ALTERNATIVE DISPUTE RESOLUTION (ADR) IN THE ADMINISTRATION OF JUSTICE

A STUDY IN THE CHIEF MAGISTRATE'S COURT OF

MENGO

A RESEARCH PAPER SUBMITED BY NZWEBE PHILIP REGISTRATION NUMBER LLB/17293/71/DU IN PARTIAL FUILFILMENT OF THE REQUIREMENT

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DEDICATION

I dedicate this research paper to my dear wife MRS **KASOBA KYAKIMWA JULIDA NZWEBE** and my two children **MUMBERE FELIX** and **MUHINDO FELISTA ASIIMWE VALANTINE** who dearly missed my love and care during the time of my study.

DECLARATION

I NZWEBE PHILIP declare that this is my original piece of work and neither whole nor part of it has been produced and submitted to any institution of learning as thesis, dissertation or research paper.

SIGNED RESEARCHER .....

NZWEBE PHILIP

DATE ..... 15th Day of July 2011 .....

I affirm the foregoing declaration and submitted with my consent

SIGNED SUPERVISOR .....

EMMANUEL FEMI GBENGA AJAYI

DATE ..... 1st July, 2011 .....

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1. The Almighty God for the gift of life and wisdom given to me that has enabled me to pursue this course.
2. I acknowledge the financial, material and words of encouragement rendered to me by my parents **BLAZIO TIBAIJUKA and KYAMANYWA CHRISTINE ITHUNGU** who i thank without end, they have been by my side since my first day on earth to date rendering and providing all necessaries for my life.
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CHAPTER ONE

1.1 INTRODUCTION

In the last decade, ADR has taken a heightened significance in legal and judicial practice within the common law jurisdictions. Originally starting as a stand-alone mechanism largely operating outside the court system there is now emerging ADR, which can be referred to as Court based ADR[1]

The first driving factor for change came 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.[2]

Article 126 (2) (b)[3] provides that justice shall not be delayed while clause 2(d) provides that in the adjudication of cases both civil and of criminal nature, courts shall encourage reconciliation between parties. Section 160 of the Magistrates Courts Act is to the effect that, in criminal cases, a magistrate's court may promote reconciliation and encourage and facilitate settlement in an amicable way. These provisions of the law have been depended on as a base for introduction and application of Alternative Dispute Resolution herein after referred to as ADR.

The bible in the book of St Luke[4] provides that if some one brings a lawsuit against you and takes you to court, do your best to settle the dispute with them before you get to court. If you don't, they will drag you before a judge who will hand you over to the police and you will be put to jail. This is seen as an advocating verse for ADR in the Bible.

The ways in which disputes of civil nature in courts of law, between employers and employees are resolved have changed dramatically over the past few decades. With the rapid advance of globalisation and the competition for goods and services generated in the global marketplace, courts have sought an alternative to dispute resolution while

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[1] Justice Geoffrey Kiryabwire – court based ADR a paper presented at LDC training of trainers seminar at Nile Resort Hotel Jinja 11TH JUNE 2004
[2] ibidi
[3] 1995 Uganda constitution
[4] Chapter 12:58

many countries have realised that improving their labour relations environment and enhancing the prospect of industrial peace is essential for successful economic endeavour and for attracting and retaining foreign and domestic investments.

The effective management of conflict and the resolution of disputes have, as a consequence, assumed increasing importance.[5] In countries where labour laws have been devised or developed in response to these changes, drafters have in many instances been influenced by the significant interest in and growth of the alternative dispute resolution (ADR) movement.

While collective bargaining, conciliation, mediation and arbitration remain the principal modes of dispute settlement, new and innovative tools, techniques and approaches to conflict management and dispute resolution have been introduced in many countries' judicial systems and workplaces. The future of dispute resolution systems is being debated, and traditional structures and approaches are continuously being reassessed. Greater emphasis is now being placed on cases of civil nature especially commercial that involve debts, contracts, prevention of labour disputes and the design of systems that will facilitate speedier and less costly resolution of labour disputes.

1.2 Aims and Objectives of ADR

The project aims at explaining what Alternate Dispute Resolution is and how it evolved. It also aims at looking at and analyzing the various skills of advocacy and ADR skills and the common ground between them. An objective of this project includes analyzing the need for ADR methods, looking at ADR techniques and putting forth the advantages of ADR. Further, this research aims at providing an insight into the ADR and the variety of its processes that are used in settling disputes in Uganda and number of countries around the world so that judicial officers and policymakers might understand how these processes could be applied in their own departments to the best advantage of reducing case backlog, the social partners and their industrial relation.

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

A brief background to the development of ADR and a brief discussion of its application in a variety of settings

A working definition of ADR is "*a set of practices and techniques that aim* [6] *to permit legal disputes to be resolved outside the courts for the benefit of all disputants;*[7] *to reduce the cost of conventional litigation and the delays to which it is ordinarily subject; or*[8] *to prevent legal disputes that would otherwise likely be brought in courts.*"[9]

Even though there are various definitions, ADR maintains one fundamental premise: "*It is worthwhile both to reduce the cost of resolving disputes, however this can be accomplished, and to improve the quality of the final outcome.*" Alternative dispute resolution has four basic goals[10]

- To relieve court congestion, as well as undue cost and delay
- To enhance community involvement in the dispute resolution process
- To facilitate access to justice
- To provide more effective dispute resolution

The following principles present the benefits, which are gained by the parties through the use of alternative dispute resolution: save the cost of litigation, avoid the time, irritation, and emotion of a trial, afford the recipient immediate use of money, allow the payer to avoid the possibility of a larger verdict, eliminate all uncertainties about the final outcome of a trial and to produce the best result: a settlement with which no one loses or wins. Both win some and lose some.

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[6] **Harry T. Edwards, "Alternate Dispute Resolution- Panacea or Anathema?" 1986 *Harvard Law Review* 668.**

[7] **James F. Henry, "Some Reflections on ADR" 2000 *University of Missouri Journal of Dispute Resolution* 63**

[8] **Justice Jitendra N. Bhatt, "A Round Table Justice Through Lok Adalat (People's Court)- a Vibrant ADR in India" (2002)1 *SCC Journal* 11.**

[9] **Suzanne J. Schmitz, "Giving Meaning to the Second Generation of ADR Education: Attorneys' Duty to Learn about ADR and what they must learn?" 1999 *University of Missouri Journal of Dispute Resolution* 29**

[10] **Suzanne J. Schmitz, "What Should We Teach in ADR Courses?: Concepts and Skills for Lawyers Representing Clients in Mediation" 2001 *Harvard Negotiation Law Review* 189**

Alternative dispute resolution attempts to retain the best about the legal system while avoiding the impediments to justice and efficiency. The forums created by ADR provide a means for parties to air their problems and solve them simply and cheaply.

Alternative dispute resolution is premised on the hypotheses that a lack of trust prevents the resolution of disputes and "if the parties could overcome this distrust, they could voluntarily reach a settlement as just as the result a court would impose." Trust is essential in most ADR procedures. Also, ADR is premised on the belief that the results from ADR are superior to litigation itself because the solution is not limited by legal rules and direct involvement by the client can minimize difficulties arising from the self-interest of lawyers.[11]

The process of ADR can be used to settle existing disputes or to prevent disputes from developing. ADR is designed to solve legal disputes rather than problems, grievances, or claims. The methods under ADR should truly be termed alternative because they provide an alternative forum for those "disputes that could legitimately be disposed of by judicial decree."[12]

Through experimentation and using creativity a vast variety of ADR techniques have been developed.

The ADR techniques include Negotiation, Mediation/Conciliation, Mediation-Arbitration, Mini-trial, Arbitration, Fast Track Arbitration, Neutral Listener Agreement, MEDOLA, Rent-a-Judge and Final Mini Trial[13] This list is not exhaustive and parties are also often advised to adopt a combination of some of the elements of more than one ADR procedure if that is considered appropriate for resolution of a particular class of disputes.

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[11] Walter B. Jackson, "ADR, The Judiciary and Justice- Coming to terms with the Alternatives" 2000 *Harvard Law Review* 1851.

[12] Harry T. Edwards, "Alternate Dispute Resolution- Panacea or Anathema?" 1986 *Harvard Law Review* 668

[13] Walter B. Jackson, "ADR, The Judiciary and Justice- Coming to terms with the Alternatives" 2000 *Harvard Law Review* 1851.

It must be noted that parties must seek resort to these methods with the help of advocates. It is thus essential that advocates are trained in ADR methods so that they can offer clients a different and better route to a solution of their problem. Advocates must develop interpersonal skills and ADR skills to complement their skills of advocacy so that they become complete lawyers and serve the interests of their clients in the best possible way and also help the cause of justice.

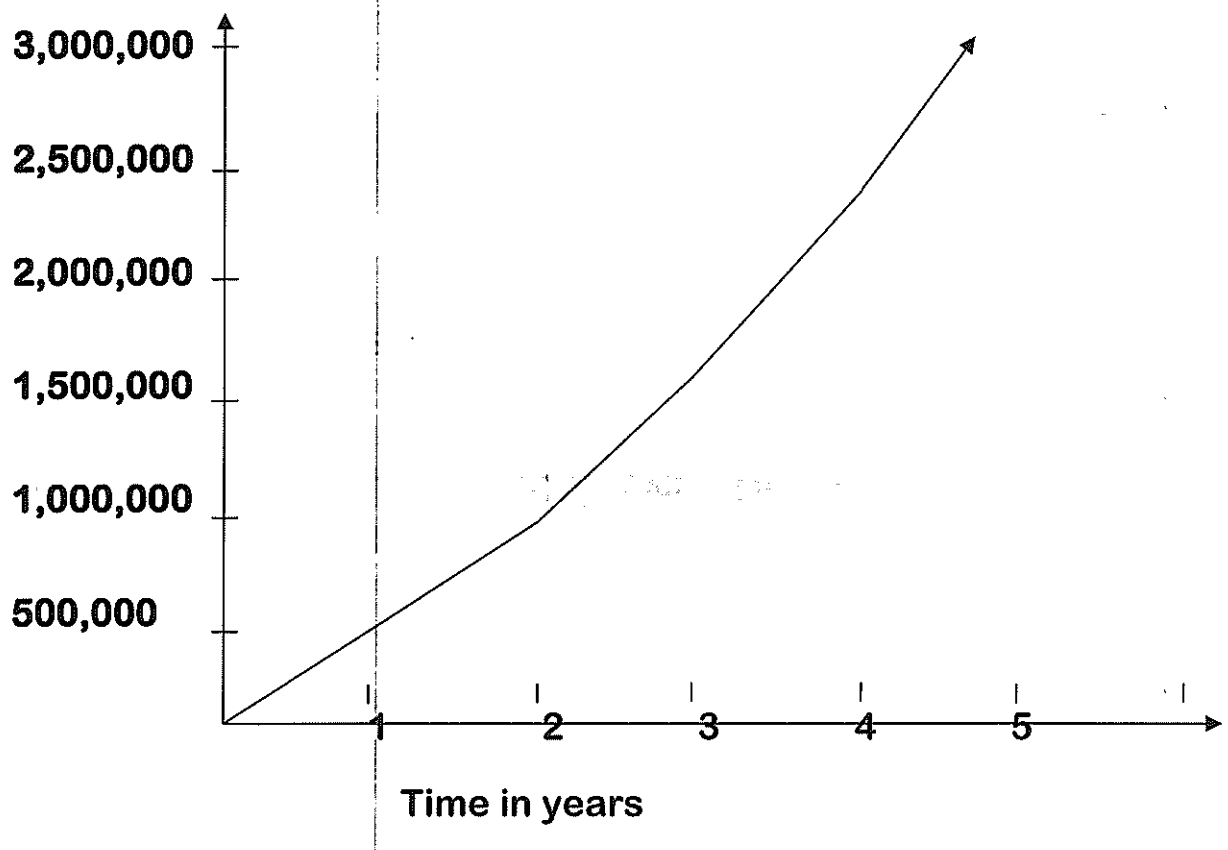
Since there is a common ground between skills of advocacy and ADR skills advocates must adopt ADR methods as a part of their profession as ultimately such synchronization between ADR methods and the formal system of administration of justice through the courts will serve the interests of everyone-the advocates, the clients and the legal system.

The cost of conflict and disputes has become a particularly important consideration in many countries and has influenced the approach taken to dispute resolution. Costs are not only measured in terms of the price paid for dispute resolution services but also the time to deal with conflict and disputes, the impact of conflict and disputes on, amongst other things, production, quality and customer relations.

The following diagram is intended to illustrate the relationship between cost and the time taken as a conflict develops into a dispute. The longer it takes to resolve a dispute, generally the more it costs the parties and the economy.

THE RELATIONSHIP BETWEEN COST AND THE TIME TAKEN AS A CONFLICT DEVELOPS INTO A DISPUTE[14]

THE RELATIONSHIP BETWEEN COST AND THE TIME TAKEN AS A CONFLICT DEVELOPS INTO A DISPUTE



1.3 PROBLEM STATEMENT

Uganda in the administration of justice today is faced with a problem of case backlog which had been decried by both the public and international community. The backlog has been seen as delayed justice meaning justice denied. Parliament has enacted regulations in concurrence that direction e.g. Legal Notice No. 7 of 2003,SI 71 of 2005 all have been put in place to guide the mediators in the application of ADR as a means of administering justice.

[14] Author's discussion with Antonia Evans of CEDR on 5th October 2007

This study therefore is set to investigate into the impact of ADR in conflict resolution and the administration of justice. It will focus on the different approaches that have been used to explain the concept of ADR

1.4 PURPOSE OF THE STUDY

The project aims at explaining what Alternate Dispute Resolution is and how it evolved. It also aims at looking at and analyzing the various skills of advocacy and ADR skills and the common ground between them.

An objective of this project includes analyzing the need for ADR methods, looking at ADR techniques and putting forth the advantages of ADR in the administration of justice.

The purpose of the study is to analyze and examine the implications and the roles of ADR in settlement of conflicts in both the judicial and non judicial matters, tribunals (administrative).

1.5 THE METHODOLOGY AND SCOPE

In putting together this paper, a combination of primary and secondary sources have been used. The primary and secondary sources were used in reviewing available literature and has been relied on for the greater part. In the concluding sections of the paper a prescriptive *modus operandi* will be employed. In this part of the paper a number of suggestions, proposals and recommendations will be put forward to enable the researcher achieve the stated objectives of the paper. In addition the use of unstructured interviews, focus group discussions and electronic sources have been employed.

The paper restricts itself to a discussion of access to Justice and the rule of law with special focus on the poor. The Justice, Law and Order Sector of Uganda was the primary centre of focus.

Given the complexity of the subject and the time available for research, the study is confined to an analysis of the methods of ADR i.e. mediation, and arbitration. It also

identifies other variables that impinge on the application of ADR and explores into the different methods and approaches to ADR.

1.6 SIGNIFICANCE OF THE STUDY

The adjudication of cases applies related or same methods in settlement of cases or disputes. The study will benefit both the judicial institutions, administrative tribunals, states, parties to cases, NGOS and other bodies that engage in settlement of disputes using ADR and these are, Courts of Judicature, UN agencies, Line ministries, Tribunals ,Litigants ,Advocates and Judicial officers

1.7 RESEARCH HYPOTHESIS

In order to make a full and thorough investigation of the application of ADR in the administration of justice, the research is based on the following.

- The way judicial officers encourage, communicate, inform the parties in cases and their advocates to explore ADR and its importance in the administration of justice
- The advantages of ADR against prolonged litigation
- The different types of ADR and the approaches that have been given by the researchers to explain the concept of ADR.

1.8 CHALLENGES FACED DURING THE STUDY

Since ADR is not very much employed in all courts of law, there were very few people to interview and to obtain the required information.

Time dedication by the few available mediators especially those of the Commercial Court to the extent that they gave very little time for the interview and left much of the information undisclosed.

CHAPTER TWO

LITERATURE REVIEW

2.0 Emphasis of Literature Review

To fully understand court based ADR in Uganda one would have to make an appreciation of the evolution of ADR in Uganda.

There can be no doubt that when a legal dispute arises then the claimants will instruct their lawyers and about 85% of these lawyers will issue a notice of intention to sue the other party in court.[15]

It is difficult to say whether this is the preferred route of the claimant or it is the desired route of the lawyer. One can almost say with certainty 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 63-3 (first promulgated by General Notice 607 of 1928)[16] provided for Arbitration under order of a court but this also has seldom been used. This could be referred to as the first "Court based ADR". However it is important to observe that for a court to make an order of a reference to arbitration, it would first have to make an inquiry and satisfy itself that the parties making the application were not under some disability. This test clearly threw a negative connotation to the choice of arbitration so one had to first be in a right thinking state of mind in order to use arbitration as an alternative to litigation.

It can therefore be argued that there was a traditional perception that alternative dispute mechanisms/procedures like arbitration were somewhat inferior to litigation and therefore they could only be allowed after due inquiry as to the state of mind of the parties.

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[15] **Okuni Charles – Registry Head Commercial Court Uganda Interview on the role of ADR in Administration of Justice at the Commercial Court of Uganda on Lumumba Avenue Kampala on the 6th day of June 2011**

[16] **The role of AD in the Resolution of International Disputes by Anthony Commentary Arbitration International Vol. 2 No. 1 1990 page 47**

Secondly there was a traditional perception under the common law system that disputes had to be resolved through an adversarial method of dispute resolution. This appears to be a direct result of the training given to lawyers and judicial officers. The training is such that a dispute is resolved on a win/lose basis and any sign of concession is evidence of weakness. Judgment is given for a party and against another. This may not always work when parties seek dispute resolution through ADR[17]

A third reason is that since courts of law (and in particular the High Court) have unlimited jurisdiction any attempt by a party to remove a dispute from a court to an ADR process was perceived as an attempt to oust the court's jurisdiction contrary to Article 139 of The Uganda Constitution 1995. In recent times, section 9 of the new Arbitration and Conciliation Act (Cap) 4) has come under similar criticism as being consistent with Article 139 of the 1995 Constitution in the case of ***Iraq Fund for External Development V A.G.***[18]

Fourthly, it was generally believed that for justice to be seen to be done, alternative dispute resolution procedures have to be closely supervised by the High Court. This was the philosophy behind the notorious Section 11 of The Old Arbitration Act (Cap 55) that generally allowed an award of an Arbitral tribunal to be remitted for reconsideration.

Courts have routinely interfered with arbitral awards where they were perceived not to have been determined by the legal rights of the parties but rather what appeared to be fair, reasonable or appropriate in the circumstances.

National Union of Clerical Commercial and Technical Employees V Uganda Bookshop.[19] It was held that, it would be unjustified and unreasonable for an arbitrator,

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[17] Order 13 rule I (I) provided that parties who are not under disability to a suit could agree that any matter in difference between them be referred to arbitration at any time before judgment.

[18] HCCS 1391 of 2000.

[19] 1965 EA p 533

instead of deciding the question submitted to him to direct what to him may seem an equitable arrangement between the parties.

In other cases the whole award would be set aside under S 12 of The Arbitration Act Cap. 55. This gave rise to uncertainty as to the actual finality of an award when procured.

Another and perhaps even more critical tradition perception was that ADR decisions were not capable of being enforced as decrees of court. This meant that where a losing party chose not to recognize an ADR decision, that is the end of the matter. There was and still is a lot of merit in this traditional perception. ADR decisions are not binding by the nature of their definition and are only acted upon in "good faith" by the parties. Most authorities on the subject advise that the award in ADR decisions should be reduced into writings as contracts between the parties so that on default, a party can sue on the contract for its enforcement.

In the case of The Old Arbitration Act (Cap 55) an arbitral award would have to be filed in court to be enforced as a decree of court under Section 13 (1). Even then, it would only be filed according to that section if it was not first remitted for reconsideration or set aside. So for an arbitral award to be enforceable, it had to first pass the test of "non-remission and setting aside". This made the enforcement for ADR decisions on the whole, long and burdensome.

Changing International Perceptions from 1976 to the Present

It is now clear that the traditional perceptions of ADR are changing and now ADR is becoming a credible method of dispute resolution even for common law countries.

The first driving factor in changing the traditional perceptions was international trade, which sought to create a dispute resolution mechanism that was universal, yet at the same time snubbed from national courts, which could be biased against foreign business concerns. In this regard the United Nations Commission on International Trade Law (UNCITRAL) came up with the following legal documents/codes.

- The UNCITRAL Arbitration Rules 1976

- The UNCITRAL Conciliation Rules 1976
- The UNCITRAL Model Law on International Commercial Arbitration 1985(hereinafter called the Model Law)

These UNCITRAL documents coupled with The Convention on The Recognition and Enforcement of Foreign Arbitral Awards (The New York Convention) of 1958 are the main instruments that influenced the Drafting of The New Arbitral and Conciliation Act (Cap 4) of Uganda[20].

As a result of this international trade angle there has been a push by donor countries to modernize the Uganda commercial laws and court procedures along the lines that actively promote ADR, and by so doing promoted trade and investment in the country. In Uganda, this led to the enactment of the Investment Code Act 1991 (Cap 92), which in section 28 talks of the settlement of investment disputes amicably or through arbitration or other machinery for the settlement of investment disputes.

Another driving factor leading to a change in the traditional perceptions were the changes taking place in American Justice System. The American Justice System had a reputation as being the most litigious in the whole world leading to a lot of case backlog. In 1976, Frank E.A.Sander, professor of law at The Howard University suggested an alternative approach aimed at reducing delays in the administration of justice in the courts. This was referred to as the "Multidoor court house" through which quick settlements could be made. There then followed in the judiciary, the introduction of the "settlement week". Here civil trials were suspended for one week between 1987 and 1989 during which 700 – 900 cases were mediated with a 53% success rate. The success of this process gave a new meaning to court based ADR[21].

Another driving factor very similar to USA experience was that of changes taking place in The Royal Courts of England as a result of mounting case back log. This started with

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[20] Justice Geofry W.M. Kiryabwire- A paper delivered at the Law Development Centre (LDC) Training of Trainers Seminar at Nile Resort Hotel Jinja 11TH JUNE 2004

[21] Justice Geofry W.M. Kiryabwire- A paper delivered at the Law Development Centre (LDC) Training of Trainers Seminar at Nile Resort Hotel Jinja 11TH JUNE 2004

a Practice Statement issued by the commercial court in London in December, 1993 where Mr. Justice Cresswell confirmed that the court wished to encourage parties to consider ADR techniques such as mediation and conciliation. Judges were not advised to act as those mediators or conciliators but the clerks of the Commercial Court were directed to keep a list of willing mediators and conciliators for the parties to use.

However, the most significant driving force behind the change in England were The Lord Woolf reforms ushered in by his ***Practice Direction of January, 1995***

Under this practice direction, lawyers were supposed to file with actions in court a completed check list, which answered the following questions:-

1. Have you or counsel discussed with your client(s) the possibility of attempting to resolve this dispute (or particular issues) by ADR?
2. Might some form of ADR procedure assist to resolve or narrow the issues in this case?
3. Have you or your client(s) explored with the other parties the possibilities or resolving this dispute (or particular issues) by ADR?.

These and other Woolf reforms have started to impact on other common law jurisdictions, which tend to follow the laws of England.

2.1 Changing perceptions in Uganda

Court based ADR also 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 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 thereafter a major statement was made in the new 1995 constitution of Uganda which under Article 126(2) that enjoined the courts to inter alia, apply the following principles.

b) Justice shall not be delayed.....

c) Reconciliation between parties shall be promoted and .....

d)Substantive justice shall be administered without undue regard to technicalities.

The application of the above principles would now stand to counter the traditional perceptions of adversarial dispute resolution methods and call for change in favour of court based ADR.

In 1996, the Chief Justice Mr. Wambuzi [22] Practice Direction No. 1 of 1996 entitle Commercial Court Procedure established the Commercial Division of the High Court. Paragraph 5 (b) of the said Practice Direction enjoined the commercial judge to be "Proactive", an essential ingredients for effecting a court based ADR system.

In 1998 the Present Civil Procedure Rules were amended by the Civil Procedure (Amendment) Rule 1998 to include in the new Order 10B. Order 10 B 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 mediator arbitration and any other form of settlement....."

Order 10 rule 2 then went on to add:-

1) "Where the parties do not reach an agreement under Sub rule (2) of rule 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 the extension

[22] **Practice Direction No 1 of 1996**

3) The Chief Justice may issue directions for the better carrying into effect of alternative dispute resolution"

With the passing of order 10 B, court based ADR had also become of age in Uganda pushing in a new thinking of dispute resolution to be actively assisted by the judiciary.

Three important points to high light about order 10B are

i) It allowed for ADR before a member of the Bar or the bench. The reference to a member of the Bench is a departure from the English approach but has not yet been used.

ii) It effectively rendered useless Order 3 Arbitration under order of the court without repealing it. It is unlikely to be used again.

iii) It created a strict timetable for ADR failing which the court can continue with the hearing of the case.

In 2000 the Arbitration and Conciliation Act (Cap 4) was enacted repealing the Old Arbitration (Cap 55). Even though the Arbitration and Conciliation Act is not strictly speaking a court based ADR Mechanism, Provision is made in it for Court assistance in the following areas:-

i) Effective Interim measures S.17

ii) Taking of evidence S.27

iii) Challenging an arbitrator for Misconduct award S.13

iv) Enforcing an arbitral award S.35

v) The case stated procedure for domestic arbitration S.38.

In this sense, the court still facilitate the whole process. It is important to note that the ambiguous language that allowed for court intervention from time to time have been greatly moderated in Section 9 and 39.

However, the most significant drive towards court based ADR came with the passing of Legal Notice No.7 of 2003 by Chief Justice Benjamin Odoki. *The Commercial Court Division (Mediation Pilot Project) Practice Direction, 2003* and statutory instruments No.71 of 2003. The Practice Direction Legal Notice 7 of 2003 in its preamble stated the reasons why the mediation pilot project was set up. The reasons included:-

i) Delivering to the commercial community an efficient, expeditious and cost effective mode of adjudicating disputes.

ii) To encourage parties and counsel to consider the use of ADR as a possible means of resolving disputes or particular issues.

iii) Placing an obligation on counsel to consider and advise clients to use ADR in all suitable cases.

Direction 2 makes mediation mandatory before the trial for all cases in the commercial court. Under Direction 3, parties during the scheduling conference under order 10 B are required to consider the use of ADR. Under Direction 6 where a party to a dispute is the Central Government, Local government or a statutory corporation they shall sign a memorandum stating whether they will engage ADR.

Legal Notice 71 of 2000 gives details of how the mediation project will work

Rule 12 provides that mediation shall be carried out under the auspices of CADER (The Centre for Arbitration and Dispute Resolution) which shall provide or assign qualified and certified mediators. The mediators are bound by the CADER Administration procedure and the CADER Code of conduct.

Under Rule 7, every new action commenced in the Commercial court shall include a brief statement in the pleadings indicating whether the party consents or opposes referral to mediation. If no written objection is made in the pleadings it shall be presumed that the parties have waived any objection to referral. A party may however apply to the Registrar on proper cause being shown under Rule 9 for exemption under the rules. Under Rule 16 each party is supposed to sign a mediation agreement which

inter alia identifies at the mediation the particular person who can bind the party appearing at the mediation.

If there is an agreement resolving some or all of the issues in disputes then under Rule 21 that agreement shall be signed by the parties and filed with the Registrar for endorsement as a consent judgment.

Where there is no agreement, then the Registrar shall under Rule 21 (2) refer the matter back to court. It is important to note that throughout the mediation process, the court file is not sent to CADER to facilitate the mediation. Rather, CADER opens its own file based on its own standard documentation.

Indeed under the rule of confidentiality, all information whether oral or otherwise used during the mediation hearing is privileged and cannot be disclosed, under rule 22, in any court proceedings. The court cannot as a result, be influenced by what happened at the mediation when it has failed to determine the case before it

Emerging challenges in Uganda

Court assisted ADR has its challenges and the following are some of them that have been experienced.

The first is intransigent/unreasonable parties or their legal advisors who are not willing to try ADR.

In the case of ***S.S.Enterprise Ltd & Anor V Uganda Revenue Authority***[23] Counsel for the Uganda Revenue Authority (URA) argued that only the Board of Directors of the URA had the power to settle a case via mediation so it was not possible for URA to submit to mediation. It was held that internal institutional processes were not a good reason to avoid mediation. The reasons to avoid mediation must be legal or procedural in nature.

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[23] HCCS No 708 0f 2003 (un reported)

The court needs to be firm not to allow these forms of negative attitudes to defeat the objective of court assisted ADR. Uganda needs the means that facilitate agreements to use ADR since it has been sighted as one of the best means to resolve disputes.[24]

In the *case of* ***Dunnet V Railtrack*** [25] it was held that, where it appears that a party even though successful in litigation deliberately refused the use of court assisted ADR then costs should be awarded against that party, as was in the case of

Clearly litigation should be done only on the event that mediation would have no reasonable prospect of success. There is jurisprudence already existing for this situation in Uganda. In Uganda where a plaintiff sues without first giving notice to the other party thus depriving that second party of an opportunity to respond to the claim and before the trial the second party pays the claim, a plaintiff may be denied costs.[26] This position was further upheld by Saidi J in the case of ***Amradha Construction V Sultani Street Agip Service Station***[27]

In order to analyze and apply legal rules and principles, an advocate should be familiar with the skills and concepts involved in:[28] Identifying and formulating legal issues, formulating relevant legal theories, elaborating legal theory, evaluating legal theory. Criticizing and synthesizing legal argumentation

In order to negotiate in either a dispute resolution or transactional context, an advocates and mediators must be familiar with the skills and concepts involved in preparing and planning for negotiation, conducting a negotiation session, counseling the client about the terms obtained from the other side in the negotiation and implementing the client's decision.

In order to employ-or to advise a client about-the options of litigation and ADR, a mediator or an advocate should understand the potential functions and consequences

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[24] From October 2003 to 6th 2004 a total of 216 cases have been referred to mediation under thepilot project 38 were successfully settled,102 were unsuccessful and 76 were pending. Source Registrar Commercial Court

[25] 2002 ALL ER 850

[26] Rule 37 of the Advocates Remuneration and Taxation Rules

[27] 1968 EA p85

[28] Dr. N.R Madhava Menon, *A Handbook on Clinical Legal Education* (Lucknow: Eastern Book Company, 1998) at 41.

of these processes and should have a working knowledge of the fundamentals of[29]:litigation at the trial court level, Litigation at the appellate level, advocacy in administrative and executive forums and proceedings in other dispute resolution fora

2.2 Criticisms of the ADR

As the ADR gained momentum, its ramifications were questioned. *Those opposing it* claimed that ADR had brought elements of compulsion and coercion that were not present with previous dispute resolution method arguing that participants were pressured to pursue alternative methods instead of going to trial. Primarily, legal scholars were concerned with the constitutionality of mandated ADR, the rigidity of the ADR system, the procedural components of ADR, and the quality of justice received in ADR.

Other commentators claim that not all cases are suitable for *ADR* and that the procedures and outcomes lack institutional competence to make public law or ability *to* set precedent.

Participants are worried that ADR might even be more expensive than traditional litigation. Logically, if the case does not settle, then the constant time of ADR and associated costs are added to that of litigation. Court analysts speculate that about the same number of cases that are resolved through mediation or arbitration might have settled before the trial anyway, without the expense of ADR.

ADR as instituted destroys the value the American system traditionally placed on the right to vindication of one's position through an orderly procedure and rational decision subject to appellate review. Some critics have cautioned that ADR is not merely a supplement for adjudication; it has become its replacement.[30]

Finally, there is the underlying premise that ADR does not readily fulfill its promise of cost savings and efficiency. Some legal observers contend that ADR is merely a "perceived panacea" for what ails the legal system. Whether ADR is the solution to the

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[29] **Dr. N.R Madhava Menon, *A Handbook on Clinical Legal Education* (Lucknow: Eastern Book Company, 1998)at 41.**

[30] **Amabilis Stella Maris- Magistrate Grade I Nakawa Chief Magistrates Court, During an open interview with the researcher on the role of ADR in the Administration of Justice**

problems of formal court litigation is still an open question. The consensus of scholars, however, is a call for more research and more evaluation[31].

2.3 ADR Evaluations

ADR scholars claim the scant empirical literature that exists at best paints an incomplete picture of the effect ADR on the legal system. Observers claim the dearth of empirical support for the various claims concerning ADR has created the critical need for an objective, umpired evaluation of ADR, and made it impossible to determine its actual effect on civil litigation.

In measuring success, the answer depends on the purpose of ADR, the definitions of success or failure, and attainment of *the* selected criteria. Without addressing these factors, it is difficult to say with certainty that any ADR program is successful.
Researchers have attempted to define success by using such criteria as client satisfaction, settlement rate, efficiency, and cost. Whether any of these are valid for determining success is still controverted.

Although client satisfaction is probably the most common criterion for measuring ADR programs, and in some instances, it is the only data it may not be the best indication of whether a program is successful when used alone. Client satisfaction has been reported to provide insight into the participant's perceived control of the process, and satisfaction levels have also been closely linked with participant's perceptions of fairness.

Critics claim that satisfaction is an equitable criterion of social justice, one that ADR should not be expected to achieve, and that satisfaction levels do not accurately reflect social costs, participant expectations, or settlement fairness.

Settlement rates are also used to evaluate ADR programs, typically under the assumption that settlement is beneficial to the participants. Ostensibly, ADR is oriented

[31] **MaserekAa Martin- An Advocate with Bakiza and Co Advocates during an open interview with the researcher on the role of ADR in the Administration of Justice**

toward settlement, and in many programs, settlement in ADR before trial is a common goal. Arguably, if the case is settled before trial, then the dockets will be cleared. But in the rush to settle, observers question if the participant's rights are impaired and the fairness of the agreement jeopardized.

The figures for settlement rates may also be misleading. Rates may be inflated for various reasons and self-reports may be inaccurate. Parties that reach an agreement may still claim that they made little or no progress[32]. Further, parties that do not reach an agreement during the session may reach an agreement soon after the ADR event. Some argue that the settlement rates do not accurately signify success, since the trial settlement ratios are frequently high as well[33].

2.4 Conceptual Framework

This study provides a descriptive analysis of the role of *ADR in the administration of justice* and its programs by designing a practical ideal type for ADR programs. Using mediation as the program example, the ideal type serves as a bench marking tool for understanding and improving ADR programs. The ideal type will be used *to* assess this program and to make recommendations for improvement or modification. The assessment will also serve as a test to see if the ideal type is truly practical for the field of study.

The ideal type was designed using six broad categories taken from the literature:

1) mediation procedure;
2) mediator skill;
3) case profile;
4) participant involvement;
5) ADR method; and
6) Stated goals. Based on the literature, these areas are typically considered when deciding whether a program is successful or un successful, and should be considered when making recommendations for change in the program.

[32] **Naisimula Ruth- Clerk High Court Commercial Division- answer to the questionnaires prepared and given to her by the researcher**
[33] **ibid**

The categories are operational based on the following definitions: mediation procedure is the process used for the settlement; mediator skill describes the necessity of education for the mediation and the level of expertise, case profile describes the program sponsors had indicated that these were areas of concern in previous settlements, therefore the hypotheses are operationalized accordingly.

Participants perceptions about the suitability and timing of mediation for their case, and also provides the program's profile of the demographic characteristics of the case (e.g. nature of the dispute and dollar amount and when mediation was attempted); participant involvement describes the level of preparation for the mediation and willingness to attend; ADR method indicates which ADR mechanism is used; and stated goals are the formal objectives of the program. Although the desirability of promoting settlement" is "challenged" as a criteria for success, for purposes of this research an effective program, or a successful program, is one that promotes sett1ernent.

Since this research is evaluative, it incorporates working hypotheses and sub hypotheses formed from the categories. These hypotheses serve as guides for conducting the research and collecting evidence, and imply that if the practical ideal type is found in the program, it will be successful.

Traditional perceptions against ADR have greatly reduced thus giving room for greater use of court assisted ADR, particular break through has been made in Uganda under the mediation pilot project of the commercial court. Even though mediation is not the only form of ADR, its use within the court system is becoming good flag ship for court assisted ADR in all its possible forms

CHAPTER THREE

METHODOLOGY

This chapter focuses on the designs/methods that the researcher used in collecting data. It indicates the population sample, sampling techniques, instrument, procedure and how data was collected and analyzed.

3.1 Study design

In collecting data, the researcher used quantitative and qualitative methods. In using the qualitative method, the researcher involved research on behavior events, functions of ADR and emphasized on understanding the origin and meaning of ADR.

The researcher focused on understanding from the respondent's point of view and took forms of interpretation and rational approaches as well as taking logical and analytical approaches in applying the quantitative method.

The researcher appreciated qualitative and quantitative approaches as the latter is process oriented and the former is result oriented. The methods are real and use conversion structured a sample of which are annexed hereon and some structured interviews.

3.2 Study population.

The study was conducted in the High Court Commercial Division and the Chief Magistrates Court of Mengo. It included both support staff, Judicial officers and Advocates and some court users as their appreciation of this method of conflict settlement cannot waived.

3.3 Sample design

The research includes a sample of respondents from the High court Commercial Division and the Chief Magistrate's Court. It included Judicial officers, Advocates, support staff from the judiciary, and court users herein referred to as litigants or clients who have applied the mediation method in settlement of their cases and these were randomly selected from the two courts mentioned above.

3.4 Data collection instruments

Data was collected by use of self administered questionnaires, interviews and focus group discussion. These questionnaires were designed in the way that that they required respondents to fill in the appropriate information which enabled the researcher to get enough information.

The questionnaires provide details about the mediation process, which elements work and which ones does not, and attitudes about the program. The interview questions also allow program administrators to offer explanations as to why the program is or is not working. The study also assesses aggregate data and documents provided and compiled by the High Court of Uganda Commercial Division.

The researcher interviewed the Deputy Registrar Commercial Court Division in charge of Mediation project scheme, the In charge Registry High Court Commercial Division, Court Clerks both of High Court and of Chief Magistrates Mengo, the researcher also interviewed the Chief Magistrate of Mengo, Magistrate Grade I of Mengo and a Magistrate Grade I from Nakawa, the Chief Magistrate Nabweru Court, Advocates, Process Servers in the respective Courts above were also interviewed.

3.5 Data collection procedure

The interviewer introduced himself to the persons he wished to interviewe and create reports with the respondent, interviewing and confidentiality was highly emphasized and the respondents were informed that the information given was to be used in research and that it was not confidential, however when asked if they wanted their names to be kept secret the respondents okayed the same as indicated on the questionnaires hereon attached.

3.6 Data analysis.

The researcher observed the findings using the tallying method. This method enabled the researcher to analyze how many respondents are in favour of ADR and how many are against it, and how or whether ADR has met its objectives. The interpretation

depended on the themes and on the objectives of the study which was in their coding categories.

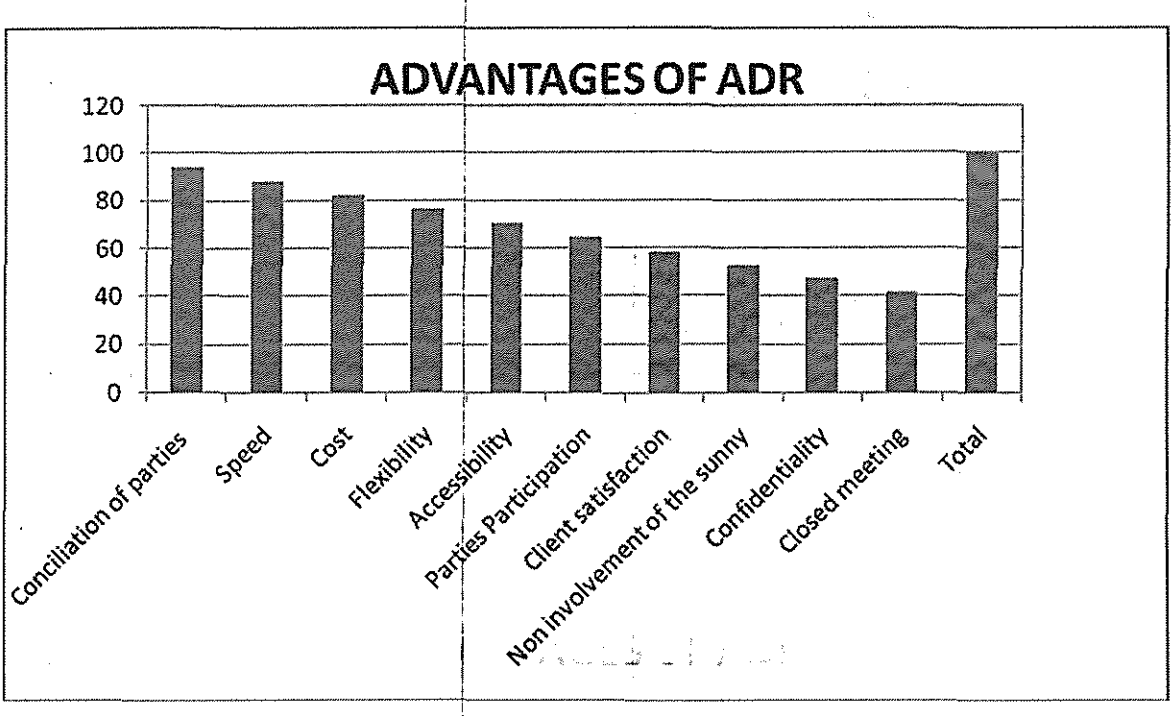
This study also used document analysis and existing data analysis to formulate triangulation in *the* study, therefore giving a broader range of historical data and attitudes.

The questionnaire was three pages in length. One *of* the problems with the instrument was that it was reported by some of the participants to be too long and hard, so, some responses were not completely answered.

The responses primarily consisted of yes and no questions. The participants were also given opportunity for elaboration with the open ended questions. The open ended questions were necessary to help with the benchmarking of this research. The researcher interviewed 5 respondents out of the 10 scheduled and collected 12 questionnaires out of the 20 that he distributed. Therefore this data is based on a total of 17 respondents.

The chart bellow shows the respondents' response to the advantages of ADR, and has been calculated in percentages as indicated on the Bar Graph. It ranges from the first agreed advantage to the least agreed.

Advantages of ADR	**Frequency**	**Percentages**
Conciliation of parties	16	94.1
Speed	15	88.2
Cost	14	82.4
Flexibility	13	76.5
Accessibility	12	70.6
Parties Participation	11	64.7
Client satisfaction	10	58.8
Non involvement of the sunny	9	52.9
Confidentiality	8	47.1
Closed meeting	7	41.2
Total	**17**	**100**



3.7 Document review:

The researcher obtained and viewed the documents to obtain information relating to the legal framework and the mandate of the Judiciary in applying ADR, assess performance, obtain the organization mandate, Goals and Objectives of ADR and performance for the period it has been in operation and the challenges so encountered ADR study describes and tests a practical ideal type for *ADR* programs. The researcher gathered the case statistics for those cases completed under the Mediation scheme, the relevant laws and other relevant literature and publications on ADR.

The study is evaluative in nature, research analysis of existing data and document analysis as the research tools. This chapter thus discusses these research methods and outlines the methodology for the study. The working hypotheses found in the conceptual framework are also operationalized.

3.8 A Critical Analysis

The Alternative Dispute Resolution had seen an extraordinary transformation in the last ten years. Little more than a decade ago, only a handful of scholars and attorneys perceived the need for alternatives to litigation. The ADR idea was seen as nothing more than a hobbyhorse for a few offbeat scholars[34]. Today, with the rise in public complaints about the inefficiencies and injustices of our traditional court systems, ADR has attracted a bandwagon following of adherents. As ADR gained prominence in judicial, academic, and private circles, it also attracted the attention of critics. The critics warned of the dangers of alternatives to litigation and expressed doubts over ADR's acceptance as a panacea to the perceived problems of the traditional court system.

Because ADR is still in its formative stage, there is much to learn about the feasibility of alternatives to litigation. ADR is, as yet, a highly speculative endeavor. We do not know whether ADR programs can be adequately staffed and funded over the long-term; whether private litigants will use ADR in lieu of or merely in addition to litigation; whether we can avoid problems of "second class" justice for the poor; and whether we can avoid the improper resolution of public law questions in wholly private fora. In light of these and other uncertainties about ADR, we should continue to view alternative dispute resolution as a *conditional venture,* subject to further study and adjustment. Every new ADR system should include a formal program for self-appraisal and some type of "sunset" arrangement to ensure that the system is evaluated after a reasonable time before becoming permanently established.[35]

Abraham Lincoln once stated, "***discourage litigation. Persuade your neighbours to compromise whenever you can. Point out to them how the nominal winner is***

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[34] **Harry T. Edwards, "Alternate Dispute Resolution- Panacea or Anathema?" 1986 *Harvard Law Review* 668**

[35] **James F. Henry, "Some Reflections on ADR" 2000 *University of Missouri Journal of Dispute Resolution* 63-64**

often the real loser – in fees, expenses and waste of time. As a peacemaker, the lawyer has a superior opportunity of being a good man."[36]

In addition to continued research and appraisal, we must ensure the quality of the suddenly emerging ADR "industry." Most participants in the ADR have joined with pure motives, but this is not true of everyone. There are now a number of self-proclaimed ADR "experts," with business cards in hand and consulting firms in the yellow pages, advertising an ability to solve any dispute. Unfortunately, those who seek to prey on a new idea may wreak havoc with our systems of justice and destroy the legitimacy of the ADR at its inception.[37]

However in spite of these criticisms and doubts expressed by the critics over ADR's ability to evolve into a viable alternative to litigation and become a gateway to justice and efficient dispute resolution, the past 40 years have seen ADR evolve from an experimental concept to a widespread and growing phenomenon, receiving increasing acceptance and use both within and outside the judicial system. The use of mediation and other forms of ADR can be expected to expand in the 21st century both as part of the judicial system and as a rubric under which many opportunities for resolving disputes outside the courtroom will be offered.

The legal profession needs to learn more about ADR, what it offers to lawyers and their clients, and how to utilize ADR, where appropriate, in the practice of law. ADR options must be recognized, both in litigation and non-litigation contexts, as strategic and tactical options to be considered at every stage of client representation.

The lawyer entering the twenty-first century must be educated about ADR in order to meet the expectations and demands of the courts and the clients.

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[36] **Harry T. Edwards, "Alternate Dispute Resolution- Panacea or Anathema?" 1986** ***Harvard Law Review*** **668.**

[37] **ibid**

Former Chief Justice of India A.S Anand highlighted the importance of ADR methods and the role they can play in the Indian system of Justice when he stated:[38]

"The spirit of change seems to be in the air. Reforms of civil litigation are higher up on the priority list than ever before. In this scenario, ADR methods can play the role of a tacit reformist and both courts and ADR can co-exist in a complementary manner".

The Government of Uganda had realized the importance of ADR and had made promotion of ADR methods a part of public policy. This policy of the Government is reflected in the various legislations[39]

However, in spite of ADR promotion in Uganda through public policy and well established ADR mechanisms, there is a long road ahead for the ADR, which in Uganda is still in its infancy.

Mediators and Advocates have a large and important role to play in order to make this movement grow. A big attitudinal change is required from them and they also need to be sensitized to ADR methods. Thus, in order to bring about this attitudinal change and sensitization, a lot of professional training is required. This training which, will help to implement ADR systems should be given to both advocates and also to the personnel who will be in charge of implementing the new systems.

Thus apart from this training other measures are also needed to help develop and promote the ADR . The outlook of lawyers and litigants should be changed so that they become interested in an early and less costly resolution of disputes. Decisions through ADR methods must also be fair and reasonable. Systems of evidence must also be more liberal. It is also necessary to see that there is no unequal bargaining power. If

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[38] *www.thehindu.com*

[39] **The Arbitration and Conciliation Act, Cap 4 has considerably reduced the intervention of the courts in arbitration matters. Conciliation has been given statutory recognition. By the passing of the Code of Civil Procedure (Amendment) Act, 2002, which has come into force from 1st July 2002, a duty has now been cast on the courts to explore the possibility of settlement of a dispute by use of ADR methods, in matters pending before them**

there is any, it must be eliminated. There is extensive literature with regard to the various ADR techniques. This must be made available to both advocates and clients[40]

A policy decision should also be taken as to who should be nominated to the various boards in the centers for acting as mediators, negotiators, conciliators, counselors or arbitrators. Will it be retired judges, lawyers, bureaucrats, professionals, social business or men in business and other experts? This question must be answered pragmatically.[41]

The law Council of Uganda should train advocates in ADR methods and ADR must be made a part of the curriculum in all law schools in the country.

Thus loads of change is needed and an effort is required from the entire legal system in order to develop and incorporate ADR into the Uganda legal system as an important and valuable complement to the courts. Such development of ADR will benefit advocates, courts and above all clients and in the long run the entire system of justice will reap the benefits of the growth and development of the ADR movement.

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[40] P.CRao and William Sheffield, *ADR-What it is and How it works?* (New Delhi: Universal Law Publishing Company Private Limited, 1996)at 106.

[41] **Ibid at 107**

CHAPTER FOUR

4.1 NEED FOR ADR

As a litigant, I should dread a lawsuit almost anything short of sickness and death.

- Learned Hand[42]

Resolution of disputes is an essential characteristic for societal peace, amity, comity harmony and easy access to justice. It is evident from the history that the function of resolving dispute has fallen upon the shoulders of the powerful ones. With the evolution of modern States and sophisticated legal mechanisms, the courts run on very formal processes and are presided over by trained adjudicators entrusted with the responsibilities for resolution of disputes on the part of the State. The procesual formalization of justice gave tremendous rise to consumption of time and high number of cases and resultant heavy amount of expenditure. Obviously, this led to a search for an alternative complementary and supplementary mechanism to the process of the traditional civil court for inexpensive, expeditious and less cumbersome and, also, less stressful resolution of disputes[43].

ADR emerged as this alternative and this emergence of alternative dispute resolution has been one of the most significant movements as a part of conflict management and judicial reform, and it has become a global necessity. Lawyers, law students, law-makers and law interpreters have started viewing disputes resolution in a different and divergent environmental light and with many more alternatives to the litigation. ADR is, now, envisioned and ingrained in the conscience of the Bench and the Bar and is an integral segment of modern practice.

Litigation, some hold the view that, apart from being extremely time consuming and expensive does not do actual justice. Even after the judgment is passed by the court the differences between the parties continue to subsist, the competing interests of the

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[42] **Harry T. Edwards, "Alternate Dispute Resolution- Panacea or Anathema?" 1986 *Harvard Law Review* 668.**

[43] **Justice Jitendra N. Bhatt, "A Round Table Justice Through Lok Adalat (People's Court)- a Vibrant ADR in India" (2002)1 *SCC Journal* 11.**

parties remain unresolved and the inter personal relationship of the parties becomes more hardened[44]. The common man has thus started looking upon the legal system as a foe and not as a friend. For him, law is always taking something away. When we go to court, we know that we are going to win all or lose all. Whereas, when we go to any method of ADR or for informal settlement with different expectations, we know that we may not get all that we want, but we will not lose everything. The necessity and utility of ADR is thus unquestionable.

The Government of Uganda too has recognized the need for ADR and is taking steps to promote and popularize ADR methods and reduce the dependence of the parties on courts to settle their disputes. The Arbitration and Conciliation Act,2000 has considerably reduced the intervention of the courts in arbitration matters. Conciliation has been given statutory recognition. By the passing of the Code of Civil Procedure (Amendment) Act, 2002, which has come into force from 1st July 2002, a duty has now been cast on the courts to explore the possibility of settlement of a dispute by use of ADR methods, in matters pending before them[45]

4.2 THE FORMS OF ADR

1. MEDIATION.[46]

By definition, mediation means the process by which a neutral third party facilitates communication among the parties disputing and assists them in reaching a mutually agreed solution.[47]

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[44] James F. Henry, "Some Reflections on ADR" 2000 *University of Missouri Journal of Dispute Resolution* 63.

[45] *www.icsi.edu*

[46] P.CRao and William Sheffield, *ADR-What it is and How it works?* (New Delhi: Universal Law Publishing Company Private Limited, 1996)at 85

[47] Henry Haduli- Mediation, a new case strategy in the commercial court- a paper presented to commercial court users committee on 21/6/2006 at Grand Imperial Hotel Kampala.

The Commercial Court of Uganda preferred mediation to other forms of ADR. Perhaps it has resemblance to our ageless traditional form of Dispute Resolution Mechanisms of clan meetings.[48]

In Uganda, Mediation is mandatory[49]as a form of ADR in all civil actions filed in courts. The Judicature Commercial Court Mediation Rules[50]have made Mediation a permanent feature in all proceedings before courts of law.

In every action filed in the commercial court each party is required to indicate in the pleadings which category of mediator the party prefers to mediate his/her case.

4.3 HOW MEDIATION IS DONE.

Present at the session are the parties, their attorneys if represented, the Mediator and others agreed in advance.

a. The Mediator will give an opening statement which is often a welcome remark and perhaps one or two jokes depending on the parties.[51] This is intended to lessen the tension the parties usually have about courts, getting them relaxed and adjusted to the mediation environment. Introduction of every participant is made.
b. The mediator then educates the participants about the mediation process, its advantages and disadvantages. Emphasis is put on the confidentiality of the process, listening to others without interruption, etc. Role of counsel in the mediation process is explained[52].
c. The plaintiff presents his case, then followed by the defendant. The plaintiff makes clarification on any issues raised.
d. The Mediator then identifies the problem (issues) for resolution. Paties and their counsel confirm the issue identified.
e. Brainstorming follows in which parties suggest or offer solutions to the problem. The mediator notes offers from each party and if neither party accepts the offer

[48] Ibid the parties, their attorneys if represented, the Mediator and others agreed in advance.
[49] Section 8 of The Judicature(Coimmercial Court Division)(Mediation) Rules 2007
[50] ibid
[51] Ibid 45 and 46
[52] ibid

from the opposite party, the mediator reconsiders those offers, generates options and lays them on the table for the parties to consider them. If the parties do not find them acceptable to solve the problem, he breaks into causes (private meetings with parties). This is intended to establish the interests, fears and concerns of each party that gets them stuck to their position[53].

Many times parties fear to talk in plenary for fear of "undressing" their case to the opposite party. After the caucus we go into the plenary, where the mediator skillfully generates new options without disclosing what he was told in the secret meeting.

A party may be accepting liability but fears immediate execution to recover all the money. Such party readily accepts to pay by installment. If the opposite party accepts payment by installment, they discuss the schedule of payment. The case is concluded, parties shake hands, as counsel drafts the consent judgment which is typed, signed and filed.[54]

2. ARBITRATION[55]

Arbitration is the process whereby parties in a dispute refer the issue to a third party for resolution and agree to be bound by the resulting decision rather than taking the case to the ordinary law courts.

Arbitration developed initially as an alternative to litigation. Arbitration is the most favoured method of settlement and its value is recognized by the courts.

Participation is typically voluntary; a third party imposes a resolution/decision which is binding on the parties. The decision is called the arbitral award.[56]the arbitration clause is the contract which forms the basis for arbitration. The intention of arbitration is to assist the parties resolve their disputes outside court.

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[53] ibid
[54] ibid
[55] P.CRao and William Sheffield, *ADR-What it is and How it works?* (New Delhi: Universal Law Publishing Company Private Limited, 1996)at 85
[56] Mary Kisakye(lecturer) - Class notes

The arbitral award can be appealed against or can be set aside.

Arbitration is governed by the Arbitration and Conciliation Act of 2000. This act regulates to some extent the operation of arbitration procedures and the behavior of the arbitrator.

The purpose of the Act[57]is to empower the parties and to increase their autonomy. It was always the case that if an arbitration agreement existed, the courts would not hear the case until the arbitration procedure had taken place.

The Act[58] also provides for the Centre for Arbitration and Dispute Resolution (CADER) as a statutory institutional alternative dispute resolution provider.

3. NEGOTIATION

The process of negotiation is the oldest most common means of dipute resolution. It's the process where parties meet face to face with or without a 3rd party to talk about their differences. It is voluntary in nature and no one can impose a decision. Where there is a third party involved, his role is simply to facilitate communication between the parties.[59]

4. CONCILIATION.

This is similar to Mediation. The only difference is that a conciliator is positioned between between the parties to create channels of communication by conveying massages to parties who are unwilling to meet face to face.[60]

A conciliator plays a more passive role than a mediator. He only identifies common grounds and subsequently re establishes communication between the parties. When conciliation is part of the court based dispute resolution process, a judge or a neutral

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[57] **Arbitration & Conciliation Act 2000**
[58] **ibid**
[59] **P.CRao and William Sheffield, *ADR-What it is and How it works?* (New Delhi: Universal Law Publishing Company Private Limited, 1996)at 85**
[60] **P.CRao and William Sheffield, *ADR-What it is and How it works?* (New Delhi: Universal Law Publishing Company Private Limited, 1996)at 85**

person appointed by court holds a conciliation conference with litigants and their lawyers in the litigation process.

The essential weakness in the procedures of mediation and conciliation lies in the fact that, although they may lead to resolution of a dispute, they do not necessarily achieve that end. Where they operate successfully, they were excellent methods of dealing with problems as, essentially the parties to a dispute determine their own solutions and therefore feel committed to the outcome. The problem is that they have no binding power and do not always lead to an outcome.[61]

5. SCHEDULING CONFERENCE.

A conference is defined as a meeting between counsel to discuss a case.[62]
It's a court based ADR where parties are given an opportunity at the earliest stage of a case management to resolve their issue by narrowing down the issues of disagreement, agree on the documents to be used, agree on the witnesses to be called and where possible they agree on the resolution mechanism[63].
This process is usually facilitated by a judicial officer

The concept of scheduling conference owes its existence to coming into force of the Civil Procedure (Amendment) Rules S.I 26 of 1998. In an effort to reduce civil delay and expedite the disposal of civil cases, it was deemed imperative that the Civil Procedure Rules be amended.

The main objective and feature of a scheduling conference is to give an opportunity of settlement before the full costs of the trial are incurred, and where settlement is not possible, to prepare an agenda at the trial. It is the stage where the parties put their

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[6161] Anthony C. Kakoza- Business law class notes Uganda Christian University.
[62] Osborn's Concise Law Dictionary.
[63]Mary kisiakye- lecture notes for LLB 4th year 2nd semester 2011 Kampala International University

"cards on table" as opposed to trial by ambush. It is the most significant starting point for the pro active judge[64]

In the case of ***Tororo Cement Co Ltd V Forkina International***, it was held that under O.12[65], the holding of a scheduling conference in civil cases is mandatory.

6. THE MINI TRIAL.

A mini trial is not a trial. The procedure in a min trial is not lengthy and it does not require a judge. Decisions are reached quickly and made by managers who have managerial and often technical skills, not by third parties such as judges. A mini trial is a structured form of negotiated statement.[66] The parties enter into a mini trial voluntarily, and any party can drop out when it wants to. Its successful when there is a mutual agreement.[67]

7. MED-ARB

This is the process where the parties agree first to try mediation and if mediation fails then the parties agree to arbitration. The parties will at the beginning to all formalities in an mediation and those in arbitration. The parties will voluntarily consent to the mediation and later arbitration if mediation fails. The mediator will be agreed upon and also what the mediator is expected to do.[68]

4.4 ADVANTAGES OF ALTERNATIVE DISPUTE RESOLUTION (ADR)

Generally ADR is usually faster, and cheaper than litigation, is also private and informal when compared to litigation and it gets both parties involved in the settlement process and the decisions are not necessarily final. However, ADR does not always guarantee

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[64] Lady Justice M.S Arach Amoko- scheduling conference(objective and method) A paper presented at the annual judges conference for Heads of division and resident judges held at Rider hotel Seeta on 10-11/5/2002

[65] Civil Procedure rules

[66] P.CRao and William Sheffield, *ADR-What it is and How it works?* (New Delhi: Universal Law Publishing Company Private Limited, 1996)at 85

[67] Harriet Diana Musoke – lecturer at the Law development centre Kampala.

[68] ibid

an agreed upon decision and with arbitration the decision is final but may not be binding if an aggrieved party opts for litigation.

1) **Speed**: The biggest advantage of ADR over the current court systems is the fact that, court trials take a lot of time where as the ADR process is swift. It takes less time to reach a final decision. In many jurisdictions around the world it could take months, even years before a dispute can even be heard before the judge, let alone a verdict. And one thing is certain in the legal world where time is money. And this is truer nowhere than in the commercial cases, where more time spent in dispute adds to the overall costs and adversely affects business[69]

2) **Cost:** The cost side of ADR is the fact that it encourages parties to take up ADR on the first place[70]. The court trials involve many lengthy procedures which are both time consuming and costly. This affects both the parties, but in litigation the expenses are kept down, attorney and expert evidence are costly. They wait in the court and the lengthy procedures drive the costs of justice very high. But ADR offers the benefit of getting the issue resolved quicker and cheaper than court trials that means money is spent less on both the sides. A research by Professor Hazel Genn (1998) carried out in the mediation scheme of the Central London County Court. Though the research was not substantial it did show that cases mediated, and settled thorough the mediation schemes cost less than cases settled by the court trial process. [71]

3) **Flexibility**: The flexibility of ADR is a major reason for it's acceptability .for it allows the parties to choose the kind of technique that will govern their meeting. They can choose any relevant industry standards, or any kind of law be it domestic or of a foreign country. Thus making it a standing point that can be easily worked out between the parties to put the problems nature and it's result on the parties involved.

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[69] **Okuni Charles – in charge Registry Commercial Court while responding to the question as to whether, when compared with litigation ADR was faster?**

[70] **Ruth Naisamula-clerk at the Commercial Court of Uganda, in answering the question as to the advantages of ADR in the questionnaires set by the researcher**

[71] **Professor Hezel Genn- research carried out** in (1998) carried out in the mediation scheme of the central London county court.

4) Accessibility: This alternative method to dispute resolution is more informal than court proceedings, without complicated rules of evidence and the adversarial nature. The adversarial process. This process can therefore be less intimidating and less stressful. One example is the small claims track where claims under 5000 are heard in the court. There the judge will hold an informal and some time inquisitive hearing to decide the dispute amongst both the parties.[72]

5) Expertise Involved: The parties involved in the dispute can have their dispute arbitrated or mediated by a person who is an expert in the relevant field. In an ordinary trial problems involving technical knowledge or procedures that many people cannot understand could make a trial go on for a long time. Also the calling of expert evidence on the basis of providing the necessary information to the judge can cost a lot of money. Not to mention the time spent educating and explaining to the judge and the jury about the complex and detailed points of fact that are involved. But if the mediator or arbitrator has a background in the relevant field, it will take a less time and money and the parties can easily jump to the core of the subject that easily and swiftly put an end to their discord

6) Conciliation of the Parties: ADR allows the conciliation of the parties to take place and help negate future disputes amongst the involved parties. A very good example is the family disputes. ADR allows both the parties to have an amicable settlement on an equal footing and retain family relationships. This takes place nowhere more than in divorce cases or in the child custody cases.

7) Non involvement of the Jury: A jury is not involved in the ADR process. They have awarded claimants damages that are well above what they would have received thorough alternative dispute resolution. And they have also done the opposite. Basically avoiding juries means that both parties are more likely to get reasonable damages, if they are due.

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[72] **Naisimula Ruth a Court Clerk Commercial Court- Answering the questionnaires presented to her by the researcher on the need for ADR in the administration of Justice 2011**

8) Closed Meetings: One of the advantages of ADR is it's closed door meetings. Court trials are open and do not offer privacy. This may be undesirable in business disputes, where the parties might not want to disclose information of their companies or high profile cases where publicity can cause mental and physical harm to the parties involved.

9) Customer Satisfaction[73] In ADR, both the parties involved leave with a high level of customer satisfaction. The reason being that the parties get involved to set up the terms on the grounds upon their dispute is to be settled. However, satisfaction may not be achieved in insistences where Arbitration takes years to reach a conclusion.[74]

10) Confidentiality of Results: The results of an ADR meeting can be kept confidential, thus making it virtually impossible to cause any type of scandals or scoops on newspaper headlines. The parties can agree that information disclosed during negotiations can not be used in later. However, this is not absolute since ADR is conducted in English as the language of court but some disputants are illiterate hence cannot express themselves.[75]

4.5 CHALLENGES

The use of ADR in Uganda especially the court annexed ADR has not been without challenges. The following are the challenges pointed out.

a. Strong traditional perceptions that litigation is more effective and better than ADR. This needs provocative judges, lawyers and the court users themselves. In the case of ***Verner V General and Commercial Investment Trust***[76] , Lord Linderly held that. "A proceeding may be perfectly legal and yet opposed to sound commercial principals"

[73] Professor Hezel Genn- ADR research carried out in 2002
[74] Ibid 75
[75] Ruth Naisamula-clerk at the Commercial Court of Uganda, in answering the question as to the advantages of ADR in the questionnaires set by the researcher
[76] (1842)2 Ch 239 at 264

b. ADR is used as a time wasting fishing expedition. It is suggested that those who use ADR to waste time should be penalized with costs. For instance, the mediation pilot project provides for unnecessary adjournment costs against the offending party.
c. Inadequate ADR training. Most legal training in Uganda is still based on the adversarial system and this has to be moderated with ADR training and awareness as well.
d. Sustainability and self funding. The pilot project is coming to an end and so will the incentive of the free provision of the mediation service. It may be necessary to load this cost on to the court filing fees to ensure access to justice more expensive but this must be weighed against the improvements it will bring to the judicial system as a whole

4.6 RECOMMANDATIONS

According to reports published by the High Court of Uganda Commercial Division, there has been success registered hence reduced case backlog. It should be noted that case backlog doesn't only affect the High Court but the entire judiciary and almost all courts in the country. There is need therefore to appoint Mediators and post at least two to every court especially those courts that are affected by case backlog.[77]

ADR should be officially conducted by all courts in Uganda. ADR is not conducted by all the courts. Those that try to conduct it, do it as a by the way through asking Advocates representing both parties to first sit and try whether they could settle their case through ADR. This is not taken seriously by Advocates since most of them prefer litigation to ADR. Secondly, there is never a mediator who is a neutral person that can reconcile all sides in case of disagreement in trying to settle the case out of court.[78]

The government should provide funds for mediators through budget allocations to ensure smooth carrying on and conducting of Mediation sessions by all courts in Uganda. This will also enable recruitment of mediators whose work will specifically be to conduct mediation sessions.

If the government cannot recruit Mediators, all judicial officers should be inducted in ADR techniques and methods to acquaint them with skills of conducting ADR in court proceedings.

Setting Mediation Commission Boards to regulate and oversee Mediation work in all courts. This commission should be empowered to control all mediators and is answerable to the Chief Justice who is the head of the judiciary.

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[77] John O.E Arutu – Deputy Registrar High Court Commercial Division while answering as to whether ADR has achieved any success.

[78] Her Worship Nakitende Juliet – Magistrate Grade I Mengo Court, while responding to the applicability of ADR in Magistrates courts. She informed the researcher that Consent Judgments have been reached between the parties with or without their lawyers and at times a magistrate cannot act as a mediator since he/ she is the one hearing the case. That at times consents are executed by bailiffs and leave a lot to be desired

The training of mediation trainers. There should be training of mediation trainer/coordinators and they should hold their jobs until retirement. These coordinators should be, through the training be acquainted with basic skills and techniques of conducting mediation sessions. In addition, these trained mediators should be given the opportunity to travel to other countries like the USA, Malaysia, or India for exposure to other mediation techniques. Mediation coordinators should also participate in regular refresher meetings once a month at the Ministry of Justice. Each coordinator should be responsible for overseeing a number of community mediation boards. Their duties should include monitoring the mediators, giving feedback to the mediators and the chairpersons, answering questions and giving advice about the mediation process, and dealing with any administrative issues.

The recruitment and training of mediators (panel members). The Arbitration and Reconciliation Act should be amended to include guidelines that should be followed in recruiting and training of mediators.

Awareness raising and educational programs for police, local officials, school children, social workers.

The appointed coordinators should then be tasked to identify other administrative bodies like the police and equip them with mediation skills to reduce criminal rates around the entire country. These trained police officers should be deployed to every police station to acquaint cases that are direct and willing parties to be reconciled and reconcile them. This can greatly reduce the number of cases that police forward to court, hence reducing case backlog. However, an officer nominated under this paragraph shall be eligible for appointment to the panel appointed for every mediation area within that administrative district

Regular monitoring and evaluation of panel members by the mediation trainers and the mediation boards commission members.

Training for law school students in universities. Many universities in Uganda have started and included ADR on their curriculum and it is now being taught to students especially those studying law. However, much as ADR is being taught in universities, it is optional and few students pursue it. It should be made a core subject so that all who pursue law taste and offers it to equip them with the culture and knowledge of Mediation. Students should also be given the opportunity to observe mediations conducted by the mediation boards and be allowed to participate in mediation workshops..

There should be media talks about the need and role played by Mediation as an ADR technique so that people are made aware of the process and facility. Media talks should be conducted country wide so that the information is circulated in all parts of the country.

The mediation committee in every district should be set up to entertain all conflicts referred to it by the court of law upon application for mediation by the parties in order to reduce costs related and affiliated to prolonged litigation.

4.7 CONCLUSION

As discussed in the Guide, ADR programs can serve as useful vehicles for promoting rule of law and other developmental objectives. Properly designed ADR programs, undertaken under appropriate conditions, can support court reform, improve access to justice, increase disputants satisfaction with outcomes, reduce delay, and reduce the cost of resolving disputes. In addition, ADR programs can help prepare community leaders, increase civic engagement, facilitate public processes for managing change, reduce the level of community tension, and resolve development conflicts.

An advantage of informal ADR systems is that they are less costly and intimidating for underprivileged communities, and therefore tend to increase access to justice for the poor. These systems are also less expensive for the state, and can be more easily placed in locations that will improve access for underserved populations. It is not possible, based on available data, to measure accurately ADR's ability to increase access or ADR's cost relative to formal litigation systems.

This inability to measure accurately, however, does not mean that the impact is not observable or significant. Although ADR programs can accomplish a great deal, no single program can accomplish all these goals. They cannot replace formal judicial systems, which are necessary to establish a legal code, redress fundamental social injustice, provide governmental sanction, or provide a court of last resort for disputes that cannot be resolved by voluntary, informal systems.

Furthermore, even the best-designed ADR programs under ideal conditions are labour intensive and require extensive management. In the development context, particular issues arise in considering the potential impacts of ADR. First, some are concerned that ADR programs will divert citizens from traditional, community-based dispute resolution systems.

This study has found a number of instances in which ADR programs have been effectively designed to build upon, and in some cases improve, traditional informal

systems. Second, while ADR programs cannot handle well disputes between parties with greatly differing levels of power, they can be designed to mitigate class differences; in particular, third parties may be chosen to balance out inequalities among disputants. Third, there is no clear correlation between national income distribution and ADR effectiveness.

ADR programs are serving important social functions in economies as diverse as those of the United States, Bangladesh, South Africa, and Argentina. Finally, it is not clear from the evidence to date whether ADR programs are more suitable for civil or common law jurisdictions. ADR programs are operating effectively within both, but not enough data exists to compare success rates under the two types of legal systems.

This Guide is a first step in understanding the strengths and limitations of introducing ADR within rule of law programs.
While past and present ADR projects have provided some significant insights into ADR, there is much still to be learned. More analysis is needed on the range of possible strategies for using ADR to support judicial reform, reduce power imbalances, and overcome discriminatory norms among disputants. Another important issue for study is how ADR programs may be replicated and expanded to the national level while maintaining sufficient human and financial resources..

Effective monitoring and evaluation of ADR systems are hard to find in developing and developed countries alike. Present and future ADR projects should have systematic monitoring and evaluation processes in place to ensure not only effective programs, but also continued learning.

This Guide mentions ADR's ability to advance development objectives other than the rule of law, such as facilitating economic, social and political change, reducing tension in a community, and managing conflicts hindering development initiatives. Further exploration of non-rule of law uses of ADR is critical to complete the picture of the range of ADR's applications. More in-depth research and analysis in this area would be

extremely useful to development professionals and others seeking to understand the strengths and limitations of ADR programs in developing and transitional societies.

Abraham Lincoln once stated, "***discourage litigation. Persuade your neighbors to compromise whenever you can. Point out to them how the nominal winner is often the real loser – in fees, expenses and waste of time. As a peacemaker, the lawyer has a superior opportunity of being a good man.***"[79]

It must be remembered that Alternative Dispute Resolution is not an adequate substitute for litigation but it is meant to supplement it with the aim of lowering costs and quick settlement. All cases are different, and all parties have different interests. "*The notion that most people want black-robed judges, well-dressed lawyers, and fine paneled courtrooms as the setting to resolve their disputes is not correct.*

People with problems, like people with pains, want relief, and they want it as quickly and inexpensively as possible."[80] Parties will overwhelmingly settle for tolerable solution over total frustration. Because parties have different interests and goals, ADR is not taking away from the legal system, but attempting to acknowledge those differences.

Alternative dispute resolution attempts to meet the varied goals of the parties and provide alternatives for those who would not find justice in the courtroom.

The movement towards alternative dispute resolution is an attempt to better serve clients and their interests. What could be more useful than a means to resolve disputes that encourages parties to work together to reach a mutual understanding? While litigation may allow one party to feel the satisfaction of "justice," ADR helps both parties achieve a feeling of satisfaction and resolution. Thus advocates and ADR methods should go hand in hand and no advocate should overlook ADR methods as a route to a possible solution as in the long run a solution through ADR may be in the best interests of the client.

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[79] **Harry T. Edwards**, "Alternate Dispute Resolution- Panacea or Anathema?" 1986 *Harvard Law Review* 668.

[80] Ibid

Because the method of dispute resolution has a substantial impact on the parties' interest, lawyers have a duty to consider alternatives to litigation. If the lawyer adequately advises the client about ADR methods, the client is in a better position to determine the best means to solve the dispute. Clients have a better outlook on their goals and interests and, therefore, should be able to make decisions which have substantial impact on the case and their lives. By overlooking ADR and failing to offer clients the option to pursue ADR, advocates are taking a valuable choice away from their clients.

Advocates may not only have an ethical duty to advise clients of ADR, but they could be negligent if they fail to do so. As the availability and success of ADR improve, clients will become aware of litigation alternatives. Clients will expect to be informed of those options. If an advocate fails to consider ADR options and does not present them to the client, the advocate will have failed to provide competent service

As the number of lawsuits continues to rise and the cost of legal counsel skyrockets, clients' and judges' desire for alternatives to litigation will increase. Advocates must to be prepared to meets those needs or face the consequences.

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KAMPALA
INTERNATIONAL
UNIVERSITY

Ggaba Road, Kasanga
P.O BOX 20000 Kampala, Uganda
Tel : +256 (0) 41-267634
Mobile: 0772 458443
Fax : +256 (0) 41-501974
Email:admin@kiu.ac.ug*Website:http://www.kiu.ac.ug

FACULTY OF LAW
Office o f the Ag. Dean

10th May, 2011

TO WHOM IT MAY CONCERN

Dear Sir /Madam,

RE: NZWEBE PHILIP
REG.NO: LLB/17293/71/DU

This is to certify that the above mentioned is a registered student in the Faculty of Law at Kampala International University, Uganda, pursuing a Degree course of Bachelor of Laws.

Philip is in his Fourth Year of the course. He is required to write a dissertation as part of the requirements for the course. He is expected to carry out research on his approved topic.

This is to request you to avail him with necessary information and materials to enable him compile the research.

Any assistance accorded to him in this regard is highly appreciated.

Thank you.

KAMPALA INTERNATIONAL UNIVERSITY * FACULTY OF LAW * DEAN 10 MAY 2011

Yours sincerely,

Sewaya Muhamud
Ag. Dean

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THANK YOU FOR YOUR COORPERATION IN PROVIDING INFORMATION TO THE SEARCHER. YOUR ASSISTANCE WILL ALWAYS BE REMEMBERED. MAY GOD REWARD U ABUNDANTLY?

URS SINCERELY

WEBE PHILIP (STUDENT/RESEARCHER) 0782739983

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