

**CEDR MEDIATOR FORUM: 'An International Theme':
Wednesday 23 June 1999 – The Baltic Exchange, London**

RECENT TRAINING IN KENYA (Transcript)
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My Lords, Ladies and Gentlemen –

I am honoured to be invited to speak to you all on recent CEDR training in Kenya, but I think it's only fair to tell you that it was as much a training exercise for me and for my colleagues in the Dispute Resolution Centre as it was for the participants. We are, in Kenya, very much in our infancy in the world of ADR and grateful for CEDR's support through our affiliate membership.

Kenya's legal system is in chaos.

I live in a society bound in tradition by enviable values of family, trust and respect for its elders, whose disputes are traditionally resolved by non-state activity, founded on a desire for peace and reconciliation. The European adversarial system, imposed by colonial rule, does not recognise in law these powerful traditional settlements.

In public, and in the exercise of his or her profession, the educated Kenyan embraces Western values and is therefore nervous of the West's apparent switch, suggesting today that the so-called Old Ways, reconciliation and so on, could be part of the answer to this chaos.

Currently, the court system boasts a backlog of 200,000 cases. The Registry is in chaos; files are lost in the mess. It can also be arranged that files are lost, or tampered with – for a fee.

The incumbent problems are familiar: clients become victims of the process, its lengthy and expensive delays (6 to 7 years before a case is even heard); relationships are damaged. A far cry from the communal fora of the village.

The London Chartered Institute of Arbitrators branch in Kenya has fallen the way of the rest. The process has been hijacked by lawyers (a recent case of which I'm aware took four years) and a number of corporations have admitted they prefer the risk of corrupt but experienced judges than a non-legal inexperienced arbitrator imposing a dodgy Arbitral Award. Until last month, when CEDR came to Kenya, the general belief was that arbitration and mediation were one and the same thing.

The Dispute Resolution Centre in Nairobi was founded to promote and provide ADR services to business and the non-commercial sector in Kenya. Our services were initially promoted to the legal fraternity; this approach failed miserably, driving us to the alarming conclusion that advocates in Kenya are generally content with the system as it is, however badly it serves their clients.

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In 1999, we gained affiliation to CEDR and sought advice as to the best means to promote ADR in Kenya. It was agreed to target the private, commercial sector. Their awareness of and ensuing demand for ADR would create a groundswell in the media and in civil society which would drive ADR towards integration into business practice. Ultimately, the legal sector will have to endorse it.

We invited CEDR to run two 1-day ADR Awareness seminars in Kenya and spend a third day with us at DRC developing a strategy. DRC has no financial resources so funding for CEDR fees was sought from DFID on the back of their current Business Deregulation Programme to Kenya.

In his opening address to the seminar, the British High Commissioner explained how Kenya needs a more reliable and fair legal system if it is to attract foreign investors. To quote: 'with nearly half of Kenya's population living in extreme poverty, with little or no progress being made to meet international development targets for the 21st century, Kenya's prospects will remain bleak unless key constraints to development are tackled'. He stressed that willing investors expect a more positive socio-economic and political environment, citing good infrastructure, security and intolerance of corruption as pertinent aspects of good governance that investors assess before setting up their businesses in the country. With Kenya's current situation, donor funding is critical to economic recovery.

In the spirit of the current DFID Programme, we pursued a cost-sharing exercise to finance the rest of the expenses: Kenya Airways flew CEDR Faculty from London and our local Nation Media Group (Aga Khan backed) supported an advertising campaign and a series of articles written by one of my colleagues.

Our objectives were clearly defined:

- ✓ to target senior members of the private commercial sector and other interested parties including selected advocates;
- ✓ to raise understanding, profile and use of ADR procedures potentially across the full spectrum of civil disputes in Kenya as a real alternative to litigation;
- ✓ to encourage members of the private sector to:
- ✓ instruct lawyers to use ADR in the first instance;
- ✓ include ADR clauses in standard contracts;
- ✓ through THAT, to circumvent the reluctance of most advocates to utilise ADR;
- ✓ to create understanding of the FACT that ADR will relieve and support the court system, not jeopardise it;
- ✓ to explain the value of ADR in international cross-border disputes. Kenya is home to a large number of multi-national corporations sometimes covering up to 20 countries from their regional base in Nairobi;
- ✓ for the Dispute Resolution Centre to develop our own teaching/training methods for in-house and specialist ADR training.

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We issued personally written invitations to a target group of some 500 senior members of the private commercial sector; about 100 carefully selected advocates and members of the local Chartered Institute of Arbitrators. We restricted numbers to 30 participants each day to maximise interaction with CEDR Faculty and with each other. Remember: ADR was a foreign concept.

Unusually, we mixed professions: about 20% of the participants were from our construction industry. Banks and insurance companies were much in evidence and we attracted interest in private health services, advertising, the motor industry, agriculture as well as the oil industry.

CEDR devised a programme specifically for Kenya. After opening addresses from the British High Commissioner and a very welcome endorsement of our activity by the Chairman of the Chartered Institute of Arbitrators, the Hon Justice Mulwa – a member of our local Bench - the workshop reviewed current initiatives in ADR on the continent of Africa. We then focussed on the current court system before moving into CEDR's indepth description of the ADR process. An Expert Panel comprising CEDR faculty, Kenyan experts in Arbitration and Adjudication and a member of the Kenyan Bench led the debate on the applicability of ADR to local conditions. A video presentation of a Mediation in Action preceded the Arbitration/Mediation roleplay exercise to reinforce the difference between the two processes and allowed for interaction between the professions. A second Panel later dispelled lurking worries and focussed on the day's experience.

We sought feedback through written Programme Evaluations and general interaction with the participants throughout the day. CEDR were put through their paces, rising to meet adversaries with typical conviction and charm. The process was truly a revelation to most of the participants, 65% of whom have requested an ADR seminar/workshop specific to their field of activity (mainly construction, insurance and banks) and 20% of whom declared an interest in in-house training (mainly banks and insurance again).

Beyond the obvious attractions of mediation, participants highlighted their interest in discovering a process that might actually achieve a settlement. Recently, I heard of a Kenyan parastatal whose in-house lawyers are instructed by their Board never to settle! Confidentiality is of paramount importance in a small community, as is the possibility of a continuing working relationship. A means of settlement which circumvents a corrupt court system is also extremely attractive. It is also a process which is available now; we do not have to wait for legal reform.

We achieved our principal objective of creating and enhancing ADR awareness, and of convincing our participants of ADR's suitability and applicability to the full spectrum of civil disputes in Kenya.

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Kenya is ready for ADR. The commercial sector has an immediate interest, need and capacity. The legal sector has an immediate need to relieve the backlog and chaos, like it or not. The influence of a strong movement overseas towards ADR is worthy of attention; keeping up with the West, or being seen to be trying to keep up with the West, is important.

A systematic expansion of our ADR programme is therefore essential: general, in-house and specialist awareness training, especially for the banking, insurance and construction sectors is a priority.

Ultimately, Kenya may have its own Mediator training with full registration and accreditation to establish and maintain high local standards, although I would argue that maintaining international links to CEDR is vital to our local credibility and transparency. We need to identify a small group of Kenyans, African and European, to come to Europe to train as mediators though how we finance that is a major consideration.

We generated high interest in the media. 'Legal reform' are buzz words, at the forefront of daily news and of interest in all levels of society. The seminar was given high profile on the evening news, broadcasting interviews with the British High Commissioner, a fellow Director of the DRC and a member of the local Bench. Later in the week, a business magazine programme profiled the seminars and CEDR's visit. Interestingly, we later learned that the local Swahili-speaking radio station carried mention of the seminars and the ADR message to rural areas.

We regard the seminars as a landmark in the development of ADR in Kenya but we have yet many obstacles to overcome, the greatest of all being perhaps the lethargy to change. I will offer you some examples:

- . last March, the Canadian Bar Association, funded by CIDA, ran a three-day seminar for members of the Law Society of Kenya and the Judiciary. Due to a petty argument over allocation of prizes at the annual society dinner, the entire Judiciary boycotted the seminar leaving standing judges and Masters who had travelled 10,000 miles to address them;

- . we offered two free places on CEDR's seminar to the Kenya Law School. No one came forward;

- . a recently published commissioned report on the need for judicial reform we thought heralded some change of attitude with its mild endorsement of ADR. However, only last week its author, Justice Kwach, wrote: 'I had a quick look at ADR in action in Dar-es-Salaam. I was struck that it gave judges more work than ever struggling to bring reluctant parties together. It certainly is not the answer for Kenya.' Needless to say, the DRC fired a respectful letter across his bows; we await the outcome.

- . there is a tangible concern in the local community that a local Mediator could compromise the parties in some way. For this reason, we would like to pursue Pan-African links to Nigeria, South Africa, Zimbabwe, Tanzania and Uganda through CEDR and through the Commonwealth Mediation Association, of which David Miles is President, thereby creating a pool of Mediators from which we can draw. The

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expense of travel may be little less than the flights from UK but the cultural sympathy would be of tremendous assistance in spreading the gospel of ADR.

We have the energy to pull this off, but at our Centre in Kenya we have no resources. We need a permanent secretariat financed through donor funding or foundation membership. We need CEDR to enhance our credibility in attacking this lethargy; we need CEDR to help develop our Panafrican links; we need CEDR's back-up in training and in awareness, in assisting us with resources and materials; we need CEDR to teach us to teach.

Those of us who care for the future of Kenya know that ADR must be part of our reform process, to assist business by reducing the phenomenal litigation costs and also as a part of legal reforms which will make justice more accessible to civil society. We are very proud to have CEDR's help in achieving this.

Thank you.