African Lawyers and Alternative Dispute Resolution

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APPRECIATION

Ladies and Gentlemen, I am elated to stand before you to deliver this paper on this interesting and "trending topic". I am grateful to the leadership of PALU and the organizers for finding me worthy of sharing this stage with other eminent speakers and practitioners.

INTRODUCTION

A point I must make from the outset is that ADR is not alien to us as a Continent. The introduction of some terms, laws, rules and/or terminologies does not make it foreign to us. It is for this reason that some have argued that ADR also means African Dispute Resolution. The foregoing is indicative of the fact that ADR is also adapting to this fast and ever-changing world.

African dispute resolution mechanisms from the outset focused greatly on principles of reconciliation and maintaining social cohesion as opposed to punitive justice. Any punishment meted out to an offender was always meant to bring healing to the victim, the victim's family, and the community. Thus, the principles we see today in typical ADR systems derive its validity from our "original African Concept". A fact I believe we should be proud of.

Punishment at the time was often delivered in the form of compensation of the victim by the offender, an apology or atonement by the offender to the victim, and the community. Compensation also included associated gestures and rituals such as dancing, drinking traditional beer and slaughtering animals. Preparation for dispute resolution involved consultation, invitations sent to the appropriate persons, the gathering of materials for rituals such as sacrificial

animals, local brew for consumption after the process is complete and selection of a date that does not clash with events like market days, farming or festivals[1].

ADR being originally an 'African Concept' one would have expected that Africa embraces it holistically. This is however not the case. The message across Africa is mixed. ADR is, on its face, a natural dispute resolution process for the continent. With its emphasis on flexibility and informality over consideration of strict legal rights and obligations, one would expect ADR to be more prevalent in our clime. Yet it remains generally underdeveloped in Africa.

In a recent SOAS Arbitration in Africa survey conducted in 2018, it revealed that that African disputes have a strong presence in international arbitration. However, the same cannot be said for African arbitration practitioners either as counsel, arbitrator or tribunal secretary.[2] This disparity has raised concerns particularly among African arbitration practitioners. Some of the reasons noted in published materials and at conferences can generally be classified into two main headings:

a. Lack of expertise; lack of information on skilled African arbitration practitioners;
b. Lack of trust in the capability of African arbitration practitioners.[3]

That said, several jurisdictions have incorporated mandatory mediation or conciliation procedures of some form into certain civil litigation processes (such as Algeria, Chad, Equatorial Guinea, Gabon, Ghana, Malawi, Namibia, Nigeria, Republic of Congo, Rwanda, Senegal, Sierra Leone, Tanzania, and Uganda).[4]

[1] Policy and Government's Role in Constructive ADR Developments in Africa By Nokukhanya Nox Ntuli presented at a conference "ADR and
[2] SOAS Arbitration in Africa Survey Domestic and International Arbitration: Perspectives from African Arbitration Practitioners 2018
[3] SOAS Arbitration in Africa Survey Domestic and International Arbitration: Perspectives from African Arbitration Practitioners 2018
[4] A Multi-Jurisdictional Review Dispute Resolution in Africa

Generally, ADR is not compulsory unless the parties have contractually agreed to it. It is regarded as a positive process, though, in need of a wider application. Several local counsel have noted that reform in the context of ADR is on the horizon in their countries. It will be apposite to mention some notable Countries at different stages of the application of ADR and its impact on African Lawyers.

ADR IN SOUTH AFRICA

ADR in South Africa is not a new concept and has been around in formal terms since the 1960s. South Africa has an arbitration framework regulated by the Arbitration Act No. 42 of 1965 and in 1976 South Africa became a signatory to the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, after which it enacted the Recognition and Enforcement of Foreign Arbitral Awards Act 40 of 1977. This means that foreign arbitration awards are recognized and enforceable in South Africa[5].

One of the flagships uses of ADR programs, which promote the use of mediation and arbitration in South Africa, is the Commission for Conciliation, Mediation, and Arbitration (CCMA). Their functions are among others to conciliate/mediate and arbitrate workplace disputes as set out in the Labour Relations Act No. 66 of 1995. The Act makes it mandatory for disputing parties in employment disputes to use conciliation/mediation and requires that certain disputes, which remain unresolved during conciliation, be referred for arbitration. This system limits the use of legal representation thereby affording parties access to justice without the high costs it is often associated with.

There are various other policies, which encourage the use of ADR either through mediation or arbitration. **The Children's Act 38 of 2005**, which came into effect in 2007, encourages the use

[5] https://www.plagscan.com/highlight?doc=126338258&source=2

of mediation in family disputes involving children. In some instances, the Act makes mediation mandatory unless the matter is urgent or there are allegations of abuse or sexual abuse. The Act also makes provision for the court to make a punitive order were one of the parties refused to attempt mediation or where the party was uncooperative during the mediation process. The use of mediation and arbitration is also built into various pieces of land legislation. **S18 (3), s19, s20 and s36 of the Land Reform (Labour Tenants) Act 3 of 1996** provides for the use of mediation and arbitration. **S10 (2) of the Communal Property Association Act of 1996** provides for the use of mediation, **ss. 21 and 22 of the Extension of Security of Tenure** provide for mediation and arbitration respectively, and **s13 of the Restitution of Land Rights Act of 1994** makes provision for settlement of disputes through mediation[6]. South Africa is making progress when it comes to ADR and prides itself as having one of the fastest developing alternative dispute resolution (ADR) systems in Africa.

It has been argued that the scope of the application of ADR in South Africa needs to be expanded further, particularly to incorporate the developments in UNCITRAL particularly as it relates to arbitration. This would among other things broaden the scope of application of the South Africa Act to include international disputes. The lack of this scope has resulted in multinational companies wishing to solve their disputes looking to other jurisdictions like Mauritius to do so.[7]

ADR IN EGYPT

Arbitration has become an increasingly important means of settling investment and commercial disputes in Egypt. The promulgation of Arbitration Law No. 27 of 1994 was a milestone in providing a comprehensive framework for the arbitration process in the country. The Law

[6] http://capechamber.co.za/wp-content/uploads/2013/11/POLICY-IN-AFRICA-AND-GOVERNMENT.pdf
[7] https://www.imimediation.org/2017/12/09/adr-south-africa-brief-overview/

provides for the rules governing the formation and validity of arbitration agreements, Arbitrability of disputes, the composition of the arbitral tribunal, arbitral proceedings, and enforcement of an arbitral award. Judicial precedents of the Supreme Constitutional Court and the Court of Cassation have played an important role in supplementing the provisions of the Arbitration Law.[8]

Although the Arbitration Law is the primary source for regulating the extrajudicial dispute resolution mechanism, the country's unrest over the past years spurred the introduction of other quicker and more flexible mechanisms for the settlement of investment disputes. Egypt has also acceded to several international conventions governing the arbitral process, the provisions of which have been incorporated into the country's national legal system.[9]

Although the judiciary has traditionally been regarded as the primary and sometimes exclusive forum for the settlement of legal disputes in Egypt, the country's judicial system has become increasingly overloaded over the past few decades, rendering it incapable of keeping up with the swift pace of modern business transactions. Furthermore, the technicalities involved in many modern investment disputes have prevented state courts from issuing informed and timely decisions in these kinds of cases.[10]

These drawbacks of the conventional judicial system, coupled with the desire of investors to preserve confidentiality regarding their disputes and to have a say in the composition of settlement tribunals, spurred the Egyptian legislature to take a fundamental step towards encouraging arbitration as a parallel route for settling disputes, especially those disputes related to investment and commerce, with the promulgation of **Law No. 27 of 1994 on Arbitration in**

[8] Legal Framework for Arbitration by Mohamed Oweis Taha
[9] http://www.loc.gov/law/help/arbitration/egypt.php
[10] https://www.plagscan.com/highlight?doc=126338258&source=2

Civil and Commercial Matters (Arbitration Law). The Law establishes an overarching framework authorizing and regulating arbitration as the main alternative dispute resolution mechanism in Egypt.[11]

While the Arbitration Law stands as the primary source of procedural rules governing arbitration in Egypt, a comprehensive overview of the legal framework that governs arbitration in Egypt also requires an examination of relevant judicial decisions by the Supreme Constitutional Court and the Court of Cassation as a secondary source of law regarding these rules. Additionally, some investor-state disputes in Egypt are governed by other decrees, issued in the wake of what has become widely known as the 2011 revolution, which establishes an extraordinary means for settling investment disputes, to encourage international investors to remain in the Egyptian market.

The Arbitrability of disputes arising out of government contracts has, however, become complicated since the issuance of the 2014 Constitution in Egypt. The current Constitution requires the submission of any administrative dispute to the exclusive jurisdiction of the State Council. The State Council's exclusive jurisdiction may cast some doubts on the Arbitrability of disputes arising out of government contracts including, most notably, project contracts concluded between the granting authority and the project company according to the Public-Private Partnership Law, as such disputes are administrative.[12]

[11] Law No. 27 of 1994 (Arbitration in Civil and Commercial Matters), al-Jarīdah al-Rasmīyah, vol. 16, 21 April 1994, English translation incorporating 1997 amendments available at https://www.crcica.org.eg/LawNo271994.pdf.

[12]Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention)

It is worthy of note, however, that there is no requirement under Egyptian law for the parties to consider ADR or mediation, although the parties may agree to submit to this by way of contract.[13]

ADR IN RWANDA

Rwanda has opted to use traditional justice to complement the formal justice system. This is done through the reinstitution and recognition of the “comite y’abunzi” (abunzi) which was mandated by Article 159 of the Constitution, and the Organic Law No. 31/2006 and Organic Law No. 02/2010/OL23. Abunzi is a Kinyarwanda word meaning "those who reconcile and provide for a system using trained mediators to resolve disputes in communities". The Abunzi is defined as ‘an organ meant for providing a framework of obligatory mediation before submission of a case before the first degree courts'. In essence, the provisions of the Organic Law are such that the formal courts will not consider a dispute unless the Abunzi has first considered and ruled on the dispute, especially if the disputed property value is below 3 million Rwandese Francs (approximately $3000).[14]

The Abunzi, which was officially launched in 2004, form part of the local government structures (the Cells and the Sectors) and fall under the Ministry of Justice with the Ministry of Local Government performing an administrative oversight. The Abunzi are trained to mediate disputes in the community. One of the distinct features of governance institutions in Rwanda is that they are required under the constitution to have 30% participation by women. This is also true for the Abunzi.

[13] https://www.plagscan.com/highlight?doc=126338258&source=9
[14] http://www.ipstc.org/media/documents/IPSTC_OP_No7.pdf

According to the Rwanda Governance Advisory Council (RGAC), the Ministry of Justice Rwanda has a total of 32,400 Abunzi Committee members across 2,150 cells and within 30 districts. Some of the achievements of this initiative are that there has been a 75% drop in land disputes referred for adjudication. A survey conducted by Transparency International Rwanda reported that 81.6% of the communities are satisfied with the use of these committees to mediate matters because it promotes access to justice. On the other hand, in comparison with the ordinary courts, the most highlighted indicators are the reduction of time spent to settle cases (86.7%); a reduction of economic costs of cases in jurisdictions (84.2%); and mitigation of disputes between parties (80.1%). [15]

Rwanda has also gone further to introduce the Kigali International Arbitration Centre (KIAC), which was set up in 2012 following extensive consultation on how best to improve arbitration in Rwanda. The Centre aims to attract and create opportunities for arbitration, not solely in Rwanda but also with neighboring countries in the East African Community (comprising Burundi, Kenya, Tanzania, Rwanda, and Uganda) and from the Common Market of Eastern and Southern Africa (comprising twenty countries stretching from Libya to Zimbabwe).

In 2007 the Commercial Courts were established and in 2008 a new Arbitration Law based on the UNCITRAL Model Law was proposed. Rwanda also ratified the New York Convention. The aim was to ensure that commercial parties in Rwanda would be able to access an alternative way to resolve their disputes. In 2010 the Rwandan government passed an act of Parliament establishing an independent body tasked with promoting Rwanda as a venue of efficient arbitration services and a Centre of excellence for research and training of professionals in ADR. That independent body was to become the Kigali International Arbitration Centre (KIAC).

[15] http://www.ipstc.org/media/documents/IPSTC_OP_No7.pdf

Since May 2012, KIAC has become fully operational. The Centre has acquired its purpose-built facility, with modern hearing rooms, well equipped with IT and videoconference facilities. The Centre is available for use for arbitrations organized under the KIAC rules or for ad-hoc arbitrations and also for mediations. The Rwandan judiciary, particularly those in the Commercial Courts, was trained in arbitration and on the court's role in the arbitration process.

KIAC also launched a campaign to speak to Rwanda's business community in all sectors of the economy about the potential use of arbitration. This government-led push to promote the efficient resolution of commercial disputes, both in the courts and through arbitration was coupled with an aggressive policy to build an investor-friendly environment and to promote Rwanda as a place to do business in East Africa. Rwanda is now ranked second in Africa in the World Bank's Ease of Doing Business rankings for 2016, behind Mauritius, but ahead of South Africa.

Unlike in Egypt, in Rwanda, Parties to arbitration are not required by law to consider or submit to ADR before or during proceedings, unless the agreement requires that of the parties. For commercial litigation, if the parties wish to mediate, the judge may grant a stay to allow the parties to attempt mediation. In labour cases, there is a requirement to mediate with a district inspector of labour before taking the matter to the courts. Only where the mediation fails are the parties allowed to refer their case to the tribunal.[16]

ADR IN TOGO

Alternative Dispute Resolution in Togo has not experienced bliss or development as seen in other African Countries. Several technical and financial partners, including the European Union Delegation and the UNDP- in terms of improving access to justice, supported the Togolese

[16] https://doi.org/10.1002/bies.201300149

government in recent years.[17] The judicial system remains characterized by a lack of confidence from the citizens. Recent research carried out by the European Union shows that in Togo the contact rate with courts is as low as 11% because the majority believe that the Judicial System is fraught with fraud, complexities, and technicalities and is too expensive to start with.

The above should not be a weakness but a source of inspiration to relevant stakeholders to boost the ADR system in the Country. This Country is one of the few African Countries that still maintains its heritage and takes pride in the African Culture. It is recommended that this should be a solid foundation, which ADR in Togo should be built on as it has been established above that ADR derives its root from Africa. The efforts at sensitization of the citizens to the advantages of ADR and resuscitation of confidence of the citizens in the judiciary must be commended because for there to be an effective ADR system, there must be a vibrant and working Judiciary as one cannot effectively function without the other.

On the 28th March 2011, The Investment Climate Facility for Africa (ICF) signed an agreement with the Government of Togo and the Togolese Chamber of Commerce and Industry to support a project to strengthen alternative dispute resolution in the country. The project, implemented by the Chamber's Court d'Arbitrage de Togo (CATO), was to provide an effective alternative to the traditional commercial litigation by (i) putting CATO into operation (ii) revising its arbitration rules, (iii) training of arbitrators and professionals of the legal sector, (iv) promoting arbitration and mediation as a mechanism to resolve commercial disputes and (iv) ensuring a fast enforcement of arbitration rulings by the Judiciary.

[17] http://crop-africa.org/en/togos-judicial-system-marked-by-popular-distrust-perceptions-of-corruption/

ADR IN NIGERIA

In Nigeria today, there are 3 (three) main methods of resolving commercial disputes, litigation, arbitration and mediation/conciliation. Large commercial disputes are litigated at the State and Federal High Court. The Federal High Court has exclusive jurisdiction over matters of revenue, company taxation, customs and excise, banking, aviation and shipping. A large portion of commercial disputes cases are adjudicated upon at the State High Court which has unlimited jurisdiction to hear and determine matters other than those within the exclusive list of the Federal High Court. Appeal from these courts lie to the Court of Appeal and further to the Supreme Court.

The clogs experienced with litigation have led to a greater awareness of the advantages of ADR mechanisms among business stakeholders, investors and legal practitioners. Most contracts today contain ADR clauses or arbitration clauses. The Courts now refer parties dispute to the Multi-door Courthouse (Court connected ADR Centers) to explore settlement of their dispute through one of the ADR mechanisms available therein.

The Arbitration and Conciliation Act is being adopted or modified by many states of the Federation and there has been an increase in institutional and ad-hoc, local and international arbitrations as well as a tremendous rise in the activities of institutional arbitration centers in Nigeria and other parts of Africa. It is without doubt that Nigeria is equipping itself to grapple with the escalating commercial disputes resulting from the growth in business activities and increase in international trade and investment.[18] It is beyond doubt that Nigeria has in place a robust ADR process, which has over the years provided succor for disputants to resolve their disputes without going to court.

[18] http://www.mondaq.com/Nigeria/x/308626/Arbitration+Dispute+Resolution/The+Rise+of+Alternative+Resolution+Mechanisms+In+Nigeria

ADR IN KENYA

The main Alternative Dispute Resolution (ADR) methods available in Kenya are negotiation, conciliation, mediation and arbitration. There is no mandatory requirement for parties to commercial litigation to submit to ADR proceedings. However, in terms of the Civil Procedure Act, the courts may, either on the application of the parties or on its own motion, refer a commercial dispute to ADR mechanisms.[19]

In ADR proceedings parties generally agree that each party will bear their own costs and expenses and the parties will share the costs of any third party involved in facilitating the resolution of the dispute (example, conciliator or mediator). The Kenyan Chartered Institute of Arbitrators- and the Dispute Resolution Centre and Mediation Training Institute are currently the main bodies that offer ADR in Kenya.

Parties are not obliged to use these bodies. They are free to state in their agreements how the ADR proceedings will be carried out and which body will oversee the proceedings. The parties are also free to choose individual qualified arbitrators.[20]

The duration of arbitration proceedings in Kenya varies depending on the complexity of the subject matter, the efficiency and enthusiasm of the parties, the respective schedules of the parties and the arbitrator and his/ her efficiency.

Arbitration proceedings in Kenya generally take between six months and three years. A court can intervene in arbitration proceedings but the level and instances of intervention are limited. Under the Arbitration Act the instances in which a court may intervene in arbitration proceedings include:

[19] https://www.africanlawbusiness.com/news/6067-alternative-dispute-resolution-in-kenya
[20] Sean Omondi and George King of Bowman Gilfillan Africa Group's Coulson Harney office in Nairobi

a. Determination of the enforceability of arbitration agreements;
b. Granting interim measures of protection;
c. Setting aside the appointment of an arbitrator;
d. Appointing an arbitrator where none has been appointed;
e. Assisting in taking of evidence;
f. Removing an arbitrator; setting aside of arbitral awards;
g. Enforcement of arbitral awards; and
h. Hearing and determining appeals, where a right of appeal from the decision of an arbitral tribunal lies to the court.[21]

An arbitrator has power to grant interim relief and measures of protection, as he/she may consider necessary. There is no mandatory requirement to disclose any documents. Parties disclose documents that are relevant to their cases. The parties and the arbitrator agree upon the disclosure and exchange of documents and other information during the preliminary arbitration scheduling meetings. Certain documents are privileged. Communications between a lawyer and his/ her client are strictly privileged. Medical records must also not be disclosed without the consent of the patient concerned unless law requires disclosure.

It is also common practice by opposing parties to enter into negotiations in an effort to settle pending matters without fear of prejudicing their clients' claims. Any document and/or statement made with the intent of settling a dispute is not admissible in court proceedings. In practice such documents are marked 'without prejudice'.

[21] https://www.kra.go.ke/en/adr/about-adr

Documents emanating from the official status of a person are also privileged. Such privilege includes the privilege of judges and magistrates and public officers in connection with official information.[22]

In arbitration proceedings, evidence may be presented in any manner agreed by the parties. In the absence of an agreement, the arbitral tribunal is entitled to decide whether to hold an oral hearing for the presentation of evidence or require that the proceedings shall be conducted on the basis of documents. The oral hearing and the presentation of oral evidence at the hearing usually follows the same format used in courts.[23]

AFRICAN CONTINENTAL FREE TRADE AGREEMENT AND ADR

The African Continental Free Trade Agreement came into force on the 30th of May 2019. The key objective of AFCFTA is to boost intra-African trade through progressive elimination of tariff barriers to trade in goods and liberalization of trade services. The agreement will also involve cooperation on investment, intellectual property rights and competition policy.[24]

The question is: Will this impact ADR in any way? The answer is in the affirmative as it is a known fact that where two or more persons come together, there is bound to be conflict. Little wonder why several institutions will be created when the AFCFTA comes to force. According to Phase 1 negotiations, the pivotal institution identified is the Dispute Settlement Body. The rules and procedures will be laid down in the Protocol on Dispute Settlement, which is to be negotiated. Introduction of ADR in Africa as seen above, is yet to be embraced as an effective way of dispute settlement across board, and without the formal sensitization of the entire

[22] https://www.idlo.int/news/highlights/enhancing-access-justice-through-alternative-dispute-resolution-kenya
[23] https://www.africanlawbusiness.com/news/6067-alternative-dispute-resolution-in-kenya
[24] https://www.accaglobal.com/gb/en/member/member/accounting-business/2019/07-08/insights/afcfta-jul19.html

countries that signed up for AFCFTA, they will settle for litigation which will not be favorable since this agreement is meant to bring these countries together for the greater good.

AFCFTA's institutional framework is complimented by a dispute settlement mechanism, which is mandatory and binding for member states and is based on the World Trade Organization model. In addition to this mechanism, which is exclusively intergovernmental, it would be appropriate to explicitly recognize the possibility for individuals to assert their rights under the AFCFTA.

In this sense, the juridical framework is proposed to be developed according to a subsidiarity perspective, consisting in a system of complaints and appeals that should involve arbitration, national courts, the courts established by the regional economic communities and, as a last resort, the African Court on Human and Peoples' Rights, which should be equipped with an ad hoc "trade chamber", also with a view to creating positive synergies between trade law and human rights law.[25]

The above Dispute Settlement mechanism set up by the AFCTA is worrisome as there is no explicit provision for ADR. Or could it be mere semantics? We will find out when the implementation process begins. The obvious truth is that ADR played a significant role in the negotiation process. It will be recalled that South Africa, which accounts for 16% of Africa's economy did not sign the agreement immediately the idea was hatched. South Africa only signed the agreement on the 21st of July 2018 after a series of negotiations and consultations. Nigeria only signed recently.

It is worthy of note that the main objectives of the AFCFTA are to create a single continental market for goods and services, with free movement of businesspersons and investments, and thus

[25] http://www.federalist-debate.org/index.php/current-issue/comments/item/1215-african-continental-free-trade-area-opportunities-and-challenges

pave the way for accelerating the establishment of the Customs Union. It will also expand intra-African trade through better harmonization and coordination of trade liberalization and facilitation and instruments across the RECs and across Africa in general. [26]

The AFCFTA is also expected to enhance competitiveness at the industry and enterprise level through exploitation of opportunities for scale production, continental market access and better reallocation of resources.[27] The entire process and especially the implementation will not run smoothly without an adequate dispute settlement technique already embraced by most African States. We, therefore, recommend that since the agreement is yet to be implemented, ADR should, as a child of necessity, be included in the agreement.[28]

Dispute resolution mechanisms have constantly transformed throughout the history of commercial conflicts. The processes of litigation have been acknowledged to prove grossly inadequate and prone to more damage than the resolution of conflict by hampering positive future relationship and association between the parties to it.

Today, there's a global paradigm shift from governmental control to deregulation in all facets of life, and a similar shift from placing reliance on strict legal provisions in resolving business or commercial disputes to the use of processes of ADR, a phrase designed to cover a wide range of processes adopted for the resolution of conflict other than through litigation. That is why we strongly recommend that provision for ADR should be included in this agreement to positively impact the system.

Some of these processes include Arbitration, Mediation, Conciliation, Adjudication, Judicial Appraisal, Early Neutral Evaluation, Expert Determination just to mention a few.

[26] African Continental Free Trade Area: Policy and Negotiation Options for Trade in Goods: Mr. Magdi A. Farahat.
[27] https://wn.com/Union_movement
[28] https://unctad.org/en/PublicationsLibrary/webditc2016d7_en.pdf

A BREIF DISCUSSION ON SOME KEY ADR MECHANISMS

NEGOTIATION

Negotiation is a process in which two or more parties hold discussions in an attempt to develop agreement on matters of mutual concern. This process of communication, which involves the give and take of ideas and mulling over options in an endeavor to find common ground, forms the basis of every non-adjudicative dispute resolution procedure.[29]

Negotiation is an indispensable step in any ADR process as it is consensual to all ADR activities. It is believed to be the most satisfactory method of dispute settlement. It involves the discussions or dealings in a matter with the intention to reconcile differences and establish areas of agreement, settlement or compromise that would be mutually beneficial to the parties. Usually, negotiation consists of a "quid pro quo" of sorts, which is the giving up of something in other to get something else in return.[30]

CONCILIATION / MEDIATION

Conciliation is a method of settling disputes by consensus rather than by adjudication. The **Arbitration and conciliation Act**[31] provides for the right to settle disputes by conciliation. Part II of the Act i.e. Section 37 to 42 and 55[32] stipulate detailed provisions for conciliation. Section 37 provides that the parties to any agreement may seek amicable settlement of any dispute in relation to the agreement by conciliation under the provisions of the Act. In addition, Section 55 provides that parties to an international commercial agreement may agree in writing that a

[29] International Arbitration and Disputes Resolution Directory 1997. "A Summary of Dispute Resolution Options". By Paul Mitchard. P.3.
[30] Arbitration as a means of disputes Resolution (A paper presented at a seminar) by Honourable Dr. Olakunle Orojo CON, OFR, FCI Arb. Lagos P 1 – 1. See also N. L. Craig at p.239.
[31] CAP 19- LFN 1990
[32] supra

dispute in relation to the agreement shall be settled by conciliation under the Conciliation Rules set out in the Third Schedule to the Act10.[33]

It is interesting to note that in Nigeria, conciliation is distinguishable from mediation particularly with regard to the Arbitration and Conciliation Act[34]. Mediation is not codified in any form in Nigeria and practitioners will prefer that it remain that way. Thus, whilst several statutes and rules of court recognize mediation, there are no mediation rules as you have in conciliation rules. The Conciliation Rules provided in the Act are the UNCITRAL conciliation Rules and these form part of the conciliation Rules of the Regional Centre for International Commercial Arbitration – Lagos (RCICAL)- a major institutional provider of Arbitration, Conciliation and other ADR services in Nigeria and sub-Saharan Africa.

ARBITRATION

Arbitration is an agreement by parties that tribunal(s) of their choice settle a dispute arising between them. "The modern arbitral process has lost its earlier simplicity and so has become more complex, more legalistic and more institutionalized. Yet, in its essentials, it has not changed. There is still the original element of two or more parties faced with a dispute, which they cannot resolve by themselves, agreeing that some private individuals would resolve it for them.[35]

Where two or more persons agree that a dispute or potential dispute between them shall be decided in a legally binding way by one or more impartial persons of their choice, in a judicial manner, the agreement is called an arbitration agreement or a submission to arbitration when

[33] Cap 13 – Laws of the Federation of Nigeria, 1990.
[34] now Cap 19 of the LFN 1990
[35] Handbook on Arbitration Practice by Bernstein p.9.

entered after a dispute has arisen. It is put before such person or persons for decision. The procedure is called arbitration and the decision made is an award.

AFRICAN LAWYER'S ROLE IN ADR

It is a fact that many African citizens have lost faith in the ability of their nations' courts to provide a timely or just conclusion to their grievances. Lack of confidence in the justice sector has a profound impact on governance in any society. Numerous attempts at modernization notwithstanding, many African countries are still struggling to establish functional, timely, and trusted judicial systems.

Most courts in Africa are fraught with systemic problems, such as antiquated structures. Countless judges still take notes by hand, as there are no stenographers, records are archived manually and a reliable computer in an African court is rare. The biggest problem, however, is overcrowding. It can take many years to get to trial and months to have a motion heard.[36]

Disputants often express frustrations at the "come today, come tomorrow" syndrome and mounting legal fees for professional representation with each futile court appearance. It is not uncommon in African countries for a dispute to take a decade or more to resolve. As a foreign diplomat in East Africa once joked, "it is easier for one to pass through the mouth of a lion than go through the legal system."[37]

This ineffectiveness reflects the state of the African justice structure. The formal legal system is overloaded and cannot provide timely and effective closure. It is also more costly in time and money for disputants. Meanwhile, the sphere of influence of the traditional justice system has been greatly diminished with modernization, especially in urban areas. The average Ghanaian

[36] https://africacenter.org/publication/alternative-dispute-resolution-in-africa-preventing-conflict-and-enhancing-stability/
[37] https://is.mendelu.cz/eknihovna/opory/zobraz_cast.pl?cast=66991

disputant would prefer the indigenous chief's arbitration, just as an Ethiopian would prefer to turn to the traditional Shimangele (elder) for conciliation of most civil or family matters. However, these options are not available to many citizens. [38]

CONCLUSION

As we have established above, the notion of ADR fits comfortably within traditional concepts of African justice, particularly its core value of reconciliation. Pioneering ADR projects in Ghana, Ethiopia, and Nigeria have generated positive results and illustrate the suitability of ADR in African contexts. The ADR projects in Ghana and Ethiopia were implemented between 2003 and 2008 with funding from the U.S. Department of State with Ernest Uwazie as the Principal Investigator/Project Director. The Nigeria project was implemented from 2008-2009 and was funded by the World Bank with Ernest E. Uwazie as the social scientist consultant and trainer.[39]

ADR can contribute to building an effective dispute settlement system and bridge the gap between the formal legal system and traditional modes of African justice. The institutionalization of ADR in African legal systems should also bolster security and development. While some conflict is inevitable in any society, its effective resolution directly hinges on the availability of trusted processes and skilled personnel.

ADR is a practical tool to foster peace building and conflict resolution at both the interpersonal and community levels. By reducing disaffection with the lack of access to justice and the perceived need for disputants to take justice into their own hands the potential for violence and rebellion is reduced.

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[38] Deborah H. Isser, Stephen C. Lubkemann, and Saah N'Tow, Looking for Justice: Liberian Experiences with and Perceptions of Local Justice Options, Peaceworks No. 63 (Washington, DC: United States Institute of Peace, 2009).

[39] https://africacenter.org/publication/alternative-dispute-resolution-in-africa-preventing-conflict-and-enhancing-stability/ Africa Security brief No. 16

As African Lawyers, we are saddled with the enormous responsibility to ensure that ADR travels to every nuke and cranny of this great continent. We can achieve this desired goal by adhering to the following recommendations:

1. **Having vibrant ADR legislation.**

While most African court rules or policies permit the judge to encourage parties to settle out of court, enacting legislation would elevate the status of ADR before a skeptical disputant, build public confidence, and further increase ADR utilization. The legislation would also provide a framework for reference, review, and reform as well as to institutionalize much-needed education and professional training.

2. **Measure progress.**

Dr. Ernest E. Uwazie a Professor of Criminal Justice at California State University, suggests that to maximize the efficiencies and complementarities of ADR with the official judicial process, a systematic monitoring process should be established. This includes measuring key qualitative and quantitative data that would then lead to adjustments in the scope and focus of ADR efforts. Indicators include ADR usage, percentage of cases filed and processed through ADR vs. court litigation, the average time spent on a case, the number of successful ADR settlements with agreements reached, the number of qualified ADR practitioners and trainers, the number of ADR institutions and services in the country, community acceptance, and level of service satisfaction by disputants and practitioners.[40]

[40] https://www.ghanabusinessnews.com/2019/07/28/ghanaians-asked-to-embrace-local-community-justice-systems/

3. **Involvement in training, sensitization workshops and attendance of ADR conferences.**

To adequately take advantage of ADR, we as lawyers must ensure that we participate in ADR training and events to make us equipped to handle complex matters or disputes. Training is essential to a successful application and utilization of the process.

4. **ADR Centers, Arbitral Institutions, and Connected Annexed ADR Centers**

The success of ADR in Africa depends the establishment of institutions that can offer the services, drive and champion the process and deliver on the needs of disputants. Only by doing this can we build confidence in the public and would be investors that we are ADR friendly.

5. **Create appropriate incentives for stakeholders.**

There is a common phrase among us Africans that "when the stomach is empty, the brain goes to sleep". That is why to develop and broaden the adoption of ADR mechanisms, their benefits and contributions to legal professionals must be clear. For lawyers, strategic use or inclusion of ADR should offer an additional tool to enhance the efficiency of their practice, potentially increase revenue, and achieve greater satisfaction for both the lawyer and client. Awards and recognitions by the legal profession, including reviews of criteria for conferment of the rank senior advocates/silk, as well as national merit honors, would also elevate the support and use of ADR among members of the bar and bench.