A CRITICAL ANALYSIS ON THE USE OF ALTERNATIVE DISPUTE RESOLUTION (ADR) IN BACKLOG MANAGEMENT IN UGANDA.

BY

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DECLARATION

I hereby declare that except for references to other peoples work, which have been duly acknowledged, the study presented here was written by me, under the supervision of Dr. Bello Magaji. 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

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DATE

16/July/2019

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

Dr. Bello Magaji

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DATE

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DEDICATION

I dedicate this work primarily to the almighty God for his guidance and mercy throughout my studies.

I also dedicate this work to my mother the Late Namukasa Emily and the entire family of the Late Gilbert Kigongo for the support, love and care they have given me throughout my studies.

ACKNOWLEDGEMENT

I wish to thank the almighty God for giving me the strength and courage to pursue this project. Let me also acknowledge the immense support and assistance rendered by my Supervisor Dr. Bello Magaji who was available at all times to guide me throughout the project and Mulindwa R. Rachel of Mulindwa-Kasule & Co. Advocates for the inspiration and moral support

I wish to acknowledge the contribution of Kampala International University and in particular the KIU school of Law administration special mention is made of Counsel Kyazze Joseph, Mr. Kahama Dickson, Mr. Karim and my classmates Jacob Alituha, Mwissi Edirisa and all those who provided moral support and advice throughout the project. May the almighty God bless you all.

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ABSTRACT

This study was carried out using the A doctrinal methodology of research, the study is based on secondary information such as writings of high qualified state publicists as clearly envisaged in textbooks, novels, law journals, articles, websites and different literature including class notice. The researcher also relied on judicial decisions made by different judges of different states, Acts of parliament relating to ADR and international Conventions where Uganda is party.Over the past several decades, there has been growing interest amongst advocates world-wide, in the use of alternative dispute resolution (ADR) techniques to resolve their clients' disputes more economically and efficiently. In the face of bottlenecks and backlogs in the court systems, as well as spiraling costs and fees, courts and members of the legal fraternity have been part of the movement seeking means other than litigation for resolving disputes. The development of more flexible means of resolving disputes in the form of ADR techniques has therefore gained increasing popularity, and the Ugandan legal system is no exception. Certainly, the advantages to be gained by the implementation of ADR in the Ugandan legal system provide enormous potential and as such, ADR has not gone unnoticed in Uganda. In the past years, tremendous reforms have been made in the Ugandan legal system, and a study on ADR is therefore most timely in this context. This paper seeks to introduce to the reader, the concept of ADR and its implications in the Ugandan context especially in dealing with the rampant problem of case backlog in the judiciary in Uganda.The study seeks to critically analyze the use of ADR in the resolution of disputes in Uganda and whether the notion of ADR has been of great importance to Ugandans especially by speeding and quickening the resolution of disputes as compared to the adversarial system. It also seeks to establish how the stake holders in Uganda have appreciated the notion of ADR especially the parliament and the Judiciary to the extent of making laws to favor ADR and making Mediation compulsory in all civil litigations. The study covers the legal frame work of ADR in Uganda and the different mechanisms of ADR used to resolve disputes in Uganda and those used by other countries as best practice that Uganda should adopt in order to reduce case backlog in the judiciary.

CHAPTER ONE

1.0 Introduction

Disputes have long existed even in times before Christ. Take an example of the dispute between the two women in the Bible where each of them claimed to be the mother of the living little child while disowning the other dead one and King Solomon had to step in to save the situation by resolving the dispute.[1]

A Dispute is a natural and inevitable part of all social relationships. It may arise when interests of more than one person clash with other or when there is a disagreement between two or more parties regarding differences of opinions.[2] Professor J.G. Merrills defines 'dispute' as a specific disagreement concerning a matter of fact, law or policy in which a claim or assertion of one party is met with refusal, counter-claim or denial of another.[3] Disputes are a way of life since the creation of more than one human being on the planet earth.[4] According to Syagga , since that happened, need has often arisen to settle the disputes as a way of co-existence, whether by way of "tit for tat", by seeking redress from a higher authority like quarrelsome siblings do from their parents, or by submitting the dispute to a respectable neutral person or persons whose opinions will be respected by the disputants.[5]

In recent years, alternative dispute resolution ("ADR")[6] processes, particularly mediation, have been promoted in developing countries under the banner of access to justice.[7] One result is that many African countries are experiencing a transformation of their civil justice systems as modern dispute resolution gains a strong foothold throughout the African continent. ADR's informality and focus on non-adversarial justice has captured the imagination of many African

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[1] Book of 1st Kings 3:16

[2] Syed Robayet Ferdous, An Empirical Study On Dispute Resolution Methods (DRM) From The Perspective Of Employee And Employer: Special Emphasis On Alternative Dispute Resolution (Adr) Volume Viii, Issues 1 And 2, January-June, July-December, 2013

[3] Merrills, J.G., 'International Dispute Settlement', Cambridge University Press (2000), p. 1.

[4] Syagga, P.M, (2007): Expert Analysis, Land Policy and dispute Resolution, newsletter;

[5] ibid

[6] The term "ADR" refers to non-judicial dispute resolution. It is variously defined as "alternative dispute resolution," "appropriate dispute resolution" or "amicable dispute resolution." In this Article the term "ADR" refers to alternatives to the court adjudication of disputes. These processes include negotiation, mediation and arbitration and various hybrids of these processes. See Stephen B. Goldberg Et Al., Dispute Resolution: Negotiation, Mediation, Arbitration, And Other Processes 2–3 (6th ed. 2012).

[7] William Davis & Helga Turku, Access to Justice and Alternative Dispute Resolution, 2011 J. DISP. RESOL. 47 (2011).

states concerned with spiraling rates of litigation, backlogged court calendars,[8] and citizens' lack of meaningful access to justice.[9] Influenced by promises of increased flexibility and efficiency in resolving disputes, greater access to justice, and in some cases, promotion of foreign investment, legislators and policy-makers have become active both in promoting and in privatizing modern dispute resolution processes.[10]

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. A wide variety of such mechanisms has developed, including mediation, arbitration, mini-trials, summary jury trials, and numerous hybrid dispute resolution proceedings. Each of these methods of dispute resolution offers certain advantages over conventional litigation in particular cases.[11]

Alternative Dispute Resolution (ADR) is referred to by the International Labor Organization (ILO) as being a substitute for the court system, namely: a set of processes that comprise of negotiation, conciliation, mediation and arbitration.[12] This description includes a set of approaches to settling disputes which in practice vary significantly in terms of their nature and use from one institutional context to another. For instance, in some contexts ADR refers to everything from assisted settlement discussions – where disputants are encouraged to consider issues directly with each other as a first step to later legal procedures such as an arbitration system or mini-trials that look and feel very much like court processes.[13]

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[8] Patrick Tabaro, Alternative Dispute Resolution is the Magic Wand to Solve Case Backlog in Our Courts, THE OBSERVER (Sept. 14, 2012), http://www.observer.ug/index.php?option=com_content&view=article&id=20722&catid=57 (describing ADR as the "magic wand" for getting rid of crowded case dockets);

[9] Richard C. Crook, Kojo Asante & Victor Brobbey, Popular Concepts of Justice and Fairness in Ghana: Testing the Legitimacy of New Or Hybrid Forms of State Justice 2 (Afr. Power & Pol. Programme, Working Paper No. 14, 2010) [hereinafter Popular Concepts of Justice].

[10] Amadou Dieng, ADR in Sub-Saharan African Countries, in ADR IN BUSINESS: PRACTICE AND ISSUES ACROSS COUNTRIES AND CULTURES 611, 614 (Arnold Ingen- Housz ed., 2d ed. 2011) (saying it is a viable alternative to litigation). Ngor A. Garan, S. Sudan's Chief Justice Calls for Speedy Dispute Resolution, SUDAN TRIBUNE, (Sept. 13, 2011) http://www.sudantribune.com/spip.php?article40137.

[11] Kenneth R. Feinberg Mediation-A Preferred Method of 'Dispute Resolution(p s6)

[12] International Labour Organization. (1997). Consensus Seeking Skills for Third Parties Training Package.

[13] Brown, S, Cervenak, C. and Fairman, D 1998. Alternative Dispute Resolution Practitioners Guide. Office of Democracy and Governance, Bureau for Democracy, Conflict, and Humanitarian Assistance, US Agency for International Development.

This paper will therefore examine the use of Alternative dispute resolution in case backlog management in the judicial system in Uganda

1.1 Background to the study.

1.1.1 Development of ADR

The concept of ADR is as old as time. **Sir Francis Bacon** expressed this concept in the following words, "It is generally better to deal by speech than by letter and by the mediation of a third than by a man's self".[14]

Informal dispute resolution has a long tradition in many parts of the world societies dating back to 12th Century in China, England and America.[15] Early advocates of ADR include **Abraham Lincoln,** himself a gifted trial lawyer to whom is attributed the following exhortation to law students, "Discourage litigation. Persuade your neighbors to compromise whenever you can. Point out to them how the nominal winner is often the loser in fees, expenses and waste of time".[16] And **Mahatma Gandhi** who said:

"I realized that the true function of a lawyer was to unite the parties...A large part of my time during the twenty years of my practice was occupied in bringing about private compromises of hundreds of cases. I lost nothing thereby – not even money, certainly not my soul."[17]

Some forms of ADR like negotiation, mediation and even arbitration are not new, having been used in earlier societies.[18] With reference to England, Derek Roebuck writes that a cursory glance at the ways in which earlier societies dealt with disputes long before there were courts or judges, or lawyers, or even written law, not only shows that they have always used mediation and arbitration, but that there is early evidence of assemblies where they met to deal with a wide range of business including disputes between individuals and groups. [19] In the United States of

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[14] John H.B. Roney (1999). 'Alternative Dispute Resolution: A Change in Perception.' 10 International Company and Commercial Law Review. 11, at p.329.

[15] K. Jayachandra Reddy (1997). "Alternative Dispute Resolution." In P.C. Rao and William Sheffield (Ed.). Alternative Dispute Resolution: What it is and how it works at p.79.

[16] 'Notes for a Law Lecture.' July, 1850. In Basler P. Roy (Ed.). The Collected Works of Abraham Lincoln. http://home.att.net~norton/lincoln78.html.

[17] 5See Prabhu R.K. Mohan – Mala: A Gandhian Rosary (Being a thought for each day of the year gleaned from the writings and speeches of Mahatma Gandhi) found online at: http://www.mahatma.org.in/books/showbook.jsp?link=bg&lang=en&book=bg0007&id=1&cat=books.

[18]WINNIE SITHOLE MWENDA , (2006) PARADIGMS OF ALTERNATIVE DISPUTE RESOLUTION AND JUSTICE DELIVERY IN ZAMBIA.at p 29

[19] (2006).'The Prehistory of Dispute Resolution in England.' 72 Arbitration International. No.2 at p. 93.

America, ADR has grown rapidly since the political and civil conflicts of the 1960's. The community dispute resolution movement spawned from the social activism of the 1960's and helped to propel the ADR movement generally. With the promulgation of the Civil Rights Act in 1964 came the creation of the Community Relations Services (CRS) which utilized mediation and negotiation to assist in preventing violence and resolving community-wide racial and ethnic disputes. The CRS helped to resolve numerous disputes involving schools, police, prisons and other government entities throughout the 1960's.[20]

The introduction of new laws protecting individual rights as well as less tolerance for discrimination and injustice, led more people to file law suits to settle conflicts.[21] For example, the Civil Rights Act, 1964 outlawed discrimination in employment or public accommodations on the basis of race, sex, or national origin.[22] Laws such as this gave the American people new grounds for seeking compensation for rights violations. Parallel to this, the women's movement and environmental movement were also growing, a situation which led to a host of court cases. These developments led to a significant increase in the number of lawsuits being filed in United States courts. Eventually the system became overloaded with cases, resulting in long delays and sometimes procedural errors.[23]

In the 1970's, broad-based advocacy for increased use of ADR techniques emerged. This trend, often described in the United States as the 'Alternative Dispute Resolution Movement,' was officially recognized by the American Bar Association in 1976 when it established a Special Committee on Minor Disputes.[24]The ADR movement came not only with an increased use of arbitration but also the development and application of other ADR techniques such as mediation, conciliation, facilitation, mini-trials, summary jury trials, expert fact-finding, early neutral evaluation and variations thereof.[25]

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[20] Dana H. Freyer (1997). 'The American Experience in the Field of ADR.' In P.C. Rao and William Sheffield (Ed.). Id.n 3 above, at p.109.
[21] Stephen B. Goldberg, Eric D. Green and Frank E.A. Sander (1985). Dispute Resolution. p.3.
[22] Dana H. Freyer (1997). 'The American Experience in the Field of ADR.' In P.C. Rao and William at p 7
[23] ibid
[24] Later changed to Dispute Resolution Section. See Dana H. Freyer, ibid
[25] Dana H. Freyer, ibid. Most of these techniques are discussed later in this Chapter.

Although the development and use of ADR mechanisms have proliferated in recent years, arbitration, a well-established alternative to litigation, is not a new procedure. Its use in the United States pre-dates both the Declaration of Independence and the Constitution.[26]For example, arbitral tribunals were established as early as 1768 in New York and shortly thereafter in other cities primarily to settle disputes in the clothing, printing and merchant seaman industries.[27] The modern form of ADR was developed in the United States in response to the direction litigation was taking and the undesirable manner in which it was being fought. It developed to provide individuals and businesses with a means to obtain final resolution of their disputes without going to court.[28]

Processes like mediation and arbitration soon became popular ways to deal with a variety of conflicts because they helped alleviate pressure on the overburdened court system. ADR first established itself in a significant way in the United States in the field of labor management disputes but it was not uncommon for commercial contract disputes to be submitted to private arbitration.[29]The use of ADR in the United States has since significantly increased in the following fields, namely, consumer disputes; divorce; parent/child disputes; disputes within institutions; disputes between citizens and government; public disputes and many others.[30] It would thus be a great disservice to the ADR discourse to conduct a study of ADR without reference to its development and practice in the United States of America, for such a study would be incomplete.

This should be hardly surprising because many of the ADR forms originated and have been developed in the United States and due to the vast experience that the country has had in ADR, it provides a useful source of information and experience when analyzing the concept.[31]

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[26] Dana H. Freyer, ibid, at p.108
[27] ibid
[28]Jethro K. Lieberman & James F. Henry (1986). 'Lessons from the Alternative Dispute Resolution Movement.' 53 University of. Chicago. Law Review at p. 424.
[29]Paul Pretorius (1990). 'Alternative Dispute Resolution – A Challenge to the Bar for the 1990's.' 3 Consultus, No.1, at p. 39.
[30] Winnie Sithole Mwenda , (2006) Paradigms Of Alternative Dispute Resolution And Justice Delivery In Zambia.at p 32
[31] ibid

As Henry J. Brown and Arthur L. Marriott succinctly point out,[32] there are a number of reasons why ADR has found increasing favor in the United States.

Firstly, the level of litigation there has grown to enormous proportions and court lists are so full that very long delays in obtaining trial dates are common; the costs of litigation are high and not ordinarily recoverable; and very high awards are often granted, making litigation an extremely hazardous exercise which has led increasingly to dissatisfaction with the system. ADR has become a significant part of conflict resolution in the United States involving Federal and State institutions, public authorities, the American Bar Association, universities and private organizations and individuals.[33]

From the time it was introduced in the United States of America, ADR has spread far and wide to places such as Canada, Australia, Hong Kong, the United Kingdom, India, South Africa, New Zealand and many other countries including Uganda.

1.1.2 Development of ADR in Uganda

The development of ADR in Uganda has interesting history. Although America states center stage especially with the assistance of Washington DC judiciary, the idea came from Canada in 1990 when Ambassador Tumusanga the then Uganda high court commissioner to Canada met informally with justice Ntabagoba now retired principle judge after the meeting the ambassador Tumusanga interacted with Canadian government officials and it so happened that the government of Canada was willing to extend aid to the judiciary of Uganda[34].

Court based ADR began to creep into the judicial system from mid 1900s the first driving factor for change from the 1994 justice Platt report on judicial reform which recommended the increased use of arbitration and ADR alongside litigation and the creation of a commercial division of the high court. Shortly after, a major statement was made in the new 1995 constitution of Uganda under article 126(2) enjoined the court to inter alia apply the following principles. Justice shall not be delayed, adequate compensation shall be awarded to victims of wrongs, Reconciliation between parties shall be promoted, and Substantive justice shall be administered without under regard to technicalities. The application of the above principles

[32] ADR Principles and Practice. (1993). p.14

[33] Paul Pretorius). 'Alternative Dispute Resolution – A Challenge to the Bar for the 1990's.' 3 Consultus, (1990No.1, at p.39.

[34] Alternate dispute resolutions in the magic want to solve ease backlog in courts written by Justice Patrick Tuburo step 14, 2012.

would now attend to counter the traditional perception of adversarial dispute resolution methods and call for change in favor of based ADR. In **1998** the civil procedure rules were amended to the civil procedure (amendment) rules to include in then order 10B which under its rule 1of the CPR which is to the effect that the courts shall hold a scheduling conference to sort out points of agreement and disagreement, the possibility of mediation arbitration and any other of settlement. **Rule 2 of order 12** of the civil Procedure Rules is to the effect that were parties do not reach an agreement and rule 1(2) of the same order the court may if it is of the view that the case has a good potential for settlement, order alternative dispute resolution before a member of the bar or the bench, named by the court, the rule goes ahead to give 21 days as the period in which ADR shall be completed. This is the basis of the court based ADR today coupled with other legislations. In the early 2000 mediation was piloted in the commercial court as an alternative to litigation and many cases were successfully mediated. Judicial officers were left with time to try cases which are ordinary not amenable to mediation substantially increasing the productivity of the courts, satisfaction and confidence of court users in the justice system. Mediation and arbitration have been on the increase in Uganda since the creation of The Centre for Arbitration and Mediation (CADER). In 2003 and 2005 the commercial court provision implemented the mediation pilot project where by cases were referred to CADER for mediation. Mediation became a permanent feature at the commercial court with the passing of the of judicature (mediation) rules of 2013. Following the success story at the commercial court, it was decided to rollout mediation at all the courts with the gazetting of the mediation rules in 2013[35]

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.

The introduction of Mandatory court based Alternative dispute resolution in the Justice system of the Uganda is intended to bring down case backlog to a bare minimum. However, this has not been achieved. While there are clear instruments establishing and governing the court based

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

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

Alternative dispute resolution initiative, as well as a well laid down implementation procedure, it is not certain whether these have inherent shortcomings that may explain the failure of the initiative to achieve its overall goal. Yet the Judiciary cannot afford to continue deploying resources to implement an initiative that is not achieving what it was intended to achieve, which is the expeditious dispensation of justice through case backlog reduction. The research seeks to find out the different mechanism of alternative dispute resolution, the international best practice on ADR and how best practices can be adopted to better the use of ADR in the judicial system in Uganda.[36]

1.3.1 General objective

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

1.3.2 The Specific Objectives of the study are:

i. To analyze the legal frame work governing ADR in Uganda and how ADR has been used in Backlog management in the justice system in Uganda.
ii. To establish the different Mechanisms of ADR used in the legal system in Uganda
iii. To establish the international best practice on alternative dispute resolution.
iv. To propose reforms and recommendations of improving ADR as a mode of dispute resolution.

1.4 Research questions.

i. What are the different laws governing Alternative Dispute Resolution in the legal system in Uganda?
ii. What are the different mechanisms of ADR that are used in the Ugandan legal system?
iii. What are the ADR best practices around the world?
iv. What do you propose as reforms and recommendations in improving ADR as a mode of dispute resolution in the legal system in Uganda?

1.5 Hypothesis

The study is based on the hypothesis that ADR is a cost effective, time saving because its quick and speedy and it promotes reconciliation among the parties. Similar that the process allows

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

parties to negotiate their own dispute and come up with their own decision that binds them other than being subjected to a decision of a judge. In this matter ADR has been embraced in the Ugandan civil Justice system to facilitate quicker resolution of disputes among disputants so as to reduce casebacklog. This study assumes that if ADR is effectively practiced case backlog will be history in the Judiciary of Uganda.

1.6 Significance of the study.

The present study is aimed at studying and evaluating the notion of alternative dispute resolution. Where the parties can be motivated to negotiate to arrive at a compromise by mutual negotiations, the notion of ADR especially mediation and conciliation can work most effectively to bring a permanent solution to the dispute and that too by the participation of the parties to the dispute themselves. The notion of ADR is not foreign to our country. Even in our daily life, whether it is family or office, knowingly or unknowingly we tend to compromise with the situation. Such a mode of dispute resolution, if adopted for resolution of disputes of a less grave nature and stake, will yield much better results for the parties involved. The present study shall deal with the details of the ADR notion like the nature of disputes that can be solved vide ADR, the different mechanisms of ADR that can be adopted in resolution of disputes. Once this is explained to the litigants and if they agree to use ADR as a form of dispute resolution, they will certainly look out for their future interest which lies in removing the dispute from its roots and bringing a permanent solution.

ADR mechanisms are confidential, informal, private and swift, has a greater likelihood of arriving at a mutual compromise and a permanent end to the problem. Hence, ADR is an extremely prudent option over the judicial process and in the present study an effort has been made to highlight the same.

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

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

1.7 Methodology.

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

1.8. Limitations.

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

1.9 literature review

This study does not claim pioneer authorship on subject of Alternative Dispute Resolution (ADR) as Methods of settling disputes outside court. The subject of settling disputes outside court has been addressed in legal and other social science literature. Consequently the study has been inspired and shall be enriched by a number of writings in this area. For purpose of this study literature review is more biased towards policy, legal and institutional arrangements for Alternative Dispute Resolution.

Monica Twesiime Kirya[37]sets out the features of commission of inquiry as Executive, Ad hoc-ness, Independence, Public hearings, sovereign appointment, and Inquisitorial proceedings. In explaining the role of commission of inquiry in governance she asserts that the appointment of an inquiry is preceded by allegations and rumours of official wrongdoing, omission or error, leading to national crises of confidence in the integrity, ability and discretion of public authorities. Public suspicion that something morally unacceptable has happened is often accompanied by a strong public sentiment that something should be done about the wrongdoing and that a cover-up must not be allowed. Thus follows a need for truth finding in order to restore public confidence in the machinery of government. In Uganda where the state is beleaguered by accusations of corruption, inefficiency and of being neo-patrimonial appointing a Commission

[37]Monica Twesiime Kirya,Performing "good governance:" Commissions of Inquiry and the Fight against Corruption in Uganda" Thesis submitted in partial fulfillment of the requirements for a Doctor of Philosophy (PhD) Degree in Law University of Warwick School of Law 2011

of Inquiry can be a way of reiterating the legal-rationality of the State and its commitment to good governance.

She asserts that commissions of inquiry are appointed toto provide an independent response to a crisis; to investigate allegations of impropriety; to obtain information; to define policy problems; to provide government with policy options; to review policies, programs or organisations; to resolve public controversy; to help governments manage policy agendas; to justify government decisions and to help governments decide what to do about previous promises.[38]

Monica then gives example of commissions of inquiry that have been put in place to investigate given matters for example the 1986 Commission of Inquiry into human rights violations which thrown the spot-light on the Police Force as having been responsible for perpetrating various cases of torture, murder and other forms of abuse against the very civilians whom they were supposed to protect.[39] That commission of inquiry noted that there was widespread corruption and abuse of office in the Police which had to be completely eradicated in order to restore confidence in the force as a protector and not an abuser of the citizens of Uganda.[40]Accordingly, in 1999, the President appointed a Commission of Inquiry into Corruption and Abuse of Office in the Uganda Police Force. Lady Justice Julia Sebutinde was chosen as Chair. A Legislative Drafting expert educated at the University of Edinburgh, Justice Sebutinde had recently returned to Uganda in 1996 after working at the Commonwealth Secretariat in London and for the Namibia Government.[41]

The terms of reference of the inquiry were:

To generally investigate allegations of corruption within the force generally and make recommendations for improving the efficiency and effectiveness of the Police;

To investigate specific allegations of corruption made against Chris Bakiza Director Criminal Investigations Department (CID), George Galyahandere Assistant Police Commissioner(ACP)

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[38] ibid

[39]Monica Twesiime Kirya, Performing "good governance:" Commissions of Inquiry and the Fight against Corruption in Uganda" Thesis submitted in partial fulfillment of the requirements for a Doctor of Philosophy (PhD) Degree in Law University of Warwick School of Law 2011

[40] ibid

[41] ibid

for Crime, and Clever Byamugisha of the CID that they interfered in the investigations of various crimes after being bribed;

To investigate the mismanagement by the Police, of criminal investigations relating to various cases of murder.[42]

She notes that The Commission of Inquiry into the purchase of helicopters by the Uganda Military, popularly known as the junk helicopters inquiry, was appointed in November 2000 to:

...inquire into all the circumstances pertaining to the procurement, purchase, acceptance, delivery and payment of MI-24 helicopters for the army, and in particular, to establish whether any loss was occasioned to Government; to establish whether any officer of the UPDF or any other person corruptly received any gratification as an inducement for any act or omission regarding the transaction; to establish whether there was an negligence on the part of any officer of the UPDF, any officer of Government, or any other person in the transaction; and to inquire into any other incidental matter.[43]

Justice Sebutinde was once again appointed as chair, assisted by Mr. Geoffrey Kiryabwire as the second commissioner and Ms. Maureen Owor as Lead Counsel. Ms. Owor had also served as Lead Counsel for the Police Inquiry, whereas Mr. Kiryabwire (now Justice) was then Managing Director of a local private company, Pan World Insurance.

The Uganda Revenue Authority (URA) Inquiry 2002 was also put in place toTo investigate specific allegations of corruption made against individual officers and to establish inter alia –

(i) Those employees of the authority who in the course of their employment, had acquired significant wealth that cannot be shown to have been received from legitimate means;

(ii) Those employees who have corruptly received gratification or inducement in the course of their employment in Uganda Revenue Authority;

To inquire into any other appropriate matter incidental or relevant to the foregoing;

[42] ibid
[43] ibid

To make recommendations concerning URA employees who should be dismissed from service or who should be subjected to criminal prosecution or both;[44]

To make recommendations for improving the efficiency and effectiveness of the Uganda Revenue Authority.

She goes ahead to note that another committee dubbed The Global Fund Inquiry 2005 was put in place headed by Justice James Ogoola, Principal Judge, was appointed to Chair the Inquiry. He was to be assisted by Margaret Mungerera, a prominent psychiatrist who was then the chair of Uganda Medical Association, and Mr. Emmanuel Mutebile, the Governor of the Bank of Uganda.The main reason for the appointment of the Commission of Inquiry into the Alleged Mismanagement of the GF was the suspension in August 2005 of all the five Global Fund grants to Uganda and the disbandment of the administrative unit (Project Management Unit: —PMUǁ) in the Ministry of Health (MOH) which had been managing the operations and activities of the Global Fund in Uganda. The GF Secretariat reiterated that the suspension would continue until the Government of Uganda (through its Auditor General)had carried out a satisfactory audit of the finances and activities of GF Uganda and had put into place a caretaker mechanism to attend to the life - threatening and strategic needs of the Project pending comprehensive resolution of the underlying issues.[45]

Burton and Carlen's analysis of official discourse first proposed a view of inquiries as devices for repairing crises of legitimacy in government. Using Marxist theory and Foucaultian discourse analysis, they argued that governments use the lay intelligentsia' of judges and experts to transmit forms of knowledge into political practices, thereby replenishing official arguments with both established and fresh ideas.[46]

Gilligan notes that inquiries are legitimating either actively, by findings that exonerate or justify state action, or passively, by remaining silent about key failures by state agents. Other inquiries

[44] ibid

[45]Monica Twesiime Kirya, Performing "good governance:" Commissions of Inquiry and the Fight against Corruption in Uganda" Thesis submitted in partial fulfillment of the requirements for a Doctor of Philosophy (PhD) Degree in Law University of Warwick School of Law 2011

[46]Burton, F. and P. Carlen (1979). Official Discourse: On Discourse Analysis, Government Publications, Ideology and the State, Routledge & Kegan Paul Books

can be subversive, taking positions that are contrary or even hostile to the state. Nevertheless, I propose that the distinction proposed by Gilligan is redundant, because —subversivell inquiries too, can have a legitimating effect.[47] Indeed, in a status quo characterised by intense media scrutiny, it may be in the government's favour if the inquiry findings are contrary or even hostile towards it in order to avoid claims of white-washing.

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.[48] 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.[49]

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, Labor mediators and the community mediators who govern the world of ADR. Finally, the author 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

[47]Gilligan, G. (2004) —Official Inquiry, truth and criminal justice, in Gilligan, G., and J. Pratt, Crime, Truth and Justice: official inquiry, discourse, knowledge; Devon: Willan Publishing, Chapter 1, pp. 11- 25.
[48]Keneth Kressel, *The strategic style in mediation*. conflict resolution Quarterly(2007)
[49]Keneth Kressel, The strategic style in mediation. conflict resolution Quarterly(2007)

the strategic style as well as other styles are appropriate, in what rays is the strategic style more effective or less so?"[50]

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.[51] 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.[52]

Brown, H., and Marriot define Negotiation as a process whereby parties to a dispute hold discussions or dealings about a matter with a view to reconciling differences and establishing areas of agreement, settlement or compromise.[53]They go ahead to say that Negotiation is "the process we use to satisfy our needs when someone else controls what we want". The same author argues that negotiation normally occurs because one has something the other wants and is willing to bargain to get it.[54]This is the simplest and very often the quickest way of settling commercial disputes, because the parties themselves are in the best position to know the strengths and weaknesses of their own cases.[55]A lot of disputes end after the parties negotiate a settlement themselves or with the help of their legal representatives. Some commentators point out that there are basically two approaches to negotiation, namely, the problem solving approach and the

[50]Keneth Kressel, The strategic style in mediation. conflict resolution Quarterly(2007)
[51]Bordone, Robert C., 'Electronic Online Dispute Resolution: A Systems Approach--Potential, Problems, and a Proposal' (1998) vol 3, *Harvard Negotiation Law Review* 175

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

[53] BROWN, H., and MARRIOT, A. ADR Principles and Practice. London: Sweet & Maxwell. (1993)
[54] ibid
[55] Margaret Wang. 'Are Alternative Dispute Resolution Methods Superior to Litigation in Resolving Disputes in International Commerce?' 16 Arbitration International, No.2, (2000)

competitive approach.[56] According to Bernstein, the problem solving approach puts more emphasis on parties' interests, rather than on parties' rights while the latter approach puts emphasis on the parties' rights but both approaches necessarily involve the consideration of the alternatives to a negotiated settlement, that is, the consideration of the likely outcome and cost of an adjudicatory procedure such as litigation or arbitration.[57]

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 neighborhood 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.[58]

Mwenda defines Adjudication as any dispute resolution process in which a neutral third party hears each party's evidence and arguments and renders a decision that is binding on them. This decision is usually based on objective standards. The term adjudication includes arbitration and litigation. Sometimes adjudication is treated as a dispute resolution process in its own right.[59]
She goes ahead to assert that Adjudication is the determination of a dispute by an independent expert or panel of experts.[60] This is a person or people chosen because of their appropriate specialist technical knowledge and experience. Adjudication can be swift because it comprises essentially of an exchange of written submissions followed by a hearing. This can lead to a decision within a very short time. The most significant advantage of adjudication is the ability of

[56] Ronald Bernstein, John Tackaberry, Arthur L. Marriot and Derek Wood (1998). Handbook of Arbitration Practice.
[57] ibid
[58] Winslade, John, Monk, Gerald and Cotter, Alison, 'A Narrative Approach to the Practice of Mediation' (1998) 14 *Negotiation Journal* 21

[59] Winnie Sithole Mwenda, Paradigms Of Alternative Dispute Resolution And Justice Delivery In Zambia, Submitted In Accordance With The Requirements For The Degree Of Doctor Of Laws At The University Of South Africa. Unpublished (2006)
[60] ibid

the parties to benefit from the technical expertise and experience of the adjudicator or panel or adjudicators. The likelihood of the process resulting in a technically correct decision is thereby increased. Further, the results of adjudication can be contractually binding on the parties. The procedure can also permit the adjudicator or panel of adjudicators to open up, review and revise decisions made and certificates issued during the administration of a contract. However, like all other forms of ADR, there are also disadvantages to the use of adjudication as a dispute resolution mechanism.[61]

Macduff examines various aspects of negotiation in the context of the Treaty of Waitangi. Macduff begins by pointing out some difficulties in Treaty negotiations which suggest that while the outcomes of the negotiations are clearly important the protection and management of the negotiation process is equally important both in terms of the outcomes and with a view to the ongoing relationship of the negotiating parties. He argues that in this setting as much as in any other, negotiations do not look after themselves and there are clearly special issues that need attention where there are differences in the cultural needs and priorities of the parties. Macduff then examines two key uses of negotiation, the more common settlement of deals or disputes and negotiated rulemaking or "negotiated justice". He notes that in the resolution of disputes and negotiation of claims the tasks are those of developing tools and skills for intercultural dialogue. In the negotiation of rules and policy the issue is that of determining the scope of, and structure for, Maori participation in the setting of those rules and policies. Macduff concludes with three main points. Firstly, that in this area of negotiation more than any other, what is at stake is not simply the issues of economic rationality in the determination of settlement figures, but also, and more importantly, the issue of identity. Secondly, dialogue is of the utmost importance and negotiation is not just about the settlement of narrowly defined claims and conflict, but also about the enduring qualities of the relationship of the parties. Finally, Macduff notes that the principles of negotiation need to be principles of participation, dialogue and commitment to the results. The article ends with questions asked by those attending the conference.[62]

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[61] Ibid

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

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.[63]

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."[64]

Alexander points out that mediation and ADR has grown rapidly in many common law jurisdictions such as USA.[65] Australia, Canada and England and less quickly in civil law jurisdictions such as Germany, Austria, Denmark, Belgium. Germany Switzerland and Yugoslavia with the exception of the Netherlands and South Africa.[66] 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

[63] Keneth Cloke in The crossroads of conflict: a journey into heart of dispute resolution (2006)
[64] Keneth Cloke in The crossroads of conflict: a journey into heart of dispute resolution (2006)
[65] Alexander, Global Trends in Mediation. World Arbitration and Mediation. (2002)
[66] ibid

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.[67] 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 hisarticle,"Alternative DisputeResolutioninAfrica:PreventingConflictsandEnhancing Stability",Uwaziepositsthatagreatpercentageof Africanshavelostconfidenceintheirstates' courtstoensuretimelyandjustclosuretotheircases.[68]Inpostconflictsandfragilesettings characterizedbyhightensionsandmalfunctioningjusticesystems,thereisanurgentneedfor "timely, accessible, affordable and trusted" dispute resolution mechanisms toresolve disagreementsordisputesbeforethey wideninscopeanddestruction.Heassertsthatin situationswherethecourtsareinvolved, muchemphasisisonaddressinglegalquestions,while lessornoattentionisgiven toconflictresolutionandmitigation whichhasthetendency of escalatingdisputesasitisassumedthatrealconflictbeginsafterajudgeproclaimswinnerin acase.Theabilityofcitizenstohaveconfidenceinthejusticesectoroftheircountryhas seriousrepercussionsonthegovernanceofthesociety. Fromasurveyconductedin26African states,henoted that"respondentswhoexpressedconfidencein theirjudicialsystemswere morethanthreetimesaslikelytosaytheyhaveconfidenceintheirnationalgovernance." Citizens' confidence in the judiciary is tantamount to their judgmentson their own Governments. The useofantiquatedstructures,inadequatestenographers,and manualrecords keepingandaboveallovercrowding ofcasesrenderthecourtsprey tomanipulations. Meanwhile,thereisadeclineinthepreferencefortraditionaljusticewherecitizensprefertheir

[67] Alexander, Global Trends in Mediation. World Arbitration and Mediation. (2002)
[68]Uwazie "Alternative DisputeResolutioninAfrica:PreventingConflictsandEnhancing Stability", Africa security Brief Number 16, November 2011

indigenouschiefs,spiritual leadersandclanheadstoarbitrateandconciliatetheirgrievances duetomodernization.[69]

FortheinstitutionofADRinAfricandispute resolutionsystems,hecalls ongovernments and internationalpartnersto invest intrainingand infrastructuralsupport forADRnetworks composedofmediatorsandadvocatesensuringthecontinuousadvancementofbestpractice.
Healsocalls for capacitybuildingtrainingforlegalprofessionals, religious leaders, traditional authorities,election officials,and policeandsecuritypersonnel amongothers.Thecreation of appropriateincentivesforstakeholdersisalsonecessary tobroaden theadoption ofADR mechanisms.[70]

Uwazie'sthesisisrelevanttothisworkbecauseitemphasizestheuseoftimely,accessible,and trustedmechanismsinresolvingdisputesasaway ofensuringpeace,security andgood governanceinAfrica.Howeverhisassessment on ADRprojectsin thenamedcountrieswas notcomprehensiveas itwasonbasedonpioneeringprojectsasa"small"successchalkedmay behypedandestablishedprojectcomeswithitsownchallenges. Again,Uwazie doesnottouch thesocio-cultural andpolitico-traditional discrepancieswhichcouldstiflesmooth implementation ofADRoperationsin thosecountries.Despitetheseconcerns,ADRcan succeedwhenall stakeholders givetheneededsupportitdeserves toflourish.

In"MediationwithTraditionalFlavorsintheFodomeChieftaincyandCommunalConflicts", AhorsuandAme,advocate theuseof"culturallytunedindigenousvalues,normsand ethnographicpracticeasfoundationsforconflictresolution,"they arguethat though African societieshaveembracedmodernization andundergonevariouschanges,elementssuch as kinship, culturalbondsandpractices stillexistsandplayinfluentialroleinthelivesofmany.[71]
As a resultofthesecommitments,aneffectivedisputeresolutionmechanismshouldinvolvea blendofindigenous orethnographicmeans ofresolvingdisputes withthe"imported"western

[69]Uwazie "Alternative Dispute Resolution in Africa: Preventing Conflicts and Enhancing Stability", Africa security Brief Number 16, November 2011
[70]ANigerianlawyer,Kekarias Kenneaa,madetheassertion atanAlternativeDisputeResolution(ADR)training inAddisAbaba,December29,2007.quotedinUwazie,ErnestE. *Alternativedisputeresolutioninafrica: Preventing conflictandenhancingstability*.AfricaCenterforStrategicStudies,2011. P2.
[71] ibid

mediationprocesses.[72]Theirargumentisthat therecently promotedconflictresolution mechanisms arewholesalewesterninperspectivetransmittedtoAfrican settings withoutdue cognizanceforthegapsindevelopment,consciousness,rationality andsociocultural differencesbetween thedevelopednationsoftheWestand thedevelopingAfricannations. WhileadmittingthatADRis efficientinsavingtimeandeconomicalwithregardstolitigation rates andmoreimportantly,allowingdisputants toworkforgreaterjointsolutions,attention mustalsobefocused on theirculturalmediationandarbitrationproceduresandpracticesof indigenous peopleandindeed,beblendedwiththeWesternforms ofresolution.[73]

A prerequisiteforaneffectiveconflictmanagement,according tothewriters,are those that partiesindisputecanidentifywithastheirown.Therefore,anunderstandingof the socioculturallocaleswithinwhichconflictoccurs"shouldconstitutetheprimaryunit of analysis,andalsotheappropriatesourceof modelsforpreventing,managing,andresolving conflictsandfacilitatingnewrelationships."[74]Theauthoreffectively demonstratedthe applicationofthismethodthroughthemediationwithtraditionalflavorapproachin2008-09 toresolveaprotractedchieftaincy andcommunal conflictsin theFodometraditionalarea amongtheEwepeopleof theVoltaregionof Ghana;datingbacktothe1940swhichwere prosecutedatthelawcourtswithsomemovingasfarastheAppealCourtwithout success.The mediatorscumauthors,whileadheringtoprinciplesofcontemporarymediation,complimented itwithtraditionalphilosophy,institutions,symbolicorders, practices,norms anddiscoursesin themediationprocesstosuccessfullybringthedisputetoanend.Theirwork ismuchrelated tothisstudyastheaimofthestudyistoaccess howeffectivelytheadoptedalternativedispute resolutionmechanismarebeingimplementedtoensuretherealizationof peaceandsecurity inWestAfricansocieties.[75]

In"Mediation–APreferredMethodofDisputeResolution",Feinbergargues thatissuessuch as"burgeoningcourtdockets, spiralinglitigationcosts,anddissatisfactionwiththetraditional

[72]MagaliRheault andBobTortora,"ConfidenceinInstitutions,"Harvard InternationalReview32, no. 4(Winter 2011), accessat <http://hir.harvard.edu/india-in-transition/confidence-in-institutions>.
[73] AhorsuandAme,"MediationwithTraditionalFlavorsintheFodomeChieftaincyandCommunalConflicts", (2011)
[74] AhorsuandAme,"MediationwithTraditionalFlavorsintheFodomeChieftaincyandCommunalConflicts", (2011)
[75]AhorsuandAme,"MediationwithTraditionalFlavorsintheFodomeChieftaincyandCommunalConflicts", (2011)

adversarial processhavecausedincreasedinterestin anduseofalternativedisputeresolution mechanisms."[76]HeespousesthevirtuesofADRandnotedthatthoughalltheseADR methods havetheiradvantagesoverlitigationinparticularcases.Mediation,intheviewofthewriter, isparticularlyadvantageoustonotonlylitigationbutall otheralternativemeansof resolving disputes.In thedisputeresolution process,litigation focuseson narrowissuesdeterminedby prefabricatedlegaldoctrines,andlitigation'sprimeinterestindisputeresolutionistodetermine whoisrightorwrong,notnecessarilytoresolvetheconflictandfosterrelationship.[77]He furthernotedthatmediated-assistedconflictdoesnotonlyensureamicablesettlementof the conflictbutgoes beyondlegaldeterminants toexploreexistingrelationshipbetweendisputing parties.This reconciliatoryapproachadoptedbyADR is veryimperativeas thesurvivalofthe societyisatstake.Disputingpartieswillalwaysmeettogetherandengageinsomeactivities inthesocietybeyondtheconflict, soitis importantinensuringthattheantagonismceasesand parties reconcile,forpeaceandtranquilitytoprevailinthesociety.[78]

Faulkes provides an overview of the development of ADR in Australia. She considers many developments including the Pilot Project of 1979, early ADR for specific types of disputes such as discrimination or family and the Conciliation Acts. The development and expansion of the Community Justice Centers, first established in New South Wales, is covered in detail. Faulkes expresses some concern at the low regard with which most people continue to hold ADR. She emphasizes that the Centers 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 "professionalized" service (academic qualifications rather than 28 personal suitability and motivation) would erode the vitality and enthusiasm which have made mediation a success.[79]

[76]Kenneth R. Feinberg, Mediation - A Preferred Method of Dispute Resolution, Pepperdine Law Review Volume 16 (1989)
[77] ibid
[78]Feinberg "Mediation–APreferredMethodofDisputeResolution",(1989)
[79]Faulkes, Wendy, 'The Modern Development of Alternative Dispute Resolution in Australia' (1990) vol 1, no 2, ADRJ 61

In"MediationandAccesstoJusticeDeliveryinAfrica:Perspectives fromGhana", Jacqueline Nolan-Haleypraisedtheadoptionoftheadringhanatoconsolidateits entrenchedpeaceful andgloriousstabledemocracyintheWestAfricansubregion.Themainthrustofherworkis thefactthatmediation shouldremainavoluntaryprocessinordertoprovideauthenticaccess tojustice.Shebemoanshowmediation hasbeen transformedintoan "indemnity" clausein someindustriallaws,andonly recommendedorresortedwhenjudicial processesstall.This indemnitygiventomediationhasthetendencyoflosingitsconflictresolutionprowessandnot giventheprominenceitdeserves inthelongrun.Sheconcludesbyadvocatingthatinensuring thewheels ofjusticetosmoothlyprovidefairness,mediationshouldbemadevoluntary.[80]

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- solving approach and explore the transformative potential of mediation.[81] 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.[82]

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

[80]", Jacqueline Nolan-Haley "MediationandAccesstoJusticeDeliveryinAfrica:Perspectives fromGhana", (2014)
[81]Bush and Folger, The Promise of "Mediation" the transformative approach to mediaton (1994)
[82] ibid

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 defectiveness which so often occurs in problem-solving mediation, putting responsibility for all outcomes squarely on the disputants.[83]

The narrative approach to managing and mediating conflicts was offered by Winslade and monk.[84] 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 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" [85] 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

[83] ibid
[84]Winslade and Monk, "Narrative Mediation" loosing the grip of conflict , published byJossey Bass (2000).
[85]Bush and Folger, The Promise of "Mediation" the transformative approach to mediaton (1994)

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. [86]

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), the Insight mode takes parties through an in-depth exploration of the presenting problem rather than around it.[87]

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.[88]

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

[86]Bush and Folger, The Promise of "Mediation" the transformative approach to mediaton (1994)
[87]Bush and Folger, The Promise of "Mediation" the transformative approach to mediaton (1994)
[88]Bush and Folger, The Promise of "Mediation" the transformative approach to mediaton (1994)

the predominant mediation models.[89] 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.[90]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 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

[89]Danesh and Danesh ,Consultative Conflict Resolution Model Beyond Alternative Dispute Resolution.(2002)
[90]Danesh and Danesh Consultative Conflict Resolution Model Beyond Alternative Dispute Resolution.(2002

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.[91]

Conclusion

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

[91] ibid

CHAPTER TWO

LEGAL FRAMEWORK OF ALTERNATIVE DISPUTE RESOLUTION USED IN THE JUSTICE SYSTEM OF UGANDA

2.0 Introduction

This chapter introduces the different laws that provide for Alternative dispute resolution as means of resolving disputes without referring the dispute to courts of law. In this chapter international laws like the UN charter, the UNICITRAL model laws on ADR, regional laws and Municipal laws on ADR will be explored by the researcher.

2.1 Municipal legal framework

2.1.1 The Constitution of the Republic of Uganda, 1995

The Constitution of the Republic of Uganda Came into force on 8th day of October 1995 by the Constituent Assembly, replacing the 1967 Constitution. Since its publication the constitution has been amended three times.[92]

The Constitution of the Republic of Uganda, 1995 provides for exercise of judicial power and the mandate of court under Article 126. Article 126 (2) (d) specifically provides for promotion of reconciliation between parties.[93]

In light of the above Court-based Alternative dispute resolution began to creep into the Uganda Judicial system from the mid 1990s. The first driving factor for change came from the 1994 Justice Platt Report[94] on Judicial Reform which recommended the increased use of Arbitration and Alternative Dispute Resolution alongside litigation and the creation of a Commercial Division of the High Court.

The Constitution under Chapter eight, specifically Article 126 (2) provides that;

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[92] Per the preface in the Constitution of the Republic of Uganda [As at 15th February 2006] , that is The Constitution Amendment Act, No. 13 of 2000, No. 11 of 2005 and 21 of 2005

[93] The Constitution of the Republic of Uganda [As at 15th February 2006]

[94] Ibid

"in adjudicating cases of both a civil and criminal nature, the courts shall, subject to the law, apply the following principles-"

Shortly thereafter, a major statement was made in the new 1995 Constitution of Uganda which under Article 126(2) enjoined the courts to inter alia apply the following principles;

(a) justice shall be done to all irrespective of their social or economic status.

(b) Justice shall not be delayed;

(c)Adequate compensation shall be awarded to victims of wrongs;

(d) Reconciliation between parties shaft be promoted and.... .

(e) reconciliation between parties shall be promoted; and

(f) Substantive justice shaft be administered without undue regard to technicalities.

A study of these provisions shows that the intention of the legislators is to implore court, in as much as possible to expedite trial and ensure that justice is delivered timely and that the parties thereto are involved in the decision reached. If indeed followed to the letter, these Constitutional provisions will have the effect of causing expediency of cases in all courts. And there would be no better avenue than having matters resolved through Alternative dispute resolution. This in the end would significantly cut down on the challenge of backlog and all its progenies.

The proper application of the constitutional principles in Article 126 (2) would counter the traditional perceptions of adversarial dispute resolution methods and call for change in favour of court based ADR.

What however, remains outstanding is the fact that the same Constitution has provisions that inherently have the potential to delay discharge of cases.

On the other hand Article 126 (2) is not conclusive; it stops at laying down the principles that should be followed in the exercise of judicial power.[95] The article does not clearly provide the means through which above mentioned principles will be achieved. In particular Article 126 (2)

[95] The Constitution of the Republic of Uganda, Article 126

d, encourages reconciliation between the parties however, it does not specifically state the methods through which the reconciliation will be attained.

2.1.2 The Judicature Act, Cap. 13

An analysis of this section shows that the Act empowers courts to refer matters to be tried before an arbitrator. The Act also gives the parties power to choose an arbitrator of their own choice.

This Act makes the first reference to court-based Alternative dispute resolution under its section 26. It provides that the High Court may, in accordance with rules of court, refer to an official or special referee for inquiry and report any question arising in any cause or matter, other than in a criminal proceeding. 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.

Section 27 enjoins the High Court with the powers to refer any matter they deem worth the cause for arbitration in accordance with the criterion espoused under the Act.[96]

Section 28of the Act, specifically spells out the mandate of the arbitrators

> "... the arbitrators shall be deemed to be officers of the High Court and, subject to Rules of Court, shall have such powers and conduct the reference in such manner as the High Court may direct."[97]

Section 29 of the Act[98] is to the effect that where a question of law arises in arbitration, an arbitrator may present the question in form of a special case for the opinion of the High Court. This clearly shows that any the Judicature Act creates a platform for several problems to be settled under the Act can be resolved in arbitration.[99] In addition Section 30 clearly gives court the power to impose costs as it thinks fit.

Section 31 of the Act provides for remuneration of referees and arbitrators to whom a matter is referred under an order of the High Court.

Further under **Section 32** of the Act provides that the High Court shall not order any proceedings to which the Government is a party without the consent of the Government, and neither shall

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[96] The Judicature Act Cap 13
[97] *Ibid* Section 28
[98] *Ibid* Section 29
[99] *Ibid* Section 29

costs payable to Government be affected by any inquiry made by an arbitrator. An analysis of the Judicature Act shows that the Act caters for Alternative dispute resolution, for it advocates for Alternative dispute resolution as one of the modes of solving disputes.

2.1.3 The Legal and Administrative Framework for Commissions of Inquiry

Commissions of Inquiry are governed by the Commissions of Inquiry Act of 1969.[100] They may be appointed by the President or by a Minister.[101] They are established by a Statutory Instrument known as a Legal Notice. Such Legal Notice lays down the terms of reference, the time frame for the commission's work, the methods of work it may adopt as well as explicit naming of the chair, commissioners, secretary and counsel of the inquiry. Once appointed, Commissioners enjoy immunity from prosecution or civil liability.[102]

There are two notable issues concerning the fact that appointment of inquiries in Uganda is by the President on an ad hoc basis. Firstly, because the government is beholden to donors for its funding, the President is able to quickly respond to crises in governance arising from corruption scandals in order to reiterate that he is committed to the principles of good governance. This tactic worked successfully with the Global Fund inquiry,Secondly, as the appointing authority and the one to whom the report is presented, he can use his authority to suppress a report that is not favourable to him, as he did with the Junk Helicopters Inquiry report where he was implicated for influencing the award of the tender.

The choice of commissioners is in theory, an administrative matter handled by the Solicitor General from his metaphorical —book of the great and the good. During the period under review (1999-present), there has however, been a marked preference for Justices Sebutinde and Ogoola, as table 3 shows. In reality, it cannot be denied that political factors influence the appointment of the inquiry. For example, Justice Sebutinde, although appointed routinely to chair the 1999 Police inquiry, became a popular choice for subsequent inquiries due to the perception that she had done an excellent job with her unrelenting cross examination that left public officials

[100]Cap. 166, Laws of Uganda, Vol. XXI.
[101]Section 2 of the Commissions of Inquiry Act, Cap. 166 provides for presidential appointment of inquiries. However, Ministerial appointment is deemed to be authorised by the Transfer of Powers and Duties Act, Cap 260, Vol. 10, which provides that the President may delegate his functions to a Minister.
[102]Section 10 of the Act.

literally lost for words. Justice Ogoola's appointment on the other hand, may have been influenced by his comparatively milder approach to examining witnesses, after the URA inquiry was nullified on the grounds of Justice Sebutinde's disregard for natural justice during the cross-examination of witnesses. He was also, notably, respected for his seniority as Principal Judge, hiscommercial law expertise and his international work experience as a former employee of the IMF.[103]

The wording of section 2 of the Act, which provides that inquiries —may‖ appoint a commission of inquiry, points to the fact that they are appointed on an ad hoc basis under Executive discretion. Thus, they are temporary and exist outside the day-to-day apparatus of government. This factor may enhance their function as legitimating devices. When a corruption scandal revealing that government funds have been stolen erupts, appointing an ad hoc Commission outside the normal anti-corruption apparatus shows that the government is taking the matter very seriously and can have a placating effect on the angry public as well as the donors. This tactic worked especially well when it was found that the Global Fund for HIV/AIDS and Malaria was being mismanaged by the Ministry of Health. The Global Fund headquarters in Geneva suspended the grants to Uganda, but when an inquiry was instituted, the suspension was lifted.[104]Commissions of inquiry have the power to determine their own modus operandi, subject to section 2, which provides that the proceedings shall be held in public. Nevertheless, Commissioners have discretion to transfer the proceedings to be held in Camera if they deem fit. Section 8 provides that —Commissioners acting under this Act may make such rules for their own guidance, and the conduct and management of proceedings beforethem, and the hours and times and places for their sittings, not inconsistent with their commission, as they may from time to time think fit, and may from time to time adjourn for such time and to such place as they may think fit, subject only to the terms of their commission. Invariably, the procedure chosen has involved inquisitorial proceedings, which have been said by Keeton to be unavoidable to the fact-finding function of such bodies.[105] In Uganda, a number of public officials appearing as

[103]See Justice Ogoola's profile, at http://www.newvision.co.ug/D/8/12/467195,
[104]State House Uganda, —President meets Global Fund Delegation, 11 November 2005, at http://www.statehouse.go.ug/news.detail.php?category=Major+Speeches&newsId=659,
[105]Keeton, G. (1960). Trial by Tribunal: A Study of the Development and Functioning of the Tribunal of Inquiry; Museum Press, London

witnesses before inquiries have been deeply offended by the inquisitorial style and what they perceive as the unjust imputation of guilt upon them. One of them who was a respondent to this study likened the Global Fund Commission of Inquiry in Uganda to a Kangaroo Court. In Annebrit Aslund versus the Attorney General, [106]the plaintiff was the Commissioner General of Uganda Revenue Authority, which had been subjected to an inquiry process for allegations of corruption. She successfully sought an order of certiorari to quash the inquiry report and record of proceedings on grounds that the inquiry chairperson had abused natural justice when she called her incompetent and a liar during cross examination without giving her a chance to respond to the allegations. Under section 9, the Commissioners have the powers of the High Court to summon witnesses, to call for the production of books, plans and documents and to examine witnesses and parties concerned on oath. Where the commissioners consider it desirablefor the purpose of avoiding expense or delay or for any other special reason, they may receive evidence by affidavit or administer interrogatories and require the person to whom the interrogatories are administered to make a full and true reply to the interrogatories. In Uganda, the wide investigatory power of inquiries is one of the factors that makes them a better alternative to conventional criminal proceedings. As we saw in the previous chapter, the investigatory process for corruption cases in the criminal justice system is greatly hampered by lack of skilled and motivated staff and lack of equipment. There are frequent delays and cases are often abandoned due to lack of evidence. Inquiries have a time limit within which to present their findings. They are also able to combine investigation and fault-finding, which can help to address the evidence gap by allowing oral testimony to supplement the often inadequate paper trail. Moreover, intense public scrutiny ensures that public officials are wont to comply with the inquiry process, as opposed to low-key criminal investigations that could be more easily compromised.

When proceedings are concluded, commissions of inquiry are required to report to the President or Minister as the case may be, in writing. The report should detail the result of the inquiry and furnish a full statement of the proceedings of the commission and of the reasons leading to the conclusions arrived at or reported.[107] The report is then reduced to a White Paper by the Solicitor

[106]High Court Miscellaneous Application No. 441 of 2004.
[107]Section 6 of the Commissions of Inquiry Act.

General's chambers, which is forwarded to Cabinet for discussion. Cabinet may accept or reject the conclusions reached by the Commission. Moreover, Cabinet proceedings in Uganda are subject to a high degree of secrecy and are even included in the category of information to which the public has no right of access under the Access to Information Act. There is no legal obligation to publish the report or to implement the recommendations made by the inquiry. While this has caused endless consternation among donors and the public, it reiterates my earlier assertion that commissions of inquiry's chief importance lies in the proceedings, and not in the outcome. Moreover, in this media age, the government's reluctance to publish an inquiry's report serves little purpose because the truth has already been published by the media's reporting on proceedings.

3.1.4 The Arbitration and Conciliation Act Chapter 4

In May 2000, Uganda introduced The Arbitration and Conciliation Act, 2000, described as "an Act to amend the law relating to domestic arbitration, international commercial arbitration and enforcement of foreign arbitral awards, to define the law relating to conciliation of disputes and to make other provision relating to the foregoing". This comprehensive piece of legislation consists of 73 sections divided into 7 parts and two accompanying schedules. The largest part lays down the principles governing arbitration, from the initial agreement to the final award. These provisions for the most part reflect the principles expressed in the UNCITRAL model laws. However, Uganda has chosen to diverge on certain points. For instance, a sole arbitrator shall be appointed if the parties have not stipulated the number to be appointed. English is in principle to be the language of arbitration.

Uganda's new Arbitration and Conciliation Act replaces the former Arbitration Ordinance dating from 1930 and brings arbitration in Uganda in line with prevailing international practice. A notable change introduced by the new Act is the widening of arbitrability to cover any dispute arising from a legal relationship, "whether contractual or not"[108].

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[108] The full text of The Arbitration and Conciliation Act, 2000 was published in Supplement No. 7 of The Uganda Gazette No. 32, Vol. XCIII, dated 19 May 2000.

This act is very instrumental for it legalizes and sets the standards for the operation of arbitration and conciliation. In addition the Act regulates the behavior of the conciliator or arbitrator in the conduct of the arbitration process. The Arbitration and Conciliation Act is very important for it incorporates into its framework, the provisions of the 1985 United Nations Commission on International Trade (UNICITRAL), Model law on International Commercial Arbitration and the UNCITRAL Conciliation Rules 1976.

It is important to high light the fact that in comparison to the UNCITRAL Model Law, The Act[109] does not cater for immunity of an arbitrator. An example is drawn from the High Court Commercial Division, where Alternative dispute resolution is mandatory. When parties file pleadings; that is the plaint and written statement of defence, they are mandated to attach Alternative dispute resolution summaries. The effect is that before a matter is allocated a hearing date, the parties in the case must go through the Alternative dispute resolution process. During the Alternative dispute resolution stage some of the Advocates and parties turn out to be hostile, in addition to the hostility a mediator may guide the parties to resolve the case at hand. However, in the event that the case at hand involves sensitive matters the Act does not provide for the immunity of the mediator.

This anomaly should be rectified because at the end of the day the mediators may opt out of some matters, since they are not protected. And this would then defeat the purpose of Alternative dispute resolution, and rather indirectly increase case backlog.

Section 2 (1) (e) of the Act defines an arbitration agreement;

> " as 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"[110]

The Act is to the effect that in cases where parties have signed an arbitration agreement, they cannot resort to court unless the terms in the arbitration agreement have been met. The Act

[109] The Arbitration and Conciliation Act Cap 4
[110] *Ibid*

makes it mandatory for the parties with a dispute to submit to the terms in the arbitration agreement.

Anthony Conrad is of the opinion that;

> "The stated purpose of the Act is to empower the parties and to increase their autonomy. It has been the case that if an arbitration agreement existed, the courts would not hear the case until the arbitration procedure had taken place. Disputing parties are thus obliged to submit to the provisions under the Act on the basis of an existence of an agreement to arbitrate in the event that a dispute arises."[111]

Section 5 of the Act[112] provides for stay of legal proceedings and is to the effect that;

> "A Judge or Magistrate before whom proceedings are being brought in a matter which is the subject of an arbitration agreement shall, if a party so applies after the filing of a statement of defense and both parties have been given a hearing, refer the matter back to arbitration ..."[113]

The Act however, gives exceptions that in cases where the arbitration agreement is null and void, inoperative or incapable of being performed or in cases where there is not in fact any dispute between the parties with regard to matters agreed to be referred to arbitration then Section 5 would not suffice.

Section 67 of the Act establishes the Centre for Arbitration and Dispute Resolution. It should be noted that the Arbitration and Conciliation Centre is a body corporate with perpetual succession and a common seal capable of suing or being sued.[114]

The Arbitration and Conciliation Act is critical in ensuring realization of the goal of increased party autonomy and provision of appropriate and user-friendly rules of procedure to guide parties, ensuring creation of an adaptable framework for arbitration tribunals [115] to operate under

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[111] Anthony Conrad K. Kakooza (2000) , *Arbitration, Conciliation & Alternative dispute resolution in Uganda- A focus on the practical aspects*

[112] Supra Chapter 4

[113] Supra Chapter 4

[114] *Ibid*

[115] Section 17 of the Arbitration and conciliation Act. Cap 4

as well as other default methods in the absence of the parties; own agreements, and the advancement of equality and fairness in the whole process[116].

The Act also establishes a body known as the Centre for Arbitration and Dispute Resolution, which is intended to fulfill various functions defined elsewhere in the Act. The Centre also devises rules for the implementation of arbitration, conciliation and ADR processes[117], establishes a code of ethics for, and maintains a list of, qualified arbitrators, conciliators and experts, sets fees for arbitrators, and facilitates certification, registration and authentication of arbitral awards and conciliation settlements.

A further feature of the new Act is a set of model forms for use by the parties or the arbitrator at different stages of arbitral proceedings. They include an agreement to submit to arbitration following the occurrence of a dispute, an agreement on the appointment of a single arbitrator and a form relating to the extension of the time allowed for the arbitrator to make his award.

Since the introduction of the pilot project in 2003, court based Alternative dispute resolution has taken a heightened significance in legal and judicial practice within the ``commercial court and The (Alternative dispute resolution) Rules have been central in expediting the Alternative dispute resolution process.

The Act clearly refers to arbitration, Alternative dispute resolution methods. In addition CADER as a body does not provide for Alternative dispute resolution but rather provides for Arbitration.

2.1.5 The Civil Procedure Act, Chapter 71 and the Civil Procedure Rules S.I 71-1

The Civil Procedure Act[118] which is here under referred to as the Act, makes provision in civil courts and this Act commenced on the 1st day of January 1929, this Act excludes any definition that is repugnant to natural justice as evidenced from Section 2 which is the Interpretation Section.[119] In addition this Act is made up of ten (X) parts and one hundred sections (100)

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[116] Anthony Conrad K. Kakooza (June 1990), *Arbitration, Conciliation & Alternative dispute resolution in Uganda-A focus on the practical aspects*
[117] Alternative Dispute Resolution
[118] The Civil Procedure Act Cap 71
[119] Ibid

Part VI of the Act provides for special proceedings and it specifically provides for Arbitration, Section 60 of the Act[120] specifically provides that;

> "All references to arbitration by an order in a suit, and all proceedings thereunder, shall be governed in such a manner as prescribed by the rules. "[121]

The rules in this case are the Civil Procedure Rules [122] and these rules provide for Scheduling Conference and Alternative Dispute Resolution.

In 1996 the Chief Justice Mr. Wambuzi (as he then was, by Practice Direction No. 1 of 1996 established the Commercial Division of the High Court Paragraph 5 (b) of the said Practice Direction enjoined the commercial judges to be 'Proactive', an essential ingredient for establishing a court based ADR System.

In 1998 the present Civil Procedure Rules were amended by the Civil Procedure (Amendment) Rules 1998 to include Order 10B. Order 10B rule 1 introduced into the Uganda Judicial system the use of a pre trial scheduling conference and provided -

> "...The court shall hold a scheduling conference to sort out points of agreement and disagreement, the possibility of Alternative dispute resolution, arbitration and any other form of settlement....."

Order 10 rule 2 adds that;-

> " (1) Where the parties do not reach an agreement under sub rule (2) of rules, 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 of the Bench, named by the court.
>
> (2) Alternative dispute resolution shall be completed within twenty-one days after the date of the order except that the time may be extended for a period not exceeding fifteen days on application to court, Showing sufficient reasons for extension.
>
> (3)The Chief Justice may issue directions for the better carrying into effect of alternative dispute resolution"

[120] The Civil Procedure Act Cap 71
[121] Ibid, Section 60
[122] Ibid Section 60

The passing of Order 10B truly reflects the fact that court based alternative dispute resolution had clearly made its way in the legal system. No wonder the High court commercial division in its effort to promote justice, reduce case backlog among others ushered in compulsory court based Alternative dispute resolution.

In final analysis, it is my considered opinion that there can be no doubt that when a legal dispute arises then the claimants will go to their lawyer and about 85% of these lawyers will issue a notice of intention to sue the other party in court. It is difficult to say whether this is the preferred route of the claimant or it is the desired route for the lawyer. One can almost say with certainty that almost without thinking it has become the automatic route. This is not to say that litigation has been the sole alternative open to claimants in Uganda. Uganda for example first got an Arbitration Act in 1930 but it was seldom used. Furthermore Order 43 of the Civil Procedure Rules S.I 71-1 (first promulgated by general Notice 607 of 1928) provided for Arbitration under order of a court5 but this also has seldom been used. This could be referred to as the first "court based ADR".

Traditional perceptions against ADR have greatly reduced thus room for a greater use of court assisted ADR. Particular break through has been made in Uganda under the Alternative dispute resolution Pilot Project of the Commercial Court Even though Alternative dispute resolution is not the only form of ADR. Its use with in the court system is becoming good flag ship for court assisted ADR in all it? Possible forms. For ADR to succeed in Uganda there is need for the Judicial Officer to be proactive and encourage litigants to explore ADR before going into fully-fledged litigation.

2.2 Regional Legal Framework.

2.2.1 East African Court of Justice Arbitration Rules, 2012

The East African Court of Justice (the EACJ) which is one of the organs of the EAC established under Article 9 of the Treaty for the Establishment of the EAC.[123]It has arbitration related

[123] Treaty for the Establishment of the East African Community (EAC Treaty), adopted on 30 Nov. 1999 at Arusha, entered into force on 7 Jul. 2000 (Amended on 14 Dec. 2006 and 20 Aug. 2007).

jurisdiction. The EAC arbitration jurisdiction covers matters arising from arbitration agreements contained in a contract or agreement concluded by the Community or any of its institutions; and arbitration agreements contained in a commercial contract or agreement which the parties have conferred jurisdiction on the Court to deal with arising disputes.[124]

The EAC Court has formulated the EACJ Arbitration Rules, 2012,[125] made under Article 42 of the EAC Treaty. Rule 1 of the Rules provides that unless the parties to arbitration agree otherwise: (a) these Rules shall apply to every arbitration under Art. 32 of the Treaty; (b) the parties to any arbitration may agree in writing to modify or waive the application of these Rules; (c) where any of these Rules is in conflict with any provision of the law applicable to arbitration from which the parties cannot derogate, that provision shall prevail.[126] These Rules apply to very arbitration references pursuant to Article 32 of the EAC Treaty.[127] Where the parties have agreed to submit to arbitration under the Rules, they are deemed to have submitted ipso facto to the Rules in effect on the date of the commencement of the arbitration proceedings, unless they have agreed to submit to the Rules in effect on the date of their arbitration agreement.[128]

Despite the existence of the arbitration rules which have incorporated international best practices on arbitration. It does not however appear that the EAC Court has a vibrant arbitration matters cause list.[129] This may partly be attributed to the fact that the integration process of the East Africa Community is still ongoing. The Member countries have also not submitted any matters to the EACJ jurisdiction on arbitration.

2.3 International legal framework

2.3.1 The UN Charter

Article 1 of the UN Charter concisely states the organization's principal objective 'to maintain international peace and security' and the ways in which that goal is to be attained collectively,

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[124] Article 32, EAC Treaty.
[125] East African Court of Justice Rules of Arbitration, EACJ, Arusha, Tanzania, March 2012. The Rules were made in exercise of the powers conferred on the East African Court of Justice by Art. 42 of the Treaty for the Establishment of the East African Community.
[126] Rule 1 of the East African Court of Justice Rules of Arbitration
[127] Rule 1(2)(a), East African Court of Justice Rules of Arbitration.
[128] Rule 7(1), East African Court of Justice Rules of Arbitration
[129] H.R. Nsekela, Overview of the East African Court Of Justice, a paper presented during the sensitization workshop on the Role of the EACJ in the EAC Integration, Imperial Royale Hotel, Kampala, Uganda, 1-2 Nov. 2011

peacefully, and preventively.[130] At the dawn of the twenty-first century, the peaceful settlement of disputes is widely considered essential, not only in the interest of avoiding deadly armed conflict, but also to counter the rise of extremism ideologies and ethno-nationalism, and a host of corollary reasons:

So long as States cannot rely on the peaceful resolution of their disputes, there can be no genuine reversal of world-wide arms competition; no adequate resources for the eradication of poverty; no proper respect for human rights or the environment; nor sufficient funds for health, education, the arts and humanities.[131]

Article 2 (3) states that 'all members shall settle their international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered.' As noted by Bruno Simma, 'the principle of the peaceful settlement of disputes occupies a pivotal position within a world order whose hallmark is the ban on force and coercion.'[132] This principle, therefore, creates certain obligations for member states and responsibilities for the UN's principal organs. States themselves bear primary responsibility for the pacific settlement of disputes, while the Charter enumerates institutional arrangements to facilitate the pursuit of this principle.

Article 2 (3) creates an obligation 'primarily incumbent' on all UN member states that applies to all disputes, 'whether they are connected with the UN Charter or rooted in other subject-matters.'[133]

Article 33 (1) catalogs various methods to be employed by states to settle disputes pacifically:

The parties to any dispute, the continuance of which is likely to endanger the maintenance of international peace and security, shall, first of all, seek a solution by negotiation, enquiry,

[130] Article 1 of the UN charter
[131] Julie Dahlitz, 'Introduction,' *in Peaceful Resolution of Major International Disputes, ed. Dahlitz* (New York: United Nations, (1999), 5.
[132] Bruno Simma, ed., The Charter of the United Nations: A Commentary, 2nd edn., vol. I (Oxford: Oxford University Press, (2002), 103
[133] Ibid at 105

mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice.[134]

Article 33 (2) continues: 'The Security Council shall, when it deems necessary, call upon parties to settle their disputes by such means' (i.e., negotiation, enquiry, mediation, etc.). This article, therefore, also aims to demarcate the responsibilities of the parties to the conflict from those of the UN.[135]

2.3.2 The UNCITRAL Model Law on International Commercial Arbitration (UNCITRAL Model Law) (hereinafter referred to as the Model Law).

The United Nations Commission on International Trade Law whose secretariat is in Vienna is a subsidiary body of the General Assembly of the United Nations established pursuant to a resolution of the United Nations General Assembly[136] and vested with the mandate of promoting the harmonization, unification and modernization of international trade law.[137] Its establishment followed a proposal by Hungary urging the United Nations to be actively involved in the removal of legal hindrances to the flow of international trade.[138]

In 1982, in order to alleviate the fears of parties engaged in international commerce of not getting a fair trial in another jurisdiction, solve the problems of inadequacy of domestic laws and disparity between national laws; [139]the UNCITRAL Working Group began deliberations on the Model Law on International Commercial Arbitration which was adopted by the United Nations General Assembly on 11 December 1985 by consensus resolution 40/72. The UNCITRAL Model Law is built on the principles of uniformity and internationalization rather than nationalization.[140] The UNCITRAL Model Law is not a convention but an international persuasive legislation.[141]

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[134] Article 33 (1) of the UN charter
[135] Article 33 (2) of the UN charter.
[136] Resolution 2205 (XXI) of 17 Dec. 1966
[137] Blake, S; Browne, J; Sime, S. A Practical Approach to Alternative Dispute Resolution (Oxford University Press: Oxford) 2011 p.449
[138] Farnsworth E.A UNCITRAL- Why? What? How? When?" 20 American Journal of Comparative Law Quarterly 34 (1989)
[139] See Background to the UNCITRAL Model Law on International Commercial Arbitration; available at http://www.uncitral.org/pdf/english/texts/arbitration/ml-arb/07-86998_Ebook.pdf
[140] Kerr, M. "Arbitration and the Courts: the UNCITRAL Model Law" in International and Comparative Law Quarterly 34 (1985) p. 7
[141] Okekeifere, A. "Appointment and Challenge of Arbitrators Under the UNCITRAL Model Law Part 1: Agenda for Improvement 2(5/6) in Int'l A.L.R 167 (1999)

The Model Law aims to regulate international commercial arbitration.[142] The Model Law is driven towards "the need for uniformity" which "*is greater regarding international arbitration than domestic arbitration and that States may be more inclined to preserve their traditional concepts and familiar rules in a purely domestic context than in international cases*".[143]

According to Article 1(2) of the Model Law, "the provisions of this Law, except Articles 8,9,35 and 36 apply only if the place of arbitration is in the territory of this State" (that is the adopting State). This implies that where a country like Uganda has adopted the Model Law, then the Model Law can be said to apply within the Ugandan jurisdiction.

Article 1(5) of the Model Law provides that "*this Law shall not affect any other law of this State by virtue of which certain disputes may not be submitted to arbitration or may be submitted to arbitration only according to provisions other than those of this Law.*" Therefore, according to the Model Law, what is arbitral is determined by the State adopting the Model Law. In the case of **Soleimany v.Soleimany**, Waller LJ noted that some 'illegal or immoral' dealings are '*incapable of being arbitrated from an English Law perspective because an agreement to arbitrate them would itself be illegal or contrary to public policy'.*[144]

Article 4 of the Model Law regulates waiver of the right to object. It provides that "*a party who knows that any provision of this Law from which the parties may derogate or any requirement under the arbitration agreement has not been complied with and yet proceeds with the arbitration without stating his objection to such non-compliance without undue delay or, if a time limit is provided therefor, within such period of time shall be deemed to have waived his right to object.*" The Model Law requires an actual knowledge and "without undue delay". In the case of **Athletic Union of Constantinople v. National Basketball Association**, it was held that under Section 73(1) of the English 1996 Act1996, an applicant is deemed to have waived any ground of objection based on jurisdiction.[145]

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[142] Article 1(1) of the UNCITRAL Model Law on International Commercial Arbitration which provides that "this Law applies to international commercial arbitration, subject to any agreement in force between this State and any other State or States"
[143] Lord Justice Mustill (now Lord Mustill) "The United Kingdom and the UNCITRAL Model Law: The Mustill Committees' Consultative Document of October 1987 on the Model Law (1987)2 Arbitration International 278-297
[144] [1999] QB 785 at 797
[145] [2002]1 Lloyd's Rep 305

Article 5 of the Model Law provides that "*in matters governed by this Law, no court shall intervene except where so provided in this Law*". This gives courts a narrow room for intervention.[146] Conversely, the English Arbitration Act 1996 permits wider scope of judicial intervention in comparison with that of the Model Law. Section 1(c) of the Act provides that "*...in matters governed by this Part the court should not intervene except as provided by this Part*". The use of the word should have been interpreted by the English courts to imply that there may be situations where the court might intervene other than those specifically provided for in Part 1 of the 1996 Act.[147] This position was further buttressed by Reid, Alan who observed that the restrictive scope of the Model Law is narrower than the corresponding provision of the 1996 Act.[148]

The Model Law has incorporated the doctrines of competence-competence and separability into its laws and these doctrines also form part of the Ugandan Legal Systems. The Competence-Competence doctrine refers to the extent to which an arbitral tribunal may rule on its jurisdiction while the Separability doctrine on the other hand refers to the independence of an arbitration clause even where the contract wherein it is found is invalid.[149]

Article 16(1) of the Model Law provides that the arbitral tribunal may rule on its own jurisdiction, including any objections with respect to existence or validity of the arbitration agreement...a decision by the arbitration tribunal that the contract is null and void shall not entail ipso jure the validity of the arbitration clause.

With regards to the Separability doctrine, the Model Law Article 16(3), is to the effect that the arbitral clause is separate and independent of the contract. This doctrine was aptly expressed by Lord Macmillan in the case of **Heyman v. Darwins Limited** when he observed as follows:

"*...an arbitration clause in a contract... is quite distinct from the other clauses. The other clauses set out the obligations which the parties undertake towards each other...but the arbitration clause does not impose on one of the parties an obligation in favor of the other. It*

[146] Faturoti, Bukola. "Complementarity or Disparity? The UNCITRAL Model Law on International Commercial Arbitration 1985 and English Arbitration Act 1996 Revisited" in University of Ibadan Law Journal Vol.2, No.1, May 2012 pp.108
[147] This was decided in the case of Runman Faruqi v. Commomwealth Secretariat [2002] WL 498805 (QBD (Comm. Ct.)
[148] Reid, Alan. "The UNCITRAL Model Law on International Commercial Arbitration and the English Arbitration Act: Are the Two Systems Poles Apart? In Journal of International Tribunal Vol. 21 No.3 (2004) pp 227-237
[149] Faturoti Supra

embodies the agreement of both parties, that, if any dispute arises with regard to the obligations which the one party has undertaken to the other, such dispute shall be settled by a tribunal of their own constitution... What is commonly called repudiation or total breach of a contract... does not abrogate the contract, though it may relieve the injured party of the duty of further fulfilling the obligation which he has by the contract undertaken to the repudiating party. The contract is not put out of existence, although all further performance of the obligations undertaken by each party in favor of the other may cease. It survives for the purpose of measuring the claims arising out of the breach, and the arbitration clause survives for determining the mode of their settlement. The purposes of the contract have failed, but the arbitration clause is not one of the purposes of the contract."[150]

In the case of **Vee Networks Ltd. v. Econetwireless International Limited**, the court held that *even though the Technical Support Agreement (TSA) signed by both parties was ultra vires, its invalidity did not affect the validity of the arbitration clause.*[151]

2.3.5 UNCITRAL Model Law on International Commercial Conciliation

United Nations Commission on International Trade Law (UNCITRAL) has preparedand circulated "Conciliation Rules'. These Conciliation Rules were adopted by theUNCITAL at its thirteenth session after consideration of the observations ofGovernments and interested organizations. The General Assembly of the UnitedNations has also adopted them through a Resolution 35/52 on 4 December, 1980. TheU.N. has recommended, "the use of the Conciliation Rules of the United NationsCommission on International Trade Law in cases where a dispute arises in the contextof international commercial relations and the parties seek an amicable settlement ofthat dispute by recourse to conciliation". The UNCITRAL Conciliation Rules contain20 Articles

According to the model law "conciliation" means a process, whether referred to by the expression conciliation, mediation or an expression of similar import, whereby parties request a third person or persons ("the conciliator") to assist them in their attempt to reach an amicable settlement of their dispute arising out of or relating to a contractual or other legal relationship.

[150] (1942) 1 All E R 337.
[151] [2004] EWHC 2909 (Comm.)14 December 2004

The conciliator does not have the authority to impose upon the parties a solution to the dispute.[152]

The conciliation process can be commenced by either party to the dispute. When one party invites the other party for resolution of their dispute through conciliation, the conciliation proceedings are said to have been initiated. When the other party accepts the invitation, the conciliation proceedings commence.[153] If the other party rejects the invitation, there are no conciliation proceedings for the resolution of that dispute.[154]

Generally, only one conciliator is appointed to resolve the dispute between the parties. The sole conciliator is appointed by the parties by mutual consent.[155] If the parties fail to arrive at a mutual agreement, they can enlist the support of any international or national institution for the appointment of a conciliator.[156] There is no bar to the appointment of two or more conciliators. In conciliation proceedings with three conciliators, each party appoints one conciliator. The third conciliator is appointed by the parties by mutual consent.[157] Unlike arbitration where the third arbitrator is called the Presiding Arbitrator, the third conciliator is not terms as Presiding conciliator. He is just the third conciliator.

The conciliator is supposed to be impartial and conduct the conciliation proceedings in an impartial manner.[158] He is guided by the principles of objectivity, fairness and justice, and by the usage of the trade concerned and the circumstances surrounding the dispute, including any previous business practices between the parties.[159] The conciliator is not bound by the rules of procedure and evidence. The conciliator does not give any award or order. He tries to bring an acceptable agreement as to the dispute between the parties by mutual consent. The agreement so arrived at is signed by the parties and authenticated by the conciliator.[160]

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[152] Article I(3) of the UNCITRAL Model Law on International Commercial Conciliation
[153] Ibid article 4 (1)
[154] Ibid article 4(2)
[155] Ibid article 5(1)
[156] Ibid article 5(3)
[157] ibid
[158] Ibid article 6
[159] ibid
[160] Paper written following a UNITAR Sub-Regional Workshop on Arbitration and Dispute Resolution (Harare, Zimbabwe 11 to 15 September 2000) at pp 10

A conciliator is not expected to act, after the conciliation proceedings are over, as an arbitrator unless the parties expressly agree that the conciliator can act as arbitrator. Similarly, the conciliation proceedings are confidential in nature. Rules of Conciliation of most of the international institutions provide that the parties shall not rely on or introduce as evidence in arbitral or judicial proceedings, (a) the views expressed or suggestions made for a possible settlement during the conciliation proceedings; (b) admissions made by any party during the course of the conciliation proceedings; (c) proposals made by the conciliator for the consideration of the parties; (d) the fact that any party had indicated its willingness to accept a proposal for settlement made by the conciliator; and that the conciliator shall not be produced or presented as a witness in any such arbitral or judicial proceedings.[161]

2.4 Conclusion

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 hence reducing case backlog. The system may be more helpful if more mediators are trained as the researcher recommends at the jurat of this paper.

[161] ibid

CHAPTER THREE

THE USE OF ALTERNATIVE DISPUTE IN UGANDA SPECIFICALLY COMPARING MEDIATION AND ARBITRATION AS ADR MECHANISMS

3.0 Introduction

This chapter lays down the advantages of mediation and Arbitration as the most commonly used mechanisms of alternative dispute resolution in Uganda and all over the world. The chapter will also compare mediation to mediation.

3.1.1 Mediation

The mediation process consists of the neutral and independent third party meeting with the parties who have the necessary authority to settle the dispute. The mediator begins the process by explaining the process to the parties, assessing the appropriateness of mediation to the situation and ensuring that the parties are willing and able to participate. This is known as a joint session.[162]

The neutral and independent third party then meets with each party privately to discuss their respective positions and their own underlying needs and interests. These private meetings are known as caucus. Information which is provided by the party to the third party during a caucus is strictly confidential, unless a party expressly consents to the third party informing the other party of such information

Once all parties have expressed their views and interests to the mediator in private, the mediator will try to establish areas of common ground and provide the parties with the opportunity of exploring proposals for a mutually acceptable settlement. When an agreement is reached between the parties, the mediator will draft the terms of agreement, ensuring that all parties are satisfied with the agreement, and have all parties sign the agreement.[163] This final session is known as the closing joint session.[164]

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[162]Law Reform Commission, ALTERNATIVE DISPUTE RESOLUTION CONSULTATION PAPER(LRC CP 50 - 2008) AT pp 46

[163]Stitt Mediation: A Practical Guide (Cavendish, 2004);

[164]Stitt Mediation: A Practical Guide (Cavendish, 2004); and Boulle Mediation: principles, process, practice (Butterworths, 2001).

The parties are not bound by any positions taken during a mediation until a final agreement is reached and signed, at which point it becomes an enforceable contract. Mediation aims to achieve a "win-win" result for the parties to a dispute. Some of the proclaimed advantages of mediation include: speed, privacy, cost, flexibility, informality, party-control, and preservation of relationships.[165]

Several varieties of mediation have been developed. Shuttle mediation is a form of mediation where the mediator goes between the parties and assists them in reaching an agreement without meeting "face to face".[166] Transformative mediation does not seek resolution of the immediate problem, but rather, seeks the empowerment and mutual recognition of the parties involved.[167] Therapeutic mediation is an assessment and treatment approach that assists families in dealing with emotional issues in high conflict separation and divorce. The focus is on the parties themselves as opposed to the dispute.[168] In evaluative mediation the third party plays a more advisory role in assisting in the resolution of the disputes. The mediator allows the parties to present their factual and legal arguments. After evaluating both sides, he or she may then offer his or her own assessment of the dispute or put forward views about the merits of the case or particular issues between parties. This form of mediation mirrors conciliation.[169] Community mediation is mediation of a community issue. [170] Peer mediation is a process whereby young people, trained in the principles and skills of mediation, help disputants of their own age group to find solutions to a range of disputes and is often promoted in school settings for resolving disputes between peers.[171]

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[165] Law Reform Commission, ALTERNATIVE DISPUTE RESOLUTION CONSULTATION PAPER (LRC CP 50 - 2008) AT 46

[166] Liebmann Community and Neighbourhood Mediation (Cavendish Publishing Ltd. 1998) at 59.

[167] Bush & Folger The Promise of Mediation: Responding to Conflict Through Empowerment and Recognition (Jossey Bass 1994).

[168] Irving and Benjamin Therapeutic Family Mediation: Helping Families Resolve Conflict (Sage Publications, 2002);

[169] Levin, Propriety of Evaluative Mediation: Concerns about the Nature and Quality of an Evaluative Opinion (2000) 16 Ohio St J Disp Resol 267

[170] www.nclc.ie.

[171] Law Reform Commission, ALTERNATIVE DISPUTE RESOLUTION CONSULTATION PAPER (LRC CP 50 - 2008) at pp47

Facilitation and fact-finding are similar concepts to mediation and involve a neutral and independent third party assisting the parties in identifying problems and positions but they do not impose or recommend any solutions to the parties.[172]

Therefore mediation can be defined as a facilitative, consensual and confidential process, in which parties to the dispute select a neutral and independent third party to assist them in reaching a mutually acceptable negotiated agreement. The participation of the parties in the process is voluntary and the mediator plays no advisory or evaluative role in the outcome of the process, but may advise on or determine the process.[173]

3.1.2 Advantages of Mediation

3.1.2.1 Participation in Mediation is Voluntary and Nonbinding

Perhaps the most attractive feature of mediation is the fact that participation in the process is completely voluntary and nonbinding. Both the initial decision to try mediation and the decision to continue participation in the process are left entirely to the parties. They retain complete control of the process from beginning to end. If either party is dissatisfied at any time with any aspect of the proceeding, that person can withdraw. The only commitment involved is to give it a try.[174]

Furthermore, if the attempt at mediation fails, no alternative options have been foreclosed. Parties are free after mediation to engage in litigation or in other alternative methods of dispute resolution. Thus very little, if any, risk is involved. As one commentator put it, *"[i]f it is going to work, it is going to work with some rapidity. If it's not going to work, you don't lose a lot finding out."*[175]

The fact that the decision to participate in mediation is risk-free makes people more willing to try it. This gives mediation a significant advantage as compared to Arbitration. The single greatest obstacle to successful development of alternative dispute resolution techniques is an unwillingness, especially among lawyers, to try alternatives to litigation. The voluntary and

[172] Ibid at 48
[173] Ibid at 48
[174] Kenneth R. Feinberg, Mediation - A Preferred Method of Dispute Resolution 5-15-1989
[175] Hart, Alternative Dispute Resolution: Negotiation, Mediation and Minitrial, 37 FED'N INS. & CORP. COUNS. Q. 113, 121 (1987).

nonbinding nature of the mediation process helps overcome this unwillingness and therefore makes mediation especially attractive.[176]

3.1.2.2Mediation is Informal

Another advantageous feature of mediation is the informality of the process. The exchange of thoughts and ideas through mediation is not constrained by predetermined rules of evidence or other rules that structure the presentation of information and other aspects of the proceedings. In mediation, parties are free to set their own rules and procedures and usually choose to forgo much of the formality associated with other forms of dispute resolution.

Mediation is considerably less formal than arbitration, for example. Arbitration involves several formal stages and in many respects resembles a trial.[177]The parties make formal presentations of evidence and of arguments and sometimes submit briefs. Furthermore, ex parte communications between the arbitrator and the parties is prohibited. The mediator of a dispute, on the other hand, can communicate freely with each of the parties and can gather information in any form. While the parties to a mediation can choose to incorporate a formal exchange of information or arguments, the parties are free to forgo such formalities and all trappings of courtroom proceedings.

3.1.2.3 Flexibility and Adaptability

Another advantageous feature of mediation is its adaptability to a vast, wide-ranging variety of disputes. There is a long history of using mediation to address labor and employment disputes.[178]More recently, mediation has been applied successfully to resolve family disputes, community disputes, environmental disputes, landlord-tenant disputes, and even criminal matters. In my own particular experience as a mediator, cases involving commercial contractual disputes, construction defects, product liability claims arising out of government use of Agent Orange in Vietnam, antitrust claims, as well as allegations of larceny, embezzlement and RICO violations have all been satisfactorily resolved through mediation. Mediation can be tried in any kind of dispute. No law governs its availability or restricts its use. Moreover, it is suitable not

[176]Kenneth R. Feinberg, Mediation - A Preferred Method of Dispute Resolution 5-15-1989
[177] Cooley, Arbitration v. Mediation: Explaining the Differences, 69 JUDICATURE 263 (1986);
[178]M. BERNSTEIN, PRIVATE DISPUTE SETTLEMENT 315 (1968).

only for disputes between two parties but also for multiparty disputes and even in class actions.[179]

Mediation also can be employed at any stage in a dispute, whether or not litigation is already pending. The parties can schedule a mediation soon (even within days) after the dispute arises. On the other hand, the parties can enter mediation after litigation commences. If litigation has already commenced and proceeded into discovery, the parties can draw on discovery materials. If mediation is begun before the parties reach the discovery stage, they can choose to incorporate a "mini-discovery" schedule into the mediation process.[180]

This kind of procedural flexibility is one of mediation's foremost qualities and is one reason that mediation is adaptable to a wide variety of disputes. As one commentator has put it, *"a mediation can proceed along any path and according to any format depending upon the circumstances of the case and the predilections of the mediator."*[181]

Furthermore, as indicated previously, a mediator is not constrained by rules governing formation of a record or appropriate forms of communications with the parties. A mediator is free to adopt operating procedures that fit the precise needs of the parties and can change those procedures at any time during the process if necessary.[182]

Another reason that mediation is adaptable to a vast range of disputes is the ability of the parties to choose the mediator. The parties may, for example, seek out an individual who has had prior experience in resolving similar disputes. Or the parties in a dispute involving detailed technical issues may want to employ a mediator with technical expertise. This enables the parties to save the time they would otherwise spend on educating a factfinder, be it a judge, jury or arbitrator, about the technical aspects of their case.[183]

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[179] Susskind & Ozawa, Mediated Negotiation in the Public Sector, 27 AM. BEHAV'L SCIENTIST 255 (1986).
[180] Kenneth R. Feinberg, Mediation - A Preferred Method of Dispute Resolution 5-15-1989
[181] Hart, Alternative Dispute Resolution: Negotiation, Mediation and Minitrial, 37 FED'N INS. & CORP. COUNS. Q. 113, 111 (1987).
[182] Kenneth R. Feinberg, Mediation - A Preferred Method of Dispute Resolution 5-15-1989
[183] On the other hand, even in a case involving complex technical issues, the parties may not need a mediator with technical expertise. In mediation, it is the parties themselves who already have the requisite knowledge and make all the decisions. Unlike a judge or arbitrator, the mediator cannot impose a decision; thus, the mediator's technical understanding of the issues may not be crucial.

3.1.2.4Cost-Effectiveness

The cost-effectiveness of mediation as a dispute resolution device is another attractive feature of mediation. Mediation is cost-effective in several respects. First, mediation generally requires little time when compared to such means of dispute resolution as litigation and arbitration.[184]

By saving time, the parties to the dispute minimize the costs such as lost revenues and lost business opportunities-associated with diversion of staff and attention from ongoing business activities. Moreover, minimizing time means minimizing legal fees, which are often the most costly aspect of a business dispute.[185]

Mediation helps parties to minimize legal fees in other ways as well. Unlike both litigation and other alternative means of dispute resolution, mediation emphasizes participation by the parties themselves, rather than giving control over the process to lawyers. The parties may not even find it necessary to hire outside counsel. Indeed, my own experience in the mediation of business disputes indicates that direct dealings with the parties, as opposed to their attorneys, is more effective. Of course, the fee paid to the mediator, who is often a lawyer, may be substantial. This cost, however, is shared by the parties. Similarly, the parties can share other costs by, for example, mutually agreeing on experts to be consulted.[186]

Mediation also allows parties to avoid the emotional costs associated with such adversarial dispute resolution methods as litigation and arbitration. As one of my clients has commented publicly: "*You don't expend as much emotional energy as you do in court, and that's a huge cost savings.*"[187]

The nonadversarial, cooperative nature of mediation and its focus on the needs of the parties also help parties to avoid the costs associated with damage or destruction of their business relationship. Adversarial processes often increase antagonism among the parties and damage or

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[184] THE FIRST ANNUAL JUDICIAL CONFERENCE OF THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT (May 20, 1983),

[185] ROGERS & SALEM, A STUDENT'S GUIDE TO MEDIATION AND THE LAW 45 (1987) (reporting that researchers have found that, on average, some 98% of a party's civil litigation expenses are attorney's fees).

[186] Liepmann, Confidentiality in Environmental Mediation: Should Third Parties Have Access to the Process?, 14 ENVTL. AFF. 93, 103 (1986).

[187] Abramson, Kenneth Feinberg Prospers by Getting Firms to Resolve Disputes Out of Court, Wall St. J., Oct. 20, 1988, at B6, col. 1 (quoting William Von Glahn, an attorney for Williams Cos. in Tulsa, Okla.).

destroy the potential for a positive relationship. Mediation, on the other hand, seeks to encourage cooperation among the parties, not only with regard to the immediate dispute, but also with regard to structuring their relationship in the future. It thus leaves open the possibility of profitable future business among them. Some have suggested that going through the mediation process may even help parties avoid future disputes.[188]

Many commentators have compared the mediator to a catalyst, one who prompts action by others through identification of issues, clarification of facts, reason, and persuasion. In doing so, the mediator will help educate each party (at least those with a continuing relationship) not merely for the resolution of the present dispute, but for the resolution and even prevention of further disputes.[189] Mediation's ability to help parties preserve opportunities for future business and to avoid the cost of future disputes is further evidence of its cost-effectiveness.

Finally, there are some indications that agreements arrived at' through mediation have greater durability than those arrived at through adjudicatory proceedings, such as litigation or arbitration.[190]

Unlike a' court decree or arbitrator's award, the outcome of a mediation is one fashioned, and agreed to, by the parties themselves. No coercion is Thus, as one commentator has stated: "*By definition, a settlement reached through mediation is an efficient outcome; all the disputants and stakeholders prefer it to no agreement at all, or to any other feasible outcome.*" [191] In other words, mediation results in more stable agreements and, therefore, may enable parties to avoid costs associated with future noncompliance. In sum, mediation is cost-effective because the process itself is economical and because the result of a successful mediation is often not only a durable agreement but a more stable relationship between the parties as well.

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[188] Kenneth R. Feinberg, Mediation - A Preferred Method of Dispute Resolution 5-15-1989

[189] Henry & Lieberman, Mediation: The Sleeping Giant of Business Dispute Resolution, in THE MANAGER'S GUIDE TO RESOLVING LEGAL DISPUTES 59-60 (1985),

[190] Susskind & Weinstein, Toward a Theory of Environmental Dispute Resolution, 9 BRIT. COLUM. ENVTL. AFF. L. REV. 311, 312-13 (1980-81);

[191] L. SUSSKIND, L. BACOW & M. WHEELER, RESOLVING ENVIRONMENTAL DISPUTES 2 (1983)

3.2.2 Arbitration

Arbitration is a long-established procedure in which a dispute is submitted, by agreement of the parties, to one or more impartial and independent arbitrators who make a binding and enforceable decision on the dispute. The arbitrator is usually selected from a panel of available arbitrators or may have already been agreed upon in the arbitration clause. Once the matter has been submitted to the arbitrator, the arbitrator will contact all parties. A schedule will be set, which includes when all documents must be exchanged, when all witnesses must be disclosed, when arbitration briefs are to be submitted, and where and when the hearing will be conducted. A preliminary meeting will be held at arbitrator's request. This may be a joint session with all parties present or may be conducted by telephone conference. At the arbitration hearing, each of the respective parties is allowed to present evidence. After review of the evidence, the arbitrator will make an "arbitrator's award." After the arbitrator's award has been issued, the prevailing party often has the ability to have it issued as an enforceable court order.[192]

3.2.2.1 Advantages of Arbitration

Flexibility: The arbitrator is typically chosen by the parties or nominated by a trusted third party.

Specialist Knowledge: The arbitrator will usually have specialist knowledge of the field of activity.

Efficiency: The parties can decide on the location, language and to a great extent, the timing of the hearing to facilitate the parties and their witnesses.

Informality: The process is less formal than court.

Certainty: The arbitral award is binding and enforceable.

Finality: The arbitral award is final and cannot be appealed.

Speed: Expedition results in cost savings.

Privacy: Arbitral awards are private and do not become binding precedents.[193]

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[192]Stewart Arbitration: commentary and sources (FirstLaw 2003).

[193]The Chartered Institute of Arbitrators, Irish Branch website www.arbitration.ie.

There are now many variants of arbitration developing in other jurisdictions. These include

Baseball arbitration - In this arbitral process, each party submits a proposed monetary award to the arbitrator. At the conclusion of the hearing, the arbitrator is required to select one of the proposed awards, without modification. This approach, sometimes called "Last Offer Arbitration", severely limits the arbitrator's discretion.[194]

Bounded arbitration: In this process the parties agree privately without informing the arbitrator that the arbitrator's final award will be adjusted to a bounded range.[195]

Incentive arbitration: In this form of arbitration, the parties agree to a penalty if one of them rejects the arbitrator's decision, resorts to litigation, or fails to improve his position by some specified percentage. Penalties may include payment of attorneys' fees incurred in the litigation.[196]

High-low arbitration: This is an arbitration in which the parties agree in advance to the parameters within which the arbitrator may render his or her award.[197]

3.2.3 COMPARISON OFMEDIATION AND ARBITRATION

3.2.3.1 Decision control and process control by disputants

Decision control is determined by a large extent to which any one of the participants may unilaterally determine the results of the dispute. For instance, when a third-party decision maker alone may order a resolution to be imposed, the decision maker has total decision control. Control over the process refers to control over the development and collection of information that will constitute the starting point for resolving the dispute. Participants given authority to conduct an exploration and to plan the presentation of evidence may be said to exercise significant process control.

Mediation and arbitration both can offer the disputants a high process control, for disputants have plenty of opportunity to present information as they attempt to influence the perceptions of

[194] The International Institute for Conflict Prevention & Resolution "ADR Glossary" 2005 at www.cpradr.org; and Carey "Baseball arbitration" (2004) 11(6) CLP 138.
[195] The International Institute for Conflict Prevention & Resolution "ADR Glossary" 2005 at www.cpradr.org.
[196] ibid
[197] Arbitration Defined 2003 JAMS. Available at www.jamsadr.com.

the third party. However, while disputants have high decision control in mediation (they may decline any settlement proposed by the mediator) but low decision control in arbitration (they must accept an arbitration resolution).[198]

3.2.3.2 Cost and Time Savings

Cost is referred to the total costs involved in reaching a settlement.[199] Cost and time are interrelated or even directly. Speedy resolution generally leads to reduced overall expense.[200] Standard procedures are required to adhere in litigation which have been written and established over a long period of time. It is not unlikely to take months or years before there is a trial in court. From this perspective, arbitration can be faster because it has saved much time on waiting to have a trial in court.[201] A hearing can be arranged within a relatively short period of time in arbitration procedures: there is no fixed place of hearing as those in litigation cases. Arbitrator can also reduce the party-incurred costs in a great amount because of the ability to control the preparations by means of the variety of procedures open to him. This makes arbitration quicker than litigation.[202]

In a survey carried out in one thousand largest U.S. corporations, Zimmerman showed that nearly 90% of the respondents found that mediation saved money and time. A strong reason supported for using mediation was that it allowed the parties to control their own destinies as both sides must agree to the settlement. Fewer respondents reported that arbitration saved both time and money.[203]

The major reason behind this finding is one of two parties in dispute can control the time of arbitration, for instance, one party can call upon a lot of evidence. May it be expert evidence, witnesses etc, all these increase hearing time. The larger gang of witnesses, the longer the time of the hearing processes. It is, however, not the interest of arbitrator to stop or reduce the length of

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[198] Ross, W. H., & Conlon, D. E. (2000). Hybrid Forms of Third-Party Dispute Resolution: Theoretical Implications of Combining Mediation and Arbitration. The Academy of Management Review, 25(2), 416-427.
[199] Cheung, S. O., & Suen, H. C. H. (2002). A multi-attribute utility model for dispute resolution strategy selection. Construction Management and Economics, 20(7), 557.
[200] ibid
[201] Bladel, E. B. (1999) Abitration in the building industry in the Netherlands. Dispute Resolution Journal, May, 42-47.
[202] ibid
[203] Zimmerman, P. (1999). Who Uses Mediation and Arbitration, and Why. The CPA Journal, 69(6), 66.

hearing process. They are paid on the time spent on the whole process! Therefore, in case one side of the party is wealthier than their counterpart substantially, it is unwise for the poor side to initiate arbitration as a means of dispute resolution. Such problem, however, is relatively mild in mediation.[204]

3.2.3.3Enforceability

It is undeniable that the enforceability of mediation is not as good as arbitration. In the light of this, a dispute is only suitable to be resolved by mediation when the parties reach agreements on terms of settlement. The outcome of mediation should not be either a settlement or abandonment of the mediation. [205]Unavoidably, mediation may not be effective as it might not be able end up in a valid solution to the dispute. This is in sharp contrast to a court judgment or an arbitral award which could be immediately enforced by the law. Compared to mediation, arbitration awards are final and binding upon all the parties or stakeholders concerned.

3.2.3.4 Incorporation into Contractual Agreement

Survey conducted previously by Zimmerman 1999 found that disputants choose arbitration when it is extensively used in their own industry. For instance, arbitration is usually contractually required in the construction industry and broadly applied for dispute resolutions. Costly construction delays due to slow motion by courts can be avoided by using faster arbitration process instead.[206]Most arbitration arises from agreements that enclose an arbitration clause. Such clause can form a foundation for arbitration as a method in resolving future disputes. Each arbitration body provides the parties with a list of probable arbitrators and gives them the chance to select suitable candidates from the list.[207] Mediation is once in a blue moon entered contractually. The parties generally entered it any time prior to or even during litigation.[208]

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[204] Li Yi Man and ZHANG Peihua, A comparative study of arbitration and mediation to resolve disputes on sites in Hong Kong (2008)

[205] Suen, H.y C. H. (2000). A selection model of dispute resolution systems for construction professionals. Hong Kong : Thesis (Ph. D.), The University of Hong Kong.

[206] Zimmerman, P. (1999). Who Uses Mediation and Arbitration, and Why. The CPA Journal, 69(6), 66.

[207] Berman, P. J. (1994). Resolving business disputes through mediation and arbitration. The CPA Journal, 64(11), 74-77.

[208] Zimmerman, P. (1999). Who Uses Mediation and Arbitration, and Why. The CPA Journal, 69(6), 66.

3.2.3.5 Relationship conservation between disputants

A long-lasting, continuing relationship is one of the critical elements in the management of business. It is never in doubt that such kind of precious relations require effort and the commitment of both parties and stakeholders involved to maintain it.[209] While mediation can result in the settlement of a dispute in a cost-efficient manner, it can also conserve business relationships that might be annihilated through litigation. Mediators often try their best to negotiate on behalf of the two parties, aim at achieving a conclusion which can favor both parties. Participants seldom feel as though one side has won while the other has lost.

Discussions leading to settlement can often result in a better understanding of how the disagreement arose and how such disputes could be avoided in the future. With arbitration, the outcome is adjudicated and imposed by the arbitrators; disputants may not agree with the decision but have to accept ultimately unless they would like to kick off a legal procedure in court which can be even more expensive.[210]

3.2.3.6 Conformity with traditional culture

It is worthwhile to note that even before the advent of colonialism and establishment of the modern state in Africa and Uganda inclusive, pre-colonial societies in Africa had indigenous or their own ways and means of settling their disputes. These mechanisms included mediation and arbitration though not described then as such. These means were preferred because of their capacity to promote cohesion even after disruptive disputes. Most African culture were founded on the principle that everyone was his brother's keeper.[211]

No activities can depart from informal institution which includes cultures and norms in a society. In African countries, mediation can be attributed to the collective cultures where integrity, security and conformity are valued high. Uganda is not of exception. Indeed section 88 (1)[212] provides:

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[209] Cheung, S. O., & Suen, H. C. H. (2002). A multi-attribute utility model for dispute resolution strategy selection. Construction Management and Economics, 20(7), 557.

[210] Zimmerman, P. (1999). Who Uses Mediation and Arbitration, and Why. The CPA Journal, 69(6), 66.

[211] Chukwuemerie, A. (2006): The Internationalization of African Customary Law of Arbitration, African Journal.Com;

[212] The Land Act (Cap 227)

"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"

However for its advantages mediation has since been made a mandatory feature in the civil justice system[213] or is in some way incorporated into civil litigation.[214]

3.3 chapter conclusion

It should be noted that because of its adjudicatory nature Arbitration possesses some characteristics of the adversarial system of adjudication these include giving a binding decision, entertaining a lot of witnesses, and taking a lot of time. Because of the above Mediation is currently being more desired in the resolution of disputes because it is fast and besides parties control the outcomes and this later creates a win- win situation for the disputants.

[213] Job Bwire, Uganda: Mediation Fastens Dispensation of Justice, ALL AFRICA (June 20, 2013), http://allafrica.com/stories/201306201336.html; Bernard

[214] HERBERT SMITH FREEHILLS (March 2013), http://www.herbertsmithfreehills.com/-/media/Files/PDFs/2014/Guide-to-dispute-resolution-in-Africa-TEASER.pdf.

CHAPTER FOUR

THE INTERNATIONAL BEST PRACTICE OF ALTERNATIVE DISPUTE RESOLUTION (ADR)

4.0 Introduction

ADR has been adopted in many jurisdictions all over the world for its advantages like being cost effective, time saving and limited procedure to be followed. The idea of ADR is believed to have emanated from the US and then spread to other states, Uganda not being exceptional. This chapter will examine the practice of ADR in civilized countries in the use of ADR both in Africa for example Malawi and South Africa and outside Africa USA and United Kingdom.

4.1.1 United kingdom

ADR in Labour disputes in United Kingdom

In the years leading up to the 1979, which saw the election of Margaret Thatcher as the Prime minister of the United Kingdom, the pendulum of bargaining power swung heavily in favour of the labourers and trade unions.[215] This was evident in the in the coal miner strike of 1974, through which the public-sector unions managed to disrupt essential services.[216] With the election of the conservative government of Prime Minister Thatcher, a process of labour reform in the United Kingdom. Between 1980 and 1993 no less than six pieces of legislation were enacted by the Thatcher Government as corrective measures among others, to limit the excessive power held by the trade unions of old and the 'collective laissez-fair' developed by Sir Otto Kahn-Freund.[217]

During 1982 the Termination of Employment convention – C158 was put into force by the International Labour Organisation.[218] Even though the United Kingdom has not ratified the

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[215]168Labour Market Reform in the United Kingdom: From Thatcher to Blair John T. Addison University of South Carolina and University Birmingham (U.K.) W. Stanley Siebert University of Birmingham (U.K.) page 2.

[216] Ibid at page 3

[217]Van Niekerk "The Plurality of Legal Domains in South Africa: The States Historical Legislative Intrusion into the Field of Urban Popular Justice and Customary Law" in Scharf and Nina (eds) "The outer law: Non-State Ordering in South Africa" 2001, Juta, Lansdowne page 14.

[218]http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:11310:0::NO:11310:P11310_INSTRUMENT_ID:312303:NO

convention, their legislative development reflects their willingness to conform to the international standards set by the International Labour Organisation.[219]

Article 8 of the International Labour Organisation (ILO) convention C158 is of some significance for the purposes of this study and provides as follows:

Procedure of appeal against termination Article 8

"1. A worker who considers that his employment has been unjustifiably terminated shall be entitled to appeal against that termination to an impartial body, such as a court, labour tribunal, arbitration committee or arbitrator.

2. Where termination has been authorised by a competent authority the application of paragraph 1 of this Article may be varied according to national law and practice.

3. A worker may be deemed to have waived his right to appeal against the termination of his employment if he has not exercised that right within a reasonable period of time after termination."

During 1999 the United Kingdom enacted the Employment Rights Act of 1999, which aims at the regulation of disciplinary enquiries at the work place and dispute settlement procedures and during 2008, the Employment Act of 2008 was enacted which expands on the dispute resolution and disciplinary procedures.[220] In terms of the Employment rights Act of 1998, the employee has the right not to be unfairly dismissed.[221] The legislation carries on to state that there must be fair reason for the dismissal of an employee, based on capabilities, conduct, redundancy or any other substantively fair reason.[222]

The Employment Act of 2008 creates a framework for disciplinary procedures, both pre-and post-dismissal.[223] The statutorily prescribed procedure in disputes arising in matter where unfair dismissal is alleged by the employee is remarkably similar to the procedure in South Africa.

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[219]Here after referred to as the 'ILO'.
[220]International Labour Organisation - The Termination of Employment convention – C158.
[221]Section 94(1) of the Employment rights act
[222]Section 98 of the Employment rights act
[223]Employment Act of 2008 Schedule 2.

Disputes of Right in the United Kingdom, specifically disputes based on allegations of unfair dismissal are referred to the Advisory, Conciliation and Arbitration Service[224] by the Employment Tribunal upon receiving the ET1 from the employee alleging unfair dismissal.[225]

It is at this point that a conciliator will attempt to resolve the dispute and facilitate settlement between the disputing parties. However, the parties are under no statutory obligation to participate in the conciliation process.[226] Should conciliation fail at ACAS the dispute is referred back to the Employment Tribunal for hearing. The role of ACAS as part of the Alternative Dispute resolution process is essential. During 2014 the statutory early conciliation was introduced by ACAS, resulting in an estimated 20 % to 25 % being settled in terms of a "COT3 Settlement agreement". While post-claim conciliation will continue to play an important part in Employment Tribunal litigation, pre-claim conciliation has now been replaced by a statutory early conciliation scheme.[227] Should the conciliation officer at ACAS at any time during the conciliation process conclude that settlement is not possible or if settlement cannot be reached during the prescribed period an early conciliation certificate will be issued by ACAS.[228]

The role of the Employment Tribunal in alternative dispute resolution

Upon receipt of the acceptance of a claim, an employment judge shall review and consider all the documentation relating to the claim and if necessary request that further information be submitted by the parties. Based on the assessment of the provided documentation the Employment Tribunal shall confirm whether there is an arguable compliant established by the claimant.[229]

The employment judge conducting the consideration may make an order regarding the case management of the matter. Such and order may deal with the listing of a preliminary or final hearing, and may propose judicial mediation or other forms of dispute resolution.[230]

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[224]Hereafter referred to as 'ACAS'

[225]Employment Act of 2008 Schedule 2.

[226]Section 18(2) of the Employment Act of 2008.

[227]Brian Doyle, Arbitration 2015, 81(1), pages 20-24 Westlaw.

[228] ibid

[229] ibid

[230]Employment Tribunals Rules of Procedure 2013 r.26.

Alternatively the employment judge may order a preliminary hearing during which the following may be ordered:

(a) That a preliminary consideration of the claim with the parties be conducted in order for a case management order to be made;[231]

(b) determine any preliminary issue;[232]

(c) consider whether a claim or response, or any part, should be struck out;[233]

(d) make a deposit order;[234] and

(e) explore the possibility of settlement or ADR (including judicial mediation).[235]

The Employment Tribunal was originally designed as a 'people's court' where legal representation was not required. The Tribunals decision maker, having a legal background is assisted by two advisory members, one with experience as an employer and the other having experience in representing employees such as trade unionists.[236]

4.2 Kenya

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

Med-Arb

Med-Arbisacombination ofmediationandarbitration.Itisacombination ofmediation and arbitrationwhere thepartiesagree tomediatebutifthatfailstoachieveasettlementthe disputeis referredtoarbitration.Itisbesttohave differentpersonsmediate andarbitrate.Thisisbecause the personmediatingbecomes privytoconfidentialinformationduringthemediationprocess andmaybe biasedifhetransformshimselfintoanarbitrator.

[231] ibid
[232] ibid
[233] Employment Tribunals Rules of Procedure 2013 r.37.
[234] Employment Tribunals Rules of Procedure 2013 r.39
[235] Employment Tribunals Rules of Procedure 2013 r.53.
[236] Purcell, UK "Individual disputes at the workplace – alternative dispute resolution" http://www.eurofound.eu/observatories/eurwork/comparative-informatin /national-contributions/united-kingdom/uk-individual-disputes-at-the-workplace-alternative-dispute-resolution -2010-02-09

Med-Arbcanbesuccessfullybeemployedwherethepartiesarelookingforafinaland bindingdecisionbutwouldliketheopportunitytofirstdiscuss theissuesinvolvedinthedisputewith theotherpartywiththeunderstandingthatsomeor alloftheissuesmaybesettledpriortogoinginto thearbitrationprocess,withtheassistanceofatrainedandexperiencedmediator.[237]

Elsewhere,thecourtshaveheld,thesuccessof thehybridmediation/arbitrationprocessdepends on theefficacyoftheconsenttotheprocess enteredintobytheparties.[238]

Arb-med

Thisiswherepartiesstartwith arbitrationand thereafteropttoresolvethedisputethrough mediation. It is best to havedifferent persons mediateand arbitrate. This is because a person arbitratingmayhavemadeuphismindwhoisthesuccessfulparty andthusbebiasedduringthe mediationprocessifhe transformshimselfintoa mediator.ForinstanceintheChinesecase of ***Gao HaiYan&AnothervKeeneyeHoldingsLtd&Others*[2011]HKEC514and[2011]HKEC1626 ("Keeneye")**,theHongKongCourtofFirstInstancerefusedenforcementofanarbitralawardmadeinmai nlandChinaonpublicpolicygrounds.Thecourtheldthattheconductofthearbitrators turned mediatorsinthecasewould "causea fair-mindedobserverto apprehendarealriskofbias".[239]

Althoughthedecisionnottoenforcetheawardwaslaterreversed,theCourtofAppealdidnothavea problem with theobservation onrisksinvolvedbutwith theparticulardetailsofthatcasewherethe parties weredeemedtohavewaivedtheirrighttochooseanewthirdpartyinthematter.[240]

Adjudication

Adjudicationis definedundertheCIArb(K)AdjudicationRulesasthedisputesettlement mechanism whereanimpartial,third-party neutralperson knownasadjudicatormakesafair,rapid andinexpensivedecision onagiven disputearisingunderaconstructioncontract.Adjudicationisan informalprocess,operatingundervery tighttimescales(theadjudicatorissupposedtoreacha decisionwithin28daysortheperiodstatedin thecontract),flexible andinexpensiveprocess;which

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[237]Mediation-Arbitration(Med-Arb),
Available at http://www.constructiondisputes-cdrs.com/about%20MEDIATION-ARBITRATION.htm A
[238]EdnaSussman,DevelopinganEffectiveMed-Arb/Arb-MedProcess,*NYSBANewYorkDisputeResolutionLawyer*, Spring2009,Vol.2,No. 1, page73,
Availableathttp://www.sussmanadr.com/docs/Med%20arb%PDF.pdfA
[239]MarkGoodrich,Arb-med:idealsolutionordangerous heresy? Page1,March2012,Availableat http://www.whitecase.com/files/Publication/fb366225-8b08-421b-9777-a914587c9c0a/Presentation A
[240] ibid

allowsthepowerimbalancein relationshipstobedealtwith sothatweakersub-contractorshavea clearroutetodealwithmorepowerfulcontractors.Thedecisionoftheadjudicatorisbindingunless thematterisreferredtoarbitration orlitigation.Adjudicationisthuseffectivein simpleconstruction disputethatneedtobesettledwithinsomeverystricttimeschedules.

Thedemerits of adjudicationarethatitisnotsuitabletonon-constructiondisputes;thechoice ofthearbitratorisalsocrucial ashisdecisionisbindingandthatitdoesnotenhancerelationships betweentheparties.[241]

4.3 South Africa

SouthAfricaisembracingthepath of ADR becauseithas been shown clearlyfromthehappeningsattheformal courts thattheyarefailing the peoplein manyrespects suchasinordinate delays, unbearable costsof legal feesand so on . Awayout isto continue to explore thepossibilityof all alternativesthat willprovide and dispense justice to all.[242]

Legislative Support for Mediation in Labour disputes in south Africa

One of the main objectives of the Labour Relations Act (LRA),[243] as explained in the preamble of the LRA, is to 'provide simple procedures for the resolution of labour disputes through statutory conciliation, mediation and arbitration' through the Commission for Conciliation, Mediation and Arbitration (CCMA)[244] or through accredited independent ADR services. The central objective of the LRA is promoting healthy industrial relations.[245] The CCMA plays a pivotal role in the overall dispute resolution system and since its inception, has enjoyed a national settlement rate of 70% and greater.[246]

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[241] K. W. Chau, Insight intoresolving construction disputes bymediation/adjudication in Hong Kong, *Journal Of ProfessionalIssues InEngineeringEducationAndPractice*,ASCE/APRIL2007,pp143-147at Page143,Availableat http://www.academia.edu/240893/Insight_into_resolving_construction_disputes_by_mediation_A

[242] FeehilyR2008.ThedevelopmentofcommercialmediationinSouthAfricainviewoftheexperienceinEurope,NorthAmericaandAustralia.Fromhttp://uctscholar.uct.ac.za/PDF/91302_Feehily_R.pdf.

[243] Act 66 of 1995.

[244] As mentioned in part 2.3.1.5 of Chapter 2.

[245] Steenkamp A & Bosch C 'Labour dispute resolution under the 1995 LRA: Problems, pitfalls and potential' (2012) Acta Juridica 120.

[246] CCMA 'About us' available at http://www.ccma.org.za/ (

Prior to the promulgation of the LRA and CCMA,[247] labour disputes were settled through formal procedures carried out in forums such as the Industrial Court, which did not make provision for any options of ADR methods.[248] Other forums included conciliation boards[249] and industrial councils.[250] Their procedures were not user-friendly; they were 'lengthy, complex and pitted with technicalities'.[251] In 1995 the government undertook a 'fundamental and dramatic overhaul'[252] of the labour dispute resolution procedures.[253] As a result the legislature repealed and replaced the 1956 LRA with the current 1995 LRA, making room for the CCMA.[254]

The functions of the CCMA are inter alia that it 'must-

(a) attempt to resolve, through conciliation, any dispute referred to it in terms of this Act;

if a dispute that has been referred to it remains unresolved after conciliation, arbitrate the dispute if-

i. this Act requires arbitration and any party to the dispute has requested that the dispute be resolved through arbitration; or
ii. all the parties to a dispute in respect of which the Labour Court has jurisdiction consent to arbitration under the auspices of the Commission...' [255]

Generally, when a labour dispute is referred to the CCMA, a commissioner is appointed to attempt to resolve the matter through conciliation[256] within 30 days.[257] If the dispute is not

[247]Act 66 of 1995
[248] Paleker M'Mediation in South Africa: Here but not all there' in Alexander N Global Trends in Mediation 2ed(2006) 355.
[249] Benjamin P Dialogue: Assessing South Africa's Commission for Conciliation, Mediation and Arbitration (CCMA) (2013) 4.
[250] On average these conciliation boards resolved 20 per cent of matters referred to them and industrial councils 30 per cent. Paleker M 'Mediation in South Africa: Here but not all there' in Alexander N Global Trends in Mediation 2ed(2006) 355.
[251] Paleker M'Mediation in South Africa: Here but not all there' in Alexander N Global Trends in Mediation 2ed(2006) 355.
[252]Van Niekerk A 'Dispute Resolution, Practice and Procedure' in Cheadle H Current Labour Law (1995) 40.
[253] Paleker M'Mediation in South Africa: Here but not all there' in Alexander N Global Trends in Mediation 2ed(2006) 355.
[254] ibid
[255]Section 115(1)(a),(b) of the LRA
[256]Section 135(1) of the LRA.
[257]Parties may however agree extend the time period. Section 135(2) of the LRA.

resolved through conciliation, it proceeds to arbitration and the CCMA must appoint a different commissioner to arbitrate the dispute within 90 days.[258]

In view of the above, the objectives of labour dispute resolution through these alternative processes at the CCMA are:

'*speed, accessibility (in terms of geographical location, cost and relatively simple procedures) and legitimacy (which derives from representivity in the dispute resolution body, certainty and expertise).*'[259]

The essential purpose for these objectives is that neither employers nor employees[260] can afford delays and often neither of them possesses an intimate knowledge of usual civil litigation procedures. Further, the CCMA plays a vital role in maintaining a 'balance between the rights and interests of employers and employees while maintaining relatively healthy industrial relations with minimal resort to self-help'.[261]

In south Africa the Judiciary has Supported Conciliation and Arbitration in Labour Law for example In some instances the Labour Courts have highlighted the benefits and functions of the conciliation and arbitration processes at the CCMA. These are briefly discussed below.

In Kasipersad v Commission for Conciliation, Mediation & Arbitration & others,[262] the applicant sought inter alia to review and set aside the conciliation proceedings held at the CCMA as well as the certificate of outcome and the settlement agreement produced.[263] The court in this matter emphasised the benefit of confidentiality in the conciliation process.[264]

The court held that by nature, conciliation is private and confidential and that conciliators are not expected to keep a record of conciliation proceedings.[265] The court in this regard held that the

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[258]Section 136 of the LRA.
[259] Steenkamp A & Bosch C 'Labour dispute resolution under the 1995 LRA: Problems, pitfalls and potential' (2012) Acta Juridica 120.
[260] ibid
[261] ibid
[262](2003) 24 ILJ 178 (LC)
[263] In Kasipersad v Commission for Conciliation, Mediation & Arbitration & others (2003) 24 ILJ 178 (LC) 181.
[264] ibid
[265]ibid

approach to conciliation is underpinned by rule 7(3) and 7(4) of the Rules of the CCMA, which provides:

'(3) Conciliation proceedings are private and confidential and are conducted on a without prejudice basis so that no party may make reference to statements made at conciliation proceedings during any subsequent proceedings unless the parties have so agreed in writing.

(4) Neither the Commissioner dealing with the conciliation nor anybody else attending the conciliation hearing may be called as a witness during any subsequent proceedings to give evidence about what transpired during the conciliation process.'[266]

Arbitrators at the CCMA are obliged to conduct arbitrations in a manner which they deem appropriate to determine a labour dispute fairly and speedily and to deal with the substantial merits of the disputes 'with the minimum of legal formalities'.[267] In Naraindath v Commission for Conciliation, Mediation & Arbitration & Others,[268] the applicant, employed as a prison warder, was found in possession of prohibited drugs and was dismissed.[269] He referred the matter to the CCMA which was arbitrated by a commissioner, assigned for this purpose.[270] The commissioner held that the employee's dismissal was substantively fair but procedurally unfair, and compensation was awarded.[271] The applicant, however, was unhappy with the outcome of the arbitration and sought to review it in the Labour Court.[272]In the above matter, the court highlighted section 138 of LRA[273] and the objects of labour dispute resolution.[274] The court held that in this instance, the rights of the parties conferred by section 138 of the LRA are always conferred subject to the overriding discretion of the commissioner as to the appropriate form of

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[266] In Kasipersad v Commission for Conciliation, Mediation & Arbitration & others (2003) 24 ILJ 178 (LC) 182. 'rules 7.3 and 7.4, which, in the subsequent re-formulation of those rules, but in exactly the same terms, are now rules 16(1) and (2) thereof' as quoted in Hofmeyr v Network Healthcare Holdings (Pty) Ltd [2004] 3 BLLR 232 (LC) para 5.

[267] Section138 (1) of the LRA.

[268] (2000) 21 ILJ 1151 (LC).

[269] Naraindath v Commission for Conciliation, Mediation & Arbitration & Others (2000) 21 ILJ 1151 (LC) para 1.

[270] Ibid para 2

[271] ibid

[272] ibid

[273] Section 138, 'General provisions for arbitration proceeding

[274] Naraindath v Commission for Conciliation, Mediation & Arbitration & Others (2000) 21 ILJ 1151 (LC) para 26.

the proceedings.[275] The application was accordingly dismissed.[276] The court emphasised that the commissioner was justified in the manner in which he arbitrated the matter, in that his methods were sensible, practical and had expedited the proceedings.[277]

South African Labour Courts appear to support and promote the benefits and efficiency of ADR through the CCMA in resolution of labour disputes. In addition, based on the above discussions, ADR, particularly conciliation and arbitration, are the preferred methods of dispute resolution in the field of labour law. In this regard, the replacement of the Industrial Court by the CCMA through labour legislation evidences the shift from a highly adversarial model of dispute resolution to one based on promoting greater co-operation, industrial peace and social justice through ADR.[278]

ADR in Corporate/Commercial Law in South Africa

Mediation in corporate law is endorsed through its governance system[279] which encompasses the Code on Corporate Governance for South Africa 2009 ('the Code'), the King Report on Governance for South Africa 2009 ('the King III Report') and the Companies Act 71 of 2008 ('the new Companies Act').[280]The sections below discuss how this management system has been implemented in commercial practice.

The Code on Corporate Governance

The Code[281] has been updated on 1 March 2010 by the Institute of Directors in Southern Africa and now makes provision for the practice of mediation in commercial disputes. The Code, as well as the King III Report, applies to all entities incorporated in and resident in South Africa, regardless of the manner and form of incorporation or establishment.[282] Compliance with the

[275] Ibid para 74
[276] ibid
[277] ibid
[278] CCMA 'About us' available at http://www.ccma.org.za/
[279] Cassim FHI (ed), Cassim MF & Cassim R Contemporary Company Law 2ed (2012) 473.
[280] The new Companies Act came into effect on 1 May 2011 after substantial amendment to the old Companies Act 61 of 1973.
[281] Also known as 'the King Code of Governance for South Africa 2009'. The Code on Corporate Governance is a system by which companies are directed and controlled. The Code regulates directors and their conduct not only with the aim of complying with the minimum statutory standard, but also to ensure that the best available practice relevant to the company is used appropriately in various circumstances.
[282] Paragraph 17 of the King III Report.

provisions of these documents is mandatory for all companies listed on the Johannesburg Stock Exchange (JSE); for all other entities there is no statutory obligation to comply.[283] Even though compliance with these documents may be voluntary to other entities, they are highly recommended and have considerable persuasive value.[284]

The Code places a duty upon directors and executives to ensure that disputes are resolved effectively, expeditiously and efficiently.[285] Furthermore, the interests, needs and rights of the disputants must be taken into account and the resolution of the dispute should be cost effective and not drain the finances and resources of the company.[286] Paragraph 84 of the Code goes on to support and emphasize the necessity of mediation in resolving disputes by stating that:

'[e]xternal disputes may be referred to arbitration or a court. However these are not always the appropriate or most effective means of resolving such disputes. Mediation is often more appropriate where interests of the disputing parties need to be addressed and where commercial relationships need to be preserved and even enhanced'.

The King III Report

The King III Report[287] sets out vital corporate governance principles and must be read together with the Code, which sets out the best practice recommendations on how each principle is to be carried out.[288]The King III Report was impelled by changes and reforms implemented by the new Companies Act as well as by the changes in international governance trends.[289]

According to Chapter 8, paragraph 39 of the King III Report, ADR is the most effective and efficient method of addressing the costly and time-consuming features associated with more formal litigation procedures. Further, according to the King III Report, consideration must be

[283]Cassim FHI (ed), Cassim MF &Cassim R Contemporary Company Law 2ed (2012) 474.
[284] ibid
[285]Paragraph 81 of the Code of Corporate Governance.
[286] ibid
[287] The King Committee was established in South Africa in 1992 by the Institute of Directors in Southern Africa with the objective of making recommendations on the effective implementation of corporate governance in the country. The King III Report must be read together with the Code and was introduced due to the corporate law reform in South Africa (which also gave rise to the new Companies Act of 2008).
[288]Cassim FHI (ed), Cassim MF &Cassim R Contemporary Company Law 2ed (2012) 474.
[289] ibid

given to the preservation of business relationships as well as to the cost of dispute resolution, which must not drain the finances and resources of the company.[290]

The successful resolution of disputes entails choosing a particular dispute resolution method that best serves the interests of the company.[291] The King III Report suggests that mediation may be a more appropriate mechanism to resolve disputes where interests of the disputing parties need to be addressed and where commercial relationships need to be preserved and even enhanced.[292] The King III Report defines 'mediation' as 'a process where parties in dispute involve the services of an acceptable, impartial and neutral third party to assist them in negotiating a resolution to their dispute, by way of a settlement agreement'.[293]

The King III Report states that there are no prescribed rules that dictate which ADR method to use under a particular set of circumstances.[294] However, the King III Report does make reference to six factors that should be taken into account during the selection process, together with a brief description for each of them.[295] These factors and descriptions are:

1. The time available to resolve the dispute.

'Formal proceedings, and in particular court proceedings, often entail procedures lasting many years. By contrast, alternative dispute resolution (ADR) methods, and particularly mediation, can be concluded within a limited period of time, sometimes within a day'.[296]

2. Whether principle and precedent is necessary.

In circumstance where the issue in dispute relates to a matter of principle and where companies require a resolution that will be binding on similar disputes in future, ADR may not be suitable.[297] In these circumstances court proceedings may be more appropriate.[298]

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[290] Chapter 8, paragraph 38 of the King III Report.
[291] Cassim FHI ibid at 501
[292] Chapter 8, paragraph 43 of the King III Report.
[293] Chapter 8, paragraph 50 of the King III Report.
[294] Chapter 8, paragraph 53 of the King III Report.
[295] Chapter 8, paragraph 53.1 to 53.6 of the King III Report.
[296] Chapter 8, paragraph 53.1 of the King III Report
[297] Chapter 8, paragraph 53.2 of the King III Report.
[298] ibid

3. The business relationships involved in the dispute

'Litigation and processes involving an outcome imposed on both parties can destroy business relationships. By contrast mediation, where the process is designed to produce a solution most satisfactory to both parties (a win-win resolution), relationships may be preserved. Where relationships and particularly continuing business relationships are concerned, therefore, mediation or conciliation may be preferable.'[299]

4. Whether expert recommendation is required.

'Where the parties wish to negotiate a settlement to their dispute but lack the technical or other expertise necessary to devise a solution, a recommendation from an expert who has assisted the parties in their negotiations may be appropriate. This process would be termed conciliation.' [300]

5. The Confidentiality of the dispute.

The proceedings of any private dispute resolution process may be conducted in confidence.[301] The new Companies Act also makes provision for alternative dispute resolution processes to be conducted in private.[302]

6. The rights and interests of the parties in dispute.

'The adjudicative process involves the decision-maker imposing a resolution of the dispute on the parties after having considered the past conduct of the parties in relation to the legal principles and rights applicable to the dispute. This inevitably results in a narrow range of possible outcomes based on fundamental considerations of right and wrong. By contrast, mediation and conciliation allow the parties, in fashioning a settlement of their dispute, to consider their respective needs and interests, both current and future. Accordingly, where creative and forward-looking solutions are required in relation to a particular dispute and

[299]Chapter 8, paragraph 53.3 of the King III Report.
[300]Chapter 8, paragraph 53.4 of the King III Report.
[301]Chapter 8, paragraph 53.5 of the King III Report.
[302]Chapter 8, paragraph 53.5 of the King III Report.

particularly where the dispute involves a continuing relationship between the parties, mediation and conciliation are to be preferred...'[303]

It appears that the King III Report in particular favours mediation as the ADR method of choice in resolving corporate disputes, as four out the six factors listed above encourage the use of mediation. In this regard, mediation would be better suited to these disputes as the turnaround time in the resolution of a matter is short. The process of mediation would therefore save valuable business time and money. In addition, business relationships would be better preserved and the risk of destroying future business relationships would be considerably lessened through the use of mediation and amicable benefits of settlement. As previously mentioned, mediation proceedings are conducted privately; therefore the goodwill and private affairs of the disputing companies would be protected and safe-guarded.[304]

Businesses in this regard have the freedom to openly discuss and negotiate their affairs without fear of corporate defamation or having any statements made during the negotiation process used against them outside of the mediation arena. Through mediation a wide range of possible solutions to the dispute would be available to the parties. Through settlement discussions a creative and best-suited solution can be uniquely crafted to satisfy the specific needs of the businesses, as opposed to the narrow range of fixed solutions available through the adjudicative process of civil litigation.

On the other hand, in cases where a binding solution of a dispute is necessary for setting precedent for similar future corporate disputes, litigation may be more suitable. Therefore, understandably mediation may not be suitable to all corporate disputes. However, the use and implementation of such a convenient ADR tool will generally assist in considerably alleviating the burden of corporate dispute resolution.

According to paragraph 10 of the King III Report, entitled 'Emerging governance trends incorporated in the King III Report: Alternative dispute resolution (ADR), the following is said about mediation and ADR. Mediation is being used as a dispute resolution mechanism as well as

[303]Chapter 8, paragraph 53.6 of the King III Report.
[304]factor number 5 of the King III Report

a management tool in the field of commercial law.[305] Globally, ADR is not a reflection on a judicial system of a country, but has become an important element of good governance.[306] Paragraph 10 goes on to state that directors should preserve their business relationships and exercise their duty of care, by endeavouring to resolve disputes expeditiously, efficiently and effectively.[307] This paragraph also states that mediation enables novel solutions, which a court may not achieve, as it is constrained to enforce legal rights and obligations. Furthermore, in mediation, the parties' needs are considered, rather than their rights and obligations.[308] It is in this context that the Institute of Directors in South Africa advocates administered mediation and, if it fails, expedited arbitration.[309]

The New Companies Act

The old South African Companies Act 61 of 1973 (the 'old Companies Act'),t hardly any referred to mediation nor ADR as a method for resolving corporate disputes.[310] The new Companies Act, however, makes provision for and supports the growing concept of mediation (and ADR). The new Companies Act recognizes the necessity of ADR and dedicates a portion of the Act to ADR (which includes the process of mediation).[311] Moreover, the long title of the new Companies Act expressly provides that the purpose of the Act is to inter alia establish a Companies Tribunal in order to facilitate ADR processes.[312]

Section 156 of the new Companies Act provides a short list of options which disputants may choose from in order to resolve their corporate disputes.[313] The first option in this list is aimed at addressing a dispute through the process of ADR (mediation, conciliation or arbitration) among

[305] Paragraph 10 of the King III Report.
[306] ibid
[307] ibid
[308] ibd
[309] ibid
[310] Section 72 of the old Companies Act provided that companies had the capacity to refer any existing or future dispute between themselves and any other company or person to arbitration. However, this provision became irrelevant in the new Companies Act, as section 19(1)(b) now provides companies with the same powers and legal capacity as a natural person.
[311] Part C of the Companies Act 71 of 2008.
[312] The long title of the new Companies Act provides: "To provide for the incorporation, registration, organisation and management of companies,...to establish a Companies Tribunal to facilitate alternative dispute resolution and to review decisions of the Commission...
[313] Section 156:'Alternative procedures for addressing complaints or securing rights.

the options of conventional civil litigation and grievance procedures according to provisions in the Act. [314]

Further, a portion of the new Companies Act is now reserved for 'Voluntary Resolution of Disputes' under Part C of the Act, comprising a lengthy section 166, entitled 'Alternative Dispute Resolution', and section 167, entitled 'Dispute Resolution may Result in Consent Order'. Section 166(1) provides that as an alternative to applying for relief to court, a disputant is entitled to apply for relief by referring his or her matter for resolution through the process of mediation, conciliation or arbitration through the Companies Tribunal or an accredited entity or any other person. If the Companies Tribunal or an accredited entity[315]facilitating the mediation, conciliation or arbitration concludes that either party to the dispute is not participating in good faith or that there is no reasonable probability of the parties resolving their dispute through that particular process, the facilitator must issue a certificate stating that the process has failed.[316] The option of court proceedings to resolve the parties' dispute may then be pursued.

Finally, section 167 provides that if the dispute in question has been resolved, the facilitator to the dispute may record the resolution in the form of an order and if the parties consent to that order, may submit it to court to be confirmed as a consent order. The courts after hearing an application for the consent order may make the order as agreed and proposed in the application or indicate changes therein before making it an order of the court or refuse to make the order completely. The consent order may include an award of damages and the benefit of confidentiality still applies during the court hearing as it does during the initial mediation or ADR process. It is evident that the process and outcomes of mediation is as legitimate as a complete court proceeding would have been and is thus an equally valid method for resolving commercial disputes.

The above provisions of the new Companies Act, the requirements of the Code of Corporate Governance together with the King III Report (and its paragraph 10), as well as the compelling

[314] ADR for purposes of the Act means conciliation, mediation or arbitration, and is dealt with in Part C of Chapter 7 of the Act.
[315]Section 166(2) does not mention 'any other person' as per section 166(1) of the Companies Act, 2008.
[316]Section 166 (2) of the Companies Act 71 of 2008.

advantages of saving costs and time, will make it challenging in future for any disputant to resist seeking mediation to resolve their disputes in the corporate arena.[317]

The rationale behind the legislative and corporate bodies incorporating mediation into the above corporate statutes is premised on the fact that traditional litigation in commercial disputes have destroyed business relationships and wasted financial resources as well as valuable time.[318] Thus, by incorporating ADR processes into the corporate arena, the focus now shifts to resolving disputes in a way that would preserve corporate relationships, such as those with suppliers, competitors, employee bodies or customers.[319] Furthermore, ADR techniques, such as mediation, provide the benefit of innovative, quicker and less expensive processes of resolving commercial disputes.[320] Moreover these ADR techniques preserve confidentiality, as the dispute resolution process does not take place in an open forum such as a court room.

Litigation focuses solely on legal issues, while mediation has the flexibility of considering the commercial and even emotional aspects of the disputants as well as their needs and interests. By resolving past differences, parties are able to take the opportunity to map their future relationships in a fair way and hopefully arrive at a win-win solution. This could be based on improved, joint profitability or some other arrangement from which both parties would benefit.[321] Thus finally the ADR techniques applied in commercial law improves the prospects of a better outcome for organizations and their shareholders.[322]

[317] Brand J, Steadman F & Todd C Commercial Mediation: A User's Guide to Court-referred and Voluntary Mediation in South Africa (2012) 8.
[318] King M 'Civil litigation being replaced by cost-effective dispute resolution' 2008 Occupational Risk Management 19.
[319] ibid
[320] ibid
[321] King M 'Corporate governance and the Companies Act' 2009 Management Today 17.
[322] ibid

CHAPTER FIVE

REFORMS AND RECOMMENDATIONS THAT CAN BE ADOPTED IN THE UGANDAN LEGAL SYSTEM TO IMPROVE THE USE OF ADR IN THE LEGAL SYSTEM

5.0 Introduction

ADR recently has taken center stage as the preferred mode of resolving disputes, especially those of civil nature. This is regardless of the fact that law schools in Uganda still give a major part of the training of the law to adversarial methods that center on ligation. Never the less there are a number of legislative provisions on ADR

5.1 The involvement of Non-Governmental Organization in ADR

In South Africa theNon-governmentalorganizations (NGOs)are veryproactive inthequestforand aggressivenessfor the use of alternative dispute resolution.[323] According to Ok haredia, "prior to and during the transitioningovernment, many NGOs, financed by numerous donors, undertookADReffortsforavarietyofpurposesthroughoutSouthAfrica."NGOshavebeenverypromin entinthe areas oflabourdisputesresolutionusing the alternative informaljustice system. Theyarepromotingthisinformaljustice system becauseit hasbeen noted to offer"a varietyof flexible mechanismsbest to match thedispute,asopposed toa rigid adversarial trial process, informalityandnotboundby strict procedural rules,timeand cost effectiveness, focus on interests and restructuringofrelationships".[324]

OneoftheoutcomesoftheNGOseffortsistheestablishmentoftheCCMAtoresolvelabourdisputeina workplace environment[325]. Theestablishmentof The **Commissionfor Conciliation,Mediation and Arbitration** (CCMA) wasasa result of lessonslearnt and emulated fromother jurisdictionsthat haveputinplace similarmechanismsto dispensejustice in an informal way. Since inceptionof the CCMA, it hasbeen seen tobe playinga veryuseful rolein resolving labourdisputeswhich hitherto would haveledtoprotractedindustrialactions and

[323] ComaroffJ,ComaroffJ2007.*PopularjusticeinthenewSouthAfrica:policingtheboundariesoffreedom*.NewYork,USA:Russell SageFoundation.

[324] TembaFM2014.ADRinsettlementoflabourdisputeinTanzania,SouthAfrica,andAustralia:acomparativesurvey.*Open UniversityLawJournal2013*,4(1):115-139.

[325] Musukubili FZ2013.Labourdisputeresolution system:compliancewithinternationallabourstandards andacomparisonwiththesouth african.Fromhttp://digital.unam.na/handle/11070.1/1891.

strikes.[326]Undoubtedly, informaldispute resolutionhasproven veryreliable,accessible to all anddispensingjustice timeously in South Africa. This isworking verywellin South Africaparticularly in employmentdisputes. Theestablishment ofthe CCMAhashelpedto reduce the numberof casesthatwouldhave been referred to theformal courts. Theissues surrounding legal representation should not beinvoked to undermine the good workbeingdone by the CCMA. Consequently, the rules as theyare should be allowedto apply. The poor and the vulnerable shouldbe assisted rather than confused with less importantissueoflegalrepresentationatthe CCMA.The conciliation andmediation rolesbeingplayedbythe CCMA meettherequirementand standard inherentinthe conceptofruleoflaw. If the idea of involving NGOs in Dispute resolution will improve dispute resolution in Uganda.

5.2 Adopt the system of appointing "Experts"

Certaincontracts,particularlythoseinvolvingcomplexandlongtermconstruction projects,adoptthesystemofappointing'Experts"fortheresolutionofdisputesthat mayarisethereunder.Suchexpertsaregenerally constructionorcivilengineerswho areregularly availableattheconstructionsiteandareexpectedtoresolvedisputes betweenthepartieswithinareasonabletime."Experts"canalsobeappointedforthe resolutionofdisputesarisingunderotherkindsofcontracts.The qualificationsand experience ofanExpertdependsonthenatureofcontractandthedisputethathas arisen there under. The Expertsareexpectedto be impartial.Theyundertaketo interprettheprovisionsof thecontractand/orexplaintheirpracticalapplication.Expert Assessment has worked for countries World over in resolving disputes in the construction sector hence reducing case backlog.

5.3 The adaptation of Mediation and ADR in corporation disputes

Corporations or companies are the major affected parties when it comes to the lengthy and costly adversarial system of resolving disputes these delays and heavy costs have scared away investors. However ADR mechanisms should be incorporated in the resolution of disputes in the corporations by empowering company directors to resolve disputes that arise amongst the employees. Directors should preserve their business relationships and exercise their duty of care,

[326] Steenkamp A, Bosch C 2012. Labour dispute resolution under the 1995 LRA: problems, pitfalls and potential. Fromhttp://reference.sabinet.co.za/sa_epublication_article/ju_jur_2012_a8.

by endeavouring to resolve disputes expeditiously, efficiently and effectively. In south Africa Mediation has since been incorporated in corporation management According to Chapter 8, paragraph 39 of the King III Report, ADR is the most effective and efficient method of addressing the costly and time-consuming features associated with more formal litigation procedures. Further, according to the King III Report, consideration must be given to the preservation of business relationships as well as to the cost of dispute resolution, which must not drain the finances and resources of the company.[327]It is important for Uganda to make legislations that provide for the internal resolution of disputes by companies to protect company secretes. The rationale behind the legislative and corporate bodies incorporating mediation into the above corporate statutes is premised on the fact that traditional litigation in commercial disputes have destroyed business relationships and wasted financial resources as well as valuable time.[328] Thus, by incorporating ADR processes into the corporate arena, the focus now shifts to resolving disputes in a way that would preserve corporate relationships, such as those with suppliers, competitors, employee bodies or customers.[329] Furthermore, ADR techniques, such as mediation, provide the benefit of innovative, quicker and less expensive processes of resolving commercial disputes.[330] Moreover these ADR techniques preserve confidentiality, as the dispute resolution process does not take place in an open forum such as a court room.

5.4 Adoption of the community ADR model is important

The adoption of the community ADR model is a major recommendation. This model represents a combination of a high degree of regulation and/or government support with a decentralized approach. In the community ADR model, ADR is widely accessible through community-based ADR organizations and other community organizations like refugee and women's shelters, government-sponsored legal centers, legal aid and the police. ADR practitioners include volunteers, employees of community ADR organizations and freelance mediators and arbitrators engaged on a contract basis. Typically disputants do not pay for the service and where ADR

[327] Chapter 8, paragraph 38 of the King III Report.
[328] King M 'Civil litigation being replaced by cost-effective dispute resolution' 2008 Occupational Risk Management 19.
[329] ibid
[330] ibid

services are not volunteered, the costs are carried by the government. This will significantly improve ADR uptake in disputes settlement.

5.5 Training and Research

Many arbitrators and mediators should continually train in the ADRs. This will equip them with the necessary skills needed in conflict resolution using ADR. On that note, there is also a need for academic institutions such as Universities and the Centre for Arbitration and Dispute Resolution (CADR) to introduce and encourage part time courses for individuals on ADR. Training in communication skills to the local government administrators is crucial as it is one of the ingredients for effective dispute resolution. This could be done through seminars and post graduate diploma. Informal training is also important; Mediation as a key process and strategy in ADR has been explored in-depth and it was determined that there was need for extensive and more inclusive training on mediation and arbitration and other ADR forms for effective community ADR.

5.6 Introduction of Code of Ethics for Mediators

In Uganda there is no code of conduct for mediators. As such; mediators have the leeway to engage in unprofessional conduct. It is thus recommended that a code of ethics for mediators be enacted to regulate the conduct of arbitrators and mediators to promote ethics and professionalism in the practices of arbitration and mediation in Uganda.

5.7 Introduction of Computer Courses for Judicial Officers

It is recommended that it be made compulsory for all Judges, High Court Registrars, Magistrates, Local Court Justices and other judicial officers to attend computer and internet courses to be provided by the judiciary or co-operating partners to enable them to become computer and cyber-literate. This would facilitate their access to the vast resources provided by the internet and enable them to learn from latest legal developments in other jurisdictions. Ultimately, their performance in justice delivery would be enhanced.

5.8 Improvement of Conditions of Service for Judicial Officers

We have learnt that inadequate funding undermines the independence of the judiciary. Therefore, it is imperative for government, despite its limited resources, to ensure that the judiciary is

always provided with sufficient financial resources. It goes without saying that Judges and other judicial officers who are well paid and enjoy good and competitive conditions of service would be less prone to temptations and corrupt practices. In this regard, it is recommended that conditions of service of all judicial officers be improved to comparefavorably with those obtaining in the region. Improved conditions of service in the judiciary would without doubt, attract more qualified people to the bench.

5.8 Conclusion

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

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

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