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RE-THINKING THE RECOVERY OF BANK DEBTS: THE MEDIATION ALTERNATIVE

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INTRODUCTION

The banking sector of any economy is based essentially on faith and trust: faith that the surplus units who keep money can always recall any money deposited and trust that when the bank gives loans to the deficit units the loan will be recoverable. These are all rational expectations. All banks have guidelines on granting of loans, advances and overdrafts to customers. Unfortunately some bank functionaries grant loans without the necessary collateral security. Some other times, macro-economic instruments are used to the detriment of some sectors of the economy that may lead to industrial failures and the consequent inability to repay the loans/debts.

In Nigeria, since the liberalization of the banking sector and emergence of finance and mortgage institutions, the issue of recovery of bank debts has come to the fore. Other than initial communications to the customers to pay up their debts, litigation has been the sole legal means of recovery of such debts. We shall contend in this paper that litigation is rights based and therefore is less concerned with the needs and interests of the bank and its customers. For instance a customer may default in repayment because of a number of factors, some beyond his control. This is probably why even when judgments are obtained, enforcement is almost impossible. It is imperative, therefore, that there should be a re-thinking about the ways bank debts can be recovered. We shall also contend that most of the crises in the banking industry degenerate to the level of bank

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failures because the parties fail to appreciate the potency of alternative dispute resolution processes. One of the attractions of the mediation model is its privacy and confidentiality. These are also features of the banking sector.

THE MEDIATION ALTERNATIVE

For purposes of this paper, we will consider, as part of the Alternative Dispute Resolution (ADR) processes, mediation and conciliation. It should be stressed that it is impossible to distinguish with certainty some of these procedures from the others. In most texts and jurisdictions, conciliation and mediation are used interchangeably though mediation has become the preferred term. Sometimes mediation is understood to involve a process in which the mediator is more pro-active and evaluative than in conciliation but sometimes the reverse usage is employed. In this paper, we shall use the terms interchangeably. The common feature between the two is that the resolution of disputes is by consensus and is entirely a decision of the parties and not of the third party neutral, i.e. the conciliator or mediator. In both cases, a neutral is appointed by the parties. However, generally the role of the conciliator is facilitative while that of a mediator is not only facilitative but can be evaluative. The neutral's role involves assisting the parties, privately and collectively, to identify the issues in dispute and to develop proposals to resolve them. Quite unlike an arbitrator, the mediator/conciliator decides nothing and awards nothing. Consequently, the mediator/conciliator is not bound to observe the strict rules of natural justice. In carrying out his functions, he is like a shuttle diplomat: he "caucuses".

The settlement of a dispute usually starts with negotiation. It is when this fails that mediation is adopted. Mediation is not only a flexible process but offers more opportunities beyond the exchange of money or other tangible things. Because it focuses on the needs and interests of the parties, feelings, egos and business considerations are given prominence in the settlement process. These benefits make a re-thinking of the processes for resolving the myriad of problems facing the banking industry imperative.

See generally, Macfarlane J (ed) Rethinking Disputes: The Mediation Alternative (London: Cavendish Publishing Limited, 1997), Brown H and Marriott A ADR Principle and Practice, (2nd Ed, London, Sweet & Maxwell, 1999) and Mackie K et al The ADR Practice Guide: Commercial Dispute Resolution (2nd Ed, London, Dublin and Edinburgh, 2000)

Brown & Marriott, Op Cit at 127. See also Orojo J O and Ajomo M A Law and Practice of Arbitration and Conciliation in Nigeria (Lagos: Mbeyi & Associations (Nigeria) Ltd, 1999), p 337 and Asouzu, A "Conciliation under the 1988 Arbitration and Conciliation Act of Nigeria" (1993) 5 RADIC 825 at 827-28

In Nigeria, the legal instruments regulating mediation/conciliation of commercial disputes is the Arbitration and Conciliation Act and the various High Court Laws. According to section 37 of the Act, the parties to any agreement may seek amicable settlement of any dispute in relation to the agreement by conciliation under the provisions of the Act. The Act provides for how the dispute can be referred to a conciliation body consisting of one or three conciliators to be appointed by the parties and after examining the case and hearing the parties, if necessary, the body shall submit its terms of settlement to the parties. If the parties agree to the terms of settlement submitted, the conciliation body shall draw up and sign a record of settlement. However, if they disagree, they may refer the dispute to arbitration in accordance with any agreement between them; or take any action in court as they may deem fit. This is so because the conciliation proceedings is without prejudice to taking further legal action or resorting to arbitration. Although the Act draws a line between domestic and international conciliation, there is no provision for rules to be adopted in the case of domestic conciliation. However, the parties can agree to adopt the UNCITRAL Conciliation Rules or any other rules .

In the case of international commercial agreement, the parties may agree in writing that disputes in relation to the agreement shall be settled by conciliation under the Conciliation Rules set out in the Third Schedule to the Act. These Rules are the same as the UNCITRAL Conciliation Rules. In any case, the rules are optional. The parties can adopt them or other Rules like that of the International Chamber of Commerce (ICC). One striking similarity between mediation and arbitration is that the principle of party autonomy is respected by the consensual nature of the settlement. However one of

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See sections 37-42 and 55 of the Arbitration and Conciliation Act, Cap 19, LFN, 1990 (hereinafter referred to as "the Act") and the Conciliation Rules set out in the Third Schedule to the Act . See also Orojo J O and Ajomo Op Cit at 336

See sections 40 and 42 of the Act.

See UN General Assembly Resolution 35/52 of 4 December, 1980.

See the Third Schedule to the Act, The Rules of the Negotiation and Conflict Management (NCMG) and the Rules of Corporate Mediators.

See section 55 of the Act. supra

differences is the fact that there is no provision for intervention by the domestic court in the case of mediation.

Section 18 of the High Court Act of the Federal Capital Territory provides thus:
Where an action is pending, the Court may promote reconciliation among the parties thereto and encourage and facilitate the amicable settlement thereof.

The import of this provision is that there is a statutory duty imposed on the court to encourage and facilitate amicable settlement of disputes when an action is pending in court but not before an action is commenced. This provision is not in consonance with the current trend in common law jurisdictions where case management strategies are used and ADR processes fully integrated into court proceedings. Under the case management strategies, courts are obliged to inquire from the parties what efforts they made at settlement out of court and any intransigent party may be visited with costs. We humbly submit that our laws should be reformed accordingly. This will help in decongesting the courts.

One fundamental issue that arises from resorting to arbitration or litigation where conciliation proceedings fail is whether the views, suggestions, admissions or indications of willingness to settle might be used to the detriment of the party who made them. This possibility may discourage parties from actively trying to reach a settlement during conciliation proceedings, which may greatly reduce the usefulness of conciliation. In order to address this issue, the UNCITRAL Conciliation Rules provide in Article 20 thus:
The parties undertake not to rely on or introduce as evidence in arbitral or judicial proceedings, whether or not such proceedings relate to the dispute that is the subject of the conciliation proceedings:
(a) Views expressed or suggestions made by the other party in respect of a possible settlement of the dispute;
(b) Admissions made by the other party in the course of the conciliation proceedings;
(c) Proposals made by the conciliation;
(d) The fact that the other party had indicated his willingness to accept a proposal for settlement made by the conciliation.

See section 34 of the Act which gives limited powers to domestic courts to intervene in arbitral proceedings

Cap 510, Laws of the Federation of Nigeria, 1990. See also Rule 12 of the Rules of Professional Conduct in the Legal Profession (Nigeria), 1979

If parties use no conciliation rules or use rules that do not contain a provision such as Article 20 of the UNCITRAL Conciliation Rules, under many legal systems the parties may be prevented from giving evidence of such admissions Similarly, if the conciliation proceedings fail, can the conciliator be appointed an arbitrator where the parties resort to arbitration or a counsel of the other party in judicial proceedings? Generally the conciliator cannot. This is so because Article 19 of the UNCITRAL Conciliation Rules provides thus:
The parties and the conciliator undertake that the conciliator will not act as an arbitrator or as a representative or counsel of a party in any arbitral or judicial proceedings in respect of a dispute that is the subject of the conciliation proceedings. The parties also undertake that they will not present the conciliator as a witness in any such proceedings.

It is noteworthy that in some jurisdictions like the United States, a mediator can be appointed an arbitrator – med-arb. This is premised on the fact that prior knowledge on the part of the arbitrator might be regarded by the parties as advantageous (in particular because that knowledge will allow the arbitrator to conduct the case more efficiently).

One major potential disadvantage of mediation is the possibility that the time and money spent in the proceedings will be in vain if the parties do not reach a settlement. We submit that the attractiveness of this process would be greatly increased if a settlement reached during the proceedings would have executory force so that a party to the settlement would not be compelled to litigate in order to achieve what has been agreed upon. One way of obviating this difficulty is by making the mediator an arbitrator so that the arbitration proceedings will be limited to recording the settlement in the form of an arbitral award on agreed terms as provided in Article 34(1) of the UNCITRAL Arbitration Rules . We further submit that our laws be amended so that such settlements reached are enforceable by treating them as an arbitral award on agreed terms.

See section 25 of the Evidence Act dealing with "without prejudice".
See also Arbitration Rules, 1st Schedule to the Act

SETTING STANDARDS FOR MEDIATION

In setting standards for the training of mediation practitioners, a lot of "indoctrination" is required. This is so because the strategies and methodologies adopted in a consensual method are radically different from the adjudicatory method. The strategies include the fact that while the adjudicatory method is rights-based only and adversarial, the consensual method is interests-based and non-adversarial; the rules and practice of courts are different from the rules and principles of the mediation model. The focus on interests rather than rights changes the way in which a dispute is categorized, analysed and processed.

More fundamentally, although the mediation model is a like a confluence, its tributaries are varied. For example, the process and culture for pure commercial mediation is different from mediation in the banking sector. In the former, the lawyer is likely to be actively involved in the process and decisions reached may be converted to binding agreements while in the latter, a law degree may not be sufficient as a background in banking or accounting may be more relevant. This analysis can be extended to other tributaries like labour relations, construction disputes, community and neighbourhood mediation and personal injuries mediation. In Nigeria, we can add environmental disputes mediation, resource control disputes mediation, religious disputes mediation, marginalisation disputes mediation and generational shift mediation.

In a mediation model, a line is usually drawn between process expertise and expertise in the subject matter of the dispute. However, expertise in one field of activity like commercial mediation does not guarantee expertise in another field like maritime mediation. It is preferable to have a mediator who has expertise in the process and the subject matter of the dispute. Expertise in the process will inevitably mean specialized knowledge of the applicable rules. The rules cannot be effectively applied without the necessary training and skills.

Generally in resolving disputes using the mediation model, there are three stages and many phases and each stage/phase will have specific activity (or activities). For example, there is a stage before mediation, during the substantive mediation and at the end of the mediation. In each stage, there are phases which are further broken down into tasks that are peculiar to the type of dispute, be it commercial, family, environmental,

etc. However, the success or otherwise of mediation depends largely on the quality of the mediator. It is imperative, therefore, that we produce mediators who are highly trained and skilled.

Let us consider a hypothetical case. Assuming one of your valued customers who has been banking with you for many years and has been applying for loans and repaying regularly suddenly submits a feasibility report to your bank for a loan of N60m (sixty million naira). From the feasibility report, it is clear that the customer has entered into a joint venture agreement with a reputable firm in Afghanistan and has registered a company in Nigeria for that purpose; the foreign firm will act as the technical partners, and bring in sixty percent of the Authorized Share Capital of the company while the Nigerian partners will pay the remaining forty percent and provide office space, site for the installation of the factory and meet local costs. The nature of the business is in the solid minerals sector of the economy and the registered office of the company is in the Middle Belt region of Nigeria. From the cash projections, after the initial expenditure, as soon as the solid minerals are being exported, the company will pay its way. Based on your assessment of the feasibility report, the project is viable and you decided to fund it. You asked the Nigerian partner to mortgage or charge its undertakings and issue debentures. All these instruments were perfected. After you have granted the loan and operations started, the company was repaying as and when due. Unfortunately, the Americans started bombing Afghanistan and dealings with the foreign partners stopped. Similarly, the Federal Government of Nigeria has taken over exclusively the mining of solid minerals. The consequence of all these is that the company has defaulted and repayment appears impossible. The Nigerian partners inform you that they have found another technical partner and that their activities fit into the new policy of government. You referred this matter to your legal department and you are advised that by way of "Undefended List" you can obtain summary judgment and sell off the undertakings of the company.

How does the adjudicative model (litigation) respond to such problems. This model is concerned with the contractual rights and responsibilities of the parties. Thus

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Brown & Marriott Op Cit at 154

See Order 23 of the Uniform High Court (Civil Procedure) Rules and the High Court of the FCT, Abuja (Civil Procedure) Rules

since the title deeds to the offices and factories of the company are with the bank, the bank can exercise the right of sale or appoint a receiver or manager. Alternatively, the bank can sue for the recovery of the principal and interest. This will be based on the assumptions that judgment would be obtained within a short time. However, litigation has potential for lengthy delays and the decision-making process of the court is out of the control of the parties . It is worthy of note that people do not generally like to buy properties sold on the order of court because of the likelihood of litigation arising from such purchases. Such litigation includes applications to set aside the order of sale. In most cases, it is the customer that rushes to the bank first to forestall such sale of mortgaged properties. Even where the banks have the right to sell, it is generally advisable to obtain a court order before sale is effected; in which case the customer can only appeal against the judgment of the court. All these cause delay. Instead of litigation the other option will be 'avoidance strategy'. On the part of the bank, this will mean that they will allow the customer to source for funds and repay the loan while on the part of the customer, this will mean pursing the option of getting another technical partner and going on with the project.

How would this dispute be processed and what might the outcome be if, instead of pursuing either a strategy to avoid conflict or a rights-based claim through the courts, the parties decided to try mediation. First the parties would have to agree on a neutral third party, possibly someone with a background in macro-economic polices and the manufacturing sector of the economy. As a mediator, the third party is not going to offer a legal opinion but must be familiar with the alternatives to a negotiated agreement if the case were ultimately to be litigated. Such familiarity may help the parties to more realistically assess their different settlement options. For instance the bank can compare the overall outcome through adjudication with the outcome through negotiation. If the outcome through negotiation is better, negotiation should be pursued as there is no best alternative to a negotiated agreement.

See Rossek & Ors v ACB Ltd & Anor (1993) 8 NWLR (pt 312) 382 which after 18 years in court, the Supreme Court ordered a retrial.

Usually described as the parties' 'BATNA' ('Best Alternative to a Negotiated Agreement') and 'WATNA' ('Worst Alternative to a Negotiated Agreement'). See generally Fisher R, Ury, W and Paton B Getting to Yes (2nd Ed, Penguin, 1991) cited in MacFarlane, Op Cit at 12

However in some cases, it may not be in the best interest of the banks to reach an agreement in a negotiation. Thus if the outcome to be achieved through non-negotiated alternatives is better than the outcome through negotiation, negotiation should be discontinued and that option which is the best alternative to a negotiated agreement (BATNA) should be pursued. It must be borne in mind that in computing BATNA all relevant factors, even unquantifiable ones, such as psychological effect, delay and publicity must be taken into account. In other words BATNA should take the overall outcome and not merely the legal options into account. The mediator will convene a meeting of the parties and the parties will agree on the process to be followed, that is, adopt rules for mediation. After the initial meeting, subsequent meetings can be joint or separate (caucusing). The mediator may require legal representation or other representatives of the parties. There are various options open to the mediator in conducting the proceedings but generally it is commonplace for him to explain his role to the parties and the purpose of the mediation which is to assist the parties in developing their own solutions to their problems. This is so because unlike litigation where the judge controls the process, in mediation, the parties are empowered to control the process and outcome. Once the proceedings have commenced then the mediator will bring his expertise to bear by unraveling the interests and needs of the parties. The interest of the bank is to recover its money while that of the customer is to carry on with the project. This will be the focus of the mediation instead of the contractual rights and responsibilities of the parties. Bearing in mind the BATNA and WATNA of both parties, it would be obvious that a negotiated settlement is preferable to the option of litigation. Such resolution will also take into account the relationship that had existed between the parties over the years and the opportunity for further relationship. Thus in situations like the above scenario, negotiation and mediation are best alternatives to litigation.

Assuming in our hypothetical case, the company is willing to pay the principal sum but refuse to pay the interest or even negotiate it, what is the bank's BATNA? The

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Doherty, O Legal Practice and Management in Nigeria (London: Cavendish Publishing Ltd, 1998) pp 251-252

bank's BATNA would be an action in court to recover the debt together with the interest and costs of the proceedings.

THE ROLE OF THE MEDIATOR

In this mediation model, the role of the mediator is very crucial. The mediation model challenges the assumptions of the traditional adjudicative model. Mediation offers an alternative dispute resolution process which differs from adjudication not only in form – two participants, how it is organized and conducted, and so on – but also in orientation and ultimately in substance. Mediation seeks different types of outcome to those available through litigation. These are win/win outcomes rather than win/lose, tailor-made solutions rather than choice between a range of legal orders, and agreements which are complied with as pragmatic solutions rather than because they are necessarily legally binding. It will be naïve to assume that 'settlement' is always preferable to adjudication. It is therefore necessary to establish criteria for determining what process suits a particular dispute.

To determine the role of the mediator, therefore, a 'mediation construct' is normally used. This is merely a device to assist in graphically identifying some of the main features of what a mediator ideally brings to the process. Thus a mediator should be creative, flexible, of sound judgment, possess theoretical and practical skills, substantive knowledge of legal, technical or practical aspects of matters relevant to the dispute, ethically aware and emotionally sensitive. In addition to these attributes, the mediator also needs to use various skills in conducting mediation. These include listening, observing non-verbal communications, questioning, summarizing, mutualising, using language effectively and reframing, normalizing (without patronizing), managing conflict and the expression of emotions, managing the process, lateral thinking (by thinking in a different way from the usual method, by changing perceptions and concepts and seeking new perspectives, ideas and alternatives), understanding triangulation and avoiding coalitions and encouraging a problem-solving mode of negotiation. Above all these, a mediator must have balance: an

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Macfarlane, Op Cit at 19

Brown & Marriott, Op Cit at 328

impartial, balanced and even-handed approach to the issues and the parties. Although a mediator, he must be sound in the theories and approaches of negotiation.

ENFORCEMENT OF ADR OUTCOMES

Where mediation (which is at the core of the ADR processes) arises out of court proceedings, the mediated settlement is converted into a consent judgment, order or award in the pending adjudicatory proceedings. In such an event, the normal adjudicatory machinery would be available for enforcing the consensual outcome as if it were a determination in the adjudication. However, in a purely consensual model like mediation, such settlement terms would usually be legally enforceable as binding contracts between the parties. Thus except where the mediator becomes an arbitrator or the settlement is a consent judgment, enforcement of a settlement contract will ordinarily be for the party to take action on it in the appropriate court where the remedies of damages, specific performance or an injunction, as appropriate, will be given. Enforcement, therefore, to a large extent, depends on the parties. It is common knowledge that parties are more likely to enforce an outcome that they were part of instead of that imposed by a third party, as in litigation or arbitration.

C O N C L U S I O N

In this paper, we have attempted to highlight the place of mediation in resolving disputes emanating from bank/customer relationship. Conventionally, litigation was the sole means of resolving these disputes but because of the problems and difficulties associated with litigation a re-thinking of the processes for resolving such disputes is imperative. In considering the legal regime regulating these processes, reference was made to the Arbitration and Conciliation Act and the High Court Act. There is the need to establish the criteria for determining which dispute fits a process instead of assuming that all disputes are capable of being litigated.

There are many dispute resolution processes. However the main thrust was on mediation. There are Conciliation/Mediation Rules. The Rules cannot be effectively applied without the necessary training and skills. Similarly the success or otherwise of mediation depends largely on the quality of the mediator. It is imperative, therefore, that

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Mackie, K Op Cit at 181

we produce mediators who are highly-trained and skilled. If we carry judicial reform like has been done in other common law jurisdictions, the lawyer will know that the starting point in a dispute resolution process is not litigation but negotiation, mediation and arbitration. If parties appreciate the potency of these processes, disputes which have manifested and threatened the survival of the banking sector may be peacefully resolved. It is when and only when all these fail that litigation can commence. Even in the course of litigation, any of the ADR paradigm can go on side by side with litigation. The courts should, as a matter of deliberate policy, actively encourage settlement – before and during court proceedings.

The banks should recruit or train staff with negotiating skills. Such staff will assist bank in the recovery of debts and also decide when to go for mediation. The disadvantages of adjudication such as delay, cost and uncertainty of outcome of any trial make both negotiation and then mediation two viable options to be explored.