COMMERCIAL MEDIATION AS A REMEDY FOR CORRUPT JUSTICE IN SECURING THE BUSINESS CLIMATE IN SUB-SAHARAN AFRICA

NKULU MUKUBU LUNDA Johnny*

ABSTRACT

Since their independences, in most of sub-Saharan African countries the administration of justice has suffered from a wickedness that is eating away at it and compromising the judicial security necessary for economic development: corruption. Corruption has many faces and form but one of the worst forms is judicial corruption, because it is really a break the development of our countries and even for the sub-region. In the face of corruption, commercial mediation is proposed as a remedy for the countries of the sub-region. Mediation is an alternative method of conflict resolution where the parties try to find a solution to a conflict on their own, under the supervision of a third party: the mediator. This alternative dispute resolution method excludes any possibility of judicial corruption or financial domination by one party over another, simply because the mediator has no role to play in favour of one party to the detriment of another. This definitively excludes any intention or possibility of corruption

Rather, the objective of mediation is to re-establish lasting and quality communication between the parties because, free from all the misunderstandings that caused the conflict, they can even after the dispute consider better relations, which is crucial in the business world. Commercial mediation offers a framework of trust, since the parties are freed from intimidating legal proceedings with judges and lawyers, a considerable time saver, since the parties do not bother with long trials, an ideal framework for commercial collaboration, since no one loses out but also an infallible remedy against corruption, since no party has an interest in influencing the mediator, whose role is not to agree with one party or another but rather to lead them to a solution that suits them all.

A. Introduction

Since their independences, several of the countries of sub-Saharan Africa, whether they are in the Romano-Germanic system or in the common wealth, have experienced a rather pathological judicial situation, the symptoms of which are in particular corruption, the elasticity of procedures, their exacerbated cost, the complexity and ineffectiveness of the solutions proposed.

* Lawyer at the Bar of Haut-Katanga, Assistant at the Faculty of Law of the University of Lubumbashi and PhD student in Law. Email address johnnylunda@gmail.com, tel; +243 990 197 624.

This situation has the direct consequence of judicial insecurity that is harmful to investments in the sub-region and does not promote the rapid development of this part of the continent. Without just justice, the challenge of sub-Saharan Africa's development remains a distant dream. To cure it, drastic measures would be needed, requiring both the political will of the countries concerned and above all a 180° change in the mentality of both judicial actors and the population.

While the mechanism proposed above seems conceivable, its implementation nevertheless remains a headache and requires considerable time to materialize. It is therefore timely and urgent that an alternative mechanism be tried: mediation seems to be the long-awaited remedy.

Since November 23, 2017 in Conakry, the Council of Ministers, acting as a legislator within the community of the Organization for the Harmonization of Business Law in Africa, OHADA in acronym, has adopted a new uniform act relating to mediation as an alternative method of conflict resolution.

> *It has taken twenty-four years since the signing of the OHADA treaty to witness the diversification of its justice offer. Its previous system was based only on the adjudicative methods of public justice by the state courts and private justice by the office of arbitrators. The offer of justice was therefore monolithic, de facto excluding litigants from decision-making*[1].

Thus, the advent of a dispute resolution system centered on the deliberate will of the parties to find a fair, equitable and pragmatic solution to their dispute constitutes a major advance in the perception that litigants had of justice, thus excluding the punitive aspect characterizing it to arrive at a consensual and harmonious approach to the solution to the dispute, and a hope for medication or a remedy for the ills that plague justice in a sub-Saharan Africa sick with corruption.

B. About mediation

I. Definition

It could be defined in the context of Africa as a new alternative dispute resolution method where the parties try to find a solution to a conflict situation by themselves, supervised by a third party: the mediator. Indeed, considered as a non-jurisdictional method of conflict resolution, mediation postulates the hypothesis that the judicial process is not the only and universal technique for resolving disputes between the members of a society.

While judicial logic proposes to settle a dispute by ruling in favour of one or the other of the parties in conflict, mediation is intended to be "*a formal process by which a neutral*

1 *Ibii OTTO*, The OHADA Uniform Act on Mediation: The Faculty of Evolution from Adjudication to Collaboration in the Field of Justice in French-Speaking Africa, in OHADATA, D-17–24, Abidjan 2017, p.1.

third party attempts, through the conduct of a meeting, to allow the parties to confront their points of view, and to seek, with his or her help, a solution to the dispute between them[2]. »

We can define it in the context of justice by using the definition of the consultative council of Europeans judges. In its Opinion No. 21 (2018), Preventing corruption among judges, the Consultative Council of European Judges proposes a definition of judicial corruption: it is the dishonest, fraudulent or unethical conduct of a judge with the aim of obtaining a personal advantage or an advantage for third parties. This definition forgot other actors like Lawyers and bailiffs.

This alternative method of dispute resolution excludes any possibility of judicial decadence or financial domination of one party over another, simply because the mediator has no role in ruling in favour of one party to the detriment of another. This definitively excludes any intention or possibility of corruption.

II. Function of mediation

To speak of the function of a method of conflict resolution seems, from all points of view, useless insofar as the function is obvious in its statement: it is the resolution of conflicts. Nevertheless, here the function in question must be understood in the sense of the particularity of this mode which distinguishes it from other traditional methods of conflict resolution such as the judicial process, arbitration, settlement, etc.

Thus, mediation, here under analysis, corresponds more to this palliative method of conflict resolution whose particularity is a free conciliation where the parties seriously show the desire to find a fair agreement, a fair solution to their dispute.

This is why it has more of a function of establishing communication between people or social groups. Therefore, mediation differs from the court process in that it requires the prior consent of the parties and, unlike the settlement, does not require any of them to accept the proposed solutions. Finally, unlike negotiation which brings the participants face to face, mediation is carried out by a third party accepted by the protagonists and from whom they expect neutrality and independence[3].

The objective of mediation is more to restore lasting and quality communication between the parties because, free of all the misunderstandings at the origin of the conflict, they can even after the dispute envisage better relations. Mediation is therefore the ideal procedure to resolve a conflict between two business partners who do not wish to break their partnership despite the dispute between them. And unlike the judge's solution, the mediator's solution does not have the effect of breaking the relations between the parties.

2 *Bonafe-Schmitt, J-P*., Plaidoyer pour une sociologie de la médiation, Paris 1988, 3n°29, p. 21.

3 *Nkulu Mukubu Lunda Johnny,* la médiation du droit OHADA dans la sphère judiciaire congolaise, in OHADATA D-18–18*,* Lubumbashi 2018*,* p.6.

From all this, it is undeniable that in sub-Saharan Africa, mediation is an economical, effective and efficient solution in this period of increased confidence in judges and judicial solutions.

C. Commercial mediation as a medication for corrupt justice in sub-Saharan Africa

Presented in this way, mediation in sub-Saharan Africa is called upon to participate in a process of medication or improvement of the judicial system by serving as an emulation of traditional systems and by offering solutions more adapted to the needs of litigants.

Indeed, it must be admitted that in our lethargic judicial systems it is difficult to introduce new practices, such as mediation. But before holding lawyers and legislators to blame, it should be noted that mentalities first require a certain evolution.

Thus, within the meaning of the Uniform Act, the mediation provided by the law resulting from OHADA seems to encroach on the turf of the cases submitted to the judges, since it allows the parties to snatch their files from their hands when they believe that they can give them, with the help of a mediator, a better solution far from any corruption and harmful influence.

It is therefore obvious that there is friction as to its reception within the body of judicial actors. Indeed, resorting to mediation as another way of resolving conflicts augurs the affirmation of a crisis of confidence in the traditional justice system, which, although it is no longer reassuring, is intended to be the most efficient for the needs of litigants.

This already reveals to us that at this stage, mediation will have to impose itself in order to survive in such an environment and demonstrate through its solutions the undeniable advantages it offers. Moreover, it will be necessary to change the judicial mentality of African businessmen and women in order to adapt it to this new way of resolving disputes.

In addition, the current reversals show us that the interpretation and application of the rule of law by African judges risks bringing more conflicts than solutions to the problems of litigants.

Indeed, it is no longer to be hidden that the current regulation and practice of the law reveal that several mechanisms prevent the development or achievement of sound justice in the judicial process. This is the case with corruption[4], the unfortunate interpretation of laws by judges[5], etc.

All these procedural pitfalls can thus be circumvented by the mediation mechanism thanks to the simplicity of its procedures and above all by the good faith of the parties, who

4 According to the 2019 ranking of Transparency International, the main civil society organization fighting corruption, the DRC is ranked 161st out of 180 countries, comments collected on http://www.afrique.lalibre.be DRC: TSHISEKEDI on a crusade against corruption of July 12, 2019, accessed on August 27, 2019 at 5:07 p.m.

5 *MUKONGA SEFU Jacques*, circular relating to the prohibition of garnishment and precautionary seizure by the presidents of commercial courts: a late arbitration reinstalling legal insecurity, in Juriafrique, Lubumbashi September 2019, p.3.

are determined to find a fair, equitable and honest solution to their dispute and which serves as its basis.

D. Conclusion

All in all, mediation clearly appears to be a medication, a way of helping those who have gotten themselves into a bad situation together, who get bogged down in violence and lock themselves in conflict, to free themselves from it and to benefit from it[6] while sparing them the pangs of a discolored justice.

Moreover, since alternative dispute resolution methods are considered to improve the business climate since they advocate harmony rather than victory, this act is really part of OHADA's aim.

However, it could be argued that this method of conflict resolution is a bit timid in view of the current state of Africa, since there are currently very few mediation institutions that can serve this purpose, nor less than a precedent for the effectiveness of such a procedure.

And so, in a context such as that of sub-Saharan Africa, the mechanism of mediation does augur well for the beginning of a cure, but requires a certain popularization among litigants, a greater institutionalization as well as a legitimization, which, in this context, should come from the states through the production of texts giving force to this new mode of conflict resolution.

Book reviews

1. Ibii OTTO, **The OHADA Uniform Act on Mediation: The Faculty of Evolution from Adjudication to Collaboration in the Field of Justice in French-Speaking Africa**, in OHADATA, D-17–24, Abidjan 2017, p.1.
2. Bonafe-Schmitt, J-P., **Plaidoyer pour une sociologie de la médiation**, Paris 1988, 3n°29, p. 21.
3. Nkulu Mukubu Lunda Johnny, **la médiation du droit OHADA dans la sphère judiciaire congolaise**, in OHADATA D-18–18, Lubumbashi 2018, p.6.
4. MUKONGA SEFU Jacques, **circular relating to the prohibition of garnishment and precautionary seizure by the presidents of commercial courts: a late arbitration reinstalling legal insecurity**, in Juriafrique, Lubumbashi September 2019, p.3.

6 Point 5 of the mediation charter of the National Mediation Centre in Paris.