ADR 2000 - RESOLVING CORPORATE DISPUTES

IN THE 21ST CENTURY

BY

KEHINDE AINA[1]

INTRODUCTION

How do I resolve my company's disputes? With workers, customers, clients and outsiders? What is wrong with the way we are resolving disputes now? What are the alternatives that we have? What are the appropriate alternatives for particular disputes? Which alternative should ALWAYS come first? Am I using it now? How can we make it mainstream in my company? Are there experts providing this alternative? Where are the experts? Who are they? Are they in tune with the current trend in dispute resolution worldwide? Do we have proofs of success of this service? Finally, what is ADR-2000? How can we benefit or be a part of it?

Those are questions you probably have in mind. And my task at this roundtable is to make my own contributions to them, knowing that you will equally have answers which we shall also look at so that we can leave this forum with an understanding of how we ought to resolve business and commercial disputes.

Let us begin by attempting to answer some of the questions above.

1. HOW DO I RESOLVE MY COMPANY'S DISPUTES

Business people hate the thought of conflict. They hate the disruption it brings to management time; the diversion of attention from developing new business and caring for customers. Most especially, they loathe the inordinate delay, expense and bad publicity that litigation brings in resolving disputes. But then, conflict is inevitable in any human organization. As long as human beings have a role to play, no

[1] Kehinde Aina, Executive Director of Negotiation & Conflict Management Group (NCMG), is the Managing Partner in the law firm of Aina, Blankson & Co. Being a paper presented at IOD April 1999 Members' Evening on Wednesday April 28, 1999.

matter how picayune, in the sustenance of any establishment, disagreements and disputes are bound to occur.

Corporate executives' approach to disputes varies according to their understanding of what dispute is. I personally believe that disputes are not only normal but also positive and greatly helpful to effect necessary changes, test group cohesion, re-examine existing ideas and the boundaries between the possible and the impossible, reveal and exorcise fears, build teams, but also disputes help a great deal in revealing different needs and interests among individuals and among groups, explore personalities, learn about each other, enable people to express strong feelings, discover the way other people think, reveal or discuss fears about each other and about personal failure and, finally I create mutual dependence. So, if you see a dispute in this light, you would have a positive approach to resolving disputes.

On the other hand, if you view disputes as a win or lose affair then your approach would be negative. While some organisations have been known to translate disputes to veritable sources of boon, for the vast majority incalculable doom has resulted.

The problems with and complaints about litigation as a dispute resolution mechanism are widely understood. They include complaints about cost (time and money spent to resolve disputes); the incomprehensibility of the process (issues related to the lack of participation of the affected parties); and the results (issues related to the imposition of a "remedy" by a "stranger" who is most often ignorant of the issues involved.

My mission here today is not to present litigation as an ineffective means of dispute resolution, rather, my intention is to examine the new trends in dispute processing and present a number of alternatives to the costliness, untimeliness and divisive nature of the adversarial process. More to the point, my goal in this lecture is to present "alternative dispute resolution (ADR)" as a "must consider" concept for the corporate organisation hoping to have a competitive edge in the twenty-first century.

2. WHAT IS ADR?

ADR is the acronym for Alternative Dispute Resolution. It is the name given to a wide spectrum of dispute resolution options or mechanisms which exist as supplements to traditional litigation. The term "ADR" thus refers to a range of processes designed to aid parties in resolving their disputes without the need for a formal judicial proceeding.

ADR is not another term for arbitration, rather it involves a wide array of dispute resolution processes ranging from negotiation and mediation to various forms of adjudication, including arbitration and such "hybrid" processes as mini-trial, med-arb and many others.

ADR provides an opportunity to resolve conflicts creatively and effectively, finding the process that best handles a particular dispute. It is useful for resolving many disputes that never get to court, as well as providing a means of settling 90 to 95 percent of the cases that are filed in court.

Let us examine the traditional ADR processes by categorizing them into two - Participatory and Adjudicatory Alternatives.

PARTCIPATORY ALTERNATIVES

- **Negotiation:**

"Communication for the purpose of persuasion" is how notable ADR proponent, Professor Frank Sander defined Negotiation. Direct Negotiation between the parties is the heart of all participatory alternatives. It is the pre-eminent mode of dispute resolution. For most business executives, negotiation is a major part of their professional duties - wide variety of contracts and other transactional arrangements are regularly negotiated while myriad forms of disputes are daily negotiated.

One of the most important benefits of negotiation as a dispute resolution device is that the disputants retain control both over the process and the outcome. Communications in negotiations centre on the search for common ground and compromise. While traditional negotiations involve the incremental

change in "positions" as the primary communicative device, "principled" negotiations focus on the underlying interests and utilize a problem solving method characterised by brainstorming for outcomes to which both parties can say "yes".

- **Mediation**

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, "turbo-charged negotiation" as the primary function of the mediator is to help facilitate negotiations among the parties. The mediator is not empowered to render a decision.

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 for settlement by helping the parties in identifying and crystallising 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. In the course of this roundtable, I will talk more on the practice of mediation with a view to establishing its relevance in the corporate establishment.

ADJUDICATORY ALTERNATIVES

Once we cross the boundary from consensual dispute settlement (negotiation and mediation) to externally imposed solutions (judge or arbitrator), the nature of the proceeding changes dramatically. In adjudicatory alternatives (court or arbitration), the third party is catapulted into a highly significant position. It is he or she who seeks to craft the solution, usually drawing on some pre-existing norms, such as application of law or a contract between the parties that specifies the substantive rules to be

applied. The "interest' of the parties have no place in adjudicatory alternatives. Often the solution is an "all or nothing" variety, so that instead of an accommodative solution, we have a winner and a loser.

Corporate establishments and their lawyers are reasonably familiar with adjudicatory alternatives, all of which attempt to replicate the judicial process in a less costly and time-consuming fashion. The growth within the past 40 years of arbitration, probably the best known of the adjudicatory alternatives has been phenomenal. Prior to the outbreak of World War II, virtually no one was willing to submit working place disputes to arbitration, but with the official blessing of the American Supreme Court in the famous Steelworkers Trilogy case, judicial approval was reaffirmed to the submission of industrial disputes to arbitration. Ever since, arbitration became a viable world-wide alternative to the delay and expense of inflexible traditional litigation. Arbitration may be binding or non-binding, voluntary or compulsory, private, statute authorised or court-annexed, and may consist of one arbitrator or a tripartite panel.

The essence of the arbitration process is the decision-making role of the expert third party neutral. Arbitration does not provide the parties with the same range of options or the same right of self-determination as in the mediation process. Indeed, save for its informality, its speed, its cost and the involvement of the parties in choosing the judge, arbitration has the identical "win-lose" feature of a trial. For this and more, many multi-national corporations are backing away from its use as a first dispute resolution mechanism of choice. This however does not take away from its relevance as an effective ADR mechanism.

HYBRID PROCESSES

One significant development of the dispute resolution movement has been the spawning of various "hybrid" dispute resolution processes, each of which blends in some way the particular features of some of the basic processes mentioned above. For example, mini-trial or what I prefer to call "Executive-Dialogue" is a hybrid rights and interest-based procedure, combining mediation, negotiation and non-binding arbitration. It was developed in 1976 in a complex patent and infringement case, which had been languishing in the Federal Court in Los Angeles for a number of years, racking up dust and significant attorneys' fees without any apparent progress.

The Counsel in that case decided that a new kind of process was needed. They hired a retired judge to act simply as facilitator for exchange of information between the parties. The procedure was such that the lawyers for each side presented the very essence of his case and the other side's lawyer would question the plaintiff about issues raised. This same procedure is followed by the other side.

A key feature of this proceeding is that there must be present high officials of both organisations who were not personally involved in the dispute but who have full authority to settle. Thus in a typical inter-corporate dispute, the CEO of each organisation must be present. At the conclusion of the proceedings, the high-ranking officials, having now been exposed, perhaps for the first time - to the real strength and weakness of their case and their opponent's retire to see whether they can work out an acceptable solution. Oftentimes, the solution is not expressed in legal terms but rather, along business lines.

In the instant case, it took these two officials less than an hour to find such mutually acceptable business solution. Should the parties have been unable to find a solution, the retired judge would have provided an opinion as to likely outcome in court. Armed with this information, parties could again attempt to negotiate an acceptable solution.

Another hybrid process is called Early Neutral Evaluation (ENE). Here, a neutral evaluator, generally, a judge or a lawyer with specialised expertise and experience in the substantive area in issue, gives a brief non-binding opinion early in the litigation. The evaluator, identifies the main issues in dispute, explores the possibility of settlement and, assesses the merits of the claims. While ENE might include actual settlement discussion, its more narrow purpose is to make both the case development and the rights settlement processes more efficient. For cases involving simple legal principles, ENE is useful by providing simple valuations of a claim. More importantly, ENE provides the litigants with a neutral expert who can provide neutral standards against which parties can measure their positions and chances.

Finally, experts have sometimes tried to blend mediation, with its persuasive force, and arbitration, with its guarantees of an assured outcome into a process called Med-Arb. Simply put, it is mediation followed by arbitration where mediation fails to resolve the dispute or parts of it. By this approach, it is thought that the best of both worlds is achieved. But there is a vigorous debate amongst academics whether

commingling these two quite distinct processes in one individual does not produce bad result. If the parties are to communicate their fears freely with the mediator during mediation, how then can he suddenly don a Judicial (arbitral) hat and purport to hand down a judgment that must be based strictly on narrow legal considerations?

3. CHOOSING THE 'RIGHT' ADR MECHANISM FOR SPECIFIC DISPUTES

The dispute resolution mechanism chosen for particular disputes depends on the result desired. For example, where a severance in relationship is the goal, or an interim relief is sought, or a precedence is required and where delay is seen as beneficial, then an adversarial mechanism such as litigation might be the most appropriate route to take.

However, where parties are in an important relationship, the sustenance of which is mutually beneficial, or where there is a predisposition on the part of the parties for a settlement; where there is a desire for confidentiality or for party control of own dispute; where there is a belief that a neutral third party may help arrive at a negotiating position; where there is a concern for loss of face; where emotions have run so high that a forum is needed to fully express feelings; where parties are in a dispute-prone industry; where the source of dispute is not clear; where many people are involved or where there are complex or technical issues and more importantly, where there is a desire to save an ongoing business relationship, then an amicable dispute resolution mechanism such as mediation would be the most appropriate approach.

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.

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.

For example, 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" Jose 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 year. 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 does not permit.

It is clear from the thoughts that I have shared so far that I would give precedence to ***mediation*.** The most important reason why I think a dispute should first be mediated whenever direct negotiation fails is that mediation is user friendly, speedy and cheap. It also allows the parties to continue talking to one another under strict confidentiality albeit with the assistance of a trusted third party, the mediator. This ensures that a dispute does not kill an important relationship but is rather used to strengthen it and make it grow to the mutual benefit of the parties.

4. ADR IN ACTION

I began this roundtable discussion by saying that disputes are inevitable. To minimise the cost of disputes, I examined some of the ADR mechanisms, with emphasis on mediation as a viable tool in the resolution of business dispute. No doubt my emphasis has been on resolving specific disputes. But even if you succeed in resolving a particular dispute, the underlying conflict of interest that generated the dispute will remain. New disputes will arise, and the parties may go back to fighting. Thus, to have an impact beyond a single dispute, the challenge is to develop procedures that the parties will use, even in your absence, to resolve disputes more satisfactory and at minimal cost. That is the ultimate application of ADR. Indeed, that was the challenge facing union and management of Eastern Airlines in 1997; IBM and Fujitsu in 1987; and Texaco and Mobil in 1998.

In 1982, a dispute arose between the two computer giants, IBM and Fujitsu concerning the copying of IBM mainframe operating system software by Fujitsu. As stipulated under the terms of their agreement, two arbitrators were appointed, one skilled in dispute resolution, the other a retired computer executive. The arbitrators felt the case was suited to ADR and that it would be more beneficial to deal with general agreement to regulate future disputes, rather than the specific case at hand. Thus, they decided to act as mediators rather than arbitrators. They successfully plotted out agreements which dealt with the past software abuses, made compensation payable and finally set out in the contract governing their relationship that any future dispute arising between them would be handled by ADR.

Similarly, in 1986, two oil companies that were about to engage in a joint venture agreed that all disputes arising out of the joint venture would be submitted to a partnership committee. Disputes not resolved by the partnership committee were to be referred to two senior executives, one from each company, both uninvolved in the joint venture. The executives' task was to study the problem and, in

consultation with their companies, negotiate a settlement. If they were unsuccessful, the dispute was to be sent to final and binding arbitration.

Why did the corporations in these two examples set up elaborate dispute resolution systems? Why didn't they opt for litigation in resolving their differences? Why did the arbitrators chose to act as mediators before embarking on arbitration? More importantly, why didn't the two oil companies simply provide in their contract, as often done that any dispute between them would be resolved by arbitration? The answer is clear: Change. Change in the way agreements are being drawn; change in our understanding of conflict and in the way organizations deal with disputing.

Any organization, medium size or large (whether banking, construction, insurance or petroleum) can use this concept to develop a systematic framework for handling disputes within the organization as well as those between it and others. An excellent example is the Motorola Corporation where under a new policy all new and existing lawsuits that seek damages of more than $50,000 were to be reviewed by using an "ADR Case Evaluation Worksheet" which they developed. This screening procedure also requires that all new disputes involving claims of more than $20,000 be reviewed by the responsible attorney in consultation with one of the ADR specialists on the team. If there is a consensus between them that ADR is the appropriate approach, then the lawyer must urge the client to use ADR.

5. HOW CAN WE MAKE MEDIATION MAINSTREAM IN OUR ORGANIZATION

The first step is to ensure that your management staff are exposed to the idea and practice of mediation. This should not be restricted to in-house solicitors but all managers. A good manager today must also be a good mediator. It is not difficult to make a company executive wear the cap of a mediator: the manager is already skilled in one kind of negotiation or the other and utilizes it in his day-to-day work. In order to acquire and apply mediatory skills, the manager is re-orientated to use structured, party-controlled, non-adversarial, non-competitive and non-coercive negotiation techniques which is what mediation is all about.

The second step is to ensure easy access to mediation in times of dispute by making provision for it in all contracts. An example of a mediation clause is the following:

> "The parties hereby agree that in the event of disputes arising from this agreement, the parties shall, in good faith, undertake a speedy resolution by reference to a mediator under the Mediation Procedures Rules of the NCMG Centre for Dispute Resolution."

Where you already have a dispute at hand and your contract subject matter of the dispute does not provide for a mediation clause, you could persuade the other disputant to agree to mediation in which case, the agreement to mediate will read as follows:

> "A dispute having arisen between the parties in respect of (describe the nature of dispute), the parties have agreed to attempt an amiable and confidential resolution by reference to a mediator under the Mediation Procedure Rules of the NCMG Centre for Dispute Resolution"

A third step is for organisations such as the Institute of Directors (IOD) to provide for mediation in their charter or their articles of association. This makes it easy for their members especially in disputes between them to make use of the charter provision to resolve their disputes holistically.

Alternatively, the organisation could draw up a *Dispute Prevention and Management Policy* which would subsequently be widely publicised among members and at the same time, IOD could encourage its member Organisations to endorse the **ADR Pledge** of NCMG.

In order make the IOD policy and the **ADR Pledge** effective, the organisation could constitute interested members into specialised mediation panels, for example, Bankers' Mediation Panel, Construction Mediation Panel, Securities and Finance Mediation Panel etc. This will provide easy access to mediation for members of the organisation. This policy would not foreclose members' rights to seek and obtain urgent legal relief to protect themselves in the interim, that is, before the commencement of mediation. It also does not prevent them from legal representation: the process of mediation has plenty of room for robust advocacy although not for legal arguments and faultfinding.

6. The NCMG Centre For Dispute Resolution

The NCMG Centre for Dispute Resolution is a division of the Negotiation & Conflict Management Group, an independent, non-profit organisation with the primary mission of promoting peace and the widespread use of prompt, effective and economical means of dispute resolution.

The NCMG Centre which is located at No.8, Boyle Street, Onikan, is the first Alternative Dispute Resolution Centre in Nigeria and operates as a "Multi-door" dispute resolution service Centre. Depending on the nature and complexity of the dispute, the Centre offers options ranging from Mediation, Neutral Evaluation, and Med-Arb to Arbitration in the resolution of disputes.

The NCMG Centre maintains a list of respected Mediators drawn from various industries and professions. Parties in disputes have access to this list from which both parties choose and agree on a mediator best suited for their dispute. The mediators are trained to international standards in addition to being outstanding in their own professions and industries. For international disputes, The NCMG Centre has access to mediators and facilities all over the world through its association with established organisations such as the *Centre for Dispute Resolution,* London, the *JAMS/Endispute* and *Resolutions LLC* both in the Unites States.

The NCMG Centre also maintains a panel of arbitrators. Former Chief Judge of Lagos State, Hon. Justice Rosaline Omotoso is the President of The NCMG Centre for Dispute Resolution.

ADR 2000 AND THE BUSINESS COMMUNITY

The central aim of ADR 2000 is to make amicable dispute resolution (ADR) "mainstream" in legal, business and public sector practice before the end of the year 2000. The *ADR 2000 Project* builds on our existing experience and the fast-growing universal transformation of ADR from a fringe activity to a core system. We consolidate and deepen the successes achieved in ADR development, open up new horizons in practical ADR applications and, more importantly, develop the capacity of NCMG as an organisation to monitor and respond to the need of the business community for ADR services.

In summary, five major priorities guide the **ADR 2000 Project:**

I. To encourage the government (Federal and State) to have all civil disputes involving the government or its agencies referred to mediation or any other ADR process as a first step before litigation.

II. To add to the resources for justice available to the public by having the rules of court amended to accommodate the ADR concept and allow judges in appropriate circumstances to refer cases to ADR providers or the court annexed ADR programs to be established with NCMG assistance.

III. To have corporate bodies demonstrate commitment to cutting the cost of dispute by signing an **ADR PLEDGE** agreeing to have disputes referred to ADR as a first step before having recourse to litigation.

IV. To ensure "tomorrow's lawyers" and professionals are better equipped for client service by having the Nigerian Law School, the Universities and other institutions of higher learning make ADR a core subject of study/training.

V. To enhance the capacity of the general public to resolve disputes amicably and cut the costs of conflict by providing public lectures and awareness programmes towards making ADR a way of life in human interactions, be it personal, communal, corporate or national.

CONCLUSION

ADR is a "paradigm shift" from thinking solely about who is more right and less wrong, to openly and fully discussing all parties' interest, which include money, legal considerations and other particular needs, wants, hopes and fears. This is the way disputes should be and indeed, would be processed by corporate organisations in the 21st century. To find relevance in the "global neighbourhood", corporate policy must emerge on *ADR.*

With virtually no down side and such great potential benefits as the restoration of business relationship, it only makes good business sense for corporate organisations, business executives, lawyers and other professions to approach the mediation room long before the courtroom.

I thank each one of you for taking out time to listen to me and to NCMG's vision for amicable dispute resolution particularly in business. I do hope that when the ADR 2000 Project is formally launched, we shall have the benefit of your presence and endorsement as a mark of your undoubted commitment to this business approach to managing disputes. I shall be happy to hear from you and your various organisations as to how the NCMG Centre for Dispute Resolution can assist both the IOD and your individual organisations to manage corporate disputes holistically.

This presentation will be incomplete if I do not the “millennium problem”, the scope and impact of which cannot be under-estimated. NCMG is not only part of the International Millenium Accord to effectively deal with Y2K disputes but has also designed Fast Track procedures for disputes being anticipated when the clock hits 12.01a.m on January 1, 2000. I believe NCMG is an Organisation worthy of associating with through membership. The benefits are too great to ignore.

God bless you all.

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