

The Climate of Arbitration and ADR in Kenya

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Kenya is emerging from a difficult period in its commercial history. The timing of this Colloquium is pertinent for us as our new political regime heralds a new age of optimism; change is vital and change is happening.

In the late sixties and throughout the seventies, Kenya stood firmly as one of Africa's prime investment destinations but by the end of 2002, a poor physical infrastructure, political and economic frustrations as well as significant administrative and procedural barriers restrained business at every level; the 'enabling environment' had all but collapsed. Our Eastern and Southern neighbours had successfully competed to attract new foreign investment; Kenya's commercial sector was no longer expanding, it was actually contracting. In the context of discussing the climate of arbitration and ADR in Kenya, it is essential to recognise these constraints. Long awaited legal reform and changes and developments in legal practice will have a tremendous impact on regenerating our economy and thereby relieving poverty but they cannot take place in isolation of a complete overhaul of our commercial justice sector.

In common with many fellow Africans, Kenya's present legal system does not yet deliver swift or cost-effective justice. There are now well over 200,000 cases pending in our principal High Court in Nairobi; cases can take up to 10 years to reach judgement; uncertainty has been rife. Even with ongoing changes within the judiciary, the backlog is simply unmanageable; we have to change the way cases are handled in our courts to achieve efficiency and effectiveness at a reasonable cost and thereby dispel the adage that: 'It is better to enter the mouth of a lion than a Kenyan court of law'!

The notion of non-lawyers assisting in the resolution of disputes is not foreign to Africa. A former Chief Justice of Tanzania, the Hon Justice Nyalali once said: 'The use of custom, special rules and communal practice to resolve disputes is not a strange idea. It is common in most African communities and in commercial communities the world over'.

Traditional systems in Kenya have broken down largely due to a rise in political appointments at district level and a lack of understanding of legal rights by the older, less educated, generation such that our communities have come to believe that litigation provides not only the ultimate, but the only, justice.

Arbitration

The practice of domestic and international arbitration in Kenya is conducted within the framework of our 1995 Arbitration Act and is interpreted as: 'any arbitration whether or not administered by a permanent arbitral institution'. The Act follows the UNCITRAL model almost word for word but with a number of glaring omissions: notably no provision for costs and interest. These omissions are dealt with by the Rules of an active local branch of the

London-based Chartered Institute of Arbitrators, being an amalgam of Rules established by leading international arbitral institutions and providers such as the London Court of Arbitration and the ICCA (International Commercial Court of Arbitration).

Draft amendments to the Act, completed by 2001, take stock of the experience of Kenyan Fellows and Chartered Arbitrators as well as the most effective provisions of the English 1996 Act with particular reference to speed and cost. However, this Draft is yet to see the light of day in Parliament. Significantly, it contains no reference to ADR, conciliation or mediation, unlike our neighbours in Uganda who passed an Arbitration and Conciliation Act in 2000 and those in Tanzania who have recently amended their Court Procedure to encompass compulsory mediation for all cases filed in the High Court.

In addition to ratifying the UNCITRAL Model Law, Kenya has also ratified the New York Convention, the WTO and WIPO Treaties relating to arbitration.

Enacting legislation is all very well; the reality is that it does not necessarily provide certainty. Furthermore, Kenya's legal fraternity is currently concerned at judges recently overturning arbitral awards on seemingly weak grounds.

At the international level, arbitration is still very much in its infancy but Kenya can boast competent, if insufficient numbers of, experienced arbitrators. Donor contracts (eg: World Bank and construction-related) usually espouse and envisage arbitration as the first step in dispute resolution and there is no question that arbitration makes a significant contribution to commercial justice in Kenya, but too many of these contracts are drafted in isolation of reality: how many Kenyans can afford to support international arbitration fees let alone meet requirements of attendance in Paris or Geneva. Proposals for a regional centre of arbitration are to be welcomed.

Alternative Dispute Resolution (ADR)

Disputes arise from a default in a relationship between two or more parties. The ultimate goal in resolving any problem, through traditional means, in Africa is 'reconciliation'. ADR embraces this sentiment by seeking to settle with:

Realistic Effective Acceptable Lasting (REAL) solutions.

Should lawyers not swear a form of Hippocratic oath, taken by doctors: 'I swear to do all within my power to assist disputing parties achieve reconciliation' rather than perhaps actively seek to prolong litigation in confident pursuit of the stream of fees emanating from a disgruntled client?

Arbitration, like litigation, views the dispute as a legal analysis and seeks a solution based on entitlement and rights but, by its very nature, arbitration may ignore the interests and needs of an individual party and, critically in international disputes, not embrace cultural influences on the problem in hand.

Eileen Carroll of CEDR, in her book on International Commercial Mediation, describes the successful resolution of a commercial problem as requiring: 'layers of understanding and approach. Indeed, the more complex the problem, the greater the need for a broader and more flexible approach.

'In the diverse arena of international commercial disputes, those who have experienced mediation attest to its effectiveness. Mediation does not pretend to be a panacea but it is true that arbitration and litigation are blunter and costlier in approach and outcome.'

The mediation experience is filtering across the globe and now across the continent of Africa and yet, despite its affinity to traditional practices, Kenya's formal system is slow to absorb the concept.

Kenya's Dispute Resolution Centre (DRC) is an independent, not-for-profit organisation which promotes the prompt, effective and economic resolution of disputes through arbitration and ADR, predominantly mediation, expert determination and early neutral evaluation. We look to the intent behind the evolution of ADR: its flexible, creative, future-oriented, mutually acceptable nature. Mediation seeks reconciliation and it satisfies Africa's multi-faceted, multi-cultural business community seeking settlements without the complexity and expense of court, or even arbitration.

DRC probably spends as much time talking about ADR as practising it. A large part of Kenya's Bench initially perceived ADR as a threat to the court system and is still not comfortable with it; lawyers saw it as a threat to their incomes. Happily, the mood is changing albeit slowly: some enthusiastic, others resigned to the inevitability of its incorporation in the legal system, not 'if' but 'when'. However, the strength and potential of successful mediation interventions at international level, along with recent growth trends in the use of this technique suggest that mediation is likely to emerge as a key mechanism as younger generations of international managers, lawyers and professional advisors emerge. Training is key. The business community, legal fraternity and our judges need to be sensitised; so does the new generation of lawyers and business people.

Awareness training by international visitors to Kenya to date, although generally of a high standard, has been piecemeal, lacking in direction, and without envisaging a continuous programme of cyclical training and professional development, partly due to spasmodic funding by donors. Studies commissioned at high level have put forward recommendations which have included a judiciary-led ADR initiative comprising awareness training for the judiciary, legal professions, academic and private sectors plus a pilot court-annexed mediation programme and training of independent mediators to internationally recognised standards. Tragically, funding remains elusive and Kenya drags her heels.

We are critically aware that we will not win the hearts and minds of all our senior judges and lawyers but we do need to harness the enthusiastic new generation of lawyers coming through university. Moi University offers a popular, optional ADR component to its third year students; its fourth (final) year students support a Legal Aid Clinic and attempt to mediate but without real skills. When we address the Law Society of Kenya, students of Nairobi University outnumber the advocates, but have no opportunity to learn skills. Commerce today is invaded with talk of 'corporate governance': our Business Schools need effective negotiation skills training and sensitisation to effective means of dispute resolution.

DRC is affiliated to the Centre for Effective Dispute Resolution (CEDR) in London and has concluded an agreement with CEDR to move forward, subject to funding, with a dynamic joint programme of accredited commercial mediator training based on course materials which will be designed and produced in Africa and which can be moulded to suit the cultural needs of a particular country. I see this as a PanAfrican initiative to benefit international commercial practices at all levels.

ADR in Kenya needs to be market-driven by the private commercial sector. Its success in relieving pressure on, without usurping, the court system will bring about a change in thinking within the judiciary. While this evolves, DRC will extend the training programme throughout the region and beyond and develop a PanAfrican network of mediators, again subject to donor support. The cost of training must be subsidised to make it accessible to the African pocket. We envisage trade-specific mediation schemes for the banking sector, the insurance sector and construction as well as employment and housing mediation schemes, among others.

In examining international disputes, we cannot exclude small businesses. The UNCITRAL Model Law footnote to Article 1 states that the term: 'commercial' has a wide interpretation and includes: 'matters arising from all relationships of a commercial nature, whether contractual or not - including the simple supply or exchange of goods and services ... '.

In East Africa, many ethnic groups are divided by geographical, political boundaries (eg: the Luo of Uganda and Kenya; the Maasai of Kenya and Tanzania) but these groups continue to trade regardless of national frontier. Indeed, a considerable amount of cross-border trade is defined by simple need: a Tanzanian village trader living a few kilometres south of a Kenya border town will buy from the Kenyan distributor rather than travel more than a 100 kms to buy in the nearest trading centre in Tanzania. Mediation allows disputes at this level to be resolved simply, amicably and without reference to jurisdiction or complex international systems and processes. Further from home, we have worked at community level in Northern Rwanda with groups of Rwandese, Ugandans and Congolese seeking jointly to acquire simple skills of negotiation and mediation to circumvent international political and legal barriers and just work out ways of living, trading and working together in peace while recognising each others' interests and needs.

The security offered by ADR to small traders and communities makes a real difference to their livelihoods. Both arbitration and litigation to them are unintelligible, beyond their means and beyond their control. Interestingly, both the 2000 Report on the Reform of Kenya's Commercial Justice Sector and the 2000 Study on Tanzania's Enabling Environment for Business addressed this specific need as critical to alleviating poverty and improving access to justice.

DRC has addressed this grassroots need through a second proposal to partner with non-governmental and community-based organisations in developing a separate video-led mediator training programme with comprehensive course manuals for training 1200 rural-based paralegals, plus train 40 trainers to roll over the programme in 2 years. Again, we would like to pilot a model in Kenya, designed to be adaptable to other jurisdictions, languages and cultures in other parts of the continent. We are beating on the doors of donors but as yet, and again, to no avail.

Concerted efforts are needed to ensure the development of ADR on a PanAfrican scale. At national level, DRC has aspirations beyond offering arbitration and ADR services, to acting as a Resource Centre to all sectors of society: commercial and academic, religious and community, legal and judicial; facilitating dedicated mediator training and awareness training programmes and maintaining consistent (if not persistent) lobbying and publication of articles and literature.

A Regional Arbitration Centre has been discussed by our Attorney General over the past five years but nothing has transpired. Kenya's business sector is just a village; we have a genuine need to access a pool of mediators and arbitrators outside Kenya but within

Africa. Attendance at this Colloquium has provided a fruitful opportunity to meet and to reinforce associations as well as forge new links. It is our view in DRC that international endorsement is essential to the success of our initiatives and training programmes for credibility in the local and the international arena and to maintain standards.

Although the focus of this presentation is on mediation, DRC espouses and practises arbitration. Interestingly, a number of mediations are referred to us as a result of arbitrators proposing mediation to the parties during the Preliminary Hearing. It is also our experience that putting parties together at a pre-mediation meeting is sometimes sufficient to prompt a negotiated settlement before the actual mediation takes place.

Nigeria's Multi-Door Courthouse is a remarkable achievement by a small group of individuals headed by a fellow mediator, Kennedy Aina. It would be of interest to our Kenyan judges, I am sure, to hear of his experiences if ever we could ever find a way of facilitating his visit.

In the interim, one of the great strengths of ADR is that its informality allows us to make substantial changes within the legal system without having to wait for legal reform. If business wants to use ADR across borders, it can. The impetus for change can come from the commercial sector and establish Kenya as a critical component in a co-operative PanAfrican association of arbitration and ADR centres, competent to handle international disputes within the continent.

Why do the donors delay their support for these simple initiatives and thereby strangle development?

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