MODERNISING JUDICIAL PRACTISES AND PROCEDURES: AN OVERVIEW OF THE ALTERNATIVE DISPUTE RESOLUTION SYSTEMS.

A Paper Presentation at The Refresher Course for Magistrates

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DATE:
APRIL 24 – 28TH, 2017

CONTENT

1.0 INTRODUCTION

1.1 Magistrate Courts generally were created under the Magistrate Court Laws of the various states with clear mandates and jurisdiction. This covers both Civil and Criminal matters. In the FCT District Courts double as Magistrate Courts and were created under the Civil Procedure Code. The challenge of congested dockets and slow speed of dispensation of justice, which has become symptomatic of Nigeria's legal system are also acute at Magistrate Courts level.

1.2 Therefore the case for introduction of **Modern Judicial Practice and Procedure** to enhance the efficiency of justice administration cannot be over-emphasized. Consistent with the modernisation of judicial practice worldwide is the deployment of Alternative Dispute Resolution (ADR) Systems. In some specific circumstances, these ADR systems are court annexed or court-connected.

1.3 Within the penumbra of this discourse on Modernisation of Judicial Practice and Procedure, we now situate the bold and unprecedented step taken by the former Chief Justice of Nigeria and Chairman, National Judicial Council, **Hon. Justice Mahmud Mohammed GCON**. At the swearing-in ceremony of the five recently appointed Judges of High Court of Justice of the Federal Capital Territory Abuja on Thursday, 18th December 2014, the Honourable Chief Justice of Nigeria had declared:

> "…… **it is a cardinal objective of my tenure as the Chief Justice of Nigeria and Chairman of the National Judicial Council (NJC) to pursue actively the full adoption and utilization of Alternative Dispute Resolution (ADR) processes in the various jurisdictions of our courts……I have decided that matters disposed of utilizing ADR processes will now be counted as part of a Judicial Officer's performance in the Performance Evaluation Quarterly Returns to the NJC. It is my earnest desire and hope that this incentive will galvanise our judges to employ legitimate non-adjudicatory measures and ultimately increase our case disposal rate."**

The import of this decision trickles down to Magistrate and District Court levels. The clear intention of the former Chief Justice of Nigeria was that ADR processes shall be applicable in "the various jurisdictions of our courts…" This arguably includes both Magistrate Courts (as existing in Southern States) and District Courts (as existing in some Northern States and the FCT).

2.0 MAGISTRATE COURT LAWS

As stated earlier, Magistrate courts were created under the various Magistrate Court Laws of the various States. In the Southern States, Magistrate courts have jurisdiction in both civil and criminal matters. Typical of the Magistrate Courts Law in Southern Nigeria is the Lagos State Magistrates Court Law, 2009 which in respect of Alternative Dispute Resolution mechanism (ADR) provided as follows:

Section 25: **Reconciliation on Civil cases**

> "In civil cases, a magistrate shall, as far as there is proper opportunity, promote reconciliation among persons over whom the magistrate has jurisdiction and encourage and **facilitate** (emphasis added) the settlement in an amicable way, of matters in difference between them"

Section 26: **Reconciliation in Criminal cases**

> "In criminal cases, a magistrate may encourage and **facilitate** (emphasis added) the settlement in an amicable way of proceedings for common assault or any other offence not amounting to felony or not aggravated in degree on terms of payment of compensation or other terms approved by him"

Doubling as magistrate courts in the Northern States, with few exceptions (e.g. Kano State), are District Courts which have jurisdictions purely in civil matters. Consequently, District Courts Law Cap 33, Laws of Northern Nigeria, applicable in Abuja provides as follows:

Reconciliation

Section 26: "A District Court shall, so far as there is proper opportunity, promote reconciliation among persons over whom the court has jurisdiction, and encourage and facilitate the settlement in an amicable way and without recourse to litigation of matters in difference between them"

Section 27: "Where a civil suit or proceeding is pending, the District Judge may promote reconciliation among the parties thereto and encourage and facilitate the amicable settlement thereof."

The use of the word "facilitate" in the foregoing sections suggests a more direct and active participation of the Judge in the amicable settlement of the matter in contention.

In addition, **Section 50** of the District Courts Law provides for Arbitration as follows:

Section 50(1): "The District Judge may with the consent of the parties to any civil proceedings, order such proceedings to be referred to arbitration, whether with or without other matters within the jurisdiction of the court in dispute between the parties, to such person or persons and in such manner and on such terms as he thinks just and reasonable"

(2) No such reference shall be revocable by any party except with the consent of the District Judge.

(3) On any such reference, the award of the arbitrator or umpires shall be entered as the Judgement in the proceedings and shall be as binding and effectual as if given by the District Judge.

(4) Notwithstanding the provisions in subsection (3), the District Judge may, if he thinks fit, on application made to him at the first convenient court held at the expiration of one week after the entry of the award, set aside the award or may, with the consent of the parties, revoke the reference or direct another reference to be made in the manner aforesaid.

Finally per Section 51(1), the District Judge may in appropriate circumstances, refer a matter to a referee.

The implication of the foregoing therefore is that Magistrate and District Court Laws of Nigeria amply provide for alternative and amicable ways of resolving disputes, other than resort to litigation, which constitute what is referred to as ADR systems.

3.0 HIGH COURT LAWS

The Nigerian Legal System had always recognized the compatibility of ADR systems with the Court Infrastructure. Therefore the High Court Law of the various states of the Federation has always anticipated and provided for an alternative to strict legal constructs in the administration of Justice. Below are sample states.

OGUN STATE

The High Court law of Ogun State provides as follows:

3.1 Section 27: Reconciliation in civil cases.

"**Where an action is pending the Court, may promote reconciliation among the parties thereto and encourage and facilitate the amicable settlement thereof**"

3.1.1 High Court of Ogun State (Civil Procedure) Rules 2014

Pursuant to the provision of S27 of the High Court Law of Ogun State and section 274 of the constitution of the Federal Republic of Nigeria as amended (10th January, 2011) which provides as follows:

"Subject to the provisions of any law made by the House of Assembly of a State, the Chief Judge of a State may make rules for regulating the practice and procedure of the High Court of the State", the High Court of Ogun State (Civil Procedure) Rules were issued. ORDER 25 of the said Rules provided for **"Pre-trial Conferences and Scheduling"** and stipulated as follows:

1) "Within 14 days after the close of pleadings, the claimant shall apply for the Issuance of a pre-trial conference Notice, Form 17.

2) "Upon application by a claimant under sub-rule 1 above, the Judge shall cause to be issued to the parties and their Legal Practitioners (if any) a pre-trial conference Notice as in Form 17 accompanied by a pre-trial information sheet as in Form 18 for the purposes set out hereunder:
    a) disposal of matters which must or can be dealt with on interlocutory application;
    b) giving such directions as to future course of the action as appear best adapted to secure its just, expeditious and economic disposal;
    c) **promoting amicable settlement of the case or adoption of alternative dispute resolution (emphasis added).**

ORDER 25(3) provides the Agenda outline at a pre-trial conference to include the following:

a) formulation and settlement of issues;
b) amendments and further and better particulars;
c) the admissions of facts, and other evidence by consent of the parties;
d) control and scheduling of discovery, inspection and production of documents;
e) narrowing the field of dispute between expert witnesses, by their participation at Pre-trial conference or in any other manner;
f) hearing and determination of objections on point of law;
g) giving orders or directions for separate trial of a claim, counterclaim, set-off, cross-claim or third party claim or any particular issue in the case.
h) settlement of issues, inquires and accounts under Order 27;
i) securing statement of special case law or facts under Order 28;
j) determining the form and substance of the pre-trial order;
k) **such other matters as may facilitate the just and speedy disposal of the action (emphasis added).**

Within the empowering and elastic provision of Order 25(3)(K) supra, the Judge can direct that the matter be referred to appropriate ADR Institutions or Practitioners in accordance with the Practice Directions that shall from time to time be issued by the Chief Judge of Ogun State.

3.1.2 ORDER 25(5) provides that;

"After a pre-trial conference or series of pre-trial conferences, the Judge shall issue a Report. This Report shall guide the subsequent course of the proceedings unless modified at the trial".

It is quite instructive that Order 25 sub-rule 5(2) specifically provides that;

"The Pre-trial conference Judge shall also be the trial Judge unless either of the parties apply, with good cause that he case be transferred to another Judge for trial. Thus a pre-trial Judge who had participated in an amicable settlement/ADR Programme is still empowered except for just cause, to preside over the trial of the matter.

3.2 **Section 28: Reconciliation in Criminal cases**

"In criminal cases the Court may promote reconciliation and encourage and facilitate the Settlement in an amicable way, of proceedings of common assault or any other offence not amounting to felony and not aggravated in degree, on terms of payment of compensation or other terms approved by the Court and may thereupon order proceedings to be stayed."

Section 274 of the constitution of the Federal Republic of Nigeria as amended (10th January, 2011) supra, empowers the Chief Judge of a State, subject to the provisions of any law made by the House of Assembly of the State, to make rules for regulating the **practice** and **procedure** of the High Court of the State. The clear intendment of this constitutional provision is that relevant Procedure and Practice Directions for the administration of Justice fall squarely within the ambit of the Powers of the Chief Judge of a State, subject however to any Law made by the House of Assembly of the State. This implies that until a contrary and limiting law is enacted by the State House of Assembly, the Chief Judge can by Practice Directions provide for effectuating the provisions of section 28 of the High Court Law of Ogun State.

It appears therefore that save for offences amounting to felony or aggravated in degree, the Chief Judge can by Practice Directions, given any lacuna in the Ogun State Criminal Procedure Law, provide for the payment of compensation or other terms approved by the court in amicable resolution of a criminal matter. Ogun State Criminal Procedure Law, mutatis mutandi, stands on all fours with the Criminal

Procedure Act, CAP C41 Laws of Federation of Nigeria 2004 which had been applicable to the entire Southern Nigeria.

Therein, are no express provisions for a compensatory mechanism in satisfaction of any offence except as provided by Section 255(1) and (2) of CAP 41 as against the accused and a private prosecutor respectively, and section 256 in case of a false and vexatious charge.

ABUJA

3.3 Section 274 of the constitution of the Federal Republic of Nigeria as amended (10th January, 2011) provides:

> **"Subject to the provisions of any law made by the House of Assembly of a State, the Chief Judge of a State may make rules for regulating the practice and procedure of the High Court of the State"**

This provision mutatis mutandis, covers the Federal Capital Territory and consequently informed the enactment of the High Court of the Federal Capital Territory (Civil Procedure) Rules 2004 and subsequently, High Court of Lagos State (Civil Procedure) Rules 2012. Coincidentally, both jurisdictions constitute the most advanced in the administration of justice utilizing ADR processes/systems.

3.4 **ORDER 17 Rule 1** of the High Court of the Federal Capital Territory (Civil Procedure) Rules, 2004 provides as follows:

> A Court or Judge, with the consent of the parties, may encourage settlement of any matter(s) before it, by either:
>
> a) Arbitration,
> b) Conciliation,
> c) Mediation, or
> d) Any other lawfully recognized method of dispute resolution.

The ADR systems outlined above are by no means exhaustive, as evidenced by Rule 1(d) supra which actually constitutes a pro-active extension mechanism covering new systems that shall subsequently become lawfully recognized.

LAGOS STATE

3.5 The combined effect of **ORDER 3 Rule 11** and **ORDER 25 Rules 1 and 6** of the Lagos State (Civil Procedure) Rules 2012, cover the application of ADR Systems in the administration of Justice within the jurisdiction of the High Court of Lagos State. **Order 3 Rule 11** provides as follows:

> "All originating processes **shall** upon acceptance for filing by the Registry be screened for suitability for ADR and referred to the Lagos Multi Door Court House or other appropriate ADR institutions or practitioners in accordance with the Practice Directions that shall from time to time be issued by the Chief Judge of Lagos State" (emphasis added).

3.5.1 **Order 25 Rule 1** provides inter alia:

> (1) Within fourteen (14) days after the close of pleadings, the Claimant shall apply for the issuance of a case management Conference Notice as in Form 17.
>
> (2) Upon the application by the Claimant under sub-rule 1 above, the judge shall cause to be issued to the parties and their Legal Practitioners(if any) a Case Management Conference Notice as in Form 17 accompanied by a Case Management Information Sheet as in Form 18 for the purposes set out here under:
>
> (a) disposal of matters which must or can be dealt with on interlocutory application;
>
> (b) giving such directions as to the future course of the action as appear best adapted to secure its just, expeditious and economical disposal;
>
> (c) **promoting amicable settlement of the case or adoption of ADR** (emphasis added).

3.5.2 **Order 25 Rule 6 (1)** also provides inter alia:

> "Where a case is deemed suitable for ADR under **Order 3 Rule 11** or has by directives been referred to ADR under order 25 Rule (2)(1) above, the ADR Judge shall in case for recalcitrant parties consider and give appropriate

directives to parties on the filing of statement of case and other necessary issues".

Therefore it is clear that the Lagos State (Civil Procedure) Rules 2012, is a lodestar of sort, given its very comprehensive ADR provisions. States that do not have ADR provisions, rules or guidelines in their High Court Civil procedure Rules should, given the expressed policy objective of the Honourable Chief Justice of Nigeria, enact such Rules for efficient administration of Justice in their jurisdictions.

4.0 ADMINISTRATION OF CRIMINAL JUSTICE ACT 2015

4.1 Administration of Criminal Justice Act (ACJA) 2015 came into effect in May 2015, with the stated purpose as "to ensure that the system of administration of justice in Nigeria promotes efficient management of Criminal Justice Institutions, speedy dispensation of justice, protection of the rights and interests of the suspect, the defendant, and the victim" (Part 1 Section 1(1) ACJA 2015).

The ACJA proposals merged the provisions of the Criminal Procedure Act (applicable to the Southern State of Nigeria), and the Criminal Procedure Code (applicable to the Northern States of Nigeria), into one seamless enactment, made applicable to the Federal Capital Territory and other Federal Courts. The implication is that save for subsequent adoption by the various State Governments the default law applicable in the various states would remain the Criminal Procedure Act as "domesticated" by the various Southern States and the Criminal Procedure Code as "domesticated" by the various Northern States.

4.2 The ACJA which covers Magistrate Courts (Part 12 Section 109) fills the gap noticed in the CPA and CPC and introduces innovative provisions for the enhancement of the efficiency of Criminal Justice Administration in Nigeria. Such innovative provisions within the contemplation of ADR mechanisms inter alia include:

a) Payment of costs, compensation, damages and Restitution (Part 32 sections 319 – 328)
b) Plea bargain – Part 28 (Section 270)
c) Suspended Sentence – Part 44 (Section 460(1)

d) Community – Part 44 (Section 460(2))

e) Parole – Part 45 (Section 468)

It is suggested that save for Ekiti, Lagos and Anambra states that had amended their criminal procedure laws before the coming into force of ACJA 2015, the other States of the Federation should adopt the provisions of ACJA 2015 so as to provide uniformity in the Criminal Justice System in Nigeria.

5.0 ALTERNATIVE DISPUTE RESOLUTION (ADR) SYSTEMS

ADR mechanisms are dispute resolution processes developed as alternatives to litigation and germane to commercial and social relationships. They largely avoid the adversarial posturing of litigation and are more party-friendly, protective of business relationships, effective, cost-efficient, and generally emphasize interests rather than rights and obligations. Because they are collaborative and participatory, ensuing results are consensual and party-compliance profile high.

They include but are not limited to the following:

Negotiation

This is a bargaining process involving incremental adjustment of positions by the parties until agreement is reached. It provides an opportunity for the parties to exchange promises and commitments to aid resolution of differences (1). Creation of trust and sustaining a healthy relationship with the other party is crucial to a positive outcome.

However, the art of negotiation in the corporate world has become increasingly sophisticated, involving such strategies as doubt creation, expectations management, and assessment of positions, perceptions, assumptions, and values. These key ingredients, when properly articulated, often yield acceptable results.

Mediation

This is basically facilitated negotiation involving a neutral third party whose basic function is to engineer civility, facilitate candid discussions, and help the parties to

reach consensual solutions. Its popularity is hinged on its promotion of the win-win scenario where successful settlement leaves each party feeling a winner. According to Justice Adams:

"Mediation, of all ADR techniques, has the greatest impact on communication between the parties. Mediators can manage the flow of information. They can reduce the risk in communicating. The parties can explore proposals without identifying authorship. The achievement of cooperative dialogue may be accelerated by a mediator's presence and his or her interest in facilitating a principled discussion between parties. . . Mediators are on the look-out for common ground in ways that parties too close to their cases may find invaluable.(2)"

Recently, some jurisdictions have initiated court based pilot schemes to explore the beneficial effect of mediation in enhancing dispute resolution. Prominent among these are the Ontario (Toronto) experiment of March 1994 and small claims courts experiments in Washington, DC,

Portland, OR, and Des Moines, IA (3). These programs confirm reduction of case load, general party satisfaction, and cost-effectiveness. A settlement once signed by the parties becomes binding in contract.

Conciliation

Like mediation, conciliation involves third party intervention but requires a more active participation of the conciliator in generating solutions. In Nigeria, it comes under the statutory purview of the Arbitration and Conciliation Act cap A18 Vol. 1 laws of the Federation 2004, and is relevant to both domestic and international commercial contracts. Domestic conciliation is covered by sections 37- 42, while section 55 and the rules set out in the Third schedule to the Act cover international commercial conciliation. Successful conciliation is evidenced by a record of settlement, which when signed by the parties becomes binding (4).

Mini-Trial

This describes the adjudicative/mediative process involving the presentation of the disputed issues by party legal counsels, before a panel of a neutral adviser and

suitably empowered top executives (preferably CEOs) of the disputant companies. After the presentation of relevant facts by the respective counsels, the top executives are encouraged to generate an acceptable solution. If this fails, the neutral adviser, usually a lawyer, would volunteer the likely legal outcome in default of settlement. Thereafter, the parties would attempt further settlement or call off the process. A variant of the mini-trial involves the judge or neutral adviser as the only decider with settlement empowered executives of both parties in attendance, to hear the evidence and the decision. This variant is also known as summary jury trial without a jury (5).

Early Neutral Evaluation

This describes the process where a lawyer or judge with specialist knowledge of the issues in dispute attempts a settlement, and in the process proffers a legal opinion on the matters incidental thereto (6). This alternative is predicted on the belief that the parties and their lawyers need the reality check of a third party to more objectively evaluate the strengths and weaknesses of their case and to spur settlement discussions (7).

Judicial Mediation

In some cases, Judges take on the role of mediators in an effort to reach a settlement. Judges would usually mediate on cases to which they are assigned. It is however not uncommon to find a Judge assigning the task of mediation to a different Judge.

Mediation/Arbitration (Medarb)

As the name suggests, this is a hybrid of mediation and arbitration where the arbitrator first attempts a mediation. If this fails, he/she dons the cap of an arbitrator and continues with the reference. The same person may continue with the arbitral reference or for confidentiality reasons, as in some jurisdictions, another person may be appointed to conduct the arbitral reference and give an award.

Arbitration/Mediation

This mechanism starts with arbitration proceedings upto the writing of the award yet unpublished, the Arbitrator thereafter encourages the parties to engage in

mediation which if successful, a settlement agreement is drafted and signed by the parties whilst the award becomes redundant. Failure of mediation activates the publication of the award which is binding.

Arbitration

Arbitration in the Nigerian case of **Misr (Nig) Ltd v Oyedele (1966)2 ALR Comm. P157** was defined as the reference of a dispute or difference between not less than two parties for determination after hearing both sides in a judicial manner by a person other than a court of competent jurisdiction. Arbitration in Nigeria is governed by the provisions of the Arbitration and Conciliation Act cap A18 Vol. 1, laws of the Federation, 2004. This act is a compendium of UNCITRAL model law of 1985, the model rules of 1976, and the Convention on recognition and enforcement of foreign arbitral awards of 1958 (New York Convention). The UNCITRAL Model Rules, the New York Convention and the UNCITRAL Conciliation Rules constitute the first, second, and third schedules to the Act, while the model law slightly modified constitutes the substantive enactment (8). The award of the Arbitrator is usually expressed as final and binding.

Rent-a-Judge

Also known as Private Judging, this ADR mechanism permits parties in dispute to hire their own judge. The hired adjudicator, usually a retired judge, renders a decision on the issues in dispute. The process enables parties to jump long queue of cases awaiting trial and receive a binding decision from a figure clothed in legitimacy and expertise. (9)

Others

Other options include non-binding arbitration, binding arbitration, and multi-door courthouse, cited by the Honorable Justice James M. Farley:

"One interesting concept is the multi-door courthouse approach conceived by Professor Frank E.A. Sander, one of the founders of the ADR movement and the associate dean at the Harvard Law School.

Instead of just one door leading to a courtroom, this comprehensive justice center has many doors through which individuals might pass to obtain the most appropriate process" (10).

6.0 MEDIATIVE-CONCILIATION

Mediative-Conciliation is a knowledge-based Alternative Dispute Resolution (ADR) mechanism that combines the facilitative skills of mediation with the evaluative techniques of conciliation to offer a unique dispute resolution model with an assured outcome. The parties in dispute will agree at the outset that they will first attempt the resolution of their dispute through mediation; failing which the neutral will conciliate by making an imposed decision.

The mechanism works if and only if the following conditions are met:

i) Mediator/Conciliator is knowledgeable in the field of dispute

ii) The parties have confidence in his/her ability to be just and unbiased.

iii) Parties agree and consent to being bound by the decision of the neutral if they fail to resolve through mediation

iv) A party's refusal to attend an adjourned session is deemed to have 'failed to resolve through ***mediation*** and will consequently await, receive and be bound by the decision of the neutral

v) Having agreed to be bound by the decision of the neutral, the 'decision' is final and binding on the parties and will be treated as an 'Award'.

Mediative – Conciliation is uniquely suitable to the new ADR-compliant regime and focus of the Honourable Chief Justice of Nigeria and Chairman, National Judicial Council, Hon. Justice Mahmud Mohammed GCON. It has been generally suggested, that mere return of a plethora of consent Judgments by a Judge, may not meet the intendment of the stated

policy of encouraging ADR processes, without a clear indication of what active role the Judge played in arriving at the Settlement. Given this understanding, a Judge who adopts this mechanism, after the formulation and settlement of issues per Order 25(1)(c): 25(3)(a)(k) necessarily must play a very active role in ensuring an outcome. He is obliged to mediate between the parties with the default expectation of giving his decision upon failure of the mediation exercise, which functions as a Consent Judgment, **provided** that the Parties opted for Med-Con after they had been seized of the applicable rules. The distinctive Feature of Med-Con among the family of soft ADR Processes, is that once the process is adopted and initiated, an outcome is assured whether vide Settlement by the parties or default decision by the Judge;

CORE COMPETENCIES

Mediative Expertise

A triad of skills is necessary in every effective meditative conciliation process. The key skills necessary to function proficiently are mediatory. A mediator by definition is a third party neutral whose main role is to assist the parties to communicate effectively, discover mutual interest (as against positions) and strive to meet mutual needs. He/she must therefore possess human angle and empathetic skills necessary to generate trust, confidence, and attitudinal disposition by the parties, to collaborate in amicable resolution of the dispute. He must create the psychological environment that would inspire the parties to open up, come clean, and patiently endeavor to hear out the other party, knowing full well that every disclosure during this process is strictly confidential. This expertise would generally include: active listening techniques such as the following.

a. Encouraging: to convey interest and encourage the other person to keep talking.
b. Clarifying: to help clarify what is said, get more information and help the speaker see the other points of view.
c. Re-stating: to show you are listening, understand what is being said and to check your meaning and interpretation.
d. Reflecting: to show that you understand how the person feels and help the person evaluate his or her own feelings after hearing them expressed by someone else.

e. Summarizing: to review progress, pull together important ideas and facts, and establish a basis for further discussion.
f. Validating: to acknowledge the worthiness of the other person, acknowledge the value of their issues and feelings, and show appreciation for their efforts and actions.

These techniques are fluid and must be internalized by the mediator through training and practice. Mediative expertise therefore anchors the potency of the entire process.

Technical Expertise

Technical expertise constitutes the second component of the triad. The process is described as knowledge-based because the mediative conciliator, like an arbitrator, must possess core knowledge and qualification in the area of dispute.

Section 7 of the Act generally provides for the arbitrators appointment by the parties, a designated institution, and the court. Section 7 specifically provides that, "the court in exercising its power of appointment under subsections and of this section shall have due regard to any qualifications required of the arbitrator by the arbitration agreement."

The dominant building and engineering contract forms provide for the appointment of a suitably qualified professional in the construction industry. A sample is clause 35.1 of both the Standard Form of Building Contract in Nigeria (May 1990 edition) and the Federal Ministry of Works lump sum contract which specify interalia ". . . such a person shall be an experienced professional in the building industry."

Possession of relevant knowledge inspires confidence that the mediative conciliator is abreast of industry usages and trade customs and therefore generally acquainted with what ought to be. This knowledge becomes particularly handy when mediation fails, and the meditative conciliator makes a formal conciliation award.

Legal Exposure

Legal exposure completes the triad. While the meditative conciliator need not be a lawyer, he is required to have a legal appreciation of the matters in issue. This exposure is relevant in assessing the likely outcome of the dispute should matters proceed to arbitration and/or litigation. We have found this particularly useful in caucusing when

we need to address the parties independently. Usually, mastery of the law of contract, a typical offering in the training program of most regulated professionals, reinforced by continuous professional development regime, is adequate to service this requirement.

PROCEDURE/CONDUCT

The procedure commences either when the parties choose the process or when they adopt the arbitration rules of the institute as the appropriate procedural framework for the conduct of the arbitration (11). This could either happen after the dispute has arisen or be enshrined in the reference agreement (arbitration clause) prior to the dispute. The important point is the willingness to adopt the process. This pre-supposes that the parties are willing to resolve the dispute amicably. Once there is a consensus and a mediative conciliator is appointed, the procedure is activated.

His first action is to request each party to forward a brief description of the dispute, highlighting the issues in contention along with any relevant document in support of its position. Since the mediative conciliator has a period of 28- days within which to attempt a mediation, the time limit for submitting the requisite document/information is flexible and totally at his discretion.

Thereafter he convenes the first meeting of the parties (along with their advisers if need be). It is expected that prior to this meeting, and after procuring the necessary information, he should review the various submissions and note areas of agreement and isolate issues on which the parties disagree (the core issues for mediation). At this meeting, after the introductory remarks involving self-introduction, explanation of the mediative conciliator's role, and the process and ground rules and validation of the parties for agreeing to use the process, he proceeds to agree a shortlist of disputable issues with the parties.

The second stage is to collect the stories or hear each party alternately tell its story. This stage requires the full deployment of mediative skills by asking probing questions, empathizing with the feelings of each party, acknowledging and validizing of important

issues and feelings, and identifying similarities and summarizing issues for each party. During this process, the mediative conciliator must take relevant notes.

The third stage involves the generation of solution. The purpose of this stage is to allow for venting frustration as the parties are allowed to talk to each other within the ambit of the ground rules on civility. Parties in the process are requested to generate solutions for mutual consideration. Meanwhile, the mediative conciliator must maintain an environment that allows the parties to work together and communicate, while ensuring that the discussion is focused.

In generating solutions to specific issues, it is expected that any of the parties may hold firm positions that are prejudicial to consensual solution. This may heat up emotion and generate hostility. The mediative conciliator may suspend the discussion and caucus with the parties alternately. During the caucusing, he is expected to bring technical expertise and legal exposure to bear in persuading the parties to scale down expectations and reach a consensus.

The fourth stage involves articulation of solutions and reaching agreement. The parties are expected to proffer solutions that are mutually acceptable. If they mutually reach agreement, the mediative conciliator's immediate role is to reduce the agreement in writing for signing and congratulate the parties for reaching a solution. The agreement once signed becomes binding and enforceable as an award.

This mediative process must be concluded within 28 days of the conciliator's appointment.

However, crucial to the entire process is the mediative conciliator's evaluative role throughout the proceeding.

His/her notetaking assists in assessing the relative merits and strength/weakness of each party's position. Cognate to this evaluation is his/her legal assessment of each party's rights and obligations, although he/she would decide based on principles of objectivity, fairness, and justice. Failure to agree on any outstanding issues compels his/her making a

formal conciliation award on those issues within 14 days, which if unrenounced within the stipulated period, becomes as enforceable as if it were an arbitral award (12).

Our experience is that proficient handling of the meditative stage, creates the trust and confidence necessary for the parties to generally accept the mediative conciliator's decision on any outstanding issues.

SETTLEMENT/AWARD

The rules allow a maximum of 56 days from inception of the process to enforcement of the award. However, in our recent experience (involving a multi-million Naira hotel project) the entire process lasted about 7 days, involving about 5 hours of actual sitting. In fact, the proceeding terminated with a record of settlement. Other projects (a broadcasting facility and hospital complex) witnessed immediate acceptance of the mediative conciliator's award, and voluntary compliance by the parties.

The cost implication of the process (fees and administrative charges) are comparatively minimal, being subject to the compensatory mechanism agreed by the parties and comprised in the Mediative Conciliation Agreement.

ENFORCEMENT

Failure to comply voluntarily with an unrenounced award may compel enforcement as an arbitral award. This involves application to a court of law (usually by way of originating summons) seeking the leave of the court to enforce the award (13). In respect of international commercial arbitrations, enforcement is in accordance with the convention on the recognition and enforcement of foreign arbitral awards, 1958. Therefore, mediative conciliation awards, in respect of international commercial disputes, falls within this ambit and subject to the convention, "as if it were an arbitral award." (14)

The distinctive feature of mediative conciliation is that the process terminates either in a settlement or a binding award enforceable as an arbitral award. As indicated earlier, skillful handling of the mediative stage largely ensures voluntary compliance with any contingent award. The process therefore greatly dilutes the likelihood of double jeopardy typical of most failed mediation and conciliation processes. Furthermore, the twin issues of cost and time-efficient dispute resolution generated by the process was highlighted.

7.0 CONCLUSION

For ADR systems to achieve the expected objectives, all the critical stakeholders such as Judges, Magistrates and Lawyers must key into the programme and support its application. To achieve this, **firstly** the Chief Judge of the State may have to issue a Practice Direction empowering Judges to impose financial sanctions on lawyers who "forum shop", in order to truncate ADR provisions in a contract especially, where the presiding Judge rules that the matter ought to have been referred to ADR. The Rules of Professional Conduct for Legal Practitioners, 2007 clearly provides inter alia, *"In his representation of his client, a Lawyer **shall** not – fail or neglect to inform his client of the option of Alternative Dispute Resolution mechanisms before resorting to or continuing litigation on behalf of his client" R15(3)(d)*. The Supreme Court in a very proactive fashion, in **Ogboru v Uduaghan (unreported) in S.C. 18a/2012**, to deter such frivolous and vexatious application awarded a punitive cost of ₦8, 000,000.00(Eight Million Naira) only personally against the Counsel.

Secondly, the Nigeria Bar Association, in line with international best practices should issue a standardized template for pricing and invoicing of services, where every aspect of a lawyer's services, from briefing to conclusion of a matter, is segmented and priced appropriately so a counsel does not suffer financial harm, for as the Holy writ says, **"a Labourer is worthy of his wages"** (1 Tim 5:18).

Thirdly, Lawyers should key into the current international strategic ethos in dispute management. The philosophical underpinning for legal services in most developed countries is that;

(a) pre-dispute; your client pays/retains you to keep him out of Court.

(b) Post-dispute; your client pays/retains you to assist in resolving the matter and not necessarily to litigate it. Therefore a constructive and pro-active counsel should offer a fee quote sufficient to navigate the process to an **outcome.** Whether that outcome is via ADR intervention or Litigation is immaterial.

Australia, some years ago, introduced ADR into its justice administration system and caseload reduced by 83%. Only 17% of the matters went to full trial. It can happen here

too. And your Lordships and Worships can make it happen. Today we are here dealing with the issue of performance enhancement in the context of justice administration. A certain preacher who was king in Jerusalem summarized the whole matter thus:

> "Let us hear the conclusion of the whole matter; Fear God and keep His commandments; for this is the whole duty of man. **For God shall bring every work into judgement, with every secret thing**, whether it be good, or whether it be evil" – Ecclesiastes 12: 13 – 14 (KJV).

Are we listening? God bless.

Ifeanyi Tim. Anago

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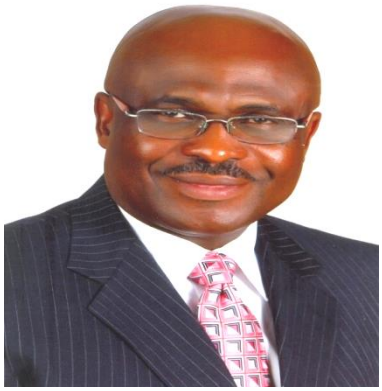

Mr. Ifeanyi Tim. Anago is a Fellow of the Nigerian Institute of Quantity Surveyors, and the Chairman of its Fellows Forum, a Fellow of the Institute of Construction Industry Arbitrators, a Registered Quantity Surveyor with the Quantity Surveyors Registration Board of Nigeria (QSRBN) and a Solicitor and Advocate of the Supreme Court of Nigeria.

He was a Federal Government nominee to the Quantity Surveyors Registration Board of Nigeria (QSRBN) and was the Chairman of its Accreditation Committee, responsible for certifying all Quantity Surveying educational programmes in Nigerian Universities and Polytechnics.

Mr. Ifeanyi Anago served as the Federal Government-appointed consultant to oversee the implementation of the MDGs 'Quickwins' project on Health, Education and Water sectors in Anambra and Abia States, and later appointed as the consultant to supervise Boreholes assessment program under 2008/2009 Quickwins projects in the South East zone of Nigeria.

Mr. Ifeanyi Tim Anago is a listed Neutral with the Abuja Multi-Door Court House of the Abuja High Court and is presently a sitting Arbitrator at the same court. He has served on several court-ordered Arbitral referrals and has also functioned as counsel in several Arbitrations.

Under Divine Inspiration, he propounded the concept of **Mediative-Conciliation** as a dispute resolution model in the Construction Industry, which model has been adjudged by the Community Relations Service (CRS) of the U.S. Department of Justice, as the best model for resolving school-based hate crimes in the United States of America. This novel concept has now been Trademark- Patented as **Anago Mediative-Conciliation** with certificate N0. 92036.

Mr. Anago has been a very active participant in Engineering and Construction practice spanning over 28years as a respected Quantity Surveying and Total Cost Management Consultant. Furthermore, He was The Executive Director-Contract/Vice-Chairman with Paul-B Nigeria Plc; a notable building and civil engineering construction company and disengaged from the company in 2007, after seven years of active construction practice. He is currently a member of the Infrastructure Policy Commission of the Nigerian Economic Summit Group (NESG) and serves on its Roads and Rails sectoral working groups.

Moreover, He functions as the Group Company Secretary and Legal Adviser of **CROWN AGRO-ALLIED INVESTMENTS LIMITED,** the sponsor of **CROWNEK GREEN ENERGY LIMITED,** a premier fuel-grade cassava-based ethanol prospecting company in Nigeria, and is also the Chief Training Consultant of SET-CTI, an ADR training and research firm based in Abuja, Nigeria. Above all, Mr. Anago is a preacher of the gospel of Jesus Christ.

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