

## CONCILIATION IN NIGERIA

### Introduction

In the world of human interactions and commercial transactions, disputes generally arise as a result of disagreements between the parties involved. When these disputes arise, the need to resolve them as quickly as possible often arises, and the common methods of doing this are litigation, negotiation, arbitration, conciliation and mediation.

The traditional method of resolving such disputes where negotiation failed was by litigation. Globally, this traditional method of dispute resolution is gradually giving way to alternative dispute resolution techniques, especially in this electronic age. If it were practicable businesses would desire an electronic resolution of all disputes! Karl Mackie<sup>1</sup> identifies two major under-currents leading to this global growth. The first relates to dissatisfaction with the costs, delays and uncertain outcomes of the litigation systems (and, to a lesser extent, arbitration, their traditional alternative). The second relates to a deeper social transformation involving our search for systems, which can adequately match the speed, responsiveness, customer orientation and globalization of business and technological change. Another reason, which makes litigation unattractive to a vast number of businesses, is the fact that some disputes are of a sensitive and confidential nature and commercial entities may be unwilling to accept the determination of their rights in the full glare of the public.

Businesses are more likely now than ever to need rapid decisions and dispute procedures, which support rather than undermine business and customer relationships. In this regard alternative dispute resolution techniques are becoming popular because they appear to answer this business need as well as offset some of the defects of the traditional systems. Alternative Dispute Resolution (ADR) consists of a variety of approaches to early intervention and dispute resolution. Many of these approaches include the use of a neutral individual such as a mediator or conciliator, who can assist disputing parties in resolving their disagreement. ADR increases the parties' opportunities to resolve their disputes prior to or during the use of formal administrative procedures and litigation. Such alternative dispute resolution techniques include binding arbitration, co-operative problem-solving, dispute panels, early neutral evaluation, facilitation fact-finding, interest-based problem-solving, mediated arbitration (Med-Arb), mediation, mini-trial, negotiated rule-making, settlement conferences, non-binding arbitration, ombudsman, partnering, peer review and conciliation.

In his *Alternative Dispute Resolution*, M. Ozonnia Ojielo identifies six potential advantages of alternative dispute resolution processes.

### Saving of time and money

Where ADR is introduced at the onset of a conflict, much time and money could be saved. In Nigeria, litigation is usually protracted, time consuming and expensive. A look at the cause-list of the courts reveal matters that have been pending for several years. This does not augur well for business organisations. By producing early settlement, alternative dispute resolution reduces the time and money disputants might otherwise spend on litigation. Even where ADR does not produce an immediate resolution, it can still produce savings by clarifying and narrowing the scope of the dispute.

### Increased flexibility and control

ADR gives the parties greater flexibility and control in the dispute resolution process. The flexibility and control is evident in the procedures followed, the interests considered

and the remedies adopted. ADR enables the parties to adopt a process which best suits the particular situation. This is unlike litigation which follows laid-down rules of the court and focuses only on the parties' legal rights and responsibilities. ADR goes further than this, as it not only addresses the parties' legal rights and obligations but also takes into account a wide variety of non-legal interests and concerns such as an interest in preserving the relationship between the parties, which is of utmost importance in commercial transactions. Additionally, a much broader range of potential remedies is generally available through ADR as parties can adopt creative remedies to their disputes.

### **Confidentiality**

ADR is generally confidential in nature, unlike litigation which proceeds in public, as it were. The parties resolving their disputes through ADR may adopt a method which encourages openness and candour. The extent or scope of confidentiality depends on applicable statutes and the disputants agreeing to use ADR.

### **ADR improves communication and preserves relationships**

The adversarial postures taken in litigation often aggravate the communication problems inherent in most disputes, and may further damage the relationship between the parties. In several instances it may be necessary to preserve the relation between the parties. ADR aims at this by bringing disputants together and encouraging them to talk and work with each other to design a mutually satisfactory resolution for their dispute. ADR processes seek to create a cooperative atmosphere and help disputants find win-win solutions that can preserve or improve, rather than further damage on-going relationships.

### **ADR removes hindrances**

The ADR process gives the parties the opportunities to sell their stories fully. Parties can sell their story to the other side and to a neutral third party in a way that is unavailable in litigation. This is because parties are not hampered by rules of evidence or procedure, which may pose as hindrances to the settlement process.

### **ADR is fulfilling**

ADR reduces stress and increases satisfaction. Litigation can be highly stressful for the parties. Lack of control over the process or the outcome, prolonged uncertainty, and mounting costs make the parties anxious. Parties are more likely to abide by the results of the terms of a resolution because they participated in formulating them.

### **Conciliation**

Conciliation is the adjustment and settlement of disputes in a friendly manner.<sup>2</sup> It has been known over the years as a method of settling disputes by consensus rather than by adjudication. It involves reconciling, appeasing, uniting and winning over the other party.<sup>3</sup> In recent times, the systematic use of conciliation in dispute resolution has assumed more importance because of its efficiency. In Nigeria, conciliation is recognized by the Arbitration and Conciliation Act.<sup>4</sup> Under the Act, the word 'conciliation' is not defined. The Act merely provides that the parties to any agreement may seek amicable settlement of any dispute in relation to the agreement by conciliation.

Conciliation is a technique of dispute resolution wherein a third party or conciliator (who may or may not be totally neutral to the interests of the parties) is used by the parties to help build positive relationships.

### **Conciliation and Arbitration**

Arbitration, which could be binding or non-binding, involves the presentation of a dispute to an impartial or neutral individual or panel for issuance of a binding (in cases of binding arbitration) or advisory or non-binding decision (in case of non-binding arbitration). In Nigeria, both arbitration and conciliation are statutorily provided for. However, these methods of dispute resolution differ from each other. Unlike an arbitrator, a conciliator does not give a decision, but his main function is to induce the parties themselves to come to settlement. An arbitrator is expected to give a hearing to the parties, but a conciliator does not engage in any formal hearing, though he may informally consult the parties separately or together. The arbitrator is vested with the power of final decision and in that sense it is his contribution that becomes binding. In contrast, a conciliator merely assists the parties to come to a settlement by agreement.

An arbitrator generally decides after a contest between the parties, while in the case of conciliation the final result depends on the will of the parties. Therefore, at the end of the proceedings, emotional harmony between the parties may not suffer much, in the case of conciliation.

### **Conciliation and Mediation**

Mediation is the intervention in a negotiation or a conflict of an acceptable, impartial and neutral third party who has limited or no authoritative decision-making power, but who assists the involved parties in voluntarily reaching a mutually acceptable settlement of issues in dispute. In addition to addressing substantive issues, mediation may also strengthen or establish relationships of trust and respect between the parties, or terminate relationships in a manner that minimizes costs and psychological harm.<sup>5</sup> Mediation is useful in highly polarised disputes where the parties have either been unable to initiate a productive dialogue, or where the parties have been talking and have reached a seemingly insurmountable impasse. A mediator makes primarily procedural suggestions regarding how the parties can reach agreement. Occasionally, a mediator may suggest some substantive option as a means of encouraging the parties to expand the range of possible resolution under consideration. He often works with parties individually; in caucuses, to explore acceptable resolution options or to develop proposals that might move the parties closer to resolution.

Conciliation and mediation are similar in that the dispute is resolved by consensus and is entirely a decision of the parties and not of the third party, i.e. the conciliator or mediator. In both cases, the parties appoint a neutral person. In Nigeria for example, the Trade Dispute Act<sup>6</sup> provides for the appointment of a mediator jointly by the employer and the workers for the settlement of a trade dispute. Section 6 of the same enactment provides for the appointment of a conciliator by the Minister of Labour where the mediator fails.

The learned authors<sup>7</sup> of *Law and Practice of Arbitration and Conciliation in Nigeria*, observe that conciliation and mediation are often synonymous. The usual distinction between the two is that in conciliation all that the conciliator does is to explore the opportunity for settlement. He is not necessarily a reconciliator and he has no power to bind the parties.<sup>2</sup> He is not an adviser to the parties, who should turn to their lawyers and experts for advice. He merely provides the environment for negotiation. He may assist the parties by helping to establish communication, clarifying mis-perceptions, dealing with strong emotions, and building the trust necessary for cooperative problem solving. Some of the techniques used in conciliation include providing for a neutral meeting place, carrying initial messages between or among the parties, reality testing

regarding perceptions or mis-perceptions, and affirming the parties' abilities to work together. Mediation in its normal form on the other hand, demands that the mediator be more leading in that he may make recommendations for the consideration of the parties. His role is to persuade the parties to focus on their underlying interests and concerns and move away from fixed positions that often cloud the real issues. His function is to act as a facilitator or broker.<sup>9</sup>

Martin Hunter and Allen Redfern<sup>10</sup> state that a mediator is usually taken to be a person accepted by the parties, whose role is to help them reach an agreed settlement. He sees each party privately and listens to their respective viewpoints. He makes sure that each party understands the other's point of view. He also brings the parties together in order that they may themselves achieve a compromise solution. A conciliator performs a different function, in that after discussing with the parties, he proceeds to draw up the terms of a settlement designed to represent what is, in his view, a fair compromise of the dispute.

According to Henry Brown and Arthur Marriot,<sup>11</sup>

“Mediation is often used interchangeably with conciliation; sometimes, however, mediation is understood to involve a process in which the mediator is more pro-active and evaluative than in conciliation, and sometimes, the reverse usage is used; there is no national or international consistency of usage of these terms.”

### **Conciliation and Negotiation**

Negotiation as a method of dispute resolution refers to talks between conflicting parties who discuss ideas, information and options in order to reach mutually acceptable agreements. It involves the conflict parties discussing matters between themselves in a bi-polar relationship. Even if facilitators are present, communications are essentially between the conflict parties. On the other hand, in conciliation there is the use of a neutral third person who assists the conflict parties in exploring the opportunities for settlement.

Conciliation is useful in preparing parties for negotiation. This is particularly important when the parties have little constructive communication. Their positions may be extremely polarised and their perception of each other highly disturbed as a result of heavy losses in the conflict and/or a particularly protracted conflict. At the beginning of negotiations, recourse may be made to conciliation to resolve preliminary issues.

### **Scope of Conciliation**

Conciliation can be resorted to in relation to disputes arising out of, or relating to a contractual or other legal relationship.<sup>12</sup>

### **Commencement**

Where a party wishes to initiate conciliation, he sends to the other party a written request to conciliate. The request contains a brief statement setting out the subject of the dispute.<sup>13</sup> Conciliation commences when the other party accepts this invitation in writing. If it does not accept it, then there will be no conciliation. It must be noted that if the party initiating conciliation does not receive a reply within 30 days from the date on which he sends the invitation, or within such other period of time as specified in the invitation, he may elect to treat this as a rejection of the invitation to conciliate, and he informs the other party accordingly.<sup>14</sup>

### **Conciliators**

Once the parties agree to commence proceedings, they jointly appoint the conciliator. Under the rules:

- (a) There will be only one conciliator, unless the parties agree to two or three.
- (b) Where there are two or three conciliators, then as a rule, they ought to act jointly.
- (c) Where there is only one conciliator, the parties may agree on his name.
- (d) Where there are two conciliators, each party may appoint one conciliator.
- (e) Where there are three conciliators, each party may appoint one, and the parties may agree on the name of the third conciliator, who shall act as presiding conciliator.
- (f) But in each of the above cases, the parties may enlist the assistance of a suitable institution or person.

### **Institutional Assistance**

Under Article 4(2) of the Conciliation Rules,

- “(a) Parties may enlist the assistance of an appropriate institution or person in connection with the appointment of conciliators.
- (b) The institution may be requested to recommend or to directly appoint the conciliator or conciliators.
- (c) In recommending such appointment, the institution, etc., shall have regard to the considerations likely to secure an “independent and impartial conciliator’.
- (d) In the case of a sole conciliator, the institution shall take into account the advisability of appointing a conciliator other than the one having the nationality of the parties.”

### **Stages in Conciliation**

The conciliation process is as follows:

- (1) The conciliator, when appointed, may request each party to submit a statement, setting out the general nature of the dispute and the points at issue. A copy is to be given to the other party. If necessary, the parties may be asked to submit further written statements, and other evidence.
- (2) The conciliator assists the parties in an independent and impartial manner, in their attempt to reach an amicable settlement.<sup>15</sup>
- (3) The conciliator is guided by the principles of objectivity, fairness and justice. He is to give consideration to the following matters:
  - (i) rights and obligations of the parties;
  - (ii) trade usages; and

- (iii) circumstances surrounding the dispute, including previous business practices between the parties.<sup>16</sup>
- (4) He may, at any stage, propose a settlement, even orally, and without stating the reasons for the proposal.<sup>17</sup>
- (5) He may invite the parties (for discussion) or communicate with them jointly or separately.<sup>18</sup>
- (6) Parties themselves must, in good faith, co-operate with the conciliator and supply the needed written material, provide evidence and attend meetings.<sup>19</sup>
- (7) If the conciliator finds that there exist "elements of a settlement which may be acceptable to the parties", then he formulates the terms of a possible settlement and submits the same to the parties for their observation".<sup>20</sup>
- (8) On receipt of the observations of the parties, the conciliator may re-formulate the terms of a possible settlement in the light of such observation.
- (9) If ultimately a settlement is reached, the parties may draw and sign a written settlement agreement. At their request, the conciliator can help them in drawing up the same.

### **Legal Effect**

The settlement agreement signed by the parties is final and binding on the parties and the agreement is to be authenticated by the conciliator.<sup>21</sup>

### **Role of the Parties**

A party may submit to the conciliator his own suggestions for the settlement of a dispute. Such suggestions may be submitted by him on his own initiative or on the conciliator's request.

### **Conciliator's Procedure**

The net result of Articles 7 and 9 is that the conciliator is not bound by the rules of Civil Procedure of the various courts in Nigeria, or the provisions of the Evidence Act but is guided by the principles of objectivity, fairness and justice. Subject to the foregoing, he may conduct the proceedings in such manner, as he considers appropriate, taking into account the circumstances of the case, wishes expressed by the parties and the need for speedy settlement.

### **Disclosure and Confidentiality**

- (a) Factual information received by the conciliator from one party should be disclosed to the other party, so that the other party can present his explanation, if he so desires. But information given on the conditions of confidentiality cannot be so disclosed.
- (b) Notwithstanding anything contained in any other law for the time being in force, the conciliator and a party keep all matters relating to the conciliation proceedings confidential. This obligation extends also to the settlement agreement, except where disclosure is necessary for its implementation and enforcement.<sup>22</sup>

### **Admissions**

In any arbitral or judicial proceedings (whether relating to the conciliated dispute or otherwise), the party may not rely on, or introduce as evidence

- (i) views expressed or suggestions made by the other party for a possible settlement;
- (ii) admissions made by the other party in the course of conciliation proceedings;
- (iii) proposal made by the conciliator; and
- (iv) the fact that the other party had indicated his willingness to accept a settlement proposal.

### **Parallel Proceedings**

During the pendency of conciliation proceedings, a party is debarred from initiating arbitral or judicial proceedings on the same dispute, except such proceedings as are necessary for preserving his rights. (There is no mention of arbitral or judicial proceedings which are already initiated.)

### **Conciliator Not to Act as Arbitrator, etc.**

Unless otherwise agreed by the parties, the conciliator cannot act as arbitrator, representative or counsel in any arbitral or judicial proceedings in respect of the conciliated dispute. Nor can he be presented by any party as a witness in such proceedings.

### **Conciliation and the Limitation Period**

Most actions are governed by statutory rules of limitation. In such a situation, legal proceedings must be instituted before the expiration of the prescribed period. An action which is instituted after the expiration of the prescribed period becomes statute-barred.

Article 16 of the Conciliation Rules provide that during the pendency of conciliation proceedings, a party is debarred from initiating arbitral or judicial proceedings on the same dispute, except such proceedings as are necessary for preserving his rights. In such a situation, can a party who refrains from instituting a claim within the prescribed period maintain an action after the prescribed period?

In *Inco Beverages Ltd v. Class W, Brans & Ors*,<sup>23</sup> the Plaintiffs in a suit instituted at the Federal High Court claimed from the Defendants special and general damages for negligence in not taking reasonable care or failing to exercise care in employing an efficient and reliable work-force to ensure safe delivery of bags of granulated sugar accepted for delivery to the Plaintiffs. The Defendants applied for the matter to be struck out on the ground that the claim was time-barred having been commenced more than one year after the goods ought to have been delivered. The Plaintiffs argued that with regards to the time-bar that the parties were negotiating, time did not run against them during the period in which negotiations were on. The Court disagreed with the Plaintiffs and held that there is no principle of law or equity which says that negotiations with a view to settlement serves as estoppel to a plea of time-bar. In another decision of the Federal High Court,<sup>24</sup> where the Defendant through its agent granted an extension of time within which the Plaintiff could bring an action, the court held that the Defendant was estopped from pleading time-bar.

The Supreme Court in *Ebaigbe v. NNPC*,<sup>25</sup> held that the rule that negotiations between parties will not stop the time from running is subject to a qualification. Thus where negotiation involves acknowledgment of liability and formal extension of time in writing by the Defendant in favour of the Plaintiff to commence legal proceedings, time will stop running by virtue of such negotiation and the Plaintiff may institute an action after the statutory period.

The importance of this decision is recognized when we consider Article 16 of the Conciliation Rules, which prevents parties from initiating during conciliation proceedings any arbitral or judicial proceedings in respect of a dispute that is the subject of conciliation 'except such proceedings as are necessary for preserving his rights'. A party engaged in conciliation who wants to benefit from his right to judicial proceedings should conciliation break down must endeavour to get the other party to agree to an extension of time.

### References

1. A director in the Centre for Dispute Resolution, London, United Kingdom, in his article: 'The Use of Commercial Mediation in Europe:
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3. *Longman's Dictionary of English Language* 2<sup>nd</sup> ed. p. 331.
4. Chapter 19 Laws of the Federation of Nigeria (LFN) 1990.
5. Moore, W.C. (1991) *The Mediation Process: Practical Strategies for Resolving Conflict*. San Francisco: Jossey-Bass, p. 15.
6. S.3 of the Trade Disputes Act Cap 432 LFN 1990.
7. Under Article 7 (4) of the Conciliation Rules made under the Arbitration and Conciliation Act, the Conciliator may make proposals for settlement to the parties.
8. Orojo, C.O. and M.A. Ajomo, *Law and Practice of Arbitration and Conciliation in Nigeria*. Lagos: Mbeyi and Associates.
9. Allen Redfem and Martin Hunter (1991) *Law and Practice of International Commercial Arbitration*, 2nd Edition.
10. *Ibid* at 26.
11. ADR principles and Practice 1993 at 108.
12. Article 1(1) of the Conciliation Rules.
13. S.38 Arbitration and Conciliation Act Article 2(1) Conciliation Rules.
14. Article 2(4) Conciliation Rules.
15. Article 7 of the Conciliation Rules.
16. Article 7(2) of the Conciliation Rules.
17. Article 7(4) of the Conciliation Rules.
18. Article 9 of the Conciliation Rules.
19. Article 11 of the Conciliation Rules .
20. Article 13 of the Conciliation Rules.
21. S.42(2) of the Arbitration and Conciliation Rules.
22. Article 14 of the Conciliation Rules.
23. (1990-1993) Vol 4 N5C 123.
24. *Inlaks Limited v. Polish Ocean Lines* (1980-1986) Vol.2 NSC 501.
25. (1994) 5 NWLR (Pt 347) 649 at 654.

The information contained in this publication is only intended as a general review of the subject concerned and should not be treated as a substitute for specific advice concerning specific situations. If you need further information about any issue discussed above, please contact Chuka Agbu at [chukagbu@babalakinandco.com](mailto:chukagbu@babalakinandco.com)

**BABALAKIN & CO.**  
 8<sup>th</sup>-10<sup>th</sup> Floors, 24A Campbell Street, Lagos  
 Phone: +234-1-2632185  
 Fax: - +234-1-26237136  
[http: www.babalakinandco.com](http://www.babalakinandco.com)  
 E-mail: [mails@babalakinandco.com](mailto:mails@babalakinandco.com)