

MEDIATION (A “FACE SAVING DEVICE”) - THE NIGERIAN PERSPECTIVE¹.

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1. INTRODUCTION:

Mediation, an alternative dispute resolution (ADR) mechanism is the traditional way of resolving disputes peacefully in agrarian rural based Nigeria. The mediator’s authority was hinged on his standing and the respect accorded to him in the community. In the Nigerian traditional societies mediation was used as a tool for preserving cultural norms and values. Mediation prevented disputes from festering, maintained peace and preserved traditional values (e.g. the elder is always right, the younger has no alternative but to accept the words of the elder).

The court system was introduced with the advent of colonialism and urbanization. Urbanization relegated mediation to the background though customary ADR is still recognized in the Nigerian Legal System.

In the case of *Okpuruwu vs. Okpokam* the Honourable Justice Oguntade JCA (as he then was) observed thus: -

“In the pre-colonial times and before the advent of the regular courts, our people (Nigerians) certainly had a simple and inexpensive way of adjudicating over disputes between them. They referred them to elders or a body set up for that purpose. The practice has over the years become strongly embedded in the system that they survive today as custom”.²

Mediation in Nigeria has developed into a more structured process and within a legislative framework. The Nigerian Arbitration and Conciliation Act Cap A18 Laws of Federal Republic of Nigeria (LFN) 2004, (the “Act”) an adoption of the UNCITRAL Model Law on International Commercial Arbitration was enacted in 1988³. The third schedule of the Act contains the Uncitral Conciliation Rules. The Rules apply to conciliation of disputes arising out of or relating to a contractual or other relationship where the parties seeking an amicable settlement of their dispute have agreed that the

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² (1998) 4 NWLR Pt 90, 554 at 586

³ Nigeria adopted the Model Law in 1988

conciliation rules apply.⁴ The Act like the Model Law does not define conciliation however conciliation in Nigeria is often used synonymously with mediation.⁵

Alternative dispute resolution as an alternative to imposed / rights based decisions (e.g. arbitration and litigation) is encouraged and promoted by our various High Court Laws, the rules of court and the government. Mediation continues to be a tool in Nigeria for the resolution of disputes in an amicable manner at less cost usually on a win-win basis and with the benefit of face saving. Mediation encourages the restoration of the relationship of the parties and avoids it being prejudiced by a “battle” before a court or tribunal with power to impose a decision.

Unfortunately having been exposed to the court system Nigerians appear to have adopted a culture of litigation. Active steps are being taken to encourage and promote the use of ADR.

In this paper I shall give an overview of the current legal framework and the developments regarding mediation in Nigeria.

2. MEDIATION AND THE COURTS:

2.1 The Nigerian Legal System has always recognized the compatibility of ADR with the court system. From the inception of the court system there have been provisions in the Laws of Nigeria enjoining Judges to encourage reconciliation between the parties. There are specific provisions in the High Court Laws in this respect. Section 24 of the High Court Law of Lagos State chapter H3 Laws of Lagos State 2003 states thus: -

“Reconciliation in civil cases:

In any action in the High Court the courts may promote reconciliation among the parties thereto and encourage and facilitate the amicable settlement thereof! :”⁶

Section 25 also states thus

Reconciliation in criminal cases:

In criminal cases the High Court may encourage and facilitate the settlement in, an amicable way of proceedings for common assault or for any other offence not amounting to felony and not aggravated in degree, on terms of payment of compensation on other terms approved by the court.⁷

⁴ Article 1(1) of the Conciliation Rules in the third schedule to the Act

⁵ See J. Olakunle Orojo and M. Ayodele Ajomo Law and Practice of Arbitration and Conciliation in Nigeria (1999) pg 336 Mbeyi & Associates

⁶ See also section 28 of the High Court Law of Rivers State Cap 62 Laws of Rivers State 1999, Laws of Oyo State Cap 46 1978, and Laws of Ogun State Cap 44 1978. The earlier laws contained similar provisions e.g. High Court Law of Northern Nigeria 1963 and that of the Western Region of Nigeria 1959.

⁷ See also section 29 of the High Court Law of Rivers State 1999. Section 22 High Court Law of Bornu State Cap 63 1994. Laws of the Northern States appear to have omitted the provision for reconciliation in criminal cases e.g. Laws of Bornu State.

It appears that these provisions were not optimally utilized. A more proactive use of the court's power to use ADR was encouraged by the need to decongest the court system and ensure a more effective and expeditious dispute resolution system. In Nigeria a change was pioneered by the Lagos State judiciary motivated by the Lord Woolf's Reforms in Britain to amend the rules of court to place emphasis on active case management by judges. Consequently the High Court of Lagos State promulgated the new Civil Procedure Rules 2004. Section 1(2) of the rules provides that the application of the rules shall be directed towards the achievement of a just efficient and speedy dispensation of justice. A major change in the system was the requirement for a pre-trial conference prior to commencement of trial and after close of pleadings.⁸ The rules required the judge to cause to be issued to the parties and their legal practitioners if any a pre-trial conference notice. Listed among the purpose of the pretrial conference was ***promoting amicable settlement of the case or adoption of alternative dispute resolution***. Order 25 rule 3 gave the judge the power to take action as may be necessary or desirable ***to facilitate the just and speedy disposal of the action***. It's mandatory that parties attend pre-trial conferences. Pre-trial conference is conducted in an informal manner, the judge descending from his high seat and joining counsel and litigants in the well of the court. Counsel abandon the traditional horse hair wig and black robe all of which help to create a relaxed atmosphere which is more conducive to amicable resolution. Judges in the judicial service system are therefore playing a role in settlement of disputes through the active participation of parties as against the imposed decisions they would usually render. Upon conclusion of the pre-trial conference the judge issues a report and the matter is thereafter transferred to a trial judge in the event that it's not settled at the pre-trial conference stage.⁹ Indeed several cases are now settled at the pretrial conference stage rather than go to trial.

The trend pioneered by the Lagos State Judiciary is being followed in other states with major commercial centres.

2.2 MULTI-DOOR COURTHOUSE:

An innovation aimed at offering an institutional framework for resolution of disputes by ADR whether arising from cases instituted in the court system or outside of it (walk-ins) is provided by the Multi-door Courthouse system. On the 11th day of June 2004 the Chief Judge of Lagos State issued practice directions for the functioning of the Multi-Door Courthouse located within the court premises. The practice directions emphasized that the court must further its overriding objective by actively managing cases. Active case management was defined as including "encouraging the parties to use an alternative dispute resolution procedure if the court considers that appropriate and facilitating the use of such procedures"¹⁰. The court was required to refer cases to the Lagos Multi-Door Courthouse where the court considers ADR a worthwhile option¹¹. The motivation was providing access to justice for a timely cost effective and user friendly system. The Multi-Door Courthouse offers disputants various doors to disputes resolution, early neutral evaluation, arbitration and mediation. Mediation is a popular method used at the

⁸ Order 25 rule 1. Other states followed suit e.g. Kwara State High Court (Civil Procedure) Rules 2005 Order 33(2)(2), Rivers State High Court (Civil Procedure) Rules 2006 Order 25.

⁹ See Order 25 rule 5

¹⁰ Section 1.1(a)

¹¹ Section 1.1(b). See also section 1.2 on role of counsel and 1.3 on role of parties

Lagos Multi-Door Courthouse due to its advantages including that of face saving, the absence of an imposed outcome and / or an assessment of the parties rights and obligations. The users of the system may be referred by the judge from the pre-trial conference stage. Others usually referred to as walk-ins go directly to the Multi-door Courthouse. The initiative is usually taken by one party and the other is requested to submit.

A settlement agreement entered into once reduced into writing and signed by the parties is forwarded to the referral judge in the case of court referred matters. In respect of walk-ins the ADR judge would endorse a settlement agreement as an enforceable consent judgment. There are a number of highly trained CEDR (UK) accredited mediators listed on the Panel of Neutrals of the Lagos Multi-door Courthouse.

From statistics available the number of cases settled at the Multi-door Courthouse is comparatively low when compared with the number that remains in the litigation system. A major reason for this appears to be the reluctance of parties to submit to the mediation process.

At present there are two jurisdictions that have replicated the Multi Door Court House concept i.e. Kano and the High Court of the Federal Capital Territory Abuja.

3. **MEDIATION AND GOVERNMENT**

3.1 **CITIZENS' MEDIATION CENTRE:**

The Citizens Mediation Centre under the Directorate of the Citizens Rights of the Lagos State Government Ministry of Justice was setup in 1999. The Citizens Mediation Centre is a legal entity established under the provisions of the Citizens Mediation Centre Law 2003. Its present ambit is the provision of free alternative dispute resolution services to indigent members of the public. The idea of access to justice for this class of people had previously been promoted by special television programs. Complaints and requests for the free mediation services of the centre from members of the public increased from 4,623 in 2000 to 9,465 in 2007. The Centre has a number of highly trained mediators. The centre was set up to actualize the access to justice program of the Lagos State Government.

The centre thus created the opportunity for cases to be diverted from the court system and enabled the decongestion of the judge's docket.

4. **LEGAL FRAMEWORK:**

The main statute regulating the ADR process in Nigeria is the Arbitration and Conciliation Act, Cap.A18 Laws of the Federation of Nigeria.2004. The law is an adoption of the UNCITRAL Model Law on International Commercial Arbitration 1985.¹² Section 37 of the Act provides as follows: -

¹² General Assembly Resolution 40/72 (1985)

“Notwithstanding the other provisions of this Decree, the parties to any agreement may seek amicable settlement of any dispute in relation to the agreement by conciliation under the provisions of (Part II) of this Decree.”

The third schedule of the Act contains the UNCITRAL Conciliation Rules.¹³

Various sector specific statutes specify ADR as the mechanism for resolving disputes¹⁴. The Nigerian Communications Commission (Commission) the regulatory body for the telecommunications sector is a pioneer in this respect. The Nigerian Communications Act 2003 (The Act) provides that the “Commission may resolve disputes in such manner including but not limited to alternative dispute resolution processes and upon such terms and conditions as it may deem fit”.¹⁵ “The Act provides that the Commission, in carrying out its functions under subsection (1) of this section, shall always be guided by the objective of establishing a sustained dispute resolution process that is fair, just, economical and effective and not be bound by technicalities, legal form or rules of evidence and at all times act according to the ethics of justice and the merits of each case.”¹⁶

The Commission has formulated rules for the mediation of industry specific disputes.

5. CURRENT DEVELOPMENTS:

5.1 THE NATIONAL COMMITTEE

In 2005 the former Attorney-General and Minister of Justice of the Federal Republic of Nigeria Chief Bayo Ojo SAN instituted a National Committee on the Reform and Harmonisation of Arbitration and ADR Laws in Nigeria. The task before the National Committee was principally to review Nigeria’s Laws on Arbitration and other ADR mechanisms with a view to proposing necessary reforms in line with modern trends. The work of the National Committee resulted in a draft Federal Act and Uniform State Arbitration and Conciliation Laws. There is a bill before the National Assembly to pass the federal draft into law whilst a recommendation was made by the Committee that the respective Attorney Generals of the States constituting the Federal Republic of Nigeria consider and enact the draft Uniform State Arbitration and Conciliation Law.

The work of the National Committee was largely influenced by the UNCITRAL Model Law 2002 (MLICC).¹⁷ Part II of the bill contains provisions on conciliation.

5.2 The draft bill retained some of the conciliation provisions of the 2004 Act. The retained provisions are: -

¹³ See United Nations General Assembly Resolution 35 / 52 (1980)

¹⁴ See for instance Electric Power Sector Reform Act 2005 and

¹⁵ Section 73 Nigerian Communications Commission Act 2003

¹⁶ Section 76(2) Nigerian Communications Commission Act 2003

¹⁷ See United Nations General Assembly Resolution 57 / 18 (2002)

- i. Section 38 - Request to conciliate
- ii. Section 39 - Commencement of Conciliation proceedings
- iii. Section 40 - Appointment of Conciliators
- iv. Section 41 - Action by the Conciliation body
- v. Section 42 - Terms of Settlement

5.3 The National Committee in line with the MLICC 2002 recommended the following new provisions:-

1. i. Definition of Conciliation: - Section 62(2) of the draft bill incorporates the definition of conciliation in the Model Law.¹⁸

Thus 62(2) of the draft bill defines conciliation “to include mediation, as well as other processes (by whatever named called) by which parties request a third person or persons to assist them in their attempt to reach an amicable settlement of their dispute arising out of or relating to a contractual or other relationship, such third person or persons not having the authority to impose a solution on the disputing parties”.

- ii. Impartiality of the conciliator

Clause 68 of the draft bill adopted Article 5(5) of the MLICC 2002 and makes specific provisions in relation to the duty of impartiality of the conciliator. An obligation is imposed on the conciliator to withdraw from the conciliation where his / her impartiality and neutrality is in doubt.

- iii. Disclosure of information

Clause 69 of the bill adopted Article 8 of the MLICC and provides that a conciliator may disclose the substance of information received from a party during the proceedings to any other party to the proceedings unless the information was provided subject to a specific condition of confidentiality.

- iv. Enforcement of Settlement Agreements

Clause 74 of the draft bill provides that if the parties conclude an agreement settling a dispute that settlement is binding and enforceable on the parties as if same were an arbitral award. Thus a settlement agreement was elevated to the status of an arbitration award. This is in line with MLICC Article 14 which left it the enacting states to insert a description of the method of enforcing settlement agreements or refer to provisions governing such enforcement.

¹⁸ Section 3 Model Law

v Confidentiality of Information and Proceedings

Clause 70 of the draft bill adopted Arbitral 9 of the MLICC and provides that unless otherwise agreed by the parties all information relating to conciliation proceedings shall be kept confidential except where disclosure is required under the law or for the purposes of implementation or enforcement of a settlement agreement.

vi Conciliator Acting as Arbitrator

Clause 73 of the draft bill adopted Article 12 of MLICC and provides that a conciliator shall not act as arbitrator in respect of a dispute that was or is the subject of conciliation proceedings or in respect of another dispute that has arisen from the same contract or legal relationship, or any related contract or legal relationship. The parties may by agreement exclude the operation of this provision.¹⁹

vii Admissibility of Evidence in Other proceedings

Clause 71 of the draft bill adopted Article 10 of the MLICC. The Article prevents the use in other arbitral, judicial or other proceedings of certain types of information relating to the conciliation process. The Article prohibits introducing as evidence, or giving testimony or evidence regarding the following: -

- (i) An invitation by a party to engage in conciliation proceedings or the fact that a party was willing to participate in conciliation proceedings;
- (ii) Views expressed or suggestions made by a party in the conciliation in respect of a possible settlement of the dispute;
- (iii) Proposals made by the conciliator,
- (iv) The fact that a party had indicated its willingness to accept a proposal for settlement made by the conciliator
- (v) A document prepared solely for purposes of the conciliation proceedings

Arbitral tribunals, courts and other competent governmental authorities are precluded from ordering disclosure of such information, except to the extent required by law or for the purposes of implementing or enforcing a settlement agreement.

viii Application of Statute of Limitation to Conciliation

MLICC Article 4 footnote 3 has a suggested text for states that might wish to adopt a provision on the suspension of the limitation period in respect of the claim

¹⁹ There are various schools of thought as to whether or not a conciliator should act as arbitrator in subsequent proceedings in respect of the same dispute. I take the view that this should never happen. See also Pieter Sanders UNCITRAL MODEL LAW ON INTERNATIONAL COMMERCIAL ARBITRATION LCIA Vol. 23 Number 1 pg 134. The Model Law was silent on the possibility of a conciliator acting as representative or counsel of a party in subsequent proceedings regarding the dispute subject to the conciliation. Various countries have legislation to the effect that the conciliator should not so act. E.g. Croatia, Uganda. See Pieter Sanders UNCITRAL MODEL LAW ON INTERNATIONAL COMMERCIAL ARBITRATION LCIA *ibid*.

giving use to the proceedings during conciliation proceedings.²⁰ Article 72 of the draft bill contains provisions suspending time from running between the commencement of the conciliation and the date of the conciliation agreement. This is a welcome development as the effect of limitation laws may discourage parties from considering conciliation. Assurance that the limitation period is suspended may therefore encourage conciliation.

2. Civil Immunity

The MLICC does not contain provisions conferring immunity on conciliators. Clause 76 of the concerns bill provides that conciliators and conciliation institutions shall be immune from civil liability for or resulting from, any act or omission done or made while engaged in efforts to conduct, assist or facilitate a conciliation, unless the act or omission was done in bad faith, with malicious intent or in a manner exhibiting a willful, wanton disregard of the rights, safety or property of another.

Conclusion

Mediation as a tool for resolving disputes peacefully has been used in Nigeria from time immemorial. In ancient times it was often an alternative to wars and battles. The mechanism provided an opportunity for face saving even among the egocentric and prevented wars. In modern times mediation remains a useful mechanism in dispute resolution. It is expeditious, cost effective, face saving, maintains relationships often destroyed in adversarial proceedings and focuses the parties on their real interests. The introduction of the court system commenced a trend for litigation. Urbanization fueled the trend.

Nigerian courts have come to a realization of the role of ADR quite aside from imposed decisions in an effective justice delivery system. The Nigerian government has tried to promote mediation. The lawyers have contributed to the promotion of ADR and the multi-tiered dispute resolution clause with mediation as a prior step to arbitration or litigation is becoming increasingly popular in contracts. The Nigerian legislative framework is being revamped to ensure that the system adequately responds to modern challenges in the field of mediation. There has also been an appreciation of the need for training in mediation to meet modern challenges. High priority is being accorded to attaining the highest standard of practical training in mediation and developing the requisite skills. Indeed there is an appreciable number of CEDR UK accredited mediators in Nigeria. The quest to keep with up modern training needs and skills acquisition is being driven by lawyers.

The users however are yet to fully embrace mediation as an alternative to litigation. There is scope for further enlightenment to ensure that a greater percentage of disputants are exposed to the benefits of mediation and the goal of reducing the burden on the litigation system is achieved.

²⁰ Various state laws prescribe limitation periods for different classes of action. Negotiations / discussions for settlement do not stop time from running for purposes of the statute of limitation. See *Nigeria Customs Service and Nigeria Customs Service Board vs. Sunday Osaro Bazuaye* (2001) 7 NWLR 357