MEDIATION AS AN ECONOMIC TOOL

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by

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> *"….Not only do court battles represent unproductive time and effort-their results are legal rather than businesslike. It might well be that the best solution to a dispute between a dam builder and a hydroelectric turbine manufacturer would be a change in contract specifications and a promise of future work. But the law does not provide for this businesslike solution- the law only looks backwards to determine what happened in the past. Business, on the other hand, looks forward to what opportunities lie ahead. It is a poor fit.[1]"*

Introduction

A major challenge confronting all the economies of the world is how to institute a justice system that maximizes harmony and simultaneously promotes economic growth of individual, enterprises and nations. For the legal profession, this challenge is more daunting considering its role as a major economic driver and most importantly, the fact that its tradition of conservatism coupled with an inclination towards litigation can no longer be trusted for solution to the emerging challenges of the contemporary business era. For instance, in spite of ourselves, the dynamics and potentials for conflict in the world of global business are expanding along with the growth in the magnitude, diversity, and complexity of transactions both domestically and internationally.

Today, domestic and international business transactions create complex legal, financial, and technical relationships; and involve numerous participants from many different countries, including multinational corporations, global financial institutions, sovereign governments, state enterprises, and international organizations. These business transactions may include international manufacturing joint ventures, multi-party strategic alliances, huge infrastructure construction projects, high technology licensing agreements, international franchising arrangements and production-sharing petroleum agreements.[2] This is aside from mergers, acquisitions and take-overs which domestic transactions may in particular necessitate. In addition, parties from countries throughout the world are negotiating and carrying out these complex transactions in an environment of diverse cultures, political instability, conflicting ideologies, differing bureaucratic and organizational traditions, inconsistent laws, and constantly changing monetary and economic variables.[3]

In this paper, I will show the link between the Law, Access to Justice and Economic Development and describe the antecedents which make inevitable, the new global wave of

[1] F.Peter Phillips, The Emerging Role of ADR within the Business Sector, a paper delivered during the 1st African ADR Summit , Nov.1 -2, 2006

[2] Salacuse, J.W. Mediation in International Business http://fletcher.tufts.edu/faculty/salacuse/pubs/mediation.html

[3] Salacuse, J.W. Making Global Deals - Negotiating in the International Marketplace. 1991. Boston: Houghton Mifflin

justice system and its shift towards the development of the financial system. I will highlight the place of mediation in that wave; reflect on the advantages of mediation through some case studies; and itemize the strategies to entrench mediation as an economic tool. More to the point, I will underscore the central role of the lawyers in today's matrix of "border-less commerce."

Law, Access to Justice and Economic Development

Max Weber[4] had earlier expounded the idea that the development of a market economy is dependent on an effective legal system founded on formal, universal rules
which are uniformly applicable and predictable. In further justification of this position, Kao in his paper [5] gave the following apt illustration:

> *"A merchant who enters into a contract must know with reasonable certainty that her valid future expectations would be enforced by the state, based on the framework of substantive rules in which both parties operate, should the other party renege on the agreement. In other words, a modern legal system of autonomous rules, uniformly and consistently applied to yield a degree of predictability and legitimacy, promotes and furthers capitalist exchanges, and hence economic growth, because it allows economic players to base their decision making on criteria of formal rationality."*

However, that economic development is closely linked with credible set of laws is no longer an issue if ever it was. In modern times, to a large extent, the issue is how best these sets of rules should be interpreted, administered and enforced. This has become more overwhelming in view of growing sophistication of the world in both domestic and international trades. For instance, according to the "World Investments Report" for 2006, both the value of cross-border Mergers & Acquisitions rose to $716 billion (an 88% increase) while the number of deals rose to 6,134 (a 20% increase). This is traceable to the emergence of transnational corporations (TNCs) from developing and transitional economies. While this high level of M& As reflected strategic choices of TNCs, it was also fuelled by the recovery of stock markets, which led to an increasing number of mega deals (each worth more than $1 billion in transaction value). In 2005, there were 141 such deals, representing a total value of $454 billion – more than twice the amount recorded in 2004. The fore going web of M & A's excludes domestic transactions involving banks, insurance and aviation as demonstrable by the trend in the Nigerian economy.

Quite regrettably, although Foreign Direct Investments (FDI) inflow to Africa shot up from $17 billion in 2004 to an unprecedented $31 billion in 2005, the region's share in global FDI

[4] Max Weber on Law in Economy & Society 142 (Max Rheinstein ed., Max Rheinstein & Edward Shils trans, Harvard Univ. Press 1954) p.145

[5] Lan Kao, Law and Development. Edited by Anthony Carty. New York, N.Y.: New York University Press, 1992, pp. 506.

continued to be low, at just over 3%. South Africa was the leading recipient, with about 21%. Arguably, this is in part due to political instability and the inefficiency of the justice system. For instance, economic cooperation depends largely on predictable political structure while a prominent feature of domestic and international investments is the universe of Agreements and International Agreements (IIAs) which respectively are becoming increasingly complex. Hence, interpreting and enforcing these agreements and other memoranda of understanding (MOU) in the event of disputes has continually posed a big challenge to the developing nations whose commercial transactions are governed by "regular contract clause" on dispute resolution and a regular judicial system for its interpretation.

- **Commercial transactions and "regular contract clause" on dispute resolution**

Until very recent times, it is the practice in some countries of the world, particularly in Nigeria for solicitors and legal advisors to insert in agreements and memoranda of understanding, a clause allowing parties to resort to the court for the interpretation of agreements in the event of a dispute. Also where reference was made to an Alternative Dispute Resolution (ADR) other than litigation, the choice has been in favor of arbitration which provides a forum for the disputants to present legal arguments and offer evidence to a neutral third party who makes a binding decision. Indeed arbitration has been a popular way of resolving contractual disputes among commercial people and institutions.

However, commercial transactions and cooperation in sensitive industries such as banking, insurance, engineering, aviation and telecommunication often entail time bound processes and require an enduring relationship. In the event of a dispute, these transactions require conflict management intervention which the facilities of arbitration and litigation may not always effectively afford. Put differently, they may not be appropriate options of first choice or immediate resort in the event of a dispute. For instance both arbitration and litigation involve adversarial process which may portend danger for future business relationship if not appropriately employed.

- **Commercial transactions and the constraints of the "regular judicial system"**

Generally, in most economies particularly the developing economy , the administration of justice is fraught with myriad problems which include understaffing; over work; lack of working materials and resources ; poor pay for judges; inadequate training programme and lack of experience; poor system of judgment enforcement ; delay in the adjudication of disputes; and expense of litigation. Although each of these problems by itself does impede access to justice, however the most common challenges to commercial transactions that nations have had to face are delay, expense of justice and more importantly efficient delivery of justice.

Regrettably, the twin challenge of delay and expense flowered mostly in countries where the justice system is characterized by adversarial court room contests. In Nigeria, perhaps nothing best evidences the foregoing than the comments aptly made by Hon. Justice Chukwudifo Oputa, a now retired jurist of the Supreme Court of Nigeria:

"The administration of Justice in our courts suffers from two major constraints, namely delay and expense. If it takes 7-10 years to decide a case, a prospective litigant may decide not to go to court at all. But the one thing that frightens litigants away from the courts is the inordinate expense which has to be incurred with the result that a very large proportion of country men are, as it were, priced out of our legal system."

Another jurist, Hon. Justice O.O Oke expressed similar sentiments when she said:

*"**Delay** in resolution of disputes among parties is definitely a primary enemy of justice, peace and stability in any community or society. **Frustration**, **distrust** and **anger** keep rising during trial …. If we have been in "bondage" of **case congestion** in our courts, why can't we **explore other means of dispute resolution** that will give us the 'freedom' we need…?"*

In further proof, statistics provided by the Judiciary proved a stunning eye opener to the enormity of these challenges facing the courts and how ill equipped the system has been. For example in Lagos State, an annual report by the Ministry of Justice in 1990 provided the following statistics within the year:

- 9,929 fresh cases were filed
- 23, 197 remained pending
- It took an average of between 5-7 years to conclude an average civil case
- 8-10 years (conservatively) to resolve land disputes

Indeed, Hon. Justice O.O.Oke clearly described the state of the judicial system and the need for a revolution when she said:

"Our courts are overflowing with cases. Congestion in the courts has generated more anger, more agony in the parties. Each Honourable Judge has not less that Three Hundred cases pending before him with new ones on a daily basis. We must not forget that proceedings are still being recorded in long hand and with other various technical problems, some cases last over 10 years from the date of filing. For instance, in my court, I have over 20 years old cases inherited by me from retired Judges. These are cases that have gone before two or three Judges before coming to my court. I remember vividly that suit No. LD/469/77, A.J. Lawal & Anor Vs. Santos is 26 years old, Suit No. LD/89/74 Mrs. S. A. Abudu Vs. Alhaja T. Ogunbambi & Anor. Is 29 years old, while suit No. LD/4/78 Sipeolu & Anor. Vs. AIICO Eng. Group Nig. Ltd. is 25 years old> I have about 50 cases that are more than 10 years old and 140 cases that are over five years old."

Countries with well advanced technology have also been faced with the challenges of an ineffective justice system. In the United States of America, as far back as in the late 1970s, there was growing discontentment with the public justice system by many

business leaders. The reasons for this dissatisfaction were several: cost, delay, belligerence, limits of legal solutions, lack of legal solutions, lack of certainty and uniformity and waste.[6]

In England, Lord Woolf started his two year enquiry into Access to Justice in 1994 and noted in his interim report of 1995 that litigation was not the only means of achieving a fair, appropriate and effective resolution of commercial disputes. According to Sir Henry Brooke,[7] it was the report of Lord Woolf that there was a need to increase awareness of what ADR offer among legal practitioners and the general public, and it was desirable to consider whether the various forms of ADR had any lessons to offer to the courts in terms of practices and procedures.

The ineffectiveness of a legal system that offers the mono-option of litigation to commercial disputes was also a concern in Canada, as the Chief Judge of Ontario, Canada rightly observed:

> *"People attend lawyers with problems they want resolved, not problems they want litigated. A trial is only one way to resolve a case, yet a trial is the only option offered by the court- administered system. Lawyers and their clients deserve better."*

Mediation as an Economic Tool

Traditionally, companies engaged in business disputes have not actively sought the help of mediators. They have first tried to resolve the matter themselves through negotiation, but when they judged that to have failed, they have immediately proceeded to arbitration. Various factors explain their failure to try mediation: their lack of knowledge about mediation and the availability of mediation services, the fact that companies tend to give control of their disputes to lawyers whose professional inclination is to litigate, the belief that mediation is merely a stalling tactic that only delays the inevitability of an arbitration proceeding[8] and, more importantly, the fact that arbitration was fast donning the cloak of litigation not just in style but in its effect on business relationships.

With increasing recognition of the disadvantages of arbitration, some companies are beginning to turn to mediation to resolve business disputes. Increasingly, when a dispute can be quantified, for example the extent of damage to an asset by a partner's action or the amount of a royalty fee owed to a licensor, the parties will engage an independent third party such as an international accounting or consulting firm to examine the matter and give an

[6] Phillips, *op. cit*
[7] Sir Henry Brooke, Judicial Reforms and the Emerging Role of the Judge in the Dispensation of Justice; Unpublished
[8] Salacuse *op.cit*

opinion. The opinion is not binding on the parties but it has the effect of allowing them to make a more realistic prediction of what may happen in an arbitration proceeding.[9]

In the United States, mediation has been accepted because its features directly addressed the very problems of the business community. According to Phillips, mediation has addressed business concerns in United States of America in the following aspects:

> *"**Cost:** Mediation takes one day, sometimes a few more. And preparation is nothing as costly or time-consuming as preparing for adjudicatory, contested processes like arbitration and litigation.*
>
> ***Delay:** The parties themselves control the timing and the length of the mediation proceeding. It can happen next month, next week or tomorrow, depending on what the parties themselves think is most likely to accomplish the task of settling the case.*
>
> ***Belligerence:** Accusations and other emotionalism are part of any disagreement. But in mediation they occur in a conference room, behind closed doors, and once emotions are vetted they are put aside in favor of acting like business people. Companies engage in mediation in order to get the matter behind them, not in order to be vindicated at great expense. So the toll on business relationships is minimized.*
>
> ***Limits of Legal Solutions:** There are no legal limits to the outcome of mediation. Very frequently, a mediated solution to a business dispute will involve reforming the contract, apologizing, agreeing to do future business, or making a recommendation for later hiring. None of these remedies is available to a court, yet they are the very essence of doing business."*
>
> ***Lack of Certainty and Uniformity:** Mediation does not create legal precedent; it does not involve matters other than the dispute at issue; and its contours and repercussions are within the control of the private parties. The disputants themselves can agree upon the impact of the settlement.[10]"*

In the United Kingdom, as Sir Henry Brooke[11] vividly recalls, when Lord Woolf started his two-year inquiry into Access to Justice in 1994, the judges of the Commercial Court had already adopted a practice of staying proceedings for a month if they thought that there was a reasonable prospect of having the matter resolved in some other way if the parties set their minds to it. The eminent jurist related that Mr Justice Colman, who has been one of the foremost proponents of ADR in that court, explained concisely in one of his judgments that

[9] Salacuse Ibid
[10] Philips, *op. cit*
[11] Brooke ,*op. cit*

commercial mediation *"… as a tool for dispute resolution was not designed to achieve solutions which reflected the precise legal rights and obligations of the parties. Instead it achieved solutions that were mutually acceptable to both sides at the time of the mediation."*

Mediation and Advantages

Mediation is a process for resolving disputes with the aid of a neutral. The neutral's role involves assisting parties, privately and collectively, to identify the issues in dispute and to develop proposals to resolve the disputes. Unlike arbitration, the mediator is not empowered to decide any disputes; accordingly the mediator may meet privately and hold confidential and separate discussions with the parties to a dispute.

Simply put, mediation is negotiation assisted by a third party. If the disputants are unable to resolve their dispute by negotiation, a third party who is usually referred to as Mediator, conciliator, or facilitator, may be called in 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 distinction between the role of a third party mediator and a third party judge or arbitrator is crucial. While the latter decides the dispute for the parties, the role of the skilled neutral mediator is to act as a catalyst by helping the parties in identifying and crystallizing each side's underlying interests and concerns; carry subtle messages and information between the parties; explore bases for agreement and develop a co-operative, problem solving approach. The common denominator to all these efforts by the mediator is the enhancement of communication between the parties in conflict. The important point with respect to both negotiation and mediation as participatory alternatives is that the disputants themselves retain control over the process and the outcome.

Mediation may be compulsory, under the terms of laws or court rules, or may be voluntary, by agreement of the parties. Some jurisdictions have rules requiring mediation of disputes at some point in the litigation process. Voluntary mediation may be undertaken under terms of a mediation clause by which parties to an agreement agree in advance to submit any disputes to mediation. Such mediation clauses are common in agreements in which the parties seek to resolve their disputes in a manner which avoids hostility and preserves an ongoing relationship. Mediation agreements also may be made at the time a dispute arises.

Mediation services may be provided by an organized tribunal. In some jurisdictions, bar associations and institutes may offer mediation service provided by mediators who undergo mediation training and so earn the privilege of becoming a member of the tribunal's panel of mediators. Private organizations, both profit and non-profit, may maintain mediation tribunals. These tribunals may maintain panels of mediators and may have rules governing the conduct of mediation proceedings.

No doubt, mediation is the sleeping giant of ADR. Indeed, the state of the art is towards participatory alternatives, especially mediation. The reason why mediation, of all ADR techniques seem to have special appeal to the corporate world has to do with its nature, flexibility and most especially, its ability to restore business relationships. Mediation helps business people to approach their disputes, not as antagonists but as joint problem solvers. While virtually every other dispute resolution process cedes all or part of the power to determine outcome to a third party, mediation has the appeal of being an informal, voluntary, loosely structured process in which the mediator facilitates communication, encourages exchange of information and ideas, tests the reality of parties perceptions and ideas, advises, suggests and translates, all in a bid to detoxify the emotional climate. Besides, the very process of mediation is an educational one in that disputants are by the process somehow empowered to resolve future disputes on their own. However, a decision as to the process of choice is best determined by the nature of the case and the goal to be achieved.

Another principal reason businesses are turning to mediation is because the process presents an opportunity, beyond the mere exchange of money or other tangible considerations, for creative solutions. Moreover, the mediation atmosphere of acknowledging that disputes may involve feelings and egos, as well as business considerations, can spur the settlement process by allowing the release and acknowledgement of emotions in a neutral, dignified environment. No doubt, the exchange of money or other items of material value (as would occur in an adversarial proceeding such as litigation or arbitration) is a usual component of compromise and settlement. However, mediation presents an opportunity to expand parameters for resolutions from the mere exchange of value to "expansion of the pie". A resolution may include new or further business dealings or the use of non-monetary values such as recommendations, introduction or apologies - tools most often underestimated in dispute resolution.

Mediation: How it works

The Mediation session usually gets underway with an initial meeting where ground rules are laid down for the session. After the preliminaries, each party explains how he /she views about the issue. The Mediator may meet each party separately for clarification and deliberation and to explore options. This is referred to as the caucus meeting. At the meeting, the mediator clarifies each party's version of the facts, priorities, positions, explores alternative solutions and seeks trade –offs. A joint session is convened as soon as there is an appearance of common ground, where differences are narrowed down and offers are formalized to gain agreement. The terms of settlement reached are reduced into agreement and signed by parties.

Needless to state, the "Multi-Door thinking" has found its way into Nigerian case law. In **Chief John Kushimo Vs. Disc Engineering Limited,** the Claimant, a subscriber to the cable television of the Defendant asked the court for certain reliefs, based on the claim that a

decoder he bought from the Defendant became faulty and were repaired by the Defendant at a cost; furthermore, less than a week after the repairs, despite his payment of the quarterly fees, two out of the four channels paid for were scrambled, whilst pictures from the other two were hardly visible. The Claimant stated that this amounted to a breach of contract as he got no satisfaction for the payment he had made.

The court after a consideration of the case for both sides referred the dispute to The Lagos Multi-Door Courthouse for an amicable resolution. However at the insistence of the Claimant, the matter was not mediated upon. Holding in favour of the respondent, Hon. Justice Okunnu-Shu'aib stated:

> "*The Claimants insistence on proceeding with his court case has, however, failed him. I have no doubt that he would have been happier with whatever decision was arrived at had he had talks with the Defendant, whether on their own as the Defendant had suggested, or with the expert assistance of The LMDC. This should have been a case settled in a more conciliatory manner.*"

The approach or disposition displayed by the Nigerian Judge is very much in tune with recent trends in other jurisdiction, one of which is the United Kingdom where in the highly celebrated case of Dunnet v. Railtrack[12], the appellant was denied costs inspite of winning on appeal .Why? Simply because the appellant refused the offer of mediation.

Paving role for Mediation in commercial transactions

- **Construction Industries**

Construction activities include many parties, involve highly technical complexities, and take a long time to complete. The possibilities for conflict among the participants are virtually endless. Therefore it is essential for all concerned that disputes among the parties not impede the progress of the project. It will be onerous and most ridiculous to expect parties to resort to arbitration or litigation on each occasion that dispute arises in the implementation of a project that may take years to end. A typical construction contract may therefore provide a clause allowing a consulting engineer, review board, permanent referee, or dispute advisor, with varying powers, to handle disputes as they arise in a way that will allow the construction work to continue. Sometimes, as in the case of a consulting engineer, the third person will have the power to make a decision, which may later be challenged in arbitration or the courts; sometimes as in the case of dispute advisor the third person plays the role of a mediator, by engaging in fact finding or facilitating communication among the disputants.

A particular case worthy of note is how the Dispute Review Board (DRP), which was used in the construction of both the Channel Tunnel between England and France and the new Hong Kong Airport and is now required by the World Bank in any Bank-financed construction project having a cost of more than $50 million. Under this procedure, a Board, consisting of

[12] {2002} 1 WLR 243

three members, is created at the start of the project. One member of the board is appointed by the project owner and a second by the lead contractor. The third member is then selected either by the other two members or by mutual agreement between the owner and the contractor. The Board functions according to rules set down in the construction contract. Generally, it is empowered to examine all disputes and to make recommendations to the parties concerning settlement. If the parties to a dispute do not object to a recommendation, it becomes binding. If, however, they are dissatisfied, they may proceed to arbitration, litigation or other form of mandatory dispute settlement.[13]

- **Show Business**

Building relationship is particularly important when nurturing a star in show biz. The potentials of a star are awesome and often hidden when they just start off. It does behove professionals such as lawyers, consultants, producers and managers who start off with them to work into their contracts the mechanism of negotiation and mediation in the event of dispute. The story of a lawyer called Ron Shapiro vividly underscores this point.

Long before Oprah Winfrey became a household name and got so big and no longer needed a second name, she was represented by a lawyer named Ron Shapiro. Ron helped navigate Oprah's career as she climbed the major market ladder. She was hot and everybody had their eyes on her, including a very aggressive agent in Chicago. He pursued her ardently. Initially she resisted. But he wouldn't give up. Not long after that, Ron got one of those phone calls that starts with "Ron, this is really hard to say, but….." Oprah went on to tell Ron how much she appreciated all the good work he'd done for her, how she hoped they could stay friends and may be even work together again someday. Thus Ron lost Oprah Winfrey. But that is not the humbling part of the story. According to one of the attorneys in Ron's office, Oprah still owed the firm some commissions. On a strictly legal basis, the lawyer was right but, Ron's instinct told him to drop it, but he refused to follow his instincts. He sued. Oprah and her new agent fought it. The matter was settled and Ron's firm got their money. But, it was a short-term gain and a life-time loss of opportunities and goodwill.

- **Joint Ventures and mega transactions**

One of the few published accounts on conciliation involving the above mentioned concerns the first conciliation conducted under the auspices of the International Centre for Settlement of Investment Disputes (ICSID)[14]. ICSID, an affiliate of the World Bank created by treaty in 1964, provides arbitration and conciliation services to facilitate the settlement of investment disputes between host countries and foreign investors. One such dispute, between Tesoro Petroleum Corporation and the government of Trinidad and Tobago, arose out of a joint venture which the two sides established in 1968, each with a 50% interest, to develop and

[13] Bunni, Nael G. "Major Project Dispute Review Boards." 1997. In-House Counsel International (June-July 1997). pp. 13-15

[14] Nurick, L. and Schnably, S.J. "The First ICSID Conciliation: Tesoro Petroleum Corporation v. Trinidad and Tobago." 1986. ICSID REVIEW, 1. pp. 340-353.

manage oil fields in Trinidad. By their joint venture contact and subsequent agreements, the two partners developed a complex arrangement on the extent to which profits would be paid as dividends or reinvested to develop additional oil properties. Their joint venture agreement also provided that in the event of a dispute the parties would first attempt conciliation under ICSID auspices, but if the dispute was not settled within six months from the date of the conciliation report, either party could then commence ICSID arbitration.

By 1983, following the rise of oil prices and continued turbulence in world petroleum industry, Tesoro and the Government of Trinidad and Tobago were embroiled in a conflict over whether and to what extent to use accumulated profits for payment of dividends to themselves or for reinvestment to develop new oil properties. Finally, Tesoro decided to sell its shares and pursuant to their agreement offered them first to the Trinidad and Tobago government. The two parties then began to negotiate a possible sale, but appeared to make little progress. In August 1983, Tesoro filed a request for conciliation with the ICSID Secretary-General, claiming that it was entitled to 50% of the profits as dividends and that the government had breached the joint venture agreement on dividend payments.

The ICSID rules, recognizing the importance of a conciliator in whom the parties have confidence, gives the parties wide scope in the conciliator's appointment. The rules allow them to choose anyone, provided he or she is "of high moral character and recognized competence in the fields of law, commerce, industry, or finance, who may be relied upon to exercise independent judgment." Tesoro and the Trinidad and Tobago government agreed to a single conciliator (instead of a commission of three or more conciliators as the Rules allow) and through direct negotiations chose Lord Wilberforce, a distinguished retired English judge, in December 1983 to serve as their conciliator.

Lord Wilberforce held a first meeting of the parties in March 1984 in London, where they agreed upon basic procedural matters, including a schedule for the filing of memorials and other documents by the parties in support of their positions. The parties proceeded to file their memorials and then met once again with Lord Wilberforce in July 1984 in Washington, D.C. In this meeting, at the conciliator's suggestion, they agreed that no oral hearing or argument by the parties would be necessary, that the parties could submit to Lord Wilberforce their views in confidence on what might constitute an acceptable settlement, and that thereafter Lord Wilberforce would give them his recommendation.

In February 1985, Lord Wilberforce delivered a lengthy written report to the parties, in which he stated that his task as a conciliator had three dimensions: 1. to examine the contentions raised by the parties; 2. to clarify the issues in dispute; and 3. to evaluate the respective merits of the parties positions and the likelihood of their prevailing in arbitration. Thus, he saw his task as giving the parties a prediction of their fate in arbitration, with the hope that such prediction would assist them in negotiating a settlement. He concluded his report with a suggested settlement, which included a percentage of the amount sought by Tesoro, based on his estimate of the parties' chances of success in arbitration on the issues in dispute.

Following receipt of the report, Tesoro and the Trinidad and Tobago government began negotiations, and by October 1985 they had reached a settlement by which the joint venture company would pay dividends to the two partners in cash and petroleum products totaling $143 million. The conciliation thus helped the parties reach an amicable settlement of their dispute with minimum cost, delay, and acrimony. The whole conciliation process from start to finish took less than two years to complete, and administrative costs and conciliator fees amounted to less than $11,000. Equally important, conciliation preserved the business relationship between the parties. After the conciliation, the Trinidad and Tobago Government purchased a small portion of Tesoro's shares so as to gain a majority interest, but Tesoro continued as a partner in the venture.

Tesoro's matter is most instructive in that had the matter proceeded to arbitration or litigation, without conciliation, the case would have lasted several years, cost many hundreds of thousands of dollars and perhaps more, and would have resulted in a complete rupture of business relationships between Tesoro and the Government.[15]

- **Automobiles**

In the widely publicised industrial espionage dispute of 1997 between General Motors (GM) and Volkswagen (VW) involving the high powered, last minute snatching of "whiz-kid" José Lopez by Volkswagen, the eventual settlement was a "common sense decision for both sides". Under the agreement, VW was to pay $100m in damages and buy $1 billion of GM-made car parts over the next seven years. In addition, VW expressed regret for issuing statements attacking GM. In a related development over wrongful termination, the compromise reached included a two-year part-time, low-cost independent consulting contract for the former employee (performing essentially the same services, but physically removed from the Company's environment and the people and circumstances which led to the conflict and dismissal). The Company got services it valued at a good price, and the former employee obtained stature as an independent consultant and the opportunity to leverage that into a new career for himself. These are all practical, business remedies offered by mediation which the strict confines of litigation do not offer.

Strategies for Making Mediation become an Economic Tool in Nigeria

Literature has revealed that in advanced countries where mediation is in its pride of place, like other ADR mechanisms, it has assumed such status through corporate legal leadership, corporate pledge, legal mainstreaming and initialing, professional literature on the subject and public policy[16]. It was the view of Phillips that mediation campaign must be owned by the corporate society since it stands to benefit a lot from the success of the facility. The pledge is to get the commitment of corporate leaders to mediation. The approach on legal mainstreaming is designed to put mediation at the center of legal practice. Professional writing on the subjects will encourage practitioners to acquaint with how mediation operates

[15] Salacuse *op.cit*
[16] Philips *op.cit*

while public policy is to focus the attention of the law making bodies on the need to make laws and policies that will assist the use of mediation.

- **NCMG Strategies and Efforts**
  - **Multi-Door Courthouse concept**

In Nigeria, for about a decade now the NCMG has made consistent efforts to entrench mediation and other ADR mechanisms in the legal practice in Nigeria. In 2002, significant progress was made when the NCMG collaborated with the Lagos State Judiciary to establish The Lagos Multi-Door Courthouse (LMDC) as the first court-connected ADR center in Africa. At the moment, there are three "doors" or processes available at the LMDC, namely Mediation, Early Neutral Evaluation and Arbitration. The overriding objective of the LMDC is as contained in the Lagos Multi-Door Courthouse Practice Direction[17] namely to:

> *"enlarge resources for justice by providing enhanced, timely Cost-effective and user-friendly Access to Justice for would be and existing plaintiffs and defendants".*

Subsequent to the establishment of the LMDC, the concept was replicated in the judiciary of Abuja. The Abuja Multi- Door Courthouse (AMDC) began operation on November 3, 2003 with the Negotiation & Conflict Management Group, the initiators of the multi-door concept in Nigeria working as consultants in the areas of training, project design and execution.

NCMG took an extra mileage in the institutionalization of ADR, when on November 9, 2005, after a presentation at the Court of Appeal, Abuja, the presiding justices of the ten divisions of the Court of Appeal in Nigeria, unanimously endorsed the setting up of a mediation program in the Court of Appeal.

- **MADREP**

Also, as part of our efforts to enhance the use of mediation and other ADR mechanisms, the NCMG initiated the Mergers and Acquisitions Dispute Resolution Program (MADREP). MADREP encourages corporations to insert into their agreements clauses allowing them to resort to negotiation, mediation and arbitration in that order in the event of a dispute. It also consists of a pledge which all institutions are enjoined to endorse committing them to Alternative Dispute Resolution when disputes arise. Finally, there is the MADREP Solve

[17] The Lagos Multi-Door Courthouse Practice Direction Pursuant to Section 274 Constitution of the Federal Republic of Nigeria 1999

which bids all stakeholders in commercial transactions to refer disputes to a multi-door courthouse or any other alternative dispute resolution center.

- **The ADR Club**

The major reason for the establishment of ADR Club is to afford professionals and corporate bodies a platform to promote amicable resolution of disputes particularly, commercial disputes. It is a club whose membership is bound by a simple pledge to explore mediation or any other amicable Alternative Dispute Resolution (ADR) process before resorting to litigation. Its membership is composed of professionals with integrity who appreciate the value of keeping their words.

Conclusion

Along with the abiding conflicts which characterize the web of economic transactions in modern times exists the challenges for the 21st century lawyers to include in their kit, multiple skills on ADR to enable them stay atop of situations. Although, in this part of the world, litigation and arbitration are popular mechanisms among professionals for business disputes, international developments in the financial system have shown that mediation of varying types offers domestic and international business executives an additional supplementary (not as supplant) tool as attractive and effective as litigation and arbitration.

It does behove us as legal practitioners to accord mediation a prime position in our practice. Making this happen will not come without an effort, an effort which will no doubt include attitudinal change and most importantly, a commitment to pursue the underlying interests of clients in dispute resolution as against the silk! It is in the stark realization of the foregoing that the NCMG would at this auspicious meeting urge the Nigerian Bar Association and all forward thinking lawyers gathered here today to endorse the NCMG strategies, particularly The ADR Club as a veritable way of mainstreaming ADR in the Nigerian legal practice. It is my firm belief that our resolve here today shall position us and indeed our nation, on the path which alone leads to timely justice, peace and economic development.

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