

Chapter 28

ADR in Sub-Saharan African Countries

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1. INTRODUCTION

There is no question that ‘A’DR is all about Dispute Resolution. ‘A’ can stand for a set of terms ranging from ‘Amicable’ or ‘Appropriate’ to ‘Alternative’ (‘alternative’ including or excluding arbitration). The ‘A’ word is not a question of nuance but the crux of how disputes are resolved in business matters in Sub-Saharan Africa.

Are disputes resolved through litigation, arbitration or mediation? How do such procedures work? Are they formal or informal? History and tradition have determined the present situation. What will the future bring?

Organic and material factors are keys to the direction taken by any mode of dispute resolution. According to either of these modes, organic criteria operate outside state courts whereas material criteria come into play as well within as outside the courts. Combining both criteria highlights what amicable dispute resolution (ADR) is meant to be in Sub-Saharan Africa. This reflects the traditional concept of dispute settlement in the region – comparatively less formal, more peaceful and more conciliatory. There is no win–lose positioning but rather a win-win objective.¹

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1. A. Dieng, ‘Approche culturelle des ADR en OHADA’, *Revue Africaine du Droit des Affaires* no 1 (to be released by year-end 2010)).

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Traditionally the goal of indigenous Sub-Saharan African justice is restoration of peace and social harmony. Hence, all modes of dispute resolution – mediation, arbitration and state court proceedings – are interrelated. It is the mission of mediators, arbitrators and judges to create the conditions of a fair settlement in lieu of a strict application of the law. Therefore, in the indigenous Sub-Saharan justice system, arbitration and mediation are not alternative dispute resolution methods but an integral part of institutional justice.²

In traditional Sub-Saharan African societies, ADR may not have been legally laid down but solving problems by amicable means was generally the preferred option. Can such a system be applied in the modern Sub-Saharan African society?

Colonialism has certainly altered the picture in these regions, with variegated consequences. Moreover, matters have considerably changed in a globalized world in conjunction with the rise of new nation states, major industrialization and geographically dispersing families.

Legal documents have become a necessity for transactions in business and otherwise.

Traditional leaders have gradually lost hold of the power they once exercised over their community. Today, disputes need to be resolved at another level within a deeply transformed society. By necessity, the state has undertaken to fill the gap by delivering a more official form of justice represented by courts and legal textbooks.

Where does this leave us? Are there proper institutions encouraging and organizing ADR in Sub-Saharan countries? If so, are these bodies working similarly in all relevant States, members or non members of the *Organisation pour l'Harmonisation en Afrique du Droit des Affaires* (OHADA)?³ And what about the role of ADR in the future international business relations of the Sub-Saharan countries?

2. A BRIEF HISTORY OF ADR IN SUB-SAHARAN AFRICA

2.1. THE TRADITIONAL SOCIETY IN PRE-COLONIAL AFRICA

Customary law, by its very nature, regulates community life. In Africa, all 'law' was originally of customary nature until it was supplanted by the demands of the first centralizing national governments.

Traditional indigenous African societies were organized on the basis of clan or family relationships and leadership. Dispute settlement mechanisms were mostly

2. F.K. Camara & A. Cissé, 'Arbitrage et médiation dans les cultures négro-africaines: entre la prédominance à dénouer et la mission de trancher', *Revue de l'Arbitrage* no. 2 (2009), 285–316.

3. OHADA comprises seventeen sub-Saharan African Member States: Benin, Burkina Faso, Cameroon, the Republic of Central Africa, Comoros, Congo, Côte d'Ivoire, Gabon, Guinea, Guinea-Bissau, Equatorial Guinea, Mali, Niger, Senegal, Chad, Togo and the Democratic Republic of Congo. OHADA's purpose is the promotion of regional integration and economic growth and ensuring a secure legal environment through the harmonization of business law.

amicable. Communities were traditionally led by an elder, who was regularly consulted and respected for his decisions when it came to sorting out disputes. The indigenous African justice system was indeed a tool for reconciliation, its goal being the resolution of conflict through peace and social harmony.⁴

The traditional concept of justice in Senegal was based on sociological criteria taking into account the idea of a community in a traditional society. Any dispute between two parties not only involved the actual opposing actors but was extended to the entire group or groups they belonged to. Dialogue, discussion and debate contributed to preserve the community's interests and integrity.

Such was the case for all types of conflict – between a Muslim country and a friendly non-Muslim country, between authorities and rebels, between offender and victim, between creditor and debtor and also between spouses.

The Muslim concept of arbitration allowed preferential space for conciliation between the parties and subsequently for amicable composition.

Many Sub-Saharan countries have been influenced by Islamic law and culture. Senegal, for example, an already highly converted Islamic society, has gradually become subjected to divine law or 'Shari'a', whereby conciliation and peace restoration were the ultimate goal of any form of justice.

2.2. THE COLONIAL PERIOD

In the nineteenth and early twentieth centuries, the European colonizing powers' objective was to ensure that trade was regulated under laws acceptable to themselves and that, in terms of administration, their rules were applied. Customary law was largely ignored and marginalized. More specifically, they had no time or vested interest in making changes to the laws affecting local administration, personal status or minor criminal offences.

In the English colonies, customs recognized as law were usually admitted only at the local level and did not apply to all groups indiscriminately throughout the country. In short, customary law differed from one region to another. This remains the case today in the countries concerned.

The methods of traditional dispute resolution entrenched in the social fabric of the African heritage enabled the Colonial Courts, established by the colonial administrators, to recognize, validate and enforce settlement agreements through the courts. Settlement was effectuated thanks to the intervention of tribal chiefs, elders and heads of families and clans in each community.

In Senegal, the French colonial authorities took into account the significant legal impact of Islamic customs in law and instituted a parallel legal system akin to their own Western-style structure through the creation of Muslim Courts led by a '*Kadhi*' in which conciliation played a major role.

4. See Dieng *supra* n. 1. See Camara & Cissé *supra* n. 2. Also: D. N'Doye, *Les systèmes non juridictionnels de règlement des conflits au Sénégal*, Le droit de savoir, no. 4, les Editions du CAFORD, 2001.

2.3. THE POST-COLONIAL PERIOD UNTIL THE 1990s

With the rise of the modern nation-state, relying on formal law and a fully organized bureaucratic and rational judicial process, such non-litigious means of settling disputes were sidelined.

In the Sub-Saharan former French colonies, customary courts were abolished at the beginning of the 1960s. All subject matters were thus adjudicated by the ordinary Courts of Law. Notwithstanding the abolition of these courts, new legislative measures and ensuing reorganization of the legal system resulted in the incorporation of certain customary principles (Islamic and pre-Islamic) into national statutory laws that are applicable throughout the country.

This created a hybrid or composite system of law. In this respect, certain laws, particularly in relation to personal status, had a strong customary basis.⁵

Since Senegal's justice reform of 1984, the '*Kadhi*' no longer rules in parallel courts but is integrated into the system's District Courts, his power being limited to family disputes, including inheritance matters. While the '*Kadhi*' still settles disputes, his decision can only be validated and thus enforced after a judge's approval.

The advantages of flexibility, efficiency, steadfastness and confidentiality in ADR led African legislators to develop ADR as an alternative to litigation, especially in cases in which the economic stakes and social incidence were low. This was also the case in administrative and commercial disputes of a certain complexity.

There are competing views on the relevance and sustainability of customary law in the context of rapidly developing societies and the gradual mixing of populations. As to the old rules, modern society now has recourse to regular proceedings and, where there was reconciliation, there is now adjudication.

Many commentators consider customary law an anachronism of a bygone age. From another point of view, however, considerable evidence exists that the traditional methods, particularly in resolving disputes, have many advantages, in particular in dispensing swift and equitable restorative justice and reintegrating wrongdoers into their community. One only has to look at the modern trend of ADR to understand the value of reconciliation.

3. ADR REGULATORY FRAMEWORK IN SUB-SAHARAN COUNTRIES

3.1. NATIONAL LEGISLATIONS

The purpose here is to provide a practical overview of ADR provisions in the OHADA countries. The working of ADR will also be considered in an English

5. J. Miles, 'Customary and Islamic Law and its Development in Africa', *Law for Development Review*, 1 (African Development Bank).

speaking Sub-Saharan country such as Ghana, which is not an OHADA Member State.

3.1.1. OHADA Countries

In many Sub-Saharan countries, mediation and conciliation have traditionally been practised in cases of employment and family law. In the event of labour disputes, parties made a conciliation effort; if this failed, the case went to the courts.

The use of ADR processes in Senegal, as in other African former French colonies, was established by laws within several sectors, including criminal cases.

Article 7 of Senegal's Civil Code allows a district judge, whether upon his own initiative or the proposal of the opposing parties, to make an attempt at conciliation by any possible means. Such an attempt is an obligation when it comes to family law and, more particularly, divorce settlement.

Article 21 of the Civil Code provides for conciliation by village chiefs and area councils regarding family, marriage, inheritance, wills and donation matters. Cases relative to the enforcement of labour contracts are submitted to a double degree of conciliation before both a work inspector and a Labour Court Judge. Similarly, administrative litigation, whether relating to a full court or excess power recourse, provides for non-litigating solutions with a mandatory preliminary administrative recourse in one case and encouragement in the other. As far as criminal offences are concerned, Article 752, paragraph 2 of the Criminal Code Procedure allows the public prosecutor to proceed to mediation in cases concerning first-time minor delinquents.

Economic litigation, namely, in matters relating to customs fraud and public procurement can be settled, thus avoiding public action and recourse to justice.

In other words, there is no real separation and even less opposition between, on the one hand, mediation, conciliation, arbitration and settlement and, on the other, the court decisions. Natural persons, legal entities and public bodies can use all these amicable or appropriate disputes resolution mechanisms.

Apart from this, preliminary conciliation, if required by law, usually appears to be a pure formality, both for the plaintiff and the judiciary, in cases in which any possibility of settlement is obviated by contentious intent. Consequently, it is reduced to nothing more than a procedural formality to protect one's self from potential inadmissibility of the claim in court.⁶

Another difficulty hampering mandatory preliminary conciliation or mediation processes in Sub-Saharan former French colonies, in particular in OHADA countries, is the lack of professional mediators, well-trained and available for amicable dispute settlement. Furthermore, there are no mediators accredited to courts to be designated and there is no clear status for mediators or conciliators.

6. N'doye, District Tribunals register a success rate of 5% for preliminary divorce conciliation. In labour cases the conciliation rate obtained by the Tribunal of Dakar amounts to 40%, compared with 20% elsewhere in the country.

3.1.2. Non-OHADA Countries: The Ghana Experience

Ghana is leading other countries in the promotion of ADR with initiatives such as 'Media Week', a program presented in April 2003 that spread the word about uses of alternative methods of dispute resolution. An ADR Task Force was set up by the Chief Justice of Ghana to advise him on the ways to incorporate ADR in the justice delivery system. The ADR Task Force undertook to educate the public on alternative dispute resolution in particular through the media. Public reaction was very positive, mainly because of bad experiences with litigation in the past.

In 2003 the Chief Justice of Ghana incorporated ADR into the court system under the label court-connected ADR. Under that program, parties are first invited by the court's judge or magistrate to attempt to settle the case before a mediator chosen from a list of mediators accredited by the court. A date is agreed upon for the mediation session, after which any agreement as signed by the parties is confirmed by the court as an enforceable consent judgment. If a case is not resolved through mediation, it is referred back to the court for trial.

In 2007 and 2008, approximately 150 mediators were recruited, trained and assigned to courts throughout the country. The program is currently active in forty-one District Courts across the country. In Accra alone and in 8 District Courts, a total of approximately 2,600 cases were mediated in 2007 and 2008. Nearly half were successfully resolved, thus representing a success rate of approximately 50%. The future of the program looks bright. It is to be extended to all District, Circuit and High Courts in Ghana.⁷

Court-annexed mediation is part of a comprehensive reform program of the Judicial Service of Ghana. Under the High Court Civil Procedure Rules, mediation is practised in the Commercial Division of the High Court of Ghana as a mandatory pre-trial procedure.

Private individuals and organizations have also contributed to ADR advocacy and practice in the country. These include the ADR Coalition of Ghana, the Ghana Arbitration Centre, the Ghana Association of Chartered Mediators and Arbitrators (GHACMA), the Gamey & Gamey Academy of Mediation and the West Africa Dispute Resolution Centre (WADREC).

3.2. INTERNATIONAL INSTRUMENTS

The environment of the use and practice of ADR in Sub-Saharan Africa is now structured, in part, by international agreements both multilateral agreements, such as the 1958 New York Convention and the 1965 Washington Convention and by

7. See Senyo M. Adiabeng, *Alternative Dispute Resolution in Ghana* (August 2007), <www.academyofmediation.com>.

bilateral investment treaties (BIT), such as those concluded with Western States and those concluded among African States.⁸

International Convention for Settlement of Investment Disputes (ICSID) also provides a forum for conciliation of disputes between Member States and foreign investors qualifying as nationals of other Member States. All African Sub-Saharan countries are ICSID Member States.

Many bi-lateral investment treaties concluded by the OHADA countries provide for an amicable settlement procedure of disputes between a foreign investor and the host country before any other form of dispute resolution.⁹

Nevertheless, in the region there is no known example of amicable settlement of an investment dispute. This may be due to a preference for arbitration rather than mediation.

3.3. ADR IN UNIFORM REGIONAL LAW

In addition to investment treaties, regional treaties such as the OHADA or the CIMA¹⁰ treaties offer the necessary means for amicable dispute settlement.

3.3.1. ADR in CIMA Legislation

The CIMA Code, providing single insurance legislation for the region, was instituted by a treaty signed in 1992 (in force since February 1995), with the objective of strengthening cooperation in the insurance industry of the fourteen Member States in Central and West Africa.

It is no secret that before the implementation of the CIMA Code, there was total anarchy in the region. Insured parties had indeed largely lost confidence in insurance companies.

Another factor contributing to the deplorable image of the insurance industry was the sluggishness and unpredictability with which courts took decisions.¹¹

The CIMA Code promotes conciliation techniques in determining the actual amount of compensation in traffic accidents. CIMA mandatory provisions aim

8. *Alternative Dispute Resolution Services in West Africa*, A Guide for Investors – Benin, Burkina Faso, Cameroon, Côte d'Ivoire, Ghana, Mali, Nigeria, Senegal and Togo.

9. See, e.g., BIT's France/Ghana, Art. 13 and France/Senegal, Art. 8.

10. CIMA is a French acronym standing for *Conférence Inter-Africaine des Marchés d'Assurances*. The fourteen Member states of CIMA are Benin, Burkina Faso, Cameroon, the Central African Republic, Comoros, Congo, Côte d'Ivoire, Gabon, Equatorial Guinea, Mali, Niger, Senegal, Chad and Togo.

11. R. Mbifi, *The Promise, the Problem and the Problem of the CIMA Code in Cameroon*, Ohadata D-04-43.

J. Issa-Sayegh, *Nature et régime des règles d'indemnisation des victimes d'accidents causés par des véhicules terrestres à moteur* (Arts 225 à 277 du Code CIMA), Ohadata D-03-04. M. Djimadoum, *Analyse contributive sur le principe de la transaction en assurance*, Ohadata D-08-03.

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at finding an amicable resolution to disputes between insurance companies and victims. Those parties have at least eight or twelve months to reach an amicable settlement.

However, there is no clear provision as to how and where this amicable settlement is to be reached. Once the twelve-month limit has expired and no such arrangement has been reached, the parties will then have to resort to resolution of the dispute in court.

Even though the offer of amicable resolution is clearly covered by the Code according to certain guidelines, a result is rarely achieved. This situation leaves the victims vulnerable to the insurance companies' will to settle in their own best interest. Accident victims are at the mercy of insurance companies who are in no hurry to pay.

In fact, the CIMA procedure for amicable settlement is very questionable indeed. How is it that insurance companies, representing the party accused of wrong-doing but also having a clear interest in the dispute, can adopt an impartial and independent position in establishing fair compensation? Is it reasonable to count on the insurance company's good faith with regard to the settlement process?

Clearly there is a dire need for a third neutral party to render this process more balanced. Perhaps a mediator could fill this gap.

3.3.2. Development of ADR Since the Creation of OHADA

The 1993 OHADA Treaty provides a single unified legal framework for business law in the region. Among its institutions is the Common Court of Justice (CCJA), whose seat is in Abidjan (Ivory Coast). In 1998 the OHADA Arbitration Act came into force, together with the Rules of Arbitration of its Common Court. In its administrative capacity the court administers arbitrations referred to it by the parties and scrutinizes draft arbitration awards.

Arbitration legislation in the OHADA countries allows award by consent. This occurs typically when opposing parties reach a settlement after the case has been transmitted to the Arbitral Tribunal.

Nevertheless, some Uniform Acts contain provisions that permit the use of ADR means. That occurs in criminal law and debt recovery.

Pursuant to Article 10 of the OHADA Treaty, Uniform Acts are directly applicable in the Member States, notwithstanding any conflicting provision of national law, be it previous or subsequent.

The CCJA, the sole supra-national court will rule on, in the Contracting States, the interpretation and enforcement of the Treaty and Uniform Acts

3.3.3. Criminal Sanctions in OHADA Law

Article 5 of the OHADA treaty provides: 'the Uniform Act can define criminal offences; the member states will determine their sanctions'. To this end, several

Uniform Acts have identified certain offences.¹² Only two Member States, however, have so far promulgated the relevant sanctions.¹³

There are thus too many sources of ambiguity and lack of harmony between national and regional legislation to ensure a successful integration.¹⁴

In Senegal, there is room for mediation in criminal law cases when they have already been tried and before the actual sentencing. In this situation, ADR can be attempted. But how does this apply specifically to the rest of the OHADA countries?

3.3.4. Debt Recovery

According to the OHADA Uniform Act on debt recovery, a judge is entitled to suggest an amicable settlement through conciliation. But nothing is mentioned about the manner in which this conciliation can be conducted. Is the conciliator or mediator to be appointed by the judge a specialized neutral? Should an attempt at conciliation start or even take place before the judge or later on, after the hearing? Once reached, a conciliation agreement has to be signed by both a judge and the parties so as to become enforceable.

In the OHADA legal system, there are no clear provisions regarding ADR. This situation impedes access to ADR and hinders the development of amicable settlement of commercial disputes

The aforementioned bi-lateral investment provisions applicable in the OHADA countries, particularly those regarding CIMA and specific OHADA Uniform Acts, unfortunately do not lay the common groundwork for the transnational development of ADR in the Sub-Saharan region.

Consequently, it is vital to build such a common framework to improve and encourage the use of ADR in dispute settlements in the OHADA and CIMA countries at the appropriate supranational level as available.

In this regard, it is important for African national arbitration and mediation centres to compensate for the lack of qualified mediators by providing training and ethical principles to ensure fair mediation proceedings in the context of OHADA and CIMA matters.

3.4. PRIVATE COMMERCIAL ADR CENTRE PRACTICES IN OHADA COUNTRIES

The main impact of OHADA on ADR is in its favouring of arbitration, resulting in establishment of several arbitration and mediation centres in Sub-Saharan African

12. These Acts concern accounting, commercial law, debt restructuring and 'groupements d'intérêt économique'.

13. Senegal and Cameroon.

14. Justice Anne Afong, 'The Problematic Application of Commercial Criminal Law Within the OHADA Territory', *Africa Law Today*, April 2009, vol. 1, no. 3, 4-8 (Publication of the ABA Section of the International Law Africa Committee).

countries were created.¹⁵ As mentioned earlier, OHADA indeed lacks direct provisions on mediation or conciliation. Many of the national ADR centres have been instituted or planned from within the governmental Chambers of Commerce and, therefore, are implicitly supported by the national governments.

The conventional and institutional mediation processes proposed by these centres are identical regarding the proceedings and the mediation or conciliation rules.¹⁶

National ADR centres accept cases in accordance with a mediation or conciliation agreement reached between the parties, or in the absence of such an agreement, in accordance with one party's application for mediation or conciliation with the consent of the other party. These centres maintain a panel of conciliators and mediators from among whom parties can choose their mediators for their specific cases.

The way these centres operate varies. Some exist only on paper, are not functional or have been inoperative for more than ten years (e.g., CATO in Togo). Others are more or less active because they handle some cases and organize training seminars and arbitration and mediation conferences. Few statistics are available regarding the number of mediation cases handled by these new institutions, but it is known that only a few effectively exist. My experience with these centres is that very few cases have actually considered mediation and conciliation as an alternative, rather turning more often than not to arbitration.¹⁷

Groupement Inter-Patronal du Cameroun (GICAM) is a professional association representing almost 80% of the commercial enterprises existing in Cameroon. Based in Douala, the GICAM arbitration centre provides arbitration services to enterprises and individuals. The number of resolved cases, although lower than expected, is increasing as a result of communication and educational seminars on the subject.

Arbitration and mediation centres in the region can work only if political support, adequate human resources, support of cultural norms, relative parity in the power of potential users, adequate legal foundations and sustainable financing are effectively available.

However, if a more harmonized legislation existed, these centres could reap the benefit of a – much desirable – better resolution-oriented environment.

Local ADR centres suffer from a lack of sustainable financing, a problem that persists even with strong political backing for ADR programs. Currently, local centres depend on financing from the donor community. These centres may become self-sufficient if they can attract a greater number of clients.

15. National ADR centres exist in Benin, Ivory Coast, Senegal, Burkina, Mali, Cameroon, Ghana, Togo, etc. In 2008, an 'Association des Centres Africains d'Arbitrage et de Médiation' was created.

16. A. Ngwanza, *Regards Franco-africains sur les étapes de la médiation commerciale*: JADA no. 1.

17. From its creation to 2004 the Dakar Centre did not have any mediation or conciliation case, but there were approximately ten arbitration cases. Since its creation in 2005, with three years of activity until 2010, the Burkina Faso Arbitration and mediation has registered more than one hundred cases. It has registered thirty-eight mediation cases from 2007–2009.

In fact, the success of ADR in Sub-Saharan countries covered by the present chapter will depend on the ability of the local centres to attract a regular and reliable client base.

In this respect, there is great need for OHADA countries to create a more sustainable and predictable legal framework to establish a strong interface between litigation and mediation. The ADR process in Sub-Saharan Africa cannot be left only to the private sector although there are several private mediation and conciliation centres. These centres have to be more connected to courts. The objective of securing better access to justice should encompass access to judicial as well as extrajudicial dispute resolution methods.

3.5. **ADR PERSPECTIVES FOR FUTURE INTERNATIONAL AFRICAN
BUSINESS RELATIONSHIPS**

Investment contracts tend to organize long-term productive activities or other activities in a host country. A continuing amicable relationship between the state and the investor is essential to achieve development and other goals of the state.

Mechanisms capable of dealing with disagreements and misunderstandings between the state and foreign investors are vital to prevent disruptive and irreparable damage to the relationship. In view of this, investment treaties imply that ADR techniques are a superior form of managing investment disagreements compared with litigation or arbitration.

**3.5.1. ADR in Western Countries and African
Business Relationships**

Investment disputes between Sub-Saharan countries and Western investors have generally been settled by arbitration and litigation in a venue located outside of the African continent.

Despite the amicable process of dispute settlement clearly suggested by investment legislations and bi-lateral investment treaties, it has not actually been used during the last decade in investment disputes between African states or entities and Western investors.

This may be due to a more Western conception of settlements marked, in arbitration, by a win-lose perspective rather than by the more African concept of negotiation by amicable means for problem solving. The expansion potential for successful partnerships in investment within the African continent could be substantially enhanced if both sides could have recourse to a reliable legal system for dispute settlement by amicable means.

Furthermore, with the increasing interest in mediation within the European Community, this attentiveness could be extended to dispute settlement between African States and Western investors.

3.5.2. Some Interesting Common Features in the Chinese and African Approaches to ADR

Many traditional societies in Asia and Africa share similar values according to which a social/legal relationship – ranging from trade agreements to marriage – not only involves the actual protagonists but also extends to a certain extent to the parties' respective communities.

In these traditions, the law is often tailored to a case-by-case approach, also taking into account issues other than the mere facts relating to the specific matter. External elements are invariably examined.

In China and most of Africa, compromise and re-negotiation or amicable settlement are traditionally preferred to litigation before the courts, considered the worst possible outcome to dispute. Court proceedings normally imply that the original friendly working relationship is over.¹⁸

In both China and Africa the contract is perceived as a lasting relationship – like a marriage – rather than as a spot allocation of obligations and rights established at the start, once and forever – with litigation as the inevitable outcome for any situation of non-compliance.

Common 'maintenance' of relationships is the key to traditional non-Western mediation and arbitration, whereas in the Western tradition ADR means a mere substitute to court litigation after a break of the relationship and confidence.

With increasing commercial relationships between China and Africa, one may expect that in case of disputes, the recourse to amicable means should be more frequent.

The conciliation network referred to hereunder attaches great importance to exchange and cooperation with corresponding international conciliation institutions. The China Council for the Promotion of International Trade (CCPIT) Conciliation Centre entered into a Joint Conciliation Cooperation Agreement in 1987 with the Hamburg Conciliation Centre, the Argentine–China Conciliation Centre and the New York Conciliation Center and eventually in 1997 with the London Court of International Arbitration (LCIA). Now the Chinese conciliation network is looking to engaging in still broader exchanges and cooperation with more international conciliation institutions in the world.

In a non-Western approach, 'dispute resolution' and 'contract' might actually be considered, to a fair extent, as just a single issue. At any rate, they are closer to being one issue rather than two different and separate matters as they are considered in the Western concept of law.

In business relationships between South-South countries, in particular between China and Sub-Saharan countries in Africa, one can only assume that the two parties would be that much closer to problem solving through amicable means such as mediation rather than litigating so as to allot blame to one party or another.

18. Ignazio Castellucci & Trento, *A Non-Western to and as a Resource for Sino-African Business Relations*, Club OHADA-Chine Conference (Macau, 27 Nov. 2007).

3.5.3. Building a Better Infrastructure for ADR Services in Sub-Saharan Countries

As in many other areas of the world, judicial systems in Sub-Saharan Africa are not equipped to handle the infinite number of cases brought before them, particularly pertaining to commercial disputes. In fact, sizeable caseloads leave many Sub-Saharan Africa courts over-extended and under-budgeted.

Some investors are merely inconvenienced by the existence of slow, over-burdened judicial systems in Sub-Saharan Africa. These financiers invest in the region, and when a dispute arises, they resort to arbitration and alternative dispute resolution forums outside the region. Other investors are deterred outright from investing in the region because to the perceived lack of timely and affordable dispute resolution options located in the region.

ADR is useful in resolving commercial disputes by providing quicker binding decisions through mediation or conciliation mechanisms. The availability of cost-effective ADR mechanisms capable of resolving complex commercial disputes helps to strengthen the confidence of commercial operators interested in the Sub-Saharan African region and therefore stimulates trade and investment both internationally and locally.

Like the European Union, OHADA is able to put into place rules on mediation in order to encourage parties to use this mode of dispute resolution, in particular in cases in which a national court refers parties to mediation or in which national law prescribes mediation. Areas for harmonization could also be the training and accreditation of professional mediators, the confidentiality of mediation and the enforceability of agreements resulting from mediation.

A common legal framework in these areas should be helpful to increase the use of ADR in the region. So far, the creation of the Association of African Centres of Arbitration and Mediation is a credible vehicle to support this purpose and attain the goal of establishing a real ADR network in Sub-Saharan Africa.

4. CONCLUSION

There is room for OHADA to produce more effective and efficient legal frameworks to encourage better working relationships between African and other countries in general and more particularly between African and Western countries.

This could produce not only a more favourable environment for Western investors to work with African partners but also a more acceptable framework for Africans to host those Western investors in a relationship to build up confidence and advocate legal settlement not by litigation but rather through ADR.

Furthermore the OHADA countries would benefit from better legislation regarding amicable dispute settlement so as to promote more effective working business relationships within the region.

To succeed in a business climate subject to sudden and even radical change, collaborative international relationships must be synthesized (designed, structured

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and implemented) in a conceptually different way than conventional agreements. Instead of relying primarily on the enforceability of contractual rights, the parties must seek to achieve overriding mutuality of purpose.¹⁹

ADR techniques can be used to build the collaborative relationships that yield durable agreements in international commerce.

19. Michael Hager & Robert Pritchard, 'Deal Mediation: ADR techniques can help achieve durable agreements in the Global Markets', *Transnational Dispute Management* I, no. 1 (February 2004).