

AFRICA ADR : SPEECH

Tonight, for the first time, we can open the doors of an African arbitral authority, an authority which crosses borders and which has a continental reach.

It has been long in coming and its absence has been sorely felt.

Business has been conducted in Africa without a safety net. Trade and commercial disputes have been left to fester in the absence of regional and continental dispute resolution mechanisms.

There has been no arbitral highway linking the capitals of Africa. No joint effort to create the missing infrastructure.

The cost has been high. Africa has paid it in many different ways.

If Africa has no framework to resolve disputes, then parties have had little option but to refer matters to the arbitral institutions of Europe. The fees and the costs involved are simply too great to justify. African businesses are inevitably charged in European and dollar currencies at European and American rates for the services of European and American arbitrators. It is perverse. It is the cost of letting things go by default.

And then there is the psychological cost. That disputes in Africa should be decided in Africa is self-evident. Outsourcing the resolution of disputes to Europe and to America is an abject admission of a structural failure. It brings with it also a sense of resentment. Disputants rightly complain of the excessive cost involved and African practitioners have a sense of exclusion, a feeling that they have no legitimate part in international arbitration, and that the culture of that arbitration is overtly eurocentric.

What of the cost of the loss of the opportunity to develop necessary skills? Why is it that so few of this continent's

practitioners are familiar with the elementary practices of international arbitration and are so poorly equipped to advise their business clients as to the perils and the prospects of cross-border trade and commerce. In the absence of an inclusive arbitral framework for Africa why is this a surprise: what else can we expect?

These needs and these failings have been widely felt, both in this country and in this region. There is a broad consensus that these needs can only be addressed by the creation of an institution such as Africa ADR.

Let me show you the range and depth of that consensus and the accompanying level of commitment to commission Africa ADR.

In this country, at this meeting, you see present the representatives of the leading firms of attorneys; you see the Societies of Advocates; you see the major accounting firms and the representatives of the Secretariat of the Arbitration Foundation, the main stream local provider of dispute

resolution services in the commercial field.

All of these commit to the building of the arbitral highway; to the creation of the essential framework.

But beyond the South African legal and accounting professions there are present here tonight the representatives of our founding partners in Mozambique and the Congo; Mauritius sadly is absent tonight but we carry its unqualified endorsement. Observers have come from Lesotho and Swaziland. Soon, we hope, they will be fully fledged members. Lex Africa is here with its connections with the attorney firms on a continental scale.

And if we look beyond the continent, we are able to welcome the representatives of one of the leading sets of the English Bar and welcome them not merely as visiting friends but as participants in this venture.

Let me say at once that Africa ADR understands the need for international acceptance. It is not enough that it become the preferred dispute resolution authority in Africa' it must also be acceptable to foreign investors. The inclusion as partners of sets such as 39 Essex seems to us to be the obvious way of establishing that credibility; of creating a truly international mix in an African institution.

And what of business – the users of the service, the ultimate beneficiaries of Africa ADR. The IOD was the first business institution to recognise the potential contribution which Africa ADR could make and it endorsed its mark from the start.

BUSA which speaks for 80% of Corporate South Africa is another partner in this project. BUSA has far-reaching links with the region and the continent. If there is any network which connects business communities of the region and the continent with each other, than BUSA is at the heart of the network. Its links run directly to the Pan African Chamber of Commerce.

And with BUSA is also the SADC Employers Group, a group which belies its name since it includes employers and unions representing the collective interests of the primary industries in SADC and maintaining a leading relationship with the SADC Secretariat. It is, in effect, the SADC business forum at work.

And so housed in Africa ADR, in a partnership for the continent's benefit and not for its own profit, are the essential ingredients for the dispute resolution service which can reach out to all the business communities of the continent. The constituency which Africa ADR is designed to serve is an active partner and protagonist.

Let me not forget that we have the expressions of goodwill and support from the ICC and the other international arbitration authorities which recognise the need for each region and for each continent to develop its own dispute resolution framework.

We have been careful to make sure that we did not open the doors of Africa ADR without first equipping it with the necessary intellectual and technical platforms from which to operate. For the competent administration of dispute resolution one needs skilled staff with wide experience in case management; one needs the appropriate rules and tariffs; one needs access to a pool of competent arbitrators and more than that one needs familiarity with African conditions; one must allow for difficulties in communication; one must appreciate the differences in language and in jurisprudential culture. One must have the knowledge and ability to select arbitrators and to monitor their charges and to give them the support and assistance to allow them to do their work.

The Arbitration Foundation of Southern Africa will, in the first instance, provide that knowledge and expertise. Its Secretariat has, for more than 10 years, provided comprehensive dispute resolution services in thousands of commercial cases both locally and in the region. That

Secretariat is at the disposal of Africa ADR. The Secretariat is the engine room of any arbitral institution. It makes or breaks the reputation of any arbitral authority. It is the Secretariat of Africa ADR which will receive the requests to arbitrate and will satisfy itself that the request is in proper form; that Africa ADR has jurisdiction; that the dispute is arbitrable and the matter is one appropriate for Africa ADR to assume jurisdiction.

Once that is done it is the Secretariat which communicates with the disputants; it puts them on terms to proceed in an orderly and disciplined fashion with the presentation of their case. It screens the arbitrators suggested by the parties and it appoints a suitable chairperson; it ensures the effective interaction between the parties and the Tribunal; it collects the fees which are payable to the Tribunal and it cossets and shepherds the parties and the Tribunal to finalization by the publication of an award.

Africa ADR has the inestimable benefit of a Secretariat which has performed all those functions over a considerable period and in all sorts of circumstances. We have opened our

doors with the service providers and the services in place.

Do not think my repeated references to arbitration implies a lack of concern or involvement either with mediation or conciliation or, indeed, any other form of facilitated settlement process. I simply use arbitration as a compendious word and I emphasise that the range of service which is offered by Africa ADR is the comprehensive dispute resolution service.

The rules of Africa ADR have been designed both with an eye to international best practice and with an eye to the particular needs of this continent. It is the work of an outstanding academic in the field and also a leading practitioner. To Professor David Butler and to Pat Lane we owe a debt of gratitude.

Pat Lane is here this evening and he will sketch for you very briefly the ambit of the arbitration rules. Those rules will accommodate both the conventional international arbitration and a simplified counterpart in which a single arbitrator and

not a Tribunal of three can dispose of matters which do not justify, the cost or the involvement of a larger Tribunal.

The arbitral process starts with an arbitration clause. In that clause the parties identify the arbitral authority to which the resolution of the dispute is entrusted. Inclusion of that clause is the responsibility of the parties and their advisers. Only after that step has been taken can the Secretariat begin its work.

From this moment it has become possible to include a clause which identifies Africa ADR as the appropriate arbitral authority. You will find that the appropriate clauses are now published widely. As I speak, and if the promises of the technicians can be trusted, our website has gone live. It should be easy to find. It is www.africaadr.com. You will find the range of appropriate arbitration clauses on the website; you will find the rules there; you will find the contact personnel; you will find, as I say, that Africa ADR has opened for business.

We have, besides, ambitions for Africa ADR which go beyond these high aims.

Africa ADR must do more than provide a service; it must bind and unite legal communities; it must contribute to the creation and the acceptance of a shared jurisprudence.

Building the bridges between our legal communities is the necessary precursor to acceptance and to participation.

We recognise that our continent's fragmented jurisprudential inheritance dates back to the divisive effects of colonialism. That inheritance manifests itself each time our lawyers talk to each other.

Maputo may, in global terms, be barely a stone's throw from Johannesburg but in terms of legal inheritance they are far distant, and that anomaly is true throughout Africa.

Yet these disparate legal communities must surely learn to work together in a spirit of mutual understanding. How are

we to have regional integration and the emergence of a common market without the legal glue?

Africa ADR is the appropriate shared project which should bind and unite.

We expect that it will take time for the legal communities outside of SADC to throw their weight behind the initiative. All sorts of concerns may arise: the shock of the new; the suspicion of change; the distrust of a regional or continental body.

That is why we chose first to commission Africa ADR before we approached the legal communities of East Africa and of francophone and North Africa to join with us. We want to show the reality of a working system and thereby to encourage widespread acceptance.

As each country takes up a stake in this venture, it will form a local organizing committee, not only to market the initiative and to assist the Headquarters Secretariat but also to

foster and develop the arbitral culture in that country and to bring its business and its legal communities into the management structures of Africa ADR.

And what do we expect from the Governments of Africa? We do not ask for funding or material assistance. We hope that Government and regional structures will themselves take advantage of the services which Africa ADR offers. If it is inappropriate for private African disputes to go outside Africa for resolution, how much more so for regional disagreements not to be resolved on this continent.

But Africa ADR has another task to fulfill in that connection. Many countries in Africa have not yet signed the New York Convention. One can only believe that the failure is due to a lack of information and not to a deliberate choice. But it is essential that the business and legal communities of Africa actively persuade their governments to prepare the arbitral playing fields to fit into a continental framework. And Africa ADR will address itself to that task as well.

Tonight is an occasion for good wishes and some celebration. There is a long road ahead to meet the full extent of the vision. But, looking back, we have already come a long way and with a great deal of success.

And so the doors are open; the service is available; and arbitration in Africa is beginning to find its voice.

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