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Alternative Dispute Resolution Methods

Paper written following a UNITAR Sub-Regional Workshop on Arbitration and Dispute Resolution (Harare, Zimbabwe 11 to 15 September 2000)



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INTRODUCTION

The increasing importance of arbitration and dispute resolution in the African context is a reflection of the global growth in international business and what are the preferred methods of resolving international disputes, a trend that is likely to continue into the 21st Century. Since the 1970s there has been a surge in the participation in arbitration by less developed countries. It is therefore important for lawyers and officials representing less developed countries to be aware of the issues and problems involved in the various stages of international arbitration.

This paper follows a UNITAR workshop on Arbitration and Dispute Resolution for Sub-Saharan Africa (Harare, Zimbabwe, 11 to 15 September 2000).

This workshop was addressed to 27 senior and middle level participants from Angola, Botswana, Ethiopia, Ghana, Kenya, Lesotho, Mozambique, Nigeria, Rwanda, South Africa, Swaziland, Tanzania, Uganda, Zambia, and Zimbabwe. Participants were targeted as senior lawyers and other members of the Attorney General's office responsible for negotiating, drafting, reviewing or in any other way involved in the preparation of all types of international contracts; senior officials of the ministry of justice; all persons responsible for projects (tenders, contract negotiation etc) in the Ministries most likely to be engaging international contractors, such as the Ministry of Works, Ministry of Transport, Ministry of Housing, Ministry of Finance, those responsible for infrastructure projects (electricity, roads, telephone communications, water supplies, waste and sewerage treatment, etc); all senior employees of State Owned enterprises engaged in international business (including telecommunications companies, banks, construction companies etc); representatives from the law faculties of the Universities who may be interested in international arbitration; representatives of regional law societies interested in international arbitration; and judges who may be interested in international arbitration.

The objectives of the workshop were to familiarise the participants with the various types of international dispute mechanisms, including: the determination of the appropriate method of dispute resolution; the drafting of arbitration and other dispute resolution clauses; and the familiarisation with the procedural aspects of an arbitration and the procedural and substantive legal issues involved. In order to address some of the specifically less developed countries-related issues, the UNCITRAL rules, the ACP Convention and construction arbitration were all covered in detail.

This document is the outcome of the issues discussed at the Harare workshop. It comprises two chapters written by the workshop speakers, Dr. Vinod K. Agarwal and Mr. Bolaji Owasanoye. We are grateful to them for their interest and valuable contributions to our training activities. We hope that this document will be useful as well as challenging to its readers.

Marcel A. Boisard
Executive Director of UNITAR

ALTERNATIVE DISPUTE RESOLUTION METHODS

by Vinod K. Agarwal*

There are several methods available for resolving disputes between two parties. The first and most important method is through the courts. When a dispute arises between two parties belonging to the same country, there is an established forum available for the resolution of the same. The parties can get the said dispute resolved through the courts established by law in that country. Generally, this has been the most common method employed by the citizens of a country for the resolution of their disputes with the fellow citizens.

When a dispute arises between two persons belonging to two different countries, the difficulty arises. One option available to the parties is to go to the domestic courts of either country for the resolution of that dispute. However, this approach may have its own problems. The first is the jurisdiction of the courts. The laws relating to jurisdiction of courts in a country are not made keeping in view the transnational disputes. Normally, they are designed to resolve domestic disputes, that is, disputes arising between two citizens of the same country. The other is dissimilarity in the legal system of two countries. The problem acquires serious dimensions if the country of one party follows common law system and the country of the other party follows civil law system. In spite of tremendous work done by many international organisations and institutions, unification or uniformity of different legal systems is still a distant dream. The next is the choice of law applicable to the agreement and the consequential dispute between the parties. Availability of assets of the defendant in that jurisdiction is also a consideration for the purpose. The reason being that the enforcement of the judgement in any other jurisdiction may be a prolonged and cumbersome process. The absence of a treaty for the enforcement of foreign judgements between the two countries may render the judgement a worthless paper. If the judgement debtor happens to be a sovereign of that other country, the execution may involve claim for sovereign immunity. In some countries, sovereign assets enjoy sovereign immunity. The establishment of the fact in the court of that very country that the sovereign has waived the immunity itself will be a Herculean task. Apart from these difficulties, conventional difficulties, like undue delay in the dispensation of justice, complicated procedural formalities, transportation of entire evidence and witnesses from one country to the other country, high cost of litigation, judicial imperfection, etc., cannot be ignored. In view of these and other difficulties, either party avoids going to the courts in the country of the other party.

It is for these reasons that the alternative dispute resolution methods are becoming more popular for resolution of disputes between parties belonging to two different countries. So much so that some persons have started calling them “appropriate” dispute resolution methods rather than “alternative” dispute resolution methods. The alternative dispute resolution methods offer distinct advantages over litigation.

* *This script was prepared for presentation to the participants in the Workshop on “Arbitration and Dispute Resolution” organized by the UNITAR at Harare, Zimbabwe from 11th to 15th September, 2001. This is not an exhaustive description of the “Alternative Dispute Resolution Methods” but only an illustrative discussion.*

Litigation is a process which takes place in the court rooms. These court rooms are open to public. Any member of the public can enter a court room and can watch, so long as he wishes, the court proceedings of any case. Alternative dispute resolution proceedings take place in private. They are not public proceedings. Thus, they ensure confidentiality. Further, for initiation of alternative dispute resolution methods, an agreement between the parties is an essential requirement. While litigation is an adversarial, formal and inflexible process, alternative dispute resolution methods may be less adversarial, less formal and more flexible process. In litigation, rules of evidence and procedure have to be strictly followed. In alternative dispute resolution methods, simple procedure is followed and the formal rules of evidence and procedure do not apply. Similarly, in litigation, the parties have no voice in the process of selection of judges. They are appointed and paid by the State. Such judges are not specialists in any particular branch of law or subject. They are generalists and deal with all kinds of cases. Generally, the arbitrators and other persons helping in the resolution of disputes through alternative means are selected and paid by the parties. The parties have a choice to prescribe their technical and other qualifications and experience or they can insist that the person having expertise in any particular discipline may alone be appointed. Except in rare or specified circumstances, the settlements arrived at through alternative dispute resolution methods are not subject to challenge in court of law. In addition, the alternative dispute resolution methods offer the conventional advantages like less expensive and dispensation of quick justice, including choice of venue for the resolution of disputes.

The alternative dispute resolution methods have been found satisfactory and are popular not only in the settlement of disputes between two parties belonging to two different countries but they are equally popular and common in the resolution of disputes between two parties belonging to the same country.

Alternative dispute resolution encompasses a variety of methods for the resolution of disputes between the parties. The availability or deployment of any particular method of alternative dispute resolution in any specific case depends on a number of factors. The clause relating to alternative dispute resolution in the agreement between the parties, the availability of persons well versed in the process of alternative dispute resolution, the support provided by the legal system of a country to the alternative dispute resolution methods, the national or international institutional framework for alternative dispute resolution, the availability of necessary infrastructure facilities, etc., play a significant role in the selection of any particular method of the resolution of dispute. The most important, popular and common alternative method of dispute resolution is arbitration.

ARBITRATION

Arbitration is one of the oldest methods for the resolution of disputes between the parties. It has existed, in one form or the other, in every country at all times. Arbitration as a process of dispute resolution offers many advantages to both the parties.

In the field of arbitration, there are three international documents. However, all these three documents deal with the enforcement of foreign arbitral awards. The first is Protocol on Arbitration Clauses signed at Geneva on 24th September, 1923

(commonly known as Geneva Protocol, 1923). It has 8 Articles. It has been ratified by 30 States. However, it is not very popular amongst the States for obvious reasons.

The second is the Convention on the execution of Foreign Arbitral Awards signed at Geneva in 1927 (commonly known as Geneva Convention, 1927). This Convention amended the Geneva Protocol in certain respects. According to this Convention “Each High Contracting State was required to recognise as binding and to enforce, in accordance with the rules of the procedure of its territory, arbitration award made in another Contracting State pursuant to an agreement covered by the Protocol.”

Last, is the Convention on the Recognition and Enforcement of Foreign Arbitral Awards signed at New York on 10th June, 1958 (commonly known as New York Convention). This Convention gave the parties greater freedom in the choice of the arbitral authority and of the arbitration procedures. It attempted to remove the difficulties faced by the parties in the enforcement of foreign arbitral awards. The New York Convention reduced and simplified the requirements with which the party seeking recognition or enforcement of an award had to comply.

There is one more international document, that is, 1965 Convention on the Settlement of Investment Disputes Between States and Nationals of Other States done at Washington in 1965 (commonly known as ICSID Convention, 1965). It applies only to the investment disputes between a country and the investors of another country who have made investments in that first country. There are a few regional conventions and protocols also, such as European Convention on International Commercial Arbitration, 1961, Inter-American Convention on International Commercial Arbitration signed on 30th January, 1975 (commonly known as Panama Convention).

Internationally, the United Nations Commission on International Trade Law (UNCITRAL) has prepared Model Law on International Commercial Arbitration. It has been prepared after long deliberations in various meetings of the whole Commission during 18th Annual Session and was adopted on 21st June, 1985. The General Assembly of the United Nations, in its Resolution 40/72 of 11th December, 1985, recommended, “that all States give due consideration to the Model Law on International Commercial Arbitration, in view of the desirability of uniformity of the law of arbitral procedures and the specific needs of international commercial arbitration practices.” So far a large number of countries have adopted UNCITRAL Model Law on International Commercial Arbitration in their domestic legislation on arbitration. It has resulted in achieving uniformity in the law relating to arbitration in these countries.

In addition to the Model Law on International Commercial Arbitration, the UNCITRAL has also prepared and published detailed “UNCITRAL Arbitration Rules”. These Rules were adopted by the General Assembly through its Resolution 31/98 on 15th December, 1976, that is much before the adoption of the Model Law on International Commercial Arbitration. Article 1 of these Rules provides that, “Where the parties to a contract have agreed in writing that dispute in relation to that contract shall be referred to arbitration under the UNCITRAL Arbitration Rules, then such dispute shall be settled in accordance with these Rules subject to such modification as the parties may agree in writing.” Thus, the parties to an agreement can adopt the

UNCITRAL Arbitration Rules for the resolution of their international disputes. Except the preparation and publication of these documents, the UNCITRAL as such does not provide arbitration facilities.

The UNCITRAL has also brought out a publication called, “UNCITRAL Notes on Organising Arbitral Proceedings”. These Notes were finalised at its twenty-ninth Session held at New York in May-June, 1996. According to paragraph 1 of these Notes, “The purpose of the Notes is to assist arbitration practitioners by listing and briefly describing questions on which appropriately timed decisions on organising arbitral proceedings may be useful.” These Notes provide guidance on all aspects of arbitration proceedings like administrative services that may be needed for the arbitral tribunal to carry out its functions; deposits in respect of its costs; confidentiality of information relating to the arbitration, possible agreement thereon; routing of written communications among the parties and the arbitrators; defining points of issue; documentary evidence; witnesses, experts and expert witnesses; multi-party arbitration; filing and delivering award, etc.

The most important and oldest institution in the field of arbitration is the International Chamber of Commerce, Paris. The International Court of Arbitration of the International Chamber of Commerce (the “ICC”) is the arbitration body of the ICC. The Court does not itself settle disputes. The function of the Court is to provide necessary facilities for the settlement by arbitration of business disputes of an international character in accordance with the Rules of Arbitration of the ICC if so empowered by an arbitration agreement between the parties.

Apart from ICC, another international body engaged in the arbitration is the International Centre for the Settlement of Investment Disputes. It has also framed rules of arbitration. As has been stated above, it is relevant for the resolution of investment disputes only and not other commercial disputes.

Further, practically every country has one or more bodies or institutions which provide facilities for arbitration and other alternative dispute resolution methods for resolving commercial disputes. Even though they are national bodies or institutions, they provide all the necessary facilities for resolution of both domestic and international commercial disputes. Only to illustrate, some such bodies or institutions are American Arbitration Association (AAA), London Court of International Arbitration (LCIA), Permanent Court of International Arbitration, Hong Kong International Arbitration Centre (HKIAC), Korean Commercial Arbitration Board (KCAB), Kuala Lumpur Regional Centre for Arbitration, World Intellectual Property Organization Arbitration and Mediation Centre, Geneva, International Centre for Alternative Dispute Resolution, New Delhi, World Arbitrators and Mediators Council, New Delhi, etc. Most of them have framed their own rules of arbitration. They provide arbitration facilities and charge costs in accordance with their own respective rules. The parties to an arbitration agreement can adopt in their agreement any institution of their choice for the resolution of their disputes.

One of the essential requirements for resolution of a dispute through arbitration is the existence of an arbitration agreement between the parties. An arbitration agreement may be in the form of an arbitration clause in an agreement or in the form of a separate agreement. Various institutions engaged in arbitration have drafted

arbitration clauses and incorporated them in their rules for adoption by the parties in their arbitration agreements. Some illustrations of arbitration clauses are as follows:

International Chamber of Commerce

“All disputes arising out of or in connection with the present contract shall be finally settled under the Rules of Arbitration of the International Chamber of Commerce by one or more arbitrators appointed in accordance with the said rules.”

British Columbia International Commercial Arbitration Centre

“All disputes arising out of or in connection with this contract or in respect of any defined relationship associated therewith or derived therefrom, shall be referred to and finally resolved by arbitration under the rules of the British Columbia International Commercial Arbitration Centre. The appointing authority shall be British Columbia International Commercial Arbitration Centre. The case shall be administered by the British Columbia International Commercial Arbitration Centre in accordance with its ‘Procedures for Cases under the BCICAC Rules’.

The place of arbitration shall be Vancouver, British Columbia, Canada.

The following matters also should be considered by parties for inclusion in the arbitration provisions of contracts:

- governing or proper law;
- procedural laws;
- number of arbitrators;
- specific qualifications of the arbitrators or a presiding arbitrator including, but not limited to, language, technical training, nationality and legal training;
- language or languages of arbitration”

London Court of International Arbitration

“Any dispute arising out of or in connection with this contract, including any question regarding its existence, validity or termination, shall be referred to and finally resolved by arbitration under the Rules of the London Court of International Arbitration, which Rules are deemed to be incorporated by reference into this clause.”

Netherlands Arbitration Institute

“All disputes arising in connection with the present contract, or further contracts resulting therefrom, shall be finally settled in accordance with the Arbitration Rules of the Netherlands Arbitration Institute (Nederlands Arbitrage Instituut).

Additionally, various matters may be provided for:

“The arbitral tribunal shall be composed of one arbitrator/three arbitrators.”

“The place of arbitration shall be _____ (city)”

“The arbitral procedure shall be conducted in the _____ language.”

“The arbitral tribunal shall decide as *amiable compositeur*.”

“Consolidation of the arbitral proceedings with other arbitral proceedings pending in the Netherlands, as provided in art. 1046 of the Netherlands Code of Civil Procedure, is excluded.”

Zurich Chamber of Commerce

“All disputes arising out of or in connection with the present agreement, including disputes on its conclusion, binding effect, amendment and termination, shall be resolved, to the exclusion of the ordinary courts by an arbitral tribunal (or by a three person arbitral tribunal/a sole arbitrator) in accordance with the International Arbitration Rules of the Zurich Chamber of Commerce. (Optional: The decision of the Arbitral tribunal shall be final, and the parties waive all challenge of the award in accordance with Art. 192 of the Private International Law Statute.)

It is not proposed to discuss the subject of arbitration any further, as arbitration is the subject for discussion for the next four days in this Workshop.

FAST TRACK ARBITRATION

Fast track arbitration is nothing but a kind of arbitration. In fact, fast track arbitration is a time bound arbitration. Fast track arbitration can be adopted for the resolution of international as well as national disputes. Many international and national institutions engaged in providing arbitration facilities have promulgated fast track arbitration rules. These rules provide, in detail, the fast track arbitration procedure. The parties can adopt the fast track arbitration rules of any international or national body or institution for the speedy and time bound resolution of their dispute. The agreement for the resolution of dispute through fast track arbitration is same as for the ordinary arbitration, except that, in addition to the provision for arbitration, it provides that the parties have agreed for fast track arbitration.

Generally, subject to the agreement between the parties, the fast track arbitral tribunal consists of sole arbitrator. However, there is no legal bar to the arbitral tribunal consisting of more than one arbitrator, that is, three arbitrators, if the parties so decide. If the fast track arbitration is by three arbitrators, the third arbitrator is called the “Presiding arbitrator”. The procedure for the appointment and challenge of arbitrator(s) is the same as in the case of ordinary arbitration, except that all such actions must be taken within the prescribed time limit. Fast track arbitration commences when one party gives notice of its intention to commence fast track arbitration and the said notice is received by the other party. The claimant is required to submit his statement of claims within 15 days from the date of constitution of the arbitral tribunal. Similarly, the other party is required to submit its statement of defence, including counter claim, if any, within the next fifteen days. In another 15 days, the parties may submit their rejoinders. The arbitral tribunal decides about the time limit for hearings of the case. It is also expected to deliver its award not later

than 15 days from the close of the arbitration proceedings. It should be a reasoned award, unless otherwise agreed by the parties.

The essence of the fast track arbitration is that the time limit is fixed for every action to be taken by the parties or the arbitrator(s). The parties are not permitted or allowed to seek extension of time or postponement of any matter by the arbitral tribunal. The parties are expected to adhere to these time limits. If the claimant fails to observe the time limits without sufficient cause, the arbitral tribunal is competent to terminate the proceedings. If the respondent fails to observe the time limits without sufficient cause, the arbitral tribunal is competent to proceed ex parte in the absence of the defaulting party.

CONCILIATION

Conciliation is the process by which one or more independent person(s) selected by the parties to an agreement generally by mutual consent, either at the time of making the agreement or subsequently when a dispute has arisen between them, to bring about a settlement of their dispute through consensus between the parties by employing various persuasive and other similar techniques. It is a process of confidence and faith. Sometimes, and in some systems it is also called mediation. There may be technical or legal differences between the two expressions, namely, conciliation and mediation, but for the present purpose the expression “conciliation” is used to refer to both the processes, namely, the conciliation and mediation. Conciliation is an effective means of alternative dispute resolution and can be usefully deployed for both international as well as domestic disputes, except that in the conciliation of an international dispute certain facts assume greater importance than they would in a domestic conciliation.

United Nations Commission on International Trade Law (UNCITRAL) has prepared and circulated “Conciliation Rules”. These Conciliation Rules were adopted by the UNCITRAL at its thirteenth session after consideration of the observations of Governments and interested organizations. The General Assembly of the United Nations has also adopted them through a Resolution 35/52 on 4 December, 1980. The U.N. has recommended, “the use of the Conciliation Rules of the United Nations Commission on International Trade Law in cases where a dispute arises in the context of international commercial relations and the parties seek an amicable settlement of that dispute by recourse to conciliation”. The UNCITRAL Conciliation Rules contain 20 Articles.

The countries who have adopted the Model Law on International Commercial Arbitration of UNCITRAL have also adopted the Rules of Conciliation of the UNCITRAL or other international institutions and have enacted a composite law called Arbitration and Conciliation Act. Such statutes provide for the resolution of disputes through either of these methods, that is, arbitration or conciliation.

Many other international organisations and institutions have issued conciliation rules for the resolution of disputes between the parties. The International Chamber of Commerce has promulgated, “ICC Rules of Optional Conciliation”. The Preamble to these Rules says that, “Settlement is a desirable solution for business disputes of an international character. The International Chamber of Commerce therefore sets out

these Rules of Optional Conciliation in order to facilitate the amicable settlement of such disputes”.

The conciliation process can be commenced by either party to the dispute. When one party invites the other party for resolution of their dispute through conciliation, the conciliation proceedings are said to have been initiated. When the other party accepts the invitation, the conciliation proceedings commence. If the other party rejects the invitation, there are no conciliation proceedings for the resolution of that dispute. Generally, only one conciliator is appointed to resolve the dispute between the parties. The sole conciliator is appointed by the parties by mutual consent. If the parties fail to arrive at a mutual agreement, they can enlist the support of any international or national institution for the appointment of a conciliator. There is no bar to the appointment of two or more conciliators. In conciliation proceedings with three conciliators, each party appoints one conciliator. The third conciliator is appointed by the parties by mutual consent. Unlike arbitration where the third arbitrator is called the Presiding Arbitrator, the third conciliator is not termed as Presiding conciliator. He is just the third conciliator. The conciliator is supposed to be impartial and conduct the conciliation proceedings in an impartial manner. He is guided by the principles of objectivity, fairness and justice, and by the usage of the trade concerned and the circumstances surrounding the dispute, including any previous business practices between the parties. The conciliator is not bound by the rules of procedure and evidence. The conciliator does not give any award or order. He tries to bring an acceptable agreement as to the dispute between the parties by mutual consent. The agreement so arrived at is signed by the parties and authenticated by the conciliator. In some legal systems, the agreement so arrived at between the parties resolving their dispute has been given the status of an arbitral award. If no consensus could be arrived at between the parties and the conciliation proceedings fail, the parties can resort to arbitration.

A conciliator is not expected to act, after the conciliation proceedings are over, as an arbitrator unless the parties expressly agree that the conciliator can act as arbitrator. Similarly, the conciliation proceedings are confidential in nature. Rules of Conciliation of most of the international institutions provide that the parties shall not rely on or introduce as evidence in arbitral or judicial proceedings, (a) the views expressed or suggestions made for a possible settlement during the conciliation proceedings; (b) admissions made by any party during the course of the conciliation proceedings; (c) proposals made by the conciliator for the consideration of the parties; (d) the fact that any party had indicated its willingness to accept a proposal for settlement made by the conciliator; and that the conciliator shall not be produced or presented as a witness in any such arbitral or judicial proceedings.

Model conciliation clause (UNITAR)

“Where, in the event of a dispute arising out of or relating to this contract, the parties wish to seek an amicable settlement of that dispute by conciliation, the conciliation shall take place in accordance with the UNCITRAL Conciliation Rules as at present in force.”

Model conciliation clause

“If any dispute arises between the parties out of or relating to this contract, or in respect of any defined legal relationship associated therewith, the parties agree to refer the same to sole conciliator for amicable settlement. The conciliator shall be appointed by the parties by mutual consent. If the parties shall fail to arrive at an agreement, the conciliator shall be appointed by _____ (give the name of any person or institution)

The conciliation shall be conducted in accordance with the Rules of Conciliation of _____ (give the name of any institution).

(The parties can mention specific technical or other qualifications and experience, if any, of the conciliator)

MINI-TRIAL

The resolution of disputes through this alternative dispute resolution method is called mini-trial. It is relatively a new device for the resolution of disputes. Sometimes it is also called as “exchange of information”. It has nothing to do with a criminal or any other trial. This procedure is only named as a mini-trial. In fact, in this process, no adjudication process takes place. Various national and international institutions engaged in providing arbitration and mediation facilities have made rules for “mini-trial”. The parties to a dispute can select and adopt any such institution and its rules for the resolution of their dispute through mini-trial. It is also a time bound process. It is expected that under normal circumstances, the entire process of mini-trial should be completed within 90 days from the date of its commencement.

The major difference between the conciliation and the mini-trial is that in conciliation, the conciliator tries to bring about an agreement between the parties. In mini-trial, the neutral adviser tells the senior management personnel of the parties of the respective strengths and weaknesses of the case to the parties. Thereafter, the senior management personnel of the parties can take an appropriate decision about their dispute. According to American Arbitration Association’s Mini-trial Procedures, “...The mini-trial is a structured dispute resolution method in which senior executives of the parties involved in legal disputes meet in the presence of a neutral adviser and, after hearing presentations of the merits of each side of the dispute, attempt to formulate a voluntary settlement.”

The process of mini-trial can be commenced by either party to the dispute. When one party invites the other party for mini-trial and send a written invitation identifying the subject of dispute, the process of mini-trial is said to have been initiated. When the other party accepts the invitation in writing, the mini-trial proceedings are deemed to have commenced. If the other party rejects the invitation, there is no mini-trial proceeding. Generally, only one neutral adviser is appointed to resolve the dispute between the parties. The parties, if they so desire, can have more than one neutral adviser also. The neutral adviser(s) is appointed by the parties by mutual consent. If the parties do not wish to appoint their own neutral adviser(s) or do not reach agreement on any particular name, they may enlist the support of any national or international institution for the purpose. The neutral adviser is expected to possess

special legal or technical knowledge and experience about the subject matter of dispute. Amini-trial is also a time bound process.

In mini-trial, first, the parties explain their respective cases and then the neutral adviser discusses the nature of dispute with the senior executives of both the parties. If necessary, he may also discuss the matter with the experts, if any, proposed to be produced by the parties. Thereafter, he indicates his views of the respective strengths and weaknesses of each side, the aspects of the case which are reasonably clear and those which are uncertain. The neutral advise also answers the questions or doubts the senior executive may have. This process helps the parties to gain a better understanding of the issues and the merits of their respective case. The senior executives are then expected to enter into a mutual discussion with a view to arriving at a settlement. The neutral adviser only assists them in such discussions, as a facilitator, and not as a judge of the dispute. The mini-trial terminates when the parties have arrived at an agreed settlement or the neutral adviser makes a written declaration to the effect that further efforts at settlement of the dispute through mini -trial are no longer justified.

The model clause (mini-trial)

“The parties shall try to resolve any dispute, difference or claim arising out of or relating to this agreement through negotiations. If it is not so resolved, the parties shall resolve the same through mini-trial. The sole neutral adviser shall be appointed by the parties by mutual consent. If the parties fail to arrive at an agreement on any name, the neutral adviser shall be appointed by _____ (give the name of any institution). The mini-trial shall be conducted in accordance with the rules of procedure for mini-trial of _____ (give the name of any institution).

If the dispute is not resolved by mini-trial procedure within 90 days of the initiation thereof, or if either party will not participate in such procedure, the dispute shall be referred to arbitration.”

EXPERT ASSESSMENT (ENGINEERS)

Certain contracts, particularly those involving complex and long term construction projects, adopt the system of appointing “Experts” for the resolution of disputes that may arise thereunder. Such experts are generally construction or civil engineers who are regularly available at the construction site and are expected to resolve disputes between the parties within a reasonable time. “Experts” can also be appointed for the resolution of disputes arising under other kinds of contracts. The qualifications and experience of an Expert depends on the nature of contract and the dispute that has arisen thereunder.

The Experts are expected to be impartial. They undertake to interpret the provisions of the contract and/or explain their practical application. Generally, only one expert is appointed but there is no legal bar for the appointment of a Board of experts consisting of two or three experts. In construction contracts, generally the Expert is appointed by the Employer. Before making any such appointment, it is desirable that the contractor is consulted and his opinion is given due consideration. The Expert can give his opinion or determination during the progress of performance of the contract or even after the termination of the contract. The Experts appointed in pursuance to

this provision are not bound by the rules of procedure or evidence. They do not give award or judgements. They express their opinion or give their determination depending on the facts and circumstances of dispute between the parties. The opinions given by the experts are not binding on the parties, unless the parties have by their agreement given an authority to the Expert to make binding determinations. In such a case, the decisions given by the Expert will be binding on the parties. An Expert is expected to give his opinion or determination within the time prescribed by the parties in the relevant clause.

The major advantages of this system are that if a dispute arises between the parties, the Expert, for the resolution of the same, is instantly available. The time taken for the process of appointment of the Expert is avoided. It is also a time bound system. Further that, if a dispute arises between the parties to the contract, the work does not suffer. The contractor is required to continue with the performance of the contract with all due diligence during the period the determination of the said dispute takes place. Thus, with the arising of a dispute between the Employer and the contractor, the contractual relationship does not come to an end.

The International Chamber of Commerce has founded an organisation called the International Centre for Technical Expertise. The functions of the Centre include collaboration with similar international organisations or institutions and to identify and make available experts in various technical fields for the resolution of disputes between the parties.

The Federation Internationale des Ingenieurs-Conseils (FIDIC) has prepared “Conditions of Contract for Works of Civil Engineering Construction”. Condition 67.1 of the said Conditions contains an “Expert Assessment” clause. It provides for the resolution of dispute through an Expert Engineer. Those interested to have an “Expert Engineer Assessment” clause in the agreements for the resolution of their disputes can refer to it or adopt it.

DISPUTE REVIEW BOARD

The settlement of disputes through Dispute Review Boards, also known as Dispute Resolution Boards, is another method of alternative dispute resolution system. It is common in long term contracts involving construction works and similar contracts. Resolution of disputes through Dispute Review Board is fast, inexpensive and avoids disruption of the construction work. Dispute Review Board is generally set up or established immediately after the contract is made. It functions with relative informality.

It has many interesting features which are generally not found in other alternative dispute resolution methods. First, the Dispute Review Board generally consists of three members. There is no procedure of having a Dispute Review Board consisting of only one member like sole arbitrator. Second, the Employer and the Contractor, both have a right to select one member each on the Dispute Review Board. The member of the Dispute Review Board selected by the Employer should be approved by the Contractor and the member selected by the Contractor should be approved by the Employer. Indirectly, it means that in fact the Board is constituted by both the parties to the agreement with their mutual consent. It eliminates any subsequent

dispute or disagreement between the parties about the selection of members of the Board. The purpose and object of this approval is that the parties should have faith and confidence in the Dispute Review Board and its recommendations. Third, the third member of the Dispute Review Board is selected by the two selected Members but he should be approved by the parties. Fourth, most of the actions like selection of a Member, appointment of a Member, etc., have to be taken within the prescribed time frame. If any party fails to take action within the prescribed time, it loses the right to select the Member and in his place, the Appointing Authority selects the Members. Fifth, the Members of the Dispute Review Board, before they can assume office, have to sign a Declaration of Acceptance. Once a Declaration of Acceptance is signed by a Member, he is presumed to be properly selected according to the procedure prescribed by this clause. Sixth, the Dispute Review Board has power only to make “Recommendations” to the parties. These recommendations do not have the binding force. The parties are at liberty to disagree with the recommendations of the Board. In such an event, the dissatisfied party can have recourse to arbitration. Seventh, it is not bound by the rules of procedure or evidence. Eighth, if either party does not express its disagreement with the recommendations of the Board within 14 days of its receipt, the recommendations become final and binding on the parties to the agreement. Ninth, the recommendations of the Dispute Review Board are not considered secret or confidential. The clause specifically provides that the recommendations of the Board shall be admissible as evidence in any subsequent legal or judicial proceedings between the parties like arbitration, litigation, etc. This is not the case with the findings of a conciliator. The conciliation proceedings are considered to be secret and confidential and cannot be disclosed in any legal or judicial proceedings between the parties. Tenth, it consists of members who are expected to be specialists or technically qualified in the construction projects. Last, if the parties so agree, a Dispute Review Board can also act as an arbitral tribunal.

There is no law, rules or regulations in any country about the constitution and working of the Dispute Review Boards. It is also not administered by any international or national institution engaged in providing arbitration facilities or other alternative dispute resolution methods. The Dispute Review Board is purely a contractual institution. Therefore, the clause providing for the Dispute Review Board in an agreement should cover all aspects of its constitution and working and has to be comprehensive.

The best illustration of the clause regarding the Dispute Review Board can be found in the Standard Bidding Documents for Procurement of Works prepared and issued by the World Bank. Those who are interested in having Dispute Review Board as a method of dispute resolution in their agreement can adopt this clause with suitable or appropriate modifications. It is a self-contained clause in every respect.

Apart from the above mentioned alternative methods for the resolution of disputes, some more methods, such as Med-Arb, Medialoa, partnering, etc. are also adopted by the parties from time to time. The purpose is that the dispute should be resolved amicably, justly and as early as possible, whatever methods the parties adopt for the same.

DISPUTE RESOLUTION MECHANISMS AND CONSTITUTIONAL RIGHTS IN SUB-SAHARAN AFRICA

by Bolaji Owasanoye

Disagreements and misunderstanding are key characteristics of human relationships whether the relationship is a domestic, national or international one. The potential for disputes is even higher where the parties are from different cultural, economic and political backgrounds with different legal systems. Since disputes are such a critical part of human relationships, many countries have mechanisms to resolve them in a manner, which maintains the cohesion, economic and political stability of the state. This is particularly so with regard to disputes related to commerce because commerce is the engine of growth.

The adjudicatory system of dispute resolution or the civil court system as we know it today evolved to resolve disputes among citizens. In each country of the world, the local court system has a history of development behind it but modern court systems all over the world have been influenced by the common law system which originated from England because England was at one time the dominant world power exporting its culture, ideas and system of governance to the rest of the world through the activities of its famous explorers. This adjudicatory or common law system is what has been exported to many developing countries, which were former colonies of Britain. In particular, many sub Saharan African countries which were colonies of Great Britain have retained the system of dispute resolution inherited from the former colonial governments.

The point made above is not to say that African nations did not have their own indigenous system of dispute resolution before the advent of the colonial government. In fact as we shall see, African traditional system of dispute resolution is closer in nature and character to arbitration than to the colonial system of adjudication. But since African lawyers are trained in the common law system of adjudication which is integrated into the system of governance by the constitution backed by the establishment of courts, judges, the rules of procedures and the enforcement of the judgements, African lawyers have come to rely on and trust the common law system more than any other form of dispute resolution.

But the common law adjudicatory system of dispute resolution is widely known to be fraught with a myriad of shortcomings especially when applied to the resolution of commercial disputes. These shortcomings range from the delay in the process of litigation, the cumbersome rules of procedure, the corruption of judges and court officials in some countries, the cost of litigation, the publicity which goes with the hearing and the judgement etc. Whereas developed countries have managed to develop dispute resolution mechanisms which reduce the impact of the shortcomings identified here and conform with modernity and the demands of economic growth, many developing countries especially in Africa are still saddled with old forms of adjudication which they inherited from colonial governments. One of the reasons for this is the conservatism of lawyers in these countries who prefer to resolve disputes within their familiar adjudicatory system in spite of all the problems. Another reason is that they are not familiar with the modern forms of dispute resolution. In spite of

the imposition of the foreign system of adjudication and its promotion by British trained African lawyers, many Africans still believe in and use the traditional system of dispute resolution although its scope and application to commercial disputes is limited.

Alternative Forms of Dispute Resolution

The shortcomings in the adjudicatory system of resolving disputes led to the emergence of other methods of dispute resolution now popularly referred to as ADR. The value of ADR over and above the common adjudicatory system is that any of the techniques can be implemented very early in the dispute thereby giving the parties an opportunity to air their views and to involve decision makers within their respective organizations long before the subject of dispute eats deep into the fabric of the relationship and cause irreparable damage.

ADR methods vary and their processes overlap but are all designed as alternatives to litigation and complement arbitration which is the most popular form of ADR. The methods include negotiation, early neutral evaluation or neutral fact finding, conciliation, mediation, mini trial, med-arb etc. The key factor is that all these methods are designed to assist the parties resolve their differences in a manner that is creative and most suited to the particular dispute. Some people see ADR methods as supplanting the adjudicatory system but if considered from the angle that the courts in many jurisdictions are unable to resolve all disputes in a manner appealing to litigants, then ADR methods will be accepted as complementary to the litigation system.

Negotiation

This is a voluntary and informal process by which the parties to a dispute reach a mutually acceptable agreement. As the name implies the parties seek out the best options for each other which culminates in an agreement. At their option, the process may be private. In this process, they may or may not use counsels and there is no limit to the argument, evidence and interests, which may be canvassed.

Early Neutral Evaluation/Fact Finding

This is an informal process whereby a neutral third party is selected by the disputants to investigate the issue in dispute and submit a report or come to give evidence at another forum like a court or arbitration. The outcome of a neutral fact finding is not binding but the result is admissible for use in a trial or other forum. The method is particularly useful in resolving complex scientific, technical, sociological, business or economic issue. Using a neutral fact finder eliminates the strategic posturing which characterizes the litigation or even arbitration process.

Conciliation

This mechanism is used to discover the whether there is room for the parties to a dispute to make up. A third party, the conciliator is appointed who discusses the dispute with the parties and then prepares a solution based on what he or she as the conciliator considers to be a just compromise. The solution presented to the parties is reviewed with all relevant documents after which the conciliator meets with the parties separately for oral presentation of their cases. The conciliator may consult the parties privately as often as necessary to reach a solution. The proceedings are therefore flexible enough to accommodate this process. The conciliator tries to satisfy both parties. In doing this he or she looks for a consensus and while not dictating a

solution to the parties, nevertheless crafts one for them. In effect, the conciliator may be regarded as designer of the solution. This may be contrasted with mediation where the parties are guided to design their own solution.

Mediation

Parties to a dispute seek mediation when they are ready to discuss a dispute openly and honestly. Usually in a dispute, there are varying degrees of interests and concerns therefore it is usual that a trade off may be made in a creative manner which a court may not consider. The underlying factor in mediation is that the parties have bargaining power and that a continuing relationship is essential after the dispute therefore trial is to be avoided.

In view of the factors recounted above, a neutral party, the mediator, is brought in to help the parties find a solution to a dispute. The person controls the process while the parties control the outcome. A mediator cannot impose a decision on the parties. In a typical mediation session, the mediator opens the session by declaring how the session will run, who will speak, when, for how long and the length of the session. The parties are requested to confirm their good faith and trust in the process and to agree that all that will be said will be confidential and therefore inadmissible in any subsequent proceeding. After this, parties take turn to state their views of the dispute. The mediator asks for clarification as may be necessary. If necessary, the mediator may meet with the parties separately in a confidential caucus to assess position, identify real interest, consider alternatives or help generate a possible solution. This is called shuttle mediation. The process may involve several sessions before a solution is arrived at. Mediation may be of different types but three popular variations are the rights based mediation which focuses on legal rights of the parties, the interest based mediation which focuses on the interests and compelling issues of the dispute and therapeutic mediation which focuses on the problem solving ability of the parties or the emotional aspects of the dispute.

A successful mediation affords the parties an opportunity to generate a creative solution to their dispute in a manner that focuses on the future and not the past. Its major benefits include that they control the process, choose their mediator and avoid trial.

Mini-Trial

A mini-trial is a private abbreviated process of presentation by lawyers to the disputants to help them assess the strength and weakness of their positions and to help them reach a decision whether or not to proceed to trial. Usually there will be a third party advisor who renders a non-binding opinion about the legal, factual and evidentiary points of the case and what the outcome might be in court. The lawyers can then use this information to come to a conclusion.

This is a two-part settlement process, which originates as mediation but may graduate to arbitration using the neutral party as the arbitrator who gives an award.

African Customary System of Dispute Resolution

Customary law is generally known to be the accepted norm of usage in any community. A community may accept certain customs as binding on them. In Africa, such customary laws may be accepted by members of particular ethnic groups and may be regarded as ethnic customary law. Customary law is unwritten and one its most commendable characteristics is its flexibility, apart from the fact that it is the accepted norm of usage. In one Nigerian case, the court said

“One of the most striking features of West African native custom ... is its flexibility; it appears to have been always subject to motives of expediency, and it shows unquestionable adaptability to altered circumstances without entirely losing its character.”[1]

Resolution of disputes was a major function under the indigenous system of governance. The role was taken up by the elders or the chief and was meant to maintain social cohesion. In its operation, African dispute resolution was very much like arbitration in that resolution of disputes was not adversarial. Any person who is concerned that a dispute between the parties threatened the peace of the community could initiate the process. In the process, parties have the opportunity to state their case and their expectation but the final decision is that of the elders. Whereas the western type arbitration is attractive because of its private nature, customary arbitration is not private but is organised to socialise the whole society, therefore, the community is present. Another distinction is that the process is gender sensitive as such women were excluded from male driven communal dispute resolution. Parties could arise from the whole process and maintain their relationship and where one party got an award the whole society was witness and saw to it that it was enforced. Social exclusion or ostracism was a potent sanction for any erring party therefore enforcement of an award was not a problem.

There are however several limitations of this process in modern times. One is that it is mostly applied to land and family disputes. It is hardly applicable to monetized commercial transactions and certainly not to transaction of an international character. Furthermore, it is community focused and does not contemplate transactions where the parties are from different cultural backgrounds. The lack of privacy could be a disadvantage in that the parties might not want the community involved.

[1] *Lewis v Bankole (1908) 1 N.L.R 81 at 100.*

Arbitration

Arbitration is one of the various methods of dispute resolution but undoubtedly the most popular. It is defined in the Halsbury's Laws of England as "the reference of a dispute or difference between not less than two parties for determination, after hearing both sides in a judicial manner, by a person or persons other than a court of competent jurisdiction"[2].

Similarly, one distinguished author said –

“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 in a judicial manner, that is upon evidence put before him or them, the agreement is called an arbitration agreement or a submission to arbitration. When, after a dispute has arisen, it is put before such person or persons for decision, the procedure is called an arbitration, and the decision when made is called an award”.[3]

Arbitration is a voluntary method of ADR, which is applied to both domestic and international contracts and is founded on the present or future agreement of the parties to submit any dispute between them to arbitration. By the above definitions it is clear that parties to a contract can choose to resolve any dispute which arises between them without reference to the regular courts. The reasons for sidelining the regular court for arbitration have been outlined above.

In the case of international commercial agreements there are other reasons of great importance why it is to be preferred. International arbitration as it is now well recognized developed after the second world war and became popular as alternative to litigation in contracts where the parties came from different national backgrounds and one party was familiar with the legal system while the other was suspicious of it. In such situations, the only viable alternative was international arbitration. In other words, arbitration has the added advantage that in international contracts it gave the parties opportunity to choose a forum neutral from their own national legal systems.

The basis for proceeding to arbitration is the arbitration agreement or the arbitration clause, which has been voluntarily executed by the parties. For example, the Nigeria Arbitration and Conciliation Act [4] provides in section 1(1)(a-c)

“Every arbitration agreement shall be in writing contained in a document signed by the parties or in exchange of letters, telex, telegrams, or other means of communication which provide a record of the arbitration agreement or in an exchange of points of claim and of defence in which the existence of an arbitration agreement is alleged by one party and not denied by the another”

[2] Halsbury's Laws of England, 3rd Edition, Volume 2 at pg.2 para 2.

[3] Bernstein, Ronald Handbook of Arbitration Practice quoted by Obi O, "Introduction to Arbitration Clause" Continuing Legal Education Association of Nigeria Lecture Notes No. 3a and 3b, December 1990.

[4] Cap 19, Laws of the Federation of Nigeria 1990 formerly Decree No 11 of 1988.

Section 1(2) “ Any reference in a contract to a document containing an arbitration clause constitutes an arbitration agreement if such contract is in writing and reference is such as to make the clause part of the contract.” At common law, the parties could have an oral agreement to submit a dispute to arbitration and such oral agreement would be valid. But by virtue of the above provision every arbitration agreement must be in writing. Section 1(1)(c) of the law implies that an allegation of the existence of an arbitration agreement, which is not denied by the other party, will constitute a written agreement.

The above provision in Nigeria’s arbitration statute is typical and is in fact based on the UNCITRAL model law, which many countries have adopted[5].

A careful appraisal of the provision reveals that an arbitration agreement may arise in different ways and that the agreement may be concluded during the negotiation of the subject matter which has brought the parties together or after a dispute has actually arisen. There is no doubt that it is better to conclude the arbitration agreement before a dispute arises because once a dispute is called it is much more difficult for the parties to be reasonable in negotiation.

Considering that the process is a voluntary one, the arbitration agreement may include a variety of things but it must cover the important aspects of the expectation of the parties. The clause must be carefully drafted and must be able to get the parties to arbitrate when the need arises. Where there is an Arbitration Act, the matters to be covered in the agreement may be identified and this may be sufficient for domestic arbitration[6] but for international arbitration domestic laws were often inadequate to deal with matters of international arbitration therefore, model clauses have been proposed by treaty and the rules of some arbitration institutions. For example, the United Nations Commission on International Trade Law (UNCITRAL) set up by the General Assembly of the UN in 1966 to help remove or reduce legal obstacles to international trade proposed in its draft rules the following clause –

“Any dispute, controversy or claim arising out of, or relating to this contract, or the breach, termination or invalidity thereof, shall be settled by arbitration in accordance with the UNCITRAL Arbitration Rules as at present in force.

The Appointing Authority shall be (insert)

The number of arbitrators shall be one or three (choose)

The place of arbitration shall be (insert)

The language to be used in the arbitration shall be . (insert)”

Another important issue to be covered in the arbitration agreement is the governing law therefore, parties are advised to include the law governing the contract in the arbitration agreement if the law has not been covered elsewhere in the main contract. It is also helpful to assert that the award shall be final.

[5] E.g. Bulgaria, Canada, Australia and also Nigeria have adopted the model law.

[6] Under Nigeria’s Arbitration and Conciliation Act the parties are advised to provide for the number of arbitrators, (s.6) procedure for appointing and challenging them, (ss 7(1) and 9(1) respectively, place of arbitration (s.16 (1) the language of arbitration (s.18 (1), nature of evidence to be used (s.20 (1) etc.

Although we have not discussed the requirements in detail each of these requirements must be carefully considered as their impracticability may frustrate the whole expectation of the parties. For example, the venue selected for arbitration must be one which assures freedom from interference under the law of the situs and it must be a place which is accessible to both parties in a somewhat equitable manner. The tiniest detail must therefore be considered in order to get the best out of the agreement. The clause must be clear and unambiguous.

Once the basic points are covered in the arbitration agreement, a party who obtains an award from arbitration obtains a final award, which may not be appealed or challenged except for very specific reasons recognized by law. The extent to which this clause is enjoyed will depend on the governing law of the contract and whether or not the countries to which the parties belong are signatories to the New York Convention. The principle of finality of award is one of the factors which has pitched arbitration against constitutional rights advocates. The argument is that every one has a constitutional right to court for the determination of disputes therefore any agreement which precludes a person from going to court must be unconstitutional. The underlying principle is that an arbitration agreement is subordinate to the constitutional right to go to court and have disputes resolved. Therefore, it is felt that an arbitration agreement does not and cannot preclude the right to go to court.

Arbitration and Constitutional Rights

Access to court is a fundamental right recognized in civilized countries. Section 34 of Chapter 2 on Bill of Rights of the South African Constitution Act No. 108 of 1996 provide

“Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum.”

Similarly, section 6 of Nigeria’s 1999 Federal Constitution provides that the judicial powers of the Federation shall be vested in the courts. In particular, section 6(6)(b) says that the judicial powers “shall extend to all matters between persons, or between government or authority and to any person in Nigeria, and to all actions and proceedings relating thereto, for the determination of any question as to the civil rights and obligations of that person”

The principle is linked to the concept of judicial independence and the separation of powers which espouse that one arm of government i.e. the legislature cannot oust the jurisdiction of the courts by legislation and thereby undermine the role of the court[7]. Similarly, at common law, an agreement by parties to oust the jurisdiction of court was frowned upon by the courts and declared contrary to public policy even though the common law recognised the use of arbitration to settle disputes.

[7] See section 4(8) 199 Constitution of Nigeria

In spite of these principles, parties have over the years executed arbitration agreements by which they bound themselves not to resort to litigation in the event of a dispute in respect of the contract. At common law, although arbitration agreements were recognised, there was reservation as to the extent it could go. In *Lee v Showman's Guild of Great Britain*[8] Lord Denning said

“... parties cannot contract to oust the ordinary courts from their jurisdiction. They can of course agree to leave questions of law, as well as fact to the decision of the domestic tribunal. They can, indeed, make the tribunal the final arbiter on questions of law. They cannot prevent its decision being examined by the courts. If parties should seek by agreement to take the law out of the hands of the courts and put it in the hands of a private tribunal, without recourse at all to the courts in case of error, then the agreement is to that extent contrary to public policy and void.”

This weighty pronouncement by no less a jurist than the late law Lord Denning has had profound impact on the attitude of lawyers in developing countries to arbitration agreements. In particular, there is concern about the finality of an arbitration agreement, which precludes the parties from resort to court for judicial review. But the reasons, which made arbitration like all other ADR mechanisms popular over litigation, have not disappeared. In many countries, litigation remains an expensive and tortuous way to enforce a legal right aside from the delay, there is the question of rigid formality, publicity, corruption in many judicial system, and in international commercial disputes there is the question of multiple jurisdictions from which the parties have to decide. Although these problems are associated with arbitration in different degrees, there is the advantage that the parties can to an extent control their impact.

Arbitration is not totally without disadvantages. Firstly is the question of its private covenant nature, which removes it from the purview of the state. To compound this the proceedings take place in secret, the award is private and may not contain reasons for the award. It may never be published and where published the names of the parties are omitted. In short it is too secret for comfort. Secondly, there is the fact that its use has exploded beyond the traditional areas of commerce to areas like tort, insurance, medical malpractice etc., such that excluding the scrutiny of courts may deny parties to much precious constitutional rights.

Despite these shortcomings, however, arbitration is in most jurisdictions practiced in accordance with law made by the state[9]. By implication, arbitration is part of the legal system and if the law allows awards to be final by not allowing judicial review, then it has merit. More importantly, is that in the case of international commercial transactions, investors are not likely to invest in countries where the opportunity to resolve disputes is bogged down by protracting procedural rules and the process is fraught with other bottlenecks as identified above.

[8] [1959] 1 All E.R. 1175

[9] see the *Arbitration and Conciliation Act Cap 19, Laws of Nigeria 1990, Arbitration Act of England, 1996.*

The final point is that once a party has signed an arbitration agreement which makes the award final and not subject to judicial review except for express reasons, no court should entertain any action from an aggrieved party. This will be a violation of the spirit of the agreement and a further breach of the contract, a waste of the resources expended in pursuing the arbitration and a triumph for the losing party.

Conclusion

As a dispute resolution method, arbitration ought to fascinate African lawyers. As can be seen from the charts below it is close in many respects with the African traditional dispute resolution methods. That it is not promoted as much as it ought to in Africa can only be attributed to conservatism imbibed from the common law system.

Although African dispute resolution mechanisms cannot be applied to commercial disputes except perhaps those dealing with community land, nevertheless, it offers an insight into the options available outside the adjudicatory system offered by the common law. By comparing it to arbitration and the parameters of litigation, lawyers, particularly government lawyers ought to be able to advise their governments on the need and basis for arbitration in commercial arrangements especially those of an international nature.

DIFFERENCES IN ADR METHODS

	WESTERN	AFRICAN
1.	CONFIDENTIAL	OPEN TO ANYBODY
2.	EXCLUSIVE TO DISPUTANTS (MAY DISAGREE TO MEDIATION)	COMMUNITY-FOCUSED OUTCOME
3.	NO POWER TO SANCTION AGREEMENT	COMMUNITY SANCTION AND MUNDANE POWERS
4.	CONSENSUAL (INTER- DISPUTANTS)	CONSENSUAL INTER COMMUNITY
5.	ADDRESSES EMOTIONS	ADDRESSES SOCIAL NORMS
6.	NON-SPIRITUAL ELEMENTS (OATHS)	NON-SPIRITUAL INTEGRATION
7.	GENDER FREE	GENDER SPECIFIC
8.	FLEXIBLE	CULTURE SPECIFIC
9.	MEDIATION	MED-ARBITRATION
10.	PROFESSIONAL MEDIATORS	ELDERS (IN ROLE PLAY)
11.	WIN-WIN OUTCOME	OFTEN RIGHT/WRONG VERDICT
12.	ANYTIME	CONVENIENT TIME
13.	REMUNERATES MEDIATORS	FREE
14.	CAUCUS (MEDIATOR WITH ONE PARTY)	CAUCUS (ELDERS ONLY)
15.	TRAINING	EXPERIENTIAL LEARNING
16.	SIGNED AGREEMENTS	COMMUNITY MEMBERS ACT AS WITNESSES TO DECISIONS REACHED

ADVANTAGES

WESTERN		AFRICAN
1.	SUITABLE IN MULTI CULTURAL SETTING	ADDRESSES CULTURAL REALITY
2.	MEDIATOR DOES NOT INFLUENCE SOLUTION	ENHANCES RESPECT FOR ELDERS
3.	CONSENSUAL PROBLEM SOLVING	DEMOCRATIC AND CONSENSUAL FREE PARTICIPATION
4.	FLEXIBLE	WIDE APPLICATION
5.	EMOTIONAL HEALING	RECONCILIATORY, INTERPERSONAL AND INTERCOMMUNITY
6.	CONFIDENTIALITY	OPENNESS EXPOSES OTHERS TO SOCIAL JUSTICE
7.	CHEAPER AND SAVES TIME MORE THAN LITIGATION	CHEAPER, QUICKER AND PEACE FOCUSED

DIS-ADVANTAGES

WESTERN		AFRICAN
1.	NOT COMMUNITY FOCUSED	DIFFICULT IN MULTI CULTURAL SETTINGS
2.	PARTIES MUST AGREE BEFORE MEDIATION/ARBITRATION	SOLUTION DOES NOT COME FROM DISPUTANTS
3.	NOT APPLICABLE TO CRIMINAL CASES	APPLICABLE IN MOST TYPES OF CASES
4.	TOO INDIVIDUAL BASED	WOMEN ARE EXCLUDED FROM PROCESS
5.	DIFFICULTY IN SANCTIONING AGREEMENT	-

Source: NIALS ADR Workshop Manual, March 1997

Undoubtedly, the desire of less developed countries to attract foreign investment can only be assisted if they promote international arbitration because the balance comes down in favour of international arbitration when a dispute between different nationals arise. The starting point is to promote legislation which recognize arbitration as an integral part of the legal system not as opposed to it. Secondly, countries which have not adopted the widely accepted international instruments on the subject should do so. These are the UNCITRAL Model Law, UNCITRAL Arbitration Rules and the 1958 New York Convention on the Enforcement of Foreign Arbitral Awards[10]. The model law and rules may be modified for the domestic environment as necessary.

[10] As at the end of 1999 the following African countries had ratified the New York Convention Algeria, Benin, Botswana, Burkina Faso, Cameroon, Central African Republic, Cote d'Ivoire, Djibouti, Egypt, Ghana, Guinea, Kenya, Lesotho, Madagascar, Mali, Mauritius, Morocco, Mozambique, Niger, Nigeria, Senegal and South Africa.

Finally, because the practice of arbitration has a long history in the developed countries, it is common for most arbitration to take place in these countries with experts drawn locally with all of the implications for bias which may exist. Furthermore, the absence of suitable laws in developing countries fuelled this practice. By updating their knowledge in the area of international commercial arbitration through training seminars and workshops such as those of UNITAR and UNDP and their regional partners, sub-Saharan African lawyers gain confidence to practice in this area. They are also better able to promote regional institutions such as the Cairo Regional Center for International Commercial Arbitration (CRCICA), the Kuala Lumpur Regional Center for Arbitration (KLRCICA), and the Lagos Regional Center for International Commercial Arbitration (LRCICA) all devoted to promoting the resolution of international commercial disputes in accordance with principles agreed to under the international instruments mentioned above.

PROFILE OF THE AUTHORS



Dr. Vinod K. AGARWAL has LL.M and Ph.D (Law) degrees from the University of Bombay, India. He obtained a Certificate in Comparative Law from the Institute of European Studies, University of Brussels and has attended the External Session of the Hague Academy of International Law. He has been a Visiting Fellow at the Institute of Advanced Legal Studies, University of London. Presently, he is the Secretary General of the International Centre for Alternative Dispute Resolution in New Delhi after retiring from the Government of India as Secretary, Ministry of Law, Justice and Company Affairs. He has held various positions in the Government of India. He has been a member of many delegations sponsored by the Government of India for negotiation, both in India and abroad, of loan agreements entered into by public sector undertakings such as Industrial Development Bank of India, Industrial Finance Corporation of India, Railway Finance Corporation, Shipping Credit and Investment Corporation of India, Oil and Natural Gas Commission, Air India, Indian Airlines, etc. with the international financial and other institutions like Export-Import Bank of Japan, Export-Import Bank of Korea, Export-Import Bank of America, Caisse Nationale de Credit Agricole S.A. Paris, Bank Paribas, Kreditanstalt für Wiederaufbau, Chase Manhattan Asia. As part his work with the Government of India, Dr. Agarwal was responsible for examination, vetting and negotiation of international loan agreements entered into by the Indian borrowers with lenders and other international financial institutions. He was also responsible for attending negotiations on behalf of the Government of India as well as advising the government on various legal issues and the conduct of litigation and arbitration.



Mr. Bolaji OWASANOYE has sixteen years of professional experience as a legal practitioner, lecturer and researcher (from 1985 to 2000) as well as Undergraduate and Graduate teacher and Tutorial Master. As a Research Fellow of the Nigerian Institute of Advanced Legal Studies (NIALS) he has researched several aspects of law and served as faculty member of the Institute's Continuing Legal Education Programmes on Legal and Legislative Drafting, Negotiation of International Contracts, Legal Aspects of Debt and Financial Management, Human Rights, and Judicial Education and Capacity Building Programmes for Financial and Capital Market Operators. Since 1995, he is a UNICEF consultant on the Implementation of the UN Convention on the Rights of the Child involved in developing Children Legislation for Nigeria. Since 1995, he has also been Head of the Department of Commercial and Property Law which is responsible for packaging and implementing programmes on Economic and Regulation Laws in Nigeria. He is an Associate Research Professor since 1998. Mr. Owasanoye has published several articles and books relating to debt and financial management issues.



About UNITAR

UNITAR is an autonomous body within the United Nations which was established in 1965 to enhance the effectiveness of the UN through appropriate training and research. UNITAR's programmes in the legal aspects of debt, financial management and negotiation are among a wide range of training activities in the field of social and economic development and international affairs carried out, generally, at the request of governments, multilateral organizations, and development cooperation agencies. UNITAR also carries out results-oriented research, in particular research on and for training, and develops pedagogical materials including distance learning training packages.

UNITAR's **Training and Capacity Building Programmes in the Legal Aspects of Debt, Financial Management and Negotiation** are conducted for the benefit of over 35 partner countries mainly from sub-Saharan Africa and Vietnam. These programmes aim at meeting the priority training needs of senior and middle-level government officials through a wide range of seminars, workshops, and training of trainers workshops. In parallel to training activities, the programme also assists in strengthening local capacities of governmental and academic institutions through distance learning training packages, up-to-date publications as well as networking activities.

During 2001, the programme will focus on:

- Training government officials through short-duration regional seminars and workshops on various aspects of debt, financial management and negotiation;
- Developing On-line Training Courses (in parallel with its traditional regional training) with a view to tapping a wider audience and reducing cost of training per participant;
- Strengthening existing ties with regional training centres and offering joint courses with partners in the field;
- Creating awareness among senior government officials of the importance of the legal aspects in the borrowing process and of putting together a multidisciplinary team for loan management and public administration;
- Providing in-depth training and skills development for accountants, economists, financial experts and lawyers coming from government ministries and departments involved in negotiation, financial management and public administration; and
- Developing and disseminating training packages and 'best practice' materials directly related to the practicalities of legal aspects of debt and financial management, with a view to strengthening existing human resources and institutional capacities at the national level.

A description of UNITAR's latest activities and training programmes in the area of debt and financial management is available on its website at: www.unitar.org/dfm.

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