

THE
MERGERS & ACQUISITION
DISPUTE RESOLUTION PROGRAM
(MADREP)

THE MADREP DESIGN

- THE MADREP PLEDGE
- THE MADREP AGREEMENT
- THE MADREP SOLVE

Resolving Mergers & Acquisition Related Disputes

*“...The CBN will remain focused in **reducing** the **risk** of **systemic banking crisis**, and promoting general economic and financial sector development...”*

Prof. Charles Soludo.

Governor, Central Bank of Nigeria

Preamble

Eighty- nine banks have been directed by the Central Bank of Nigeria (CBN) to re-capitalize to the tune of ₦25 billion as against the previous ₦2 billion, by December 31st 2005. Most of these banks are at different stages of the process of mergers and acquisitions in order to meet up with the Central Bank’s deadline. The Governor of the Central Bank, Professor Charles Soludo, at a Special meeting of the Banker’s Committee, on July 6th 2004, stated that The Central Bank will collaborate with other institutions “*to work out the structure of incentives and legal/regulatory frameworks to facilitate the rapid consolidation of the system.*” It is in regard to the Governor’s desire for an efficient “legal/regulatory framework” that we present, “The Mergers & Acquisitions Dispute Resolution Program: **MADREP**”.

An Overview

Following the pronouncement of the CBN, a number of Banks have signed Memoranda of Understanding as a prelude to merging and a number of them are in the process of signing similar agreements. These agreements are to precede possible mergers.

From Wall Street in the United States to the city of London, billions of dollars of M & A related transactions are consummated on a daily basis. In those business environments, it is the exciting details of the deals that we learn the most about, with very little, if anything at all about the disputes and litigation that ensue. Is that to suggest that disputes do not arise? Most certainly not! The difference between the American legal system, the British legal system and the Nigerian Legal system (?) lies in the structure of the justice system’s appreciation of the essence of time on M & A related disputes and most importantly, the negotiating skills of the lawyers and financial advisors. The nature of Mergers & Acquisitions may be divided into: inter-party and intra-party disputes.

- INTRA PARTY ISSUES
Intra-party issues may include: Compensations and benefits, severance packages, Human resource policies, and administration, Job grades and titles, shareholders, and shareholder interests.
- INTER PARTY ISSUES
Inter-party issues may include on-going litigation, third party creditors and pre-merger liabilities with third parties, non-disclosure on financials, breach of merger agreement terms or misrepresentation of facts.

As disputes are bound to arise in any of the areas listed, the only available mode of resolution currently available is litigation. The question then is: given our legal system, can it be truly said that the “Soludo directive and deadline” can be met if any of the parties resort to litigation in resolving any M & A related dispute?

The Mergers & Acquisition Dispute Resolution Program (MADREP) has been specifically designed to mitigate the delay, the high cost, and the divisive nature of litigation in Mergers & Acquisitions related disputes. More to the point, MADREP is our contribution to the Central Bank’s aspiration of working out an efficient legal/regulatory framework to facilitate the development of the Banking sector.

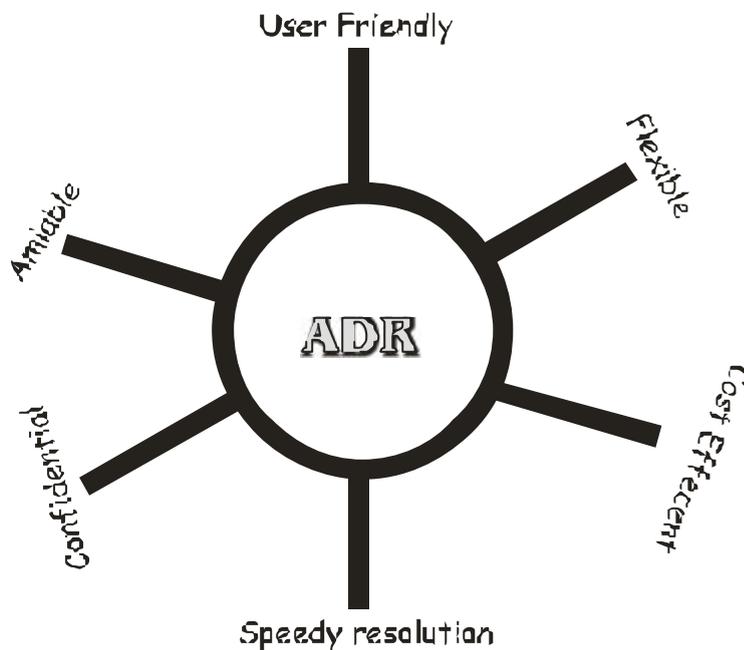
OUR PROPOSAL

For most business disputes, Alternative Dispute Resolution holds the promise to speedy, amicable, cost-effective and private resolution. M & A related disputes are no exception.

What is ADR

“ADR” is the acronym for **Alternative Dispute Resolution** which refers to any means of settling disputes outside of the “courtroom” but not necessarily outside of the courthouse (The Lagos & Abuja Multi-Door Courthouses are examples of court connected ADR Centres located within the administrative structure of the Court). Typically, ADR includes negotiation, mediation, arbitration, early neutral evaluation, conciliation and other hybrids.

As burgeoning court queues, rising costs of litigation and time delays continue to plague litigants, and stall businesses, more businesses are beginning to lay the foundations for Alternative Dispute Resolution in their terms of contract by including in them ADR clauses to accommodate disputes that may arise as a result of the contract.



For an efficient management of M & A related disputes, the cardinal point in designing a successful ADR process is that it must be fair in fact and perception and must be mutually acceptable to the parties. It is in this regard that we have designed/ customized **The Mergers & Acquisition Dispute Resolution Program : MADREP.**

THE MADREP DESIGN: How does it work?

The Mergers & Acquisition Dispute Resolution Program has been categorised into three:

- **The MADREP Pledge**
- **The MADREP Agreement**
- **The MADREP Solve.**

THE MADREP PLEDGE

1. The MADREP PLEDGE

The MADREP Pledge is a promise of good faith between:

- Merging Banks
- Merging Banks and their employees
- Merging Banks and their advisers
- Merging Banks and their shareholders.
- Merging Banks and their Executive Management Board
- Merging Banks and the various unions.

The aim of the MADREP pledge is to foster a commitment between merging parties to confidential and non-adversarial forms of dispute resolution through ADR. Simply put, signatories to the MADREP Pledge undertake to make ADR their first option in the resolution of disputes that may arise.

THE PLEDGE

“Being aware that Disputes may arise from the ongoing merger discussions or the agreed merger between our bank and other banks we hereby subscribe to a less expensive and more effective method of Resolution than the traditional lawsuit to avoid in-ordinate delays, and the threat to our long standing relationships”.

In demonstration of the commitment of our Bank to the merger process/agreement, to an effective administration of Justice and the ideals of ADR, WE

of _____
Bank's name

Hereby pledge as follows:

1. To explore Negotiation, Mediation, or Arbitration towards the resolution of any dispute which may arise as a result of this merger agreement before litigation is considered.

2. In the event that litigation is recommended or finally resorted to in the resolution of any given dispute which involves any other party that has signed this pledge, it will be commenced only after a notice has been forwarded to the other party, provided that the commencement of such an action does not preclude further attempts at negotiation or mediation by the parties.

The MADREP AGREEMENT

The MADREP Agreement refers to clauses which parties to a MoU or merger agreement may insert to instruct disputes that may arise from their contract.

Dispute resolution clauses may specify only one dispute resolution mechanism or may provide an opportunity for others. A two or three step process is highly advised. It might first stipulate that if the parties are unable to work out their differences on their own through negotiation, mediation may be resorted to and in the event that it is still not resolved through mediation, parties may then submit to binding arbitration
Sample MADREP Clauses might read:

Step 1: NEGOTIATION

In the event of any dispute, claim, question, or disagreement arising from or relating to this Memorandum of Understanding (or merger agreement) or the breach thereof, the parties hereto shall use their best efforts to settle the dispute, claim, question, or disagreement. To this effect, they shall consult and negotiate with each other in good faith and, recognizing their mutual interests, attempt to reach a just and equitable solution satisfactory to both parties.

Step 2: MEDIATION

Failing the ability of the parties to resolve the dispute within a period of 14 days through negotiation; all disputes, claims questions or differences shall be referred to confidential mediation at The NCMG Centre for Dispute Resolution in accordance with the provisions of its Commercial Mediation Rules. The mediation proceeding may be initiated by either of the parties upon notice to the other party (ies) or the NCMG Centre for Dispute Resolution

[The clause may also provide for the qualifications of mediators, method of payment, venue and any other item of concern to the parties]

Step 3: ARBITRATION

Failing the ability of the parties to resolve the dispute through mediation, the dispute shall be referred to *(binding/ advisory)* arbitration as administered by The NCMG Centre for Dispute Resolution in accordance with the Arbitration and Conciliation Act, Cap. 19, L.F.N.

There shall be a single arbitrator, and the appointing authority shall be the NCMG Centre for Dispute Resolution. The venue of arbitration will be the NCMG Centre for Dispute Resolution Lagos, or such other venue as agreed by the parties or advised by the NCMG Centre for Dispute Resolution.

Step 4: LITIGATION

The parties hereby agree that failing the ability of the parties to resolve following an advisory arbitration, the dispute shall be submitted to litigation.

THE MADREP HYBRIDS

The MADREP Design also recommends a hybrid of the fore mentioned processes for the effective resolution of related disputes. Examples of such processes are

Neutral Evaluation

This is a process in which an experienced attorney, retired judge or a dispute resolution specialist evaluates the relative strengths and weaknesses of the positions advanced by the parties, the probable outcome at trial and offer parties an impartial assessment of case strength. The evaluator will assist the parties in settlement negotiations and/or renders an advisory opinion as to settlement value, if parties so request.

Med-Arb

Simply put, it is a process in which Mediation is followed by Arbitration where Mediation fails to resolve the dispute or parts of it. This makes possible achieving the best of both worlds.

Short for mediation-arbitration, this process gives the parties the opportunity to use mediation to reach a settlement, and then to rely on a decision by the arbitrator on issues on which no agreement has been reached. This process encourages parties to create their own best settlement under the threat of having one imposed by an arbitrator.

Lit- Med

Lit-Med is the combination of litigation and mediation as a single process. Parties may agree that in the eventuality that a matter might be part resolved through mediation and issues not resolved would be referred to litigation. Matters of constitutional law and interpretation may also be referred to litigation.

THE MADREP SOLVE

Commencement of Action at The NCMG Centre for Dispute Resolution

The Mediation Procedure

STEP ONE **Request for Mediation**

- Any party or parties to a Mergers & Acquisition related dispute may initiate mediation simply by writing, telephoning or visiting The NCMG Centre for Dispute Resolution.(The NCMG Centre)
- Request for mediation or submission to Dispute Resolution Forms are provided by The NCMG Centre.
- Upon filling of the duly completed Request or Submission Forms, along with four copies of the initiating party's Brief Statement of Issues, the case is assigned to a Case Administrator who promptly schedules a preliminary meeting.
- At this meeting, the Case Administrator explains the program to the parties and assists in clarifying issues and the choice of mediator(s)
- Where there is no submission to mediation, a party may request The NCMG Centre to invite the other party to join in a submission to mediation.

STEP TWO **Selection of the Mediator**

- The NCMG Centre will propose the name of a suitable Mediator or, at the request of the parties, submit a short list of Mediators; and provide them with a biographical sketch of the mediator(s).
- The parties are instructed to review the sketch closely and inform The NCMG Centre of their choice of Mediator.

STEP THREE **Preparation for Mediation**

- The NCMG Centre will issue a Mediation Confidentiality Agreement for execution by the parties and the Mediator, which stipulates the confidentiality, and without prejudice nature of the process.
- The NCMG Centre will arrange an appropriate date and location for the mediation and co-ordinate the exchange of Statements of Issues between the parties and the Mediator(s).
- The parties shall each deposit with The NCMG Centre such portion of the fee covering the cost of mediation and all appropriate expenses of the proceeding.

STEP FOUR

The Mediation Session

- The Mediation session usually begins with an initial joint session between the parties and the Mediator. He explains the procedures and ground rules covering each party's opportunity to talk, order of presentation, decorum, use of caucuses and confidentiality of proceedings.
- After these preliminaries, each party describes how it views the dispute. The initial party discusses its understanding of the issues, the facts surrounding the disputes, what it wants, and why. The other party then responds and makes similar presentation to the mediator.
- After a period of clarification and some discussion, the Mediator may meet each party privately (caucuses) to explore the case with them, in confidence. Several separate caucuses of this kind may take place.
- During each caucus, the Mediator clarifies each party's version of the facts, priorities, and positions, explores alternative solutions, and seeks possible trade-offs. The mediator serves not as an advocate but as an "agent of reality".
- As soon as there is a semblance of common ground, another joint session is scheduled. Here, the mediator narrows the differences between the parties; emphasizes the progress made and formalizes offers to gain an agreement.

STEP FIVE

The Settlement

- If the parties fail to reach a settlement of any or all of the issues, they may submit such issue(s) to advisory arbitration, binding arbitration or any other ADR process considered suitable.
- When the parties reach an agreement, the terms of settlement are drafted with the assistance of the Mediator. Once reduced to writing and signed by the parties, it becomes legally binding.

STEP SIX

Follow Up

- On conclusion, The NCMG Centre will furnish the parties with an invoice of the total expenditure and make refunds, if any.
- The NCMG Centre for Dispute Resolution will issue a questionnaire to the parties after the settlement of the dispute, to assist with its quality control handling and assessment of the skills of the Mediators used.

The Arbitration Procedure

Where the parties to a MoU have agreed in writing that disputes in relation to the merger shall be referred to arbitration under the administration of the NCMG Centre for Dispute Resolution, such disputes shall be settled in accordance with the **Arbitration and Conciliation Act, Cap. 19, L.F.N**, subject to such modifications as the parties may agree in writing. For International Arbitration, The NCMG has adopted the **UNCITRAL Rules** or **the NCMG Arbitration Procedure Rules**.

The NCMG Centre for Dispute Resolution

Who we are

Board of Governors

Hon. Justice Kayode Eso C.O.N

Mr. Gamaliel Onosode

Prof. Itse Sagay S.A.N

Dr. Christopher Kolade

Amb. Audrey Ajose

Mrs. Maryam Uwais

Chief Arthur Mbanefo M.F.R

Brig-Gen. Adetunji Olurin

Alh. Shehu Musa C.F.R

Prof. Isabella Okagbue

Mrs. Margaret Tilley – Gyado

Mr. Kehinde Aina

Established in 1996, **The Negotiation & Conflict Management Group** a not-for-profit peace building organisation has been in the vanguard of promoting the widespread use of prompt, effective and economical means of resolving disputes.

NCMG has over the years acquired the status of the pacesetter in the field of Alternative Dispute Resolution (ADR) in Nigeria. It is to our credit that the NCMG Centre for dispute resolution was established in 1996 and the first court-connected ADR Centre in Africa, The Lagos Multi-Door Courthouse, in 2002.

The NCMG Centre for Dispute Resolution has a notable crop of seasoned professionals in the field of Dispute Resolution on its panel of neutrals and offers a variety of services including training, consultancy and facilitation of Alternative Dispute Resolution processes.

THE M & A Division of The NCMG Centre for Dispute Resolution is a one stop department for M& A related disputes. With more than 20 seasoned experts in the field of Mergers & Acquisition and banking dispute resolution. The Centre is devoted to the ethical, efficient and economical resolution of disputes that may arise from such transactions.

For further information, please contact:

The NCMG Centre for Dispute Resolution
4B, Akenzua Street, Off Ajayi Crowder Street
Asokoro, Abuja.
093140072-3

Lagos Contact: 2631688-9, 08033501635