

Enhancing Africa's Competitiveness in the Global Alternative Dispute Resolution Arena

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Abstract

Globalization has led to the growth of Alternative Dispute Resolution (ADR) as a viable forum for managing disputes involving parties from different nationalities. ADR processes in the global arena provide numerous benefits including neutrality of forum, enforcement of outcomes, and flexible procedures for managing disputes. ADR is therefore being embraced as the preferred method of conflict resolution in the international business world. This paper critically examines the need to enhance Africa's competitiveness in the global ADR arena. It argues that the potential of ADR is yet to be fully harnessed in Africa therefore limiting the continent's competitiveness in the global ADR arena. The paper critically explores the landscape of ADR in Africa. It argues that ADR has been practiced in Africa for many centuries therefore creating an ideal environment for the growth of these mechanisms in the continent. The paper also examines some of the factors hindering Africa's competitiveness in the global ADR arena. In addition, the paper suggests measures towards enhancing Africa's competitiveness in the global ADR arena.

1.0 Introduction

Globalization is shaping the function of international law and with it the mechanisms used to resolve international conflicts and disputes¹. It has been noted that collective global problems are driving the development of collaborative problem-solving approaches². The need to foster international peace and security has resulted in the global community embracing approaches aimed at pacific resolution of international disputes

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¹ Spain. A., 'International Dispute Resolution in an Era of Globalization' Available at <https://lawweb.colorado.edu/profiles/pubpdfs/spain/IntlDispRes-EraGlobalization.pdf> (Accessed on 02/09/2024)

² Ibid

for both legal disputes as well as for those that arise from armed conflict³. The *Charter of the United Nations*⁴ stipulates that parties to any dispute, the continuance of which is likely to endanger the maintenance of international peace and security, shall, first of all, seek a solution by negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice⁵.

Alternative Dispute Resolution (ADR) entails a set of processes that are applied to manage disputes without resort to adversarial litigation⁶. ADR mechanisms may be linked to but function outside formal court litigation processes⁷. These techniques include negotiation, mediation, arbitration, conciliation, adjudication, expert determination, early neutral evaluation, and Traditional Dispute Resolution Mechanisms (TDRMs) among others⁸.

ADR processes are being widely embraced globally as a result of the increase in trade and commerce between parties from different nationalities which activities have also lead to disputes among parties from different nations⁹. ADR processes such as arbitration and mediation offer several advantages in the global arena such as neutrality of forum in the determination of disputes therefore addressing the differences that may arise as a result of multiple legal systems¹⁰. They also guarantee enforcement of outcomes across jurisdictions due to the presence of legal frameworks such as the *New York*¹¹ and

³ Ibid

⁴ United Nations, Charter of the United Nations, 24 October 1945, 1 UNTS XVI

⁵ Ibid, article 33 (1)

⁶ Muigua. K., 'Alternative Dispute Resolution and Access to Justice in Kenya.' Glenwood Publishers Limited, 2015

⁷ Uwazie. E., 'Alternative Dispute Resolution in Africa: Preventing Conflict and Enhancing Stability.' *Africa Security Brief*, No. 16 of 2011

⁸ Muigua. K., 'Alternative Dispute Resolution and Access to Justice in Kenya.' Op Cit

⁹ Spain. A., 'International Dispute Resolution in an Era of Globalization' Op Cit

¹⁰ Moses, 'The Principles and Practice of International Commercial Arbitration' 2nd Edition, 2017, Cambridge University Press

¹¹ United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 10 June 1958), Available at www.newyorkconvention.org/english (Accessed on 02/09/2024)

Singapore¹² Conventions. Further, it has been noted that unlike national legal systems, ADR processes in the global arena including international arbitration and international mediation are less rigid and flexible therefore permitting the parties to adjust procedures to the particular demands of their dispute¹³. ADR processes have therefore emerged as a viable and effective forum for managing disputes in the global arena making ADR the preferred method of conflict resolution in the international business world¹⁴.

This paper critically examines the need to enhance Africa's competitiveness in the global ADR arena. It argues that the potential of ADR is yet to be fully harnessed in Africa therefore limiting the continent's competitiveness in the global ADR arena. The paper critically explores the landscape of ADR in Africa. It argues that ADR has been practiced in Africa for many centuries therefore creating an ideal environment for the growth of these mechanisms in the continent. The paper also examines some of the factors hindering Africa's competitiveness in the global ADR arena. In addition, the paper suggests measures towards enhancing Africa's competitiveness in the global ADR arena.

2.0 Alternative Dispute Resolution in Africa: Prospects and Challenges

ADR occupies a special place in Africa. It has been part and parcel of conflict management in Africa since time immemorial¹⁵. ADR mechanisms have been practiced in Africa for many centuries¹⁶. These techniques were firmly embedded in the culture and customs of African communities¹⁷. The idea of conflict management in Africa societies is guided by key values including peace, harmony, truth, honesty, unity, cooperation, forgiveness,

¹² United Nations Convention on International Settlement Agreements Resulting from Mediation., Available at https://uncitral.un.org/sites/uncitral.un.org/files/singapore_convention_eng.pdf (Accessed on 02/09/2024)

¹³ Lominack. R., 'Examining Alternative Dispute Resolution in the International Business Domain' *South Carolina Journal of International Law and Business.*, Volume 1, Issue 1 (2003)

¹⁴ Ibid

¹⁵ Muigua. K., 'Resolving Conflicts through Mediation in Kenya.' Glenwood Publishers Limited, 2nd Edition, 2017

¹⁶ Ibid

¹⁷ Ibid

reconciliation, and respect¹⁸. Conflict management in African societies was therefore aimed at creating consensus, facilitating reconciliation, fostering peace, harmony and cohesion and gave prominence to communal needs over individual needs¹⁹. In order to achieve these objectives, African societies had flexible dispute resolution mechanisms that offered a speedy, inexpensive, and accessible just resolution that maintains and restores communal relations, especially in disputes involving family and the community at large²⁰. African societies therefore embraced traditional forms of mediation, adjudication, reconciliation, arbitration and negotiation since these techniques fitted comfortably within traditional concepts of African justice, particularly its core value of reconciliation²¹.

ADR in the African context is therefore generally seen as a return to traditional African conflict resolution methods and hence not a novelty²². It has been argued that ADR mechanisms can strengthen dispute settlement systems and bridge the gap between formal legal systems and traditional concepts of African justice²³. These techniques may have particular value in stabilization and statebuilding efforts especially when judicial institutions are weak and social tensions are high²⁴. It has been noted that despite numerous attempts at modernization, many African countries are still struggling to establish functional, timely, cost-effective and trusted judicial systems²⁵. Access to justice through formal justice processes in Africa is hindered by obstacles such as costs, bureaucracy, complex legal procedures, illiteracy, distance from formal courts, backlog

¹⁸ Awoniyi. S., 'African Cultural Values: The Past, Present and Future' *Journal of Sustainable Development in Africa*, Volume 17, No.1, 2015

¹⁹ Muigua. K., 'Alternative Dispute Resolution and Access to Justice in Kenya.' Op Cit

²⁰ Ntuli. N., 'Africa: Alternative Dispute Resolution in a Comparative Perspective' Available at https://www.researchgate.net/publication/322638491_Africa_Alternative_Dispute_Resolution_in_a_Comparative_Perspective (Accessed on 05/09/2024)

²¹ Uwazie. E., 'Alternative Dispute Resolution in Africa: Preventing Conflict and Enhancing Stability.' Op Cit

²² Ntuli. N., 'Africa: Alternative Dispute Resolution in a Comparative Perspective' Op Cit

²³ Uwazie. E., 'Alternative Dispute Resolution in Africa: Preventing Conflict and Enhancing Stability.' Op Cit

²⁴ Ibid

²⁵ Ibid

of cases in courts and lack of legal knowhow²⁶. ADR techniques are suitable in addressing these challenges and enhancing access to justice in Africa²⁷. Embracing ADR in Africa can therefore contribute towards building effective dispute management systems and further bridge the gap between the formal legal system and traditional modes of African justice²⁸.

The landscape of ADR in Africa is growing. Africa's dispute resolution landscape has long been dominated by litigation, but the use of ADR processes such as arbitration and mediation is becoming more prevalent²⁹. For example, countries such as South Africa, Kenya, Nigeria, Egypt and Rwanda all have established arbitration centres, with Cairo and Johannesburg considered among the most popular arbitral seats on the continent³⁰. The formation of regional ADR centres in Africa including the Nairobi Centre for International Arbitration, the Kigali International Arbitration Centre, and the Cairo Regional Centre for International Commercial Arbitration is enhancing the uptake of ADR in Africa³¹. As a result, it has been noted that there is increasing confidence in selecting African laws to govern commercial contracts and African seats for domestic and international arbitrations³². Most African countries also have in place arbitration laws with others including Nigeria and Malawi recently reforming their laws to align with global standards including the United Nations Commission on International Trade Law (UNCITRAL) Model Law on International Commercial Arbitration³³.

²⁶ Ojwang. J.B , "The Role of the Judiciary in Promoting Environmental Compliance and Sustainable Development," *1 Kenya Law Review Journal* 19 (2007), pp. 19-29: 29

²⁷ Muigua. K., 'Alternative Dispute Resolution and Access to Justice in Kenya.' Op Cit

²⁸ Uwazie. E., 'Alternative Dispute Resolution in Africa: Preventing Conflict and Enhancing Stability.' Op Cit

²⁹ ALN Africa., 'Africa's Growing Dispute Resolution Landscape' Available at <https://aln.africa/wpcontent/uploads/2023/06/Africas-Growing-Dispute-Resolution-Landscape.pdf> (Accessed on 05/09/2024)

³⁰ Ibid

³¹ Ibid

³² Ripley-Evans. J., & De Sousa. M., '2022 SOA Arbitration in Africa Survey Reveals a Thriving Market for Arbitration on the Continent.' Available at <https://hsfnotes.com/africa/2022/11/25/2022-soaarbitration-in-africa-survey-reveals-a-thriving-market-for-arbitration-on-the-continent/> (Accessed on 05/09/2024)

³³ Owa. I., '2023 Year in Review: A Transformative Expedition of Arbitration in Africa' Available at <https://arbitrationblog.kluwerarbitration.com/2024/01/24/2023-year-in-review-a-transformative-expedition-of-arbitration-in-africa/> (Accessed on 05/09/2024)

Arbitration in Africa therefore enjoys a thriving present and a promising future³⁴. Arbitral institutions are playing an important role in developing regional centres, which will be key to meeting the growing demand for dispute resolution services on the continent³⁵. For example, the implementation of the African Continental Free Trade Area (AfCFTA) is expected to boost Intra African trade and enhance cross-border investments in the continent³⁶. However, commercial and investment disputes may also arise in the course of implementation of the AfCFTA involving parties from different nationalities in Africa³⁷. Effective management of such disputes is therefore necessary in order to maintain commercial relationships and enhance trade and investments in Africa³⁸. The Protocol on Rules and Procedures on the Settlement of Disputes to the Agreement establishing the AfCFTA envisages the use of ADR processes including arbitration, conciliation, and mediation in managing disputes under the AfCFTA³⁹. It has been noted that the AfCFTA and its focus on fostering economic integration in Africa through trade will result in more intra-African disputes⁴⁰. This in turn provides opportunities to help the continent's arbitral institutions gain more experience, compel the continent to pay the required attention to supporting ADR infrastructure, and in turn increase the level of comfort with Africa as a seat for arbitration⁴¹. It is therefore imperative to develop ADR in Africa in order to meet the growing needs of dispute management under the AfCFTA.

³⁴ Ripley-Evans, J., & De Sousa, M., '2022 SOA Arbitration in Africa Survey Reveals a Thriving Market for Arbitration on the Continent.' Op Cit

³⁵ Ibid

³⁶ Erasmus, G., 'The AfCFTA Dispute Settlement Mechanism as part of a continental Trade Regime' Available at <https://www.tralac.org/blog/article/15378-the-afcfta-dispute-settlement-mechanism-as-part-of-a-continental-trade-regime.html> (Accessed on 05/09/2024)

³⁷ Ibid

³⁸ Ibid

³⁹ African Union., 'Agreement Establishing the African Continental Free Trade Area' Available at https://au.int/sites/default/files/treaties/36437-treaty-consolidated_text_on_cfta_-_en.pdf (Accessed on 05/09/2024)

⁴⁰ ALN Africa., 'Africa's Growing Dispute Resolution Landscape' Op Cit

⁴¹ Ibid

Mediation is also gaining traction in Africa with countries such as Kenya introducing mandatory court-annexed mediation as part of the broader ADR framework⁴². This gives the courts discretionary powers to refer certain disputes to mediation towards reducing backlogs in the court system⁴³. It has been noted that mediation is preferred in many cultures across the continent, as African philosophical and political thinking largely favours the approach of conciliation and mediation of disputes over the adversarial approach of Western cultures⁴⁴. Mediation may provide a greater scope for solutions which account for the context of the dispute, and can provide greater fairness (or perceived fairness) in outcomes⁴⁵. Mediation can also result in collaborative outcomes based on mutual problem solving⁴⁶. It is also vital in ensuring open communication, finding common ground, and creating a culture of trust⁴⁷. Mediation is therefore ideal when it is necessary to maintain all parties' relationships or when the solution itself will have a significant impact on a large group of people⁴⁸. As a result, there is room for significant growth in the adoption of mediation for commercial disputes in Africa⁴⁹.

Notwithstanding their benefits, ADR processes in Africa face key challenges, including inadequate political support, human resources, legal foundations, and sustainable financing⁵⁰. Further, the current practice of ADR in most African countries is largely based on the western notions of dispute resolution and access to justice and hence could

⁴² The Judiciary of Kenya., 'Court Annexed Mediation' Available at <https://judiciary.go.ke/court-annexed-mediation/> (Accessed on 05/09/2024)

⁴³ Ibid

⁴⁴ Ripley-Evans. J., & De Sousa. M., '2022 SOA Arbitration in Africa Survey Reveals a Thriving Market for Arbitration on the Continent.' Op Cit

⁴⁵ Ibid

⁴⁶ Food and Agriculture Organization., 'Collaborative Conflict Management for Enhanced National Forest Programmes (NFPs)' Available at <https://www.fao.org/3/i2604e/i2604e00.pdf> (Accessed on 05/09/2024)

⁴⁷ Miroslavov. M., 'Mastering the Collaborating Conflict Style In 2024' Available at <https://www.officernd.com/blog/collaboratingconflictstyle/#:~:text=It's%20one%20of%20the%20strategies,their%20underlying%20needs%20and%20interests.> (Accessed on 05/09/2024)

⁴⁸ Isenhardt. M.W., & Spangle. M., 'Summary of "Collaborative Approaches to Resolving Conflict"' Available at <https://www.beyondintractability.org/bksum/isenhardt-collaborative> (Accessed on 05/09/2024)

⁴⁹ Ripley-Evans. J., & De Sousa. M., '2022 SOA Arbitration in Africa Survey Reveals a Thriving Market for Arbitration on the Continent.' Op Cit

⁵⁰ Uwazie. E., 'Alternative Dispute Resolution in Africa: Preventing Conflict and Enhancing Stability.' Op Cit

defeat its purpose and limit its uptake by communities in the continent⁵¹. The colonial era in Africa resulted in the introduction of western justice systems with customary law being largely ignored and marginalized⁵². The indigenous practices and institutions on conflict management were largely weakened and even destroyed in many African societies, since the colonial powers introduced formal justice processes such as law courts, which came to pronounce judgments rather than resolve conflicts according to the African concepts of justice⁵³. Further, it has been noted that the current practice of ADR originated and developed within specific cultural, ideological and political contexts inherent in the West and therefore, its application in non-Western societies especially Africa may turn out to be counter-productive since the latter exhibit markedly different social, historical and political conditions⁵⁴. ADR in the African context was a cultural specific process that made it possible for disputants to reach, understand and own the verdict or outcome of the resolution process⁵⁵. African societies developed flexible dispute resolution mechanisms that offered a speedy, inexpensive, and accessible just resolution that maintained and restored communal relations, especially in disputes involving family and the community at large⁵⁶. The current practice of ADR in Africa may not meet these objectives since the process has been largely formalized⁵⁷. Addressing these challenges requires ADR to be embraced from an African perspective⁵⁸.

⁵¹ Ntuli. N., 'Africa: Alternative Dispute Resolution in a Comparative Perspective' Op Cit

⁵² Dieng. A., 'ADR in Sub-Saharan African Countries' Available at <https://www.ohada.com/uploads/actualite/1131/Dieng-Chapter%2028-ADR-in-Business-II.pdf> (Accessed on 06/09/2024)

⁵³ Adeyinka. A., & Lateef. B., 'Methods of Conflict Resolution in African Traditional Society' An *International Multidisciplinary Journal*, Ethiopia Vol. 8 (2)

⁵⁴ Ogbaharya. D., 'Alternative Dispute Resolution (ADR) in Sub-Saharan Africa: The Role of Customary Systems of Conflict Resolution (CSCR).' Available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1612865 (Accessed on 06/09/2024)

⁵⁵ Ntuli. N., 'Africa: Alternative Dispute Resolution in a Comparative Perspective' Op Cit

⁵⁶ Ibid

⁵⁷ Muigua. K., 'Legitimising Alternative Dispute Resolution in Kenya: Towards a Policy and Legal Framework.' Available at <https://kmco.co.ke/wp-content/uploads/2018/08/LEGITIMISINGALTERNATIVE-DISPUTE-RESOLUTION-MECHANISMS-IN-KENYA.pdf> (Accessed on 06/09/2024)

⁵⁸ Muigua. K., 'Preparing for the Future: ADR and Arbitration from an African Perspective' Available at <https://kmco.co.ke/wp-content/uploads/2023/10/Preparing-for-the-Future-ADR-and-Arbitration-from-an-African-Perspective.pdf> (Accessed on 06/09/2024)

Africa is also yet to fully entrench its place in the global ADR arena⁵⁹. For example, most commercial and investment disputes arising in Africa often end up being contested outside Africa, with London being the most popular seat for mining related arbitration⁶⁰. Further, it has been noted that even when disputes involve two parties from Africa, the cases tend to be subject to either the International Chamber of Commerce (ICC) or the London Court of International Arbitration (LCIA) rules, with the arbitration proceedings taking place in centres such as Paris, London and Singapore⁶¹.

Africa's effectiveness in the global ADR arena is hindered by several factors including bias and perception of corruption⁶². The governance challenges that are prevalent in some African countries portray the continent in a negative image to the global community with parties doubting the ability to attain justice in Africa⁶³. There are also concerns of inadequate legal enforcement, with parties often concerned that arbitral awards may not be effectively enforced in the continent⁶⁴. Court interference in arbitration in Africa is also a key concern that limits Africa's competitiveness in the global ADR arena⁶⁵. Lack of clarity and uniformity on the limits of court intervention in arbitration portrays Africa as a continent that is not arbitration- friendly⁶⁶. Defining and limiting the extent of court intervention in arbitration is therefore key in enhancing Africa's competitiveness in the global ADR arena⁶⁷.

⁵⁹ ALN Africa., 'Africa's Growing Dispute Resolution Landscape' Op Cit

⁶⁰ Ibid

⁶¹ Ibid

⁶² Amazu A. Asouzu, *International Commercial Arbitration and African States: Practice, Participation and Institutional Development*, University Press, Cambridge, 2001. PP. 5-6 Available at <http://catdir.loc.gov/catdir/samples/cam031/2001018482.pdf> (Accessed on 05/09/2024)

⁶³ Ibid

⁶⁴ ALN Africa., 'Africa's Growing Dispute Resolution Landscape' Op Cit

⁶⁵ Muigua. K., 'Promoting International Commercial Arbitration in Africa' Available at <https://kmco.co.ke/wp-content/uploads/2018/08/PROMOTING-INTERNATIONAL-COMMERCIAL-ARBITRATION-IN-AFRICA-EAIA-Conference-Presentation.pdf> (Accessed on 05/09/2024)

⁶⁶ Ibid

⁶⁷ Ibid

It is imperative to address the foregoing challenges in order to enhance Africa's competitiveness in the global ADR arena.

3.0 Conclusion

In order to enhance Africa's competitiveness in the global ADR arena, it is imperative to market the continent⁶⁸. It is imperative for stakeholders including ADR practitioners and ADR institutions to use marketing tools such as ADR conferences and collaborations with institutions in other continents in order to enhance their visibility in the global ADR spectrum and showcase the continent's capacity in ADR⁶⁹. In addition, ADR practitioners including arbitrators and mediators can also tap into marketing tools such as publications, websites and social media in order to portray their skills and qualifications and promote confidence to the global community in relation to Africa's capacity in ADR⁷⁰.

Governments also have a key role to play in enhancing Africa's competitiveness in the global ADR arena. Among the key challenges facing ADR in Africa include inadequate political support, human resources, legal foundations, and sustainable financing⁷¹. In order to address these challenges, it is imperative to enact robust ADR legislations throughout Africa⁷². It has been noted that legislation is key in elevating the status of ADR in the continent, building public confidence, and further increasing ADR utilization⁷³. Legislation would also provide a framework for reference, review, and reform as well as institutionalize much needed education and professional training in ADR⁷⁴. Governments should also support capacity building efforts through establishing national and regional ADR centres and financing ADR programmes in the continent⁷⁵.

⁶⁸ Muigua. K., 'Promoting International Commercial Arbitration in Africa' Op Cit

⁶⁹ Ibid

⁷⁰ Ibid

⁷¹ Uwazie. E., 'Alternative Dispute Resolution in Africa: Preventing Conflict and Enhancing Stability.' Op Cit

⁷² Ibid

⁷³ Ibid

⁷⁴ Ibid

⁷⁵ Ibid

It is also imperative for ADR practitioners and institutions to build their capacity in order to enhance Africa's competitiveness in the global ADR arena⁷⁶. Education, training and mentorship are vital in enhancing the capacity of ADR practitioners in Africa⁷⁷. Further, ADR practitioners should enhance their knowledge and capacity in relation to emerging global issues in ADR including climate change disputes⁷⁸. It is also vital to set up more ADR institutions to facilitate training in ADR mechanisms such as arbitration, mediation and conciliation in addition to the existing institutions⁷⁹. ADR institutions in Africa should also develop rules and/or expertise specific to the resolution of climate change disputes among other emerging areas in order to enhance Africa's competitiveness in the global ADR arena⁸⁰. Further, closer collaboration among regional ADR centres in Africa is essential in raising the continent's capacity in the global ADR arena and increasing appointment opportunities for African arbitrators and mediators in global disputes⁸¹.

Finally, there is also need to define and limit the extent of court intervention in ADR⁸². Unnecessary interference by courts in ADR mechanisms especially arbitration can hinder Africa's competitiveness in the global ADR arena⁸³. Due to unnecessary intervention, delays, and uncertainty on issues such enforcement of awards, the global community may shun away from Africa in favour of arbitration- friendly jurisdictions⁸⁴. It has been noted that investors want to be certain that courts in Africa respect arbitration agreements, and have a reputation for providing the needed and timely support for

⁷⁶ Muigua. K., 'Nurturing International Commercial Arbitration in Kenya.' Available at <http://kmco.co.ke/wp-content/uploads/2021/10/Nurturing-International-Commercial-Arbitration-inKenya.pdf> (Accessed on 06/09/2024)

⁷⁷ Ibid

⁷⁸ International Chamber of Commerce., 'Resolving Climate Change Related Disputes through Arbitration and ADR' Available at <https://iccwbo.org/wp-content/uploads/sites/3/2019/11/icc-arbitration-adrcommission-report-on-resolving-climate-change-related-disputes-english-version.pdf> (Accessed on 06/09/2024)

⁷⁹ Muigua. K., 'Nurturing International Commercial Arbitration in Kenya.' Op Cit

⁸⁰ International Chamber of Commerce., 'Resolving Climate Change Related Disputes through Arbitration and ADR' Op Cit

⁸¹ ALN Africa., 'Africa's Growing Dispute Resolution Landscape' Op Cit

⁸² Muigua. K., 'Promoting International Commercial Arbitration in Africa' Op Cit

⁸³ Ibid

⁸⁴ Ibid

arbitration proceedings including enforcement of arbitral awards⁸⁵. Adopting an arbitration friendly approach by courts is therefore key in enhancing Africa's competitiveness in the global ADR arena⁸⁶.

Enhancing Africa's competitiveness in the global ADR arena is therefore necessary and achievable.

⁸⁵ ALN Africa, 'Africa's Growing Dispute Resolution Landscape' Op Cit

⁸⁶ Ibid

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