FOOD FOR THOUGHT FOR THE MODERN AFRICAN LAWYER

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In order for mediation to develop as a mode of resolving conflicts in international trade in Africa, it is necessary for merchants, legislators and African lawyers to take note of two points. Firstly, mediation is the best ADR (alternative dispute resolution), and arbitration is only a very distant second. Secondly, Africa should especially embrace and promote this mode of conflict resolution, because it was the one employed by our ancestors. As such, it has proved its effectiveness over a period of thousands of years. Two objectives would be fulfilled if this was taught in law school in Africa. On the one hand, it would dispel people's fears of trying something new, and misgivings about whether or not it will work or whether it is worth trying if it is bound to fail. The tendency is to wait and see how it works in other countries, particularly our former colonial rulers (France, England, Portugal), which is a waste of precious time. We should tread boldly where others fear to tread once we are shown that our ancestors have "been there, done that" and had a better society for it! If it is a technique, reproducing it should not be a matter of time or place, but simply reading the instructions correctly. In light of all this, we have to ask ourselves if arbitration is really the adequate ADR, that is the one we, as Africans, should promote above all others (I). Answering that question will provide a better understanding of how stepping in the past will bring us a step forward (II).

I. Is arbitration the adequate ADR ?

A- Basic elements of arbitration : a private court of law

B- The true meaning of ADR : a different way of dispute resolution

II. Stepping in the past to be a step forward

A- Law as a process : reaching an agreed settlement of the dispute

B- Peace and harmony as a rule : training lawyers to be mediators

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I. Is arbitration the adequate ADR ?

An alternative mode of conflict resolution is generally thought of as one that takes place out of state courts. Arbitration is then perforce perceived negatively. Such a definition is, indeed, lacking in ambition, as taking such a view suggests that the sole purpose of ADR is to avoid state judges and public justice. It simply makes arbitration courts private courts of law (A). But what if we substituted that definition of ADR with a bolder, more ambitious one and define alternative in an entirely different light? In our case, it would mean an entirely different way of resolving conflicts than the conventional one, be it in private or state courts of law (B).

A- Basic elements of arbitration : a private court of law

No one disputes the fact that arbitration is now widely accepted as the standard way of resolving international conflicts among commercial traders. A large number of countries and prominent conventions offer firm legal foundations guaranteeing arbitration tribunals that are dependable, objective, independent, neutral and efficient. Arbitration has thus attained the status of a legitimate mode of conflict resolution, and is continuously gaining in strength. Recent proof of that is the Uniform Act on arbitration, which governs arbitration in sixteen African countries (Benin, Burkina Faso, Central African Republic, Cameroon, Comoros, Côte d'Ivoire, Congo, Gabon, Guinea, Guinea Bissau, Equatorial Guinea, Mali, Niger, Senegal, Chad, Togo). The Uniform Act is unparalleled in terms of freeing and facilitating access to arbitration as well as ensuring that parties, arbitrators and arbitral awards are free from interference from state law or state court judges; while providing all the help needed to enforce the arbitration agreement and the arbitral award.

Nonetheless, avoiding the jurisdiction of ordinary courts and constituting a much-needed international forum for justice does not make it the ideal form of alternative dispute resolution. Arbitration eliminates the risks of being tried in a foreign country by foreign judges who may not only be biased in favour of citizens of their own country, but also professionally incompetent. However, an arbitration tribunal does not offer a new way at looking at a dispute. It does not change the way justice is done. It is still consistent with a procedure opposing a claimant and a respondent in a fair hearing, both being given the means to state the facts supporting their claims and/or disagreeing with

the other submissions. But what if we could have those guarantees and more, to wit, fairness, efficiency, neutrality and creativity?

B- The true meaning of ADR : a different way of dispute resolution

A court of law features two opponents (or adversaries), the court being the arena or the ring, and the judge the referee. An arbitrator is a judge, albeit a private one. Her/his role is to deliver an award casting wrongs and rights, saying who is to pay or collect damages, and so on. Therefore the question is whether arbitration is simply another form of ordinary justice, only swifter and more efficient. ADR should involve more than doing the same thing (a trial), only in a different setting (a private court). We must start looking at ADR mainly as a means of finding a "helper" rather than a "referee". We must start thinking of means of resolving conflicts, reconciling differences (legal and cultural) instead of getting an award. Let us learn from our past that justice can mean something else than declaring a winner and a loser in a trial.

In pre-colonial Africa, the immovable goal was peace and harmony on earth, in the community and among its people. Everything was focused on attaining that objective. Everyone was taught that principle from infancy. Men being men, it did not suffice for them to be taught to worship the "Goddess" Peace, Harmony and Truth; it was necessary for them to be shown how to live in peace, restore lost harmony and not be afraid of telling the truth when challenged. When a conflict arose, many techniques were devised to attain those goals, many of them were private and within the family circle. However, when it came to it, administering justice from a judge's bench was never thought of as the best way to resolve disputes. From a legal standpoint, it is possible to end a dispute by handing down a decision one of the litigants disagrees with. Such a decision cannot bring peace in the heart and mind of the party who feels wronged or misunderstood by the judge (or by the arbitrator). If she/he doesn't get mad, she/he will try to get even by stalling the enforcement of the decision, using every legal means available. Thus rather than settle a dispute, a court decision or an arbitral award may simply fuel discontent.

II. Stepping in the past to be a step ahead

African magistrates in the pre-colonial era did not engage in legal fiction (B). A conflict was not over simply because the court (state institution or private) had decided that it

was so by issuing a ruling. Rather, it was resolved once there was no more cause for confrontation or ill-will between the litigants. For the litigants, the end court proceedings should mean that they have overcome whatever made them adversaries and shaken hands as reconciled business partners (A).

A – Law as a process: reaching an agreed settlement of the dispute

In ancient Africa, although everyone from the humblest of citizens to the higher magistrate and up to the higher supreme ruler was supposed to know and abide by the law; violating on other people's rights, failing to deliver on a contractual promise did not automatically bring condemnation according to a pre-ordained rule. Justice was not limited to respecting due process. Traditional conflict resolution in ancient times was all about techniques and procedures aimed at enabling conflicting parties to listen to what each had to say, understand each other's point of view and then reach a mutually acceptable solution to end the dispute. The law was simply meant to remind parties of the model behaviour.

A good solution never being a forced solution, both parties had to genuinely agree with it and see the wisdom; in other words see the light. The whole judicial process was therefore a process of enlightenment, of dismissing the darkness enshrouding the relationship of the litigants through talking until you tell the truth and listening until you see the truth which is the solution that seems best to all parties involved.

In order to attain such an ambitious goal, everyone involved needed to be part of a culture which valued and promoted harmony. Maybe in some parts of the world, to fully adopt mediation as the only adequate alternative to both judicial and arbitration courts would require for a profound cultural change. In Africa we would simply need to reverse gear and stop considering our black culture as being irreconcilable with the modern world and its challenges. We should bring the past into our schools and, in the case of law schools, we should train our lawyers to not only be judges, attorneys and such, but also skilled mediators.

B- Peace and harmony as a rule: training lawyers to be skilled mediators

Lawyers should know the law as professionals and not as amateurs. Abiding by the law is still the best way to conduct one's business and one's life. However, law has become so complex that no one individual can know it all; nonetheless, lawyers more than other citizens are expected to know it all, at least in their respective fields of specialisation. Therefore, law schools and law professors must strive to up-to-date in the courses they teach. It is particularly difficult, especially in third-world countries with limited resources, to keep up with the legal materials relating to international business law and procedures. Arbitration took a long time to reach legal codes in the former French dependencies in Africa. In my country of birth, Senegal, it was not until 1998 that a statutory law was adopted putting arbitration on the books. Since then the OHADA[1] council of minister's has issued a Uniform Act on arbitration (1999). Unfortunately, OHADA has so far taken absolutely no interest in mediation. Arbitration is therefore the only ADR mentioned in the Treaty of Port-Louis on the creation of the Organisation or in the Uniform Acts. However, its disregard by our legislators should not mean that our law schools should ignore it too, for mediation is the way of the future in terms of dispute resolution in international business transactions. We might therefore as well be prepared and prepare for it by acquainting our students with it. Mediation techniques and psychology courses should therefore be taught in every law school. The time has come to teach would-be attorneys, barristers, and magistrates, to not only be learned law professionals but also skilled mediators. Including such courses in the program would put mediation at the par with other modes of conflict resolution. It will then be, hopefully, not simply 'an' alternative mode of conflict resolution but 'the' alternative mode of dispute resolution.

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[1] Organisation for the Harmonisation of Business Law in Africa (*Organisation pour l'Harmonisation du Droit des Affaires en Afrique*), started out with nine African countries in 1993; it now comprises sixteen African member states (Benin, Burkina Faso, Central African Republic, Cameroon, Comoros, Côte d'Ivoire, Congo, Gabon, Guinea, Guinea Bissau, Equatorial Guinea, Mali, Niger, Senegal, Chad, Togo)