
Is ADR a knell for litigation in Africa or a partner, and how far has it gone so far?

Bereket Alemayehu Hagos, Mehrteab Leul and Associates, Addis Ababa
alemayehu.bereket@yahoo.com

Introduction

Disputes are the order of the day in multifaceted human interactions. Needless to say, Africa is no exception in this regard. It has been experiencing a variety of conflicts throughout its intricate history. To handle these disputes, many African countries have previously put into use customary methods. At present, these methods are dominantly supplanted by litigation. However, alternative dispute resolution (ADR) mechanisms are also, to some extent, applied by African countries.

The purpose of this article is, therefore, to appraise whether ADR is a knell or partner for adjudication in Africa, and to measure the extent of its use. To do this, the remaining part of this article is divided into four sections. In the first section, we define ADR and litigation, and describe their main features. In the next section, we look back and deal with African customary dispute resolution methods, which share many similarities with ADR. In the third section, we hope to address the interrogatory title of the article. As such, it is observed that ADR is highly underutilised in Africa and, therefore, it has not yet become a knell for litigation. On the contrary, we show that there are some experiences that demonstrate that ADR has been a partner to adjudication on the continent. Finally, we provide some concluding remarks and recommendations.

ADR and litigation

Humankind has devised and employed various methods of dispute resolution. These methods may aptly be grouped into litigation and ADR. Litigation forms part of the state structure and involves, after an examination of the evidence of the disputants, a court's determination of a winner and loser. It is typically known for its stringent, public and antagonistic procedures, and winner-loser outcomes. On the other hand, ADR is a rubric for a range of dispute settlement mechanisms other than adjudication. ADR methods usually utilise lax, confidential and amicable procedures and bring about win-win results.

African customary dispute resolution methods: precursors to ADR

In many parts of Africa, customary dispute resolution methods have been deeply entrenched in community cultures and traditions. For centuries, they have been the most indispensable, if not the sole, fora for settling disputes of various kinds. Even though they have many commonly shared features, African customary dispute resolution methods differ from one part of the continent to another. The main goal of these mechanisms was the restoration of social equilibrium, which has been dis-equilibrated due to a conflict.^[1]

Many scholars opine that African customary dispute resolution and ADR mechanisms have some commonalities. For example, according to Uwazie, the notion of ADR fits comfortably within traditional concepts of African justice, particularly its core value of reconciliation.^[2] Likewise, Idornigie even went to the extent of stating that ADR is a

restatement of customary jurisprudence because the focus of ADR – interests and needs of the parties – is the focus of customary jurisprudence.^[3] As such, it may be asserted that customary dispute resolution mechanisms are the precursors of modern ADR.

Despite the hefty hegemony they formerly had over African societies, customary dispute settlement methods are now relegated and their use has immensely dwindled owing, among other factors, to colonisation, globalisation and urbanisation. Consequently, today, disputes need to be resolved at another level within a deeply transformed society.^[4] Thus, litigation, as principally borrowed from and developed outside the continent, is now an integral part of the legal systems of African countries.

The contemporary state of litigation and ADR in Africa

As per the age-old notion of separation of powers, the task of dealing with conflicts has been assigned to courts. This arrangement was incorporated by African nations in their constitutions as part of their post-colonisation endeavours. Since then, the governments of African countries have been administering justice.

Be this as it may, African judiciaries have multiple challenges, some inbuilt in the nature of litigation and others not. As stated above, adjudication inherently makes use of strict and public procedures, and creates feelings of enmity between the disputing parties. Furthermore, in many African countries, overcrowding of cases is a serious problem.^[5] Repeated adjournments and the resultant delays in disposition of cases are also other associated problems observed in our judiciaries. For example, in Nigeria, commercial cases can take up to ten years to progress through the courts and, in Egypt, enforcement actions often take longer to conclude than the underlying suit on the merits.^[6] In Ethiopia also, courts are overburdened by cases, and it is commonplace for cases to take many months and even years to be finally settled.^[7] Moreover, disputants complain of the mounting legal fees for professional representation with each futile court appearance.^[8] As a result of these problems, courts of many African countries have registered negative track records and the level of public trust in them is low, if not nil.

On the other hand, ADR methods, despite the conducive customary background, are still underutilised in Africa and they are not yet a knell for litigation. For different reasons, ADR mechanisms have not been effectively and consistently made part of the justice systems of many African countries. In other words, particularly in non-commercial disputes, the use of ADR has been irregular and piecemeal. Thus, litigation, with all its ills, even now dominates African justice systems.

The continent has, however, performed better in terms of creating institutions that serve as places for the resolution of commercial disputes than for non-commercial disputes. Among these institutions are the Cairo Regional Centre for International Commercial Arbitration, the Common Court of Justice and Arbitration of the Organization for the Harmonization of Business Law in Africa, the Kigali International Arbitration Centre, the Nairobi Centre for International Arbitration and the Mauritius International Arbitration Centre. Even though their nomenclatures seem to indicate that they are solely arbitral institutions, such centres additionally have the legal and organisational frameworks for mediation and conciliation. Nevertheless, as in the case of non-commercial disputes, the problem of underutilisation also subsists in African ADR institutions. The number of cases they usually entertain is far below their capacities and aspirations.^[9]

There are many reasons for the underutilisation of ADR methods in Africa. Many ADR programmes face the challenges of inadequate political support, human resources, legal foundations and sustainable financing.^[10] In addition, particularly concerning arbitration institutions, an absence of proper awareness about arbitration processes and procedures, even among legal professionals, lack of confidence in African arbitrators and political uncertainty have contributed to the low level of use of ADR on the continent.^[11] Therefore, trying to fully benefit from ADR methods without solving these and other challenges would be very thorny for African countries.

Despite the underuse of ADR, there are some success stories in Africa that indicate that ADR methods have coexisted with courts and borne positive fruits. For example, in Ghana, court-connected mediation was introduced in 2003 as part of its judicial reform and many cases were successfully mediated, thereby reducing the backlog in its courts.^[12] Similarly, numerous cases have been handled through mediation and have been positively settled since the creation of multi-door courts and the ADR Centre in 2002 in Nigeria.^[13] Apart from lessening the workload of courts, the disputing parties, who mediated their cases, expressed their satisfaction in the mediation processes and their willingness to recommend them to others.^[14]

By the same token, in Ethiopia, some limited but encouraging experiences were observed in regard to using ADR. A case in point may be the growing number of cases submitted to the Addis Ababa Chamber of Commerce and Sectoral Associations Arbitration Institute.^[15] Moreover, the defunct Ethiopian Arbitration and Conciliation Center entertained many commercial, construction, labour and family cases during its heyday. Among others, these two institutions have reduced, even if below the required level, the caseloads of Ethiopian courts.

Conclusion and recommendations

The practice of settling disputes through ADR is underdeveloped in Africa, although customary dispute resolution methods, which are akin to ADR, were previously rampant throughout the continent. As such, the majority of disputes are currently resolved through litigation. Hence, ADR has not reached the stage at which it becomes a knell for litigation in Africa. Nonetheless, Africa has been experiencing some positive outcomes in using ADR methods.

The underutilisation of ADR in Africa has been attributable to such primary problems as a lack of political backing, failure to integrate them with judicial systems, financial constraints, lack of proper awareness regarding ADR and mistrust in African ADR institutions and professionals. Thus, to effectively reap the benefits of ADR methods and solve the limitations of African judicial systems, it is recommended that governments of African countries appropriately comprehend ADR methods and appreciate their outweighing advantages. Then they should create the necessary enabling legal and institutional frameworks. This can, for example, be made by integrating ADR methods with judicial systems, such as the commendable Ghanaian experience of creating court-connected mediation. Furthermore, governments together with other stakeholders must take measures that aim at creating know-how on ADR systems and ensuring their sustainable financing. Other bodies, such as the United Nations Commission on International Trade Law, should also help African countries to strengthen their ADR systems by, for example, providing them with ADR experts to train African professionals. Finally, unwarranted lack of confidence in African ADR institutions and professionals should be eliminated for Africa to have a robust experience and jurisprudence on ADR.

Notes

- [1] Paul Obo Idornigie, 'Overview of ADR in Nigeria' (2007) 73 *Arbitration* 73.
- [2] Ernest E Uwazie, *Alternative Dispute Resolution in Africa: Preventing Conflict and Enhancing Stability, Africa Security Brief (A Publication of the Africa Center for Strategic Studies)* (No 16, November 2011) 3.
- [3] Idornigie (n 1).
- [4] Amadou Dieng, 'ADR in Sub-Saharan African Countries' in Arnold Ingen-Housz (ed), *ADR in Business: Practice and Issues across Countries and Cultures* (2 Kluwer Law International BV 2011).
- [5] Uwazie (n 2).
- [6] Stéphane Brabant, John Ogilvie and Paula Hodges, *Dispute Resolution in Africa: The Philosophy of Risk* (Practical Law Publishing Limited 2013).
- [7] Yoseph Aemero, 'Process, Challenges and Prospect of Civil Litigations' in Yazachew Belew (ed), *Ethiopian Business Law Series, The Resolution of Commercial/Business Disputes in Ethiopia: Towards Alternatives to Adjudication?* (In Amharic, Bereket Alemayehu Hagos (tr), Vol V, AAU Printing Press 2012) p 13.
- [8] Uwazie (n 2).
- [9] Collins Namachanja, 'The Challenges Facing Arbitral Institutions in Africa, Meeting the Challenges: CIArbs in Africa (Learning from Africa)', CIArb Centenary Conference, 1–17 July, 2015, 11.
- [10] Uwazie (n 2) 5.
- [11] Namachanja (n 9) 12–13 and 15.
- [12] Dieng (n 4) 616.
- [13] Uwazie (n 2) 4.
- [14] *Ibid.*
- [15] Yohannes W Gebriel, 'Institutional Commercial Arbitration under Ethiopian Law: The Case of Chamber Arbitration Institute' in Yazachew Belew (ed), *Ethiopian Business Law Series, The Resolution of Commercial/Business Disputes in Ethiopia: Towards Alternatives to Adjudication?* (In Amharic, Bereket Alemayehu Hagos (tr), Vol V, AAU Printing Press 2012) p 92.