ALTERNATIVE DISPUTE RESOLUTION
A UGANDAN JUDICIAL PERSPECTIVE

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A. Introduction

In the last decade ADR (or Alternative Dispute Resolution) has taken a heightened significance in legal and judicial practice within the common law jurisdictions. This paper shall attempt to give a definition to ADR, trace its evolution in Uganda and discuss how ADR can be court based. 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". ADR has been defined in various ways largely depending on the jurisdiction that one comes from. ADR stands for alternative Dispute Resolution.

The question of definition rests on Alternative to what? In many developed countries ADR is in the alternative to procedures normally adopted in dispute resolution namely litigation in court or arbitration. In other jurisdictions where even arbitration itself is not well developed (like in Uganda), ADR is in alternative to litigation in the courts.
The definition is important because of the general feeling among legal practitioners that ADR is new. It is therefore common for the question to be posed as to

"Whether ADR is presenting itself as an alternative in the strict sense of the word or is just an option that can be used together with litigation"

A common follow up question that is commonly posed is

"If ADR is a new procedure or mechanism, whether it is indeed recognized and enforceable under the law” This lack of clarity has in many ways has led to the difficulty in marketing ADR, largely because of the attempt to use it is seen to be down playing litigation in courts which is more widely used. A better way of defining ADR could be

"That ADR is 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 ADR"

The common forms of ADR are negotiation conciliation, mediation mini trial/early neutral evaluation, rent a Judge and Arbitration. Negotiation as a settlement technique is fairly straight forward with parties talking directly to each other even though writers do make a distinction between conciliation and mediation; it is increasingly appearing like these two forms of ADR are being merged into one
single concept generally called "Mediation". This is because the processes are very similar in substance. Both involve a neutral whose role is to help the disputing parties reach an agreed settlement. Agreement is reached through a process of caucusing where the neutral holds a series of meetings with the parties in dispute either together or on an isolated basis. In this way differences are either narrowed and or eventually resolved. Mini-trial Early neutral evaluation is mostly common among commercial corporations. In this case a neutral third party is called in to conduct a "hearing" in which the executives of the corporation may

Alternative Dispute resolution (ADR) The Perspective from the Private Sector by Geoffrey Kiryabwire paper delivered to The ILI/CADER/USAID-SPEED PROJECT ADR Roundtable 25th September 2002. See R5 The Commercial Court Division (Mediation Pilot Project) Rules, 2003 where "mediation" means the process by which a neutral third party facilitates communication among the parties to a dispute and assists them in reaching a mutually agreed resolution.

be involved with a view to testing the merits of the case before a decision is finally made to go to trial. Rent a Judge on the hand is not as strange as it sounds but merely involves a retired Judge privately hearing the parties' dispute. The processes of ADR so far defined
above as can be deduced from the definitions themselves are not legally binding.

Arbitration is where the parties refer a dispute to a neutral called an Arbitrator with the understanding that the arbitrators' decision called an award would be binding on the parties.

Court based ADR can be defined a process by which parties who have filed their dispute in court are given an opportunity at an early stage before the hearing of the dispute by the Judge to have the said dispute referred to ADR first with a view to finalizing it or narrowing the issues involved.

A close look at ADR would suggest that it is not as new as it sounds. In African culture the use of a third party neutral in the resolution of disputes is still very common today. The neutral is normally appointed because of his/her stature and respect within society. Decisions reached with the intervention of the third party are implemented in good faith and are normally widely supported in the community. Under continental law the principle of "ex aequo et bon" (in justice and good faith) or "amiable composition" where a decision is reached on principles that appear to be fair and just as opposed to legal has been part of that judicial system for some time. The Chinese people have traditionally been wary of litigation and have preferred to resolve their disputes informally either directly or with the help of a third party. It would therefore appear that it is the common law jurisdictions that are now coming to terms with ADR.
B. **Traditional Perceptions about ADR**

To fully understand court based ADR in Uganda one would have to make an appreciation of the evolution of ADR in Uganda first. There can be no doubt that when a legal dispute arises then the claimants will go to their lawyer and about 85% of these lawyers will issue a notice of intention to sue the other party in court. It is difficult to say whether this is the preferred route of the claimant or it is the desired route for the lawyer. One can almost say with certainty that almost without thinking it has become the automatic route. This is not to say that litigation has been the sole alternative open to claimants in Uganda. Uganda for example first got an Arbitration Act in 1930 but it was seldom used. Furthermore Order 43 of the Civil Procedure Rules S.I 63-3 (first promulgated by general Notice 607 of 1928) 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

4 The role of ADR in the Resolution of International Disputes by Anthony Connerty *Arbitration International* Vol 12 No. 1 1990 page 47.

5 Order 43 rule 1 (1) 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.

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 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.

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 formula 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 though ADR.

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 1995 Constitution. A good example of this is the case of

**Ruth Bemba & Anor vs. QAFCB HCCS 833 of 1989**

In recent times section 9 of the new Arbitration and Conciliation Act (Cap 4) has come under similar criticism as being inconsistent with Article 139 of the 1995 Constitution in the case of

**Iraqi Fund for External Development Vs, A.G. HCCS 1391 of 2000.**

Fourthly it was generally perceived that for Justice to be seen to be done alternative dispute resolution procedures had 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 air reasonable or appropriate in the circumstances.

In other cases the whole award would be set aside under Section 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 traditional perception was Thai 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 was 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 ADR decisions should be reduced into writings as contracts between 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 or "n on-remission and setting side. This made the
enforcement of ADR decisions on the whole long and burdensome.

C, Changing International Perceptions 1976 to the Present

It is now clear that 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 insulated 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 1953 are the main instruments that influenced the drafting of the new Arbitration and Conciliation Act (Cap 4) of Uganda.

As a result of this international trade angle there has been a push by donor countries to modernize the Ugandan
commercial laws and court procedures along the lines that actively promote ADR and by so doing promote 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, which talks of the settlement of investment disputes, amicably or through arbitration or other machinery for the settlement of investment disputes.

A political perspective was also added. The 9th NRM/A Anniversary celebrations on the 26th January 1995 when H.E. The President of Uganda Yoweri Museveni also apparently driven by this global trend made a passionate appeal to the judiciary to put in place measures to facilitate investors in their court disputes.

Another driving factor leading to a change in the traditional perceptions were the changes taking place in the 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 a 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.

Another driving factor very similar to the USA experience was that of changes taking place in The Royal Courts of England as a result of mounting case backlog. This started with 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 act as those mediators or conciliators but the clerks of The Commercial Court was directed to keep a fist 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 competed check list, which answered the following questions-

1. Have you or counsel discussed with your clients(s) the & possibility of attempting to solve this dispute (of 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 of solving this dispute (or particular issues) by ADR*

**Clearly** court based ADR had *come* of age in the English legal system that *first* discriminated against it. These and other **Woolf reforms** have started to impact on other common law jurisdictions which tend to follow the English lead.

**Changing perception in Uganda.**

Court based ADR also began creep into the Ugandan 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 along side 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 (as he then was, by Practice Direction No. 1 of 1996 entitled Commercial Court Procedure (Legal Notice No 5 of 1996) established the Commercial Division of the High Court Paragraph 5 (b) of the said Practice Direction enjoined the commercial judges to be ‘Proactive’, an essential ingredient for affecting a court based ADR System

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

“...The court shall hold a scheduling conference to sort out points of agreement and disagreement, the possibility of mediation, 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 tinder 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 Bur or of the Bench, named by the court

(2) Alternative dispute resolution shall be completed within twenty-one days after the date of the order except that the time may be extended for a period not exceeding fifteen days on application to court, Showing sufficient reasons for extension.

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

With the passing of Order 10B 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 10 B 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 43 Arbitration under order of the court without repealing it. It is unlikely to use 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) Effecting interim measures S. 17
(ii) Taking evidence S 27
(in) Challenging an arbitrator for misconduct S 13
(iv) Setting aside an arbitration award S 34

(V) Enforcing an arbitral award S 35
(vi) The case stated procedure for domestic arbitration S.

In this sense the court still does 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 see sections 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, B. Odoki The Commercial Court Division
(Mediation Pilot Project) Practice Direction, 2003 and statutory instrument No 71 of 2003 The Commercial court Division (Mediation Pilot Project) Rules 2003. The Practice Direction L N 7 of 2003 in its preamble stated the reasons why the mediation pilot was set up. The reasons included—Delivering to the commercial community an efficient expeditious arid cost effective mode of adjudicating disputes

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

(ii) 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, during the scheduling conference under order 10 B parties 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 in ADR

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

Rule 3 provides the pilot project will run for a period of 2 years from its commencement date (roughly to August 2005). The Principal Judge the Hon. Justice James Ogoola has said that after this pilot period this court-annexed mediation will be rolled out to other divisions of the High Court and The Magistracy.
Rule 12 provides that the 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 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 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 dispute 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.

E. **Emerging Challenges in Uganda.**

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

The first is transigent/un reasonable parties or their legal advisors who are not willing to try ADR.

In the case of **S.S Enterprise Ltd & Anor Vs. Uganda Revenue Authority HCCS No. 708 of 2003 (unreported)** 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. I 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.

The Court needs to be firm not to allow these forms of negative attitudes to defeat the objective of court assisted ADR.

The second challenge is The use of court assisted ADR to delay justice or to act as a fishing expedition to establish what is possible. Here the party at fault is just using ADR as a time wasting mechanism Under Rule 19 of Mediation Rules, an adjournment cost of Shs. 50, 000/= can be levied against a party who does not show up when a mediation hearing is caned. The enforcement of a Rule 19 cost has not been very successful because of the absence of a clear mechanism to do so.
The third challenge is when can it be said that court assisted ADR is not appropriate and so a hearing in court should go ahead? The practice on the ground has been such that suits brought under Order 33 (summary procedure) are not suitable for court assisted ADR because an Order 33 suit is itself an expedited mode of dispute settlement. However in recent times there has been an increase of Order 33 cases possible with a view to defeating a referral to mediation the courts should be keen to see that court assisted ADR is truly inappropriate before it hears the case.

**In Hurst Vs Leeming [2003] 1 Lloyds Reps 379 Lightman J., gave**

the following illustrations of insufficient reasons for mediating

- Certainly of being rig lit
- Undue cost
- Serious allegations.

The fourth challenge is the availability of competent trained mediators to carry out the ADR. ADR being a relatively new method of dispute resolution requires a push to ensure its success. In The case of Uganda and Canada' a pilot project (both 2 years) were put in place to make it mandatory. The projects also make provision to avail the said mediators In the case of Uganda, 4 staff mediators were provided under the pilot project free of charge (as the project pays them). However, there have been complaints that the mediators are young and some of them are not even lawyers. Many of these complaints go to form rather than substance as it is not clear whether there should be a minimum age for a mediator nor
indeed is it the practice that all mediators should be lawyers. However stature and confidence in the mediator is important.

Perhaps the biggest challenge to court assisted ADR is training. It is important to change the attitude that ADR is a second best option that should be used purely as an exercise of good faith”. ADR should be taught as a first line dispute resolution mechanism. There is no reason why a new pre trial protocol cannot emerge where the right from a letter of Demand/notice of Intention to sue a paragraph is added stating the plaintiff is willing to enter into mediation or another alternative method of dispute resolution. The same paragraph would also ask whether the defendant is willing to do the same. Indeed if this became the practice then the term notice of intention to sue would give way to a letter of demand as a more appropriate terminology. This would tie in well with Rule 7 of the Mediation Pilot Project Rules where this disclosure is required in the pleadings themselves. Parties would then be under an obligation to exercise their “best endeavors” and not just "good faith" in pursuing ADR or court assisted ADR.

F. Possible solutions to these Emerging Challenges

The first solution to the emerging challenges lies in the training of ADR methods to judicial officer’s, lawyers and non-lawyers alike. This would lead to a greater appreciation of the subject matter
Lengthy and complicated proceedings are not always the best solution Lord Justice Lindley in the case of

Verner vs. General and Commercial Investment Trust [1894] Ch. 239 at 264 held.

“A Proceeding may be perfectly legal and yet be opposed to sound commercial wisdom of 1694 is still relevant today.

Secondly, court assisted ADR emphasizes the need for a new bred of pro-active judicial officers who are willing to intervene in a case as opposed to being a referee, without people raising the flag of bias The Judicial officer should manage his case (as is required under Section 33 of The Judicature Act) in the manner that best meets the interests of justice. This in Uganda, means facilitating an agreement to use ADR if it is the best interest of the dispute.

Lastly where it appears that a party even though successful in litigation deliberately refused The used of court assisted ADR then costs should be awarded against that party as was in the case of – Dunnett vs. Railtrack [2002] 2 All ER 850
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 fn 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 grid before the Trial the second party pays the claim, a plaintiff may be denied costs under rule 37 of The Advocates Remuneration and Taxation of Costs Rules.

The position was further upheld by Saidi, J, in the case of-

**Amradha Construction vs. Sultani Street Agip Service Station [196BJEA85.**

**Conclusion**

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

The Hon. Mr. Justice Geoffrey Kiraybwire
1st April 2005