

# GENERAL ADVANTAGES OF **ALTERNATIVE DISPUTES RESOLUTION** IN INTELLECTUAL PROPERTY DISPUTES

by **Seun Akinade** - Associate

[www.oal.law](http://www.oal.law)

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In modern times, litigation which has hitherto been the principal method of resolving commercial disputes is now being complemented by other methods of dispute resolution. Owing to the emergence of new commercial transactions, many countries in the world now apply alternative methods of dispute resolution.

Section 19(d) of the Constitution of the Federal Republic of Nigeria (CFRN) 1999 provides for the settlement of disputes by Arbitration, Mediation, Conciliation, Negotiation and Adjudication. This is in recognition of the crucial role Arbitration and other forms of ADR now play in the resolution of various types of disputes. The constitutional status accorded Arbitration and other forms of ADR for the settlement of disputes is a complementary role to the judicial powers conferred on the Courts by the Constitution. No doubt Alternative Dispute Resolution(ADR) is becoming a popular option in resolving intellectual property disputes. A few of the advantages of ADR in IP disputes are:

## Party Autonomy

Intellectual property disputes have distinctive characteristics: they often span multiple jurisdictions and involve highly technical matters, complex laws and sensitive information. Naturally, parties will want a dispute resolution process that can be tailored to address these distinctive characteristics. However, litigation can be a highly inflexible mechanism that is constrained by complex laws, and parties rarely have the discretion to adapt the process to their dispute. In contrast, ADR gives parties the freedom to customize their dispute resolution process in a single forum. Parties can choose the ADR process best suited to their dispute: mediation, arbitration and expert determination are all possible options. Parties can agree to meet at a neutral location, submit to a neutral expert of their choosing, and abide by rules and procedures that they have modified to meet their needs. Party autonomy is the guiding principle of ADR, and is manifested in its many advantages.

## Independent Specialized Expertise:

Intellectual property disputes can involve highly technical scientific matters and complex legal issues, but not every country has specialized intellectual property courts or judges. Thus, when judges and juries lack the necessary expertise to fully comprehend the complex factual, technical and legal issues at stake, considerable time and resources may be required to present the relevant technologies and laws to them. ADR processes allow parties to choose a neutral with specialized expertise to act as a decision maker, or a facilitator. Experts in law, technology or specific industries can be appointed as neutrals; parties also have the ability to appoint a panel of experts with expertise in different areas of the dispute. Expert neutrals can use their knowledge and experience to provide guidance during the ADR process, and to craft a satisfying resolution for the dispute. When capable experts are appointed, ADR processes offer benefits that would be otherwise unavailable through litigation.

## Simplicity and Flexibility:

ADR processes are procedurally simple and flexible when compared to litigation. ADR gives parties the freedom to agree on the conduct of the proceedings, and select appropriate procedural rules. For example, parties can place limits on the amount of survey evidence admitted for trademark disputes, and even choose the extent to which certain rules of evidence are to apply, if at all.

Furthermore, ADR processes can provide a straightforward mechanism for resolving legally complex intellectual property disputes. For example, mediation focuses on the parties' motivations and interests, not necessarily their strict legal positions. This helps the parties concentrate on their shared interests instead of legal rights and wrongs, which facilitates the creation of a satisfying settlement. While this approach does not eliminate the legal complexities of the dispute, a mediator with the relevant legal and/or subject matter expertise and experience can provide appropriate assistance and support.

## Time Savings:

Legal proceedings are often time-consuming, which can have an adverse effect on intellectual property rights. Intellectual property rights of limited duration, such as patents, may expire before a final judgment can be rendered. In any case, market forces affect the profitable lifespans of intellectual property rights: patented products can be rapidly rendered obsolete, and trademarks can be time-sensitive if they represent products with short life cycles. The many advantages of ADR translate into substantial time savings. Expert neutrals do not require time-consuming explanations of the technical and legal issues at stake, and the stated flexibility and simplicity allow disputes to be swiftly resolved, especially when lengthy evidential procedures are simplified.

## Cost Savings:

Intellectual property litigation can be an expensive affair, especially if appeals and foreign litigation are involved. The prohibitive cost of legal proceedings in some jurisdictions can make it difficult for individuals or small businesses to enforce their rights or defend themselves in intellectual property claims by or against larger entities. In comparison to litigation, ADR offers an affordable and accessible avenue for parties to resolve their disputes. The many advantages of ADR provide significant cost savings, because parties can avoid expensive litigation at home and abroad, use expert neutrals who can delve straight into complex intellectual property issues, and dispense with complicated and formalistic procedures. The time savings provided by ADR naturally translate into cost savings as well.

## Confidentiality:

Confidentiality is often of critical importance in intellectual property disputes. Thus, parties may balk at court proceedings when trade secrets or proprietary information, such as experimental results from research and development, are involved. Litigation and the discovery process can force the public disclosure of such sensitive information, which can irreversibly damage the parties' business prospects.

Confidentiality is a key advantage of ADR because it allows the parties to effectively control disclosures and access to sensitive information. Proprietary information can be kept confidential through agreements between the parties, and arbitrators can issue protective orders to prevent parties from accessing confidential documents. Furthermore, unlike litigation, the entire ADR process and its outcome can be kept confidential, which can be advantageous for parties who wish to preserve their business reputations and relationships.

## Diverse Solutions:

Litigation normally offers parties a limited range of specific legal remedies. While parties can apply for monetary damages, injunctions, specific performance and other such remedies, such solutions tend to be “win-or-lose” and granted based on considerations of strict legal merits or otherwise at the court’s discretion. Parties do not have the discretion to craft their own solutions or instruct the court to deliver its decision within specified parameters. Mediation gives parties the opportunity to negotiate win-win or other creative solutions that satisfy their interests. For example, parties can agree to share the intellectual property rights in dispute through licenses or consent to use agreements, or indeed address or determine non-intellectual property issues in the resolution of an intellectual property dispute. Such mutually beneficial outcomes allow parties to preserve existing business relationships or forge new ones. In arbitration, the substance of the arbitral award is determined by the arbitral tribunal. However, parties can agree on the scope and limits of the arbitration. For example, parties can agree to establish limits to the quantum of the award, and even specify in the arbitration agreement, a desired time frame by the arbitral tribunal to issue the arbitral award. Beyond a final award, parties can petition the arbitral tribunal for interim relief in the form of an injunction, or security for costs.

## Key Contacts



**Beverley Agbakoba-Onyejianya**  
Partner, OAL  
e: [beverley@oal.law](mailto:beverley@oal.law)



**Seun Akinade Ayomide**  
Associate, OAL  
e: [seun@oal.law](mailto:seun@oal.law)

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Contact Us:

Corporate Office: 10A Ilabere Street, Ikoyi, Lagos. | Apapa Office: Maritime Complex 34, Creek Road, Apapa Lagos. | Abuja Office: Purplestone Mall, Plot 1265, Zone E27, Apo Resettlement, Apo, FCT, Abuja. | Postal Address: P.O.Box 3169, Apapa Lagos, Nigeria Website: [www.oal.law](http://www.oal.law)