ESSAYS IN HONOUR OF JUSTICE AKINSANYA, JUSTICE OF THE HIGH COURT OF LAGOS

MED-ARB: A VALUABLE SETTLEMENT STRATEGY

AINA, BLANKSON & CO.

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In my Travels I once saw a Sign call'd the Two Men at Law; One of them was Painted on one side, in a melancholy Posture, all in Rags with this Scroll, 'I have Lost my Cause'. The other was drawn capering for Joy, on the other Side, with these Words, 'I have gain'd my Suit'; But he was Stark Naked.

Benjamin Franklin

BACKGROUND

If there ever is one person to be described as the 'Mother of ADR' in Nigeria, it will be no other than the Hon. Justice Dolapo Akinsanya. A vanguard in the advocacy of the Multi-Door Courthouse concept in Nigeria, Hon. Justice Akinsanya was a member of the Steering Committee of The Lagos Multi-Door Courthouse, the first court connected ADR Centre in Africa. Standing by her firm belief that our court are in dire need of reforms – radical reforms that would give a human face to justice and ensure the needs of disputants are *relevantly* met, she has tirelessly stood on the forefront of the advocacy for ADR in Nigeria. Someday, when the history of The Lagos Multi-Door Courthouse is written, it will be incomplete without acknowledgement of the humility and doggedness of the Hon. Justice Dolapo Akinsanya which brought about The Lagos Multi-Door Courthouse. To write this essay in her honour is therefore for me a great honour - one which I do appreciate.

OVERVIEW

The wave of change experienced by justice systems world wide particularly in the past 30 years has indeed been fascinating. With the advent and formal acceptance of Alternative Dispute Resolution mechanisms as means of resolving disputes, legal practitioners and disputants who have caught on to the revolution have reason to cheer as they find they can get more disputes resolved efficiently, economically with less risk and better results. Interestingly however, Alternative Dispute Resolution processes are not without their own questions and challenges. Questions of ethics and standards often top the agenda in these debates.

This article will focus primarily on Arbitration and Mediation, the two principal, most prominent and widely used processes in the broad spectrum of means for resolving disputes. It will also give a careful analysis of their similarities, differences, strengths, weaknesses, and most especially the advantages and disadvantages of a synergy/hybrid of the two forms. It will then join the life-long debate on the promise and drawbacks to the commingling of the two processes. In conclusion I will as a tribute to the Hon. Justice D.F Akinsanya I will discuss the next phase of ADR development – Court-connected ADR.

Alternative Dispute Resolution

Alternative Dispute Resolution may be defined as a range of dispute resolution processes or mechanisms designed and available outside of, but supplementary to litigation. The ranges of these processes include Negotiation, Mediation, Arbitration, Neutral Evaluation, as well as various hybrids as Med-Arb and Lit-med. However, mediation is the most prominent of these mechanisms, while arbitration is the best known. I will briefly attempt to define two of these concepts which would form the crux of my essay and of which I am sure most of us are familiar with, both formally and informally.

Arbitration

Arbitration may be defined as a simplified version of a trial involving no discovery and simplified rules of evidence. The choice of neutral/arbitrator is that of the parties and the decision (award) of the neutral may be binding or non-binding depending on the prior election of the parties. In arbitration, the parties relinquish their decision-making right to the neutral who makes a decision for them. By pre-agreement, the neutral's decision is either binding or nonbinding. If binding, the neutral's decision is final and the winning party may enforce it against the losing party. If nonbinding, the neutral's decision is advisory in aid of settlement.

Prior to the creation of the Permanent Court of International Justice in The Hague, in the mid twentieth century and later the International Court of Justice, Arbitration (which today is debated whether or not to be an 'alternative' because of its similar nature to litigation in its approach) was already regarded as a positive means of settling disputes. Many countries acceded to or ratified the Geneva Protocol on the Execution of Arbitration Clauses of 1923 and the Geneva Convention on the Execution of Foreign Arbitral Awards of 1927. In 1958, the New York Convention (The Convention on the Recognition and Enforcement of Foreign Arbitral Awards) was universally accepted and governed international commercial arbitration involving global trade. Over the years many African countries would become contracting parties to the convention. A few decades later, the United Nation's Commission of International Trade Law (UNCITRAL) would become a model law on international commercial arbitration. In 1988, Nigerian laws on international commercial arbitration were updated by the adoption of the UNCITRAL Model Law and Rules.

Mediation

Mediation, the most commonly utilized of all ADR processes, may be defined as ***'a flexible process conducted confidentially in which a neutral person actively assists parties in working towards a negotiated agreement of a dispute or difference with the parties in ultimate control of the decision to settle and the terms of resolution'***

Simply put, mediation is negotiation assisted by a third party. If the disputants are unable to resolve their disputes by negotiation, a third party that is usually referred to as *Mediator, Conciliator* or *Facilitator*, may be called upon to help them. The mediator's sole function is not to decide the issues or determine right or wrong, but to help the disputants resolve their conflict consensually. This is why mediation is often called "turbocharged negotiation" as the primary function of the mediator is to help facilitate negotiations among the parties.

The aforementioned ADR processes may be viewed in the context of the Dispute Resolution Spectrum

THE DISPUTE RESOLUTION SPECTRUM

DISPUTE RESOLUTION SPECTRUM	
LEAST FORMAL	**Most Formal**
	Negotiation
	Conciliation
	Facilitation
	Mediation
	Arbitration
	Hybrids
MOST FORMAL	**Litigation**

The Dispute Resolution Spectrum can be viewed graphically as extending from the least formal process on the top of the chart, pure negotiation, to the most formal process on the bottom, litigation. Pure negotiation, a process that ought to be familiar to all advocates, is the only process in the spectrum in which the parties and counsel engage without the assistance of a neutral. Many times, however, it serves as an ancillary dispute resolution mechanism to other processes in the spectrum. In the next process, conciliation, the neutral's goal is to assist in reducing tensions, clarifying issues, and getting the parties to communicate. In essence, it is the process of "getting the parties to the table" and inducing their active involvement in solving their problem. Moving down the chart, facilitation is the process in which a neutral functions as a process expert to facilitate communication and to help design the process structure for resolving the dispute. Ordinarily, a facilitator deals only with procedures and does not become involved in the substance of the dispute.

The most formal and final of the dispute resolution processes is, of course, litigation. It is always a viable alternative to the other ADR processes, and in some instances it may be the most advantageous alternative to best protect and serve your client's interests, depending of course on what that interest is.

DIFFERENCES BETWEEN ARBITRATION AND MEDIATION

As previously noted, the most basic difference between arbitration and mediation is that arbitration involves a decision by the intervening third party (or neutral) after an evidentiary hearing, while mediation does not. Another way to distinguish arbitration and mediation is to compare the neutral's mental functions under each process. In arbitration the neutral uses primarily "left brain" or "rational" mental processes—analytical, mathematical, logical, technical,

and administrative. In mediation the neutral additionally employs "right brain" or "creative" mental processes—conceptual, intuitive, artistic, holistic, symbolic, and emotional. Furthermore, an arbitrator deals largely with the objective, whereas a mediator deals primarily with the subjective. The arbitrator is typically a passive participant whose role is to determine right or wrong. The mediator by contrast, is generally an active participant who attempts to move the parties to reconciliation and agreement, regardless of who or what is right or wrong.

Because the mediator's role involves instinctive reactions, intuition, keen interpersonal skills, and sensitivity to subtle psychological and behavioural indicators, in addition to the application of logic and rational thinking, some people find it much more difficult to perform effectively than the role of the arbitrator.

Besides the distinctions outlined above, the two processes also differ in that they are typically employed to resolve two different types of disputes. Parties generally use mediation where they reasonably believe they can reach an agreement with the assistance of a disinterested third party. Mediation is also used when parties will have an ongoing relationship after resolution of the conflict. On the other hand, parties generally use arbitration when no reasonable likelihood of a negotiated settlement exists. If the parties use the two processes in sequence, mediation normally occurs first, and if it is unsuccessful, the parties resort to arbitration. Viewed in terms of the judicial process, arbitration is comparable to a trial, and mediation is akin to a judicial settlement conference.

Although mediation and arbitration differ substantially, they both have the underlying structure of a decision-making process. The following chart depicts the interrelationship of their various stages.

STAGES OF MEDIATION AND ARBITRATION	
MEDIATION PROCESS	**ARBITRATION PROCESS**
Initiation	**Initiation**
Preparation	**Preparation**
Introduction	**Pre-hearing conference**
Problem Statement **Problem Clarification**	**Hearing**
Generation and evaluation of alternatives **Selection of alternatives**	**Decision-Making**
Agreement	**Award**

ADVANTAGES AND DISADVANTAGES OF THE PROCESSES

Both mediation and arbitration are non-public, a feature advantageous to the resolution of certain types of disputes where the parties desire privacy of both the proceedings and the outcome. Furthermore, in both mediation and arbitration, by mutual agreement the parties select qualified neutrals, who sometimes have specific expertise relevant to the dispute. Also, in arbitration, but more so in mediation, the parties usually have significant control over the resolution process. Representation by counsel is advisable but not necessary in some instances. As to the nature of the procedures, in the court adjudication process the procedures are highly

structured and institutionalized, typified by detailed rules and numerous compliance mechanisms. Rules of evidence enhance the reliability of proof of claims and defences. In disputes not requiring these types of stringent procedures, mediation and arbitration offer certain measurable advantages. Arbitration, while having some of the evidential and procedural regularity of court adjudication, is conducted in a less formal and less rigorous setting, thereby enhancing the potential for a more expeditious resolution. Applying legal and equitable norms and creating remedies often tailor-made to the situation, arbitrators issue decisions as awards that can be enforced through the judicial process, bringing finality to the conflict.

Some disputes are best resolved in settings having few, if any, procedural restraints. With respect to those disputes, the mediation process offers several advantages. With its minimal procedural requirements, mediation provides an unlimited opportunity for the parties to exercise flexibility in communicating their underlying concerns and priorities regarding the dispute. It can educate the parties on potential alternative solutions, empower them to improve and strengthen their relationship in future interactions, and stimulate them to explore and to reach creative solutions affording mutual gain and a high rate of compliance.

In mediation and arbitration, the parties usually share the expense of the neutrals' fees and certain administrative costs. Depending on the nature of a particular dispute, however, the fees and costs associated with the mediation and arbitration process are normally much less than those associated with a case that traverses the course of the court adjudication process, which in Nigeria lasts an average of six years.

There are a few disadvantages nevertheless. In mediation, the neutrals have little power or authority over the parties and certainly no power to impose unwanted outcomes on them, whilst Arbitration, a process becoming increasingly encumbered by "legalization," has its own drawbacks, which include the lack of binding precedent and little opportunity for appeal. One of the most celebrated criticisms of is mediation its enforceability but this is truly misunderstood or misconstrued as there is a growing body of case law which attest and reaffirm the indisputable promise and enforceability of mediation agreements. What is more, research and empirical studies show that disputing parties generally honour the terms of an agreement which they are party to crafting much more that those imposed on them through arbitral awards and court judgments. For quick reference, the charts that follow present the advantages and disadvantages of the two processes.

ADVANTAGES MEDIATION	ADVANTAGES ARBITRATION	DISADVANTAGES MEDIATION	DISADVANTAGES ARBITRATION
Privacy	Privacy	Neutrals have no power to impose settlement	**Becoming increasingly encumbered by legalization**
Parties control forum	Parties control forum	No power to compel participation	**Relaxed rules of evidence**
Parties select neutrals	Expertise	Powerful party can influence outcome	**Limited or no discovery**
Reflects concerns and priorities of disputes	Parties select neutrals	standards	**No precedent**

Flexible	Written procedures	Outcome need not be Principled	**No appeal**
Process educates disputant	Expeditious		
Addresses underlying problem	Choice of applicable norms		
Often results in creative solutions	Tailors remedy to situation		
High rate of compliance	Enforceability		
Relatively inexpensive	**Relatively inexpensive**		

IMPORTANT CRITERIA FOR SELECTING BETWEEN MEDIATION AND ARBITRATION

MEDIATION	ARBITRATION
Desire to preserve continuing relations	**Need to offset power imbalance**
Emphasis on future dealings	**Need for decision on past events**
Need to avoid win-lose decision	**High volume of disputes**
Disputants desire total control of process	**Need to compel participation**
Dispute has multiple parties and issues	**Premium on speed and privacy**
Absence of clear legal entitlement	**Premium on closure**

HYBRID PROCESSES

Alternative Dispute Resolution is no longer seen as being valuable except where it can prove to also be *Effective Dispute Resolution*. The dynamics of a dispute might be such that in order to be effectual, a commingling of ADR processes may be utilised. Examples of hybrid processes include: lit-med and med-arb.

Lit- Med

Lit-Med is the combination of litigation and mediation as a single process. Parties may agree that in the eventuality that a matter might be part resolved through mediation and issues not resolved would be referred to litigation. Matters of constitutional law and interpretation may also be referred to litigation.

Med-Arb

Med-Arb as the name suggests, is a process in which Mediation is followed by Arbitration where Mediation fails to resolve a dispute or parts of it. This makes possible achieving the best of both worlds.

This process gives the parties the opportunity to use mediation to reach a settlement, and then to rely on a decision by the arbitrator on issues on which no agreement has been reached. This process encourages parties to create their own best settlement under the threat of having one imposed by an arbitrator.

MED-ARB: A VALUABLE SETTLEMENT STRATEGY

Mediation and arbitration, already defined, combine in the hybrid process called Med-Arb. In Med-Arb, by pre-agreement of the parties, the neutral first conducts a mediation to settle the entire dispute or part of it, after which the neutral arbitrates any unresolved issues. The same neutral may perform the role of mediator and arbitrator, or different neutrals may serve in those roles.

This hybrid method is ideal to allow parties reach their own solution on some of the issues of the dispute and then submit the issues over which there is deadlock to binding arbitration. This method also allows for a very speedy resolution of disputes especially where there is a time limit for the parties and a less likely hood of contestation of the arbitrators award.

Med-Arb begins with a written commitment from both parties to participate in the Med-Arb process and to bind themselves to either a mediated or an arbitrated outcome. The process starts with traditional mediation involving the assistance of a trained mediator. If an agreement is successfully mediated, it is then reduced to writing. If, and only if, the parties ultimately reach impasse in mediating their dispute, the mediator is then asked to change roles and to become the arbitrator. Either immediately at the close of the mediation, or at an agreed later date, the arbitrator takes evidence from the parties and renders a binding arbitration decision.

POTENTIAL ADVANTAGES

Despite its overall efficacy, not every mediated dispute will reliably result in a comprehensive resolution. Parties who place a high premium on achieving finality will naturally be drawn to consider the benefits of arbitration in order to ensure that their dispute will not continue to rear its ugly head after ADR has been utilized.

Arbitration, if pursued in its traditional form, however, lacks the opportunity for the parties to play a significant role in shaping the final outcome of the dispute. The primary advantage of Med-Arb is that it attempts to capture and synthesize some of the best features of both arbitration and mediation, namely that the parties are assured of finality (either by agreement or by binding decision), while at the same time, they are afforded the opportunity to have a significant input into shaping a voluntary resolution.

Because Med-Arb is less acrimonious than litigation, it also offers the potential for maintaining ongoing business relationships, while providing a fail-safe method for resolving disputes. Research has shown that only a very small percentage of cases submitted to Med-Arb actually wind up being resolved in arbitration. It appears that the parties might be more motivated to settle in mediation because the alternative to voluntary settlement, a decision imposed by a third party, is so immediate.

The threat of a looming involuntary arbitration decision, with a potentially unfavourable result, provides a significant inducement to the parties to devise their own mediated resolution.

One of the principal advantages of Med-Arb is that it reduces both the delay and the cost of retaining a second neutral to adjudicate the dispute that has just been presented to the mediator. The neutral is arguably better equipped, by virtue of having conducted the mediation, to render a decision in an expeditious, cost-effective fashion that meets the real needs of the respective parties. One common outcome of Med-Arb hearings is that the parties will reach a partial agreement in the mediation phase, leaving only selected issues remaining for arbitration. The parties might also benefit from the selection of a neutral with specialized expertise in the subject matter of their dispute.

ARGUMENT

The Med-Arb Hybrid process has been challenged on one major issue and that is the dual role of the mediator/arbitrator. One of the arguments is that parties' knowledge that the mediator will later become the arbitrator might inhibit the free flow of information during the mediation phase of the process. Successful mediation involves an honest appraisal of the strengths and weaknesses of each side's position. Revealing a fundamental weakness or vulnerability to a mediator might be much more difficult if a party knows that person might turn out to be the ultimate decision-maker. Conversely, the mediator might feel constrained from sharing honest appraisals with the parties during the mediation phase for fear that, by doing so; he or she might compromise his or her status as a neutral decision-maker at a later time.

There is also the possibility that the arbitration award could be based on the confidential information that is provided to the mediator in one of the confidential separate caucuses with the individual parties during the mediation phase. Obviously, there is no opportunity to cross-examine what is said to the Med-Arbiter in confidential caucus. To be effective, a Med-Arbiter must commence the substantive decision-making of arbitration as though the mediation had never taken place.

ETHICAL CONSIDERATIONS

The biggest concern expressed about the use of Med-Arb is the use of confidential information in the arbitration phase of the process. Ideally, the neutral should base his/her arbitration decision solely on the admissible evidence received during the arbitration phase of the proceeding. Just as a judge is expected to exclude inadmissible evidence in a bench trial, an experienced neutral should be able to base a legal analysis solely on the evidence elicited during the arbitration portion of the hearing.

The fear is that the mediator could confer privately with all sides during the mediation, and be privy to things that those not in the conference may not know. Ultimately, those things may influence the neutral if he/she has to play the role of an arbitrator. In addition, the motivation of the parties to settle may be diminished because they know that someone (the mediator turned arbitrator) will quickly decide the dispute if the mediation fails. Some opine that the twin roles are best separated rather than have it performed by one person

SKILL OF THE MED-ARBITER

The skill of the Med-Arbiter at both mediation, as well as arbitration, is a critical ingredient for the success of Med-Arb. The parties must have confidence that the neutral can seamlessly transition from one phase to the other, should that become necessary. Neutrals must attempt to ensure that clients are given every opportunity to settle the matter in mediation before resorting to arbitration, if at all possible. The stress and disappointment that might be associated with the failed mediation must not aversely affect the arbitration process. The Med-Arbiter must be able to maintain the trust and confidence of the parties as their role changes dramatically. The Med-Arbiter should resist the temptation to be overly strong and directing in the neutral caucuses. Given the Med-Arbiter's dual roles, he/she must be sensitive that subjective feedback has the potential to be given undue weight by the parties. The Med-Arbiter must also appreciate that the parties often fear that their lack of perceived flexibility might be held against them in the event the case needs to be arbitrated.

There is an enormous potential for client satisfaction in designing an alternative dispute mechanism that suits both the dynamics of the dispute as well as your client's needs. The monetary as well as the non-monetary costs associated with traditional dispute processes are all too apparent. The real appeal of Med-Arb is the opportunity to afford significant client input into the settlement process, while assuring a final binding result at the end of the procedure.

All said, it seems to me that the day may well come when the issue will be much less about the appellation of mediation or arbitration but more about resolving disputes. In truth, disputing parties simply want their disputes resolved and not be bothered by whatever name the dispute resolution mechanism is called.

CONCLUSION: THE COURT OF APPEAL MEDIATION PROGRAM

Since it is obvious then that a paradigm shift has occurred in legal practice, today's legal practitioner must fall in line with this reality or be relegated to redundancy. This situation is comparable with the early days of the computer rave which made its way into our lives silently but surely. Many fell in line, sought training and applied it to their discipline; others resisted it and paid dearly, or are now attempting to catch the late train at extra cost. Understanding and practicing Effective Dispute Resolution is not just desirable, it is important.

In 1997, when the Negotiation & Conflict Management Group (NCMG) commenced its advocacy for ADR in the Nigerian judicial system, we were a lone voice in the wilderness with a negligible followership. Most people thought it was an outlandish idea which would never be accepted within the Nigerian Judicial system. Ten years and two Multi-Door Courthouse Houses later, the story is radically different. On November 9, 2006, the NCMG made a presentation to the Presiding Justices of the Court of Appeal on a court connected mediation program to be administered by the Court of Appeal and to be known as The Court of Appeal Mediation Program (The CAMP). The unanimous, instantaneous and warm endorsement that the proposal received did not come to me or my colleagues as a surprise; we, together with staunch ADR vanguards as Hon. Justice Akinsanya had with our mind's eye, seen this day and more glorious ones ahead for ADR not just in Nigeria but in the whole of Africa.

Our justice system is undergoing the reforms is so urgently needs. With the introduction of the Multi-Door Courthouse concept into Nigeria, we are undoubtedly on our way to consumer satisfaction in our justice system. The success of this system is hinged in the appropriate matching dispute resolution mechanism(s) to disputes. In order to avoid the rigidity of the mono-door court system, both ADR mechanisms and its hybrid processes will become definite accepted means of dispute resolution. It is then our abiding duty to embrace it, practice it and advocate it.

In closing I leave you with a comment which aptly encapsulates my viewpoint.

> *'Alternative Dispute Resolution to a large extent is going to influence the practice of law in the future. It augurs well that we have been given the opportunity to be involved in its infancy in Africa".*
>
> **Hon. Justice Mohammed Uwais**
> Chief Justice of Nigeria

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