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ANALYSIS OF ADR IN CHAMPIONING ECONOMIC GROWTH, ACCESS TO JUSTICE AND HUMAN RIGHTS IN UGANDA

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Abstract:

The Courts in Uganda are set on the colonial system of adversarial approach. The courts in Uganda experience backlog of cases,[1] that hinder access to justice.[2] Many researchers have found that there is no access to justice due to the fact cases take too long to be delivered by Courts.[3] The former Chief Justice Justice RT Hon. Bart Katurabe in his farewell speech requested the government to increase on the number of judges[4] to reduce backlog of cases. Todays' business industry, is becoming more complex and need more capital for investment. The business environment is more scared of a country where delivery of judgments takes decades.

The Commercial transactions play a vital role in generating revenue to the state. commercial disputes arise which require quick resolution to forestall the disruption of business relationships. The problem associated with litigation provide a lacuna that can only be filled with ADR,

The failure to solve disputes in a society can spiral violence due to lack of effective judicial system that can provide a credible and timely process for solving disputes. [5]Alternative Dispute Resolution (ADR) techniques can strengthen dispute settlement and bridge the gap between formal legal system and traditional modes of justice. ADR helps in stabilization of the economy, state building efforts and human rights, especially when judicial institutions fail to promote justice to all. In Uganda backlogged courts often require claimants to wait for years, without getting justice in courts. Many have a view that its impossible to get justice in Courts, which may ignite the potential violence group to cause instability.

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[1] See Justice Buteera Chairperson of Case Backlog Monitoring Committee, (2018) Banishing the Ghost of Case Backlog in the Judiciary, available at https://www.jlos.ug/index.php/about-jlos/projects/case-backlog-reduction, accessed 10 August 2010.

[2] See Judicial Service Commission of Uganda.

[3] See Acting Chief Justice Owiny-Dollo, at swearing Ceremony of Justice Buteera at Judicial Commission, where, he said the question of increasing judges should not be debatable, available at http://www.ntv.co.ug, accessed 12 August 2020.

[4] See Justice Law & Order Sector of Uganda, available at https://www.jlos.go.ug/index.php/about-jlos/project/case-backlog-reduction, accessed on 20 July 2020. Where the Judicial Commission under Art. 142(2) of the Constitution was requested to increase on judges.

[5] Deborah H Isser, Stephen Lubkemann and Saah, Looking For Justice: Liberian Experiences with and Pereceptions of Local Justice Options, Peace works N0.63 (Washington, DC, United States Institute of Peace 2009 at 15.

For one to access justice, there should be timely speed to deliver a judgment. [6] This article will also bridge the gap between municipal courts and ADR, especially, Arbitration is more hijacked by High Courts, under the pretext of Article 139 of unlimited jurisdiction of the High Court.[7] The courts mostly ignore the contractual obligations under the arbitration[8] agreement which is based on the doctrine of party autonomy. [9] ADR procedures are considered imperative worldwide, and are used by range of Courts, tribunals, and the victims of delays in delivery of cases as a tool for reaching a settlement. In examination of the different forms of ADR, much discussion will be given to arbitration due its international nature. The article will examine the current legal frame work to find the efficacy of the legislations in supporting ADR.

The article will advocate to consider other African ADR methods that have been solving disputes in African societies before the colonial rule came to Africa and Uganda at large.

Introduction:

The growth in the use of ADR has given rise to several new challenges in Uganda. This is usually the case in evolving global village, with advancement in ICT as a means of conducting trade internationally and domestic. Since Uganda was colonized by Great Britain, it still follows the approach of England and wales in its judicial system. ADR in Uganda was brought to attention after Lord Wolf review of the civil justice system in 1996.[10] Lord wolf promoted ADR as he considered it to have the merits of saving scare judicial resources, and because it offered benefits to the litigants, or potential litigants, by being speedy, cheaper, accessible than litigation and producing quick results or providing awards to those in commercial industry who choice arbitration as the dispute resolution mechanism for their commercial disputes. In line with many Lord Wolf recommendations,[11] new court rules were made to facilitate case management within the court and encourage the ADR mechanism.[12] Under the rules the courts have a duty to manage cases actively; this includes encouraging the parties' to use alternative dispute resolution proceedings where appropriate. In Uganda context, the parliament of Uganda paved away for the introduction of ADR under the Constitution of Uganda, [13] Arbitration and

[6] See Muyanja JIMMY, Center for Arbitration and Dispute Resolution (CADER) Compendium of ADR Laws, Practitioners Hand book, 2009 at 13-26.
[7] See The Constitution of Uganda 1995 Art. 139(1), which provides unlimited jurisdiction to High Court of Uganda.
[8] See Glodberg, Sanders, Rogers, Dispute Resolution (2nd edition Boston: Little Brown) 1992at 14.
[9] See ssemakula m. Mohmeded, A Critical Analysis of the Arbitration and Conciliation Act of Uganda, JAAR Vol.5 Issue 3 September 2017 at 84.
[10] See Lord Wolf, Final Report to the Lord Chancellor on the Civil Justice System in England and Wales (1996) HMSO.
[11] See the Family Act of England 1996 S.29, which provides that all those seeking for legal aid must attend a mediation session.
[12] See Civil Procedure Rules 1998 available: http://www.justice.gov.uk/courts/procedure-rules/civil/rules, accessed 15 March 2020.
[13] See the Constitution of Uganda 1995 S.126(2) d.

Conciliation Act,[14] The Civil Procedure Rules[15], The Employment Act, [16]The Land Act Act,[17] the Magistrates Act, [18]Judicature Mediation Rules,[19] Judicature Act,[20] civil Procedure Ac,[21] Labour dispute and (Arbitration and Settlement Act)[22] and others all support the reforms of Wolf.

The purpose of this article is to examine the evolution of ADR in Uganda, the legal frame work of ADR, the different types of ADR, the Role of Courts in ADR and Human Rights, the traditional disputes in enhancing trade, Recommendations and Conclusions.

Definition of ADR:

This an extra judicial mechanism of resolving disputes, which was introduced in Buganda Kingdom in 1818 and then USA 1889.[23]

ADR is an acronym for Alternative Dispute Resolution. It's a broad range of mechanisms and processes designed to supplement the traditional courts litigations by providing more effective and resolution process. In other words, it's a procedure for the settlement of disputes by means of other than confrontational and relationship destroying litigation.

Alternative Dispute Resolution is a dispute resolution process and techniques that act as a means for disagreeing parties' to come to an agreement, short of litigation. It's a collective term for the ways that parties' can settle disputes, with or without, the help of a neutral third part.

Chuah Jason, in his book,[24] refers to ADR as the various forms of adhoc procedure which are consensual and not subject to any coercive powers of the court, except perhaps in the enforcement of the resolution, for example; arbitral awards. The chief concern is the amicable settlement of disputes resolution between parties' although the extent it is achieved depends on the type of ADR chosen by the parties.[25]

[14] see Arbitration and Conciliation Act of Uganda that governs, Arbitration, Conciliation, s.28
[15] See Civil Procedure Act of Uganda S. 171-2, Civil Procedure Rules Order 47.
[16] See Employment Act 2006 of Uganda S.93(1)-(2).
[17] See Land Act Cap 227 of Uganda S.88.
[18] S.160
[19] Judicature Mediation Rules 2013 of Uganda S.41. Rule 4, provides that the Court shall refer every civil matter for mediation before proceeding for trial.
[20] See Judicature Act Cap 13 of Uganda ADR under Court's Direction S.26-32
[21] SEE Civil Procedure Act of Uganda Cap 71, which mandates court annexed mediation under Order 47 Rule 12.
[22] Labour Dispute (Arbitration Settlement Act 2006. Which provides that all employment disputes to be handles under arbitration.
[23] See Order 12 Rule 2 of Civil Procedure rules and Judicature Mediation Rules 2013.
[24] Chua Jason, (2006) *Law Of International Trade: Cross Border Commercial Transactions* (London, Sweet & Maxwell at 763.
[25] See Edwards, (1986) Alternative Dispute Resolution: Panacea or Anathema?", Harvard Law Review 668.

Other scholars define ADR as *"a structured dispute process with a third party intervention, which does not impose a legally binding out come on the parties." Mediation is the archetypal ADR process falling within this classification*."[26] The Term Alternative dispute resolution is polysomic, its variously defined and adversely termed. The term refers to an assortment of processes that utilize amicable means in resolving disputes outside litigation or court-based adjudication. This does not imply that ADR comprises all non –litigation dispute resolution methods.

In other words ADR essentially encompasses processes that utilize non-adversarial means of resolution and focus on the interests of the parties' rather than the strict determination of the legal rights.[27] It's process basically regulated by the consensual decisions of the parties instead of predetermined legal technicalities. ADR comprises different mechanisms through which disputes are resolved without litigation.[28] The most important feature of ADR is that its voluntarily. It should be noted that the acronym ADR was initially used and accepted as representing Alternative Dispute Resolution (ADR). In other words ,when there is a dispute, it warranties a mechanism of resolving it, this can be through mediation, arbitration, negotiation, reconciliation.[29] The judiciary has made it mandatory for the parties' who file a civil action in court, must first attempt to settle the dispute through mediation before a judge or magistrate can hear it. [30] It's imperative that the counsels for both sides and clients' be conversant with Court Annexed Mediation, and how to use it for their advantage. Court processes are bedeviled with inordinate delays, technicalities, strict adherence to the rules of evidence and pre- trail preparations which are not only time consuming and frustrating but also costly. ADR supports the courts where , complex cases are preserved for the courts,[31] other cases can be resolved through ADR mechanisms, thereby relieving the courts' the time that would have been spent on cases.[32] In Uganda, those engaged in ADR are trained and certified by the Center for Arbitration and Dispute Resolution (CADRE) and Uganda Mediation Chambers Ltd. Such bodies resemble the Nigerian ADR, where one to practice ADR has to be trained and certified by the Institute of Chartered Mediators and Conciliators and the Arbitration and Conciliation Act Cap 18 LFN 2004. The Justice Law and Order

[26] See Mackie K, The ADR Practice Guide: (2007) *The ADR Practice Guide: Commercial Disputes Resolutions* , Tottel Publishing West Sussex at 8-9.
[27] See
[28] see simokat.C, Environmental Mediation Clauses in International Legal Mechanisms (2008), available at www.mediate.com ,Accessed on 16 July 2020.
[29] See Arbitration and Conciliation Act Cap 4 S. 67.
[30] See Judicature Mediation Rules. 2013 of Uganda.
[31] See *Cowl v Plymouth City Council* [2001] EWCA Civ 1935, where an appeal was dismissed with costs because the reason for turning down the ADR.
[32] See *Dennett v Rail Track* [2002] 2 ALL ER 850.

Sector, [33]funded by Austrian Development Cooperation (ADC), has sensitized the communities in Uganda and provided an opportunity to implement Judicature Mediation Rules 2013, which made mediation compulsory in civil matters including land, family and civil law.

Evolution of ADR in Uganda:

ADR in Uganda can be traced to pre-colonial, during colonial and after colonial period in Uganda.

Pre - Colonial:

The state Uganda was not in existence, but kings, chiefs or elders who had absolute powers ruled over clans and tribes in different communities, and practiced traditional ADR for settlement of disputes. This was a common generic in the whole of African societies. It's at truism that ADR is not a new concept but a mechanism rooted in African societies built on reconciliation, accountability, truth telling and reparation. Kings, elders, clan chiefs participated in in resolving disputes, mainly family, inheritance, land rights, rape, murder, commercial transactions, in order to promote social cohesion as opposed to opportunity justice. For example; in Acholi to restore relationships between the perpetrators and the victims of crime before they integrate into their community, the traditional leaders who act as arbitrators, would order the offender to drink a bitter herb made from Oput tree '*Nyong tong'*. This would purify the offender being accepted in the community. In Langi community the offender would be ordered to drink charcoal called "*Gomo tong*" or "*Tumur Kir*" in order to forgive the offender. In Buganda the biggest population of Uganda, had a king called "kabaka", who had a civilized society, with "Katikiro" (prime ministers) Heads of Clans, and ministers for the administration of justice in the Kingdom.

This practice of solving disputes was common to other societies for example; in Kenya, cattle rustling communities the Marakwet" and Pokot" tribes used the council of elders called "*Kokwo*," the Turkan use extended families and clan members called "*Adakar",* the Sambulu tribe could use clan heads called "*Manyatta*" in solving disputes. In Ethiopia communities used Council of elders called "*Shimangele*s," who handled all customary disputes of the community.

ADR During Colonial Rule in Uganda:

[33] JLOS, is a committee comprised of chief Justice, Justice as chairperson, the Principal judge, Minister of Internal Affairs, Chairperson of Uganda Law Reform, Chairman of the Judicial Service Commission, Director of public Prosecution, Chairperson of the Uganda Human Rights Commission, Ministry of Justice and Attorney General.

In 1894, Uganda became a British Protectorate, and new legal order ushered in a British system of governance or Common Law English order. A new legal order. The legal order was imposed on the already established customary system.[34]under this order, the British colonial office completed takeover of the administration of the province of Uganda. The administration of the province Uganda was under colonial masters called commissioner. The commissioner was the de-facto president of Uganda and was vested with administrative powers, with legal rights over crown lands and all materials, including the prerogative of mercy and the authority to legislate through ordinances. The Order in Council diminished the African mechanism of dispute resolution mechanisms. Crown courts 'were established presided over by English judges, the traditional established ADR was seen as repugnant,[35] due to the arrogance of the English judges.[36] In Lesotho, for instance, native courts were created by the 1884 Proclamation and a similar institution was created by the Native Courts Proclamation 1900. The African societies' were monopolized with continental European Civil Law legal system, the common law system and mixed law legal system.[37] This resulted into dichotomous legal system known as legal dualism. With introduction of Christianity, the biblical teachings of mediations were also ushered in African states, in order to destroy the African religiosity and ADR.[38]

Post Colonial Rule in Uganda:

The post-colonial governments, Africa were busy fighting for independence and the status quo was the same to Uganda. The post independent governments where busy strengthening their political parties' than transforming the social, economic spectrums of commerce, hence the repugnant rule of the colonial masters continued in Uganda. Meaning the ordinance in Council of 1902 dictated the operational of disputes in Uganda. Uganda's post colonial governance and constitutionalism has been haphazard and difficult, being characterized by abuse of political power, civil rights, economic, social and cultural rights, authoritarianism and corruption. With collapse of Idi Amin regime in 1979, an attempt to set up a proper governance was made by Uganda National Liberation Front (UNLF), but its administration was short lived due to the military intervention backed by president Nyerere of Tanzania that paved away for Obote'II regime, which was later overthrown by Gen Tito Okello. In

[34] See Order in Council 1902.
[35] See Sir Robert Williams in *Rex v Amyeko Case in Kenya 1917, EA EALR 14,* where African family marriages were seen as back ward.
[36] See *Gumede V President of the Republic of South Africa* 2009 (3) BCLR 243 (CC).
[37] *See Bayou B,* (1994) Transnational Law, Unification and Harmonization of International Commercial Law in Africa, Journal of Africa Law at 125-143.
[38] See Mediators in the Old Testament, where Moses served as a mediator when communicated his Sinaitic covenant with Israel (Exodus 19;9;20,19,24, Deuteronomy Leviticus 26:46. It should be noted that Uganda was the first Country to commence Arbitration in 1877 before America, which commenced 1889.

1986, the National Resistance Movement under command of Gen Yoweri Musven the current president of Uganda captured power and promised, a fundamental change to rehabilitate the economy of Uganda and the political landscape. In 1995 a new constitution was prorogated that provided the yard stick to governance in Uganda.[39]

The revolution in ADR in Uganda was ignited by National Resistance Movement which ushered in a new Constitution of 1995, and made rapid enactments in support of ADR.[40] It should be noted in Africa Uganda is outstanding in its legislative efforts to incorporate ADR in its legal system. The Constitution of Uganda, provides for promotion of Conciliation in all maters handled by the judiciary. AS a result, the Constitutional provision, Uganda enacted the Arbitration and Conciliation Act of 2000 that described new judicial powers of referring cases to mediation,[41] replacing the colonial Arbitration Act.[42]

The Legal Frame Work of ADR:

For every legal regime to operate, a legal frame work needs to be in place to regulate its operations. In Uganda, the legal frame work for dispute resolutions is found in the common law principles and written Laws and Regulations.

The Constitution of Republic of Uganda 1995.

The constitution of Uganda sets out judicial power and it's the supreme law in the land. Traditional dispute resolution mechanisms are now recognized and protected in the supreme law of the land. The Constitution provides that judicial power is to be exercised by the courts and other judicial institutions. The Constitution of Uganda, provides that:

> "*judicial power is to be derived from the people and shall be exercised by the courts established under this constitution, in the name of the people and in conformity with law and the values, norms and aspirations of the people*. [43]

This provision of the Constitution adduces that court, one of the norms or principles is that ADR forms part of the dispute resolution mechanisms, for example; mediation, reconciliation, mediation, arbitration and traditional dispute resolution mechanisms.

[39] See RT Principal Judge Kanyeihamba George (2006) Kanyeihamba's Commentaries on Law, Politics And Governance (Renaissance Media Ltd) at 2-10, 148-156.
[40] See The Constitution of Uganda 1995 Article 126.
[41] See Brainch (2006) Justice Sector Reform in Subharan Africa: Strategic Frame Work and Practice Lessons" Dispute Resolution Centre Kenya at 9.
[42] See Arbitration Act of Uganda 1930, this was followed by ORDER 43 OF THE CIVIL PROCEDURE RULES S.63 which provided for arbitration under court order.
[43] See Constitution of Uganda Article 126

Further, Article 126 (2), (d) provides reconciliation between parties' shall be promoted. In other words, the constitution recognizes ADR as a dispute resolution mechanism in dispensing justice.

Further, the Constitution provides that a person shall not be entitled to a fair hearing, speed public hearing before an independent and impartial court or tribunal, established by Law.[44]

The Civil Procedure Act Cap 71.

This applies to only civil proceedings in High Court and Magistrate courts. The procedure to be followed by courts' is governed by the Civil Procedure Rules and out attention is on the provisions of the Rules in respect of ADR. There two main orders that deal with Court Annexed Mediation, namely; Order 47, 12 and Rule 1(C) of the Civil Procedure.

Judicature Act Cap 13

This Act provides for ADR under the Court's Direction. The Act provides for situations when a judge to a special referee or Arbitrator can refer a matter for settlement of a dispute whereas the reference is made under this Rule, the referee enjoys the powers of the judge of High Court to inquire and report on any cause or matter referred to him or her by the judge. This rule is applicable to civil or commercial cases.[45] It should be noted that in such circumstances the judge is at discretion to ignore the matter to be handled in the adversarial manner not ADR mechanism.

Judicature Mediation Rules 2013

This Act came into force on 13th March 2013. These rules revoked the 2007 rules that only applied to Commercial Court Division. The application of the Rules has been now extended to the High Court and Subordinate Courts. Under S.41 of the Judicature provides that "the Rules Committee may, by statutory instrument, make rules for regulating the practice and procedure the Supreme Court, the The Court of Appeal and the High Court and for all other Courts in Uganda subordinate to the High Court. Order 12 Rule 2(1) provides for scheduling conference on a matter before a judge. Rule 4 provides that all civil actions shall be be referred for mediation before trial. It should be noted mediation Rules are specifically for mediation matters not other forms of ADR.[46] The main purpose of these rules is to make sure that cases of ADR are handled differently from courts, in order to speed up justice to the claimants.

[44] Ibid Art.28 and 44(c).
[45] Judicature Act Cap 13 S.26-32.
[46] See the Application of Order 12 Rule 2(1) by Justice Izama Madram in the case of *Bokomo (U) Ltd and ANor v Rand Balair Momentum Feeds Civil Appeal No. 22 0f 2011.*

Arbitration and Conciliation Act Cap 4:

This Act regulates Arbitration and Conciliation in Uganda. It repealed the Arbitration Act of 1964. The Acts incorporates the UNICITRAL Model Law, the United Nations Commission on International Trade and UNCITRAL Arbitration Rules of 1976 and the UNCITRAL Conciliation Rules of 1976. The Act establishes CADRE as a statutory Tribunal in Alternative Dispute Resolution. CADER has jurisdiction to handle cases both domestic and international arbitration in Uganda.[47] The Act limits Court intervention,[48] in arbitral proceedings.[49] The Courts have set conditions for stay of arbitral proceedings when a case is referred to it.[50] It should however be noted that CADRE as a body suffers from funding from the government.

Labour Disputes (Arbitration and Settlement of Disputes Act 2006

This Act establishes the Industrial Court. It provides for procedures of reporting a labour dispute to the Labour officer. Disputes referred to Industrial Court, settled through arbitration and adjudication.[51]

Employment Act 2006:

Part X of Employment Act 2006, provides settlement of disputes.[52] The power vested to Labour officer is to carry out mediation and arbitration or conciliation. In case mediation or conciliation is unsuccessfully, the parties are free to resort to litigation. The attempt to oust the unlimited jurisdiction of the High Court by the Act will not succeed. It should be emphasized that some judges are not ready to support ADR mechanism, they regard ADR as a mechanism to oust jurisdiction of the ordinary civil courts[53] in Uganda by ensuring that employment matters are only handled by labour officers and industrial court.[54]

Land Act:

Land provides for all customary land tenure disputes are to be solved through Mediation [55]and Conciliation, by use elders and conciliators.[56] Uganda land tenure

[47] S.82{4) of the Arbitration Act.
[48] See *East African Development Bank v Ziwa Horticultural Exporters Ltd*, where the Court stayed Arbitral proceedings, in support of ADR.
[49] Ibid S.9.
[50] see *Sheell v Agip [*1991] HCB 72.
[51] See Labour (Arbitration Act an d Settlement 2006 S. 3(1), 8(1) and s.9.
[52] Employment Act 2006, S.93 (1) and (2).
[53] See Art. 139 of the Constitution of Uganda 1995.
[54] See G*4 Security Services v G4s Security Services Ltd, Civil Appeal No.18 of 2020 where* Justice Dr. Kisakye Mutimbo held that clearly that the above provisions intend to ouster the limited jurisdiction of the High Court.
[55] See Land Act S.88 (2).
[56] Ibid S.88 (1).

system is composed of 80% land ownership.[57] In Uganda every district has a land tribunal with a power to adjudicate on land matters.[58]

Local Council Courts Act 2006:

Judicial power was first given to the Local Councilors' formerly known as Resistance Committees in 1988. The Idea was to give the lowest administrative power to deal with local disputes arising in communities.[59] This was introduced by The National Resistance Movement by Gen Yoweri Musven, under the 1995 Constitution.

Types of ADR and Economic Development:

Mediation:

Mediation is an ADR mechanism that is a non-adjudicative, conducted by an impartial third party (Mediator) who assists the parties' in reaching a mutual agreement. Resolution is the disputes in mediation is achieved by negotiation and agreement between the parties. Mediators do not produce binding resolutions unless the parties reduce the agreement reached into a binding contract.[60]

Stages of Mediation:

Facilitative Mediation: the mediator only facilitates the process of mediation

Evaluative Mediation: the mediator has the advisory role, in that he evaluates the strengths and weakness of each side's argument and advise on whether they should go to court by predicting what the judge would decide, based on the facts before him. This is commonly practiced in commercial matters at Commercial Court in Uganda courts.

Transformative Mediation: this style looks at the conflict as a crisis in communication, and seeks to help resolve the conflict thereby allowing the parties' to feel empowered in themselves and better about each other. Transformative mediators try to change the attitude of the parties' conflict interaction by helping them appreciate each other viewpoint, strengthening their ability to handle conflict in a productive manner. Party relationship in commercial arena is likely to be transformed.

It's imperative to note that most judges and advocates in Uganda do not have proper training on mediation, they end up practicing court procedures of orders than listening

[57] See Land Act S. 1(1), 27, 89.
[58] See Constitution of Uganda Art.33, 34 and 35
[59] see S.13 Local Council Courts Act 2006 S. 13.
[60] See Cotton J(2006) The Dispute Resolution Review at 594

the parties. The fact that its not binding, some see it as a wastage of time than litigation process.

Court Annexed Mediation: (Can parties be coerced to mediate?)

The lawyers and proponents of ADR argue that since Court mediation is mandatory[61] many interpret it as being compulsory in Uganda. Some attend mediation due to the fear of reprisal through costs and sanctions from the commercial Court judge as a result of either failure to agree to mediation or absence from mediation sessions. The party who fails to attend may be subject to payment of costs,[62] if there is no evidence adduced to the cause.[63] It important to note that mandatory reference for mediation is only provided under Rule 4 of CPR and the second is under Order 12 Rule (1)-(2) where the Court may, if it is of the view that the case has good potential for settlement order alternative dispute resolution (mediation) before a member of the bar of the bench, named by the Court.

Under Rule 4(2), a party may raise objection to mandatory reference made by the registrar. Magistrate or authorized court officer. This objection is only limited to points of law. Under this objection may not be raised before a court accredited mediator, mediator accredited by CADER or mediator chosen by the parties,[64] or Judges with cases to mediation before trial.[65] For the business community, such mechanism is more quicker to resolve commercial disputes,[66] than the litigation cases, [67]which take long procedures to be heard.[68] Although mediation is mandatory, it should be noted if there is no consent agreement, its not binding. The only challenge is the fact that some advocates assume that its against litigation not as a mechanism for speeding up the process of solving the dispute.[69]

In the international leading authority on mediation in the case of *Halsey v Milton*,[70] the court held

> "*that ADR will be considered and used in suitable cases wherever the other party accepts* it."[71] The court further stated that *" parties need to be encouraged to embark*

[61] see *R (Cowly) v Plymouth County Council* [2001] EWCA Civ 1935, *Dunnet v Railtrack* Plc [2002] 1 WLR 2434 and *Hurst v Leeming* [2001] 1 Lloyd's Rep 379. Where support and encouragement of ADR, especially mediation has been considered by the courts.
[62] See Kakkoza, (2010) Conrad, Arbitration, Conciliation and Mediation in Uganda, Uganda Living Law Journal Vol.7 No.2 at 20.
[63] See Rule 18 of the Mediation Rules.
[64] See Mediation Case Summary under Rule 5(1).
[65] See Justice Wangutise in the case of *Sudhir, Crane Bank V Bank of Uganda* 2017.
[66] See *Cressman v Coys of Kensington* [2004] EWCA Civ 133.
[67] See Blake Susan (2016) A Practical Approach To Alternative Dispute Resolution (5th Edn, Oxford University Press) at 86-89,224-229.
[68] See *Haslesy v Milton Keynes General NHS Trust* [2004] 1 WLR 3002.
[69] See *MTN (Uganda) v The Commissioner General* URA.
[70] See *Hasley v Milton* [2004] EWCA Civ 576.
[71] Ibid Par 7.

> *on ADR… all members of the legal professional who conduct litigation should routinely consider with their clients whether their disputes are suitable for ADR*."[72] *ADR requires the parties to exchange lists of neutral individuals who are available to conduct, ADR procedure, to endeavor in good faith to agree a neutral individual*.. to take serious *step…. to solve the disputes by ADR procedures*."[73]

From the above judgment in *Hasley v Milton*,[74] its clear that a party who refused to consider whether a case is suitable for ADR, is always at risk of an adverse finding at the costs stage of litigation, particularly so where the court has made an order requiring the parties' to consider ADR. This is now a global trend that if a party frustrates mediation efforts courts can award costs to the losing party. The Courts in Uganda should adopt and consider ADR as the best mechanism and avoid delays in courts.

Negotiation:

It is a dialogue or consensual discussion with a view to reaching a compromise without the aid of third parties. Negotiation has become an indispensable part of our daily lives as it happens in almost every transaction between two or more persons. It's a means to an end and not an end in itself, the end being a mutually beneficial dispute settlement. The parties in negotiation especially those in the business industry are in total control of their disputes, without the intervention of third parties.[75] In Uganda today many conflicts are being resolved through negotiation, even in the traditional conflicts. Since negotiation allows party autonomy process, it provides a ground for the business environment or investors to invest in Uganda; for example, the oil industry in Uganda is attracting a lot of investors that prefer to negotiate terms before they commence production or any related services to oil industry.

The main goal of negotiation is to satisfy both mutual parts.[76] Courts are encouraged to be at the fore front of encouraging parties to negotiate so as to come up with mutually acceptable solution and allow the expeditious resolution of disputes.[77] Since in Uganda the issue of environmental protection is a constitutional mandate,[78] the current policies on environment compensation are more theoretical, than practice. Litigation of environmental cases commences at High Court,[79] Which hinders access

[72] Ibid.Par 11.
[73] Ibid.Par 30-31.
[74] [2004] EWCA civ 576.
[75] See Nkwaz John (2017) Assessing the Efficacy of Alternative Dispute Resolution(ADR) n the settlement of Environmental Disputes in the Niger Delta Region of Nigeria, Journal of Law and Conflict Resolution at 30.
[76] See Fenn (2002) Introduction to Civil and Commercial Mediation, In Chartered Institute of Arbitrators, workbook on Mediation (Ciarb, London) at 50-52.
[77] See Muigua Kariuki, Critical Appraisal of Alternative Dispute Resolution (ADR) Mechanism in Kenya in Relation to Article 159 of the Constitution. At 15.
[78] See Article 39 of the Constitution of Uganda 1995, see Art. 40 on Economic rights.
[79] Ibid Art 139.

to justice, especially in villages. It would be prudent companies to negotiate with the host communities in settlement of pollution to related cases especially in Mubende District where there is gold mining, or Hoima District, where oil drilling is taking place. Unless the parties' fail, resorting to court should be the last resort.[80] With backlog of cases in Judiciary, negotiation is a tool to quick decision making, since time of essence in commercial transactions. Where the company does not comply with negotiations, or fail to negotiate or pay reasonable compensation, the court may refer to the negations agreement, before a judgment.[81] Negotiation is a commercial mechanism that is not only used in Uganda but also in United states, for example; in a pre-litigation negotiation, the USA Environmental Protection Agency, reached a $22.8 million settlement with parties' to a clean up spectrum superfund site in Elkon, Maryland of hazardous chemicals caused by the parties.[82] Successful negotiation as a mechanism of ADR in Uganda possess and exhibit perpetual persuasive, analytical skills of conflict management.

Conciliation:

This another ADR mechanism aimed at bringing people together in their communities in Uganda in Uganda, conciliation is recognized by the Constitution of Uganda [83]and the Arbitration and Conciliation Act of Uganda.[84] It's a process of healing justice rather than revenge. It does not deal with who is right or wrong, but rather this reduces negative attitudes and promotes social cohesion. It Is true business cannot exist in an environment with conflict. In order to open Northern Uganda after thirty period of insurgencies of Kony,(Lord Resistance Army) the Reconciliation Stakeholders Conference was set up in December 2004 to end the conflict. Conciliation was set up also in Rwanda in order to end the conflict between the Tsutsi and Hutu after genocide in 1994. It should be noted that the conciliator, takes active part in the process of settlement of the dispute itself, from both sides. Inflammatory rhetoric and tension open channels of community and facilitates continued facilitation. The conciliator helps to build communication, clarify on mis-perceptions, deal with strong emotions and build trust necessary for cooperative problem solving.[85] Conciliation should provide the parties with a better understanding of their opponent's case and the objective appraisal of the merits of their own case. Thee conciliator in setting up the legal strengths of either party and delineating a possible solution is central to the success of conciliation as an ADR procedure. The main importance of conciliation in

[80] See *Joel Odum and Others v Shell B.P and Weco Nig Ltd* [1974]
[81] see *Shell Pet.Co Nig v Ambah*, [1999]NWLR part 593 I SC where the judge ordered parties to first negotiate before the court hearing.
[82] See J Nwazi at 31.
[83] See Art.126 (2) d, which provides that reconciliation between the parties shall be promoted.
[84] See the Arbitration and Conciliation Act of Uganda Cap 4.
[85] See Moore (1991), The Mediation Process, Practical Strategies for Conflict Resolution at 15.

commercial disputes cannot be underestimated. indeed, this is envisaged in the ICC Rules of Arbitration.[86] Courts are encouraged to promote conciliation in commercial disputes in Uganda and internationally.[87]

Arbitration and international Business:

unlike mediation, Negotiation and Conciliation, as ADR procedures termed as diplomatic means of dispute resolution.[88] As pointed out, the approach is entirely informal and the parties' are entitled to back out or refuse to carry on. Parties retain substantial control over the means and process of settlement.[89] Arbitration on the other hand, is more kin to judicial settlement of their once the parties have agreed to set up the arbitration for the resolution of the disputes, their right to withdrawal will be construed as a breach of the arbitration agreement and that will not be looked upon by the courts of law favorably. In Uganda jurisdiction, arbitration is governed under the Arbitration and Conciliation Act.[90] Arbitration is an agreement where parties' choose to reefer their current or future disputes to arbitral tribunal for settlement.[91] The arbitral agreement may be in form of a clause in agreement or contract.[92] The parties are at liberty to choose their arbitrator, for proceeding.[93] Arbitration much as it is an ADR it is more equivalent to a court, since the awards of the arbitral tribunal have international recognition under the New York convention 1958.. Part from the Arbitration and Conciliation Act, other Acts provide support for this ADR, for example; the Civil Procedure Rules [94] and Judicature . [95] the arbitrator can be appointed under party autonomy or by court.[96] The law compels the parties' to abide by the rules of arbitral proceedings. In other words, parties' cannot with drawl from the proceedings like mediation process.[97] Where parties have agreed, the decision is final and the Courts, with apply '*estoppel per rem judicatam'*,[98] unless the arbitrator has exceeded his jurisdiction. [99]

Arbitration in Uganda has helped to champion commercial investment in Uganda, because the decisions or awards of CADER only take fifteen days, with such speedy process any investor will opt for the arbitration as dispute settlement mechanism. All

[86] International Chamber of Commerce Arbitral Rules.
[87] See *Shirayama Shokusan Co Ltd v Danovo Ltd* (Dec 5 2003)
[88] see S. 42 Arbitration Act of South Africa 1965
[89] see English Arbitration Act S.9.
[90] see arbitration and Conciliation Act of Uganda
[91] Ibid. S.2.
[92] Ibid S. 3.
[93] Ibid S.3,4,21.
[94] See Civil Procedure Act Cap 71 Order 12 and 47.
[95] See Judicature Act Cap 13 S. 26-32.
[96] See S*tabilini Visinoni Ltd v Mallinson and Partners Ltd* [2014] 12 NWLR at 782-245.
[97] see *Igwe v Ezeugo,* where the Court held that parties cannot withdrawal from arbitration.
[98] See Oguntaade JCA in his dissenting judgment in the case of *Okpuruwu v Okpokam*, where he held that parties to an arbitration agreement are bound by the decision of the tribunal.
[99] See UNCITRAL Model Law Art. 18, *Braes of Doune Wind Farm* [2008] EWHC 426.

industrial cases in Uganda are handled by industrial Court which applies arbitration to solve disputes in Uganda.

Its imperative to note that arbitration is based on parties 'choice referred to as the party autonomy doctrine. [100] In other words, parties' choice of choosing,[101] the law governing the arbitration,[102] the substantive law,[103] agreement, the law governing the award,[104] the law governing the proceedings,[105] the law governing the contract of the parties[106]. In other words, the contractual theory [107] supports the normative that arbitration is a contract between the parts, any breach of this contract, a party is subject to damages or compensation.[108] Since now arbitration is the international vehicle in commerce, the arbitrators takes into the relevant trade usage and may assume the powers of "*an amiable compositeur* "or decide "*ex aequoet bono"* (according the right t and good) or equity and conscience.[109] Any document referring to an arbitration agreement in international commerce in writing is binding and forms part of the contract. [110] In analysis arbitration promotes international trade and domestic business in Uganda and the world at large. Its of great importance to note that in contemporary business, all commercial contracts, have an express clause referring to arbitration for future or current disputes. In interpreting the clause in arbitration, the arbitrator, uses an equitable interpretation rather than a legal construction. [111]The rationale is that where the award goes for judicial review, the courts will not be able to go outside the principle of law.[112]

The Role of Courts in Arbitration

The presumption that Courts are the principal forum for dispute resolution, continue to proliferate and increasingly instutionalized leading to their characterization appropriate or proportionate.[113] The interface between the national court and arbitral tribunal,[114] which is both complex and over changing, is not the harmonious product

[100] See New York Convention article (3)
[101] see Uganda Arbitration Act S. 17.
[102] See ICC Rules 2012 in Art 21.1., UNCITRAL Model La Art.35. see *Miller v Whilworth Street Estates* ltd [1970] AC 583 and *Black Clawston International Ltd v Papierwerke Waldhof-Aschaffenberg* AG [1981] 2 Lloyds'Rep 446.
[103] See London Court of International Arbitration (LCIA) Article 22.3
[104] see *C v D [2007] EWCA Civ 1282.*
[105] *See Rogers Shashoua v Mukesh Sharman* [2009] EWHC 957.
[106] *Miller v Whitworth Street Estates Ltd [1970] AC 583.*
[107] *See Red fern & Hunter (1991) Law and Practice* of International Commercial Arbitration (2nd Edition, London Sweet & Maxwell) at 155 and 146 par 1-16.
[108] See *Dubai Islamic Bank PJSC v Paymentech Merchant Services Inc.* [2001] 1 Lloyds Rep 65, where Lord Atkins held that the decision of the tribunal is final.
[109] See *Orion Compania Espanola de Sequros v Belfast Maatscahappij Voor Algemen* V [1962] 2 Lloyd's Rep 257.
[110] See Court of Appeal in *Zambia Steel & Building Supplies Ltd v Clark & Eaton Ltd* (19860 2 Lloyd's Rep 225.
[111] See *Orion Compania Espanola de Sequros v Belfast Maatschapij Algemene* [1962] 2 Lloyd's Rep 257.
[112] See *Home & Overseas Inusrance v Mentor Insurance* [1989] 1 Lloyd's Rep 473.
[113] See *Doktor & Others [2006*] ECR 15431 par 75.
[114] See Arbitration and Conciliation Act of Uganda S.9.

of the agreement between the parties' to arbitration. [115] Arbitration tribunal is structured to handle commercial disputes [116]and domestic for example; in Uganda CADER, is responsible for all arbitral disputes. The enactment of the current Arbitration and Conciliation Act was intended to mark a departure from the traditional courts, [117] and enforce the doctrine of party autonomy. [118] It should however, be noted that in promotion of human rights and access to justice, the courts are involved in arbitral proceedings[119] under the doctrine of subsidiarity.[120] In spite of the protestation of party autonomy, arbitration depends on the underlying support of the Courts, that alone have the power to rescue the system when one party seeks to sabotage it.[121] Despite the autonomous nature of arbitration, it must be recognized that just as no man is an island,[122] so no system of dispute resolution can exist in a vacuum.[123] The involvement of courts at times can be at the commencement of arbitration, before the tribunal composition, in order to protect evidence before a final award is granted by the Arbitral tribunal.[124] Courts provide the following support in arbitral proceedings:

Enforcement of Arbitration Clause:

The Courts in Uganda enforce the arbitration clause, which was developed in England, by Lord Parker in the case of *Home Insurance v Mentor*, where he held that

> "*In cases where there is an arbitration clause, its is my judgment the more necessary, that full scale argument should not be permitted. The parties' have agreed on their chosen tribunal and 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."*

In Uganda, judges implement the arbitration clause as evidenced in the Scheduling Conference by application of Order 12 Rule 1 of the CPR.[125] The main aim of the scheduling conference is to sort out points of agreement and disagreement. In other words, to find out if the parties had agreed to arbitration, then such a matter will be

[115] See Lord Denning in *David Taylor & Sons v Barnett Trading Company* [195] 1 WLR 562 at 570.
[116] See UNCITRAL Model Law on Commercial Arbitration Art. 17.
[117] See S.9 of the Arbitration and Conciliation Act of Uganda. See S.1(1) C of the English Arbitration Act 1996.
[118] See ssemakula Mohmeded (2016), Party Autonomy Doctrine is The Cornerstone of Arbitral Provisional Measures, International Academic Journal of Law and Society (Vol.1 Issue 1) at 28-43.
[119] See Art. 254 C of the Constitution of the Federal Republic of Nigeria, s.7 of the National Industrial Court Act of 2006. See Art. 4(1), (4), (5) of the National Industrial Court of Nigeria Alternative Dispute Resolution (ADR) Instrument 2015.
[120] Justice Mulangira Joseph in *Tool and Fastners Ltd and Another v Khimani Ravji and Another*, M. A No. 9 of 2011, (Arising out of HCCS.No 63/2010.). where the Judge was called to intervene in pathological situations to support arbitration.
[121] See *Channel Tunnel Group v Balfour Construction Ltd and Others* [1993] AC 334.
[122] See New York Convention Art.11 (2), UNCITRAL Art.9.
[123] See Dickson, (2009) Brussels 1 Review-Interface with Arbitration, Conflict Flaws.
[124] See Lord Denning Mr, in *Star Insurance Co Ltd v Yuval Insurance Co Ltd [1978] 1 Lloyd's Rep at 362.*
[125] See Civil Procedure Act Cap71

stayed and referred to arbitral tribunal in order to enforce the intentions of the parties' who agreed to settle their disputes through arbitration.[126] Courts in Uganda consider Scheduling conference in commercial cases to be mandatory, as evident by Justice Tsekooko in the case of *Tororo Cement*,[127] Kiryabiwre in *Shay*,[128] and *East African Development Bank v Ziwa Horticultural Exports Ltd*,[129] where S.5 of the Arbitration Act of Uganda, where mandatory reference to arbitration was put into effect by the court. Under Order 12 rule 2(3), is a discretionary power exercised by the court after evaluation of the case during scheduling conference,[130] the chief justice under Order 12 Rule (2)-(3), who is mandated to make such directions for better carrying into effect ADR for example; arbitration, has not yet made any directions. This adduces that judges have not used Civil Procedure Rules consistently, since the enactment of the Civil Procedure rules, after the Wolf reforms of 1996 in England.

Enforcement of Party Autonomy:

The courts follow the intentions of the parties to arbitral proceedings in Uganda. In the case of *Farmland Industries Ltd v Global Exports Ltd*, it was held that it was the duty of the courts in arbitration proceedings to carry out the intentions of the parties'…a"[131]

Its of great importance to note in Uganda, for the case to be referred to arbitration despite the clause and the agreement is not automatic, certain conditions must be fulfilled, as evident by Justice Tsekooko in *Shell v Agip*, he held that "it is now trite law that where parties have voluntarily chosen by agreement, the forum for resolution of their disputes, one party can only resile for a good reason." He went further, to hold that certain conditions must be present before stay of proceedings is given by the court; "(1) *there is a valid agreement to have the dispute concerned settled by arbitration, (2) the proceedings in Court have been commenced, (3) the proceedings have been commenced by a party to the agreement, (4) the proceedings are in respect of a dispute of agreed to be referred, (5) the application to stay is made by a party to proceeding, (6) the application is made after appearance by the 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."*[132]

[126] see Justice *Madrama Izam in Bokomo (u) Ltd v Rand Blair Momentum Feeds Civil* Appeal No.22 of 2011.
[127] See *Tororo Cement Co Ltd V Froskina International*, Court of Appeal No. 13 of the Supreme Court.
[128] *Shay Kameo & Others v Kenya Air ways* Ltd HCC No.151 of 2009 (Commercial Court Division).
[129] High Court Misc Appn.No. 1048 arising from Companies Cause No.11 of 2000.
[130] See Ssekana & Ssekana, (2014) Civil Procedure and Practice in Uganda (Law Africa 1st edn) at 58-59.
[131] [1999] HCB 72.
[132] Court of Appeal Civil Appeal No.49 of 1995

The author argues that the strict conditions set above, are less followed by courts in support of arbitration as adduced by Justice Okello in support of arbitral proceedings,[133] where he rejected to set a side arbitral proceeding because of party autonomy and arbitration agreement.

Stay of Court Proceedings in Support of Arbitration:

The courts will attempt to ensure that the parties abide by their agreement to go to arbitration before their disputes to go to judicial process. [134] S.9 builds on this policy. [135] In general,1 when a party takes his case to court, where there is an arbitration agreement,[136] he has committed a breach of that agreement.[137] This means that the courts will not entertain his action.[138] The court has to find that there is an arbitration agreement or clause before the stay.[139] In other words, the Court shall grant stay unless satisfied that the arbitration agreement is null and void, inoperative or incapable of being performed.[140] In Albon,[141] for example; Lightman J refused to stay proceedings under S.9, because he was not satisfied that the joint venture agreement, which contained an arbitration clause had not been forged. The doctrine of Kompetenz-Komptenz, which (provides that an arbitrator has the power to rule on his jurisdiction) would not prevent the court from deciding whether the arbitration agreement was valid or not.[142] It was argued in the case of *Stretford,*[143] that the Court should not stay its own proceedings to allow the arbitration to proceed because the arbitration clause was null and void or inoperative by reason of Art.6 of European Convention on Human Rights (ECHR). Article 6 provides for the right for affair and public hearing within reasonable time by an independent tribunal established by law. It should be noted, for the purposes of human rights, where there is evident of fair hearing by an impartial arbitral tribunal established by law, [144] as long as the arbitration agreement has been entered into voluntarily and was not subject to policy, [145]the stay shall be granted by any court in support of arbitration.[146] Stay only applies where both parties are subject to the arbitration agreement. [147]Courts in promotion of

[133] *Fulgensius Mungereza v Price Water coopers Africa*, Court of Appeal; Civil Appeal No.34 of 2001.
[134] See Justice J.W.N. Tsekokooko, in *Shell (Uganda) v Agip Supreme Court Civil Appeal No. 49 of 1995.*, where he set draconian conditions for a stay of proceedings to take place.
[135] See Uganda Arbitration Act S.9.
[136] see *Scott v Avery (*1856) 10 ER 1121.
[137] See *Capital Trust Investment Ltd v Radio Design* TJ [2002] 2 ALLER 514.
[138] see *Three Shipping Ltd v Harebell Shipping Ltd* [2004] EWHC 2001.
[139] See *Campbell J in Board Sweden AB v NYA Stronmes* AB (1991) BLR 295.
[140] See *Joint Stock Company Aeroflot v Berezovsky* [2012] EWHC 1610.
[141] See *Albon v Naza Motor Trading Sdn Bhd* (n0.3) [2007] EWHC 327.
[142] See *Al Naimi v Islamic Press Agency* [2000] 1 Lloyd's Rep 522.
[143] See *Stretford v Football Association* Ltd [2007] EWCA Civ 238.
[144] See Arbitration and Conciliation Act of Uganda. See Art.28, 129(1) of the Constitution of Uganda.
[145] See *Janos Paczy v Haendler GmbH* [1981] 1 Lloyd's Rep 30.
[146] See *Capital Trust Investments Ltd v Radio Design TJ AB* [2002] 2 ALLER 514.
[147] See *Taunton-Collins v Cromie* [1964] 1 WLR 633, see *Albert Whiting v William Halven* [2003] EWCA Civ 403.

human rights, access to justice, stay proceeding pending the outcome of the arbitral tribunal.[148]

Enforcement of Arbitral Award:

After an award has been rendered, the courts may become involved in two places; first at the place of arbitration, when a party challenges and seeks to set aside the award or lodges an appeal against the award under the applicable arbitral laws or regime;[149] and secondly at the place of enforcement,[150] where the successful party seeks recognition and enforcement of an award.[151] The courts serve as a check on the arbitrators, thereby preserving the integrity and confidence in the arbitral process.[152] If a losing party fails to satisfy the arbitral award, the victorious party would invoke the powers of the Court to enforce the award like a court judgment. Recognition and enforcement of awards by courts creates*" res judicata*" issue estoppels. The New York Convention supports the notion of Court support of enforcement, however, it restricts the involvement of Courts[153] in arbitral proceedings as evident in the case of *Mc Creary Tire Co v CEAT*[154] and *Caroline Power & Light Co v Uranex*[155], which was later applied in *Channel Tunnel v Balfour*.[156] There is still a hostile climate in Uganda most judges in High Court, instead of giving effect to Art. 126(1) d,[157] which provides power to Courts to consider Arbitration, as disputes mechanism, they ignore it and consider Art 139, [158] which provides High Court of Uganda unlimited jurisdiction. In other words, the courts oust the jurisdiction of CADER,[159] this has created a tension between the arbitral tribunal (CADER) and the judiciary. Unless courts respect the jurisdiction of the tribunal, arbitral proceedings in Uganda will be be hampered, unless the Ugandan government adopts the reciprocity approach, like Rwanda,[160] London[161], Paris which have given total autonomy of the tribunal in arbitral proceedings.[162]

Order for Confidentiality :The question is, to what extent is confidentiality order enforced by the courts?

[148] See *Haki shipping Corp v Oils Ltd*, the Times October 13, 1997, [1998] 1 Lloyd's Rep 465 CA.
[149] See Briggs & Rees, (1997) Civil Jurisdiction and Judgments (2nd edn LLP, London) at 300.
[150] See *Hamlen J in Abuja International Hotel v Meridiene* SAS [2012] EWHC 87.
[151] See English Companies Act 1985 S.726.
[152] see *Solemany v Soleymany* [1999] QB 785.
[153] See New York Convention Art 11(2).
[154] [501 f.2d 1032 (3rd Cir 1974).
[155] 451.F.Supp 1044 (ND Cal.1977).
[156] See [1995] AC 33.
[157] See Constitution of Uganda 1995.
[158] Ibid.
[159] see Arbitration Act of Uganda S.6, 27,26,28,10.
[160] See Rwanda Arbitration Act,
[161] see LCIA.
[162] see Model Law Art.27, 1(2).

As opposed to litigation arbitration have always been considered to be private in nature.[163] This has been touted as one of the advantages of arbitration. The question is how does the nature of arbitration translate into an obligation of confidentiality that binds the parties to the arbitration. In *Dollington Baker*[164], it was held that parties' within arbitration agreement were under an implied duty obligation to keep the proceedings and documents arising out confidential. For any business keeping the secretes of the company is the back bone and this stands the best reason as to why ADR champions international commerce. However, the Australian High Court in *Esso Australia Resource Ltd v Plowman*,[165] was centrally opposite, as the court held that parties do not owe a duty of care for confidential information or documents to the proceedings. The Australian view has been critised in Commonwealth counties' and is not followed, for example; in Singapore,[166] the leading center of international arbitration has adopted the English Model.[167] In England, the issue of confidentiality is considered by all courts as evident in the case of *Gildepath Bv and Others v John Thompson and Others*[168] have affirmed that confidentiality is a key factor in arbitral proceedings in England and Wales. There doctrine of confidentiality may be limited as set out in the case of *Ali shipping Corp v Shipayard Trogir*[169] where the Court of Appeal, stated where information is needed for public interest,[170] or where there is an implied consent by the parties, an order of the court or in protection an arbitral party's legal rights against a third party[171]. In Uganda, there is no implied confidential protection unless there is a clause to effect it in the contract.

ADR and Human Rights:ADR is against Human Rights?

There is a presumption that courts' are the principle forum for dispute resolution in countries' should be eroded. ADR, which is composed of mediation, negotiation, conciliation, arbitration continue to proliferate and are increasingly institutionalized, leading to their characterization as appropriate and proportionate. Despite the developments, the position of ADR and Human Rights is still a contentious among traditional lawyers and some academics. The following are the contentions that are advanced:

The Courts Approach to friendly settlement:

[163] See *Electric & Gas Insurance Co of Zurich Ltd v European Reinsurance Co of Zurich* [2003] UKPC 11, *Insurance Co v Lloyd's Syndicate* [2003] 1 WLR 1041.
[164] See *Dollington Baker v Merrett* [1995] 128 ALL ER 890.
[165] [1995] HCA 19-183
[166] See *Mynmayaung Chi oo Co Ltd v Win Win Nu* [2003] SGHC 124.
[167] See *Hassneh Insurance Co of Islael v Steuart Jew* [1993] 2 Lloyd's Rep 243.
[168] [2005] 2Lloyd's Rep549.
[169] [1999 1 WLR 314.
[170] See *Hassneh Insurance Co of Islael v Mew* {Lloyd's Rep 243.
[171] See *Esso v Plawman* [1995] 128 ALLER 39.

Its important to note that the Constitution of Uganda, was drafted in a manner that any violations of Human rights were avoided. [172] The constitution considers the international instruments like the United Nations Universal Declaration of Human Rights,[173] the African Charter of Human Rights,[174] access to justice to all parties in any proceedings, [175] through ADR mechanisms, [176] and other enactments [177] were passed by parliament to allow the speedy justice mechanism of ADR.[178] It's prudent to note that parties in ADR, avoid to commence litigation because of the, delays and backlog of cases in courts, than ADR, where for example; in arbitration proceedings at CADRE the award is settled in fifteen days. There is mounting pleasure in Courts. Art. 37 (1) of ECHR, requires the Court to reject friendly settlement reached between parties' if the respect of human rights in the convention and protocols there to require. [179] With ability to have ADR confidentiality, surrounding the friendly environment between the parties, for example; inter American Commission on Human Rights, now actively promotes friendly settlement of disputes through mediation. With parties' autonomy in most ADR especially arbitration, adduces the fact that ADR promotes access to justice and in a friendly manner,[180] where all the parties are given equal treatment in the proceedings, and where they have complaints they challenge the award like a court judgment.[181] Some judges still do see ADR as a mechanism to ouster their jurisdiction in Uganda, hence fight ADR to protect their jurisdiction.[182]

Procedural Justice:

Procedural justice attends to the notion of fairness with which a dispute is dealt, which may but does not necessarily feed into the case. Its important in assessing procedural justice to consider the principles of procedural justice. First, is substantive participation, neutrality, respect, where both parties' views are being considered and

[172] See Uganda Human Rights Commission.
[173] See Constitution of Uganda 1995 Art. 45.
[174] African Charter on Human and People's Rights Art. 24.
[175] I Uganda Constitution Article 28
[176] Ibid Art.126 (1) (d).
[177] see Arbitration Act and Conciliation Act of Uganda, Civil Procedure Rules Order 12 and 47, the Land Act S.88, Employment CT 2006 Part X, Civil Procedure Act S.26, The Magistrates Court Act Cap 16 S. 160 and Labour Dispute Arbitration and Settlement Act 2006.
[178] See Kanyeihamba, (2006) Commentaries on Law, Politics and Governance, Kampala, Renaissance Media) at 92-98.
[179] See Keller, {2010), Friendly Settlement Before the European Court of Human Rights; Theory and Practice, at 10.
[180] See Employment Act 2006 of Uganda S. 93 (1) and (2). Where the parties are free to resort to litigation
[181] see *world Trade Corp v c czarnikow Sugar* Ltd [2004] EWHC2332, see *Arab National Bank v Elsharif v Saud bin Masoud bi Haza a Elbadali* [2004] EWHC 2381, where an award was challenged due to fraud.
[182] See Lady Justice Kisaakye Mutimbo, in *G4s Security Services v G4s Security Services Ltd,* Civil Appeal No. 18 of 2010 (Supreme Court of Uganda), where he argued that the Employment Tribunal by settling disputes under S. 93 of Employment Act of Uganda 2006, intended to oust jurisdiction of the ordinary Civil Courts in Uganda, and that it contravenes Art.139 of unlimited jurisdiction of the High Court of Uganda.

their concerns are taken seriously by the legal regime.[183] The Constitution of Uganda, under Art. 28, which provides for fairness, similar to the European Commission on Human Rights (ECHR), under Art. 6(1) which provides that justice means fair trial, referring to fairness as a criteria. Other commentators [184] consider procedural justice,[185] as safe guards that help in achieving reasonable and just decisions, rather than an opportunity for voice even in the absence of the ability to influence the outcome.[186] Its imperative to note that courts 'should respect the principle of party autonomy and the self determination of voluntariness to ADR on equal arms .[187]

Mandatory Initiation of ADR and Human Rights:

The contention is the issue of legitimacy and proportionality of restricting access to a court, when determining civil rights and obligations treating the right as one of the universally recognized fundamental principles of law.[188] In the land mark case of *Golder v United Kingdom,* where the Court held that the right to a court is not absolute and can be limited, where there is ADR mechanism that provides public hearing,[189] independent and impartial tribunal, that deliveries justice in a reasonable time and fair manner. In other words, the Court found that the right must be practical and effective and not theoretical or illusory. [190] Given the value placed on judicial remedies, one might expect the Court to take strict approach to formal diversion of ADR. It should however, be noted that such approach appears warranted since the parties choose ADR voluntarily, and absence of parties' consent, public values will be diminished. In Uganda the mandatory mediation is in all commercial disputes,[191] in order to speed up settlement of commercial transactions,[192] that would take years without court delivery of judgments.[193] In Uganda, the court may make mandatory reference, under Rule 4 of Civil Procedure or Order 12 Rule (1) and (2), where the Court may, if it of view that the case has good potential for settlement, order ADR before a member of the bar or the bench named by the court. Under Rule 2 of the Commercial Court Mediation Rules, provides that

[183] See Taylor (1998) What's is Procedural Justice? Criteria Used by Citizens to Assess the Fairness of Legal Procedures Law and Society Review at 103 and 129.
[184] See Golann, (1989) Making Alternative Dispute Resolution Mandatory: The Constitution Issues Oregon Law Review at 501.
[185] See ECHR, Steel and Morris v United Kingdom Appl.No. 68416/01.
[186] See Richardson & Genn ,(2007), Tribunals in Transition; Resolution or Adjudication? Public Law at 131.
[187] See McGregor Lorna, (2015) Alternative Dispute Resolution and Human Rights: Developing a Rights- Based Approach through the ECHR, The European Journal of International Law Vol.26 No.3 at 18.
[188] See see Art.6(1) of ECHR.
[189] See ECHR, *Fredin v Sweden No.2* ,Appl.No. 18928/91 of 23 Feb 1994 par 20-22.
[190] See ECHR, *Airey v Ireland, Appl,No. 6289/1996/73/936,* judgment of 23 Sep 1999.
[191] Civil Procedure Act, Order 12 and 47.
[192] See Land Act S.88, 89.
[193] See Judicature Act Cap 13

(a) "if *there is an agreement resolving some of or all the issues in the dispute, it shall be signed by the parties' and filled with the registrar for endorsement as a consent judgment.*

(b) *If there is no agreement, the mediator shall refer the matter back to court.*"

From the above it is a clear manifestation that parties achieve justice and which is legitimate and proportionate to principles of human rights.

The contention of ADR and human rights was explored in one of the leading cases of *Hasley v Milton Keynes General NHS Trust, where in par 9, the court asked whether the court has power to order parties to submit their disputes to mediation against their will. Its one thing to encourage the parties to agree to mediation, even to encourage them in the strongest terms… it seems to us that to oblig truly unwilling parties to refer their disputes to mediation would be to impose an unacceptable obstruction on their right of access to the courts. The court in Strabourg has said in Art.6 of the ECHR that the right of access to a court may be waived, for example by means of an arbitration agreement, but such a waiver should be subject to particularly careful review, to ensure that the claimant is not subject to constraint."*[194]

Its imperative to note that the courts do not have jurisdiction to order unwilling parties to refer their disputes to mediation or ADR, however, parties should be encouraged by the court to embark on ADR.

In arbitral proceedings, the parties, under party autonomy, [195] choose arbitration without any coercive mechanism, to avoid litigation, under the doctrine of party autonomy, and courts are estopped not to intervene by the New York Convention.[196] In order to promote this ADR mechanism courts in Uganda have stayed arbitration proceedings.[197]

Debate on standards of Justice within ADR:

There is a debate around the public values of courts and ADR, a further line of analysis focuses on the nature and standards of justice and the existence of safe guards to parties' within ADR. Although Courts solve disputes, there supposed to solve

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195 see Arbitration and Conciliation Act of Uganda S.17, 27.

196 Article 11(2) of New York Convention.

197 See *Bokomo (U) Ltd and Another v Rand Blair Momentum Feeds* Civil Appeal No. 22 of 2012., see *Tororo Cement Co Ltd v Froskina International* Court of Appeal No. 13 of Supreme Court.

something special in how they solve disputes. Some commentators [198]argue that the agreement to ADR risks power imbalances and a lack of equality of arms of the parties are rarely equal.

This is true especially where there is lack of a legal representation, which is typical in the form dispute resolution that are less formal than traditional courts, on the premise that simplified process facilitates self- representation even if the other party can afford and instructs the lawyer. Commentators advance that a party to ADR may feel pressurized to settle on less favourable terms, than case merits because of financial need, or lack of funding to proceed to litigation, where legal aid is unavailable. Much of of this line of critique has focused on agreement-based dispute resolution process of ADR, with the exception of arbitration. Its is very difficult to find merit in the argument that ADR, especially arbitral tribunal which is recognized in 156 countries under the New York Convention that its is below standard. Its of great importance to note an award is similar to a Court judgment, and courts gives it support in enforcement as evidence of recognition. ADR is composed of experts for example; arbitration tribunals, experts are well advanced with knowledge of the proceedings than courts. In mediation the mediators are appointed by the courts, as acknowledgement of trust of ADR as a dispute mechanism in settling disputes.[199]

Conclusion and Recommendations:

Uganda is outstanding in its legislative efforts to incorporate ADR in its legal system. [200]The 1995 Constitution, provides for the promotion of conciliation in all matters handled by the judiciary. As a result of the constitution Uganda enacted various acts in support of ADR mechanism, that describe new judicial power of referring cases to ADR. ADR supports the application of equity rather than the rue of law.[201] Where equal treatment of parties' under a third party is paramount. In ADR every party is a winner than litigation cases. Since access to justice is subject to costs, in most ADR like mediation, is free, and cost effective than litigation that can take long to bring the matter to finality.[202]

The development of ADR has been influenced by United Nations Bodies to enhance commercial transactions and promotion of human rights, for example; United Nations Commission on International Trade Law (UNCITRAL) on arbitration and mediation,

[198] See Welsh, '(2004) Remembering the Role of Justice in In Resolution: Insights from Procedural and Social Justice Theories, Journal of Legal Education at 51.
[199] A mediator in Uganda context may be a judge, registrar, magistrate under Rule 9 (1) (a) (b) of the Civil Procedure Rules, accredited mediator under Rule 9 (1), Certified mediator by CADRE under Rule 9 (1) (e). or any person with qualifications chosen by the parties Rule 9(1).
[200] See Art. 126(1) d, Art. 28 of the Constitution of Uganda 1995.
[201] See Mirindo , (2008) Environmental Disputes Resolution in Tanzania and South Africa: A Comparative Assessment in the Light of International Best Practice at 3.
[202] See S.47 of the Arbitration of Uganda.

the New York Convention on Enforcement of Foreign arbitral awards by member states. The 1965 Washington Convention, which advocates for ADR in most Countries. The commentators view that ADR is against Human Rights is a myth than reality, due to the seat theory, where under the seat theory, arbitration is rooted in the national law, which is the law of the seat, party autonomy,[203]the arbitral tribunal is quasi-judicial,[204] hence no clear demarcations between tribunals and courts.[205]

ADR has provided effectiveness in access to justice in Africa. It's a common phenomenon, that when Courts cannot resolve dispute ADR provides the best alternative for example; in Kenya in the recent post elections between Mwai Kibaki and Raila Odinga was eventually settled through mediation by Late Kofi Anani, former Secretary UN Secretary General, in Zimbabwe in a dispute between Late Robert Mugabe and late Morgan Tsvangairia, Thabo Mbeki former president of South Africa, was able to use mediation, as an ADR to settle the political tensions between the parties.

In order for Uganda to enhance ADR, there is a need to limit the intervention of courts in the arbitral proceedings of CADER, as enshrined in the arbitration Act[206] and the New York Convention.[207] Courts in Uganda, interprets Art. 139, of the Constitution with unlimited jurisdiction, hence intervene in arbitral proceedings without host reasons.

There is a problem of funding of CADER, the main body that handles arbitral proceeding in Uganda. CADER has no budget for the operation of its operation. This impedes the progress of the arbitral tribunals.

The ADR system in Uganda or legal regime was misconstrued as similar to the west. Nevertheless, the basis of the west is not the same as the basis of Africa. The model reform ignored the traditional African system of settling disputes. Hence the prognosis did not follow the diagnosis. There is a need to adopt the Ubuntu,[208] which will provide the epistemological basis of the methodology to come up with Africanized model of [209]commercial disputes. In African context, mediation as a form of ADR meant elders, councilors, tribal chiefs, kings, elders who solved disputes in order to promote social cohesion. Importing law to Africa reform seems to be based

[203] See *Farm Land v Global Exports Ltd* [1991] HCB 72.
[204] See *Fiona Trust & Holding Corp Privalov* [2008] 1 Lloyd's Rep 254.
[205] See Macmillan *LJ Heyman v Darwins Ltd* [1942] AC 356.
[206] See S.9 of Arbitration Act of Uganda.
[207] Art 11(2).
[208] Ubuntu is a fundamental value, inherent belief system, which underscores, indigenous cultures and indigenous legal orders in Africa.
[209] See Longman Timoth,(2009) An Assessment of Rwanda's Gacaca Courts, Peace Review, A Journal of Social Justice, available at https://www.tandfonline.com/cper20, accessed 12 August 2020.

on the long assumption that African legal system in place are dysfunctional. [210]The effect has been to ignore good qualities to be found in African indigenous, ADR, for example; Gacaca, in Rwanda, which establishes a foundation for the successful reconstruction of rule of law, Council Courts in Uganda and the Neighborhood Courts in Somalia.[211] Uganda and Africa at large in order to promote economic development not subject to IMF, there is an urgent need to revamp the legal system of Africa to adopt Africanisms, where Ubuntu, as universal African philosophy, offers the opportunity to make ADR adoptable and relevant in Africa.

Traditional justice system composed of elders should be introduced in Uganda as another former ADR mechanism. Traditional justice system are normally community level dispute mechanism, which some African countries have adopted for example; Namibia[212], Malawi,[213] Kenya,[214] Mozambique,[215] South Africa[216] Congo,[217] and Zambia.[218]

[210] See KARIMI & RABAR, (2004) indigenous Democracy: Traditional Conflicts Resolution Mechanisms. The Case of Pokot, Turkan, Samburu and Marakwet Communities Nairobi.
[211] See Widner (2001) American Journal of International Law at 66.
[212] See Art.66 (N 25 of 2000).
[213] See Art.110 Chief Act 1997.
[214] Art.159 of the Constitution of Kenya 2010.
[215] Art.4 of the Constitution of Mozambique.
[216] See Traditional Leadership & governance Frame Work
[217] see National Mediation Commission of Electoral Process 2011.
[218] see Art. 23 of the Constitution of Zambia.