NATIONAL OPEN UNIVERSITY OF NIGERIA

SCHOOL OF LAW

COURSE CODE: LAW 517

COURSE TITLE:
ALTERNATIVE DISPUTE RESOLUTION I

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COURSE GUIDE

Course Title: Alternative Dispute Resolution

Course Code: Law 517

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WHAT YOU WILL LEARN IN THIS COURSE

This course is about Alternative Dispute Resolution (ADR). It examines the concept of ADR as an alternative to the conventional means of settling disputes in Nigeria; litigation. The course seeks to make you understand the different methods by which disputes can be resolved, the kinds of disputes that can be resolved through ADR, the benefits of referring disputes to ADR and limitations to the ADR process.

IMPORTANCE OF CASES

This study guide, like any textbook on any aspect of the law, makes references to important judicial decisions as well as to some statutory enactments. There is still a dearth of cases in this aspect of the law because the concept of ADR is still a relatively new concept that is gradually getting entrenched in our legal framework.

COURSE AIMS

The course aims at providing the students with the basic knowledge of alternative dispute resolution as a means of resolving commercial disputes, individual and communal disputes. In this course you will learn among other things, the concept of ADR as a means of settling disputes, and decongesting the courts by reducing the number of cases that go to litigation if they can be resolved through alternative means of settling disputes. In essence the aims of the course include:

-Definition of Alternative Dispute Resolution
-Different methods of ADR under the following headings:
-Mediation
-Conciliation

-Negotiation
-Arbitration
-Initiating processes at the multi door court house.

COURSE OBJECTIVES

At the completion of this course, you should be able

(i) To understand the concept of alternative dispute resolution(ADR)
(ii) To discuss the reasons why ADR is essential to the administration of justice in Nigeria
(iii) To discuss the types of ADR process
(iv) To appreciate the place of ADR in conflict resolution between individuals, communities and commercial entities
(v) To identify the limitations confronting the settlement of disputes through the ADR processes.
(vi) To point out areas that needs to be improved upon in order for the outcome of the processes to be enforceable.

STUDY UNITS
There are sixteen study units in this course as follows

MODULE 1

Unit 1 What is ADR?
Unit 2 Purpose of ADR
Unit 3 Advantages of ADR
Unit 4 Limitation of ADR

MODULE 2 MEDIATION

UNIT 1 Mediation

UNIT 2 Conciliation

MODULE 3 ARBITRATION

UNIT 1 Nature of Arbitration

UNIT 2 Sources of Arbitration Law

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UNIT 4 Arbitration Institutions

MODULE 4 NEGOTIATION

Unit 1 Meaning of Negotiation

Unit 2 Negotiation Strategies

Unit 3 Sources of Power in Negotiation

Unit 4 Negotiation Processes

MODULE 5 OPTIONS AND PROCESSES OF ADR

Unit 1 Other forms of ADR
Unit 2 Mechanisms for the practice of ADR

COURSE MARKING SCHEME

The following table lays out how the course marking is done.

Assessments	30% of course marks
Final examination	70% of overall course marks
Total	100%of course marks

MODULE 1 TUTOR MARKED ASSIGNMENT

Define the term ADR
List the advantages of ADR
Discuss the purpose of ADR and limitations to the use of ADR.

MODULE 2 TUTOR MARKED ASSIGNMENT

Discuss the features of mediation.

Discuss, giving examples of situation when mediation will not be applicable.

Discuss conciliation as a means of settling disputes between parties.

MODULE 3 TUTOR MARKED ASSIGNMENT

Discuss other limitations to arbitration.

List the features of arbitration and discuss.

MODULE 4 TUTOR MARKED ASSIGNMENT

What is negotiation?

Discuss the types of negotiation methods you have learnt about

Discuss the tricks used in negotiations

List and discuss the sources of power in negotiation

Discuss the phases of negotiation processes known to you.

MODULE 5

Discuss the objectives of the multi door courthouse.

Discuss the options open to citizens at the multi door courthouse.

MODULE 1 INTRODUCTION TO ALTERNATIVE DISPUTE RESOLUTION (ADR)

INTRODUCTION

Unit 1 What is ADR

Unit 2 Purpose of ADR

Unit 3 Advantages of ADR

Unit 4 Limitation of ADR

UNIT 1

CONTENTS

1.0 INTRODUCTION

A story:

The story is often told of a matter in the Nigerian jurisdiction. The matter first came up in a court where this young man was a clerk. The matter was still in court undergoing one form of adjournment or the other, on one substantive or procedural point of law or the other. The young man went to England to read Law.

The matter was still in court, while the young man returned from England with an LL.B. After being called to the Nigerian Bar and with some stint in practice, the young man joined the distinguished bench of the High Court of a State in the Country. The matter was still in court while the young man, who by then had come of age, took a seat on the eminent bench of the Court of Appeal. The matter was eventually pronounced upon by a panel of the Court of Appeal of which the then young clerk was a member, fifteen years after it was first reported in chamber. The matter waited patiently in court for well over fifteen years. Fifteen good or is it bad years?

Yet Another:

In a similar situation, another matter took about two decades going through the High Court and the Court of Appeal before finally getting to the Supreme Court. The more interesting part of this second situation is the decision of the Supreme Court on the matter. The learned justices of the Supreme Court after careful consideration in their wisdom decided that the matter be referred back to the High Court for trial, **de novo**. That was, over eighteen years after the matter first came up. Eighteen years! That is about two decades.

Statistics:

In a survey of cases completed by the Supreme Court of Nigeria between 1999 and 2005 the Lagos State Ministry of Justice came up with the following interesting statistics:

Year	Land Cases	Other Civil Matters	Criminal Matters
1999	13.6 Years	13.8 Years	8 Years
2000	18 Years	11.7 Years	7.3 Years
2001	19.4 Years	12.6 Years	9.9 Years
2002	21.5 Years	11.3 Years	12.2 Years
2004	16 years	14.2 Years	9.5 Years
2005	21.7 Years	15.5 Years	12.5 Years

As the Ministry puts it:

Taking together a total of 208 Supreme Court judgments surveyed, we found that it took an average of:

18 Years (from year of commencement) to finalize land cases

14 Years (from year of commencement) to finalize other civil cases

10 Years (from year of commencement) to finalize criminal cases

The same survey shows that:

It took an average of six years for contested cases to move from filling to judgment

Poser:

What is the value of a judgment that comes after eighteen years of brilliant and robust advocacy, when some of the parties may have died or when interest may have changed? What also is the real and actual value of a judgment if after paying lawyers tons of money and dissipating so much emotion; time and energy going to court for about two decades, the judgment finally came several years after?

This poser becomes even more relevant when the subject of the dispute is time sensitive. An investment dispute in particular and business dispute in general cannot wait for eighteen years to be **efficiently and meaningfully** resolved. The outcome will be a sheer waste of time, money, energy, emotions and other valuable resources of all the parties directly or indirectly involved including the supposedly victorious party, **except of course, the lawyer**.

Emerging developments have indicated that litigation as a mechanism for dispute resolution is old, tired, party unfriendly and incapable of coping with challenges of contemporary dispute resolution.

As has been earlier indicated

Disputes arise in contracts of sales, construction, employment, banking, insurance, etc. Where what is required is simply the appropriate interpretation of just one or two clauses

of the contract. Such matters cannot wait for eighteen years to be resolved. What is actually required is a constructive and amicable interpretation of the grey clauses for the contract to continue. Litigation simply proves inadequate in the resolution of such disputes.

Generally where relationships are on-going in nature, litigation is to say the least insufficient in resolving disputes arising thereof. Differences arising from on-going personal relationships get complicated when litigation is resorted to because of the obvious win-lose nature of litigation. Court judgments identify clear winners and outright losers. The winner becomes a triumphant champion, the loser naturally does everything to undermine the judgment or wait for another day to take his pound of flesh

Going to court creates hard feelings between the parties involved. The Yoruba of South Western Nigeria puts it clearly: You don't come back from the court to be friends.

Litigation is a win/lose means of dispute resolution. Such mode of resolving disputes is no longer fashionable especially at a time when the whole world is opening up, when the world has become a global village, when we consciously want to position our national economy as a destination point for foreign investments. We cannot afford not to have a fast and efficient means of dispute resolution. The in-thing is win/win means of resolving disputes.

It is because of the limitations of litigation, some of which the posers above highlights, that focus is now being placed on ADR in most contemporary jurisdictions as means of

resolving disputes. So what is this ADR and what is it all about? The meaning of ADR, its essence, advantages and limitations are examined in this module.

This study material which should be studied along with other works, some of which are mentioned under Reference / Further Reading, would take you through the rudiments of ADR, looking at its meaning, advantages and limitations. The work is also a reference point in the consideration of the working of the different heads of ADR as well as the laws / infrastructure for the practice of ADR in the Country.

2.0 OBJECTIVES

At the end of this unit, you should be able to:

i) Define ADR
ii) Mention some of the techniques / means of dispute resolution
iii) Indicate the need for ADR
iv) Explain the advantages of ADR techniques
v) Identify situations / disputes which for now ADR techniques are not applicable

3.0 MAIN CONTENT

3.1 What is ADR?

There is basically no standard definition for ADR. However, it can be simply explained as the means or methods of resolving legal disputes or conflicts privately through the intervention of a third party other than via litigation. It offers a more conciliatory means, quicker and less expensive platform for resolving disputes in contrast to the procedures of

seeking justice and fairness or even redress, in a law court. More importantly, ADR mechanism promotes and protects the privacy of aggrieved parties, creates calm and friendly atmosphere for parties to discuss, agree and disagree before reaching amicable and endorsable agreement. Today, the application of ADR to resolve conflicts are becoming more and more preferred than litigation in various fields and works of life. It is employed to settle contractual disputes in employment and labour laws, marriage and divorce issues and also in consumer protection and product liability cases. The common ideology of "settlement out of court" is ADR in few words. In traditional Yoruba and Igbo villages and towns, ADR is commonly employed to resolve cases among communities, families, people or groups. The aggrieved individual or parties consult the community head(s) or even the king where applicable. The community head in turn invites the other party (ies) to a meeting at a set date and place, when and where the parties meet in order to resolve issues. This method of conflict resolution has resolved major conflicts and brokered peace where war, protest, or fracas would have resulted. ADR mechanism promotes dialogue and preserves relationship where possible.

Moreover, it is worthy of note that, different conflicts may require different ADR approach. For instance, family conflicts can be resolved via methods which are at variance to community conflicts, also marriage disagreements or issues of divorce and child custody are resolved differently from disputes relating to extended family, likewise in commercial transactions etc. Thus, a good ADR consultant must first know how to evaluate disputes to determine if ADR will be the best means of resolution and also be able to select appropriate ADR approach. For instance Lagos State under the ministry of justice has created the Citizen Mediation Center (CMC) in Alausa, Ikeja for people seeking to resolve disputes without recourse to the court of law. The staffs in the center are saddled with responsibilities bothering on hearing and resolving peoples' disputes. They are trained lawyers in specialized law fields which include family, real estate/property and commercial. The CMC and other similar offices are resource center

where people call or visit when there is need to seek advice on how to deal with issues relating to disputes, when parties want informal and impartial point of view or desire mutually acceptable solutions to resolving a situation out of the court of law. A very important skill requirement for ADR personnel is ability to listen and counsel people.

3.2 The Purpose of ADR

First and foremost, there would not be the need for ADR if there are no conflicts or disputes. Therefore, the primary purpose of ADR is to create avenues and platforms for amicable resolution of *already existing or intending* conflicts or disputes in such a way that it is quick, cost less and at the same time does not infringe on the rights and privacy of the parties. However, disputes can be defined as a lack of compromise between parties. Disputes can also be said to arise when parties fail to reach satisfactory bargain over an issue. Invariable the parties are unwilling to concede to each other without the right benefit. When such phenomenon arises, the process of ADR is set up either through facilitating a resolution, i.e. by bringing the parties to acknowledge and appreciate their difference and therefore reach a mutually beneficial conclusion, or by providing the parties with a mutually binding decision, i.e. through the establishment of rights and commitments.

In addition to the aforementioned, other purposes of ADR include:

- To serve as alternative to litigation
- It is used to create a 'win-win' situation between parties by providing resolutions that the parties agree and are happy with
- Its process involves the use of negotiation skills to achieve and develop agreement that are beneficial to parties
- It is designed to engage in constructive and unambiguous dialogue to fashion out a path to resolution

- It is meant to be voluntary, flexible and used to serve the parties interest.

3.3 Advantages of ADR

The advantages of ADR have been variously mentioned in the discourse presented in previous sections. However as a way of capturing some of the important ones, the advantages which employing alternative dispute resolution serves include the following:

1. It saves time: Going through traditional court of law to resolve cases involves procedures that are time consuming. The processes of obtaining evidence, presenting the evidence, preparing witnesses and the defense proceedings takes time. This time involvement has been attributed to delayed justice in some quarters. Employing ADR saves time. The parties involved in the dispute have the control over the speed at which a resolution is reached in contrast to cases decided in a court of law.
2. It saves money: The cost of seeking the services of a legal practitioner, obtaining evidence and processing such evidence, etc. may be enormous when compared to the cost of resolving disputes via the alternative dispute resolution methods.
3. Issues resolved through the alternative dispute resolution methods/techniques end up bringing satisfaction to aggrieved parties. The parties at the end of the day come to a common ground whereby each is happy with the outcome. This may not be the case for matters resolved in a law court, where one wins and the other lose. One of the parties is happy about the final decision of the judges while the other is left aggrieved. Some time, the aggrieved party looks for opportunity for further litigation, through appeals in higher court of law. Issues of appeal do not suffice in alternative dispute resolution has each party reaches a mutually beneficial agreement that satisfy their aspirations.

4. It improves and sustains cordial relationship among parties: When disputes are resolved through means provided by alternative dispute resolution, the parties are left happy and they can continue to develop existing relationship. Most time, alternative dispute resolution fosters better understanding among parties and individuals. This is because, during the process of dispute resolution, the cause(s) of disagreement are presented and an understanding is fashioned out through bargaining which is based on the interests of the parties.
5. ADR maintains the privacy of the parties as against traditional settlement through court.
6. ADR provides platform for informal and less confrontational means of dispute resolution. It avoids placing the label "wicked enemy" on the other party but rather creates a friendly atmosphere for dispute resolution. The parties own the decision and therefore would be committed to maintaining it.

3.4 Limitations of ADR

ADR is limited in some instances irrespective of its advantages. Some of its limitations include:

1) Inability to decide criminal matters
2) Its adoption may also at times be limited by cost most especially when a party to a dispute cannot employ the services of a qualified ADR practitioner
3) Time to resolve a dispute may also be a limitation. In order for some disputes to be resolved for a win/win situation, the resolution may have to be concluded within stipulated time. However, when parties fail to agree, the resolution procedure drags on.

4) Due to the voluntary nature of ADR, a party may refuse to accept what is termed as the best resolution and therefore, refuse to comply with the mandate of the award.

4.0 CONCLUSION

From the foregoing it can be safely posited that the concept of ADR in the resolution of disputes have come to stay. The growth of the ADR process has been enhanced as a reason of the fact that the time, money and energy input to litigation is often not worth the while on the long run.

5.0 SUMMARY

Considering the advantages of ADR, individuals, corporate bodies, organizations, governments and even the courts of law have come to realize that the only way to decongest the courts and to allow for settlement of disputes amicably is through the various ADR processes.

6.0 TUTOR MARKED ASSIGNMENT

i) Define the term ADR

ii) List the advantages of ADR

iii) Discuss the purpose of ADR and limitations to the use of ADR.

7.0 REFERENCES / FURTHER READING

Orojo, J.O and Ajomo, M.A. 1999. Law and Practice of arbitration and conciliation in Nigeria, Mbeyi and Associates, Lagos.

Redfern, A. Hunter, M. Blackaby, N and Partasides, C. 2004. Law and practice of international commercial arbitration, 4th edn., Sweet and Maxwell, London

MODULE 2 MEDIATION

UNIT 1 Mediation

UNIT 2 Conciliation

1.0 Introduction

2.0 Objectives

2.0 Main Content

3.1 Development of mediation

3.2 Mediation defined

3.3 Features of Mediation

3.4 When Mediation will not be an option

1.0 INTRODUCTION

Mediation as an ADR process is one of the mostly used of the processes in Nigeria. It can be court directed or voluntary decision of the parties to mediate.

2.0 OBJECTIVES

After the student has studied this unit, student must be able to discuss and point out the importance of mediated disputes, features, advantages and the shortcomings of the process.

3.0 MAIN CONTENT

3.1 Development of mediation

The growth of mediation as an alternative method of resolving conflicts between parties have grown tremendously in recent years on a global level. The European Union is trying to make sure that it leaves no stone unturned by making sure all Directive on Mediation in Civil and Commercial matters are put into practice and effect compliance by 21 May, 2011.Many countries have embraced the concept of court annexed or court-regulated mediation i.e. Bulgaria, china, Germany etc. The realisation by the government of Nigeria both at the state and federal level that the courts alone cannot serve the purpose of satisfying settlement of commercial disputes amidst conflicting parties have necessitated efforts to ingrain into the legal system, a framework for alternative dispute resolution; mediation.

The idea of the multi door court house in Nigeria reputed for being the brain child of the Negotiation and Conflict Management Group (NCMG) in conjunction with the High Court of Lagos established the Lagos Multi Door Court House (LMDC) in 2002 through private-public sector partnership initiative. This model refers to the various alternatives available at first instance to the LMDC and to consider appropriate dispute resolution channel including mediation, arbitration etc.

Many other states in Nigeria in addition to Lagos and Federal Capital Territory, Abuja are in the process of incorporating ADR into their laws.

The LMDC Laws sets out statutory objectives to:

1. Provide alternative dispute resolution as a means to ensure access to justice and act as an appendage to litigation in settling of disputes.
2. Reduce delays and frustrations that attend litigants in the normal court process.
3. Serve as a platform to promote ADR in Lagos state.
4. Enhance the growth and effectiveness of the justice system through ADR methods.

3.2 Mediation defined

Mediation is the process in which parties involved in a dispute meet jointly and separately in confidence with a neutral and independent outside party to explore and decide how the dispute between them will be resolved. Mediation facilitates communication between disputing parties to reach an agreement acceptable to both parties.

Goodman defined Mediation as a voluntary, non-binding and private dispute resolution process in which a trained neutral person helps the parties try to reach a negotiated settlement.

3.3 Features of mediation

The definition proffered by Goodman gives an insight into what the features of mediation are

1. Voluntary
2. Non-binding
3. Private
4. Neutral mediator
5. A settlement negotiated by the parties

Voluntary

The consensus between parties to a dispute is important to initiating the mediation process. Often, mediation is organized by parties on judicial recommendation. Any of the parties that refuse to mediate stands to bear the consequences, which may be pecuniary. This may be in form of a fine especially for any party that is absent at the hearing, during which the appropriate channel for the process is determined (Article 13b LMDC Practice Direction). Mediation is voluntary and all parties are required to participate. If a party decides to abandon the process, then the purpose is defeated.

Non-binding

The process of mediation does not bind any of the parties in dispute and does not impose any obligation on them to settle. Settlement depends on the participation and agreement of parties involved. The mediator can only persuade the parties in dispute to resolve their differences amicably through the process. If parties decide not to settle, then the issues will be resolved through litigation. If settlement is achieved by the parties, the terms of

settlement will form part of an enforceable contract, and an enforceable judgment of the high court, if it is a court annexed process. See Njoku v. Ikechukwu (1992) 2 ECSLR 199, per Ikpeazu J.S 19 LMDC law and article 17 LMDC PD: Order 39 r.4(3) High Court of Lagos (Civil Procedure) Rules 2004, s. 11 Sheriff and Civil Process Law.

Private

The process of mediation is private and confidential as to limits imposed by the law; howbeit refusal to mediate can have adverse consequences in cost. Parties can in mediation disclose information, express views, make suggestion, offer concessions, without fears that such could restrict them charting a different course should matters proceed to trial. If the mediation process fails, a party is at liberty to formalize an offer made during mediation as an offer which would carry the usual cost implication.

Neutral mediator

The ability of the parties to trust and repose confidence in the mediator is paramount to the success of the whole process of mediation. Such mediator must be is neutral in all aspects of the process, must not be a person interested in issues in dispute, not related or connected to any of the parties through whatever means to avoid bias. The Parties must bestow enough authority on the mediator to perform his duties. The mediator should not let emotions or sentiments intrude into the process which can undermine the credibility of the process.

The parties' settlement

Settlement is attainable only when parties agree to resolve their differences through the mediation process and they are saddled with the responsibility of fulfilling the terms of the agreement.

The process seeks to create an atmosphere where parties to dispute are able to reach an agreement that is fair and maximize the interest of all. The flexibility of the process create avenue for exchange of ideas and opportunity to parties to properly address issues at stake before reaching a settlement.

3.3 When mediation will not be an option

With recent developments in the administration of justice through ADR processes the courts may impose sanctions on parties that reject or refuse to attend the mediation process. Any party that unreasonably fails to mediate may likely be sanctioned by the court. In line with this, when can a party refuse to mediate?

The party refusing to mediate would have to show that mediation would have no reasonable prospect of success. In the case of Hasley v. Milton Keynes General NHS trust (2004) EWCA Civ 576; (2004) 1 WLR 3002, the England and Wales Court of Appeal was more sympathetic to parties that refused to mediate. However in contrast, in the case of Hurst V. Leeming (2002) EWHC 1051 (Ch); (2003) 1 Lloyd's Rep 37. Lightman J in the case suggested that to escape a sanction for refusal, the refusing party would have to show that mediation would have no reasonable prospect of success.

In Hasley the Court of Appeal stated that, to deprive a successful party of all or part of its costs, or to impose a sanction on an unsuccessful party, he otherwise must show the party has behaved unreasonably in failing to mediate.

Factors to determine whether or not a party's decision not to mediate is unreasonable or otherwise are:

- The nature of the dispute;
- Value of the case;
- Efforts of the parties at resolving the issues on hand through other means of dispute resolution and level of success;
- Whether the costs of the mediation would be unnecessarily high;
- Whether any foot-dragging in setting up and attending the mediation would have been detrimental to the process; and
- Whether there is any indication as to the success of the outcome of the mediation p

Mediation as an ADR method will not be suitable in the following cases:

1 Where the onus lies on the court to decide issues of law and construction, which can impact the relationship between the parties far beyond the parties present contractual relations into the future.
2 In a situation where the parties want the court to decide on a recurrent point of law such that the decision will be established as a reference point for future decisions.
3 When confidence is eroded as a reason of criminal accusations against an individual or group of persons, mediation cannot be seen in the future as credible in such an instance where the person(s) will be involved.
4 Instances in which a party seeks some injunctive relief to shield his position.
5 C**o**nsidering the fact that the cost of mediation can sometimes be prohibitive, especially when the sum to be mediated compared to mediation cost is relatively insignificant.

3.4 Advantages of mediation

1. The mediator can kick start and enhance communication between parties and restore communication between estranged parties, breaking down all barriers that may hinder the smooth resolution of disputes.
2. The parties by the ingenuity of the mediator can help parties discover areas of common interests and thus reach settlements that enhance interests of all parties involved.
3. Mediation is flexible as there are no set rules or binding laws except those that the parties agree amidst themselves, they set the rule of the process and the voluntary nature of the process gives it the credibility and integrity on any agreement reached because the parties are in charge.
4. Mediation is cost effective in that the whole process is not cumbersome in relation to litigation. The parties call the shots as to how fast the disputes can be resolved as it saves cost of paying lawyer fees, filing fees and all the fees that accompany litigation.
5. It is reconciliatory to the parties because it takes away animosity and suspicion and brings about openness and amicable resolution of disputes. This helps parties to preserve relationships and even open up new opportunities for enhanced future relationship (business or otherwise).

Shortcomings of Mediation Procedure:

The confidential nature of mediation process gives no room for a culture of precedent development.

Due to the fact that mediation outcomes are not published in public domain there is no mechanism to measure the effectiveness of mediation as an ADR process.

The mediation process is enhanced:

- When parties understand the issues in dispute and maintain objectivity at resolving the issues.
- The parties are not rigid, willing to give and take for amicable settlement
- They do not view their resolve to mediate as a sign of weakness.

4.0 CONCLUSION

Mediation as a method of alternative dispute resolution has been around for a very long time. Due to the globalization of commercial transactions and the opportunity to parties for harmonious settlement of disputes arising from such transactions, the mediation process is becoming more popular.

5.0 SUMMARY

In this unit you have learnt about the growth of Mediation, the features, advantages and the possible shortcoming to such approach.

6.0 TUTOR MARKED ASSIGNMENT

Discuss the features of mediation according to Goldman.

Discuss giving examples of situation when mediation will not be applicable.

7.0 REFERENCES

Goodman, A., 2010. Mediation Advocacy, Nigerian edn, Xpl publishing, United Kingdom.

Olagunju, O., 2007. The Seven Secrets of Effective Conflict Resolution,

ADR Pre-Certification Course, Negotiation & Conflict Management Group and Aina, Blankson &Co.

UNIT 2 Conciliation

1.0 INTRODUCTION

Conciliation as a means of settling disputes though recognized by the Act has not been of much use compared to other processes.

2.0 OBJECTIVES

At the end of this unit students must be able to discuss conciliation as a means of settling disputes.

3.0 MAIN CONTENT

3.1 Conciliation

Conciliation is the process of bringing parties in dispute together, with whose consent a third party is brought in to settle the dispute. The conciliator in this instance will draw up

and propose the terms of an agreement designed to represent what in his view is a fair compromise of the dispute, after having discussed the case with the parties.

The provision of Section 37 of the Act, confer right to settle dispute by conciliation.

It empowers the conciliator to explore opportunities for the settlement of disputes before him. The Arbitration and Conciliation Act provides as follows:

"Notwithstanding the other provision of this Act, the parties to any agreement may seek amicable settlement of any dispute in relation to the agreement by conciliation under the provision of this part of the Act"

As a general rule, conciliation is essentially governed by the decision of the parties. But it is also governed by the statutes as operative in Nigeria where there are statutory provisions on conciliation.

Conciliation agreement

Parties to an agreement may decide that disputes arising there from shall be settled by conciliation. The conciliation clause only needs to be inserted in the substantive agreement. The clause may read that "if any dispute or difference shall arise between the parties to this agreement from or in connection with this agreement this agreement or its performance, construction or interpretation or otherwise, the parties shall endeavour to resolve it by agreement through negotiation conducted in good faith. If they are unable to agree, the issue shall, in the first instance, be dealt with by conciliation, the conciliator may be chosen jointly by them. Sometimes it may be agreed that the conciliator be appointed by a special body or person .In case the conciliation process fail provision may be made for the dispute to be referred to arbitration.

Types of dispute for conciliation

a .Commercial Dispute: This kind of dispute may arise in any field of commercial endeavour including those arising from corporate disputes, franchise, agency, Intellectual property, industrial and labour disputes

b. Family Disputes: Conciliation is confidential in nature and is particularly suitable for the settlement of disputes between husband and wife in matters relating to separation, granting custody of children, property and finance. Although, this method of ADR is yet to be fully embraced in Nigeria

c. Community and Neighborhood Disputes

Communal disputes are often very volatile and can arise in various ways. Disputes can arise from use of land or water. It can also be religious, ethnic or racial. Issues involving demands for compensation for environmental damages resulting from the exploitation of crude oil can be settled amicably through conciliation.

International Disputes arising between parties from different countries, or disputes arising between sovereign states who will not like to negotiate directly with the other country for reasons of prestige.

The option of the parties to conciliate may arise at any time in the course of resolving their differences. It may be chosen as the first step in resolving a conflict or it may be employed at the stage where negotiations have failed between the parties. Where talks in a negotiation become deadlocked, parties may decide to conciliate, in which the unbiased view of the conciliator will be given to the parties to arrive at a settlement.

4.0 CONCLUSION

As seen from the line of discussions it can be safely deduced that the use of conciliation as an alternative means of settling disputes in this country is not really popular. But it is

certain that as the times go by the process will attain greater use by the courts and disputants alike.

5.0 SUMMARY

The conciliation process involves the consent of parties in dispute to a consented settlement by a third party chosen by them to settle their differences by giving them options that will lead to a settlement.

6.0 TUTOR MARKED ASSIGNMENT

Discuss conciliation as a means of settling disputes between parties.

7.0 REFERENCES/ FURTHER READING

Orojo, J.O and Ajomo, M.A. 1999. Law and Practice of Arbitration and Conciliation in Nigeria, Mbeyi and Associates, Lagos.

Redfern, A. Hunter, M. Blackaby, N and Partasides, C. 2004. Law and practice of international commercial arbitration, 4th edn., Sweet and Maxwell, London

Peters, D. 2006. Arbitration and conciliation Act Companion, Dee-Sage Nigeria Limited, Lagos.

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MODULE 3 ARBITRATION

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UNIT 2 Sources of Arbitration Law

UNIT 3 Contents of arbitration Agreement

UNIT 4 Arbitration Institutions

UNIT 1 NATURE OF ARBITRATION

CONTENTS

1.0 INTRODUCTION

The process of arbitration is used between parties to resolve disputes arising out of commercial/contractual agreements, without the formalities of litigation and regular court procedures. The enhancement of relationship between conflicting parties gave rise to the growth and development of Arbitration as an alternative means of settling disputes. This form of dispute settlement has become very popular because it reduces time and cost which would have been wasted in the process of litigation.

2.0 OBJECTIVES

In this unit you will learn the following:

1. The definition of arbitration
2. Features of arbitration
3. Forms of arbitration
4. Advantages and disadvantages of arbitration

3.0 MAIN CONTENT

3.1 DEFINITION

Arbitration is a procedure for settlement of disputes between parties without recourse to the court of law. It is a private arrangement by parties to submit disputes to one or more uninvolved and impartial persons to resolve the points of disagreement. The decision of the arbiter is final and binding on the parties. Also Halsbury's laws of England define arbitration as:

"the reference of a dispute or difference between not less than two parties for determination, after hearing both sides in a judicial manner, by person or persons other than in the court of competent jurisdiction."

From the foregoing definition, it can be deduced that there must be more than one party to a dispute. They must have agreed to arbitrate, agreed on the arbiter and finality and binding nature of the arbitral decision.

3.2 MAJOR FEATURES OF ARBITRATION

a) Informal procedures: parties to arbitration must have agreed to terms that the procedure will be informal and would be devoid of the complexities of court procedures in matters of litigation. The ultimate goal is to keep the process simple.

b) Consent to arbitration: A written agreement by the parties to resolve present and future disputes by use of impartial arbitration is a must if there is to be recourse to arbitration. The agreement serves as consent for the purpose of establishing the jurisdiction of arbitration. Likewise it places the power to arbitrate on the arbiters.

c) Impartial and Knowledgeable Neutrals to serve as arbitrators: There are varied interests and fields in human endeavor from which disputes may arise. Based on this, it is of utmost importance that only experts knowledgeable in the subject matter and points of disputes should arbitrate. This gives opportunity for a proper decision to be arrived at. It is also necessary that the arbiters should share no interest in the rancour.

d) Final and Binding Awards that are enforceable by law: The opinion of consent to arbitrate is based on the fact that the eventual outcome of resolution is final and binding. This is pursued as long as the parties are satisfied at the point of resolution. More so, the parties agree that the document(s) bearing the resolution agenda is binding and could be used as evidence.

e) Mutuality: There must be consensus between the parties to an arbitration agreement. It is trite that without agreement on the side of both parties there cannot be a valid arbitration agreement.

3.3 TYPES OF ARBITRATION

a) Non binding arbitration - This form of arbitration aids the parties in making their own settlement. The role of the professional arbiter here is to guide the parties in reaching their own conclusion. The decision reached is purely that of the parties.

b) Binding Arbitration: This form of arbitration result in an award, enforceable in the courts. The procedure involved in this form of arbitration is very similar to activities of litigation. It comprise of a formal presentation of the dispute, followed

by handing out of evidence which in this case maybe documents or human evidence. There is then the setting up of an arbitration panel that serves to control the proceeding while maintaining neutrality. The arbitration panel is always a maximum of three experienced personnel.

3.4 FORMS OF ARBITRATION

Arbitration can be categorized into four namely, Domestic, International, Institutional and Ad hoc.

1. Domestic Arbitration**:** it refers to arbitration between parties who are residents of the same country. These parties have commercial contracts which guide their businesses in that country. Any disagreement resulting from operating the contracts can be resolved via domestic arbitration.
2. International Arbitration: This is in converse to domestic arbitration. It is international in nature and occurs when the parties to an arbitration agreement have their business in different countries. It could also be the case when the cause of arbitration agreement traverses beyond the borders of a country.
3. Institutional Arbitration: It arises where parties agree as stated in their agreement that in the case of future disputes, the resolution procedure will be subject to the rules of a named arbitration agency or institution. Such arbitration agencies include the International Chamber of Commerce (ICC) in Paris, American arbitration Association (AAA), The Regional Centers for Arbitration in Kuala Lumpur, Cairo and Lagos.
4. Ad hoc Arbitration: This arises in a situation where parties in their contract agreement do not refer to arbitration rules of commercial arbitration agency but is entered into after a dispute has arisen. Parties to this type of arbitration usually

establish their own rules of procedure that may be made to fit facts of dispute between them as the disputes arises.

5. Document only Arbitration**:** This is a form of arbitration in which the arbiters rely only on the documents presented by the parties in resolving the dispute. Examples of where this is usually used are in commodity agreements, consumer disputes and in construction contracts.

3.5 ARBITRATION INITIATORS

There are various ways by which arbitration are initiated. This could be by party consent to arbitration, order of court, or by statutory mandate. That by statutorily mandate refers to the situation in which it has already been pre-agreed that disputes arising from relationship will be settled via arbitration. However, arbitration by party consent is different from the other two mentioned earlier because it is flexible and designed to suit the purpose and convenience of the parties involved.

3.6 ADVANTANGES OF ARBITRATION

The rights conferred on parties to choose their arbitration tribunal that will settle their dispute is an advantage because the liberty to appoint persons on the tribunal belongs to them. In addition, various other advantages are associated with arbitration. These include

1. Privacy: Parties have the privilege of keeping their secrets intact. At times, the purpose in arbitration is to protect the sensitive interest of the parties from filtering to the public.

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2. Liberty to choose venue for arbitration: parties are at liberty to choose a venue that is convenient for both parties.

3. Power as to choose law: as regards disputes to be settled by arbitrators, parties have the power to decide the applicable law bearing in mind their convenience and protection of mutual interest.

4. Dispute resolutions are achieved in time: issues creating disagreements between the parties are quickly resolved. This gives parties the opportunity to resolve conflicts without going through the burden of time wasting as may be the case of litigation due to unavoidable court procedures.

5. Cheap: the simplicity and flexibility that are associated with arbitration procedure may save time and money. This is in contradiction to litigation where several adjournments, injunctions etc. are coped with before a judgment is reached

6. Finality of decision: it is a general rule that the decision of an arbitration panel is final and binding upon the parties and no appeal lies in this instance.

3.7 LIMITATIONS OF ARBITRATION

1. Arbitration expenditure may be high

Arbitration may not necessarily be a cost saving alternative to resolving disputes than litigation. First, arbitrator's fees and expenses must be paid by the parties which can be substantial. Depending on the arbitral institution (if one is used), administrative fees and expenses may be high especially if fees are assessed in reference to amount in dispute. Fees will also be paid on other facilities needed to facilitate a smooth arbitral process which adds to the cost of arbitration. These myriad of fees can make arbitration really exorbitant.

2. Inability to join Parties

There are millions of different contracts from which disputes may arise and parties resolve to arbitration. Issues arising may range from simple to complex ones. A construction contract for example can be very knotty when dispute arise where several aspects of the contract have different parties executing them. In such a situation special provisions need be inserted in the arbitration clause to resolve such disputes, otherwise it may be impossible for the arbitral tribunal to consolidate the disputes since it has no statutory power to do so.

3. Independence of Awards

Decisions reached in arbitration proceedings are confidential which makes it difficult to have precedents to follow when there are similar facts and issues in dispute to which arbitrators can refer. Since the system of precedents is not applicable in arbitration, each award stands on its own.

4. Limited Powers of Arbitrators

Arbitrators are limited in the powers they can exercise in the course of resolving disputes between parties. Such powers as vested in the courts to compel attendance of a party or witness cannot be exercised by arbitral tribunal. Where it is necessary to enforce an award immediately, the arbitration tribunal cannot enforce except after registration in court.

4.0 CONCLUSION

The use of arbitration as a means of settling disputes between parties, most especially commercial disputes arising from contractual transactions has been on the rise in recent times. Partly due to the fact that parties to such disputes are willing to protect their

corporate image and ensure a quick and less laborious means of settling disputes arising from their transactions.

5.0 SUMMARY

In this unit you have been intimated with arbitration as an alternative means of dispute resolution, the definition, features, advantages and limitations of arbitration.

6.0 TUTOR MARKED ASSIGNMENT

List the features of arbitration and discuss.

REFERENCES /FURTHER READING

Orojo, J.O and Ajomo, M.A. 1999. Law and Practice of arbitration and conciliation in Nigeria, Mbeyi and Associates, Lagos

Arbitration and Conciliation Act, Cap. 19 (LFN) 1990

Peters, D., 2006. Arbitration and Conciliation Act companion, Dee-Sage Nigeria Limited, Lagos

Redfern, A. Hunter, M. Blackaby, N and Partasides, C. 2004. Law and practice of international commercial arbitration, 4th edn., Sweet and Maxwell, London

UNIT 2 SOURCES OF ARBITRATION LAW

CONTENTS

1.0 INTRODUCTION

This unit introduces and intimates you with the growth and development of the arbitration legislation in Nigeria.

2.0 OBJECTIVES

After you must have studied this unit in conjunction with other recommended texts and materials, you must be able to discuss the development of arbitration legislation in Nigeria.

3.0 MAIN CONTENT

3.1 NIGERIAN ARBITARATION LAW & RULES

Application of arbitration procedures and rules in Nigeria can be traced to the colonial era, in 1914 when the Arbitration Act of Nigeria came to effect. Prior to this time, there are no established rules and regulation or law guiding arbitration practice in the country.

During the military administration of General Badamosi Babangida, the Arbitration and Conciliation Decree 1988 was enacted. This became the reference article guiding

arbitration practices in Nigeria. Further to this, the Arbitration and Conciliation Act 1990 came into operation. However, it is worthwhile to mention that the rules guiding the operation of arbitration in Nigeria can be divided into two major sources. These sources according to literature are the common law and doctrine of equity on one hand and statutes on the other hand. The common law and doctrine of equity was in operation during the colonial era. It provides guiding rules where such are missing in statutes. Complimenting the common law and doctrine of equity are the rules and regulations applicable to specific trade. These trade rules and regulation, at times referred to as trade usages, are information resources that aid arbitration when there are no provision to reach decision in statutes or common law and doctrine of equity. The follow up sections to this section are used to focus on the common law and doctrine of equity, and other rules that govern and forms sources of arbitration laws and rules in Nigeria.

3.1.1 Statutes

Statutes here refer to the laws of a nation. It serves to guide the operation of citizens and residents and provides means for delivering equity, justice and judgment. The Nigerian Arbitration law is therefore a derivative of local and foreign statues. An example of local statutes is the Arbitration and Conciliation Act 1990.

3.1.2 Common law and doctrine of equity

The common law and doctrine of equity is a formation of the colonial masters in Nigeria. It relates to the English Common law and doctrine of equity which is in operation in Britain. This forms the basis by which equity and justice are pursued and achieved in Nigeria during the British control of Nigeria economy. Today, this has become ancillary to the Nigerian Law and rules. It becomes important when the existing national laws and rules lack provision for resolving particular unanticipated issues.

3.1.3 Trade usages

These are the rules and regulations that directly apply to specific trades. Different trades may have different guiding rules and regulations. These trade rules and regulation guides the process of arbitration and aid in making appropriate decision that are in tandem with the law while simultaneously agreeing with the trade rules.

3.2 DEVELOPMENT OF ARBITRATION LEGISLATION IN NIGERIA

Refer to section 3.1 for some background information.

In addition, outcome of arbitration legislation in Nigeria is not very popular because of the secretive nature of arbitral proceedings. However, few arbitration laws that exist form the guiding policy for reaching major decisions. One major statute is the Arbitration and Conciliation Act, 1990. Older versions are the Arbitration Act, 1914 and the Arbitration and Conciliation Decree 1988. Another is the New York Convention, 1958. Moreover, the United Nations Commission on International Trade Law (UNCITRAL) has developed arbitration law called the Arbitration Rules. This forms a major source for the development of the provisions of the Arbitration and Conciliation Act. Therefore, the UNCITRAL greatly influence the existing Arbitration and Conciliation Act of the nation. Further information on the mentioned national arbitration acts can be found in the reference quoted at the end of this module. However, information on the UNCITRAL Arbitration Rules is partly provided after this section and also in the reference. Another arbitration law developed by UNCITRAL is called the UNCITRAL Model Law of International Commercial Arbitration. It is used to regulate international commercial arbitration. It is further discussed below and also in the reference.

3.2.1 UNCITRAL Arbitration rules

The United Nations Commission on International Trade Law (UNCITRAL) is a major arbitration law developed by an organ of the United Nations and adopted by the United Nations General Assembly in 1976. The aim of the law is to provide acceptable and

simple rules and regulation to guide international arbitration. This is done with an interest to provide level playing field for arbitration practices everywhere in the world. The most important advantage of this rule, apart from its being suited to be applicable to different countries, is its flexibility. This provides opportunity for its adjustability to meet required arbitration needs.

3.2.2 UNCITRAL model laws of international commercial Arbitration

The UNCITRAL Model Law of International Commercial Arbitration was adopted by the United Nations General Assembly in June1985. The following policy formulations were adopted under this law:

a) That there should be liberalization in International Commercial Arbitration procedure. The parties under this policy are given the power to choose the means of their dispute resolution.
b) That there should be baseline rules that will ensure equity and fairness in deciding the disputes.
c) There should be the establishment of provisions which will enforce final arbitration decisions and also clarify controversial issues when they arise
d) That means should be provided to resolve difficult international commercial arbitration, no matter the complexities of the disputes and disagreements.

4.0 CONCLUSION

From the foregoing it can be safely established that the emergence and the growth of the Nigeria Arbitration Law and Rules have its roots from diverse sources.

5.0 SUMMARY

The Nigerian arbitration Laws have come a long way,. Its growth and development can be traced to1914during colonial rule. Other sources include: Statutes, Common Law and Doctrine of Equity, Trade Usage etc.

6.0 TUTOR MARKED ASSIGNMENT

Discuss the growth and development of Arbitration Laws in Nigeria

REFERENCES / FURTHER READING

Orojo, J.O and Ajomo, M.A. 1999. Law and Practice of arbitration and conciliation in Nigeria, Mbeyi and Associates, Lagos

Arbitration and Conciliation Act, Cap. 19 (LFN) 1990

Peters, D., 2006. Arbitration and Conciliation Act companion, Dee-Sage Nigeria Limited, Lagos

Redfern, A. Hunter, M. Blackaby, N and Partasides, C. 2004. Law and practice of international commercial arbitration, 4th edn., Sweet and Maxwell, London

UNIT 3 ARBITRATION AGREEMENT

CONTENTS

1.0 **INTRODUCTION**

The validity of an arbitration agreement is premised on its ability to meet the requirement of the Law, falling short of the requirements renders the agreement invalid or void as the case may be.

2.0 **OBJECTIVES**

The underlying objective of this unit is to intimate you with :

a. The requirements of a valid arbitration agreement
b. The contents of an arbitration agreement

3.0 MAIN CONTENT

3.1 VALIDITY OF ARBITRATION AGREEMENT

As important as the processes of arbitration is, the outcome is what every party looks forward to. The conclusion reached is what all interested parties to the matter are willing to have, understand, keep and also remember for as long as the relationship exist. Information relating the outcome of an arbitration process is a major tool and an excellent resource material. It can become an important rudder that guides future deliberations, relationships or interactions. At times, the outcomes of arbitration are instruments that maintain, protect and control relationships along family lines, community linkages, national/international cooperation and trade links. It also helps maintain inter-tribal relationships. For instance, arbitration results between two family disputes over landed property (ies) can aid in guiding future family relationship along the lines of their land ownership. When the outcome of the arbitration is transmitted to family lines after the very owners, the beneficiaries also maintain the results of the arbitration. In such a way, the relationship is kept for as long as there are reasons for linkage and interaction on such matter.

In line with the aforementioned, there is therefore a need to validate and make permanent the outcome of arbitration. Various means exist to validate arbitration agreement. First and foremost, for an arbitration to be valid, the parties must have pre-agreed on arbitration. To this end (a) the parties must have a written consent to arbitrate. Other validation rules include:

b) The outcome of the arbitration must be in writing: According to the United Nations regulation on arbitration, every arbitration agreement must be in writing. It is also a mandatory requirement that arbitration under the Arbitration and Conciliation Act 1990 must be in writing. Section 1 (2) of the Act states that "Any reference in a contract to a document containing an arbitration clause constitutes an arbitration agreement if such contract is in writing and the reference is such as to make that clause part of the contract"

Furthermore, if reference in a contract is made to arbitration document, such contract constitutes an arbitration agreement, provided the contract is in writing. It is worthy of note also, that an arbitration agreement cannot be revoked once intention of the parties is clearly expressed except by agreement of the parties or by leave of the court of competent jurisdiction. Moreover, sometimes a party to arbitration is a corporate organization. When this arises, the agreement must be written and presented under a seal. Other forms of presenting the written agreement are contained in section 1 (1) (a) to (c) of the Arbitration and Conciliation Act 1990.

c) There must be an established legal relationship between the parties to arbitration: Before parties can consent to arbitration, the cause of disputes must be such that have to do with predefined relationship between them. This predefined relationship is the contractual agreement that exist between the parties. The contractual relationship must therefore be the reason behind dispute. The issues that cause disputes from contracts are mostly linked to the breach of the contracts and these forms the main reason for arbitration procedures.

d) The dispute must be such that can be subject to arbitration: This in essence means that the cause of such dispute must not be criminal, liquidation etc.

3.1.1 Autonomy and Independence of an Arbitration Clause

An arbitration agreement may be inserted into the contract between the parties or the arbitration agreement may be documented separately. In a situation where the agreement is inserted into the contract, it is understood in law to be an independent contract.

The court decided on the legal import of such a clause in the case of Heyman v. Darwin Ltd (1942) A.C 356 at pp. 373- 374.In that case the court decided that an arbitration clause is different from other clauses because it is the agreement of both parties that if

any conflict should arise between them in the performance of the contract they will have recourse to the arbitration tribunal.

In a situation where the contract is abandoned, the arbitral clause will still be applicable to the parties for the purpose of determining claims arising from the breach of contract.

But in an instance where the arbitration clause is illegal, it will therefore be void. Section 12(2) of the Act reiterates the independence of the arbitration clause from the main contract.

3.2 CONTENT OF ARBITRATION AGREEMENT

3.2.1 Capacities of Parties to Engage Arbitration

The question as to what qualifies parties to engage arbitration to resolve disputes is very important to the subject of alternative dispute resolution. Not everyone that bears grudge or is dissatisfied about certain issues can use arbitration to resolve such disagreement or dissatisfaction. For instance, if company A is dissatisfied with company B over certain business issues, they may be able to engage arbitration to resolve the issues. However, doing this will require the measure of their ability to do so. This measure is based on the proviso that the two companies have subsisting contract and they have resolved to arbitrate if disagreement arise. If on the other hand, the contract precludes their consent to arbitrate or there is no business contract at all, the parties cannot arbitrate.

Another important point that must be checked before arbitration is the legal capacity of the parties. This is one of the requirements of a valid contract. Parties to a contract must have legal capacity to enter into the contract. Otherwise such a contract is invalid. The significance of this lies in the ability of the parties to service the outcome (award) of the arbitration. That is, in the event of enforcing an award, the party against whom the award is subject must not be incapacitated to comply with the terms of

enforcement. This position is captured in Section 52 (2) of the Arbitration and Conciliation Act 1990. The concept of incapacitation refers to the inability of the person or party to comply with the terms of the contract. This could mean the person to be a minor, a person of unsound mind or a bankrupt. Furthermore, a company may also not be qualified to arbitrate if the business in question is against the company's law or the company's constitution has clearly declared otherwise to such business .Moreover, these set of persons can still enter into binding arbitration agreement under certain legal positions. These positions vary from country to country.

3.2.2 The Reference

An arbitration agreement is the basis for parties' ability to refer disputes between them to arbitration. The reference must be worded in a way that is devoid of ambiguity and must rest enough authority with the arbitrators so that they can resolve issues in dispute without having to flout the rules. It is suggested that a reference to arbitration be all encompassing so as to cover all the points for resolution between the parties. If the clause is written referring to disputes and differences alone, this may not resolve matters between the parties especially where there is an undisputed claim. Parties must ensure that reference is constructed in such a way that the disputes, differences and claims are covered for all points to be arbitrated upon. When disputes arise as to the existence of a contract between the parties, it cannot be established by using clauses like 'arising out of the contract' or "arising under the contract".

At common law a claim that is not disputed cannot be subject of arbitration; such can only be subject of litigation. In London and Northwest Railway company v. Jones (1915) 2 K.B 35. It was held that where a claim is partly admitted, the claimant is entitled to judgment on the admitted point, and may go to arbitration for the remainder.

Disputes that arise after the appointment of an arbitrator cannot come under the jurisdiction of such arbitrator but where provision is made in the agreement to cover all transaction without limitation of time; such will come under the arbitrator's authority.

An arbitration agreement may contain the Scot v. Avery clause. The import of the clause is that disputes between parties to a contract will first be subject to arbitration. Parties to a contract may conclude between themselves that prior to any action being initiated in court the parties will first resort to arbitration.

Another crucial clause is the ATLANTIC SHIPPING clause which makes provision to the effect that parties may be barred from arbitration if they do not arbitrate within a given period. These clauses when included in arbitration clause will enhance prompt initiation of arbitral proceedings.

3.3.3 Arbitrators

An Arbitration agreement is a comprehensive and an all encompassing document that stipulate matters relating to:

a. The number of Arbitrators that will administer the procedure will be indicated in the Arbitration agreement; it may be a single arbitrator or three according to the discretion of the parties. Section 6 of the Act

b. Appointment of Arbitrator: Parties may jointly appoint a single arbitrator, and the parties may resolve to appoint three. In this instance each of the party will appoint an arbitrator and the third will be jointly appointed by the parties. Section 7(1)

c. The authority of the Arbitrators must be clearly defined.

d. Preference for the venue where an Arbitration proceeding will be conducted is factored on the proximity of the venue to the parties which must have been provided for in the Arbitration. In a situation where the place of meeting is not

stated in the agreement, then reference will be made to section 16 ACA, 1990 for direction. It provides :

16(1) – Unless otherwise agreed by the parties, the place of the Arbitral proceedings shall be determined by the Arbitral Tribunal having regard to circumstances of the case, including the convenience of the parties.

Furthermore, Subsection 16(2) provides

Notwithstanding the provisions of this subsection (1) of this section and unless otherwise agreed by the parties, the Arbitral Tribunal may meet at any place it considers appropriate for consultation among its members for hearing witnesses, expert or the parties or for inspection of documents, goods or other properties.

e. There must be an indication as to the law regulating the contract in the Arbitration clause. Ordinarily, the Arbitration procedure is regulated and administered by the law operative in the place of Arbitration.

f. The procedure for conducting an Arbitration procedure is embodied in the Arbitration clause. It could be ad hoc or institutional. The provision should contain issues relating to start up of the Arbitral process, pretrial meeting, term of reference or settlement of issues, pleading and other documentation, hearing & evidence, award and cost.

g. Language by which the arbitration will be conducted should be indicated in the agreement since parties may be of different nationalities especially in an international arbitration. Where there is no provision as to this effect in the agreement. The provision of Section 18(1) of the ACA will be resorted to for guidance.

4.0 CONCLUSION

The validity of an arbitration agreement is dependent on observing and obeying the principles governing the procedure, failure to comply with the rules and principles can render the agreement invalid.

5.0 SUMMARY

In this unit you have learnt about the requirements and the contents of a valid arbitration agreement.

6.0 TUTOR MARKED ASSIGNMENT

a. Discuss the contents of an arbitration agreement.

b. What are the requirements of a valid arbitration agreement?

REFERENCES / FURTHER READING

Orojo, J.O and Ajomo, M.A. 1999. Law and Practice of arbitration and conciliation in Nigeria, Mbeyi and Associates, Lagos

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Idornigie, P. 2005.ADR Pre-Certification Course,Negotiation& Conflict Management Group and Aina, Blankson &Co.

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UNIT 4 ARBITRATION INSTITUTIONS

CONTENTS

1.0 INTRODUCTION

The growth in industries and the corporate world in general has enhanced the use of arbitration in settling disputes arising from commercial transactions between companies, corporations, individuals etc. These have heralded the birth of arbitration institutions. These institutions aid the arbitration process in no small measure. Some professional bodies act as arbitrators in matters in their various professions, while some offer their

services for a particular type of dispute, region; others are concerned with resolving all kinds of commercial disputes e.g. Chattered Institute of Arbitrators, Nigeria.

2.0 OBJECTIVE

At end of this unit, students will learn about the Arbitration institutions. Their functions and objectives and also be able to identify Arbitration clauses in other institutions' constitutions

3.0 MAIN CONTENT

3.1 DOMESTIC ARBITRATION INSTITUTION

The term domestic in Arbitration is only used to refer to nature of Arbitration and place of Arbitration. It has no reference to the citizenship of either parties to a dispute or of the arbitration panel. A domestic Arbitration is referenced when the parties to a commercial dispute are simultaneously doing business in the same country while operating a business contract in that country. For instance, if two parties have business relationship in a country and the contract binding their relationship was intended to be operated in the same country of business dealings, the dispute arising out of such contractual transactions will be a subject of domestic arbitration. Therefore, a domestic arbitration institution is an institution which oversees, regulates and guides arbitrators and arbitration processes in a country while at the same time it is domicile in that country. Some arbitration institutions are highlighted below.

3.1.1 Chartered Institute of Arbitrators

The Chattered institute of arbitrators founded in 1915 was granted a royal charter in 1979. It has members drawn from different professions including building, engineering, law, insurance, banking etc. The institute has a wide coverage of members in about 75 countries of the world, including Republic of Ireland, Nigeria, Kenya, New Zealand etc. Basically, the institute was established to perform regulatory functions and also act as guide and standardization for arbitrators and arbitration procedures Its various functions are highlighted below.

Functions of the Chartered Institute of Arbitrators

The functions which the Chartered Institute of Arbitrators serves to perform include:

1) Training and accreditation of arbitrators in all member countries
2) Promote and facilitate resolution of disputes by arbitration
3) Provide facilities for other forms of alternative dispute resolution processes e.g. mediation and reconciliation
4) Set standards for arbitration and issues guidelines and procedures to be adopted
5) Regulates the activities of professional arbitrators by publishing codes for the conduct of arbitrators in respect of national disputes and in specialist areas
6) It publishes general arbitration rules

3.1.2 Nigerian Branch of the Chartered Institute of Arbitrators

The Nigerian branch of the Institute of Chartered Arbitrators, an offshoot of Chartered Institute of Arbitration, was established in March 1998, but became operational in 1996. The Nigeria Branch has the same objectives and functions as those of the umbrella body.

The Nigerian branch in order to enhance its set objectives carries on series of conferences, seminars and workshops to enlighten users and update practitioners of arbitration. It advises users in selecting arbitrators and setting up arbitration panels.

3.1.3 Association of Construction Arbitrators

The association was formed to oversee activities of construction arbitration. It was founded in 1997

3.1.4 Other professional Associations

Some other professional associations existing in the country may also make provisions for arbitration in their various guidelines and codes of practice. Such Associations may include Nigerian institute of Architects (NIA), the Council for the Regulation of Engineering profession in Nigeria (COREN) etc.

3.2 Objectives of Arbitration Institution

- Provision of arbitration services which include: acting as appointing authorities
- Capacity building which involves training of arbitrators
- Supervising the arbitration process and procedure
- Producing the governing rules of arbitration
- Accreditation of arbitration panels

4.0 Conclusion

From the foregoing it is evident that the practice and profession of arbitration in a country is subjected to regulations of arbitration institutions. These institutions, mentioned in preceding sections, and other such institutions promote and enhance the practice of arbitration.

5.0 Summary

In this unit, the awareness of students has been drawn to some of the available arbitration institutions. Their knowledge about the regulatory functions of these institutions has also been enhanced.

6.0 Tutor Marked Assignment

Having gone through the lessons in this unit, each student should pick a professional institution or organization and go through their regulatory laws to discover the contents or clauses of arbitration (if any). The student is therefore required to highlight and discuss the clauses.

References/ Further Reading

Orojo, J.O and Ajomo, M.A. 1999. Law and Practice of arbitration and conciliation in Nigeria, Mbeyi and Associates, Lagos

Arbitration and Conciliation Act, Cap. 19 (LFN) 1990

Peters, D., 2006. Arbitration and Conciliation Act companion, Dee-Sage Nigeria Limited, Lagos

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MODULE 4 NEGOTIATION

Unit 1 Meaning of Negotiation

Unit 2 Negotiation Strategies

Unit 3 Sources of Power in Negotiation

Unit 4 Negotiation Processes

UNIT 1 MEANING AND SCOPE OF NEGOTIATION

CONTENTS

1.0 INTRODUCTION

Negotiation is a daily occurrence that happens without a second thought on the part of the parties. In daily life negotiation happen between husband and wife, parents and their children, the housewife negotiating stuffs by haggling in the market place, to the very

complex negotiations that go on in business circles, between states and the nations of the world.

As much as it is part of daily life, the nitty-gritty of negotiation needs to be understood, and skills sharpened especially when it gets to the formal and more advanced settings of commercial negotiations.

2.0 OBJECTIVES

It is expected that by the end of this unit, you should be able to:

- To define negotiation
- To discuss the styles in negotiation
- Discuss advantages and disadvantages of negotiation if any.

3.0 MAIN CONTENT

3.1 Definition of Negotiation

3.1.1 What is Negotiation?

Negotiation is a process by which two or more parties reach an agreement on matters that require a decision between them. The decision on the subject matter of the negotiation is taken by the two parties themselves and not by a third party.

Negotiation may come to play in resolving conflicts, structuring commercial agreements, and managing social relationship to mention a few. It may also involve domestic transaction such as banking, commercial or property transaction. Negotiation can also be

international in nature spanning transactions in crude oil, imports of industrial goods and services.

Negotiation is a skill that needs to be acquired and developed. Also it is an art that needs to be perfected for effectiveness and achievement of purpose. Before a decision is taken as to whether a matter should be resolved by negotiation or by other processes, the Best Alternative to Negotiated Agreement (BATNA) must be taken into consideration.

3.1.2 DETERMINING YOUR BATNA

Where parties fail to reach an agreement in a negotiation, several alternatives are available to them. The most preferable of the alternatives is called the Best Alternative to a Negotiated Agreement (BATNA). The option for BATNA is however due to the fact that what was desired when negotiation was employed will not (or did not) provide the result expected (proving a failed negotiation process). This therefore means that, the moment a best alternative to a negotiated agreement is found, the alternative becomes the option that brings limit to discussion. This limit will therefore be the worst case scenario. No one will invariably be willing to go below the BATNA.

In accessing your BATNA which require skills and preparation, the focus must not be on pecuniary gains. Factors such as the time required to strike the deal, risk, tolerance and relationships must be considered. A more tasking aspect is the ability to gain information on the best alternatives available to the other party. This requires hard work. The ability to know the BATNA of the other party is crucial so as to enable the negotiator determines the offers that are acceptable in the process of bargaining.

Moreover, assessment of the BATNA of both sides aid in foreknowing if there is any possibility of agreement between parties to a negotiation and also lead to determining whether there is much room to bargain or little. While considering the BATNA of the parties involved in a negotiation, it is possible to determine a point of connection (or

agreement) between the parties. This point of connection is known as the Zone Of Possible Agreement (ZOPA). Based on this, a ZOPA is achieved when there is an overlap of the bottom line position. For instance, in negotiating for the awards of maintenance of children in a divorce suit, the mother's bottom line may be N12, 000 per month while the father's bottom line may be N8000. Due to the large difference in the parties' requests, it can be concluded that there is no ZOPA. However, if the father's bottom line (i.e. the amount he is willing to part with) is N15, 000 per month, and the mother' bottom line (i.e. the amount she is willing to receive) is N12, 000, and then a Zone of Possible Agreement (between N12000 and N15000) exist.

When there is a proper evaluation of BATNA, the possibility of coming out of a negotiation with good award is strong. Inability to determine ones BATNA and that of the other party can lead to an outcome that is below what the best alternative could provide.

3.2 METHODS OF NEGOTIATION

There are different methods that are open to Negotiators. The one most often adopted is influenced by personality. The methods of Negotiation have been classified into three distinct forms which are soft, firm and hard.

3.2.1 SOFT METHOD OF NEGOTIATION

In negotiating a deal, some negotiators prefer to adopt procedures that are friendly and accommodating. They tend to carry out the process to reach an award in such a way that the relationship and interaction is kept intact. The aim is to avoid hurting the other party while at the same time undue privileges may be given unawares. This at times could be detrimental to the negotiators' interest. Though this method is welcoming, it on the other hand has its disadvantages. Such disadvantages include the soft negotiator being prone to

manipulation, unwarranted giveaways, reaching agreements that are below the best outcome that could be and etc.

3.2.2 HARD METHOD OF NEGOTIATION

This is a direct opposite to the soft method. This style of bargaining is hard and uncompromising. The negotiator starts up high and concedes piecemeal. It is forceful and tends to compel the other party to submission. The snag will be when the other party too puts up a diehard stance which may bring the negotiation to a stalemate. Negotiation will eventually break down as parties maintain the hard stance and a breakdown in communication is inevitable. This could prove a lose-lose situation.

3.2.3 FIRM METHOD OF NEGOTIATION

Contrary to the two methods of negotiation highlighted above is a method which stands in between. It is an approach for highly skilled negotiators. The negotiators employing this method are resolved in their request while considering the interest of the opposing party. They are well determined to get the best deal out of the discussion. It is the most preferred method.

4.0 CONCLUSION

Negotiation as an alternative dispute resolution process has been around for a long time. Those in the field of practice or those aspiring to be professional negotiators must be willing to learn by training, and enhance their practice by adopting the mix of the forms of negotiation for optimal result. It is worthy of note that styles and strategy may change in the course of negotiation, and more than a method may be combined in order to achieve set goal.

5.0 SUMMARY

In this unit we have discussed negotiation as an alternative dispute resolution technique. We have defined what negotiation is and the styles of negotiation and how the combination of styles can help the negotiator achieve desired result.

6.0 TUTOR MARKED ASSIGNMENT

What is negotiation?

Discuss the types of negotiation methods you have learnt about.

7.0 REFRENCES/ FURTHER READING

Fisher, R. Ury, W and Paton, B 1991. Getting to yes: Negotiating agreements without giving in, 2nd edn., Penguin Books, New York

Nwosu, Kelvin N. 2004. Critical issues in negotiation, Negotiation and dispute resolution Journal, Vol. 1, No 1, p. 1 - 22.

Watkins, M. and Rosegrant, S, 1996. Sources of power in coalition building, Negotiation Journal, vol. 12, p 5

UNIT 2 NEGOTIATION STRATEGIES

CONTENTS

1.0 INTRODUCTION

This unit will be focused on the approaches to negotiation and the tactics employed by negotiators at the bargaining table in order to have a favourable and successful process.

2.0 OBJECTIVES

At the end of the unit, you should be able to

1. Explain the negotiation strategies
2. List and discuss the tactics used in negotiation

3.0 MAIN CONTENT

3.1 NEGOTIATION STRATEGIES

Negotiations strategies are the methods negotiators use to achieve their real objectives in order to reach an agreement on the matter under negotiation. There are two types of negotiating strategies:

- Competitive
- Co-operative

3.1.1 COMPETITIVE APPROACH

The competitive approach which is also called the positional approach is characterized by a win/lose tactics. It occurs where parties take a stand and are not ready to shift or concede to the other. In this approach, the parties maintain an attitude and position of winner takes all. To be able to achieve their goals, parties resort to scheming in order to gain an advantage over the other. The approach creates competition between the parties.

This strategy is inimical and usually produces an outcome that leaves a bitter taste in the mouth of the defeated party. The characteristics of this approach make it unsuitable for parties that are willing to maintain their relationship beyond the life of the dispute. The approach may also lead to a lose/lose situation where the parties are strong on their position and are unwilling to give in to each other. Where this happens, the relationship between the parties may be sore and over.

ADVANTAGES OF COMPETITIVE APPROACH

- The winner takes all
- Gives the winner a sense of fulfillment

DISADVANTAGES

- Puts a strain on relationship (family, commercial etc)

- Loss of future opportunities that can emanate from the party that lost out in the negotiation
- There may be a deadlock where the other party also decides to take a stand where both parties lose.

3.1.2 COOPERATIVE APPROACH

The cooperative approach which is also called the problem solving approach is characterized by a win/win tactics. The negotiators are desirous of having a peaceful settlement of disputed issues in such a way that both parties gains at the end. The parties seek to work out a bargain that is profitable to all concerned. Moreover, in order to adopt the win/win strategy, negotiators need to:

a) Draw a line of difference between the parties and the problem to be solved. By this, issues are resolved and personalities of parties are preserved.
b) Pay close attention to the purpose they set out to achieve, and not maintain an unyielding stance that can jeopardize the whole process.
c) Display ingenuity in devising several alternatives by which the process can be successfully negotiated.
d) Decide that the result of negotiations be based on some objective yardstick that is measurable

Parties that resolve from the beginning of negotiations to allow for a fair and equitable process with objectivity in focus by adopting the collaborative strategy are able to have successful negotiation without straining future relationship

It is worthy of note that the strategy to adopt will be decided on the nature of transaction and circumstance.

3.2 NEGOTIATION TACTICS

Negotiation is viewed by many as a must win, nothing short of win is acceptable. To many it is a do or die affair, win by whatever means. With this mindset negotiators are prone to use every kind of trick in the achievement of their goals which are often unethical. Based on this, negotiators employ different tactics to achieve, at times, their selfish goals. These tactics are discussed below.

3.2.1 Promise

This tactic is premised on the offer of the future benefits as a trick to secure immediate concession (if you sell this to me at a cheaper price, then I will be buying from you and bring you more customers). Many times negotiators find themselves in a situation where they are promised future deals if concession can be granted in present transaction. As much as future deals are desirable the present must not be sacrificed on the altar of a future deal that may never materialize.

3.2.2 Bloated negotiating team

This trick is intended to harass and intimidate the opponent. This trick is played out by overwhelming the opponent by the number of negotiators in a team. This can be done by bringing in experts in all the relevant fields of the negotiation process. However, a well informed negotiator with adequate preparation will not be daunted by the number on the opposing side.

3.2.3 Threats

A party may issue threats to intimidate the other party and thereby resort to making hasty decisions that can be detrimental to his case. This happens especially in a situation where the party issuing threats have an advantage/information over and above the other party. A

professional negotiator will weigh the threat and the consequence that will attend to non-compliance. The use of threat will not achieve its purpose when the party being threatened is able to decode the other party. This eventually becomes detrimental to the negotiator issuing the threat.

3.2.4 Extreme initial position

The extreme initial position is a tactic commonly used by competitive negotiators by setting the initial stakes high and expecting the other party to make an offer that will fall within the range of acceptable position. This tactics works more where the other party is not well prepared for negotiations. When the necessary information is not harnessed to know the options available and how to respond, the party becomes vulnerable to the antics of the other party. The danger in this position is that party may view the other party as unserious and may respond in an outrageous manner. This situation makes the parties far away from arriving at a consensus. Negotiating for a property, the assignor may fix a price that is very high and if the buyer is not aware/ informed of the worth of such property in the area may eventually pay more than the property is worth.

3.2.5 Psychological ploy

This trick is often devised by negotiators on their opponents to secure favourable concessions for themselves even if it is detrimental to the other party. The psychological ploy can be used in various ways, like feigning ignorance or lack of competence. A party in opposition negotiation may use this trick to gather information not available to him in order to strengthen his negotiation.

The psychological ploy tactic can also manifest in a situation where in the team of a negotiating party one of the team acts as a mediator. This ploy is devised in the situation where by all other members are unyielding and difficult in their demand but this fellow plays the devil's advocate breaking the truce between his team and the other party to

reach a negotiated agreement where ordinarily there would not have been. The kind of agreement reached in this instance is to the advantage of the mediator's team

3.2.6 Deadline

Negotiators will always seek to close a deal in no time by issuing deadlines. When deadlines are issued, it pressures the other party into taking a not well thought out decision, especially if such depends on the outcome of the negotiation to take other decisions. For instance, if a man owes a bank and he has a property he wishes to sell to offset the debt. The other party may have information that might be used to rush him into decision and which will not be favourable to him. Therefore before rushing to meet a deadline, a negotiator should weigh the consequences of not meeting the deadline. He should be faced in determining what in real terms will be the price to pay for losing this deal as against other options. A negotiator should be wary of issuing deadlines that he does not intend to follow up, which labels him as unserious and lacking integrity.

3.2.7 Lack of authority

It may take months for parties in negotiation to come to an agreement and when parties are getting ready to seal the deal, a party may then declare he has power to negotiate but not make final decision, therefore may need to resort back to his principal or some authority to approve or ratify the agreement. This tactic often is a plot to buy time to have a further deliberation or review the offer made by other. It is advisable at the beginning of negotiations that the issue of authority is cleared by both parties.

3.2.8 Nibble

Nibble is a tactic that can be used by a party on whom an advantage has been conferred. It is like an Oliver Twist asking for more. This trick comes to play after parties have concluded negotiations and a party brings up a request for an additional concession which

may look intangible but ordinarily would not be conceded if it was brought up during negotiation.

4.0 CONCLUSION

From the foregoing it is important that a negotiator be adequately prepared before going to the bargaining table. Being able to recognize the opponent's approach and ability to decipher the tactics employed by the other party per time and means of avoiding falling into the trap is important for a successful negotiation.

5.0 SUMMARY

In this unit you have learnt about the types of negotiation strategies and the tricks employed by negotiators to gain a upper hand in bargaining, howbeit unethical. The negotiation strategies are competitive and co-operative. The tricks employed include

6.0 TUTOR MARKED ASSIGNMENT

Discuss the tricks used in negotiations

7.0 REFERENCES /FURTHER READING

Fisher, R. Ury, W and Paton, B 1991. Getting to yes: Negotiating agreements without giving in, 2nd edn., Penguin Books, New York

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Watkins, M. and Rosegrant, S, 1996. Sources of power in coalition building, Negotiation Journal, vol. 12, p 57

UNIT 3 SOURCES OF POWER IN NEGOTIATION

CONTENTS

1.0 INTRODUCTION

The context of power in negotiation is the ability to exercise control over the outcome of discussions between the parties during negotiation. It is a power play that can sway the process on the part of the negotiator that can play it well.

2.0 OBJECTIVES

After studying this unit student should be able to discuss the relevance of power and the sources of power in negotiation.

3.0 MAIN CONTENT

3.1 SOURCES OF POWER IN NEGOTIATION

Sometimes there are some factors that lead negotiation to a particular predetermined end. These factors have power to control the process of negotiation and thereby bring the deal in the favour of the party with such power. This power may be real or imagined. The power is real when a party is in direct possession of what it takes to direct the deal to

conclude in his desire. It is imaginary when the other party feels or thinks, his opposing party is capable of leading the deal in his direction of interest. There are however several sources of power in negotiation. These sources include:

3.1.1 Competition

Competition here refers to the commodity in question. This arises when a party has sole right and ownership of what is desired by other parties. The scarcity involved in the commodity drives the negotiation in favour of the owner. This is similar to a monopolistic market, where there is one seller and many buyers. The fluctuation of the price of such commodity is also the prerogative of the owner. He can deliberately manipulate the negotiation to his favour. However, where there are competing commodities or several owners of similar commodities, the direction of negotiation can be partly controlled by both the buyers and sellers. This is similar to the law of demand and supply in which when there is scarcity of supply while there is surplus in demand, the price is high and vice versa.

3.1.2 Legitimacy

In negotiation, legitimacy is another source of power. The validity placed on items, commodity or transaction may influence the negotiation. For instance, a NAFDAC approved drug or food item will easily attract buyers to negotiation. This official approval will also sometimes affect the price tag as against another original product without a NAFDAC approved number. Another example is a titled land with appropriate Certificate of Occupancy. Such property can attract better negotiation than one without a title. Other forms of legitimacy apart from the official, regulatory or professional authority are the legal and institutional authorities. While legal authority is rigid, institutional/organizational authority is flexible and can be negotiated.

3.1.3 Information

Information is another strong source of negotiation. The amount of information available to a party on a deal will put the party at advantage. The available but scarce information can become the wheel of manipulation in a negotiation, most especially when the other party is unaware of such viable information. More so, when a party has prior knowledge about the interest of the opponent in a negotiation the party is put in an advantage. Such information can be useful in directing the course of negotiation.

3.1.4 Precedent

Cases in court are based on strategic precedents. The outcome of a decided case can be used to determine the case at hand. This is also similar to negotiation. The current practice in a business can be used as a negotiating factor to decide on a transaction. Where this is the case, it is concluded that precedents around the business is being used to make appropriate decision.

3.1.5 Time

Business deals are always timely. The gauge of time is an important factor in striking a deal. Some businesses depreciate with time while some others appreciate. When time constraints are placed on a deal, the parties in negotiation are pressured to end the deal before the set time. For instance, in Europe, football players transfer period are always bounded by time. Whatever negotiation that would be is fixed within the time limit. It is required that all negotiations must be concluded before the deadline. Most times, negotiations close to deadline are always hurried and this many at times influence the outcome.

3.1.6 Investment

The investment power in negotiation works like a golden handcuff. It is used to get the opponent to make commitment at the beginning of a deal. A party who has invested so much in a business will be very unwilling to part with the business just because of his huge investment, even though he is no more willing to continue with the business. The size of such investment may be used by negotiators to persuade the other investor to make larger concessions in the future and to hold down his interest. The reasoning behind this is that with the investment made, the party will feel a sense of loss to rescind the transaction. On the long run even when faced with a situation that he would not have ordinarily consented to he will be unwilling to relinquish the transaction because of the investment at stake.

4.0 CONCLUSION

Having discussed what power is in negotiation, a negotiator must understand his source of power and be able to use it to his advantage, likewise he must be able to identify the opponent's source of power so as to be able to counter them when it will be to his own disadvantage.

5.0 SUMMARY

A negotiator must fully understand the power play in negotiation to be able to have a favourable concession and a successful negotiation.

6.0 TUTOR MARKED ASSIGNMENT

List and discuss the sources of power in negotiation

7.0 REFERENCES/ FURTHER READING

Fisher, R. Ury, W and Paton, B 1991. Getting to yes: Negotiating agreements without giving in, 2nd edn., Penguin Books, New York

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UNIT 4 NEGOTIATION PROCESS

CONTENT

1.0 INTRODUCTION

In this unit you will learn about the phases in negotiation and how important it is for a negotiator to be adequately prepared for, and thoroughly understand the dynamics of each of the phases.

2.0 OBJECTIVES

After studying this unit you should be able to discuss and apply the negotiation processes in a real life situation

3.0 MAIN CONTENT

3.1 THE NEGOTIATION PROCESS

The negotiation process can be divided into four stages

a. Preparation

b. Opening Phase

c. Bargaining Phase

d. Closing Phase

3.1.1 Preparation

The saying goes that he who fails to prepare is planning to fail. Developing good plans and preparation are important to the success of any negotiation. A negotiator must have a mental picture of what he plans to achieve and set out an articulate agenda to guide the process.

As events unfold in the course of negotiation, methods and strategies may change but the agenda in place guides and helps the negotiator from deviating from the substance of negotiation. It is necessary for a negotiator to do his homework well, gather all relevant information and have thorough understanding that is necessary about the transaction before going into mainstream of negotiation.

During preparation the following issues need to be considered:

i. A negotiator must know the other options open to him and that of the opponent in the course of negotiation if they fail to reach a consensus. In all the options open to a negotiator the best of the options on the scale of preference is called the Best Alternative to Negotiated Agreement (BATNA).This helps in knowing and assessing the limit of negotiation award.

ii. Get to meet the parties: the opposing negotiator and the corporate entity or individual he represents, get enough information about their background and personal traits.

iii. Be able as a negotiator to put your emotions in check, lest your apparent weakness or strength that has not been well managed can hinder the success of the negotiation

iv. Be able to meet to know the benefits the parties are aiming at and be able to make concessions without jeopardizing your own interests.

v. Review your plans and tactics, and prepare for how to respond and manage surprises that spring up in the course of negotiation.

vi. Be proactive, think ahead, and envisage circumstances that may warrant digressing from your agenda and how not to be derailed from achieving your end goal.

vii. A negotiator must not get emotionally entangled, maintain a clear thought and objective view point.

viii. The power play can be vigorous with each party doing all that is possible to tilt the balance to his own favour; in this a negotiator must be vigilant and pay close attention to what is going on at the bargaining table.

ix. Detail your bargaining work plan, determine your upper and lower limit, and also develop negotiation work plan detailing the bottom line, acceptable and the ideal positions.

3.1.2 Initiation

The initiation stage is first in line before the bargaining stage in negotiation. This stage is very crucial because on it rests the success or failure of the whole process. At this stage each of the parties will state their case, establish the real facts, and state the main issues to be addressed in the negotiation.

The parties present their problems from their different points of view in accordance to the needs the parties wants addressed. At this stage also there should be no display of emotions in stating the problem at this stage, there is a need to thread softly and be

cautious of just marshaling your position on the matter because it poses the danger of each party maintaining their own position rather than seeking opportunity for mutual gains.

In addition, parties should state clearly and have a thorough understanding of issues in dispute. This helps the parties to focus on the issues. By establishing the real facts parties will separate the supporting facts from conclusion and test all assumptions. Where parties intend to adopt the collaborative strategy, the initiation stage is the time to set the tone, check for common grounds between the parties to agree on.

Who should open discussion may become a problem. There are different ways to resolve the problem which include considering the subject matter of the transaction, the custom of the trade may indicate who starts up the discussion. The venue of the meeting may determine the one who takes the first shot. Negotiation may be opened by the party hosting, or from whose instance the meeting is convened. The person with a weak case can allow the other party to open discussion to be able to ascertain whether the other party is aware of the weakness .Where a party has a limited information, the onus of starting discussion maybe shifted to the other party which may also help gather information from the other party.

3.1.3 Negotiation

This is the phase where all the preparations of the parties come to the test. The negotiation stage is also called the bargaining phase. This is where the parties' bare issues and analyze their options. Here they agree on points noted at the preliminary stages. Also, the negotiation phase is one for persuasion on both sides to accept offers and counter offers by either party. It is a time to influence the other party to come into agreement .The success of this phase is based on the strategy adopted by the parties in bargaining. Where

the competitive strategy is adopted then parties will play the power game by using different kinds of tactics to make the opponent accept their position. The tactics include but not limited to extreme initial position, use of threat, deadline, and nibble.

In a situation where parties adopt the collaborative strategy, the bargaining phase should be used to discover, synchronize and decide options that will meet the respective needs of the parties. In order to do this, negotiators must understand the three elements at play in negotiation

A Subject Matter – this relate to the problems on which an agreement is sought.

B Standpoint – this is stance of parties on the issues to be resolved.

C Interest- Interest refers to the fundamental concern and prospects of the parties that would be affected by the agreement in the transaction.

At this stage, the communication skills of a negotiator comes in handy, he must know how to use them to maximize his benefit.

It is not uncommon in the course of negotiation for the parties to have a stalemate situation, where in the course of negotiation a party remains keen on his point not to shift position. Even when parties have adopted the win-win strategy, this does not totally negate a stalemate situation. This happens especially where parties fail to agree on the appropriate means of solving the problems identified or even where one of the parties in the course of negotiation decide to adopt the win-lose strategy.

3.1.4 Concluding phase

This is the climax. Both parties would have discussed and reached a conclusion on pertinent issues in the transaction. At this stage parties must ensure that all queries and objections raised at the bargaining phase are addressed. At this point the pertinent issues are resolved, details of the agreement are modified, and all necessary for an enforceable agreement have been dealt with. Previous agreement are reviewed and possibly

exchanged between the parties for modification or correction. Parties reach an overall and final agreement and reduce their agreement into writing. They may both agree on the form of documentation. There are specific instances where the form of documentation is prescribed.

5.0 CONCLUSION

Having learnt the processes involved in bargaining you must be able to know the requirement in each stage of the process for effective bargaining.

6.0 SUMMARY

The negotiation process is divided into four stages; preparation, opening, bargaining and the closing phase. It is not uncommon to find out in some other texts that the bargaining phase is further divided.

6.0 TUTOR MARKED ASSIGNMENT

Discuss the phases of negotiation processes known to you.

7.0 REFERENCES/FURTHER READING

Fisher, R. Ury, W and Paton, B 1991. Getting to yes: Negotiating agreements without giving in, 2nd edn., Penguin Books, New York

Nwosu, Kevin N., Critical Issues In Negotiation, In Negotiation and Dispute Resolution Journal, Vol. 1 No 1January, 2004, pp 5-13.

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ADR Pre-Certification Course, Negotiation& Conflict Management Group and Aina, Blankson &Co.

MODULE 5 OPTIONS AND PROCESSES OF ADR

UNIT 1 CONTENT OTHER FORMS OF ADR

1.0 INTRODUCTION

Having discussed the major ADR processes operative in Nigeria, major in the sense that they are mostly used in the settling of disputes either commercial or otherwise. Yet there are other ADR processes that are not particularly common to this clime but are emerging as a result of the ever expanding reach of global commercial transactions. Some of these methods may still be alien to this environment but will become popular in no distant future because in all ramification of life the world has turned a global village.

2.0 OBJECTIVES

The objective of this unit is to intimate the student to other methods of ADR that can be used in settling disputes.

3.0 MAIN CONTENT

3.1 MINI- TRIAL

This is acclaimed to be the most structured form of mediation operative primarily in the United States of America. The purpose of mini- trial is to put high- level executives, one from each party, into an environment in which the strength and weakness of their respective cases are drawn to their attention. The argument is that faced with the time and costs likely to be involved in litigation will induce them to reach a compromise.

The mini-trial procedure is relatively simple. It entail a hearing of one or two days sometimes called "information exchange", follows a limited form of disclosure of documents and the exchange of briefs. Lawyers to each of the party make a brief presentation outlining the evidence they will call in the event of a trial.

A 'neutral adviser', who can be a retired judge or senior lawyer, will give a preliminary opinion as to how a court would likely react. Information exchange by the parties signal the commencement of negotiation between the two principals, either with or without the intervention of the neutral adviser.

On the long run parties may not reach an agreement which prompts them to ask the neutral adviser to give a no binding opinion as to what the result might likely be if they resolve to litigation. This may eventually lead to a settlement.

3.1.2 MEDIATION /ARBITRATION (Med/ Arb.)

The Med/Arb is a hybrid between mediation and arbitration. This process emanate from the agreement of the parties that if they are not able to reach a mediated agreement then, the mediator will take up the role of arbitrator to decide the dispute. This process is used in the U.S, especially in labour disputes. This method however raises some pertinent questions as to the readiness of the parties to give necessary information, since they are aware that if the process does not result in a mediated agreement, the mediator can put on the garb of an arbitrator to subject the same issues to arbitration? Can the arbitrator satisfy the requirement of impartiality and fair hearing when he is already privy to discussions between the parties in mediation?

4.0 CONCLUSION

These other methods of ADR though not yet popular in this country, will definitely become a norm in some years to come.

5.0 SUMMARY

The mini trial process is executive in nature and it is required that the representative of each of the parties have adequate knowledge of issues in dispute and have enough authority to act on behalf of the party represented.

6.0 TUTOR MARKED ASSIGNMENT

Identify and discuss the ADR process you have learnt in this module.

7.0 REFERENCES/ MATERIALS

Orojo, J.O and Ajomo, M.A. 1999. Law and Practice of arbitration and conciliation in Nigeria, Mbeyi and Associates, Lagos

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Redfern, A. Hunter, M. Blackaby, N and Partasides, C. 2004. Law and practice of international commercial arbitration, 4th edn., Sweet and Maxwell, London

Unit 2 MECHANISMS FOR THE PRACTICE OF ADR

1.0 Introduction

2.0 Objectives

3.0 Main Content

3.1.1 Objectives of multi-door courthouse

3.1.2 Options at the multi-door court house

3.1.3 Merit of multi-door courthouse

3.1.4 Practice and Procedure at the multi-door courthouse

3.2 Citizens Mediation Center

4.0 Conclusion

5.0 Summary

6.0 Tutor Marked Assignment

7.0 References/ Further Reading

CONTENT

1.0 INTRODUCTION

This unit is aimed at introducing the student to the mechanisms for the practice of ADR.

2.0 OBJECTIVES

The student at the end of this study unit must be able to understand the objectives, functions and the process applicable at the multi-door courthouse.

3.0 MAIN CONTENT

MULTI-DOOR COURT HOUSE

A multi-door courthouse is a court connected Alternative Dispute Centre which offers different forms of alternative dispute resolution processes. It is a concept instituted to augment and support available resource for access to justice.

3.1.1 OBJECTIVES OF MULTI-DOOR COURTHOUSE

1) To provide support to the regular court in the resolution of disputes and dispensation of justice

2) To harness and utilize the vast human and legal resource resident with retired justices through service in mediation, arbitration and other alternative dispute resolution process.

3) To provide quick access to justice, reduce or eliminate the frustration of litigants at regular courts by resorting to ADR

4) Model and develop the executive judge notion and plan how best settlement could be achieved among litigants

3.1.2 OPTIONS IN MULTI-DOOR COURTHOUSE

1) EARLY NEUTRAL EVALUATION

An experienced lawyer, retired judge or a dispute resolution specialist are experts that sit to consider the relative strength and weakness of each parties position, analyse the likely result of the process and advise the parties accordingly.

2) MEDIATION

A voluntary and informal process in which an unconnected third party called the mediator helps parties to amicably resolve their dispute by arriving at a mutually beneficial agreement. The mediator does make decision rather the parties decide the terms of agreement.

CONCILIATION

Conciliation is presided over by a neutral third party, who if in the circumstance can contribute his opinion as to the merit of the dispute and give recommendation or advice to the clients.

ABITRATION

The arbitration process of ADR involves a third party referred to as arbitrator who preside over a dispute and has the power to give a binding and enforceable "Award"

3.1.3 MERITS OF MULTI-DOOR COURTHOUSE

1) Confidentiality is ensured, document, statement and pieces of evidence tendered during ADR sessions at multi-door courthouse are confidential and protected from disclosure for all purpose.

2) It is hence an amicable settlement of dispute and promotes relations between parties rather than aggression and animosity.

3) The time spent in ADR process is relatively lower to the time wasting, energy consuming and emotion sapping process of regular courts.
4) It helps reduce congestion and will on the long run help rid the court of the long list of cases that besiege our courts.
5) The multi-door concept helps parties to choose the process suitable to advance their cause and meet their needs

3.1.4 PRACTICE AND PROCEDURE AT THE MULTI-DOOR COURTHOUSE

Order 25 Rule (1)(2)(C) of the High Court (Civil Procedure) Rules of Lagos State 2004, makes provision for the promotion of amicable settlement of cases or adoption of Alternative Dispute Resolution. Section 24 of the High Court Laws of Lagos State 2003 also provides that in any action, the court may promote reconciliation among the parties thereto, encourage and facilitate the amicable settlement thereof. This can be done by referring dispute to ADR at the multi-door Courthouse.

In Lagos Practice Direction of 24-02-04, made pursuant to section 274 of the 1999 Constitution prescribed practice procedure at ADR sessions at the Lagos multi-door courthouse Mediation Procedure Rules 2004. Parties that opt for arbitration will be governed the Multi-Door Courthouse Arbitration Procedure Rules 2004.

In Abuja , Practice Direction 19/11/03 made pursuant to section 259of 1999 Constitution prescribes practice procedures in Alternative Dispute Resolution session at the Abuja Multi-Door Courthouse mediation proceeding, while the Abuja Multi-Door Courthouse Arbitration Procedure Rules (2002) govern Arbitration Proceedings at the Abuja Multi-Door Courthouse.

3.2 CITIZENS MEDIATION CENTER

*The Citizens Mediation Center at the Ministry of J*ustice Alausa*, Ikeja, Lagos* is worthy of note. There the citizens of Lagos state have free access to the resolution of their

disputes through mediation at the center. Issues ranging from landlord/tenant issues, employment, compensation matters, family, inheritance/land matters and monetary claims are mediated upon between parties at th*e* centre. The State government is to*;* decongest the courts, promote the ADR process and ensure that citizens have quick access to justice. The saying goes that justice delayed, is justice denied.

4.0 CONCLUSION

In other climes, the ADR options have been in use for a long time and has gained wide acceptance. Parties that have disputes are being encouraged first to submit to Arbitration or Mediation or use any Alternative Dispute Resolution Procedure. The growth and recognition of these procedures have increased, thereby prompting the Courts to first subject parties to negotiate. In Dunnet v. Railtrack Plc (2002) 1 WLR 2434 at 2436-7, the defendants though won the case was denied the cost in the Court of Appeal because it refused invitation to mediate.

The Court said:

"Skilled Mediators are now able to achieve results satisfactorily to both parties in many cases which are quite beyond the power of lawyers and Courts to achieve. A Mediator may be able to provide solutions which are beyond the powers of Court to provide"

The English Court enforced an ADR clause without much ado, in Cable & Wireless v. IBM, (2002) EWHC 2059 (com.ct). The parties had entered into a ten year agreement which contained the following ADR provision:

"If the matter is not resolved through negotiation, the parties shall attempt in good faith to resolve the dispute or claim through an Alternative Dispute Resolution (ADR) procedure as recommended to the parties by the Centre for Dispute Resolution. However, an ADR procedure which is being followed shall not prevent any party from issue proceedings."

A dispute arose and C & W commenced judicial proceedings without first attempting an ADR procedure. IBM applied for a stay of action in order to enforce the ADR procedure. The Judge ordered a stay of judicial proceeding pending ADR.

In Hust v. Leeming C.P. Rep. 59, the Judge described ADR as being "at the heart of today's Civil Justice System" and although on the particular facts, it was held that the defendant's refusal to mediate was reasonable. Although, defendant had satisfied the court, that mediation has no real prospect of success in the instant case.

5.0 SUMMARY

In the course of discussions it is very clear that the courts and would be litigants ordinarily will prefer to settle their disputes by ADR. This is because any of the processes can be cheaper, faster and often ensure amicable settlement of disputes. Thus, only where such procedure fails or where the matter is exclusive to the jurisdiction of the courts will such not be referred to ADR.

TUTOR MARKED ASSIGNMENT

Discuss the objectives and options of the multi door courthouse.

7.0 REFERENCES/FURTHER READING

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