

**RE-THINKING BINDING MEDIATION IN COMMERCIAL  
DISPUTES IN NIGERIA.**

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**ABSTRACT**

The modern investments and commercial transactions is largely depended on the need to protect and preserve relationships and to minimise wastage including time, thus growth of the business or commerce is paramount. Business men today are mindful of the fact that disputes and conflict in commercial relationships or agreements are inherent and imminent, therefore resort to litigation to resolve the disputes is not desirable. Consequently business men resort to an Alternative means of resolving their disputes amicably, without acrimony or ill feelings. This is not unconnected with their experience over the years in litigation and it's unsatisfied and inconveniences as a result. The preference and desire to settle disputes through alternative means is increasing and popular in Nigeria. One of the available process for resolving disputes amicably is Mediation, and this study seeks to determine the efficacy, potency and sufficiency of mediation as an alternative to litigation. And to further expand the frontier of discourse in Mediation literature to suggest an enforceable regime of all mediation settlements, perhaps mediation is rather more friendly, consensual, free and flexible. The theoretical disposition of this study is based on the proposition that underscored the central theme of the research and the need to fill in the existing gap in the available literature.

Keywords: mediation, enforcement, commercial disputes, legal framework, Nigeria

## 1- INTRODUCTION

Mediation is one of the process available within the “ADR” framework, its preference and prominence is increasingly amazing, and its potency as a means of resolving disputes among other mechanism is outstanding.<sup>1</sup> Recently considerable attention by both scholars and business men towards finding an alternative means of resolving disputes within the business and commercial environment is unprecedented, mainly due to formalised and procedure entrenched system of litigation that seriously affected the just and quick dispensation of justice.<sup>2</sup> Mediation on the other hand has many advantages which includes cost effectiveness, private, consensual and delay free<sup>3</sup>.

Mediation seek to forged an amicable settlement and foster peace and friendships between the disputing parties, it is facilitated by a neutral third party who is appointed by the disputing parties and whose function is to help, facilitate, create an enabling landscape for negotiation of the conflict which will culminate in to a settlement agreement between the disputing parties. Conflict are inevitable in commercial relationships and an improved investment climate is essential to economic growth development, thus the nature of the legal system is key factor in assessing good investment climate, and the focal point of concern in the assessment of the legal system is the available disputes resolutions mechanism is effective, affordable, transparent and stable.<sup>4</sup>

This study has note with dismay that in spite of positive attributes of mediation is still remain within the private realm of the disputing parties, the implication therefore is that mediation is able to achieve all its advantages and benefit subject to sincerity, willingness, and submission of both disputants. And even though they submit one can withdraw before agreement is reached or even where it is reached a party can nevertheless rescind the agreement. This study astonishingly interrogate this reality after mediation has commenced and concluded a party on flimsy excuse raised issues of technicalities and seek interpretation in court, and the disputes surfer set back which the disputing parties sought to avoid ab initio. This study will converse an argument that once valid and legitimate settlement is reached the dispute cannot be adjudicated upon except an enforcement of the settlement ratified by the parties.

## 2- DEFINITION AND CONCEPTUAL CLARIFICATION

Mediation as any other legal term or terminology can hardly be defined but where one is made a thoughtful analysis will reveals that it described rather than define, thus Mediation can be define as;

*“a negotiation carried out with the assistance of a neutral third party at  
The instance of disputing persons, corporate or communal entities. The*

*Disputants usually voluntarily submit their dispute to a negotiated settlement through the good offices of a facilitator who acts as a mediator, creating the atmosphere needed to enable the parties find or agree on a mutually acceptable solution to their disputes”<sup>5</sup>*

Accordingly Mediation as opined by Lukman, A.A<sup>6</sup>, is an intervention of a third party who helps the disputing parties in finding an option which is of mutual benefit. Other scholars viewed Mediation the intervention of a third party called a mediator who assist the disputants reach a settlement of disputes, a mediator does not suggest the terms of settlement nor compel parties to reach a settlement.<sup>7</sup> For our purposes within the purview of this study, to define the meaning and contours of mediation, it thus define as the appointment of a neutral third party at the instant of the disputants to create an enabling environment to assist them to reach an amicable settlement.

<sup>1</sup> Lukman, A.A, “Enhancing Sustainable Development by Entrenching Mediation Culture in Nigeria”, in Journal of Law, Policy and Globalization, vol.21, (2014), pp.19-27, available at <<http://www.iiste.org>> visited on February 21, 2015.

<sup>2</sup> Ibid, Lukman, A.A, at 19

<sup>3</sup> Brown,H, and Marriott, A, ADR Principles and Processes, Sweet and Maxwell, London, (1993), p,19

<sup>4</sup> Rhodes-vivour, A, Arbitration and Alternative Disputes Resolution as Instruments for Economic Reform, available at <<http://www.lawguru.com,html>> visited on January 27, 2015

<sup>5</sup> Chief, Udechukwu, U.N, (SAN & KSC), “Application of Mediation in Commercial Disputes: Emphasis on Sale of Goods, Domestic and International Trade Perspective”, available at <<http://www.lawguru.com,html>> visited on January 27, 2015

<sup>6</sup> Opcit, at 19

<sup>7</sup> Ezejiofor, G, (1997), The Law of Arbitration in Nigeria, Longman, Ikeja, Nigeria, p.7

It is increasingly important for comprehensive analysis to distinguish mediation process from other mechanism within ADR family, which include Arbitration, Negotiation and Conciliation.

**2-1 ARBITRATION;** This is a mechanism for the settlement of disputes, under which the parties agree to be bound by the decision of an arbitrator whose decision is in general, final and binding on both parties<sup>8</sup>. Essentially arbitration is at the instance of the disputing parties, they are at liberty to choose the arbitrator(s), venue for arbitration, language to be used, agree on rules and applicable laws<sup>9</sup>. It is worthy to note that Arbitration may arise as a result of the agreement of the parties to disputes or from a statutes which requires settlement of certain disputes by arbitration or from the orders of the court.<sup>10</sup> Thus, Arbitration is party driven initiative which is regulated by statutes and enforceable by the court, but Law governing Arbitration also provides for Conciliation<sup>11</sup>

**2-2 CONCILIATION:** this is a process for settlement of disputes at the instance of the disputants where a third party brings the disputants to discuss and reached an amicable settlement. A party who initiate a conciliation shall send a written notice which may contain subject of disputes and if the other party accept the invitation to conciliate, the conciliation commence. The parties may agree to conciliation body consisting of one or three conciliators, in the case of three conciliators, each party shall appoint one and the two shall jointly appoint the third. Accordingly the conciliation body shall acquaint itself with the details of the disputes and may require any other or additional information necessary for the settlement of disputes, After the conciliation body heard the parties in person or by representation and examine and evaluate the issues in disputes, it shall submit it terms to the parties for consideration.<sup>12</sup> If the parties agreed to the terms of settlement submitted by the conciliation body then, it shall draw up a settlement agreement and sign a record of settlement, but if parties reject the terms then they are at liberty to resort to litigation or Arbitration as the case may be.<sup>13</sup>

It should be noted that the similarities between conciliation and mediation is the intervention of third party, while in mediation the third party merely intervenes by creating an enabling environment for the parties to reached an amicable settlement, conciliation on the other hand issued out a judgement in terms of settlement agreement. However some scholars seems to disagree on the definition and concept of conciliation and mediation as to their similarities, some consider that they are synonymous others think that they are similar in nature but distinguishable by the intensity of the power of intervention vested in third party, Some think that a mediator has greater power than conciliator while others believe otherwise, In this context the two concept are not distinguishable<sup>14</sup>.

**2-3 NEGOTIATION:** This is a process where the disputants engaged each other in discussion towards reconciling their differences with a view to reaching an amicable settlement. The settlement is essentially a compromise that is, one party giving out something in order to get something in return.<sup>15</sup> This is also party driven, absolutely private and largely subject to parties experience and skills, primarily the parties might identify their differences and preferences and then make a compromise subject to mutually satisfactory agreement.<sup>16</sup>

It is observed that in negotiation there is no intervention of a third party, indeed, this process to a large extent remain a theory because hardly a disputants negotiate without a third party. Where they hope to do, it will result in one party taking advantage of the other, perhaps due to imbalance of power in skills, experience, knowledge or status or even the interplay of social stratification on the personalities, it may be obviated by the appointment of a facilitator who moderate the peace process and enable them find point which settles their disputes, to their mutual satisfaction.<sup>17</sup>

<sup>8</sup> Orojo, O.J, and Ajomo, A.M.(1999), Law and Practice of Arbitration and Conciliation in Nigeria, Mbeyi & Associates, Lagos, Nigeria.

<sup>9</sup> Temitayo, B.A, “Why Arbitration Triumphs Litigation: Pros of Arbitration”, in Singaporean Journal of Business, Economics, and Management Studies, vol.3, No.2, 2014, pp.32-38

<sup>10</sup> Otuturu, G.G, “Some aspects of the Law and practice of Commercial Arbitration in Nigeria”, in the Journal of Law and Conflict Resolution, vol.6(4), (2014), pp.67-77

<sup>11</sup> Arbitration and Conciliation Act, cap. A 18, Laws of the federation of Nigeria, 2004. (herein after referred to as the Act)

<sup>12</sup> see section 41 of the Act

<sup>13</sup> Ibid, section 41 of the Act

<sup>14</sup> Antaki, N.N, “Cultural diversity and ADR Practice in the world”, in Freeman, M, (eds.), Alternative Disputes Resolution, Dartmouth publishing Co ltd, England, (1995), p.271

<sup>15</sup> Opcit, Otuturu, G.G, at p.68

<sup>16</sup> Ibid, at 68

<sup>17</sup> Opcit, Chief, Udechukwu, U.N, at p.2

**2-4 MED-ARB, (COMBINED PROCESS);** In this instance the two separate and distinct process are combined to form one mechanism for dispute resolution, med-arb is therefore an acronym for mediation and arbitration. It is simply fusing the operational expediency of mediation in to arbitration, whereas in mediation is the invention of a neutral third party at the instance of the disputing parties to facilitate a negotiated settlement, but not necessary by reference agreement already in place. While in arbitration it is the disputing parties that gave the arbitral tribunal authority to adjudicate the disputes between them which said authority is backed by legislation.

### 3- STRUCTURAL AND ARCHITECTURAL MEDIATION

The mediation engineering involves multiple dependent variables which include; conceptual awareness and appeal, identify and define areas of conflict and disputes, mediator, when, how and venue, it is party driven initiative largely dependent on the parties submission to mediate, it is also absolutely private, flexible and mutual consent towards mutual benefit.

**3-1 WHO INITIATE MEDIATION:** The parties to commercial transaction often, at the time of executing the contract document or agreement, such agreement may contain mediation clause or provision, which subject the parties to mediation where disputes arises regarding the agreement. Parties may resort to mediation even if the agreement does not contained mediation clause, but in their bid to save time and money, avoid wastage of energy and protracted litigation, may also resort to mediation. It is observed that the parties may on their own or with the encouragement of their lawyers resort to mediation.<sup>18</sup> Mediation may be ordered by the court<sup>19</sup>, subject to either party application thereto.

Practically speaking mediation commences when one party propose or offer the option to mediate the disputes or conflict by personal invitation or notice from his lawyer, the party may or may not consent subject to different perception regarding issues of being weak or doubt the effectiveness of the process<sup>20</sup>, but if he consents the disputants determine a mediator

**3-2 WHO CAN MEDIATE;** A Mediator is appointed jointly by the disputing parties and it can be any person who can facilitate the effective discussion towards amicable settlement of the disputes under reference, Currently Nigeria has no legally designated mediators, this is not unmindful of the formalised training of mediator and even chartered mediators in Nigeria with affiliation to United Kingdom chartered Arbitrators and Mediation body. This training is carried out by a private mediation experts and issued out a certificate of proficiency at the end of the training.<sup>21</sup>

A mediator must possess the quality of sufficiently understanding the human nature on how to manage temperaments and foibles, and must have capacity to mediate and enjoy the confidence and trust of the disputing parties.<sup>22</sup> He must also maintain neutrality to enable him operate as an unbiased umpire.

**3-3 WHEN TO MEDIATE:** The time to mediate is not when the conflict occurred but when the parties realised that they need to mediate, either as a result of failure of Negotiation due to deep rooted prejudice or historical acrimony, or they realised they need a facilitator to mediate between them, or they couldn't reach a compromise through the Negotiation process. At this point the parties determine the venue of mediation, which could be anywhere convenient they choose, currently the usual venue is the private mediation professional's centres or court connected mediation centres.

**4- THE MULTI DOOR COURT HOUSE:** The American Bar Association organised National Conference in honour of Roscoe pound in 1976, on the theme "causes of dissatisfaction with the administration of justice", at the conference Professor Frank Sander of the Harvard Law School created the concept of the "multi door court house."<sup>23</sup> It is popularly called a multi-door court house because of the several "doors" or disputes resolution

<sup>18</sup> Ibid, at p.5

<sup>19</sup> Ibid, at p.5

<sup>20</sup> Opcit, Lukman, A.A, at p.20

<sup>21</sup> These private outfit include settlement House, Negotiation and Conflict Management Group, and others

<sup>22</sup> Opcit, at p.4

<sup>23</sup> Crespo, M.H, "A Dialogue between professor Frank Sander and Mariana Hanandez-Crespo; Exploring of the Multi-door Court house", in University of St. Thomas Law Journal, available at <<http://www.ssm.com/abstract>> visited on January 27, 2015

mechanism which it provides,<sup>24</sup> these include Arbitration, Conciliation, Negotiation and Mediation<sup>25</sup> and perhaps may not mention but depends on the particular multi door court house.

The establishment of the multi-door Court house in Nigeria is as a result of concerted effort and joint collaboration between the Negotiation and Conflict Management Group (NCMG) a non-governmental organisation and the High Court of Lagos State, which provided the space and the organisation funded the project based on public private partnership basis.<sup>26</sup> This therefore emerges as the first court connected Alternative Dispute Resolution centre in Africa,<sup>27</sup> Nigeria therefore is the to lead in this direction and provide African illustration of alternative means of access to justice within the confine territory of the judiciary, this approach will certainly instil and command obedience, trust and optimism from the public for being its formal and procedure entrenched disposition.

The emergence of Lagos Multi-door court house is a commendable initiative and sooner than later it was replicated in other states of the federation such as; Kwara, Kano, and Borno States, respectively are among the pilot states, even the federal Capital Territory, Abuja later followed suit.<sup>28</sup> This silent revolution has injection new approach and focus in the justice administration generally and provide an alternatives to litigants or disputing parties, thus, the concept of Multi-door court house provide for several windows where disputants will ventilate their grievances and settle their disputes amicably. It provides for options based on available process or mechanisms uniquely designed to meet the challenges, peculiarities and complexities of a given society,<sup>29</sup> for instance the Borno Multi-door court house has specially designed mechanism called “SULH” this is informed by the fact that predominant inhabitants of the state are Muslims, and has considerably reflect their socio-religious persuasions.<sup>30</sup>

It should be clearly spelt out that multi-door court houses have exhaustive list of all mediation practitioners and other specialist, so whenever disputing parties approached the centres for disputes resolution they the parties will first be given the option of choosing among the list of certified mediation specialist or suggest any preference outside, for example if a party insist to be represented by his legal counsel which is usually the case.<sup>31</sup>

**5- CUSTOMARY AND TRADITIONAL MEDIATION;** Mediation in both concept and practice is not new to Nigeria or African society, what is new is the imposition of adversarial system of litigation as a result of colonial domination of Africa which impacted on the psych and life of Nigerians generally in grater dimensions changes and transform Africans in to superficial Europeans men with a varying degree of behaviour, taste and opinion,<sup>32</sup> it is virtually the only method or process of disputes resolution when chiefs, emirs, family head, elders within the traditional framework usually will be consulted to resolve conflict matrimonial, communal or commercial or land related.<sup>33</sup> Thus, the Supreme Court in the case of **Agu v. Ikewibe**<sup>34</sup> The most common method of settling disputes in all indigenous Nigerian society is by reference of the disputes to head of the family, elders in the community for a compromise solution based on the submission of the parties, which either party is at liberty to rescind at any time before a compromise is reached. The court affirmed that this one of the most accepted methods of settling disputes in traditional Nigeria. In another decision of the court of Appeal in the case of **Okpuruwu v. Okpokam**<sup>35</sup> Hon. Justice **Oguntade JCA** (as he then was) observed as follows:

*“In the pre-colonial times and before the advent of the regular courts, our people (Nigerians) certainly had a simple and inexpensive way of adjudicating over disputes between them. They referred them to elders or a body set up for that purpose. The practice has over the years become strongly embedded in the system that they survive today as custom.”*<sup>36</sup>

<sup>24</sup> Aina, K, “Alternative Disputes Resolution and the Relationship with Court Process”, being a paper presented at Nigerian Bar Association Annual/Delegate Conference, Abuja, Nigeria, (2004), p.3

<sup>25</sup> Ibid, Aina, K, at p.4

<sup>26</sup> Ibid, Aina, K, at p.2

<sup>27</sup> Aina, K, (2005), “The Multi-Door Court House Concept: A Silent Revolution in Legal Practice”, being a paper delivered at the Nigerian Bar Association General/Delegate Conference, Jos, Nigeria, p.5

<sup>28</sup> Opcit, Lukman, A.A, at p.21

<sup>29</sup> Opcit, Aina, K, at note 26

<sup>30</sup> See the Borno Amicable Settlement Corridor (practice direction) 2009

<sup>31</sup> Opcit, Aina, K, at note 26

<sup>32</sup> Opcit, Rhodes-vivour, at 3

<sup>33</sup> Likman, A.A, at 20

<sup>34</sup> (1991) 3 NWLR (PT.180) 385, SC

<sup>35</sup> (1998) 4 NWLR (pt.90) 554, CA

<sup>36</sup> Ibid, at p. 586

Although custom of Nigerian people recognises amicable settlement of dispute by means of referral to elders or head of the family as the case may be, and has been recognized by Nigerian legal system<sup>37</sup>, yet it cannot meet the demand of complex modern commercial relationships.

## 6- TOWARDS ENHANCING MEDIATION PRACTICE IN NIGERIA;

Mediation as a concept and in practice is facing tremendous challenges and its prospects cannot be down played either, the business community and investment environment has since embraced mediation as disputes resolution option, due to its immeasurable advantages which includes privacy, flexibility, speed, costless, free from technicalities and conclude in win-win situation. The foregoing attributes gives credibility in the civil legal system and build in optimism in the mind of the disputants, accordingly **Lord Woolf** observe that the civil legal system must uphold and preserve the following principles; (1) be *just* in the results it delivers; (2) be *fair* in the way it treats litigants; (3) offer appropriate procedure at a reasonable *cost*; (4) deal with cases with reasonable *speed*; (5) be *understandable* to those who use it; (6) be *responsive* to the needs of those who use it; (7) provides as much *certainty* as the nature of particular case allows; (8) be *effective*, adequately resourced and organised<sup>38</sup>.

This study therefore suggested, that to achieve the foregoing principles the civil legal system must integrate in to its fold and sufficiently entrench these principles as its operational indicators to guide civil justice administration. It also observed that the high court of Lagos state has made provision in its civil procedure rules to the effect that it provide for pre-trial conference basically to midwife an amicable settlement of the case,<sup>39</sup> it is also noted that almost all States that established the multi-door court houses has these provision in its rules of court.<sup>40</sup> In the case of the federal capital territory, High court a judge before whom a case is pending may encourage amicable settlement, subject to the joint consent of the parties to either Arbitrate, Conciliate, Mediate or to adopt any other lawfully recognised mechanism for disputes resolution<sup>41</sup>. Thus, the High court of Borno State has since issued out practice direction<sup>42</sup>, which was inspired by the Lagos State practice direction, but there is practice direction on mediation in Lagos state.

However, the civil procedure rules are of persuasive consideration and has not impacted sufficiently on the development of mediation as concept and in practice, therefore some scholars advocated for Mediation Act for Nigeria<sup>43</sup>, to provide for adequate structural incentive and a more legally regulated regime. The proposal for the Act by the Author<sup>44</sup>, is based on an empirical research, and shall provide for establishment of the Board, composition to reflect multi-disciplinary representation and be supervised by the National Judicial Council (NJC), regulate the practice of mediation in training, qualification, accreditation, code of ethics and immunity for both practitioners and institution.

The court connected mediation is the most prominent and popular, because there are no mediation centres with the exception of Lagos state. The practice of Mediation and all other ADR process in Lagos state is robust and still developing, this is largely due to acceptability by the commercial environment and tremendous support by the government. Growth and development requires efficient and effective management of time and reduction of cost, responsible and responsive civil justice system, competent and proficient practitioners, and a strong and self-determine institution.

## 7- CONCLUSION AND SUGGESTIONS

This study primarily aligned with the recommendation of the aforesaid Author A.A, Lukman<sup>45</sup>, in his analysis and proposal for a national legislation for the regulation of mediation practice in Nigeria, and the establishment of an Agency of government to administer the mediation Act. It is the view of this research that a more formalised legal

<sup>37</sup> The application of the concept of legal pluralism afflicted Nigeria and thus created a tripartite legal regime in which Common law, Islamic law and customary law applied simultaneously.

<sup>38</sup> Cited in Oseni, A.U, "Shariah Court-annexed ADR: The Need for Effective Disputes Management in Waqf, Hibah and Wasiyyah Cases in Malaysia" available at <<http://irep.iium.my/id/eprint/27072>> visited on January 20<sup>th</sup>, 2015

<sup>39</sup> See, Order 25, Rule 1, High Court of Lagos State (civil procedure) Rules, 22005

<sup>40</sup> See, High (Court civil Procedure) Rules of Borno, Kwara, Kano States respectively and of course the Federal Capital Territory, Abuja

<sup>41</sup> See, Order 17, Rule 1, of the High Court of the Federal Capital Territory, Abuja (civil procedure) Rules 2004

<sup>42</sup> Signed on 1<sup>st</sup> may, 2009 Practice Direction for Borno Amicable Settlement Corridor (BASC)

<sup>43</sup> Opcit, Lukman, A.A, at p,23

<sup>44</sup> Ibid, Lukman, A.A.

<sup>45</sup> Ibid, Lukman, A.A, note 1

regime is imperative and imminent in view of the acceptability and preference by Nigerians, especially by the business men and commercial environment generally, of mediation as a means and mechanism for disputes resolution.

The need for effective improvement of mediation practice will increase access to justice in terms of affordability, reliability, reduce backlog of cases and remove cumbersome procedure, and ensure faster adjudication. This study further suggest that customary mediation should be integrated in to mediation practice to allow people pursue their disputes within acceptable norms and values. This will instil sense of satisfaction and accomplishment. And where the disputants choose Islamic law to guide the proceedings towards amicable resolution of the disputes, it should be allowed. The training and accreditation of mediation practice is very important, because it will encourage proficiency and professionalism.

It is the view of this research that mediation should remain private, secret, and non-technical and party driven, yet it should be based on legislation and not within the serious, timid and intense premises of the courts. Let there be a distinct mediation centres that will command respect and obedience of the disputing parties. It may also inject and provide a symbols of belief or faith as a means of extracting truth from the disputants. This includes the administration of oath taking and the presence of imam, clergy, etc.

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(2) (1998) 4 NWLR (pt.90) 554, CA