# ANALYSIS ON THE USE OF ALTERNATIVE DISPUTE RESOLUTION (ADR) IN BACKLOG MANAGEMENT IN UGANDA


**BY**

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## DECLARATION

I hereby declare that except for references to other peoples work, which have been duly acknowledged, the study presented here was written by me, under the supervision of counsel Maingi Victoria. It is a record of my own research work and has not previously been presented in any form whatsoever in any application for a degree elsewhere. All sources of information collected and materials used have been duly acknowledged by means of references and bibliography.

**STUDENT**

**ALITUHA JACOB**

**SIGNATURE**

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**DATE**

14th/09/2018

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## APPROVAL

I have approved the mentioned final year report to be presented as a partial requirement for the acquisition of Bachelor of Laws at Kampala International University

**(SUPERVISOR)**

**COUNSEL MAINGI VICTORIA**

**SIGNATURE**

.....

**DATE**

14th/09/2018.....

## DEDICATION

I dedicate this work primarily to the almighty God for his guidance and mercy throughout my studies. I also dedicate this work to my Dad Mr. Aguma Ignatius and Mum Mrs Aguma Teopista and the entire family for the support, love and care they have given me throughout my studies.

## ACKNOWLEDGEMENT

I wish to thank the almighty God for giving me the strength and courage to pursue this project. Let me also acknowledge the immense support and assistance rendered by my supervisor counsel Maingi Victoria who was available at all times to guide me throughout the project.

I also wish to express my sincere gratitude to my family members more especially my mother Mrs Aguma Teopista and my beloved sister Karungi Margret for the moral and financial support rendered towards the completion of this project. I will forever remain indebted to them. Then my brothers Mujuni Robert and Twekambe Charles for the kind words and encouragement and thanks for the occasional calls made with a purpose of reminding me to stick on this project. May the good Lord bless you.

I wish to acknowledge the contribution of my friends and classmates at Kampala International University special mention is made of Kakoma Edgar, Nuwagaba Sheya, Magumba Sam and Turatsinze Alex who provided moral support and advice throughout the project. May the almighty God bless you.

Lastly special thanks to my dear Dad Mr. Aguma Ignatius for the financial support and for encouraging me to pursue this course. Thanks for being there for me and may the good Lord continue blessing you amidst the challenges you are going through.

## LIST OF ACRONYMS

A.C.A –Arbitration and Conciliation Act
AAA-American Arbitration Association
ADR- Alternative Dispute Resolution.
ADRASA-The Alternative Dispute Resolution Association of South Africa
BATNA- Best Alternative To a Negotiated Agreement
BCICAC-British Columbia International Commercial Arbitration Centre
CADER-Centre for Arbitration and Dispute Resolution
CCMA- Commission for Conciliation, Mediation and Arbitration.
CPA- Civil Procedure Act.
CPR-Civil Procedure Rules.
FIDIC-Federation Internationale des Ingenieurs-Conseils
HKIAC- Hong Kong International Arbitration Centre
IMSSA-The Independent Mediation Service of South Africa
JSC-Justice of the Supreme Court
KCAB-Korean Commercial Arbitration Board,
KLRCA- Kuala Lumpur Regional Centre for Arbitration,
LCIA-London Court of International Arbitration
NGOs -Non-governmental organizations
PCIA- Permanent Court of International Arbitration,
The ICC-The International Court of Arbitration of the International Chamber of Commerce
UMC-University of Missouri-Columbia
UNCITRAL -United Nations commission on indentation trade (UNCITRAL)
URA-Uganda Revenue Authority
VMPS-Village Mediation Programs
WAMC- World Arbitrators and Mediators Council.
WIPOAMC-World Intellectual Property Organization Arbitration and Mediation Centre.
I C A D R - International Centre for Alternative Dispute Resolution

## LIST OF STATUTES

**Domestic**

The 1995 Constitution of Uganda as Amended
The Arbitration and Conciliation Act Cap 4
The Civil Procedure Act Cap 7
The Civil Procedure Rules Statutory instrument 71-1
The Commission of Inquiry Act
The Judicature (Mediation) Rules 2013
The Judicature Act Cap 13
The land Act cap 227.

**International**

Arbitration Act, Chapter 40 of the Laws of Zambia.
Civil Procedure Act, Cap 21, Laws of Kenya

Commercial arbitrations 1985

Companies Act, Chapter 388 of the Laws of Zambia.
Constitution of Kenya, 2010

High Court Act, Chapter 27 of the Laws of Zambia.
Labour Relations Act, No. 14 of 2007, Laws of Kenya
The UN convention of recognition of a foreign artblsal awards 1958 (new york convention)
UNCTRAL Conciliation Rules 1976
UNCTRAL model law on international commercial Arbitration 1985
United nations commission for information al trade law (UNCITRAL) Arbitrations races 1976

## LIST OF CASES

East Africa Development Bank Vs. Zziwa Horticultural [Exporters' ltd
Farmland industries Ltd V global Exports limited]
East African Development Bank V Zziwa Horticultural Exports
Oil seeds (Uganda) limited V Uganda development banks
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## ABSTRACT

This study was carried out using the qualitative methodology of research, the study is based on secondary information such as writings of high qualified state publicists as clearly envisaged in textbooks, novels, law journals, articles, websites and different literature including class notice. The researcher also relied on judicial decisions made by different judges of different states, Acts of parliament relating to ADR and international Conventions where Uganda is party.

Over the past several decades, there has been growing interest amongst advocates world-wide, in the use of alternative dispute resolution (ADR) techniques to resolve their clients' disputes more economically and efficiently. In the face of bottlenecks and backlogs in the court systems, as well as spiraling costs and fees, courts and members of the legal fraternity have been part of the movement seeking means other than litigation for resolving disputes. The development of more flexible means of resolving disputes in the form of ADR techniques has therefore gained increasing popularity, and the Ugandan legal system is no exception. Certainly, the advantages to be gained by the implementation of ADR in the Ugandan legal system provide enormous potential and as such, ADR has not gone unnoticed in Uganda. In the past years, tremendous reforms have been made in the Ugandan legal system, and a study on ADR is therefore most timely in this context. This paper seeks to introduce to the reader, the concept of ADR and its implications in the Ugandan context especially in dealing with the rampant problem of case backlog in the judiciary in Uganda.

The study seeks to critically analyze the use of ADR in the resolution of disputes in Uganda and whether the notion of ADR has been of great importance to Ugandans especially by speeding and quickening the resolution of disputes as compared to the adversarial system. It also seeks to establish how the stake holders in Uganda have appreciated the notion of ADR especially the parliament and the Judiciary to the extent of making laws to favor ADR and making Mediation compulsory in all civil litigations. The study covers the legal frame work of ADR in Uganda AND the different mechanisms of ADR used to resolve disputes in Uganda and those used by other countries as best practice that Uganda should adopt in order to reduce case backlog in the judiciary.

The study establishes the challenges faced by resolving disputes through alternative means rather than litigation. It is important to note that Uganda has faced a number of challenges in attempting to use ADR since it was first established in 2000 as part of the legal system in the commercial court and now to all civil suits commenced in the country, resolutions to all these challenges are well explained in this paper and possible researcher bothered to explain the possible solutions to the challenges. The study also provides some recommendations that if adopted may help improve the ADR system in Uganda.

The study introduces to the reader how the notion of ADR has been embraced by other countries in Africa and the world at large to resolve disputes minus necessarily going through litigation. It's vital to note that Organizations like United Nations(UN) have encouraged ADR by coming up with internationally recognized standard of dealing with Arbitral Awards which has since been adopted by many member states including Uganda. This has promoted the use of arbitration in international disputes since an Arbitral award can be enforced from one country to another as it's not affected by jurisdiction as the case is in court litigation.

## CHAPTER ONE

### 1.0 Introduction

The idea of ADR is as old as time. Informal dispute settlement has long been in existence in many parts of the world. In the Bible as well as the Quran there are instances where disputes have been resolved through intermediaries. In fact, archaeologists have found evidence of the use of ADR methods in the ancient civilizations of Egypt, Mesopotamia, and Assyria. [1] The court system itself was once an alternative dispute resolution process, in the sense that it replaced former processes of dispute resolution, such as trial by battle and trial by ordeal.[2] In the view of the Law reform commission, one of the earliest recorded mediations took place over 4,000 years ago in ancient Mesopotamian society when a Sumerian ruler helped to prevent a war and developed an accord over a dispute on land.[3] In the Western world, the development of ADR could be traced to Ancient Greece who established the position of public arbitrator in 400 BC upon the realization that Greek courts had become overcrowded.[4] India and China have long histories of the practice of ADR. As we have it now, the idea of ADR was developed and popularized in the US as a means of resolving issues pertaining to inter-racial disputes that had arisen as a result of the civil rights movements in the 1960s and the loss of faith in the ability of the court system.[5] The promulgation of the Civil Rights Act in 1964 led to the creation of the Community Relations Services (CRS). The CRS relied on the methods of mediation and negotiation to assist in preventing violence and resolving community-wide racial and ethnic disputes. This consequently, helped to resolve various disputes involving schools, police, prisons and other government entities throughout the 1960's.[6] It has since the civil rights programs assumed importance in areas of equal opportunity, anti-discrimination and the environment, to the point where it has become institutionalized and legalized in the US. To an extent it is losing its alternative tag as it has become an integral part of the justice system.[7] Similarly, ADR has gained popularity in Europe, Asia, and in Africa.

In the African context, ADR was introduced in the 1990s as part of reforms in the judicial sector particularly with the recognition of the need for improvements in the access to justice by the vulnerable and the poor. Many countries have since then adopted ADR or some of its methods and implemented them as part of their judicial reform programs. The Multi-door approach in Nigeria is one such example. Introduced in 2002 it stands as the first of its kind in Africa. The Multi-door approach is one where disputing parties are offered a choice between the formal court litigation and court-connected ADR mechanisms. Uwazie, observes

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Alternative Dispute Resolution Consultation Paper, Law Reform Commission July 2008.
Alternative Dispute Resolution Consultation Paper, Law Reform Commission July 2008
Alternative Dispute Resolution Consultation Paper, Law Reform Commission July 2008
Alternative Dispute Resolution Consultation Paper, Law Reform Commission July 2008
Alternative Dispute Resolution Consultation Paper, Law Reform Commission July 2008
Alternative Dispute Resolution Consultation Paper, Law Reform Commission July 2008.
Alternative Dispute Resolution Consultation Paper, Law Reform Commission July 2008.

for instance that, on the average 200 cases are mediated daily with a settlement rate of between 60 to 85 percent. This has as a result led to drastic reductions of caseloads on the formal court system in a country where judges admit not less done 50 cases to their dockets on daily basis. At the heart of the modern idea of ADR, as developed by its European and North American advocates, is the idea that a better form of justice can be obtained by focusing on mediation or the search for a mutually agreed settlement, rather than on binding adjudication by a state authority. Mediators based on both state and non-state institutions can offer ADR; what makes it different from the practice in formal courts is the procedure, an informal search for an agreed and just solution, as opposed deciding who has won or lost. This emphasis on 'better' and 'non-compulsory' justice distinguishes the recent ADR movement from the already well-established contractual forms of commercial ADR, which rely on binding arbitration and may exclude the right to go to court.[8]

ADR enjoys enormous support at the international, regional and domestic levels. At the international level, the United Nations (UN) General Assembly recommended the Guiding Principles for Crime Prevention and Criminal Justice in the Context of Development and a New International Economic Order adopted by the 7th Congress on the Prevention of Crime and the Treatment of Offenders. These principles enjoin judicial systems to adopt 'less costly and non- cumbersome procedures for the peaceful settlement of disputes. Similarly, the African Commission in 2006 urged State Parties to consider formulating policies and domestic legislation based on ' the principles of the Lilongwe Declaration On Accessing Legal Aid In The Criminal Justice System In Africa adopted by the participants of the Conference on Legal Aid in Criminal Justice. This declaration reiterated the right to legal aid, which is defined broadly to include ADR mechanisms, and recognized the role of traditional and community-based alternatives to formal conflict resolution.[9]

ADR is defined in several ways. According to the National Alternative Dispute Resolution Advisory Council (NADRAC), ADR is an 'umbrella term for processes, other than judicial determination, in which an impartial person assists those in a dispute to resolve the issues between them'. Some methods, such as mediation, involve seeking resolution by agreement reached between the parties. Other methods for resolving disputes, such as arbitration, may involve binding determination by a third party. There are also a variety of 'alternative' means by which judicial officers may involve independent third parties to assist in the resolution of cases that are being litigated.[10]

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*Alternative Dispute Resolution and the Magistrate's Courts in Ghana: A case of Practical Hybridity,* Working Paper, July, 2012.

Krummey-Quinn, J. Enhancing 'Access to Justice': Recognition of Informal Criminal Justice Mechanisms in International Human Rights Law.

0 Ibid note 8

In the last decade ADR (alternative dispute resolution) has taken a heighted significance in legal and judicial practice within the common law jurisdictions. ADR started as a standalone mechanism that largely operated outside the court system but now there is an emergency of ADR which has been referred to as "court based ADR."ADR stands for alternative dispute resolution. One would then ask alternative to what? In many developed countries ADR is an alternative to procedures normally adopted in dispute resolution in litigation in court. The question that is always asked is whether ADR is a new procedure or mechanism, if it is indeed reorganized and enforceable under the law. This lack of clarity has in many ways used to the difficulty in marketing ADR, largely because of the attempt to use it as seen to be down playing litigation in courts which is more widely used. According to Justice Geoffrey M. W Kiryabwire ADR can be defined as a structured negotiation process whereby the parties to a dispute themselves negotiate their own settlement with the help of an independent intermediary who is a neutral and trained in the techniques of ADR[11],.Kiryabwire goes ahead to give the common forms of ADR and these include negotiation, conciliation, and Mediation, mini trial early neutral evaluation, react a judge and arbitration [12].Blade Spangler defines alternative dispute re solution (ADR) as a term generally used to refer to informal dispute resolution processes in which the parties meet with a professional third party who helps them resolve their dispute in a way less formal and often more consensual than done in the courts. Blade contends that the most common forms of ADR are mediation and arbitration but he also considers other forms of ADR such as commission of inquiry, ombudsmen and others.

### 1.1 Background to the study.

To fully understand ADR in Uganda one would have to make an appreciation of the evolution of ADR in Uganda first. There is no doubt that when a legal dispute arises the claimants usually go to their lawyers for legal advice and about 85% of these lawyers issue a notice of intention to sue ,the opposite party in courts of law. It is difficult to think about the alternative dispute resolution[13].The development of ADR in Uganda has interesting history. Although America states centre stage especially with the assistance of Washington DC judiciary, the idea came from Canada in 1990 when Ambassador Tumusanga the then Uganda high court commissioner to Canada met informally with justice Ntabagoba now retired principle judge after the meeting the ambassador Tumusanga interacted with Canadian government officials and it so happened that the government of Canada was willing to extend aid to the judiciary of Uganda[14].

In Uganda court based ADR began to creep into the judicial system from mid 1900s the first driving factor for change from the 1994 justice Platt report on judicial reform which recommended the increased use of arbitration and ADR alongside litigation and the creation of a commercial division of the high court. Shortly after, a major statement was made in the new 1995 constitution of Uganda under article 126(2) enjoined the court to inter alia apply

1 Alternative dispute resolution:' a paper delivered at a continuation seminar for magistrates grade one at continuation hotel on 1st April. 2005.
2 Hon Justice M.W Kiryabwire Uganda live journal vol. 3 No 2 December 2005
3 Hon Justice (G W Kiryabwire Uganda live journal vol. 13 of December 2003.
4 Alternate dispute resolutions in the magic want to solve ease backlog in courts written by Justice Patrick Tuburo step 14, 2012.

the following principles. Justice shall not be delayed, adequate compensation shall be awarded to victims of wrongs, Reconciliation between parties shall be promoted, and Substantive justice shall be administered without under regard to technicalities. The application of the above principles would now attend to counter the traditional perception of adversarial dispute resolution methods and call for change in favor of based ADR. In **1998** the civil procedure rules were amended to the civil procedure (amendment) rules to include in then order 10B which under its rule 1of the CPR which is to the effect that the courts shall hold a scheduling conference to sort out points of agreement and disagreement, the possibility of mediation arbitration and any other of settlement. **Rule 2 of order 12** of the civil Procedure Rules is to the effect that were parties do not reach an agreement and rule 1(2) of the same order 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, the rule goes ahead to give 21 days as the period in which ADR shall be completed. This is the basis of the court based ADR today coupled with other legislations. In the early 2000 mediation was piloted in the commercial court as an alternative to litigation and many cases were successfully mediated. Judicial officers were left with time to try cases which are ordinary not amenable to mediation substantially increasing the productivity of the courts, satisfaction and confidence of court users in the justice system. Mediation and arbitration have been on the increase in Uganda since the creation of The Centre for Arbitration and Mediation (CADER). In 2003 and 2005 the commercial court provision implemented the mediation pilot project where by cases were referred to CADER for mediation. Mediation became a permanent feature at the commercial court with the passing of the of judicature (mediation) rules of 2013. Following the success story at the commercial court, it was decided to rollout mediation at all the courts with the gazatting of the mediation rules in 2013[15].In 2017 mediation was extended to the court of appeal through the "Appellant Mediation" as a newest form of ADR. It is therefore important that mediation and other mechanism should be embraced by all to win the war on back log and increase access to justice.

## 1.2 Statement of the problem.

Effective implementation of resolution approach mainly depends on the legal frame work of a country where it is subjected. In Uganda the laws have been set to suit and favor ADR and eventually mediation, conciliation have been made compulsory to litigants before litigation in courts. This is evidenced by rule 4 of the Judicature Mediation Rules 2013 which is to the effect that court shall refer every civil action for mediation before proceeding for trial. And section 5 of the Arbitration and Conciliation Act cap 4 that mandate the judge or magistrate to refer a matter that has an arbitration clause to arbitration before proceedings for trials. This study therefore considers whether the compulsory ADR mechanisms in the judicial system in Uganda has offered an effective solution in managing the case backlog in courts of law and whether there are more appropriate methods to reconcile litigants.

5 On Friday 18th march 2015, mediation was declared a permanent feature all out court processes by honorable principle judge Yorakam Bamwine.

0 Kampala post, posted on September 4,2017 by Abraham Kizza

### 1.3 General objective

The general objective of the study was to analyze the use of Alternative Dispute Resolution (ADR) to reduce case backlog in Uganda

### 1.3.1 The Specific Objectives of the study were:

i. To analyze the legal frame work governing ADR in Uganda and how ADR has been used in Backlog management in Uganda.
ii. To establish the International best practice of ADR and whether such best practice should be adopted in Uganda.
iii. To propose reforms and recommendations of improving ADR as a mode of dispute resolution.

### 1.4 Research questions.

i. What are the different laws governing Alternative Dispute Resolution in Uganda?
ii. Are there any International best practices on ADR that Uganda can adopt to solve the case backlog problem in the judiciary?
iii. What do you propose as reforms and recommendations in improving ADR as a mode of dispute resolution in Uganda judiciary?

### 1.5 Hypothesis

The study was guided by the hypothesis that ADR has been instrumental in reducing the rate of case back log in the judiciary and should be encouraged to spread across all courts as a mechanism of ensuring that justice is administered at all levels.

### 1.6 Significance of the study.

The study as carried out will benefit court administrators, legal practitioners, litigants resolving disputes of civil nature and this will be instrumental in managing case backlog.

In Uganda it will also help donors to prioritize this area as a vital one in the field of administration of justice.

### 1.7 Methodology.

The researcher used a qualitative method of Research which emphasizes the use of secondary information such as writings of highly qualified state publicists as clearly envisaged in textbooks, novels, law journals, articles, websites and different literature including class notice. The researcher also relied on judicial decisions made by different judges of different states, Acts of parliament relating to ADR and international conventions where Uganda is party.

### 1.8. Limitations.

The researcher encountered a number of constraints which included limited funding, limited time frame and inadequate publications on some ADR mechanism for example Commission of Inquiry that the Researcher did not exhaust.

### 1.9 Chapter synopsis

The research is organized in five chapters:

Chapter one is made up of the research proposal and the research design.

Chapter two looks at the literature review, Analyzing both the related literature to the research and the theoretical perspective about the Research topic.

Chapter three deals with the legal frame work and other ADR laws applied in Uganda together with the Mechanisms the laws are applicable.

Chapter four comprises of the international best practice on ADR explaining the application of ADR in different countries of Africa and how ADR can globally be applied.

Finally chapter five considers the recommendations and reforms as suggested by the researcher to be adopted by the government of Uganda in order to eradicate case backlog in the judiciary.

### 1.10 Conclusion

ADR is instrumental in reducing case backlog in the judiciary in Uganda today. This project therefore introduces how ADR has been used to reduce case backlog in the judiciary in Uganda.

## CHAPTER TWO

## LITERATURE REVIEW.

### 2.0 Introduction

Much has been written on ADR practice in the world legal system discussing various forms of ADR including the resolution techniques. Several researchers have written concerning practice of arbitration, conciliation mediation and negotiation as a form of a form of ADR as applied in the Uganda legal system.

### 2.1 Related literature

Mwenda, Assesses the impact of ADR on the justice delivery system in Zambia in particular, her work contributed greatly to my study as it contains very useful information to show experience on the use and benefits of ADR. The author explains that alternative dispute resolution was developed as an alternative to the traditional dispute resolution mechanism, Litigation which had become costly, time consuming, did not give the parties control over the outcome of their dispute and was generally cumbersome. She points out that ADR refers to a Varity of techniques for resolving dispute without going to courts of law. Behind the introduction of ADR methods was inter alia, to reduce the delays and costs associated with litigation to introduce relatively less formal methods of dispute resolution to introduce consensual problem solving ad empower individuals by enabling them to develop dispute resolution mechanisms that would preserve personal and business relationships. ADR processes were thus intended to produce better outcomes all round.[16]

Mwenda explains that for a very long come worldwide have played a vital and leading role in justice delivery. However, experience has shown that times litigation is a seemingly endless exercise and self-torturing ordeal. Serious concerns here repeatedly been expressed over spiraling costs and fees and delays in litigation procedures, Congestion in courts, the all too legalistic procedures and the intimidating court room atmosphere. In addition, the adversarial nature of litigation with the "win all or lose all" attributes have found un conducive to continued business or social relationships. All these factors have to some extent contributed to making litigation nerve-wracking to litigants. This state of affairs has brought about increasing dissatisfaction with litigation among disputants and other stake holders and has necessary led to the development of more flexible means of dispute resolution.[17]She goes on to explain that increasing globalization of the modern business world has also been a factor in the development of more flexible means of resolving disputes that provide alternatives to court based litigation governed by the law and precedence of particular state or country. [18]Further the legal profession has experienced vast change in the last decade of the twentieth century; insignificant among them, is the growing interest among them, is the growing interest among advocates in the case of alternative to traditional court litigation resolves their clients' disputes more efficiently and economically with less risks and better results. ADR is premised upon the principle of consensus. It is non-authoritarian and operates within the structure of a specific community according to the culture of the community prevailing more norms.[19]

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16Winnie Mwenda Sithole Paradigms of ADR and Justice Delivery in Zambia(2006)
7 Winnie Mwenda Sithole Paradigms of ADR and Justice Delivery in Zambia(2006)
8 Winnie Mwenda Sithole Paradigms of ADR and Justice Delivery in Zambia(2006)
9 Winnie Mwenda Sithole Paradigms of ADR and Justice Delivery in Zambia(2006)

The author concludes that grated the advantages of ADR, it is neither a panacea which can care all ills nor substitute for litigation. ADR should be seen as being commentary to litigation. This study is important as it provides a legal background of ADR and elaborates its benefits. Further the study is helpful in considering various important issues partnering the reviews of ADR system in Uganda in line with the reforms taking place in other countries. However the study addresses ADR generally and does not address the use of ADR in management of case backlog that this study will address.[20]

According to Mushamba, ADR was transplanted into Tanzania from the west. His research as he discusses alternative dispute resolution in Tanzania that has relationship to the ADR laws in Uganda. He traces the origins ideology of ADR and examines reforms of the US justice system in favour of ADR and the benefits of ADR. He examines alternative dispute resolution in Africa culture context and the role of Ubuntu in dispute resolution in Africa and makes a comparison between formal ADR and traditional justice system in Africa. He explains the significance of ADR in civil courts in Tanzania in that the demand for alternative ways to deal with legal disputes other than conventional courts arose out of the ever-increasing heavy caseloads and backlogs in Tanzania civil cases. So, the primary rationale for the introduction of ADR in Tanzania was to reduce the heavy caseloads as well as the backlogs. It was also meant to avoid result to unnecessary procedural techniqualities prevalent in traditional courts as well as reducing expenses involved in purposing litigation in courts of law. In this regard, the court, annexed ADR system in Tanzania was designed in an informed way to allow parties to participate easily in this process and ensure that the relationship between the parties is preserved after they had gone the ADR process.[21] He further discusses the theories and principals of international arbitration, evaluation of modern international commercial arbitration law and practice and types of international commercial arbitral tribunals which are mainly two: permanent and ad-hoc tribunals. Permanent or standing tribunals which are those attacked to institutions that are established on permanent basis including: International court of arbitration of the international chamber of commercial (ICC) London court of international arbitration (LCIA).Organization for the harmonization of business law in Africa (OHADA), International Centre for settlement of investment dispute (ICSID), American arbitration, Association international center for dispute resolution (AAA/ICDR).[22]

Ad hoc arbitral tribunal are those tribunals established to settle a specific dispute most ;or which commonly apply the races of procedures laid down in the 1976 UNCITRAL arbitration rules. The author addresses the challenges facing ADR in Tanzania on the basis of the findings of the ADR evaluation report and recommendations of the ADR evaluation report. For purposes of this study we shall confine ourselves on how ADR is used in managing case backlog in Uganda. The study goes further to make recommendations upon making an analysis of the model of currently in use in Tanzania and from actual practice of ADR including case laws.[23]

**Roger fisher and William Ury** in Getting To Yes-negotiation agreement without giving in offer an alternative to the widely held fixed pie" mentality which dominates much of the negotiating fraternity. They agree that too often mediators become entangled in awkward struggle over fixed positions and thereby fail to be imaginative to work towards of a mutually

20 Winnie Mwenda Sithole Paradigms of ADR and Justice Delivery in Zambia(2006)
21 Clement Musumba ,Alternative Dispute Resolution In Tanzania Law And Practice,(2014)
22 Clement Musumba ,Alternative Dispute Resolution In Tanzania Law And Practice,(2014)
23 Clement Musumba ,Alternative Dispute Resolution In Tanzania Law And Practice,(2014)

beneficial deal. By the help of acronym BATNA, Best Alternative To a Negotiated Agreement, they stress the need for creativity and alternative approaches when there is a stalemate. From this perspective, they encourage mediators to detah the people and positions and centre on concerning alternatives for common out comes.[24]

Negotiation provides excellent number of well-designed exercises that help mediators develop and apply the concept and principles of mediation and negotiation[25]. It anticipates mediators into in bargaining and integrative negotiation. It emphasizes preparation prior to a negotiation and tarnishes the mediator with various tactics that can be employed from getting parties to the table and how to work towards a successful negotiation. Mediators face many barriers that hinder their succession negotiation. It highlights problems of diehard bargainers, gender differences, cultural differences, difficulty with gaining trust and limitation of time as some of the difficulties mediators face and furnishes them with the necessary skills for circumventing such barriers. It also deals with mental errors, the gap in a party's presentation the mediators own mental lapses and rules and regulations (legislations) that often influence the outcome of mediators. It cautions the mediator to be alert and proactive in addressing such challenges to avoid deals being lost or turning out as bad deals in the future. The book is however mainly concerned with business disputes and it is overly academic based and one would wonder if it can be very useful for the conflicts in Uganda today.[26]

Hon Justice Geoffrey W.M Kiryabwire Judge of the commercial division court of Uganda[27], the justice gives the background of ADR in the past decade in Uganda. He defines ADR as a structured negotiation process whereby the parties to a dispute themselves negotiate their own settlement with the help of an independent intermediary who is a neutral and trained in the techniques of ADR. The author goes ahead to give negotiation, conciliation, mediation mini-trial early neutral evaluation, rent a judge and arbitration as the mechanism of ADR applicable in Uganda. He contends that ADR is not as new as it sounds. ,in African culture the use of a third party neutral in the resolution of disputes is still appointed because of his/her stature and respect within the society. Decisions reached with the "intervention of the third party are implemented in good faith and are normally widely supported in the community.[28]

The author argues that under continental law the principles of "ex aequo et bon" (in justice and good faith) or "amicable composition" where a decision is reached on the principles that appear to be fair and just as opposed to legal has been part of the judicial system for some time.He analyses the challenges of ADR that have been experienced in Uganda. Firstly are transigent/ unreasonable parties or their legal advisors, who are not willing to try ADR, secondly the use of court assisted ADR to delay justice or to act as a fishing expedition to establish what is possible. Here the party to a fault is just using ADR as a time wasting mechanism under rule 19 of the mediation rules, an adjournment costs of shs 50,000 can be levied against a party who does not show up when a mediation hearing is caned. The enforcement of this rule has not been effective because of lack of a clear mechanism to do so.

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24Fisher, Roger and William Ury In Getting To Yes-Negotiating Agreement Without Giving In (New York: Penguin Books 1983).

25 Justice Kiryabwire , Alternative dispute resolution a Uganda judicial perspective: A Paper delivered at a continuation seminar for magistrates grade one at colline hotel Mukono(2003)

26 Justice Kiryabwire , Alternative dispute resolution a Uganda judicial perspective: A Paper delivered at a continuation seminar for magistrates grade one at colline hotel Mukono(2003)

27 Harvard business Essentials Negotiation (Harvard business press 2003)

28 Justice Kiryabwire , Alternative dispute resolution a Uganda judicial perspective: A Paper delivered at a continuation seminar for magistrates grade one at colline hotel Mukono(2003

The other challenge is the availability of competent trained mediators to carry out ADR. The author gives solutions to the challenges faced by ADR in Uganda and firstly he emphasizes training of ADR methods to judicial officers, lawyers and non-lawyers alike. This would lead to a greater appreciation of the subject matter. He argues that where it appears that a party even though successful in litigation deliberately refused the used of court assisted ADR then costs should be awarded against that party as in the case of Dunnett V Railtract (2002) 2 DALLER 850.This work is relevant to the study since it brings out the background of ADR challenges and recommendation to the study.[29]

**Ken Ahorsu and Robert** in "mediation with a traditional flavour" wades into the debate on whether wholly western conflict resolution mechanism imported into African settings without due consideration for differences in developmental gaps, consciousness nationality and social cultural differences will promote efficiency in resolving conflicts in Africa.[30]They argue that for ADR to become an efficient main strum conflict management mechanism in Africa, what is essential is a blend of western and African mediation and arbitration processes to reflect social cultural differences and relevance. They advocate blending ADR with culturally tuned indigenous values norms and ethnographic practices as foundation for conflict resolution. They argue that an essential requirement for durable conflict resolution hinges on the ownership of the mediation processes and deals that parties can call their own. Therefore understanding the socio-cultural setting of Conflict locales should form the basis of the analysis of conflicts and sources for models in the management of conflicts. African communities have under gone change as modern social formations and relations have emerged: large part of the people's daily lives are influenced by traditional norms, institutional and practices, as such approaches to addressing community conflicts must equally embrace element of both the modern and traditional societies.[31]

Mediation with traditional flavor framework is built around the true philosophy of peace and conflict; it is discuses symbolic orders, values and decorum. The traditional philosophies conceptualize conflicts as abnormal states of affairs that are harmful to the well; being of the parties involved the land ancestors gods, God and future generation. And there are explicit norms and practices of setting or healing the parties, pacifying the land, gods, God and communities this holistic concept of conflict and peace. They argue that the use of ethnography is essential for effectiveness and efficiency, values, norms and practices are used as opening for mediation building trust among the parties, healing and bonding and reconciliation.[32]

The frame work nevertheless incorporate Western mediation principles into the process to ensure objectivity such that it may be described as an interface between traditional African mediation, the imported west minister judicial system and today's ADR anther novelty of the framework is the use of symbolic figures, given to the case and the experience and relevance of the symbolic intermediaries to clear the mediation and arbitration process, while the technocrat mediator acts behind the screen as a consultant and a director. The advantages that chiefs may identify more easily with a prominent chief than an ordinary mediator. The

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29 Justice Kiryabwire , Alternative dispute resolution a Uganda judicial perspective: A Paper delivered at a continuation seminar for magistrates grade one at colline hotel Mukono(2003

30Ahorsu, Ken and Robert Ame, "mediation with a traditional flavor" Africa conflict and peace building review, 1; 2 (fall 2011).

31Ahorsu, Ken and Robert Ame, "mediation with a traditional flavor" Africa conflict and peace building review, 1; 2 (fall 2011).

32 Ahorsu, Ken and Robert Ame, "mediation with a traditional flavor" Africa conflict and peace building review, 1; 2 (fall 2011).

framework was used in mediating communal conflicts in the howhoe municipality and the approach facilitated easy committing of factions to negotiation trust was easily built the parties identify easily with the settlement as their own; and the process was more amenable to mitigating conflict attitude.[33]

Anthony Conrad K. **Kakooza** looks outside the box of adversarial litigation of matters through the courts of the law. He explores a new trend in Uganda encompassing different forms of alternative dispute resolution mechanism. These include arbitration, conciliation, medration and a brief look into collaboration legal practice. Anthony Conrad explores the advantage and disadvantages of each of these mechanisms as he attempts to provoke the reader into determining whether ADR is a more viable means of administering justice in Uganda.[34]

**Bolaji Owasanye** in his article dispute resolution and constitutional rights in Africa argues that and constitution rights in Africa arguers that disagreement and misunderstanding are key characteristics of human relationship where the relationship is domestic or international one. Since disputes are such a critical part of human relationship many countries have mechanism to resolve them in a manner which maintains the coalition economics and political stability of the state. Bolaji goes ahead to argue that Africa nations had their own indigenous system of dispute resolution before colonialist introducing the adjudication or criminal law system and this negotiation and arbitration orders . He points out that because African lawyers are trained in the common laws system of adjudication which is integrated into the system of government by the constitution backed by the establishment of courts judges the rules of procedure and the enforcement of the judgment, African lawyers have come to rely on and trust the common law system more than other forms of dispute resolution.[35]

**H.J brown and Marriot** explains that arbitration has been widely used for the settlement of a variety of disputes between states, state entities and private parties. Arbitration is aprivate mechanism which takes place in private pursuant to an agreement between two or more parties under which the parties agree to be bound by the decision to be made by the arbitrator according to the agreement and a fair hearing , such a decision is enforceable by law. The authors go a head to give the sources of law in international arbitration as the New York 1958 and the European Convention of 1961, International Chember of Commerce and the London Court of International Arbitration (LCIA) together with municipal legislations. He further notes that there can be no arbitration initiated by or conducted against a person who is not part to the arbitration agreement which has to be enforced by ordinary courts. As a general rule the courts have limited jurisdiction when the parties have entered into a valid arbitration agreement. parties are free to organize their own proceedings as they like for example they may choose adversarial or inquisitorial procedure or a mixture of the two. The tribunal itself can be appointed bt parties either directly or indirectly by an appointing authority agreed upon by them and such tribunal is expected to act judicially, breach of such may result into an Arbitrator being Challenged and eventually removes by Court or award given may be nullified. In commercial Arbitration the Award given should be binding , and if there are defects in an award , it may be challenged in some jurisdictions and other

33 Ahorsu, Ken and Robert Ame, "mediation with a traditional flavor" Africa conflict and peace building review, 1; 2 (fall 2011).

34Anthony Conrad K Kkooza, Arbitration Conciliation And Mediation In Uganda, A Focus On The Practical Aspect(2009)

35 Paper Wriiten Following A UNITAR Sub Regional Workshop On Arbitration And Dispute Resolution(Harare, Zimbabwe 11 To 15 September 2000)

jurisdictions that is to say Switzerland , the parties are generally at liberty to agree and exclude the control of the courts over an award. The disputing parties through the appointing tribunal have powers to enforce the award given and an award is binding and should be strictly followed.[36]

**Mathew .T. Brodie** in his paper entitled Questions about the efficiency of Arbitration agreements notes that the decision making process by which a rationale employee would judge the desirability of an agreement, both after and before a dispute has risen is looked out, he stated that the employees in reality cannot have all required information necessary to make a rationale economic judgment about pre dispute arbitration agreement , because they are not exposed to such information, so the employees tend to overlook or misjudge the costs and benefits of arbitration agreements. He concludes that before going into pre dispute agreements, stronger evidence and information needs to be given to employees. Courts, legislators and commentators have to focus more on decision making loopholes that could render arbitration agreements inefficient.[37]

**Hon. Buteera** , reveals that there was case back log before the coming into force of the ADR mechanisms, he notes that a case which has not been resolved for a minimum of two years are around 3,000 cases in the commercial courts that through the better management of courts system reduces case backlog. The ADR frame work for banking and financial sector which will be run by Uganda law society Arbitration Centre will help expedite justice with respect to commercial law by settling commercial disputes without going through the commercial Courts for those who want to genuinely settle their disputes quickly such parties can resort to arbitration as the quickest method to be used and the claimants who are willing to withdraw their cases from commercial courts to ADR methods such as Arbitration help to reduce on the case backlog by reducing the courts Work load and ensuring efficient way of delivering justice.[38]

## 2.2 Theoretical perspective

In order to develop theory on conflict resolution, it is valuable to consider the nature of conflict itself. Huczynski and Buchanan offer the following definition:
[Conflict is] ***a process that begins when one party perceives that another party has negatively affected, or is about to negatively affect, something the first party cares about.***[39]
While the start of a conflict is framed as a product of perception, evidence of conflict does not surface until one or the other party"s actions are influenced by these perceptions. As Willmott argues, a considerable amount of conflict remains latent, and may be suppressed by the inability of the first party to articulate their perceptions to the second party. Conflict resolution processes, therefore, are likely to be more successful if they address both the actions and perceptions of both parties to the dispute. At a deeper level, however, is the parties" belief about the possibility of aligning social and economic interests. In industrial relations, the issue of whether the buyers and sellers of labour can align these interests informs their perspective on how to conduct themselves in the employment relationship. If one party believes interests can be aligned and the other does not, conflict exists not simply at

36Henry J. and Arthur L. Mariot, ADR Principles and Practice ; 4th Edition(2011)
37 Questions about the efficiency of Arbitration Agreements by Mathew T. Brodie.
38 The independent centre to reduce costs and time in commercial disputes at the banking symposium organized by the Uganda Bankers Association (UBA) at the Golden Tulip Hotel , om march 23rd , 2018 a speech by the Hon. Justice Richard Buteera.
39 Huczynski, A. and Buchanan, D. Organizational Behaviour (Harlow: Prentice Hall). (2007)

the level of action and perception, but also at the level of philosophy.[40] Fox defined three ideological perspectives on conflict. Firstly the acquisition of management power encourages a unitarist view of the employment relationship, typically supported by rhetorical strategies encouraging staff members to work in harmony towards common goals. Implicit in this view is managers "right to manage" which if internalized, regards conflict itself as irrational. Fox also identifies a pluralist perspective in which organizations are seen as comprising of competing groups that have different values, interests and objectives.[41] In industrial relations, this surfaces in the consideration of the interests of employers and employees, although postmodernist philosophers have urged broader use of the term based on inter-sections of gender identity, ethnicity and class. [42]

From a pluralist perspective, conflict is both rational and inevitable, requiring employer and employee representatives (managers, unions and staff groups) to devise and utilize agreed conflict resolution processes. Lastly, Fox outlined a more radical perspective in which conflict is not simply viewed as inevitable, but as both a product and driver of change.[43] As Hunt argues, conflict is „desirable and constructive in any social system" as it can open up different solutions to a problem, encourage creativity, and surface emotive arguments. Approached in such a way, positive conflict is a useful means of challenging organizations norms, and empowering people so that change can occur. The intellectual roots of the radical view can be traced to Marxist theory.[44]

There have been strong and repeated criticisms of mediation. Dickens, for instance, counsels caution in embracing the concept and practice of mediation in the workplace. she argues that, „there may well be a role for mediation but it needs to be recognized that disputes in the employment context may differ from the kind of interpersonal disputes found in family cases – differences which relate to the particular nature of the employment relationship". [45] Similarly, a helpful review was undertaken by Golten and Smith (undated).Although written from a practitioner perspective in environmental disputes, their paper considers a range of criticisms that apply in other contexts. For the purposes of this article, any criticism of mediation that applies equally to court proceedings (e.g. power or resource asymmetries between the parties) was discarded. After this, there remain a number of more valid criticisms grouped around two inter-related concerns: firstly, mediation undermines legitimate authority; secondly, mediation silences social criticism by hiding the process of conflict resolution from public scrutiny. The criticisms regarding authority contest that local parties should not be able to reach private agreements that undermine the authority of public

40 Willmott, H. "Strength is Ignorance; Slavery is Freedom: Managing Culture inModern Organisations", Journal of Management Studies, 30, 4, 515-552 (1993),

41 Fox, A. Man Mismanagement (London: Hutchinson & Co). (1985)

42 Barrett, M. The Politics of Truth: From Marx to Foucault, (Cambridge: Polity Press). (1992)

43 Fox, A. Man Mismanagement (London: Hutchinson & Co). (1985)

44 Hunt, J. Managing *People at Work: A Manager"s Guide to Behaviour In*

Organizations (London: Pan). (1981)

45 Dickens, L., "Legal Regulation, Institutions and Industrial Relations", Warwick Papers in Industrial Relations, No 89 (University of Warwick: Industrial Relations Research Unit). (2008)

agencies. In an industrial relations context, there could be objections to local settlements that disregard nationally agreed standards or employment law.[46]

**Kelly's** research on family mediation, however, does not support the view that mediation harms the interest of the weaker party or supports the status quo. She found that minority groups and those with low-educational achievement were positive about their experience of mediation. Moreover, the early concerns of feminist groups who objected on the basis that women would be strongly disadvantaged were not supported by later research that found that men more commonly made complaints about bias in mediation proceedings.[47] The public / private issue is grounded in a concern that the opportunity costs of private collaboration are not weighed against the opportunity costs of public debate. Firstly, there are contexts in which parties will not mediate: one party may perceive it is not in their immediate (or wider) interest to settle; alternatively, a party may perceive a 'jackpot' opportunity that inhibits their willingness to mediate.[48]

Despite Bush and Folger's claims that disputes represent crises in human interaction, rather than conflicts of interest, it remains the case that disputants often construct disputes as conflicts of interest.[49]Underpinning both sets of criticisms is the question of how power should be used and distributed. Are public bodies more 'democratic' than private groups reaching their own agreements? Anyone approaching the question from a perspective favouring direct Participation over representative participation will take a particular view. From this perspective, public agency decisions over-riding local settlements is considered anti-democratic because it is axiomatic that a person should only be bound by a decision in which they participated directly . In contrast, those defending the legitimacy of public authorities will see the enforcement of regional, national or international agreements not only as their right, but also as an expression of a democratic society. This has a direct corollary in employment disputes. Should parties be required to uphold employment laws and rules established by governments, boards of directors and executive groups? What if the laws or local rules are perceived as divisive and disruptive? To what extent should parties be able to make their own agreements according to rules they decide in situ?[50]

**Wilson** explores alternative dispute resolution particularly in the context of family and employment mediation. She compares the process of mediation in the Family Court and Employment Tribunal to provide an insight into the complexities of alternative dispute resolution in present day New Zealand. Wilson first examines the Family Court specifically looking at counseling and mediation in the Family Court. She also considers influences on mediation in the Family Court. She concludes that mediation in the Family Court system is both confused and distorted by the institutionalization of the process. She points out the

46 Golten, M. and Smith, M. Hammers in Search of Nails: Responding to Critics of Collaborative Processes, (undated)

47 Kelly, J. "Family Mediation Research: Is There Empirical Support for the Field?", Conflict Resolution Quarterly, 22, 1-2, 3-35. (2004),

48 Brett, J., Barness, Z. and Goldberg, S. "The Effectiveness of Mediation: An Independant Analysis of Cases Handled by Four Major Service Providers",Negotiation Journal, 12, 259-269. (1996)

49 Bush. R and Folger, J. The Promise of Mediation: Responding to Conflict throughEmpowerment and Recognition (San Francisco: Jossey-Bass). (1994)

50 Ward, C. "The Organization of Anarchy" In L. Krimerman and L. Perry, Patterns of Anarchy, (Garden City, NY: Anchor Books), pp. 386-396. (1966)

problems of power raised by the use of the Court and judges and mediated agreements will need to comply with the preferred outcomes favoured by these brokers of power before receiving legal and moral sanction. She then moves on to discuss mediation in the Employment Tribunal where she argues that many of the distortions in the Family Court have been removed. She provides an introduction to the Employment Tribunal before considering dispute resolution procedures, separation of functions and an assessment of mediation in such a context. She ends with some comparisons between mediation in the Family Court and Employment Tribunal. Unlike in the Family Court mediation in the Employment Tribunal is a process where the parties have a lot more control and flexibility and has the advantage of specialist mediators. She concludes that mediation in both areas is shaped by their basic objectives and moulded into an institutionalised process of dispute resolution within the state legal system.[51]

**Sir Laurence Street** attempts to co-relate the functions of the court system and ADR procedures in the resolution of disputes. Street begins with a discussion of sovereignty and the courts and notes that the judicial institution, with its inherent sovereign quality, cannot be confronted by any alternative mechanism. However, he goes on to note that although it is the responsibility of judges to enforce the rule of law, they should not be obliged to decide every dispute that may arise in society. Street goes on to warn against overtaxing judicial resources and instead suggests that alternative processes be set up to ease their burden and preserve the high standard of the judiciary. Street then considers how arbitration and other consensual processes fit within the judicial institution. He concludes that mediation is a step along the way, but not an alternative step to sovereign judicial power. Street then considers differences between Western and Islamic or Oriental cultures. He concludes that it was the rise in status of Islamic and Oriental nations that ushered in the age of ADR in the west. Street also considers the differences between the mechanisms for resolving domestic disputes and the mechanisms for resolving international commercial disputes. Ultimately Street concludes that ADR processes are not in their essence alternative to the exercise of sovereign judicial power as a means of resolving domestic disputes, nor do they present any threat to the stature and authority of judicial institutions. Rather they should be seen as no more than contractual arrangements chosen by the parties as the way in which they wish to resolve their disputes. He argues that concerns over the role of ADR procedures in domestic disputes should be dispelled and that ADR processes are part of society's overall resources for resolving disputes and should be embraced by lawyers.[52]

**Faulkes** provides an overview of the development of ADR in Australia. She considers many developments including the Pilot Project of 1979, early ADR for specific types of disputes such as discrimination or family and the Conciliation Acts. The development and expansion of the Community Justice Centers, first established in New South Wales, is covered in detail. Faulkes expresses some concern at the low regard with which most people continue to hold ADR. She emphasizes that the Centres were never intended to be just another legal service with a different face. She concludes that it is in the field of community mediation that mediators can gain the best experience to develop and maintain their skills. In a final comment she notes that the development of professional standards is essential for the survival

51 Wilson, Denise, 'Alternative Dispute Resolution' (1992-1995) 7 *Auckland University Law Review* 362

52 Street, Laurence, 'The Court System and Alternative Dispute Resolution Procedures' (1990) vol 1, no 1, ADRJ 5

of ADR and community mediation. However, she considers that a move to a fully "professionalized" service (academic qualifications rather than 28 personal suitability and motivation) would erode the vitality and enthusiasm which have made mediation a success.[53]

**Pengilley** explores the philosophy and need for ADR as well as some key aspects. He begins with an exploration of the historical need for ADR. Next Pengilley considers the track record of ADR and highlights some of its more interesting successes. He then considers the prerequisites for the successful use of ADR techniques, specifically commitment in principle and an appropriate philosophical approach. Pengilley then attempts to define ADR before considering the types of ADR processes which exist. The advantages and disadvantages of ADR are then addressed. Pengilley then examines the role of lawyers in ADR. Finally Pengilley considers the compatibility between ADR and litigation before concluding that ADR is the recognition of a philosophy of compromise when two parties are in dispute.[54]

**McCarthy and Christine** explore the relationship between the theories of alternative dispute resolution its practice particularly in the context of matters litigated in Victoria. It examines various (ADR) and Acts and Regulations dealing with ADR and compares the ADR theory with the mandated action required of litigants. A consideration of some of the case law which has arisen in the context of ADR reveals how litigation affects the attitude of the parties to the ADR process, particularly in regard to concerns of whether reliance can be placed on the assurance of confidentiality when mediation is attempted.
This analysis demonstrates that what occurs when ADR is juxtaposed with litigation may not necessarily accord with the theory of ADR.[55]

**Wills** examines the effectiveness of lying versus telling the truth as a negotiation strategy in a business environment. First she examines whether lying is an effective negotiation strategy. She examines different theorists and justifications for the use of lying in negotiations. She acknowledges that there may be strategic advantages to withholding information but that there is always the risk that the lying will be uncovered. She then moves on to consider whether truthfulness or ethical behaviour is always a good negotiating tactic from an economic point of view. She notes that there will always be those negotiators who disregard ethics and the truth, and who will reap the short-term rewards of lying to the other party. However, they have an uncertain future as it is unlikely that an unethical negotiator will escape public censure indefinitely. It can thus be inferred that the long-term benefits of being honest far outweigh the short-term benefits of making a "quick buck" at the other party's expense. She concludes that when it comes to negotiation strategy refraining from lying is ultimately the safest way to do business. Telling the truth in negotiations may not always be the most expedient tactic but is one crucial to the negotiator's continued economic and moral well-being.[56]

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53 Faulkes, Wendy, 'The Modern Development of Alternative Dispute Resolution in Australia' (1990) vol 1, no 2, ADRJ 61

54 Pengilley, Warren, 'Alternative Dispute Resolution: The Philosophy and the Need' (1990) vol 1, no 2, ADRJ 81

55 McCarthy, Christine, 'Can leopards change their spots? Litigation and its interface with alternative dispute resolution' (2001) vol 12, no 1, ADRJ 35

56 Wills, Michelle, 'The negotiator's ethical and economic dilemma: to lie, or not to lie' (2001) vol 12, no 1, ADRJ 48

**Redfern and Michael** argue that constructive use of time, and the more flexible procedures which flow as a result, mean the mediation process is able to be used more effectively for the long-term interests of the parties and the fuller and fairer handling and resolution of their dispute. The use of time in this way emphasises the essential commerciality and interest-directed approach of the mediation process and thus its greater ability to address and deal effectively with disputes, especially those of a commercial nature.[57]
The main purpose of this North Queensland study was to consider what litigating parties thought about the mediation they had participated in, to contrast these perceptions with what their respective lawyer and mediator thought of the mediation, and to find out whether perceptions of the mediation process were common to all participants. It was thought that this could shed some light on how mediation could be improved and would further raise awareness, in the minds of mediators and lawyers, of the issues that are important to clients.[58]

**Sourdin and Tania** summarize key legislative changes in relation to ADR process referral within court and tribunal systems (primarily in New South Wales). Issues relating to the legislative referral of disputes to ADR processes are also explored, together with issues relating to the role of judges and courts and their relationship with ADR processes. In particular, the role of judges, registrars and tribunal members acting as neutrals in ADR processes is considered, as well as the role that judges and courts have in encouraging or mandating ADR. [59] In choosing a dispute resolution process, the criteria have almost exclusively focused on the type of dispute. In this article the author proposes that the traditional problem based approach to dispute resolution should shift towards a party-focused one. Thus it is vital to prioritise the parties characteristics, particularly the way they deal with conflict, in determining the choice of the most suitable dispute resolution process.[60]

**Redfern and Michael** describe the value to the parties of adopting a diplomatic approach to negotiations whenever it is appropriate. Redfern argues that although giving a concession may involve a loss of a legal right or entitlement, it will often be in the interests of the party to concede this in order to ensure a final resolution of their dispute in their own long term interests and benefit. Although a concession may be unjustified on the merits of the case it may be required in order to breach an impasse, keep the discussion proceeding and reach a final resolution. The mediator must therefore always be prepared to counsel the parties and to look to the overall and final result which may be achieved by taking such steps, especially in situations where there are ongoing relations.[61]

**Meishan Goh, and Gérardine** argue that because the purpose of dispute resolution is to effectively solve the underlying disputes of the parties the problem-based approach of dispute resolution should be discarded for a party-prioritised one. This would require a contemplation

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57 Redfern, Michael, 'Capturing the magic – time as a factor in the mediation process' (2001) vol 12, no 2, ADRJ 98

58 Roebuck, Joanne, 'Mediation in North Queensland: user perceptions – a research report'

(2001) vol 12, no 2, ADRJ 119

59 Sourdin, Tania, 'Legislative referral to alternative dispute resolution processes' (2001) vol 12, no 3, ADRJ 180

60 Meishan Goh, Gérardine, 'Psychometric analysis: The winged seraph in the pandora's box of dispute resolution?' (2002) vol 13, no 2, ADRJ 73

61 Redfern, Michael, 'Capturing the magic: the diplomatic factor' (2002) vol 13, no 2, ADRJ 113

of the parties' needs and preferences using psychometric analysis. This paper catalogues the results of the field study undertaken to determine the utility of psychometric analysis in dispute resolution. A statistical analysis indicated a significant association between psychometric analysis and dispute resolution beyond that expected by coincidence. A psychometric analysis component in the existing dispute resolution system is proposed. In conclusion, it deals with the application of the proposed approach in the Singaporean legal system.[62]

**Simpson** argues that a person with a disability may be disadvantaged in mediation and other ADR processes due to their emphasis on the parties working out an agreed solution. However, it would be simplistic to jump to the conclusion that ADR has little place in disputes involving a person with disability. Rather Simpson argues that a number of features of ADR may make it particularly attractive for people with disabilities and that there are a number of approaches by which the ADR process might be adjusted to avoid a person with a disability being disadvantaged. A number of these strategies are discussed including enabling the person to participate, support and advocacy for that person, the role of other parties and the independent and statutory safeguards. Simpson concludes by noting other issues that must be considered in an ADR case involving a person suffering from disabilities.[63]

**Bagshaw, Dale and Baker, David,** report on a survey conducted by the authors to ascertain the views of the dispute resolution community about issues facing the field, including the need for national collaboration and ways to promote this. A questionnaire was completed in 2000 by a total of 145 dispute resolution practitioners from a range of locations, professions and affiliations in Australia and the findings suggested a need for dispute resolution associations, disciplines and practitioners to put into practice some of the principles they espouse as mediators. Overall it was suggested that, among other things, unnecessary competition among various disciplines, organizations, associations and specialized fields of practice and "petty jealousies between groups" have posed barriers to national cooperation and collaboration in the field of dispute resolution in Australia.[64]

**Crocket** tackles the criticisms that have been made of cross-cultural mediation as an alternative to the courts. She argues that while ADR is not a panacea for all cultural ills there are methods through which an appropriate balance of power can be struck within a given cross-cultural dispute. Crocket discusses the cultural universalism/relativism approach and its application to cross-cultural mediation. She criticizes this approach because of the classification and judgment of other cultures that it inevitably involves. Instead, a new model is offered that combines the aspirations of P S Alder's "multiculturalist" but is rooted in R D Benjamin's notion of the "natural mediator". These enable the mediator to strive for the ideal of multiculturalism while providing the useful framework of the naturalist mediator through which immediate realities can be grasped. Crocket concludes that ADR has a crucial role to play in cross-cultural disputes because it can be flexible enough to meet the particular

62 Meishan Goh, Gérardine, 'Seraph released: psychometric analysis in the Pandora's box of dispute resolution' (2002) vol 13, no 3, ADRJ 179

63 Simpson, Jim, 'Guarded participation: Alternative dispute resolution and people with disabilities' (2003) vol 14, no 1, ADRJ 31

64 Bagshaw, Dale and Baker, David, 'And the cobbler's children have no shoes ... Promoting national collaboration between dispute resolvers in a climate of competition' (2003) vol 14, no 1, ADRJ 57

linguistic and cultural needs of individual disputants and that with this new model, mediators will have a useful tool with which to effectively engage in cross-cultural disputes and meet the challenges of ADR critics.[65]

**Rogers, Margot and Gee, Tony** discuss recent changes in mediation and conciliation with particular emphasis on high conflict families. Traditionally in Australia mediation and conciliation were classified as different interventions available for families, however, more recently there has been a blurring of these boundaries. This has also meant the "quiet" shift of a population of higher conflict clients from the court to the community. Rogers and Gee explore the differences and similarities between mediation and conciliation and the particular problem of high conflict families. They argue that both mediation and conciliation are embedded in a "rational man/mutual interest" model which is unable to effectively deal with high conflict cases. Effective intervention with these families is beyond the boundaries of rational, mutual interest interventions. In high conflict couples, even minimal change requires an increased number of sessions, greater flexibility, structure, and containment. Rogers and Gee then recommend a different approach based on "self-interest" and a greater emphasis on working with the individual.[66]

**Rothfield** provides a case example where although the parties argued the dispute was"just about the money" it became evident it was about something more than just money. The case involved a claim for unfair dismissal in the telecommunications industry. Lawyers represented each of the parties in mediation and insisted the mediation was nothing more than a dispute over money. Rothfield then explains the stages of the mediation from the first joint session to exploring the needs and interests to changing the mediation from rights based to interest based. As these interests were further explored Rothfield discovered that the dispute was not just about the money. Rothfield concludes that the sharing and understanding of the very significant non-monetary parts of the dispute enabled the parties to cooperatively negotiate a settlement of their very significant monetary disagreements.[67]

**Fisher** shares her extensive experience of homosexuality and mediation. She begins by analyzing her approach to practice and assumptions about mediation and homosexual couples. She challenges some commonly held assumptions about mediation and about homosexual men and women, and describes some of the ways in which mediators may be able to assist gay and lesbian partners sort out their separation issues more effectively. These include departures from traditional mediation models and processes. She begins by considering the skills and attributes of a "same sex mediator". Next she considers aspects of mediation practice, like choosing an appropriate mediator and venue, and aspects of the mediation process which also requires flexibility and a focus on the parties' needs. She then considers mediating non-disputes and describes ways in which mediators may be able to assist gay and lesbian partners in the development of commitment, cohabitation and parenting agreements so that later disputes may be avoided. Fisher concludes that working with gay and lesbian partners is both similar to, and different from, working with heterosexual couples.[68]

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65 Crockett, Julia, 'Cross-cultural mediation and the multicultural/natural model' (2003) vol 14, no 4, ADRJ 257

66 Rogers, Margot and Gee, Tony, 'Mediation, conciliation and high conflict families: Dialogue with adead horse' (2003) vol 14, no 4, ADRJ 266

67 Rothfield, Jonathan, 'Is it really just about money?' (2004) vol 15, no 3, ADRJ 188

68 Fisher, Linda , 'Working with gay and lesbian partners – process and practice issues' (2004) vol 15, no 4, ADRJ 273

**Redfern, and Michael,** look at the role the courts might play in future dispute resolution systems where primary importance is placed upon mediation and alternative dispute resolution rather than litigation. Redfern begins by noting that in the future the role of the courts could be limited todealing with those cases which are unable to be dealt with by ADR processes and in all other cases confined to little more than the administration and management of the new processes. He considers the current influence of ADR in pre-litigation and post-litigation procedures but also emphasises the continued need for the courts. Redfern concludes that with the increasing importance of ADR there are real concerns that there is an absence of the valuable controls provided by the courts. Ideally, he argues, the best of both worlds could be obtained by marrying the benefit of the mediation process with the supervisory strengths of the courts. The result would be that mediation processes can be pursued wherever possible, together with the minimal involvement, but nevertheless still critical protective and authorative controls, of the courts and the ready availability of the courts to proceed with their own determinative processes if and when required.[69]

**Bernauer and Amber** critically analyze the prevalence of confidentiality as a basic philosophical tenet of mediation. In particular, it canvasses the contemporary proliferation of statutory and common law principles imposing limitations upon the absolute application of non-disclosure. Bernauer argues that while contemporary limitations imposed upon the privilege of "without prejudice" may be plausible in specific circumstances, doubt may be cast upon the absolute exclusion of confidentiality as a fundamental philosophical underpinning of mediation. Accordingly, in advocating the success of procedures of dispute resolution one must achieve a balance between supporting mediation on one hand, and awarding respect to the traditional justice system on the other. While complex, theaccommodation of such interests in upholding the significance of confidentiality, essentially allows the salutary innovation of mediation to prosper.[70]

**Balstad and Just** utilize existing research and literature to contextualize and describe party satisfaction with different dispute resolution procedures in order to provide a comprehensive view on which expectations are most likely to be met in adversarial negotiation and ADR with third-party intervention (facilitative mediation). Balstad begins by exploring the concept of negotiation within different dispute resolution procedures before comparing and evaluating ADR and adversarial negotiation in terms of party satisfaction. Balstad suggests that all dispute resolution procedures have advantages and disadvantages in terms of how they cater for party satisfaction. Much of the critique of the adversarial process has been rooted in the fact that it is too rigid, expensive and time consuming. However, some claimants prefer adversarial procedures for a variety of reasons. Balstad thus concludes that in principle making an informed and individual choice of dispute resolution process seems to be the best way to ensure the greatest party satisfaction.[71]

**Power and Mary R.** investigate how the concept of negotiation is represented in newspaper stories. Based on a study of the Factiva database Power argues that the way newspapers use the word "negotiation" emphasizes adversarial and "big picture" negotiations rather than the

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69 Redfern, Michael, 'A place for the courts in the dispute resolution process' (2005) vol 16, no 1, ADRJ 79

70 Bernauer, Amber, 'Confidentiality' (2005) vol 16. no 2, ADRJ 135

71 Balstad, Just, 'What do litigants really want? Comparing and evaluating adversarial negotiation and ADR' (2005) vol 16, no 4, ADRJ 244

problem-solving principled negotiations which form a productive part of everyday life, as well as being useful to business people and politicians. Power expresses concern over this "haggling positional" approach reported by journalists and notes that the innovation of interest-based negotiation needs to be more effectively diffused among journalists in order to spread interest in alternative ways of solving problems and conflicts. She then uses the Diffusion of Innovations Model to explain why journalists report negotiations as adversarial. Power concludes that greater awareness by journalists of the range of types and methods of negotiation could ensure that reports would reveal attempts by negotiating parties to use an analytical approach, to commit themselves to a wide exploration of possibilities and to accept outside facilitation which is the hallmarks of principled negotiation.[72]

**Field, Rachael and Brandon, Mieke** in this article the authors have a conversation about some of the practical and theoretical issues for women arising from the introduction in Australia of compulsory family dispute resolution in parenting disputes from July 2007. The authors begin by providing an introduction to the compulsory family dispute resolution scheme in Australia. They consider the positive aspects of mandating family dispute resolution for women parties, along with some of the potential disadvantages and dangers that women might face, particularly when family violence has been perpetrated in the relationship. The authors conclude that training and the development of full and relevant professional mediator ethics are critical to the ongoing growth and maturing of the mediation process, and its appropriate use in a variety of contexts where significant power fluctuations leave one party feeling coerced into a settlement. Ethical decision making on the part of mediators, as to how they use their power and position in the mediation room, must be based on an integration of theory, practice application and reflection in and on practice.[73]

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**Gutman**, Examines the interface between ADR practice and the teaching of ADR in most Australian Universities. The authors begin by presenting the case for teaching ADR at law school followed by an overview of Australian legal education. The article then describes an empirical inquiry conducted at La Trobe Law which investigated the extent to which attitudes of law students changed from an adversarial, rights-based approach towards a collaborative, interests based approach after taking the ADR unit offered to La Trobe Law students in their first year of law school. The authors discuss the results of the study and conclude that teaching ADR to law students is influential in changing their attitudes. The authors conclude that such courses are useful for preparing students for the future focus of Australian contemporary legal practice but warn that the effects may be countered by the rest of their legal education.[74]

**Dickinson** seeks to evaluate negotiation as a dispute resolution process through an examination of non-adversarial theories of negotiation (negotiation characterised by problemsolving, with a focus on the parties' interests). He attempts to address the question of whether principled negotiation is most usefully considered as a theoretical "ideal", as distinct

72Power, Mary R., 'Negotiation in the news: The role of newspaper reporting in the broader social acceptance of principled negotiation' (2006) vol 17, no 1, ADRJ 20

73 Field, Rachael and Brandon, Mieke, 'A conversation about the introduction of compulsory family dispute resolution in Australia: Some positive and negative issues for women' (2007) vol 18, no 1, ADRJ 2

74 Gutman, Judy, Fisher, Tom and Martens, Erika, 'Teaching ADR to Australian law students: Implications for legal practice in Australia' (2008) vol 19, no 1, ADRJ 42

from a sound practical model for negotiations involving legal issues. Dickinson then provides an overview of a variety of different works including Mary Parker Follett (integrative negotiation), Roger Fisher and William Ury with Bruce Patten (principled negotiation), Mnookin, Peppet and Tulumello (problem-solving negotiation) and Menkel-Meadow (problem-solving negotiation). Dickinson argues that models of non-adversarial negotiation may contain several weaknesses. It is submitted, however, that these challenges can be moderated through negotiation training and greater self-awareness and introspection. Dickinson concludes that we can be optimistic that training in non-adversarial negotiation will reduce this evident gap between theory and practice. We can also consider mediation as a vehicle for non-adversarial negotiation approaches through the use of a skilled, neutral third party facilitating the process.[75]

**Fox** explores the role of self-agency in negotiation using examples from the Boston Housing Court. She begins by pointing out that in some cases the primary goals of negotiation (protecting legal rights, producing co-constructed agreements and resolving conflict efficiently) are not achieved. She argues that the key to effective negotiation on one's own behalf is "self-agency" or personal authorisation to act as an agent for oneself. Fox begins by providing an overview of the problem in context and traces the development of ADR primarily in a housing context with a focus on the Boston Housing Court. Fox then moves on to consider self-agency. A model of self-agency and the traditional approach to self-agency are addressed. Next Fox explores self-agency in more detail addressing private expressions and public obstructions. Finally she assesses the ADR and Housing Law Revolutions before concluding that these self-agency problems are common in many areas and at one point or another, most people find themselves negotiating "alone in the hallway." She argues that appreciation for the role of self-agency will clarify the causes of many negotiation breakdowns, as well as suggest new ways to improve negotiators' effectiveness.[76]

**Bordone** explores the developing online world and dispute resolution. Bordone begins with an assessment of what makes cyberspace different before considering the struggle between rights and power on the internet. He then considers the potential of ADR to transform this issue and break the impasse between rights and power. In this part Bordone explores the advantages of an interest-based model and a systems approach to the resolution of conflicts in cyber space. This is followed by an examination of the problems in a systems approach. These include power issues, rights issues, getting the word out and the problem of interface. Finally Bordone includes a detailed proposal for an online dispute resolution system. Bordone concludes that the ADR community needs to involve itself in the growing world of the internet and take advantage of the potential for an integrative and comprehensive online dispute resolution model.[77]

**Winslade, John, Monk, Gerald and Cotter, Alison,** explore a narrative approach to mediation. The authors begin by considering some of the issues which have been raised about problem solving mediation and attempt to stretch the boundaries of problem solving by

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75Dickinson, Mark, 'An evaluation of non-adversarial models of negotiation' (2009) vol 20, no 4, ADRJ 212

76 Fox, Erica L., 'Alone in the Hallway: Challenges to Effective Self-Representation in Negotiation' (1996) vol 1, *Harvard Negotiation Law Review* 85

77 Bordone, Robert C., 'Electronic Online Dispute Resolution: A Systems Approach--Potential, Problems, and a Proposal' (1998) vol 3, *Harvard Negotiation Law Review* 175

applying narrative thinking to mediation. They attempt to demonstrate the usefulness and applicability of the ideas developed by Michael White and David Epston (among others) to the practice of mediation. The authors then seek to demonstrate the potential of narrative mediation. They tell a story about a neighbourhood conflict and, as the story unfolds, explore the role of the mediator from a narrative stance. The authors conclude with a seven-point summary of the features of a narrative approach to mediation.[78]

**Macduff** examines various aspects of negotiation in the context of the Treaty of Waitangi. Macduff begins by pointing out some difficulties in Treaty negotiations which suggest that while the outcomes of the negotiations are clearly important the protection and management of the negotiation process is equally important both in terms of the outcomes and with a view to the ongoing relationship of the negotiating parties. He argues that in this setting as much as in any other, negotiations do not look after themselves and there are clearly special issues that need attention where there are differences in the cultural needs and priorities of the parties. Macduff then examines two key uses of negotiation, the more common settlement of deals or disputes and negotiated rulemaking or "negotiated justice". He notes that in the resolution of disputes and negotiation of claims the tasks are those of developing tools and skills for intercultural dialogue. In the negotiation of rules and policy the issue is that of determining the scope of, and structure for, Maori participation in the setting of those rules and policies. Macduff concludes with three main points. Firstly, that in this area of negotiation more than any other, what is at stake is not simply the issues of economic rationality in the determination of settlement figures, but also, and more importantly, the issue of identity. Secondly, dialogue is of the utmost importance and negotiation is not just about the settlement of narrowly defined claims and conflict, but also about the enduring qualities of the relationship of the parties. Finally, Macduff notes that the principles of negotiation need to be principles of participation, dialogue and commitment to the results. The article ends with questions asked by those attending the conference.[79]

**Wada** considers the power of parties' perceptions of what constitutes compensation in a dispute and the relationship between formality and informality in dispute resolution. First Wada reviews the various arguments as to the relationship between formal and informal dispute resolution within the ADR movement. Various positions on ADR and litigation are considered. He then points out a number of issues which have not been raised or extensively argued in the ADR debate, aiming to take dispute resolution research to new levels. In particular, the issues are revisited from a legal sociological perspective, stressing the views of participants themselves. Wada concludes with the example of traffic accident compensation disputes in Japan. He argues that it is essential to give parties the chance to express their own perceptions, including those as to extralegal problems, and to control their own disputes for themselves. He also argues that if the dispute resolution processes support parties in giving their own meanings to compensation the processes can work much better. In order to achieve this, he concludes, an appropriate combination of formality and informality is required.[80]

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78 Winslade, John, Monk, Gerald and Cotter, Alison, 'A Narrative Approach to the Practice of Mediation' (1998) 14 *Negotiation Journal* 21

79 Macduff, Ian, 'The Role of Negotiation: Negotiated Justice' (1995) 25 *Victoria University of Wellington Law Review* 144

80 Wada, Yoshitaka, 'Merging Formality and Informality in Dispute Resolution' (1997) 27 *Victoria University of Wellington Law Review* 4

## 2.3 Chapter conclusion

Many books and literature have published relating to ADR since it is a faster system of Resolving disputes and it is not affected by jurisdiction like courts of law and their decisions. As a system that is considered of great value to the community writers have published books on the same to encourage its use by the community members in resolving their disputes. The literature review given above is not conclusive, but rather gives the basis of the research as it highlights some of the books relied on by the researcher during the research process.

## CHAPTER THREE

## LEGAL FRAMEWORK GOVERNING ADR IN UGANDA

### 3.0 Introduction

ADR recently has taken center stage as the preferred mode of resolving disputes, especially those of civil 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 center on ligation. Never the less there are a number of legislative provisions on ADR[81].

### 3.1 The Judicature Act Cap 13

This act provides for ADR under courts direction. Section 26[82] "**the court may in accordance with rules of court and report of any question arising in any cause or matter, other than in criminal proceedings. It is further stated that the report of an official or special referee may be adopted wholly or partly by the high court and if so adopted may be enforced as a judgment or order of the high court.**

Under section 27 it is stated that where any cause or matter other than a criminal proceeding all the parties interested who are not under the disability consent. The high court may, at any time order the whole cause or matter or any question of fact arising in it to be tried before a special referee or arbitrator agreed by parties or an official referee ;or an officer of the high court[83]

### 3.2 The Civil Procedure Act (Cap 7) and the Civil Procedure Rules.

Order XII (12) of the civil procedure rules provides for "scheduling conference and alternative dispute resolution "Rule 1 (1) thereof provides that 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"[84]Order 12 rule 2 further highlights courts emphasis on alternative disputes resolution as it states. Where the parties do not reach an agreement under rule 1;;; the court may if it is of the view that the case has good potential for settlement order alternative dispute resolution (ADR) before a member of the bar or the bench named by the court.."[85]

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 exceeding 15 days on application to court showing sufficient reasons for the extension[86]The chief justice may issue directions for better carrying issues directions alternative dispute resolution. 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 the provision with in Uganda civil procedure law[87].Rule 1 (1) of the order provides that " where in any suit all the parties interested who are not under disability agree that any matter indifference between them in the suit shall be referred to arbitration they may at any time before judgment is Ptonouncel apply to the court for an order of reference[88]"Rule 2 of the same order goes on to provide that the arbitrator

81 Judicature Act Arbitration conciliation and mediation by comrade ict
82 Judicature Act Cap 13
83 Section 27 of the judicature ct cap 13
84 Order xii rule 1 of the CPR
85 Order xii rule 2( 1) of the CPR
86 Order xii rule 2(1) of the CPR
87 Order 47 of the civil procured rules cap 71
88 Order 47 rule 1(1) of the CPR

shall be appointed in such manner as May be agreed upon between the parties[89] the statutory provisions themselves focus on the principal basis of arbitration being the maintenance of mutual respect for each other interests between the parties or other words creating consensus on key matters where the parties have opted for arbitration but fail to agree on the arbitrator the court shall appoint one as is provided under order 47 rule of the CPR.

### 3.3 The Arbitration and Conciliation Act (Cap 4) and Mechanisms Regulated By the Act

This regulates the operation of arbitration and conciliation produces as well as the behavior of the arbitrator or conciliator 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 indentation trade (UNCITRAL) model law on international commercial arbitration as well as the UNICITRAL arbitration rules 1976 and UNCITRAL conciliation rules 1976. However it should need that the cat does not provide do the immunity of an arbitrator which is conceived under UNCITRAL model law[90]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[91]Disputing parties are thus obliged to submit to the provision under the act on the basis of an existence of an agreement to arbitration agreement: as it states that: "an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship whether contractual or not,"[92]

The act also provides for the Centre For Arbitration and Dispute Resolution (CADER) as a statutory institutional alternative resolution provides'[93]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 absence of an appropriate control system as well as a general oversight over arbitration especially with respect to the fees charged?[94]The arbitration and conciliation act is thus instrumental three major objectives.

Ensuring realization of the goal of increased party autonomy and provision of appropriate and user,- friendly rules of procedure[95]
Creating of an adaptable frame work for arbitration tribunal to operate under as well as other default methods in the absence of the parities own agreement.
The advancement of equality and fairness in the whole process. It ison these three case objectives that CADER was established[96]

The arbitration and conciliation act (as amended) further goes ahead to create equilibrium between legal practitioners and foster a positive judicial attitude towards arbitration. Increased powers are granted to the arbitral tribunal and there is an open window within

89 Order 47 rule 1(1) of the CPR
90Arbitration , conciliation and mediation in Uganda by Anthony Conrad. K. Kakooza
91 Section 5 of the arbitration and conciliation act
92 Section 2(1) of the arbitration and conciliation act
93 Section 67 of the arbitration conciliation
94SempasVentre Arbitration And The New Legislative Foundation On Adr, Uganda Living 1w Journal Vol. 1 No 1 June 2003at P981at 86
95 Arbitration, Conciliation And Mediation In Uganda A Focus On The Practical Aspects By Anthony Condrad. K
96 Part 5 Of The Arbitration And Conciliation Act.

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[97].

Part v of the arbitration and conciliation act provided for conciliation as a form of alternative dispute resolution and under section 48 it is provided for that... this part shall apply to the conciliation of disputes arising out of a legal relationship, whether contractual or not and to all proceedings of the award.

### 3.3.1 Arbitration.

This is Procedure whereby parties in dispute on refer the issue to a third party for resolution and agree to be bound by the resulting decision rather than taking the decision to ordinary courses of law.[98] The third party is an intermediate who is neutral and trained in the techniques of ADR Internationally, Arbitration has been the most favorable method for settlement of commercial disputes for hundreds of years, its value is reorganized by the courts and it is governed by states which employ arbitrators and regulates the process. More recently in Uganda, arbitration has become a common method of resolving commercial disputes and other forms of disputes, under section 5 of the arbitration and conciliation Act is to the effect that a judge or magistrate before whom proceedings are being brought in a matter which is the subject of an arbitration agreement shall, if the party so applies after the filing of a statement of defence and both parties having been given hearing, refine the matter back to the arbitration. The section was applied in the case **East Africa Development Bank Vs. Zziwa Horticultural [Exporters' ltd[99]]**Section 6(present S.5) of the arbitration and conciliation act, provide for mandatory reference arbitration of matters before court which are subject, to an arbitration agreement where court is satisfied that arbitration agreements is valid, operative and capable of being performed. It may exercise its discretion and refer the matter to arbitration

However in arbitration, the intention of parties is paramount as stated in **Farmland industries Ltd V global Exports limited]**[100] it was held that "it was a duty of court in arbitration proceedings to a 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.

### 3.3.2 Arbitration and jurisdiction of high court

The question whether arbitration quots the jurisdiction of the high court enshrined under article 139 of the 1995 constitution. This article is to the effect that ***[the high court shall have unlimited original jurisdiction in all matters and such appellate']***

Many lawyers, scholar have argued that section 5 of the arbitration and conciliation act that confer powers to the judges to refer a matter that is a subjected of n arbitration agreement to arbitration and the matter is pending in the court to oust the unlimited jurisdiction of the high court under article 39.

97 See Section 5,6,9,16(6) 17(13), 27,34, 35, 38, 40, 43, 46, 47, 59 And 71.
98 Arbitration, Conciliation And Mediation In Uganda A Focus On The Practical Aspect
99 High Court In Application No 12048of 2000
100 Supreme Court Civil Appeal No 49 Of 1995

**Justice Okumuwengi in East African Development Bank V Zziwa Horticultural Exports**[101] asserts that section 5 of the Arbitration and Conciliation Act seems to amount to an outer of the inherent jurisdiction of the court as to states "firstly, it appears to make arbitration and conciliation procedures mutually exclusive from court proceedings as for instance to divorce or restrict alternative dispute resolution mechanisms 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 proceeding. Thirdly it leads to greatly curtail the courts inherent power which is fundamental in judicature. By so doing the judiciary is easily emasculated power in granting and issuing prerogative orders of mandamus and certioraris is not addressed if not sidelined clearly, empowering people to adjudicate their own disputes need not to 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 arbitration and conciliation act actually gives cognizance of the high court's overall unlimited but never the less orchestrates the methodology of such jurisdiction.

The provision in section 9[102] with due respect does not necessarily mean that 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 was portrayed in **oil seeds (Uganda) limited V Uganda development banks karokorajsc stated that"** the court has jurisdiction to interfere with the arbitrators award if it is found to be necessary in the interest of justice he further relied on the persuasive authority of **Rashid moledina and co (Mombasa) limited and Ors Vs Hoima Ginneries limited**[103] in the question whether or not having regard to the arbitration award the high court held had powers to set aside remit the award, the court of appeal for east Africa held that although in the case before it, there were sufficient facts to support the award, never the less the court went ahead to say;

***(court 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 arbitration in arriving at their decision have done so a wrong understanding or interpretation of law")***

In cases where there is an arbitration clause in contracts, courts have been in sending the parties to arbitration as the best forum since they agreed through their contract to settle their disputes by arbitration before proceeding to court. In **home insurance Vs mentor insurance**[104]. It was stated by 1parker, LJ "in cases where there is an arbitration clause it is my more necessary that full scale argument should not be permitted. The parties have agreed on their chosen tribunal and defendant is entitled, prema facie, to have the dispute decided by the tribunal in the first instance1 to be free from intervention of the courts until it has been so decided."This rule was applied by **Justice Tsekoko JSC** in **shell (U) Limited Vs Agip (U) Limited**[105]Where he stated that "*it is now trite law that where parties have voluntary chosen by voluntary chosen agreement the forum for resolution of the dispute, one party can only relle for a good reason."*

101 'Except As Provided For In This Act No, Court Shall Intervine In Matter Governed By This Act.
102 Supreme Court Civil Appeal No 203 Of 1995.
103 (1967) EA 645
104 (1989)3aller 74 Page 98
105 Supreme Court Civil Appeal No.49 Of (1995) Unreported

The Arbitration And Conciliation Act seeks to ensure respect and adherence towards arbitration award. An arbitration award can only be set aside by grounds stated under section 34 of the A.C. A. otherwise the entire process of arbitration would be useless if it was easy to set out arbitration awards. A party to an agreement containing an arbitration clause cannot turn round and deny its existent. In **Fulgensius Mangereza Vs Price Water Cooper Africa central**[106] the case the appellant was appealing, inertia against the lower court's decision to say proceeding on which the basis of the existing mediation and arbitration clause in a frame work 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 to show good reason.*** "The trial judge was justified to order stay of proceedings The trial stay of steps in arbitration re mentioned under the A.C.A.

### 3.3.3 Conciliation

Conciliation is the process by which one or more independent person selected by the parties to an agreement[107] generally by mutual consent, either at the time of making the agreement or subsequently when a dispute has arisen between them, to bring about a settlement of their dispute through consensus between the parties by employing various persuasive and other similar techniques. The source does not differentiate between conciliation and mediation but rather status that conciliation can also be referred to as mediation. However mediation and conciliation may be technically and legally different in some ways but justice kiryabwire argues that mediation and conciliation are being merged into one single concept generally called "meditation" because of their similarity in substance[108].

The learned justice Kiryabwire goes ahead to give the similarities between the mechanisms1one being both involve a neutral third party whose role is to help the disputing parties reach an agreed settlement secondly in both the agreement is reached through a process of causing where y the neutral holds a series of meetings with the parties in dispute either together or on an isolate basis and in this way the differences are either narrowed or and eventually resolved Other writers[109].Other writers argue that conciliation and mediation have a slight difference in that the conciliators possess expert knowledge of the domain in which they conciliate. Conciliators may also use their role to actively encourage the parties to come to a resolution. In certain types of dispute the conciliators have a duty to provide legal information. This helps ensure that agreements comply with relevant statutory frame work.

The conciliation process can be commenced by either party to the dispute, when one party invite the other party for resolution of their dispute through conciliation, the conciliation proceedings are said to have been initiated. When the other party accepts the imitation, the conciliation proceedings commence. If the other party rejects the invitation, where there are no conciliation proceedings for the resolution of that dispute. The sole conciliator is appointed to resolve the dispute between the parties by mutual consent. If the parties fail to arrive at a mutual agreement, they can enlist the support of any international or national institution for appointment of a conciliator[110]

106 Court of appeal civil appeal no 34 of 2001
107 Paper written following a unitary sub regional workshop arbitration and dispute resolution (Harare Zimbabwe 11 to 15 Sept 2001)document no 4
108ADR. A Ugandan judicial perspective a paper delivered at a continuation
109 Supra
110 A Ugandan judicial perspective a paper delivered at a continuation

There is no bar to the appointment of two conciliation proceedings with three conciliators each party appoints one conciliator. The third conciliator is appointed by the parties by mutual consent. Unlike arbitration where the third arbitrator is not termed as the presiding conciliator. He is just third conciliator. The councilor is supposed to be imperial and conduct the conciliation proceedings in an impartial manner. He is guided by the principles of objectivity, fairness and justice and by the usage of the trade concerned and the circumstances surrounding the dispute[111]. Including any business practices between the parties. The conciliator does not give any award or order, the tries to bring an agreement as the dispute between the parties by mutual consent[112]. The agreement so arrived at between the parties is signed by the parties and authenticated by the conciliator. If no consensus could be arrived at between the parties and the conciliation proceeding fail, the parties can resort to arbitration. The above mentioned rues of conciliation are well elaborated in the chapter 4 of the act

### 3.4 The Land Act (Cap 227)

ADR and administration of justice can be better appreciated through the practice of land law in Uganda. Traditionally elders have always played a key role of mediators over land dispute as oppose to such matters being appreciated 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 the reconciling their differences. **Sections 89 and 88** of land Act provides for customary dispute settlement and mediation as well as the functions of the mediator. Approximately 75% of land in Uganda is categorizes under the customary tenure system, thus it is only appropriated that the statutory law provisions should stipulate for a combination of customary system of settling disputes together with the modern mediation strategies[113]

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 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**. Dispute through court annexed mediation. A case study form Uganda he states that; Mediation as a dispute mechanism is not all together new in traditional Uganda and African society. There has for centuries been a customary mediation mechanism, using elders as conciliators1mediators in disputes using procedures acceptable to the local community by which were not as formal as those found in the courts."[114]Significantly, where a lan l tribunal adjudicating our 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[115]

Section 89 provides guidance on the basis of which the selection and function of a mediator follow, it provides that the mediator should be acceptable by parties, should be a person of

111 ADR. A Ugandan judicial perspective a paper delivered at a continuation
112 Ibid
113 A.C.K kakooza land dispute settlement in Uganda: exploring the efficacy of the mediation option Uganda living journal vii 5 june 2007
114 A paper given to the global corporate governance forum on mediating corporate governance dispute
115 Section 88(2) land act cap 227

high moral character and proven integrity not subject to control of any of the parties involves both. Parties in the mediation process and should be guided by the principles of natural justice, general principles of mediation and the desirability of assisting the parties to reconcile their difference[116].

### 3.5 Mediation and The Judicature (Mediation) Rules 2013

Mediation As used in law is a form of Alternative Disputes Resolution (ADR) a way of resolving disputes between two or more parties with concrete effects. Typically, a third party, the mediated assists the parties to negotiate a settlement disputant may mediate disputes in a variety of domains, such as commercial, legal diplomatic work pace, community and family matter[117]Mediation is also defined as the interaction between two or more parties who may be disputants, negotiators or interacting parties whose relationship could be improved by the mediators' intervention. Under different circumstances (determinants of mediation) the parties or disputants decide from a number of available approaches and is influenced by various factors, such as environment, mediators training disputants. Characteristics and nature of their conflicts[118]Mediation aims to assist the disputing parties in reaching an agreement. Whether an agreement result or not and whether the content that agreement, if any the parties themselves determine the results as opposed to something imposed by a third party[119].In Uganda today there is what is referred to as court-annexed mediation. Whereby the law mandates court to refer every civil action for mediation before proceeding trials[120]In the next chapter it will be analyzing the effectiveness and success of the court bases mediation and its role in reducing case backlog inUganda.

Mediation has been made mandatory for all litigants by virtue of section 4 of the rules[121]which is to the effect that "*the court shall refer every civil action for mediation before proceeding for trial.* The Act under section 8 gives 60 day within which a mediation proceeding has to be concluded and under section 14 an adjournment fee of 100000sh is slapped on a party who fails to attend a mediation proceeding. This has led to the rise of court based ADR in Uganda as the process has been extended to the court of appeal.The parties' refusal or reluctance to attend to mediation may drastically turn the case against such even before the takes off. As stated by lord justice broke **Dunnet V Railtrack(20O2)**[122] that parties which turn down a suggestion of ADR by court 'may face un comfortable consequences"

Similarly in **SS enterprises ltd and Anor V Uganda Revenue Authority** (unreported)[123] counsel for the (URA) argued that only the Board of director of the URA had the powers to settle a case via mediation so it was not possible for URA to submit to mediation. Justice kiryabwire held that internal institutional processes were not a good reason to avoid mediation must be legal or procedural in nature.

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116 section 89 of the land act
117 Alternative dispute resolution (study pack) volume 1
118Swall et al. 2001:3:370 in ramine 2 a conceptual map of land conflict management.
119 http:www.ug.org/mediation-definition. html.
120 The judicature (mediation) rules 2013 (section 4)
121 Judicature (mediation)rules.
122 Cited by John lang: should warring parties be forced to mediate" the lawyer,23feb 2004.
123 Supra

## 3.6 COMMISSION OF INQUIRY

The institution of setting up commission of inquiry originated in the Hague convention of 1899 and 1907. It is specific purpose is to elucidate the facts behind a dispute in order to facilitate a settlement. It does not involve the application of rules. A commission of inquiry can also be defined as a formally constituted body of people who are usually well thought of in the community. A commission of inquiry can also be said to be a high breed of the judicial and administrative limb of the state, it is judicial in the sense that its findings can directly affect the reputation of a person though it is not a court of law as it cannot give a binding verdict.[124] A commission of inquiry is a unique tool in the hands of government for collection of information without the use of police and other coercive investigation and methodologies.The commission of inquiry has attracted a high acceptability amongst the public because of the a large public participation.

### 3.6.1 `Powers of the commission of inquiry.

It possesses certain powers of court. The commission of inquiry summons people and enforces the attendance of witnesses and Arbitration and conciliation act examining them on oath. The commission has the power to detain people who fail to abide by their rules.[125]
Power of investigation search and ceasure[126]
Nature of the proceeding before a commission shall be demined to the judicial proceeding.[127]
Protection of witnesses from prosecution. Persons giving evidence before the commission except for pergery.[128]

Commission of inquiry in Uganda is regulated by the commission of inquiry act which state the duties and powers of the commission.

Currently the commission of inquiry is used in the investigation and pobing of land, matters in Uganda. The commission is chaired by Catherine Bumugemererire, justice of the court of appeal.

The commissioners are Owekitiibwa Robert Ssebunya, Mrs. Mary OdukaOchan, Mrs Joyce Gunze Habaasa, Dr. Rose Nakayi Mr. Fredrick Ruhindi and Mr. George BayonzaTinkamanyire.

The commission of injury that was appointed in December 8, 2016 and Sworn in February 19 of 2017 was given a responsibility of inquiring into registration the effectiveness of law, politics and processes of land. Acquisition, land administration, land management and land registration in Uganda.

### 3.6.2 Mandate of the commission

1. Investigate and inquire into the law, process and procedures by which land is administrated and registered in Uganda.

124 Class notes 2018 KIU by madam Maingi Victory
125 ibid
126 ibid
127 ibid
128 ibid

2. Investigate and inquire into the role and effectiveness of the Uganda land commission (ULC) in administering public and the land fund.

3. Investigate inquire and review the effectiveness of the relevant bodies in the preservation of wetland forest and game reserve and examine ways in which the challenges of human habitation in those areas can be resolved.

4. To assess the legal and policy frame work on the government land acquisition.

5. To identify the legal inquire into the effectives of the dispute resolution mechanisms available to persons involved in land disputes.

6. To inquiries into other matter connected with or incidental to the matter afore said and make recommendation.

7. The commission shall make recommendations: (a)For improving the efficiency and effectiveness of the policies and processes of land acquisition, land administration, land management and land registration in Uganda and proposing necessary reforms.

The commission of inquiring as an ADR mechanism was also used in the inquiry into the National roads Authority (UNRA) which in its recommendation of May 2016 report recommended the prosecution of more than 90 public officials.

However the government does not perform the recommendations of the commission of inquiry but they ignore for example the 90 public officials that the commission of inquiry into the Uganda wildlife authority led y

Professor George. W. Kanyeihamba, the 2002 commission of inquiry into corruption in the Uganda Revenue authority (URA) led by justice Julia Sebutinde and the 2011 justice sebutinde led commission of inquiry into corruption in police

Therefore if governments consider the recommendations' of the different commissions of inquiry disputes may be dissolved and avoided by the findings of the different commission of inquiry.The effectiveness of the commission of inquiry shall be discussed in the next chapter.

### 3.7 ADR and its Impact on reducing case backlog in Uganda.

Civil procedure reforms of the civil procedure rules [CPR] were last done in 1998 with introduction of the civil procedure Rules 1998 S1 number 16 of 1998 following the Woolf reforms in the UK and recommendation of Hon Justice Platt commission in Uganda. The reforms followed key findings by Lord Woolf that the civil justice system in UK was slow, too costly and too complex, it was therefore recommended that Rules be made in with a view of securing that;

The civil justice system is accessible, fair and efficient
The rules are both simple and simply expressed.[129]
In the Ugandan context amendments were proposed and were made affecting substantially the CPR by the introduction of a new procedure known as;

129Paper delivered by John O.E Aretu deputy registrar mediatin commercial court during the JLOS case backlog review conference

A scheduling conference.
Alternative disputes resolution [ADR[130]]

In the 2003 the commercial court launched a two year pilot project to introduce compulsory Court annexed mediation at the commercial court. This was done by the enactment of the Commercial Court Division [mediation pilot project] Rules 2003.[131]The effect of the Pilot Rules was to make mediation an integral part of the commercial court case administration system[132]
After the pilot period new Rules were promulgated the Judicature [commercial court division] Rules 2007.[133] The objective for introducing these rules was to assist in the efficient and effective disputes resolution and disposal of cases at the commercial court. Under these Rules mediation became a permanent feature of the commercial court process and the court became a mult-door court house where mediation was to be attempted by the parties before a case could be fixed for hearing.[134]

The process of mediation its self was conducted by the Centre For Arbitration and Disputes Resolution [CADER] however this arrangement collapsed after the finding dried up. There after the court assigned one Acting assistant registrar to provide mediation service in court and despile his good performance the court needs to improve on its service to cope with increased demand for mediation not only in commercial court but in all other court in the land.[135]

In 2010 it was evident that the commercial court had achieved its objectives and the process had developed some of the best practice of court annexed mediation on the African continent. By 31 December, 2012 the successful completion rate of all case referred to court stood at 26%. [136]

Riding on the back of the succession, the judiciary decided that time was ripe enough for the rolling out of the best practice of mediation to all court after two years of rigor work the draft rules have now been passed into law and are cited as the Judicature (mediation) Rules 2013.[137] Through these rules mediation is now mandatory in all civil cases. Mediation has rolled out all the court through country wide sensitization and posting of mediators at the courts.[138]The success rate for cases that go through ADR is 55% and the court of appeal has successfully resolved 100 appeals through appellate mediation. The challenges are now providing mediator facilities and continuous capacity building programs for court annexed mediation.[139]Notwithstanding the achievement a monitoring and evaluation exercise by the mediation committee in 2016 identified number of challenges including;

Land matters often require focus yet the mediators lack funding to travel to the village to meet with the communities
High failure rates caused by negative perceptions of mediation from the public and lawyers.
A lack of skilled staff to manage the register in some courts

130 Ibid
131 S.I No 55 of 2007
132 Case backlog reduction committee report (2017)
133 SI No.55 of 2007
134 Case backlog reduction committee report 2017
135 A Paper presented to the 3rd magistrates and Registrars comference in 2012 by John Ochepa ; Regisrar Mediation
136 Case backlog reduction committee report 2017
137 IBID
138 See Rule 4 0f the Judicature (mediation) Rules 2013
139 case backlog reduction committee report 2017

Some advocates don't file mediation summaries and delay during mediation.
Some courts are faced with language barriers and lack funds to pay interpreters
Some wrong procedures were being used in registers and mediation file were being mixed with court files.
Some station had not seen or heard about the Judicature [mediation] rules 2013
There was limited space to conduct mediation especially court up country
There is negative perspective by advocates and the public towards mediation many advocate prefer litigation because they feel that they will not earn enough money through mediation.
According to the annual report of commercial court division mediation registration in 2013 had an overall work loads of 623 constituting 468 file cases in the same year and 155 cases brought forward from 2012.[140] Out of these 383 cases were finalized which is a disposal rate of 60.7%. This however dropped from 73.15% percent that had been registered throughout the previous year. This was attributed to the small number of accredited mediators.[141]

Meditation is a time saving initiative which allows judicial officer time to handle causes which are ordinarily not agreeable to tradition. This substantially increases the productivity of court. Most importantly, Satisfaction and confidence of court users in in justice system is enhanced with commitment to render justice to all manners of people through timely adjustification of disputes without discrimination.[142]

The judiciary established the center for Arbitration and dispute resolution of CADER which has let to implementation of the mediation pilot basis by commercial court where 33% of the referred cases were successfully mediated pilot by 2014.[143]
This means that the mediation pilot has contributed to the reduction of case backlog in Uganda's judiciary.

In 2017 the judiciary cleared a record of 175,000 cases the Chief Justice Bart Katurebe said the high number of cases disposed of has reduced the total number of backlogged causes to 25% from the 32% cases they had in system.in 2015 court censes revealed that the judiciary had backlog of 11,474 cases.
The Chief Justice attributed this Performance to the increased use of alternative dispute resolution in civil cases and plea bargaining in criminal cases which ensured timely adjudication of cases.[144]

**Conclusion.**

There are a number of law that have been enacted to favor court annexed ADR so as to facilitate faster resolution of disputes in the judiciary in Uganda. Mediation has since been made mandatory in all Civil matters commenced in all Courts in Uganda by virtue of Rule 4 of the Judicature (Mediation Rules) of 2013 in that parties are allowed time by court to Mediate their dispute and oif they agree to settle it by Mediation then a consent judgment is entered by court, since the introduction of these Rules many cases have been Mediated as seen above hence reducing case backlog. The system may be more helpful if more mediators are trained as the researcher recommends at the jurat of this paper.

140 Daily monitor Tuesday march 11 2014
141 Acting Chief Justice Steven Kavuma during the weeklong training of judicial officers in kampala([daily monitor march 11, 2014].
142 Justice David Wangutsi, the head of high court commercial division on said during a week along training of judicial officers in Kampala [Daily monitor march 11 2014].
143 Acting justice kavumasteven during the week long training of judicial officers in kila [Daily monitor march 11 2014
144 The chief Justice Speech at the Openig of the new law year at the high court( New vision 29/JANUARY/2018)(www.newvision.co.ug)

## CHAPTER FOUR

## INTERNATIONAL BEST PRACTICES OF ALTERNATIVE DISPUTE RESOLUTION.

### 4.0 Introduction

This chapter establishes the use of ADR by different states to reduce backlog in their judicial system. In East Africa the researcher put focus on how ADR is applied in Kenya and Tanzania and on the continental view Nigeria, Ghana and South Africa were considered since the Notion of Court Annexed ADR is believed to have commenced in those countries in Africa.

### 4.1 Regional Overview

### Kenya

### Introduction

Before the advent of the current Constitution of Kenya 2010, justice was perceived to be a privilege reserved for a select few who had the financial ability to seek the services of the formal institutions of justice. This is because in the past litigation has been the major conflict management channel widely recognized under our laws as a means to accessing justice. Litigation however did not and still does not guarantee fair administration of justice due to a number of factors. Courts in Kenya and even elsewhere in the world have encountered a number of problems related to access to justice. These include high court fees, geographical location, complexity of rules and procedure and the use of legalese.[145]

The court's role is also 'dependent on the limitations of civil procedure, and on the litigious courses taken by the parties themselves'.[146] Conflict management through litigation can take years before the parties can get justice in their matters due to the formality and resource limitations placed on the legal system by competing fiscal constraints and public demands for justice. Litigation is so slow and too expensive and it may at times lose the commercial and practical credibility necessary in the corporate world.[147] Litigation should however not be entirely condemned as it comes in handy for instance where an expeditious remedy in the form of an injunction is necessary. Criminal justice may also be achieved through litigation especially where the cases involved are very serious. Litigation is associated with the following advantages: the process is open, transparent and public; it is based on the strict, uniform compliance with the law of the land; determination is final and binding (subject possibly to appeal to a higher court).[148] However, there are also many

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145 *Strengthening Judicial Reform in Kenya: Public Perceptions and Proposals on the Judiciary in the new Constitution*, ICJ Kenya, Vol. III, May, 2002; See also Kariuki Muigua, *Avoiding Litigation through the Employment of Alternative Dispute Resolution*, pp 6-7, a Paper presented by the author at the In-House Legal Counsel, Marcus Evans Conference at the Tribe Village Market Hotel, Kenya on 8th & 9th March, 2012.
Available at http://www.chuitech.com/kmco/attachments/article/101/Avoiding.pdf

146 Jackton B. Ojwang, "The Role of the Judiciary in Promoting Environmental Compliance and Sustainable

147 Patricia Kameri Mbote et al., *Kenya: Justice Sector and the Rule of Law*, Discussion Paper, A review by AfriMAP and the Open Society Initiative for Eastern Africa, March 2011,

148 Chartered Institute of Arbitrators, Litigation: Dispute Resolution, Available at http://www.ciarb.org/dispute-resolution/resolving-a-dispute/litigation A

shortcomings associated with litigation so that it should not be the only means of access to justice. Some of these have been highlighted above. Litigation is not a process of solving problems; it is a process of winning arguments.[149]As recognition of the above challenges associated with litigation, the Constitution under article 159 now provides that alternative forms of dispute resolution including reconciliation, mediation, arbitration and Traditional Dispute Resolution Mechanisms shall be promoted as long as that they do not contravene the Bill of Rights and are not repugnant to justice or inconsistent with the Constitution or any written law.[150]

Globally, the role of alternative dispute resolution mechanisms in the management of a range of conflicts has been noted over time. [151] Courts can only deal with a fraction of all the disputes that take place in society. Courts have had to deal with an overwhelming number of cases and as one author notes 'one reason the courts have become overburdened is that parties are increasingly turning to the courts for relief from a range of personal distresses and anxieties. Remedies for personal wrongs that once were considered the responsibility of institutions other than the courts are now boldly asserted as legal "entitlements." The courts have been expected to fill the void created by the decline of church, family, and neighborhood unity'.[152]Regionally most African countries still hold onto customary laws under which the application of traditional dispute resolution mechanisms is common. It has been observed that throughout Africa the traditions have since time immemorial emphasized harmony/togetherness over individual interests and humanness expressed in terms such as *Ubuntu* in South Africa and *Utu* in East Africa. Such values have contributed to social harmony in African societies and have been innovatively incorporated into formal justice systems in the resolution of conflicts.[153]Another author confirms that access to justice has always been one of the fundamental pillars of many African societies. He notes that 'Igbo justice is practised in land matters, inheritance issues, socio-communal development strategies, interpersonal relationships and sundry avenues'.[154]

Thus, the recognition given to traditional dispute resolution mechanisms in the said Article 159 (2) (c) of the Constitution is thus a restatement of customary jurisprudence.[155]

Under their constitution, there however exists a qualification for the application of Traditional Dispute Resolution mechanisms in that they must not be applied in a way that contravenes the Bill of Rights. For instance, they must not lead to outcomes that are gender-

149 Advantages & Disadvantages of Traditional Adversarial Litigation, Available at http://www.beckerlegalgroup.com/a-d- traditional-litigation A

151 Kariuki Muigua, *Traditional Dispute Resolution Mechanisms under Article 159 of the Constitution of Kenya 2010*, page 2. Available athttp://www.chuitech.com/kmco/attachments/article/111/Paper%FINAL.pdf; See also Sunday E. N. Ebaye, The relevance of arbitration in international relations, *Basic Research Journal of Social and Political Sciences* Vol. 1(3) pp. 51-56, November 2012 Available at http//www.basicresearchjournals.org

152 Marc Galanter, 'Reading the Landscape of Disputes: What We Know and Don't Know (And Think We Know) About Our Allegedly Contentious and Litigious Society', page 2, 31 *UCLA L. Review.* 4, October 1983, Available at http://www.marcgalanter.net/Documents/papers/ReadingtheLandscapeofDisputes.pdf A

153 Mkangi K, *Indigenous Social Mechanism of Conflict Resolution in Kenya: A Contexualised Paradigm for Examining Conflict in Africa*, Available at www.payson.tulane.edu,

154 Ikenga K. E. Oraegbunam, The Principles and Practice of Justice in Traditional Igbo Jurisprudence, *African Journal Online,* page 53,

155 ibid

biased or act as barriers to accessing justice. They must also not be repugnant to justice and morality or result in outcomes that are repugnant to justice or morality.[156]

Justice and morality are however not defined in the Constitution and therefore it would be difficult to ascertain when a mechanism is repugnant to justice and morality. Alternative and Traditional dispute resolution mechanisms must also not be used in a way that is inconsistent with the constitution or any written law.[157]

If ADR mechanisms could be applied in a way that conforms to International Human Rights standards they can play a major role in the management of disputes. ADR mechanisms focus on the interests and needs of the parties to the conflict as opposed to positions, which approach is contrary to the formal common law and statutory law practices.[158]These are capable of ensuring that justice is done to all by addressing the concerns of the poor and vulnerable in the society through legally recognized but more effective means.

**Mechanisms of ADR that are Practiced in Kenya and not practiced in Uganda**

**Med-Arb**

Med-Arb is a combination of mediation and arbitration. It is a combination of mediation and arbitration where the parties agree to mediate but if that fails to achieve a settlement the dispute is referred to arbitration. It is best to have different persons mediate and arbitrate. This is because the person mediating becomes privy to confidential information during the mediation process and may be biased if he transforms himself into an arbitrator.

Med-Arb can be successfully be employed where the parties are looking for a final and binding decision but would like the opportunity to first discuss the issues involved in the dispute with the other party with the understanding that some or all of the issues may be settled prior to going into the arbitration process, with the assistance of a trained and experienced mediator.[159]

Elsewhere, the courts have held, the success of the hybrid mediation/arbitration process depends on the efficacy of the consent to the process entered into by the parties.[160]

**Arb-med**

This is where parties start with arbitration and thereafter opt to resolve the dispute through mediation. It is best to have different persons mediate and arbitrate. This is because a person arbitrating may have made up his mind who is the successful party and thus be

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156 Article159(3) ot he Constitution2010

157 Repugnancy and morality qualification clauses were seen as obstacles put in place by the British colonial Law makers to undermine the legitimacy of the African customary laws. See also s. 3(2), *Judicature Act*, Cap 8, Laws of Kenya. Though there are certain aspects of customary laws that do not conform to human rights standards, the subjection of customary laws to the repugnancy clause has been used by courts to undermine the efficacy of these laws. See Kariuki Muigua, *Traditional Dispute Resolution Mechanisms under Article 159 of the Constitution of Kenya 2010*, Op cit. page 5

158 See Roger Fisher, William Ury & Bruce Patton, *Getting to Yes-Negotiating Agreement Without Giving in*, (3rd Ed. (Penguin Books, United States of America, 2011) p.42

159 Mediation-Arbitration (Med-Arb),
Available at http://www.constructiondisputes-cdrs.com/about%20MEDIATION-ARBITRATION.htm A

160 Edna Sussman, Developing an Effective Med-Arb/Arb-Med Process, *NYSBA New York Dispute Resolution Lawyer*, Spring 2009, Vol. 2, No. 1, page 73,
Available at http://www.sussmanadr.com/docs/Med%20arb%PDF.pdf A

biased during the mediation process if he transforms himself into a mediator. For instance in the Chinese case of ***Gao Hai Yan & Another v Keeneye Holdings Ltd & Others*** **[2011] HKEC 514 and [2011] HKEC 1626 ("Keeneye"),** the Hong Kong Court of First Instance refused enforcement of an arbitral award made in mainland China on public policy grounds. The court held that the conduct of the arbitrators turned mediators in the case would "cause a fair-minded observer to apprehend a real risk of bias".[161]

Although the decision not to enforce the award was later reversed, the Court of Appeal did not have a problem with the observation on risks involved but with the particular details of that case where the parties were deemed to have waived their right to choose a new third party in the matter.[162]

**Adjudication**

Adjudication is defined under the CIArb (K) Adjudication Rules as the dispute settlement mechanism where an impartial, third-party neutral person known as adjudicator makes a fair, rapid and inexpensive decision on a given dispute arising under a construction contract. Adjudication is an informal process, operating under very tight time scales (the adjudicator is supposed to reach a decision within 28 days or the period stated in the contract), flexible and inexpensive process; which allows the power imbalance in relationships to be dealt with so that weaker sub-contractors have a clear route to deal with more powerful contractors. The decision of the adjudicator is binding unless the matter is referred to arbitration or litigation. Adjudication is thus effective in simple construction dispute that need to be settled within some very strict time schedules.

The demerits of adjudication are that it is not suitable to non-construction disputes; the choice of the arbitrator is also crucial as his decision is binding and that it does not enhance relationships between the parties.[163]

**4.2 Continental over View:**

**NIGERIA**

Arbitration and Alternative Dispute Resolution (ADR) are not imported mechanisms in Nigeria. Litigation is the imported mechanism. Traditionally in Nigeria like most of Africa disputes were traditionally resolved through Arbitration and ADR.[164]

Indeed customary law arbitration and ADR remains part of the Nigerian Legal System. In the case **of Oparaji vs. Ohanu** the Hon. Justice Iguh (JSC) stated thus: -

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161 [57] Mark Goodrich, Arb-med: ideal solution or dangerous heresy? Page 1, March 2012, Available at http://www.whitecase.com/files/Publication/fb366225-8b08-421b-9777-a914587c9c0a/Presentation A

162 ibid

163 K. W. Chau, Insight into resolving construction disputes by mediation/adjudication in Hong Kong, *Journal Of Professional Issues In Engineering Education And Practice,* ASCE / APRIL 2007, pp 143-147 at Page 143, Available at http://www.academia.edu/240893/Insight_into_resolving_construction_disputes_by_mediation_ A

164 Encyclopedia of Forms and Precedents Vol. 3(1) paragraph 38(71).

*"Where two parties to a dispute voluntarily submit the issue in controversy between them to an arbitration according to customary law and agree expressly or by implication that the decision of such arbitration would be accepted as final and binding, then once the arbitrators reach a decision, it would no longer be open to either party to subsequently back out or resile from the decision so pronounced".*[165]

In the case of **Okpuruwu vs. Okpokam** the Honorable Justice Oguntade JCA (as he then was) observed thus: -

*"In the pre-colonial times and before the advent of the regular courts, our people (Nigerians) certainly had a simple and inexpensive way of adjudicating over disputes between them. They referred them to elders or a body set up for that purpose. The practice has over the years become strongly embedded in the system that they survive today as custom."*[166]

Customary arbitration and alternative dispute methods of resolving disputes recognize practices such as oath taking before shrines. In the case of John Onyenge & Ors vs. Chief Love day Ebere & Ors the Hon. Justice Niki Tobi delivering the lead Judgment stated thus: -

:"Learned Senior Advocate does not seem to like the tradition or custom of oath taking. He cited a number of cases including Nwoke Vs Okere, supra. This Court recognizes oath-taking as a valid process under customary law arbitration. It is my view that where parties decide to be bound by traditional arbitration resulting in oath taking, common law principles in respect of proof to title of land no longer apply. In such a situation the proof of ownership or title to land will be based on the rules set out by the traditional arbitration resulting in oath taking. It is in this regard that I find it difficult to go along with counsel in his submissions bordering on the common law".[167]

Although customary arbitration is recognized under the Nigerian legal system it cannot meet the needs of modern business relationships. Therefore with the advent of development came the need to have in place a suitable legal framework for the conduct of arbitration and ADR in Nigeria. The first statute on arbitration in Nigeria was the 1914 Arbitration Ordinance. The ordinance came into force on the 31st of December 1914.[168] The Law was based on the English Arbitration Act of 1889 and was applicable to the whole country which was then being governed as a unitary state. When Nigeria became regionalized in 1954 and later Federal the ordinance became the respective laws of the regions and later the states. The provisions of the ordinance include the criticized "statement of case procedure" which obliged an arbitrator to state a case for the decision of the court.[169] The provisions did not

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165 (1999) 9 NWLR (Pt 618) 290 at 304. See also Onyenge & & Ors vs. Ebere & Ors (2004) 11 MJSC 184 at 199,Agu vs. Ikewibe (1991) 1 N.S.C.C at 385 at 398 -399

166 (1998) 4 NWLR Part 90, 554 at 586

167 (2004) 11 MJSC 184 at 199-200

168 See J.Olakunle Orojo & M. Ayodele Ajomo Law and Practice of Arbitration and Conciliation in Nigeria (Mbeyi & Associates
(Nigeria) Limited 1999) Chapter 1, pages 3 & 13

169 See Sections 6, 9, 10, 11, 12, 13 & 15 of the Ordinance. Section 15 provides as follows "any arbitrator or umpire may at any state

limit court intervention in arbitration proceedings. The ordinance based law was enacted as Chapter 13 of the 1958 Revised Laws of Nigeria and Lagos. The Federal Government later repealed chapter 13 and promulgated the Arbitration and Conciliation Decree 1988 Laws of the Federal Republic of Nigeria hereinafter referred to as ACA .ACA is a modification of the United Nations Commission on International Trade Law (UNCITRAL)Model Law on International Arbitration .On the international arena states that have adopted the Model Law are regarded as "investor friendly ".Sadly the ordinance based arbitration law remains in the statute books of some of the states constituting the Federal Republic of Nigeria. These States are enjoined to bring their arbitration laws in line with modern developments

## SOUTH AFRICA

South Africa is embracing the path of ADR because it has been shown clearly from the happenings at the formal courts that they are failing the people in many respects such as inordinate delays, unbearable costs of legal fees and so on . A way out is to continue to explore the possibility of all alternatives that will provide and dispense justice to all. [170]

The Non-governmental organizations (NGOs) are very proactive in the quest for and aggressiveness for the use of alternative dispute resolution in South Africa.[171] According to Ok haredia, "prior to and during the transition in government, many NGOs, financed by numerous donors, undertook ADR efforts for a variety of purposes throughout South Africa." NGOs have been very prominent in the areas of labour disputes resolution using the alternative informal justice system. They are promoting this informal justice system because it has been noted to offer "a variety of flexible mechanisms best to match the dispute, as opposed to a rigid adversarial trial process, informality and not bound by strict procedural rules, time and cost effectiveness, focus on interests and restructuring of relationships".[172]

One of the outcomes of the NGOs efforts is the establishment of the CCMA to resolve labour dispute in a workplace environment[173]. The establishment of The **Commission for Conciliation, Mediation and Arbitration** (CCMA) was as a result of lessons learnt and emulated from other jurisdictions that have put in place similar mechanisms to dispense justice in an informal way. Since inception of the CCMA, it has been seen to be playing a very useful role in resolving labour disputes which hitherto would have led to protracted industrial actions and strikes.[174]

With regard to the intrinsic role of alternative dispute resolution in resolving disputes, Temba eloquently assert that "the concept of alternative dispute resolution (ADR) includes all

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of the proceedings under reference, and shall if so directed by the court or a judge, state in the form of a special case for the opinion of the court, any question of law arising in the course of the reference. See also Section 7B & Section 19 of the 1889 Arbitration Act

170 Feehily R 2008. The development of commercial mediation in South Africa in view of the experience in Europe, North America and
Australia. From http://uctscholar.uct.ac.za/PDF/91302_Feehily_R.pdf.

171 Comaroff J, Comaroff J 2007. *Popular justice in the new South Africa: policing the boundaries of freedom.* New York, USA: Russell
Sage Foundation.

172 Temba FM 2014. ADR in settlement of labour dispute in Tanzania, South Africa, and Australia: a comparative survey. *Open University Law Journal 2013,* 4(1):115-139.

173 Musukubili FZ 2013. Labour dispute resolution system: compliance with international labour standards and a comparison with the south african. From http://digital.unam.na/handle/11070.1/1891.

174 Steenkamp A, Bosch C 2012. Labour dispute resolution under the 1995 LRA: problems, pitfalls and potential. From http://reference.sabinet.co.za/sa_epublication_article/ju_jur_2012_a8.

dispute resolution mechanisms other than the formal process of adjudication in a court of law. ADR therefore, denotes a phenomenon other than a judicial determination, in which an impartial third party assists disputants in resolving issues between them. It covers a broad spectrum of approaches, from party-to-party engagement in negotiations as the most direct way to reach a mutually accepted resolution, to arbitration at the other end, where an external party imposes a solution. Somewhere along the axis of ADR approaches between these two extremes lies 'mediation', a process by which a third party aids the disputants to reach a mutually agreed solution. Alternative Dispute Resolution helps to clear the backlog of cases at statutory dispute resolution institutions and is thus assisting government agencies to meet their societal responsibilities more effectively."[175]

Apart from CCMA dispensing alternative justice, there are other specific and specialized ADR systems set up by the government and the Department of Justice for the purposes of resolving disputes informally ranging from land to family issues, community strives and conflicts.[176] There are other several national and state agencies which are also providing alternative disputes resolution without venturing to the use of normal litigation process.

The rationale for establishment of the CCMA is to enable it concentrate on dealing with issues that can be solved through Conciliation Mediation and Arbitration, thereby allowing the labour courts to deal with and resolve more serious and involved issues such as strikes action, unfair dismissal, retrenchments and discriminatory practices in workplace environment.[177] Reinforcing the significance of ADR, Bendeman indicates that "alternative dispute resolution (ADR), for instance conciliation and arbitration, is often regarded as a better option than the more conventional mechanisms for the settlement of labour disputes, because of the lower cost and greater speed involved. Because it normally requires the consent, and thus the commitment, of the parties involved, it has the potential of presenting a more successful and sustainable solution to labour disputes."[178]

With regard to the mandatory nature of ADR as part of the justice mix in South Africa, Bendeman asserts that "in South Africa, ADR has not only been formalized, but has also been made compulsory as part of the transformation of the South African labor relations system after 1994. **The Commission for Conciliation, Mediation and Arbitration** (CCMA) is one institution that was created with high expectations and is specifically tasked with ADR-type processes. However, the dispute resolution system of the CCMA is currently under strain due to a very legalistic approach, long delays, and declining settlement rates." The view expressed by Bendeman "the dispute resolution system of the CCMA is currently under strain due to a very legalistic approach, long delays, and declining settlement rates" is well founded because of the seeming backlogs, technicalities, and dealing with important issues such as unfair dismissals and misconduct issues sometimes taking months to be resolved hence eroding the very reason why CCMA was established.[179]

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175 Ibid note 3

176 Mwenda WS 2009. Paradigms of alternative dispute resolution and justice delivery in Zambia. From http://uir.unisa.ac.za/handle/10500/2163http://uir.unisa.ac.za/handle/10500/2163.

177 Bendeman H 2006. Alternative Dispute Resolution (ADR) in the Workplace–The South African Experience. *African Journal on Conflict Resolution*, 2006. 7(1):137-161.

178 ibid

179 Bendeman H 2006. Alternative Dispute Resolution (ADR) in the Workplace–The South African Experience. *African Journal on Conflict Resolution*, 2006. 7(1):137-161.

At the CCMA, instances of frivolous suits being instituted by employees abound[180]. This is possible because of the flexible nature of the procedure to institute an action.[181] Take for an instance, under the South African Labor Relations Act 55 of 1995, the employee only needs to establish whether the dismissal was unfair hence opening the floodgates for aggrieved employees to bring rash and frivolous charges of unfair dismissal before the CCMA, according to Venter this in turn, "slows the process, and perhaps even leads to a dilution of the seriousness of other allegations that warrant greater attention."[182]

Undoubtedly, informal dispute resolution has proven very reliable, accessible to all and dispensing justice timeously. This is working very well in South Africa particularly in employment disputes. The establishment of the CCMA has helped to reduce the number of cases that would have been referred to the formal courts. The issues surrounding legal representation should not be invoked to undermine the good work being done by the CCMA. Consequently, the rules as they are should be allowed to apply. The poor and the vulnerable should be assisted rather than confused with less important issue of legal representation at the CCMA. The conciliation and mediation roles being played by the CCMA meet the requirement and standard inherent in the concept of rule of law.[183]

## GHANA

As part of a comprehensive reform programme to reduce caseloads and enhance the efficiency of the court system and the associated long delays, the Judicial Service of Ghana through the instrumentation of the then Chief Justice, His Lordship Justice George Kingsley Acquah set up a task force to look into alternative dispute resolution particularly how it can be made an integral part of Ghana's justice system. Of more importance was the fact that these ADR mechanisms by their nature were seen as less expensive and more conducive as they provide flexibility not only to the disputants but to all involved in the search for an amicable solution. Ghana formally introduced ADR through the institution of what is christened 'Media Week' in 2003. This was a week set out to settle cases that had been pending before the courts for several years. These were to be settled through the use of ADR Mechanisms. The decision to introduce ADR into the formal court system was mainly motivated by a strong commitment to ADR championed by the former Chief Justice, George Kingsley Acquah and continued with equal vigor under Chief Justice Her ladyship Justice Mrs. Georgina Wood.[184] Crooks notes that the policy was clearly motivated by two main considerations the first of which was tackling the crisis caused by the inability of the judicial system to cope with the large numbers of new cases filed every year. Secondly, it was motivated by an acceptance of ADR as a method of dispute resolution which can

180 Madhuku L 2002. Constitutional Protection of the Independence of the Judiciary: A Survey of the Position in South Africa. *Journal of*
*African law*, 46(2): 232-245.
181 Van Schaack B 2004. With All Deliberate Speed: Civil Human Rights Litigation as a Tool for Social Change. *Vanderbilt Law Review*, 57:
2305-2319.
182 Venter R 2003. *Labour relations in South Africa.* Cape Town, Southern Africa: Oxford, UK.
William LF, Felstiner RL A, Austin S 1981.The Emergence and Transformation of Disputes: Naming, Blaming, Claiming . *Law & Society*
*Review*, 15(3): 631-654.

183 ibid
184 Sandra Thompson of Judicial Service, Accra on 14/ 03/2013

improve access to justice for the poor and vulnerable.[185] About 300 cases pending in select courts in Accra were mediated over 5 days. The effort was a major success, with 90 percent of disputants expressing satisfaction with the mediation process and stating that they would recommend it to others.

a result of the successes chalked with the initial programme, a follow-up was done in 2007. And like in the previous instance, 155 commercial and family cases from 10 district courts in Accra were mediated over 4 days with about a 100 cases fully mediated or concluded in settlement agreements.[186] A further 18 cases reached partial agreement and were adjourned for a later mediation attempt. About 37 of the cases were returned to court unresolved.[187] The 2007program was expanded through 2008, and over 2,500 cases in seven district courts in Accra were mediated, with over 50 percent of the cases completely settled. The successful implementation of the pilot programmes demonstrated the huge potential of ADR especially as regards reduction of backlogs of cases at the courts. After the piloting of ADR in a few of the Accra Magistrates Courts, ADR was rolled out across all ten Regions of Ghana and is now offered in 47 courts. According to the national coordinator of the ADR directorate, by the year 2015 all Magistrate courts would offer ADR services across the country.[188]

**ADR and the Magistrate Courts in Ghana**

Ghana has a total of 153 Magistrate courts distributed across the ten administrative regions of Ghana. The Magistrate courts constitute the lowest courts of adjudication in Ghana. The jurisdiction of the Magistrate's Court covers both civil and criminal matters.[189] The civil matters are limited to personal actions under contract example which include commercial debts and damage to property, nuisance and 'defamation up to a value of Ghc 5000, landlord-tenant relations, matrimonial matters and land cases where the value of the land does not exceed Ghc 5000. On the other hand, the criminal jurisdiction of the magistrate's court is limited to summary offences such as assault, offensive or threatening conduct and theft, where the maximum fine is 500 penalty points or a prison term not exceeding two years.[190] Since 2005 the Magistrate's Courts have become the venue for an important experiment in 'Court-connected ADR'. Currently, 47 of the 153 Magistrate's courts offer ADR services in Ghana. This year about 10 more courts would be added to the ADR programmed and it is hoped that by 2017 all magistrate courts would offer ADR. Under Ghana's court connected ADR, litigants are referred to ADR by the Magistrate or Judge only after they have filed their case at the court and made an appearance before him or her, and with their consent. With the view to making ADR attractive to disputants, no fee is charged beyond the filling fee. According to Mr. Alex Nartey, cases that have not been filed at the courts cannot be dealt with under the court connected ADR. In such instances, the parties in dispute can go to a private practitioner to have their case heard. He goes further to note that, in a bid to encourage the usage of ADR,

185 Alternative Dispute Resolution and the Magistrate's Courts in Ghana: A Case of Practical Hybridity, Working Paper, July, 2012. http://www.institutions-africa.org accessed on 3/6/2013

186 Judicial Service of Ghana – Reforms and Projects 2007-2008 Legal Year,

187 Alternative Dispute Resolution in Africa: Preventing Conflict and Enhancing Stability

188 National Coordinator ADR Directorate Ghana, Accra on 14th March, 2013.

189 ibid

190 ibid

Magistrates or Judges regularly put the availability of amicable settlement of dispute through the use of ADR to the parties involved. This is normally done when disputants show up for the first time in court. Once the parties opt for ADR, the court ADR coordinator explains the system to them in more detail emphasizing the voluntary nature of the whole process but that once an agreement has been reached it will be ratified by the Magistrate as a judgment of the court, and that there is no appeal.[191] To reduce tensions, various styles are used by the mediator. A common practice is the mediator urging the disputants to address each other by their names, to show respect and not interrupt each other. This helps the mediator guide the discussion in the direction which is most likely to result in a mutual settlement. According to Mr. Nartey, once a case is settled under the ADR procedure, the parties return to court for the Magistrate to enter the agreement as a 'consent judgment'. This gives it the status of a legal judgment which can be enforced by the court. Hence if a party fails to honour the agreement they can be compelled to do so. In instances where the mediator is unable to resolve the dispute the case is sent back to the courts for the normal litigation to begin.[192]

### 4.3 Global over view

**Introduction**

There are several methods available for resolving disputes between two parties. The first and most important method is through the courts. When a dispute arises between two parties belonging to the same country, there is an established forum available for the resolution of the same. The parties can get the said dispute resolved through the courts established by law in that country. Generally, this has been the most common method employed by the citizens of a country for the resolution of their disputes with the fellow citizens[193].

When a dispute arises between two persons belonging to two different countries, the difficulty arises. One option available to the parties is to go to the domestic courts of either country for the resolution of that dispute. However, this approach may have its own problems. The first is the jurisdiction of the courts. The laws relating to jurisdiction of courts in a country are not made keeping in view the transnational disputes. Normally, they are designed to resolve domestic disputes, that is, disputes arising between two citizens of the same country. The other is dissimilarity in the legal system of two countries. The problem acquires serious dimensions if the county of one party follows common law system and the country of the other party follows civil law system. In spite of tremendous work done by many international organizations and institutions, unification or uniformity of different legal systems is still a distant dream. The next is the choice of law applicable to the agreement and the consequential dispute between the parties. Availability of assets of the defendant in that jurisdiction is also a consideration for the purpose. The reason being that the enforcement of the judgment in any other jurisdiction may be a prolonged and cumbersome process. The absence of a treaty for the enforcement of foreign judgments between the two countries may render the judgment a worthless paper. If the judgment debtor happens to be a sovereign of that other country, the execution may involve claim for sovereign immunity. In some countries, sovereign assets enjoy sovereign immunity. The establishment of the fact in the

191 Interview with Mr Alex Nartey, op. cit.
192 ibid
193 Paper delivered at a UNITAR workshop on Arbitration and Dispute Resolution for Sub-Saharan Africa (Harare, Zimbabwe, 11 to 15 September 2000).

court of that very country that the sovereign has waived the immunity itself will be a Herculean task. Apart from these difficulties, conventional difficulties, like undue delay in the dispensation of justice, complicated procedural formalities, transportation of entire evidence and witnesses from one country to the other country, high cost of litigation, judicial imperfection, etc., cannot be ignored. In view of these and other difficulties, either party avoids going to the courts in the country of the other party[194].It is for these reasons that the alternative dispute resolution methods are becoming more popular for resolution of disputes between parties belonging to two different countries. So much so that some persons have started calling them "appropriate" dispute resolution methods rather than "alternative" dispute resolution methods. The alternative dispute resolution methods offer distinct advantages over litigation[195].

Litigation is a process which takes place in the court rooms. These court rooms are open to public. Any member of the public can enter a court room and can watch, so long as he wishes, the court proceedings of any case. Alternative dispute resolution proceedings take place in private. They are not public proceedings. Thus, they ensure confidentiality. Further, for initiation of alternative dispute resolution methods, an agreement between the parties is an essential requirement. While litigation is an adversarial, formal and inflexible process, alternative dispute resolution methods may be less adversarial, less formal and more flexible process. In litigation, rules of evidence and procedure have to be strictly followed. In alternative dispute resolution methods, simple procedure is followed and the formal rules of evidence and procedure do not apply. Similarly, in litigation, the parties have no voice in the process of selection of judges. They are appointed and paid by the State. Such judges are not specialists in any particular branch of law or subject. They are generalists and deal with all kinds of cases. Generally, the arbitrators and other persons helping in the resolution of disputes through alternative means are selected and paid by the parties. The parties have a choice to prescribe their technical and other qualifications and experience or they can insist that the person having expertise in any particular discipline may alone be appointed. Except in rare or specified circumstances, the settlements arrived at through alternative dispute resolution methods are not subject to challenge in court of law. In addition, the alternative dispute resolution methods offer the conventional advantages like less expensive and dispensation of quick justice, including choice of venue for the resolution of disputes[196].

The alternative dispute resolution methods have been found satisfactory and are popular not only in the settlement of disputes between two parties belonging to two different countries but they are equally popular and common in the resolution of disputes between two parties belonging to the same country[197].

Alternative dispute resolution encompasses a variety of methods for the resolution of disputes between the parties. The availability or deployment of any particular method of alternative dispute resolution in any specific case depends on a number of factors. The clause relating to alternative dispute resolution in the agreement between the parties, the availability of persons well versed in the process of alternative dispute resolution, the

194 Ibid
195 Ibid
196 Alternative dispute resolution by Dr Vinod Agarwal
197 Ibid

support provided by the legal system of a country to the alternative dispute resolution methods, the national or international institutional framework for alternative dispute resolution, the availability of necessary infrastructure facilities, etc., play a significant role in the selection of any particular method of the resolution of dispute. The most important, popular and common alternative method of dispute resolution is arbitration[198].

## ARBITRATION

Arbitration is one of the oldest methods for the resolution of disputes between the parties. It has existed, in one form or the other, in every country at all times. Arbitration as a process of dispute resolution offers many advantages to both the parties. In the field of arbitration, there are three international documents. However, all these three documents deal with the enforcement of foreign arbitral awards. The first is Protocol on Arbitration Clauses[199]. It has 8 Articles. It has been ratified by 30 States. However, it is not very popular amongst the States for obvious reasons. The second is the Convention on the execution of Foreign Arbitral Awards[200]. This Convention amended the Geneva Protocol in certain respects. According to this Convention "Each High Contracting State was required to recognize as binding and to enforce, in accordance with the rules of the procedure of its territory, arbitration award made in another Contracting State pursuant to an agreement covered by the Protocol."Last, is the Convention on the Recognition and Enforcement of Foreign Arbitral Awards[201]. This Convention gave the parties greater freedom in the choice of the arbitral authority and of the arbitration procedures. It attempted to remove the difficulties faced by the parties in the enforcement of foreign arbitral awards. The New York Convention reduced and simplified the requirements with which the party seeking recognition or enforcement of an award had to comply. There is one more international document, that is, 1965 Convention on the Settlement of Investment Disputes between States and Nationals of Other States[202]. It applies only to the investment disputes between a country and the investors of another country who have made investments in that first country. There are a few regional conventions and protocols also, such as European Convention on International Commercial Arbitration, 1961, Inter-American Convention on International Commercial Arbitration[203]

Internationally, the United Nations Commission on International Trade Law (UNCITRAL) has prepared Model Law on International Commercial Arbitration.[204]The General Assembly of the United Nations, in its Resolution 40/72 of 11th December, 1985, recommended, "that all States give due consideration to the Model Law on International Commercial Arbitration, in view of the desirability of uniformity of the law of arbitral procedures and the specific needs of international commercial arbitration practices." So far a large number of countries have adopted UNCITRAL Model Law on International Commercial Arbitration in

198 Ibid

199 Signed at Geneva on 24th September, 1923 commonly known as Geneva Protocol, 1923).

200 Signed at Geneva in 1927 (commonly known as Geneva Convention, 1927).

201 signed at New York on 10th June, 1958 (commonly known as New York Convention)

202 Done at Washington in 1965 (commonly known as ICSID Convention, 1965)

203 signed on 30th January, 1975 (commonly known as Panama Convention).

204 It has been prepared after long deliberations in various meetings of the whole Commission during 18th Annual Session and was adopted on 21st June, 1985

their domestic legislation on arbitration. It has resulted in achieving uniformity in the law relating to arbitration in these countries[205].

In addition to the Model Law on International Commercial Arbitration, the UNCITRAL has also prepared and published detailed "UNCITRAL Arbitration Rules".[206] Article 1 of these Rules provides that, "Where the parties to a contract have agreed in writing that dispute in relation to that contract shall be referred to arbitration under the UNCITRAL Arbitration Rules, then such dispute shall be settled in accordance with these Rules subject to such modification as these parties may agree in writing." Thus, the parties to an agreement can adopt the UNCITRAL Arbitration Rules for the resolution of their international disputes. Except the preparation and publication of these documents, the UNCITRAL as such does not provide arbitration facilities. The UNCITRAL has also brought out a publication called, "UNCITRAL Notes on Organising Arbitral Proceedings"[207]. According to paragraph 1 of these Notes, "The purpose of the Notes is to assist arbitration practitioners by listing and briefly describing questions on which appropriately timed decisions on organising arbitral proceedings may be useful." These Notes provide guidance on all aspects of arbitration proceedings like administrative services that may be needed for the arbitral tribunal to carry out its functions; deposits in respect of its costs; confidentiality of information relating to the arbitration, possible agreement thereon; routing of written communications among the parties and the arbitrators; defining points of issue; documentary evidence; witnesses, experts and expert witnesses; multi-party arbitration; filing and delivering award, etc[208].

The most important and oldest institution in the field of arbitration is the International Chamber of Commerce, Paris. The International Court of Arbitration of the International Chamber of Commerce (the "ICC") is the arbitration body of the ICC. The Court does not itself settle disputes. The function of the Court is to provide necessary facilities for the settlement by arbitration of business disputes of an international character in accordance with the Rules of Arbitration of the ICC if so empowered by an arbitration agreement between the parties[209].Apart from ICC, another international body engaged in the arbitration is the International Centre for the Settlement of Investment Disputes. It has also framed rules of arbitration. As has been stated above, it is relevant for the resolution of investment disputes only and no other commercial disputes[210].

Further, practically every country has one or more bodies or institutions which provide facilities for arbitration and other alternative dispute resolution methods for resolving commercial disputes. Even though they are national bodies or institutions, they provide all the necessary facilities for resolution of both domestic and international commercial disputes. Only to illustrate, some such bodies or institutions are American Arbitration Association (AAA), London Court of International Arbitration (LCIA), Permanent Court of International Arbitration, Hong Kong International Arbitration Centre (HKIAC), Korean Commercial Arbitration Board (KCAB), Kuala Lumpur Regional Centre for Arbitration, World Intellectual Property Organization Arbitration and Mediation Centre, Geneva, International Centre for Alternative Dispute Resolution, New Delhi,

205 Documents 14 series no 14. Alternative dispute resolution method
206 These Rules were adopted by the General Assembly through its Resolution 31/98 on 15th December, 1976, that is much before the adoption of the Model Law on International Commercial Arbitration
207 These Notes were finalised at its twenty-ninth Session held at New York in May-June, 1996
208 www. Unitary.org/dfm for other titles of our document series
209 Ibid
210 Ibid

World Arbitrators and Mediators Council, New Delhi, etc. Most of them have framed their own rules of arbitration. They provide arbitration facilities and charge costs in accordance with their own respective rules. The parties to an arbitration agreement can adopt in their agreement any institution of their choice for the resolution of their disputes[211].

One of the essential requirements for resolution of a dispute through arbitration is the existence of an arbitration agreement between the parties. An arbitration agreement may be in the form of an arbitration clause in an agreement or in the form of a separate agreement[212]. Various institutions engaged in arbitration have drafted arbitration clauses and incorporated them in their rules for adoption by the parties in their arbitration agreements. Some illustrations of arbitration clauses are as follows:

"All disputes arising out of or in connection with the present contract shall be finally settled under the Rules of Arbitration of the International Chamber of Commerce by one or more arbitrators appointed in accordance with the said rules.[213]"

"All disputes arising out of or in connection with this contract or in respect of any defined relationship associated therewith or derived therefrom, shall be referred to and finally resolved by arbitration under the rules of the British Columbia International Commercial Arbitration Centre. The appointing authority shall be British Columbia International Commercial Arbitration Centre. The case shall be administered by the British Columbia International Commercial Arbitration Centre in accordance with its 'Procedures for Cases under the BCICAC Rules'[214].The place of arbitration shall be Vancouver, British Columbia, Canada. The following matters also should be considered by parties for inclusion in the arbitration provisions of contracts: governing or proper law, procedural laws, number of arbitrators, specific qualifications of the arbitrators or a presiding arbitrator including, but not limited to, language, technical training, nationality and legal training language or languages of arbitration. "Any dispute arising out of or in connection with this contract, including any question regarding its existence, validity or termination, shall be referred to and finally resolved by arbitration under the Rules of the London Court of International Arbitration, which Rules are deemed to be incorporated by reference into this clause."[215]"All disputes arising in connection with the present contract, or further contracts resulting therefrom, shall be finally settled in accordance with the Arbitration Rules of the Netherlands Arbitration Institute (Nederland Arbitrage Institut).[216]

"All disputes arising out of or in connection with the present agreement, including disputes on its conclusion, binding effect, amendment and termination, shall be resolved, to the exclusion of the ordinary courts by an arbitral tribunal (or by a three person arbitrala tribunal/a sole arbitrator) in accordance with the International Arbitration Rules of the Zurich Chamber of Commerce. (Optional: The decision of the Arbitral tribunal shall be final, and the parties waive all challenge of the award in accordance with Art. 192 of the Private International Law Statute.)[217]

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211 Paper delivered at a UNITAR workshop on Arbitration and Dispute Resolution for Sub-Saharan Africa (Harare, Zimbabwe, 11 to 15 September 2000).
212 Section 5 of the Arbitration and Conciliation Act Cap 4
213 International Chamber of Commerce
214 British Columbia International Commercial Arbitration Centre
215 London Court of International Arbitration
216 Netherlands Arbitration Institute
217 Zurich Chamber of commerce

It is not proposed to discuss the subject of arbitration any further, as arbitration is the subject for discussion for the next four days in this Workshop.

## FAST TRACK ARBITRATION

Fast track arbitration is nothing but a kind of arbitration. In fact, fast track arbitration is a time bound arbitration. Fast track arbitration can be adopted for the resolution of international as well as national disputes. Many international and national institutions engaged in providing arbitration facilities have promulgated fast track arbitration rules. These rules provide, in detail, the fast track arbitration procedure. The parties can adopt the fast track arbitration rules of any international or national body or institution for the speedy and time bound resolution of their dispute. The agreement for the resolution of dispute through fast track arbitration is same as for the ordinary arbitration, except that, in addition to the provision for arbitration, it provides that the parties have agreed for fast track arbitration[218].

Generally, subject to the agreement between the parties, the fast track arbitral tribunal consists of sole arbitrator. However, there is no legal bar to the arbitral tribunal consisting of more than one arbitrator, that is, three arbitrators, if the parties so decide. If the fast track arbitration is by three arbitrators, the third arbitrator is called the "Presiding arbitrator". The procedure for the appointment and challenge of arbitrator(s) is the same as in the case of ordinary arbitration, except that all such actions must be taken within the prescribed time limit. Fact track arbitration commences when one party gives notice of its intention to commence fast track arbitration and the said notice is received by the other party. The claimant is required to submit his statement of claims within 15 days from the date of constitution of the arbitral tribunal. Similarly, the other party is required to submit its statement of defense, including counter claim, if any, within the next fifteen days. In another 15 days, the parties may submit their rejoinders. The arbitral tribunal decides about the time limit for hearings of the case. It is also expected to deliver its award not later than 15 days from the close of the arbitration proceedings. It should be a reasoned award, unless otherwise agreed by the parties[219].

The essence of the fast track arbitration is that the time limit is fixed for every action to be taken by the parties or the arbitrator(s). The parties are not permitted or allowed to seek extension of time or postponement of any matter by the arbitral tribunal. The parties are expected to adhere to these time limits. If the claimant fails to observe the time limits without sufficient cause, the arbitral tribunal is competent to terminate the proceedings. If the respondent fails to observe the time limits without sufficient cause, the arbitral tribunal is competent to proceed ex parte in the absence of the defaulting party.[220]

## CONCILIATION

Conciliation is the process by which one or more independent person(s) selected by the parties to an agreement generally by mutual consent, either at the time of making the agreement or subsequently when a dispute has arisen between them, to bring about a settlement of their dispute through consensus between the parties by employing various

218 Documents 14 series no 14. Alternative dispute resolution method
219 Alternative dispute resolution by Dr Vinod Agarwal
220 Documents 14 series no 14. Alternative dispute resolution method

persuasive and other similar techniques. It is a process of confidence and faith. Sometimes, and in some systems it is also called mediation. There may be technical or legal differences between the two expressions, namely, conciliation and mediation, but for the present purpose the expression "conciliation 'is used to refer to both the processes, namely, the conciliation and mediation. Conciliation is an effective means of alternative dispute resolution and can be usefully deployed for both international as well as domestic disputes, except that in the conciliation of an international dispute certain facts assume greater importance than they would in a domestic conciliation[221].

United Nations Commission on International Trade Law (UNCITRAL) has prepared and circulated "Conciliation Rules".[222]. The U.N. has recommended, "The use of the Conciliation Rules of the United Nations Commission on International Trade Law in cases where a dispute arises in the context of international commercial relations and the parties seek an amicable settlement of that dispute by recourse to conciliation". The UNCITRAL Conciliation Rules contain 20 Articles. The countries who have adopted the Model Law on International Commercial Arbitration of UNCITRAL have also adopted the Rules of Conciliation of the UNCITRAL or other international institutions and have enacted a composite law called Arbitration and Conciliation Act. Such statutes provide for the resolution of disputes through either of these methods, that is, arbitration or conciliation[223].

Many other international organizations and institutions have issued conciliation rules for the resolution of disputes between the parties. The International Chamber of Commerce has promulgated, "ICC Rules of Optional Conciliation". The Preamble to these Rules says that, "Settlement is a desirable solution for business disputes of an international character. The International Chamber of Commerce therefore sets out these Rules of Optional Conciliation in order to facilitate the amicable settlement of such disputes".[224]

The conciliation process can be commenced by either party to the dispute. When one party invites the other party for resolution of their dispute through conciliation, the conciliation proceedings are said to have been initiated. When the other party accepts the invitation, the conciliation proceedings commence. If the other party rejects the invitation, there are no conciliation proceedings for the resolution of that dispute. Generally, only one conciliator is appointed to resolve the dispute between the parties. The sole conciliator is appointed by the parties by mutual consent. If the parties fail to arrive at a mutual agreement, they can enlist the support of any international or national institution for the appointment of a conciliator. There is no bar to the appointment of two or more conciliators. In conciliation proceedings with three conciliators, each party appoints one conciliator. The third conciliator is appointed by the parties by mutual consent. Unlike arbitration where the third arbitrator is called the Presiding Arbitrator, the third conciliator is not terms as Presiding conciliator. He is just the third conciliator. The conciliator is supposed to be impartial and conduct the conciliation proceedings in an impartial manner. He is guided by the principles of objectivity, fairness and justice, and by the usage of the trade concerned and the circumstances surrounding the dispute, including any previous business practices between the parties. The conciliator is not bound by the rules of procedure and evidence.

221 Documents 14 series no 14. Alternative dispute resolution method

222 These Conciliation Rules were adopted by the UNCITAL at its thirteenth session after consideration of the observations of Governments and intercsted organizations. The General Assembly of the United Nations has also adopted them through a Resolution 35/52 on 4 December, 1980

223 Documents 14 series no 14. Alternative dispute resolution method

224 Paper delivered at a UNITAR workshop on Arbitration and Dispute Resolution for Sub-Saharan Africa (Harare, Zimbabwe, 11 to 15 September 2000).

The conciliator does not give any award or order. He tries to bring an acceptable agreement as to the dispute between the parties by mutual consent. The agreement so arrived at is signed by the parties and authenticated by the conciliator. In some legal systems, the agreement so arrived at between the parties resolving their dispute has been given the status of an arbitral award. If no consensus could be arrived at between the parties and the conciliation proceedings fail, the parties can resort to arbitration[225].

A conciliator is not expected to act, after the conciliation proceedings are over, as an arbitrator unless the parties expressly agree that the conciliator can act as arbitrator. Similarly, the conciliation proceedings are confidential in nature. Rules of Conciliation of most of the international institutions provide that the parties shall not rely on or introduce as evidence in arbitral or judicial proceedings, (a) the views expressed or suggestions made for a possible settlement during the conciliation proceedings; (b) admissions made by any party during the course of the conciliation proceedings; (c) proposals made by the conciliator for the consideration of the parties; (d) the fact that any party had indicated its willingness to accept a proposal for settlement made by the conciliator; and that the conciliator shall not be produced or presented as a witness in any such arbitral or judicial proceedings[226].

*Model conciliation clause (UNITAR)*

**"Where, in the event of a dispute arising out of or relating to this contract, the parties wish to seek an amicable settlement of that dispute by conciliation, the conciliation shall take place in accordance with the UNCITRAL Conciliation Rules as at present in force."**

*Model conciliation clause*

**"If any dispute arises between the parties out of or relating to this contract, or in respect of any defined legal relationship associated therewith, the parties agree to refer the same to sole conciliator for amicable settlement. The conciliator shall be appointed by the parties by mutual consent. If the parties shall fail to arrive at an agreement, the conciliator shall be appointed by(give the name of any person or institution**

**MINI-TRIAL**

The resolution of disputes through this alternative dispute resolution method is called Mini-trial. It is relatively a new device for the resolution of disputes. Sometimes it is also called as "exchange of information". It has nothing to do with a criminal or any other trial. This procedure is only named as a mini-trial. In fact, in this process, no adjudication process takes place. Various national and international institutions engaged in providing arbitration and mediation facilities have made rules for "mini- trial". The parties to a dispute can select and adopt any such institution and its rules for the resolution of their dispute through mini-trial. It is also a time bound process. It is expected that under normal circumstances, the

225 Ibid
226 ibid

entire process of mini-trial should be completed within 90 days from the date of its commencement[227].

The major difference between the conciliation and the mini-trial is that in conciliation, the conciliator tries to bring about an agreement between the parties. In mini-trial, the neutral adviser tells the senior management personnel of the parties of the respective strengths and weaknesses of the case to the parties. Thereafter, the senior management personnel of the parties can take an appropriate decision about their dispute. According to American Arbitration Association's Mini-trail Procedures, "... The mini- trial is a structured dispute resolution method in which senior executives of the parties involved in legal disputes meet in the presence of a neutral adviser and, after hearing presentations of the merits of each side of the dispute, attempt to formulate a voluntary settlement."[228]

The process of mini-trial can be commenced by either party to the dispute. When one party invites the other party for mini-trial and sends a written invitation identifying the subject of dispute, the process of mini-trial is said to have been initiated. When the other party accepts the invitation in writing, the mini-trial proceedings are deemed to have commenced. If the other party rejects the invitation, there is no mini-trial proceeding. Generally, only one neutral adviser is appointed to resolve the dispute between the parties. The parties,if they so desire, can have more than one neutral adviser also. The neutral adviser(s) is appointed by the parties by mutual consent. If the parties do not wish to appoint their own neutral adviser(s) or do not reach agreement on any particular name, they may enlist the support of any national or international institution for the purpose. The neutral adviser is expected to possess special legal or technical knowledge and experience about the subject matter of dispute. A mini-trial is also a time bound process[229].

In mini-trial, first, the parties explain their respective cases and then the neutral adviser discusses the nature of dispute with the senior executives of both the parties. If necessary, he may also discuss the matter with the experts, if any, proposed to be produced by the parties. Thereafter, he indicates his views of the respective strengths and weaknesses of each side, the aspects of the case which are reasonably clear and those which are uncertain. The neutral advice also answers the questions or doubts the senior executive may have. This process helps the parties to gain a better understanding of the issues and the merits of their respective case. The senior executives are then expected to enter into a mutual discussion with a view to arriving at a settlement. The neutral adviser only assists them in such discussions, as a facilitator, and not as a judge of the dispute. The mini-trial terminates when the parties have arrived at an agreed settlement or the neutral adviser makes a written declaration to the effect that further efforts at settlement of the dispute through mini -trial are no longer justified[230].

*The model clause (mini-trial)*

"The parties shall try to resolve any dispute, difference or claim arising out of or relating to this agreement through negotiations. If it is not so resolved, the parties shall resolve the same through mini-trial. The sole neutral adviser shall be appointed by the parties by mutual consent. If the parties fail to arrive at an agreement on any name, the neutral adviser shall be

227 www. Unitary.org/dfm for other titles of our document series

228 Ibid

229 Ibid

230 www. Unitary.org/dfm for other titles of our document series

appointed by _____ (give the name of any institution). The mini- trial shall be conducted in accordance with the rules of procedure for mini-trial of _____ (give the name of any institution). If the dispute is not resolved by mini-trial procedure within 90 days of the initiation thereof, or if either party will not participate in such procedure, the dispute shall be referred to arbitration."

**EXPERT ASSESSMENT (ENGINEERS)**

Certain contracts, particularly those involving complex and long term construction projects, adopt the system of appointing "Experts" for the resolution of disputes that may arise thereunder. Such experts are generally construction or civil engineers who are regularly available at the construction site and are expected to resolve disputes between the parties within a reasonable time. "Experts" can also be appointed for the resolution of disputes arising under other kinds of contracts. The qualifications and experience of an Expert depends on the nature of contract and the dispute that has arisen thereunder[231].

The Experts are expected to be impartial. They undertake to interpret the provisions of the contract and/or explain their practical application. Generally, only one expert is appointed but there is no legal bar for the appointment of a Board of experts consisting of two or three experts. In construction contracts, generally the Expert is appointed by the Employer. Before making any such appointment, it is desirable that the contractor is consulted and his opinion is given due consideration. The Expert can give his opinion or determination during the progress of performance of the contract or even after the termination of the contract. The Experts appointed in pursuance to this provision are not bound by the rules of procedure or evidence. They do not give award or judgments. They express their opinion or give their determination depending on the facts and circumstances of dispute between the parties. The opinions given by the experts are not binding on the parties, unless the parties have by their agreement given an authority to the Expert to make binding determinations. In such a case, the decisions given by the Expert will be binding on the parties. An Expert is expected to give his opinion or determination within the time prescribed by the parties in the relevant clause[232].

The major advantages of this system are that if a dispute arises between the parties, the Expert, for the resolution of the same, is instantly available. The time taken for the process of appointment of the Expert is avoided. It is also a time bound system. Further that, if a dispute arises between the parties to the contract, the work does not suffer. The contractor is required to continue with the performance of the contract with all due diligence during the period the determination of the said dispute takes place. Thus, with the arising of a dispute between the Employer and the contractor, the contractual relationship does not come to an end[233].The International Chamber of Commerce has founded an organization called the International Centre for Technical Expertise. The functions of the Centre include collaboration with similar international organizations or institutions and to identify and make available experts in various technical fields for the resolution of disputes between the parties[234].The Federation Internationale des Ingenieurs-Conseils (FIDIC) has prepared "Conditions of Contract for Works of Civil Engineering Construction".

231 Paper delivered at a UNITAR workshop on Arbitration and Dispute Resolution for Sub-Saharan Africa (Harare, Zimbabwe, 11 to 15 September 2000).

232 Paper delivered at a UNITAR workshop on Arbitration and Dispute Resolution for Sub-Saharan Africa (Harare, Zimbabwe, 11 to 15 September 2000).

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Condition 67.1 of the said Conditions contains an "Expert Assessment" clause. It provides for the resolution of dispute through an Expert Engineer. Those interested to have an "Expert Engineer Assessment" clause in the agreements for the resolution of their disputes can refer to it or adopt it[235].

**DISPUTE REVIEW BOARD**

The settlement of disputes through Dispute Review Boards, also known as Dispute Resolution Boards, is another method of alternative dispute resolution system. It is common in long term contracts involving construction works and similar contracts. Resolution of disputes through Dispute Review Board is fast, inexpensive and avoids disruption of the construction work. Dispute Review Board is generally set up or established immediately after the contract is made. It functions with relative informality[236].

It has many interesting features which are generally not found in other alternative dispute resolution methods. First, the Dispute Review Board generally consists of three members. There is no procedure of having a Dispute Review Board consisting of only one member like sole arbitrator. Second, the Employer and the Contractor, both have a right to select one member each on the Dispute Review Board. The member of the Dispute Review Board selected by the Employer should be approved by the Contractor and the member selected by the Contractor should be approved by the Employer. Indirectly, it means that in fact the Board is constituted by both the parties to the agreement with their mutual consent. It eliminates any subsequent dispute or disagreement between the parties about the selection of members of the Board. The purpose and object of this approval is that the parties should have faith and confidence in the Dispute Review Board and its recommendations. Third, the third member of the Dispute Review Board is selected by the two selected Members but he should be approved by the parties. Fourth, most of the actions like selection of a Member, appointment of a Member, etc., have to be taken within the prescribed time frame. If any party fails to take action within the prescribed time, it loses the right to select the Member and in his place, the Appointing Authority selects the Members. Fifth, the Members of the Dispute Review Board, before they can assume office, have to sign a Declaration of Acceptance. Once a Declaration of Acceptance is signed by a Member, he is presumed to be properly selected according to the procedure prescribed by this clause. Sixth, the Dispute Review Board has power only to make "Recommendations" to the parties. These recommendations do not have the binding force. The parties are at liberty to disagree with the recommendations of the Board. In such an event, the dissatisfied party can have recourse to arbitration. Seventh, it is not bound by the rules of procedure or evidence. Eighth, if either party does not express its disagreement with the recommendations of the Board within 14 days of its receipt, the recommendations become final and binding on the parties to the agreement. Ninth, the recommendations of the Dispute Review Board are not considered secret or confidential. The clause specifically provides that the recommendations of the Board shall be admissible as evidence in any subsequent legal or judicial proceedings between the parties like arbitration, litigation, etc. This is not the case with the findings of a conciliator. The conciliation proceedings are considered to be secret and confidential and cannot be disclosed in any legal or judicial proceedings between the parties. Tenth, it consists of members who are expected to be

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specialists or technically qualified in the construction projects. Last, if the parties so agree, a Dispute Review Board can also act as an arbitral tribunal.[237]

There is no law, rules or regulations in any country about the constitution and working of the Dispute Review Boards. It is also not administered by any international or national institution engaged in providing arbitration facilities or other alternative dispute resolution methods. The Dispute Review Board is purely a contractual institution. Therefore, the clause providing for the Dispute Review Board in an agreement should cover all aspects of is constitution and working and has to be comprehensive[238].The best illustration of the clause regarding the Dispute Review Board can be found in the Standard Bidding Documents for Procurement of Works prepared and issued by the World Bank. Those who are interested in having Dispute Review Board as a method of dispute resolution in their agreement can adopt this clause with suitable or appropriate modifications. It is a self-contained clause in every respect[239].Apart from the above mentioned alternative methods for the resolution of disputes, some more methods, such as Med-Arb, Medaloa, partnering, etc. are also adopted by the parties from time to time. The purpose is that the dispute should be resolved amicably, justly and as early as possible, whatever methods the parties adopt for the same[240].

### 4.4 Conclusion.

Following the current development in the world many countries around the world have lost confidence in the court systems because of the delays and the untold story of corruption among the Judicial officers and therefore countries have preferred to settle their disputes through ADR since it facilitates faster resolution of Disputes among the disputants. The continued desire of people to settle disputes through Alternative means has led to much more improvement in ADR system by states and these states have developed a number of international best practices of ADR that have been instrumental in reducing case backlog in those particular countries that Uganda is yet to adopt in its legal system to reduce case backlog, some of these practices include med-arb, arb-med, and many others as mentioned above.

237 Ibid
238 Paper delivered at a UNITAR workshop on Arbitration and Dispute Resolution for Sub-Saharan Africa (Harare, Zimbabwe, 11 to 15 September 2000).
239 Ibid
240 Ibid

# CHAPTER FIVE

# RECOMMENDATIONS AND REFORMS TO THE IMPROVEMENTON THE USE OF ADR IN BACKLOG MANAGEMENT IN UGANDA

## 5.0 Introduction.

The judiciary has embraced the use of ADR in the resolution of Disputes in order to reduce case backlog and for that case many laws have been put in place to favour the same but despite the efforts the introduction of ADR has not effectively handled the Backlog challenge in the Judiciary due to a number of challenges. The researcher therefore provides recommendations that may be adopted by the government and the judiciary in particular to effectively operate ADR to reduce Case backlog.

## 5.1 Recommendations

Alternative dispute resolution mechanisms have been effective in administration of justice where they have been used. The constitutionalization of these mechanisms means that there will be a paradigm shift in the policy on resolution of conflicts towards encouraging their use to enhance access to justice and the expeditious resolution of disputes without undue regard to procedural technicalities. A comprehensive policy and legal framework to operationalize alternative dispute resolution mechanisms is needed. It should be realized that most of the disputes reaching the courts should never have reached there in the first place and can be resolved without resort to court if alternative dispute resolution mechanisms were to be applied and be treated not as inferior alternatives to litigation but as equally appropriate means to realization of justice. Where they have been used in managing conflicts and seeking justice they have been effective since they are closer to the people, flexible, expeditious, foster relationships, voluntary and cost-effective.

The settlement of disputes through Dispute Review Boards, also known as Dispute Resolution Boards, is another method of alternative dispute resolution system. It is common in long term contracts involving construction works and similar contracts. Resolution of disputes through Dispute Review Board is fast, inexpensive and avoids disruption of the construction work. Dispute Review Board is generally set up or established immediately after the contract is made. It functions with relative informality[241].

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should be approved by the parties. Fourth, most of the actions like selection of a Member, appointment of a Member, etc., have to be taken within the prescribed time frame. If any party fails to take action within the prescribed time, it loses the right to select the Member and in his place, the Appointing Authority selects the Members. Fifth, the Members of the Dispute Review Board, before they can assume office, have to sign a Declaration of Acceptance. Once a Declaration of Acceptance is signed by a Member, he is presumed to be properly selected according to the procedure prescribed by this clause. Sixth, the Dispute Review Board has power only to make "Recommendations" to the parties. These recommendations do not have the binding force. The parties are at liberty to disagree with the recommendations of the Board. In such an event, the dissatisfied party can have recourse to arbitration. Seventh, it is not bound by the rules of procedure or evidence. Eighth, if either party does not express its disagreement with the recommendations of the Board within 14 days of its receipt, the recommendations become final and binding on the parties to the agreement. Ninth, the recommendations of the Dispute Review Board are not considered secret or confidential. The clause specifically provides that the recommendations of the Board shall be admissible as evidence in any subsequent legal or judicial proceedings between the parties like arbitration, litigation, etc. This is not the case with the findings of a conciliator. The conciliation proceedings are considered to be secret and confidential and cannot be disclosed in any legal or judicial proceedings between the parties. Tenth, it consists of members who are expected to be specialists or technically qualified in the construction projects. Last, if the parties so agree, a Dispute Review Board can also act as an arbitral tribunal.[242] For the above mentioned features Dispute Resolution Boards should be adopted in Uganda to help reduce case backlog in the Judiciary.

The Investment Climate Advisory Services of the World Bank Group while making their recommendations in their work ADR guidelines recommended that providing free ADR services could to an extent help in building up a culture of employment of ADR services in a society. They observe that when first developing ADR services in a jurisdiction, stakeholders may consider providing the service for free to encourage parties to use the process. They go further to suggest that newly trained and enthusiastic ADR practitioners who want to be involved in the project may offer to do this for a while.[243]This, with proper infrastructure in place, could be tried as part of the legal aid programmes in place. However, the above World Bank group also observes that if disputants become accustomed to receiving a service for free, it will be very difficult later to collect a fee for that service.[244] Therefore, this can only be done with very appropriate measures in place to decide when such services should be sought and by which class of people. Alternative dispute resolution has also been said to have indirect benefits. As already noted elsewhere in this paper it can increase the effectiveness of courts by reducing backlog. This can in turn improve trust in the country's legal system, which may increase foreign investment.[245]

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242 Ibid

243 World Bank Group, *alternative dispute resolution guidelines*, page 44,Available at http://siteresources.worldbank.org/INTECA/Resources/15322_ADRG_Web.pdf A

244 ibid

245 Inessa Love, *Settling Out of Court: How Effective Is Alternative Dispute Resolution?* , page 1, The World BankGroup Financial and Private Sector Development vice presidency, october 2011. Available at http://siteresources.worldbank.org/FINANCIALSECTOR/Resources/282044-1307652042357/VP329-Sector A

Another viable recommendation is the adoption of **Village Mediation Programmes.** The Village Mediation Programme (VMP) is a model of mediation established first in Africa by the Paralegal Advisory Services Institute (PASI) in Malawi.[246] The VMP introduces a village-based diversion and mediation scheme that can assist poor and vulnerable people to access justice in civil and some minor criminal cases. The Programme is inspired by the *Madaripur Mediation Model* in Bangladesh and other village-based mediation programmes around the world.[247]

It has been stated in this regard that one of the goals of ADR is to provide affordable and appropriate dispute resolution institutions and procedures in different communities of society. Laws - any laws, relating to any aspect of community life in all areas of the law - cannot be made in a vacuum. The needs and requirements of all the end users must be taken into consideration when drawing up statutes, as this is the only way in which to promote more effective access to justice for all the people concerned. In this respect, South Africa, for example, in an effort to develop an affordable and appropriate dispute resolution system, has been engaged in an investigation into arbitration since 1995 Rather than dashing head-long into the implementation of an ADR system, the South African Law Commission was instructed to broaden its investigation into arbitration, to include all facets of alternative dispute resolution, to provide a framework within which ADR could be discussed in an orderly fashion. In December 1996, it published, as a first step, a draft International Arbitration Act for information and comment, and published a Working Paper to submit comments on their older, 1965 Act, inviting all interested parties to submit their response to the Issue Paper. The manner in which the investigation continued depended to a large extent upon the response received. Such a plan of action is obviously more suited to the cosmopolitan environment of South Africa, but is however not suited to the Ugandan situation - particularly because of our much smaller population, and indeed, the obvious limitations in terms of being able to reach large numbers of people to respond to such investigation, to provide a fair picture of what is actually required. There is, too, the consideration of the need firstly to educate the general public on ADR mechanisms, in order to allow people to make an informed and meaningful contribution, in particular, given the relative novelty of ADR to the Ugandan jurisdiction, before any such study could be undertaken.

One of the major considerations with regard to the development of legislation for a complete ADR system is the level of state control in terms of the various processes and devices. It is essential to recognize a fundamental difference between adjudication at the hands of public authorities and ordinary forms of ADR. Arbitration, mediation and other forms of alternative dispute resolution rely for the effectiveness on the willingness of the parties to submit to the process. They do so by agreement. On the other hand, the compulsory jurisdiction conducted at the hands of the state relies for its effectiveness on the ability of one party to compel the other to submit to the jurisdiction of the state. This distinction raises a fundamental issue regarding the extent to which ADR processes should be introduced into the formal and compulsory jurisdiction of the courts administered by the state. This writer supports the view, and indeed recommends that the compulsory

246Paralegal Advisory Services Institute (PASI) , *Village Mediation Programme*, page 2, Available at http://www.afrimap.org/english/images/documents/PASI-VMP-booklet-Oct09.pdf A

247 ibid

jurisdiction of the courts be exercised in order to make ADR in certain instances, a pre-requisite for litigation. For example, as regards mediation, the question is, whether or not it should be a compulsory pre-litigation procedure in Uganda Litigation, in many instances, should be seen as a last resort, and therefore, reference to mediation should be compulsory. Certainly it should be noted that in any event, if parties to a dispute fail to reach an agreement during a mediation session, they still remain at liberty to proceed to litigation . Indeed, settlement by mediation will be more easily achieved if the parties are acutely aware that failure to come to some form of agreement will result in an imposed solution in the very near future.

With the growing awareness of the need for a fully integrated ADR system in Uganda, there is a need for the Centre for Arbitration and Dispute Resolution (CADER) to undertake the following duties which are considered to be vital components of an ADR system:

- Training and accrediting arbitrators and mediators;
- Offering a service to the parties in connection with the appointment of suitable qualified arbitrators or mediators,
- Offering a facility to manage the appropriate ADR process
- Taking responsibility for the development of appropriate rules or representing a focal point for ADR in Uganda.

In South Africa, there are a number of specialized organizations, which actively promoted the use of arbitration as a means of resolving disputes, and these include the Association of Arbitrators, with objectives similar to the American Association of Arbitrators in the United States of America. Its aims include the following:

- the promotion of arbitration as a method for resolving disputes;
- the compilation of model rules for the conduct of arbitration proceedings;
- the making available of experienced arbitrators and the supervision of the conduct of members when acting as arbitrators; and
- The training of arbitrators.

Other organizations in South Africa include: The Independent Mediation Service of South Africa (IMSSA) - a non-profit organisation specialising in mediations and arbitrations in labour disputes; The Alternative Dispute Resolution Association of South Africa (ADRASA), formed by a group of attorneys and advocates to promote the use of alternative dispute resolution techniques in South Africa and to train members of the legal profession as mediators and arbitrators; and finally, the ADR Centre (Pty) Ltd, a professional service organization based in Johannesburg, which provides the physical facilities, documentation and personnel to resolve commercial and other disputes through various ADR methods, including arbitration. In sum, there are a number of methods used by states to ensure proper management of Disputes by using ADR around the world, that can be adopted by Uganda since the CADER has relatively failed to perform its mandate under the Act.

Professionally trained arbitrators and mediators are vital, in that they inspire confidence in the ADR system, and encourage the use of ADR devices by especially the business community, who are the main beneficiaries of the implementation of a formalized system of ADR. It is further recommended that High Court Judges be similarly trained, not as mediators or arbitrators, but rather, inducted to arbitrations and mediations. This is especially important, in view of the recent modifications to the law.

Given the major developments relating to ADR in Uganda, it has become clear also that it is necessary to change the curriculum at the Universities of Uganda by the law council to make ADR Compulsory, in order to expose all law students to the knowledge of alternative dispute resolution mechanisms. Lawyers need to review their traditional perception of themselves as "boxers" who believe that dispute resolution means "winning or losing" This concept is wrong, and there is urgent need for lawyers to re-orient their culture. To do this, it is necessary to provide the right foundation at the 'grass roots' - in the Law schools that chum out the lawyers of the future.

Many Law Schools, in Universities all over the world for example Kenya, now teach ADR as a compulsory course unit. In some schools, ADR is taught as a course on its own. Other schools approach the teaching of ADR as an 'integrative' concept; thus, for example, at the University of Missouri-Columbia (UMC) School of Law, dispute resolution is integrated into required first year courses rather than rely exclusively on separate courses. An overview of dispute resolution and mediation, for example, is taught in civil procedure. This is done in order to expose students to dispute resolution knowledge, perspectives, and skills, at the time when they are beginning to decide how to live their professional lives. As the ADR drive in Uganda comes to fruition, the Law Schools must be prepared to complement this process by providing their students with a wider perspective of their role as lawyers. Certainly, with the introduction of the new provisions relating to mediation, more and more people in Uganda are becoming aware of the advantages of ADR.

Any recommendation for the implementation of ADR will involve not only alteration or amendment to existing laws, but also, funding. One cannot, call for the implementation of ADR in Uganda, advocate for the changing of laws, the training of skilled manpower in ADR and the need for integration of ADR into the curriculum of the Law School, without paying due attention to the question of funding. As initiators of the ADR drive, the legal fraternity itself must come together to determine how best to generate the necessary funding for the various aspects of the implementation of ADR in Uganda. The government should increase on the money allocated to the judiciary in the national budget such that more money can be invested in improvement on the service of ADR in resolution of disputes. Just like other African countries like Ghana, Uganda should introduce the ADR fund that is gotten from the consolidated funds. This will help to reduce the challenges of funding. As seen under section 125 of the Ghana Alternative Dispute Resolution Act of 2010

It is further recommended that funds be solicited from legal and accounting practices, and other professional practices, such as architectural, medical and engineering firms, who make up a large part of the parties that have a vested interest in quick dispute disposal through ADR the CADER. These contributions may be made in the way of either, a lump sum contribution or, a monthly contribution similar to membership fees. The idea would be to emulate such institutions as the Arbitration Foundation of South Africa, which was

started in 1993, with funds predominantly from large legal and accounting practices; and whose initial funding is supplemented by monthly contributions to the Foundation by way of subsidy'".

It should be noted however, that in today's dwindling economy, the issue of funding is one that can cause grave difficulties in the implementation of a full-blown programme of ADR in the country. There are few business houses in Uganda with sufficient income to make any meaningful and long-lasting commitments, financially, to an initiative which they may or may not need in the future. The task therefore lies in convincing business houses not of their own need for such an initiative, but rather, of the 'spin off benefits of ADR. Such benefits, for example, as enhanced confidence of the foreign business community in the legal system. Another' spin off effect may be renewed interest in Uganda by investors.

Med-Arb is a combination of mediation and arbitration. It is a combination of mediation and arbitration where the parties agree to mediate but if that fails to achieve a settlement the dispute is referred to arbitration. It is best to have different persons mediate and arbitrate. This is because the person mediating becomes privy to confidential information during the mediation process and may be biased if he transforms himself into an arbitrator.
Med-Arb can be successfully be employed where the parties are looking for a final and binding decision but would like the opportunity to first discuss the issues involved in the dispute with the other party with the understanding that some or all of the issues may be settled prior to going into the arbitration process, with the assistance of a trained and experienced mediator. This mechanism has been successfully been applied by many countries in the resolution of disputes including African countries like Kenya, Ghana, Zambia and South Africa. If the same is adopted by Uganda then there will be a faster and speedy resolution of disputes without necessarily going for litigation in courts of law hence reducing case backlog.

Adoption Of Arb-Med As A Dispute Resolution Mechanism. This is where parties start with arbitration and thereafter opt to resolve the dispute through mediation. It is best to have different persons mediate and arbitrate. This is because a person arbitrating may have made up his mind who is the successful party and thus be biased during the mediation process if he transforms himself into a mediator. This makes resolution of disputes easy such that if a dispute is not resolved by arbitration then the parties can resolve the dispute through mediation. If this is adopted it may reduce the number of cases being referred to court for adjudication hence reducing case backlog.

Certain contracts, particularly those involving complex and long term construction projects, adopt the system of appointing "Experts" for the resolution of disputes that may arise thereunder. Such experts are generally construction or civil engineers who are regularly available at the construction site and are expected to resolve disputes between the parties within a reasonable time. "Experts" can also be appointed for the resolution of disputes arising under other kinds of contracts. The qualifications and experience of an Expert depends on the nature of contract and the dispute that has arisen there under. The Experts are expected to be impartial. They undertake to interpret the provisions of the contract and/or explain their practical application. Expert Assessment has worked for countries World over in resolving disputes in the construction sector hence reducing case backlog.

Mini-Trial is relatively a new device for the resolution of disputes. Sometimes it is also called as "exchange of information". It has nothing to do with a criminal or any other trial. This procedure is only named as a mini-trial. In fact, in this process, no adjudication process takes place. It is also a time bound process. It is expected that under normal circumstances, the entire process of mini-trial should be completed within 90 days from the date of its commencement this tells that the mechanism facilitates faster resolution of disputes as compared to the adversarial system of adjudication. Many countries including the US, Britain and in Africa countries like Kenya have since adopted mini-trial to facilitated quicker resolution of disputes especially in the commercial sector. The writer therefore recommends the adoption of the same to boost the commercial industry especially by resolving disputes Quicker, this will encourage more investors in the commercial sector.

Disputants in private ADR processes should be allowed to establish their own processes. A fundamental difference between ADR processes and legal proceedings is that ADR processes provide an opportunity for participants to reach agreement by self-determination. To a certain extent, participants in private ADR processes can choose how to participate in ADR processes. For example they can through a contract set the ground rules they prefer to use or apply including any conduct requirement. For this reason Statutory intervention can be justified only in exceptional circumstances. However it should acknowledged that there may be greater justification for legislative prescription in the context of mandatory ADR processes.

Legislation should not be a first resort solution. While the terms of reference ask for advice on necessary legislative changes. A legislative 'fix' is neither necessary nor desirable as a response to arrange of issues. This is so in the field of ADR which itself is premised on the concept such as self-determination and flexibility to meet the varying needs and circumstances of the disputants. This can be very difficult to adequately capture and preserve in legislations and legislative intervention inadvertently stagnate ADR practice, and prevent it from organically evolving to meet changing needs and circumstances. Even less desirable would be an outcome where legislative prescription in ADR field eventually led to ADR becoming a quasi-litigious or simply an adjunct of the court process rather than an alternative way in which to resolve disputes. In this context therefore the Researcher recommends that:

- Legislative intervention should be where there is an empirically-demonstrated issue which needs to be resolved to protect and promote the integrity of ADR.
- Attempted to craft recommendations for legislation in a way that deliberately avoids over regulations of field that is necessarily and innately, dynamic rather than prescriptive in a way it changes and evolves.
- Legislative intervention should not be enforced by the imposition of sanctions.

Civil justice reforms should ensure that the benefits of ADR outweigh the risks of satellite litigation. Each recommendation made to protect the integrity of ADR processes should add value to to the distinctive to distinctive attributes of ADR. In particular , great care should be taken to ensure that the recommendation for legislative intervention do not, individually or cumulatively lead to participation in ADR being subject to as much(

Or more) legislative or other administrative prescriptions as litigation.
Similarly legislative intervention should not open ADR processes upto the assertion of legal rights in a way which could in turn lead to disproportionate satellite litigation.

The needs of participants should take precedent. The researcher identified a wide range of stakeholders in the civil justice system whose interest may be affected by the recommendations made in this paper. They include the disputants, legal practitioners and other representatives. The interests of these stake holders vary in weight, the primary focus should be on the interest, needs and expectations of the potential and current consumers of civil justice-the disputant.

The Involvement of Non-Government Organizations (NGOS) In Funding ADR. The NGOS in Uganda should be actively involved in supporting the ADR system such as to speed up the resolution of disputes in the country rather than looking on as the government struggles to push the system. Just like the South African NGOS are funding the **Commission for Conciliation, Mediation and Arbitration** (CCMA) in order to speed up dispute resolution among workers in South Africa, Different NGOS in Uganda should support and fund the Centre for Arbitration and Dispute Resolution (CADER) in Uganda in order to speed up the resolution of disputes through ADR in the Country.

Trained meditators are very few in Uganda which has also created backlog in the judiciary yet all suite are first referred for mediation before proceeding to litigation in courts under order 4 of the Judicature Mediation Rules .Training of mediators will help to fasten the process of mediation and increase the level of expertise in dealing with disputes referred to mediation by virtue of section 4 of judiciary (mediation) rules.

Many people in Uganda do not know about ADR as dispute resolution mechanism. Mostly when disputes arise among people the first thing they think about is commencing a suite in courts of law. The judiciary should sensitize citizens about the availability of other dispute resolution methods like mediation, arbitration and conciliation.

The lawyers are using mediation as a delaying tactic to buy time for their clients especially in cases arising from contracts involving huge amounts of money. The lawyers use section 14 of the judicature (mediation) Rules that gives only 100000/= as adjournment fees with the name of buying time for their clients which delay justice .This rule should be amended by parliament to put reasonable money ( I Recommend 200000/=) that can compel litigants to occasionally attend mediation proceeding whenever summoned.

The judicature mediation rules provide for 60 days in which mediation proceedings shall be concluded but to the surprise mediation proceeding take more days than mandated by the law. The judiciary needs to employ more mediators and put strict laws against those who without reasonable cause miss to attend mediation proceedings.

There is need to engage in periodical and quality control of meditators or practitioners especially the court based ones to ensure that its process its processes do not easily assume the character of ligation.

There should be rigorous information education and communication campaign to disseminate more ADR activation and information to the general public in or due to generate interest on ADR.

Uganda should make ADR a compulsory course unit to all students doing law in various Universities in the country. This will increase the number of trainees in the ADR Sector hence increase the number of mediators since mediation is now mandatory as per rule 4 of the Judicature (Mediation) Rules 2013.

Finally, given the current recognition both at home and internationally of the importance of ADR in any judicial system, we need no longer emphasize the reasons or justification for ADR in Uganda. Our focus now must be, not on the "'whys' and wherefores", but rather, on "how and when."

### 5.2 Conclusion

The direct inclusion, as opposed to inference, of ADR mechanisms as part of the means of conflict management in the Constitution and in Acts of Parliament is a bold ground breaking move. However, there is need for caution so that this effort is not defeated by capacity challenges, some of which are discussed above.

The Law Commission in Dublin observes that 'Alternative dispute resolution must be seen as an integral part of any modern civil justice system. It must become such a well-established part of it that when considering the proper management of litigation it forms as intrinsic and as instinctive a part of our lexicon and of our thought processes, as standard considerations like what, if any, expert evidence is required.'[248] They go on to state that while litigation must always remain available for clients, this can be a very stressful undertaking and should be seen as the final place for resolving a dispute.[249]

It is essential that in the application of ADR and to achieve a just and expeditious resolution of disputes, the Bill of rights as enshrined in the constitution must at all times be kept in mind and upheld. The future of ADR in Uganda is bright and really promising in bringing about a just society where disputes are disposed of more expeditiously and at lower costs, without having to resort to judicial settlements. Finally, a party who wishes to avoid the complexities of litigation can seek the services of ADR mechanisms experts and do so legally. There may come a time when ADR becomes the norm rather than the exception in conflict management in our fast growing country and one embracing globalization where court systems differ significantly.

ADR mechanisms can rightly be referred to as Appropriate Dispute resolution mechanisms instead of alternative as the use of the word 'alternative' makes them appear inferior to litigation while this is not the case. The reality is that these mechanisms should at least be treated as equal if not better mechanisms when compared to litigation. These have the potential for being made applicable in all walks of life wherever there exist possibilities of any dispute, a potential only waiting to be tapped. This is the time to recognize that alternative dispute resolution mechanisms stand independently and not as an alternative to any adjudicatory process. It is possible to herald a new dawn and achieve justice through the effective Application of ADR in Uganda.

Alternative Dispute resolution deals with any method or methods used in the settlement of disputes outside the formal courts. Since its introduction the world over, ADR has seen an exponential increase particularly as an integral part of justice sector reform.

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248 Law Reform Commission, *Consultation Paper on Alternative Dispute Resolution*, July 2008
249 ibid

As part of a comprehensive reform programme of the judicial service of Uganda, the idea of ADR has been introduced into the justice delivery system of Uganda under the label court- Annexted ADR. The study has amply demonstrated the role of ADR as a tool for reducing case backlog in Uganda. The hypothesis of this study posits that, ADR has been instrumental in reducing the rate of case backlog in the Judiciary and should be encouraged to spread across all courts as a mechanism of ensuring that Justice is administered at all levels. In line with this the study looked at the challenges of the formal court system such as huge caseload backlogs which often occasion long delays in delivering justice as well as the high cost associated with prosecuting cases at the formal courts. particularly in a situation where the mass of the people can barely afford the filing fee let alone acquiring a lawyer.

The availability of the various mechanisms under ADR enables practitioners to contextualize each individual dispute so as to design an appropriate mechanism for that. ADR allows parties' greater control over resolving the issues between them, encourages problem-solving approaches, and provides for more effective settlements covering substance and nuance. It also tends to enhance co-operation and to be conducive to the preservation of relationships. Effective neutral third party intercession can help to overcome blocks to settlement, and by expediting and facilitating resolution it can save costs and avoid delays and risks of litigation.

ADR processes, like adjudicatory procedures, have advantages and disadvantages which make them suitable for some cases but not for others. Indeed, ADR is not and cannot be a complete substitute for formal court litigation. This is clearly illustrated by the Constitution of the Republic of Uganda in the following instances where ADR is not applicable. These are cases involving enforcement and interpretation of constitutional provisions, the environment, any issue that bothers on national or public interest and any other matter that cannot be settled with the use of ADR. It is apparent from then that the concept is to supplement the formal court litigation and enhance the quality of justice delivery.

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