ARBITRATION, CONCILIATION AND MEDIATION IN UGANDA: A focus on the practical aspects

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Abstract:
This article looks outside the box of adversarial litigation of matters through the Courts of law. It explores a new trend in Uganda encompassing different forms of Alternative Dispute Resolution mechanisms. These include Arbitration, Conciliation, mediation and a brief look into Collaborative legal practice. The author explores the advantages and disadvantages of each of these mechanisms as he attempts to provoke the reader into determining whether ADR is a more viable means of administering justice in Uganda.

1.0 Introduction:

Arbitration and Mediation are two of the strategies employed in Alternative Dispute Resolution. The Ugandan court systems have, of late, progressed and become more appreciative of global commercial developments and thus bringing about the establishment of other dispute resolution mechanisms in the administration of justice that are efficient and accessible; faster and cheaper. This is where Alternative Dispute Resolution (commonly referred to as ADR) comes in.

ADR is a structured negotiation process under which the parties to a dispute negotiate their own settlement with the help of an intermediary who is a neutral person and trained in the techniques of ADR. The various strategies involved in ADR include negotiation, conciliation, mediation, mini-trial/early neutral evaluation, court annexed ADR and arbitration[2]. These ADR approaches are continuously being relied upon as an alternate or complement to conventional law suits. This article focuses on the practices of Arbitration, Conciliation and Mediation, and how they are appreciated through legislation and the Courts of law in the administration of Justice in Uganda. The article introduces the concept of Collaborative Legal practice as a form of dispute resolution and discusses the viability of its effectiveness in the Ugandan setting.

2.0 Arbitration:

This is the procedure whereby parties in dispute refer the issue to a third party for resolution and agree to be bound by the resulting decision, rather than taking the

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[2] Hon. Justice G. W. M. Kiryabwire: Alternative Dispute Resolution – A catalyst in Commercial Development: A case study from Uganda; in Uganda Living Law Journal , Vol. 3: No. 2 December 2005, at p. 145.

case to the ordinary courts of law. The third party is an independent intermediary who is neutral and trained in the techniques of ADR. Internationally, Arbitration has been the most favoured method for settlement of commercial disputes for hundreds of years. Its value is recognized by the courts and it is governed by statute, which empowers arbitrators and regulates the process. More recently in Uganda, arbitration has become a common method of resolving commercial and other disputes.

The question of speed and cost comes up to explain the preference for arbitration as opposed to court action. It has also been argued, however, that informal procedures tend to be most effective where there is a high degree of mutuality and interdependency, and that is precisely the case in most business relationships.

2.1 Commercial arbitration: The relationship between business and arbitration
An essential part of businesses is that they seek to establish and maintain long term relationships with other concerns. However, when it comes to solving court disputes among business concerns, court cases tend to terminally rapture such business relationships.

In contemporary business practice, it is standard practice for commercial contracts to contain express clauses referring any future disputes to arbitration. This practice is well established and its legal effectiveness has long been recognized by the law. Any person acceptable to the parties may act as their arbitrator. In practice they will tend to choose someone with skill and experience in the relevant field.

2.2 Legislative provisions on Arbitration:
Arbitration has recently taken centre stage as the preferred mode of resolving disputes, especially those of a commercial nature. This is regardless of the fact that law schools in Uganda still give a major part of the training of the law to adversarial methods that centre on Litigation. Nevertheless, there are a number of legislative provisions on arbitration:

2.2.1 The Judicature Act, Cap. 13
This Act provides for Alternative Dispute Resolution under Court's direction. Sections 26 to 32 of the Act provide for situations when matters can be referred to a special referee 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. These provisions read together with section 41 of the Act, which stipulates for the functions of the Rules Committee give the origin of the Judicature (Commercial Court Division)(Mediation) Rules, No. 55 of 2007 which are discussed in a later stage of this article.

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 that effect. Interestingly, however, the subsequent arbitration is nevertheless referred to as consensual.

2.2.2 The Civil Procedure Act (Cap. 71) and the Civil Procedure Rules S.I 71-1

Order XII (12) of the Civil Procedure Rules provides for "Scheduling Conference and Alternative Dispute Resolution". Rule 1 (1) thereof provides –
"*The Court shall hold a scheduling Conference to sort out 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 12 rule 2 further highlights Court's emphasis on Alternative Dispute Resolution. It states –
"*(1) 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.*
(2) Alternative dispute resolution shall be completed within twenty one (21) days after the date of the order . ..the time may be extended for a period not exceeding 15 days on application to the Court, showing sufficient reasons for the extension.
(3) The Chief Justice may issue directions for the better carrying into affect alternative dispute resolution . .."

This provision has thus set the pace for the procedure of having a scheduling Conference before hearing of any suit commences. This is presently strictly adhered to though it is apparent that Litigants follow this procedure with the perspective of looking at it as a mandatory process before hearing of cases in Court, rather than focusing on the use of a scheduling conference as a means of possibly settling the case out of Court. The latter perspective was the main reason for the establishment of this provision within Uganda's Civil Procedural law.

Further on, ***Order XLVII (47)*** also provides for Arbitration under Order of Court, also referred to as Court-annexed Arbitration. The beauty of this rule, again as in the spirit of ADR, lies in agreement between the parties.

Rule 1 (sub rule 1) of this Order, for instance, provides that –
"*Where in any suit all the 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 an order of reference.*"

Rule 2 of the same Order goes on to provide that the "*Arbitrator shall be appointed in such manner as may be agreed upon between the parties*". The statutory provisions themselves focus on the principal basis of arbitration being the maintenance of mutual respect for each other's interests between the parties or in other words, creating consensus on key matters. Of course, where the parties have opted for arbitration but fail to agree on the arbitrator, the Court shall appoint one as is provided for in rule 5 thereto.

2.2.3 The Arbitration and Conciliation Act (Cap. 4)

This regulates the operation of arbitration and conciliation procedures, as well as the behavior of the arbitrator or conciliator in the conduct of such procedure. This Act is of significance because it incorporates the provisions in the 1985 United Nations Commission on International Trade (UNCITRAL) Model Law on International Commercial Arbitration as well as the UNICITRAL Arbitration Rules 1976 and the UNCITRAL Conciliation Rules 1976. However, it should be noted that the Act does not provide for the immunity of an arbitrator which is covered under the UNCITRAL Model law.

The stated purpose of the Act is to empower the parties and to increase their autonomy. It has always been the case that if an arbitration agreement existed, the courts would not hear the case until the arbitration procedure had taken place[3]. Disputing parties are thus obliged to submit to the provisions under the Act on the basis of an existence of an agreement to arbitrate in the event that a dispute arises. Section 2(1)(c) provides for the meaning of "Arbitration Agreement". It states – *"an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not"*

The Act also provides for the Centre for Arbitration and Dispute Resolution (CADER) as a Statutory Institutional alternative dispute resolution provider[4]. Until the coming into place of the *Arbitration and Conciliation Act*, the use of arbitration, which has been in place since the 1930s, was rather limited with an absence of an appropriate control system as well as a general oversight over arbitrators especially with respect to the fees charged[5].

The *Arbitration and Conciliation Act* is thus instrumental in three major objectives:

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[3] Sec. 5
[4] Sec. 67
[5] S. Sempasa: Centre for Arbitration and Dispute Resolution & the new legislative formulation on A.D.R; Uganda Living Law Journal, Vol. 1, No. 1, June 2003 p. 81 at p. 86

(1) Ensuring realization of the goal of increased party autonomy and provision of appropriate and user-friendly rules of procedure to guide parties.
(2) Creation of an adaptable framework for arbitration tribunals to operate under as well as other default methods in the absence of the parties' own agreements, and
(3) The advancement of equality and fairness in the whole process.

It is on these three core objectives that CADER was established[6].

CADER has made significant contributions to the development of the arbitration mechanism in ADR[7]. The institution makes available to individuals and their legal counsel, at no charge, pre-drafted model arbitration and mediation clauses for inclusion in their contracts. It also has a detailed fee structure that can be relied upon when charging for various services including fees that are charged by the individual CADER registered mediators or arbitrators. These registered members are also required to subscribe to CADER's Code of Conduct and are subject in their conduct of arbitration and mediation proceedings to the Ethics Committee established within CADER's governing body referred to as "The Governing Council". Unfortunately, in the past, CADER was not able to effectively perform its services due to inadequate funding. From the time of inception, CADER was funded by USAID (United States Aid for International Development) which funding was terminated in 2003 on the understanding that government would take over. In June of 2008, the *Arbitration and Conciliation (Amendment) Act*[8], was enacted with the purpose of providing for funding of the Centre for Arbitration and Dispute Resolution by government. Refocusing the sourcing of funds for the Centre has enabled the revival of its operations in the settlement of disputes in Uganda.

The Arbitration and Conciliation Act (as amended) further goes out to create equilibrium between legal practitioners and fosters a positive judicial attitude towards arbitration. Increased powers are granted to the arbitral tribunal and there is an open window within which the jurisdiction of courts can be exercised as an intervention in assisting and supporting the arbitral process with the aim of enhancing the development of ADR generally[9].

Interestingly, in the pursuit of justice through arbitration, the Act provides that the arbitration tribunal may opt to follow considerations of justice and fairness where it is not bound by rules of law. Section 28(4) 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.*"

[6] See Part VI of the Act.
[7] Ibid
[8] Act No. 3 of 2008
[9] See e.g sections 5, 6, 9, 16(6), 17(3), 27, 34, 35, 36, 37, 38, 39, 40, 41, 43, 46, 47, 59 and 71.

Since the revival of the operations of CADER, between August 2008 and November 2009, the majority of cases that have been handled have been addressing applications for the compulsory appointment of a single arbitrator. The basis of such applications before CADER is the existence of an arbitration clause in a contractual agreement binding the parties, the request to submit any dispute to arbitration and the Respondent's refusal to cooperate in the appointment of an arbitrator. What is most prevalent in such matters is that the arbitrator is always advised or reminded to sign the Declaration of Impartiality, Party Undertaking Agreement and file the same with CADER upon assuming jurisdiction over the matter in dispute as well as returning the file to CADER for archiving purposes upon completion of the case.

2.3 Case law provisions

Where a case has commenced in Court and it is established that the matter was meant for arbitration, the Court respects the mandatory provision of the Act to this effect and will always order that the matter be referred to arbitration as provided for in section 5 therein. This was also held in the case of ***East African Development Bank vs Ziwa Horticultural Exporters Ltd***[10] to the effect that:"*Sec. 6 (present sec. 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 it's discretion and refer the matter to arbitration.*"

The most important thing to note is that Courts follow the intention of the parties. In ***Farmland Industries Ltd v. Global Exports Ltd***[11] 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."

However, in order to satisfy court that the case before it should be referred to arbitration, certain conditions must be present as was spelt out by Tsekooko S.C.J in ***Shell (U) Ltd vs Agip (U) Ltd***[12]***.*** 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.

[10] High Court Misc. Appln. No. 1048 of 2000 arising from Companies Cause No. 11 of 2000.
[11] [1991] H.C.B 72
[12] Supreme Court Civil Appeal No. 49 of 1995(Unreported)

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.

Thus, where the case is for arbitration pursuant to an agreement to that effect, appointment of an arbitrator under section 11 of the Act follows as a mutual consideration and not for one party only to decide. As was stated by CADER Executive Director in ***Uganda Posts Ltd v. R.4 International Ltd***[13], " *. . . the appointment of an arbitrator is a mutual obligation which is imposed on all parties. A party unwittingly forfeits its statutory right, when it fails to participate in the 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, then the advocate would be best placed person to advice the client on the unpropitious task to be performed.*"

Jurisdiction of Court in arbitration matters.

The issue of Court jurisdiction or relevance in arbitration matters has been addressed through various concerns, one of them being the principle of *Res Judicata*[14]. The existence of an on going Court case where a similar matter is brought before an arbitrator, does not render such matter as *res judicata.* In the arbitration case of ***Bayeti Farm Enterprises Ltd & Anor v. Transition Grant Services***[15], this was an application for the compulsory appointment of a single arbitrator. In opposition to the application, the respondent argued that the matter was creating a multiplicity of suits basing on an existing suit before Court and relied upon sec. 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 (C.P.A) has no application to section 11 of the Arbitration and Conciliation Act (A.C.A)(which provides for appointment of Arbitrators) because the C.P.A applies, as per its section 1, to proceedings in the High Court and Magistrates Court.

[13] CAD/ARB/NO. 11 of 2009

[14] This principle is well laid out in section 7 of the Civil Procedure Act, Cap. 71 (Laws of Uganda, 2000 Ed.) which provides that: No Court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try the subsequent suit or the suit in which the issue has been subsequently raised, and has been heard and finally decided by that court.

[15] CAD/ARB/No. 4 of 2009

In the same vein, however, a very sound criticism of the Act is given by Okumu Wengi, J. in ***East African Development Bank v Ziwa Horticultural Exporters Limited*** (supra) in which he states that in the first instance under section 5, the Act seems to have firstly removed a perceived bar to Court proceedings where an arbitration was agreed on. Under section 5(1), the Court exercises its discretion to satisfy itself that the arbitration agreement is valid, operative and capable of being performed. In other words, the Honourable Judge opines, the mandatory reference to arbitration is subject to the Court's decision under section 5 (1) of the Act. However, section 5 (2) leaves the option open to both parties to proceed with arbitration in spite of the existence of an application for stay of such proceedings pending in Court. He goes further to note that section 9 provides a bar to court intervention where it states that: "*Except as provided in this Act, no Court shall intervene in matters governed by this Act.*"
He asserts that this section seems to amount to an ouster of the inherent jurisdiction of the Court. He states:" *Firstly, it appears to make arbitration and conciliation procedures mutually exclusive from Court proceedings as for instance to make Court based or initiated mediation or arbitration untenable. Secondly, it seems to divorce or restrict alternative dispute resolution mechanisms from Court proceedings. Thirdly, it tends to greatly curtail the courts inherent power which is fundamental in judicature. By so doing the judiciary is easily emasculated in its regulation of arbitration and conciliation as adjudication processes; its remedial power in granting and issuing prerogative orders of mandamus and certiorari is not addressed if not sidelined. Clearly, empowering people to adjudicate their own disputes need not oust the core mandate and function of courts in the context of governance."*

With this criticism in mind, it is paramount to note that the A.C.A actually gives cognizance of the High Court's overall unlimited jurisdiction but nevertheless orchestrates the methodology of such jurisdiction. The provision in section 9 is similar to Article 5 of the (UNCITRAL) Model Law. However, with due respect, this does not necessarily mean that the Court's jurisdiction is out-rightly ousted as stated by the learned judge (supra). It simply allows for certain boundaries within which court intervention can be allowed to exist. This position has been well portrayed through case law[16].

In the case of ***Oil Seeds (Uganda) Limited vs Uganda Development Bank[17]***, Karokora JSC., stated that, "*… the Court has jurisdiction to interfere with the arbitrator's award if it is found to be necessary in the interest of Justice*." He further relied on the persuasive authority of ***Rashid Moledina & Co. (Mombasa) Ltd &***

[16] Also see the cases of *Kayondo vs. Co-operative Bank (U) Ltd, Civil Appeal No. 10 of 1991* and *Kameke Growers Co-operative Union vs Bukedi Co-operative Union, Civil Appeal No. 989 of 1994* , in which the issue of Court jurisdiction in arbitration matters also came up.
[17] Supreme Court Civil Appeal No. 203 of 1995

Others v Hoima Ginneries Ltd[18] in which a question arose as to whether or not, having regard to the arbitration award, the High Court had any jurisdiction to set aside or remit the award to the appeal committee. The Court of Appeal for East Africa held that although in the case before it, there were sufficient facts to support the award, nevertheless the Court went ahead to say:

> "*Courts will be slow to interfere with the award in the Arbitration, but will do so whenever this becomes necessary in the interest of justice and will act if it is shown that the Arbitrators in arriving at their decision have done so on a wrong understanding or Interpretation of the law*".

The Arbitration and Conciliation Act therefore, with precision, provides for the particular instances and limitations under which Court intervention and assistance is necessary. This is through: staying of legal proceedings (sec. 5); effecting interim measures (sec. 6); taking evidence (sec. 27); setting aside the arbitration award (sec. 34) and enforcement of an arbitral award (sec. 36).

Significantly, the Court does not come in to impose its authority upon the parties but continues to give due respect to the autonomy of the parties and assists in the successful attainment of their interests.

On another note, the East African Court of Justice[19] also has jurisdiction to handle disputes arising from an arbitration clause contained in a commercial contract or agreement in which the parties have conferred jurisdiction on the Court[20].

Another significant provision in the Act is the empowerment of the Arbitral tribunal to rule on its jurisdiction[21]. It stipulates that the arbitral tribunal may rule on its own jurisdiction as well as ruling on any objections with respect to the existence or validity of the arbitration agreement. It further stipulates that:

a) an arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract[22], and
b) a decision by the arbitral tribunal that the contract is null and void shall not itself invalidate the arbitration clause.[23]

The Act therefore empowers the arbitral tribunal to not only examine issues facing illegality in the performance of the contract, with authority to rule on objections

[18] (1967) E.A 645
[19] This is a regional judicial body that serves to ensure adherence to law in the interpretation and application of and compliance with the treaty establishing the East African Community.
[20] Article 32
[21] Sec. 16
[22] Sec. 16 (1)(a)
[23] Sec. 16 (1)(b)

to its jurisdiction[24], but also issues facing illegality in the existence of the contract[25]. Interestingly, the arbitral panel may also proceed to hear and resolve a case notwithstanding that a question regarding the jurisdiction of the panel is pending before Court, as provided under sec. 16 (8) of the Act.

This provision on the powers of the Arbitral tribunal further emphasizes the autonomous authority yielded by an arbitration agreement. In the case of ***Shell (U) Limited vs. Agip (U) Limited***[26] Tsekooko JSC., stated to the effect that: "*It is now trite law that where parties have voluntarily chosen by agreement, the forum for resolution of their dis*putes, *one party can only resile for a good reason.*" In coming to this decision, Tsekooko JSC relied on the case of ***Home Insurance v Mentor Insurance (1989)3 All E.R 74 at page 78,*** in which Parker, L.J., had this to say in respect of commercial disputes arising from agreements containing arbitration clauses –

> "*In cases where there is an arbitration clause, it is my judgment the more necessary that full scale argument should not be permitted. The parties have agreed on their chosen tribunal and a defendant is entitled, prima facie, to have the dispute decided by the tribunal in the first instance, to be free from intervention of the Courts until it has been so decided.*"

The Arbitration and Conciliation Act further serves to ensure respect and adherence towards arbitration awards. There are rather limited grounds upon which a person can challenge such an award[27]. Undoubtedly, the true essence of arbitration would entirely lose meaning if it were easy to set aside arbitration awards. Similarly, a party to an agreement containing an arbitration clause can not turn round and deny its existence. For instance, in the case of ***Fulgensius Mungereza vs Pricewatercoopers Africa Central***[28] in which the appellant was appealing, inter alia, against the lower court's decision to stay proceedings on the basis of an existing Mediation and Arbitration Clause in a framework agreement between the parties. G.M. Okello, JA, in his judgment, stated that:" The arbitration agreement was freely and voluntarily entered into by the appellant and the respondent. To depart from it, the appellant had to show good reason. Unfortunately, none had been shown. As such the trial judge was therefore justified to order stay of proceedings."

2.4 Basic steps in Arbitration

The Act provides guiding steps to be followed in arbitration proceedings:

[24] Otherwise known as the principle of "Kompetenz – Kompetenz"
[25] Ibid, See supra note 5
[26] Supra note 12
[27] Sec. 34
[28] Court of Appeal Civil Appeal No. 34 of 2001

a) A statement of Claim is filed at CADER by the Party initiating the arbitration proceedings detailing the brief facts pertaining to the dispute and the issues to be resolved, as well as the relief or remedy sought[29]. It should also include a nomination of an arbitrator.
b) A copy of the filed Statement of Claim is then served upon the Respondent who then responds with a statement of Defense within ample or reasonable time. Such time may be proposed by the Claimant, unless agreed otherwise[30].
c) The Parties involved in the dispute appoint one or more arbitrators as may be agreed upon[31]. If they fail to agree on an arbitrator, the Centre for Arbitration and Dispute Resolution (CADER) provides one[32]. The procedure for appointment of an Arbitrator is informal and agreed upon by the Parties[33].
d) Each party is treated equally during arbitration proceedings with reasonable opportunity to present their case[34].
e) If there is a default by any of the parties in fulfilling his obligation in the course of or prior to the start of the proceedings, the arbitral tribunal shall act accordingly in either terminating the proceedings or making an award with the evidence before it[35]
f) The Arbitral tribunal decides the dispute according to rules of law chosen by the parties[36]
g) Proceedings during arbitration may either involve hearing oral arguments or filing of written submissions[37]
h) The tribunal is mandated to make its award in writing within two months after having been called on to act after which, the proceedings are terminated.[38]
i) The award is recognized as binding under the Act[39] and can be enforced as if it were a decree of Court[40].

2.5 Advantages and disadvantages in Arbitration

a) Privacy –

Arbitration tends to be a private procedure. This has the two fold advantage that outsiders do not get access to any potentially sensitive information and

[29] Sec. 23
[30] Sec. 21
[31] Sec. 10
[32] Sec. 11 and 68
[33] Sec. 11(2)
[34] Sec. 18
[35] Sec. 25
[36] Sec. 28
[37] Sec. 24(1)
[38] Sec. 31 and 32
[39] Sec. 35
[40] Sec. 36. The First Schedule to the Act also provides for procedure on enforcement of an arbitration award.

the parties to the arbitration do not run the risk of any damaging publicity arising out of the proceedings. This confidentiality can boost the possibility of the warring parties maintaining a business and friendly relationship after the dispute is resolved, which is hardly the case in litigation.

b) Informality –
The Proceedings are less formal than a court case and they can be scheduled more flexibly than court proceedings. As such, they can be ad hoc and are tailored around the dispute involved unlike disputes brought before Court for litigation which have to fit within the legal procedures provided.

c) Speed –
Arbitration is generally much quicker than taking a case through the courts. Where, however, one of the parties makes use of the available grounds to challenge an arbitration award, the prior costs of the arbitration will have been largely wasted.

d) Costs –
It is generally a much cheaper procedure than taking a case to the normal courts. Nonetheless, the costs of arbitration and the use of specialist arbitrators should not be underestimated.

e) Expertise-
The use of a specialist arbitrator ensures that the person deciding the case has expert knowledge of the actual practice within the area under consideration and can form their conclusions in line with accepted practice, e.g Accountants in disputes in debts; Engineers for construction disputes, etc. Furthermore, the person arbitrating over the matter has his full focus on this particular dispute as opposed to litigation where a judge has a number of matters to focus upon in one day.

f) Enforcement -
Considering that an arbitral award is enforced as a decree of Court[41], the party aggrieved by it can exercise the option of appealing as one would appeal against a Court Decree. However, an arbitration award is taken to be a more binding and enforceable decision than other forms of ADR.

g) International applicability of arbitration awards.
The Arbitration and Conciliation Act gives effect to the New York Convention on the Recognition and Enforcement of Arbitral Awards (referred to as the

[41] Section 36

New York Convention Award)[42]. In effect therefore, the Arbitral Awards granted in Uganda can be enforced in any Country which is a party to the Convention adopted by the United Nations Conference on International Commercial Arbitraion on the 10th of June, 1958. On the other hand, Court judgments can only be enforced outside of Uganda with Countries that have a standing reciprocal arrangement in enforcement of Judgments.

There are a number of disadvantages though: Arbitration can, in some instances be time consuming and ultimately expensive; Arbitrators have fewer powers than the courts to obtain evidence from the parties and to expedite the proceedings; they may also lack necessary legal knowledge, ultimately necessitating an appeal, which will inevitability increase the costs. Commercial arbitration procedures are also not necessarily appropriate unless the contracting parties are in a position of equal bargaining power. Furthermore, because of the laxity involved in arbitration, the element of mutual respect of the arbitration process can sometimes be lacking as opposed to litigation where the disputing parties are obliged by law to respect court procedure inclusive of attending hearings. It is, for example apparent that ever since the revival of CADER in late 2008, the majority of arbitration matters brought before CADER have been handled ex parte in the absence of the respondent which portrays the respondent's lack of respect for such hearings and failure to co-operate in the institution of the arbitral tribunal.

In practice, Arbitration basically stands out as the preferred choice in International Commercial disputes as opposed to domestic commercial disputes because it is more expensive to resolve International commercial disputes through domestic Courts of law. Furthermore, business entities view the disadvantages in domestic arbitration as outweighing its advantages.

3.0 Conciliation

This is another form of Alternative Dispute Resolution provided for under the Arbitration and Conciliation Act. A Conciliator aims to assist the parties to a dispute to find a solution, but has no power to enforce it. There is inadequate documentation and study in the practice of Conciliation as an ADR tool, which is most likely because of the private nature in which it is conducted. The parties to the dispute arrive at their solution independently and impartially as stipulated by Section 53 of the Act. The Act provides the basis for which the Conciliator plays his role. It states that:

> *" The Conciliator shall be guided by principles of objectivity, fairness and justice, giving consideration to, among other things, the rights and obligations of the parties, the usages of the trade*

[42] Part III of the Act.

concerned and the circumstances surrounding the dispute, including any previous business practices between the parties.[43]"

It therefore follows that, save for the Conciliator conducting the proceedings of the conciliation in the best manner that he deems fit[44], the whole focus of the proceedings rests on the interests of the parties; their common business practices (usages of trade), if any; and the circumstances surrounding the dispute.

3.1 Basic steps in Conciliation

Part V of the Act provides for the steps to follow in Conciliation proceedings:

a) The party initiating the proceedings sends to the other party a written invitation for conciliation which is only initiated if the other party accepts the invitation by replying to the same within 21 days[45].
b) Similar to arbitration proceedings, the parties appoint a Conciliator[46].
c) Each party then submits to the Conciliator a brief written statement describing the general nature of the dispute and the points at issue[47]
d) Once elements of settlement surface during the course of the proceedings, the Conciliator helps the parties to draft a settlement agreement, which is signed by the parties, hence terminating the proceedings.[48]
e) The Settlement agreement also served the same status as an arbitral award under the Act.[49]

Meetings between the Conciliator and the parties are rather informal. He may choose to meet with them physically at a place either party may agree upon, or may opt to communicate orally or in writing[50]. He does not even necessarily have to meet with them together. It can be done separately[51]. Just like in mediation, suggestions for the settlement of the dispute are, in most instances, opined by the disputing parties[52]. However, the Conciliator can assist in formulating terms of settlement when it emerges that there are basics of settlement that have been agreed upon by the parties[53].

The Conciliation process bears some significant similarities to Arbitration. The Settlement agreement, for instance, once drawn up and agreed upon by the

[43] Sec. 53(2)
[44] Sec. 53(3)
[45] Sec. 49
[46] Sec. 51
[47] Sec. 52
[48] Sec. 61
[49] Sec. 59
[50] Sec. 54(1)
[51] Sec. 54(2)
[52] Sec. 57
[53] Sec. 58(1)

parties, carries the same status and effect as an arbitral award under the Act[54]. Furthermore, the autonomous power exhibited in arbitral processes is reflected in Conciliation proceedings. Section 62 of the Act is to the effect that during the course of conciliation proceedings, no arbitral or judicial proceedings can be initiated by the same parties. This helps to create an organized and effective means of smoothly coming to a solution on one front.

It is also evident that the outcome of Conciliation proceedings is not to be abused or disrespected in any way. The parties to a conciliation proceeding can not rely on its outcome or any information obtained from such proceedings to be used as evidence in an arbitral or judicial proceeding. This is regardless of whether or not it is the same dispute to be dissolved in the arbitral or judicial proceeding[55]. The limitations imposed on conciliation proceedings therefore also serve to prevent protracted handling of disputes under ADR.

3.2 Weaknesses and Strength in Conciliation proceedings.

The essential weakness in the Conciliation strategy procedure of ADR lies in the fact that, although it may lead to the resolution of the dispute, it does not necessarily achieve that end. Where it operates successfully, it is an excellent method of dealing with problems as, essentially, the parties to the dispute determine their own solutions and, therefore, feel committed to the outcome. The problem is that Conciliation, like mediation, has no binding power on the parties and does not always lead to an outcome.

4.0 Mediation

Mediation is quite similar to Conciliation. It has been termed as "*the interaction between two or more parties who may be disputants, negotiators, or interacting parties whose relationship could be improved by the mediator's intervention. Under various circumstances (determinants of mediation), the parties/disputants decide to seek the assistance of a third party, and this party decides whether to mediate. As the mediation gets underway, the third party selects from a number of available approaches and is influenced by various factors, such as environment, mediator's training, disputant's characteristics, and nature of their conflict. Once applied, these approaches yield outcomes for the disputants, the mediator, and third parties (other than the mediator).*"[56] In some respects, Mediation is referred to as Negotiation in Alternative Dispute Resolution categories.

[54] Sec. 59
[55] Sec.66
[56] Wall, et al., 2001:370 in R. Ramirez: *A conceptual map of land conflict management: Organizing the parts of two puzzles* (March 2002) in http://www.fao.org/sd/2002/IN0301a3_en.htm , visited February 26, 2007.

As such, mediation aims to assist the disputing parties in reaching an agreement. Whether an agreement results or not, and whatever the content of that agreement, if any, the parties themselves determine the results as opposed to something imposed by a third party[57]

The Arbitration and Conciliation Act (as amended) does not make any specific reference to Mediation. However, the prevalent Uganda Commercial Court-assisted ADR today particularly focuses on Mediation as the most appropriate ADR tool and has made significant breakthrough in this regard.

4.1 Legislative provisions on Mediation:

4.1.1 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. Traditionally, elders have always played the key role of mediators over land disputes as opposed to such matters being handled by western-style Tribunals that, in most respects are regarded as not being appreciative of the traditional modes of handling such disputes, as well as the fact that they may lead to permanent enmity between the warring parties instead of reconciling their differences.

This is the basis for the recognition of traditional mediators under the Land Act. Sections 88 and 89 of the Act provide for Customary Dispute Settlement and mediation as well as the functions of the mediator. Approximately 75% of land in Uganda is categorized under the customary tenure system, thus it is only appropriate that the statutory law provisions should stipulate for a combination of customary systems of settling disputes together with the modern mediation strategies[58]. 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.

Justice Geoffrey Kiryabwire of the Uganda Commercial Court adds credence to this position as well. In his article: *Mediation of Corporate Governance*

[57] See http://www.hg.org/mediation-definition.html, visited 20th November, 2009

[58] See A.C.K. Kakooza: Land dispute settlement in Uganda: *Exploring the efficacy of the mediation option;* Uganda Living Law Journal, Vol. 5, June 2007; Uganda Law Reform Commission

Disputes through Court annexed mediation – A case study from Uganda[59], he states that:

> "*. . . 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 elders as conciliators/mediators in disputes using procedures acceptable to the local community but which were not as formal as those found in the courts.*"

Significantly, where a Land tribunal adjudicating over a land dispute in Uganda has reason to believe, on the basis of the nature of the case, that it would be more appropriate for the matter to be handled through a mediator, whether traditional authorities or not, may advice the disputant parties as such and adjourn the case accordingly[60].

Section 89 of the Land Act provides guidance on the basis of which the selection and functions of a mediator follow. It provides that the mediator should be acceptable by all the 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 be guided by the principles of natural justice, general principles of mediation and the desirability of assisting the parties to reconcile their differences.

4.1.2 The Judicature Act, Cap. 13: The Judicature (Commercial Court Division) (Mediation) Rules, No. 55/2007

In some instances, the intensity of a dispute may mean that the parties are not even in a position to hear each other out amicably. This inevitably leads to seeking redress from Court with varying objectives, the most common of which are: (1) For Court to assist the parties in determining the outcome of the case, (2) For the losing party to be punished through damages and costs to the winning party. Sometimes the issues to be resolved are too complex to be resolved through mediation.

However, in spite of the aforementioned scenarios, the *Judicature (Commercial Court Division)(Mediation) Rules, 2007*[61] were recently made operational by the Commercial Court with effect from 1st November 2009, making mediation a mandatory procedure for all litigants[62]. These Rules are an after math to the Commercial Court's Mediation Pilot Project conducted between 2003 and

[59] A paper given to The Global Corporate Governance Forum on Mediating Corporate governance disputes, World Bank office, Paris – February 12, 2007
[60] Sec. 88(2) Land Act, Cap. 227, Laws of Uganda, 2000 Ed.
[61] S.I No. 55 of 2007
[62] With certain exceptions under rules 9 and 10.

2005[63]. The 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 may want to refer in the mediation. Effectively, as of November 2009, a Court litigant's pleadings will not be considered complete unless these Mediation Rules have been complied with.

Is Mediation binding?

The new Mediation rules play a strong positive impact in the practice of mediation as a form of dispute resolution because they add more weight to mediation agreements through regulation. They effectively answer the question as to whether mediation is binding. Ordinarily, if an agreement is reached through mediation, then the terms settlement will be filed at Court and bring the proceedings to a close. If no agreement is reached, then the Court will only be told that Mediation has been attempted and has failed[64]. This position is stipulated under rule 20 of the Commercial Court Mediation Rules. It states –

> *(1) If there is an agreement resolving some or all of the issues in dispute, it shall be signed by the parties and filed with the Registrar for endorsement as a consent judgment.*
>
> *(2) If there is no agreement, the mediator shall refer the matter back to Court.*

Court-annexed Mediation: Can Courts be seen to force parties into mediation?

Proponents for ADR, particularly mediation, push for the same with the perspective being - the benefits in the procedure but not necessarily *what the parties really want.* However, in some instances, what the parties want can be more safely and conveniently arrived at through mediation than through litigation. It should also be considered that with the new mediation rules, some parties may appear to be forced into mediation out of fear of reprisal through costs sanctions from the Commercial Court judge as a result of either failure to agree to mediation or absence from mediation meetings. Rule 18 of the Mediation rules provides for the payment of costs by the party that fails to attend mediation meetings without sufficient cause. With the Commercial Court embracing mediation, a party's refusal or reluctance to attend to mediation may drastically turn the case against such party even before the case takes off. As was stated by Lord Justice Brooke in ***Dunnet v Railtrack***

[63] This was Court-annexed mediation in Uganda created by the Chief Justice through two instruments namely: The Constitutional Commercial Division (Mediation Pilot Project Rules) Practice Direction, 2003 (Legal Notice No. 7 of 2003); and The Commercial Court Division (Mediation Pilot Project) Rules, 2003.

[64] See Briefing Note 5: *Dispute Resolution – MEDIATION,* in http://www.jstlawyers.co.uk, accessed 20th November 2009

(2002)[65] – that parties which turn down a suggestion of ADR by the Court "may face uncomfortable consequences".

Jon Lang, a practicing mediator, argues that it is human nature to reject any form of compulsion. He adds that: "*If it becomes regular practice to force reluctant parties to mediate, we may well end up with a process characterized by stage – managed and doomed mediations, rather than the high success rates we have seen over the last 10 years.*"[66]

The Commercial Court Mediation Rules provide a softer landing, however, through rule 10 which gives an exemption from mediation. It is to the effect that where sufficient cause is shown to exempt a matter from mediation, Court shall allow such exemption. One may thus argue that there is no coercion as such by Court pushing parties into mediation. The Rule clearly implies that where the parties do not envisage a way out in resolving their case through mediation, then once they have convinced Court of this situation, then they would be exempted from proceeding through the Mediation Rules.

4.2 Collaborative legal practice: Avoiding protracted litigation through Peace making.

Collaborative legal practice is a new concept that is yet to receive appreciation in Ugandan judicial practice. Mr. Arinaitwe Patson, a Ugandan lawyer trained in Collaborative practice and a member of the International Academy of Collaborative Professionals (IACP) Texas, USA, describes the practice as " . . . *about cooperation, not confrontation*."[67] He further states that " It is a way of solving problems with lawyers assisting the parties to understand each other's perspective."[68]

Basically, Collaborative legal practice can be understood as a tool in dispute resolution that is similar to negotiation or mediation only that the lawyers involved play a key role in advising the parties as to the positive benefits that may arise from any course of action taken. In this way, they are guiding the parties to determine the best course of action to take, while in the same vein ensuring that there is no ultimate loser.

Arinaitwe states that the procedure involved relies on an atmosphere of mutual respect, honesty, cooperation, and a commitment to maintaining a safe environment, with the objective of ensuring the continued good business

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[65] Cited by Jon Lang: *Should warring Parties be forced to mediate?*- The Lawyer, 23 February 2004 – see http.//www.jonlang.com/pdf/sweet-talk.pdf accessed 20th November 2009

[66] ibid

[67] Arinaitwe P.W; *Collaborative Law and Lawyers in Peace Making: A paradigm Shift in Dispute Settlement; The Uganda Christian University Law Review, Vol. 01, No. 2 August 2009, Faculty of Law, U.C.U at pp. 87-116*

[68] Ibid, at p. 93

relationship for commercial entities and future well-being of the parties and their children in the case of family disputes.

Characteristics of Collaborative legal practice:
This dispute resolution mechanism is purely voluntary and not orchestrated by Court. This is the basis of it being a peace making mechanism. The parties agree at the onset that the matter in dispute will never end up in Court.

Secondly, the lawyers involved do not derive benefit from the weaknesses of the opposite party's case, but in the alternative, help each other out in the progress of resolving the dispute.

It is thus a process of interest-based negotiation with the ultimate objective resting on drawing up an agreement that is equitable to all involved.

Adversarial litigation, on the other hand, derives its benefits it riding on the weaknesses of the opposite party and even going further by not pointing out these weaknesses to the other party, the plan being that an ambush of legalese will be 'unleashed' in Court. After all, the common belief is that it is the crafty and heartlessly shrewd lawyer that attracts the most clients. This philosophy does not auger well with the belief in Collaborative legal practice which is all about selflessness during the negotiation.

Ultimately the effectiveness of Collaborative law would be most felt in the area of resolving family disputes like divorce or custodial undertakings. The fact that it hinges on the "*commitment of maintaining a safe environment*" shows that it is easier to implement this under family disputes as opposed to commercial disputes where the warring parties are probably haggling over huge losses arising from contractual breaches. To explain this point further, a number of Common law Countries rely on the *Irrevocable breakdown of marriage* principle in the dissolution of marriage. This is a no-fault principle where the parties agree that the marriage has broken down and the only way out is divorce. It is in such a setting that Collaborative law would thrive. However, where the dispute is initiated through fault or the pointing of figures, it would be difficult to resolve such through Collaborative legal practice. Such a dispute resolution mechanism can not be effective where the dispute is weighed down by issues of blame. One would only have the option of trying out the other dispute resolution mechanisms instead.

Conclusion.
Uganda is gradually moving away from the traditional concept that litigation is more effective than ADR but there is still more to be done. Much as the lawyer's stock in trade is his time, for which he lavishes in his bills subsequent to court litigation, ADR can also be cost effective as well as financially and intellectually rewarding. More and more business concerns are opting for ADR,

particularly Arbitration and mediation, in resolving their disputes as opposed to conventional Court litigation. This is essentially because they would rather protect their business contacts, reputations and interests rather than severe them through exploring lengthy and embarrassing litigation. However, in the same vein, warring parties that are advised to opt for ADR should not be led to believe that this option is out of compulsion by Court or any quasi judicial structure, but should freely appreciate the benefits that come with it.

It is also noteworthy that legal training in Uganda is progressing away from the adversarial system to moderate training involving ADR and exposure to ADR practical techniques. Law Students and advocates alike should be encouraged further in this awareness so as to appreciate ADR more, rather than ridicule it and thus embrace it in the practice of pursuit of justice in Uganda.