

**AN OVERVIEW OF THE EFFECTIVE USE OF ALTERNATIVE DISPUTE RESOLUTION IN
RESOLVING LEGAL MATTERS IN UGANDA**

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CS20B11/012

**A DISSERTATION SUBMITTED TO THE SCHOOL OF LAW, IN PARTIAL FULFILLMENT OF
THE REQUIREMENTS FOR THE AWARD OF A DEGREE OF BACHELOR OF LAWS OF
UGANDA CHRISTIAN UNIVERSITY**

May, 2024



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ABSTRACT

Dispute are inevitable element of human interaction and society needs to develop efficient and innovative methods of dealing with them and to resolve them through man developed court system. The search for alternatives to violence gave birth to the precursors of alternative dispute resolution (ADR) thus making it an important critical aspect in the resolving of disputes all over the world. Even with that whenever a dispute arises the parties will go to their lawyers and the lawyers will issue a notice of intention to sue the other party in court without considering whether the dispute can be resolved in a different way. This has led to an increase in cases in the court system thus leading to case backlog.

This research paper intends to show how effective the use of Alternative dispute resolution in resolving disputes between parties in Uganda.

DECLARATION

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

STUDENT

AINEMBABAZI LYNNETTE

SIGNATURE

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DATE

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APPROVAL

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

SUPERVISOR

MR. ISAAC SEKABANJA

SIGNATURE

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DATE

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DEDICATION

This research paper is dedicated to the Almighty God who renewed my strength each day as I woke up to make ground breaking research. To my father Mr. Twinomuhwezi Henry and my mother Mrs. Twinomuhwezi Grace for the great support in prayer and financial wellbeing. To my brother Ainebyona Marvin, Kiiza Alvin and Muhwezi Joel. And to my friends for the great support through words of encouragement to be able to complete my research paper.

ACKNOWLEDGEMENT

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

I also wish to express my sincere gratitude to my family members my father Mr. Twinomuhwezi Henry and my other Mrs. Twinomuhwezi Grace for the moral and financial support rendered towards the completion of this project. I will forever remain indebted to them.

LIST OF ACRONYMS

ADR- Alternative Dispute Resolution

UNCITRAL- United Nations Commission on International Trade Law

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CHAPTER ONE

INTRODUCTION

The study focuses on the effective use of Alternative Dispute Resolution (**ADR**) in resolving legal matters in Uganda. This case study is based on what practically takes place in courts of Uganda.

This chapter presents the background of the study, purpose of the study, objectives of the study, scope of the study and the significances of the study.

BACKGROUND

Alternative Dispute Resolution (ADR) refers to a structured negotiation process under which parties to a dispute negotiate their own settlement with the help of an intermediary who is a neutral person trained in the techniques of ADR¹.

There are various strategies involved in ADR include negotiation, conciliation, mediation, mini-trial/early neutral evaluation, court annexed ADR and arbitration². These approaches are continuously being relied upon as an alternative to conventional law suits.

The search for alternatives to violence gave birth to the precursors of alternative dispute resolution (ADR). The most basic form of ADR is negotiation at its core, two people simply talk about a problem and attempt to reach a resolution both can accept. Then mediation started when negotiators realised they needed help in this process then they would accept the intervention of a third person. If the third party was asked to make a decision or placed the decision in the hands of some arbitrary mechanism, the process was arbitration³.

ADR is often thought of as a new method of resolving disputes though it has been there over the years and had been used even before being used in the court system. It was used in different societies for example in the Yoruba of Nigeria in case of any disputes, the traditional head of the Yoruba known as the Olubadan also acts as an arbitrator in many of the disputes and it would be considered a shame when a matter between the Yoruba ends up in court⁴. In India, the system of

¹ Anthony Conrad K. Kakooza: Arbitration, Conciliation and Mediation in Uganda: A focus on the practical aspects 2009 at Page.1

² Hon. Justice G.W.M. Kiryabwire: Alternative Dispute Resolution: Catalyst in Commercial Development: A case study from Uganda (Vol 3: No. 2 December 2005) at Page 145

³ J.T. Barrett, J.P. Barrett: A History of Alternative Dispute Resolution: The story of political, cultural and social movement (first published 2004 Bass A Wiley Imprint 1989 Market Street, San Francisco) 1

⁴J.T. Barrett, J.P. Barrett: A History of Alternative Dispute Resolution: The story of political, cultural and social movement (first published 2004 Bass A Wiley Imprint 1989 Market Street, San Francisco) 5

arbitration with an arbitrator called a Panch. In the early Yi Dynasty in Korea (1392-1910) is remarkable for its longevity and its extensive use of arbitration, it was widely practiced in a variety of commercial and civil disputes between citizens⁵.

The story of ADR can be traced back to the ancient Greeks. It was simply a matter of mythology to the ancient Greeks. As Athenian courts became crowded the city state instituted the position of the public arbitrator sometime around 400 BC. According to Aristotle, all men served this function during their sixtieth year, hearing all manner of civil cases in which disputes did not feel the need to go before the more formal and slower, court system⁶.

Aristotle (384-322 BC) and Cicero (106-43 BC) made clear that arbitration was an alternative to court. Aristotle said arbitration was introduced to give equity its due weight, making possible a larger assessment of fairness. Cicero said a trial is exact clear cut and explicit whereas arbitration is mild and moderate and that person going to court expects to win or lose, a person going to arbitration expects not to get everything but not to lose everything either.

ADR can also be traced back to the days of King Solomon 980 B C and the Jewish tradition based on Torah and Talmud in the bible. It was used as an alternative to war as said in **1 Corinthians** and under the Jewish tradition, the concept of compromise in dispute resolution was highly valued, a further encouragement of negotiations and mediation. Also, in the earliest days of Islam, Muhammad (570-632) encouraged and practiced tahkim or arbitration to resolve a variety of disputes. Tahkim has a long tradition in Arab world⁷.

During the tenth and eleventh centuries, commercial arbitration become widely used in many European cities under a practice referred to as the law merchant, although no governmental law was involved. ADR predecessor was voluntarily developed, adjudicated and enforced by merchants⁸.

⁵ Supra (note 4) at Page 9

⁶ Ibid at Page 7

⁷ Ibid at Page 13

⁸Ibid at Page 16

By the late Middle Ages state court had taken over some work of the law merchant. These courts, however, lacked the technical expertise of the merchant judges who were more akin to arbitrators with their extensive knowledge of travel and commerce.

In 1698, Ireland enacted the first arbitration law and remained unchanged for 250 years. It used these words to authorize arbitration. It was lawful for all merchants, traders and others desiring to end arbitration any controversy, suit or quarrels for which there is no other remedy but by personal action or suit inequity to agree that their submission of the matter to be made a rule of any of his majesty's courts of record, which the parties shall chase⁹.

The law established several important principles that continue in arbitration today, the parties were allowed to choose their own arbitrator, arbitration awards were recorded in a state court and the court was likely involved in enforcing the awards.

By the seventh century, the coastal nations to western Europe were engaged in significant commercial trade and maritime pursuits. This commercial activity and growth of diplomacy spawned by a greater sense of nationhood and competition advanced the need for and use of ADR.

In Uganda, arbitration was first introduced in the Arbitration Act in 1930 but it was seldom used. Furthermore Order 43 of the Civil Procedure Rules (CPR)¹⁰ first promulgated by General Notice 607 of 1928 provided for Arbitration under order of a court but this was seldom used. This could be referred to as the first 'court-based ADR'¹¹. In 2003, the then Chief Justice Benjamin Odoki issued Legal Notice No 7 of 2003 which introduced the first pilot project of court-based mediation was introduced to reduce case backlogs even though it was not embraced but it was at this time that mediation took on a prominent role in the judicial system. Following the successful implementation of the pilot project in the Commercial Court in 2013, mediation was rolled out to all divisions of the High Court and is now mandatory prior to proceeding to litigation with a civil matter¹²

⁹J.T. Barrett, J.P. Barrett: A History of Alternative Dispute Resolution: The story of political, cultural and social movement (first published 2004 Bass A Wiley Imprint 1989 Market Street, San Francisco) 17

¹⁰ Civil Procedure Rules S.I 63-3

¹¹ Justice G. W.M. Kiryabwire: Alternative Dispute Resolution; A Ugandan Judicial Perspective: A paper delivered at a continuation Seminar for Magistrates Grade One at Colline Hotel Mukono 2005 at Page 6

¹² Ms. Akao, Mr.J.P. Ekemu: Roots of alternative dispute resolution in Uganda, 2019 updated in 2021 https://www.monitor.co.ug/uganda/oped/commentary/roots-of-alternative-dispute-resolution-in-uganda-1800478#google_vignette accessed on 19th March 2024

STATEMENT OF THE PROBLEM

ADR has become an important critical aspect in the resolving of disputes all over the world. However, in Uganda the use of ADR in resolving disputes has not been effectively used because people believe that their disputes are best solved in the courts of law. Even after the law has provided that before people take their cases to court to be heard that the parties should first go for mediation as per Order 12 Rule 1(1) of the Civil Procedure Rules¹³ which provides for scheduling conference and alternative dispute resolution. This provision is meant to help the parties consider the option of settling the matter before hearing in Court can commence. Whenever a dispute arises the claimants will go to their lawyers and the lawyers will issue a notice of intention to sue the other party in court without considering whether the dispute can be resolved in a different way. This has led to an increase in cases in the court system thus leading to case backlog. This research paper intends show the effectiveness of ADR in resolving legal matters without going through the court process.

OBJECTIVE OF THE STUDY

The major objective of the study is to find out the effective use of ADR in resolving legal matter in Ugandan courts.

Specific objective of the study

1. To analyze the legal framework governing ADR
2. To examine the challenges facing the use of ADR in Uganda.
3. To provide recommendations for an effective use of alternative dispute resolution in the judicial system in Uganda.

RESEARCH QUESTION

1. What are the existing legal frameworks governing ADR?
2. What challenges are experienced in governing ADR?
3. What are the best strategies to enhance the effective use of ADR?

SIGNIFICANCE OF THE STUDY

This study will be of benefit to the following; Policymakers, researcher and add to the body of knowledge.

¹³ Civil Procedure Rules S.I 71-1

1. The study will help inform people about the availability of ADR in Uganda and it shall illustrate on the different modes of ADR that are available.
2. The study will educate people on the effective use of ADR.
3. The study will discuss the current hindrances being faced by ADR.

At the end of the study, we should be able to know the reasons as to why ADR has not been well appreciated in Uganda and should be able to give recommendations to solve the problem.

JUSTIFICATION OF THE STUDY

ADR is often thought of as a new method of resolving disputes though it has been there over the years and had been used even before being used in the court system. However, whenever a dispute arises the claimants will go to their lawyers and the lawyers will issue a notice of intention to sue the other party in court without considering whether the dispute can be resolved in a different way. This research paper intends show the effectiveness of ADR in resolving legal matters.

SCOPE OF THE STUDY

Content of scope

This study will only be limited to the effective use of alternative dispute resolution in resolving legal matters in Uganda. This study will collect data from both primary and secondary sources as stated in the methodology.

Time Scope

The study will be conducted within a period of four months.

Geographical scope

This research shall be carried out at the High Court of Uganda at Kampala.

METHODOLOGY

The research methodology will be both qualitative and quantitative methods.

Under qualitative research I will analyses data from fieldwork observations in depth, open-ended interview and written document. I will collect information from the library of Centre of Arbitration and Dispute Resolution, Commercial Court Library, Hamu Mukasa Library (Uganda Christian University).

Under Quantitative method, I will carry out interviews using a set of questions that will enable me obtained the answers needed for my research work. The interviews shall be carried out using a particular sample of the population that is to say the staff of CADER (Centre for Arbitration & Dispute Resolution).

Research design

The researcher carried out a descriptive cross-sectional study using both quantitative and qualitative collection methods based on randomly and purposively selected samples, qualitative data was obtained through focused group discussion, interviews and observations. The interviews enhanced an in-depth description and analysis of the views of different stake holders for the success of this study.

CHAPTER TWO

LITERATURE REVIEW

The researcher will examine the different existing literature works in regard to some research topics for purposes of reviewing, identification of gaps in such works and how the present work will address those gaps.

In his paper **Justice G. W.M. Kiryabwire**¹⁴, stated under the chapter of emerging challenges in Uganda that court assisted ADR first challenge is transient/unreasonable parties or their legal advisors who are not willing to try ADR at page 18. I agree with the author because in Uganda many of the lawyer/clients do not want to go in for ADR claiming it is a timewasting and expensive yet the litigation process is more expensive and more timewasting. This research paper is intended to add to his statement to show the different challenges that have hindered with the effective use of alternative dispute resolution in resolving the disputes in legal matters.

The author also stated in the same paper at page 22 that clearly litigation should be done only on the event that mediation would have no reasonable prospect of success. I disagree with the author because he only focuses on mediation yet ADR is made up of different form of dispute resolution like arbitration, conciliation and negotiations which can be used to resolve the legal disputes. This research paper intends to show how all form of ADR can effectively be used to resolve legal matters.

In same paper the author mainly focuses on the use of ADR in commercial cases only. I disagree with the author because ADR can be used in the criminal cases as was seen in the case of Kanyamunyu, who shot a one Akena dead. He sought intervention of Acholi Religious Leaders Peace Initiative (ARLPI) and Acholi Cultural Institution to broker a reconciliation agreement between him and Akena's family to find a closure to the case. Under the Acholi traditional justice system of Mato Oput, the accused person must admit his/her mistake through a meaningful confession and must also accept to pay reparations for the damages caused¹⁵. This was not to hinder him from serving his sentence but to reconcile him with the family of the man that he killed, also

¹⁴ Justice G. W.M. Kiryabwire: Alternative Dispute Resolution; A Ugandan Judicial Perspective: A paper delivered at a continuation Seminar for Magistrates Grade One at Colline Hotel Mukono 2005

¹⁵ URN: 'Kanyamunyu finally admits to killing Akena, to pay 10 cows to family' (2020) (The Observer)

<https://observer.ug/news/headlines/66540-kanyamunyu-finally-admits-to-killing-akena-to-pay-10-cows-to-family> accessed on 19th March 2024

getting his sentence reduced. Therefore, this research paper intends to show that ADR can be used in criminal cases.

Justice G. W.M. Kiryabwire in his book¹⁶, he mainly talks about mediation as the alternative dispute of resolving disputes in the different chapters like chapter 10 which explores appellate mediation in international jurisdictions such as England and Wales and also he talks about traditional methods in such scenarios often result in the dissolution of lucrative business partnerships when disputes arise which offers valuable insights into how mediation can not only resolve disputes but also preserve valuable business partnership. I disagree with the author because ADR has various strategies involved including negotiation, conciliation, mediation, mini-trial/early neutral evaluation, court annexed ADR which can be used to preserve valuable partnerships.

Arthur L. Marrioti and Henry.J. Brown in their book¹⁷ states that the essence of ADR accomplished by structured negotiation which may take many take many forms. However, the author does not give a detailed form and approach to give a coordinator precedent to readers as much as it limits on the subject matter. I would disagree with this suggestion because the author tends to draw much more conclusion on negotiation as the best means of resolving disputes, especially when it comes to deceptive negotiating tactics which furthers the interests of some clients upon the other.

Anthony Conrad Kakooza also in one of his legal journals¹⁸, lays out that Arbitration and Mediation are two of the strategies in Alternative Dispute Resolution. The Ugandan Court Systems have, of late, progressed and become more appreciative of global commercial development and thus bringing the establishment of other dispute resolution mechanism in the administration of justice that are efficient and accessible; faster and cheaper. This is when Alternative Dispute Resolution (commonly known as ADR) comes in trough these developments it is not tolerant to aver that ADR is effective as a mode of dispensing justice since the country is embracing it as a large. However, he does not discuss other types such as negotiation in the resolving of disputes.

¹⁶ Justice Geoffrey. W.M. Kiryabwire: Alternative Dispute Resolution: The Ugandan Court Experience (1st Edition, LawAfrica Publishing (k) Ltd 2021)

¹⁷ Henry. J. Brown, Arthur.L. Marriot: ADR Principles and Practice (2nd Edition, Sweet &Maxwell 1999) 1

¹⁸ Anthony Conrad K. Kakooza: Arbitration, Conciliation and Mediation in Uganda: A focus on the practical aspects 2009

This research intends to show how all types of alternative dispute resolution help in resolving disputes in the judicial system.

Elizabeth Nakiru in her article¹⁹ states that under ADR in URA the process can be done after a taxpayer has filed an objection with the URA and an objection decision has been communicated to a tax payer by URA. Where the taxpayer dissatisfied with the objection decision, the taxpayer can opt to engage in ADR with URA as opposed to challenging the objection decision through the court process. This simply means that ADR can only be done when an objection has been raised and a decision has been passed. I disagree with the author because ADR could be the first option after the objection is raised in order for the parties to sit down and discuss the objection amicably.

Robert. A. Baruch and Joseph.P.Folger in their book²⁰ focus on transformative mediation under the oppression story. The authors state that mediation is dangerous because of its informality and consensually as it allows the stronger party to manipulate the weak and also allows the mediator enormous amount of power to manipulate the outcome in the way they wish. And that mediation does not follow precedent or necessarily concern itself with the public interest problems. I disagree with the authors because the mediators have no power to manipulate the decision of the parties but simply guides them to reach a solution and in most cases the parties must compromise in order to reach solution for the dispute.

Roger fisher and William Ury in their book ²¹ they agree that too often mediators become entangled in awkward struggle over fixed positions and thereby fail to be imaginative to work towards of a mutually beneficial deal. By the help of Best Alternative to a Negotiated Agreement, they stress the need for creativity and alternative approaches when there is a stalemate. From this perspective, they encourage mediators to detach the people and positions and center on concerning alternatives for common out comes. Negotiation provides excellent number of well-designed exercises that help mediators develop and apply the concept and principles of mediation and negotiation• It anticipates mediators into in bargaining and integrative negotiation. It emphasizes preparation prior to a negotiation and tarnishes the mediator with various tactics that can be

¹⁹ Elizabeth Nakiru: Understanding Alternative Dispute Resolution(ADR) 2023

²⁰ Robert A.B. Bush and Joseph.P. Folger: The Promise of Mediation; Responding to Conflict through Empowerment and Recognition (Jossey-Bass; First Edition 1994)

²¹ Fisher, Roger and William Ury: In Getting To Yes-Negotiating Agreement Without Giving In (New York: Penguin Books 1983).

employed from getting parties to the table and how to work towards a successful negotiation. Mediators face many barriers that hinder their succession negotiation. It highlights problems of diehard bargainers, gender differences, cultural differences, difficulty with gaining trust and limitation of time as some of the difficulties mediators face and furnishes them with the necessary skills for circumventing such barriers. It also deals with mental errors, the gap in a party's presentation the mediators own mental lapses and rules and regulations (legislations) that often influence the outcome of mediators. It cautions the mediator to be alert and proactive in addressing such challenges to avoid deals being lost or turning out as bad deals in the future. The book is however mainly concerned with business disputes and it is overly academic based and one would wonder if it can be very useful for the conflicts in Uganda today.

Bolaji Owasanye in his article²² argues that disagreement and misunderstanding are key characteristics of human relationship where the relationship is domestic or international one. Since disputes are such a critical part of human relationship many countries have mechanism to resolve them in a manner which maintains the coalition economics and political stability of the state. He goes ahead to argue that Africa nations had their own indigenous system of dispute resolution before colonialist introducing the adjudication or criminal law system and this negotiation and arbitration orders. He points out that because African lawyers are trained in the common laws system of adjudication which is integrated into the system of government by the constitution backed by the establishment of courts judges the rules of procedure and the enforcement of the judgment, African lawyers have come to rely on and trust the common law system more than other forms of dispute resolution.

Lee Jay Berman in his article²³ states that the biggest mistake most attorneys make is not getting all of the value that the mediator has to offer and for which client is paying. Many attorneys won't let the mediator get a word in edgewise, tie their hands with respect to what they can reveal and discuss in other room and only want to talk numbers with them after lunchtime. However, despite the author stating these challenges associated with mediation he failed to pin point out how even if mediation exists, it lacks enforceability in commercial courts which has been a challenge in

²² Bolaji Owasanye: Dispute resolution Mechanisms and constitutional rights in Sub-Saharan Africa 2000

²³ Lee Jay Berman: Ways to make your mediator work harder for you

solving commercial disputes this arises where there is no enforceability clause in the contractual agreement of a commercial dispute.

CONCLUSION

In conclusion, this study intends to show the effective use of ADR to resolving legal matters in Uganda in order to reduce the case backlog that is faced by the judicial system which leads to a delay in justice yet “Justice delayed is justice denied”.

CHAPTER THREE

ADR AND ITS MECHANISMS

3.0 INTRODUCTION

This chapter looks at the different forms of ADR applied in Uganda and how they are applied to resolve disputes under the commercial court.

3.1 FORMS OF ADR

ADR refers to a structured negotiation process whereby the parties to a dispute themselves negotiate their own settlement with the help of an independent intermediary who is a neutral and trained in the techniques of ADR²⁴.

The common forms of ADR are negotiation, conciliation, mediation, Arbitration, Mini-trial/early neutral evaluation and adjudication.

3.2 NEGOTIATION

This is a fairly straight forward settlement technique. Under this technique, parties talk to each other thus negotiation can be defined as formal discussion between disputing parties in which people or groups try to reach an agreement. It consists of basically, discussions between the interested parties with a view to reconciling divergent opinion or at least understanding the different positions maintained.

When opening the negotiation, consider the following; what needs exist, what are as of common ground exist between us what is the history/track record of the relationship, how much authority does my negotiating partner have, what is their “power” over us and/ or competitors, how can we exploit our strength for mutual benefit?²⁵

Negotiation is normally the precursor to other settlement procedure as the parties decide amongst themselves how best to resolve their differences.

How, it is rarely used because it depends on a certain degree of mutual good will, flexibility and sensitivity.

²⁴ Anthony Conrad K. Kakooza: Arbitration, Conciliation and Mediation in Uganda: A focus on the practical aspects 2009 at Page.1

²⁵ Olivia Kyarimpa Matovu: ADR-The Mutual Warrior at Page 5

3.3 CONCILIATION

Under this technique, a third part called a conciliator aims to assist the parties to a dispute to find a solution but has no power to enforce it. Conciliation refers to the process in which the third party restores damaged relationship between disputing parties by bringing them to clarifying perceptions, pointing out misperceptions, work out what everyone agrees on, identify areas of common ground, aim to reach a workable agreement, develop options to resolve each issue or receive expert advice and legal information(in some circumstances)²⁶.

The parties to a dispute arrive at their solution independently and impartially as per Section 53²⁷. The conciliator shall be guided by principles of objectivity, fairness, justice, giving consideration to, among other things, the right and obligations of the parties, the usage of the trade concerned and the circumstances surrounding the disputes including any previous business practices between the parties as per **Section 53(2)**²⁸.

The whole focus of the proceedings rests on the interest of the parties, their common business practices(usages of trade), if any and the circumstances surrounding the disputes²⁹.

Meetings between the conciliator and the parties are rather informal that is to say they may choose to meet physically at a place either party may agree upon or opt to communicate orally or in writing as explained under **Section 54**³⁰.

The outcome of conciliation proceedings is not to be abused or disrespected in any way that is to say the parties to conciliation proceedings cannot rely on its outcome or any information obtained from such proceedings to be used as evidence in arbitral or judicial proceeding³¹.

However, even if conciliation may lead to the resolution of the dispute, it does not necessarily achieve the end meets. It has no binding power on the parties.

²⁶ Olivia Kyarimpa Matovu: ADR-The Mutual Warrior at Page 7

²⁷ Arbitration and Conciliation Act Cap.4

²⁸ Ibid note 27

²⁹ Anthony Conrad K. Kakooza: Arbitration, Conciliation and Mediation in Uganda: A focus on the practical aspects at page 14

³⁰ Ibid note 27

³¹ Anthony Conrad K. Kakooza: Arbitration, Conciliation and Mediation in Uganda: A focus on the practical aspects at page 15

3.4 MEDIATION

Under this technique, a neutral third party facilitates communication among the parties to a dispute and assists them in reaching a mutually agreed resolution³².

Mediation is quite similar to conciliation even though different writers have tried to make a distinction between both of them. It is increasingly appearing like the two forms of ADR are being merged into one single concept generally called “Mediation”. This is because the processes are every similar in substance. Both involve a neutral third party whose role is to help the disputing parties reach an agreed settlement³³.

The origins of mediation as a mechanism in dispute resolution and administration of Justice can be better appreciated through the practice of law in Uganda³⁴. Mediation as a dispute resolution mechanism is not all together new in traditional Ugandan and African society. There has for centuries been a customary mediation mechanism, using elder as conciliators/mediators in disputes using procedures acceptable to the local community but which were not as formal as those found in the courts³⁵.

Judicature (Commercial Court Division) (Mediation) Rules, 2007 makes mediation a mandatory procedure for all litigants. These rules are an aftermath to the Commercial Court’s Mediation Pilot Project conducted between 2003 and 2005. These rules generally stipulate to the effect that a party filing pleadings at the Commercial Court shall provide for the mediator(s) in the matter; a concise summary of the case in dispute and all documents to which the case summary refers and any others to which the party wants to refer in the mediation³⁶. In **SS Enterprises Ltd & Anor v Uganda Revenue Authority**³⁷, counsel for URA argued that only the Board of directors of the URA had the powers to settle a case via mediation so it was not possible for URA to submit to mediation. Justice Kiryabwire held that internal institutional processes were not a good reason to avoid mediation, reasons to avoid mediation must be legal or procedural in nature.

³² Justice Geoffrey. W.M. Kiryabwire: Alternative Dispute Resolution: A Ugandan Judicial Perspective at Page 4

³³ Ibid note 32 at page 4

³⁴ Anthony Conrad K. Kakooza: Arbitration, Conciliation and Mediation in Uganda: A focus on the practical aspects at page 16

³⁵ Anthony Conrad. K. Kakooza: Arbitration, Conciliation and Mediation in Uganda: A focus on the practical aspects at Page 17

³⁶ Ibid at Page 18

³⁷ SS Enterprises Ltd & Anor v Uganda Revenue Authority HCT-00-CC-CS-708-2003

Under **Rule 10**³⁸ states that where a judge, registrar or magistrate acts as a mediator under these Rules and the mediation is unsuccessful, the judge, magistrate or registrar shall immediately cease to take part in any further proceedings relating to that civil action.

3.5 ARBITRATION

Under this technique, 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 court of law. Arbitration has become the most favored method of settlement of commercial disputes and it is recognized by the courts under **Section 5**³⁹ provides that a judge or magistrate before whom proceedings are being brought in a matter which is the subject of an arbitration agreement shall if the party so applies after the filing of a statement of defense and both parties having been given hearing, refer the matter back to the arbitration.

The parties must agree to go for arbitration under the arbitration agreement which refers to an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationships whether contractual or not **as per Section 2**⁴⁰.

Section 26 to 32⁴¹ provides for situation when matters can be referred to a special reference or arbitrator to handle where such official has been granted High Court powers to inquire and report on any cause or matter other than a criminal proceeding.

The Arbitration and Conciliation Act provides for the Centre for **Arbitration and Dispute Resolution(CADER)**, a statutory institutional alternative dispute provider. Participation is typically voluntary and the third party imposes a resolution/decision which is binding on the parties and it is called the arbitral award which must be given within two weeks. The decision can be set aside in case one of the party is happy with how the award was given. Arbitration is informal thus it tends to be most effective where there is a high degree of mutuality and interdependency and that is precisely the case in most business relationships⁴².

³⁸ The Judicature (Mediation) Rules, 2013

³⁹ Arbitration and Conciliation Act Cap 4

⁴⁰ Arbitration and Conciliation Act Cap 4

⁴¹ Judicature Act Chapter 13

⁴² Justice Geoffrey. W.M. Kiryabwire: Alternative Dispute Resolution: A Ugandan Judicial Perspective at Page 2

3.6 MINI TRIAL/ EARLY EVOLUTION

Mini-trial Early neutral evaluation is mostly common among commercial corporations. In this case a neutral third party is called in to conduct a "hearing" in which the executives of the corporation may be involved with a view to testing the merits of the case before a decision is finally made to go to trial⁴³.

3.7 ADJUDICATION

Under this technique, it is a process of dispute resolution applied in the Construction industry where the dispute is determined by an adjudicator or a tribunal or adjudicators. It is quick dispute resolution method usually expected to be concluded within 28 days from the date of submission of the dispute to the adjudicator. The decision of the adjudication is binding on the parties unless any of the parties is dissatisfied with it and they pursue final resolution through arbitration or litigation. The adjudication process begins when the party referring the dispute to adjudication gives written notice of its intention to do so⁴⁴.

The process of adjudication starts with the selection of an adjudicator by the parties, both parties meet the adjudicator who acts as a judge in the case. The person who adjudicates will either be set by the contract or chosen and agreed upon by the parties to the dispute or may be nominated by an independent body⁴⁵.

⁴³ Ibid at page 4

⁴⁴ Olivia Kyarimpa Matovu: ADR- The Mutual Warrior at Page 8

⁴⁵ Ninsiima Irene: Alternative Dispute Resolution in East Africa 2021 <https://lawfirmsinuganda.ug/alternative-dispute-resolution-in-east-africa/> accessed on 3rd May 2024

CHAPTER FOUR

NON LEGAL ASPECT OF ADR

4.0 INTRODUCTION

ADR is not a new concept for centuries various societies used informal and non-adversarial processes for resolving disputes. It can be argued that the modern methods of ADR are not in the sense modern but a mere return to earlier and traditional ways of dealing with such disputes in the traditional societies.

ADR could be an alternative of the court system but in some society the court was considered as an alternative of ADR. ADR came from the ancient societies that existed way before the modern era. This includes the classical times, traditional societies (before and after colonization) and as well as the religious perceptive.

4.1 ADR IN THE CLASSICAL TIMES

The earliest recording of mediation occurred more than 4000 years ago in the ancient society of Mesopotamian when a Sumerian rulers who helped avert a war and developed an agreement in a dispute over land⁴⁶.

The development of ADR in the western world can be traced to ancient Greek. It was simply a matter of mythology to the ancient Greeks. As Athenian courts became crowded the city state instituted the position of the public arbitrator sometime around 400 BC. According to Aristotle, all men served this function during their sixtieth year, hearing all manner of civil cases in which disputes did not feel the need to go before the more formal and slower, court system⁴⁷.

Aristotle (384-322 BC) and Cicero (106-43 BC) made clear that arbitration was an alternative to court. Aristotle said arbitration was introduced to give equity its due weight, making possible a larger assessment of fairness. Cicero said a trial is exact clear cut and explicit whereas arbitration is mild and moderate and that person going to court expects to win or lose, a person going to arbitration expects not to get everything but not to lose everything either.

⁴⁶ Lon.L.Fuller: Mediation-Its forms and functions

⁴⁷ J.T. Barrett, J.P. Barrett: A History of Alternative Dispute Resolution: The story of political, cultural and social movement (first published 2004 Bass A Wiley Imprint 1989 Market Street, San Francisco) 7

4.2 ADR IN AFRICAN TRADITIONAL SOCIETY

Justice Geoffrey Kiryabwire in his article stated that mediation as a dispute resolution mechanism is not all together new in traditional Uganda and African Society. There has for centuries been a customary mediation mechanism using elders as conciliators, mediators in disputes using procedures acceptable to the local community but which were not as formal as those found in the courts⁴⁸.

ADR can be considered as a long cultural phenomenon in most African countries. Disputes were resolved through negotiated settlement.

However, overtime these methods were made informal with the introduction of the court system by the colonialists. Most of the traditional methods used for resolving the disputes are as old as the tradition and custom itself.

In these disputes, the parties could arise from the whole process and maintain their relationship and where one party got an award the whole society was witness and saw to it that it was enforced.

In the Yoruba of Nigeria in case of any disputes, the traditional head of the Yoruba known as the Olubadan also acts as an arbitrator in many of the disputes and it would be considered a shame when a matter between the Yoruba ends up in court⁴⁹.

According to the Acholi tribe of Northern Uganda, parties were often encouraged to settle disputes through Mato Oput (drinking the bitter herb), it is both a process and ritual ceremony that aims at restoring relationships between clans that would have been affected by either an intentional murder or accidental killing⁵⁰.

In the event of any dispute between family members, it was first brought to notice of the head of the family and where he failed to resolve the dispute or if the dispute is of high gravity by its nature then the dispute was forwarded to the clan leaders. The leaders usually handled disputes that would affect the entire clan.

⁴⁸ Justice Geoffrey W. M. Kiryabwire: Mediation of Corporate Governance

⁴⁹J.T. Barrett, J.P. Barrett: A History of Alternative Dispute Resolution: The story of political, cultural and social movement (first published 2004 Bass A Wiley Imprint 1989 Market Street, San Francisco) 5

⁵⁰ RocoWatiAcoli: Restoring Relations in Acholi-land Traditional Approaches to Reintegration and Justice, September 2005

Community leaders were considered the highest ranking leaders in the community and they handled disputes where social wrongs involving the entire community were committed and they used open community debates to come up with a punishment and remedy for the offender and offended respectively. These leaders ensured peace and harmony amongst the people⁵¹.

4.3 ADR ON INTERNATIONAL LEVEL

The history of ADR in International law can be traced back to the 1794 Jay Treaty between Great Britain and the US. The growth of international trade is one of the reasons for international disputes which transcend national frontiers and geographical boundaries. For the resolution of such disputes the preferred to litigation in courts and therefore the foreign element being preferred in the international courts. This is also because there is no international court to deal with international commercial disputes⁵².

4.4 ADR UNDER RELIGION

According Justice David Wangutusi, he stated that it is obvious that mediation is anchored in humanity. It is supported by both Christianity and Islam. Furthermore, it is less expensive than the traditional legal system. The judge quickly inserts an Afrocentric mediation perspective. “what we are doing in mediation is what our forefathers did before the colonialists came along with this judicial system we have now.” Whenever they had a disagreement, they would gather around a pot of Malwa (local brew) and speak about it until they were shaking hands because the situation had been resolved⁵³.

Prior to courts, there were temples and prior to judges, there were elders and priests. ADR can be traced in the Bible and the Koran which were used to resolve disputes among the parties.

4.4.1 UNDER CHRISTIANITY

Christianity is the religion based on the preaching and teachings of Jesus Christ.

ADR can also be traced back to the days of King Solomon 980 B C helps resolve the dispute about the ownership of the living child between two prostitutes. The two prostitutes claimed to be the rightful mother of the living child and not the dead child. King Solomon having listened to both

⁵¹ Geneva: African tradition and humanitarian law (1978) Pg. 10

⁵² Anthony Connerty: The role of ADR in Resolution in International Disputes Vol 12 No.1 1990 Pg. 47

⁵³ Ssentongo Yakubu: The Impact of Alternative Dispute Resolution on Uganda's Civil Justice System 2018

their argument and decided to cut the baby into half and then made his decision⁵⁴. This could be as present day arbitration.

Paul encourages the believers to appoint a capable person among the believers to listen to the matter and help the disputants to resolve their differences⁵⁵. It is highly frowned upon for disputants to take their disputants to non-believers for judgement.

Jesus taught all people needed to work out their differences in order to be saved saying, “Love your enemies, do good to those who hate you, bless those who curse you, pray for those who ill treat you. If someone strikes you on one cheek, turn to him also the other.”⁵⁶ Jesus compelled his followers to forgive one another and reconcile their differences, he also taught them how to go about accomplishing those goals. Jesus taught that if your brother sins against you, show him his sin in private; if he listens, you have won your brother⁵⁷. If a dispute cannot be resolved private it between the parties, Jesus taught that one of the grieving parties should take one or two others along with (him or her) so that every fact may be established on the testimony of those witnesses⁵⁸

People these days use the church as an intermediary between disputants for mostly family related matters. This is one of the many ways through which ADR is practiced in Uganda.

4.4.2 UNDER ISLAM

The rule for dispute resolution in Islam is a combination of both authoritative sets of rules and regulations and general principles. The purpose of these rules are to provide the environment for dispute resolution⁵⁹. ADR in Islam is believed to originate from the Quran and was embraced from the time of the Prophet for example in the earliest days of Islam, Muhammad (570-632) encouraged and practiced tahkim or arbitration to resolve a variety of disputes. Tahkim has a long tradition in Arab world⁶⁰.

⁵⁴ 1st Kings 3:16-28

⁵⁵ 1 Corinthians 6:1

⁵⁶ Luke 6:27-28

⁵⁷ Matthew 18:16

⁵⁸ Matthew 18:17

⁵⁹ Johnston Rizzo R: A Return from Tradition to Reform-The Sharia's Appeals Court Rulings on Child Custody (1992-2001) Fordham International Law Journal 597(2003)

⁶⁰ J.T. Barrett, J.P. Barrett: A History of Alternative Dispute Resolution: The story of political, cultural and social movement (first published 2004 Bass A Wiley Imprint 1989 Market Street, San Francisco)13

The validity of ADR in Islam can be derived from one of the ayah of the Quran which says the believers are but a single brotherhood , make peace and reconciliation(sulh) between two(contending) brothers; and fear Allah, that ye may receive mercy⁶¹.

Modern conciliation is called Sulh in Islam which includes compromises, settlement or agreement between parties and its purpose is to end hostility and conflict among believers so that they may continue their peaceful relationships in society.

Arbitration is called tahkim which allows resolving the disputes between its followers through arbitration if they are unable to reach an amicable solution of their private disputes. The method of arbitration in Islam is not limited to economic, social, religious and political affairs but it could be applied to private law as well, but it is limited to rights or obligations to specific individuals and not extended to physical punishment or any kind of retribution⁶² and these have made a great contribution to Islamic justice. Adjudication can be arguably a superior mechanism for dispute resolution. Islam is a religion that adores to peace rather than fighting and loves compromise rather than confrontation.

4.5 CONCLUSION

ADR is not an alien to world since it can be traced back to African Traditional Society, to the bible and the Quran as explained above. It can be considered as a friendly concept in the sense that it promotes peace among people thus it is part and parcel of dispute resolution of both the old and modern society.

⁶¹ Quran, Surah Al-Gujarat (49) ayah 10

⁶² Musa Furber: Alternative Dispute Resolution- Arbitration and Mediation in non- Muslim Regions, Tabaha Analytic Brief No.11(2011)

CHAPTER FIVE

LEGAL ASPECT GOVERNING ALTERNATIVE DISPUTE RESOLUTION

5.0 INTRODUCTION

The ADR movement in the United States was launched in the 1970s beginning as a social movement to resolve community wide civil rights disputes through mediation, and as a legal movement to address increased delay and expense in litigation arising from an over crowded court system. Ever since the legal ADR movement in the United States has grown rapidly and has evolved from experimentation to institutionalization with the support of the American Bar Association, academics, courts, the US Congress and State government. The move from experimentation to institutionalization in the ADR field has also affected US administrative rule-making and federal litigation practice. Laws now in place authorize and encourage agencies to use negotiation and other forms of ADR in rule making, public consultation and administrative dispute resolution⁶³.

Uganda did not readily incorporate ADR into her judicial system. There was a belief that encouraging ADR would deter adherence to the rule of law and cause confusion in the justice system. As years went by, ADR was first formally introduced in Uganda through the enhancement of the Arbitration Act of 1930. With the growth of the use of ADR mechanisms internationally, Uganda become open to ADR in order to encourage trade and foreign thus led to the establishment of the Investment Code Act 1991 which encouraged amicable resolution of investment disputes⁶⁴.

The British being the colonial masters of Uganda encouraged the adoption of ADR because of a shared common law judicial system and in 1994 Justice Platt wrote a report on Judicial reform which encouraged the use of ADR mechanisms which led to the increase of ADR in Uganda.

Over time, there are various laws that make provision for alternative dispute resolution on the international level and national level. On the International level, only those to which Uganda is signatory apply to Uganda. It should be noted that the New York Convention was entered into force in 1953, it was a convention on Recognition and Enforcement of Foreign Arbitral Awards. This was followed by the adoption of legal instruments by the United Nations Commission on

⁶³ Scott. B, Cervenak. C, Fairman. D: Alternative Dispute Resolution Practitioners Guide Page 5

⁶⁴ Gender Sensitive Toolkit for Land and Alternative Dispute Resolution(ADR) 2023 <https://land-in-uganda.org/shared-files/1561/?GENDER-SENSITIVE-ADR-TOOLKIT.pdf> accessed on 3rd May 2024

International Trade Law(UNCITRAL). Also different case law has affirmed the use of ADR mechanisms.

5.1 INTERNATIONAL LAWS

5.1.1 UNITED NATIONS CHARTER

The charter of the United Nations is the founding document of the United Nations. It was signed on 26 June 1945 in San Francisco at the conclusion of the United Nations Conference on International Organization and it came into force on 24th October 1945⁶⁵

Article 2(3) of the Charter states that all members must settle international disputes peacefully so that world peace, security and justice are not jeopardized. The charter also provides for ADR procedures such as negotiation, inquiry, mediation, conciliation and arbitration as remedies to any disagreement⁶⁶.

The United Nations General Assembly Resolution 2625, the General Assembly adopted the resolution in which it proclaimed the principle that states shall settle their international disputes by peaceful means so that international peace, justice and security are not endangered and it also reaffirmed the ADR procedures as a form of peaceful procedures⁶⁷.

5.1.2 UNCITRAL ARBITRATION RULES

The rules provide a comprehensive set of procedural rules upon which parties may agree for the conduct of arbitral proceedings arising out of their commercial relationship and are widely using in ad hoc arbitration as well as administrated arbitrations. These rules also provide for the arbitral process, model arbitration clause, procedural rules regarding the appointment of arbitrators and the conduct of arbitral proceedings⁶⁸.

There exist four different versions of Arbitration rules that is 1976 version, 2010 revised version and 2013 version which incorporates the UNCITRAL Rules on Transparency for Treaty- based

⁶⁵ United Nations: Peace, dignity and equality on a healthy planet <https://www.un.org/en/about-us/un-charter#:~:text=United%20Nations%20Charter&text=As%20such%2C%20the%20UN%20Charter,of%20force%20in%20international%20relations>. Accessed on 2nd May 2024

⁶⁶ United Nations Charter, 1945

⁶⁷ Declaration on Principles of International law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations, 1970

⁶⁸ United Nation: United Nations Commission on International trade law <https://uncitral.un.org/en/texts/arbitration/contractualtexts/arbitration> accessed on 2nd May 2024

Investor- State Arbitration and the 2021 version which incorporates the UNCITRAL Expedited Arbitration Rules⁶⁹.

The UNCITRAL Arbitration Rules 1976 was used for the settlement of a board range of disputes which included disputes between private commercial parties where no arbitral institution is involved, investor-state disputes, state to state disputes and commercial disputes administered by arbitral institutions. The commission decided to revise the rules in 2006 which aimed at enhancing the efficiency of arbitration under the Rules without the original structure of the text, its spirit or drafting style. In 2010 the rules were revised which included provisions dealing with multiple party arbitration and joinder, liability and procedure to object to experts appointed by the arbitral tribunal. With the adoption of the UNCITRAL Rules on Transparency in Treaty based investor State Arbitration (The Rules on Transparency) in 2013 a new article was added to the rules in order to incorporate the Rules on Transparency for arbitration initiated pursuant to an investment treaty concluded on 1st April 2014. With the adoption of the UNCITRAL Expedited Arbitration Rules in 2021, a new article was added to incorporate the Expedited Rules as an appendix to the UNCITRAL Arbitration Rules⁷⁰.

5.1.3 UNCITRAL CONCILIATION RULES 1980

These rules provide a comprehensive set of procedural rules upon which parties may agree for the conduct of conciliation proceeding arising out of their commercial relationship. They cover all aspects of the conciliation process, providing a model conciliation clause, defining when conciliation is deemed to have commenced and terminated and addressing procedural aspects relating to the appointment and role of conciliators and the general conduct of proceedings⁷¹.

5.1.4 1996 UK ARBITRATION ACT CAP 23

This Act governs parties and lawyers conducting arbitration proceedings seated in England and Wales or Northern Ireland and/or seeks to enforce domestic or international awards in English and

⁶⁹ United Nations: United Nations Commission on International Trade Law
<https://uncitral.un.org/en/texts/arbitration/contractualtexts/arbitration> accessed on 2nd May 2024

⁷⁰ Ibid

⁷¹ United Nations: United Nations Commission on International Trade Law
<https://uncitral.un.org/en/texts/mediation/contractualtexts/conciliation> accessed on 2nd May 2024

Welsh court. It does not transpose and is not based on the UNCITRAL Model Law on International Commercial Arbitration⁷².

This Act was enacted to restate and improve the law relating to arbitration pursuant to an arbitration agreement to make other provision relating to arbitration and arbitration awards and for connected purposes. This act is updated up to 27th January 2021. Most provisions of this Act have been enriched Arbitration and Conciliation Act Cap 4 of Uganda with just a few minor changes.

5.2 NATIONAL LAWS

5.2.1 CONSTITUTION OF THE REPUBLIC OF UGANDA 1995 AS AMENDED

Article 2(1) provides that the Constitution is the supreme law of Uganda and shall have binding force on authorities and persons throughout Uganda.

Article 79 provides that parliament shall have the power to make laws on any matter for the peace, order development and good governance of Uganda.

Article 126(2) provides that in adjudicating cases of both civil and criminal nature, the court shall, subject to the law, applying the following principles reconciliation between parties shall be promoted.

5.2.2 THE JUDICATURE ACT CAP 12

The Act provides for Alternative Dispute Resolution under Court's direction.

Section 26 to 32 provides for situations when matters can be referred to a special referee or arbitrator to handle where such official has been granted to inquire and report on any cause on matter other than a criminal proceeding.

Section 41 states that

Court-annexed arbitration falls in this regard because it is carried out pursuant to a Court Order as opposed to consensual arbitrations which are pursuant to an existing agreement to consensual arbitrations which are pursuant to an existing agreement to that effect.

⁷² LexisNexis: A guide to the Arbitration Act 1996(AA 1996) 2023 <https://www.lexisnexis.co.uk/legal/guidance/a-guide-to-the-arbitration-act-1996-aa-1996> accessed on 2nd May 2024

5.2.3 CIVIL PROCEDURE RULES S. I 71-1

Order XII provides for scheduling conference and Alternative Dispute Resolution under Rule 1(1) provides that the court shall hold a scheduling conference to determine points of agreement and disagreement, the possibility of mediation, arbitration and any form of settlement...”

This provision is meant to help the parties consider the option of settling the matter before hearing in Court can commence. It also serves the purpose of expediting hearing of the case where possible contentious issues such as which documents and witnesses are to be relied upon, are agreed at the onset.

Order XII rule 2 states that where the parties do not reach an agreement under rule 1...the court may if it is of the view that the case has a good potential for settlement, order alternative dispute resolution before a member of the bar or the bench named by the court. The rule provides that ADR has to be completed within 21 days after the date of the order and the time may be extended for a period not exceeding 15 days on application to the court.

Order XLVII provides that where in any suit all parties interested who are not under disability agree that any matter in difference between them in the suit shall be referred to arbitration, they may, at any time before judgment is pronounced apply to the court for any order of reference.

5.2.4 THE ARBITRATION AND CONCILIATION ACT CAP 4

This Act regulates the operations of arbitration and conciliation procedures as well as the behavior of the arbitrators or conciliator in the conduct of such procedure. It incorporates the provisions of the 1985 United Nations Commission on International Trade (UNCITRAL) Model law on international Commercial Arbitration Rules 1976 and the UNCITRAL Conciliation Rules 1976 but it does not provide for the immunity of an arbitrator which is covered in the UNCITRAL Model Law.⁷³

The purpose of the Act is to empower the parties and to increase their autonomy. This act has three objectives which are: ensuring realization of the goal of increased party autonomy and provision of appropriate and user friendly rules of procedure to guide parties, creation of an adaptable

⁷³Anthony Conrad K. Kakooza: Arbitration, Conciliation and Mediation in Uganda: A focus on the practical aspects
Page 4

framework for arbitration tribunals to operate under as well as other default methods in the absence of the parties own agreements and the advancement of equality and fairness in the whole process.⁷⁴

The Act also provides for the **Centre for Arbitration and Dispute Resolution(CADER)** which is considered as a statutory institutional alternative dispute resolution provider. CADER makes available to individuals and their legal counsel at no charge pre drafted model arbitration and mediation clauses for inclusion in their contracts.

For the parties to submit for arbitration there must be an arbitration agreement between the parties and the court cannot hear the case until the arbitration procedure has taken place as per **Section 5 of the Act**.

Before the come of this Act the use of arbitration was limited due to the absence of an appropriate control system as well as a general oversight over arbitrators especially with respect to the fees charged.

The Act also provides that the arbitral tribunal may opt to follow considerations of justice and fairness where it is not bound by rules as per **Section 28(4)** which states that if there is no choice of the law... by the parties, the arbitral tribunal shall apply the rules of law it considers to be appropriate given all the circumstances of the dispute.

5.2.5 THE LAND ACT CAP 227

The origins of mediation as a mechanism in dispute resolution and administration of Justice can be better appreciated through the practice of land law in Uganda.

Sections 88 and 89 of the Act provide for Customary Dispute Settlement and mediation as well as the functions of the mediator. **Section 88** states that nothing in this part shall be taken to prevent or hinder or limit the exercise by traditional authorities of the functions of determining disputes over customary tenure or acting as a mediator between persons who are in dispute over any matter arising out of customary tenure.

Section 89 provides that the mediator should be acceptable by all parties; should be a person of high moral character and proven integrity; not subject to the control of any of the parties; involve both parties in the mediation process and should e guided by the principles of natural justice,

⁷⁴ Anthony Conrad K. Kakooza: Arbitration and Mediation un Uganda: A focus on the practical aspects Page 5

general principles of mediation and the desirability of assisting the parties to reconcile their differences.

5.2.6 JUDICATURE (COMMERCIAL COURT DIVISION) (MEIDATION) RULES NO 55/2007

These rules were made operational by the commercial court with effect from 1st November 2009 making mediation a mandatory procedure for all litigants. These rules were an after math to the commercial court's mediation pilot project conducted between 2003 and 2005.

These rules stipulate that a party filing pleadings at the commercial court shall provide for the mediator(s) in the matter; a concise summary of the case in dispute, and all documents to which the case summary refers and any others to which the party may want to refer in the mediation.

5.2.7 JUDICATURE(MEDIATION) RULES 2013

These rules were made in exercise of the powers conferred on the Rules Committee by Section 41 of the Judicature Act. These rules apply to all civil actions filed in or referred to the High Court any subordinate to the High Court.

Rule 4(1) states that the court shall refer every civil action for mediation before proceeding for trial. **Rule 8(1)** states that a civil action referred to mediation under these rules shall be concluded within sixty days after the mediator commences mediation.

5.3 CASE LAW

Different have discussed different aspects of ADR including the procedure, the principles governing arbitration agreements, jurisdiction of CADER and also courts intervention in the arbitral process and so many others. These are discussed below;

5.3.1 EAST AFRICAN DEVELOPMENT BANK V ZIWA HORTICULTURAL EXPORTERS LTD⁷⁵

Court held that section 6 (present section 5) of the Arbitration and Conciliation Act, provides for mandatory reference to arbitration of matters before court which are subject to an arbitration agreement; where court is satisfied that the arbitration agreement is valid, operative and capable of being performed, it may exercise its discretion and refer the matter to arbitration.

⁷⁵ East African Development Bank v Ziwa Horticultural Exporters Ltd H.C. Misc. Application No.1048 of 2000 arising from Companies Cause No.11 of 2000

5.3.2 SHELL(U) LTD V AGIP (U) LTD⁷⁶

Justice Tsekooko S.C.J stated to the effect that it is now trite law that where parties have voluntarily chosen by agreement, the forum for resolution of their disputes, one party can only refile for a good reason. He also set out certain condition which must be fulfilled before the court refers the matter is referred for arbitration. These are:

1. There is a valid agreement to have the dispute concerned settled by arbitration.
2. Proceedings in Court have been commenced.
3. The proceedings have been commenced by a party to the agreement against another party to the agreement.
4. The proceedings are in respect of a dispute so agreed to be referred.
5. The application to stay is made by a party to the proceedings.
6. The application is made after appearance by that party and before he has delivered any pleadings or taken any other step in the proceedings
7. The party applying for stay was and is ready and willing to do all the things necessary for the proper conduct of the arbitration.

5.3.3 UGANDA POSTS LTD V R4 INTERNATIONAL LTD⁷⁷

CADER Executive Director stated that...the appointment of an arbitrator is a mutual obligation which is imposed on all parties. A party unwilling forfeits its statutory right, when it fails to participate in the appointment of the arbitrator. The duty would then fall upon the advocate to appointment of the arbitrator. The duty would then fall upon the advocate to advice the client that the appointment of an arbitrator is a task, which ought to be performed by a party, since that is the essence of the undertaking, upon signing the arbitration clause. Assuming the party is not well versed with arbitration, the advocate would be best placed person to advice the client on the unpropitious task to be performed.

5.3.4 BAYETI FARM ENTERPRISES LTD & ANOR V TRANSITION GRANT SERVICES⁷⁸

This application was for the compulsory appointment of a single arbitrator. The respondent argued that the matter was creating a multiplicity of suits basing on an existing suit before

⁷⁶ Shell(U) Ltd v Agip(U) Ltd S.C.C.A No. 49 of 1995

⁷⁷ Uganda Posts Ltd v R4 International Ltd CAD/ARB/No.11 of 2009

⁷⁸ Bayeti Farm Enterprises Ltd & Anor v Transition Grant Services CAD/ARB/No.4 of 2009

Court and relied upon section 6 of the Civil Procedure Act Cap 71 which provides for the stay of suits on the basis of res judicata. This argument was rejected by CADER on the basis that the Civil Procedure Act(CPA) has no application to Section 11 of the Arbitration and Conciliation Act which provides for appointment of Arbitrators because the CPA applies as per its Section 1 to proceedings in the High Court and Magistrates Court.

5.3.5 BALAGI GROUP(EA) LTD V HOUSING FINANCE BANK⁷⁹

Court held that by submitting to the jurisdiction of court through filing a defense to the main suit, the applicant does not automatically elect to have its future disputes settled through court and not arbitration. Therefore, the applicant was still entitled to seek a reference of its dispute with the respondent to arbitration. That the mere fact that a dispute involves parties who are not party to the arbitration agreement does not in and of itself, automatically render that arbitration agreement inoperative and incapable of being performed. Court also stated that there is no standard form course of action in law or practice requiring courts to invariably declare arbitration agreements inoperative simply because the disputes to which they were intended to apply involve 3rd parties. Each case is adjudged in its own facts.

5.3.6 FOUNTAIN PUBLISHERS V NANTAMU & ANOR⁸⁰

Court held that the delay in delivering the award is not just to avoid delay but also to prevent miscarriage of justice. That while the delay in delivering an arbitral award may be a ground for setting aside the award it must be determined judicially on the facts of each case.

5.3.7 WERE AND OTHERS V AKMAN MARIN DENIZCILIK⁸¹

Justice Stephen Mubiru stated that court's jurisdiction in arbitration matters is ancillary and it does not have continuing supervision over arbitral process. He also stated that there are only six instances when court may intervene in the arbitral process and these are under Section 11(2) of the Arbitration and Conciliation Act which gives court power to appoint an arbitrator where the parties fails, under Section 5 to grant an order of stay of a suit, under section 16(6) where the arbitral tribunal rules as a preliminary question that it has jurisdiction any party aggrieved by the ruling may apply to court within 30 days after having received notice of that ruling to

⁷⁹ Balagi Group(EA) Ltd v Housing Finance Bank HCMA No.1018/2022

⁸⁰ Fountain Publishers v Nantamu & Anor (Arbitration Cause No 1 of 2011) [2019] UGCommC 30(25 September 2019)

⁸¹ Were and others v Akman Marin Denizcilik (Miscellaneous Application 1626 of 2022) [2023] UGCommC 41(30 January 2023)

decide the matter, under section 27 to assistance in taking evidence, under section 6 to consider applications for interim measures of protection and under section 38(1) to consider application by any party to determine questions of law.

CHAPTER SIX

FINDINGS, CONCLUSIONS AND RECOMMENDATION

6.0 INTRODUCTION

ADR has been used to resolve civil disputes outside the court as it is considered to be flexible, less expensive and a peaceful means. ADR mainly emphasizes the value of a problem solving perspective in addition to the rights of the parties.

ADR has been effective in resolving civil disputes and could be considered a success but it is faced with a few challenges which if worked upon would make its use in the resolving of civil disputes more effective.

6.1 FINDINGS

6.1.1 ADVANTAGES OF ADR

Parties are sure that all matters that are handled using ADR are kept confidential and even the settlement agreement shall be kept confidentially and should be disclosed in case of enforcement and implementation unlike in litigation where the matters are not confidential thus making it hard for the parties to freely open up to be able to resolve the matters

ADR is generally much cheaper and faster than taking a case to the normal court. ADR has been traditionally been favored as a cheaper and speedier form of dispute resolution than adjudication as well as being flexible. The fact that ADR is quicker with a procedure that is dependent on the parties in conflict actually helps the individuals at conflict get the justice they were seeking without bias or procedural impropriety as they decide everything about the settlement in their own⁸²

The proceedings under ADR are less formal than the ones in court. These are usually based on the decisions of the parties thus making them more flexibly than the court proceedings.

6.1.3 HAS ADR BEEN EFFECTIVE OR NOT

Once asked about alternative dispute resolution, Mr. Constance Obeke, the Registrar of CADER at Commercial Court stated that ADR has been effective used in Uganda because more and more people keep going in for it instead of going to court. Most of the case are usually successful because ADR depends on the agreement of parties to resolve the matter between them thus making the process a success

⁸² Hilary Astor and Christine. M. Chinkin: Dispute Resolution in Australia [1992] Page 116-117

He also stated that ADR does not necessarily reduce case backlog as many people believe because a mediator makes a report about the mediation process stating how the process went and if the process is a success then the case does not need to be referred back to court for trial thus reducing on the backlog of the courts but where the parties fail to reach an agreement in regard to their dispute then the mediator has to refer the matter back to court for trial thus adding to the already existing cases in the court system thus increasing on the case backlog.

Yorokamu Bamwine, the Principle Judge as he then was once stated that mediation is the best because it leads to reconciliation between parties unlike the adversarial system where the winner takes it all, here everyone is a winner. The major aim of justice is to promote reconciliation and that is what mediation does, he said.

Thus the effectiveness of the use of alternative dispute resolution depends on the parties' willingness to agree to resolve the matter since the whole process is basically party centered thus incase the parties do not agree then the process would be considered unsuccessful.

6.1.4 CHALLENGES FACED IN THE USE OF ALTERNATIVE DISPUTE RESOLUTION

Despite the increased encouragement by the court to use Alternative resolution to resolve disputes it is faced by different challenges which could be considered as the disadvantages of the use of ADR.

Mr. Constance Obeke states that one of the challenges faced by use of ADR is the rigid mindset of lawyers. Lawyers have been taught in law school that in case a dispute among the parties then the matter has to go to court making it hard for them to resort to using ADR

He also stated that people do not believe that ADR can effectively resolve the dispute between them thus making it hard for parties to resort to use ADR in order to resolve the matter between them.

He also stated that another challenge is inadequate number of mediators. This is because of the lack of an institution for training the mediator. He stated that by the time he studied, he had to go to the UK to study but he starts that recently the Chartered Institute of Arbitrators- Uganda Chapter was opened but still the number of people enrolling are still few.

Mr. Ampaire Kenneth, an arbitrator states that one of the challenges faced by ADR is the no response of the parties to the process making it difficult for them as arbitrators to do their work. He basically called it lack of commitment among the parties because they may start the process and may not to be committed enough to see the process go through properly.

He also stated that sometimes parties do not believe that the arbitrator appointed for them, in case the arbitrator is not chosen by them, is biased all in the name that the arbitrator prays from same church as one of the parties, or that the arbitrator is from the same tribe as one of the parties thus making it difficult for arbitrators from carrying on their work effectively.

He also stated that senior litigants do not know anything about the ADR process and thus making it difficult for them to resort to using ADR as a method of resolving the disputes among the parties.

Another challenge is lack of space, in spite the commercial court which has space to carry out mediation, other courts do not have space for it to be carried out thus making it difficult for them to encourage people to go in for mediation.

6.2 RECOMMENDATION

Mr. Constance Obeke recommends an increase in the sensitization of people of what DR is and its benefits. These people include litigants, judges and also arbitrators themselves. This is through providing the necessary information needed to about ADR to the public. This will ensure that all involved parties are more knowledgeable what they are signing up and do away with the litigant's ignorant choice of litigation over alternative dispute resolution methods. This can be through media talks in order to circulate the importance of the alternative dispute resolution over the court system.

There is need to change the teaching methods in the different university. Instead of training people to use the traditional perception of an adversarial methods of resolving dispute that is to go to court to resolve a dispute. Even though many universities have introduced ADR as a course unit, it is an optional course unit thus those who want to offer it as course unit and those who do not want will not therefore ADR should be made a must for students from 1st year in order for the next generation of lawyers to understand the use and benefit of alternative dispute resolution forms so that they can be able to advise their clients in the future that they can use ADR forms to resolve their disputes instead of going to court.

There is also need to train more mediators and arbitrators especially those who desire to take it up as a career. The training should enable them acquire basic skills and techniques that are needed in order to conduct mediation or arbitration sessions. And proper guidelines should be set out in the retirement and training of mediators and arbitrators.

The government should provide acquire funding for mediators through budget allocation to ensure the smooth conduct of the mediation sessions by the courts in Uganda. Even if mediation was made mandatory people do not take it serious and also the mediators do not put much effort during the sessions. Therefore, in case proper funding is given for the mediation sessions then the mediators will have been given an initiative to do their work.

6.3 CONCLUSION

The Chief Justice, Owiny Dollo during his speech on the New Law Day in February 2024 encouraged the use of ADR as an alternative to the court system to resolve disputes and also President Yoweri Kaguta Museveni during his speech delivered by Vice President Jessica Alupo at the opening of the first ever national Alternative Dispute Resolution summit in Kampala stated that “I am happy to note that the judiciary is beginning to explore alternative mechanisms of settling disputes because I have always urged the judiciary to examine the principles of African jurisprudence and establish what was the philosophy of law among Africans before the British introduced the current legal system”⁸³. This therefore means that people are encouraged to opt for ADR as opposed to the court system.

With the different advantages of ADR, it is thus considered to be an effective way of resolving disputes among people in Uganda and we can't say it is a perfect mechanism, it is faced with different challenges and disadvantages and if the recommendations suggested are put in place. It could be considered as the next best thing in the country.

⁸³ Farooq Kasule: Museveni wants Judiciary to explore traditional justice system (June 27 2023) https://www.newvision.co.ug/category/news/museveni-wants-judiciary-to-explore-tradition-NV_163651 accessed on May 7, 2024

BIBLIOGRAPHY

STATUTES

NATIONAL LAWS

1. 1995 Constitution of the Republic of Uganda
2. Arbitration and Conciliation Act Cap.4
3. Civil Procedure Rules S.I 71-1
4. Civil Procedure Rules S.I 63-3
5. The Judicature (Mediation) Rules, 2013
6. Judicature Act Chapter 13

INTERNATIONAL LAW

7. United Nations Charter 1945
8. The UNCITRAL Arbitration Rules
9. The UNCITRAL Conciliation Rules
10. 1996 UK Arbitration Act

CASE LAW

1. Balagi Group(EA) Ltd v Housing Finance Bank HCMA No.1018/2022
2. Bayeti Farm Enterprises Ltd & Anor v Transition Grant Services CAD/ARB/No.4 of 2009
3. East African Development Bank v Ziwa Horticultural Exporters Ltd H.C. Misc. Application No.1048 of 2000 arising from Companies Cause No.11 of 2000
4. SS Enterprises Ltd & Anor v Uganda Revenue Authority HCT-00-CC-CS-708-2003
5. Shell(U) Ltd v Agip(U) Ltd S.C.C.A No. 49 of 1995
6. Uganda Posts Ltd v R4 International Ltd CAD/ARB/No.11 of 2009
7. Were and others v Akman Marin Denizcilik (Miscellaneous Application 1626 of 2022) [2023] UGCommC 41(30 January 2023)
8. Fountain Publishers v Nantamu & Anor (Arbitration Cause No 1 of 2011) [2019] UGCommC 30(25 September 2019)

BOOKS

1. J.T. Barrett, J.P. Barrett: A History of Alternative Dispute Resolution: The story of political, cultural and social movement first published 2004 Bass A Wiley Imprint 1989 Market Street, San Francisco
2. Justice G. W.M. Kiryabwire: Alternative Dispute Resolution: The Ugandan Court Experience 2021(1st Edition, LawAfrica Publishing (k) Ltd 2021)
3. Hon. Justice G.W.M. Kiryabwire: Alternative Dispute Resolution: Catalyst in Commercial Development: A case study from Uganda (Vol 3: No. 2 December 2005)
4. H.J. Brown, A. L. Marriott: ADR Principles and Practice (2nd Edition, Sweet &Maxwell 1999)
5. Fisher, Roger and William Ury: In Getting to Yes-Negotiating Agreement Without Giving in (New York: Penguin Books 1983).
6. Robert A.B. Bush and Joseph.P. Folger: The Promise of Mediation; Responding to Conflict through Empowerment and Recognition (Jossey-Bass; First Edition 1994)
7. Johnston Rizzo R: A Return from Tradition to Reform-The Sharia's Appeals Court Rulings on Child Custody (1992-2001) Fordham International Law Journal 597(2003)

ARTICLES

1. Anthony Conrad K. Kakooza, 'Arbitration, Conciliation and Mediation in Uganda: A focus on the practical aspects' 2009
2. Bolaji Owasanye: Dispute resolution Mechanisms and constitutional rights in Sub-Saharan Africa 2000
3. Justice G. W.M. Kiryabwire, 'Alternative Dispute Resolution; A Ugandan Judicial Perspective' A paper delivered at a continuation Seminar for Magistrates Grade One at Colline Hotel Mukono 2005
4. Elizabeth Nakiru: Understanding Alternative Dispute Resolution(ADR) 2023
5. Olivia Kyarimpa Matovu: ADR-The Mutual Warrior
6. Justice Geoffrey W. M. Kiryabwire: Mediation of Corporate Governance
7. RocoWatiAcoli: Restoring Relations in Acholi-land Traditional Approaches to Reintegration and Justice, September 2005
8. Anthony Connerty: The role of ADR in Resolution in International Disputes Vol 12 No.1 1990

9. Ssentongo Yakubu: The Impact of Alternative Dispute Resolution on Uganda's Civil Justice System 2018
10. Geneva: African tradition and humanitarian law (1978)
11. Scott. B, Cervenak. C, Fairman. D: Alternative Dispute Resolution Practitioners Guide
12. Declaration on Principles of International law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations, 1970
13. Musa Furber: Alternative Dispute Resolution- Arbitration and Mediation in non- Muslim Regions, Tabaha Analytic Brief No.11(2011)
14. Hilary Astor and Christine. M. Chinkin: Dispute Resolution in Australia [1992] Page 116-117

ONLINE ARTICLES

1. Ms. Akao, Mr.J.P. Ekemu: Roots of alternative dispute resolution in Uganda, 2019 updated in 2021 <https://observer.ug/news/headlines/66540-kanyamunyu-finally-admits-to-killing-akena-to-pay-10-cows-to-family> accessed on 19th March 2024
2. URN, Kanyamunyu finally admits to killing Akena, to pay 10 cows to family (September 12, 2020) <https://observer.ug/news/headlines/66540-kanyamunyu-finally-admits-to-killing-akena-to-pay-10-cows-to-family> accessed on 19th March 2024
3. Ninsiima Irene: Alternative Dispute Resolution in East Africa 2021 <https://lawfirmsinuganda.ug/alternative-dispute-resolution-in-east-africa/> accessed on 3rd May 2024
4. United Nations: Peace, dignity and equality on a healthy planet <https://www.un.org/en/about-us/un-charter#:~:text=United%20Nations%20Charter&text=As%20such%2C%20the%20UN%20Charter,of%20force%20in%20international%20relations>. Accessed on 2nd May 2024
5. United Nation: United Nations Commission on International trade law <https://uncitral.un.org/en/texts/arbitration/contractualtexts/arbitration> accessed on 2nd May 2024

6. United Nations: United Nations Commission on International Trade Law <https://uncitral.un.org/en/texts/arbitration/contractualtexts/arbitration> accessed on 2nd May 2024
7. United Nations: United Nations Commission on International Trade Law <https://uncitral.un.org/en/texts/mediation/contractualtexts/conciliation> accessed on 2nd May 2024
8. LexisNexis: A guide to the Arbitration Act 1996(AA 1996) 2023 <https://www.lexisnexis.co.uk/legal/guidance/a-guide-to-the-arbitration-act-1996-aa-1996> accessed on 2nd May 2024
9. Gender Sensitive Toolkit for Land and Alternative Dispute Resolution(ADR) 2023 <https://land-in-uganda.org/shared-files/1561/?GENDER-SENSITIVE-ADR-TOOLKIT.pdf> accessed on 3rd May 2024
10. Farooq Kasule: Museveni wants Judiciary to explore traditional justice system (June 27 2023) https://www.newvision.co.ug/category/news/museveni-wants-judiciary-to-explore-tradition-NV_163651 accessed on May 7, 2024