A CRITICAL ANALYSIS ON THE LAW RELATING TO THE SETTLEMENT OF DISPUTES OUTSIDE COURT.

BY

TURATSINZE ALEX

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A RESEARCH REPORT SUBMITTED TO THE SCHOOL OF LAW IN PARTIAL FULFILLMENT OF THE REQUIREMENT FOR THE AWARD OF BACHELOR OF LAWS DEGREE.

SEPTEMBER 2018

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 Ms Maigi 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

TURATSINZE ALEX

SIGNATURE

.....

DATE: 24.09.2018

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 24/9/18 .....

DEDICATION

I would like to recognize the efforts of my dear Dad Mr. Bakefuga Julius and My Mum Mrs. Joy Bakefuga in educating me, which education has enabled me to produce this work.

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God bless you all.

LIST OF ACRONYMS

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

LIST OF STATUTES

Domestic

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

International

1. Arbitration Act, Chapter 40 of the Laws of Zambia.
2. Civil Procedure Act, Cap 21, Laws of Kenya
3. Commercial arbitrations 1985
4. Companies Act, Chapter 388 of the Laws of Zambia.
5. Constitution of Kenya, 2010
6. High Court Act, Chapter 27 of the Laws of Zambia.
7. Labour Relations Act, No. 14 of 2007, Laws of Kenya
8. The UN convention of recognition of a foreign artblsal awards 1958 (new york convention)
9. UNCTRAL Conciliation Rules 1976
10. UNCTRAL model law on international commercial Arbitration 1985
11. United nations commission for information al trade law (UNCITRAL) Arbitrations races 1976

LIST OF CASES

1. East Africa Development Bank Vs. Zziwa Horticultural [Exporters' ltd
2. Farmland industries Ltd V global Exports limited]
3. East African Development Bank V Zziwa Horticultural Exports
4. Oil seeds (Uganda) limited V Uganda development banks
5. Rashid moledina and co (Mombasa) limited and Ors Vs Hoima Ginneries limited
6. home insurance Vs mentor insurance
7. shell (U) Limited Vs Agip (U) Limited
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11. Okpuruwu vs. Okpokam
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ABSRACT

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.

Resolving disputes outside court has gained recognition in the Ugandan legal system especially through the establishment of the Judicature (Mediation) Rules of 2013 that made mediation part and partial of the judicial system. This act was to enhance access to relatively cheaper and quicker justice to help reduce the clogging associated with the adversarial system of adjudication and afford more amicable and reconciliatory peace and justice among the citizens of Uganda.

The paper therefore discusses the different laws that govern the resolution of disputes outside Court and how the same have been incorporated in the legal system in Uganda and whether the same have been implemented by the judges in dealing with different facts that are brought before them relating to resolving disputes outside court.

This paper also evaluates the different mechanisms of ADR applicable in the Ugandan legal system. It explains more on conciliation, mediation, arbitration and commission of Inquiry that are mostly applied in Uganda.

The paper also analyzes the international best practices of ADR as applied by different states for example Tanzania, Kenya, Zambia and others. The researcher recommended some other best practices to be adopted by Uganda.

Resolution of disputes outside court though popular and desirable is limited in application because of limited resources and few trained people in carrying out the exercise, lack of public awareness and constitutional limitations that render some cases non Judicable under the ADR regime.

CHAPTER ONE

1.0 Introduction.

Settling disputes outside court has gained its center stage in Uganda in the Last decade as legislators formulate laws in favor of the settlement of the settlement of disputes without necessarily going to court of law. The whole process of settling disputes outside court has been referred to as Alternative Dispute Resolution (ADR) which literally means resolving disputes without going through court litigation. Alternative Dispute Resolution has been with African societies since the pre-colonial time, besides the modern concept of litigation at law courts came with colonialism. Justice David Wangutusi, the chairperson of the Alternative Dispute Resolution Project Advisory Board brings it out clear as he stated that "what we are doing in mediation ;is what our ancestors used to do before the colonialists came with this court system we have now. Whenever they had a dispute, they would seat around a pot of malwa (local brew) and talk about it and at the end they would be shaking hands because the matter would have been settled."[1]The assertion by the learned justice shows that the ADR is not a new mechanism in Uganda but rather, it was a mechanism used by our ancestors to resolve disputes before the litigation process was introduced to Africa and Uganda by colonialists. ADR is rooted in humanity; it is backed by Christianity and Also Islam. Mathew 5:25 which states that "settle matters quickly with your adversary who is taking you to court. Do it while you are still together on the way or your adversary may hand you over to the judge and the judge may hand you to the officer and you may be thrown into prison."[2]

ADR mechanism while well applied leads to reconciliation between warring parties as the constitution of Uganda (1995) under article 26 encourages reconciliation between parties which ADR seeks to achieve. Under the article[3]there are principles that are to guide court in administration of justice and they include: Justice shall be done to all irrespective of their social or economic status, 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 administrated without undue regard to techniqualities.[4]

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1 The observer (Kampala) 4th may 2016 http/allafrica.com/stories/201605040866.html.
2 Mathew 5:25 of the Good news bible.

3Article 126(2) of the constitution of Uganda (1993).
4 ADR, A Ugandan judicial perspective, a paper delivered at a continuation seminar for magistrates grade one at colline hotel.1st april2005

According to Justice Geoffrey W.M Kiryabwire "ADR is a structured negotiations process whereby the parties to a dispute themselves negotiated their own settlement with the help of an independent intermediary who is a neutral and trained in techniques of ADR"[5] Mediation is an alternative dispute resolution mechanism that allows parties entangled in dispute find a quick resolution with the assistance of a neutral third party.[6]Mediation as used in law is a form of alternative dispute resolution (ADR), is a way of resolving disputes between two or more parties with concrete effects. Typically a third party the mediator assists the parties to negotiate a settlement; disputants may mediate disputes in a variety of Domains such as a commercial legal, diplomatic, workplace, community and family matters.[7]

Conciliation is another form of ADR provided under the arbitration and conciliation Act[8], a conciliator aims at assisting the parties to the dispute to find a solution but has no power to enforce it. The parties to the dispute arrive at their solution independently and impartially as stipulated by ***Section 53***of the Act *"the conciliator shall be guided by principles of objectivity fairness and justice, giving consideration for among others this the right and obligations of parties the usages of the trade considered and circumstances surrounding the dispute, including any previsions business practices between the parties*[9].

Negotiation as a settlement technique is fairly straight forward with parties talking direct to each other even though writers do make a distinction between conciliation and mediation, it is increasingly appearing like these two forms of ADR are being merged into one single concept generally called "mediation" this is because the processes are very similar in substance. Both involve a neutral whose role is to help the disputing parties reach an agreed settlement. An agreement is reached through a process of caucusing were the neutral holds a series of meetings with the parties in dispute either together or as isolated bass[10].In this way, differences are narrowed and or eventually resolved. Mini-trial early neutral evaluation is mostly common among commercial corporations. In this case a neutral third party is called

5ADR, A Ugandan judicial perspective, a paper delivered at a continuation seminar for magistrates grade one at colline hotel.1st april2005.
6 Http// all Africa. Com/stories/201605040866.htm/
7 ADR, A Ugandan judicial perspective, a paper delivered at a continuation seminar for magistrates grade one at colline hotel.1st april2005

8 Part III of the arbitration and conciliation act cap 4
9 Section 53
10The perspective from the private sector by Geoffrey kiryabwire to the ILI/CADER/USAID-SPEED PROJECT

in to conduct a hearing in which the executive of the corporation may participate in ADR sessions.[11]

Commission of inquiry's a device that has proved useful on some occasion. It originated from the Hague convention of 1899 and 1907. Its specific purpose is to eradicate the facts behind a dispute in order to facilitate a settlement. , it does not involve the application of rules or law. The device is linked to the idea that the resort to an inquiry provides a cooling off period and reduces to risk of counter measures or breaches of the peace. In Uganda today a commission of inquiry has been used in investigating land matters in Uganda and it is headed by Honorable Justice Catherine Bamugemereire.[12]

A close look at ADR suggests it is not a new mechanism In Uganda and Africa at large. The use of a third party neutral in the resolution of disputes had been and is still; very common up-to date. The decision reached with the intervention of the third party is implemented in good faith and are normally widely supported in the community. This is usually referred to as the win/win situation since both parties appreciate their position.[13]

1.1 Back ground to the study.

It is important to note that civil law countries have applied ADR more readily than common law countries.[14]Since the French resolution 1789 power has shifted to the ordinary people therefore the judiciaries in the Franco-phone countries, administering roman French law, easily concede authority to non-state actors to resolve disputes. As a matter of fact there is a whole office of the mediator of French, set aside for mediation disputes, including those between government and private individuals. As an example we can take the USA and the UK to highlight the gravity of backlog and ADR has been utilized to address the malaise.[15]

As early as 1906 at a conference to address backlog in USA Roscoe E Pound remarked "we have trenched the point where our systems of justice, both state and judiciary may literally break down before the end of its century". Pound expressed fear that American society was

11 ADR, A Ugandan judicial perspective, a paper delivered at a continuation seminar for magistrates grade one at colline hotel.1st april2005

12 Daily Monitor (News Paper)

13 Hon Justice Geoffrey Kiyabwire Court Based ADR A Paper Delivered At The Law Development Center

14 Alternative dispute resolution is the magic wand to solve case backlog in our courts, September 14, 2012 by Justice Tabora Patrick. (Observer).

15 Alternative dispute resolution is the magic wand to solve case backlog in our courts, September 14, 2012 by Justice Tabora Patrick. (Observer).

in danger of being overrun by order of lawyers, hungry as locusts and brigades of judges. It is not far from the truth to say that with slight modification the remarks can apply to Uganda R.E pound was talking about the problems that result from backlog of cases and how people can profiteer.[16]

In April 1976 the chief justice of the supreme court of USA justice warren E Burger called a conference on causes of popular dissatisfaction with administration of justice in the USA. It was attended by judicial officers, civil rights, activities, public litigation lawyers and academics. The conference the idea of enabling people to resolve their own conflict was mooted. It would appear the conference sparked off interest alternative methods and lays of settling disputes.In 1990 congress passed an act to require all federal agencies to develop policies on the use of ADR. It was made obligatory to appoint an ADR specialist and appropriate employees trained in ADR techniques and in 1990 an executive order was passed and obliged federal agencies to use negotiation or third party settlement techniques in appropriate case[17]

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 [18] enjoined the court to inter alia apply the following principles. Justice shall not be delayed, adequate compensation shall be awarded to victims of wrongs, Reconciliation between parties shall be promoted, 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 role 1 [19] 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.

16 ibid

17 Ibid.
18 Article 126(2)
19 Civil procedure rules cap 71 now order 12 rule 1

Rule 2 of order 12[20] 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.[21]

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[22]. 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.

Settlement of disputes outside court has been with African societies since the pre-colonial times besides the concept of modern litigation at the law courts that came with colonialism however contemporary settlement of disputes outside court (ADR) mechanisms are wholly western perspective transferred to African settings with title regard for the development gaps, consciousness, rationality and socio-cultural differences between the developed nations and the developing ones.

20Civil procedure rule cap 71

21 Alternative dispute resolution is the magic wand to solve case backlog in our courts, September 14, 2012 by Justice Tabora Patrick. (Observer).

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

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

This has become the subject of growing debate in the settlement of disputes outside court fraternity, especially among African scholars, who argue that traditional African societies practice the so called western "alternative measures" for centuries before their recent adoption[23]Besides conceptually and in practice settlement of disputes outside court has its fair share of problems and critics, for example successful mediation is one thing, rate of compliance is another. Mediation is sometimes challenged as changing victims' rights that needs to be enforced into needs often in rational cases that are mediated. In such cases others forms of morality that compete with the morality of Mediation are raised. Besides the effectiveness and efficiency of settlement of dispute outside court (ADR) depends on the level of consciousness of the parties, education and the quality of mediators. The research seeks to find out the different mechanism of dispute resolution outside court and the effectiveness of alternative dispute resolution.[24]

1.3 Scope

This study examined the extent to which ADR has been employed as a tool for resolving disputes in Uganda with particular reference to issues related to domestic, religions, land and work place disputes. A review of success challenges and prospects will be conducted as well.

1.4 The General Objective was

The general objective will be to analyze the law relating to settlement of disputes outside court in Uganda.

1.4.1 The specific objectives of this study were as follow:

i. To analyze the existing legal frame work and mechanisms used in settling disputes outside court in Uganda.
ii. To analyze the International best practice on settlement of disputes outside court.
iii. To propose reforms and recommendation of improving settlement of disputes outside court.

1.5 Research questions.

i. What are the different laws used in settling disputes outside court in Uganda?

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23 A botchie, Chris, social control in traditional southern Edward of Ghana: relevance of mode prevention (ACCRA: Ghana university press 1997)

24 Alternative dispute resolution is the magic wand to solve case backlog in our courts, September 14, 2012 by Justice Tabora Patrick. (Observer).

ii. What is the international best practice to settlement of disputes outside court?

iii. What do you propose as reforms and recommendations of improving settlement of disputes outside court?

1.6 Hypothesis

The settlement of disputes outside court offers quicker, cheaper and amicable solution to disputes in Uganda since it encourages reconciliation among parties and a" win win" situation is reached by the parties.

1.7 Rationale

There is a seeming perceptional that the use of formal court system, in which judgment passed to settle a dispute among belligerent parties is by far the best means to dispute resolution. In most cases where judgments are passed there is always the existence of winner takes all situation or total loss among the belligerents. This may bring peace but not necessarily a lasting solution to the problem. In ADR however there is full participation of all parties in settling the dispute and are all involved in agreements. This therefore gives all parties some amount of satisfaction as against that of court ruling in which judgment is reached without consent of the feeding parties. This research therefore seeks to bring the fore, the advantages of applying ADR more extensively in the settlement of disputes outside court

1.8 Methodology.

This research is based on a qualitative methodology ,information is from publications of highly qualified state publicists through different publications including text books 'novels, law journals, class notes, judicial decisions, law dictionaries and both municipal and international legislations.

1.9 Limitations to the study

The researcher anticipates encountering a number of constraints which include limited funding, limited time frame work.

1.10 Conclusion

ADR is instrumental in settling disputes outside court in Uganda today. This paper therefore introduces how ADR has been effectively used in the settlement of disputes outside court by the judiciary in Uganda.

CHAPTER TWO

LITERATURE REVIEW

2.0 Introduction

Quite a lot of literature has been written about this subject, both locally and internationally. The first step in examining national and international mediation and ADR trends is to examine the current thinking around mediation models.

2.1 Related literature

Boulle distinguishes between four models mediation settlement, facilitative, therapeutic and evaluative and makes the point that mediators in practice might demonstrate use of two or more models. Briefly summarized, the main objective of settlement mediation is to encourage incremental bargaining towards a central point between the two parties' positions, the mediator works to bring the parties off their positions to a compromise. In the facilitative model mediators are encouraged to focus primarily on helping the parties identify and express their interests and needs, assuming that this will bring to the surface common ground and highlight areas for trade-offs and compromise. Evaluative mediators try to provide disputants with a realistic assessment of their negotiating positions according to legal rights and entitlements and within the aniticipated range of court outcomes, a style that is common where parties are in conflict over a single issue often money. Finally the therapeutic model, which has a focus on dealing with the underlying causes of the problem with a view to improving future relationships between the parties.[25]

Facilitative mediation (sometimes known as problem-solving mediation) is widely practiced amongst the mediation community. Its primary focus is on the problem itself and mediators' encourage parties to explore data and experiences related to the problem. The approach is pragmatic, focuses on underlying interests and needs and is well expressed in the influential work by Moore . Critics of this approach argue that when mediators practicing the model probe for issues underlying the conflict, they focus on information that relates to the problem itself rather than exploring broader issues relating to the parties' identities and relationships.[26]

In the prominent work by Bush and Folger on Transformative Mediation the authors contrast their perspective on the practice of mediation with the more traditional problem-

25 Boulle, Mediation: skills and techniques.(1998)
26boulle Mediation: skills and techniques(1998)

solving approach and explore the transformative potential of mediation.[27] According to Bush and Folger the goal of problem solving mediation is generating a mutually acceptable settlement of the immediate dispute. They see problem solving mediators as often highly directive in their attempts to reach this goal - they control not only the process. But also the substance of the discussion, focusing on areas of consensus and resolvable' issues, while avoiding areas of disagreement where consensus is less likely. According to them although all decisions are, in theory, left in the hands of the disputants, problem-solving mediators often play a large role in crafting settlement terms and obtaining the parties' agreement.[28]

The transformative approach to mediation does not seek resolution of the immediate problem, but rather, seeks the empowerment and mutual recognition of the parties involved. Empowerment, according to Bush and Folger, means enabling the parties to define their own issues and to seek solutions on their own. Recognition means enabling the parties to see and understand the other person's point of view - to understand how they define the problem and why they seek the solution that they do. Often, empowerment and recognition pave the way for a mutually-agreeable settlement, but that is only a secondary effect. The primary goal of transformative mediation is to foster the parties' empowerment and recognition, thereby enabling them to approach their current problem, as well as later problems, with a stronger, yet more open view. This approach, according to Bush and Folger, avoids the problem of mediator directiveness which so often occurs in problem-solving mediation, putting responsibility for all outcomes squarely on the disputants.[29]

The narrative approach to managing and mediating conflicts was offered by Winslade and monk.[30] This approach attempted to re-examine traditional approaches to conflict mediation by examining the stories (or discourses) we tell about our conflicts. The authors introduced theory that challenges assumptions that our interests are natural" and argue that what people want does not stem from internal desires or interests. Instead people construct conflict from narrative descriptions of events and the stories we tell about these events condition our interests, both socially and culturally. Within the mediation framework a safe place is set up for disputants to tell their personal stories about the conflict and their relationship to it. The mediator then works to break down the conflict into its component parts and stories, and works to uncover the assumptions that each party brings to the conflict. Once the biases and

27Bush and Folger, The Promise of "Mediation" (1994)
28 ibid
29 ibid
30Winslade and Monk, "Narrative Mediation" (2000).

assumptions about a conflict are uncovered, alternative approaches are considered and new stories about the conflict are created the aim being to move disputants from seemingly intractable conflict situations to new stories based on understanding, respect and collaboration.

There has been significant international debate since the publication of The Promise of"Mediation" [31] and "Narrative Mediation" These models have been positioned as alternatives to the interest-based approach that has dominated mediation practice especially in business and legal matters. Many mediators continue to identify with a particular model in their practice; others have found that their styles are an amalgam of various models. At Carleton University in Ottawa, Canada, Insight mediation is the model that is taught and practiced- it draws on the work of Canadian philosopher Bernard Lonergan and his theory of insight. mediators who practice this type of mediation look for direct insights (moments of clarity, the "Ah ha! ") and inverse insights (those new insights that a mediator achieves by displaying curiosity and by challenging assumptions and expectations) into what the conflict means to each party by discovering what each party cares about and how that threatens the other party.The Transformative and Narrative models maintain that probing for information about the problem keeps parties locked into a conflict and to achieve resolution a shift must be made away from the problem. In contrast, Picard and Melchin found when they looked at their own mediation practice they could, by focusing on the problem and by exploring the parties' concerns about the conflict, breakthrough to a deeper understanding of the relational issues of the problem. [32]

Using highly developed questioning and listening skills the mediator works to foster communication among the disputants to explore the full dimensions of the conflict. Insight mediators work under the assumption that conflicts are maintained by feelings of threat and the Insight mediator works to help parties examine and understand their underlying values and threats, both real and perceived. In comparison to the Transformative model, which the authors maintain focuses on the interactions between the parties (looking for opportunities to foster empowerment and recognition), and the Narrative model where the mediator works co-construct a new non-conflict story (and spends little time probing the "problem" story),

31 Joseph Folger The promise of mediation 2002
32 Joseph Folger The promise of mediation 2002

the Insight mode takes parties through an in-depth exploration of the presenting problem rather than around it.[33]

Whilst the Insight model does share some similarities with the problem-solving model, the difference between the Insight model and the Interest-based "problem-solving model according to Picard and Melchi, that the Insight model is relationship-centered rather than problem-centred and assumes that parties must not only explore the problem, but move through and beyond it to understand the deeper cares, concerns, values, interests and feelings that underlie the problem'. In their view this model is well suited to conflicts where there is an ongoing relationship and. because of the newness of the model; they invite researchers and practitioners to evaluate its usefulness in a variety of contexts.[34]

Another perspective is offered by Danesh and Danesh who use the consultative intervention model to offer a critique of institutionalized mediation. The three defining features of this model are that it is pro-active, unity-centered and educative; features which they argue are missing from the predominant mediation models.[35] A pro-active effect offers three possibilities; firstly a disputant could leave a conflict resolution process with a better understanding of how to deal with the psychological and physical toll that conflict can have on individuals and their relationships. Secondly, disputants can learn how to better manage future conflicts without resorting to external intervention. Thirdly, disputants may learn how to approach future conflict in a way that lessens the appearance of conflict in the first place. Tied into this is the premise that our approach to conflict, the intensity of it and the way we pursue conflict resolution, is tied into our worldview - proactive conflict resolution requires making participants aware of the connection between their worldview, the conflict they are in and their approach to the resolution of that conflict. According to Danesh and Danesh conventional mediation is not designed to engage at the level of worldview.[36]Engagement in a consultative intervention model gives disputants the opportunity to learn about themselves and others, and how conflicts emerge, (a worldview self-education as they are encouraged to become aware of and reflect upon their own worldview), education as "challenge and transparency" meaning that the process itself educates disputants by challenging them to evaluate themselves, and their alternatives. According to the authors it is important that this process be transparent so disputants'

33 Joseph Folger The promise of mediation 2002
34 Joseph Folger The promise of mediation 2002
35Danesh and Danesh ,Consultative Conflict Resolution Model Beyond Alternative Dispute Resolution.(2002)
36Danesh and Danesh Consultative Conflict Resolution Model Beyond Alternative Dispute Resolution.(2002

recognize the worldview underlying their approach to conflict. Encouraging disputants to consider how they can build a degree of trust and unity between themselves as a group rather than focusing on themselves as individuals, may result in conscious reflection and facilitate a more harmonious. Meaningful process as disputant reflects upon the nature of conflict and their own behavior in trying to settle the matter at hand. The authors contrast this with the interest-based approach where the job of the mediator is to help individuals to avoid "the particular idiosyncratic problems that are pushing the parties toward impasse" and focus them instead on an institutionalized model that aims at resolving the specific differences between them. Finally, the authors consider that in combining these components, the consultative conflict resolution model should "invite participants to consciously reflect on the range of predominant worldviews and the relationship of those worldviews to approaches to resolving conflict". The current challenge according to the authors is to recognize a condition of unity as the broader purpose of conflict resolution.[37]

In an article by Kressel the Strategic style of mediation is approached in which the mediator attempts to attend to the underlying dysfunction that is fuelling the conflict. The author maintains that although this style is illustrated in divorce mediation, there is little documented research or discussion about it. The author cites a number of writings that, in his view reveal little evidence of mediators who believe it is important to search for and address underlying causes of conflict and in fact most of the empirical studies focus on a "professional bent" to encourage discussions around interests rather than positions or a non-directive facilitator who aims to improve communications and understanding, regardless of agreement making.[38]

The characteristics of the Strategic style are summarized as having a focus on latent causes, having a highly active mediator who is clearly the leader of the problem-solving process rather than a non-directive facilitator and a circumscribed, pragmatic focus. Mediators surface problems that are immediately relevant to solving a practical problem in an efficient manner. The author considers that the strategic style is a result of mediators' training in disciplines with well-developed traditions of latent cause thinking, repeated experiences involving disputing parties with ongoing relationships and organizational contexts that support reflection about latent causes-such training is not typical of lawyers, Labour mediators and the community mediators who govern the world of ADR. Finally, the author

37 ibid
38 Kressel, The strategic style in mediation. (2007)

raises a number of empirical "How common is the strategic style? in settings for which the strategic style as well as other styles are appropriate, how flexible are mediators in moving between styles, either from case to case or within a given dispute, as the parties' motivation and circumstances alter? In settings for which the strategic style as well as other styles are appropriate, in what rays is the strategic style more effective or less so?"[39]

Some recent literature from the USA and the creation of the Harvard Negotiation Insight Initiative led by Erica Arid Fox has seen a progressive move towards managing conflict at a deeper level and encouraging mediators to explore the spiritual side of mediation offers another vision of mediation practice and conflict resolution. The work aims to examine the essence of the process rather than the procedure and sets out to challenge mediators to question their own assumptions about how conflict should be handled and notes that mediation is about "respect, honest and empathetic communication, trusting collaborative relationships, responsibility, forgiveness and closure." . Every conflict and every resolution, says Cloke, "has a spiritual dimension and energy... Boldness, spirited issues in mediation, it is necessary to become aware of and cultivate spiritual experience within ourselves, which means pursuing mediation as a spiritual task."[40]

In the more complex "The Crossroads of Conflict" Cloke encourages mediators and parties in conflict to improve their dispute resolution skills by –travelling "the pith of transformation and transcendence of wisdom, spirit and heart" (p1). Cloke does not – address litigated disputes and so the direction that is set out in the book would be more difficult when disputes have reached court or with people who do not have an ongoing relationship.And so within the modern mediation movement there is a variety of models being practiced and researched. remarks that a lack of clear process definition leads to disparate practices and goes on to comment that whilst disparate practices reflect mediation diversity, they also pose a real problem for quality control and mediation promotion amongst consumers.[41]

Mediation growth and application is very much influenced by the context in which it takes place. Alexander (2002) points out that mediation and ADR has grown rapidly in many common law jurisdictions such as USA. Australia, Canada and England and less quickly in

39 39 Kressel, The strategic style in mediation. (2007)
40 Kressel, The strategic style in mediation. (2007)
41 Cloke in The crossroads of conflict: a journey into heart of dispute resolution

civil law jurisdictions such as Germany, Austria, Denmark, Belgium.Germany Switzerland and Yugoslavia with the exception of the Netherlands and South Africa. ADR plays a unique role in South Africa due to the fall of the apartheid system and the ensuing human rights and discrimination issues. Alexander suggests that despite the differences in developmental stages, universal themes exist around such issues as the debate on standards for mediation practice and accreditation; how to determine the suitability of a dispute for mediation; flexibility regulation; how to mobilize mediation practice in the shadow of the court. In regards to process, the debate continues about the practice of mediation versus the theory of process this being more obvious in the court-related mediation where lawyers or judges play a role. Another key issue is whether the policy aims of mediation such as improving access to justice, reducing court waiting lists and increasing consumer satisfaction with the legal system have been and can be met. At the practice end of the spectrum, she observes that mediators, regardless of accreditation training, tend to mediate in a way that reflects their previous training whether as lawyers, engineers, social workers, psychologists or academics.[42]

The debate continues as to whether lawyers, or those with a socio and psychology background, make better mediators, although the design of best-practice formula for mediation models and systems cannot be significantly dependent on the nature of the Leal system in which it operates, Alexander points out that there is a risk in merely reproducing policy and making international comparisons without asking which success stories will or will not translate. In his article, "Alternative Dispute Resolution in Africa: Preventing Conflicts and Enhancing Stability", Uwazie posits that a great percentage of Africans have lost confidence in their states' courts to ensure timely and just closure to their cases. In post conflicts and fragile settings characterised by high tensions and malfunctioning justice systems, there is an urgent need for a "timely, accessible, affordable and trusted" dispute resolution mechanisms to resolve disagreements or disputes before they widen in scope and destruction. He asserts that in situations where the courts are involved, much emphasis is on addressing legal questions, while less or no attention is given to conflict resolution and mitigation which has the tendency of escalating disputes as it is assumed that real conflict begins after a judge proclaims winner in a case. The ability of citizens to have confidence in the justice sector of their country has serious repercussions on the governance of the

42 Alexander, Global Trends in Mediation. World Arbitration and Mediation. (2002)

society. From a survey conducted in 26 African states, he noted that "respondents who expressed confidence in their judicial systems were more than three times as likely to say they have confidence in their national governance."

Citizens' confidence in the judiciary is tantamount to their judgments on their own Governments. The use of antiquated structures, inadequate stenographers, and manual records keeping and above all overcrowding of cases render the courts prey to manipulations. Meanwhile, there is a decline in the preference for traditional justice where citizens prefer their indigenous chiefs, spiritual leaders and clan heads to arbitrate and conciliate their grievances due to modernization.[43]

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43Uwazie "Alternative Dispute Resolution in Africa: Preventing Conflicts and Enhancing Stability",

absent in the ADR processes. The use of ADR, Uwazie noted, places much emphasis on mediation as it focus mainly on the interests of parties unlike their negotiation positions. With mediation, claimants are offered the opportunity to be heard and processes ensure that parties arrive at a mutually beneficial solution. With the belief that their positions have been considered with seriousness, they easily Embrace the resolution because their participation guarantees the integrity of the process. ADR with emphasis on mediation, in the assertion of the author, has saved many courts around the world to reduce backlog of cases, delays, cost to litigants, fair and prompt justice delivery and offer parties the opportunity to have control over their case resolution without feeling a sense of being side lined. On the track record of ADR in Africa, Uwazie further states that the idea of ADR is in tandem with traditional concept of African justice due to its core values of reconciliation. Positive results from the pioneering ADR projects in Ghana, Ethiopia and Nigeria in 2003 were a manifestation that ADR is suitable in African settings. He concluded by stating that the use of ADR can serve as an effective dispute settlement system and closethe gap between formal legal system and traditional modes of African justice. Its institutionalization into the legal system of Africa will ensure security and development.[44]

For the institution of ADR in African dispute resolution systems, he calls on governments and international partners to invest in training and infrastructural support for ADR networkrks composed of mediators and advocates to ensure the continuous advancement of best practice. He also calls for capacity building training for legal professionals, religious leaders, traditional authorities, election officials, police and security personnel among others. The creation of appropriate incentives for stakeholders is also necessary to broaden the adoption of ADR mechanisms.[45]

Uwazie's thesis is relevant to this work because it emphasizes the use of timely, accessible, and trusted mechanisms in resolving disputes as a way of ensuring peace, security and good governance in Africa. However his assessment on ADR projects in the named countries was not comprehensive as it was on based on pioneering projects as a "small"

44Ernest E Uwazie "Alternative Dispute Resolution in Africa: Preventing Conflicts and Enhancing Stability"(2011).

45 A Nigerian lawyer, Kekarias Kenneaa, made the assertion at an Alternative Dispute Resolution (ADR) training in Addis Ababa, December 29, 2007. quoted in Uwazie, Ernest E. *Alternative dispute resolution in Africa: Preventing conflict and enhancing stability*. Africa Center for Strategic Studies, 2011. P2.

success chalked may be hyped and established project comes with its own challenges. Again, Uwazie does not touch the socio-cultural and politico-traditional discrepancies which could stifle smooth implementation of ADR operations in those countries. Despite these concerns, ADR can succeed when all stakeholders give the needed support it deserves to flourish.

In "Mediation with Traditional Flavors in the Fodome Chieftaincy and Communal Conflicts",

Ahorsu and Ame, advocate the use of "culturally tuned indigenous values, norms and ethnographic practice as foundations for conflict resolution," they argue that though African societies have embraced modernisation and undergone various changes, elements such as kinship, cultural bonds and practices still exists and play influential role in the lives of many.[46]

As a result of these commitments, an effective dispute resolution mechanism should involve a blend of indigenous or ethnographic means of resolving disputes with the "imported" western mediation processes.[47] Their argument is that the recently promoted conflict resolution mechanisms are wholesale western in perspective transmitted to African settings without due cognisance for the gaps in development, consciousness, rationality and sociocultural differences between the developed nations of the West and the developing African nations. While admitting that ADR is efficient in saving time and economical with regards to litigation rates and more importantly, allowing disputants to work for greater joint solutions, attention must also be focused on their cultural mediation and arbitration procedures and practices of indigenous people and indeed, be blended with the Western forms of resolution.[48]

A prerequisite for an effective conflict management, according to the writers, are those that parties in dispute can identify with as their own. Therefore, an understanding of the sociocultural locales within which conflict occurs "should constitute the primary unit of analysis, and also the appropriate source of models for preventing, managing, and resolving conflicts and facilitating new relationships."[49] The authors effectively demonstrated the application of this method through the mediation with traditional flavor

46 ibid

47 Magali Rheault and Bob Tortora, "Confidence in Institutions," Harvard International Review 32, no. 4 (Winter 2011), access at <http://hir.harvard.edu/india-in-transition/confidence-in-institutions>.

48 Ahorsu and Ame, "Mediation with Traditional Flavors in the Fodome Chieftaincy and Communal Conflicts", (2011)

49 Ahorsu and Ame, "Mediation with Traditional Flavors in the Fodome Chieftaincy and Communal Conflicts", (2011)

approach in 2008-09 to resolve a protracted chieftaincy and communal conflicts in the Fodome traditional area among the Ewe people of the Volta region of Ghana; dating back to the 1940s which were prosecuted at the law courts with some moving as far as the Appeal Court without success. The mediators cum authors, while adhering to principles of contemporary mediation, complimented it with traditional philosophy, institutions, symbolic orders, practices, norms and discourses in the mediation process to successfully bring the dispute to an end. Their work is much related to this study as the aim of the study is to access how effectively the adopted alternative dispute resolution mechanism are being implemented to ensure the realization of peace and security in West African societies.[50]

In "Mediation – A Preferred Method of Dispute Resolution", Feinberg argues that issues such as "burgeoning court dockets, spiraling litigation costs, and dissatisfaction with the traditional adversarial process have caused increased interest in and use of alternative dispute resolution mechanisms."[51] He espouses the virtues of ADR and noted that though all these ADR methods have their advantages over litigation in particular cases. Mediation, in the view of the writer, is particularly advantageous to not only litigation but all other alternative means of resolving disputes. In the dispute resolution process, litigation focuses on narrow issues determined by prefabricated legal doctrines, and litigation's prime interest in dispute resolution is to determine who is right or wrong, not necessarily to resolve the conflict and foster relationship.[52] He further noted that mediated-assisted conflict does not only ensure amicable settlement of the conflict but goes beyond legal determinants to explore existing relationship between disputing parties. This reconciliatory approach adopted by ADR is very imperative as the survival of the society is at stake. Disputing parties will always meet together and engage in some activities in the society beyond the conflict, so it is important in ensuring that the antagonism ceases and parties reconcile, for peace and tranquillity to prevail in the society.[53]

In "Mediation and Access to Justice Delivery in Africa: Perspectives from Ghana", Jacqueline Nolan-Haley praised the adoption of the ADR in Ghana to consolidate its

50Ahorsu and Ame, "Mediation with Traditional Flavors in the Fodome Chieftaincy and Communal Conflicts", (2011)

51 Ahorsu, K., & Ame, R. (2011). Mediation with a Traditional Flavour in the Fodome Chieftaincy and Communal Conflicts. *African Conflict & Peacebuilding Review*, (2011):

52 ibid

53 Feinberg "Mediation – A Preferred Method of Dispute Resolution", (1989)

entrenched peaceful and glorious stable democracy in the West African sub region. The main thrust of her work is the fact that mediation should remain a voluntary process in order to provide authentic access to justice. She bemoans how mediation has been transformed into an "indemnity" clause in some industrial laws, and only recommended or resorted when judicial processes stall. This indemnity given to mediation has the tendency of losing its conflict resolution prowess and not given the prominence it deserves in the long run. She concludes by advocating that in ensuring the wheels of justice to smoothly provide fairness, mediation should be made voluntary.[54]

Bolaji, A. Kehinde's "Adapting Traditional Peacemaking Principles to Co ntemporary Conflicts: The ECOWAS Conflict Prevention Framework" narrates the West African perpetual conflict predicaments as deep-rooted interest of groups and individuals fighting to protect and expand their spaces as a tool for resolving political, social and religious discrimination suffered.[55] Kehinde's praise for the sub-regional body, Economic Community of West African States (ECOWAS) efforts in addressing the phenomenon through effective, dynamic and workable "home-grown" conflict management through the "The ECOWAS Conflict Prevention Framework," is appropriate and proactive.[56] He further opines that the inclusion of traditionally-trusted conflict resolution mechanisms coupled with local structures, resonant with West African societies in the right directions as this will court traditional, religious and other stakeholders into mainstream conflict resolution without too much reliance on central authority, is tantalising. The incorporation of traditional and religious structures in ECPF is viewed from their potency and capability of speedily resolving conflict. These structures will continue to ensure the survival and sustenance of traditional West African societies. Indeed, tapping the experiences of traditional and religious leaders with conflict resolution clouts is very important as they can offer immeasurable assistance in this regard.[57]

The preoccupation of conflict resolution mechanisms is the restoration and sustenance of peace on the society. Peace-building efforts are thus very imperative in ensuring the

54", Jacqueline Nolan-Haley "Mediation and Access to Justice Delivery in Africa: Perspectives from Ghana", (2014)

55 Feinberg, Kenneth R., (1989). *Mediation - A Preferred Method of Dispute Resolution*, 16 Pepp. L. Rev. 5

56 ibid

57 Bolaji, K. A., (2011). Adapting Traditional Peacemaking Principles to Contemporary Conflicts: The ECOWAS Conflict Prevention Framework. *African Conflict & Peacebuilding Review, 1*(2), 183-204.

societal existence. In "A Glossary of Terms and Concept in Peace and Conflict Studies" by Christopher Miller, peace-building is seen as "policies, programs and associated efforts to restore stability and the effectiveness of social, political, and economic institutions and structures in the wake of a war or some other debilitating or catastrophic event." Peace is ultimately expected after every conflict resolution. But this does not happen automatically as sometimes, disputants may revert to becoming worse enemies- especially in the adversarial court system, which can become disastrous for society. Peace is a non-negotiable resource for which peace-building activities must be instituted in order to assuage possible conflict in the society. Indeed, peace is a social web connecting and permeating in all spheres of life and its absence accordingly affects every facets of society as well. Traditional and religious peace-building mechanisms should be strengthened and entrenched in order to make them more proactive than responsive to emerging conflict.[58]

2.2 Theoretical perspective.

The occurrence of disputes in human society is endemic since the time immemorial. Divergence of interests has been causative of such disputes in different spheres of human activity. Human ingenuity has led to crafting of modalities to address disputes of different types and at different levels. Dispute resolution was not a serious factor when the society did not have to grapple with complex issues. Disputes of personal nature were amenable to resolution through an informal process something akin to what now carries the label of negotiation or mediation or even some kind of arbitration through a mutually acceptable third party. Disputes of a serious nature would land in some formal forum for resolution. According to John Dunlop , in western societies, "give and take of market place" and "government regulatory mechanism established by the political process" ranging from courts to administrative tribunals constituted "two approved arrangements over the past 200 years" for resolution of disputes among groups and organizations. The inability of market place mechanism to achieve social purpose and a general dissatisfaction of the stakeholders with government's regulatory role prompted the policy makers to seek alternatives that led to the establishment of an independent regulatory and dispute settlement mechanisms. Even with these institutions, the question remains as to how do we assess the quality of dispute systems and how do we rate one against the other. Scholars have variously described the

58A Glossary of Terms and Concept in Peace and Conflict Studies" by Christopher Miller

attributes of an efficient dispute system.[59] Susskind lays stress on attributes such as fairness of the process and judiciousness of the outcome.[60] Ury, Brett and Goldberg view the efficacy of the process in terms of cost, outcome and durability of conflict resolution. The other views lay stress on providing for multiple options, involvement of the stakeholders in the dispute system design, flexibility available to the parties to choose a particular process and then move over to another process and features like transparency and accountability of the process. Since all these attributes are not uniformly present in a dispute system, and a trade-off between different attributes is usually seen, the task of determining an appropriate process becomes difficult to that extent. Hence, it is important to analyze the framework of a sound practice. The framework should address some key elements like the objective behind the system, its structure, and identification of parties that have a stake in the system, resources available to them and the nature of its accountability.[61]

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.[62] Fisher shares her extensive experience of homosexuality and mediation. She begins by analysing 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

59 John T. Dunlop, Dispute Resolution- Negotiation and Consensus Building, Auburn House Publishing Company, Dover, Massachusetts, 1984

60 Lawrence Susskind & Jeffrey Cruishank, Breaking the Impasse: Consensual

Approaches to Resolving Disputes (1987)

61 William L. Ury et al, Getting Disputes Resolved: Designing Systems To Cut The Costs of Conflict (1988)

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

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.[63]

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 to dealing 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 emphasizes 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.[64]

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

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

64 Redfern, Michael, 'A place for the courts in the dispute resolution process' (2005)

vol 16, no 1, ADRJ 79

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.[65]

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.[66]

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" emphasises adversarial and "big picture" negotiations rather than the 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

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

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

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 are the hallmarks of principled negotiation.[67]

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.[68]

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

67Power, 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

68 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 27

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.[69]

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 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 (problemsolving 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.[70]

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 authorization 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

69 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

70Dickinson, Mark, 'An evaluation of non-adversarial models of negotiation' (2009) vol 20, no 4, ADRJ 212

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.[71]

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.[72]

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 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.[73]

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

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

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

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". e 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.[74]

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

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

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.[75]

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 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.[76]

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

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

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

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.[77]

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 Centres, 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 emphasises 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 of ADR and community mediation. However, she considers that a move to a fully "professionalised" service (academic qualifications rather than 28 personal suitability and

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

motivation) would erode the vitality and enthusiasm which have made mediation a success.[78]

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.[79]

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.[80]

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

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

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

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

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.[81]

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.[82]

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.[83]

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

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

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

83 Roebuck, Joanne, 'Mediation in North Queensland: user perceptions – a research report' (2001) vol 12, no 2, ADRJ 119

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.[84]
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.[85]

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.[86]

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 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.

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

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

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

Inconclusion, it deals with the application of the proposed approach in the Singaporean legal system.[87]

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.[88]

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, organisations, associations and specialised fields of practice and "petty jealousies between groups" have posed barriers to national cooperation and collaboration in the field of dispute resolution in Australia.[89]

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

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

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

89 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

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 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.[90]

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.[91]

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

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

CHAPTER THREE

LEGALFRAMEWORKGOVERNINGSETTLEMENTOFDISPUTES OUTSIDE COURT.

3.0 Introduction

Arbitration and Mediation are two of the strategies employed in Alternative Dispute Resolution. The Ugandan court systems have, of late, progressed and become more appreciative of global commercial developments and thus bringing about the establishment of other dispute resolution mechanisms in the administration of justice that are efficient and accessible; faster and cheaper. This is where Alternative Dispute Resolution (commonly referred to as ADR) comes in. ADR is a structured negotiation process under which the parties to a dispute negotiate their own settlement with the help of an intermediary who,is a neutral person and trained in them techniques of ADR. The various strategies involved in ADR include negotiation, conciliation, mediation, mini-trial/early neutral evaluation, court annexed ADR and arbitration[92].These ADR approaches are continuously being relied upon as an alternate or complement to conventional law suits. This chapter focuses on the practices of Arbitration, Conciliation and Mediation, and how they are appreciated through legislation and the Courts of law in the administration of Justice in Uganda.

3.1 The Judicature Act Cap 13

This act provides for ADR under courts direction. Section 26[93] **"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 of the Judicature act,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[94]

92 Hon. Justice G. W. M. Kiryabwire: Alternative Dispute Resolution – A catalyst in Commercial Development: A case study from Uganda; in Uganda Living Law Journal ,Vol. 3: No. 2 December 2005, at p. 145.
93 Judicature Act Cap 13
94 Section 27 of the judicature ct cap 13

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"[95]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.."[96]

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[97]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[98].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 Ptonounce1 apply to the court for an order of reference[99]"Rule 2 of the same order goes on to provide that the arbitrator shall be appointed in such manner as May be agreed upon between the parties[100] 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.

95 Order xii rule 1 of the CPR
96 Order xii rule 2(1) of the CPR
97 Order xii rule 2(1) of the CPR
98 Order 47 of the civil procured rules cap 71
99 Order 47 rule 1(1) of the CPR
100 Order 47 rule 1(1) of the CPR

3.3.THE ARBITRATION AND CONCILIATION ACT (CAP 4).

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 low 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[101]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[102]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,"[103]

3.4 Arbitration.

This is the procedure whereby parties in dispute refer the issue to a third party for resolution and agree to be bound by the resulting decision, rather than taking the case to the ordinary courts of law. The third party is an independent intermediary who is neutral and trained in the techniques of ADR. Internationally, Arbitration has been the most favoured method for settlement of commercial disputes for hundreds of years. Its value is recognized by the courts and it is governed by statute, which empowers arbitrators and regulates the process. More recently in Uganda, arbitration has become a common method of resolving commercial and other disputes. The question of speed and cost comes up to explain the preference for arbitration as opposed to court action. It has also been argued, however, that informal procedures tend to be most effective where there is a high degree of mutuality and interdependency, and that is precisely the case in most business relationships[104].

101 Arbitration , conciliation and mediation in Uganda by Anthony Conrad. K. Kakooza
102 Section 5 of the arbitration and conciliation act
103 Section 2(1) of the arbitration and conciliation act
104 Ibid

3.5 Commercial arbitration: The relationship between business and arbitration

An essential part of businesses is that they seek to establish and maintain long term relationships with other concerns. However, when it comes to solving court disputes among business concerns, court cases tend to terminally rapture such business relationships. In contemporary business practice, it is standard practice for commercial contracts to contain express clauses referring any future disputes to arbitration. This practice is well established and its legal effectiveness has long been recognized by the law. Any person acceptable to the parties may act as their arbitrator. In practice they will tend to choose someone with skill and experience in the relevant field.[105]

The act also provides for the Centre For Arbitration and Dispute Resolution (CADER) as a statutory institutional alternative resolution provides'[106]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?[107]The arbitration and conciliation act is thus instrumental three major objectives.

a) Ensuring realization of the goal of increased party autonomy and provision of appropriate and user,- friendly rules of procedure[108]
b) 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.
c) The advancement of equality and fairness in the whole process. It is on these three case objectives that CADER was established[109]

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 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[110].

105 Arbitration, mediation and conciliation by Conrad Kakooza
106 Section 67 of the arbitration conciliation
107 Sempas Venture Arbitration And The New Legislative Foundation On Adr, Uganda Living 1w Journal Vol. 1 No 1 June 2003at P981at 86
108 Arbitration, Conciliation And Mediation In Uganda A Focus On The Practical Aspects By Anthony Condrad. K
109 Part 5 Of The Arbitration And Conciliation Act.
110 See Section 5,6,9,16(6) 17(13), 27,34, 35, 38, 40, 43, 46, 47, 59 And 71.

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.

3.6 Conciliation

This is another form of Alternative Dispute Resolution provided for under the Arbitration and Conciliation Act. A Conciliator aims to assist the parties to a dispute to find asolution, but has no power to enforce it. There is inadequate documentation and study in the practice of Conciliation as an ADR tool, which is most likely because of the private nature in which it is conducted. The parties to the dispute arrive at their solution independently and impartially as stipulated by Section 53 of the Act[111]. The Act provides the basis for which the Conciliator plays his role. It states that "The Conciliator shall be guided by principles of objectivity, fairness and justice, giving consideration to, among other things, the rights and obligations of the parties, the usages of the trade"

3.7 Basic steps in Conciliation

Part V of the Act provides for the steps to follow in Conciliation proceedings:

a) The party initiating the proceedings sends to the other party a written invitation for conciliation which is only initiated if the other party accepts the invitation by replying to the same within 21 days[112].

b) Similar to arbitration proceedings, the parties appoint a Conciliator[113].

c) Each party then submits to the Conciliator a brief written statement describing the general nature of the dispute and the points at issue[114] Once elements of settlement surface during the course of the proceedings, the Conciliator helps the parties to draft a settlement agreement, which is signed by the parties, hence terminating the proceedings.[115]

111 Arbitration and Conciliation Act
112 Sec. 49
113 Sec. 51
114 Sec. 52
115 Sec. 61

The Settlement agreement also served the same status as an arbitral award under the Act.[116] Meetings between the Conciliator and the parties are rather informal. He may choose to meet with them physically at a place either party may agree upon, or may opt to communicate orally or in writing[117]. He does not even necessarily have to meet with them together. It can be done separately[118]. Just like in mediation, suggestions for the settlement of the dispute are, in most instances, opined by the disputing parties[119]. However, the Conciliator can assist in formulating terms of settlement when it emerges that there are basics of settlement that have been agreed upon by the parties[120].

The Conciliation process bears some significant similarities to Arbitration. The Settlement agreement, for instance, once drawn up and agreed upon by the parties, carries the same status and effect as an arbitral award under the Act.[121] Furthermore, the autonomous power exhibited in arbitral processes is reflected in Conciliation proceedings. Section 62 of the Act is to the effect that during the course of conciliation proceedings, no arbitral or judicial proceedings can be initiated by the same parties. This helps to create an organized and effective means of smoothly coming to a solution on one front.[122]

It is also evident that the outcome of Conciliation proceedings is not to be abused or disrespected in any way. The parties to a conciliation proceeding cannot rely on its outcome or any information obtained from such proceedings to be used as evidence in an arbitral or judicial proceeding. This is regardless of whether or not it is the same dispute to be dissolved in the arbitral or judicial proceeding[123]. The limitations imposed on conciliation proceedings therefore also serve to prevent protracted handling of disputes under ADR.

116 Sec. 59
117 Sec. 54(1)
118 Sec. 54(2)
119 Sec. 57
120 Sec. 58(1)
121 Sec. 59
122 Arbitration, conciliation and mediation by kakooza conrad
123 Sec.6

3.8 Weaknesses and Strength in Conciliation proceedings.

The essential weakness in the Conciliation strategy procedure of ADR lies in the fact that, although it may lead to the resolution of the dispute, it does not necessarily achieve that end. Where it operates successfully, it is an excellent method of dealing with problems as, essentially, the parties to the dispute determine their own solutions and, therefore, feel committed to the outcome. The problem is that Conciliation, like mediation, has no binding power on the parties and does not always lead to an outcome.[124]

3.9 THE LAND ACT (CAP 227)

The origin of 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[125]

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

124 Arbitration, conciliation and mediation act

125 A.C.K kakooza land dispute settlement in Uganda: exploring the efficary of the mediation option Uganda living journal yii 5 june 2007

procedures acceptable to the local community by which were not as formal as those found in the courts."[126]Significantly, where a land 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 advise the disputant parties as such and adjourn the case accordingly[127]

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 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[128].

3.10 The Judicature (Mediation) Rules 2013

Mediation has been made mandatory for all litigants by virtue of section 4 of the rules[129] 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)[130] 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)[131] counsel for the (UNRA) 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 to hat internal institutional processes were not a good reason to avoid mediation must be legal or procedural in nature'

126 A paper given to the global corporate governance forum on mediating corporate governance dispute
127 Section 88(2) land act cap 227
128 section 89 of the land act
129 Judicature (mediation)rules.
130 Cited by John lang: should warring parties be forced to mediate" the lawyer,23 feb 2004.

131 Supra

3.11 Mediation

Mediation is quite similar to Conciliation. It has been termed as "the interaction between two or more parties who may be disputants, negotiators, or interacting parties whose relationship could be improved by the mediator's intervention. Under various circumstances (determinants of mediation), the parties/disputants decide to seek the assistance of a third party, and this party decides whether to mediate. As the mediation gets underway, the third party selects from a number of available approaches and is influenced by various factors, such as environment, mediator's training, disputant's characteristics, and nature of their conflict. Once applied, these approaches yield outcomes for the disputants, the mediator, and third parties (other than the mediator)."[132] In some respects, Mediation is referred to as Negotiation in Alternative Dispute Resolution categories.

As such, mediation aims to assist the disputing parties in reaching an agreement. Whether an agreement results or not, and whatever the content of that agreement, if any, the parties themselves determine the results as opposed to something imposed by a third party. The Arbitration and Conciliation Act (as amended) does not make any specific reference to Mediation. However, the prevalent Uganda Commercial Court- assisted ADR today particularly focuses on Mediation as the most appropriate ADR tool and has made significant breakthrough in this regard.[133]

3.12 Is Mediation binding?

The new Mediation rules play a strong positive impact in the practice of mediation as a form of dispute resolution because they add more weight to mediation agreements through regulation. They effectively answer the question as to whether mediation is binding. Ordinarily, if an agreement is reached through mediation, then the terms settlement will be filed at Court and bring the proceedings to a close. If no agreement is reached, then the Court will only be told that Mediation has been attempted and has failed.

132 Wall, et al., 2001:370 in R. Ramirez: *A conceptual map of land conflict management: Organizing the parts of two puzzles* (March 2002) in http://www.fao.org/sd/2002/IN0301a3_en.htm ,

133 Arbitration , conciliation and arbitration by kako

3.13 Court-annexed Mediation: Can Courts be seen to force parties into mediation?

Proponents for ADR, particularly mediation, push for the same with the perspective being - the benefits in the procedure but not necessarily what the parties really want. However, in some instances, what the parties want can be more safely and conveniently arrived at through mediation than through litigation. It should also be considered that with the new mediation rules, some parties may appear to be forced into mediation out of fear of reprisal through costs sanctions from the Commercial Court judge as a result of either failure to agree to mediation or absence from mediation meetings. Rule 14 of the judicature (Mediation) rules provides for the payment of costs by the party that fails to attend mediation meetings without sufficient cause. With the High Court embracing mediation, a party's refusal or reluctance to attend to mediation may drastically turn the case against such party even before the case takes off.

Jon Lang, a practicing mediator, argues that it is human nature to reject any form of compulsion. He adds that: "If it becomes regular practice to force reluctant parties to mediate, we may well end up with a process characterized by stage – managed and doomed mediations, rather than the high success rates we have seen over the last 10 years."[134]

3.14 Conclusion.

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

134 Cited by Jon Lang: *Should warring Parties be forced to mediate?*- The Lawyer, 23 February 2004

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

CHAPTER FOUR

INTERNATIONAL BEST PRACTICE ON RESOLVING DISPUTES OUTSIDE COURT

4.1 REGIONAL OVERVIEW:

TANZANIA

The legal framework for arbitration in Tanzania Mainland is governed by two main pieces of legislation, the Civil Procedure Code[135] and the Arbitration Act[136] together with the Arbitration and the Arbitration Rules.[137] There is also a separate and distinct legal regime for arbitration in labour matters and for land matters at the lower levels.

The Civil Procedure (Arbitration) Rules are contained in the Second Schedule to the Civil Procedure Code. The Code which is pari materia with the Indian Civil Procedure Code of 1809 was received in the Tanganyika Territory by way of India during the British colonial rule. Tanzania Zanzibar, a constituent of the "union" also has its own Civil Procedure Decree, which also traces its origin from the Indian Civil Procedure Code. The Arbitration Act of Tanzania Mainland traces its origins in the colonial Arbitration Ordinance, which was promulgated by the British colonial government in 1957. The historical origins of the Civil Procedure Code and the Arbitration Act, may account for the existence of two separate legal regimes on arbitration in this country, the Civil Procedure (Arbitration) Rules are contained in the Second Schedule to the Civil Procedure Code, which governs the enforcement of domestic arbitration and the Arbitration Act and its Rules for the enforcement of domestic awards and enforcement and recognition of foreign awards.

THE CIVIL PROCEDURE (ARBITRATION) RULES

(i) Order of reference to arbitration in asuit

The Civil Procedure (Arbitration) Rules make provisions for reference to arbitration in "*a matter in difference between parties in a suit.*"[138] The Rules therefore only come into play where there is a "suit" already filed in court and a matter in difference between the

135 Cap.33 R.E. 2002

136 Cap. 12 R.E. 2002

137 GN No. of 1957

138 Rule 1(1)

parties arise in that suit which merits to be resolved by arbitration. In my considered view, if this procedure is resorted to by parties it could serve a lot of the parties' and the court's time. Where the court sees no cause to remit the award or any of the matters referred to arbitration for re-consideration, and no application has been made to set aside the award in a suit or the court has refused such application, after the time for making such application has expired, *"the court shall proceed to pronounce judgment according to the award."*[139] The Rules explicitly bars any appeal against a decree from a judgment pronounced on an award in a suit except where the decree is *"in excess of, or not in accordance with, the award."*[140]

(ii) Order of Reference on Agreements to Refer to Arbitration

The Civil Procedure (Arbitration) Rules also provide for reference on agreement to refer to arbitration by way of *"application in court"* [Rule 17(1)]. Reference on agreement to refer to arbitration presuposses the existence of an agreement between persons involved in a suit in court to refer their differences to arbitration prior to fling the application. Upon the application being filed in court, it has to be numbered and registered *"as a suit"* [Rule 17(2)]..

(iii) Arbitration without the Intervention of Court

Rule 20 of the Civil Procedure (Arbitration) Rules deals with the filing of award in a matter referred to arbitration *"without intervention of court."*In order for the Court to intervene under Rule 20, there has to be a matter already referred to arbitration without its intervention, and an award which has been made, which is now sought *"to be filed"* in court. Rather strangely however, Rule 20 of the Civil Procedure (Arbitration) Rules does not limit the opportunity to file the application to file the award only to the person who is *"a party to the agreement to refer to arbitration."* It widens the opportunity to *"any person interested in the award"*, which escapes any definition under the Rule and thus a recipe for confusion. The legal net cast by the Rule is too wide, since *"any person interested in the award"* would mean any person interested in having the award filed

139 Rule 16(1)

140 Rule 16(2)

in court. The award is filed in Court to seek enforcement by the judicial process of an award made by agreement of the parties without the intervention of the court. The award may impact not only the parties to the agreement to arbitratee but to other interested parties as well. Where the Court is satisfied that the matter has been referred to arbitration and that an award has been made thereon, and where there are no grounds for making an order of remittance or reference or for setting aside the award, the Court will make an order for the "***award to be filed,***" and proceed to "***pronounce judgment***" and a decree to follow. The law expressly bars appeal from such decree expect "***in so far as the decree is in excess of or not in accordance with the award.***"[141]

Rule 20 of the Civil Procedure (Arbitration) Rules concerning the filing of award in a matter referred to arbitration without intervention of court is also a fertile source of confusion. There are more or less similar provisions in the Arbitration Act and the Arbitration Rules, which regulate the procedure for filing, recognition and enforcement of domestic and foreign arbitral awards in matters referred to arbitration without the intervention of the court.

We should think seriously if it serves any useful purpose to continue having in place two separate schemes for the filing and enforcement of domestic arbitral awards. The need for harmonizing these two legal regimes and put in place a single legal regime for filing and enforcing domestic awards made with or without the intervention of the court cannot be overemphasized.

(iv) Application for Stay of Suit

There are two provisions for application of stay of suit, where there is agreement to refer to arbitration and where there is submission agreement. Rule 18 of the Civil Procedure (Arbitration) Rules provides for stay of suit where there is "***an agreement to refer to arbitration.***" It stipulates as follows:

> *"Where any party to any agreement to refer to arbitration, or any person claiming under him, institutes any suit against any other party to the agreement, or any person claiming under him, in respect of any matter agreed to be referred, any party to such suit may,* ***at the earliest possible opportunity and in all cases where***

141 Rule 21(2)

issues are settled at or before such settlement, apply to the court to stay the suit; *and the court, if satisfied that there* ***is no sufficient reason why the matter should not be referred in accordance with the agreement to refer to arbitration,*** *and* ***that the applicant was, at the time when the suit was instituted and still remains, ready and willing to do all things necessary to the proper conduct of the arbitration,*** *may make an order staying the suit." (the emphasis is mine).*

Two conditions are precedents for Rule 18 to apply. There has to be an agreement between the parties to refer to arbitration and the instituted suit has to be "***in respect of any matter agreed to be referred.***" The powers of the Court to make an order for stay of a suit under Rule 18 are discretionary as it has to be satisfied that, firstly, there is no sufficient reason why the matter should not be referred in accordance with the agreement to refer to arbitration. Secondly, the applicant was, at the time when the suit was instituted and still remains, ready and willing "*to do all things necessary to the proper conduct of the arbitration.*"

Another provision for stay of a suit is found under section 27 of the Arbitration Act, which deals with stay of court proceedings in respect of matters to be referred to arbitration under submission to arbitration by providing as follows:

"Notwithstanding anything in Part II, if any party to a submission made in pursuance of an agreement to which the Protocol on Arbitration Clauses of 1923 which is set forth in the Third Schedule hereto applies or any person commences any legal proceedings in any court against any other party to the submission or any person claiming through or under him in respect of any matten agreed to be referred, any party to these legal proceedings may, ***at any time after appearance, and before delivering any pleadings or taking other steps in the proceedings apply to that court to stay the proceedings*** *and that court, unless satisfied that the agreement or arbitration has become inoperative or cannot proceed or that there is not in fact any dispute between the parties with regard to the matter agreed to be referred, shall make an order staying the proceedings."*

The application to stay a suit under Rule 18 of the Civil Procedure (Arbitration) Rules is made "*at the earliest possible opportunity and in all cases where issues are settled at or before such settlement.*" Under section 27 of the Arbitration Act, the application is for to stay of the "legal proceedings" and is made "*at any time after appearance, and before delivering any pleadings or taking other steps in the proceedings.*"

THE ARBITRATION ACT AND ARBITRATION RULES

The Arbitration Act provides for "*arbitration of disputes.*" The Act does not define what kind of disputes are amenable to arbitration but provides further that it applies "*only to disputes which, if the matter submitted to arbitration formed the subject of a suit, the High Court only would be competent to try.*" The Act does not distinguish between commercial and noncommercial disputes. There is a proviso in the Act that:

> "*in regard to disputes which, if they formed the subject of a suit would be triable otherwise than by the High Court, the President may, with the concurrence of the Chief Justice, confer the powers vested in the court by this Part either upon all subordinate courts or any particular subordinate court or class of court.*"

That the conferment of powers on subordinate courts has to be made by the President with the concurrence of the Chief Justice is peculiar enough. That the vesting of powers otherwise exercisable by the High Court on subordinate courts has not been done to this date is rather telling. Consequently, only the High Court has jurisdiction over disputes concerning all commercial arbitral awards. The idea to confer such powers on subordinate courts at least at the level of Resident and magistrate courts should further be explored and implemented.

4.2 CONTINENTAL OVERVIEW

ZAMBIA

The Zambian Judicial System is no stranger to Alternative Dispute Resolution. Arbitration, Mediation, Conciliation and Negotiation are all a part of the Zambian Judicial system to varied extents; but this, however, has not always been the case.

The current drive towards the introduction of ADR mechanisms into the Zambian Judicial system may be traced back to 1990, when the then Chief Justice Annel M Silungwe addressed the First Judicial and Law Association of Zambia Seminar. In his paper, simply entitled "Alternative Dispute Resolution", the Chief Justice traced the history of various systems of dispute resolution in Zambia during the pre-colonial, colonial and post-independence periods. He also gave an introduction of various ADR mechanisms, including Conciliation, Mediation and Arbitration, highlighting their advantages, and their appropriateness to application in Zambia. Even then, in1990, the problem of court congestion was one of serious proportion, and the court examined how best to ease this congestion. As the Chief Justice stated:

> *"As many people appear to be litigious, especially those in urban areas, and the court system is bursting at the seams with the ever increasing volume of court business, it seems instructive that a systematic campaign for the promotion of ADRMs is not only desirable but also urgent..."*[142]

Calling for education of the general public to settlement of disputes through conciliation, mediation, arbitration and other forms of ADR mechanisms, the Chief Justice further stated,

> *"Above all, ADRMs require the broadened involvement and support not only of the legal profession, the judiciary and the legal education establishments, but also ... of the public at large. If members of the public are made to appreciate that [ADR] is cheaper, informal, speedy and does not expose the disputants to the public gaze, many of them*

142 Chief Justice Annel M Silungwe, Alternative Dispute Resolution, a paper presented at the First Judicial and Law Association of Zambia Seminar, held in Lusaka in October, 1990

would resort to such methods.,,[143]

Since 1990, the ADR drive in Zambia has grown with increasing impetus. The quest for alternatives to traditional litigation has been taken up by a new generation of lawyers and other interested parties in Zambia, who envisage a judicial system comparable to international standards. For example, Chief Justice M M W S Ngulube has been a keen enthusiast of the ADR drive in Zambia; and prominent Lusaka Lawyer, Mr Patrick Matibini, has written extensively on ADR, as well as Arbitration and Mediation, and has on several occasions emphasized the need for the improvement of our laws in this respect. [144]

Zambia's drive for a responsive legal and judicial system has captured the interest of the international community. Thus, the Law Association of Zambia (LAZ), in conjunction with the United States Agency for International Development (USAID) and the Foundation for International Commercial Arbitration (FICA), set out to launch a campaign to not only bring ADR into focus in Zambia, but to re-examine the inadequacies with a view to introducing or re-activating appropriate dispute resolution methods to improve the Zambian Judicial System.[145]

As part of this campaign, in 1996, Chief Justice Matthew Ngulube opened a seminar on "Alternative Dispute Resolution", organized by LAZ in conjunction with USAID. The seminar was attended by Judges from both the Supreme Court and the High Court of Zambia, five Judges from the United States, and several senior Lawyers from the Zambian Bar.[146] The response from the participants in this seminar had positive results for the future of ADR in Zambia.[147] A new awareness of ADR had been

143 Chief Justice Annel M Silungwe, Alternative Dispute Resolution, a paper presented at the First Judicial and Law Association of Zambia Seminar, held in Lusaka in October, 1990

144 Articles by P Matibini taken from various editions of "The Legal Desk" column of the Sunday Mail, include the following titles: "Alternative Dispute Resolution"; "Mediation Rules Should be Re- Visited"; "What is Arbitration?"; "LAZ and Government Should Jointly Promote ADR"; "Promote Commercial Mediation"; "Zambia Should Brace for International Commercial Arbitration". In Addition, P Matibini has addressed the Judges Seminar on "Alternative Dispute Resolution", and he has been the point person for Training in the Steering Committee for ADR organised by LAZ in conjunction with USAID.

145 Richard Martin, "The Potential for the Development of Arbitration and Alternative Dispute Resolution Systems in Zambia, and Proposals for Implementation"; a Report for the Law Association of Zambia (1998).

146 ibid

147 P Matibini, "Alternative Dispute Resolution", an Article from The Legal Desk of the Sunday

instilled in the legal and judicial fraternity, and plans were being laid for the next steps to be taken towards the integration of ADR devices into the Zambian Judicial System. The success of the initial part of the ADR drive began to show its fruits within a relatively short space of time. The following year, in May, 1997, the High Court Rules Committee passed Statutory Instrument No. 71 of 1997, being the High Court (Amendment) Rules of 1997, introducing Mediation as an alternative dispute resolution procedure into the Zambian jurisdiction.

In 1998, LAZ established an Alternative Dispute Resolution Committee, anchored by Patrick Matibini,[148] as a way of ensuring continuity in the process of introducing ADR into the system. LAZ solicited the support of the business community, and, with the Zambia Association of Chambers of Commerce and Industry (ZACCI) throwing their weight behind the development of ADR and bringing pressure to bear on the government to reform the judicial system the ADR drive gained further impetus with the result that, in 1999, The High Court Rules Committee passed Statutory Instrument No. 29 of 1999, being the High Court (Amendment) Rules, 1999, introducing for the first time, a Commercial List in the High Court for Zambia, and incorporating fundamental provisions for the mediation process in Commercial actions.

With all these developments in recent years, the importance of ADR to the Zambian Judicial System may well be appreciated, especially with the introduction of Mediation into the jurisdiction. As we shall see below, the recent introduction of the Commercial list has also been a major landmark, and, with the forthcoming promise of major reforms relating to arbitration, the future of ADR in Zambia seems bright indeed.

In the next section, we highlight the current status of these alternatives in the Judicial System.

Mail.

148 See P Matibini, "LAZ and Government Should Jointly Promote ADR", An Article from the Legal Desk of the Sunday Mail, 22 November, 1998

COMMERCIAL LIST

The Commercial List was introduced into the High Court System by the passage of Statutory Instrument No. 29 of 1999, under the auspices of the High Court Rules Committee. The High Court Rules Committee comprises the Chief Justice, two High Court Judges appointed by the Chief Justice and two legal practitioners nominated by the Council of the Law Association of Zambia and finally appointed by the Chief Justice.[149] The introduction of the Commercial list has been a major landmark in terms of the reform of the Zambian Judicial System. Although the commercial list is an adjunct of the High Court and not in itself an ADR device, it was introduced as part of the drive to improve the inefficiencies and delays in the court system, Furthermore, the incorporation into the rules of a provision enabling judges in commercial actions, where they see fit, to refer the parties to mediation or arbitration, is a positive aspect.

Under Rule 6, Judges have to summon the parties to a commercial action to a scheduling conference, at which the judge shall prepare a chart or schedule of events and review the status of the case as it stands. In this respect, Rule 7 therefore provides:

Mediation 7. A judge may, at the scheduling conference, refer parties to mediation in accordance with Order XXXI, or where applicable, to arbitration.

Under Rule 1, a "commercial action" is defined as any cause arising out of any transaction relating to commerce, trade, industry or any action of a business nature. [150]

Besides easing the substantial burden of the high court in terms of congestion, the introduction of the Commercial list creates a positive environment for specialisation in the field of commercial law from which the business community can only stand to benefit.[151] Indeed, LAZ, as part of its campaign to develop ADR in Zambia, has actively sought the involvement of the business

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149 Rapporteur's Report, submitted to the Council of the Law Association of Zambia, September 1998

150 See Rule 1, Order LIII of the High Court (Amendment) Rules, the High Court Act, Cap. 27 of the Laws of Zambia, as amended by Statutory Instrument No. 29 of 1999.

151 In September 1998, Seminars on ADR were held by LAZ in conjunction with USAID, FICA and ITC. These seminars were held in Ndola and Lusaka, and drew partcipants from nominees of the Prefoessional Centre including Enginees, Quantity Surveyors, Architect, Land Surveyors, Valuation Surveyors, Journalists, Accountants and members of ZACCI.

community both in the participation of workshops+" on ADR as well as by providing information to educate the business community on the status quo. For example, in July 1999, LAZ, through its Honorary Secretary Nigel K Mutuna, presented a Paper to the Monthly General Meeting of the Bankers Association of Zambia,[152] in which it noted the delays in the dispensation of justice caused by congestion in the courts, and pointing out the following:

1. That due to congestion in the courts, the area of Commercial law, and banks, quasi banks and other lending institutions in particular, had suffered the most because huge sums of money had been tied up in litigation for years on end.
2. That this has been further exacerbated by the fact of lack of specialisationin the Zambian Courts, resulting from which there has been a failure by some presiding judges to appreciate some of the complex issues related to commercial transaction.
3. Another major cause of the delay in dispensation of justice has been recognised as the lack of manpower in the judiciary and the low income and poor conditions of service have failed to attract lawyers in private practice to the bench.
4. That this situation had led to denial of speedy justice to the vast majority of citizens; creation of an unfavourable investment climate in the country; and excessive workload on the members of the bench which may lead to poor quality decisions being made.

After some delay[153],due to some logistical problems relating to the implementation of the system, the Commercial list was effectively launched into the Zambian Judicial system on April 3, 2000. It may be considered to be the fore-runner to major reforms in the Judicial System that include viable alternatives in a traditional system that badly needed overhauling. Its major aim is to reduce the back-log of cases in the

152 Paper Presented by Honorary Secretary of the Law Association of Zambia to the Monthly General Meeting of the Banker's Association of Zambia held on 13th July, 1999 on Revitalisation of Arbitration in Zambia.

153 One of the major reasons for the delay of the effective introduction of the Commercial List was the need for adequate funding with regard to training of Mediators. As Chief Justice M M M W S Ngulube intimated in his opening remarks at the opening ceremony for Mediation Training on 17th April, 2000, both the commercial community and the legal fraternity itself, were anxious to see the implementation of the Commercial List as soon as possible.

High Court, and to encourage specialisation in the area of commercial law. With mediation fast becoming recognised as a viable and positive alternative to "battling it out" in the traditional system, it seems likely that not only will the judges be more likely to recommend a case for mediation in accordance with the rules relating to the Commercial list, but also, lawyers themselves will be more likely to make the initial recommendation, and to advise their clients on the positive implications of mediation. As Chief Justice Matthew Ngulube remarked, *"With the launching of the Commercial List, I am confident many disputes will be referred to Mediation and Arbitration ..."*[154]

This view is shared by the Honourable Mr Justice K C Chanda (Retired) ,[155] who welcomed the introduction of the Commercial list to the High Court. Citing the congestion in the courts, and the resulting delays, Justice Chanda stated that the Commercial list would certainly go a long way towards relieving such congestion, and that he looked forward with interest to the forthcoming court reforms. The Judge observed that the introduction of the Commercial list could only connote an improvement in the quality of justice in the Courts, as it will encourage specialisation not only amongst the lawyers but more importantly, amongst judges. He cited three important factors:

- The introduction of the commercial list is important for specialization of Judges in commercial law.
- This will enhance the quality and reasoning of judgments, with more in-depth analysis on the part of judges.
- This in turn will mean that the overall dispensation of justice will be improved.

The Judge pointed out the many advantages of Arbitration and Mediation, and predicted that in future, greater awareness in these areas of dispute resolution will encourage disputing parties to opt for ADR devices such as Mediation and Arbitration,because of the relaxed rules and the strong similarities these processes bear to the pre-colonial methods of traditional dispute resolution'.

What is more, the incentive to specialisation in the field of commercial law may itself

154 Speech by His Lordship Mr Justice M M W S Ngulube the Chief Justice, At the Opening Ceremony of the Mediation Training held at the Pamodzi Hotel on 17th April, 2000

155 The author conducted several interviews with the Honourable Justice Chanda during the research process for the purpose of this essay.

spawn a whole new incentive to investors into the country. It seems clear that a major barrier to economic development in terms of foreign investment has been the reluctance of foreign investors to invest in a climate where the future of their investment is not subject to a stable and responsive judicial system. The congestion in the courts and the time and effort as well as expense that can go into protracted litigation for the enforcement of contractual rights can cause major losses to any commercial establishment, and for this reason, the need for an efficient, responsive and capable judicial system is a paramount consideration when deciding whether to invest in a given country.i'" It is hoped that the introduction of the commercial list, with all its positive implications, will remove a major barrier to foreign investment.

Finally, in pursuit of the provisions relating to mediation, it has been announced that extensive training programmes are being undertaken to train both lawyers and judges in the law and practice of mediation's", and this welcome development appears to bode well for the future of ADR in Zambia. Certainly, a system which recognises the need for alternative dispute resolution is one that recognises the simple reality that these alternatives are not meant to replace the current system but rather, to act as complementary processes, which flex and adapt to the varying needs of any dynamic society. The introduction of the commercial list is therefore a step in the right direction.[156]

Although Arbitration has been on the Zambian statutes since 1933, its use in Zambia has been, to say the least, sporadic and rather ineffectual.[157] As one report for the Law Association of Zambia observes, although a number of contracts, particularly in the construction industry, include arbitration clauses, the system has been under-utilised.[158] Further, the report states that the concept and practice of arbitration is almost unheard of among either the commercial, legal or professional community. As such, parties have been said to commonly ignore an arbitration clause and take a dispute to court; and of the arbitrations that do take place, little is known, although it is quite possible that they fall below the

156 Rapporteur's Report, submitted to the Council of the Law Association of Zambia, September 1998

157 Martin, R, Th Potential for the Development of Arbitration and Alternative Dispute Resolution Systems in Zambia, and Proposals for Implementation (1998).

158 Martin, R, Th Potential for the Development of Arbitration and Alternative Dispute Resolution Systems in Zambia, and Proposals for Implementation (1998).

internationally accepted standards of practice. As Martin observes on the situation in Zambia;

> *"Not only is arbitration not widely used, but it regularly takes up to five years for commercial cases to be heard in court. This, especially in the context of an unstable currency, is a major disincentive to investment in the country. Investors seek prompt dispute resolution systems of integrity and quality. The Minister of Legal Affairs and the Chief Justice are both aware of the fact that the court system is inadequate, and the effect of this on investors."*

As we noted in the previous section LAZ, together with ZACCI, has set up a massive campaign to develop ADR in Zambia, and its main emphasis is on the revitalisation of Arbitration - the reason for this being that "it is well known that the momentum which will be gained by fostering arbitration will also stimulate ... other forms of ADR.,,[159] Furthermore, USAID has been working with LAZ to support the process of developing ADR, and has funded a number of seminars and consultative workshops, both in Lusaka and Ndola, with participants drawn from The International Trade Centre (ITC), the Foundation for International Commercial Arbitration (FICA) and the Arbitration Foundation of South Africa (AFSA).[160]

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.

159 Martin, R, The Potential for the Development of Arbitration and Alternative Dispute Resolution Systems in Zambia, and Proposals for Implementation (1998).

160 Rapporteur's Report, submitted to the Council of the Law Association of Zambia, September 1998.

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.[161] 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 improve access to justice for the poor and vulnerable.[162] 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.[163] 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.[164] 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 programs 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.[165]

161 Sandra Thompson of Judicial Service, Accra on 14/ 03/2013

162 Crook, C. R. *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

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

164 Uwazie, E. E., Alternative Dispute Resolution in Africa: Preventing Conflict and Enhancing Stability

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

The Legal Framework behind Ghana's ADR Programme

The legal mandate for Court Connected ADR practice in Ghana is found in Sections 72 and 73 of the Courts' Act 1993 (Act 459) as amended and Order 58 Rule 4 of the High Court Civil Procedure Rules 2004 C.1 47, as well as in the various enactments listed in 2.1.3.[166] Court- connected ADR is provided for under section 73 of the Courts Act 1993 (Act 459) and requires any Ghanaian courts exercising criminal jurisdiction 'to promote reconciliation, encourage and facilitate a settlement in an amicable manner' but only in the case of misdemeanours.[167] The dispute in question is required first to be filed at the court, after which the disputing parties may consent to refer their matter to ADR to attempt a resolution. Where an agreement is reached, the terms of the agreement become an order of the court. However, if a solution is not found, the dispute goes to trial[168]

Besides, the Courts Act, the ADR concept in Ghana was given a further boost by the passage of an ADR Act by Ghana's Parliament in 2010 after more than a decade of deliberations and consultations with the various stakeholders. Uwazie notes that, 'the ADR Act 798 is the most comprehensive ADR legislation of its kind in Africa.'[169] This Act sets out a comprehensive legal framework for ADR practice. According to Emilia Onyema, the provisions in the Act on arbitration and the other methods of ADR are based on internationally recognized principles such as autonomy of the arbitration agreement and the supremacy of the arbitral agreement. It however pushes the boundaries of current standards of international arbitration by granting the appointing authority an enhanced role in the process. Significantly, the Act breaks new grounds
By first legislating on customary arbitration and secondly by granting the settlement from mediation proceedings an enhanced status equal to an arbitral award. In her view then, the new Act is a comprehensive, modern and forward looking and it is worthy of emulation within the sub-Saharan Africa.[170] Essentially the Act also makes provision for an ADR Fund and a national ADR Centre.[171]

Again, the Act empowers the Magistrate's Courts to handle and minor criminal matters

166 Judicial Service of Ghana, Uniform Practice Manual on Court-Connected ADR Practice

167 Krumrey-Quinn, J. Enhancing 'Access to Justice': Recognition of Informal Criminal Justice Mechanisms in International Human Rights Law, 2010-2011. h ttp://www.lawfoundationsa.com ,

168 ibid

169 Uwazie, E., op. cit.

170 Onyema, E. The New Ghana ADR Act 2010: A Critical Overview, Arbitration International, 28 (1). pp.101-124.

171 Alternative Dispute Resolution Act 2010

covering the following kinds of cases: monetary claims for recovery, minor assault, family maintenance claims, offensive conduct, landlord/tenant disputes, defamation, and threat of harm or damage to property, unlawful entry and minor land disputes.[172] Furthermore, Section 1 of the Act, sets out the applicability of the Act, and states clearly that the Act applies to all matters with the exception of issues relating to: The national or public interest; The environment; The enforcement and interpretation of the Constitution; and Any other matter that by law cannot be settled by an alternative dispute resolution method.[173]

Accordingly, there are potentially wide categories of dispute which might be deemed to fall outside the scope and application of the Act. According to Section 82 of the ADR Act 2010, mediation agreements are recognized as binding and enforceable as court judgments.[174]

Types of ADR Methods Available

There are several methods/mechanisms available under ADR which can be utilized in the search for a solution to a particular dispute unlike the traditional court system. The particular method to be used would mostly be determined first by the dispute in question and the parties involved in the dispute.

Negotiation

Negotiation is a process by which the parties to a dispute or their representatives discuss the issues in dispute with the intention to settle the dispute without the intervention of a third party. The most widely-used form of ADR is negotiation, which is simply "the process of refining and agreeing to the issues and establishing a range of compromise options." Although attorneys are often retained to assist parties with the negotiation process, negotiations take place every day without legal representation, making them a very attractive form of ADR to disputing parties. Negotiations vary in level of formality, with some taking place over the course of a few informal meetings or phone conversations, and others through a series of written settlement offers issued pursuant to a pending lawsuit. Whatever the formality, by far the biggest advantage of negotiation is that the parties completely control the process in this form of ADR.

172 Crook, C. R., op. cit.

173 Alternative Dispute Resolution Act 2010

174 Ibid

In addition to controlling the level of formality, parties to a negotiation also control the tempo of their discussions, the settlement options they entertain, and the ultimate outcome of their dispute. Although the level of preparation necessary for negotiation will vary depending upon the complexity of the issues at stake, the first step in any successful negotiation must be an in-depth review of the relevant facts. Parties should take care to not only review the facts relevant to their side of the argument, but also to those of all other parties, to ensure that they are fully aware of all possible issues. Next, the parties should determine who should be their main negotiator: the parties themselves, their attorneys, or some other representative. The primary negotiator should be experienced in negotiation, very familiar with the dispute, and/or very familiar with the opposing party. Once selected, the parties should work with the negotiator to determine a varied range of settlement options, while keeping in mind the best and worst alternatives and the parties' ultimate goals. The parties should also evaluate what their next step will be in the event negotiations prove unsuccessful.

Customary Arbitration

Customary mediation exists;

a. When the parties in dispute voluntarily submit their dispute to an arbitrator(s) acting under customary law or according to customary traditional norms.
b. The submission to customary arbitration is demonstrated by the performance of the requirements necessary for the process.
c. There must be prior agreements to accept the award
d. The award must be published or announced to the disputing parties.

Neutral Case Evaluation

Neutral Case Evaluation is a process by which the parties, their lawyers or both the parties and their lawyers appear before a neutral person/body to present their arguments and evidence in support of their cases. The neutral person/body then makes a non-binding evaluation of their propositions and gives an opinion concerning the likely outcome if the dispute is tried in court. Based on the outcome of the evaluation, the parties may decide on which dispute mechanism to opt for in a bid to reach a mutually acceptable solution. In an interview with Mr Alex Nartey, the National Coordinator of the court-connected ADR in Ghana, he states clearly that: "the parties seek a specialist

advice on the likely outcome of the case should they go to court."[175] The recommendation is not binding on the parties. Again, he notes that the major disadvantage of this mechanism is that once the evaluation has been done and the likely outcome is known, the party who is likely to win might drag the process for a long time. However he notes that, unlike mediation, negotiation and arbitration, the neutral case evaluation is rarely asked for, a situation he attributes to the lack of trust among people."[176]

Med-Arb

One of the significant developments of the use of ADR is the flexibility that is associated with it. In this way various hybrid mechanisms for dispute resolution can be developed depending on the choice or consent of disputants. The major aim of ADR is promote the peaceful/amicable settlement of disputes. In some instances, depending on the peculiarities of the dispute in question, more than one method of dispute resolution would be needed in the search for an acceptable solution. One of such hybrid mechanisms is Med-Arb.

Like the name suggests it is a combination of the methods of mediation and arbitration. Because it is a blend of mediation with its persuasive force and arbitration with its guarantee of an assured outcome it is seen as getting the best of both worlds.[177] Once an agreement is reached the parties sign and becomes binding on the parties. If the parties however fail to reach an agreement the mediator will then act as an arbitrator and give a binding or non-binding award. Med-Arb has the advantage of ensuring that at the end of the day there would be an acceptable solution to both parties. Disputants also feel the sense of having had their day in court. However, should the same person act as a mediator and an arbitrator it might result in a bias if care is not taken.

Again, Mr. Nartey argues cogently that in some instances, the parties will be reluctant to speak freely in private to mediators who will decide the case should the mediation fail. In his view, this undermines the principal objective of opting for ADR process, namely, free communication with the neutral third party.[178]

175 Mr Alex Nartey, op. cit.
176176 ibid
177 Prof Quashigah, Dean of Faculty of Law, University of Ghana, 20 March 2013
178 Ajabeng, M. S., Alternative Dispute Resolution in Ghana. www.mediate.com, a

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.[179] 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.[24] 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.[180] 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 programme 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.[26] 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, 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.[181] To reduce tensions,

179 Crook, C. R., op. cit.

180 ibid

181 Interview with Mr Alex Nartey, op. cit.

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.[182]

Effectiveness of ADR in Ghana

The key objective for the introduction of court-connected ADR by the Judicial Service of Ghana was the belief that the ADR option would be more rapid and lead to a reduction of the long delays and huge backlog of cases clogging up the formal court system some cases having been pending for years.[183]

In this regard, the introduction of ADR has led to reductions in the number of cases pending at the courts. Given that ADR is still less than a decade old since it was formally piloted in Accra and Tema, and it is still indeed in the piloting stage, the programme has chalked a lot of successes. There is no doubt that ADR was quicker than persisting with the action in court.[184] The official target given to mediators was that they should settle cases within 30 days, and remit the case back to court if it was not possible to deal with it within that time frame, although it was possible to ask for an extension. In practice, most of the cases were dealt with in one or two mediation sessions.[185]

Since it was first piloted, ADR programme adjudicated 853 cases in 2006-7 out of which 466 of the cases were successfully settled. In 2007-8, a total of 1,723 were submitted of which 807 of the cases were successfully dealt with. In 2008-9, a total of 5358 cases were adjudicated with 3871 being successful. As observed by Justice Mills, 11,524 cases out of the 22,004 presented for mediation between 2007 and 2012 and this

182 ibid
183 Ajabeng, M. S., Alternative Dispute Resolution in Ghana. www.mediate.com, a
184 ibid
185 Interview with Mr Charles Turkson, Regional ADR Coordinator for Greater Accra Region 14 March 2013

represents 52.3 percent settlement rate. According to him, the concept had also served as a compliment to the court system by making access to justice cheaper, easier, expeditious, non-adversarial and faster particularly to the poor and vulnerable. He noted that, currently the programme had been extended to 52 District and Circuit Courts with at least three mediators assigned to each of these courts'. A Regional ADR Secretariat staffed with a Regional ADR coordinator and two other supporting staff is established in all the 10 Regions. It is expected that when ADR is functional in all Magistrate courts across the country by 2017 it would lead to very huge reductions in the caseloads clogging up the court system.[186]

4.3 Global Overview

Disagreements and misunderstanding are key characteristics of human relationships whether the relationship is a domestic, national or international one. The potential for disputes is even higher where the parties are from different cultural, economic and political backgrounds with different legal systems. Since disputes are such a critical part of human relationships, many countries have mechanisms to resolve them in a manner, which maintains the cohesion, economic and political stability of the state. This is particularly so with regard to disputes related to commerce because commerce is the engine of growth[187].The adjudicatory system of dispute resolution or the civil court system as we know it today evolved to resolve disputes among citizens. In each country of the world, the local court system has a history of development behind it but modern court systems all over the world have been influenced by the common law system which originated from England because England was at one time the dominant world power exporting its culture, ideas and system of governance to the rest of the world through the activities of its famous explorers. This adjudicatory or common law system is what has been exported to many developing countries, which were former colonies of Britain. In particular, many sub Saharan African countries which were colonies of Great Britain have retained the system of dispute resolution inherited from the former colonial governments.[188]The point made above is not to say that African nations did not have their own indigenous system of dispute resolution before the advent of the colonial government. In fact as we shall see, African

186 Interview with Mr Alex Nartey, op. cit.
187 Paper delivered following a UNITAR sub –regional workshop on arbitration and dispute resolution (Harare, Zimbabwe 11 to 15 September 2000)
188 Ibid

traditional system of dispute resolution is closer in nature and character to arbitration than to the colonial system of adjudication. But since African lawyers are trained in the common law system of adjudication which is integrated into the system of governance by the constitution backed by the establishment of courts, judges, the rules of procedures and the enforcement of the judgments, African lawyers have come to rely on and trust the common law system more than any other form of dispute resolution.[189]But the common law adjudicatory system of dispute resolution is widely known to be fraught with a myriad of shortcomings especially when applied to the resolution of commercial disputes. These shortcomings range from the delay in the process of litigation, the cumbersome rules of procedure, the corruption of judges and court officials in some countries, the cost of litigation, the publicity which goes with the hearing and the judgments etc. Whereas developed countries have managed to develop dispute resolution mechanisms which reduce the impact of the shortcomings identified here and conform with modernity and the demands of economic growth, many developing countries especially in Africa are still saddled with old forms of adjudication which they inherited from colonial governments. One of the reasons for this is the conservatism of lawyers in these countries who prefer to resolve disputes within their familiar adjudicatory system in spite of all the problems. Another reason is that they are not familiar with the modern forms of dispute resolution. In spite of the imposition of the foreign system of adjudication and its promotion by British trained African lawyers, many Africans still believe in and use the traditional system of dispute resolution although its scope and application to commercial disputes is limited[190].

Alternative Forms of Dispute Resolution that are applied internationally and not applied in Uganda

The shortcomings in the adjudicatory system of resolving disputes led to the Emergence of other methods of dispute resolution now popularly referred to as ADR. The value of ADR over and above the common adjudicatory system is that any of the techniques can be implemented very early in the dispute thereby giving the parties an opportunity to air their views and to involve decision makers within their respective organizations long before the subject of dispute eats deep into the fabric of the

189 www.unitary.org/dfm

190 Dispute resolution mechanism and constitutional rate in sub Saharan Africa by Mr Bolaji Owasanoye

relationship and cause irreparable damage[191].

ADR methods vary and their processes overlap but are all designed as alternatives to litigation and complement arbitration which is the most popular form of ADR. The methods include early neutral evaluation or neutral fact finding, Dispute Review Board, arb-med, mini trial, med-arb etc. The key factor is that all these methods are designed to assist the parties resolve their differences in a manner that is creative and most suited to the particular dispute. Some people see ADR methods as supplanting the adjudicatory system but if considered from the angle that the courts in many jurisdictions are unable to resolve all disputes in a manner appealing to litigants, then ADR methods will be accepted as complementary to the litigation system[192].

Early Neutral Evaluation/Fact Finding

This is an informal process whereby a neutral third party is selected by the disputants to investigate the issue in dispute and submit a report or come to give evidence at another forum like a court or arbitration. The outcome of a neutral fact finding is not binding but the result is admissible for use in a trial or other forum. The method is particularly useful in resolving complex scientific, technical, sociological, business or economic issue. Using a neutral fact finder eliminates the strategic posturing which characterizes the litigation or even arbitration process[193].

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

191 Ibid

192 Paper delivered following a UNITAR sub –regional workshop on arbitration and dispute resolution (Harare, Zimbabwe 11 to 15 September 2000)

193 Ibid

arisen thereunder[194].

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[195].

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[196].The International Chamber of Commerce has founded an organization called the International Centre for Technical

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

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

[196] www. Unitary.org/dfm for other titles of our document series

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[197].The Federation Internationale des Ingenieurs-Conseils (FIDIC) has prepared "Conditions of Contract for Works of Civil Engineering Construction". 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[198].

Mini-Trial

A mini-trial is a private abbreviated process of presentation by lawyers to the disputants to help them assess the strength and weakness of their positions and to help them reach a decision whether or not to proceed to trial. Usually there will be a third party advisor who renders a non-binding opinion about the legal, factual and evidentiary points of the case and what the outcome might be in court. The lawyers can then use this information to come to a conclusion.

This is a two-part settlement process, which originates as mediation but may graduate to arbitration using the neutral party as the arbitrator who gives an award.

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

[197] www. Unitary.org/dfm for other titles of our document series

[198] www. Unitary.org/dfm for other titles of our document series

be settled prior to going into the arbitration process, with the assistance of a trained and experienced mediator.[199]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.[200]

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 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".[201]
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.[202]

African Customary System of Dispute Resolution

Customary law is generally known to be the accepted norm of usage in any community. A community may accept certain customs as binding on them. In Africa, such customary laws may be accepted by members of particular ethnic groups and may be regarded as ethnic customary law. Customary law is unwritten and one its most commendable characteristics is its flexibility, apart from the fact that it is the

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

[200] 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

[201] 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

[202] ibid

accepted norm of usage. In one Nigerian case, the court said

> **"One of the most striking features of West African native custom ... is its flexibility; it appears to have been always subject to motives of expediency, and it shows unquestionable adaptability to altered circumstances without entirely losing its character."**[203]

Resolution of disputes was a major function under the indigenous system of governance. The role was taken up by the elders or the chief and was meant to maintain social cohesion. In its operation, African dispute resolution was very much like arbitration in that resolution of disputes was not adversarial. Any person who is concerned that a dispute between the parties threatened the peace of the community could initiate the process. In the process, parties have the opportunity to state their case and their expectation but the final decision is that of the elders. Whereas the western type arbitration is attractive because of its private nature, customary arbitration is not private but is organized to socialize the whole society, therefore, the community is present. Another distinction is that the process is gender sensitive as such women were excluded from male driven communal dispute resolution. Parties could arise from the whole process and maintain their relationship and where one party got an award the whole society was witness and saw to it that it was enforced. Social exclusion or ostracism was a potent sanction for any erring party therefore enforcement of an award was not a problem.[204]

There are however several limitations of this process in modern times. One is that it is mostly applied to land and family disputes. It is hardly applicable to monetized commercial transactions and certainly not to transaction of an international character. Furthermore, it is community focused and does not contemplate transactions where the parties are from different cultural backgrounds. The lack of privacy could be a disadvantage in that the parties might not want the community involved.

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

203 *Lewis v Bankole (1908) 1 N.L.R 81 at 100.*
204 Dispute resolution mechanism and constitutional rate in sub Saharan Africa by Mr Bolaji Owasanoye

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.

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[205].

[205] Documents 14 series no 14. Alternative dispute resolution method

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 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.[206]

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[207].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[208].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[209].

Arbitration and Constitutional Rights

Access to court is a fundamental right recognized in civilized countries. Section 34 of Chapter 2 on Bill of Rights of the South African Constitution Act No. 108 of 1996 provide "Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum."

Similarly, section 6 of Nigeria's 1999 Federal Constitution provides that the judicial

[206] Ibid

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

[208] Ibid

[209] Ibid

powers of the Federation shall be vested in the courts. In particular, section 6(6)(b) says that the judicial powers "shall extend to all matters between persons, or between government or authority and to any person in Nigeria, and to all actions and proceedings relating thereto, for the determination of any question as to the civil rights and obligations of that person"

The principle is linked to the concept of judicial independence and the separation of powers which espouse that one arm of government i.e. the legislature cannot oust the jurisdiction of the courts by legislation and thereby undermine the role of the court[210]. Similarly, at common law, an agreement by parties to oust the jurisdiction of court was frowned upon by the courts and declared contrary to public policy even though the common law recognized the use of arbitration to settle disputes.

In spite of these principles, parties have over the years executed arbitration agreements by which they bound themselves not to resort to litigation in the event of a dispute in respect of the contract. At common law, although arbitration agreements were recognized, there was reservation as to the extent it could go. In Lee v Showman's Guild of Great Britain[211] Lord Denning said

"*...parties cannot contract to oust the ordinary courts from their jurisdiction. They can of course agree to leave questions of law, as well as fact to the decision of the domestic tribunal. They can, indeed, make the tribunal the final arbiter on questions of law. They cannot prevent its decision being examined by the courts. If parties should seek by agreement to take the law out of the hands of the courts and put it in the hands of a private tribunal, without recourse at all to the courts in case of error, then the agreement is to that extent contrary to public policy and void.*"

This weighty pronouncement by no less a jurist than the late law Lord Denning has had profound impact on the attitude of lawyers in developing countries to arbitration agreements. In particular, there is concern about the finality of an arbitration agreement, which precludes the parties from resort to court for judicial review. But

210 *See section 4(8) 199 Constitution of Nigeria*

211 *[1959] 1 All E.R. 1175*

the reasons, which made arbitration like all other ADR mechanisms popular over litigation, have not disappeared. In many countries, litigation remains an expensive and tortuous way to enforce a legal right aside from the delay, there is the question of rigid formality, publicity, corruption in much judicial system, and in international commercial disputes there is the question of multiple jurisdictions from which the parties have to decide. Although these problems are associated with arbitration in different degrees, there is the advantage that the parties can to an extent control their impact.

The final point is that once a party has signed an arbitration agreement which makes the award final and not subject to judicial review except for express reasons, no court should entertain any action from an aggrieved party. This will be a violation of the spirit of the agreement and a further breach of the contract, a waste of the resources expended in pursuing the arbitration and a triumph for the losing party.

Conclusion

As a dispute resolution method, arbitration ought to fascinate African lawyers.

Although African dispute resolution mechanisms cannot be applied to commercial disputes except perhaps those dealing with community land, nevertheless, it offers an insight into the options available outside the adjudicatory system offered by the common law. By comparing it to arbitration and the parameters of litigation, lawyers, particularly government lawyers ought to be able to advise their governments on the need and basis for arbitration in commercial arrangements especially those of an international nature.

CHAPTER FIVE

Recommendations and Conclusion.

5.0 Introduction.

This chapter establishes the recommendations and possible reforms to the laws relating to ADR.in this chapter the writer establishes the possible recommendations that Uganda can adopt to improve on the use of ADR to Resolve Disputes.

5.1 Recommendations

Med-Arb Should Be Adopted And Applied In The Ugandan Legal System As A Mechanism Of ADR.

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 hence resolving disputes outside court.

Uganda should adopt Dispute Review Boards to in order resolve Disputes faster.

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[212].

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

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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.[213] For the above mentioned features Dispute Resolution Boards should be adopted in Uganda to help reduce case backlog in the Judiciary.

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.

Uganda Should Adopt 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 there under. The Experts are expected to be impartial. They undertake to interpret the provisions of the contract and/or explain their practical application. If adopted this will help resolve disputes in the construction sector hence reducing case backlog.

[213] Ibid

Mini-Trial Should Also Be Adopted For Quicker Resolution Of Disputes.

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. 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.

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 intervation 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 intervation 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.

Increase in funding

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

Training of mediators.

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.

Sensitization about the use of ADR in dispute resolution.

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.

Adjournment fee should be increased.

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 that can compel on to attend a mediation proceeding.

Employing more mediators to speed up the process.

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.

Uganda should adopt neutral evaluation or fact finding as a mechanism of dispute resolution

This is an informal process whereby a neutral third party is selected by the disputants to investigate the issue in dispute and submit a report or come to give evidence at another forum like a court or arbitration. The outcome of a neutral fact finding is not binding but the result is admissible for use in a trial or other forum. The method is particularly useful in resolving complex scientific, technical, sociological, business or economic issue. Using a neutral fact finder eliminates the strategic posturing which characterizes the litigation or even arbitration process.

5.2 Conclusion

ADR has been undermined especially by the lawyers as being inappropriate to resolve disputes among people due to the challenges mentioned above faced by ADR system. But if the recommendations and reforms mentioned above are considered ADR may be the appropriate rather than alternative dispute resolution mechanism.

Uganda is gradually moving away from the traditional concept that litigation is more effective than ADR but there is still more to be done. Much as the lawyer's stock in trade is his time, for which he lavishes in his bills subsequent to court litigation, ADR can also be cost effective as well as financially and intellectually rewarding. More and more business concerns are opting for ADR, particularly Arbitration and mediation, in resolving their disputes as opposed to conventional Court litigation.

This is essentially because they would rather protect their business contacts, reputations and interests rather than severe them through exploring lengthy and embarrassing litigation. However, in the same vein, warring parties that are advised to opt for ADR should not be led to believe that this option is out of compulsion by Court or any quasi-judicial structure, but should freely appreciate the benefits that come with it. It is also noteworthy that legal training in Uganda is progressing away from the adversarial system to moderate training involving ADR and exposure to ADR practical techniques. Law Students and advocates alike should be encouraged further in this awareness so as to appreciate ADR more, rather than ridicule it and thus embrace it in the practice of pursuit of justice in Uganda.

There are a number of laws 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 if 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 in this chapter of this paper.

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.

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.

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