

THE USE OF ALTERNATIVE DISPUTE RESOLUTION IN CLASS ACTION CASES

Being a Presentation By

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Introduction

In all jurisdictions, there are various provisions on the conduct of court actions. The provisions¹, usually referred to as Court Rules, provide for how a suit is commenced, the form, endorsement, service, summary judgment, parties generally, joinder, pleadings, admissions, case management, discovery and inspection, proceedings at trials, filing of written addresses, evidence generally, judgment, amongst others.

For the purpose of this presentation, we shall focus on parties and how such parties invoke these court rules. The general rule is that all persons may be joined in one action as plaintiffs/claimants in whom any right to relief is alleged to exist whether jointly or severally and judgment may be for such plaintiffs/claimant(s) as may be found to be entitled to relief and for such relief as he or they may be entitled, without any amendment². Similarly any person may be joined as defendant against whom the right to any relief is alleged to exist, whether jointly, severally or in the alternative. Judgment may be given against one or more of the defendants as may be found to be liable, according to their respective liabilities, without any amendment.

There is usually provision for joinder of persons severally or jointly and severally liable in the court rules.

Another related concept especially in relation to arbitration is multi-party arbitration³. Such parties can be states and several investors in the case of international arbitration

1 In the US, other than the Federal and State Court Rules, there is the Class Action Fairness Act of 2005.

2 See Order 9, Rule 1, Federal High Court (Civil Procedure Rules), 2009; Order 13, Rule 1, High Court of Lagos State (Civil Procedure Rules), 2012 and Order 10, Rule 1(1), High Court of the Federal Capital Territory (Civil Procedure Rules), 2004

3 See *Multiparty Actions in International Arbitration* edited by the Permanent Court of Arbitration (Oxford University Press, Oxford, 2009)

and other entities as shareholders and other classes of persons in domestic disputes. There can also be multiple issues involved in such disputes. Unlike in litigation where such actions can easily be consolidated using the court rules, in arbitration it requires the consent of all the parties as most arbitral rules do not provide for consolidation. Arbitrating multi-party cases has its own challenges especially in relation to the issue of proper parties, consent to arbitrate, the procedure to be adopted and how the resulting award can be enforced. As is the case with litigation, there are arbitration and mediation rules.⁴

Meaning of Class Action Cases

According to *Black's Law Dictionary*⁵, a class action is

a lawsuit in which the court authorises a single person or a small group of people to represent the interest of a larger group; specifically a lawsuit in which the convenience either of the public or of the interested parties requires that the case be settled through litigation by or against only a part of the group of similarly situated persons and in which a person whose interests are or may be affected does not have an opportunity to protect his or her interests by appearing personally or through a personally selected representative, or through a specially appointed to act as a trustee or guardian

Thus in law, a **class action**, a **class suit**, or a **representative action** is a form of lawsuit in which a large group of people collectively bring a claim to court and/or in which a class of defendants is being sued. This form of collective lawsuit originated in the United States and is still predominantly a U.S. phenomenon. However, in several European countries with civil law, as opposed to the Anglo-American common law system, changes have been made in recent years that allow consumer organizations to bring claims on behalf of large groups of consumers. Other than the United States, class actions are permitted in some form in many countries, including Canada, France, Germany, Italy, the Netherlands and Spain, although there may be limitations on the types of class action litigation that can be brought. Other countries, such as Switzerland, forbid any type of class action litigation.

In the United States of America, the federal civil procedure law, which has also been accepted by approximately 35 states (through adoption of state civil procedure rules similar to the federal rules), the class action must have certain definite characteristics

4 See the UNCITRAL Arbitration Rules, UNCITRAL Conciliation Rules, International Chamber of Commerce (ICC) Arbitration Rules and the Rules of the American Arbitration Association, London Court of International Arbitration and Stockholm Chamber of Commerce. In Nigeria, we have the Arbitration and Conciliation Rules which are schedules to the Arbitration and Conciliation Act, Cap A18, LFN, 2004.

5 Bryan A Garner (ed) (9th Edn West Publishing Co, St Paul, 2004) 284

(often referred to by the acronym **CANT**):

1. Commonality—there must be one or more legal or factual claims common to the entire class (in some cases, it must be shown that the common issues will predominate the proceedings over individual issues, such as the amount of damages due to a particular class member),
2. Adequacy—the representative parties must adequately protect the interests of the class,
3. Numerosity—the class must be so large as to make individual suits impractical (in other words, that the class action is a superior vehicle for resolution than numerous individual suits), and
4. Typicality—the claims or defenses must be typical of the plaintiffs or defendants.⁶

In the United Kingdom, the Civil Procedure Rules 1998 did not originally have elaborate provisions on representative action. However, the current rules provide for representative action thus⁷:

(1) Where more than one person has the same interest in a claim –

(a) the claim may be begun; or

(b) the court may order that the claim be continued,

by or against one or more of the persons who have the same interest as representatives of any other persons who have that interest.

(2) The court may direct that a person may not act as a representative.

(3) Any party may apply to the court for an order under paragraph (2).

(4) Unless the court otherwise directs any judgment or order given in a claim in which a party is acting as a representative under this rule –

(a) is binding on all persons represented in the claim; but

6 See US Federal Rules of Civil Procedure rule 23 which provides that damages can be sought by an individually-named plaintiff who files a lawsuit on behalf of a class of other individuals.

7 See Rule 19.6 of the UK Civil Procedure Rules

(b) may only be enforced by or against a person who is not a party to the claim with the permission of the court.

In Nigeria, the various court rules provide for representative actions⁸. In the Federal High Court Rules, Order 9, Rule 4 makes reference to 'class actions' in respect of intellectual properties only while Rule 12 deals with 'numerous persons'. In the case of the High Court of the Federal Capital Territory, Order 10, Rule 8 deals with 'numerous persons'. However that of the Lagos High Court Rules is more comprehensive as it deals with 'numerous persons' and 'representation of persons or classes of persons in certain proceedings'. For ease of exposition, therefore, we will reproduce Order 13, Rule 13 of Lagos State thus:

(1) Where in any proceedings concerning;

- (a) the administration of an estate; or
- (b) property subject to a trust; or
- (c) Land held under customary Law as family or community property;
or
- (d) the construction of any written instrument, including a statute, a judge is satisfied that:

- (i) the person, the class or some members of the class interested cannot be ascertained or cannot readily be ascertained;
- (ii) the person, the class or some members of the class interested if ascertained cannot be found;
- (iii) though the person or the class and the members thereof can be ascertained and found; it is expedient for the purpose of efficient procedure that one or more persons be appointed to represent that person or class or member of the class, the Judge may take the appointment. The decision of the judge in the proceedings shall be binding on the person or class of persons so represented.

(2) Notice of appointment made by a Judge under this Rule and all processes filed in Court shall be served on a person(s) so appointed.

(3) If in any proceedings mentioned in sub-rule (1) of this Rule, several persons having the same interest in relation to the matter to be determined attend the hearing by separate Legal Practitioners, then, unless the Judge considers that the circumstances justify separate representation, not more than one set of costs of the hearing shall be allowed to those persons, and judgment or order shall be framed accordingly.

⁸ See Order 9, Rules 4 and 12, Federal High Court (Civil Procedure) Rules, 2009; Order 10, Rule 8 of the High Court of the FCT (Civil Procedure Rules), 2004 and Order 13 Rules 12 and 13 of the High Court of Lagos State (Civil Procedure) Rules, 2012

(4) In this Rule, the word “class” includes the persons recognized by Customary Law as members of a family or as members of a land owning a community

Thus under Nigerian law, the provisions on ‘numerous persons’ cover representative actions generally while that of Lagos State deals with representative and class actions in defined circumstances. However, as compared to the US, numerosity is one of the conditions precedent to be fulfilled under Rule 23 of the Federal Rules of Civil Procedure.

The literature on class action in the US is overwhelming. A celebrated case is that of Apple customers who purchased an iPod between September 12, 2006 and March 31, 2009. Arising from the defect in the product, there was a class action. The customers were informed via email that they were being included in a class-action lawsuit filed against Apple in 2004. The lawsuit was granted class-action status by the courts and includes millions of customers who purchased any of a broad number of iPod music players. Notices were distributed to customers covered by the class, directing them to the lawsuit’s webpage.

Another case is that of Nigeria Airways Limited (NAL) where several passengers instituted a class action against the NAL in the United States of America in 2003 and the passengers were contacted by publications in newspapers in the United States and Nigeria.

What is Alternative Dispute Resolution (ADR)?

The term ‘ADR’ does not have an agreed definition. It is safe to assert, therefore, that the ADR jurisprudence⁹ is still evolving as there is no

9 See generally Brown H & Marriott A *ADR Principles and Practice* (3rdedn, Sweet & Maxwell, London, 2011), Mackie K, Miles D, Marsh W & Allen T *The ADR Practice Guide, Commercial Dispute Resolution* (3rdedn, Tottel Publishing Ltd, Haywards Heath, 2009), Mcilwrath M & Savage J *International Arbitration and Mediation, A Practical Guide* (Kluwer Law International, Netherlands, 2010), Blake S, Browner J & Sime S *A Practical Approach to Alternative Dispute Resolution* (2ndedn, Oxford University Press, Oxford, 2012), Sutton D S, Gill J & Gearing M *Russell on Arbitration* (23rdedn, Sweet & Maxwell, London, 2007), Blackaby N & Partasides C *Redfern and Hunter on International Arbitration* (5thedn, Oxford University Press, Oxford, 2009), Macfarlane J (ed) *Rethinking Disputes: The Mediation Alternative* (Cavendish Publishing Ltd, London, 1997), Binder P *International Commercial Arbitration and Conciliation in UNCITRAL Model Law Jurisdictions* (3rdedn, Sweet & Maxwell, London, 2010), Orojo J O & Ajomo M A *Law and Practice of Arbitration and Conciliation in Nigeria* (Mbeyi & Associates (Nigeria) Ltd, Lagos, 1999), Azinge E & Ani C (eds) *Principles of Negotiation and Mediation* (NIALS Press, Lagos, 2012), Tackaberry J & Marriott A *Bernstein’s Handbook of Arbitration and Dispute Resolution Practice* (4thedn, Sweet & Maxwell, London, 2003), Asouzu A *International Commercial Arbitration and African States: Practice, Participation and Institutional Development* (Cambridge University Press, Cambridge, 2001) and Yannaca-Small K (ed) *Arbitration under International Investment Agreements* (Oxford University Press, Oxford, 2010)

agreement on several issues. The issues include:

- a) What is the meaning of ADR? Does it mean a range of dispute resolution processes that add to the existing dispute resolution process or serves as alternatives to one or two of the others?
- b) What does the word 'A' stand for? Does it stand for 'Alternative', or 'Appropriate', or 'Amicable'?
- c) When reference is made to 'alternative'. Is it alternative to litigation or mediation or conciliation or reconciliation or settlement?
- d) What is the primary or normal dispute resolution process – settlement or litigation bearing in mind that it is generally when a dispute cannot be settled that resort to other means is sought.
- e) Is ADR a western concept or alien to our customary jurisprudence or a reinstatement of customary jurisprudence?
- f) Does ADR include 'arbitration'? While some refer to 'Arbitration and ADR' suggesting that arbitration is excluded from ADR, others argue that arbitration is part of ADR.

Clearly, terminology and methodologies are still evolving. For our purpose, it is safer to examine the dispute resolution processes in relation to how they function instead of focusing on whether they are alternatives or complementary. In each case, it is also safer to analyse the appropriate dispute resolution process and hence the argument that the 'A' in ADR should stand for 'appropriate' and not 'alternative'.

Generally in class action cases, reference is to litigation. Thus most court rules provide for representative or class action. It is possible that in the course of hearing a matter the courts invoke their powers under the court rules and encourage the parties to adopt arbitration or mediation. However, when other processes like arbitration, mediation/conciliation and negotiation are invoked, difference issues are raised. We will, therefore, examine, these other processes other than litigation.

Arbitration is a means of resolving disputes. It starts by way of a private agreement between the parties to refer present or future disputes to

arbitration, continues by way of a private hearing in which the parties play a predominant role (party autonomy) and ends with an award that has a public effect. Public effect in the sense that the award is enforced by the state organs.

Arbitration has key features:

- a) The agreement to arbitrate – either a clause or a submission agreement.
- b) The agreement must be in writing, signed by the parties.
- c) The appointment of the arbitrators. Generally in *ad hoc* arbitration, it is the parties that appoint arbitrators while in institutional arbitration, this is done by the institution.
- d) The conduct of the arbitral proceedings. This is regulated by statute and contract.
- e) The principle of arbitrability – not every subject matter is capable of being resolved by arbitration.
- f) The privacy and confidentiality of the proceedings. Unlike litigation, the general public is usually not allowed to be present at arbitral proceedings.
- g) The level of control by the parties – the arbitral tribunal controls the process and the outcome. However, there are instances where the courts play supportive and supervisory roles.
- h) Arbitration is adjudicatory.
- i) The binding nature of the award.
- j) The enforcement of the award. The award is enforced like a court judgment.
- k) The principle of judicial non-intervention – the court cannot intervene in arbitral proceedings except as provided by the arbitral enactment.

Conciliation/Mediation is also used to resolve disputes. According to Article 1(3) of the United Nations Commission on International Trade Law (UNCITRAL) Model Law on International Commercial Conciliation (2002):

For the purposes of this Law, “conciliation” means a process, whether referred to by the expression conciliation, mediation or an expression of similar import, whereby parties request a third party or persons (“the conciliator”) to assist them in their attempt to reach an amicable

*settlement of their disputes arising out of or relating to a contractual or other legal relationship. **The conciliator does not have the authority to impose upon the parties a solution to the dispute** (emphasis added).*

We will, therefore, use the words 'conciliation' and 'mediation' interchangeably.

The significant features of conciliation/mediation include:

- a) It requires an agreement to mediate and at the end of the mediation, a settlement agreement is executed if the proceedings are successful. The general challenge is the effect of such settlement agreement. Is it self-executory like an arbitral award? Generally, it is not except where linked to the court or where there is a Multi-door courthouse.
- b) Can be used to resolve various disputes even in areas like family matters that arbitration is not suitable.
- c) Conciliation is consensual and not adjudicatory.
- d) The conciliator can caucus or meet the parties together. An arbitrator cannot caucus – must meet the parties together.
- e) The conciliator controls the process but not the outcome – does not have the authority to impose upon the parties a solution to the dispute. Thus the parties control the outcome.
- f) The conciliator decides nothing and awards nothing. Merely assist the parties to arrive at a settlement.

Negotiation is not unique to arbitration or conciliation/mediation. It can also be used in litigation. Broadly negotiation is “the process we use to satisfy our needs when someone else controls what we want”¹⁰ It is seen as the primary tool in the dispute resolution process. Generally, negotiation is not seen as an ADR process.

Other than arbitration, mediation/conciliation and negotiation, there are other disputes resolution processes that we did not consider relevant to class action litigation.

The Use of ADR in Class Action Cases

In Nigeria today, the reform of the court rules has led to the provision for references to either arbitration or ADR in the court rules. Thus class arbitration can emerge from a court reference.

Class arbitration is an alternative to a class action lawsuit in which a group of plaintiffs settles its differences with a defendant in the form of arbitration. Class arbitration is less common than class action lawsuits, but does occur in certain situations. It enables plaintiffs to recover for damages they incur, without the need for a case to go to court.

Class arbitration occurs when a group of plaintiffs joins together to file a complaint against an entity. This is common in product liability cases and in situations where a drug doesn't work properly or injures people. It's also common when a defective product causes people to suffer some type of loss.

In arbitration, the agreement to arbitrate is critical. This agreement can be in a contract or it is a separate clause. Thus unlike litigation where agreement to litigate is unnecessary, generally, agreement to arbitrate is the foundation stone of arbitration. This may pose a challenge to class actions.

It is noteworthy that in the spirit of the reforms of the court rules, judges attempt to compel parties to go for arbitration or adopt any of the ADR processes. Where a judge makes such an order and the parties do not agree to arbitration, the arbitral tribunal will lack jurisdiction. What most court rules provide for is that parties should be encouraged to arbitrate not compelled.

In the context of this presentation, class arbitration can arise from reference from the court or without reference from the court. An analogous concept in arbitration is multi-party arbitration. As in the case of parties in the court proceedings, who is a proper party is also a very critical issue in arbitration. According to section 57(1) of the Arbitration and Conciliation Act, 2004, "party" means a party to the arbitration agreement or to conciliation or any person claiming through or under him and "parties" shall be construed accordingly. In other words, one must be a party to an arbitration agreement before one can become a party to arbitral proceedings. In the words of Sutton *et al*

Arbitration is generally a bilateral affair because the arbitration agreement is typically made between two parties to a contract containing an arbitration clause. However, contracts may be made between several parties or there may be several related contracts comprised in a transaction and these may involve different parties. Clams may also arise against non-parties in relation to the same or a similar subject matter as that of an agreement with an arbitration clause. The situations described are quite distinct, but all give rise to potential

*difficulties as regards combining the different claims and parties in arbitration proceedings. At the heart of these difficulties is the common theme that arbitration is a consensual process and this will usually prevent the introduction into the proceedings of claims or parties which were not within the scope of what the contracting agreed to.*¹¹

In arbitration, one major area which multi-party issue arise is in a construction project where there is a main contractor who has entered into an agreement with the employer and several separate contracts with the sub-contractors¹². Each of the parties may agree in their arbitration clauses to have all related disputes arising between any of them heard together in one arbitration or separate arbitrations but allowing for consolidation or for there to be concurrent hearings. There need be no agreement to which they are all party, provided the agreement into which each has entered demonstrates their consent to the chosen mechanism for dealing with disputes. In the case of construction project, there may be no agreement between the employer of the main contractor and the sub-contractors but may be bound to have their disputes heard in the same tripartite arbitration proceedings with the main contractor. These are the challenges that multi-party disputes cause generally.

At the international level, multiparty arbitration which is similar to class action, has been handled by the Permanent Court of Arbitration (PCA) since the *Preferential Treatment of Claims of Blockading Powers Against Venezuela* of 1904. Multiparty issues have continued to arise at the PCA and other arbitral institutions, commencing with the PCA's role as the initial home for the Iran-United States Claims Tribunal in the early 1980s and continuing through in cases such as the *Bank for International Settlements* concluded in 2003 and the *Eurotunnel* Arbitrations, one of which was concluded in 2007.

In the United States of America, the Supreme Court's decision in *Bazze*¹³ has led to

11 Sutton (n.....) 107

12 In the case of bilateral investment treaty, arbitration can arise involving several shareholders. See R Doak Bishop 'Multiple Claimants in Investment Arbitration: Shares and Other Stakeholders' in *Multiple Party Actions in International Arbitration* (n 1) 239

13 *Green Tree Financial Corp v Bazze*, 539 U.S. at 444 (2003). This was a case involving two home owners (the Bazze plaintiffs), one of whom had taken out a home improvement loan and the other who had entered into a loan agreement for the purchase of a mobile home, brought a class action against the lending corporation, Green Tree Financial. The two borrowers had two separate agreements with Green Tree Financial Corporation. The underlying loan agreements contained arbitration agreements which were silent with respect to the treatment of class actions but did indicate that all disputes arising out of or relating to the contract was to be resolved by arbitration. The South Carolina state court granted the motions to compel arbitration and appointed one who conducted an ad hoc arbitration. The arbitrator rendered two class arbitration awards on behalf of the two classes of individuals and the awards were confirmed by the court. Green Tree appealed to the Supreme Court arguing that the language of the arbitration agreements did not provide for class action arbitration while the Bazze plaintiffs argued that the language of the arbitration agreement did not preclude class action arbitration. The Supreme Court agreed with the Bazze plaintiffs.

the incorporation of class action arbitration in the Arbitration Rules of the American Arbitration Association (AAA)¹⁴. The Supreme Court held that where arbitration agreements are silent with respect to the availability of class-wide proceedings, it is for an arbitrator and not a court to determine if the contract forbid class arbitration. This decision implicitly endorsed the notion that entire class-wide proceedings could take place in the arbitral forum.

Other than the *Bazzle*, California courts have a significant history dealing with class-wide arbitration that predates *Bazzle*. The California Arbitration Act¹⁵ gives California courts authority to consolidate arbitrations. On that authority, California courts routinely certified class-wide arbitrations and sent them to arbitrators for adjudication of the merits of the dispute¹⁶.

Whether domestic or international, the critical issues arising in multiparty arbitration as in class action arbitration are consent, the procedure - the predictability that safeguards the system's integrity, and enforcement - without reasonable prospects of which the basis for arbitration disappears.

Mediation has always been used in other jurisdictions to resolve lawsuits. This is usually on the order of the presiding judge.

I had a personal experience of being involved in a mediation of a lawsuit in the United States in 2006 when I was General Counsel at the Bureau of Public Enterprises (BPE). Under the Public Enterprises (Privatization & Commercialization) Act, 2004, the Nigeria Airways Limited (NAL) was one of the public enterprises listed for privatization. However, due to the huge debt overhang of NAL, the National Council on Privatization (NCP) approved that NAL should be liquidated. In the course of the liquidation, it would found that there was a lawsuit against NAL in the Eastern District of New York¹⁷ alleging several causes of action including fraudulent inducement, negligent misrepresentation, false imprisonment, breach of the Warsaw Convention, Unjust Enrichment, Detrimental Reliance, Violations of Title 18, United States Code, sections 1962© and 1964©, Racketeer Influenced and Corrupt Organisations (RICO) Act and seeking compensatory and punitive damages in the sum of \$50 million.

The facts of the case were as follows: On November 30, 2002, NAL Flight WT 851, a Boeing 747-400 departed JFK International Airport in New York with about 400 Thus the court implicitly endorsed the notion that entire class-wide proceedings could take place in the arbitral forum

14 See the AAA Supplementary Rules for Class Arbitration, 2003. Arising from this Rues, about 230 class arbitrations have been filed with the AAA since *Bazzle* was decided in 2003

15 See section 1281.3 of the California Civil Procedure Code. By contrast, the Federal Arbitration Act does not permit consolidation of arbitrations absent the agreement of the parties.

16 See Richard Chernick 'Class-Wide Arbitration in California' in *Multiple Party Actions in International Arbitration* (n.....) 337

17 Case No. 03-CV-06387 Ndidiaziwe, et al v NAL, et al of 22 December, 2003.

passengers and arrived Lagos on 1 December, 2002 and left the pieces of luggage of the passengers behind in the US and the passengers were stranded in Nigeria for several weeks without their luggage. NAL staff forced passengers to pay \$125.00 per carry-on bag, numerous passengers with return tickets were stranded in Nigeria as NAL could not transport them back to the US and NAL failed to refund their return tickets or make alternative return flights arrangements for the passengers.

At a pre-motion conference on 2 June, 2006, the court ordered the parties to attend mediation for the purpose of resolving the dispute out of court. On 7 August, 2006, the parties attended mediation presided over by a court-appointed mediator and on 20 December, 2006, the parties executed a Settlement Agreement. The terms included the payment of \$1m to the passengers, \$500,000 as attorney's fees and additional \$500,000 to be paid according to the class definition. Definition was based on those passengers who had round-trip tickets (Class A) and those with one-way ticket (Class b). Each member of Class A got \$1,312.50 and Class B \$1,000.00.

As a court-ordered mediation, the Settlement Agreement was subject to the approval of the Court.

In the UK, with the coming into force of the Civil Procedure Rules, 1998 (CPR), ADR has been given prominence. The CPR contains various rules and practice directions relevant to ADR. In addition, a number of pre-action protocols have been established under the CPR which specify certain preliminary steps to be taken before commencing proceedings, which include reference to ADR¹⁸.

In Nigeria, the various High Court Rules, provide for forms of dispute resolution like arbitration and conciliation/mediation. In the High Court of the FCT Rules, Order 17 deals with ADR. Accordingly, a court or judge, with the consent of the parties may encourage settlement of any matter before it by any of these processes. However, this order is not clear as to whether an arbitrator or mediator is obliged to give a final award or make an award subject to the confirmation of the judge who made the reference. In the case of mediation, the order is not clear on the effect of the settlement agreement. It is noteworthy that there is no reference to class action in the order but that the court or judge may encourage the settlement of any matter. In our view, this includes class action.

Order 52 of the High Court Rules of the Federal High Court deal with Arbitration. This is a court-annexed arbitration as the court has powers to modify or correct an award on the application of either party. If arbitration is conducted under the provisions of the Arbitration and Conciliation Act, 2004, the court does not have such powers, that is,

the powers to correct or amend an award. This is a matter for the arbitrator¹⁹. Order 52, Rule 1 of the High Court Rules of the Federal High Court provides for reference of a matter to one or more arbitrators without qualification. It is also contended that class action can be referred to arbitration under this rule.

In Lagos State, the High Court Rules, in Order 3, Rule 11 provides for screening of cases if they are suitable for ADR for purposes of reference to the Lagos Multi-door Court House or other appropriate ADR institutions or practitioners. Order 25 provides for Case Management Conference and Scheduling. Order 25, Rule 6(1) provides that when a case is deemed suitable for ADR under Order 3, Rule 11, or under other directives, the ADR Judge shall, in case of recalcitrant parties, consider and give appropriate directives to parties on the filing of the Settlement of Case and other necessary issues. Where a recalcitrant party fails to comply with the directives, the ADR judge, shall in the case of the claimant dismiss the claim and in the case of the defendant enter judgement against him where appropriate.

It would appear that in Lagos State, ADR is mandatory. There are few jurisdictions world wide where ADR is mandatory²⁰. Our view is that ADR especially mediation should be a consensual process and not mandatory. Although there is no reference to class action, since the judge is obliged to consider whether a matter is suitable for ADR, it is contended that class action can be one of such actions.

In various states, there are Multi-door courthouses. Such courthouses handle arbitration and mediation without any express reference to class action.

Conclusion

Society as a whole can benefit from the concept of class actions. Companies may know that there is a greater degree of accountability, since a class of plaintiffs can join together to sue while one individual would not do so. In addition, the courts are not clogged with hundreds or even thousands of individual lawsuits, which makes for greater efficiency.

Class actions are common for defective products. Class actions often occur against medical companies who release a defective drug, wherein numerous plaintiffs join together to sue the drug company. A named plaintiff brings the attention of the case to a class action attorney, who assembles and organizes the class and files suit.

Sometimes in the course of hearing the lawsuit, the judge, with the consent of the parties can request the parties to go for arbitration or mediation.

19 See section 28 of the Arbitration and Conciliation Act, 2004.

20 For example US, Canada, Australia and New Zealand.

It is obvious, therefore, that the various High Court Rules provide for representative or class action. They also provide for ADR without express reference to how a class action should be handled. It is recommended that other than the provision for ADR, specific reference should be made to class action. Although Lagos State should be commended in this regard, the scope is restrictive. It should be expanded to include tortious liability and labour issues.

It is also recommended that our court rules should be further reformed to provide for conditions like the **CANT** in the US for the invocation of class action litigation. In this regard, the provision for 'numerous persons' with the same interest in the court rules is inadequate. In addition, the numerous persons must be adequate and competent to represent the class and the claims must be typical of the class-wide claims.

As is the case in California, arbitration enactments and rules should provide for consolidation of arbitration proceedings in cases of multiple parties. Similarly, in the absence of consolidation, the Nigerian courts should adopt the principle in *Bazzle*, that is, where appropriate, the courts should hold that in the absence of express exclusion clause, where there are two separate agreements dealing with the same issues, class action arbitration in respect of such issues are permissible.