
Kluwer Mediation Blog

Taking The Third Way In Deal Making

Kenny Aina (Aina Blankson LP) · Saturday, October 22nd, 2011

Anyone who saw the 2010 Wimbledon match between Nicholas Mahut and John Isner would appreciate my feelings as I watched an almost endless play of wits during a recent energy deal in which I had been appointed as Transaction Counsel. Clearly, parties to the deals had their cards and kept playing it in a bid to outsmart the other team with the aim of gaining the best or most favourable points for their respective Companies. However, everybody on the table was quite evenly matched in board room intrigues so we had an almost unending tennis match with the biggest loser being the deal itself. As transaction counsel, my allegiance was to neither party but to shepherd the deal on the legal front so the amount of energy and paperwork being expended on these corporate games seemed basically a waste of professional time which could easily be avoided. Here the knowledge of mediation in deal making became invaluable.

First, I had to tactfully take control of the process by helping the parties identify the big picture which was to make the deal happen. I also got the guys on each side to express what their hopes or aspirations for coming into the deal were in the first place. Once this was said, the atmosphere changed considerably from one of competitiveness to openness. From this point, I thought it necessary to have each party make plain their interests in the transaction but no! They immediately clamped up, the high adrenaline competitive nature of board room politics which they had been used to would not allow such simplicity! Again, I requested their co-operation to listen to each party's interests privately. Given the trust level they had for me, this seemed very convenient for them and their openness was quite instructive. Funny though, when all the dross was out, their interests were not mutually exclusive save for two issues which were not deal breakers.

Once this news was out, negotiations progressed with such speed that in two hours we were done with each party satisfied to a great degree as to the gist of their interests and the entire deal reached. I was also satisfied that my part in this deal was beyond the law per se to managing the deal making process to a 'yes'. A major takeaway for me though is how many more deals could be saved if deal makers employed the services of a deal mediator in their negotiations rather than this chance meeting with a transaction counsel that had a mediation background. Also, I wondered how crucial knowledge of deal mediation would be to transaction advisers who usually are neutral and appointed by both parties to transactions, in the process of deal mediation. Finally, given the sheer waste of time, resources and relationships expended on commercial litigations, most times instigated by a losing party in a zero sum negation, I wondered if it was not the best option for parties to reach agreements that best protected the interests of all in a win/win scenario. My experience in this and other transactions leans to the affirmative.

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The graphic features a black background with white text and a circular icon. The icon depicts a group of five stylized human figures, with a magnifying glass positioned over the central figure. The background is accented with horizontal lines in blue and green.

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