THE EFFICACY OF ALTERNATIVE DESPUTE RESOLUTIONAND ITS RELEVANCE IN THE ADMINISATRATION OF JUSTICE IN UGANDA

A CASE STUDY OF HIGH COURT

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2013

DECLARATION

I, NYABOGO ARNOLD, declare that this is my original work and that to the best of my knowledge, it has never been presented to any institution of higher learning for the award of academic qualification.

Signed ..... Date 09/11/2013.....

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APPROVAL

This Dissertation has been submitted under my supervision as a University Supervisor.

Signed ..... Date .....9/12/2013.....

SUPERVISOR

LIST OF STATUTES

Civil procedure act cap 71

Arbitration and conciliation Act

Judicature Act cap 13

Land Act cap 227

Civil procedure rules

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List of Abbreviation

ADR: ALTERNATIVE DISPUTE RESOLUTION

CADER: CENTER FOR ALTERNATIVE DISPUTE RESOLUTION

DRD: DISTRICT RESOLUTION DIVISION

UNCITRAL: UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE

USAID: UNITED STATES AID FOR INTERNATIONAL DEVELOPMENT

ACA: ARBITRATION AND CONCILIATION ACT

CPA: CIVIL PROCEDURE ACT

CJPR: COMMERCIAL JUSTICE REFORM PROGRAM

IACP: INTERNATIONAL ACADEMY OF COLLABORATIVE PROFFESIONALS

CHAPTER ONE

INTRODUCTION

1.0 Introduction

The study focuses on the efficacy of alternative dispute resolution in administration of justice in Uganda. A case study based on what practically take place in courts.

The Chapter presents background of the study, purpose of study, objectives of study, scope of study, and significance of study.

1.1 Background of the Study

The term alternative dispute resolution[1] is often used to describe a wide variety of dispute s resolution mechanism that are short or alternative to full scale court process.

Although mediation goes back hundreds of years, Alternative dispute resolution has grown rapidly in the United States since the political and civil conflicts of the 1960s. In the late and early 1990 people became increasingly concerned that the traditional methods of resolving disputes in the united states through conventional litigation had become too expensive, too slow and too cumbersome for many civil law suits (cases between private parties). This concern led to the growing use of ways other than litigation to resolve disputes. These other methods are commonly known collectively as Alternative Dispute Resolution (ADR). As of the early 2000, ADR techniques were being used more and more as parties and lawyers and courts realized that these techniques could often help them resolve

[1]Mayanja,A review of Uganda framework governing the institutional intervention in Arbitration . C/A new Vo. 17 pg 18-24

disputes quickly and cheaply and more privately than could conventional litigation. Moreover many people preferred ADR approaches because their methods are being more creative and more focused on problems solving than litigation, which has always been based on an adversarial model.

The term Alternative Dispute Resolution is to some degree a misnomer in reality fewer than 5% of all lawsuits filed go to trial, the others 95% are settled or otherwise concluded before trial. Thus it's more accurate to think of litigation as the alternative and ADR as the norm. Despite this fact the term Alternative Dispute Resolution has become such a well accepted shorthand for the vast array of non litigation process that its continued use seems assured.

Although certain ADR techniques are well established and frequently used for example mediation and arbitration– Alternative Dispute Resolution includes a wide range of processes, many with little in common expect that each is an alternative to fill-blown litigation.

Litigants, Lawyers, and Judges are constantly adapting existing ADR processes or deriving new ones to meet the unique needs of their legal disputes. The definition of Alternative Dispute Resolution is constantly expanding to include new techniques.

ADR techniques have not been created to undercut the traditional US courts system. Certainly ADR options can be used in cases where litigation is not the most appropriate rout. However they can explore other options but want also to return to the traditional court process at any point. Of the many ways to resolve a legal dispute than formal litigation, mediation arbitration, mini-trial early evaluation and summary jury trial are the most common.

1.2 Statement of the Problem

The courts in administration of justice have made it inevitably difficult to leave out other alternative to court process, because of the increased backlog of

cases, expenses in carrying on with the case like hire services of a lawyer, court fees involved while leading proceedings and others including time consumed, have made it necessary to call for another alternative in solving disputes. This study is therefore to examine the efficiency and efficacy of ADR use in the administration of justice in contrast with formal court process

1.4 Objectives of the Study

The main objective of the study is to find out the weakness faced by Ugandan courts in implementing ADR.

The specific objectives of this study are:

i) To establish the development of ADR in the judicial system of Uganda
ii) To discuss non-legal factors affecting the implementation of ADR in Uganda.
iii) To analyze the legal framework governing ADR in Uganda

1.5 Significance of the Study

The study will be important and beneficial to the following categories of institutions:

It will help courts understand their weaknesses in administration of justice and therefore be in position to make changes in the way administration of court process is carried out in order to improve their services.

The study will also provide guidance to the institutions and lawyers that administer alternative dispute resolution. It helps to provide the necessary techniques and procedures in carrying out their duties entrusted to them by the disputants.

The study will also benefit other institutions that advocate for justice and other human rights. It will help them realize that court process is not the only way to achieve justice but other alternatives can be used.

It will also benefit students and other scholars who may be conducting research and other study purposes.

1.6 Scope of the Study

This study will be conducted in Uganda specifically in Kampala district focusing on the Ugandan courts system especially the high court (commercial division) with the intent of finding the legal issues related to ADR ,thereby examining the application and efficiency of the law governing ADR in Uganda. The study will be conducted between the months of October to November 2013

1.7 Hypothesies

Looking at the two variables that is administration of justice and alternative dispute resolution, it is anticipated that there is a very close link and connection between the two variables.

1.8 Literature Review

The researcher based on many different written literature works in regards to some already researched topics for purpose of reviewing and identifying of gaps and how each gap are addressed today.

Hon. Justice G.W.Kiryabwire[2], delivered a paper entitled "Alternative Dispute Resolution : a Ugandan judicial perspective(April; 2005) where he advocated for adoption of court order.ADR .

He viewed that the traditional perceptions against ADR has greatly reduced thus giving room for a greater use of courts assisted ADR, particular breakthrough had been made in Uganda under the mediation pilot project of the commercial court given, though mediation is not the only form of ADR in all its possible forms, the author recommended that for ADR to be filled in Uganda there was need for the judicial officers to be proactive and encourage litigants to explore ADR to going into fully fledged litigation.

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[2] Hon justice G. kanyeihamba

James Alfini[3] in his article expresses that the role of judges has under gone significant changes over the last few decades, but that the ethical structure necessary to support judicial involvement in ADR has not been adequately explored.

The author takes the view that judges should adopt a mediator or case evaluator's role in attempting to reach a settlement, but that they should not mediate cases that have been assigned to them for trial because of the conflicting role of adjudicator and settlement agent and the risk of coercion .Alfini also questions whether judges have the combatant to mediate and suggest that they should certainly have mediation training.

The author takes the view that judges should adopt a mediator or care evaluator's rule in attempting to reach a settlement; but that they should not mediate cases that have been assigned to them for trial because of the conflicting role of adjudicator & settlement agent, and the risk of coercion. Alfinni also questions whether judges have the combatant to mediate & suggest that they should certainly have mediation training.

Deborah Henslar[4] "suggests that there is a potential gap between the ADR movement and the way that ADR is happening in court or business as usual. The article stated that very little is known about most important aspects of court, annexed ADR.

Hensler outliners an agenda for research with particular emphasis on qualitative research that would draw out "thick descriptions " of how ADR is carried out by court.

More information must be collected on when and under what circumstances ADR reduces time and cost versus traditional litigation. The author finds that it would be interesting to consider why it's perceived that ADR cuts time

[3] Risk of coarion too great : judges should not mediate cases assigned to them for trial pg. 1
[4]A research agenda : what we need to know about court- connected ADR pg 15

and costs even when it may not. The role that expectations play in shaping evaluation of ADR should also be explored.

Finally the author finds it important to look at what ADR processes are prepared by parties and lawyers and why the article concludes that we may come with some undesirable results. By looking into these questions the perfect bubble of ADR may break –but that we very much need to look seriously and comprehensively at these issues.

John Bickarman[5] in his article centers on an analysis of the ADR act (ADRA) it does provide for greater visibility of and options regarding ADR. The author provides a brief history of coming into being of ADR and the gist of the act is so summarized as stated below.

[5] Great potential: New federal law provides the vehicle in local courts have the willing pg 3

CHAPTER TWO
ADR AND ITS MECHANISMS

2.0. Introduction
This chapter is about the topic identified by the researcher. The chapter looks basically at the types of ADR applied in Uganda. The literature was mainly taken from other sources of secondary data. As such the researcher will look at literature related to ADR and its administration in Uganda.

2.1 Types of ADR procedure
Alternative dispute resolution (ADR) has become more significant in common

Law jurisdictions in recent years, and Uganda has successfully used what might be called 'court-based ADR'. ADR is an alternative to the adversarial approach of a court case: a structured negotiation process where a settlement is reached with the aid of a trained mediator.

The following therefore are the types of ADR applied in Uganda

Mediation

Mediation also known as conciliation, it's the fastest growing ADR method : unlike litigation mediation provides a form in which parties can resolve their own disputes with the help of a neutral third party.

Mediation depends upon the commitment of the disputes to resolve their own problems. The mediators, also known as facilitators never impose a decision upon the parties. Rather the mediator's job is to keep the parties talking and to help move them through the more difficult points of connection. To do this, the mediator typically takes the parties through five stages.

First the mediator gets the parties to agree on a procedural matter such as by stating that they are participating in the mediation voluntary ,setting the time and place for future session, executing a formal confidentiality agreement.

One valuable aspect of this is that the parties who often have been unable to agree on anything begin a pattern of saying yes.

Secondary the parties exchange initial positions not by way of lecturing the mediators but in a fact to fact exchange with each other. Often, this is the first time each party hears the other complete and uninterrupted version. T he parties may begin to see that the story has two sides and that it may not be so unreasonable to compromise their initial positions.

Third, if the parties have agreed to what is called a causing procedure, the mediator meets with each side separately in a series of confidential private meeting and begins explaining settlement alternatives. Perhaps engaging the parties in some "reality tasting "of their initial proposal. This process sometimes called shuttle diplomacy often uncovered areas of flexibility that the parties could not see or would have been uncomfortable putting forward officially.

Fourth, when the parties agree upon the broad term of a settlement they formally reaffirm their understanding of that settlement, complete the final details and sign a settlement agreement.

Mediation permits the parties to design and retain control of the procedure at all times and ideally eventually strike their own bargain, evidence suggest that parties are more willing to comply with their own agreements, achieved through mediation, than adjudicated decisions, imposed upon them by an outside party such as a judge.

An additional advantage is that when the parties reach agreement in mediation, the dispute is over– they face no appeals, delay, continuing, expenses or unknown risks .the parties can begin to move forward again .unlike litigation, which focuses on the past, mediation looks to the future thus a mediated agreement is practically valuable to parties to have an ongoing relatio0nship such as commercial or employment relationship.

So mediation is a process in which a neutral third party (the mediator) assist the parties in resolving their disputes by facilitating and negotiating.

The mediator has no authority to improve a settlement and the parties are under no obligation to reach agreement. Mediation proceedings are generally private and confidential.

Arbitration

Arbitration more closely resembles traditional litigation in that a neutral third party hears the disputes' arguments and imposes a final and binding decision that is enforceable by the court. Arbitration is a private form of adjudication it's generally less formal than a trial in court. However an arbitrator's role to decide the outcome of the case, and the arbitrator's decision is binding.

The difference is that in arbitration, the disputants generally agree to the procedure before the dispute arose, and the disputant mutually decide who will hear their case and the proceedings are typically less formal than in a court of law.

One extremely important difference is that unlike court decisions, arbitration offers almost no effective appeals process. Thus, when an arbitration decision is issued, the case is ended.

Final and binding arbitration has long been used in labour –management deputes for decades, unions and employers have found it mutually advantageous to have a knowledgeable arbitrator whom they have chosen-resolve their disputes in this cheaper and faster fashion. One primary advantage for both sides is that taking disputes to arbitration has kept working by providing an alternative to strike and lockout and has kept every one out of the court. Given this very successful tarcki record, the commercial word has become enthusiastic about arbitration for other types of disputes as well.

Now a new form of arbitration, known as court annexed, has emerged throughout the United States. More recently in Uganda, arbitration has become common method of resolving commercial and other disputes.

The new form in America, one can be found in Minnesota ,where in the mid-1990s,the Hennapin county district court adopted a program making civil cases involving less than $ 50,000 subject to mandatory non binding arbitration. The results of that experimental program were so encouraging that legislation was later enacted expending the arbitration program statement. As of 2003, most cases were channeled through an ADR process before they could be heard in court. A growing number of other federal and state courts were adopting this or similar approaches.

Conciliation

Conciliation is defined as an intervention to resolve an international dispute by a body without a political authority that has the trust of the parties involved in responsible for examining all aspects of the dispute and proposing a solution that is not binding for the parties. Without this trust, its involvement will be in vain. In addition, because it's responsible for examining all aspects of the dispute, it must identify the facts of the case, and it can take into account not only applicable rules of law but also all non legal aspects of the case. Its proposal can be based in whole or in part of the law. However, legal considerations may only be secondary and may even be absent altogether moreover ,because the parties are not bound to implement the body's solution, They are free to reject its proposals the freedom of the state remains unfettered.

Mediation –arbitration

As its name suggests, mediation - arbitration or med-Arb combines mediation and arbitration. First, a mediator tries to bring the parties closer together and help them reach their own agreement. If the parties cannot compromise they

proceed to arbitration –before that same third party or before a different for a binding decision.

Mini-trial

The mini-trial, a development in ADR is finding it greatest in resolving large scale disputes involving complex questions of mixed law and fault, such as product liability, massive construction and antitrust cases. In a mini-trial each party presents its case as in a regular trial, but with the notable difference that the case is "tried" by the parties themselves and the presentation are dramatically abbreviated.

In a mini trial, lawyers and experts present a condemned version of the case to top management of both parties, often a neutral adviser –sometimes an expert in the subject sits with management and conducts the hearing. After these presentations top management representation- by now are more aware of the strength and weaknesses if each side-try to negotiate a resolution of the problem. If they are unable to do so, they often seek for the neutral adviser's best goals as to the probable outcome of the case then resume negotiations.

The key to the sources of this approach is the presence of both sides' top officials and the exchange of information that takes place during the mini-trial. Too often, pre-litigation work has insulated top management from the strength and weakness of their cases. Mini-trial presentation allows them to see the dispute as it would appear to an outsider and the stages for a cooperative settlement.

Negotiation

This is defined as a consensual bargaining process in which the parties attempt to reach an agreement on disputed or potentially disputed matter.

It consists of basically, discussions between the interested parties with a view to reconciling divergent opinion or at least understanding the different positions maintained. It does not involve any 3rd party at least at that stage and so differs from other forms of dispute settlement.

In the fisheries jurisdiction case ,judge Nervo observed that, in addition to being an extremely active method of settlement itself, negotiation is normally the precursor to other settlement procedures as the parties decide amongst themselves how best to resolve their differences.

Negotiations are the most satisfying means to resolve disputes since the parties are so directly engaged. However they do not always sound since they don't depend on a certain degree of mutual good will, flexibility and sensitivity .negotiation has been defined as any form of direct or indirect communication whereby parties who have opposing interests discuss the form of any joint action which they might take to mange and ultimately resolve the dispute between them, negotiation may be used to resolve an already –existing problem or to lay the ground work for a future relationship between two or more parties. Negotiation has also been characterized as the "pre-eminent mode of dispute resolution which is hardly surprising given its presence in virtually all aspects of everyday life, whether at the individual ,institutional national or global levels.

Each negotiation is unique, differing from one another in terms of subject matter, the number of negotiation in daily life ,it's not surprising to find that negotiation can also be applied within context of other dispute resolution processes, such as mediation and litigation settlement conferences.

The success of the ADR according to Bickerman ,will depend on who pursues for it is now up to local districts courts & bars to decide how to design their programs .the author campaigns on the need to consider carefully about who will design these ADR programs and offers suggestions regarding collaboration between staff and judges or judicial officers.

According to Anthony Conrad K Kakooza[6] in his research stated that a new trend in Uganda encompassing different forms of alternative dispute resolution mechanisms such as arbitration, conciliation, mediation and a brief look into collaborative legal practice. This article is relevant to the study because it covers ADR process in details and explains the advantages and disadvantages to the reader. However, he does not discuss negotiations as the other type of ADR which this study tackles in detail.

2.2 Other Methods of Alternative Dispute Resolution

When parties are involved in a conflict they may initially attempt to resolve the matter themselves. If they are unable to do so, the traditional dispute resolution process is to engage in litigation thus they turn the problem over to the judge to decide who is right who is wrong (i.e. who has the better position).

However Alternative Dispute Resolution (ADR) offers a wide variety of methods to resolve the matter through settlement instead of litigation, it's a voluntary process where parties, with the aid of a third party neutral focus on achieving a mutually satisfactory solution rather than on determining who has the stronger position. ADR usually involves a third party neutral who helps the parties design a process that they believe will aid them in finding mutually acceptable solution to their disputes.

At FERC the following groups assist parties with ADR:

1. Dispute resolution division

The dispute resolution Division (DRD) is a small service –oriented team that promotes timely and high quality resolution of disputes through consensual decision making.

DRD have two major functions:

[6] Arbitration, conciliation and mediation in Uganda. A focus on the practical aspects

To provide services such as mediation and facilitation in disputes involving entities subject to the commission's jurisdiction. All communications with DRD representations are privileged and confidential, unless otherwise agreed.DRD staff is not involved in the commission's decisional process and does not advocate positions or conduct investigations.

To promote the use of ADR both within and outside of the commission through activities such as consultation, workshops, collaboration, training and coaching.

Administrative law judges and FERC trial staff.

Under the commission's rules, administrative law judges (ALJ) can serve as settlement judges and can conduct settlement negotiations mediation, facilitation and arbitration, as well as evaluate and certify settlements.

FERC trial staff also plays a major role in helping parties to resolve disputes and settle cases. This assistance is primarily achieved through the use of early neutral evaluation techniques.

2.3 The traditional means of dispute resolution

This sector is to look at how traditional methods of alternative dispute resolution have influenced the judicial sector in Uganda; it also goes ahead to show through which disputes may be resolved.

Going to the African writers, we have even use of a third party neutral in resolving of disputes still going on in very many African societies. The third party is normally appointed and they base on the integrity of that person as well as his good faith. This is supposed to be done in good faith and as well these deputes are carried out within the community /members in that society watch on /witness.

Traditional leaders

It's very natural[7]; that there are conflicts in every community mostly social and economic – when someone committed a social wrong the whole community got involved. The family came in to side with or against him in resolving the conflict. The methods used to resolve such disputes differed depending on each society for instance sex age and status were always considered. Societies in Uganda were heterogeneous, therefore it's not easy to discuss a single form of traditional methods of dispute resolution that was used in all the different societies.

However open debates were taken as a potential path towards agreement on what was factually true and what was morally right. Among the Ateso of Uganda negotiation was considered the best way to resolve a dispute. The two rival parties would be called by the elders and asked to state the cause of their strife. The two rival parties would have to come to an agreement by the end of the day. If compensation was required then the offending party would be asked to pay and upon this the parties would stay in peace. This is more or less what took place in every society.

Religious leaders

Going back to the biblical[8] times means of dispute resolution was to settle matters quickly with your adversary who is taking you to court. Do it while you are still with him on the way or he may hand over to the judge and the judge may hand you over to the officer and you may be thrown in the danger in order to bring justice as well as fairness, the bible further provides "don't deny justice to your poor people in their lawsuits. Have nothing to do with a fatic/charge and don't put an innocent /honest person

[7]Diallo African traditional and humanitarian law Geneva 1978 pg 10
[8]The holy bible, new international version NIV Mathew 3;25-26 ,international bible society, England ,1984 pg 684

to death for I will not acquit the guilty do not accept a bribe, for a bribe blinds who see and twists the words of the righteous.

2.4 Benefits of alternative dispute resolution (ADR)

Alternative dispute resolution (ADR) gives parties in a dispute the opportunity to work through dispute with the help of a neutral third party. It's generally faster and less expensive than going to court. When used appropriately, ADR can:

Save a lot of time by allowing resolution in weeks or months (compared to court, which can take years.

Save a lot of money, including fees for lawyers and experts and work time lost.

Put the parties in control (instead of their lawyers or the court) by giving them an opportunity to tell their side of the story and have a say in the final decision

Focus on the issues that are important to the people in dispute instead of the just their legal rights and obligations.

Help the people involved come up with flexible and creative options by exploring what each of them wants to achieve and why.

Preserve relationship by helping people co-operate instead of creating one winner and one loser.

Alternative dispute resolution offers settlement which is flexible, convenient and fast at any stage of the dispute. There is no strict compliance to court rules. It also offers confidentiality because it's strictly confidential n and user friendly and offers more control to disputants to reach amicable settlement. However to embrace ADR in Uganda, people should see it as an alternative to judicial settlement but not as an alternative to judicial settlement but not as a replacement to it. Basically, benefits can be summarized as follows:

Produce good results, for example settlement rates of up to 85 percent

Reduce stress from court appearances, time and cost.

Keep private disputes –only people who are invited can attend an ADR session unlike court where the proceedings are usually on the public record and others, including the media can attend.

Leads to more flexible remedies than court, for example by making agreements that court could not enforce or order (e.g a change in the policy or practice of a business)be satisfying to the participants ,who often report a high degree of satisfaction with ADR progress.

Give more people access to justice, because people who cannot afford court or legal fees can still access a dispute resolution mechanism.

2.4.1 Benefits of ADR to the judiciary

At a judicial level, incorporating ADR mechanisms will:

Complement existing court procedures

Reduce case backlog

Circumvent ineffective or corrupt courts

Improve access to justice for all sectors

Cut /cost dramatically of achieving settlement

Facilitates settlement of multi - party international dispute

Enhance parties satisfaction and critically

Enhance public perception of judiciary's inefficiency and effectiveness.

2.5 Advantages of ADR

More flexibility : the case of arbitration ,the parties have far more flexibility to settle what procedural and discovery rules will apply to their dispute (they can choose to apply relevant industry standards ,domestic laws, the law of a foreign country etc.

Expenses are reduced

Attorneys and experts witnesses are very expensive ,litigating a case easily run into the tenth of dollars .ADR offers the benefits of getting the issue resolved quicker than occur at trial and that means less fees incurred by all parties .

ADR is generally faster and less expensive; it's based on more direct participation by the disputants rather than being run by lawyers, judges and the state. In most ADR processes the disputants outline the process they will use and define the substance of the agreements. This type of involvement is believed to increase people's satisfaction with the outcomes as well as their compliance with the agreement reached.

A jury is not involved

Juries are unpredictable and often damages awarded are based solely on whether they like the parties or are upset at one party because of some piece of evidence such as a photo that inframes the passion of the jury. Juries have awarded claimants damages that are wall above what they would have received through ADR and they have also done the opposite.

The results are kept confidential

The parties can agree that information disclosed during negotiations can't be used later even if litigation ensures. The final outcome can also be made private if the parties so stipulate and agree. On the other hand most trials and talented proceedings are open to the public and the press.

ADR does have many potential advantages, but there are also some possible drawbacks and criticism of pursuing alternatives to court based adjudication. some critics have concerns about the legitimacy of ADR outcomes, changing that ADR provides "second –class justice" its argued that people who cannot afford do go to court are those most likely to use ADR procedures. As a result,

these people are less likely to truly "win" a case because of the co-operative nature of ADR.

2.6 Disadvantages of ADR

There are a number of disadvantages though Arbitration can in some instances be time consuming and ultimately expensive;

Arbitrators have fewer powers than the courts to obtain evidence from the parties and to expedite the proceedings;

They may also lack necessary legal knowledge, ultimately necessitating an appeal, which will inevitability increase the costs. Commercial arbitration procedures are also not necessarily appropriate unless the contracting parties are in a position of equal bargaining power.

Furthermore, because of the laxity involved in arbitration, the element of mutual respect of the arbitration process can sometimes be lacking as opposed to litigation where the disputing parties are obliged by law to respect court procedure inclusive of attending hearings. It is, for example apparent that ever since the revival of CADER in late 2008, the majority of arbitration matters brought before CADER have been handled ex parte in the absence of the respondent which portrays the respondent's lack of respect for such hearings and failure to co-operate in the institution of the arbitral tribunal.

In practice, Arbitration basically stands out as the preferred choice in International Commercial disputes as opposed to domestic commercial disputes because it is more expensive to resolve International commercial disputes through domestic Courts of law. Furthermore, business entities view the disadvantages in domestic arbitration as outweighing its advantages.

Discovery limitations : some of the procedural safe guard designed to protect parties in court may not be present in ADR ,such as the liberal discovery /ruler used in US –courts which make it relatively easy to obtain evidence from the other party in a lawsuit.

Warning: parties pursuing ADR must be careful not to let a statute of limitation run while a dispute is not initiated through ADR process. Once the case expires, judicial remedies may no longer be available.

Limit on arbitration awards: Arbitration can only resolve disputes that involve money. They can't issue orders compelling one party to do something or refrain from doing something (also known as injunction) for example arbitration generally can't change title to read property ,of course this is subject to the specific language of the arbitration clause

CHAPTER THREE

LEGAL AND CASE LAW PROVISIONS RELATING TO ADR ADMINISTRATION IN UGANDA

3.0 Introduction

This chapter looks at the legal provisions regarding the administration of ADR in Uganda specifically looking at various sections of different Acts and other related legal provisions.

3.1 Legislative provisions on Arbitration:

Arbitration has recently taken centre stage as the preferred mode of resolving disputes, especially those of a commercial nature. This is regardless of the fact that law schools in Uganda still give a major part of the training of the law to adversarial methods that centre on Litigation. Nevertheless, there are a number of legislative provisions on arbitration:

3.2 The Judicature Act, Cap. 13

This Act provides for Alternative Dispute Resolution under Court's direction. Sections 26 to 32 of the Act provide for situations when matters can be referred to a special referee or arbitrator to handle where such official has been granted High Court powers to inquire and report on any cause or matter other than a criminal proceeding. These provisions read together with section 41 of the Act, which stipulates for the functions of the Rules Committee give the origin of the Judicature (Commercial Court Division)(Mediation) Rules, No. 55 of 2007 which are discussed in a later stage of this article. Court-annexed arbitration falls in this regard because it is carried out pursuant to a Court Order as opposed to consensual arbitrations which are pursuant to an existing agreement to that effect. Interestingly, however, the subsequent arbitration is nevertheless referred to as consensual.

3.3The Civil Procedure Act (Cap. 71) and the Civil Procedure Rules S.I71-1

Order XII (12) of the Civil Procedure Rules provides for "Scheduling Conference and Alternative Dispute Resolution". Rule 1 (1) thereof provides –

"The Court shall hold a scheduling Conference to sort out points of agreement and disagreement, the possibility of mediation, arbitration and any form of settlement .. ."

This provision is meant to help the parties consider the option of settling the matter before hearing in Court can commence. It also serves the purpose of expediting hearing of the case where possible contentious issues such as which documents and witnesses are to be relied upon, are agreed at the onset. Order 12 rule 2 further highlights Court's emphasis on Alternative Dispute Resolution. It states –

"(1) Where the parties do not reach an agreement under rule 1, . . . the Court may, if it is of the view that the case has a good potential for settlement, order alternative dispute resolution before a member of the bar or the bench, named by the Court.(2) Alternative dispute resolution shall be completed within twenty one (21) days after the date of the order . ..the time may be extended for a period not exceeding15 days on application to the Court, showing sufficient reasons for the extension.(3) The Chief Justice may issue directions for the better carrying into affect alternative dispute resolution . .."

This provision has thus set the pace for the procedure of having a scheduling Conference before hearing of any suit commences. This is presently strictly adhered to though it is apparent that Litigants follow this procedure with the perspective of looking at it as a mandatory process before hearing of cases in Court, rather than focusing on the use of a scheduling conference as a means of possibly settling the case out of Court. The latter perspective was the main reason for the establishment of this provision within Uganda's Civil Procedural law.

Further on,Order XLVII (47) also provides for Arbitration under Order of Court, also referred to as Court-annexed Arbitration. The beauty of this rule, again as in the spirit of ADR, lies in agreement between the parties. Rule 1 (sub rule 1) of this Order, for instance, provides that – "

Where in any suit all the parties interested who are not under disability

Agree that any matter in difference between them in the suit shall be referred to arbitration, they may, at any time before judgment is pronounced, apply to the court for an order of reference."

Rule 2 of the same Order goes on to provide that the "

Arbitrator shall be appointed in such manner as may be agreed upon between the parties".

The statutory provisions themselves focus on the principal basis of arbitration being the maintenance of mutual respect for each other's interests between the parties or in other words, creating consensus on key matters. Of course, where the parties have opted for arbitration but fail to agree on the arbitrator, the Court shall appoint one as is provided for in rule 5 thereto.

3.4 The Arbitration and Conciliation Act (Cap. 4)

This regulates the operation of arbitration and conciliation procedures, as well as the behavior of the arbitrator or conciliator in the conduct of such procedure. This Act is of significance because it incorporates the provisions in the 1985 United Nations Commission on International Trade (UNCITRAL) Model Law on International Commercial Arbitration as well as the UNICITRAL Arbitration Rules1976 and the UNCITRAL Conciliation Rules 1976. However, it should be noted that the Act does not provide for the immunity of an arbitrator which is covered under the UNCITRAL Model law. The stated purpose of the Act is to empower the parties and to increase their autonomy. It has always been the case that if an arbitration agreement existed, the courts would not hear the case until the arbitration procedure had taken place.[9]

Disputing parties are thus obliged to submit to the provisions under the Act on the basis of an existence of an agreement to arbitrate in the event that a dispute arises. Section 2(1)(c) provides for the meaning of "Arbitration Agreement". It states – "an agreement by the parties to submit to arbitration all

[9] Sec. 5

or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not"

The Act also provides for the Centre for Arbitration and Dispute Resolution (CADER) as a Statutory Institutional alternative dispute resolution provider.[10] Until the coming into place of the Arbitration and Conciliation Act, The use of arbitration, which has been in place since the 1930s, was rather limited with an absence of an appropriate control system as well as a general oversight over arbitrators especially with respect to the fees charged.[11]

The Arbitration and Conciliation Act is thus instrumental in three major objectives:

5(1) Ensuring realization of the goal of increased party autonomy and provision of appropriate and user-friendly rules of procedure to guide parties.

(2) Creation of an adaptable framework for arbitration tribunals to operate under as well as other default methods in the absence of the parties' own agreements, and

(3) The advancement of equality and fairness in the whole process. It is on these three core objectives that CADER was established[12].

CADER has made significant contributions to the development of the arbitration mechanism in ADR[13]. The institution makes available to individuals and their legal counsel, at no charge, pre-drafted model arbitration and mediation clauses for inclusion in their contracts. It also has a detailed fee structure that can be relied upon when charging for various services including fees that are charged by the individual CADER registered mediators or arbitrators. These registered members are also required to subscribe to CADER's Code of Conduct and are subject in their conduct of arbitration and

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[10] Sec. 6

[11] S. Sempasa: Centre for Arbitration and Dispute Resolution & the new legislative formulation on A.D.R; Uganda Living Law Journal, Vol. 1, No. 1, June 2003 p. 81 at p. 86

[12] See Part VI of the Act.

[13] Ibid

mediation proceedings to the Ethics Committee established within CADER's governing body referred to as "The Governing Council". Unfortunately, in the past, CADER was not able to effectively perform its services due to inadequate funding. From the time of inception, CADER was funded by USAID (United States Aid for International Development) which funding was terminated in 2003 on the understanding that government would take over.

In June of 2008, the Arbitration and Conciliation (Amendment) Act[14]was enacted with the purpose of providing for funding of the Centre for Arbitration and Dispute Resolution by government. Refocusing the sourcing of funds for the Centre has enabled the revival of its operations in the settlement of disputes in Uganda. The Arbitration and Conciliation Act (as amended) further goes out to create equilibrium between legal practitioners and fosters a positive judicial attitude towards arbitration. Increased powers are granted to the arbitral tribunal and there is an open window within which the jurisdiction of courts can be exercised as an intervention in assisting and supporting the arbitral process with the aim of enhancing the development of ADR generally.[15]

Interestingly, in the pursuit of justice through arbitration, the Act provides that the arbitration tribunal may opt to follow considerations of justice and fairness where it is not bound by rules of law. Section 28(4) states that: "

If there is no choice of the law . . . by the parties, the arbitral tribunal shall apply the rules of law it considers to be appropriate given all the circumstances of the dispute."

Since the revival of the operations of CADER, between August 2008 and November 2009, the majority of cases that have been handled have been addressing applications for the compulsory appointment of a single arbitrator.

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[14]Act No. 3 of 2008

[15]See e.g sections 5, 6, 9, 16(6), 17(3), 27, 34, 35, 36, 37, 38, 39, 40, 41, 43, 46, 47, 59 and

The basis of such applications before CADER is the existence of an arbitration clause in contractual agreement binding the parties, the request to submit any dispute to arbitration and the Respondent's refusal to cooperate in the appointment of an arbitrator.

What is most prevalent in such matters is that the arbitrator is always advised or reminded to sign the Declaration of Impartiality, Party Undertaking Agreement and file the same with CADER upon assuming jurisdiction over the matter in dispute as well as returning the file to CADER for archiving purposes upon completion of the case.2.3 Case law provisions Where a case has commenced in Court and it is established that the matter was meant for arbitration, the Court respects the mandatory provision of the Act to this effect and will always order that the matter be referred to arbitration as provided for in section 5 therein. This was also held in the case of **East African Development Bank vs Ziwa Horticultural Exporters Ltd**[16]to the effect that: "Sec. 6 (present sec. 5) of the Arbitration and Conciliation Act, provides for mandatory reference to arbitration of matters before court which are subject to an arbitration agreement; where court is satisfied that the arbitration agreement is valid, operative and capable of being performed, it may exercise its discretion and refer the matter to arbitration."

The most important thing to note is that Courts follow the intention of the parties. In **Farmland Industries Ltd v. Global Exports Ltd**[17] it was held that "it was the duty of Courts in arbitration proceedings to carry out the intention of the parties . . . the intention of the parties was that before going for expensive and long procedures of arbitration, the parties had to first negotiate a settlement failing which they could resort to arbitration."However, in order to satisfy court that the case before it should be referred to arbitration, certain

[16] High Court Misc. Appln. No. 1048 of 2000 arising from Companies Cause No. 11 of 2000.

[17][1991] H.C.B 72

conditions must be present as was spelt out by Tsekooko S.C.Jin **Shell (U) Ltd vs Agip (U) Ltd**[18]

These are:

1. There is a valid agreement to have the dispute concerned settled by arbitration.
2. Proceedings in Court have been commenced.
3. The proceedings have been commenced by a party to the agreement against another party to the agreement.
4. The proceedings are in respect of a dispute so agreed to be referred.
5. The application to stay is made by a party to the proceedings
6. The application is made after appearance by that party, and before he has delivered any pleadings or taken any other step in the proceedings.
7. The party applying for stay was and is ready and willing to do all the things necessary for the proper conduct of the arbitration. Thus, where the case is for arbitration pursuant to an agreement to that effect, appointment of an arbitrator under section 11 of the Act follows as a mutual consideration and not for one party only to decide. As was stated by CADER Executive Director in **Uganda Posts Ltd v. R.4 International Ltd**[19] ,. . The appointment of an arbitrator is a mutual obligation which is imposed on all parties. A party unwittingly forfeits its statutory right, when it fails to participate in the appointment of the arbitrator. The duty would then fall upon the advocate to advice the client that the appointment of an arbitrator is a task, which ought to be performed by a party, since that is the essence of the undertaking, upon signing the arbitration clause. Assuming the party is not well versed with arbitration, then the advocate would be best placed person to advice the client on the unpropitious task to be performed."

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[18] Supreme Court Civil Appeal No. 49 of 1995(Unreported)

[19] CAD/ARB/NO. 11 of 2009

3.5 Jurisdiction of Court in arbitration matters.

The issue of Court jurisdiction or relevance in arbitration matters has been addressed through various concerns, one of them being the principle of Res Judicata[20]

The existence of an ongoing Court case where a similar matter is brought before an arbitrator, does not render such matter as res judicata. In the arbitration case of **Bayeti Farm Enterprises Ltd & Anor v. Transition Grant Services**[21]. This was an application for the compulsory appointment of a single arbitrator. In opposition to the application, the respondent argued that the matter was creating a multiplicity of suits basing on an existing suit before Court and relied upon sec. 6 of the Civil Procedure Act, Cap. 71 which provides for the stay of suits on the basis of res judicata. This argument was rejected by CADER on the basis that the Civil Procedure Act (C.P.A) has no application to section 11 of the Arbitration and Conciliation Act (A.C.A)(which provides for appointment of Arbitrators) because the C.P.A applies, as per its section 1, to proceedings in the High Court and Magistrates Court.

In the same vein, however, a very sound criticism of the Act is given by Okumu Wengi, J. in **East African Development Bank v Ziwa Horticultural Exporters Limited (supra)** in which he states that in the first instance under section 5, the Act seems to have firstly removed a perceived bar to Court proceedings where an arbitration was agreed on. Under section 5(1), the Court exercises its discretion to satisfy itself that the arbitration agreement is valid, operative and capable of being performed. In other words, the Honorable Judge opines, the mandatory reference to arbitration is subject to the Court's decision under section 5 (1) of the Act. However, section 5 (2) leaves the option open to

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[20]This principle is well laid out in section 7 of the Civil Procedure Act, Cap. 71 (Laws of Uganda, 2000Ed.) which provides that: No Court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try the subsequent suit or the suit in which the issue has been subsequently raised, and has been heard and finally decided by that court.

[21] CAD/ARB/No. 4 of 2009

both parties to proceed with arbitration in spite of the existence of an application for stay of such proceedings pending in Court. He goes further to note that section 9 provides a bar to court intervention where it states that: " Except as provided in this Act, no Court shall intervene in matters governed by this Act."

He asserts that this section seems to amount to an ouster of the inherent jurisdiction of the Court. He states:"

Firstly, it appears to make arbitration and conciliation procedures mutually exclusive from Court proceedings as for instance to make Court based or initiated mediation or arbitration untenable. Secondly, it seems to divorce or restrict alternative dispute resolution mechanisms from Court proceedings. Thirdly, it tends to greatly curtail the courts inherent power which is fundamental in judicature. By so doing the judiciary is easily emasculated in its regulation of arbitration and conciliation as adjudication processes; its remedial power in granting and issuing prerogative orders of mandamus and certiorari is not addressed if not sidelined. Clearly, empowering people to adjudicate their own disputes need not oust the core mandate and function of courts in the context of governance." With this criticism in mind, it is paramount to note that the A.C.A actually gives cognizance of the High Court's overall unlimited jurisdiction but nevertheless orchestrates the methodology of such jurisdiction. The provision in section 9 is similar to Article 5 of the (UNCITRAL) Model Law. However, with due respect, this does not necessarily mean that the Court's jurisdiction is out-rightly ousted as stated by the learned judge (supra). It simply allows for certain boundaries within which court intervention can be allowed to exist. This position has been well portrayed through case law[22] In the case of **Oil Seeds (Uganda) Limited vs Uganda Development Bank[23] ,**

Karokora JSC., stated that, "

[22] Also see the cases of Kayondo vs. Co-operative Bank (U) Ltd, Civil Appeal No. 10 of 1991

[23]Supreme Court Civil Appeal No. 203 of 1995

... The Court has jurisdiction to interfere with the arbitrator's award if it is found to be necessary in the interest of Justice." He further relied on the persuasive authority of **Rashid Moledina & Co. (Mombasa) Ltd & Others v Hoima Ginneries Ltd**[24] in which a question arose as to whether or not, having regard to the arbitration award, the High Court had any jurisdiction to set-aside or remit the award to the appeal committee. The Court of Appeal for East Africa held that although in the case before it, there were sufficient facts to support the award, nevertheless the Court went ahead to say:

"Courts will be slow to interfere with the award in the Arbitration, but will do so whenever this becomes necessary in the interest of justice and will act if it is shown that the Arbitrators in arriving at their decision have done so on a wrong understanding or Interpretation of the law".

The Arbitration and Conciliation Act therefore, with precision, provides for the particular instances and limitations under which Court intervention and assistance is necessary. This is through: staying of legal proceedings (sec. 5); effecting interim measures (sec. 6); taking evidence (sec. 27); setting aside the arbitration award (sec. 34) and enforcement of an arbitral award (sec. 36).Significantly, the Court does not come in to impose its authority upon the parties but continues to give due respect to the autonomy of the parties and assists in the successful attainment of their interests. On another note, the East African Court of Justice[25] also has jurisdiction to handle disputes arising from an arbitration clause contained in a commercial contract or agreement in which the parties have conferred jurisdiction on the Court[26]

.Another significant provision in the Act is the empowerment of the Arbitral tribunal to rule on its jurisdiction[27] it stipulates that the arbitral tribunal may

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[24](1967) E.A 645

[25] This is a regional judicial body that serves to ensure adherence to law in the interpretation and application of and compliance with the treaty establishing the East African Community.

[26] Article 32

[27]Sec. 16

rule on its own jurisdiction as well as ruling on any objections with respect to the existence or validity of the arbitration agreement. It further stipulates that

a) An arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract[28], and

b) A decision by the arbitral tribunal that the contract is null and void shall not itself invalidate the arbitration clause[29]. The Act therefore empowers the arbitral tribunal to not only examine issues facing illegality in the performance of the contract, with authority to rule on objections to its jurisdiction[30], but also issues facing illegality in the existence of the contract[31]

.Interestingly, the arbitral panel may also proceed to hear and resolve a case notwithstanding that a question regarding the jurisdiction of the panel is pending before Court, as provided under sec. 16 (8) of the Act. This provision on the powers of the Arbitral tribunal further emphasizes the autonomous authority yielded by an arbitration agreement. In the case of

Shell (U) Limited vs. Agip (U) Limited[32] Tsekooko JSC., stated to the effect that: "It is now trite law that where parties have voluntarily chosen by agreement, the forums for resolution of their disputes, one party can only resale for a good reason." In coming to this decision, Tsekooko JSC relied on the case of

Home Insurance v Mentor Insurance (1989)3 All E.R 74 at page 78,

In which Parker, L.J., had this to say in respect of commercial disputes arising from agreements containing arbitration clauses – "

In cases where there is an arbitration clause, it is my judgment the more necessary that full scale argument should not be permitted. The parties have agreed on their chosen tribunal and defendant is entitled, prima facie, to have

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[28] Sec. 16 (1)(a)

[29] Sec. 16 (1)(b)

[30] Otherwise known as the principle of "Kompetenz – Kompetenz

[31] Ibid, See supra note 5

[32] Supra note 12

the dispute decidedly the tribunal in the first instance, to be free from intervention of the Courts until it has been so decided."

The Arbitration and Conciliation Act Further serves to ensure respect and adherence towards arbitration awards. There are rather limited grounds upon which a person can challenge such an award.[33]

Undoubtedly, the true essence of arbitration would entirely lose meaning if it were easy to set aside arbitration awards. Similarly, a party to an agreement containing an arbitration clause cannot turn round and deny its existence. For instance, in the case of

Fulgensius Mungereza vs Pricewatercoopers Africa Central[34] in which the appellant was appealing, inter alia, against the lower court's decision to stay proceedings on the basis of an existing Mediation and Arbitration Clause in a framework agreement between the parties. G.M. Okello, JA, in his judgment, stated that:" The arbitration agreement was freely and voluntarily entered into by the appellant and the respondent. To depart from it, the appellant had to show good reason. Unfortunately, none had been shown. As such the trial judge was therefore justified to order stay of proceedings."2.4 Basic steps in Arbitration the Act provides guiding steps to be followed in arbitration proceedings.

a) A statement of Claim is filed at CADER by the Party initiating the arbitration proceedings detailing the brief facts pertaining to the dispute and the issues to be resolved, as well as the relief or remedy sought[35]

It should also include a nomination of an arbitrator)

b) A copy of the filed Statement of Claim is then served upon the Respondent who then responds with a statement of Defense within ample or reasonable time. Such time may be proposed by the Claimant, unless agreed otherwise[36]

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[33] Sec. 34

[34] Court of Appeal Civil Appeal No. 34 of 2001

[35] Sec. 23

[36] Sec. 21

.c) The Parties involved in the dispute appoint one or more arbitrators as maybe agreed upon.[37]

If they fail to agree on an arbitrator, the Centre for Arbitration and Dispute Resolution (CADER) provides one.[38]

The procedure for appointment of an Arbitrator is informal and agreed upon by the Parties[39]

D) Each party is treated equally during arbitration proceedings with reasonable opportunity to present their case[40]

.e)If there is a default by any of the parties in fulfilling his obligation in the course of or prior to the start of the proceedings, the arbitral tribunal shall act accordingly in either terminating the proceedings or making an award with the evidence before it[41]

f) The Arbitral tribunal decides the dispute according to rules of law chosen by the parties[42]

g) Proceedings during arbitration may either involve hearing oral arguments or filing of written submissions[43]

h)The tribunal is mandated to make its award in writing within two months after having been called on to act after which, the proceedings are terminated[44].

i) The award is recognized as binding under the Act[45]and can be enforced as if it were a decree[46] of Court

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[37]Sec. 10

[38] Sec. 11 and 68

[39] Sec. 11(2)

[40] Sec. 18

[41]Sec. 25

[42]Sec. 28

[43]Sec. 24(1)

[44] Sec. 31 and 32

Expertise-The use of a specialist arbitrator ensures that the person deciding the case has expert knowledge of the actual practice within the area under consideration and can form their conclusions in line with accepted practice, e.g. Accountants in disputes in debts; Engineers for construction disputes, etc. Furthermore, the person arbitrating over the matter has his full focus on this particular dispute as opposed to litigation where a judge has a number of matters to focus upon in one day) Enforcement -Considering that an arbitral award is enforced as a decree of Court[47], the party aggrieved by it can exercise the option of appealing as one would appeal against a Court Decree. However, an arbitration award is taken to be a more binding and enforceable decision than other forms of ADR.) International applicability of arbitration awards. The Arbitration and Conciliation Act gives effect to the New York Convention on the Recognition and Enforcement of Arbitral Awards (referred to as the[48]New York Convention Award)[49]

. In effect therefore, the Arbitral Awards granted in Uganda can be enforced in any Country which is a party to the Convention adopted by the United Nations Conference on International Commercial Arbitration on the 10th of June, 1958. On the other hand, Court judgments can only be enforced outside of Uganda with Countries that have a standing reciprocal arrangement in enforcement of Judgments. There are a number of disadvantages though: Arbitration can, in some instances be time consuming and ultimately expensive; Arbitrators have fewer powers than the courts to obtain evidence from the parties and to expedite the proceedings; they may also lack necessary legal knowledge,

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[45] Sec. 35

[46] Sec. 36. The First Schedule to the Act also provides for procedure on enforcement of an arbitration award

[47] Section 36

[48] Section 36

[49] Part III of the Act.

ultimately necessitating an appeal, which will inevitability increase the costs. Commercial arbitration procedures are also not necessarily appropriate unless the contracting parties are in a position of equal bargaining power. Furthermore, because of the laxity involved in arbitration, the element of mutual respect of the arbitration process can sometimes be lacking as opposed to litigation where the disputing parties are obliged by law to respect court procedure inclusive of attending hearings. It is, for example apparent that ever since the revival of CADER in late 2008, the majority of arbitration matters brought before CADER have been handled ex parte in the absence of the respondent which portrays the respondent's lack of respect for such hearings and failure to co-operate in the institution of the arbitral tribunal. In practice, Arbitration basically stands out as the preferred choice in International Commercial disputes as opposed to domestic commercial disputes because it is more expensive to resolve International commercial disputes through domestic Courts of law. Furthermore, business entities view the disadvantages in domestic arbitration as outweighing its advantages.

Conciliation is another form of Alternative Dispute Resolution provided for under the Arbitration and Conciliation Act. A Conciliator aims to assist the parties to a dispute to find a solution, but has no power to enforce it. There is inadequate documentation and study in the practice of Conciliation as an ADR tool, which is most likely because of the private nature in which it is conducted. The parties to the dispute arrive at their solution independently and impartially as stipulated by Section 53 of the Act. The Act provides the basis for which the Conciliator plays his role. It states that:

"The Conciliator shall be guided by principles of objectivity, fairness and justice, giving consideration to, among other things, the rights and obligations of the parties, the usages of the trade parties, carries the same status and effect as an arbitral award under the Act[50]

[50] Sec. 59

.Furthermore, the autonomous power exhibited in arbitral processes is reflected in Conciliation proceedings. Section 62 of the Act is to the effect that during the course of conciliation proceedings, no arbitral or judicial proceedings can be initiated by the same parties. This helps to create an organized and effective means of smoothly coming to a solution on one front. It is also evident that the outcome of Conciliation proceedings is not to be abused or disrespected in any way. The parties to a conciliation proceeding can not rely on its outcome or any information obtained from such proceedings to be used as evidence in an arbitral or judicial proceeding. This is regardless of whether or not it is the same dispute to be dissolved in the arbitral or judicial proceeding[51]

. The limitations imposed on conciliation proceedings therefore also serve to prevent protracted handling of disputes under ADR.3.2 Weaknesses and Strength in Conciliation proceedings. The essential weakness in the Conciliation strategy procedure of ADR lies in the fact that, although it may lead to the resolution of the dispute, it does not necessarily achieve that end. Where it operates successfully, it is an excellent method of dealing with problems as, essentially, the parties to the dispute determine their own solutions and, therefore, feel committed to the outcome. The problem is that Conciliation, like mediation, has no binding power on the parties and does not always lead to an outcome.

Mediation is quite similar to Conciliation. It has been termed as "

The interaction between two or more parties who may be disputants, negotiators, or interacting parties whose relationship could be improved by the mediator's intervention. Under various circumstances (determinants of mediation), the parties/disputants decide to seek the assistance of a third party, and this party decides whether to mediate. As the mediation gets underway, the third party selects from a number of available approaches and is

[51] Sec.66

influenced by various factors, such as environment, mediator's training, disputant's characteristics, and nature of their conflict. Once applied, these approaches yield outcomes for the disputants, the mediator, and third parties (other than the mediator)[52]

In some respects, Mediation is referred to as Negotiation in Alternative Dispute Resolution categories. As such, mediation aims to assist the disputing parties in reaching an agreement. Whether an agreement results or not, and whatever the content of that agreement, if any, the parties themselves determine the results as opposed to something imposed by a third party[53]

The Arbitration and Conciliation Act (as amended) does not make any specific reference to Mediation. However, the prevalent Uganda Commercial Court-assisted ADR today particularly focuses on Mediation as the most appropriate ADR tool and has made significant breakthrough in this regard.

3.6 Legislative provisions on Mediation:
The Land Act, Cap. 227

The origins of mediation as a mechanism in dispute resolution and administration of Justice can be better appreciated through the practice of land law in Uganda. Traditionally, elders have always played the key role of mediators over land disputes as opposed to such matters being handled by western-style Tribunals that, in most respects are regarded as not being appreciative of the traditional modes of handling such disputes, as well as the fact that they may lead to permanent enmity between the warring parties instead of reconciling their differences. This is the basis for the recognition of traditional mediators under the Land Act. Sections 88 and 89 of the Act provide for Customary Dispute Settlement and mediation as well as the functions of the mediator. Approximately 75% of land in Uganda is categorized

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[52] Wall, et al., 2001:370 in R. Ramirez:
A conceptual map of land conflict management: Organizing the parts of two puzzles
(March 2002) inhttp://www.fao.org/sd/2002/IN0301a3_en.htm, visited February 26,2007.

[53] Seehttp://www.hg.org/mediation-definition.html, visited 20th November, 2009

under the customary tenure system, thus it is only appropriate that the statutory law provisions should stipulate for a combination of customary systems of settling disputes together with the modern mediation strategies[54]
. Indeed, Section 88 (1) provides:

Nothing in this part shall be taken to prevent or hinder or limit the exercise by traditional authorities of the functions of determining disputes over customary tenure or acting as a mediator between persons who are in dispute over any matters arising out of customary tenure.

Justice Geoffrey Kiryabwire of the Uganda Commercial Court adds credence to this position as well. In his article:

Mediation of Corporate Governance

Disputes through Court annexed mediation – A case study from Uganda[55]

states that:

. . . Mediation as a dispute resolution mechanism is not all together new in traditional Ugandan and African society. There has for centuries been a customary mediation mechanism, using elders as conciliators/mediators in disputes using procedures acceptable to the local community but which were not as formal as those found in the courts."

Significantly, where a Land tribunal adjudicating over a land dispute in Uganda has reason to believe, on the basis of the nature of the case, that it would be more appropriate for the matter to be handled through a mediator, whether traditional authorities or not, may advice the disputant parties as such and adjourn the case accordingly[56]

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[54]See A.C.K. Kakooza: Land dispute settlement in Uganda:
Exploring the efficacy of the mediation option;
Uganda Living Law Journal, Vol. 5, June 2007; Uganda Law Reform Commission

[55]A paper given to The Global Corporate Governance Forum on Mediating Corporate governance disputes, World Bank office, Paris – February 12, 2007

[56].Section 89 of the Land Act provides guidance on the basis of which the selection and functions of a mediator follow. It provides that the mediator should be acceptable by all the parties; should be a person of high moral character and proven integrity; not subject to the control of any of the parties; involve both parties in the mediation process, and; should be

The Judicature Act, Cap. 13: The Judicature (Commercial Court Division) (Mediation) Rules, No. 55/2007

In some instances, the intensity of a dispute may mean that the parties are not even in a position to hear each other out amicably. This inevitably leads to seeking redress from Court with varying objectives, the most common of which are: (1) For Court to assist the parties in determining the outcome of the case, (2) For the losing party to be punished through damages and costs to the winning party. Sometimes the issues to be resolved are too complex to be resolved through mediation. However, in spite of the aforementioned scenarios, the Judicature (Commercial Court Division)(Mediation) Rules, 2007[57] were recently made operational by the Commercial Court with effect from 1st November 2009, making mediation mandatory procedure for all litigants[58]

These Rules are an after math to the Commercial Court's Mediation Pilot Project conducted between 2003 and (2002)[59]

– that parties which turn down a suggestion of ADR by the Court" may face uncomfortable consequences". Jon Lang, a practicing mediator, argues that it is human nature to reject any form of compulsion. He adds that: "

If it becomes regular practice to force reluctant parties to mediate, we may well end up with a process characterized by stage – managed and doomed mediations, rather than the high success rates we have seen over the last 10 years."[60]

The Commercial Court Mediation Rules provide a softer landing, however, through rule 10 which gives an exemption from mediation. It is to the effect that where sufficient cause is shown to exempt a matter from mediation, Court

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guided by the principles of natural justice, general principles of mediation and the desirability of assisting the parties to reconcile their differences

[57] S.I No. 55 of 2007

[58] With certain exceptions under rules 9 and 10

[59] Cited by Jon Lang:
Should warring Parties be forced to mediate?-
The Lawyer, 23 February 2004 – seehttp.//www.jonlang.com/pdf/sweet-talk.pdf accessed 20th November 2009

[60] ibid

shall allow such exemption. One may thus argue that there is no coercion as such by Court pushing parties into mediation. The Rule clearly implies that where the parties do not envisage a way out in resolving their case through mediation, then once they have convinced Court of this situation, then they would be exempted from proceeding through the Mediation Rules.

Collaborative legal practice: Avoiding protracted litigation through Peacemaking.

Collaborative legal practice is a new concept that is yet to receive appreciation in Ugandan judicial practice. Mr. Arinaitwe Patson, a Ugandan lawyer trained in Collaborative practice and a member of the International Academy of Collaborative Professionals (IACP) Texas, USA, describes the practice as " . . .about cooperation, not confrontation."[61]

He further states that " It is a way of solving problems with lawyers assisting the parties to understand each other's perspective."[62]

Basically, Collaborative legal practice can be understood as a tool in dispute resolution that is similar to negotiation or mediation only that the lawyers involved play a key role in advising the parties as to the positive benefits that may arise from any course of action taken. In this way, they are guiding the parties to determine the best course of action to take, while in the same vein ensuring that there is no ultimate loser .Arinaitwe states that the procedure involved relies on an atmosphere of mutual respect, honesty, cooperation, and a commitment to maintaining a safe environment, with the objective of ensuring the continued good business relationship for commercial entities and future well-being of the parties and their children in the case of family disputes. Characteristics of Collaborative legal practice: This dispute resolution mechanism is purely voluntary and not orchestrated by Court. This is the basis of it being a peace making mechanism. The parties agree at the onset that the

[61] Arinaitwe P.W; Collaborative Law and Lawyers in Peace Making: A paradigm Shift in DisputeSettlement; The Uganda Christian University Law Review, Vol. 01, No. 2 August 2009, Faculty of Law,U.C.U at pp. 87-116

[62] Ibid, at p. 93

matter in dispute will never end up in Court. Secondly, the lawyers involved do not derive benefit from the weaknesses of the opposite party's case, but in the alternative, help each other out in the progress of resolving the dispute. It is thus a process of interest-based negotiation with the ultimate objective resting on drawing up an agreement that is equitable to all involved. Adversarial litigation, on the other hand, derives its benefits it riding on the weaknesses of the opposite party and even going further by not pointing out these weaknesses to the other party, the plan being that an ambush of legalese will be 'unleashed' in Court. After all, the common belief is that it is the crafty and heartlessly shrewd lawyer that attracts the most clients. This philosophy does not auger well with the belief in Collaborative legal practice which is all about selflessness during the negotiation. Ultimately the effectiveness of Collaborative law would be most felt in the area of resolving family disputes like divorce or custodial undertakings. The fact that it hinges on the "commitment of maintaining a safe environment" shows that it is easier to implement this under family disputes as opposed to commercial disputes where the warring parties are probably haggling over huge losses arising from contractual breaches. To explain this point further, a number of Common law Countries rely on the irrevocable breakdown of marriage principle in the dissolution of marriage. This is a no-fault principle where the parties agree that the marriage has broken down and the only way-out is divorce. It is in such a setting that Collaborative law would thrive. However, where the dispute is initiated through fault or the pointing of figures, it would be difficult to resolve such through Collaborative legal practice. Such a dispute resolution mechanism cannot be effective where the dispute is weighed down by issues of blame. One would only have the option of trying out the other dispute resolution mechanisms instead.

CHAPTER FOUR

FINDINGS AND THE EXTENT OF ADMINISTRATION OF ADR IN UGANDA

4.0 Introduction

This chapter explores the findings and its recordings as obtained from the primary and secondary sources and their presentation, judgments made in relation to the findings and all the possible discussions made there under. The chapter looks into the practical application and administration of ADR as well as the co-relation with the secondary data.

The researcher among others specifically put emphasis on the following two divisions while carrying out research:

The Constitutional Commercial Division (Mediation Pilot Project, Practice Direction, 2003 (Legal notice 7 of 2003) and

The Commercial Court Division (Mediation Pilot Project) Rules, 2003.

Formally for the first time created court annexed mediation in Uganda to be applied for a pilot period of 2 years at the Commercial Court. The Pilot Project was funded by International donors through the Commercial Justice Reform Programme (CJRP) and run from September 2003 to September 2005. The main characteristics were;

1. It made an attempt at mediation compulsory in most cases filed in the court and if the attempted mediation failed then the case could be fixed before a Judge for litigation.

2. All such cases filed in court would be referred to institutional mediation under the Centre for Arbitration and Dispute

Resolution CADER (which is attached to the court and established under the Arbitration and Conciliation Act 2000 Chapter 4 Laws of Uganda Revised Edition 2000). The mediation was carried out under the strict Code of Conduct of CADER.

3. The reference to CADER for the mediation was free to the parties as the costs were covered by CJRP

4. If the mediation was successful then it would be registered as a consent judgment of the court for purposes of enforcement.

4.1 Performance of the Mediation Pilot Project

At the time of this research the period of the Pilot Project had expired and new rules now making mediation permanent features of the court have been drafted. As such this service is now available at the court and the court continues to hold mediations though other means as shall be discussed later are also applied.

The new draft rules are a result of the evaluation of the Pilot Project done by a pre-working group and working group of its stakeholders. During the two years of the Pilot the following were the results of the mediation.

Cases referred to mediation	Mediation cases settled	Mediation cases completed but unsuccessful	Cases discontinued
778	172	251	278

Period 03rd October 2010 t05thAugust2013 source CADER

1	Total mediations held from start to finish (successful and unsuccessful)	**54.3%**
2	Mediations that failed at reference for various reasons	**35.7%**
3	Mediations that settled and disposed of the dispute	**22.1%**

Research showed that just over fifty percent (50%) of all disputants agreed to submit their disputes to mediation even though they had originally filed a case for litigation in the court. According to the mediation pilot project, of these cases twenty two percent (22%) had their disputes disposed of through the mediation without recourse to litigation

Clearly the Mediation Pilot Project reduced the court's work by over twenty percent (20%) allowing the court to concentrate on only cases for which mediation had failed or was not an option. Secondly mediation allowed for settlement within a far shorter time than litigation. This evidently was a good start to the court annexed mediation. It is not possible to establish how many of these settled mediations involved Corporate Governance disputes as the contents of these settlements are not reportable cases and so are not reflected in our law reports. But since such cases come to the courts it is perceivable that Corporate Governance disputes are handled.

Research showed that just over one third (1/3) of the cases referred to mediation failed at reference for various reasons. These reasons were evaluated at the post Pilot Project stage.

One of the reasons for failure was the lack of awareness and general training in the area of mediation.

In one case **SS Enterprises Ltd & Anor V Uganda Revenue Authority** H.C.C.S Commercial Court Division) No. 708 of 2003 (un reported) the parties refused to go to mediation because the in house counsel for the defendant (Uganda Revenue Authority) argued that mediation required the settlement of a

dispute and only the Board of Directors of the Revenue Authority had the power to agree to a settle of a tax dispute. In that case the judge ruled that under rule 8(1) of the mediation rules a party opposed to a mandatory mediation reference had to provide reasons to the courts Registrar in order to be exempted under rule 9 thereof.

He further ruled that internal institutional processes (for settlement approval) were not a proper cause to avoid mediation. He referred the dispute for mediation to be attempted under the rules before litigation[63].

According to research, there are still strong perceptions that litigation is better than ADR/Mediation. But this is not always true in commercial or corporate matters. Here I refer to wise observation of Lord Justice Lindley in the English case of **Verner V General and Investment Trust** (1894) 2 CH 239 at 264 where he said:

"A proceeding may be perfectly legal yet opposed to sound commercial principles..."

Research also showed that, there is a criticism that mediation could turn in to a time wasting fishing expedition. The Mediation Pilot Project rules provided for a fine on the party who caused delays at mediation[64]. This fine was rarely applied during the pilot period.

The other issue is that of sustainable financing of this court annexed service as the Pilot was donor funded. This was to encourage parties to use the service. It is proposed that when this service resumes each party will bear its own costs for the mediation.

4.2 The creation of a multi door court house

According to research findings, Mediation at the Commercial Court has now become wider than the Pilot Project.

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[63]The mediation in this dispute was attempted and failed it was referred to court for trial however during mediation the parties were able to do executive discovery of the documents and agree matters for trial.

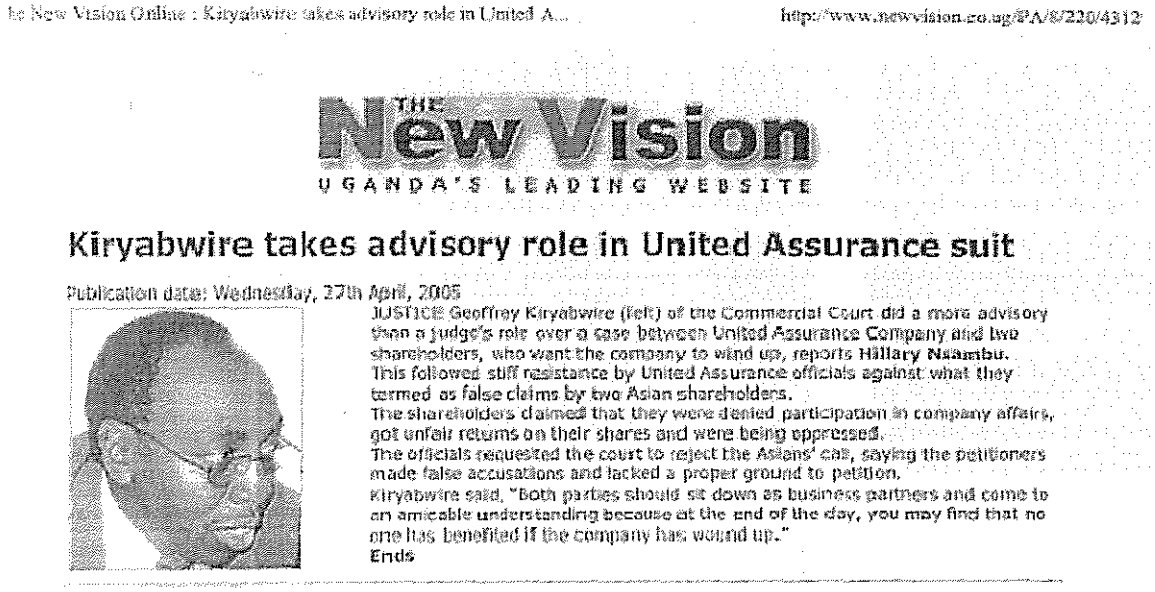
[64]Rule 19 provides a fine of Uganda Shillings 50,000/= (about US$25). In the English case of **Susan Dunnet V Railtrack PLC** [2002] 2 All E.R. 850. It was held that a court should deny a successful party at litigation costs if it can be shown that the mediation would have worked.

Even where mediation had failed during the court annexed process parties were still free to suggest mediation and or settlement before a Judge. Indeed eighty percent (80%) of all cases which come to a Judge eventually settle through mediation or some other ADR process.[65]

One such other case handled involved a Corporate Governance dispute as:

K.M. Patel and another V United Assurance Company Ltd Company Cause No. 5 of 2005. In that case two Asian brothers both by the names of Patel who as shareholders filed a minorities petition to wind-up one of Uganda's largest private insurance companies on the grounds that their 40% shares in the company had been wrongfully and illegally diluted during a restructuring and sale of the company without notice to them. In that case it was decided to have mediation before the a Judge with the consent of the parties.

To show how unique this decision to mediate was, a journalist in a leading newspaper wrote "Justice Geoffrey Kiryabwire of the Commercial Court did more advisory than a Judges role over a case between United Assurance Company and two shareholders..." this is illustrated here under;



he New Vision Online : Kiryabwire takes advisory role in United A... http://www.newvision.co.ug/PA/8/220/4312

THE New Vision
UGANDA'S LEADING WEBSITE

Kiryabwire takes advisory role in United Assurance suit

Publication date: Wednesday, 27th April, 2005

JUSTICE Geoffrey Kiryabwire (left) of the Commercial Court did a more advisory than a judge's role over a case between United Assurance Company and two shareholders, who want the company to wind up, reports **Hillary Nsambu.**

This followed stiff resistance by United Assurance officials against what they termed as false claims by two Asian shareholders.

The shareholders claimed that they were denied participation in company affairs, got unfair returns on their shares and were being oppressed.

The officials requested the court to reject the Asians' call, saying the petitioners made false accusations and lacked a proper ground to petition.

Kiryabwire said, "Both parties should sit down as business partners and come to an amicable understanding because at the end of the day, you may find that no one has benefited if the company has wound up."

Ends

[65]OP Cit 2004, Commercial Justice Reform Programme P. 21

Clearly the journalist did not see mediation as a role of a Judge. However, the mediation was successful leading to a consent Judgment where the insurance company bought out the two shareholders and thus settling the dispute. The same journalist then carried another report in the newspaper highlighting the

Settlement and quoting the Chief Executive Officer of the insurance company saying

> "...we are happy this has been amicably concluded. I believe the Patels as the founders will leave us with their blessings..."

The New Vision, Wednesday, June 29, 2005 BUSINESS 39

United Assurance Co. buys out petitioning Asian shareholders

By Stephen Ilungole and Hillary Nsambu

UNITED Assurance Company and two Asian shareholders who earlier sought Court orders to wind up one of the regional giant insurance companies have reached an amicable settlement.

The 40,000 contested shares will be sold to other existing shareholders of United Assurance Company at "a substantial premium".

This follows a consent decree between Kantibhai Maganbhai Patel and Mathew Koech, the United Assurance managing director, said on Monday, that existing shareholders would be invited to apply for the Patels shares.

"I have already received many applications. I am sure the shares will be over-subscribed," he said.

Koech said the settlement would bring a tremendous level of confidence "between the company, our clients and the public."

"We expect lots of new business. I am happy the dispute was resolved because we wasted tremendous man-hours attending court.

"We are happy this has been amicably concluded. I believe the Patels as the founders will leave us with their blessings," Koech (right) said.

"By consent of the parties, it is hereby agreed and decreed that United Assurance Company Limited shall undertake to get the shareholders to purchase the shares of the petitioners at a considerable amount of sh200m from June 24 when the consent was endorsed by the Court," the decree read.

The consent sealing was witnessed by Alex Rozida and James Nangwala, the counsel for the petitioners and Barnarbas Tunausingize and Joseph Luswata, the counsel for United Assurance Company.

It was also agreed that United Assurance pays the petitioners general damages of sh450m by September 30 in four equal instalments.

United Assurance will also pay the petitioners approved dividends for the financial year 2004 by the end of this month.

Kantibhai Manibhai Patel and United Assurance Company Limited before the Commercial Court judge, Geoffrey Kiryabwire (above), on June 1.

The court further recorded that the settlement constitutes the final resolution of the entire dispute between the petitioners and the company.

Evidently this is a clear case where mediation worked to resolve a corporate governance dispute.

Another avenue created by the court to handle mediations was by dedicating one of the court's Registrars to handle mediations where the parties so agree. This done to bridge the evaluation time for the Pilot Project. Thus out of 118 cases referred to mediation by the court's Registrar, 60% of them were successfully settled without going to litigation. This shows a three (3) fold improvement after the Pilot Project ended. With these results in mind the new draft rules now envisage a multi door court house where apart from litigation, court annexed mediation shall now also be available using

i) CADER as an ADR Institution

(ii) A Registrar of the Commercial Court

(iii) A Judge of the Commercial Court

(iv) A private mediator agreed to by the parties.

CHAPTER FIVE
CONCLUSION AND RECOMMENDATION

5.0 CONCLUSION

Uganda is gradually moving away from the traditional concept that litigation is more effective than ADR but there is still more to be done. Much as the lawyer's stock in trade is his time, for which he lavishes in his bills subsequent to court litigation, ADR can also be cost effective as well as financially and intellectually rewarding. More and more business concerns are opting for ADR, Particularly Arbitration and mediation, in resolving their disputes as opposed to conventional Court litigation. This is essentially because they would rather protect their business contacts, reputations and interests rather than severe them through exploring lengthy and embarrassing litigation. However, in the same vein, warring parties that are advised to opt for ADR should not be led to believe that this option is out of compulsion by Court or any quasi judicial structure, but should freely appreciate the benefits that come with it.

'The judicial process tends to transform social, political and economic disputes into legal disputes. Not only are some problems ill-suited to a proper or full resolution through the process, the process may accentuate and exaggerate conflict rather than resolve it'.

Independent Uganda has shown a continuity of penal policy with the colonial Era, with an emphasis on retribution and deterrence through harsh punishment. This has resulted in a justice system that is under-resourced and inefficient and with little commitment to rehabilitation or addressing causes of crime. A grassroots mechanism of popular justice has been instituted through the LC courts that attempt to deliver community justice. These represent the integration of a largely customary, community justice system at the bottom of the formal justice system. More recently, concrete initiatives that aim to introduce a restorative

Approach has been taken in specific sectors. The possibility of indigenous and largely restorative processes being integrated into the criminal justice system has been raised by the government's commitment to addressing off case related to the LRA insurgency using traditional approaches.

Uganda and other African states in a similar position face several dilemmas. They seek to address the crisis in their justice systems, and have begun to look to restorative approaches, seeing an echo in these of the customary justice that colonial systems replaced. However, the systems that the state is trying to impose are also Western concepts, divorced from local tradition. It seems likely that the state will fail to make these appear relevant to the people. An alternative is to attempt to build on existing customary practice from the bottom up, and use custom to build law that is meaningful to the people. The solution is likely to be a mix of top down and bottom-up models. The LCI courts are the bottom of the formal judicial pyramid and already have a largely customary approach to lesser offences. By introducing the concepts of restorative process that underlie community service and mediation to the judiciary at this level, but leaving with them their flexibility to interpret these concepts in a way that is relevant for their communities, one can create a system that is restorative and relevant.

5.1 RECOMMENDATION

The researcher there fore makes the following suggestions and recommendations.

The issue of serious crimes, raised by the need to prosecute LRA offences, Poses a far greater challenge. Communities must be involved, and customary Process invoked, but in a way that does not challenge the need for a unitary and codified approach throughout the state or neglect the needs of the ethnic groups involved. This appears to be a dilemma that neither the community-based LC courts nor a top-down process can readily address.

It is also noteworthy that legal training in Uganda is progressing away from the adversarial system to moderate training involving ADR and exposure to ADR practical techniques. Law Students and advocates alike should be encouraged further in this awareness so as to appreciate ADR more, rather than ridicule it and thus embrace it in the practice of pursuit of justice in Uganda.

The experience in Uganda will show that court annexed mediation can work in the settlement of Corporate Governance Disputes. However the Uganda experience has also shown that for mediation to succeed it has to be made part of rules of procedure of the court so that parties are clear that the filing of a case in court will not mean automatic litigation. There is still however need for awareness of mediation as a dispute resolution mechanism which is suitable for most commercial disputes including those of Corporate Governance.

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