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The Role of Lawyers In Arbitration and Mediation

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Introduction

Generally lawyers[1] play advisory and advocacy roles in arbitration and mediation. Thus representing a client in arbitration and mediation does not change the lawyer's basic duty to act in the best interest of the client. However, there are differences in the way in which that duty can most effectively be carried out. The fundamental role of any lawyer at any time in this context is that of a consummate adviser. Classically, he is the well-informed champion of the client (not his mouthpiece), advising on law and procedure, articulating the client's views to the other side and pursuing the client's best interests.

Both arbitration and mediation are means of resolving disputes. Arbitration and mediation arise from the agreement to arbitrate or mediate. A lawyer can also act as an arbitrator or mediator or a registrar in any of these proceedings. If a lawyer needs to be acquainted with his role as a registrar in any arbitral proceedings, the United Nations Commission on International Trade Law (UNCITRAL) Notes on Organising Arbitral Proceedings[2] is a useful document. However, the focus of this article

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The word used in the Legal Practitioners Act, Cap L11, LFN, 2004 is "legal practitioner". Section 24 of the Legal Practitioners Act defines a legal practitioner as 'a person entitled in accordance with the provisions of this Act to practise as a barrister or as a barrister and solicitor either generally or for the purposes of any particular office or proceedings'. However in the Rules of Professional Conduct in the Legal Profession, 2007 the words used are "legal practitioner" or "lawyer" though in Rule 56 of the Rules, a lawyer means 'legal practitioner as defined by the Legal Practitioners Act'.

2 See http://www.uncitral/pdf/english/texts/arbitration/arb-notes/arb-notes-e.pdf

is not that of a lawyer as an arbitrator or mediator or registrar but as a counsel in arbitration and mediation.

In arbitration, the lawyer and other advisers must bear in mind that the client has chosen them to try to resolve the dispute in an adjudicatory manner and in a different forum. Similarly in mediation, the lawyer and advisers must also bear in mind that the client has chosen them to resolve the dispute in a consensual and different forum.

In this article, therefore, we will examine the role of lawyers in each of these processes.

Arbitration

Arbitration is a means of resolving disputes. Simply put, it is a binding resolution of dispute by an arbitral tribunal[3].

Article 4 of the Arbitration Rules[4] provide that the parties may be represented or assisted by legal practitioners of their choice. The names and addresses of such persons must be communicated in writing to the other party; such communication must specify whether the appointment is being made for purposes of representation or assistance. The differences between representation and assistance is that in the former, the lawyer is in control of the proceedings using his knowledge and expertise to achieve the ends of the instructions of his client; while in the latter, the lawyer is invited to give assistance on specific matters in the proceeding. In practice, the latter role for lawyers is rare in this country except as an expert. What is common is the legal representation by a lawyer[5].

The provisions of Article 4 of the Arbitration Rules have implications for international commercial arbitration. The Arbitration Rules are derived from the UNCITRAL Arbitration Rules, 1976[6]. Article 4 of the UNCITRAL Arbitration Rules provides, *inter alia*, thus:

> *The parties may be **represented or assisted by persons of their choice**. The names and addressed of such persons must be communicated in writing to the other party; such communication must specify whether the appointment is being made for purposes of representation or assistance. (emphasis added)*[7]

Thus, whereas in Nigeria, to appear as a representative of any of the parties to an arbitration, one must be a legal practitioner, as defined under the Legal Practitioners Act, under the UNCITRAL

3 According to section 57(1) of the Arbitration and Conciliation Act, , Cap A18, LFN, 2004, an 'arbitral tribunal' means a sole arbitrator or a panel of arbitrators.

4 Schedule 1 to the Arbitration and Conciliation Act.

5 See Orojo J O and Ajomo M A *A Law and Practice of Arbitration and Conciliation in Nigeria:* (Lagos: Mbeyi & Associates (Nigeria) Ltd, 1999) 327

6 See Article 5 of the Revised UNCITRAL Arbitration Rules 2010 which in part provides thus: 'each party may be represented or assisted by persons chosen by it'. In other words, the new rules do not provide for legal representation. For the Rules, see http://www.uncitral.org/pdf/english/texts/arbitration/arb-rules/arb-rules.pdf

7 Similar provisions are contained in Article 21 (4) of the ICC Rules, Article 18 of the LCIA Rules, Article 16 of the CIETAC Rules and Article 3 (13) of the Swiss Rules

Arbitration Rules of 1976 and 2010, there is no requirement that the representative must be a legal practitioner. Some arbitration rules however require certain statutory instruments as evidence of authorization of the party representatives. This may be a power of attorney executed by the relevant disputing party,[8] or other evidence,[9] while some do not require any evidence of such instructions.[10]

According to Onyema[11] national courts in some jurisdictions have ruled on the question of whether a foreign lawyer can represent the disputing parties in international arbitration proceedings held within their territorial jurisdiction. In *Builders Federal (Hong Kong) Ltd & Josef Gartner & Co. v Turner (East Asia) Pte. Ltd*[12] the Singapore High Court held that the representation of the foreign respondents by foreign counsel contravened the Singapore Legal Profession Act.[13] In the arbitration proceedings giving rise to this case, Builder's Federal had engaged the services of an American attorney, Mr Jalili to assist their team of lawyers. Turner applied for an interim injunction restraining Mr Jalili from representing Builder's Federal on the grounds that he was not admitted to practice law by the local Bar. The Singapore High Court granted the interim injunction, which was later, made permanent.[14] However in March of 1992, the Singapore Legal Profession Act was amended to enable foreign lawyers appear in arbitrations where the applicable substantive law is not Singapore law or where Singapore law applies, the foreign lawyers jointly appear with a Singaporean lawyer. The Singaporean law was amended again in 2004 to enable foreign lawyers conduct international arbitrations in Singapore without any hindrances.

In *Zublin Muhibbah Joint Venture v Government of Malaysia,*[15] the plaintiffs entered into a contract with the defendants to construct three berths at the Johore Port. In the arbitration proceedings, the claimant's solicitors instructed an American attorney to assist it in the cross-examination of the witnesses. The defendant objected on the grounds that the attorney was not an advocate and solicitor within the meaning of the Malaysian Legal Profession Act 1976. The Malaysian High Court held that the arbitral forum is not a court of justice but a private tribunal to which the Act did not apply[16].

We agree with Onyema[17], that these decisions raise the question whether lawyers representing parties in international commercial arbitration references are 'practising law' such as to be liable to their clients (the disputing parties) in the event of professional negligence[18] and disciplinary issues.[19]

Given our experience, the provisions in the UNCITRAL Arbitration Rules prevail in most international

8 An example is Article 16 (1) CIETAC Rules.

9 Article 18 (2) LCIA Rules leaves it to the discretion of the arbitral tribunal to determine what it requires in proof of authorization to act for the party. In practice some tribunals request for Letters of Authority.

10 An example is Article 4 UNCITRAL Rules.

11 Onyema, E. PhD Thesis, University of London, 2008

12 *V*ol.2 (1988) MLJ 280

13 Michael Polkinghorne, 'The Rights of Representation in a Foreign Venue' (1988) 4 Arb Int 333 discussed the Singapore case and wondered if this decision would influence other jurisdictions. Andeas F Lowenfeld, 'Singapore and the Local Bar: Aberration or Ill Omen?' (1988) JIA 71

14 The primary reason for granting the application was the protection of the public from unauthorized persons practicing law within the meaning of the Singapore Legal Practitioner's Act.

15 *V*ol. 1 (1992) ADRLJ 248, (1991) XVI YBCA 166 the decision was appealed to the Supreme Court which dismissed it without comments.

16 Similar restrictions in Japan but have been repealed.

17 Ibid

18 An example of a case raising this issue is *Birbrower, Montalbano, Condon & Frank, P.C. et al v Superior Court*, 949 P.2 d 1 (1998) decision of the California Supreme Court, where the attorneys could not recover their professional fees for engaging in unauthorized practice of law in the State of California. Arbitration (or conciliation) of international commercial disputes are excluded under the relevant legislation.

19 This was raised in *Bidermann Ind. Licensing Inc., v Avmar NV* (1990) NYLJ 23

arbitration and by extension in other jurisdictions. The provisions of the Nigerian enactment may be nationalistic in outlook but there are other challenges especially considering the stage of our development. Nigeria should therefore amend its Arbitration Rules if it must be seen as a hub for international arbitration in the sub-region. This is so because international commercial arbitration is now global and transnational. Failure to amend the law may affect the choice of Nigeria as a place of arbitration.

Lawyers Role in Arbitration

In arbitration, a lawyer can be engaged to play all or any of the following roles:

Drafting and Negotiating the Agreement

Sometimes, parties to an agreement negotiate such agreements without the involvement of a lawyer and thereafter engage the lawyer to draft. This is not standard practice and should be avoided. A lawyer should be fully briefed on a transaction and thus be involved in negotiating and drafting the agreement. By virtue of the lawyer's skills and expertise, he will determine what appropriate dispute resolution mechanism to insert – negotiation, mediation, expert determination and arbitration. If it is arbitration, whether it is a domestic arbitration or international on the one hand or *ad hoc* or institutional on the other. The other factors that the lawyer will take into account include

a) Number of Arbitrators – should it be one or three?

b) Procedure for their appointment – by the parties or other appointing authority.

c) Appointing Authority – the arbitral institution or other entity designated, by the parties, a state court or a presiding officer of an association or another body, to appoint one or more arbitrators in a given arbitration.

d) Arbitration Rules – UNCITRAL, American Arbitration Association (AAA), International Chamber of Commerce (ICC), London Court of International Arbitration (LCIA), etc[20]

e) Venue – every arbitration must have a seat (place) though it may be different from the venue for the hearing.

f) Whether the obligations of the parties will continue while arbitration is in progress

Drafting the Arbitration Agreement – Arbitration Clause or Submission Agreement

An arbitration clause is a clause providing for arbitration in a contract while submission agreement is an agreement entered into after a dispute has arisen to refer the dispute to arbitration even though

20 It should be noted that in the case of domestic arbitration in Nigeria, section 15(1) of the Arbitration and Conciliation Act confines parties to the Arbitration Rules set out in Schedule 1 to the Act. However, in the case of international commercial arbitration, section 53 of the Act does not restrict parties.

there was no such clause in the contract[21]. Bearing in mind the distinction between an arbitration clause and a submission agreement, it is usually advisable to insert an arbitration clause in the agreement. This is because parties generally will disagree on every issue when a dispute has arisen. However, if the parties agree to submit the dispute to arbitration, the following factors should be borne in mind:

a) Adopting a Model Arbitration Clause or drafting such a clause.

b) If drafting a submission agreement, the following should be noted:

   i) Introductory matters e.g. scope of the submission, notices, calculation of periods, and representation and assistance.

   ii) Composition of the Arbitral Tribunal – appointment, challenge, replacement, repetition.

   iii) Arbitral Proceedings – place, language, memorials (pleadings) and their amendments, jurisdiction, written statements, periods of time, evidence and hearing, interim measures, experts, default, closure of hearing, waiver of rules.

   iv) The award – decisions, form and effect of the award, applicable law, settlement, interpretation, correction, additional award, costs, and deposits.

c) There are pitfalls to be avoided. They include:

   i) Uninformed tinkering with model arbitration clauses.

   ii) Equivocation e.g. 'in case of arbitration, the Rules of Arbitration shall apply'.

   iii) Insufficient specification of the arbitral institution.

   iv) Appointing Authority – confirm that the institution is willing to accept such a responsibility.

   v) Combining irreconcilable procedural laws eg a venue in country X in return for application of the procedural law of country Y. What happens if the law of country X contains mandatory provisions with respect to any arbitration taking place in that country and those are inconsistent with the laws of country Y?

   vi) Designation of an applicable law, be it substantive or procedural, that does not exist e.g. the law of the USA or the law of Great Britain.[22]

Preparing the Notice of Arbitration

When a dispute has arisen and a counsel is formally appointed to represent a party, being involved in an arbitration as a counsel is like being involved in other adjudicatory matters. Thus the counsel should take full instructions on the details of the parties – names, addresses, contracts, and those

21 The beauty of an arbitration clause in a contract is the principle of separability. Section 12(2) of the Arbitration and Conciliation Act provides that such a clause is independent and separate from the main contract and even if the main contract fails or declared null and void, the arbitration clause is not affected. The clause survives. There are similar provisions in almost all enactments on arbitration, eg section 7 of the English Arbitration Act and Article 16 of the UNCITRAL Model Law on International Commercial Arbitration. For the Model Law, visit http://www.uncitral.org/pdf/english/texts/arbitration/ml-arb/07-86998_Ebook.pdf

22 Tackaberry J and Marriott A *Bernstein's Handbook of Arbitration and Dispute Resolution Practice*, 4th Edn (London: Sweet & Maxwell, 2003) p 667

of the other party and the counsel; details of the arbitration agreement – a copy of the substantive contract including the arbitration agreement. In practice, the letter of appointment of counsel will include all these; and details of the dispute. Again this can be contained in the letter of instruction.

If the provisions of the Arbitration and Conciliation Act are applicable, Article 3 of the Arbitration Rules[23] provides for what should be contained in the Notice of Arbitration – a demand that the dispute be referred to arbitration, the names and addresses of the parties, a reference to the arbitration clause or the submission agreement, a reference to the contract out of or in relation to which the dispute arises, the general nature of the claim and an indication of the amount involved, if any, the relief or remedy sought and a proposal on the number of arbitrators if not already agreed.

Attending the Preliminary Meeting

Arbitration is anchored on fundamental principles[24] like the principle of party autonomy[25]. Under this principle, the parties determine most issues collected with the arbitration. Thus the parties generally control the process before the arbitral tribunal is constituted. In consultation with the parties and their lawyers, the arbitral tribunal arranges for the Preliminary Meeting.

When the arbitral tribunal is properly constituted, a Notice and Agenda for a Preliminary Meeting is usually served on the parties and if the lawyers are known, on the lawyers. It is the duty of the lawyer to represent his client at the Preliminary Meeting where procedural matters, jurisdictional issues, memorials (pleadings), costs of arbitration, deposit for costs, time table for the hearing and other relevant issues are discussed. Thereafter an Order for Direction/Procedural Order is issued. Such orders can be updated in the course of the arbitral proceedings. In view of the fact that in Nigeria, there is no statutory immunity for arbitrators and arbitral institutions, it is standard practice to enter into Terms of Engagement with the parties where contractual immunity is provided for, amongst others.

Conducting the Arbitration

After the Preliminary Meeting, a Pre-Hearing Meeting is usually held. Again it is the duty of counsel to be present at the meeting. As in litigation, the counsel will prepare the memorials (pleadings) – point of claim/statement of case, point of defence/counter claim, reply to defence and defence to counter claim, rejoinder, notice to produce or request for production of documents using the Redfern Schedule, interrogatories, bundle of documents and filing at the appropriate time. It is not good practice to file out of time or seek for extension of time except in rare circumstances. When it is borne in mind that the Evidence Act[26] does not apply to arbitral proceedings, care should be taken that there is an agreement on procedural rules. The IBA Rules on Taking Evidence, 2010 is always helpful in this regard. Similarly on the issue of conflict of interest, the IBA Guidelines on Conflicts of

23 All institutional rules provide for how such a notice is issued. In some, it is called 'Request for Arbitration'.

24 See Idornigie P O 'Anchoring Commercial Arbitration on Fundamental Principles': *The Journal of the Institute of Arbitrators and Mediators* (Australia) Vol 23, Number 1, April 2004, p 65

25 See sections 2, 6, 7, 9, 13, 16, 17, 18, 20, 21 and 22 of the Arbitration and Conciliation Act.

26 See section 256 of the Evidence Act, 2011

Interest in International Arbitration, 2004 is useful.

The Role of Court: Before, During and After

The relationship between courts and arbitrators has been compared to a relay race:

> *Ideally, the handling of arbitral disputes should resemble a relay race. In the initial stages, before the arbitrators are seized of the dispute, the baton is in the grasp of the courts; for at that stage there is no other organisation which could take steps to prevent the arbitration agreement from being ineffectual. When the arbitrators take charge they take over the baton and retain it until they have made an award. At this point, having no longer a function to fulfil, the arbitrators hand back the baton so that the court can in case of the need lend its coercive powers to the enforcement of the award.*[27]

It is pertinent, therefore, to examine the statutory relationship before the court and arbitration. Section 34 of the Arbitration and Conciliation Act provides thus: "A court shall not intervene in any matter governed by this Act except where so provided in this Act"[28]. In commenting on a similar provision in the UNCITRAL Arbitration Rules, Binder states thus:

> *The issue regulated in art.5 is a highly sensitive one, as this provision is concerned with the extent of judicial intervention in the Model Law. Without doubt, the success of international commercial arbitration would not have been possible without the mechanism for judicial control as a safety-net in the background. Regardless of attempts to free arbitration of all local restrictions, until arbitral tribunals gain court-like powers, arbitration remains ultimately dependent on the municipal courts for assisting during the proceedings, and, especially for the enforcement of awards.*[29]

The thrust of this provision is to ensure finality in arbitral proceedings and that courts do not intervene unnecessary – the principle of judicial non-intervention. It is a statement of principle and a clear recognition of the policy of party autonomy underlying arbitral proceedings. Support for this view is section 4 of the Arbitration and Conciliation Act which provides that a court before which an action which is the subject of an arbitration agreement is brought shall, if any party so requests not less than when submitting his first statement on the substance of the dispute, order a stay of proceedings and refer the parties to arbitration. In *Cetelem v Roust*[30], the Court of Appeal (English)

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27 See Lord Mustill, 'Comments and Conclusions' in *Conservatory Provisional Measures in International Arbitration, 9th Joint Colloquium* (ICC Publication, 1993) page 118

28 See Article 5 of the UNCITRAL Model Law on International Commercial Arbitration, 1985 as amended in 2006. This general principle is also stated in section 1(c) of the English Arbitration Act. See also sections 42-45, and 66-71 of the English Arbitration Act, 1996, Sutton David *et al Russell on Arbitration*, 23rd Edn (London: Sweet & Maxwell, 2007), pp 344 and 449 and Blackaby N and Partasides C *Redfern and Hunter on International Arbitration*, 5th Edn, (Oxford: Oxford University Press, 2009) p 439

29 Binder P *International Commercial Arbitration and Conciliation in UNCITRAL Model Law Jurisdictions*, 3rd Edn (London: Sweet & Maxwell, 2010) p 66

30 (2005) 1 WLR 35555 at 3571. See also the position of the House of Lords *in Lesotho Highlands v*

held that this provision is 'intended to ensure that the powers of the court should be limited to assisting the arbitral process and should not usurp or interfere with it'. It is a well established principle of English law that section 1(c) of the English Arbitration Act **'makes it clear that the general position is that there is no inherent common law jurisdiction of the court to supervise arbitration outside the framework of the Arbitration Act 1996'**[31]

In arbitral proceedings, various applications are made to court. In Nigeria, they include:

a) Appointment of Arbitrator[32]

b) Application to revoke arbitration agreement[33]

c) Application for staying of court Proceedings[34]

d) Application for Interim Measures[35]

e) Application to challenge jurisdiction[36]

f) Application for removal of arbitrator[37]

g) Application to order attendance of witness[38]

h) Application to set aside an award[39]

i) Application to enforce an award[40]

It should be noted that the relationship of the lawyer to the arbitrator is substantially the same as his relationship to a judge in the court. The lawyer's conduct should be characterized by candour and fairness as enshrined in the Rules of Professional Conduct in the Legal Profession, 2007. It is

Impreglio SpA, per Lord Wilberforce (2006) 1 AC 221 – 'it has given to the court only those essential powers which I believe the court should have'.

31 Sutton et al, Op cit at 345

32 Section 7 of the Arbitration and Conciliation Act

33 Section 2, ibid

34 Sections 4 and 5 ibid

35 Article 1(3) of the Arbitration Rules

36 Under Nigerian law, section 12 of the Arbitration and Conciliation Act, empowers the arbitral tribunal to rule on its jurisdiction either as a preliminary question or in an award on the merits. There is no provision under the Nigerian law empowering the courts to intervene on the question of jurisdiction. The maxim is: *kompetenz-kompetenz - t*he arbitral tribunal is competent to rule on questions pertaining to its own jurisdiction and on any objections with respect to the existence or validity of an arbitration agreement. However, under Article 16 of the UNCITRAL Model Law, if the arbitral tribunal rules as a preliminary question that it has jurisdiction, any party may request, within thirty days after having received notice of that ruling, the court to decide the matter and such a decision shall be subject to no appeal and while such a request is pending, the arbitral tribunal may continue the arbitral proceedings and make an award. See also sections 30-32 of the English Arbitration Act especially section 32 that provides that the court may determine any preliminary point of jurisdiction and such an application to court can either be made with the agreement in writing of all the other parties to the proceedings or with the permission of the tribunal.

37 Section 30(2) of the Arbitration and Conciliation Act

38 Section 23 ibid

39 Sections 29, 30(1), and 48 ibid

40 Sections 31, 32, 51-52 ibid

thus unprofessional and dishonourable to deal other than candidly with the facts in taking the statement of witnesses, in drawing up affidavits and making other documents and in the presentation of causes.

Where a lawyer seeks to invoke the jurisdiction of the court in circumstances not provided in the Arbitration and Conciliation Act, the client should sue such a lawyer for professional negligence. Arbitration should not be seen as a first step to litigation. Though the courts play advisory and supportive role in arbitral proceedings, the two processes are largely independent. Lastly arbitration does not oust the court's jurisdiction as enshrined in section 6 of the 1999 Constitution, as amended but simply a means of resolving disputes other than litigation through the courts.

Above all, the lawyer should prepare his case and present the same with diligence

Mediation[41]

Out of the alternative dispute resolution (ADR) processes, mediation or conciliation is the most popular. According to the UNCITRAL Model Law on International Commercial Conciliation, "conciliation" is defined as **"a process, whether referred to by the expression conciliation, mediation or an expression of similar import, whereby parties request a third person or persons ("the conciliator") to assist them in their attempt to reach an amicable settlement of their dispute arising out of or relating to a contractual or other legal relationship".[42]**

As in arbitration, Article 6 of Conciliation Rules[43] provides that the parties may be represented or assisted by persons of their choice. The names and addresses of such persons are to be communicated in writing to the other party and to the conciliator; such communication is to specify whether the appointment is made for purposes of representation or of assistance.

Mediation, like arbitration is like a confluence with many tributaries. There is civil/commercial mediation, family mediation, environmental mediation, employment mediation, mediation of community and neighbor disputes and victim-offender mediation and reparation. In Nigeria, we now have Mediation Centres set up by various states like Lagos, Ekiti, Jigawa, Kano, Kwara and the Federal Capital Territory. Thus the way that a counsel represents his clients in all these is different. Generally, a counsel is more active in commercial mediation than in family mediation.[44] A lawyer's central mission is to help clients and society solve problems. Sometimes, the lawyer's role is preventive and it is only when this fails that means of resolving the disputes are sought.

41 See generally Mcilwrath M and Savage J *International Arbitration and Mediation: A Practical Guide* (New York: Wolters Kluwer, 2010)

42 See United Nations General Assembly Document No. A/RES/57/18 of 24 January, 2003 (hereinafter referred to "the UNCITRAL Model Law on International Commercial Conciliation")

43 See Schedule 3 to the Arbitration and Conciliation Act.

44 See Brown H and Marriott A *ADR Principles and Practice*, 3rd Edn (London: Sweet and Maxwell, 2011) p 405. See generally Mackie Karl *et all The ADR Practice Guide: Commercial Dispute Resolution,* 3rd Edn (London: Butterworths, 2007), Kovach K K *Mediation: The Principles and Practice*, 2nd Edn (St Paul, Minnesota: West Group, 2000) and Riskin L L and Westbrook J E *Dispute Resolution and Lawyers*, 2nd Edn (St Paul, Minnesota: West Group, 2003)

A lawyer's basic role is to render advisory and advocacy services to his clients. Thus whatever has been said in respect of arbitration applies to mediation. Consequently a lawyer will be involved in drafting and negotiation the agreement, decide appropriate dispute resolution mechanism and be involved in the process. However factors to consider in adopting a mediation forum include:

a) Is it essential to have a court order – if so, mediation will be inappropriate.

b) Is there a time-limit within which litigation must be started before mediation?

c) Is the case being brought or defended for strategic reasons?

d) Are the issues capable of negotiated settlement?

e) Does the dispute involve a past or present relationship that has broken down – personal, professional or working relationship?

f) Are there any other indicators or contra-indicators to mediation – does the case turns on credibility – will there be common ground on which to base a settlement?

g) Which mediation rules to adopt – UNCITRAL, CEDR, LCIA, etc?

h) Is mediation a mandatory requirement either stipulated by the dispute resolution provision in a contract or by a court rule or direction of a judge?

i) Is it a voluntary ad hoc decision by the parties after a dispute has arisen?

<u>A Lawyers Role Before, During and After Substantive Mediation</u>

These include:

a) At the very early stage of the engagement having a session with the client to consider any or all of the following:

- A thorough investigation and understanding of the client's and the opposing party's position, motivation and imperatives, financial, technical and legal so as to be able to deal with them in terms that they understand.
- Assessing the concessions that could be given which will not harm the client.
- Deciding how best to demonstrate to the other party that the case being presented has substance, is being run competently and needs to be respected as such and taken seriously.
- Testing each proposition against what the best or worst alternative to a negotiated agreement (BATNA or WATNA) is.
- Assessing the risk factor for each possible outcome and valuing them realistically.
- Taking the client through their part in presenting the best case both in joint sessions

and in private.

- Endeavouring to define the 'bottom line' point below which negotiations within the mediation are simply not worth continuing.
- Trying to define what factors would make a difference to the decision about bottom line and which would cause a change of approach.

b) Agreeing on the Mediation Rules in a Mediation Agreement – the agreement will deal with confidentiality, mediation costs, time allocated to the process and complaints procedure.

c) Preparing a Statement of Each Party's case and bundle or selection of documents.

d) Preliminary lawyers' meeting with Mediator. The meeting may serve a number of functions:

i) It allows the lawyers an opportunity to form a preliminary view about how the mediator will deal with the matter.

ii) The mediator explains the process.

iii) Agreement on procedural matters such as preparing and submitting the parties' statements and bundle of documents and mediation time table.

iv) Summary of the cases of the parties.

e) Presentation of the case during the mediation process – the focus shifts here because unlike an arbitrator, the neutral does not have powers to make a decision.

f) Drafting and formalizing the terms of settlement. In doing this, a lawyer should bear in mind the following:

- Check that the terms of settlement are understood and agreed.
- Are the terms to be binding immediately? If not, when and under what circumstances do they become binding?
- Are the terms unconditional?
- Are all dates, periods, amounts, methods of calculation and other directions and formulae clear, specific and unambiguous?
- What are the consequences of non-compliance with the settlement agreement?
- Does the terms of settlement comply with the Agreement to mediate?
- What format is appropriate for the settlement agreement?
- Do the parties envisage that a further and more comprehensive document will be entered into later?
- Is an order of court required for enforcement?
- If proceedings are pending in court, is the settlement agreement clear as to what is to happen with such proceedings?

- If an existing relationship is to continue, is this on the same terms as at present or are these to be varied, and if so, are the new terms clear and explicit?
- Does confidentiality need to be confirmed or is this already explicitly covered?
- Can the evidence adduced at the mediation proceedings be used in other proceedings?
- Can the Mediator act as an Arbitrator if the proceedings fail?
- Check the draft agreement with other parties, lawyers and mediator before finalising[45]

In the mediation process, whether it is face-to-face with the other party or the mediator is caucusing, the skills to be deployed by the lawyer vary from one form of mediation to the other. There is the need, therefore, to engage a lawyer who possesses the relevant skill in the particular area of dispute and the process. The skills to be acquired include:

- Negotiation Skills
- Presentation Skills
- Subject matter Skills
- Process Skills
- Knowledge of law and procedure
- Self-confidence, candor and courage
- Professionalism[46]

Immunity of Arbitrators/Mediators

Unlike in the UK where sections 29 and 74 of the Arbitration Act confers statutory immunity on arbitrators and arbitral institutions respectively unless bad faith is shown, in Nigeria, arbitrators and arbitral institutions do not enjoy statutory immunity unless common law immunity[47] or contractual immunity. Where it is necessary to draft clauses dealing with contractual immunity, lawyers should be careful as to the scope of such clauses.

Limitation Statute and Arbitration and Mediation[48]

Lawyers should bear in mind that limitation enactments[49] apply the same way to arbitration and

45 See generally Brown and Marriott, Op Cit at 415-439

46 See generally Mackie et al, Op cit at 188-194

47 See *Sutcliffe v Thackra*h (1974) AC 727 and *Arenson v Arenson* (1977) AC 405.

48 See generally Idornigie P O 'Statutes of Limitation and ADR Processes': *The Journal of the Institute of Arbitrators and Mediators* (Australia) Vol 23, Number 2, April 2004, p 1

49 See the Limitation Act of the FCT and Limitation Law, Lagos State.

mediation (including negotiation) as they apply to litigation. Where negotiations are embarked upon and it becomes clear that the six- or twelve-year rule, as the case may be, is approaching, there will be need to file a process in court and seek a long adjournment to explore settlement by negotiation or medication or arbitration.

C o n c l u s i o n

Arbitration and Mediation have become specialized areas of study. Qualifying as a lawyer alone does not equip one to represent clients in these proceedings. There is the need to acquire training in arbitration and mediation/conciliation so as to understand the processes. There is also the need to acquire training in the kinds of dispute that these two processes can be deployed. As a lawyer, you must be able to establish a nexus between a dispute and a process and determine which process is more appropriate.

In this article, we have examined the roles of lawyers in the two processes.