EFFICIENCY OF MEDIATION IN RESOLVING CIVIL MATTERS AS OPPOSED TO LITIGATION: A CASE STUDY OF THE COMMERCIAL COURT, KAMPALA

BY

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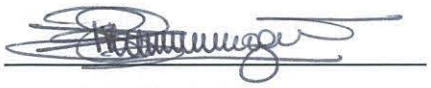
A RESEARCH REPORT SUBMITTED TO FACULTY OF LAW IN PARTIAL FULFILLMENT OF THE REQUIREMENTS FOR AWARD OF BACHELOR OF LAW OF KAMPALA INTERNATIONAL UNIVERSITY

JUNE 2017

DECLARATION

I **BYARUHANGA RONALD**, hereby declare that the work presented in this Research is my own work and that it has never been submitted in any university whatsoever for the award of Bachelors' Degree in Law.

Signed: Date:



22nd MAY 2017

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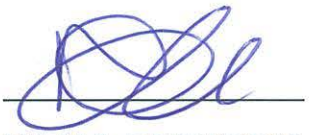
Signed; 

Date: 23RD MAY 2017

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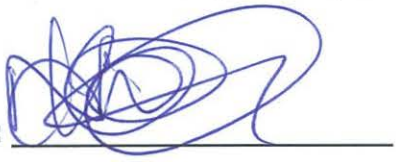
APPROVAL

This is to certify that this research report is of work done by **Byaruhanga Ronald LLB/6205/113/DU** under my supervision. I have read through it and it is ready for submission to the faculty with my due approval.

Signed: 

Dated: 23RD MAY 2017

Research supervisor;

KAHAMA DICKSON

DEDICATION

I would like to dedicate this Research to the Almighty God, beloved parents Mr. Gordon Byaruhanga and Namusoke Edith, my wife Leila Kansiime, my children, my brothers and sisters, my classmates and all my senior lecturers, who have been very instrumental towards completion of this research. I equally dedicate this research to all Court users, Litigants, judicial officers, officers of Court and I wish this research will be instrumental in helping to move ADR(Mediation) to a higher substantial level.

BYARUHANGA RONALD.

ACKNOWLEDGEMENT

This research about the efficiency of Mediation in resolving civil matters as compared to litigation, a case study of High Court, Commercial Division has been developed and many thanks to the energy, financial support, inspiration and hard work of my parents, and I would like to sincerely thank Mr. KAHAAMA DICKSON who was my supervisor and his role towards my research was very instrumental in guiding me throughout my endeavors. I hope the report will be widely used to help in civil claims in the whole of Uganda.

My special gratitude and appreciation goes out to all the staff and management of M/s ENSafrica Advocates, especially Mr. Samuel Kakande, whose influence in my academic endeavors has been so strong in academic guidance.

I equally would like to recognize the priceless influence, my late Father and my brother Counsel Ronald Tusingwire, fostered towards me to make sure I take this path of educational career I have undertaken. **RESPECT IN ALL ASPECT.**

BYARUHANGA RONALD.

ACRONYMS

ADR	Alternative Dispute Resolution
CADER	Centre for Arbitration and Dispute Resolution
CCUC	Commercial Court Users Committee
CIPD	Chartered Institute for Personnel and Development
DFID	Department For International Development
FEB	Federal Executive Boards
IFC	International Finance Corporation
OAG	Office of the Auditor General
UIA	Uganda Investment Authority
UGX	Uganda Shillings
VFM	Value For Money

LIST OF LEGISLATIONS.

Constitution of the Republic of Uganda 1995

The Contracts Act 2010

The Land Act Cap 227

The Judicature Act Cap 13

The Judicature (Commercial Court Division) (Mediation) Rules, No 55 of 2007

The Civil Procedure Act Cap 71

The Civil Procedure Rules S.I 71-1

TABLE OF CONTENTS:

ABSTARCT:

This research aims at looking outside the box of adversarial litigation of matters through the Courts of law. It explores the new trend in Uganda encompassing different forms of ADR mechanisms specifically mediation.

In my conclusion this research has looked into the advantages of ADR(Mediation) and tempted me into determining that ADR is a more viable means of administering Justice in Uganda visa vie Litigation.

CHAPTER ONE

GENERAL INTRODUCTION

1.0 Introduction

This chapter gives the background to the study, statement of the problem, objectives of the study, research questions, and scope of research, significance of the study, methodology, literature review and chapterization.

1.1 Background to the study

The ability to enforce contracts is essential to support efficient allocation of resources and growth in an economy. The ease with which contracts can be enforced varies dramatically across economies. According to data from the World Bank's Doing Business project, the time required to enforce a contract (from the moment the plaintiff files the lawsuit until payment is made) ranges from about five months in Singapore and seven in New Zealand to more than four years in Guatemala, Afghanistan, and Suriname[1].

Among the reasons that contract enforcement is so inefficient in many countries are lack of modern laws, deficient and underfunded court systems, and prevalent corruption. Alternative dispute resolution (ADR) has emerged as an alternative to court litigation that may offer a more efficient and less expensive avenue for resolving disputes. It provides confidentiality, choice of neutral parties, more flexibility of procedure, and other benefits[2].

Civil problems and disputes can have adverse consequences for people, affecting their confidence, well-being, financial situation and health. We include in ourdefinition all civil matters which raise a legal issue or which, if not resolved earlier, could ultimately result in legal proceedings. For example, issues with welfare benefits, debt, housing,

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[1]Doing Business 2009: Comparing Regulation in 181 Economies, available at http://www.doing business.org/documents/DB09_overview.pdf.

[2]Goldberg, S. (2005). How interest based grievance mediation performs in the long term. Dispute Resolution Journal, 60(4), 8–15.

employment, family disputes and consumer rights. Problems and disputes can escalate from simple, minor issues into major, complex challenges. The early resolution or avoidance of these problems can improve people's lives

ADR is defined as any process or procedure other than adjudication by a presiding judge in court-litigation in which a neutral third party assists in or decides on the resolution of the issues in dispute. Among the many different types of ADR processes, the most common are mediation, arbitration, and conciliation. Others include early neutral evaluation, summary jury trial, mini-trial, and settlement conference[3].

Mediation is a form of ADR, 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[4]Mediation programs differ widely in their "design features," that is, how they are structured, delivered, and the characteristics of the disputants they serve. Such domains of difference can include: the nature of the disputes being mediated; the cost of the program's services to users; the length of the mediation sessions; whether mediations occur in-person, over distance, or both; the training and experience of the mediators; the mediation techniques used; the issues open to mediation; whether it is mandatory or voluntary; whether it is court-connected, court-annexed, or private; and whether the parties are represented by counsel[5]. This analysis makes no attempt to speak to how these different design features might be associated with different outcomes. While practitioners have been turning their minds to the issue of what dispute resolution options work best in which circumstances.

By resolving conflicts outside of, or earlier in, the court system, limited court resources can be re-allocated to other matters. This happens when[6]:

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[3]Nabatchi, T. and Stanger, A. (2013) Faster? Cheaper? Better? Using ADR to resolve federal sector EEO complaints. Public Administration Review, 73(1), 50–61.

[4] https://www.google.com/search?ei=0-XrWLHECIv3Uu04

[5]Taylor, R. (2003). Workplace tiffs boosting demand for mediators. National Post, FP8.

[6]Lawler, J. (June 20, 2010). The real cost of workplace conflict. Entrepreneur.com. Online article retrieved from: http://www.entrepreneur.com/article/207196.

Mediation results in conflicts resolving before commencing the litigation process, resulting in shorter time to resolution and, therefore, less use of court staff and judicial time. Mediated agreements are complied with more often than court-imposed terms, thereby reducing re-litigation; and even when mediation does not result in an agreement, post-mediation court proceedings are shorter and therefore less expensive (because the mediation process gave the parties more information about the dispute, narrowed the issues for trial, allowed them to resolve some issues, and made them less adversarial).

The main disadvantage of mediation is that disclosure of information and truthfulness of communications depend on good faith of parties. It cannot therefore compel good faith, which is key in reaching an agreement[7].

The judicial system in Uganda currently embraces mediation as a first step to settling dispute before a trial by a magistrate/judge. The commercial division of the High Court pioneered this approach. The efficiency of mediation over litigation in solving criminal matters is not clear, which is what this study seeks to establish.

1.2 Statement of the problem

According to Value For Money (VFM) audit report of 2011 on disposing of cases by the judiciary[8], it was pointed out that the Judiciary experienced delays in completing cases within the stipulated time, leading to case backlogs in courts. The delays were attributed to many challenges, with mediation being one of them.

Mediation was initially not conducted in all courts apart from the Commercial Division of the High Court. This followed a two year Mediation Pilot Project where disputes were forwarded to an Alternative Dispute Resolution (ADR) provider known as the Centre for Arbitration and Dispute Resolution (CADER). This gives parties an

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[7]Elliott, D. C. & Goss, J. (1994). Grievance mediation: Why and how it works. Aurora, ON: Canada Law Book.
[8]Office of the Auditor General (2011). Value for Money Audit Report, Kampala-Uganda.

opportunity to try out mediation before the case comes to trial. CADER also carries out institutional-based arbitrations[9].

The time taken to hold mediation in certain instances exceeds the mandatory 30 days and some cases fail the mediation process. Limited application of mediation by the courts denies parties an opportunity of reaching an amicable settlement . It is therefore necessary to find the efficiency of court-annexed mediation in comparison to litigation in solving criminal matters.

1.3.1 General objective

To establish the efficiency of mediation over litigation as a means of solving civil matter.

1.3.2 Specific objectives

This study was carried out with the following specific objectives:

a) To find out the success rate attained in solving civil matters using mediation.
b) To find out the rate of failure of mediation in solving civil matters.
c) To identify the specific civil matters where mediation has been successful.
d) To identify the specific civil matters where mediation has been unsuccessful.
e) To make recommendations on whether mediation or litigation is the best way of settling civil matters.

1.4 Research questions

This study was guided by the following questions:

a) What is the rate of success in solving civil matters using mediation?
b) What is the rate of failure of mediation in solving civil matters?
c) In what civil matters is mediation most successful?
d) In what civil matters has mediation failed most?

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[9] *Geoffrey Kiryabwire, The Development of the Commercial Judicial System in Uganda: A Study of the Commercial Court Division, High Court of Uganda, 2 J. Bus. Entrepreneurship & L. Iss. 2 (2009). Available at: http://digitalcommons.pepperdine.edu/jbel/vol2/iss2/3.*

e) Mediation or litigation, which is the best way of settling civil matters?

1.5 Scope of research

This study was conducted at the Commercial Court division of the High Court, located at Nakasero in the central district of Kampala.

The establishment of the Commercial Court in Uganda as a division of the High Court was a direct recommendation of the 1995 Justice Platt Commission of Inquiry Report on "Delays in the Judicial System." During its hearings the commission received views from the business community in Uganda. Some of the major concerns were that the Courts at the time were not able to fully appreciate neither specialized commercial disputes nor handle such cases in an efficient and expeditious manner[10].

These concerns were raised in the mid 1990's when the business landscape in Uganda was rapidly changing as a result of the government driven programs of liberalization and privatization of the economy. Consequently, this led to a shift of emphasis from state to privately owned businesses which placed greater expectations on the judicial system.

The President of Uganda, during a nationwide address[11], charged the judiciary to put in place measures to facilitate investors in their court disputes.

The Ugandan judiciary then started to reorganize itself with a view to creating a commercial division of the High Court. On June 20, 1996, then Chief Justice W.W. Wambuzi issued Legal Notice No. 5 of 1996, entitled "Constitutional Commercial Court (practice)Directions 1996" (now Statutory Instrument Constitution No. 6), creating the Commercial Division of the High Court as a Commercial Court. Direction 2 of the instrument states: ". . . It has been decided to establish, a Commercial Court capable of delivering to the commercial community an efficient, expeditious and cost-effective

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[10] ***Ibid***
[11] ***January 26, 1995***

mode of adjudicating disputes that affect directly and significantly the economic, commercial and financial life in Uganda."

The Commercial Court began its work but did not get its distinct character until January 15, 1999 when it moved to separate premises from the High Court and, more importantly, started its own independent registry. It is important to point out that Uganda was probably the first country in Africa to create a commercial court in 1996. The court celebrated ten years of its existence in 2006.

1.5.2 Time scope

This study was conducted within a time frame of five (5) months, starting from December 2016 to April 2017.

1.5.3 Field scope

This study exclusively focused on the efficiency of mediation over litigation as a means of resolving civil matters.

1.6 Significance of the study

This research has dealt with the importance of the study; for example the study will enlighten on the ineffectiveness of litigation in resolving civil matters and the possible recommendations to curb this. The study report is also of significance to people planning for a court settlement of civil matters, the University, future scholars and the student as described below.

a) The findings of this study will guide the people faced with civil matters on how best they can reach an agreement with minimum costs incurred and little time spent; and will enlighten them more on whether mediation or litigation is the way forward.
b) This report will add to the list of reference materials available at the University and will therefore increase the number of tools for knowledge dissemination.

c) To future scholars, this study report will provide a valuable source of literature and also point out research gaps that will form bases for further research.
d) The successful accomplishment of this research will aid me (the researcher) attain my degree in bachelor of law of Kampala International University.

1.7 Methodology

My methodology will entail approaches that I will use to obtain information from the field. It will further define and describe the research methods used in information collection. Appropriateness and justification of techniques to be used will be presented. Hardships that are anticipated to be encountered in this research will be highlighted.

1.7.1 Study/Research design

This study was descriptive based on qualitative methods of information collection used.

1.7.2 Study procedure

This study was conducted by reviewing among others, written information from libraries, annual reports of the court for the past years and other sources that have been having relevant materials about mediation and will help in obtaining relevant information. Text books, newspapers, journals, mini-interviews from law practitioners and any other relevant material that I may deem necessary will be consulted for the purposes of producing this qualitative and exhaustive research. This method is great; it has helped in that ideas from previous scholars were put to test in relation to the present scholars to establish the trend in performance of mediation and litigation in civil matters before the court. The staff in the mediation registry of the court were also interviewed for useful insights on how mediation contributed to settling civil matters petitioned before the court.

1.7.3Ethical consideration

The proposal for this study was sent to the research committee of the faculty of Law of Kampala International University for approval.

Permission to use records on mediation in civil matters for this research was sought from court administration (through JUSTICE MADRAMA).

1.8 Literature review

Mediation is of one of the most employed method employed in ADR in Uganda. The 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 ADR (Mediation) comes in.

1.9 Chapterization.

This report is made up of five chapters.

1.9.1 Chapter one

This chapter has the general introduction of the research, introducing the background of the problem and the purpose of the study in the research. It also has the scope of the study coupled with the significance of the study. This chapter also has literature review and the methodology used to obtain data from the field and library research done to obtain the other useful information of the research and chapterization.

1.9.2Chapter two

This chapter evaluates and details a comparative overview of merits and demerits of various dispute resolution processes, empirical evidence pointing out the benefits of mediation, empirical evidence demonstrating that mediation is cost-effective and a conclusion.

1.9.3Chapter three

The chapter contains literature on mediation context, choice of mediators, role of the mediator, procedure at mediation, information exchange during mediation, penalty for failing to attend a mediation session, agreement during the mediation, privacy of parties, mediation costs and conclusion.

1.9.4Chapter four

It reviews the following commercial cases so as to understand the impact of mediation: Mathias Lwanga Kaganda versus Uganda Electricity Board; Chevron Kenya limited & Chevron Uganda Limited vs. Daqare Transporters Limited; Bank of Uganda, Standard Chartered Bank (U) Ltd, Christopher Kibanzanga vs. Basajjabalaba Hides And Skins Ltd, The Commissioner Land Registration, Saidi Kyadondo, Dan Kataribwe, Kwatampola Stephen, Kagoro Tumwine, Siraje Imamu Kankurihemu, James Magezi; and Tononoka Steels Limited vs. The Eastern and Southern Africa Trade and Development Bank (*Court of Appeal Civil Appeal No. 255 of 1998 - 8/13/1999*), Kenya.

1.9.5Chapter five

This gives the results of the study, conclusions and recommendations.

CHAPTER TWO

THE CONCEPT OF MEDIATION

2.0 Introduction

This chapter details a comparative overview of merits and demerits of various dispute resolution processes, empirical evidence pointing out the benefits of mediation, empirical evidence demonstrating that mediation is not cost-effective and a conclusion.

Background

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 ordinarily not amenable to mediation substantially increasing the productivity of the courts, satisfaction, and confidence of court users in the justice system.

Mediation and arbitration have been on the increase since the creation of the Centre for Arbitration and Dispute Resolution (CADER) in 2000. Between 2003 and 2005 the Commercial Court Division implemented the mediation Pilot Project whereby cases were referred to CADER for mediation.

Mediation became a permanent feature at the Commercial Court with the passing of the Judicature (Mediation) Rules 2013. Following the success story at the Commercial Court, it was decided to rollout mediation at all the courts with the gazetting of the Mediation Rules 2013.

"Mediation is now a permanent feature in all out court processes as declared by the Hon. Principal Judge, Yorokamu Bamwine, on Friday 18 March 2015. Judicial officials say mediation between people with civil disputes compared to court processes saves time and will reduce case backlog.

The Judiciary announced plans to enhance mediation as a leading strategy to deal with all civil disputes filed in courts in order to fight case backlog. Speaking at the opening of a weeklong training of judicial officers in Kampala yesterday, acting Chief Justice Steven Kavuma said the initiative will tremendously reduce case backlog as well as improve public confidence in the Judiciary.

"Resolution of disputes is faster. The parties design their own solutions rather than have one impose upon them and a win-win situation is created. Reconciliation, which is a cardinal principle in our Constitutional dispute resolution process, is therefore achieved," Justice Kavuma said.

He also said mediation offers quick and easy resolution of disputes where compliance to such solutions is likely to go on without further proceedings.

Mediation is a process that allows parties to design solutions to the dispute between them with the assistance of a third party who is neutral and makes no decision except to assist the parties arrive at their solution.

The judiciary established the Centre for Arbitration and Dispute Resolution leading to the implementation of mediation on pilot basis by the Commercial Court where 33 per cent of the referred cases were successfully mediated.

Positive results

According to the Annual Report of Commercial Court Division, mediation registration in 2013 had an overall work load of 623 constituting 468 filed cases in the same year and 155 cases brought forward from 2012.

"Out of these, 383 cases were finalized which is a disposal rate of 60.7 per cent. This rate, however, dropped from 73.1 per cent that had been registered through the previous year. This was attributed to the small number of accredited mediators," Justice Kavuma said.

He added: "Outside that percentage, other cases went on to be settled in court before

completion of trial partly as a result of the work initiated in that mediation project, applying rules, the court through its registrar continued to offer mediation as an alternative to litigation."

Justice David Wangutsi, the Head of High Court Commercial Division described mediation process as a time saving initiative which allows judicial officers time to handle cases which are ordinarily not agreeable to mediation.

"This substantially increases the productivity of the court. Most importantly, satisfaction and confidence of court users in the justice system is enhanced in line with this year's commitment to render justice to all manner of people through timely adjudication of disputes without discrimination," he said[12].

The principal judge was presiding over the launch of the rollout of Alternative Dispute Resolution (ADR) from the Commercial Court of the High Court to other courts and dispute resolution bodies within the JLOS sector.

ADR is a mediation process that allows parties to a dispute find a quick solution with the assistance of a neutral third party, without going through the costly and lengthy court process.

Originally piloted in the Commercial Court, ADR is now being rolled out to the other High Court Divisions of Civil, Family, Land and Magistrate Courts. ADR services will also be available in the other JLOS dispute resolution bodies like the Industrial Court, Judicial Service Commission, Uganda Human Rights Commission, the Law Council, the Directorate of Civil Litigation, Uganda Law Society and the Office of the Administrator General.

[12] ***Daily Monitor 24 March 2014***

The Project is expected to contribute to the implementation of the JLOS 3rd Strategic Investment Plan (SIPIII), particularly with regard to increasing the use of ADR in dispute resolution.

The Project will also focus on training a pool of professional mediators across the country, strengthening of court registries for mediation in the Judiciary, conducting sensitization and community outreach programmes. The plan further includes the establishment of a fully-fledged High Court Division for Mediation in the Judiciary and harmonizing structures across JLOS institutions.

Supported by the Austrian Development Agency, the ADR Project provides the JLOS Sector with an opportunity to implement the Judicature (Mediation) Rules of 2013, which makes mediation mandatory in all civil matters including land, family and main civil law.

"Through mediation, the Project provides access to justice for vulnerable and marginalized people whose cases take long to be concluded in the formal justice system, said Justice David Wangutusi, the chairperson, ADR Project Advisory Board.

"Investors and local businessmen would like to do business in a country where disputes would be easily resolved. Much of the money used by these businesses is borrowed from banks at high interest rates. Such money tied up in disputes that stretch over a long time only leads to multiplication of bank interest, and therefore cost of operation, which directly impacts on the profits which the businessman makes, at times leading to collapse of big business ventures.

The judge says ADR principles shall apply equally to claims in family, civil and land matters. "It is therefore with mediation that the ever-growing backlog can be checked and access to justice enhanced, added Justice Wangutusi.

It is therefore important that mediation should be embraced by all to win the war on backlog and increase access to Justice.

2.1 A comparative overview of merits and demerits of various dispute resolution processes

In order to select the most appropriate process, it is important to understand and appreciate the advantages and disadvantages of the various dispute resolution processes. In the outline of advantages and disadvantages of dispute resolution processes provided below, a simplified spectrum of processes from consensual, informal (negotiation and mediation) to formal, adjudicative (arbitration and trial) is used.

2.1.1Advantages of consensual processes

It brings about a speedy and informal resolution of disputes generally less stressful[13]. There is confidentiality and the avoidance of publicity, may improve communication between parties thereby preserving or enhancing relationships between parties. There is a high degree of party control because parties create own process and craft own agreement. There is flexibility as resolutions can be tailored to the needs and underlying concerns of the parties and can address legal and non-legal issues as well as providing for remedies unavailable through adjudicative processes. Legal and or other standards of fairness can be used in crafting agreements. There is increased satisfaction and compliance with settlements when parties have directly participated in crafting agreements and may assist in clarifying and narrowing issues, and fostering climate of openness, co-operation, and collaboration, even if a settlement is not reached. It can be said that these processes are risk-free, communications are without prejudice and if no agreement reached, parties can pursue other options. In mediation parties may select mediator with substantive knowledge. In mediation-facilitated discussion useful if negotiations have broken down or if strong emotions present. The process is voluntary (except where mandated by contract or legislation) as is the case with mediation in Uganda today and the agreement is binding on the parties.

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[13] ***Bingham, L. B. and Pitts, D.W. (2002). Highlights of mediation at work: The national REDRESS***

2.1.2 Disadvantages of consensual processes[14]

As there are advantages there is always a negative aspect and these can be used as stalling tactic. The parties are not compelled to continue negotiations or mediation, they don not produce legal precedents. The exclusion of pertinent parties weakens final agreement. Parties may usually have limited bargaining authority, there is little or no check on power imbalances between the parties. Disclosure of information and truthfulness of communications depend on good faith of parties yet mediation cannot compel good faith. In negotiation-lack of neutrality may reduce chance of reaching agreement, particularly in complex disputes or those involving multi-parties may not adequately protect parties' legal rights and in mediation strong-willed or incompetent mediator can exercise too much control.

2.1.2.3Advantages of Adjudicative processes (arbitration and trial)[15]

Here parties create own process. An Arbitrator can be selected on basis of substantive knowledge, the proceedings are confidential. The formality compels proper behavior and may minimize bad faith. The rules of procedure can be tailored to the process and hence less backlog than litigation. The final decision binding or advisory depends on wishes of parties and proceedings may be shorter and therefore less expensive.

2.1.2.2 Disadvantages of arbitration

The Success here is largely dependent on the arbitrator. Time and cost affected by poor co-operation and poor process design. The right of appeal limited. Confidentiality is not suitable for some disputes and Outcome uncertain in binding arbitration.

2.1.2.3 Advantages of trial

[14] *Ibid*
[15] *Ibid*

It is formal, thus less opportunity for abuse of process. Parties are compelled to attend, it is an institutionalized process that allows safeguards. The final decision is binding and egal precedent may be established.

2.1.2.4Disadvantages of trial

a) Time consuming;
b) Parties are not in control of process or decision, its outcome is thus uncertain;
c) Public process;
d) Onerous evidentiary burden;
e) Available remedies limited; and
f) Expensive process.

2.2.1 Mediation saves government court administration costs

Mediation can save government court administration costs in the following ways[16]

By resolving conflicts before a court action is commenced, many conflicts are kept out of the courts. By resolving court disputes relatively early in the litigation process, less court staff and judicial resources are used. The vast majority of studies conducted on the issue find that the overall time to disposition of mediated cases as a group (i.e., including cases that do not settle at mediation) to be lower than cases using traditional litigation procedures. Some evidence indicates that post-mediation court proceedings are actually shorter when a case mediates but does not resolve at mediation. Therefore, mediation may make these case less expensive (e.g., because the mediation process gave the parties more information about the dispute, narrowed the issues, allowed them to resolve some issues, made them less adversarial, etc.) and by leading to agreements that are complied with more often than litigated court orders, mediation reduces re-litigation.

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[16] *Seargeant, J. (2005) The Acas small firms' mediation pilot: Research to explore parties' experiences and views on the value of mediation. London: Acas. Retrieved from: http://www.acas.org.uk/media/pdf/d/l/Research_Paper_04_05-accessible-version-July-2011.pdf.*

Further, lawyers believed that costs were reducing both mediated cases that settled and did not settle because parties were forced to evaluate their cases at an early stage[17].

In 2007, researchers found that in the Alberta Court of Queen's Bench Civil Mediation Program more than half of cases settled in full, and that the majority of lawyers and litigants believed that mediation saved time and money[18].

In a 2011 study of civil cases in Michigan under mediation produced far more settlements and consent judgments than other approaches including case litigation.

Additionally, mediated cases took an average of six months to resolve(regardless of whether they settled or not), while case evaluation took an average of one year, and cases in the regular litigation stream took an average of one year and a half[19].

The pilot of a court-connected voluntary mediation program conducted in London England found out that most of mediated cases settled during the mediation itself including those that did not settle at the mediation sessions settled far more often than cases in which mediation was rejected and cases that were not offered mediation. The cases that did not settle at mediation were also concluded earlier than cases that rejected mediation and cases that were not offered mediation.

From such findings, it is easy to conclude that settlement is more likely following mediation even when cases fail to settle at mediation. It is naturally arguable that the population of mediated cases is highly self-selected and that the mere fact of agreeing to mediation indicates that the case is ripe for settlement. However, the stated reasons for accepting offers of mediation provide an alternative view, and suggest that for a proportion of cases at least, the motivation for accepting the court's offer of mediation was that the case was difficult to settle, the parties had become entrenched and that communication between the opposing sides

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[17]Baron, Guy (2003). Public Service Staff Relations Board Mediation Program. Canadian Bar Association's Possibilities Newsletter. Retrieved from: http://www.cba.org/cba/newsletters/ADR-2003/PrintHtml.aspx?DocId=11580.

[18]Ibid

[19]Ibid

was poor. Moreover, one of the most common reasons for rejecting offers of mediation was that the case was likely to settle in any case".

In EU commercial cases, a 2001 study found that even those that do not settle at mediation involved fewer subsequent proceedings and were therefore shorter and less costly to the courts and the disputants. Specifically, the researchers found that[20] simply put, mediation in most instances saves time and money and can relieve crowded courts".

In evaluating the effectiveness of mediation in UK construction disputes, researchers in 2010 found that litigants who did not settle in mediation did not believe their time or money was wasted in mediation.

2.2.2 Mediation saves people and businesses money

Mediation saves people and businesses money in legal and court fees. This is money that could otherwise be spent in the economy. Family mediation also produces better psychosocial and economic outcomes than adversarial approaches, which may result in reduced use of social assistance and other social services.

2.2.3 Mediation reduces workplace conflict, which saves private and public sector funds

Conflict is ubiquitous in private and public sector workplaces. Mediation reduces conflict in the workplace, which saves businesses significant money. This results in a boosted economy, as businesses spend and invest more, and generates more tax income for government. Additionally, mediation reduces work place conflict in the public sector-saving government money directly. According to respondents from a 2009 study conducted in Canada, workplace conflict is most prevalent in the government. The biggest percentage of respondents had observed conflict leading to sickness and absenteeism. Financial losses due to workplace conflict therefore affects government

[20] *Ibid*

coffers directly and indirectly through the programs they fund (e.g., education, health care, etc.).

Managers spend a good deal of their time dealing with workplace conflict. However, research indicates that, "...at the present time, it appears that many leaders are falling short. When asked how well leaders deal with conflict, only minority said they are effective. Clearly there is an opportunity for managers to improve how they lead people through conflict.

According to the 2011 CIPD Conflict Management survey report, workplace mediation programs are most beneficial in improving relationships between workers, reducing the stress of formal procedures, and avoiding the cost of more formal procedures.

The 2008 CIPD[21] survey on mediation also identified other benefits of workplace mediation, including: employee retention, reducing formal grievances, creating a better organizational culture, reducing illness-related absence, and maintaining confidentiality.

Workplace mediation provides an alternative approach for staff wishing to pursue a grievance in a less confrontational manner, perhaps encouraging employees who would normally avoid conflict and even leave their job to broach their concerns.

Implementing mediation programs in the workplace can have a transformative effect on organizational culture, including improved working relations and lower levels of conflict and improved managerial conflict management skills.

2.2.4 Mediation can reduce the cost of civil litigation in which government and/or crown corporations are involved

In 2002, researchers Hogarth and Boyle found that settlement rates in mediations held on these cases were extremely high irrespective of the complexity or type of the claim, used strategically, mediation could assist in resolving more complex and higher

[21] *Chartered Institute for Personnel and Development (February 2007). Managing conflict at work. London: CIPD. Retrieved from: http://www.cipd.co.uk/NR/rdonlyres/2A206FFD-CF79-4F2A-9B8A-FA7F2A05CE07/0/manconflwrk.pdf*

claim cases early and fairly; and with appropriate safeguards, it may be possible to provide unrepresented claimants with access to a broader range of resolution tools including mediation. Lead trial counsel in the U.S. Department of Justice keep records in all cases in which a private neutral conducted an ADR process in Department litigation across the country. In fraud, employment discrimination, civil rights, and tort cases, Assistant US Attorneys and their staff estimated that in 2009they spent fewer hours on cases in which ADR (including mediation) were used, and that these cases resolved about six months earlier than they would have had they been litigated[22].

2.2.5 Distance mediation and online dispute resolution will save money and become the way of the future

Distance and technology-assisted mediation are viable, and are areas of particular expertise for Mediate BC. The Law Foundation of BC funded Distance Mediation Project concluded that mediation using web conferencing or teleconferencing can provide a safe, affordable and accessible option for resolving family conflicts involving separation and divorce. Further, this is an area that will most likely expand, as newer generations become more comfortable with technology, and people recognize the cost-savings associated with these techniques. In recognition of these factors, the European Union has recently pursued a "Digital Agenda" that will, inter alia, involve an EU-wide online ADR strategy. Further, "because they will continue to be fully engaged trading partners with the European Union, U.S. multinational companies will become familiar with the European Union online dispute resolution systems. It is likely that those companies will bring elements of those systems, or the entire online dispute resolution systems themselves, back to the U.S. domestic market.

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[22] *Hogarth, J., & Boyle, K. (April 2002). Is mediation a cost-effective alternative in motor vehicle personal injury claims? Statistical analyses and observations. UBC Program on Dispute Resolution. Retrieved from: http://www.law.ubc.ca/drcura/pdf/Statistical_Analysis_Final.pdf*

2.3 MEDIATION ON BOTH SIDES OF THE COIN

This process avoids the costly and lengthy court process. The traditional adversarial adjudicatory system has long dominated society as the primary means of solving disputes but the introduction of mediation in 2013 was expected to help in swiftly settling cases. It is now three years after it was rolled out in all High court divisions and all magistrate's courts that deal in civil cases. However, its critics say that it was kneejerk reaction to the huge case backlog hence it was bound to fail. In the first of two-part series critically analyzing mediation's impact, DERRICK KIYONGA details how poor funding and a lack of commitment from stakeholders have derailed the program. When asked about mediation, Principal Judge Yorokamu Bamwine gives the impression that it is the best policy to have been instituted by Uganda's judiciary since independence. "Mediation is the best because it leads to reconciliation between warring parties. Unlike the adversarial system where the winner takes it all, here everyone is a winner. The major aim of justice is to promote reconciliation and that's what mediation does," he says. Asked about the same, Justice David Wangutusi, the chairperson of the Alternative Dispute Resolution project advisory board, uses the Holy Bible to make a case for mediation. The candid Wangutusi cites Matthew 5:25, which states: "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 over to the officer, and you may be thrown into prison." "It is clear, mediation is rooted in humanity. It's backed up by Christianity and also Islam. On top of that, it is not as costly as the conventional litigation system," Wangutusi says.

Quickly, the judge throws in an Afrocentric perspective of mediation. "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."

Though the judges are waxing lyrical about mediation, some people from whom they derive their powers as per article 126 of the constitution don't share the same enthusiasm.

2.3.1 THE WEAKER SIDE OF MEDIATION

"You are talking about mediation? It's a joke," Edward Sekyewa says as he is seated near the High court civil division registry, "Actually it's just a waste of time because it's not taken seriously, more so by the Attorney General." Sekyewa's disdain towards mediation stems from a 2013 suit he instituted against government in which he was accusing it to failing to fully implement the Leadership Code Act 2002. Sekyewa, who works with the Hub for Investigative Media, wanted court to compel government to make it possible for the public to access information concerning wealth declarations submitted by leaders.

2.3.2 IGG AFRAID HELPED BY ADR IN UGANDA

Back then, through the Centre for Legal Aid, Sekyewa said that he had sought to access the contents of the wealth declarations of permanent secretaries from the Inspectorate of Government while working with the Kampala Dispatch magazine in early 2013 but his request was turned down. He states that Irene Mulyagonja, the Inspector General of Government (IGG), ruled that the Access to Information Act 2005 could not be used to divulge the contents of the wealth declarations. She rejected his request on grounds that there was no mechanism in force under the Leadership Code Act to compel her to disclose this information to the public. "The IGG told me she was afraid of being sued by the permanent secretaries if she declared their recorded wealth," Sekyewa says. Rule 4 of the judicature (mediation) rules of 2013 makes mediation mandatory in all civil cases, save for constitutional cases. Therefore, Sekyewa's case was referred for mediation. In August 2014, the case was mediated by Justice Bamwine. During mediation, the Attorney General (AG), who was represented by state attorney Vivian Kampiire, asked to be given six months in which government would implement

Sekyewa's demands. Two years down the road, the AG has never complied with what was agreed upon in the mediation session. "I was fighting corruption and now court has not yet settled my case," he said. "That's the waste of time I'm talking about. By now, if the case was substantively heard, it would have been determined." With the case yet to get a hearing date, Sekyewa is of the view that his endeavor to expose corruption has been foiled"As a result of the IGG's failure to give me information I requested for, I was unable to complete a commissioned investigative journalism report that would have exposed impropriety by certain permanent secretaries whose ministries were in the spotlight for grand corruption," he asserts. While Sekyewa is still licking his wounds, spare a thought for Rashid Kigemuzi, who in 2014 dragged the government and Umeme to the High court, contesting the manner in which the power distribution company got its concession in 2004. "The plaintiff [Kigemuzi] shall contend that the concession agreement is contrary to public policy as far as it inhibits government's right to terminate the agreement. It renders government liable to compensate Umeme for its own default. And it also erodes government's qualified and absolute sovereignty over national assets," the plaint read. Immediately after filing the suit, Kigemuzi's lawyers filed mediation proposal in the High court, indicating they were willing to settle the matter out of court. But two years on, the government and Umeme are yet to respond with their own mediation proposals. So much has changed since Kigemuzi filed his case.

Justice Elizabeth Musoke, who initially was handling it, was promoted to the Court of Appeal in 2015 and the case was reallocated to Justice Margaret Oguli. According to Kigemuzi's lawyer, Alex Candia, mediation is now exacerbating the already-huge backlog of cases clogging the judicial system. "Cases are not being heard at the rate at which they would have been heard because they must go through mediation. Now this case has been in the system since 2014 and no hearing has ever taken place. Why is such an important matter not given preference?" Candia wondered.

Originally piloted in the Commercial court in the early 2000s, mediation was in 2013 rolled out to the other High court divisions of Civil, Family, Land and magistrate's

courts. Though the policy was ostensibly introduced to reduce on the case backlog, the judiciary has a total of 114,512 pending cases where mediation is partly to blame for the pileup. Indeed, records at the High court of Nakawa show that whereas there are more than 1,000 cases pending mediation, there is only one mediator. The court handles cases from as far as Entebbe, Kiboga and Mityana. There were originally three mediators but two resigned last year and Amos Kwizera, the Nakawa court deputy registrar, wrote a report complaining about the whole mediation process.

"With one mediator, we cannot do a lot of work because now mediation is left to the registrar and the judge, who cannot mediate every case. The project isn't properly facilitated. That's why mediators run away," Kwizera said. Alli Innocent Balupe, who resigned as mediator of Nakawa court last year, said the programme was making him broke. "We were not given any money. I had to use my own airtime, fuel, food. So, I had to use my money to support a whole branch of government like the judiciary. That wasn't tenable," he said. According to Balupe, though he was trained with many other lawyers in mediation by the judiciary in 2014, few are practicing it.

"The principal judge [Bamwine] gave us certificates but I think because of the work conditions, none of the people with whom we trained has ever really mediated. It's not easy to balance it with private practice," he said. A partner with Kandia and Alli solicitors, Balupe is critical of the time mediators are given to handle cases. "We were told to give mediation six hours a week. That time cannot be enough when you compare it with number of mediation files. Remember, every day more cases are filed and they must go through mediation. So, how can you do all of that within six hours?" he asked.

Meanwhile, the civil division of the High court has more than 900 pending cases but has only four mediators of which two were just recruited in April. Due to the few mediators, most of the cases from the civil division are allocated to Justice Bamwine to mediate, a thing some lawyers question.

"The principal judge [Bamwine] nowadays never hears cases," says prominent city lawyer Caleb Alaka. "Actually, I don't recall the last time he appeared in court. All he does is to mediate all big cases from the civil division. We want court to know the criteria used to allocate him all these cases." The civil division handles many cases more so from central Uganda but neither has a mediation registry nor a mediation room, something which has left the court in utter disorganization.

At the Family division, where mediation was instituted in 2014, only 25 cases have been settled out of the 228 which were registered by 2015. Nicole Banister, an American from Pepperdine University School of Law, is the only fulltime mediator at the court where she is being assisted by three other volunteers.

According to Banister, the attitudes of litigants are to blame for the few cases settled. "Most people come here [for mediation] because it is mandatory but they prefer the judge to resolve the matter than settling it out of court. I think there is need for sensitization," she said. Even if the number of mediators is increased, Banister asserts that not many cases will be mediated partly because there is only one room allocated for mediation. "Unlike the Commercial court, we don't have a fully-fledged registry [specifically for mediation]. So, even if we get many mediators, they cannot handle different cases at the same time because of limited space," she said.

The situation is worse in the Land division, where there is no mediation statistics compiled though the program has been in place for two years. "We just started recently to compile them [statistics]. So, as of now, we don't know how many cases were settled through mediation and those that failed. We cannot help you," a mediation clerk told The Observer. Margaret Mutonyi, the Gulu resident judge, admitted that there is no mediation going on in Gulu due to the scarcity of mediators.

"I would have mediated some of the cases but I cannot do it since I'm the only judge here ever since Justice Eudes John Keitirima was transferred to Masaka. The rules don't allow a judge who has mediated a case to again handle the trial if it wasn't successfully

mediated," Justice Mutonyi says the same situation is observed in the High courts of Arua, Mbale, Masaka, Luweero and Masaka. Mediation might be a permanent fixture in court but Justice Bamwine admitted it is yet to succeed because government has refused to fund it.

"Now I understand why, before government puts in place a certain project, it needs a certificate of financial implication because we don't have money to facilitate mediation," he said. "Actually I'm told that at the civil division [High court] they have only one mediator." Asked how much the judiciary would need to successfully implement the program, Justice Bamwine put the figure at Shs 5 billion per annum. "We need to train more mediators, sensitize the public and also build separate mediation centres. To do all of that, we need a substantive amount of investment which we currently don't have," he said.

However, Legal Brains Trust (LBT) CEO Isaac Kimaze Ssemakadde squarely attributes judiciary's brokenness to the institution's leadership failure to push the executive and parliament to pass the Judiciary Administrative Bill into law.

"The chief justice [Bart Katureebe] was part of them [executive] since he was an attorney general in this very regime. So, there is no way he is going to take a radical approach when confronting the establishment which he was part of. The leadership of the judiciary is of conformists, not reformers," Ssemakadde said.

Actually, he insists that the absence of the Judiciary Administration Act is in violation of article 128 of the constitution which stipulates that the judiciary shall be self-accounting and may deal directly with the ministry of finance. He says that the judiciary has failed to borrow a leaf from parliament, which took control of its finances soon after the constitution was instituted 21 years ago.

"As we talk now, the judiciary has no control over its resources as the constitution provides. Though it's a whole arm of government, it is taken as department under

Justice, Law and Order Sector [JLOS]," he says. "Before rolling out mediation to other courts, they should have known better that they don't have capacity to implement it without funds. They should have carried out viability studies," Ssemakadde adds[23].

2.3.3 HEISE THEORY 2002

In 1996, Kakalik[24] and colleagues produced a study, sponsored by the RAND Corporation, which has subsequently been interpreted by many as evidence against the cost-effectiveness of mediation. They focused on six sites in which either mediation or neutral evaluation programs had been implemented in response the Civil Justice Reform Act of 1990 (which was designed to reduce costs and delays in civil litigation in the U.S. federal district courts). They compared their findings to comparison courts. In short, they found no statistical difference between the research and comparison sites in time to disposition or litigation costs. There are several reasons why this study should be interpreted with caution. The programs that were being evaluated were quite heterogeneous in terms of design features such as whether they were mandatory versus voluntary, what stage of the case they were in when they were referred to mediation, referral criteria, the lengths of the mediation sessions, and the program fees. Lumping programs with all these different characteristics together could have obscured overall differences between research and comparison programs in time to disposition and litigation costs. The courts that were used as comparators were actually "quite different geographically, culturally, and in terms of their caseloads". The authors themselves refer to several potential methodological confounds, including the belief that judges were referring more "difficult" cases to mediation. Further, several policy changes were made to the research programs during the course of the study that could have affected time to disposition, including case management practices.

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[23] http://allafrica.com/stories/201605040866.html, This story was done with the support of a reporting grant from the African Centre for Media Excellence (ACME)

[24] Kakalik, J. Dunworth, T., Hill, L. McCaffrey, D., Oshiro, M., Pace, N. & Vaiana, M. (1996). An evaluation of mediation and early neutral evaluation under the Civil Justice Reform Act. Santa Monica, CA: RAND.

2.4 Conclusion

Although it also has its hiccups, the available research supports mediation as a cost effective way of resolving legal disputes and workplace conflict. Mediation saves court administration money by resolving many cases outside of, or early into, the litigation process. It saves families and businesses money that could otherwise be spend in the economy. It produces better psychosocial outcomes for families, and can save private companies and the public sector from significant monetary losses associated with workplace conflict.

It is suggested that the "next generation" of empirical work in this area should focus on which dispute resolution processes work best in which circumstances. In other words, research should be directed toward the goals of effective triage and matching, i.e., tailoring mediation and other dispute resolution techniques to the needs of the parties and the type of dispute. The more appropriately mediation is used (i.e., the more often it results in settlement and efficient use of resources), the more net economic benefit it will provide.

CHAPTER THREE

LEGAL FRAMEWORK FOR MEDIATION IN UGANDA

3.0 Introduction

This chapter contains literature on mediation context, choice of mediators, role of the mediator, procedure at mediation, information exchange during mediation, penalty for failing to attend a mediation session, agreement during the mediation, privacy of parties, mediation costs and conclusion.

3.1 Mediation context

Mediation rules, 2007, of the commercial division of the High Court is the legal framework within which mediations are handled. It provides for the institution of an evaluation committee that comprises[25] of the Principal Judge, the Head of the Court, the Chief Registrar, a representative of the Solicitor General, the President of the Uganda Law Society, the Executive Director of CADER and the Registrar.

The Principal Judge serves as the chairperson of the evaluation committee whereas the Registrar serves as the secretary (**section 1 (2-3**) Mediation Rules 2007, Rule 1 (2-3)

The evaluation committee functions to evaluate the performance of mediation under the Mediation Rules of 2007 and, from time to time, make proposals to the Rules Committee for changes as it may consider necessary for improving mediation under the Rules, having regard to reports and recommendations submitted by the monitoring committee[26].

The Rules also instituted a Monitoring committee that comprises, the Head of the Court, a representative of the Solicitor General, representative of Uganda Law Society, a representative of the Commercial Court Users Committee, the Registrar, the Registrar Mediation anda representative of mediators.

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[25] *Mediation Rules 2007, Rule 1 (1)*
[26] *Mediation Rules 2007, Rule 2*

The Head of the Court chairs the monitoring committee whereas the Registrar serves as the secretary of the monitoring committee. The monitoring committee functions to assess the effectiveness of the operation of alternative dispute resolution under the Rules and report to the evaluation committee from time to time and make such recommendations for the improvement of mediation, as it considers appropriate[27].

The mediation rules make a mandatory reference to mediation. For example, it has conditions which state that[28]:

A party may not opt out of mediation except where allowed by an order of the Court, if the matter is brought to the attention of the Court. In every new action filed in or referred to the Court after the commencement of these Rules, each party shall indicate in its pleadings, which category of mediator the party prefers to mediate in his or her case. Notwithstanding any rule in the Civil Procedure Rules to the contrary, appeal, review or other form of challenge shall not be permitted from a referral order of a Registrar or Judge made under these Rules referring a case to the Court for mediation and where a matter is referred to mediation the time limits set out in rule 2(2) of Order XII (Scheduling Conference and Alternative Dispute Resolution) of the Civil Procedure Rules, or other relevant rules shall cease to run from the date of the referral order, until after the report of the neutral person has been filed in the Court upon completion of the mediation process.

Whereas the mediation rules 2007 makes mediation mandatory, it has grounds on which a party may opt out or ignore the mediation process. Such provisions are[29]. Where a party has opposed a reference of the matter to mediation, or the parties cannot agree on the mediator to conduct the mediation, the Registrar shall cause a notice to be issued to the parties within thirty days after the filing of the first defense, inviting the parties to attend a mediation hearing before the Registrar. At the hearing under sub-rule (1), the Registrar shall issue directions as tothe appointment of a

[27] ***Mediation Rules 2007, Rule 4 (1-5)***
[28] ***Mediation Rules 2007, Rule 5 (1-4)***

[29] ***Mediation Rules 2007, Rule 6 (1-2)***

mediator, the issues to be mediated, the time within which the mediation hearing is to be completed, the parties required to attend the mediation hearing in person and how they are to be served andany other matter necessary or desirable to facilitate the mediation hearing.

However, where a party, by motion, shows sufficient cause to exempt a matter from mediation, or the court on its own motion so decides, the Court may make an order exempting the matter from mediation under these Rules[30].

The specificity of mediation rules on the timing of mediation processes is good for quick delivery of justice to the aggrieved parties. The rules make it clear that[31]. Mediation proceedings shall be completed within thirty days from the date of the order directing mediation; except that the Registrar may, upon proper cause being shown, extend or abridge the time within which the mediation proceedings may be commenced. The parties may, upon filing an agreement for extension of time with the Registrar, agree to an extension of the time for an additional period not exceeding thirty days and the mediator may apply to the Registrar in the prescribed form for further extension of time, at least ten days before the intended hearing.

As stated in Rule 8 (3) of the rules that the mediation hearing can be extended, there are considerations for extension or abridgement of time.In considering whether to exercise the power conferred by rule 11, the Registrar shall take into account all relevant circumstances, including the number of parties, the state of the pleadings and the complexity of the issues in the action, the provisions of Order XXXV(Proceedings by Agreement of Parties) of the Civil Procedure Rules, special case stated under any provision of the law, whether the mediation is likely to succeed if the twenty one day period prescribed under rule 2(2) of Order XII (Scheduling Conference and Alternative Dispute Resolution) of the Civil Procedure Rules is extended to allow the parties to obtain evidence under Order XI (Consolidation of Suits) of the Civil Procedure Rules or whether, given the nature of the case or the circumstances of the parties, the

[30] ***Mediation Rules 2007, Rule 7***
[31] ***Mediation Rules 2007, Rule 8 (1-3)***

mediation is more likely to succeed if the twenty one day period prescribed under rule 2(2) of Order XII (Scheduling Conference and Alternative Dispute Resolution) of the Civil Procedure Rules is extended or abridged.

3.2 Choice of mediators

Mediation Rules specify that mediation shall be conducted by the Registrar Mediation or a person qualified and certified by CADER as a mediator and appointed by the parties from the CADER Roster of Mediators established and maintained by CADER or nominated by the Registrar Mediation in response to a request by the parties, a person appointed by the parties as the mediator, the Registrar or other official of the Court or any other person designated by the Court and a Judge of the Commercial Court chosen by the parties or designated by the Registrar.

Every person who conducts mediation under these Rules must comply with the code of ethics of mediators applicable to that person and enforced by his or her mediating institution. They must submit a mediator's report in accordance with rule 19 and where mediation is unsuccessful and a Judge was the mediator, the Judge must immediately cease to take part in any further proceedings arising out of the mediation and must not give evidence as a witness in any subsequent judicial proceedings arising out of the failed mediation[32].

Where the parties appoint a mediator who is not referred to in rule 13 (1) (c) and (d), the parties must pay the fees of the mediator[33].

3.3 Role of the mediator

The rules mandate the mediator to make arrangements necessary for the mediation including as may be necessary[34];

[32] *Mediation Rules 2007, Rule 10 (2-4)*
[33] *Mediation Rules 2007, Rule 10 (6)*
[34] *Mediation Rules 2007, Rule 11*

Organizing a suitable venue and dates for the mediation sessions, exchange of the case summaries and documents, meeting with any or all of the parties either together or separately to discuss any matters or concerns relating to the mediation andgeneral administration in relation to the mediation.

3.4 Procedure at mediation

The section 12 (1-2) of the rules lays the path mediation exercise should take. It specifies that each party shall state in the mediation agreement the name or names ofthe person or persons who will be the lead negotiator or negotiators for the party and who must have full authority to settle the dispute andany other persons such as professional advisers who will also be present at, or will participate in the mediation on that party's behalf, including counsel, if any.The person signing the mediation agreement on behalf of each party shall be deemed to have authority to bind the party represented by him or her.

3.5 Information exchange during mediation

The rules stipulate that[35] each party to the mediation shall, at the time of filing its pleadings, file sufficient copies ofa concise summary of its case in the dispute andall documents to which the case summary refers and any others to which it may want to refer in the mediation.The case summary shall include the particulars ofthe parties to the dispute including their names, addresses (postal, fax and email) and telephone numbers, facts giving rise to the dispute, witnesses andthe person with full authority to sign a settlement during mediation.In addition, each party may send to the mediator, through the court, or bring to the mediation, further documents, which it wishes to disclose in confidence to the mediator but not to any other party, clearly stating in writing that the document is confidential to the mediator.

[35] *Mediation Rules 2007, Rule 13 (1-3)*

Even with compliance to the exchange of information required during the mediation process, the mediator may require the parties to provide a copy of the pleadings or a case summary of each party's case[36].

3.6Penalty for failing to attend a mediation session

In case a party fails to attend a learned mediation session, Rule 15 of the rules gives the procedures that must be followed. They are that if it is not practical to conduct a scheduled mediation session because a party fails to attend, the mediator may adjourn the session to another date.A party that fails to attend the mediation session without good cause is liable to pay to the mediator the adjournment costs specified in the First Schedule to these Rules, which shall be embodied in the order of the Court.The mediator's certificate of adjournment costs shall be deemed an order of the Court and shall not be subject to appeal.

However, when all the parties attend the mediation the rules specify that within ten days after the mediation is concluded, the mediator shall submit to the Registrar and the parties a report on the mediation[37].

3.7Agreement during the mediation

If there is an agreement resolving some or all of the issues in dispute, the rules state that it should be signed by the parties and filed with the Registrar for endorsement as a consent judgment. However, if there is no agreement, the mediator shall refer the matter back to Court[38].

3.8Privacy of parties

The rules enforce confidentiality of parties by making it clear that every person, including associated persons, shall keep confidential and not use for any other purpose,

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[36] *Mediation Rules 2007, Rule 14*
[37] *Mediation Rules 2007, Rule 16*
[38] *Mediation Rules 2007, Rule 17 (1-2)*

the fact that the mediation is to take place or has taken place, other than to inform a court dealing with any litigation relating to the dispute of that fact and all information, whether given orally in writing or otherwise, arising out of or in connection with the mediation, including the fact of any settlement and its terms. The proceedings of mediation, whether oral or in the form of documents, tapes, computer discs or other media shall be privileged and shall not be admissible as evidence or be disclosed in any current or subsequent litigation or other proceedings. Sub-rule (2) does not apply to any information, which would in any case have been admissible or dis-closable in proceedings in the main suit or an application arising from the suit. Rules 20 and 21 do not apply insofar as any information referred to in sub-rule (2) is necessary to implement and enforce any settlement agreement arising out of the mediation. A party to a matter referred to mediation under these Rules shall not compel the mediator or the mediating institution or any employee, officer or representative of CADER as a witness, consultant, or expert in any litigation or other proceedings.

3.9Mediation costs

Rule 19 stipulates that each party shall bear its own costs and expenses of its participation in the mediation, unless otherwise agreed.

3.10 Conclusion

Mediation Rules 2007 is a lay out of procedures to follow during mediation. It makes it clear on how a mediation case should be handled and how the outcomes of the exercise should be treated. This is therefore a useful guide for an individual, entity or body corporate that would like to have a mediation in a commercial or any other matters civil in nature.

CHAPTER FOUR

MEDIATION VS. LITIGATION IN UGANDA

4.0 Introduction

The key achievement of the Commercial Court has been the transformation in the length of time to complete a case. When the Court was first established, cases were taking an average of over five years to be processed. But by the end of the DFID project period in 2005 cases were being turned around in 12 months on average. While there has been some slippage since then, due to increased case numbers, cases are still taking less than 18 months on average, the time frame for the disposal of substantive cases such as civil suits and bankruptcy petitions.

This sustained achievement in the speed of turnaround has been made despite a seven fold increase in the number of cases being heard. The average number of cases filed each year in 1998 and 1999, just before the DFID project started, was 239. The average for 2010 and 2011 was 1,680 a year.

The sustained improvement in turnaround time is even more impressive given the tenfold increase in the threshold for cases noted below which meant only the higher value cases were being heard. The impact of the change in the threshold is also revealed by the value of the cases heard by the Commercial Court.This chapter will review the some of the commercial cases so as to understand the impact of mediation:

4.1. Mathias Lwanga Kaganda versus Uganda Electricity Board

The plaintiff was the registered proprietor of the suit land seeking damages from rendering his land redundant because of the defendant's 132KV power lines passing through his land. in the instant case was caught up by the Law of limitation, and theweighty merits of the case were disregarded because of mere technicalities, it

was expressly shut out by the operation of the law, and the plaintiff's action could not be entertained. The suit was accordingly dismissed with costs. If it were for mediation merits would be looked at and justice would prevail as mediation considers merits not technicalities.

4.2Chevron Kenya limited & Chevron Uganda Limited vs. Daqare Transporters Limited

This miscellaneous application no. 490 of 2008 (arising from AB no. 6 of 2008) was before the Hon. Justice Geoffrey Wabwire at the High Court Commercial Division.The arbitral award made by the arbitral tribunal be set aside. Court held that there was no fault on the face of the record in the arbitrator's award of damages as a result.Given the above arguments and interpretations by the Judge, "*In light of the above the arbitration award must stand and Idismiss the application with costs.*" This gives you a sense of understanding that resolution of cases can be absolutely disposed off and bring about conclusive judgments thereof without litigation.

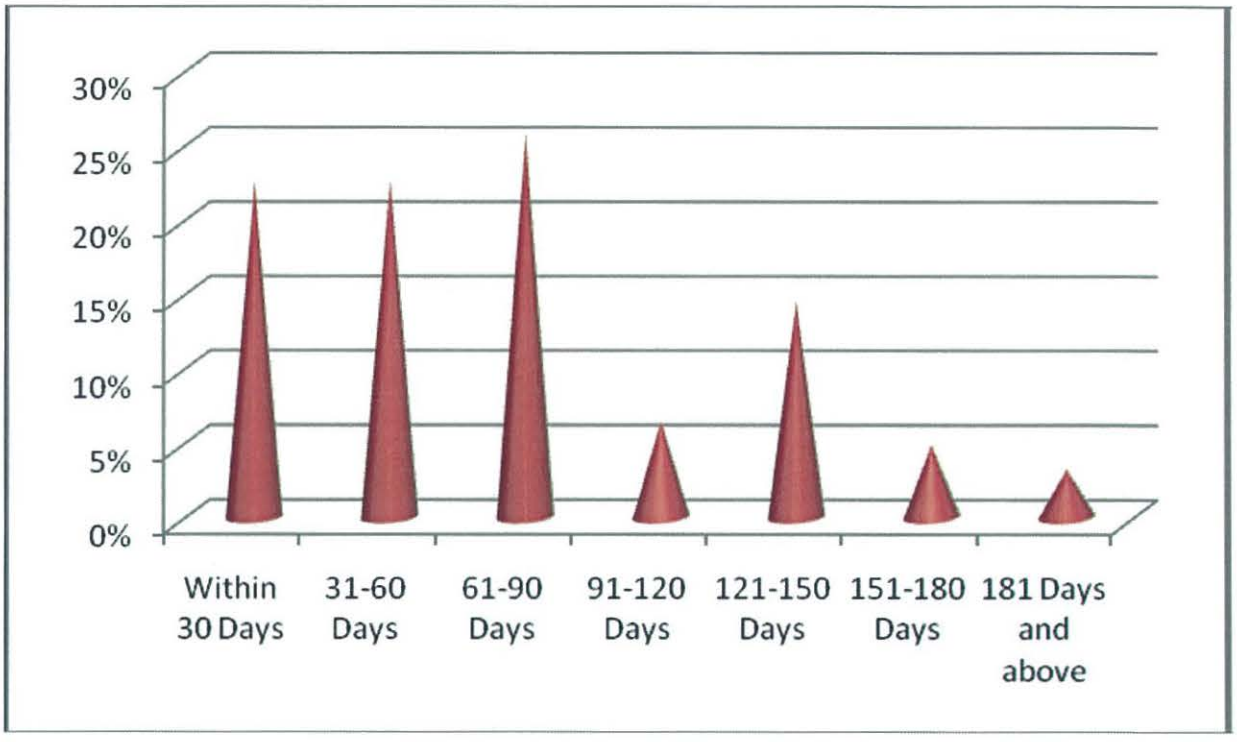
4.3 Yan Jian Uganda Company Limited vs SiwaBuilders and Engineers[39]

In this case the applicants filed an application for security for costs. In this case the Learned judge of the Hugh Court, Christopher Madrama Izama stated that in relation to the Mediation rules, the parties shall first use the utmost endeavors to diligently and in a good businessman like manner settle any dispute amicably amongst themselves and if it proves impossible shall be finally settled in accordance of the mediation rulesof Uganda in conformity of the rules. The case was later concluded in mediation and disposed of.

[39] ***Misc. Application No. 1147 of 2014***

After receiving a plaint and written statement of defence, the Court refers the case for mediation which should be completed within 30 days.[40]. The audit noted that mediation had been piloted only in the Commercial Court Division of the High Court with guidance of trained mediators although the Chief Magistrates were also encouraged to apply mediation in their areas of jurisdiction. A review of the 62 completed mediation cases revealed that time for completion of mediation procedures ranged from 1 to more than 180 days as compared to the stipulated 30 days. Only 22%of the cases had been concluded within 30 days as shown in Figure 1 below.

Figure 1: Time taken to complete mediation:

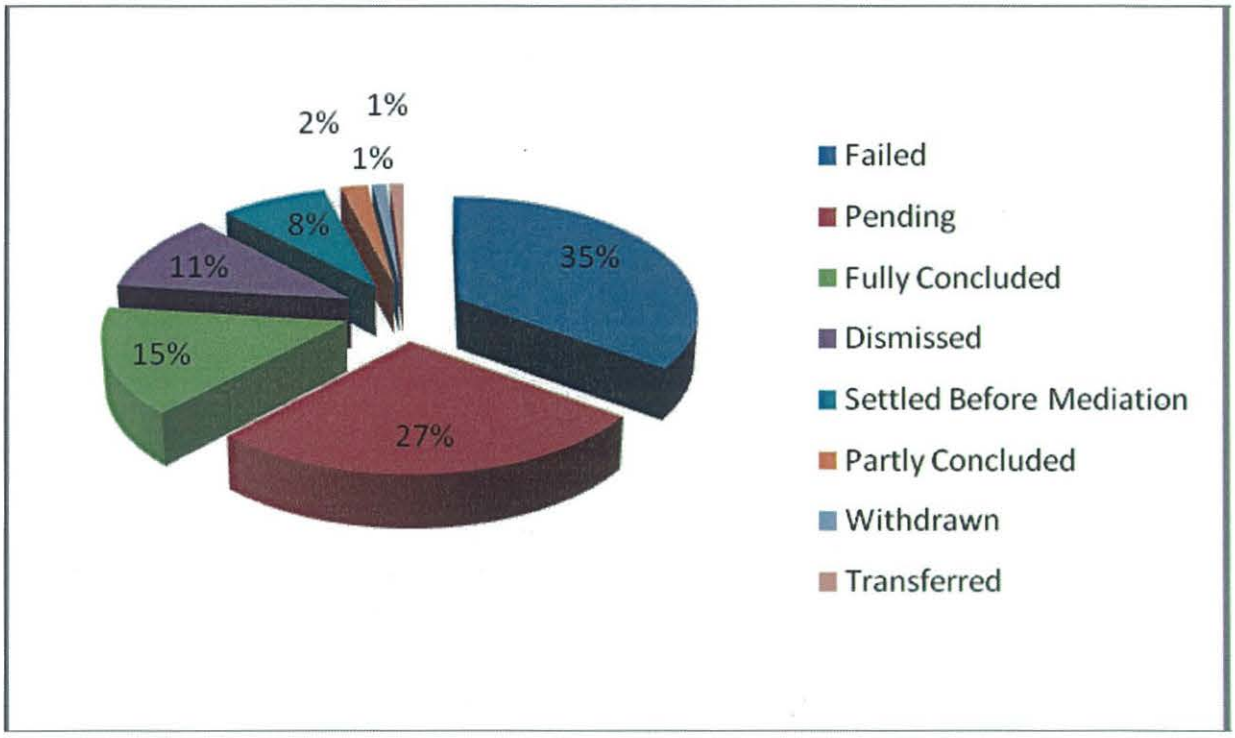


In the commercial Division of the High Court, analysis of cases referred for mediation in 2010 revealed that out of 407 cases filed 35% failed, 27% were still pending, only 15% had been fully concluded, 11% were dismissed, 8% had been settled before mediation

[40] ***Statutory Instrument 32 of 2007 - Mediation Rules for Commercial Division - S. 11 page 734. 23 23***

2% partly concluded, 1% withdrawn and 1% had been transferred to other courts at the time of audit as shown in the figure 3 below.

Figure 2: Status of Cases Filed for Mediation in the High Court Commercial Division - for the year 2010:



It was noted, however, that ADR was not very effective as parties prefer the normal Court system to mediation. Through interviews with management, it was revealed that the success of mediation is impaired by the limited awareness by the litigants and the public on the benefits and procedures of mediation. Filing a multiplicity of appeals, and several applications, sometimes in different Courts, nature of a given case (some cases may contain criminal issues like forgery requiring an opinion from the criminal Court) also limit the success of mediation.

Advocates also frustrate mediation since they charge clients fees depending on the duration or length of the trial as it is perceived that speedy trial through mediation reduces the time a lawyer handles a given case.

Apart from the mediation rules developed specifically for the Commercial Court Division of the High Court, other Courts lack rules to guide them in handling mediation.

Lack of trained mediators was another reason for limited application of ADR/mediation in other Courts. While the Judiciary has 11 trained mediators at the Commercial Court Division where mediation was piloted, the rest of the courts do not have mediators because the exercise has not yet been rolled out.

Management informed us that a Registrar in charge of mediation has been appointed and one of his responsibilities is to ensure that mediation and other initiatives like plea bargaining for criminal cases are rolled out to all courts. Plans are also underway to have another project on Small Claims Procedure where the monetary value involved is less all gearing to reducing the number of cases pending in courts and saving litigant's time and money.

The weaknesses in the application of mediation increase the workload for judicial officers and, consequently, the burden of case backlog in the Judiciary. Besides, prolonged legal processes strain relations between the parties and deprive them of an opportunity to participate in resolving disputes among themselves amicably. The inability to apply mediation in courts escalates costs to litigants, delays justice and increases case backlog.

4.4 Conclusion

These cases have exposed the importance of mediation. In each one of them, mediation reports were upheld by the Judges in instances where the parties were dissatisfied with the mediation outcomes. This thus demonstrates that if mediation is used always and results accepted by both parties, a lot of valuable time and costs are saved.

CHAPTER FIVE

CONCLUSIONS AND RECOMMENDATIONS

5.0 Introduction

This chapter gives the results of the study, conclusions and recommendations.

A survey of independent publications on the work of the Commercial Court in Uganda shows the following comments:

"*Best practices have been instituted at the Commercial Court. Cases are handled expeditiously and in a business sensitive manner which has yielded high levels of satisfaction amongst the business community.*"

Dr. Margaret Kigozi, the then Executive Director of the Uganda Investment Authority (Member of the Commercial Court Users Committee), in a paper to the CCUC dated February 27, 2004, quoted verbatim said:

"the operations of the Commercial Court have had a positive effect on commerce and promotion of business and investment prospects, and have made our work of marketing Uganda as an investment destination easier . . . Uganda Investment Authority commends the reforms of the Commercial Court."

The role of the Commercial Court of Uganda received further positive feedback in international reviews. The International Finance Corporation (IFC), in 2004, expressed that in Tanzania and Uganda Judicial dispute resolution had been streamlined recently

and is now more efficient than in many industrialized countries[41].Despite this overall success, it is clear that the continued growth in the number of cases being filed is putting the Commercial Court under increasing pressure, even allowing for the 2012 addition of two more judges to the Court. The Principal Judge's decision to assign the additional judges followed an increase in the number of cases since 2008. But since then the demands on the Court have increased .The Court continues to struggle with being a victim of its own success.

Box 2: Case backlog

One example of the challenge the Commercial Court faces is the increase in the size of the case backlog: as defined by the Commercial Court this is the number of substantive cases that are taking longer than two years to dispose of. The number of backlogged civil suits (which account for the vast majority of all substantive cases) has doubled in the last five years. But as a proportion of the total number of cases there has been no change. The number of cases have also doubled over the same period.

5.2 Conclusions

The Commercial Court Division of the High Court of Uganda has registered significant success in the adjudication of commercial justice in Uganda. This is a result of a deliberate policy of reform of the judicial practice, court-annexed mediation in particular, by the leadership of the Ugandan Judiciary. Limited resourcesin terms of manpower, training and finance continue to berestraints in achieving better results.

Despite the challenges it is now facing, the Commercial Court has clearly succeeded in its own terms: it is processing relatively large commercial cases quickly and efficiently.

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[41] ***Ahmed Badawi-Malik, IFC and the Financial Times Open Conference on Improving Physical and Regulatory Infrastructure to Lower the Cost of Doing Business in Africa, http://www.ifc.org/ifcext/pressroom/ifcpressroom.nsf/PressRelease?openform&0E24C0929169D60785***

However, the backlog of cases is now beginning to grow, and the Court is standing at crossroads, in danger of becoming a victim of its own success.

The best practices of the Commercial Court (court-annexed mediation) are being rolled out toother divisions and courts in Uganda so that there is uniform impact of these reforms in the entire Ugandan Judiciary.The Commercial Court is thus seen as the flagship of the Uganda Court system in relation to mediation.

5.3 Recommendations

This study found out that for the years the commercial division of the High Court operated since inception there has a been a tremendous reduction in the period taken for the cases to be concluded, the main reason being the use of court-annexed mediation.

This report commends the Judiciary for delegating the tasks of hearing small claims cases to lower courts and as such recommends that mediation should as well be carried out at lower courts so that the same experience from which the commercial division of the court has benefitted is felt at lower courts also as most courts below the High Court have not conceptualized and put into practice mediation.

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