

JUSTICE SECTOR REFORM IN SUB-SAHARAN AFRICA

Strategic framework and practical lessons

Commercial ADR

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The presence of leaders from 45 African nations in China a few weeks ago was a clear indication of the importance to Africa of building on existing trade and investment relations which, last year alone, jumped in value by 39%; trade worth over \$42 billion. Sino-African trade has increased tenfold since 1995 and an estimated 2,500 separate new business deals were under discussion at the Summit alone. 2,500 contracts. 2,500 potential disputes.

We live in a shrinking world where local concerns become regional, and regional become global. Economic activity is cross-border which means that people and institutions from different cultures with different legal backgrounds and different business expectations are learning to work with each other. Disputes are an inevitable product of business transactions and resolution of those disputes can describe the difference between a productive commercial relationship or closure; a phenomenal rise in domestic and international investment or none at all. Yet, despite increasing globalisation and internationalisation of business, interventions designed to attract domestic and foreign investment sometimes excludes procedures for resolving commercial disputes, although we know investors will put their money in destinations where their investment and commercial disputes will be fairly and expeditiously settled. ADR is key.

What is ADR?

ADR offers not only alternative means of resolving disputes but an entirely more efficient way of doing business with each other. It's the 'buzz' word in corridors of justice all over the world but remains widely misunderstood which is likely to be the reason it is often initially treated with suspicion.

ADR comprises a range of processes fashioned *ad hoc* to meet the specific needs of parties locked in a dispute; each process being an alternative to litigation but commonly 'mediation'. The key principle is that the means used in seeking to resolve the dispute must be proportionate to its nature in terms of value, complexity and importance to the disputants.

The Dispute Resolution Continuum

Definitions of the range of processes are not just academic, as confusion over different terms blurs information and is an obstacle to public confidence in ADR.

ADR methods can be classified in terms of the measure of control retained by parties over a dispute.

This 'Continuum' illustrates how parties lose control of their dispute: how parties lose control as they move away from direct contact with each other in negotiation, away from the opportunity to decide the outcome of the dispute towards an adjudicative, law-based settlement at the other end of the scale.

- ◆ **Negotiation** is described as the process permitting parties the maximum degree of control over both the process and the outcome through a mechanism which will not impose any settlement which is not mutually acceptable. With no third party intervention, it may not be regarded strictly as an ADR technique but its inclusion here is justified by the fact that negotiation underlies ADR practice as negotiated outcomes are the objective of ADR.

- ◆ At the other end of the scale, once submitted to **Litigation**, parties are subject to court procedures and final judgement thereby losing control over the process, the outcome and the cost.

- ◆ **Mediation** is the central and most frequently adopted ADR technique around the globe, embracing the highest level of international diplomacy, the humblest of community conflicts and the riskiest of multi-million dollar disputes. It is a flexible process conducted confidentially in which a neutral person actively assists parties in working towards a negotiated agreement of a dispute or difference, with the parties in ultimate control of the decision to settle and the binding terms of resolution. It is not designed to achieve solutions that reflect legal rights and obligations but solutions which are commercially and mutually acceptable.

The mediator is actively involved in the negotiation process but has no power to impose a settlement or adjudicate; rather he employs a range of techniques that enable parties to communicate effectively, explore options for settlement and test the consequences of non-settlement, all on a 'without prejudice' basis as to their other legal rights and remedies in the event that they do not settle in mediation and proceed to arbitration or litigation.

- ◆ **Arbitration**, being an adjudicative process, is arguably outside the range of ADR, as the arbitrator, or panel, considers oral and/or written submissions from the parties and then issues an Arbitral Award against which there is no appeal to the court. It is increasingly under criticism for being too bogged down in procedure - and too expensive.

In between, a variety of processes including:

- ◆ **Early Neutral Evaluation ('ENE')** is used increasingly to evaluate the likely outcome of a case by a retired judge or senior lawyer. It is expected to lead to realistic negotiations between the parties or assist in mediation.

We talked yesterday of the need for Accessible, Adaptable, Available and Acceptable justice and, in response, hybrids of ADR processes have evolved, underscoring its flexibility. The fundamental

characteristic is that they all focus on diffusing adversarial negotiations through an impartial third party and mutually agreeing to: Realistic, Effective, Acceptable and Lasting (REAL) , future-oriented solutions.

- ◆ The term **Conciliation** can be confusing: in South Africa and China, it has the same meaning as our definition of 'Mediation'. In other jurisdictions it implies a more interventionist approach by the Neutral who may suggest options for settlement. Uganda has an 'Arbitration and Conciliation' Act but it is rare to hear a Ugandan talking about anything other than 'mediation'. What is important is that meanings are checked in different contexts.

Factors which have given rise to ADR globally

A range of factors have stimulated the growth of commercial ADR on a global scale. I do not suggest that all are necessarily relevant to your specific jurisdiction. Nevertheless, there are elements which may pertain and others that will inspire discussion as to methodologies of incorporating ADR in your respective legal systems. Suffice to say that, in many key jurisdictions, ADR is understood by business, standard in contracts and has found its way into the legal vocabulary. Today, Courts not only embrace mediation, some of them require it. The reasons for this phenomenon were, at the outset, specific to the West and, in particular, the USA where commercial practice was being undermined by an inadequate public commercial justice system¹. The reasons for this dissatisfaction were several:

- ◆ **Delay**

We heard from the Lagos AG yesterday, the principle complaint against justice systems has been chronic delays. It has been clearly established that lingering, unresolved disputes have a counter-productive effect on the development and economic growth of the private sector. A contract can come to a standstill waiting for a dispute on a sub-contract to be resolved in the courts.

- ◆ **Cost**

Companies and small traders do not make money in court rooms. The cost of legal fees multiply with the years, lower the profitability of any business involved in litigation and risk becoming disproportionate to the issue or claim at stake. Companies can set out on a path of genuine dispute but, as costs escalate, end up fighting over which business is going to go into liquidation

- ◆ **Antagonism**

The antagonism and accusations of lawsuits are a necessary attribute of the court process. Very good lawyers are usually very antagonistic. Parties are driven apart by a process that makes it impossible for companies to continue to do business once the relationship has been destroyed in the courtroom.

- ◆ **Limits of legal solutions to commercial problems**

¹ Described by F Peter Phillips of CPR, New York at the ADR Summit in Lagos, November 2005

Courts administer justice in accordance with the law and the law tends to provide one answer only, and that is not usually a commercial one. Sometimes the best solution on a construction site could be a change in contract specifications and the promise of continued working relations, but the law does not provide for such a commercial solution: it looks backwards to determine fault while business wants to look to future opportunities.

◆ Lack of certainty / loss of control

Business was increasingly concerned about commercial disputes being resolved through precedent and law particularly when subject to other jurisdictions. Winning a case in one State does not mean you are sure to win in another. Lawyers build cases to the point where the fundamental issues are forgotten, submerged in case law. Lawyers will focus on the strengths of a case and never its weaknesses. The outcome could reflect the skills of the legal counsel which tends to mirror the pocket of the party.

◆ Waste of resources

Vast amounts of money are spent taking a case through the courts even though statistical evidence in UK, USA, Nigeria and Kenya shows that something in the region of 95% cases settle before judgement. The dilemma for commercial managers, pressurised by shareholders to maintain low operating costs, was simply justifying staying in court knowing that the chances were that there would be an agreed settlement way in the future, but only after thousands of dollars had been spent on legal costs and management time.

◆ Court administration overloaded

From the point of view of the courts, the litigation landscape was becoming unmanageable. Backlogs were such that the administration and the judges themselves simply became unable to process them in reasonable time frames. Dispute were more complex and judges sometimes out of their depth on commercial issues which were critical to the disputants.

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For decades, mediation has been used in the West in matrimonial disputes and in parts of Africa in traditional modes of dispute resolution, but once it was tried in commercial disputes in the West, it quickly rose to the fore because its characteristics addressed the very problems that had been exposed and it showed itself to be a modern, effective, conflict management and resolution tool :

◆ Delay:

Mediations can be arranged for next month, next week or tomorrow depending on what the parties believe is the best way to set about the process.

◆ Cost:

It is also cost effective. They usually last a 1 day, sometimes more and preparation is minimal compared to litigation or arbitration. Provision of mediation services will free up funds in the private sector for reinvestment and thereby play a key role in regenerating the economy.

◆ Antagonism:

Mediation is less antagonistic as it provides a confidential environment for parties to express their dissatisfaction, and then set a mirror to their own case to understand different interpretations of the legal, commercial and factual issues that initially put them into conflict. In the hands of a skilled mediator, they will move on towards common ground where options for amicable and future-oriented negotiated settlement are explored. Disputants are not constrained by a desire to win but motivated by a desire to achieve a workable, commercial solution. If the mediation does not work, parties can always proceed to litigation but the process is likely to have reduced the issues between them and injected an approach that is less adversarial and less aggressive.

◆ Limited legal solutions

ADR offers another dimension. A mediated settlement is not restricted by legal limits; it may simply require an adjustment to a contract, an apology or an agreement to do future business. None of these remedies is available to a judge, although they are at the very essence of doing business.

◆ Lack of certainty / loss of control

ADR does not create legal precedents; control over one's destiny is one of its core attractions. Cross-border disputes are not limited by jurisdictions. Those inevitable disputes with our new friends in China can be resolved with dignity, and with respect for our respective cultures.

◆ Waste of resources

Business managers give value to shareholders by demonstrating a quick, cost-effective and forward-thinking approach to dispute resolution. Poor people do not have to compromise their community in helping to pay for transport to the nearest court, only to have their cases adjourned.

◆ Court administrative overload

As to the backlogs and administrative overload, this new ADR culture has inspired a range of reforms that address procedural challenges and impact on the delivery of justice.

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Accepting the sense behind ADR is one thing, incorporating it in everyday corporate, judicial and legal practice is another. This has come about in a variety of ways in different jurisdictions:

Initial strategies for adopting commercial mediation

◆ Private sector

I mentioned earlier that, in the US, the impetus came from the business community, dissatisfied with a system which did not respond to late 20th century business needs. Corporate lawyers from leading businesses such as Mobil Oil, Exxon and Pepsi were the 'bell cows'² of the ADR movement; their professional reputations, integrity and prominence in the commercial world was sufficient for others to follow them where they led, which was to ADR.

They devised a Corporate Pledge which was distributed among corporate leadership. It said that the undersigned company would at least consider the use of ADR in any dispute with another company that had also signed the Pledge. Simple but powerful. A manager could not sign – it had to be signed by both the Chief Legal Officer and the Chief Executive Officer; in other words it was a conscious decision by the highest strategic leadership of the enterprise. Before long, over 4,000 corporations had signed, representing over 2/3 of the gross national product. It was a hit. The most ingenious element to the Pledge was that it gave business a neat excuse: if their lawyers were advising them to sue, they could simply hide behind the Pledge and call the other Pledge signer and say: 'I'm in the right and I'm confident that I'm going to win this dispute but I see that you have signed the Pledge and so did we so we have an obligation to talk to each other. When shall we meet?'. There is no way of measuring how often the Pledge has led to successful direct negotiations but it undoubtedly had a tremendous impact on the growth of commercial mediation on a global scale.

At the outset, high profile individuals such as governors, Attorney Generals and retired CEO's were engaged as Neutrals which had the immediate effect of getting the attention of influential lawyers and business people. The concept rollercoasted and was been picked up by national organisations, trade associations and other groups. Ultimately, it inspired new thinking not only in commerce, but among the legal profession and judiciaries around the world.

◆ Lawyers

The Chief Justice of Ontario (Roy McMerty) said: 'People attend lawyers with problems they want resolved, not problems they want litigated'. Lawyers are, without doubt, the gatekeepers to any successful ADR programme. The private sector strategy in the US worked: lawyers could not accuse such eminent, influential people of being 'faddish' and joined the movement. Other jurisdictions have had other Lawyer experiences largely borne out of the profession's fear that their income will be compromised. The most powerful tool in changing that mindset has been direct experience of the mediation process, even if it is forced. Lord Woolf's reforms in England and Wales (1999) started a quiet revolution which has resulted in lawyers being not only knowledgeable about ADR but considering it

² F Peter Phillips, CPR, New York

routinely when talking to their clients. The spark that lit the revolution was not the Civil Procedure Rules (CPR) themselves, which indeed provided the context for change, but subsequent case law (*Dunnet v Railtrack*) which directed lawyers to try mediation and deterred clients from not complying with ADR orders for risk of substantial cost penalties. When the lawyers then tried it, they found they liked it! More importantly, the clients liked it! A 2005 survey revealed that 75% of commercial clients in the UK courts were first-time ADR users; 87% of them said that the process exceeded their expectations. Woolf put responsibility on the judges to manage cases in accordance with an overriding objective which, in short, meant that cases only go to litigation when absolutely necessary. ADR is now part of the legal framework in England and the ripple effect in common law jurisdictions, especially within the Commonwealth of Nations, has been immense.

- ◆ Literature / academia

In the wake of this revolution, influential publications regaled the successes of mediation in business and it was soon incorporated in Law School and university curricula. The whole concept of law was re-framed and litigation became just one of several tools available to disputants seeking a solution.

- ◆ Public policy

Courts in the US and Europe began to realise that ADR was an answer to many of their problems: it promised immediate lightening of case loads and high user satisfaction. Groups such as insurers started to think: 'We're spending a lot of money suing each other', so industries considered sector-based schemes undertaking – like the Corporate Pledge - to use ADR. Then, courts began authorising their judges to recommend mediation of civil cases, or even requiring it as a condition precedent to getting a trial date. Governments started passing legislation encouraging agencies to create ADR management systems and authorising courts to create court-annexed mediation programmes. These developments served to legitimise ADR and provoked a demand for mediation and, in turn, a need to train more mediators, and train lawyers how to represent clients in a mediation.

ADR in Africa

Here in Africa, we have the luxury of learning from experiences of other jurisdictions. We do not have to go through all the growth pains of evolving an ADR system from scratch but can take what is relevant, adapt what is useful, build on what is vital and ignore what is inapplicable.

- ◆ We have heard how **Tanzania** has incorporated ADR in its legal system, especially in its Commercial Court, and stands today among the top ten countries in the world for ease of doing business (*World Bank Doing Business Indicators 2006*).

- ◆ Since 2000, **Zambia** has used Settlement Weeks to clear out the backlogs bedevilling its court system supported by court-annexed mediation.

◆ In response to the clamour from its business community to improve the investment climate, **Mozambique** passed an Arbitration, Conciliation and Mediation Act in 1999 which legitimised non-court ADR, compliant with World Trade Organisation standards, and established a Centre for Arbitration, Conciliation and Mediation. A year ago, its National Assembly approved major revisions to the commercial code which now provides an effective basis for modern commercial practice including the resolution of business disputes through ADR.

◆ I learned yesterday from fellow delegates that **Malawi** has a court-connected mediation scheme as well as a dynamic paralegal programme that trains community-based mediators to handle something in the region of 80% of the country's disputes.

◆ The 1995 Constitution laid the foundation stone for ADR in **Uganda** by promoting reconciliation in all matters handled by the judiciary. It enjoins judges to speed the trial process and settle disputes on the basis of substance and not technicalities. The 2000 Arbitration and Conciliation Act described new judicial powers of referring cases to mediation and one Commercial Court judge famously asked if this heralded 'reform of the law or of attitudes?' (Justice Kiryabwire). Shortly after, they piloted a mediation scheme whereby all cases filed in the Commercial Court were referred compulsorily to a Centre for Arbitration and Dispute Resolution (CADER) at no cost to the parties. By the end of 2005, the Commercial Court was disposing of 60% more cases than in 2001; the Pilot has been deemed such a success that it is to be rolled out to the other divisions of the High Court.

◆ Today, ADR is mainstream in **Ghana's** justice, business and social systems. Its labour legislation has long permitted negotiation and mediation within strict timelimits, but in recent years the judiciary could no longer ignore incessant complaints from business about delays in the courts. They recognised that the mono-door of litigation was the biggest impediment to improving Ghana's investment climate and set about far-reaching reforms, declaring a 'Golden Age of Business' and placing a responsibility squarely on the shoulders of the judiciary to sustain and maintain investors' confidence in the country.

Ghana's legislation has implicit provisions for ADR when the need arises: The Courts Act 1993 mandates the courts, as institutions of justice, to adopt any ADR process that would suit the particular case in order to promote reconciliation. S72(1) places responsibility on the Bench and officers of the court to ensure that this is done. Amended Commercial Court Rules 2004 reinforce this by now compelling parties to a Pre-Trial Conference where ADR is applied, outside the court system, and before litigation although terms of settlement are entered as a judgement of the court.

Moreover, it is Ghana's government policy to settle any investment-related dispute through ADR. 2006 is ADR Year! Ghana is in the throes of an extensive public ADR awareness programme and its recent Settlement Week resolved over 200 cases in selected courts in Accra.

◆ In all of this, it must be acknowledged that most of Africa is looking to **Nigeria** as a shining example of a political will to reform. Africa's first Multi Door Courthouse opened in Lagos in 2002 and has since been replicated in two other States and acquired national and continental prominence. The process of filing matters in the High Courts of these States has been restructured for effective case management by the judge, and robust rules remove cases from the court system where ADR is more appropriate. The MDC concept turns on the premise that litigation, as a single door, is insufficient in meeting the demands of 21st century commerce, so it offers litigants and non-litigants the choice of three 'doors' to resolving disputes: Arbitration, Early Neutral Evaluation and Mediation. All settlements achieved at the MDC are endorsed by the ADR Judge and, by Order 39(2), 'an award made by an arbitrator or decision reached at the MDC may, by leave of a judge, be enforced in the same manner as a judgement or order of the court'.

Lagos CPR require judges to ask in the Pre-Trial Information Sheet: 'Is there any way the Court can assist the parties resolve their dispute or particular issues without a full trial?' And secondly: 'Have you considered some form of ADR procedure to resolve or narrow the dispute or particular issues in it? If yes, state the steps that have been taken. If not, give reasons.' The practical result is that, for the administration of justice, only those disputes which cannot be resolved through ADR will proceed to trial.

Such is the success of the concept, that the Chief Justice has expressed his wish to see it replicated in all States of the Federation. The Nigerian Federal **Court of Appeal Mediation Programme (CAMP)** is intended to further facilitate the decongestion of courts, enhance the services of the Appeal Court and, critically, 'promote foreign investment'.

Their industry has joined the ADR call. The **Nigerian Investment Securities Tribunal** boasts an ADR Unit which, under statute, concludes proceedings within 90 days of commencement of action through arbitration, mediation and 'any other creative dispute resolution process'. All settlements are passed to the Tribunal which, sitting as a court, enters a consent judgement based on the agreed terms.

The **Nigerian Communications Commission** has established conflict resolution centres in selected cities to dispose of disputes in the telecommunications industry; with a value under N1million (US\$) within 60 days to ensure consumers get 'justice and fairness'.

◆ Regional initiatives within **ECOWAS, COMESA, NEPAD and the African Union** remain limited. Again, West Africa is taking the lead as ECOWAS has not only introduced dispute resolution mechanisms for the West African Power Pool (WAPP) and the West African Gas Pipeline (WAGP) but has incorporated ADR practices within its court. COMESA has restructured its Treaty to accommodate Conflict Resolution with an emphasis on peacebuilding; but, on the basis that without peace there is no development and no foreign investment, this initiative bodes well for a stronger directive to come on

commercial lines, perhaps similar to the EU Directive which promotes better access to adequate dispute resolution processes in order to make it easier for businesses to agree to mediation.

◆ As yet, **Kenya** is still to join its neighbours but there is currently a strong manifestation of good faith to test ADR in the Commercial Court before long.

Strategies for continued growth

A range of strategies have consolidated global ADR developments:

◆ **ADR contract clauses** direct parties to attempt to resolve disputes through direct negotiation in the first instance and on to mediation if that fails. These clauses, like an order by a court to ADR, present excellent cover for anyone concerned that an offer of mediation is a perceived sign of weakness.

◆ **Industry and government based schemes**

As in the Nigerian and US examples, banks, insurance companies and others – as well as governments - can develop ADR policies and pledges whereby they commit to try and resolve all disputes through ADR in the first instance.

◆ **Enforcement of ADR Clauses and ADR settlements**

With enforcement, two issues arise: enforcement of an ADR contract clause directing disputing parties to ADR in the first instance; and, secondly, enforcement of a mutually agreed mediated settlement where proceedings have not been issued: in effect, a contract. In our common law, it is presumed that judges can do anything if they are not forbidden. Some jurisdictions - as in Nigeria – have embodied Customary Law and recognise non-formal settlements made through traditional processes as long as they have been mutually agreed and are in accordance with the rule of law. In the civil law of jurisdictions with whom we conduct business, the presumption is that judges may not do anything unless they are permitted. In Croatia, for example, a civil contract must be notarised for it to be enforceable. Globalisation recognises these limitations. Poignantly, legislation is currently being reviewed in China to address this precise limitation in their own law.

◆ **Lower courts and traditional institutions**

It is true that ‘in many countries only the rich can afford resolving disputes through the courts. For the rest, justice is out of reach’. The strategies discussed earlier are at risk of excluding the lower end of the commercial litigation market, despite the fact that MSME’s contribute more than 50% of GNI in most sub-Saharan countries. Your Magistrates and Small Claims courts and your traditional institutions can incorporate schemes that will address their specific needs by providing affordable legal advice and ADR services at community level, that even transcend national boundaries.

Conclusion

In conclusion, flexibility and speed are the hallmarks of today's corporate winners. For business, ADR is accessible and largely successful; most cases are suitable for it – the skill is to identify which are not.

ADR began in the US as a private sector initiative. These days, the commercial sector tends to look to the civil justice system as a whole to increase the take-up of ADR. Mandatory ADR is not always favoured but is growing in popularity. The business community is looking to judges to make a greater use of their powers, in common law, to direct more disputants to mediation, backed up by tough cost sanctions.

England's Woolf reforms stand as a monument not only to the efficacy of ADR but to the profound effect that a small group of judges can have on bringing about change through leadership. International experience suggests that reform of Civil Procedure Rules and the introduction of case management in tandem with related ADR schemes is among the most effective of all judicial civil reforms. Maintaining quality in delivering services is crucial, so investment must be made in designing procedures, protocols and mechanisms that match today's business practices.

Benefits to the judiciary

At a judicial level, incorporating ADR mechanisms will:

- Complement existing court procedures
- Reduce case backlog
- Circumvent ineffective or corrupt courts
- Improve access to justice for all sectors
- Cut costs dramatically of achieving settlement
- Facilitate settlement of multi-party and international disputes
- Enhance parties' satisfaction, and critically:
- Enhance public perception of judiciary's efficiency and effectiveness

Benefits to development

In the context of development, ADR will:

- Promote a culture of non-confrontational dispute management and resolution
- Facilitate the settlement of cross-border disputes
- Improve productivity by releasing cash, otherwise spent in litigation, for investment in the community or commercial sector;
- Promote an efficient and effective legal system attractive to foreign investors.

A unified, continental ADR voice will build investor confidence in Africa.

'The judicial process tends to transform social, political and economic disputes into legal disputes. Not only are some problems ill-suited to a proper or full resolution through the adversarial process, the process may accentuate and exaggerate conflict rather than resolve it'.

Edmond, USA

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