

Alternative Dispute Resolution (ADR) as Panacea to Courts Decongestion: An Overview of the ADR Processes

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Abstract

ADR as a subject of discourse is very vital because the formal framework in the administration of justice that envisages the process of litigation by adversarial procedures has in modern time proven to be expensive time consuming, disruptive of social relationship and highly stressful for both parties as well as the justice administration system. This paper examines the ADR system via its application to the Ugandan justice system with a view to reaping its advantages i.e. the decongestion of the formal courts. It posits that the Ugandan justice system would be greatly enhanced by the application of the ADR process.

Keyword: ADR, Courts, Uganda, Overview decongestion.

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Background to the Study

Alternative Dispute Resolution (ADR), known in some countries such as India as external dispute resolution includes dispute resolution processes and techniques that acts as a means for disagreeing parties to come to an agreement short of litigation. It is a collective term for the ways that parties can settle disputes with (or without) the help of a third party.¹

Uganda national instruments that deal with the provisions of Alternative Dispute Resolution include; The Constitution of Uganda in its articles 126(2).

This article was explained in the case of Stephen Mabosi V URA. Article 126(2) of the constitution states that, in adjudicating cases of both a civil and criminal nature, the courts shall, subject to the law, apply the following principles

- a) Justice shall be done to all irrespective of their social or economic status.
- b) Justice shall not be delayed
- c) Adequate compensation shall be awarded to victims of wrongs.
- d) Reconciliation between parties shall be promoted, and
- e) Substantive justice shall be administered without undue regard to technicalities.

The above article in the constitution puts emphasis on speedy resolution of conflict., reconciliation of the parties involved and ensuring that justice is achieved without dwelling too much on the how and the small details or rules especially if this may instead end up being a hindrance to achieving the ultimate goal.²

Arbitration, Conciliation and Mediation

The Arbitration and Conciliation, provides for the law governing arbitration in Uganda and it defines arbitration as any arbitration whether or not administered by a domestic or international institution where there is an arbitration agreement.

Section 2(1) (c) an arbitration agreement is further defined in the Act as “an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationships whether contractual or not”.³

The Judicature Act, this provides for Alternative Dispute Resolution under courts direction. Section 26 to 32 of the Act provides situations when matters can be referred to a special referee or arbitration to handle where such official has been granted high court power to inquire and report on any cause or matter other than a criminal proceeding.⁴

The Civil Procedure Act Section 60 and the Civil Procedure Rules Order 47 rule 1 also makes reference to arbitration. The civil procedure rules actually provides for court sanctioned arbitration and other forms of ADR under order 12 of the civil procedure rules and this

¹ [https://en.wikipedia.org/wiki/ Alternative Dispute Resolution](https://en.wikipedia.org/wiki/Alternative_Dispute_Resolution). Accessed 6/03/2018 10:58am.

² The Constitution of the Republic of Uganda 1995.

³ Civil procedure Act Cap 4

⁴ Ibid

practice has especially been emphasized in the commercial courts of Uganda and has yielded tremendous success results. The commercial courts in Uganda will respect the wishes of the parties if there is an arbitration a suit in their courts when there is an arbitration agreement in place until there is genuine failure to reach an arbitral award by the arbitration or a waiver by both parties of this agreement.⁵

In the Downstream Industry Uganda has Downstream Petroleum Act. This Act govern the downstream sector of the petroleum industry in Uganda setting up the petroleum authority of Uganda, national oil company, licensing, state participation and national content etc. this Act also provides for dispute resolution and settlement in the event that companies have a fall out. Section 87(2) of the Act provides that;

“Where the dispute cannot be amicably settled through negotiation, the aggrieved party may submit the dispute to the authority for arbitration”⁶

Ditto for the upstream act passed in 2013, clearly arbitration is provided for and seems to be one of the preferred methods of solving disputes. It is thought that most companies that will be operating in this area will be Ugandan companies due to the emphasis on national content.⁷

Mediation

The origin of mediation as a mechanism in Dispute Resolution and Administration of Justice can be 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, indeed section 88(1) provides. 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 matters arising out of customary tenure.⁸

The Judicature (Commercial Court Division (Mediation)] Rules No.55/2007. Making mediation a mandatory procedure for all litigants with certain exception is under rules 9 and 10.⁹

Online Dispute Resolution

Online Dispute Resolution (ODR) is a branch of dispute resolution which uses technology to facilitate the resolution of disputes between parties. It primarily involves negotiation, mediation or arbitration, or a combination of the three. In this respect it is often seen as being the online equivalent of alternative dispute resolution (ADR). However, ODR can also augment these traditional means of resolving disputes by applying innovative techniques and on the technologies to the process.

⁵ Civil Procedure Act Cap 71 and Civil Procedure Rules 71-1.

⁶ Petroleum (Refining, Gas Processing and Conversion, Transportation and Storage) Act, 2013.

⁷ Upstream (exploration, development and production) Act No.3 of 2013.

⁸ The Land Act Cap 227,

⁹ The Judicature Act Cap 13.

ODR is a wide field, which may be applied to a range of disputes, from interpersonal disputes including consumer to consumer disputes (C2C) or marital separation, to court disputes and interstate conflicts. It is believed that efficient mechanisms to resolve online disputes will impact in the development of e-commerce. While the application of ODR is not limited to disputes arising out of business to consumer (B2C) online transactions, it seems to be particularly a product for these disputes, since it is logical to use the same medium (the internet) for the resolution of e-commerce disputes when parties are frequently located far from one another or disputes arising from an issue not involving the internet called an “offline” dispute.¹⁰

Advantages of ADR

- a) **Flexibility:** In the case of arbitration, the parties have far more flexibility to select what procedural and discovery rules will apply to their dispute (they can choose to apply relevant industry standards, domestic law, the law of a foreign country etc).
- b) **Select your own arbitrator or mediator:** The parties can often select the arbitrator or mediator that will hear their case, typically selecting someone with expertise in the substantive field involved in the dispute. The arbitrator (or panel members) needs not even the substantive issues involved on technical procedural rules. In normal litigation, the parties cannot select the judge, and the judge and or jury may often need expert witnesses to explain extremely complex issues. The greater the expertise of the arbitrator, the less time that needs to be spent bringing him to the speed.
- c) **A jury is not involved:** Juries are unpredictable and often damage awards are based solely, on whether they like the parties or are upset at one party because of some piece of evidence such as a photo that inflames the passion of the jury. Juries have awarded claimants damages that are well above what they would have received through alternative dispute resolution and they have also done the opposite.
- d) **Expenses are reduced.** Attorneys and expert witnesses are very expensive. Litigating a case can easily run into the tens of thousands of dollars. Alternative Dispute Resolution offers the benefit of getting the issue resolved quicker than it would occur at trial and that means less fees incurred by all parties.
- e) **Alternative Dispute Resolution is speedy.** Trials are lengthy, and in many states and countries it would take years to have a case heard by a Judge or Jury. Appeals can then last months or years after that in a matter of hours an arbitrator often can often hear a case that otherwise may take a week in court to try with live witnesses with arbitration the evidence can be submitted by documents rather than by testimony presented through witnesses. ADR can be scheduled by the parties and the panelist as soon as they are all able to meet together.

¹⁰ <http://en.wikipedia.org/wiki/on-the-dispute-resolution>. accessed 6/03/2018 7:16pm

- f) **The results can be kept confidential.** The parties can agree that information disclosed during negotiations or arbitration hearings cannot be used later even if litigation ensues the final outcome can also be made private if the parties so stipulate and agree. On the other hand, most trials and related proceedings are open to the public and the press.
- g) **Party participating.** ADR permits more participation by the litigants. ADR allows the parties the opportunity to tell their side of the story and have more control over outcome than normal trials overseen by a judge. Many parties desire the opportunity to speak their piece and tell their side of a story in their own words rather than just through counsel.
- h) **Fosters cooperation.** Alternative Dispute Resolution allows the parties to work together with the neutral arbitrator or mediator to resolve the dispute and come to a mutually acceptable remedy.
- i) **Less stress.** Alternative Dispute Resolution is often less stressful than expensive and lengthy litigation. Most people have reported a higher degree of satisfaction with ADR.¹¹

Disadvantages of ADR

- a) Can be used as stalling tactic
- b) Parties not compelled to continue negotiation or mediation
- c) So not produce legal precedents
- d) Exclusion of pertinent parties weakens final agreement
- e) Parties may have limited bargaining authority
- f) Little or no check on power imbalances between the parties.
- g) Disclosure of information and trustfulness of communications depend on good faith of the parties. Mediation cannot compel good faith.
- h) In negotiation lack of neutral may reduce chance of reaching agreement, particularly in complex disputes or those involving multi-parties.
- i) May not adequately protect parties legal rights
- j) In mediation –strong---willed or incompetent mediator can exercise too much control
- k) Success largely dependent on arbitrator.
- l) Time and cost affected by poor-co-operation and poor process design.
- m) In arbitration confidentiality not suitable for some disputes.
- n) Outcome uncertain in binding arbitration.¹²

Arbitration

Arbitration is a simplified version of a trial involving limited discovery and simplified rules of evidence. The arbitration is headed and decided by an arbitral pane. To comprise a panel,

¹¹ <http://albrightstoddard.com/advantages-disadvantages-adr/> accessed 6/03/2018 4:43

¹² <http://www.blaney.com/sites/default/files/other/adr....> accessed 6/03/2018 6:01pm

either both sides agree or one arbitrator, or each side selects one arbitrator and the two arbitrators elect the third.¹³

Arbitrators are appointed by the parties in accordance with the terms of the arbitration agreement or in default by court. Advantages of arbitration are as follows, promotes privacy, less formal, speedy, less costly, expertise, enforceable, international applicability of arbitration award.¹⁴

In *East African Development Bank V Ziwa Horticulture Exporters Ltd* High Court misc. Appln No.1048 of 2000 arising from companies case No. 11 of 200. To the effect 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.

In *Farmland Industries Ltd V Global Export Ltd* (1991) HCB 72. It was held that it was the duty of courts in arbitration proceedings to carry out the intention of the parties...the intention of the parties was that before going for expensive and long procedures of arbitration, the parties had to first negotiate a settlement failing which they could resort to arbitration.

Mediation

Mediation means a form of alternative dispute resolution in which an independent third party (mediator) assists the parties involved in a dispute or negotiation to achieve a mutually acceptable resolution of the points of conflict. The mediator, who may be a lawyer or a specially trained non lawyer has no decision-making powers and cannot force the parties to accept a settlement. In international law a method for the peaceful settlement of an international dispute in which a third party, acting with the agreement of the disputing states actively participates in the negotiating process by offering substantive suggestions concerning terms of settlement and in general, by trying to reconcile the opposing claims and appeasing any feeling resentment between the parties involved.¹⁵

Conciliation

In civil disputes a procedure of peaceful settlement of international disputes. The matter of dispute is referred to a standing or adhoc commission of conciliations, appointed with the parties agreement, whose functions to elucidate the facts objectively and impartially and then to issue a report, the eventual report is expected to contain concrete proposal for a settlement, which however, the parties are under no legal obligation to accept.¹⁶ This is a process in which a third party called a conciliator restore damaged relationships between disputing parties by bringing them together, clarifying perceptions and pointing out misconceptions.

¹³ [https://www.law.cornel.edu/wex/Alternative Dispute Resolution](https://www.law.cornel.edu/wex/Alternative%20Dispute%20Resolution) accessed 6/03/2018 9:50-10:48am.

¹⁴ Oxford Dictionary of Law, 6 edn P. 118

¹⁵ Ibid

¹⁶ Ibid

A conciliator aims to assist the parties to a dispute to find a solution, but has no power to enforce it; this is provided in arbitration and Conciliation Act Cap 4.

Mini-trial

This technique provides for a summary presentation of evidence by an attorney or full informed representative for each side to decision makers usually a senior executive from each side. After receiving the evidence the decision maker privately discuss the case.

Non binding expert finding

The parties engage an expert to make an appraisal of the dispute especially where the issues are highly technical, who suggest an outcome which is non-binding.¹⁷

Good offices

Means a technique of peaceful settlement of an international disputes, in which a third party, acting with the consent of disputing states, serves as a friendly intermediary in an effort to persuade them to negotiate between themselves without necessarily offering the disputing states substantive suggestions towards achieving a settlement. The UN secretary general is often used in this role to facilitate communication between contending parties and he may on behalf of a concerned international community, play an active role in encouraging negotiations on promoting a successful outcome.¹⁸

Conclusion

Because of these advantages many parties choose ADR to resolve disputes instead of filing or even proceeding with a law suit after it has been filed. It is not uncommon after a lawsuit has been filed for the court to refer the dispute to a neutral before the lawsuit becomes too costly. ADR has also been used to resolve disputes even after trial while and appeal is pending.

¹⁷ African Multidisciplinary Journal Vol 2, No 3, 2017

¹⁸ Ibid

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