cyberjustice*, *op cit*, at page 18.

25. For example, see <http://www.arikaar.com/> where flights on arikkar can be booked and paid for and <http://www.amazon.com/> where products from other sellers are also marketed. Both websites accessed on 27 September 2011.

26. See for example the google or yahoo online search engines.

27. For example, in the UK, Sky Unlimited Broadband is up to 20mb, Talk T broadband is up to 24mb as listed at <http://www.sky.com/shop/custionshop/broadband-talk/> and <https://sales.talktalk.co.uk/products/broadband-fibre-optic/check/> respectively and accessed on 27 September 2011.

23. See for example the free services provided by 'skype' at <http://www.skype.com/intl/en/features/> accessed 27 September 2011.

environment.²⁸ One very obvious reason being that with parties transacting online over vast physical distances, for them to meet face-to-face for the resolution of a dispute when one arises, may prove to be unrealistic, and in such situation, the consumer may be left without any effective remedy. It is unrealistic in terms of cost and time when compared with the value of the dispute. So the justification for the development of online dispute resolution processes for online based transactions is clear. However, ODR has developed not just to serve online based transactions but also to serve offline or face-to-face transactions.²⁹

It is equally recognised that in least-developed economies such as Nigeria,³⁰ there are fewer online business-to-consumer transactions generated from within these countries. There are various reasons for the dearth of such transactions in these countries. Some of these include the unavailability of internet service or very poor and very slow internet connections for access; lack of secure online payment facilities;³¹ limited knowledge of the internet and its uses by majority of the population inhabiting these countries which effectively evidences their poor technological sophistication and the low literacy rate of great numbers of the populations in these countries. This means there are relatively few business-to-consumer online transactions originating and concluded in such countries.³² Now it is important to clarify that this does not

28. Ponte & Cavenagh, *Cyberjustice*, *op cit.*, at page 18.

29. Pursuant to this, online replication of various *face-to-face dispute resolution mechanisms* have been put in place, including arbitration.

30. See <http://www.unohrls.org/> for a definition and list of the least developed economies, and note that most countries in Africa fall within this definition and list. Accessed 27 September 2011.

31. This is especially so as most of these economies are still cash based.

32. See Newspaper article by Dayo Oketola: "E-Commerce: Challenges, Prospects of Online Transactions in Nigeria", published in *The Punch* Newspaper of Monday 31 January 2011.

mean that such transactions are none existent in such countries.³³ There are technologically very literate and internet savvy consumers who shop online in these countries. They shop on websites such as e-bay, amazon, among others and such consumers pay with their credit or debit cards issued by their local or foreign banks so they effectively fall within the description of online consumers. Having concluded that the numbers of consumers who transact business online are few in these countries, is it still relevant to examine the regime for ODR? This is an understandable query however it will be myopic not to examine this regime. This is especially so since online dispute resolution processes are not only used for business-to-consumer transactions but can be adopted and applied to disputes arising from any medium of transaction, whether face-to-face or virtual.

Online Negotiation

We shall examine three types of online negotiation that are available to disputants wishing to resolve their disputes in an online environment: automated blind bid negotiation, software enhanced negotiation and asynchronous communication negotiation.

Automated Blind Bid Negotiation

Automated negotiation is the product of the frustration two attorneys felt arising from the inefficiencies and unrealistic demands of offline negotiation. The two attorneys were involved in a time and effort consuming negotiation of a dispute in which liability was not in dispute. The only

33. For example in Nigeria airline tickets for domestic flights may be purchased online on the websites of the various domestic carriers such as aero at <http://sutra158.airkiosk.com/cgi-bin/airkiosk/771810021?AJ=2&LANG=E> N# or Air Nigeria at <https://www.mvairnigeria.com/en/ng/bookflightsandmore/bookflights/index.jsp> both accessed on 27 September 2011.

outstanding issue was the monetary settlement. To progress the impasse, they agreed to submit bids of what will be an acceptable settlement to a court clerk and if the bids were within USD5000 (for the particular dispute), the parties will split the difference. Subsequently, one of the attorneys realised that computers and emails could replace the court clerk and pieces of papers respectively. This led to the birth of "Cybersettle", the pioneer automated negotiation platform.³⁴

The process involves the definition of a settlement range by the parties and the submission of settlement offers and demands to a computer through a secure, password protected web-based communication platform. Upon a party entering a monetary offer or a series of monetary offers, the opponent is notified by an automated e-mail that an offer has been made. This email does not reveal the amount offered. The opposing party on its part enters a counter offer or series of counter-offers. If the bids fall within a predetermined monetary range or percentage, the negotiation is settled by the computer for the medium or average of the predetermined amount. However if this does not happen the dispute is declared closed without settlement. The period when the offer will be open differs depending on the platform. Cybersettle, for example allows bids for several months while providers like Meditation Arbitration Resolution Service (MARS) allows bids for a few weeks.³⁵ The computer performs the function of comparing the bids and the conclusion of the agreement hence the appellation automated negotiation. It can thus be described as a species of assisted negotiation in the sense that the parties are assisted by the computer to reach an agreement though it is the computer that makes the actual settlement offers. The bids of each party

34. See for details, <http://www.cybersettle.com/pub/> accessed 27 September 2011.

35. See for details www.resolvemydispute.com/ accessed 27 September 2011.

is not revealed to the opposing party save if it falls within the range of the predetermined monetary sum, hence the appellation "blind bidding".³⁶ Apart from affordability, automated negotiation is designed for negotiation of settlement amounts. Unless the dispute is settled there is no direct communication between the parties, therefore, ego and personality clashes will not hinder settlement. Automated negotiation is only used for money disputes where liability is not in dispute and suitable for use by rational parties with proximate or quantifiable expectations.

The most widely known automated negotiation platform is the Cybersettle which has processed over 75,000 claims in a total estimate of more than USD500 Million since its inception.³⁷ Under the Cybersettle regime, an automated negotiation is commenced once a party to the dispute initiates the claim on the Cybersettle platform. The responding party to the alleged dispute is notified of the initiation of the online negotiation through an e-mail. Each party is allowed to make a maximum of three rounds of settlement offers. Neither party has access to the other party's settlement offers, meaning that all offers are based on the respective party's belief as regards the strength and or weaknesses of its respective position. As already mentioned this form of online negotiation is mostly used in disputes where liability is admitted but the parties disagree on quantum and is primarily resorted to in disputes over monetary compensation. The resolution of insurance

36. According to Kausch E & Rifkin J., *Online Dispute Resolution*, Jossey Bro: 2001 at page 61 when an offer falls within 30% of the disputed sum, the parties are considered within the settlement range.

37. See <http://www.cybersettle.com/pub/home/casestudies.aspx> accessed 27 September 2011 and Pome & Cavenagh, *Cyberjustice*, op cit... at page 41.

disputes through automated blind bid negotiation is very popular.³⁸

The automation, user friendliness and affordability of automated negotiation are some of the advantages of the system. Others are that it is a very quick and cost effective dispute resolution platform with or without the assistance of legal representation. Also since parties are not in direct face-to-face contact during the process, automated negotiation obviates the occurrence of personal conflicts and communication difficulties between the disputants. It further allows parties to the process to make confidential settlement offers and demands without compromising their chances of future online or offline negotiation.

There are some noticeable disadvantages to the process of automated negotiation. In the first place, the process is strictly suited to disputes of a monetary nature and small value disputes that will not justify resort to more expensive means of dispute resolution. Secondly, the process gives little opportunity for innovation by the parties in the negotiation process, and is wholly unsuitable for the resolution of non-monetary disputes or those in which liability is disputed. It is also arguable that automated negotiation encourages premature participation in the negotiation process by disputants who may not have fully evaluated their dispute and options simply because the process does not require them to adduce arguments in support of their demands, offer or counter-offers.

Another example is SettlementOnline which has a similar system to Cybersettle. Their procedure involves three bidding rounds. The online negotiation process commences with the initiating party entering its settlement offers ranked for the first, second, and third rounds and expiration dates for those

rounds. The computer software sends an automated e-mail to the other party intimating them of the settlement offer made and requesting the other party to make its own counteroffers for the first, second, and third rounds, if they wish. The computer software subsequently compares the offers and counteroffers for each round so as to decide if a settlement has been reached provided the bids are within a predetermined range. If the software determines that no settlement was reached, the offers remain confidential and future bargaining positions are uncompromised. This procedure is simple and straightforward and makes the platform very user friendly and very affordable. However the systems are designed to resolve only money disputes.

Another system is ClickNsettle which permits the parties to make as many rounds of offers and counteroffers as they wish, though within a specified time limit. If a settlement is not reached within the specified time limit, the offers expire and the online negotiation will be considered as a failure. The parties are however permitted to resubmit their claim or resort to another process of dispute resolution such as arbitration or litigation.³⁹ This is a major advantage of the ClickNsettle platform. It is however doubtful whether the settlement correspondences between the disputants can be of evidential value in subsequent dispute resolution mechanisms.

Software Enhanced Negotiation

Software enhanced negotiation on the other hand is primarily resorted to for disputes that involve both monetary and non-monetary issues. This type of online dispute resolution negotiation process consists of a computer software that helps

38. See <http://www.cybersettle.com/pub/home/casestudies.aspx> accessed 27 September 2011 and Ponte & Cavenagh, *Cyberjustice, op cit.*, at page 39.

39. Goodman J.W.: "The Pros and Cons Of Online Dispute Resolution: An Assessment of Cybermediation Websites", *Duke Law and Technology Review*, page (2003).

preference on each of the disputed issues and possible outcomes. The OneAccord software uses the parties' data contained in it to develop settlement packages for the parties' consideration. If the parties choose the same settlement package or "solution," the software attempts to generate improvements in order to maximize the benefits to both parties. The innovation of making bespoke settlement packages is laudable given the fact that disputes cannot be similar on all fours and each should be considered with respect to their respective peculiarities.

Sensitive or intricate disputes (such as family disputes) are well managed in the cyberspace using software enhanced negotiation. It averts personal conflicts and the effects of misunderstanding between the disputing parties by enabling the disputants negotiate complex issues with technological assistance. Depending on the software package used, the online negotiation process may replace or support documents that have been faxed or sent as attachments to emails, with a single current version of the document which it also continues to update. This creates greater flexibility and user friendliness and interaction with the platform. The use of software enhanced negotiation may also reduce the cost and time associated with reaching a settled negotiation by streamlining the preparation and actual bargaining during the negotiation process and by reducing the administrative task that accompany complicated negotiation processes. In addition, the sophisticated manner in which settlement alternatives are created and evaluated may produce results that are more creative when compared with outcomes reached in offline negotiations.

the parties identify and refine the issues in dispute and most significantly assists the parties to generate mutually acceptable settlement options. The most well known software enhanced negotiation platform is the "Smartsettle".⁴⁰ Smartsettle developed an online dispute resolution software that takes the disputing parties through a six-step negotiation process. The steps are: prepare for negotiation; qualify interest; quantify satisfaction; establish equity; maximize benefits; and secure commitment. These are aimed at resolving issues in disputes of both qualitative and quantitative nature.⁴¹ The software is available to download for use by disputants, free of charge.⁴² Additionally, the Smartsettle platform provides a facilitator that assists the parties through the negotiation process in the form of software support and other administrative functions.⁴³ Katsch and Rifkin are of the view that Smartsettle is suitable for use in the resolution of any type of dispute whether simple, complex, one or multi issues, two or multiparty, short or long disputes.⁴⁴

Another software enhanced negotiation platform is OneAccord which combines innovative negotiation process and an effective computer program that allows multiple parties to participate in interest-based negotiation. Initially, the respective interests and disputed issues of the parties are expressed and identified with the assistance of a third party neutral facilitator over the internet.⁴⁵ The facilitator subsequently elicits from each disputant its initial confidential

40. See for details <http://www.smartsettle.com/> accessed 27 September 2011.

41. Small claims, insurance, family, are among disputes that can be negotiated on the smartsettle platform.

42. See <http://www.smartsettle.com/home/products/smartsettle-infinity/accessed> 27 September 2011.

43. Ponne & Cavenagh, *Cyberjustice*, op cit., at page 49.

44. See Katsch & Rifkin, *Online Dispute Resolution*, op cit., at page 63.

45. <http://oneaccord.com/> accessed 27 September 2011.

Asynchronous Communication Negotiation

Asynchronous communication negotiation is more suitable for the resolution of disputes that involve both factual and legal issues. The communication between the disputants is in the form of an electronic chat room wherein the parties discuss both the issues in dispute and sets of settlement alternatives through the use of various electronic media. Like other ODRs asynchronous communication is also suitable for disputes where a negotiating party feels they are not prepared to make a face-to-face presentation of their position in a traditional negotiation dispute resolution process. An example of a well known platform for Asynchronous communication is SquareTrade.⁴⁶ When parties decide to use the SquareTrade platform, following their agreement to this effect, they discuss the issues in dispute by means of a password protected "case page" on the SquareTrade website. Under the SquareTrade platform the disputants engage in direct communication or discussion which is conducted via the password protected "case page" on the SquareTrade website. By using the SquareTrade platform disputants attempt to reach an agreement by directly communicating with each other while they remain geographically distant.⁴⁷ Asynchronous negotiation shares the same advantages of time and cost saving as other forms of online negotiation mentioned above.

Assisted Negotiation

Assisted negotiation is also referred to as, enhanced negotiation, mediated negotiation, direct negotiation or technologically facilitated negotiation. We shall refer to this

form of online negotiation as assisted negotiation.⁴⁸ In assisted negotiation disputants seek to reach an agreement by means of direct, bilateral or multilateral communications.⁴⁹ Assisted negotiation is strictly speaking neither mediation nor negotiation. This is because there is no human third party such as a mediator involved in the process and the information technology tools that enhance the negotiation process perform very similar functions as those performed by a mediator in the mediation process. This is evidenced by the software asking questions, suggesting answers and sending reminders, consequently assisting the parties reach a resolution unaided by a human third party. The system uses such tools as threaded messaging board, online meeting management devices, and contains software for setting up secure and safe communication, secure storage facilities, identifying and assessing potential solutions and writing agreements. Assisted negotiation may be used for the whole negotiation process or just as a negotiating tool for example in a mediation process. Some examples of platforms that use software enhanced negotiation include OnlineResolution.com, Groupmind, Express, and Lotus Quickplace.⁵⁰

However, assisted negotiation like other new technologies requires new behaviour. In the instant case the change in behaviour is due to the lack of human element in the process of electronic communication. Traditional ADR leaves room for non-verbal communication which play a major role in helping the parties understand each other's interests and objectives.

48. Parties involved in assisted negotiation have at their disposal sophisticated information technology (IT) tools designed to improve their ability to reach a solution.

49. Kaufmann-Kohler & Schultz, *Online Dispute Resolution*, *op cit.*, at page 12.

50. See <http://www.OnlineResolution.com>, <http://www.groupmindexpress.com>, and <http://www-01.ibm.com/software/lotus/products/quickplace/> used by IBM, both accessed 27 September 2011.

46. See <http://www.squaretrade.com/pages/> accessed 27 September 2011.

47. According to Katsch & Rifkin, *Online Dispute Resolution*, *op cit.*, at page 129, as of 2000, the SquareTrade Direct Negotiation process enjoyed an 80% success rate.

According to the statistics provided by SquareTrade, assisted negotiation appears to enjoy a high success rate.⁵¹ An unscientific survey over the internet revealed over fifteen assisted negotiation providers.⁵²

Online Mediation

Online mediation relies on new technologies to provide dispute resolution services to disputants in a manner similar to traditional face-to-face mediation. It differs from traditional mediation only in so far as the means of communication is transmitted electronically through the internet rather than face-to-face. The process is by means of negotiation between the parties under the auspices of a mediator through the use of e-mails or specifically designed internet websites that provide virtual rooms designated for use by the parties and the mediator. The intricate exercise of caucusing in traditional mediation has also been incorporated into the process of online mediation. For this purpose, the mediator and individual disputants caucus through the use of e-mails, chat rooms or by a specifically designated and secure site on the website.

While traditional mediation is well suited for disputes between parties with continuous commercial relationships, disputes that have not been susceptible to resolution by negotiation or disputes economically expedient for resolution by mediation, the online mediation process is in addition to these, well suited for disputes between parties in different locations, disputes of a highly confidential nature and

containing proprietary information and disputes of both low and high monetary value.

Though similar in many respects the conduct of online mediation differs from that of offline mediation. Communication in online mediation proceedings is largely textual and asynchronous. Teleconferencing and video conferencing are not of widely employed in online mediation where communication is predominantly limited to emails, and web based textual communications including the use of tools such as chat rooms for synchronous communication along with the use of bulletin boards for asynchronous communication. The process is therefore devoid of the use of non-verbal communication tools such as body language and tone of voice. This is not necessarily a shortcoming of the online mediation process, because the ease of not meeting face to face may be the preference of some disputants, especially in situations where there is marked power imbalance or the dispute is of a sensitive nature. Therefore communication between the parties inter se and between the parties and/or party and the mediator is largely asynchronous. This also allows participants in online mediation flexibility of time and space. The technological tools of communication used during online mediation can be complemented with the use of interactive forms and surveys that enhance the exchange of facts and offers between the disputants in standardized formats. In addition, the use of web-based conferencing tools make it possible to conduct mediation conferencing online between parties in distant localities. Owing to the similarity between offline and online mediation, online mediation platforms, such as SquareTrade, have modelled their standards of practice in a manner similar to offline mediation and make

51. According to Kaufmann-Kohler & Schultz, *Online Dispute Resolution*, *op cit.*, at page 16, SquareTrade, the largest of such providers handled 1.5 million business-to-business, consumer-to-consumer, and business-to-consumer disputes between February 2002 and June 2004.

52. Some examples are: Allsettle, Cybersettle, Settleonline, Wecansettle, Internet Ombudsman, Resolution Forum, Online Resolution, TheClaimRoom.com. and TRUSTE.

provisions for ethical issues, such as privacy and the role of the mediator, in offline mediation.⁵³

Offline mediation is usually conducted in three broad phases. The first phase comprise of the opening joint session where all the parties, attorneys, mediators and possibly experts are present and the disputing parties present their respective positions which is thereafter summarized by the mediator. In the second stage, the mediator discusses privately with each disputing party in the absence of the other party in caucuses. This then leads to the third stage comprised of another joint session. At this stage the mediator and the disputing parties meet and the mediator reports the progress made by each party and possibly at this stage the parties would have moved closer to each other with settlement in sight. We shall now briefly describe the online mediation procedure of two popular providers: squareTrade and Webmediate.

SquareTrade

The history of SquareTrade is bound up with e-bay which is described as the largest online auction market in the world and as having several million users from all over the world which includes sellers and buyers in both developed and developing economies including participants from least developed countries. This clearly implies that residents in these countries may find themselves participating in the dispute resolution process of e-bay as well. E-bay is a virtual market where buyers and sellers interact. To give a sense of how huge e-bay is, Tim Knox provided some statistics to the effect that there are almost 95 million e-bay users who spend an average of USD894 per second. The site handles the sales of more than two million items everyday and at any given time, e-bay

53. See <http://www.squaretrade.com/pages/about-us-overview> accessed 27 September 2011.

conducts about 19 million auctions.⁵⁴ Thus being a virtual market emphasis is placed on public safety and to this end a number of mechanisms have been put in place, particularly the feedback system.⁵⁵

Sometime in 1998 e-bay approached the Centre For Information Technology and Dispute Resolution to conduct a research on the efficiency of online mediation in electronic dispute that arise out of online auction transactions on the e-bay website. The researchers wanted to ascertain the efficiency of an online mediation totally bereft of face to face interaction. The experiment revealed that 75% of disputants were willing to take part in an online mediation as opposed to 50% in another experiment willing to participate in offline mediation. It was discovered that the reason for the large preference for online mediation was the desire of the disputants to continue using the e-bay auction site and not the desire to reach a mutually beneficial outcome to the dispute. This experiment birthed the SquareTrade initiative.⁵⁶

SquareTrade is a USA company that provides online dispute resolution services to online sellers.⁵⁷ The ODR procedure under SquareTrade allows the parties at the initial stages to attempt to reach agreement by communicating directly with each other using SquareTrade's completely automated web based "Direct Negotiation Tool". This is left to the discretion of the parties. Where the parties do not wish to negotiate or failing the negotiation phase, the parties have the

54. See Tim Knox: "The Secret to e-Bay Success", available at <http://www.entrepreneur.com/article/71112> accessed 27 September 2011.

55. The feedback system enables both seller and buyer to rate each other's performance which is available to users of the website for future transactions.

56. The providers of the dispute resolution process on e-bay is now Paypal.

57. See generally Steiner Ina, "Getting to Yes - Online! SquareTrade's Online Dispute Resolution Service" available at <http://www.auctionbytes.com/crab/abuy/200/m08/abid0020/s04> accessed 27 September 2011.

tion of requesting SquareTrade to appoint a mediator on their behalf. The mediator's role is to promote positive solution-oriented discussions between the parties with the aim of helping them resolve their dispute. The mediator can only comment non-binding solutions subject to the parties' request. Parties can resolve disputes of any value on the SquareTrade platform. On charges or fees, the claimant who institutes the process is not required to pay any fees where the negotiation tool is used. This is because sellers for whom SquareTrade resolves disputes make a monthly payment for its service to SquareTrade. If however the dispute escalates that a mediator is requested to be appointed by SquareTrade, the requesting party will need to pay for the appointment.⁵⁸ The service is quick and readily available to consumers. When SquareTrade was engaged by e-bay to solve seller-buyer disputes arising from the auction site which then had about 13 million users and 2 million transactions per week, SquareTrade mediated over 30,000 disputes. E-bay now conducts its dispute resolution process line through the paypal system.⁵⁹

We shall now briefly examine the standard of practice promoted by SquareTrade for users of its ODR services as an ample of standards that can be adopted by ODR providers. As a result of the unique circumstances created by providing ODR Services online, the Squaretrade Standards of Practice tend beyond those of traditional or face-to-face ADR processes. There are eight standards comprising of the impartiality and impartiality of the mediator which is an ongoing

The fee is currently USD15.

See <https://www.paypal.co.uk/uk> accessed 27 September 2011. Briefly, under the Paypal process, buyers and sellers on e-bay may resolve their disputes using the Paypal platform through direct communication. If a resolution of the dispute is not achieved, the complaint can then be escalated to a claim within 20 days when Paypal then reviews the dispute.

requirement; disclosure by the mediator of any potential or actual issues of conflict of interest he or she may be (or later become) aware of, to the parties; the need to maintain the confidentiality, privacy and security of the process by SquareTrade and its neutrals; warranty of the competence and quality of the dispute resolution process by the neutral which assures the parties that the neutral appointed by SquareTrade is duly qualified and has the relevant experience or expertise to conduct the dispute; promote a fair process by encouraging the parties to seek information and relevant advice during the process; providing a transparent dispute resolution process and giving the parties all relevant information including transparency as to cost of the process; assuring the parties that the appointed neutral is technologically competent to enable him or her conduct the dispute resolution process in an effective and efficient manner, while SquareTrade itself gives all necessary technological support to both the parties and its neutrals; and finally, guarantees that its system will be accessible at all times of the day and by the use of standard systems, browsers and internet service providers, except during scheduled maintenance works, and users will have access to its customer support unit at all times.

WebMediate

Another example of a provider of online mediation is WebMediate which was set-up with the aid of business professionals, attorneys and technical experts to offer fair, fast, independent and affordable online resolution of disputes.⁶⁰ We shall examine the procedure under Webmediate as another example of the process of online mediation. The process under Webmediate comprises of five stages. Stage 1 is when a disputant completes an online "New Matter Form" which

60. See <http://www.webmediate.com/> accessed 27 September 2011.

ggers the online mediation process. Webmediate thereafter generates a notification of the dispute to the other party named the Form with necessary information of the readiness to commence the mediation process in stage 2. Upon the receipt a response from the replying party, Webmediate embarks on stage 3 which involves it appointing amongst its list of neutrals a webmediator. The role of the webmediator is to assist the disputants with their discussion of the dispute, the change of relevant information and exploration of settlement options. As the parties enter into the process, the Webmediate platform creates three secured virtual conference rooms for the mediation process. One of the virtual rooms will be used as a common resolution space accessible by the mediator and disputants for joint sessions and two separate virtual conference rooms for use by the parties to discuss with the webmediator in private (caucus) or among themselves (the party and its advisors or other members of the group forming a party). This leads to stage 4 which is the webmediation process. It is at this stage of the webmediation process that the parties present their positions and listen to the positions of the other party with the webmediator being party to the discussions. During this stage disputants are also encouraged to engage in private one-on-one discussions with the webmediator in the absence of the opposing side. The duty of a webmediator is to help the disputants articulate their points of view, identify their respective interests and ultimately propose alternatives that will help in reaching a mutually acceptable outcome of the dispute. If the parties reach an amicable solution or settlement of the dispute, the process moves onto stage 5 where the webmediator assists the parties (if they so request) in preparing a written record of their settlement agreement.⁶¹ This process is fully internet

⁶¹ See Ponte & Cavenagh, *Cyberjustice*, *op cit.*, at page 73.

based with no additional hardware or software required to access the platform. All that disputants require is access to the internet to take part in Webmediation. All interaction between the parties and the webmediator is via the secured and confidential "Resolution Forum". The online mediation process can last as long as the parties choose. The process under Webmediate attracts payment of fees by the parties who are jointly and severally liable for such fees. The fees are based on the time spent by the mediators appointed by WebMediate. This process also generally describes the system adopted by other providers of online mediation.⁶²

Advantages of Online Dispute Resolution

The various types of online negotiation processes are more time efficient in the sense that the online negotiation platforms can be accessed at any time of the day and by parties wherever they are situated in the world. All that the participants need is to have access to a computer and the internet. The automated negotiation processes evidence the time saving advantage of online dispute resolution processes. This is particularly enhanced by the fact that parties are not required to give justification for their settlement offers or demands. They are simply required to transmit their monetary offers and demands to each other. Online negotiation processes also give value for money and are cost effective. This is because the fees of accessing online negotiation platforms are negligible and the user-friendliness of the platforms themselves reduces the need and the extent of participation of legal representatives. Indeed the need to use legal representatives may not even arise during the negotiation process. In addition to being faster and cheaper, online negotiation can also serve as a case filter for

⁶² Other providers include Internet Neutral mediation services and Square Trade.

lawyers and their clients by settling cases that are more suitable for early settlement, or helping to narrow the issues in dispute. Furthermore, online negotiation allows parties to make their best settlement offer and demands without the risk of having such offers and demands used against them at a later phase of the negotiation or other dispute resolution process the parties may have recourse. Finally, it can be argued that online negotiation offers a truly neutral dispute resolution mechanism for parties from different legal, cultural and language backgrounds, regardless of stages of development of the jurisdictions parties are from, as long as the parties have access to and can use the internet and computer.

To the disputants, ODR opens the means of communication between the disputants and encourages discussion between the disputants. It achieves this because first, the process is less confrontational thereby obviating the hostility and suspicion of adversarial dispute resolution mechanisms, such as arbitration or litigation. Secondly, the parties communicate online rather than face-to-face and this may assist the parties in adopting an open and communicative attitude to the process. This can be contrasted with face-to-face communication which may be characterised by fear and the discomfort of communicating negative feelings or critical concerns.

Thirdly, the confidential nature of ODR boosts the capacity of the parties to identify outcomes in their best interests which may further enhance their future business relationships. The confidentiality of both the negotiation and mediation processes is premised on the rationale that good faith efforts at dispute resolution may lead to parties divulging information that may be damaging to them or include admission of liability, and these should not be subsequently used in later proceedings. These fundamental matters have

been recognised by national courts and have been incorporated into online mediation agreements. For example, the WebMediate online mediation platform has on its website an exhaustive confidentiality clause that binds the disputants, legal representatives, Webmediate, its mediators and employees. To give further effect to this clause, is an associated exemption clause which exempts Webmediate, its mediators and employees from being compelled to give evidence or produce documents in any form of dispute resolution forum. The aim of this wide exemption clause is to ensure that the parties do not rely on evidence, communication and documents revealed in Webmediate proceedings in subsequent dispute resolution proceedings. This is a very widely drawn exemption clause which may be in breach of disclosure laws in some jurisdictions. For example in the English case of *Farm Assist Ltd (in Administration) v. The Secretary of State for Environment, Food and Rural Affairs (No 2)*, the mediator was compelled to give evidence.⁶³ However the Supreme Court of California in *Foxgate Homeowners' Association Inc. v Bramelea California Inc.* held that the fact that the defendant was obstructive in its attitude during the mediation proceeding was of a confidential nature and could not be disclosed in the subsequent litigation that accompanied the failed mediation.⁶⁴

It is generally recognised that ODR proceedings reduce the time and cost of conducting the dispute resolution. As it relates to reduction of costs, travel time and expenses are drastically

63. *Farm Assist Ltd (in Administration) v. The Secretary of State for Environment, Food and Rural Affairs (No 2)* [2009] EWHC 1102 (TCC) which also reviewed earlier case law on the point.

64. *Foxgate Homeowners Association Inc v. Bramelea California Inc.*, 26 Cal. 4th 1.25 P.3d 1117 but see a 1999 decision of a Magistrate Court in California in *Olan v. Congress Mortgage Company*, 68 F. Supp. 2d 1110 which required disclosure by compelling the mediator to give evidence of what happened during the mediation process. in the interest of justice.

unfamiliar with the technology or platform or lacks confidence in its ability to use it, the party may be dissuaded from resorting to ODR. This issue affects the number of people who may have recourse to ODR just as it affects the number of people who may engage with online transactions. It is therefore not necessarily a disadvantage of the system itself but of possible access since to participate in ODR any user should have at least a very basic knowledge and understanding of, and ability to use the internet and computer. This perceived disadvantage should not be of major concern since the number of people conversant with the computer and internet increases all the time, so that in due course, this will be non-existent.

The second obvious disadvantage of ODR (when compared to its face-to-face counterparts) is the loss of or great reduction in the use and value of the non-verbal communication tools such as facial expressions, tone of voice, and other forms of body language, to the process of dispute resolution. We must acknowledge that face-to-face contact between disputants may help the parties have a better understanding or appreciation of the importance (to each other) of the issues in dispute between them. It is possible for an uncooperative party in an ODR to abuse the process by for example, concealing facts, using inflammatory language and online postings, ignoring vital issues in dispute and other tactics, to stall the proceedings, tactics which may easily be picked up in a face-to-face process. However, even this disadvantage can be eliminated with the use of technological tools such as video conferencing and video streaming over the web and such other tools.

Halsey v. Milton Keynes General NHS Trust & Steel v. Joy and Halliday [2004] EWCA Civ 576, *Burchell v. Bullard* [2005] EWCA Civ 358; and *Corby Group Litigation v. Corby District Council* [2009] EWHC 2109 (TCC).

The other issues relate to confidentiality and enforcement and apply equally to face-to-face and online negotiation and mediation processes.⁶⁸ On confidentiality, usually participants in the process are required to keep the communication, documents and disclosures made during the process confidential. This may be an advantage of the process. However where this may possibly be limited by disclosure requirements under the necessary law or as ordered by the courts, it may become a disadvantage. It is this fear of disclosure which may reduce the value of the process to parties who price confidentiality very highly. On enforcement, the time and costs saved in embarking on an ODR process may be lost in an attempt to enforce its outcome. This is pertinent as settlement agreements are not self enforcing in the same manner as a final arbitral award or judgment of a national court. Such agreements are at best treated as contractual agreements which may then be so enforced before a national court. This state of affairs leaves performance of the settlement agreement at the discretion of the parties, and resort to the courts where it is not voluntarily performed.⁶⁹ This clearly has both cost and time implications for the parties.⁷⁰

Finally there are no defined procedural and evidential rules or guidelines governing the ODR processes of negotiation and mediation though rules and guidelines available for face-to-face negotiation and mediation processes may be adapted for

68. Disclosure of information by a party (especially large corporations) which may also be in the public interest such as defective products or unethical business practices may be hidden under the guise of confidentiality of the dispute resolution process.

69. Another issue which is of importance is the legal status of the settlement agreement from an ODR process. It is our view that such an agreement should be legally binding as any validly concluded contract.

70. So effectively, the time and costs saved in embarking on an ODR process may have to be expended on enforcing the settlement agreement.

fraught with participation-entry difficulties especially for parties coming from the developing world. It is very clear that a very basic entry requirement is computer literacy which is in short supply in some of these jurisdictions. To retain its attraction and viability, providers of ODR processes will need to continue to ensure that their platforms are user-friendly and easy to navigate, and do not require use by only those that are technically very knowledgeable. So that the easier it is to use the software or platform, the more parties may be encouraged to take recourse to ODR processes. This is particularly important in emerging economies such as Nigeria.

It is also important that ODR processes are properly regulated and in this regard, the work of UNCITRAL Working Group on ODR is useful.⁷³ It is for states to examine and create an enabling and safe environment especially for consumers who wish to engage in ODR. States also need to examine their legal regime for the recognition of electronic documents and signatures and ensure they are up-to-date. In this regard the UNCITRAL Model law on E-Commerce will also be useful.⁷⁴ This is very important as it affects the status of the agreement to embark on an ODR process and the resulting settlement agreement from online dispute resolution processes. This will increase the faith of participating in the process since they will be assured that participating in the process is not just as a precursor to litigation or arbitration but a bona fide process of which the settlement agreement is enforceable.

73. For more details see http://www.uncitral.org/uncitral/commission/working_groups/3Online_Dispute_Resolution.html accessed 27 September 2011.

74. See UNCITRAL website for the various electronic communication texts at http://www.uncitral.org/uncitral/texts/electronic_commerce.html accessed 27 September 2011.

use in the online environment.⁷¹ It is hoped that in due course similar guidelines will be adapted to the regime of online mediation. As it relates to ODR providers, there are no rules or guidelines for best practices developed yet so that where a disputant feels aggrieved by the fraudulent, negligent or other acts of impropriety or negligence perpetrated by an ODR service provider, there is no regulatory body from which redress may be sought. It is arguable that for consumers, redress may be made to any appropriate consumer protection agency or regulator. It is equally important that providers of ODR create a method of self enforcement which by the orderless nature of the online environment may involve cross-order inputs and agreements. We have examined the code of practice adopted by SmartTrade above and this should be encouraged. However while the current situation persists, it is advisable for disputants to enter into a contract with the service providers so that they have contractual rights on which they can rely.⁷²

Conclusion

We have shown that ODR mechanisms are traditional dispute resolution mechanisms that are replicated online. This gives some sense of familiarity for those already involved in traditional or face-to-face processes of negotiation and mediation. Online dispute resolution processes generally have come to stay and are a healthy add-on to the gamut of dispute resolution processes available. It provides for more choice by disputants. However, participation in ODR processes is

1. See for example the EU Mediation Directive and its UK implementation as, The Cross Border Mediation (EU Directive) Regulations 2011 available at http://www.legislation.gov.uk/uk/si/2011/133/pdfs/ukSI_20111133_en.pdf accessed 27 September 2011.

2. This will raise issues of applicable law especially since in most cases of online transactions the parties are not in the same jurisdiction.

We have also argued that engaging in ODR processes goes beyond computer and internet literacy. It is important that participants have access to the internet with very good broadband speeds and these will have to also be affordable. Secure payment mechanisms for online use are also a necessity for an efficient ODR regime along with security of the internet regimes from hacking and interference. Finally we have noted that ODR is the future especially as more transactions are concluded in the online environment. It is therefore important that adequate marketing of these types of dispute resolution processes is made to bring awareness of the processes and how they function to the citizens who will then decide which of the processes they may wish to participate in as the need arises. ODR comprises of important processes for businesses to consider setting up and engaging in for quick, cheap and easy means of resolving disputes.

uced or may even be non-existent as the need for parties to
 vel is practically eliminated and meetings can be held at any
 e of the day for parties located in different legal,
 graphical and time zones.

On the benefits of ODR to the public, Ponte and Cavenagh
 re that first by offering disputants the opportunity of
 osing other means of dispute resolution, ODR reduces
 ation backlogs and thereby reduces the workload of the
 rts. This in turn frees up more time for judges to proceed
 1 disputes more suited for litigation. Courts reforms are
 influenced by the practices adopted in the ODR
 ironment. Some examples are in techniques for the
 amlining of court processes and administration such as the
 of emails in communicating and use of technology in the
 : management exercises of courts, all aimed at facilitating
 ed and making the court system more effective. These will
 tinue to be influenced by future developments of more
 editious interactive technologies.

advantages of Online Dispute Resolution

ine negotiation and mediation processes share some of the
 dvantages of face-to-face negotiation and mediation
 cesses which are peculiar to the processes themselves while
 e of their disadvantages arise from the online nature of the
 ute resolution process. While online negotiation like all
 r forms of ODR help avoid personal confrontations
 veen the disputants and are of an impersonal nature, online
 otiation may not be suitable for use in disputes emanating
 n long term relationships or contracts which by their very
 ure require or lead to the creation of relationships. It is
 able that the virtual nature of the online negotiation
 cess fails to inculcate effective inter personal and non-
 al communication skills in the parties. This is particularly

evident in systems such as automated blind bid negotiation
 examined above. On enforcement of the settlement agreement
 emanating from online negotiation, national courts are yet to
 give a direct ruling on its legal consequences. It can however
 be argued that since national courts have recognised that
 parties to online transactions are bound by the terms of the
 online agreement, settlement agreements arising from online
 negotiations may equally be so recognised as contractual
 terms. It is advisable for such settlement terms to be recorded
 and reproduced in a paper form and duly signed especially
 where there are no guidelines from the courts in the relevant
 jurisdiction.⁶⁵

The supremacy of the principle of party autonomy is
 keenly felt in various ODR processes. This is particularly
 evident as ODR is dependent on the consent, wishes and
 participation of the disputants, who retain control over the
 ODR proceedings and their outcomes.⁶⁶ Thus parties determine
 the effectiveness of the process through their willingness to
 fully and meaningfully participate in the process. However,
 this same laudable power of the parties may become the
 Achilles heel of the process. It is well acknowledged that once
 a dispute eventuates, cooperation between parties becomes
 very difficult, so where parties have such overriding control
 over the process, it becomes quite easy for a dilatory party to
 derail or frustrate the process.⁶⁷ In addition where one party is

65. This falls within the broader question of the recognition of e-documents, e-
 signatures, etc by the law applicable to the agreement and the law of the
 enforcing court.

66. The parties choose the type of ODR they wish to participate in, appoint the
 neutral and decide on the applicable rules (if any).

67. A party can achieve this by refusing to cooperate or meaningfully and
 truthfully participate in the process. In mediation and as part of its policy to
 promote ADR, some jurisdictions have put in place various mechanisms
 such as costs sanctions to remedy such behaviours. See for example the
 English cases of *Dunnet (Sison) v. Railtrack Plc* [2002] EWCA Civ 302.