

THE UNIVERSITY OF ZAMBIA

SCHOOL OF LAW

I recommend that this Directed Research Paper prepared under my supervision

by

AMELIA PIO YOUNG

entitled

**ALTERNATIVE DISPUTE RESOLUTION
AND
ITS PLACE IN THE ZAMBIAN JUDICIAL SYSTEM**

Be accepted for examination. I have checked it carefully and I am satisfied that it fulfills the requirements pertaining to format as laid down in the regulations governing Directed Research Papers.

Supervisor: 
PATRICK MATIBINI

Date: 10th May, 2000

**ALTERNATIVE DISPUTE RESOLUTION
AND
ITS PLACE IN THE ZAMBIAN JUDICIAL SYSTEM**

by

AMELIA PIO YOUNG

Directed Research Paper submitted to the University of Zambia
Law Faculty
in partial fulfilment of the requirements of the
Degree of Bachelor of Laws.

**THE UNIVERSITY OF ZAMBIA
P O Box 32379
LUSAKA**

MAY 2000

For my mother

FRANCES GERTRUDE PIO

for all your sacrifices

and

for my 'father': my brother,

FRANCISCO D'OLIVEIRA PIO

*who, at a youthful age, stepped so skilfully into my
late father's shoes, that I never knew the difference.*

ACKNOWLEDGEMENTS

This is the 'thank you' page, and as such, it's really the most important page to the author, though many readers just skip through to the text. Without the help of these people, this work would not have taken its final form.

First and foremost, I wish to thank my supervisor, my mentor, Mr PATRICK MATIBINI, whose enthusiasm for this project set the spark to the fire. Mr Matibini is one of the foremost proponents for ADR in this country, and his unbounded knowledge and passion for the subject has made writing this paper not only a learning experience for me, but a sheer joy.

I wish to thank my brother, my 'executive producer', EDWARD S. PIO, who read and re-read this manuscript till he became more knowledgeable on ADR than I; and who gave up countless, valuable hours in the final production of this paper. Well, Eddie, you know if you ever need a good lawyer ...!

Special thanks must go to my sister-in-law PAMELA PIO, for introducing me to a number of people who were invaluable in the research phase of my work.

One of these people in particular, and to whom I am indebted for a fountain of information, is Mr SIDNEY WATAE of USAID, who provided me with certain materials I would not otherwise have had access to. Thank you Sidney.

I would be remiss not to mention my friends, VERONICA K SCOTT and MWANSA P MULUMBA, who provided for me a firm anchor when things got rough; a listening ear, a shoulder to lean on – true friends I can always rely on.

My thanks go also to my friend, my boss, NICOLA SHARPE-PHIRI, who has been a source of inspiration, support and encouragement throughout my time in Law School.

I wish to express my sincere gratitude to his honour JUDGE KABASO C. CHANDA, (Rtd.), who always had a moment to spare in his busy schedule, to talk with me and give me a judge's perspective on ADR; and who pointed the way particularly with regard to the history of ADR in Zambia.

To my girls, in whom I am truly blessed, YASMIN, KARLA, PIA and MARIA-MARGARETHE, for their radiant joy and beauty, and who, even through the difficult times, have never lost their unique sense of humour which helps to put everything into perspective. I love you my babies.

Last but by no means least, my deepest gratitude and my love go to my husband, ROLF YOUNG, for his calming voice of reason during the panicky late stages of this work; and for putting up with all that pounding on the computer late at night, all those bad moods, and all the times I was too busy, too tired, too swept up in my work. Thank you, Rolf, for being there.

ABSTRACT

Over the past several decades, there had been a growing interest amongst advocates world-wide, in the use of alternative dispute resolution (ADR) techniques to resolve their clients' disputes more economically and efficiently. In the face of bottlenecks and backlogs in the court systems, as well as spiralling costs and fees, courts and members of the legal fraternity have been part of the movement seeking means other than litigation for resolving disputes.

The development of more flexible means of resolving disputes in the form of ADR techniques has therefore gained increasing popularity, and the Zambian legal system is no exception. Certainly, the advantages to be gained by the implementation of ADR in the Zambian legal system provide enormous potential and as such, ADR has not gone unnoticed in Zambia.

In the past year alone, tremendous reforms have been made in the Zambian legal system, and a study on ADR is therefore most timely in this context.

This paper seeks to introduce to the reader, the concept of ADR and its implications in the Zambian context. In our first chapter, gives a brief overview of the problems faced by the court systems today and the need for alternatives to traditional litigation, not only because of congestion in the court systems or because of the need to save time and money, but more importantly, because of the many advantages that ADR processes bring to the disputants. We also provide a basic introduction to ADR, giving a bird's eye view of the various processes and techniques in the resolution of disputes, and highlighting the importance of ADR processes to any judicial system.

We trace the history of ADR in general, and the historical development of ADR in Zambia in our second Chapter, giving an account of the genesis of the ADR movement and the current importance and status of ADR mechanisms. The importance and relevance of the historical background to this study is that it gives the reader who is new to ADR an

idea of the speed and impetus with which the ADR movement has grown in recent times. This is an important aspect in that it creates a setting in which ADR has become an important and topical subject, of particular interest not only to lawyers in Zambia today, but more importantly, to the law students - the future generations of lawyers who will undoubtedly come across these processes in the not-too-distant future, and will require some idea as to how ADR developed as an important part of any judicial process.

Our third Chapter gives a philosophical analysis of the various underlying factors that need to be considered in examining ADR processes. It highlights the basic underlying conceptual ideologies behind each process, and relates these concepts to the manner in which the lawyer and the client relate within the ADR environment. This is an important Chapter in that it creates a philosophical backdrop that conduces to the understanding of ADR processes and lays the foundation for the practical application of these processes. Further, it elucidates the broad approaches to ADR processes, pointing out how the basic underlying concepts impact upon the various players in the ADR system.

Chapter four goes into the specifics of ADR Processes. It discusses the Primary ADR Processes and their practical application, as well as the Hybrid Processes. The major ADR processes, namely, arbitration, mediation and negotiation, are compared with traditional litigation, and described along with their advantages and disadvantages. An important section in this chapter relates to the current status of ADR processes in Zambia, detailing the major developments in recent years. The law stated is as at May 2000.

Our fifth and final Chapter draws on previous chapters to highlight the importance and the necessity for ADR in Zambia, in order to make recommendations in terms of the institutional and legal framework for the implementation of ADR in Zambia

TABLE OF CONTENTS

ACKNOWLEDGEMENTS	ii
ABBREVIATIONS	iii
ABSTRACT	iv
 CHAPTER I An Introduction to Alternative Dispute Resolution	 2
The Problem	2
Importance of Alternative Dispute Resolution	7
Advantages of Alternative Dispute Resolution	11
Overview of Alternative Dispute Resolution	12
Adjudicative Processes	13
Evaluative Processes	14
Mediative Processes	14
The Processes	15
Arbitration	15
Mediation	16
Conciliation	17
Negotiation	18
Neutral Fact-Finding	18
Structured Settlement Conference	18
Private or Special Judging.....	19
Combined Processes and Hybrids	19
Med-Arb.....	19
Mini Trial or Executive Tribunal.....	20
 CHAPTER II Historical Background of the ADR Movement	 22
Introduction	22
International Development of ADR	23
Historical Development of ADR in Zambia	26
Pre-Colonial Period	27
Colonial Period	28
Post-Independence Period	30
 CHAPTER III General Aspects and Approaches to ADR Processes	 34
Introduction	34
Evaluating a Case for ADR Process	36
The importance of “law” or the Courts	36
Speed and Expense	37
Effect of the Outcome on Each Party and the relationship between the parties	37

The Role of the Parties in Resolving the Dispute	38
Underlying Concepts of ADR	38
The Concept of Justice	38
The Degree of Autonomy	41
The Need to Preserve the Relationship	41
The Role of the Lawyer	43
The Broad Approaches to ADR Processes	46
Adjudicative Approaches	47
Arbitration	48
Reference Procedures	51
Neutral Fact-Finding	53
Evaluative Processes	54
Peer Evaluation	55
Lay Evaluation	57
Judicial Evaluation	58
Specialist or Expert Evaluation	59
Mediative Processes	59
Mediation	60
Conciliation	63
Consensus Building	64
CHAPTER IV Varieties of Alternative Dispute Resolution Devices	65
Introduction	65
Primary and Hybrid Dispute Resolution Processes	66
Primary Dispute Resolution Processes	67
Negotiation	68
Adversarial Approach	69
Problem Solving Approach	70
Negotiations Approaches	72
The Role of Law in Negotiation	72
Arbitration	73
Overview	73
The Process	75
Initiating Arbitration	76
Selection of Arbitrators	77
Qualifications of the Arbitrator	77
Arbitral Immunity	79
The Arbitration hearing	79
The Role of Lawyers	80
The Role of the Arbitrator	81
The Award	83
Advantages and Disadvantages of Arbitration	84
Speed, Lower Costs and Informality	85
A Suitable Decisionmaker	86
Privacy	86
Party Autonomy	87

Mediation	87
Overview	87
The Agreement to Mediate	89
Selection of the Mediator	89
Skills of the Mediator	89
The Role of the Mediator	90
The Role of the Lawyer	92
The Process	93
Preliminary Arrangements	94
Mediator's Introduction	94
Opening Statements	94
Information Gathering	94
Ventilation	95
Issue Identification, Option Generation and Agenda Setting	95
Bargaining and Negotiation, and Reality Testing	95
Agreement and Closure	96
Outcome	96
Advantages and Disadvantages of Mediation	96
Advantages	96
Privacy and Confidentiality	97
Control and Autonomy	97
Problem Solving	97
Informality	97
Preserving the Relationship of the Parties	98
Disadvantages	98
Hybrid Dispute Resolution Processes	99
The Mini-Trial	99
Med-Arb	100
The Current Status of Alternative Dispute Resolution in Zambia	101
Commercial List	104
Arbitration	108
The Essential Elements of a System of Arbitration	109
Legislative Framework	110
International Standards	112
An Institution	113
Rules of the Conduct of Arbitrations	113
Skilled Arbitrators	114
Mediation	116
Skilled Mediators	117
Settlement Week	118
CHAPTER V Conclusion and Recommendations for the Implementation of ADR in Zambia	120
Introduction	120
Recommendations for the Implementation of ADR in Zambia	126
Summary of Recommendations	127
The Legal Framework	127
The Institutional Framework	127

Requirements for Skilled Manpower: Education and Training	127
Funding	128
Legal Framework	128
Arbitration	130
Mediation	132
State Control Vs State Support	133
Accession to International Conventions Relating to Arbitration	134
Institutional Framework	135
Dispute Resolution Centre	135
Education and Training	138
Funding	139

BIBLIOGRAPHY

142

CHAPTER I

AN INTRODUCTION TO ALTERNATIVE DISPUTE RESOLUTION

"Discourage litigation. Persuade your neighbors to compromise whenever you can. Point out to them how the nominal winner is often the real loser - in fees, expenses and waste of time."

Abraham Lincoln

I. THE PROBLEM

In the wake of a world-wide decline in the economy, dwindling resources and the ever-increasing growth of population, it has become clear that courts in Zambia are backlogged with cases dating back not just months, but in some cases, many years. This problem is exacerbated by the fact that as the number of qualified lawyers in the country continues to rise exponentially, the availability of judges cannot match the ever-increasing number of cases to be heard. Even though efforts are being made to reduce the number of cases pending in the courts¹, the situation has gone too far to make any meaningful impact upon what Chief Justice Ngulube refers to as "the huge backlog of cases".²

This problem is not peculiar to Zambia alone. World-wide, the judicial systems of many countries are facing much the same difficulties. As the American Jurist, W Burger laments³,

"We read in the news of cases that continue not weeks or months, but years. Can it be that the authors of our judicial system ... ever contemplated cases that monopolize one judge for many months or even years? ... All litigants

¹ At the start of the new millennium, the Chief Justice, Mathew Ngulube, in an effort to reduce the 'huge backlog of cases', made an announcement banning with immediate effect all judges and magistrates from making routine adjournments to avoid delay in disposing of cases. See "Justice Ngulube bans Courts from making routine adjournments", *The Post Newspaper*, Thursday, January 6, 2000, p.6.

² "Justice Ngulube bans Courts from making routine adjournments", op. cit.

³ W Burger, *Isn't There a Better Way?* (1982)

standing in line behind a single protracted case - whether it is a one-month, a three-month or a longer case - are denied access to that court."

This obviously means that many people are being denied speedy access to justice; and in the time-long adage, "justice delayed is justice denied". Delays necessarily mean expense, and so a lengthy case can incur such high expenses as to make it not worth their while for the parties concerned to bring their dispute before the courts. Nevertheless, litigation is the traditional option, chosen almost instinctively by lawyers as a response to any dispute between their client and another party. Invariably, of course, it is the middlemen - the lawyers - who are the true winners, as each step in the court proceedings is another addition to the fees.

Problems in the judicial system are fed indirectly by the economic situation in the country: On the one hand, the present harsh economic situation means that more companies - and individuals - are falling into debt. As a result, deadlines are not met, obligations unfulfilled, customers are frustrated, and invariably, litigation ensues in a last-ditch effort to redeem what little may be had. Add to this the many bankruptcies, redundancies, companies going into receivership or liquidation - an almost endless list of ills that have in fact become a constant reminder of the harsh realities faced by the country. All this must at one time or another pass through the judicial system, and this means more backlogs in the courts' caseload.

On the other hand, the distressed economy also bears directly upon the court system itself: the Government's constricted financial purse means that the courts cannot be maintained as well as they could be. The recent computerisation of the Court Registry is aimed at enhancing efficiency in the court, but few of the staff are well-versed in the intricacies of computer literacy, and as a result, we see that there are further delays in the system. The court registries as well as the courts are severely understaffed; there is a lack of courtroom space and this too means that the caseload will worsen. The listing procedure of Zambian courts is mostly based upon the availability of the judges and often cases are delayed because of a heavy caseload. Lawyers are all too familiar with the lengthy delays not only in securing dates for hearings, but also because of frequent adjournments, with the result that even

seemingly straight-forward cases drag on for years that could have been disposed of in a matter of weeks; and even then, the long periods spent waiting for a ruling or judgment that should have followed swiftly. As a result, Burger observes, even when an acceptable result is finally achieved in a civil case, that result is often drained of much of its value because of the time-lapse, the expense, and the emotional stress inescapable in the litigation process.⁴

Coupled with the delays in the judicial system is the reality that in fact, many of the cases brought before the courts are actually cases that could quite easily be resolved between the parties themselves, without the need to resort to litigation. Certainly, there are also many other cases which should never have been brought before the Courts at all, and are therefore a waste of valuable court time, that could otherwise have been spent on more deserving matters. However, this will only come to light once the case is actually before the judge or adjudicator, and again, we come back to the problem that it will be a long time before the case actually comes to see the light of day... So the problem perpetuates itself: more and more cases are added to the caseload; as a result, less cases are heard, and so the cycle continues.

At the same time, because of the well-known and even notorious delays in the court systems, certain cases that should have been brought to court, are not, for the simple reason that the aggrieved is discouraged by the prospect of such delays, and holds little hope or indeed confidence in the ability of the courts to address his grievances and come up with a satisfactory resolution to the problem. Furthermore, often, the party to a dispute is reluctant to yield control of something that is to him of such personal meaning and importance, over to a veritable stranger, who might not treat the matter with the seriousness and urgency that he feels it deserves. Linda Singer observes⁵ that whenever we must use the system - for example to handle corporate conflicts over substantial sums or personal problems such as a divorce - court or administrative action displaces our power over our own disputes:

"The legal process distorts reality; not only speed and economy but the real issues in dispute and the treatment of disputants by the professional dispute

⁴ W Burger, *Isn't There a Better Way?* (1982)

⁵ Linda R Singer, *Settling Disputes*, p.3.

resolvers escape our control. Even top corporate managers feel as if their business problems take on a legal life of their own once they turn them over to lawyers and courts."

Clearly, today's corporate executive as well as the ordinary man on the street who is involved in any kind of dispute, has the desire to control and manage the manner in which his dispute is to be resolved, but many are simply intimidated by the complexities the legal system appears to represent. Consequently, they are left with little choice but to surrender this control to their lawyer and the courts.

Another major problem is that, once litigation is commenced, there will be little chance of a conciliatory compromise between the parties. Indeed many relationships, business or otherwise, have suffered a complete breakdown as a result of litigation, and very few have been revived. As Singer suggests, even if the legal system of justice were more efficient, it would not satisfy some participants' most critical interests; as she clearly illustrates:

*"The emphasis of courts and other traditional forums on pronouncing right and wrong and naming winners and losers necessarily destroys almost any pre-existing relationship between the people involved. Whether the parties are a divorcing husband and wife who must continue to share the parenting of their children, businesses that want to retain their customers and suppliers, or employers and employees who want to keep their jobs, it is virtually impossible to maintain a civil relationship once people have confronted one another across a courtroom."*⁶

The truth of this statement is unavoidable. In most cases, as Goldberg, Green and Sander⁷ suggest, litigation will not enhance and is more likely to harm, the parties' relationship. So there can be no doubt that there are limits to the judicial process. As Nolan-Haley points out, once a case is in court, it is the judges and the lawyers who are the central players while the affected party often sits on the sidelines.⁸ A neutral third party will then fashion a remedy - usually a money judgement - applying a rule of law that does not consider the affected party's feelings and allows little room for

⁶ Linda R Singer, *Settling Disputes*, p.4.

⁷ S Goldberg, E Green and F Sander, "Dispute Resolution" (1985) in *Dispute Resolution and Lawyers* by Leonard L Riskin and James E Westbrook, p 454.

⁸ Jacqueline M Nolan-Haley, *Alternative Dispute Resolution*, (1992), p.8.

other values such as an apology to the victim of some malpractice, or substitute employment for the injured worker.

Another reason why people may be discouraged from bringing their case before the courts is the aspect of publicity - many people do not wish their disputes to be decided in a public way, particularly where there are no important public policy issues or principles at stake. Clearly litigation does not afford the parties to the dispute the privacy they may wish for and a viable alternative has to be sought.

In the meantime, a new economic reality is emerging. The legal profession itself is undergoing its own dynamic evolution. As the country liberalises its economy, more and more commercial transactions are being made, and it is only natural that disputes will arise from time to time. Changes in the economy naturally affect the manner in which disputes are approached. More and more, parties to a dispute are seeking remedies that will be tailored for their particular and individual needs. This means that lawyers have to advise their clients on the quickest, most efficient and most flexible means of resolving their client's disputes, without resorting to lengthy litigation and its accompanying baggage of costs, adjournments and delays in procedures.

So we see a growing interest in alternative methods of dispute resolution. Alternative Dispute Resolution (ADR) is an umbrella term used to refer generally to alternatives to court adjudication of disputes, such as, negotiation, mediation, arbitration, mini-trial and summary jury trial. Much more than merely fashioning monetary remedies as with litigation, ADR may be said to "personalise the faces and masks of the law".⁹ For example, people's names and feelings are important in a process such as mediation; private as well as public agendas are important in negotiation; and the parties' notion of fairness is important in structuring an arbitration.

⁹ Jacqueline M Nolan-Haley, *Alternative Dispute Resolution*, (1992), p.9.

between arbitration, mediation and a mini-trial. He says many lawyers have little understanding of alternative methods because they lack either education or interests, but fortunately, this is changing, as law schools, bar associations and courts promote knowledge about alternatives. An understanding of the various ADR mechanisms is therefore an important and indeed, should be an integral part of every lawyer's reckoning in determining the best way in which to resolve his clients' dispute, without resorting immediately to litigation.

The current realities as outlined above have led to increased interest in alternatives to traditional litigation. It is clear that litigation is not only stressful and frustrating, but expensive and in frequent cases, unrewarding for litigants. ADR processes therefore provide a means by which the lawyer may provide alternative mechanisms which can produce an acceptable result in the shortest possible time, with the least possible expense and with a minimum of stress on the parties involved. As Burger observes:

"The law is a tool, not an end in itself. Like any tool, particular judicial mechanisms, procedures, or rules can become obsolete. Just as the carpenter's handsaw was replaced by the power saw and his hammer was replaced by the stapler, we should be alert to the need for better tools to serve our purposes."

ADR must therefore be seen as a flexible, viable and responsive alternative to litigation. The lawyer, in considering how to handle his clients' particular problem, must be encouraged to examine the full pallet of "tools" at his disposal, with litigation as a final resort. Although indeed, we must remember that in many instances, it may be that the courts are the only avenue to justice. However, the adversarial role of the lawyer in any conflict must be placed in its proper perspective, otherwise we run the risk of placing the ego needs of the advocate before the interests of the client.

"Law schools have traditionally steeped the students in the adversary tradition rather than the skills of resolving conflicts. And various facts in the past 20-25 years have combined to depict today's lawyer in the role of a knight in shining armor, whose courtroom lance strikes down all obstacles."

*But the emphasis on that role can be carried too far. ... The adversary process is expensive. It is time-consuming. It often leaves a trail of stress and frustration.”*¹³

One of the basic obstacles to appropriate involvement of lawyers in alternatives to traditional litigation is that the adversarial perspective, so valuable in some settings, often constricts the way lawyers function in settings where a problem-solving approach might be more appropriate.

In trying to arrive at a solution, the lawyer must not only look at the issue to be resolved, but he must also address the interconnected issue of each party's interest; and in so doing he must also thoughtfully examine the actual *process* by which the dispute might be resolved. As Nolan-Haley points out, the lawyer's counselling is a major influential factor in the client's decision as to whether to assert his claim or being his dispute into the public arena. Thus, where a lawyer decides that his client's claim is legitimate and he advises his client to proceed, then the question to ask is "What process should the client use to resolve the particular dispute?"¹⁴ It is here then, that the lawyer will begin to assess the merits of a particular process for that purpose.

An ADR lawyering perspective must therefore go beyond the bounds of advocacy to help clients to settle their disputes without running the risk of ruining what could continue to be a mutually beneficial relationship, and to do this, lawyers can educate their clients about the range of choices of ways to accomplish their goals, and implementing the theory of problem solving through such processes as negotiation, and mediation, advances that goal.

As people look for quicker and better ways to resolve their disputes, more and more contracts are including ADR clauses as the only form of dispute resolution, to prevent either of the parties from making its way into court as soon as a dispute arises¹⁵. An understanding of ADR is as important to the lawyer - and to the law student - as his

¹³ W Burger, *Isn't there a Better Way?*, (1982)

¹⁴ Jacqueline M Nolan-Haley, *Alternative Dispute Resolution*, (1992)

understanding of the more traditional systems of litigation. As Riskin and Westbrook¹⁶ point out:

Lawyers need to know more about alternative means to prevent and resolve disputes, for their own good as well as for their clients and society. Practising lawyers advise clients about how to deal with disputes and help carry out some dispute resolution processes. But lawyers do more than represent clients. Serving in many capacities, they become architects and engineers of dispute resolution methods. They become judges, legislators, and heads of government agencies. They serve on committees of bar associations and community groups and as advisors to every conceivable public and private enterprise. Accordingly, it is important that law students begin to see dispute resolution from many perspectives in addition to that of the lawyer serving an individual client

During the course of this study, we shall examine the various processes of Alternative Dispute Resolution in order to provide an overview of what it actually entails, and to highlight its importance to Zambia, in the light of the heavy caseloads in our courts, and in an attempt to give a clear picture as to the various alternatives an advocate may have to provide swift, cost-effective and satisfactory solutions to disputes, with the minimum of stress and unnecessary frustration on the parties involved.

As Zambia takes a firm footing on the world stage, and as new approaches to dispute settlement are being implemented with increasing rapidity in other jurisdictions, legal practitioners need to break out of their rigid mould and explore those other avenues, giving a fresh approach to old problems in keeping with the rest of the world. Although some of these alternatives have in fact been practised for many hundreds of years¹⁷, there is a renewed interest today in Alternative Dispute Resolution (ADR), because of its flexibility, privacy of proceedings, and the less formal manner in which a mutually satisfactory resolution to the dispute might be reached. Today's lawyer therefore needs to understand the various mechanisms of dispute resolution besides litigation, to help the client make an informed choice of the process best suited to a speedy and cost-effective resolution to the problem. The importance of developing the skills necessary to use ADR processes is as important to today's lawyer as the

¹⁵ Lease agreements in particular more often than not contain the arbitration clause, and it is now inserted in the agreement almost as a matter of course.

¹⁶ Leonard L Riskin and James E Westbrook, *Dispute Resolution and Lawyers*, (1987) preface.

¹⁷ Jacqueline M Nolan-Haley, *Alternative Dispute Resolution* (1992).

need for developing his advocacy skills. Simply put, *"The lawyer's principal job is to help clients solve problems, and advocacy skills are simply one of several important techniques to accomplish that.."*¹⁸

III ADVANTAGES OF ADR

Given the problems, mentioned earlier, of the judicial system as it stands in Zambia today, it seems clear that ways and means must be sought to incorporate ADR processes and techniques into the Zambian judicial system, particularly in light of the many advantages inherent in ADR processes. Briefly outlined, these advantages may be considered as follows:

- i. ADR eliminates unnecessary delays caused by the back-log in the litigation process as well as the unnecessary expense involved in litigation.
- ii. ADR provides clear time-frames within which a resolution must be reached, thus eliminating the long delays while waiting for judgments from judges who are over-loaded with cases.
- iii. ADR is a private process, whose main focus is on achieving a resolution that is mutually satisfactory to the parties involved.
- iii. ADR provides the means by which parties to a dispute can preserve and maintain their on-going or prior relationships.
- iv. ADR provides the means by which parties to a dispute are encouraged to resolve their disputes in an amicable manner where the parties might otherwise have been reluctant to come forward with their problems.

Of course, to every advantage there may be corresponding arguments to the contrary, and there are perhaps many arguments to show that the judicial process is the more superior mechanism of dispute settlement. However, as stated earlier, it must be

emphasised that alternative dispute resolution should be seen not as a replacement of the judicial system, nor as a reformation of the law, but rather, as a complementary process, to locate alternative views of what a dispute is and, we would hasten to add, that because each case is different and not all disputes are the same, the question is one of degree in terms of the appropriateness of the system rather than a blanket application of one system over the other. Should we litigate or should we arbitrate? This is a question that it is hoped will be on the mind of every advocate who studies a problem, before he rushes off to court to file a suit that could well last for a good part of his career.

IV. OVERVIEW OF ALTERNATIVE DISPUTE RESOLUTION

Given the scenario put forward in the arguments above, a question might be asked: What then, is Alternative Dispute Resolution?

Generally, Alternative Dispute Resolution (ADR) is the term which identifies a group of processes through which disputes, conflicts and cases are resolved outside of formal litigation procedures. Alternative Dispute Resolution procedures include negotiation, mediation, conciliation, arbitration, mini-trial or executive tribunal, structured settlement conference, "Med-Arb" and expert evaluation or non-binding appraisal.

Kovach suggests that the most effective system of dispute resolution consists of a method which increases the reconciliation of interests.¹⁹ It will be recalled that one the basic tenets of ADR is to maintain existing relationships where possible, so that the parties to a dispute do not sever what, but for the dispute, might have continued to be a mutually beneficial liaison.

It must be remembered however, as Russell states, that ADR does not guarantee a binding result, although it can lead to one, and the main distinction between most ADR and arbitration lies in this aspect.

¹⁹ Kimberlee K Kovach, *Mediation Principles and Practice*, p.5.

The variety of ADR devices all involve, to some extent, a third party neutral or neutrals, who facilitate the resolution of the dispute. In this respect, much depends on the role of the neutral - including the process to be followed. As Kovach states:

*“The type of assistance provided to the dispute depends largely on the neutral’s role. That role determines the effect the neutral has on the negotiation. In fact, what the third party neutral does to assist the settlement defines the process.”*²⁰

Kovach categorises the more common ADR process into three broad approaches²¹: Adjudicative, evaluative, and mediative. We shall examine the various mechanisms under these headings in some detail under Chapter Two of this study, but for introductory purposes, a brief examination of each category is instructive.

A. ADJUDICATIVE PROCESSES

In adjudicatory dispute resolution processes, the neutral adjudicates, or makes a decision. It is the basis of the legal system that when a case is submitted to the court, someone other than the parties makes the decision. This is the most familiar process to lawyers, where a third party has power to impose a solution upon the disputants. Adjudicative processes usually produce a “win/lose” result. The process is mostly formalised, although slightly less rigid than the courts system. Invariably, the parties agree upon the neutral party whom they have selected to make a decision.

Adjudicative ADR procedures that are most like the formal litigation process. Most adjudicatory processes involve lawyers who present their clients case in much the same manner as the adversarial court systems. Although traditional litigation is always binding on the parties, arbitration, on the other hand can be varied, and so non-binding or advisory decisions are possible. The most common adjudicative processes of ADR are:

i. Arbitration

²⁰ Ibid., at p.6

- ii. Private or Special Judging
- iii. Neutral Fact Finding
- iv. Structured Settlement Conference

B. EVALUATIVE PROCESSES

The evaluative process consists of providing lawyers and litigants with feedback as to the merits of the case. Advocates present their version of the case to one or more third party neutrals, who then evaluate the strengths and weaknesses of each. Kovach notes that the primary purpose of neutral case evaluation is to provide an objective, non-binding, confidential, evaluation of the case, which may be used by the lawyers and clients in further settlement negotiations. The neutral provides expert evaluation or non-binding appraisal, and, depending on the dispute and type of evaluation sought, feedback can be provided by peers, professions, experts or lay persons. The process is confidential, and the evaluation is non-binding. Neutral evaluation encourages settlement of cases in early pre-trial stage.

Variously, evaluation can be:

- i. Peer Evaluation
- ii. Lay Evaluation
- iii. Judicial Evaluation
- iv. Specialist or Expert Evaluation

C. MEDIATIVE PROCESSES

In the mediative Process, the neutral does not render a decision or an evaluation, but rather acts as a facilitator for the parties to reach an acceptable and mutually satisfactory agreement. The three most common mediative processes are:

- i. mediation,
- ii. conciliation and
- iii. consensus building.

The specifics and background of the range of ADR mechanisms will be discussed in detail under Chapter Three of this study. However, for introductory purposes, this section will give a brief overview of each of the various processes of Alternative Dispute Resolution.

It should be noted from the outset that there are naturally certain methods of dispute resolution that have, over time achieved more prominence and recognition in the judicial process. Two of the main forms of alternative dispute resolution are Arbitration and Mediation. In Zambia, there are statutory provisions allowing for both Arbitration and Mediation. Arbitration is generally covered by the Arbitration Act, Cap. 40 of the Laws of Zambia, whilst Mediation is provided for under the High Court Rules of the Laws of Zambia.

D. THE PROCESSES

The following is a brief outline of some of the more common ADR processes.

1. Arbitration

Arbitration is a process for the determination of disputes by adjudicators chosen by the parties to the dispute, and who are empowered to render a decision. By and large, this is a voluntary process, where parties submit to a neutral person for a decision. However, it is possible that the parties may have a contractual agreement to arbitrate rather than litigate, or the court may order the parties to submit to arbitration under its supervision. This is known as *compulsory arbitration*.

Invariably, the parties' lawyers are involved, and it is the lawyers who present their clients' case to the arbitrator. A private, neutral evaluation; arbitration is perhaps the most formalised alternative to court litigation. It is perhaps because of this - along with other pragmatic and policy considerations - that has led courts and legislatures to endorse arbitration as the preferred process in resolving a wide range of disputes, despite the fact that in the past, courts did not look kindly toward the arbitration

process. Not only was arbitration a slow and expensive process which tended to mimic litigation rather than lay down and follow its own ground rules. However, Nolan-Haley observes that arbitration today has been transformed into a flexible adjudicatory process, operating both in the mandatory, public context as well as in voluntary, private settings.²²

Much the same as a court trial, the process is typically adversarial, with counsel representing and arguing their clients' case before a tribunal comprising a single arbitrator or an uneven panel of three arbitrators²³, who are empowered to issue a ruling known as an **award**. Generally, arbitrators are chosen who have more expertise in the specific subject matter of the dispute than would a judge. Furthermore, the process offers the arbitrator more flexibility in decision making than judges, as they are not bound by the principle of *stare decisis* in rendering their decision.

2. Mediation

This process involves a third party neutral, whether one person or more, acts as a facilitator to assist in resolving a dispute between two or more parties. The mediator assists the disputing parties in communicating their positions and exploring possible solutions or settlements. Mediation is now one of the fastest growing forms of dispute resolution process in the world, as it has many advantages, which include privacy, confidentiality, speedy resolution to problems, less expense - particularly at international level; and the fact that solutions may be tailored to specific situations.

As Kovach observes, as with all types of ADR, Mediation is the least adversarial approach to conflict resolution and encourages the parties to communicate directly. Thus the role of the mediator is to facilitate communications between the parties, and to assist in identifying the real issues of the dispute with the goal that the parties themselves arrive at a mutually acceptable resolution of the dispute.

²² Nolan-Haley, *op cit.*, at p.114.

As with all types of ADR, the mediation process is flexible and may be determined by the types of dispute, the style of the mediator and the relationship of the parties. Although mediators may come from all walks of life, most litigation cases are handled by attorney mediators. Mediation is appropriate in all types of disputes and can be effective at any level of the dispute - even at the appellate level. Mediative processes are therefore of particular value as an alternative to litigation.

3. Conciliation

The term “conciliation” sometimes is used interchangeably with “mediation”. Often, however, it is meant to refer to a less formal process (e.g. where the neutral acts as a “go-between”) or to a less active role for the neutral. It involves bringing a neutral third party, called a conciliator, into the negotiation process, but the aims of conciliation may vary, depending on whether it is conducted in a private setting or in a court setting. Generally, the conciliator assists parties in reconciling their differences by performing the role of a go-between, communicating each side’s position and settlement options to the other.

In a court setting, on the other hand, the conciliation may take the form of a “Conciliation conference”, whereby a retired judge or neutral appointed by the court confers with litigants and their lawyers quite early in the litigation process. The parties may be required to submit summaries of their cases, lists of witnesses and evidence in advance of the conference, for the purpose of allowing the conciliator to become familiar with the various aspects of the case. Again, the conciliator’s role may vary: He may offer settlement assistance, or he can also act as a litigation advisor answering questions about discovery and other issues, helping each party to complete the necessary steps to prepare the case for trial if attempts to settle are unsuccessful.

²³ In cases where the arbitration is conducted by a three-person panel, the common practice is for each side to choose an arbitrator, and the two arbitrators then select the third, usually the chair. It is this third individual who is essentially the real “neutral”.

4. Negotiation

This process is voluntary, usually informal, and the parties attempt to arrive at a mutually acceptable agreement. Negotiation has been said to be a fundamental skill that all lawyers are required to practice, as virtually every aspect of a lawyer's work involves negotiation in one form or another. Negotiation is a consensual bargaining process, the whole point of which is to achieve an advantage which is not possible by unilateral action.

Negotiation differs from other methods of dispute resolution in the degree of autonomy experienced by the disputing parties who are attempting to reach agreement without the intervention of third parties such as judges, arbitrators and mediators.

5. Neutral Fact Finding

This is another adjudicatory process, in which the neutral third party gathers information from all the parties in order to make a determination of the facts. The determination is then made public, and recommendations for final resolution of the matter may also be included in the fact-finder's report. Neutral fact-finding is used primarily in the resolution of public sector labour relations and disputes. It should be noted that the process is only quasi-adjudicatory because the recommendations of the neutral are not final.

6. Structured Settlement Conference

This is a procedure aimed at pre-trial settlement, usually ordered and performed by a judge in an increasingly common effort to encourage parties to agree to a compromise settlement, as a means of disposing of cases expeditiously.

7. Private or Special Judging

Private or special judging is another ADR tool that falls within the adjudicatory sphere. Parties hire a retired or former judge to hear the case and render a decision. The judge, also termed a referee, can then decide the relevant issues of the case. Use of a private judge has been said to be probably most useful in cases where a dispute of both law and fact is the impediment to settlement. In such instance, the parties require a decision-maker who possesses judicial expertise, and therefore select a former judge.

E. COMBINED PROCESSES AND HYBRIDS

The most interesting aspect of ADR is that it is possible to design a specific ADR procedure to suit the parties to the dispute. The various processes mentioned earlier may be blended to create a completely new device, which is termed a Hybrid. The Most common combined process is Med-Arb, which combines the mediation and arbitration processes. Other methods of these hybrid processes are, Mini-trials, Summary Jury Trial.

1. Med-Arb

This is a two-step dispute resolution process involving both mediation and arbitration, which offers disputing parties the best of both worlds, opportunity to take control of the dispute resolution process, as well as designing their own agreement through mediation, while at the same time resting assured that an arbitrator can always step in to resolve the dispute where mediation collapses - without resorting to litigation.

Med-Arb has been applied in so many instances that modifications have resulted, and there are currently three different versions of the Med-Arb process.

2. Mini-trial or Executive Tribunal

Mini-trials are primarily used in large corporate litigation. This is a hybrid of negotiation, mediation and case evaluation. The philosophical basis of a mini trial is the realisation that mutual benefit may be gained by each corporation or company in resolving disputes short of protracted litigation, because continued business dealings will enhance each company's profitability. Thus we see that preservation of the business relationship is a key element in the resolution.

Abbreviated presentations by advocates are made directly to the parties, to enable them to evaluate the strengths and weaknesses of both sides of the case and to assist them in deciding whether to proceed to trial or settle. This is followed by direct negotiation by the corporate executives, usually without the attorneys or the neutral present. If negotiations are unsuccessful after a predetermined amount of time, then the expert advisor provides a non-binding opinion or evaluation regarding the merits of the case, which is once again followed by negotiations. If a resolution is still to be reached, the neutral may act as a mediator.

As we examine the ADR processes described above, it should be foremost in our minds that the processes have been designed to assist disputing parties in reaching a final resolution of a matter, and exactly how that will be accomplished will differ according to the process selected. It is clear that there is no exact or specific scientific means for choosing which process is most appropriate. Of course, it is imperative that lawyers make such choices based upon the needs of the client and with awareness of the needs of others. Much of this determination will be a matter of instinct and experience as the Lawyer gains familiarity with the various processes involved and the advantages and disadvantages to each different type of dispute. As Kovach suggests, perhaps it is only with continued use that the answers will become clear.

However, that ADR has come to be so increasingly recognised not as a separate system from the courts but as truly alternative, is a clear indication of the recognition that ADR processes can be used as a complementary system to that of traditional

litigation, and more lawyers are utilising them to their benefit and of course, the benefit of their clients. Clearly, these processes should be viewed more as “tools of the trade”, and ADR must be seen to enhance rather than restrict, the lawyer’s practice.

It is hoped that this study will provide an understanding for the Lawyer as to his role in the evolving legal system, by creating an insight into the array of alternatives before him in his function as problem-solver. Advocacy, albeit the flagship of any practising lawyer - inside or outside of litigation - must be seen as simply one approach to dealing with a problem.

CHAPTER II

Historical Background Of The Alternative Dispute Resolution Movement

"The Law is a tool, not an end in itself. Like any tool, particular judicial mechanisms, procedures or rules can become obsolete. Just as the carpenter's handsaw was replaced by the power saw...we should be alert to the need for better tools to serve our purposes."

Justice W Burger

I. INTRODUCTION

Over the past two decades, there has been a growing interest among advocates in the use of alternative dispute resolution (ADR) techniques to resolve their client's disputes more efficiently and economically, and with less risks and better results. In the face of bottlenecks and backlogs in the system, courts and members of the world-wide legal community have been part of the movement seeking means other than litigation for resolving disputes. These developments should not be misread as suggesting that alternative dispute resolution techniques are intended to replace adjudication or traditional litigation. Rather, ADR should be viewed as supplemental to court efforts.

Perhaps the increasing significance and popularity of ADR in recent times has been due to the fact that concerns over costs and delays in litigation procedures, as well as the increasing globalisation of the modern business world have led to the development of more flexible means of resolving disputes which provide alternatives to court-based litigation governed by the law and procedure of a particular state or country.²⁴ Specialisation in various fields of the law and a legal system that is

²⁴ Paul Mitchard; A Summary of Dispute Resolution Options, Martindale-Hubbell International Arbitration and Dispute Resolution Directory, as cited by Patrick Matibini in his paper "Alternative Dispute Resolution", presented to the Judges' Seminar held in Livingstone, in July 1998.

responsive to the needs of the commercial community are prime considerations in terms of investment decisions.

Although ADR is relatively new to the Zambian judicial system, ADR programmes have been in existence and used, particularly in the United States of America, for as long as three decades. As Nolan-Haley submits, ADR first assumed the attributes of a law reform movement in the early nineteen seventies, when many observers in the legal and academic communities in America began to express serious concerns about the negative effects of increased litigation.

As we have noted, the historical development of ADR may be traced to the United States, where its use has developed over the past three decades into an international movement for law reform in respect of the distribution of justice. This Chapter explores the general historical background on the international plane as well as, more specifically, the historical background and development of ADR in the Zambian Judicial system.

II. INTERNATIONAL DEVELOPMENT OF ADR

Over the past three decades, with the broad range of protection being granted by new legislation covering consumer and civil rights for individuals, the search for redress and protection of those rights through the legal system was rapidly becoming a complex exercise. A veritable "litigation explosion" had erupted, as more and more people sought to "have their day in court".²⁵ Court congestion, high legal costs and delays in the administration of justice were major considerations as people began to look for alternatives to court adjudication of disputes.

In the United States, the search for alternatives culminated in 1976, with the Roscoe E Pound Conference on the Causes of Popular Dissatisfaction with the Administration of Justice (Pound Conference) convened by the former Chief Justice Warren Burger, in Saint Paul, Minnesota. At this conference, academics, members of the judiciary, and public interest lawyers joined together to find new ways of dealing with disputes, and much of today's literature on ADR incorporates many of the papers that emerged from that conference, and which form the basic understanding of dispute resolution today: Professor Frank Sander's "Varieties of Dispute Resolution" and former Chief

²⁵ Jacqueline M Nolan-Haley, *Alternative Dispute Resolution* (1992).

Justice Burgers' "Isn't there a better way?" are two prime examples. The American Bar Association established a Special Committee on Minor Disputes in 1976, which has now become the Special Committee on Dispute Resolution.

By the 1970s, the first mediation and arbitration programmes had been implemented in district courts in the United States. Professor Frank Sander's proposal of the idea of a multidoor courthouse where individual disputes would be matched to appropriate processes such as mediation, arbitration, fact finding and malpractice screening panels, was adopted in 1976 by the American Bar Association, which established three multidoor courthouses in Houston, Texas, Tulsa, Oklahoma and the District of Columbia. The success of these programmes led other courts in the United States to begin similar programmes. By the 1980s, additional expansion of ADR occurred with the innovation of summary jury trial and early neutral evaluation programmes. In 1988, the US Congress authorised ten district courts to implement mandatory arbitration programs and an additional ten to establish voluntary arbitration programmes.²⁶

Further impetus to ADR in the United States came with the passage of the Civil Justice Reform Act in 1990, which requires all district courts to develop, with the help of an advisory group of local lawyers, scholars and other citizens, a district specific plan to reduce cost and delay in civil litigation. ADR is one of the six civil management principles recommended by the statute.

Today in the United States, most state and federal bar associations now have ADR committees. ADR has gradually been added to Law school curricula, and now the majority of law schools offer one or more ADR courses or specialised courses in areas such as mediation and negotiation. Several law reviews are devoted solely to the study of alternative dispute resolution, and similar developments have occurred in graduate and business schools.

But ADR has not been without its critics. Some critics have charged that in our eagerness to adopt alternatives to litigation we risk losing the protection of the rule of law. Other critics are concerned that some forms of ADR, such as court annexed

²⁶

Elizabeth Plapinger and Donna Stienstra, ADR and Settlement in the Federal District Courts,

mediation, may become a lesser standard of justice for the poor who cannot afford lawyers. Professor Owen Fiss suggests that enthusiastic adoption of ADR minimises the importance of lawsuits in responding to public policy issues. He views adjudication in more public terms: "Civil litigation is an institutional arrangement for using state power to bring a recalcitrant realist closer to our chosen ideals. We turn to courts because we need to, not because of some quirk in our personalities. We train our students in the tougher arts so that they may help secure all that the law promises, not because we want them to become gladiators or because we take special pleasure in combat."²⁷

However, even in the face of such criticisms, the ADR movement has continued to grow.²⁸ McThenia and Shaffer submit that the "real divide" between their views and those of Fiss may not be their differing views of the sorts of cases that now wind their way into American courts, but more fundamentally, it may be their different views of justice. Fiss, they state, comes close to equating justice with law. However, As Nolan-Haley suggests,

"One thing that we have realised is that there are limits to the judicial process. High legal costs and long delays put a damper on the exercise of an individual's right to go to court. Once a case is in court, it is the judges and lawyers who are the major participants while the affected party often sits on the sidelines. A remedy will be fashioned by a neutral third party, applying a rule of law. Usually, it will be a money judgment. The judicial approach does not consider the affected party's feelings and allows little room for other values such as an apology to the malpractice victim or substitute employment for the injured worker.

On the other hand, ADR remedies are tailored to meet individual needs. The use of ADR personalises what federal judge John Noonan calls the faces and masks of the law." People's names and feeling are important in a process such as mediation. Private as well as public agendas are important in negotiation. The parties' notion of fairness is important in structuring an arbitration. Advising a client to apologise may be just as crucial as counselling her to file or defend a lawsuit."

published by the CPR Institute for Dispute Resolution.

²⁷

Professor Owen Fiss is one of the major critics of ADR as opposed to adjudication. His article "Fiss, Against Settlement" was the source of much debate amongst ADR lawyers. McThenia and Shaffer in their article "For Reconciliation" state that Fiss attacks a "straw man", and that the soundest and deepest part of the ADR movement rests not on the assumptions Fiss makes, but rather, on values - of religion, community and work place - that are more vigorous than Fiss thinks.

The interest in ADR continues to grow, and in the face of today's changing legal environment and attitudes towards dispute resolution, it is more than likely that the trend towards ADR is unlikely to shift or wane. As Nolan-Haley observes, in the last decade we have seen an enormous amount of study by cultural anthropologists, sociologists and lawyers on the kinds of disputes that are resolved and how they are resolved and those disputes that are not resolved.²⁹ It is only through a clear understanding of the underlying factors of disputes and dispute resolution that today's lawyer can truly present his client with the best options through which to seek justice.

III. HISTORICAL DEVELOPMENT OF ADR IN ZAMBIA

Throughout the world, it is common experience that societies have developed their own systems of dispute resolution mechanisms for the promotion and maintenance of law and order. The development of a system of justice in Zambia dates far back into the pre-colonial era. In Zambia, just as in most African societies, a traditional form of 'mediation' has always formed the basis of the societal dispute resolution structure. Village elders, chiefs, village headmen and counsellors, all had varying roles to play in the distribution of justice and the resolution of conflicts and disputes within the community, and even then, there existed an indigenous court. As observed by J J Moffat, in a Foreword to Hans Cory's book on Sukuma Law and Custom,

"It is common knowledge that the courts are no new thing introduced by the Europeans, like the use of the plough or the bicycle, but are an outcome of those local arrangements which everywhere obtained for the settlement of disputes...and essential function of both chief and village headman was to administer justice."³⁰

The evolution of a dispute resolution system in Zambia may be divided into three developmental periods, as described by Silungwe, J³¹, being:

i. Pre Colonial Period;

²⁸ See note 3, *supra*.

²⁹ Jacqueline Nolan-Haley, *Alternative Dispute Resolution* (1992).

³⁰ Moffat, J J, in Cory, Hans; *Sukuma Law and Custom*, (1953).

³¹ The former Hon. Mr Chief Justice Annel Silungwe, "Alternative Dispute Resolution"; Paper presented at the First Judicial and Law Association of Zambia Seminar at Lusaka, October 16-17, 1990.

- ii. Colonial Period; and
- iii. Post-Independence Period.

1. PRE-COLONIAL PERIOD

In this period, prior to the advent of the colonial era, the dispensation of justice operated via the apparatus of village administration, running through that of a chief, paramount chief and, in the case of the then Barotseland, a king³². During this period, the machinery of justice was based on customary law. As already observed, these village elders and leaders played an important role in their judicial organisation, and were just as respected as any system of justice today. As Moffat noted:

“There is no doubt that these ‘courts’ administered substantial justice by local standards; that they were popular, and that the people had confidence and trust in them.”³³

During this era, people lived in close-knit societies, and the promotion and maintenance of societal harmony were of paramount importance, and traditional institutions such as the extended family played a crucial role in fostering social relationships and harmony, particularly in the resolution of differences, quarrels or disputes between members of the society. The need to maintain relationships was therefore an important aspect of societal life, just as it is today, and so the judicial system was built around this objective. As Silungwe notes:

“The indigenous judicial system was characterised by simple and informal procedures; compensation rather than punishment; peaceable reconciliation and mediation and, in some cases, arbitration. This was so because of the importance attached to the notion of settling disputes without the rupture of harmonious relationships or the creation of lifelong enmity...Premium was thus placed on the promotion and maintenance of harmonious relationships as a pragmatic means of engendering order, tranquillity [and] social equilibrium...in society.”³⁴

³² King Lewanika of Barotseland.

³³ Moffat J J, op. cit. It should be noted that although these observations were made in reference to the indigenous courts of the then Tanganyika, they were equally true of what is now Zambia.

³⁴ Silungwe, J, op. cit.

Thus we see that even then, conciliation, mediation and arbitration were an integral and indeed, the most important, part of the judicial system in pre-colonial Zambia. The parties were allowed a certain element of control in the resolution of their dispute, first among themselves, and, where this failed, a neutral third party, acceptable to the disputants would enter the fray to attempt to resolve the dispute through skilful mediation. That is to say, the third party would try to help the parties to arrive at their own solution by using various techniques to achieve this goal:

“Such a person would then try to help the parties to arrive at their own solution without making recommendations to them (i.e. conciliation); listen to the views of the parties and make recommendations which the parties may, or may not accept (i.e. mediation); or receive evidence and thereafter impose a solution on the parties (i.e. arbitration).”³⁵

It thus emerged that a village headman, a chief or an individual whose personal ability to skilfully manipulate relationships and steer them out of the dispute without causing undue animosity between the parties, was able to command the loyalty of a large following and to acquire great prestige and political influence within his society. As a result of this, such people had to constantly broaden the field of their enquiries and consider the total history of relations between the disputants, not just the narrow issues raised by any one of them. Furthermore, upon successful conclusion or settlement of the matter, the disputants were often required to perform publicly some tangible or concrete act of reconciliation, such as a handshake or an exchange of white chickens as a demonstration of mutual goodwill and peace. A stubborn disputant who refused to publicly lay the matter to rest in this manner put himself in danger of losing respect of the community, and since the prospect of being ostracised was universally dreaded, such failure to co-operate was a rare occurrence.

2. COLONIAL PERIOD

With the advent of colonial rule in Zambia came new institutions for dispute settlement. The British brought with them the Anglo-Saxon common law system, but allowed indigenous judicial systems to continue, and these indigenous courts became known as “native courts”. In urban centres, the native courts were established as

³⁵

Silungwe, op. cit.

“Native Urban courts”. However, these courts were viewed as inferior to the newly introduced adversarial court system, as native customs were considered “repugnant to natural justice and morality”, and were outlawed.³⁶

On the other hand, a positive aspect of this era was that, despite the disapproval of the new colonial masters, the traditional indigenous system of justice continued to exist within these confines, and so the two systems - adjudicatory and conciliatory, came to co-exist side by side. L Nadar points out the disparity between the two systems; he describes ‘tribal “moots”’; an informal mediation process which continued after the imposition of colonial law:

“A court system, established by the British, was primarily adjudicative, while a tribal “moot” performed an integrative, conciliatory function. Whereas the court was characterised by social distance between judge and litigants, rules of procedure which narrowed the issues under discussion, and a resolution which ascribed guilt or innocence to a defendant, the moot emphasised the bonds between the convenor and the disputants, it encouraged the widening of discussion so that all tensions and viewpoints psychologically - if not legally - relevant to the issue were expressed, and it resolved disputes by consensus about future conduct, rather than by assessing blame retrospectively.”³⁷

It is quite obvious that in the new adversary system of dispute resolution, there is the implicit assumption that one side is right and the other, wrong. As Silungwe observes, the court operates on the basis of “winner takes all”, and not on finding a way to help the loser adjust to his loss, or to reduce the impact of frustration on the loser that fosters a long-standing or even permanent residue of hostility.

Christianity also played a part in the promotion and application of dispute resolution mechanisms during the Colonial period; where the priest, an elder or a council of elders played an important role in dispute resolution.

³⁶

M Fortes and Evans Pritchard Systems (1975).

3. POST INDEPENDENCE PERIOD

As Zambia attained her independence on October 24, 1964, Silungwe notes that the end of the colonial era saw a number of milestones that had an impact on the history of dispute resolution in the country:

- Firstly, the independence of the judiciary was established under the Independence Constitution.
- Secondly, the native and urban native courts were divorced from provincial administration, brought under the aegis of the judiciary and reconstituted as local courts.
- Thirdly, the newly acquired freedom of movement which had been controlled during the colonial period meant that rural dwellers began to flock to urban areas in search of 'greener pastures'.

Certainly, urbanisation has had a massive impact on the social fabric of the rural population, which, to this day, have yet to retain the harmony and social integration that existed prior to the colonial era.

As a result of this massive exodus into the urban areas, society became more impersonal and fragmented; and at the same time, more complex. The traditional institutions such as the extended family and the church, which had played a major role in the harmonious resolution of disputes, had begun to break down, and no longer retained the importance they once had. Increasingly, people resorted to litigation for the resolution of their disputes. Effron described this penchant for litigation as "adjudication's monomania",³⁸ which has precipitated the backlog of cases in the court system, resulting in increasing court delays.

However, as Silungwe points out, "experience has shown over the years that an increase of court personnel and/or court facilities does not offer a lasting solution as the volume of caseload continues to be on the upswing."

³⁷ Nadar, L; *Law in Culture and Society* (1969).

³⁸ Effron, Jack: *Alternatives to litigation: Factors in Choosing*, the *Modern Law Review*, Vol. 52. July 1989.

Ronald L Olson, Chairman of the American Bar Association Special Committee on Dispute Resolution, might just as well have been speaking of the Zambian judicial system, when he observed that:

“Increased urbanisation, broadening government involvement in everyday life, and a waning of non-judicial institutions traditionally engaged in dispute resolution have combined to produce an unprecedented explosion of formal litigation. Judicial institutions have not kept pace. As a result, courts have been congested, living costs having reduced the effectiveness of the judicial system, and justice as well as mercy has become more remote.”³⁹

As court congestion increased and the costs of litigation also began to soar, it became clear that there was need to explore alternative avenues of dispute resolution. As attention focused on the success of alternative dispute resolution mechanisms on the international scene, so lawyers and members of the bench in Zambia began to cast their own interests in that direction. With insightful accuracy, certain members of the bar and bench began calling for reform in the law to introduce ADR mechanisms into the judicial system, and the ADR movement in Zambia began its steady progress.

In 1990, the then Chief Justice Annel Silungwe pointed out Zambia’s need to build on her traditional ways of dispute resolution, stressing that it was both “urgent and imperative for most people involved in disputes;” and he called for a greater use of alternative dispute resolution mechanisms.

It should be noted that although Zambia has had an Arbitration Act since 1933, arbitration has been sparingly utilised as an alternative to litigation, and this is probably because of the lack of knowledge in this area, particularly as regards the advantages of arbitration as compared to litigation. Furthermore, with the current trend towards harmonisation and integration of the law relating to ADR in general, it seems clear that our arbitration is archaic and in need of reform. A major drive towards the revitalisation of arbitration in Zambia is currently under way.

³⁹ As quoted in “Alternative Dispute Resolution” by Annel Silungwe (1990).

The ADR movement in Zambia has been greatly assisted by USAID and other international donor institutions. Over the past few years, in conjunction with the Law Association of Zambia, USAID, USIS, FICA, and the ITC have all played a major role in creating an awareness amongst the legal fraternity of ADR and the need to implement ADR in Zambia. A number of workshops and seminars have been conducted to this purpose, and at this point, we would briefly list a number of milestones in the recent history of ADR in Zambia, which we shall address in detail in later chapters of this study.

- In 1996, LAZ, in conjunction with USAID, organised a seminar on “Alternative Dispute Resolution, attended by judges from the Supreme Court and the High Court of Zambia, five judges from the United States and several senior Lawyers from the Zambian Bar. The purpose of the seminar was to instil an awareness of ADR in the legal fraternity of Zambia, and to lay the foundation for the integration of ADR into the Zambian Judicial System.
- In 1997, mediation was introduced into the jurisdiction by the passage of Statutory Instrument No. 71 of 1997, being the High Court (Amendment) Rules of 1997. This paved the way for the necessary training of mediators, which has been undertaken by LAZ, with the co-operation and assistance of USAID and FICA.
- In 1998, LAZ established an Alternative Dispute Resolution Committee, as a way of ensuring continuity in the process of introducing ADR into the system.
- 1999 saw the passage of Statutory Instrument No. 29 of 1999; the High Court (Amendment) Rules, 1999, introducing for the first time a Commercial list in the High Court for Zambia, and incorporating fundamental provisions for the mediation process in commercial actions.

With the ADR drive in Zambia rapidly gaining force, major developments are under way, and we shall discuss these developments in later chapters. In the meantime, it seems clear that there is room for much more to be done, as we shall see when we make our recommendations. However, there is no doubt that ADR is not simply a

transitory system, or a “passing fad”. Far from the misguided conception that ADR is an attempt to displace litigation, ADR must be seen as a complementary system, with the objectives of:

- relieving court congestion, as well as undue costs and delays;
- enhancing community involvement or participation in the dispute resolution process;
- facilitating access to justice; and
- providing an effective and efficient dispute resolution.

ADR is rapidly gaining force on the international plane, and a knowledge of ADR must be seen as essential in any legal sphere. It is reiterated that ADR must be viewed as part of the tools of the lawyers’ trade; and, as we enter the new millennium, it is hoped that more lawyers will take up the challenge to use not just one but all the tools at their disposal, in the pursuit of justice on behalf of their clients.

CHAPTER III

GENERAL ASPECTS AND APPROACHES TO ADR PROCESSES

“Justice is never given, it is always a task to be achieved.”

Friedrich

I. INTRODUCTION

This chapter seeks to discuss the various philosophical aspects of Alternative Dispute Resolution (ADR) in general. The chapter provides an underlying basis for the following chapter, and seeks to provide an insight into the important factors to be borne in mind by the lawyer when choosing the appropriate process for his client's needs.

It is a common adage that justice must not only be done, it must be seen to be done, and it is here that the needs of the client come into special play. ADR provides an opportunity for the client to directly participate in the resolution of his problems and in this way, arrive at a solution that is both acceptable and satisfactory to him. The more involved the client feels in the actual process, the better he feels his interests are being considered and taken into account, and in the final analysis, it is this that will lead him to believe that in his case, justice has been done.

Interconnected with the concept of justice is the degree of autonomy provided by each ADR process in terms of the disputing parties' participation. The more autonomy and control over the process that the parties have, the more likely they are to accept and comply with the results of the process.

A further factor to consider is the need to preserve the existing relationship. As stated in our introductory chapter, many relationships have suffered complete breakdown as

a result of litigation, whilst one of the basic tenets of ADR is to maintain existing relationships wherever possible. Today's lawyer must understand how to manipulate the various mechanisms of dispute resolution in order to achieve this objective.

As pointed out earlier, a lawyer should view himself as more than just an advocate; he should consider his overriding function as that of problem-solver, and advocacy as simply one approach to dealing with a problem.

ADR provides the means by which lawyers can broaden their functions and make them better able to respond to the varying needs of each individual client. The concept of the lawyer as advocate must be tempered with idea of the lawyer who places the interests of the client before his own egotistical needs. ADR provides the lawyer with a full array of tools at his disposal with which to handle his client's particular problem.

The adversarial perspective is fraught with difficulties. So long a part of the traditional role of the lawyer, it has led to the 'undertraining' of students in law schools, who have been steeped in the adversary tradition rather than the skill of resolving conflicts. However as Auerbach points out, litigation does have its 'dark side'⁴⁰, and for this reason, lawyers must become alert to the need for better tools to serve their clients' purposes. It is therefore just as important for today's lawyer to develop the skills necessary to use ADR processes, as it is for him to develop his advocacy skills.

As we have pointed out, it would be a mistake to view ADR as a replacement of the judicial system as it stands today. Rather, ADR must be considered as a complementary process, a viable alternative to litigation where it is imperative that in the process of resolving a problem, important ties and relationships are not severed by the hostility and resentment that accompanies many a lawsuit.

Finally, in making the appropriate choice of alternatives to suit the needs of the clients and indeed, all the parties involved, it is important that today's lawyer must

have a clear understanding of three broad approaches to ADR processes as outlined in our introductory chapter, namely, the Adjudicatory, Evaluative and Mediative approaches under one of which heads each ADR process falls. We shall examine these three broad approaches in order to lay the foundation for our further discussion on the specific aspects and practical application of each ADR process, in the next chapter.

II EVALUATING A CASE FOR ADR PROCESS

In allocating cases to particular dispute resolution processes, there are a number of factors the lawyer needs to consider. In an interview with a Veteran Neutral, Eric Green found that the most important factors to be considered are:

- a. What is the importance of "law" or the courts to the processing of the dispute?*
- b. How important are speed and keeping down costs?*
- c. Is a "distributive" or "integrative" solution more appropriate?*
- d. How will the process affect the outcome, each party, and the relationship between the parties?*
- e. What should be the role of the parties in resolving the dispute?⁴¹*

The following is a brief exposition of these factors.

1. The Importance of "Law" or the Courts

The importance of law or the courts to the processing of the dispute may be a significant factor in determining whether the case should be resolved in a court setting or whether an alternative process might be more appropriate. For example, criminal matters and certain conduct regulated by statutes designed to protect the public.

⁴⁰ J Auerbach, *Justice without Law* (1983), in Riskin & Westbrook, *Dispute Resolution and Lawyers* (1987).

⁴¹ Professor Eric Green, *Thoughts on ADR: an interview with a Veteran Neutral*, (1986) in Riskin & Westbrook, *Dispute Resolution and Lawyers*, (1987)

A closely related aspect is the public-private consideration. There may be certain social value in deciding matters in a public way, but on the other hand, many parties prefer privacy, and this has been a major factor in influencing some individuals and organisations to choose ADR techniques. However, in cases where there are no important public policy or principles at stake, the parties may wish to get the best result possible at the least cost.

2. Speed and Expense

A major argument for increased use of alternatives to traditional litigation is that they can save time and money, but this is of course not always true. In some situations, access to court may be quicker than in others. Often one has to balance the idea of saving time against the time lost in preparation and carrying out whatever process is used. Some disputants may want to trade time for money, whilst others may want to delay a resolution, in the event that the other party may weaken and give in.

3. Effect of the Outcome on Each Party and the Relationship Between the Parties.

Adjudication is more likely to produce a “win-lose” solution, thereby creating a decisive precedent which may be harmful to one or all of the parties in the future. Consensual processes have the greater potential for developing integrative solutions from which all parties can benefit. The need to preserve the parties relationship is a major factor in determining an ADR process, and this concept is explored in the next section of this Chapter. Suffice to say, although in most cases litigation is likely to harm the parties’ relationship, there may be some instances in which a judicial solution is required to put the parties back into a proper relationship. Indeed, in other cases, the parties do not care about their future relationship.

The flexibility of an ADR process in achieving a result that responds to more than one interest of the parties is an important consideration. For example, consensual processes, like negotiation and mediation, have the greatest capacity for helping the

parties address many issues and thereby enhance their relationship, but they also make the parties interact in ways that may be detrimental to some relationships.

4. The Role of the Parties in Resolving the Dispute

It should be noted that any of the dispute resolution processes can be carried out so that the actual parties to the dispute are active in varying degrees. For instance, clients can be more or less involved in preparing their cases for trial. D Rosenthal suggests that plaintiffs in personal injury cases who are active in preparing their cases get larger recoveries⁴². Certainly, in such instances, the disputant will get some degree of satisfaction that everything that can be done is being done in his case, but the level and nature of the disputants involvement will vary with his perceptions, values and wishes, as well as his relationship with his lawyer and his relationship with other disputants. Indeed the extent to which the parties wish to develop their own solutions is another key variable.

III UNDERLYING CONCEPTS OF ADR

Close examination of any ADR process will reveal that, quite apart from the factors to be considered in choosing the appropriate process, there are certain underlying concepts that characterise each process, and which provide a common thread through these processes. As we examine these concepts, it will be seen that each is to some extent inter-connected with the others, and that indeed, each concept may have varying impact upon the choice of the process as well as the actual process itself.

A. THE CONCEPT OF JUSTICE

Central to any ADR process must be the concept of justice. As we have seen earlier, people who bring their case before the judicial system are often faced with a long, drawn out process, plagued with delays and unforeseen set-backs: from the availability of the judge to constant interlocutory applications on seemingly irrelevant

issues on the part of their adversary in the matter. As a result, the case is taking up a large proportion of their time: their lives have been disrupted; a formerly satisfactory relationship has taken a nasty turn for the worse; important decisions have to be put on hold pending the outcome of a matter, and until this is settled, it is almost impossible to continue life as normal. Whilst it is accepted in theory that justice must be delivered with speed and efficiency, in practice, court machinery is often costly and slow, the courts tend to intimidate and confuse parties by their formal procedures, and in some cases tend to deliver outcomes that seem not to reflect the interests or values of any of the parties.⁴³ This negative view of court machinery is richly illustrated by Auerbach:

*"Law and litigation have their darker side. The legal process can be threatening, inaccessible, and exorbitant - usually it is all of these for the least powerful people in society. It is more likely to sustain domination than to equalise power. Litigation expresses a chilling, Hobbesian vision of human nature. It accentuates hostility, not trust. Selfishness supplants generosity. Truth is shaded by dissembling. Once an adversarial framework is in place, it supports competitive aggression to the exclusion of reciprocity and empathy. Litigation can be as bizarre as Alice's Wonderland. (Some of Alice's strangest adventures, after all, occurred in a court of justice.) As a litigant tumbles down the slippery slope into dense procedural thickets, familiar landmarks recede. The journey may even resemble a sudden regression to childhood. There is a new language to learn, for even articulate adults stumble over legalese. Although a lawyer can provide reassuring guidance, in loco parentis, the price of protection is still dependence. Even as a dangerous adversary is fended off, the judge looms as a menacing authority figure, empowered to divest a litigant of property or liberty. Autonomy vanishes as mysteriously as the smile of the Cheshire cat."*⁴⁴

As we have seen, the formal litigative process gives parties to a dispute the sense that once they have turned over their problems to lawyers and courts, the problem takes on a legal life of its own, and their feeling of autonomy and control over the matter is lost. It is this loss of control that leaves the parties feeling intimidated by the legal system, and a great contributor to the stress factor that often accompanies litigation.

⁴² D Rosenthal, *Lawyer and Client: Who's in Charge?* (1974) in Riskin & Westbrook, *Lawyers and Dispute Resolution* (1987)

⁴³ Roscoe Pound, *The Causes of Popular Dissatisfaction with Administration of Justice*, 35 FRD 273 (1906), in "Legal Policy and Access to Justice through Courts and Mediation" by Craig A McEwan and Laura Williams, *Ohio State Journal on Dispute Resolution*, Volume 13, 1988.

⁴⁴ J Auerbach, *Justice Without Law?* (1983)

It is therefore not uncommon that parties are dissatisfied with the result, as well as with the manner in which their dispute had been handled by the courts.

All this then raises serious questions about the capacity of courts and formal adjudicatory processes to deliver justice in a way that is both meaningful and acceptable to the disputants. Auerbach suggests that as cynicism about the legal system increases, so does enthusiasm for alternative dispute-settlement institutions, and that these alternatives are designed to provide a safety valve, to siphon discontent from courts.⁴⁵

The quest for justice is both challenging and elusive, and any attempt at defining justice only sets it further from one's grasp. As Dias states, justice is perhaps too vast to be encompassed by one mind.⁴⁶ It is not something for which a clear and straightforward formula might be packaged and set down; rather, justice is a process, a complex and shifting balance between many factors.

The concept of justice therefore, must be a main objective of any ADR process, because justice entails empowerment of individuals to shape decisions about their own lives and conflicts on terms that are meaningful to them. From this viewpoint then, access to justice means allowing people to take an active part in the resolution of their dispute, in such a way that the parties do not feel that they have been coerced into accepting a particular decision or forced into some form of compromise that is less than satisfactory.

The aim of ADR processes in the quest for justice therefore, is to obtain an outcome that takes into account the values of all the parties involved because justice then, can only be achieved where the parties feel that all their interests have been considered in reaching that resolution.

⁴⁵ J Auerbach, *Justice without Law?* (1983)

B. THE DEGREE OF AUTONOMY

In choosing the appropriate ADR process, another major consideration is the importance of autonomy to the parties concerned - that is to say, how important it is to the parties that there be little or no intervention of third parties such as judges, arbitrators or mediators in the process of reaching an agreement or resolution to the problem. Since each ADR process has its own features and characteristics, the degree of autonomy varies depending on the chosen process. Likewise, each disputing party may have varying views of the degree of autonomy they wish to have during the proceedings. For example, in some cases, the parties may prefer the guidance or direction of a third party, whilst in other cases, the parties may prefer as little intervention as possible. Thus, the parties who prefer the formality of third party guidance and intervention, but without the strict adherence to court procedure, may choose a process like arbitration or its hybrid, Med-Arb, whilst the parties who prefer a higher degree of autonomy may choose a process like negotiation or mediation.

Clearly, the degree of autonomy in each ADR process will be an influential factor in the parties' choice of process, and it is therefore necessary for the lawyer to have a clear understanding of the clients' needs in order for him to help them make an appropriate choice of the ADR process in pursuit of their objectives. Most ADR processes have a fair degree of autonomy in terms of participation of the disputing parties, and this can be a strong tool of empowerment particularly when weighted against the rigidity of the process of litigation.

C. THE NEED TO PRESERVE THE RELATIONSHIP

The need for disputing parties to preserve their existing relationship will obviously affect the strategic planning in terms of their approach to the dispute resolution process, as this will differ depending on how the process is classified. Certainly, where the relationship is not important to the parties, this is not an issue, but where the relationship is a major consideration, then any tactics which are likely to harm that relationship would of course be inappropriate. Thus, one of the most important

questions the lawyer should answer in his search for the appropriate process, will be: Is the relationship an ongoing one, which looms large in the life of both parties? If there is an expectation of frequent or valuable interaction in the future, then the value of the continuing relationship may furnish an incentive for both parties to participate in an alternative dispute resolution process even though it lacks the coercive effects of the court systems.⁴⁷ As Murray, Rau and Sherman point out:

“When the potential benefits from future contacts (and the costs from disruption or termination) are great, a process that seeks to restore and maintain satisfying patterns of personal interaction seems called for. Such a process might be structured in such a way as to help the parties reduce the causes of future conflict by helping them to deal with and work at the ‘real,’ underlying problem in their relationship. Merely getting the parties to understand and to talk directly to each other in an ‘atmosphere of mutual recognition and empathy’ may go a long way in this respect.”⁴⁸

The writers point out further that adjudication, by contrast, seems ill-suited to the task, since it can easily sour future relations by escalating conflict and focusing on symptoms rather than on underlying causes.⁴⁹

However, whether disputants ignore their differences, negotiate, submit to mediation or arbitration, or retain lawyers to litigate is a matter of significant choice. As Professor Auerbach observes, how people dispute is, after all, a function of how (and whether) they relate.⁵⁰ He points out that in relationships that are intimate, caring and mutual, disputants in fact behave in a rather different manner than their counterparts who are strangers or competitors: “Selfishness and aggression are not merely functions of individual personality; they are socially sanctioned - or discouraged. So is the decision to define a disputant as an adversary, and to struggle until there is a clear winner and loser; or alternatively, to resolve conflict in a way that will preserve, rather than destroy, a relationship.”⁵¹

⁴⁷ John S Murray, Alan Scott Rau, and Edward F Sherman, *Processes of Dispute Resolution: The Role of Lawyers*, (1996).

⁴⁸ John S Murray, Alan Scott Rau, and Edward F Sherman, *Processes of Dispute Resolution: The Role of Lawyers*, (1996).

⁴⁹ Ibid.

⁵⁰ Jerold S Auerbach, *Justice Without Law?* In *Processes of Dispute Resolution supra*

⁵¹ Jerold S Auerbach, *Justice Without Law?* In *Processes of Dispute Resolution*, *ibid.*

Since the preservation of existing relationships is one of the basic underlying principles of ADR, most ADR processes have built-in mechanisms for serving this purpose. For example, the nature of mediation is such that it helps the parties to re-adjust their conflicting perspectives and view their concerns in a much broader framework than simply “legal” issues in a legal system.⁵² This means that disputing parties begin to see themselves and their opponents in a different light; and this is done not by imposing rules on the parties, but by helping them to achieve a “new and shared perception”⁵³ of their relationship.

D. THE ROLE OF THE LAWYER

Practising lawyers may deal with disputes in many ways: giving advice about how to prevent and resolve disputes, they may represent or advise parties in arbitration, mediation or negotiation; and they may also function in neutral capacities, as arbitrators, mediators, fact-finders, or mini-trial advisors.

However, we are all too familiar with the common (mis)conception of the lawyer as the knight in shining armour, which captures the adversary spirit of the lawyer who, identifying with a client seen as weak and wronged, turns to law (in particular litigation) because of its promise of a fair hearing before a disinterested arbiter able and willing to call the mighty to account and to judge their conduct according to law. An illuminating perspective of this popular conception is given to us by Mark Twain, in his story “The War Prayer”⁵⁴, an admonitory tale much remarked upon by legal scholars, which gives us a powerful reminder of the danger in the moral fervour of advocates, which blinds us towards our responsibility about the true operation of the adversary system, the harms we do to our adversaries and the ambivalence of the lawyer’s own moral posture.

Twain tells the story of a country poised on the verge of war; of how the countrymen fervently send up a great prayer, invoking God’s aid in the forthcoming battle, when

⁵² Jacqueline Nolan-Haley, *Alternative Dispute Resolution*, (1992), p.58.

⁵³ Fuller, *Mediation - Its Forms and Functions*, 44 S.Cal.L.Rev. 305 (1971). in Nolan-Haley, *ibid.*

⁵⁴ This short story is reproduced in full in Leonard L Riskin and James E Westbrook, *Dispute Resolution and Lawyers*, (1987).

an elderly stranger enters their midst, and, after pointing out to them how, as they have prayed for their own victory, so they also pray for a curse upon their neighbour at the same time. He points out how they have prayed also for the ravages of war, the thunder of guns and shrieks of the wounded, the wrecking of people's home and the suffering of women and children of their enemy - and all this, ironically, in the name of a God of love and faithful refuge. Having done this with such eloquence that the people are stunned into shocked silence, he then invites them to re-iterate their prayer - if they still desire it.

The moral of Mark Twain's story must serve as a reminder to lawyers to try to see the other side of the problem and encourages us to seek solutions to the problem that will take into account the interests of all the parties concerned, and to simply recognise the other person as more than "the adversary, the enemy." The "War Prayer" has given rise to much debate on the responsibility faced by today's advocates⁵⁵, and, as Gary J Friedman, in his *Comment on the War Prayer*,⁵⁶ aptly puts it: "My responsibility as a lawyer cannot exclude my responsibility as a citizen or a person to the human dilemma that underlies not only my client's situation but the total human situation."

We have seen that in order to reach a conclusion that is acceptable and satisfactory to all the parties involved, a lawyer must examine not only the issue to be resolved, but he must also address the interconnected issue of each party's interest; and in so doing, he must carefully and thoughtfully examine the actual *process* by which the dispute might be resolved. A lawyer must therefore be able to help his clients choose the most appropriate methods to resolve a dispute, and to be able to participate effectively in such a process once it is chosen.

To do this, it is important that the lawyer understand the processes and their advantages and disadvantages in different contexts. Clearly, not all dispute resolution processes are appropriate for any kind of dispute, and indeed, sometimes the best and

⁵⁵ A full debater on Twain's War Prayer is provided in Riskin & Westbrook, *Dispute Resolution and Lawyers* (1987), pp 63-68. See also, E Dvorkin, J Himmelstein and H Lesnick, *Becoming a Lawyer: A Humanistic Perspective on Legal Education and Professionalism* (1981).

⁵⁶ Gary J Friedman, *Comment on the War Prayer*, in Riskin & Westbrook, *Dispute Resolution and Lawyers*, (1987)

only solution is to resort to litigation. Be that as it may, a lawyer must appreciate the impact of the chosen process on those involved, as well as those who may be affected by it. Only once a lawyer has achieved this understanding and appreciation will he be in a position to help his clients or others to choose or use the appropriate process. Riskin and Westbrook stress that the danger of incomplete knowledge of these processes is substantial:

*"The lawyer who considers arbitration the only 'alternative' to litigation, for instance, may inappropriately steer too many of his clients into arbitration, or away from other alternatives."*⁵⁷

An additional danger is that, since any of these processes can be carried out in many different ways, some mediations will look more like arbitration than some arbitrations, and only a keen understanding of the various processes will provide the necessary 'know-how' to make the appropriate choice. Furthermore, the mediator who does not understand the dynamics of negotiation is of dubious assistance to the parties in the mediation, and the same is true for a lawyer who represents clients in a mini-trial. The process will not be effective if the lawyer does not know how to make the chosen process work effectively for his client.

Choosing the "best process" therefore demands much more than deciding whether or not to negotiate, mediate, or arbitrate. It demands that a lawyer and client also must decide how best to carry out a given process in order to achieve their objectives. For example, in a negotiation to consummate a supply contract, a lawyer-negotiator may conceive of his mission as 'adversarial' or 'problem-solving'; and this conception will be an influential factor in the strategies or techniques to be employed⁵⁸. In sum, as Riskin and Westbrook point out, it is imperative that lawyers make such choices based upon the needs of their client and with awareness of the needs of others.⁵⁹

The role of a lawyer in ADR therefore spreads itself across a broad spectrum, through which the common thread must be an understanding of the clients' needs and

⁵⁷ Leonard L Riskin and James E Westbrook, *Dispute Resolution and Lawyers*, (1987).

⁵⁸ The 'problem-solving' approach is addressed by Jacqueline M Nolan-Haley, *Alternative Dispute Resolution* (1992).

objectives as well as a clear understanding of the wide array of ADR processes and how best to achieve those objectives. A lawyer must not only take into account the various underlying factors of each ADR process as outline in this chapter, but he must also have an in-depth understanding of the broad approaches to ADR process so that he may better advise his clients not only on the process involved, but also the mechanics of each process and thereby make a more informed decision. However, it must be pointed out that this task is not a simple one. As Murray, Rau and Sherman comment:

“It is probably illusory to hope to be able to match particular processes of dispute resolution to particular types of disputes ... in any systematic way. Considerations are so diverse, and factual situations so fluid, that the choice may ultimately have to be made in a more intuitive fashion.”⁶⁰

Having said that, it must be pointed out that only a broad understanding of the processes can begin to provide any level of intuitiveness on the part of the lawyer upon whom falls the onerous task of choosing the appropriate ADR process for his client's dispute.

IV. THE BROAD APPROACHES TO ADR PROCESSES

There are a variety of ADR devices through which disputes, conflicts and cases are resolved outside of formal litigation procedures. At the basis of ADR is the negotiation process, but direct negotiations do not always result in satisfactory settlements. When this happens, a third party may be called in to provide assistance in helping the parties come to some resolution. All ADR processes involve a third party neutral, who facilitates a resolution to the dispute. The degree of influence which the third party has over the final result varies with each process, and as such, the type of assistance provided to the dispute depends largely on the neutral's role. That role determines the effect the neutral has on the negotiation, and in fact, what the third party neutral does to assist in settlement defines the actual process.

⁵⁹ Leonard L Riskin and James E Westbrook, *Dispute Resolution and Lawyers*, (1987).

⁶⁰ John S Murray, Alan Scott Rau, and Edward F Sherman, *Processes of Dispute Resolution: The Role of Lawyers*, (1996).

There are primary dispute resolution processes, and there are hybrid dispute resolution processes, the major processes of which we shall discuss in the next chapter.

As outlined in our introductory chapter, all ADR processes may be categorised into three primary types: adjudicative, evaluative and mediative. The following provides a closer examination of these broad approaches to ADR processes.

A. ADJUDICATIVE PROCESSES

Adjudication is the basis of the legal system. In adjudicatory dispute resolution processes, the third party neutral adjudicates, or makes a decision. It is the basis of the legal system that when a case is submitted to the court, someone other than the parties makes the decision. This is often necessary in ADR processes particularly where it is clear that the parties either want or need an outside decision maker to intervene and provide direction so that a solution may be reached. This is the most familiar process to lawyers, where a third party has power to impose a solution upon the disputants. Adjudicative processes usually produce a “win/lose” result. The process is mostly formalised, although slightly less rigid than the courts system. Invariably, the parties agree upon the neutral party whom they have selected to make a decision. The way in which the third party neutral practices the “art of settlement” often varies from case to case and from neutral to neutral.⁶¹ There are no specific techniques for conducting the sessions, and generally, the choice of settlement strategies is left to the neutral.⁶² However, this should not be considered a disadvantage as, more often than not, the whole process will be tailored to suit the specific needs of the particular problem to be resolved.

The choice of the neutral third party will depend largely upon the dispute to be settled, and the objectives of the parties in calling upon the intervention of a third party. Some disputes require that the neutral third party be an expert in the field of

⁶¹ Elizabeth Plapinger and Donna Stienstra, *ADR and Settlement in the Federal District Courts*, (1996), p. 61.

the subject of the dispute, whilst others prefer that the third party be a judge or a senior member of the community. Sometimes, the neutral third party may himself be a lawyer who meets the qualification standards required by the disputing parties. Again, the role of the neutral third party will vary, depending on the party's objectives. In some adjudicatory processes, arbitration for instance, the neutral third party is merely required to hear the case and render a decision, whilst in others, the neutral third party, after gathering information from all parties, makes a decision of the facts and this determination may then be made public. This is called "neutral fact-finding".⁶³

There can be no doubt that adjudicative ADR procedures are most like the formal litigation process.⁶⁴ Most adjudicatory processes involve lawyers who present their clients' case in much the same manner as the adversarial court systems. In some adjudicative processes, the hearings themselves may be held in an informal setting, under more relaxed rules of evidence and procedure with no witnesses. Although traditional litigation is always binding on the parties, arbitration, on the other hand can be varied, and so non-binding or advisory decisions are possible. The most common adjudicative processes of ADR are, Arbitration, Reference Procedures (also known as "private judging" or "rent-a-judge"), and Neutral Fact Finding.

1. Arbitration

The traditional and prevalent model of arbitration is that of a "private tribunal" - private individuals, chosen voluntarily by the parties to a dispute in preference to the official courts, and given power to hear and 'judge' their 'case'.⁶⁵ Arbitration may sometimes be imposed by law as a mandatory, non-consensual form of dispute resolution, and it has also been used to resolve kinds of disputes different from the traditional sort of "cases" which might otherwise have found their way into the judicial system.

⁶² See E. Plapinger and D. Stienstra, ADR and Settlement in the Federal District Courts (1996), for a fuller discussion on the practical aspects of these processes.

⁶³ Kimberlee K Kovach, *Mediation, Principles and Practice* (1994).

⁶⁴ This is indicated and agreed upon by most writers quoted in this text.

⁶⁵ John S Murray, Alan Scott Rau, and Edward F Sherman, *Processes of Dispute Resolution: The Role of Lawyers*, (1996).

Arbitration tends to be a speedier process than adjudication because the possibility of scheduling hearings at the parties' own convenience allows the parties to bypass long queues at the courthouse door. The arbitration procedure is relatively informal, as in many instances, pre-trial procedures, pleading, motion practice, and discovery are substantially streamlined or simply eliminated for expedience. This obviously means that savings in time are likely to be reflected in savings in expenses.⁶⁶

The parties' perception of justice in an arbitration is served by the fact that the parties themselves choose their 'judges' - that is, the arbitrators. This means that they are therefore at liberty to avail themselves of decision-makers with expert-knowledge of the subject matter in dispute. Indeed, it may be that the arbitrator has a similar background to the parties, or may be engaged in a similar business, such that he is more likely to be familiar with the presuppositions and understandings of the trade. This is particularly useful in instances where a contract hinges on interpretation of the agreement, which may in turn depend on the trade custom and usage, for example; or where the dispute over whether goods sold meet the necessary technical standards. Clearly, this eliminates the sometimes necessary and indeed onerous task of having to educate the judge as to the content and usage of these industry norms, particularly in cases involving a complex technical background.

Arbitration is therefore the most effective in cases where the parties cannot agree on the facts, or where the dispute is purely monetary. Also, as intimated in the last paragraph, arbitration is appropriate where the matter is highly complex or technical, and an expert decision is needed. Judges cannot be expected to have very extensive knowledge in various technical fields, and as Lon Fuller points out, the party's chance to have his case understood by the arbitrator is seriously impaired if his representative has to talk into a vacuum, if he addresses his words to uncomprehending ears.⁶⁷ Clearly, an arbitrator who is an expert in the field is far more likely to understand the issues involved in the dispute and therefore is even more likely to make a decision that is both just and fair to all the parties concerned. This means that the parties will

⁶⁶ Kimberlee K Kovach, *Mediation Principles and Practice* (1994).

⁶⁷ Lon Fuller, *Collective Bargaining and the Arbitrator*, 1963 *Wisconsin Law Review*, Vol. 3, 11-12, 17.

be more willing in advance to entrust to the arbitrator the task of working out the details of their arrangement in accordance with the common values of their trade. As Landes and Posner declare, "the evidence from arbitration is that a single qualified lay judge is superior to six or twelve randomly selected laymen - on reflection, a not implausible suggestion."⁶⁸

The degree of autonomy in arbitral processes may be regulated by the parties themselves.⁶⁹ The informality of the process means that, from the outset of the arbitration, the parties, together with the arbitrator, agree on the rules for the process, for example, the form of pre-trial procedures, rules of discovery and so on. This may be decided upon or eliminated altogether. Certain other rules, such as those relating to evidence and cross-examination, may be relaxed, and the arbitrator may, if he so wishes, frequently interrupt the examination of witnesses in order to clarify certain points or direct the flow of evidence in a certain manner. This is of particular importance to parties who prefer the formality of third party guidance and intervention without the strict adherence to rigid court procedure.

In terms of the parties' relationship, taking a dispute out of the courtroom and into the relative informality of arbitration may reduce the enmity and heightened contentiousness which invariably accompany litigation, and which work against a future co-operative relationship. Since an arbitration hearing is not open to the public, the privacy of the process may also contribute to a lessening of hostility and confrontation between the parties involved. Murray, Rau and Sherman observe that whilst arbitration has been used in a number of diverse contexts, to resolve many different types of disputes, it has flourished most in situations where parties to a contract have or aspire to have a continuing future relationship in which they will regularly deal with each other:

"The paradigm is the relationship between management and union in the administration of a collective bargaining agreement, or, perhaps, the relationship between a buyer and a seller of fabric in the textile industry. In

⁶⁸ Landes & Posner, "Adjudication as a Private Good", (1979) in John S Murray, Alan Scott Rau, and Edward F Sherman, *Processes of Dispute Resolution: The Role of Lawyers*, (1996).

⁶⁹ Much of this discussion on Arbitration has been gleaned from this writer's first-hand experience during a recent arbitration conducted in Lusaka, in which this writer had the privilege of participating as assistant to the Complainant's lawyer.

both cases there is a history and a likelihood of continued mutual dependence by which both parties may profit; there also exist non-legal sanctions allowing either party to withdraw from (or seek to adjust) the relationship, or at least to withhold vital future co-operation. All this makes it easier to settle in advance on arbitration as a less disruptive method than litigation for resolving any future disputes. It also tends to induce the parties to comply with arbitration decisions once they are handed down.”⁷⁰

The arbitrator’s decision is likely to be final, and so there is no delay imposed by any appeal process. As Kovach observes, in many instances there are very limited rights of appeal, which are often provided by statute.⁷¹ For this reason then, lawyers required to draw up arbitration agreements should ensure that all the interests of the parties are factored into it. Indeed, as Michael Arnheim points out, unless the arbitration agreement says something to the contrary, an arbitrator will have the right and the obligation to decide not only the substantive issues between the parties but also the question of costs, both the costs of the reference to arbitration and of the arbitration award itself.⁷² Of course, where the arbitration award is non-binding or merely advisory, the parties may choose to simply disregard it.⁷³ However it must be noted that where parties in a dispute voluntarily agree to participate in arbitration by either contract or stipulation, the award is often binding.

2. Reference Procedures

Reference Procedures, also known as “Private or special judging” or “rent-a-judge”, is another distinct ADR tool within the adjudicatory sphere. Most suited to civil or family cases, this process involves either a court referral or the parties themselves agreeing to take the matter to a private judge, also termed a referee, who may be required to either decide all the issues or just a portion of the case, for a certain fee.

In terms of justice, this process is most useful in almost any kind of case where a dispute of both law and fact is the impediment to settlement. As Kovach observes,

⁷⁰ John S Murray, Alan Scott Rau, and Edward F Sherman, *Processes of Dispute Resolution: The Role of Lawyers*, (1996).

⁷¹ Kimberlee K Kovach, *Mediation Principles and Practice*, (1994).

⁷² Michael Arnheim, *Drafting Settlements of Disputes*, Tolley Publishing Company Limited, Surrey, (1994).

the parties see a need for the decision maker to possess judicial expertise, and therefore select a former judge.⁷⁴ The reasons for this are obvious: a retired judge who would be acceptable to both parties would almost surely possess acknowledged judicial skills and in many instances, expertise in the particular kind of case at issue, thus ensuring a trial that is both expeditious and fair.⁷⁵

Much like arbitration, private or special judging involves a greater degree of autonomy than litigation in that the parties and the referee are free to select the times and places that will be most convenient, and this means that both sides know that when they do go to trial, both parties will be ready. This process is probably chosen more for its likeness to the usual litigative process in terms of a judge making a decision based upon the facts at hand and the law; without the disadvantage of numerous continuances and postponements that are often so frustrating in the course of regular trials in courts.

Reference procedures vary in terms of the amount of power given to the referee, the effect of the referee's decision, the amount of public involvement in the process and the extent to which it has the force of public adjudication, and so it may be in some cases that the decision of the referee has the force and effect of a trial court judgement.⁷⁶ This means therefore, that, unlike an arbitrator's award, a judgement entered by a private judge may be appealed.

The result of a referral procedure is more likely to be a personalised resolution tailored to meet the specific needs of the parties to the dispute. Parties who have gone out of their way to ensure that they select a referee upon whom they all agree, are less likely to appeal that decision, while at the same time have the comfort of knowing that they may do so if for some reason they are dissatisfied with the outcome. It seems clear that the flexibility of the procedure, as well as the opportunity of each party to be heard on the matter, will encourage the parties to allow themselves to be

⁷³ Kovach notes that mandatory court arbitration programs are usually of an advisory nature, as opposed to voluntary arbitration agreements, which are generally binding. See Kimberlee K Kovach, *Mediation Principles and Practice*, (1994).

⁷⁴ Kimberlee K Kovach, *Mediation Principles and Practice*, (1994).

⁷⁵ Barlow F Christensen, *Private Justice: California's General Reference Procedure*, (1982).

⁷⁶ Jacqueline M Nolan-Haley, *Alternative Dispute Resolution* (1994)

bound by the referee's decision, and this will naturally reflect positively upon the parties continued relationship with one another.

Reference systems have been criticised on public policy grounds for their lack of public accountability and for creating a two-tiered system of justice where the wealthy who can afford to, use personally selected private judges and the poor are relegated to the public system of justice. However, as Nolan-Haley points out, the full due process system available in the regular courts to any litigant, weakens this criticism.⁷⁷ Certainly, this process may raise concerns of corruption or bias, but in reality, its infrequent use, coupled with close monitoring of the process by court rules, means that the risk of actual abuse is minimal.

3. Neutral Fact Finding

Neutral fact-finding is used primarily in the resolution of public sector labour relations disputes, but may be considered as only quasi-adjudicatory in that the recommendations of the neutral are not final.⁷⁸ The neutral third party simply gathers information from all the parties concerned, and makes a determination of the facts, with or without recommendations for final resolution of the matter in his report.

This process is of particular use where transparency and public interest are important factors. However, this process should not be considered as a completely independent process. Rather it should be seen as complementary to other processes as it can assist in negotiation, mediation and indeed, other adjudicatory processes. To this extent, it may be considered a "hybrid" dispute resolution process, as it is often the fore-runner to other processes of dispute resolution.⁷⁹

Justice can only be fully served where all the facts are at hand, and to this end, neutral fact-finding is of particular importance. The investigative nature of the process assures that any exaggeration or bias of facts by either party are neutralised and taken into account, particularly where there may be underlying animosities which will place

⁷⁷ Jacqueline M Nolan-Haley, *Alternative Dispute Resolution* (1994).

⁷⁸ Murray, Rau & Sherman, *Processes of Dispute Resolution* (1996).

⁷⁹ Riskin & Westbrook, *Dispute Resolution & Lawyers* (1987).

more emphasis upon certain factors than on others.⁸⁰ Fact finding is also of particular use in getting to the underlying root-cause of the problem, and bringing these to the fore, so that the parties may examine and tackle these issues with a view to renewing their relationship where possible, and moving forward from that point.

B. EVALUATIVE PROCESSES

Case evaluation may be defined as a process whereby advocates present their version of the case to one or more third party neutrals, who then evaluates the strengths and weaknesses of each. The evaluative process consists of providing lawyers and litigants in trial-ready cases, with a written, non-binding assessment of the case's judgement value, based on the merits of the case. The primary purpose of neutral case evaluation

is to provide an objective, non-binding, confidential, evaluation of the case, which may be used by the lawyers and clients in further settlement negotiations.⁸¹

Before the conference, parties are usually required to submit to the evaluator and other parties court documents and memoranda describing the dispute. Evaluators are usually experienced litigators who are expert in the subject matter of the case. The evaluator generally helps the parties to clarify arguments and evidence, identifies strengths and weaknesses of the parties' positions and gives the parties a non-binding assessment of the merits of the case. Depending on the goals and objectives of the programme, the evaluator may also mediate settlement discussions or other case planning assistance. The process is confidential, and the evaluation is non-binding. Neutral evaluation encourages settlement of cases in early pre-trial stage, because if the valuation is accepted by all the parties, the case may be settled at that point.⁸² However, if any party rejects the evaluation, then the case may proceed to trial.

⁸⁰ These issues were pointed out by Mr Ali Hamir of Hamir Associates, Lusaka, the arbitrator in a recent arbitration held in Lusaka, which was attended by this writer.

⁸¹ Kimberlee K Kovach, *Mediation Principles and Practice* (1994).

⁸² Elizabeth Plapinger and Donna Stienstra, *ADR and Settlement in the Federal District Courts* (1996).

Early neutral evaluation is a non-binding ADR process designed to improve case planning and settlement prospects by providing litigants with an early advisory evaluation of the likely court outcome. The evaluation is held early in the litigation to hear both sides of the case. The evaluator helps the parties to analyse their positions and identify key areas of agreement and disagreement, and may also facilitate settlement discussions before or after the case assessment is issued.

The informality of evaluative processes provides the parties with an opportunity to dialogue in non-confrontational manner. Each side is allowed to present its case, and objections and interjections are kept to a minimum. Evaluation allows for a greater deal of objectivity on each side, so that the opponents are better able to put their own position in the perspective of the “big picture”, and this is often a big step towards facilitation of settlement.

The fact that the parties are free to accept or reject the evaluation provides a fluidity that conduces to identification of the actual matters in dispute. Whether the parties accept the evaluation or move on to trial, the general tone of the case is often tempered down after the evaluative process, and the parties perception of justice is more clearly focused on the issues themselves rather than the emotive factors of the case.

The role of the lawyer in evaluative processes is to actively seek avenues for resolution of the case and remove any barriers to settlement in order to expedite the disposition of the action.

Depending on the dispute and type of evaluation sought, feedback can be provided by peers, professionals, experts or lay persons.

1. Peer Evaluation

Also known as the Moderated Settlement Conference (MSC), peer evaluation is a process utilising a panel of three neutral, experienced attorneys who listen to a

presentation of both factual and legal argument by counsel for each party.⁸³ This panel questions the attorneys as well as the clients who are present throughout the entire process. The panel, after deliberation, will then make an advisory, confidential evaluation of the strengths and weaknesses of the case, and in most cases, will provide a range for settlement. Although this evaluation is non-binding upon the parties, it is often used as a basis for further settlement negotiations.

Peer evaluation may be adapted to better assist the litigants in achieving resolution of the case.⁸⁴ For example, in a medical malpractice case, the three moderator panel could consist of two attorneys and one physician, whereas in a personal injury case, the panel may be made up of a plaintiff's attorney, a defence attorney, and a neutral, such as a lawyer whose expertise is, say, commercial or family law. In fact, a variety of modifications of neutral case evaluation is possible.

One of the most common evaluative processes is termed "neutral evaluation" or "neutral case evaluation", in which only one individual, an attorney, serves as the evaluator in a more informal manner.⁸⁵ A more structured programme has been termed Early Neutral Evaluation (ENE), in which the attorney evaluator is hand-selected by the court, in a process whose goals include forcing the parties to confront their case as well as that of the opponent, identifying the actual matters in dispute; developing an efficient discovery process and obtaining an assessment of the case. It is notable that for some time, settlement of the case under ENE was not an explicit or primary goal. This was only added later, with the result that in practice, the process often became a settlement conference; although even now, many ENE procedures do not have settlement of the case as an explicit and primary goal.⁸⁶

However, even where settlement is not reached, the formal structuring of the procedure means that the parties will have at least established a time-line for administration of the case including discovery practices, which is an effective method of expediting the resolution of the case.

⁸³ Kimberlee K Kovach, *Mediation Principles and Practice*.

⁸⁴ Murray, Rau & Sherman, *Processes of Dispute Resolution* (1996).

⁸⁵ Kimberlee K Kovach, *Mediation Principles and Practice* (1996).

⁸⁶ David I Levine, *Early Neutral Evaluation: The Second Phase*, J Dip. Resol. 1 (1989) in Kovach, *Mediation Principles and Practice* (1996).

2. Lay Evaluation

Lay Evaluation is also known as the Summary Jury Trial (SJT). Many litigants are only satisfied with a trial before a jury of their peers, and in order to save time and expense for the parties and the court, the summary jury trial procedure was developed.⁸⁷ SJT is a procedure in which lawyers present their respective views of the case before a jury which renders an advisory decision based on such presentations. This is a non-binding procedure which in no way affects the parties' rights to a full trial on the merits.

Often, without the opportunity to hear both sides of the case presented to the finders of fact, a lawyer and his client may be unable to objectively recognise the weaknesses in their position. The lawyer and his client may believe they can "pull off" a weak case if only they can get it in front of a jury.⁸⁸ An SJT is therefore useful in that it is a non-binding advisory trial which offers litigants a "reality check": it gives them an opportunity to get a sense of how a jury might review their case and as a way in which settlement might be facilitated.⁸⁹

In an SJT, lawyers present an abbreviated version of their evidence before the jury.⁹⁰ The procedure is typically more adversarial than peer review since each side is trying to persuade the jurors to return a verdict in their favour. Upon deliberation, the jury will render an advisory verdict and then discuss this verdict with the parties and the lawyers. This discussion allows jury members to offer their opinions on the strengths and weaknesses of each side of the case, as well as an evaluation of the presentations made by the lawyers, and how those factors impacted upon their deliberations. This verdict may then be accepted by parties and used as a basis to enter settlement negotiations, or the parties may proceed to trial.

⁸⁷ Kimberlee K Kovach, *Mediation Principles and Practice* (1996).

⁸⁸ Murray, Rau & Sherman, *Processes of Dispute Resolution* (1996).

⁸⁹ Patrick Matibini in his paper, *Alternative Dispute Resolution, Presented to the Judges' Seminar* held in Livingstone in July, 1998.

⁹⁰ Kimberlee K Kovach, *Mediation Principles and Practice*.

An interesting feature of the SJT is that in some cases, the jury is not informed in advance that their verdict is only advisory; this is done in order that the jurors more effectively return a “true” verdict.⁹¹ It is also possible for parties to stipulate in advance that the jury’s verdict will be binding; or alternatively, the parties may submit only part of the case to an SJT - for example, an SJT may be held on the liability issue only.

SJT is therefore a predictive tool that may be used by lawyers to achieve a just result for their clients at minimum expense. Lambros notes that after preparation and presentation of the case at an SJT, the possibility of a settlement becomes much more real to both sides.⁹² Unreasonable demands and offers are re-evaluated, and mutually agreeable compromises are worked out in light of the jury’s findings.

3. Judicial Evaluation

Judicial evaluation is an informal process in which the case is presented before a judge who will then assess the case, pointing out the strengths and weaknesses to the lawyers and litigants. This is in contrast to private judging in which the judge actually decides the case. In general, the evaluation is based upon the past judicial experience of the judge, and for this reason the selected judge is usually one in retirement. Indeed, the knowledge, experience and temperament that a retired judge can bring to a case can be quite helpful in assisting the parties reach a settlement.⁹³ As with other types of case evaluation, the parties may engage in dialogue to gain additional feedback.

It must be noted that judicial evaluation has not been classified as an adjudicatory process, because the judge does not actually render a decision - he merely points out the strengths and weaknesses of the case, and makes an assessment based on his judicial experience.

⁹¹ Kimberlee K Kovach, *Mediation Principles and Practice* (1996).

⁹² Thomas Lambros, *The Summary Jury Trial - An Alternative Method of Resolving Disputes* (1986), in Kovach, *Mediation Principles and Practice* (1996).

4. Specialist or Expert Evaluation

This is a particularly useful process in cases which turn on a technical issue which is sometimes beyond the understanding of the court and the lawyers; such cases for example, that include matters of construction, computer design, securities or biomedical technology.⁹⁴ This process therefore provides an independent, neutral, expert evaluation of such an issue, so that a resolution might be achieved in a case which would otherwise take months to try. In view of the specialised nature of such cases, the results of the specialist evaluation are generally accepted as definitive, provided, of course, all the parties agree to the selection of the neutral expert. Here again, the expert evaluation may apply to the entire case or only a single technical issue.

C. MEDIATIVE PROCESSES

The term mediate is derived from the Latin “mediare”, which means “to be in the middle”.⁹⁵ Kovach describes Mediation as a flexible, non-binding dispute resolution procedure in which a neutral third party - the mediator - facilitates negotiations between the parties to help them settle; Mediation is therefore a facilitated negotiation.⁹⁶ A hallmark of mediation is its capacity to help parties expand traditional settlement discussions and broaden resolution options, often by going beyond the legal issues in controversy.

Mediative processes can be an empowering self-determination tool, in that they permit persons to speak for themselves and make their own decisions. Trina Grillo points out that many people chose mediation so that they, and not a lawyer, will be in charge of their own destinies.⁹⁷ In the mediative Process, the neutral, namely, the

⁹³ Kimberlee K Kovach, *Mediation Principles and Practice* (1996).

⁹⁴ Kimberlee K Kovach, *Mediation Principles and Practice* (1996).

⁹⁵ Kimberlee K Kovach, *Mediation Principles and Practice* (1996).

⁹⁶ Kimberlee K Kovach, *Mediation Principles and Practice* (1996).

⁹⁷ Trina Grillo, *The Mediation Alternative, Process Dangers for Women*, in John S Murray, Alan Scott Rau, and Edward F Sherman, *Processes of Dispute Resolution: The Role of Lawyers*, (1996).

mediator, does not render a decision or an evaluation, but rather acts as a facilitator for the parties to reach an acceptable and mutually satisfactory agreement.⁹⁸

Mediative processes are the least adversarial approaches to conflict resolution, as they encourage the parties to communicate directly. The role of the mediator, is to facilitate communication between the parties, assisting in identifying the real issues of the dispute, and generating options for settlement. Thus, mediation sessions are confidential and structured to help the parties communicate - to clarify their understanding of underlying interests and concerns, probe the strengths and weaknesses of legal positions, explore the consequences of not settling, and generate settlement options.⁹⁹ The goal of mediative processes is that the parties themselves arrive at a mutually acceptable resolution of the dispute.

Mediative processes are of particular value in those instances where the parties want to maintain the relationship, whether personal or professional, or whether there are issues underlying the dispute which need to be identified and resolved. The three most common mediative processes are mediation, conciliation and consensus building.

1. Mediation

Mediation is the process where the third party neutral, whether one person or more, acts as a facilitator to assist in resolving a dispute between two or more parties.¹⁰⁰ Unlike the judge or arbitrator, the mediator has no authority to impose a solution.

As Kovach points out, just as with all types of ADR, the mediation process is flexible.¹⁰¹ Since the mediation process deals with human behaviour and motivation, it must also be adaptable to individual differences, with the result that, although there is a structure to the mediation process, it is not rigid, but rather fluid in nature. The primary variables which will affect the process include the type of dispute, the style

⁹⁸ Kimberlee K Kovach, *Mediation Principles and Practice* (1996).

⁹⁹ Elizabeth Plapinger and Donna Stienstra, *ADR and Settlement in the Federal District Courts*, (1996).

¹⁰⁰ Kimberlee K Kovach, *Mediation Principles and Practice* (1996).

¹⁰¹ Kimberlee K Kovach, *Mediation Principles and Practice* (1996).

of the mediator and the relationship of the parties. While mediators may come from all walks of life, the mediator is usually a lawyer or an expert from another discipline who meets the required qualifications and training standards.

Mediation is appropriate in all types of cases, and is effective even at the appellate level. Indeed, as Riskin and Westbrook point out, because mediation can be conducted in so many ways with so many purposes, the question of when mediation is appropriate has no simple answer.¹⁰²

As intimated above mediation is of particular value in cases where it is important to the parties to maintain and continue existing relationships. For this reason, each case must be considered individually. Mediation is especially useful, for example, in some divorce cases, in which the strong emotional forces at work may call for more delicately wrought measures that could be provided in a court-imposed solution, particularly where there are difficulties concerning the division of property and the development of a framework for governing the future relationship of the divorcing couple and their children.

It should be noted that mediation is appropriate where a negotiated resolution is desirable and the parties or their representatives are unable to negotiate or to reach the best feasible agreement without outside help.

Mediation encourages lawyers to help make the law more responsive to the needs of individuals and society. It enhances the lawyers' sensitivity, and makes him better able to perceive his clients needs and to work more effectively with all manner of people. Riskin points out that Mediation highlights the interconnectedness of human beings, and lawyers who notice this interconnectedness are less vulnerable to the kind of over-enthusiasm with the adversary role that has brought about much of its sinister reputation.¹⁰³ Thus, lawyers who can experience both sides of a controversy and not merely understand the legal arguments, will have an awareness of consequences that can become a guide to their conduct which can compete with the established rules of

¹⁰² Leonard L Riskin and James E Westbrook, *Dispute Resolution and Lawyers*, (1987).

¹⁰³ L L Riskin, *Mediation & Lawyers* (1982) in Riskin and Westbrook, *Dispute Resolution and Lawyers* (1987).

lawyers' behaviour. This may help them to recognise that although their individual clients may be doing fine, in many ways the judicial system is not serving most people well. The mediation experiences may well encourage the lawyer to come up with creative solutions to systemic as well as individual problems, thereby leading to legal services that are more responsive to the needs of client and society.

The use of mediation has been said to probably predate the formal creation and enforcement of law: humans in the social state seem to have a natural instinct to seek the guidance of others in settling differences between individuals.¹⁰⁴ In many societies, mediation through a third party has been a favoured alternative to formal legal processes. It has therefore often existed alongside formal legal structures, offering a community-based consensual alternative to legal remedies. This has certainly been the case in African societies, in which, unlike court systems characterised by social distance between judge and litigants, rules of procedure narrowing issues under discussion and resolutions ascribing guilt or innocence to a defendant, the traditional system rather emphasised the bonds between the convenor and the disputants, and encouraged the widening of discussion so that all tensions and viewpoints relevant to the issue were expressed, so that disputes were resolved by consensus about future conduct, rather than by assessing blame retrospectively.¹⁰⁵

The underlying philosophy of the mediation process is that any agreement should be voluntarily arrived at by the parties. McEwen and Maiman provide evidence to support the premise that the parties will be more satisfied and thus more likely to abide by the agreement, if it is of their own creation.¹⁰⁶ This is the case probably because in the process of mediation, participants formulate their own agreement and make an emotional investment in its success. This means therefore that the parties are

¹⁰⁴ John S Murray, Alan Scott Rau, and Edward F Sherman, *Processes of Dispute Resolution: The Role of Lawyers*, (1996).

¹⁰⁵ Danzig, "Toward the Creation of a Complementary, Decentralised System of Criminal Justice", in John S Murray, Alan Scott Rau, and Edward F Sherman, *Processes of Dispute Resolution: The Role of Lawyers*, (1996).

¹⁰⁶ McEwan & Maiman, "Mediation in Small Claims Court: Achieving Compliance Through Consent", in John S Murray, Alan Scott Rau, and Edward F Sherman, *Processes of Dispute Resolution: The Role of Lawyers*, (1996).

more likely to perceive the resolution as being a just one, as opposed to an agreement negotiated or imposed by others.

2. Conciliation

Conciliation describes the process for “bringing disputing parties together, under circumstances and in an atmosphere most conducive to the discussion of the problem in an objective way for the purpose of seeking a solution to the issue or issues involved.”¹⁰⁷ The term “conciliation” is also often used to describe the process of involving third parties in the context of labour relations when neutral intervention is necessary to break a stalemate.¹⁰⁸

Although historically, the terms mediation and conciliation have been used interchangeably, in modern ADR there certain distinctions to be made between the two.¹⁰⁹ Firstly, conciliation is a less formal process than mediation, which maintains more structure than pure mediation. For example, while it may be possible to achieve conciliation over the phone, telephonic mediation is rarely used. Secondly, conciliation denotes that the disputing parties have been reconciled, and the relationship has been mended, whereas, in mediation, although maintenance of the relationship is an important factor, it is often the case that resolution will occur without an actual reconciliation between the disputants.¹¹⁰

In a private conciliation process, the parties differences are reconciled by a conciliator who performs as a “go-between”, communicating each side’s position and settlement options to the other.

As part of a court-based dispute resolution process, conciliation usually involves a retired judge or neutral appointed by the courts, who holds a “conciliation conference” with litigants and their lawyers early in the litigation process. The conciliator may either offer settlement assistance or he can also act as a litigation

¹⁰⁷ Walter A Maggiolo, “Techniques of Mediation in Labor Disputes”, in John S Murray, Alan Scott Rau, and Edward F Sherman, *Processes of Dispute Resolution: The Role of Lawyers*, (1996).

¹⁰⁸ Ibid.

¹⁰⁹ Murray, Rau and Sherman, *Processes of Dispute Resolution* (1996).

¹¹⁰ Kimberlee K Kovach, *Mediation Principles and Practice* (1996).

advisor, answering questions about discovery and other issues, helping each party to complete the steps necessary to prepare the case for trial if attempts to settle are unsuccessful.

Conciliation assists the parties in achieving a resolution that is justly acceptable to either side; it has particular cathartic value in that it encourages the parties to recognise and confront the underlying issues, thereby improving the parties' problem-solving ability as well as their relationship.

3. Consensus Building

This is primarily a public policy tool, used in managing public law disputes and the public interest.¹¹¹ Consensus building may be considered as an extended mediation with large groups, which involves a number of conflicts. Unlike traditional mediation which is, by design, usually a one time, short term intervention, the consensus building process takes place over a more extended period of time. Additionally, because there are a number of individuals within groups, it is unlikely that everyone attends the process. Each group will have representatives who then must obtain ratification of any decision reached at the consensus building session.

The success of a consensus building effort depends on the inclusion of all the individuals in responsible and meaningful work throughout the process, and involving them in the decision making from the earliest stages.¹¹² For example, in a dispute between government and its citizenry, the citizens must be allowed to help define the issues, from the problem, suggest means of approaching the problem and propose potential solutions. In this way, citizens can bring their particular perspective to every step of the process, and this enhances their perceptions that what is being done is both fair and just, and in the interests of their community as a whole.¹¹³

¹¹¹ Kimberlee K Kovach, *Mediation Principles and Practice* (1996).

¹¹² Murray, Rau and Sherman, *Processes of Dispute Resolution* (1996).

¹¹³ Ibid.

CHAPTER IV

VARIETIES OF ALTERNATIVE DISPUTE RESOLUTION (ADR) DEVICES

"The many alternative processes of dispute resolution are not distinct from litigation, nor mutually exclusive, but usefully complementary processes. The contemporary lawyer needs to develop an ability to work effectively with all available processes, separately, in series, and even, simultaneously."

**John S Murray
Alan Scott Rau
Edward F Sherman**

I. INTRODUCTION

We have seen from our introductory chapter that alternative dispute resolution focuses on new and creative methods to resolve disputes, and that such approaches often include an examination of the underlying causes of conflict. In our previous Chapter we discussed the various underlying factors to be considered by the ADR Lawyer in choosing an appropriate mechanism of Dispute Resolution.

This chapter moves forward from the general to the specific; it seeks to examine the specifics of various ADR processes. We shall examine firstly, the distinction between primary and "hybrid" dispute resolution processes, followed by an examination of the ADR processes falling under these heads. At this point it should be noted that, Arbitration and Mediation being the major ADR processes in any system¹¹⁴, particular emphasis shall be placed in this study upon these mechanisms, for which we shall broaden the scope of our examination to give an in-depth understanding. We seek to give a detailed account of these ADR mechanisms, analysing the specifics of operation and effect, the role and skills of the third party

neutral and, where appropriate, the role of the lawyer, and the advantages and disadvantages of the process as compared with traditional litigation.

We shall also examine the current status of Alternative Dispute Resolution in Zambia, given the recent developments with regard to the newly introduced Commercial list in the High Court, and the increased awareness of the importance of alternatives to court adjudication. This will lay the foundation for our next chapter, in which we make our recommendations for the future use of ADR in Zambia.

It is important to remember at this point that the ADR universe is not static; it is a dynamic process that continues to grow and expand as society continues to investigate the nature and causes of disputes. All ADR processes have been designed and developed to assist those involved in a dispute to arrive expeditiously at a mutually satisfactory resolution of a matter. The most effective system of dispute resolution, therefore, consists of a method which, whilst providing a resolution to the dispute, focuses on the reconciliation of the interests of all the parties involved.

II. PRIMARY AND 'HYBRID' DISPUTE RESOLUTION PROCESSES

Riskin and Westbrook state that confusion about ADR terminology is rampant, and they give several reasons for this.¹¹⁵ Firstly, many people, including lawyers are unfamiliar with the different processes and therefore tend to lump nearly all non-litigious methods into a broad category of ADR. Secondly, this confusion arises partly because, although the processes are analytically distinct, they can, in particular cases, work almost identically in practice. For example, lawyers representing individuals are said to "mediate" when they seek a fair solution; also, "mediators" may, in effect impose a solution through the force of their own convictions or techniques or because of the power they exercise outside the mediation.

¹¹⁴ Of particular interest as concerns the Zambian Judicial system, is the recent introduction of the Commercial list in the High Court for Zambia, which was launched in Lusaka on April 3, 2000.

¹¹⁵ L L Riskin and James E Westbrook, *Dispute Resolution and Lawyers* (1987).

An understanding of the distinctions is very important. Different legal consequences flow from the formal nature of certain processes. For example, an arbitrator's award is legally binding and enforceable in accordance with the statute, whereas an agreement reached through mediation is enforceable only if it satisfies the requirements of contract law; and these legal consequences obtain even if conducted in a mediative fashion or if the mediator acts like an arbitrator.

As we pointed out earlier, all ADR devices fall into one of three categories: Adjudicative, Mediative and Evaluative. One may distinguish further between "Primary" and "Hybrid" dispute resolution processes.¹¹⁶

Primary Dispute Resolution processes may be said to be the ADR device in its "pure" form.¹¹⁷ Negotiation, Arbitration and Mediation are prime examples of Primary Dispute Resolution Processes; not to mention, adjudication - all of which have a distinct form and structure specifically designed to resolve disputes in a particular way. However, it is also possible to design or "custom-make" a specific ADR process, by combining certain features of different processes best suited to the objectives and requirements of the particular case. The result of such combination of features is a "hybrid" dispute resolution process.¹¹⁸

PRIMARY DISPUTE RESOLUTION PROCESSES

Primary Dispute Resolutions include Negotiation, Arbitration and Mediation. It will be seen that Negotiation is placed at the beginning of any Alternative Dispute Resolution continuum, because of its very nature, and the fact that it pervades each and every other dispute resolution process. An understanding of the art of negotiation

¹¹⁶ These are the terms used by S. Goldberg, E Green and F Sander, "Dispute Resolution", in Riskin and Westbrook, *Dispute Resolution and Lawyers* (1987).

¹¹⁷ Riskin and Westbrook point out that there can never really be a truly "pure" form of ADR. The very fact of the flexibility and adaptability of each ADR process must mean that the processes may vary according to the nature of each dispute to be resolved. However, it will become clear from our discussion that certain elements in each ADR process do indeed remain constant, and in this sense, the term "pure" is used in its most loose form.

¹¹⁸ Where an ADR device is used in conjunction with another, this is not to be mistaken for a "hybrid"; rather, this mixture of primary processes is known as combined processes. Thus for example, the use of combined processes occurs where, after presentation of a case for, say, summary jury trial, the parties may opt to have their case mediated or arbitrated. Hybrid ADR devices are discussed in further detail in this Chapter.

is therefore an important factor to be considered by every lawyer because it touches almost every aspect of his career.

A. NEGOTIATION

It has been said of negotiation that if, in the legal arena, negotiation includes dispute resolution, rule making and transaction planning, then virtually all law and legal processes must be infused with negotiation processes.¹¹⁹ Indeed, the literature on negotiation is voluminous, and its pervasiveness in our lives is illustrated by the inexhaustive number of definitions given to use by various authors of works on Negotiation. Negotiation has been described variously to be:

- A process in which divergent values are combined into an agreed decision (Zartman & Bergman at 1)
- One kind of problem-solving process - one in which people attempt to reach a joint decision on matters of common concern in situations where they are in disagreement and conflict. (Gulliver at xiii)
- A process by which a joint decision is made by two or more parties. The parties first verbalise contradictory demands and then move toward agreement by a process of concession making or search for new alternatives (Pruitt at 1)¹²⁰

In a word, Negotiation may be said to be the most basic and informal method of dispute resolution. It occurs throughout the broad spectrum any human transaction or interaction, and is a major element in the application of dispute resolution devices. It is not surprising therefore, that most lawyers spend a major part of their professional lives negotiating. As Riskin and Westbrook observe:

“Lawyers, like everyone else, negotiate with lots of different people for many reasons. As lawyers, they negotiate with their partners and associates, with their secretaries and other staff members, with suppliers of goods and services, and of course with clients. And they advise others, especially clients, about how to negotiate.”¹²¹

¹¹⁹ Menkel-Meadow, Toward Another view of Legal Negotiation: The Structure of Problem-solving, in Riskin and Westbrook, *Dispute Resolution and Lawyers* (1987).

¹²⁰ Menkel-Meadow, Legal Negotiation: A study of Strategies in Search of a Theory, in Riskin and Westbrook, *Dispute Resolution and Lawyers* (1987).

¹²¹ Riskin and Westbrook, *Dispute Resolution and Lawyers* (1987).

It cannot be disputed that through negotiation, a very high percentage of disputes in any society are resolved without a law suit being filed, and even amongst those that do get that far, a sizeable percentage are still settled through negotiation.

However, as Murray, Rau and Sherman state, increasingly, the negotiation process is being formalised into various processes, and these formalised processes include mediation, judicial settlement conferences, arbitration, regulatory negotiation and other ADR procedures specially designed to fit particular situations.¹²²

Negotiation in its simplest form involves the flow of information or messages passing between the parties to a dispute. Information is a valuable resource for the negotiation process, as it will dictate how a particular dispute is to be resolved, and, used correctly, allows the parties to predict, say, what a court will do, or what a reasonable settlement value is; and each added bit of information moves a negotiator's perspective closer to reality and the negotiation closer to settlement.

Nolan-Haley identifies two major orientations which describe how lawyers generally negotiate: adversarial and problem solving¹²³, and that within each orientation, lawyers will adopt specific strategies, tactics and styles. Although in earlier writings, focus has primarily been on the adversarial approach, the trend appears now to be more inclined towards a problem-solving approach. The reason for this shifting trend is that as the legal negotiation process has matured, there has been a growing recognition of the advantages of the problem-solving approach, which is generally more efficacious, and may result in more mutually satisfactory outcomes.

1. Adversarial Approach

In the adversarial approach, the primary goal is to maximise individual gain, and the lawyer who adopts this approach will engage in positional bargaining in order to achieve that goal. Positional bargaining is described as a strategy in which the negotiator adopts a particular position, advances arguments to support that position,

¹²² Murray, Rau & Sherman, *Processes of Dispute Resolution* (1996).

¹²³ Jacqueline P Nolan-Haley, *Alternative Dispute Resolution* (1992).

makes some concessions and finally reaches a compromise solution.¹²⁴ The adversarial negotiator perceives the negotiating process as a “zero-sum” game, in which there will only be one winner. Adversarial Negotiators may use one of two tactics to win this prize: **competitive or co-operative**.

The goals of the effective **competitive** negotiator include:

- maximising settlement for their clients
- obtaining profitable fees for themselves; and
- outmanoeuvring their opponents.

They are, therefore, perceived as being rigid, dominating, forceful, aggressive, touchy, arrogant, and uncooperative, and they may use threats, be willing to stretch the facts in favour of their clients’ position and parsimonious with information about the case.

On the other hand, **co-operative** negotiations use radically different tactics to achieve the same end as the competitive negotiators, and generally have the following characteristics:

- conducting self ethically;
- maximising settlement for the client;
- getting a fair settlement;
- meeting client’s needs;
- avoiding litigation; and
- maintaining or establishing a good personal relationship with the opponent.

It is easily understood that the most effective adversarial negotiators are those who adopt the co-operative strategy.

2. Problem-Solving Approach

This approach focuses on the opportunities for joint, rather than individual gain, and as such, the perception of the negotiator does not involve a “win-lose” perspective, or a game to be won. Rather, the negotiator who adopts this approach will view the

¹²⁴ Roger Fisher and William Ury, *Getting to Yes* (1981).

dispute or transaction as a mutual problem capable of being resolved to the satisfaction of all the parties involved.

Problem-solving negotiators have been characterised as “value creators” who “advocate exploring and cultivating shared interests in substance, in maintaining a working relationship, in having a pleasant non-strident negotiation process, in mutually held norms or principles, and even in reaching agreement at all.”¹²⁵

Many of the characteristics of the co-operative negotiator, described above, could apply to the problem-solving negotiator. Of course, As Nolan-Haley observes: “a lawyer’s decision to adopt an adversarial or problem solving approach depends upon the context of the goals of the particular negotiation.”¹²⁶ Thus, in every negotiation, the lawyer must consciously take into consideration which approach would best serve the interest of their clients. By working closely with their clients, the lawyer must firstly determine the goals they hope to achieve in the negotiation, certainly in terms of whether the goal is to sever a relationship or indeed, to cement one, to open a deal or to close one. A conscious choice must therefore be made about the appropriate negotiating approach.

Riskin and Westbrook suggest that the co-operative theory may not initially appear to be a viable alternative to the competitive strategy, largely because of its vulnerability to exploitation.¹²⁷ However, they observe that in actual practice, the competitive approach results in more impasses and greater distrust between the parties. Indeed, they found that in a majority of cases the co-operative negotiator will not be exploited by his opponent, because the opponent also uses a co-operative approach. A summary of these two negotiation approaches, illustrated below, is instructive, as it provides a quick comparison of the effects of each approach.

¹²⁵ Lax and Sebenius, in Jacqueline Nolan-Haley, *Alternative Dispute Resolution* (1992).

¹²⁶ Jacqueline M Nolan-Haley, *Alternative Disputes Resolution* (1992)

¹²⁷ Riskin and Westbrook, *Dispute Resolution and Lawyers* (1987).

3. NEGOTIATION APPROACHES¹²⁸

	ADVERSARIAL	PROBLEM-SOLVING
Goal	Maximise self gain	seeks joint gain
Behaviour	Competitive Positional bargaining	Facilitative Interest bargaining
Perception of Issues	Distributive zero-sum win-lose	Integrative non-zero sum win-win

4. The Role of Law in Negotiation

There are mixed views as to the role of law in negotiation.¹²⁹ It has been argued, for example, that a legalistic orientation in negotiation can reduce the negotiator's creativity and restrict them to the limited kinds of remedies available in court. Another view captures the notion of how the possibility of court action affects negotiations in the concept of "bargaining in the shadow of the law". Riskin and Westbrook however, prefer the phrase "lights and shadows" of law, suggesting that the goals or principles of law can illuminate negotiations as well as darken them. Finally, Gary Friedman stresses the dangers of either extreme, allowing law to control the negotiation or ignoring the law altogether.¹³⁰ Rather, he suggests a third option, which we now adopt: seeing the law as relevant, but not altogether binding in the negotiation process, and this can be an important factor in finding a fair resolution. As Riskin and Westbrook suggests: "Sometimes it is strategically wise to use arguments based upon the facts or 'story' of the case, or of your client, rather than legal arguments."

¹²⁸ Source: Jacqueline M Nolan-Haley, *Alternative Dispute Resolution* (1992)

¹²⁹ Riskin and Westbrook explore the debate on this issue amongst several writers.

B. ARBITRATION

OVERVIEW

Arbitration has been said to be the most formalised alternative to the court adjudication of disputes.¹³¹ Although the traditional model of arbitration is a “private tribunal” - one in which private individuals, chosen voluntarily by the parties to a dispute in preference to traditional adjudication in the “official” courts, and given power to hear and judge their case, as Riskin and Westbrook state, there is no single, comprehensive definition of arbitration that accurately describes all arbitration systems.¹³² Indeed, in recent years, the term “Arbitration” has come to serve for a broad spectrum of dispute resolution processes.¹³³

As we have seen in earlier chapters, Arbitration is a form of adjudication in which the neutral decisionmaker is not a judge or an official of an administrative agency (such as, say, an ombudsman). In general, the choice to submit a case to arbitration is voluntary and private. The parties to a dispute agree in advance that designated categories of disputes will be arbitrated, or, after a dispute has arisen, they may enter into an ad hoc agreement to arbitrate. Since this agreement is voluntary and private, and entered into by consensual agreement between the parties to a dispute, it seems fair and just that the decision of the arbitrator is final and binding, and only rarely will an award be set aside. Indeed, the courts will nearly always enforce a prior agreement to arbitrate, in particular where such agreement is clearly and unequivocally laid out in a contract.

One of the principal features of private arbitration is that the parties have considerable freedom in designing the process and providing for the substantive standards used by the arbitrator in making a decision. Generally, these standards are set forth in a contract, but it is quite possible that at the beginning of the arbitration, the parties to the dispute, together with the arbitrator, may decide and agree upon the manner in which the arbitration is to be conducted, and certain standards and procedures may

¹³⁰ In Riskin and Westbrook, *Dispute Resolution and Lawyers* (1987).

¹³¹ Jacqueline M Nolan-Haley, *Alternative Dispute Resolution* (1992).

¹³² L L Riskin and James E Westbrook, *Dispute Resolution and Lawyers* (1987).

then be laid down, or certain rules may be somewhat relaxed. Thus, the parties in effect exercise control over the relevant procedures: they decide the degree of formality which will govern and the extent to which the trappings of litigation, from pre-trial motions to discovery, are relevant. Indeed, although the parties are assured an opportunity to present proofs and arguments to the arbitrator, they typically strive for less formal procedures than those followed in the courts.

Arbitrators do not consider themselves bound by the doctrine of precedent,¹³⁴ and arbitrators perforce have greater flexibility in decision-making than judges - they are not even required to give reasons to support their awards¹³⁵. However, in some fields, arbitration awards are published and such awards are often looked to for guidance.¹³⁶ On the other hand, it has been said that the production of rules or precedents may constitute a problem as far as arbitrator's impartiality is concerned: any rule that clearly indicates how a judge is likely to decide a case will assure that no disputes subject to the rule are submitted to that judge since one party will know that it will lose. Judges will tend to promulgate vague standards which give each party to a dispute a fighting chance.¹³⁷ Another important feature of arbitration is that in general, arbitrators typically have more expertise in the specific subject matter of the dispute than would a traditional judge - it is perhaps this feature that will appear most attractive to the potential disputants.

It is commonplace among those who write about arbitration that it has been in use for centuries.¹³⁸ Riskin and Westbrook state:

"Arbitration has an ancient lineage and an active present. King Solomon, Phillip II of Macedon and George Washington employed arbitration. Commercial arbitration has been used in England and the United States for hundreds of years."¹³⁹

¹³³ Murray, Rau & Sherman, *Processes of Dispute Resolution* (1996).

¹³⁴ L L Riskin and James E Westbrook, *Dispute Resolution and Lawyers* (1987).

¹³⁵ Jacqueline M Nolan-Haley, *Alternative Dispute Resolution* (1992)

¹³⁶ L L Riskin and James E Westbrook, *Dispute Resolution and Lawyers* (1987).

¹³⁷ Murray, Rau & Sherman, *Processes of Dispute Resolution* (1996).

¹³⁸ See William C Jones, *Three Centuries of Commercial Arbitration in New York* (1956) in

Murray, Rau & Sherman, *Processes of Dispute Resolution* (1996).

¹³⁹ L L Riskin and James E Westbrook, *Dispute Resolution and Lawyers* (1987).

Arbitration is widely used to resolve construction, insurance and labour-management disputes. It is also used to settle disputes between manufacturers and consumers, shareholders in close corporations, members of families, lawyers and clients, brokers and customers in the securities industry, and physicians and hospitals. Indeed, Riskin and Westbrook suggest that the perceived success of traditional private arbitration has been a factor in calls for increased reliance on arbitration.¹⁴⁰

THE PROCESS

As we noted earlier, the general process of arbitration may vary according to what has been agreed by the parties, so, unlike the court litigation process, there are no hard and fast, rigid rules. However, that is not to say that the arbitration process is completely fluid; rather, the process is flexible according to the requirements and objectives of the disputants, and there are certainly a number of elements that form a part of any arbitral process, and these are as follows:

- Initiating Arbitration
- Selection of the arbitrator
- The arbitration hearing
- The role of the arbitrator
- The Award

As stated in Halsbury's Statutes¹⁴¹, it is important to note that although generally the parties to an arbitration agreement may expressly agree the procedure to be followed at the reference, the parties rarely expressly agree a complete code of procedure, in which case the procedure to be followed must be implied from the language of the arbitration agreement, the surrounding circumstances of the reference and any custom or trade practice which is incorporated into the arbitration agreement. An award made by the arbitrator in breach of the agreed procedure may be set aside on the basis that the parties have not agreed to be bound by an award made by the procedure in fact adopted.

¹⁴⁰ L L Riskin and James E Westbrook, *Dispute Resolution and Lawyers* (1987).

¹⁴¹ Halsbury's Laws of England, 4th Edition, Vol. 2, p.382

1. Initiating Arbitration

The submission of a case before an arbitrator may be initiated by the parties to a dispute in pursuance of a contractual provision, or it may be as a result of an ad hoc agreement to arbitrate. In some instances, the contractual provision may be quite specific and provide for such concerns as:

- the selection of the arbitrator;
- administration of the hearing;
- procedural rules and substantive law.

On the other hand, the agreement or contractual provision may simply provide, for example, that :

“any controversy or claim arising out of or relating to this Agreement shall be settled by arbitration in accordance with the rules of the Arbitration Act, and judgment upon any award rendered by the arbitrator may be entered in the High Court.”

In such an instance, or where there is simply an ad hoc agreement to arbitrate, the parties may then agree upon these concerns as outlined above.

Generally, once a dispute has arisen out of the agreement, the aggrieved party will notify the other party - in writing - of his intention to arbitrate. While this demand need not necessarily comply with the formalities of a complaint in a civil action, it must be sufficiently clear to inform the opposing party of the specific issues to be arbitrated. Much like any statement of claim, it must also:

- identify the parties
- describe the dispute
- describe the type of relief claimed.

The opposing party will then respond in writing, indicating whether it believes the dispute is arbitrable. Once it has been determined and agreed that the dispute is indeed arbitrable, the disputing parties will begin the arbitrator selection process.

2. Selection of Arbitrators

It must be remembered that selection of arbitrators is a critical aspect of the arbitration. Indeed, as Murray, Rau and Sherman point out, the ability to have a dispute decided by “judges” of one’s own choosing is perhaps the most distinctive characteristic of this dispute resolution mechanism.¹⁴² For this reason, how to provide for arbitrator selection is an essential question for the parties in their planning. Thus, for example, the parties may either simply try to agree by name on the individuals who will arbitrate their dispute, or the arbitrator might simply be named in the original agreement. Selection of the arbitrator may also be left for later agreement on an ad hoc basis where a dispute actually arises, and indeed, it may well be that the choice of an appropriate arbitrator may in fact be influenced by the nature of the dispute which has arisen, or the issues which happen to be in contention.

Generally, arbitrations are conducted by a single arbitrator, but it is also possible to have a panel of three arbitrators, in which each party chooses one arbitrator, and the third, a “neutral” would be appointed by a joint decision of the party-selected arbitrators. Such practice enhances impartiality of the arbitrators, and reduces the risk of arbitrators being inclined to favour the party which selected him or her.

3. Qualifications of the Arbitrator

Generally, arbitration is an open field. Thus, beyond the general requirements of honesty, integrity and certain social standing, impartiality and general competence in the subject matter of the dispute, there are no specific additional requirements. The reason for this is that each case is unique in itself, and therefore the arbitration will be built around the particular case in question. It may be, for instance, that the dispute involves a particular point of law, and for this reason, the parties may decide that their arbitrator should be someone with a clear knowledge of the law - preferably a lawyer or even a judge. However, where the dispute involves some technical aspect of their field, say, architectural standards, then the parties would necessarily have to agree upon an expert in that field, in order to avoid having to call a host of expert witnesses

¹⁴² Murray, Rau & Sherman, *Processes of Dispute Resolution* (1996).

whose principal purpose would be to educate the arbitrator on the finer points of architectural terminology.

Generally speaking, however, it is the parties' own affair if they choose an incompetent or unfit person as arbitrator, unless he does not have the qualifications required by the agreement, and under certain circumstances unless he is or may be incapable of impartiality.¹⁴³

It must be pointed out that since arbitrators act in a quasi-judicial capacity, they are held to the same high standards of impartiality by which judges are bound, and this means therefore that arbitrators must avoid both the appearance and reality of conflict of interest, and should uphold the integrity and fairness of the arbitration process.¹⁴⁴ Indeed, in many jurisdictions in which Arbitration is an integral part of the judicial systems, there is a code of Professional Responsibility for Arbitrators, or a Code of Ethics. Briefly, the American Code of Ethics for Arbitrators in Commercial Dispute stipulates in part that:

- i) An Arbitrator should uphold the integrity and fairness of the Arbitration Process.
- ii) An Arbitrator should disclose any interest or relationship likely to affect impartiality or which might create an appearance of partiality or bias.
- iii) An arbitrator in communicating with the Parties should avoid impropriety or the appearance of impropriety.
- iv) An arbitrator should conduct the proceedings fairly and diligently.
- v) An arbitrator should make decisions in a just, independent and deliberate manner.
- vi) An arbitrator should be faithful to the relationship of trust and confidentiality inherent in that office.

Such a code of ethics is essential to any system of private adjudication. Not only does it afford some protection and assurance to the disputing parties as to the impartiality

¹⁴³

Halsbury's Laws of England, 4th Edition, Vol.2, p.367.

of the arbitrator but it also gives them some idea as to what to expect from the arbitrator and the parameters within which the arbitrator may arbitrate. Certainly, the fact that the arbitrator's decision is legally binding upon the parties, they will want to make absolutely sure that their case has been heard and decided in a manner that they perceive - win or lose - to be both fair and just.

It will be seen therefore, that the Arbitrator, or umpire as he is sometimes called, should be an independent third party neutral, who has no interest in the outcome of the proceedings. Indeed, an arbitrator may be disqualified if it can be shown that:

- a. The arbitrator has a direct interest in the subject matter of the dispute (for example, where the decision may have direct repercussions or implications on his own professional work);
- b. The arbitrator is biased in favour of one of the disputing parties.
- c. The arbitrator has misconducted himself.

4. Arbitral Immunity

Halsbury's¹⁴⁵ states that because of the judicial nature of their functions, arbitrators enjoy quasi-judicial immunity from legal liability for actions taken in their arbitral capacity, for the same reasons that judges enjoy judicial immunity. Arbitrators perform an important social function and therefore need to be protected from reprisals that could have a negative impact on their adjudicatory powers.

5. The Arbitration hearing

The system for the arbitration hearing is adversarial, much like in ordinary litigation. Both parties make their opening statements in order to present their case to the arbitrator. These case presentations may include witnesses, documentation and site

¹⁴⁴ Jacqueline M Nolan-Haley, *Alternative Dispute Resolution* (1992).

inspections. Depending upon what has been agreed in terms of procedural rules and standard of proof, the parties are required to present their case in a methodical, systematic manner. They may be required to submit briefs and memoranda in support of their position.¹⁴⁶ Generally, though, the rules relating to evidence and discovery are much more relaxed in an arbitration than in ordinary litigation, and so the atmosphere is generally much more informal.

6. The Role of Lawyers

Although the arbitration process is similar to the litigation process in that it is adversarial, lawyers who take part in an arbitration can expect to encounter an environment that is noticeably different from that of litigation. As Murray, Rau and Sherman point out:

“Lawyers who are unfamiliar with the process may at first find it difficult to adapt themselves to the different quality of advocacy expected in arbitration, and must struggle to adjust their behaviour to a different style and atmosphere of an arbitration proceeding. Such a mainstay of a litigator’s life as pre-“trial” motion practice is for all practical purposes absent from arbitration. And a forensic style carefully honed for courtroom use may be totally out of place in an arbitration proceeding, where the parties and the arbitrators are all seated together around a conference-room table. In this more relaxed setting a non-theatrical, even conversational style is likely to be much more effective.”¹⁴⁷

It is clear that if the award is to be legally binding, certain minimum requirements of ‘due process’ must be met¹⁴⁸, and this includes that the parties be entitled to be heard, to present evidence material to the controversy and to cross-examine witnesses appearing at the hearing. The role of the lawyer therefore is to frame and focus the issues, and to elicit and marshal the evidence in such a manner as to help create a coherent and rational process in the presentation of their clients’ case.

¹⁴⁵ Halsbury’s Laws of England, 4th edition, Vol. 2.

¹⁴⁶ It should be noted that although the rules of Arbitration regarding record keeping and fact finding are generally relaxed, it is important that the Arbitrator keep as accurate a record of the proceedings as possible, especially because of the fact that the only ground on which an arbitrator’s award may be set aside, is on the basis of conduct of the arbitrator.

¹⁴⁷ Murray, Rau & Sherman, *Processes of Dispute Resolution* (1996).

¹⁴⁸ R Smith, L, Merrifield and D Rothschild, *Collective Bargaining and Labor Arbitration*, in Murray, Rau and Sherman, *Processes of Dispute Resolution* (1996).

Butler and Finsen point out a particular problem with regard to lawyers faced with an inexperienced lay arbitrator.¹⁴⁹ They state that lawyers, as officers of the court, have a duty to assist in the proper administration of justice, and the existence of this duty is however not always recognised in arbitration proceedings. In consequence, lawyers sometimes take advantage of the relative ignorance and inexperience of a lay arbitrator to indulge in tactical ploys which they would not dream of using in court. The solution, Butler and Finsen state, lies in the need for more flexibility on their part.¹⁵⁰

“They should be prepared to give discovery sooner, agree the real issues in dispute, agree as much factual evidence as possible, and give their experts early opportunity of investigating the evidence and meeting the other side’s experts on a ‘without prejudice’ basis...Surely it is not beyond the bounds of possibility in many cases for lawyers on both sides to prepare a concise statement of their case along with the relevant evidence.”¹⁵¹

In short, lawyers should be able to respond to their client’s needs in a particular dispute imaginatively, by proposing procedures that will save time and costs but without sacrificing a client’s right or interests or denying any principles of justice.

7. The Role of the Arbitrator

Lon Fuller points out that one conception of the role of the arbitrator is that he is essentially a judge, and that his job is to do justice according to the rules imposed by the parties contract,” leaving the chips to fall where they may”¹⁵²: “He decides the controversy entirely on the basis of arguments and proofs presented to him “in open court” with the parties confronting one another face to face. He does not attempt to mediate or conciliate, for to do so would be to compromise his role as an adjudicator.”¹⁵³

¹⁴⁹ David Butler and Eyvind Finsen, *Arbitration in South Africa: Law and Practice*, (1993).

¹⁵⁰ Butler and Finsen, *ibid*.

¹⁵¹ M P Reynolds, “Quo vadis arbitrium...” (1987) 53 *Arbitration* 75-6.

¹⁵² Lon Fuller, *Collective Bargaining and the Arbitrator*, in *Dispute Resolution and Lawyers* by L L Riskin and James E Westbrook (1987).

¹⁵³ Riskin and Westbrook point out that an important issue for arbitrators is whether they should model their conduct after judges, mediators or some combination of the two roles. This is a very fertile and complex issue that in the past, sparked off prolific debate on the subject. However, John E

The arbitrator or arbitral tribunal must decide the dispute on the basis of such evidence and submissions as has been presented before it, and no more. The arbitrator is not permitted to “read into” an agreement or add to or alter the agreement in any way. However, the arbitrator has a distinct advantage not open to the courts, and that is the ability to interrupt examination of witnesses with questions of his own in order to clarify certain issues or indeed, to point the examination in an area of particular interest. As Lon Fuller illustrates:

“An arbitrator will frequently interrupt the examination of witnesses with a request that the parties educate him to the point where he can understand the testimony being received. This education can proceed informally, with frequent interruptions by the arbitrator, and by informed persons on either side, when a point needs clarification. Sometimes there will be arguments across the table, occasionally even within each of the separate camps. The end result will usually be a clarification that will enable everyone to proceed more intelligently with the case. There is in this informal procedure no infringement whatever of arbitral due process.”¹⁵⁴

The impartiality of the arbitrator is another important aspect, and the arbitrator must not only be impartial but he must also be seen to be impartial. The parties' perceptions of the arbitrator's impartiality in this regard is a crucial factor of their satisfaction with the proceedings and with the award itself, and the arbitrator would do well to bear this in mind at all times. Certainly, in some cases it may be quite easy during the course of the arbitration for the arbitrator to unconsciously take up a particular position in favour of one of the disputing parties once he has been convinced of some fact; this is a major difficulty, which may only be overcome if the arbitrator makes every effort to withhold “judging” one side or the other until all the evidence is before him. Though this may be difficult in practice, the arbitrator must uphold the integrity and fairness of the arbitration process, and conform his conduct to basic principles of ethics as outlined above.¹⁵⁵

Dunsford, in his paper, the Role and Function of the Labor Arbitrator, has concluded that the question of the propriety of an arbitrator's undertaking to mediate a dispute without the express encouragement and permission of the parties does not excite much controversy today, as such initiatives are generally believed to be improper. See 30 St.Louis LJ 109, 114, 117.

¹⁵⁴ Lon Fuller, Collective Bargaining and the Arbitrator, in Murray, Rau and Sherman, *Processes of Dispute Resolution*, (1996).

¹⁵⁵ See *supra*, The Qualifications of the Arbitrator.

In sum, the role of the arbitrator is to bring to bear all his knowledge and experience in weighing and putting into perspective all the evidence before him in order to render an award that is perceived by all concerned to be both fair and just. As David Feller suggests:

“The arbitrator’s so-called expertise is not so much expertise as it is knowledge of the fact that the parties have not called upon him to act like a court in adjudicating a breach of contract action, but rather to act as - perhaps there is no better word - an arbitrator.”¹⁵⁶

8. The Award

The arbitrator’s award in an arbitration proceeding is final and binding upon the disputing parties.¹⁵⁷ For this reason, the award must determine all disputes which the parties have brought before the arbitrator for determination, and an incomplete award may be found to be invalid and unenforceable, although such award will normally be remitted by the court to the arbitrator.¹⁵⁸ On the other hand, nothing must be addressed in the award which was not a matter for determination, as such an award will, likewise be invalid and unenforceable unless that part of the award which determines matters within the scope of reference may be severed from the part of the award which determines matters outside the scope of reference.

The arbitrator is under no duty to give reasons for the award, although it is possible in certain cases for the court to use its power to order the arbitrator or umpire to state the reasons, where it appears to the court that the award does not sufficiently set out its reasons, particularly to enable the court to consider any questions of law arising out of the award, for the purpose of an appeal.

¹⁵⁶ Feller, David, *Arbitration: The Days of Its Glory are Numbered*, as quoted in Risking and Westbrook, *Dispute Resolution and Lawyers* (1996).

¹⁵⁷ Per Halsbury’s Laws of England: “The effect of the awards such as the agreement of reference expressly or impliedly prescribes. Where no contrary intention is expressed and where such a provision is applicable, every arbitration agreement is deemed to contain a provision that the awards is to be final and binding on the parties and any persons claiming under them respectively.”

¹⁵⁸ Halsbury’s Laws of England, 4th Edition, Vol. 2. p.391.

Nolan Haley observes that there are four instances in which the award may be set aside, as follows:

- i. Where the award was procured by corruption, fraud, or undue means.
- ii. Where there was evident partiality or corruption in the arbitrators.
- iii. Where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehaviour by which the rights of any party have been prejudiced.
- iv. Where the arbitrators exceeded their powers or so imperfectly executed them that a mutual, final and definite award upon the subject matter submitted was not made.

ADVANTAGES AND DISADVANTAGES OF ARBITRATION

Although arbitration is the ADR process most closely resembling litigation, the arbitration process is different from the formality of litigation and trial in a number of respects. Nolan-Haley points out that Arbitral fact-finding is generally not equivalent to judicial fact finding. The record of the arbitration proceedings is not as complete, and written transcripts are usually unnecessary unless the parties decide to order them. These usual evidentiary rules are not applicable as the arbitrator has considerable discretion in the admission of evidence. Furthermore, such rights as discovery, cross examination and testimony under oath are quite limited in the arbitral process.

Although, as Riskin and Westbrook suggests, it is difficult to generalise about the characteristics of arbitration, speed, lower costs, informality, the ability to obtain a more suitable neutral decisionmaker, and privacy are the advantages usually cited in support of arbitration; and many of the advantages of arbitration result from the autonomy parties gain when they decide to arbitrate rather than go to court:

“When parties arbitrate, they have power to decide for themselves many substantive and procedural issues over which they would have no control if they used the court system. The characteristic of autonomy overlaps the other characteristics. The power to choose the neutral decisionmaker, for example, is perhaps the most significant aspect of party autonomy. Even the characteristics of speed, low costs and informality relate to autonomy. These

alleged advantages are potential rather than guaranteed, and will be fully realized only if the parties co-operating in using their freedom to pursue them.”¹⁵⁹

1. Speed, Lower Costs and Informality

The fact that arbitration is cheaper and faster than the courts is one of the most frequent claims made on behalf of arbitration. The huge back-log of cases in the courts and the long delays waiting for a trial date, as well as extensive pre-trial discovery and finally, long, drawn out trials are a daunting reality that the courts constantly have to battle with. The expansion of the court system in response to the caseload explosion is not a viable option, as the expenses involved in such an exercise would be phenomenal and far beyond the reach of public resources. Certainly, the additional judges and court personnel could dilute the quality of the judiciary, and create a large judicial bureaucracy which will provide an inferior quality of justice. In support of this idea, Nolan-Haley writes:

“In theory, traditional arbitration has numerous advantages over the litigation process, not necessarily because it is a superior form of justice, but simply because it uncomplicates the path to justice.”¹⁶⁰

Informality is one characteristic that makes arbitration not only faster and cheaper than the courts but also because it is considered to be a highly desirable goal in itself. As Riskin and Westbrook observe, although discovery is available in arbitral proceedings, it is used to a far less extent than in court proceedings. Similarly, although evidentiary objections are made in arbitration hearings, most arbitrators are not so strict in their application of the rules of evidence. The filing of numerous motions is not so common in arbitration, and the very limited review by the courts of arbitral awards discourages costly and time consuming appeals.

The informality of arbitration has also been said to promote a perception of greater fairness and increase the satisfaction of those who participate in the proceedings - rules regarding hearsay and other constraint's on witnesses' narrative are not so easily understood by the non-lawyer, and places litigation at a disadvantage in this respect.

¹⁵⁹

L L Riskin and James E Westbrook, *Dispute Resolution and Lawyers* (1987).

In arbitration proceedings, witnesses are generally allowed to tell their stories in their own way.

2. A More Suitable Decisionmaker

Most commentators believe the ability of the parties to choose the decisionmaker is one of the principal advantages of arbitration, because it is the best insurance the parties have that the arbitrator will be objective as well as sensitive to the needs of the parties and the relationship. However, the power to choose the decisionmaker has also been argued to be one of the principal weaknesses of arbitration, because it encourages arbitrators to make compromise decisions in order to remain acceptable. Although there certainly will be instances in which not more than a passing knowledge of the subject-matter is required, there can be no doubt that the advantage of expert knowledge can go a long way towards alleviating the time and expense involved in terms of calling expert witnesses to educate the judge in court on a particular technical matter.

Indeed, as Lord Salmon once professed: *"I cannot help thinking that building contractors and sub-contractors and architects ... know far more about the building trade than I, or indeed, any judge, can hope to [know]."*¹⁶¹

3. Privacy

To parties who believe that public access to the hearing or decision in the courts might result in competitive or other disadvantages, the relative privacy of arbitration might be considered to be one of its significant advantages. Arbitration hearings are conducted in private, and the parties themselves have control over who has access to the arbitrator's opinion and award. This degree of privacy is not afforded by the courts, and can hardly be paralleled.

4. Party Autonomy

As already noted, the parties to a dispute generally have more control over the handling of their dispute when they arbitrate, than when they go to court. Unlike in the court process, the parties in an arbitration has the power to:

- choose the neutral decisionmaker;
- select the substantive standards governing the arbitrator's decision;
- select the substantive standards for processing the dispute.

In building and implementing their dispute resolution system, the disputants must use their freedom to consider what is important to them. It seems clear that much of this is dependent upon the nature of the dispute and the objectives of the disputants. Thus, each of these advantages will be given different emphasis, depending on which aspects or characteristics are considered to be most desirable to the parties.

C. MEDIATION

OVERVIEW

Kovach states that Mediation has been given many definitions, the broadest being simply the facilitation of a settlement between individuals.¹⁶² The intermediary or mediator basically serves as a go-between for individuals or groups with different opinions, outlooks, ideas and interests. Another definition is that Mediation is an informal process in which a neutral third party helps others to resolve a dispute or plan a transaction but does not (and ordinarily does not have the power to) impose a solution.¹⁶³ Generally, the decision to enter into mediation is a voluntary decision taken by the parties, and as such, the decision is of a consensual nature. For this reason it will be seen that mediation usually concerns disputes that have arisen out of a contract, and in general is enforceable according to the rules of contract law.

¹⁶¹ Case not cited, in Parris, John, *Arbitration Principles and Practice* (1983)

¹⁶² K K Kovach, *Mediation Principles and Practice* (1994)

¹⁶³ L L Riskin and James E Westbrook, *Dispute Resolution and Lawyers* (1987).

The mediation process deals with human behaviour and motivation, and, in order to be effective, but be adaptable to individual differences, and therefore mediation by its very nature is a fluid or flexible process. It is because of this requirement of adaptability and flexibility that there are such a variety of definitions existing, for the term "mediation." Still, even while these definitions differ and are subject, as Kovach says, to debate, most people agree on the purpose of the process: to assist people in reaching a voluntary resolution of a dispute or conflict.

The use of the mediation process has grown tremendously, and this growth has been attributed to the nature of the process itself rather than the mediator. Certainly, it has been said that mediators often refer to themselves as mere caretakers of the process.¹⁶⁴ On the international sphere, mediation may be traced back many hundreds and thousands of years. In China and Japan, mediation was used as a primary means of conflict resolution, and was the first choice for dispute settlement, rather than fighting or adversarial approaches to problem-solving. Those cultures place a strong emphasis on peace-making and peace-keeping, and their mediative or conciliatory approach to conflict has continued throughout history. In China today, mediation boards, termed People's Mediation Committees are responsible for the resolution of over 7,2 million disputes per year.

Singer observes that because of its flexibility, mediation is adaptable to business disputes of all sizes and complexity. The process emphasises solving problems rather than establishing who did what to whom in the past. As Singer points out:

"In the hands of skilled mediators, representatives of sparring businesses can be helped to focus on their future relationships. In the case of suppliers of necessary materials, ongoing construction, or other sensitive relationships, this focus can be critical. It also may be critical in disputes that involve ongoing business or mixed business and personal relationships...In an effort to prevent a recurrence of the impasse, mediators can help parties to determine in advance how they will resolve any future disputes."¹⁶⁵

¹⁶⁴

K K Kovach, *Mediation Principles and Practice* (1994).

¹⁶⁵

Linda R Singer, *Settling Disputes*, Westview Press (1994).

1. The Agreement to Mediate

Generally, an agreement to mediate is agreed upon in advance, and is usually incorporated as a clause in a contract which provides that the parties will attempt to resolve all disputes arising out of the contract through mediation, before resorting to arbitration or litigation. An example of such a simple clause would be:

Mediation: In the event of a dispute arising out of any of the terms and conditions of this contract, the parties agree to use their best efforts to resolve the dispute through the mediation process. Both parties together will select the mediator. The costs of the mediation will be borne equally by the parties.

2. Selection of the Mediator

Although there is no magic formula guaranteeing a successful mediation, the selection of the mediator is an important task for the obvious reason that the skills of mediators can make a significant difference to the success or otherwise of the process.¹⁶⁶ It should be remembered that a mediator is a diplomat and not an advocate¹⁶⁷, and so, in selecting the mediator, the parties should select one who is not only impartial, but also tolerant, patient, resourceful and articulate.¹⁶⁸

3. Skills of the Mediator

The American Society of Professionals in Dispute Resolution created a commission to study the qualifications of mediators and arbitrators. It generally recognised that one of the main principles for these qualifications should be performance rather than paper credentials as the central criteria, and identified the following skills as necessary for competent performance as a mediator, which we here adopt.

- a. ability to understand the negotiating process and the role of advocacy;
- b. ability to earn trust and maintain acceptability;
- c. ability to convert parties' positions into needs and interests;
- d. ability to screen out non-mediable issues;

¹⁶⁶ P Matibini, *Alternative Dispute Resolution*.

¹⁶⁷ Paul Mitchard; *A Summary of Dispute Resolution Options* (1997).

¹⁶⁸ Jacqueline M Nolan-Haley, *Alternative Dispute Resolution* (1992)

- e. ability to help parties to invent creative options;
- f. ability to help the parties identify principles and criteria that will guide their decision making;
- g. ability to help parties assess their non-settlement alternatives;
- h. ability to help the parties make their own informed choices;
- i. ability to help parties assess whether their agreement can be implemented.¹⁶⁹

4. Role of the Mediator

Disagreement about the mediator's role abounds, but the reason for this is probably because of the diversity and flexibility of the nature of mediation itself. Riskin and Westbrook observe that the mediator's concept of his role strongly affects the goals he selects, and these goals, in turn, powerfully influence the strategies and techniques he employs. However, despite the fact that approaches to mediation are extraordinarily diverse, yet there are commonalities in most mediations, and a continuum of the basic roles a mediator can play may be as follows, listed roughly from the least to the most active:

- urging participants to agree to talk
- helping participants understand the mediation process;
- setting an agenda;
- providing a suitable environment for negotiation;
- maintaining order;
- helping participants understand the problem(s);
- defusing unrealistic expectations;
- helping participants develop their own proposals;
- helping participants negotiate;
- persuading participants to accept a particular solution.¹⁷⁰

Lon Fuller elegantly describes the goal of the mediator thus:

"The central quality of mediation [is] its capacity to reorient the parties towards each other, not by imposing rules on them, but by helping them to achieve a new and shared perception of their relationship, a perception that will redirect their attitude and dispositions toward one another."¹⁷¹

¹⁶⁹ Society of Professionals in Dispute Resolution (SPIDR) Commission, in *Alternative Dispute Resolution* by Jacqueline M Nolan-Haley.

¹⁷⁰ Riskin, The Special Place of Mediation in Alternative Dispute Processing, in LL Riskin and J E Westbrook, *Dispute Resolution and Lawyers* (1987).

The functions of the mediator, to enable him to fulfil this objective, have been identified and listed by Professor Lawrence Susskind, as including, inter alia, the following:

i. **The mediator is a catalyst.**

His presence affects how the parties interact, and as such, should lend constructive posture to discussions rather than cause further misunderstanding and polarisation.

ii. **The mediator is also an educator.**

He examines the dynamics of the controversy to enable him to explain the reasons for a party's specific proposal or its refusal to yield in its demands.

iii. **The mediator must be a "translator".**

His role is to convey each party's proposals in a language that is both faithful to the desired objectives of the party and formulated to insure the highest degree of receptivity by the listener.

iv. **The mediator must expand the resources available** to the parties, in order to reduce frustration in their discussion over a lack of information or support services. By his personal presence and with the integrity of his office, the mediator can frequently gain access for the parties to needed personnel or data.

Kovach points out that the most important thing to remember about the mediator's role is that **the mediator is in control** of the process:

"Mediation works in resolving disputes because of the process, not the person. That of course, is not to say that skilful mediator will not be more effective than one possessing less skill. But more often it is the procession through the stages of the process that leads parties to a mutually satisfactory resolution. The role of the mediator, then, is to safeguard, maintain, and control the process. This must be distinguished from control of the subject matter of the

dispute - that is up to the parties. Regardless of the subject matter of the dispute, the process remains the same. **The parties are responsible for the content; the mediator is responsible for the process.**¹⁷²

5. Role of the lawyer

Although the process of mediation itself generally excludes lawyers in their traditional role, lawyers may assume a wide variety of participatory roles in mediation. Whenever a dispute arises, most people usually consult a lawyer before beginning a lawsuit and in the interviewing and counselling process, lawyer are in the unique position of being able to help clients choose amongst the available range of dispute resolution processes, from negotiation to full scale litigation.¹⁷³

The lawyer, in advising clients to choose mediation, must consider the following factors¹⁷⁴:

- a. the client's desire to settle: does the client really want to resolve the problem or just "get even;"
- b. the nature of the relationship between the disputing parties: whether it is long-term, on-going or simply a one-off deal;
- c. the type of relief desired: whether a precedent is desirable;
- d. predictability of legal outcome;
- e. the parties' positions;
- f. desirability of a private settlement.

Nolan-Haley suggests that in addition to referring a client to mediation, a lawyer may function in a traditional lawyering role and act as a negotiator for a client during the mediation session. However, there may be certain disadvantages to allowing the lawyer, rather than the client to participate in the mediation process, such as; that the client becomes a non-participatory fixture who defers to the lawyer's sense of fairness. Furthermore, the client never directly experiences the benefits of mediation

¹⁷² K K Kovach, *Mediation Principles and Practice* (1994). Emphasis is the author's.

¹⁷³ Jacqueline M Nolan-Haley, *Alternative Dispute Resolution* (1992).

¹⁷⁴ Jacqueline M Nolan-Haley, *Alternative Dispute Resolution* (1992)

and the total experience becomes a rights based process, similar to what happens in the adjudication process.

Lawyers also have a role in reviewing the mediation agreement for the client, during the mediation process. This is a role that should be approached with caution: the lawyer should avoid substituting his own judgment for the client's; indeed, it may well be that the lawyer, in judging the agreement through a "legal prism", might overlook the fact of the client's satisfaction with the agreement as it stands.

Lawyers may also fulfil the role of mediator, although this is a relatively new role for lawyers.¹⁷⁵ As Nolan-Haley points out:

"One of the chief benefits of choosing a lawyer as a mediator is the lawyer's ability to help the parties explore the legal as well as the non-legal consequences of conduct. Lawyers are better able to help the parties engage in reality testing about what is involved in the litigation process as well as to understand the likely range of legal outcomes."¹⁷⁶

THE PROCESS

In explaining mediation, most writers have conceptualised it in stages. The basic model for mediation is laid down by Kovach as follows:

- Preliminary Arrangements
- Mediator's introduction
- Opening Statements by Parties
- (Ventilation)¹⁷⁷
- Information Gathering
- Issue identification
- (Agenda Setting)
- (Caucus)
- Option Generation
- (Reality Testing)

¹⁷⁵ There are however, a great deal of uncertainties over the appropriate role for lawyers who mediate, but the nature and scope of this essay prevents further discussion on that issue.

¹⁷⁶ Nolan-Haley, *Alternative Dispute Resolution* (1992)

¹⁷⁷ Stages listed in parenthesis are optional stages, positioned closed to where, if used, they would occur. Employment of these optional stages will depend upon the parties, the nature of the matter, and the mediator's style.

- Bargaining and Negotiation
- Agreement
- Closure

1. Preliminary Arrangements

The Preliminary arrangements stage includes everything that happens prior to beginning the actual mediation session, and normally refers to matters of referral, getting to the mediation table, selection of the mediator, the determination of who should attend, issues of fees, settlement authority issues, timing and court orders.

2. Mediator's Introduction

The mediator's introduction is self-explanatory; it generally sets the stage for the remainder of the mediation. The mediator introduces himself, the parties and (as appropriate) their representatives. He describes the process and sets the ground rules. At this point, the goals and objectives from the viewpoint of the mediator may be set out.

3. Opening Statements

Opening statements are made by the parties or their representatives, who are invited to make an uninterrupted presentation of their view of the dispute. Objections are generally not permissible, as it is important at this time for parties to fully express and explain in their own words, both to the mediator and to each other, how they view the dispute. Little restriction is placed upon the opening statements, although time limits may be set in complex, multi-party cases.

4. Information Gathering

The information gathering process generally allows the mediator the opportunity to clarify certain issues, particularly where the opening statements have not provided a clear or complete picture of what the dispute is about.

8. Agreement and Closure

Once the negotiations have resulted in an agreement, the mediator will restate it, and generally, will draft either the complete agreement or a memorandum of settlement which can be formalised into a legal document. Where no agreement has been reached, the mediator will restate where the parties are, noting any progress made in the process. The final stage of the process is closure.

9. Outcome

Whether or not the outcome of a mediation process is enforceable largely depends upon the law in individual jurisdictions. In some cases the mediation agreement may be enforceable as a contract, and in others, say, where mediation is court-annexed, the mediation becomes a court judgement. Where no agreement is reached, the parties have the option of deciding whether or not to pursue their claim in another forum.¹⁷⁸

ADVANTAGES AND DISADVANTAGES OF MEDIATION

1. Advantages

The very nature of mediation itself may be said to be its advantage over the litigation process. The mediation process is generally more expeditious, inexpensive and procedurally simple than adversarial problem solving, and this is a great motivating factor in the development and use of mediation. Mediation clients also experience more user satisfaction than their adversarial counterparts, and because of this, empirical studies have shown a greater inclination on the part of the disputants to abide by the mediated agreement than with a court judgment. As pointed out earlier, because of its flexibility, mediation is adaptable to business disputes of all sizes and complexity, without the complications involved in court litigation.

¹⁷⁸ Jacqueline M Nolan Haley, *Alternative Dispute Resolution* (1992).

i. Privacy and Confidentiality

Unlike in ordinary litigation which is generally aired in open court, mediation is private and confidential, and this is one of its greatest advantages. Kovach suggests that in some instances, the words mediation and confidentiality are used almost synonymously, and that in fact, it has been noted that most people operate under the assumption that the mediation process is confidential, even if it is not.¹⁷⁹

ii. Control and Autonomy

The element of control is an important advantage: Singer points out that mediation puts the disputing parties in control of resolving their own disputes, and the presence of the principals themselves can be critical in that it enables the parties to craft resolutions that might escape the notice of their lawyers as well as in revealing their business priorities. Disputing parties have considerably more autonomy in mediation than they would in an adjudication process where a judge or arbitrator would impose a decision. Mediation enables the disputants to control the outcome of the process and this usually results in a high degree of compliance with mediated agreements.

iii. Problem Solving

Mediation transcends the narrow issues in the dispute; it focuses on the underlying circumstances that contributed to the conflict and enables the parties to define what is satisfactory to them. Riskin and Westbrook suggest that one of the greatest values of mediation is that it can generate processes and results that are more attractive to some parties than traditional adversary approaches.

iv. Informality

The experience of mediation itself is far less intimidating than the adversary mode. The disputing parties have direct contact, and this can provide important learning experiences that can lead to results that more fully respond to their needs.

¹⁷⁹

K K Kovach, *Mediation Principles and Practice*.(1994).

v. Preserving the Relationship of the Parties

We have earlier noted the importance of preserving the relationship of the parties, and it will be seen that particularly where the parties have an on-going relationship, this is an especially important advantage of the mediation process. Litigation on the other hand, often precipitates an end to the parties relationship.

2. Disadvantages

It has been said that mediation lacks the procedural protection of adversarial justice, such as the right to counsel. However, it is generally agreed that mediation will result in an agreement which is more responsive to individual needs than a court judgement. As regards the issue of fairness, if parties reach an agreement in mediation without knowing what is available to them from a legal perspective, there may be the risk of unfairness in the agreement. Further, the result may be unfair to one party, where the other party has greater bargaining power whether from sheer force of personality, knowledge of the law, better grasp of the facts or emotional or economic power. The litigation process is, in this context, an “equaliser”, as it allows professional litigants to combat on an equal footing, in an arena that is familiar to both lawyers as representatives of the disputants.

Finally, it has been pointed out that the greatest potential of mediation probably lies in the early stages of conflict, before disagreements have escalated, before disputants have incurred the costs of preparing a case for trial, perhaps even before they have hired lawyers.¹⁸⁰ The potential can be realised only when the disputants themselves, rather than the courts, begin to take their disputes to mediation.

¹⁸⁰

Linda R Singer, *Settling Disputes* (1994).

‘HYBRID’ DISPUTE RESOLUTION PROCESSES

As stated earlier, the continued growth of the ADR movement has resulted in several innovative combinations of dispute resolution processes, termed “Hybrid” dispute resolution processes. Facilitated negotiation can combine with mediation in the mini-trial. Mediation connects with arbitration in the “med-arb” process. There are also a number of other Hybrid process, such as reference procedures and the “neg-reg” process, which combines negotiation with regulatory-rule making.

In our introductory chapter, we briefly outlined a number of these hybrid process, and, because of the nature and scope of this essay we shall, for purposes of brevity, here examine only the mini-trial and the “med-arb” processes in this section.

1. The Mini-Trial

The phrase “mini-trial” was coined by a New York Times journalist in 1977 to describe successful settlement negotiations in a complex infringement case between TRW Inc. and Telecredit, Inc., involving millions of dollars.

The mini-trial is not a trial in any meaningful sense of the word. It is a structured settlement process which blend together some components of negotiation, mediation and adversarial case presentation. In a mini-trial, lawyers present adversarial but abbreviated summaries of their cases to chief executives or other key decision-makers representing both clients, before a mutually agreeable “neutral advisor”, selected by the parties themselves.

The process itself is private and voluntary and is generally less formal than adjudication, although the parties may set down a number of procedural rules. For example, the rules of evidence and civil procedure are generally waived, but the hearing is structured around adversarial presentation and rebuttal of position. Free and open discussion is generally encouraged, and this is enhanced by the confidentiality of the procedure. The neutral advisor, who is usually an attorney or retired judge, is allowed to comment on the arguments or evidence, and to question

the witnesses or counsel. This helps the executives to examine the strength and weaknesses of both sides of the case.

After the hearing, the business executives then try to settle the case. The neutral advisor may be asked to mediate during these settlement discussions. If an agreement is reached, this may be enforceable as a contract. If they fail to reach an agreement, the neutral advisor may mediate or recommend a particular settlement.

The mini-trial offers executives a quick, relatively inexpensive look at the realities of the dispute, without the filter of their lawyers' adversarial assessment. It gives them an opportunity to negotiate directly with opposing executives. It is obviously important that these executives have full settlement authority, to take advantage of the full impact of face-to-face presentations.

It has been observed that the mini-trial has proved most successful in complex civil cases where there are mixed questions of law and fact. For example, cases involving patent infringement, government contracts, products liability, construction and contract and enforcement.

The limitations inherent in the process will arise in cases where one of the parties needs the cathartic effect of trial; the short-hand version of a trial will most likely prove unsatisfactory in such instances. The mini-trial will also be a particular waste of time where one of the parties has no serious desire to settle.

2. Med-Arb

“Med-arb” is described as a two-step dispute resolution process, which involves both mediation and arbitration. It is important to note that the two processes are not combined as such, but rather, consecutively. Thus, the parties first attempt to resolve their differences through mediation, and, where this mediation fails to resolve the dispute in whole or in part, the remaining issues are automatically submitted to binding arbitration. The final result in this process combines any agreements reached in the mediative phase with the award in the arbitral phase.

In the traditional med-arb process, the same person serves as both a mediator and an arbitrator in one dispute. Thus, the neutral must be skilled in both procedures in order to guide parties through the mediation phase to preside over the arbitration and render a binding decisions.

The two step med-arb process is considered a more efficient process than straight mediation followed by arbitration with a different person. The advantage of med-arb is that if the mediation process fails to result in agreement, then the parties will not have to begin their story all over again with a new arbitrator. As Matibini suggests, Med-Arb arguably offers parties the best of both worlds - the opportunity to take control of the dispute resolution process and to design their own agreement through mediation, with the assurance that if they do not resolve the dispute themselves, an arbitrator will do it for them.¹⁸¹

III. THE CURRENT STATUS OF ALTERNATIVE DISPUTE RESOLUTION IN ZAMBIA

As we noted in our introduction, the Zambian Judicial System is no stranger to Alternative Dispute Resolution. Arbitration, Mediation, Conciliation and Negotiation are all a part of the Zambian Judicial system to varied extents; but this, however, has not always been the case.

The current drive towards the introduction of ADR mechanisms into the Zambian Judicial system may be traced back to 1990, when the then Chief Justice Annel M Silungwe addressed the First Judicial and Law Association of Zambia Seminar. In his paper, simply entitled “Alternative Dispute Resolution”, the Chief Justice traced the history of various systems of dispute resolution in Zambia during the pre-colonial, colonial and post-independence periods. He also gave an introduction of various ADR mechanisms, including Conciliation, Mediation and Arbitration, highlighting their advantages, and their appropriateness to application in Zambia. Even then, in

In the traditional med-arb process, the same person serves as both a mediator and an arbitrator in one dispute. Thus, the neutral must be skilled in both procedures in order to guide parties through the mediation phase to preside over the arbitration and render a binding decisions.

The two step med-arb process is considered a more efficient process than straight mediation followed by arbitration with a different person. The advantage of med-arb is that if the mediation process fails to result in agreement, then the parties will not have to begin their story all over again with a new arbitrator. As Matibini suggests, Med-Arb arguably offers parties the best of both worlds - the opportunity to take control of the dispute resolution process and to design their own agreement through mediation, with the assurance that if they do not resolve the dispute themselves, an arbitrator will do it for them.¹⁸¹

III. THE CURRENT STATUS OF ALTERNATIVE DISPUTE RESOLUTION IN ZAMBIA

As we noted in our introduction, the Zambian Judicial System is no stranger to Alternative Dispute Resolution. Arbitration, Mediation, Conciliation and Negotiation are all a part of the Zambian Judicial system to varied extents; but this, however, has not always been the case.

The current drive towards the introduction of ADR mechanisms into the Zambian Judicial system may be traced back to 1990, when the then Chief Justice Annel M Silungwe addressed the First Judicial and Law Association of Zambia Seminar. In his paper, simply entitled "Alternative Dispute Resolution", the Chief Justice traced the history of various systems of dispute resolution in Zambia during the pre-colonial, colonial and post-independence periods. He also gave an introduction of various ADR mechanisms, including Conciliation, Mediation and Arbitration, highlighting their advantages, and their appropriateness to application in Zambia. Even then, in

1990, the problem of court congestion was one of serious proportion, and the court examined how best to ease this congestion. As the Chief Justice stated:

“As many people appear to be litigious, especially those in urban areas, and the court system is bursting at the seams with the ever increasing volume of court business, it seems instructive that a systematic campaign for the promotion of ADRMs is not only desirable but also urgent.”¹⁸²

Calling for education of the general public to settlement of disputes through conciliation, mediation, arbitration and other forms of ADR mechanisms, the Chief Justice further stated,

“Above all, ADRMs require the broadened involvement and support not only of the legal profession, the judiciary and the legal education establishments, but also ... of the public at large. If members of the public are made to appreciate that [ADR] is cheaper, informal, speedy and does not expose the disputants to the public gaze, many of them would resort to such methods.”¹⁸³

Since 1990, the ADR drive in Zambia has grown with increasing impetus. The quest for alternatives to traditional litigation has been taken up by a new generation of lawyers and other interested parties in Zambia, who envisage a judicial system comparable to international standards. For example, Chief Justice M M W S Ngulube has been a keen enthusiast of the ADR drive in Zambia; and prominent Lusaka Lawyer, Mr Patrick Matibini, has written extensively on ADR, as well as Arbitration and Mediation, and has on several occasions emphasised the need for the improvement of our laws in this respect.¹⁸⁴

Zambia's drive for a responsive legal and judicial system has captured the interest of the international community. Thus, the Law Association of Zambia (LAZ), in

¹⁸¹ P Matibini, *Alternative Dispute Resolution*, A paper presented to the Judges Seminar in Livingstone in July, 1998.

¹⁸² Chief Justice Annel M Silungwe, *Alternative Dispute Resolution*, a paper presented at the First Judicial and Law Association of Zambia Seminar, held in Lusaka in October, 1990.

¹⁸³ CJ Annel Silungwe, *ibid*.

¹⁸⁴ Articles by P Matibini taken from various editions of “The Legal Desk” column of the Sunday Mail, include the following titles: “Alternative Dispute Resolution”; “Mediation Rules Should be Re-Visited”; “What is Arbitration?”; “LAZ and Government Should Jointly Promote ADR”; “Promote Commercial Mediation”; “Zambia Should Brace for International Commercial Arbitration”. In Addition, P Matibini has addressed the Judges Seminar on “Alternative Dispute Resolution”, and he has been the point person for Training in the Steering Committee for ADR organised by LAZ in conjunction with USAID.

conjunction with the United States Agency for International Development (USAID) and the Foundation for International Commercial Arbitration (FICA), set out to launch a campaign to not only bring ADR into focus in Zambia, but to re-examine the inadequacies with a view to introducing or re-activating appropriate dispute resolution methods to improve the Zambian Judicial System.¹⁸⁵

As part of this campaign, in 1996, Chief Justice Matthew Ngulube opened a seminar on “Alternative Dispute Resolution”, organised by LAZ in conjunction with USAID. The seminar was attended by Judges from both the Supreme Court and the High Court of Zambia, five Judges from the United states, and several senior Lawyers from the Zambian Bar.¹⁸⁶ The response from the participants in this seminar had positive results for the future of ADR in Zambia.¹⁸⁷ A new awareness of ADR had been instilled in the legal and judicial fraternity, and plans were being laid for the next steps to be taken towards the integration of ADR devices into the Zambian Judicial System.

The success of the initial part of the ADR drive began to show its fruits within a relatively short space of time. The following year, in May, 1997, the High Court Rules Committee passed Statutory Instrument No. 71 of 1997, being the High Court (Amendment) Rules of 1997, introducing Mediation as an alternative dispute resolution procedure into the Zambian jurisdiction.

In 1998, LAZ established an Alternative Dispute Resolution Committee, anchored by Patrick Matibini¹⁸⁸, as a way of ensuring continuity in the process of introducing ADR into the system. LAZ solicited the support of the business community, and, with the Zambia Association of Chambers of Commerce and Industry (ZACCI) throwing their weight behind the development of ADR and bringing pressure to bear

¹⁸⁵ Richard Martin, “The Potential for the Development of Arbitration and Alternative Dispute Resolution Systems in Zambia, and Proposals for Implementation”; a Report for the Law Association of Zambia (1998).

¹⁸⁶ P Matibini, “Alternative Dispute Resolution”, an Article from The Legal Desk of the Sunday Mail.

¹⁸⁷ See P Matibini, “LAZ and Government Should Jointly Promote ADR”, An Article from the Legal Desk of the Sunday Mail, 22 November, 1998.

¹⁸⁸ Rapporteur’s Report, submitted to the Council of the Law Association of Zambia, September 1998.

on the government to reform the judicial system¹⁸⁹, the ADR drive gained further impetus with the result that, in 1999, The High Court Rules Committee passed Statutory Instrument No. 29 of 1999, being the High Court (Amendment) Rules, 1999, introducing for the first time, a Commercial List in the High Court for Zambia, and incorporating fundamental provisions for the mediation process in Commercial actions.

With all these developments in recent years, the importance of ADR to the Zambian Judicial System may well be appreciated, especially with the introduction of Mediation into the jurisdiction. As we shall see below, the recent introduction of the Commercial list has also been a major landmark, and, with the forthcoming promise of major reforms relating to arbitration, the future of ADR in Zambia seems bright indeed.

In the next section, we highlight the current status of these alternatives in the Judicial System.

A. COMMERCIAL LIST

The Commercial List was introduced into the High Court System by the passage of Statutory Instrument No. 29 of 1999, under the auspices of the High Court Rules Committee. The High Court Rules Committee comprises the Chief Justice, two High Court Judges appointed by the Chief Justice and two legal practitioners nominated by the Council of the Law Association of Zambia and finally appointed by the Chief Justice.

As we noted earlier, the introduction of the Commercial list has been a major landmark in terms of the reform of the Zambian Judicial System. Although the commercial list is an adjunct of the High Court and not in itself an ADR device, it was introduced as part of the drive to improve the inefficiencies and delays in the court system, as highlighted in Chapter II. Furthermore, the incorporation into the

¹⁸⁹ Richard Martin, *op. cit.*

rules of a provision enabling judges in commercial actions, where they see fit, to refer the parties to mediation or arbitration, is a positive aspect.

Under Rule 6, Judges have to summon the parties to a commercial action to a scheduling conference, at which the judge shall prepare a chart or schedule of events and review the status of the case as it stands. In this respect, Rule 7 therefore provides:

Mediation 7. A judge may, at the scheduling conference, refer parties to mediation in accordance with Order XXXI, or where applicable, to arbitration.

Under Rule 1, a “commercial action” is defined as any cause arising out of any transaction relating to commerce, trade, industry or any action of a business nature.¹⁹⁰

Besides easing the substantial burden of the high court in terms of congestion, the introduction of the Commercial list creates a positive environment for specialisation in the field of commercial law from which the business community can only stand to benefit. Indeed, LAZ, as part of its campaign to develop ADR in Zambia, has actively sought the involvement of the business community both in the participation of workshops¹⁹¹ on ADR as well as by providing information to educate the business community on the status quo. For example, in July 1999, LAZ, through its Honorary Secretary Nigel K Mutuna, presented a Paper to the Monthly General Meeting of the Bankers Association of Zambia¹⁹², in which it noted the delays in the dispensation of justice caused by congestion in the courts, and pointing out the following:

1. That due to congestion in the courts, the area of Commercial law, and banks, quasi banks and other lending institutions in particular, had suffered the most because huge sums of money had been tied up in litigation for years on end.

¹⁹⁰ See Rule 1, Order LIII of the High Court (Amendment) Rules, the High Court Act, Cap. 27 of the Laws of Zambia, as amended by Statutory Instrument No. 29 of 1999.

¹⁹¹ In September 1998, Seminars on ADR were held by LAZ in conjunction with USAID, FICA and ITC. These seminars were held in Ndola and Lusaka, and drew participants from nominees of the Professional Centre including Engineers, Quantity Surveyors, Architect, Land Surveyors, Valuation Surveyors, Journalists, Accountants and members of ZACCI.

¹⁹² Paper Presented by Honorary Secretary of the Law Association of Zambia to the Monthly General Meeting of the Banker's Association of Zambia held on 13th July, 1999 on Revitalisation of Arbitration in Zambia.

2. That this has been further exacerbated by the fact of lack of specialisation in the Zambian Courts, resulting from which there has been a failure by some presiding judges to appreciate some of the complex issues related to commercial transaction.
3. That another major cause of the delay in dispensation of justice has been recognised as the lack of manpower in the judiciary and the low income and poor conditions of service have failed to attract lawyers in private practice to the bench.
4. That this situation had led to
 - i. denial of speedy justice to the vast majority of citizens;
 - ii. creation of an unfavourable investment climate in the country; and
 - iii. excessive workload on the members of the bench which may lead to poor quality decisions being made.

After some delay¹⁹³, due to some logistical problems relating to the implementation of the system, the Commercial list was effectively launched into the Zambian Judicial system on April 3, 2000. It may be considered to be the fore-runner to major reforms in the Judicial System that include viable alternatives in a traditional system that badly needed overhauling. Its major aim is to reduce the back-log of cases in the High Court, and to encourage specialisation in the area of commercial law. With mediation fast becoming recognised as a viable and positive alternative to “battling it out” in the traditional system, it seems likely that not only will the judges be more likely to recommend a case for mediation in accordance with the rules relating to the Commercial list, but also, lawyers themselves will be more likely to make the initial recommendation, and to advise their clients on the positive implications of mediation. As Chief Justice Matthew Ngulube remarked, “*With the launching of the Commercial List, I am confident many disputes will be referred to Mediation and Arbitration...*”¹⁹⁴

¹⁹³ One of the major reasons for the delay of the effective introduction of the Commercial List was the need for adequate funding with regard to training of Mediators. As Chief Justice M M M W S Ngulube intimated in his opening remarks at the opening ceremony for Mediation Training on 17th April, 2000, both the commercial community and the legal fraternity itself, were anxious to see the implementation of the Commercial List as soon as possible.

¹⁹⁴ Speech by His Lordship Mr Justice M M W S Ngulube the Chief Justice, At the Opening Ceremony of the Mediation Training held at the Pamodzi Hotel on 17th April, 2000.

This view is shared by the Honourable Mr Justice K C Chanda (Retired)¹⁹⁵, who welcomed the introduction of the Commercial list to the High Court. Citing the congestion in the courts, and the resulting delays, Justice Chanda stated that the Commercial list would certainly go a long way towards relieving such congestion, and that he looked forward with interest to the forthcoming court reforms. The Judge observed that the introduction of the Commercial list could only connote an improvement in the quality of justice in the Courts, as it will encourage specialisation not only amongst the lawyers but more importantly, amongst judges. He cited three important factors:

- The introduction of the commercial list is important for specialisation of Judges in commercial law.
- This will enhance the quality and reasoning of judgments, with more in-depth analysis on the part of judges.
- This in turn will mean that the overall dispensation of justice will be improved.

The Judge pointed out the many advantages of Arbitration and Mediation, and predicted that in future, greater awareness in these areas of dispute resolution will encourage disputing parties to opt for ADR devices such as Mediation and Arbitration, because of the relaxed rules and the strong similarities these processes bear to the pre-colonial methods of traditional dispute resolution¹⁹⁶.

What is more, the incentive to specialisation in the field of commercial law may itself spawn a whole new incentive to investors into the country. It seems clear that a major barrier to economic development in terms of foreign investment has been the reluctance of foreign investors to invest in a climate where the future of their investment is not subject to a stable and responsive judicial system. The congestion in the courts and the time and effort as well as expense that can go into protracted litigation for the enforcement of contractual rights can cause major losses to any commercial establishment, and for this reason, the need for an efficient, responsive and capable judicial system is a paramount consideration when deciding whether to

¹⁹⁵ The author conducted several interviews with the Honourable Justice Chanda during the research process for the purpose of this essay.

¹⁹⁶ See *supra*, Chapter II, Historical Background.

invest in a given country.¹⁹⁷ It is hoped that the introduction of the commercial list, with all its positive implications, will remove a major barrier to foreign investment.

Finally, in pursuit of the provisions relating to mediation, it has been announced that extensive training programmes are being undertaken to train both lawyers and judges in the law and practice of mediation¹⁹⁸, and this welcome development appears to bode well for the future of ADR in Zambia. Certainly, a system which recognises the need for alternative dispute resolution is one that recognises the simple reality that these alternatives are not meant to replace the current system but rather, to act as complementary processes, which flex and adapt to the varying needs of any dynamic society. The introduction of the commercial list is therefore a step in the right direction.

B. ARBITRATION

We have seen that Arbitration is a procedure whereby the parties to a dispute refer that dispute to a third party, known as an arbitrator, for a final decision, after the arbitrator has first impartially received and considered evidence and submissions from the parties. The reference to the arbitrator takes place pursuant to an agreement between the parties. The arbitrator, in resolving the dispute, is not an ordinary court of law but a person chosen by the parties.¹⁹⁹

Although Arbitration has been on the Zambian statutes since 1933, its use in Zambia has been, to say the least, sporadic and rather ineffectual. As one report for the Law Association of Zambia observes, although a number of contracts, particularly in the construction industry, include arbitration clauses, the system has been under-

¹⁹⁷ Rapporteur's Report, submitted to the Council of the Law Association of Zambia, September 1998.

¹⁹⁸ These training programmes, sponsored by USAID, FICA and ITC, under the auspices of LAZ, are already underway. The first session of Mediation training for legal practitioners in Zambia was conducted during the month of April, 2000, with more training programmes scheduled for later in the year.

¹⁹⁹ This definition is taken from Butler and Finsen, *Arbitration in South Africa*, Juta & Co., Johannesburg, 1993.

utilised.²⁰⁰ Further, the report states that the concept and practice of arbitration is almost unheard of among either the commercial, legal or professional community. As such, parties have been said to commonly ignore an arbitration clause and take a dispute to court; and of the arbitrations that do take place, little is known, although it is quite possible that they fall below the internationally accepted standards of practice. As Martin observes on the situation in Zambia;

“Not only is arbitration not widely used, but it regularly takes up to five years for commercial cases to be heard in court. This, especially in the context of an unstable currency, is a major disincentive to investment in the country. Investors seek prompt dispute resolution systems of integrity and quality. The Minister of Legal Affairs and the Chief Justice are both aware of the fact that the court system is inadequate, and the effect of this on investors.”

As we noted in the previous section LAZ, together with ZACCI, has set up a massive campaign to develop ADR in Zambia, and its main emphasis is on the revitalisation of Arbitration - the reason for this being that “it is well known that the momentum which will be gained by fostering arbitration will also stimulate ... other forms of ADR.”²⁰¹ Furthermore, USAID has been working with LAZ to support the process of developing ADR, and has funded a number of seminars and consultative workshops, both in Lusaka and Ndola, with participants drawn from The International Trade Centre (ITC), the Foundation for International Commercial Arbitration (FICA) and the Arbitration Foundation of South Africa (AFSA).²⁰²

The Essential Elements of a System of Arbitration

There are four elements essential for an arbitration system to be effective, as follows:

- a legislative framework;
- an institution to support the process;
- rules under which arbitrations are conducted; and

²⁰⁰ Martin, R, Th Potential for the Development of Arbitration and Alternative Dispute Resolution Systems in Zambia, and Proposals for Implementation (1998).

²⁰¹ Martin, R, The Potential for the Development of Arbitration and Alternative Dispute Resolution Systems in Zambia, and Proposals for Implementation (1998).

²⁰² Rapporteur's Report, submitted to the Council of the Law Association of Zambia, September 1998.

- persons skilled in arbitration.²⁰³

In this respect, it is necessary to examine each of these elements in turn to determine the present status of these elements in Zambia.

1. Legislative Framework

Arbitration in Zambia is regulated by the Arbitration Act (hereinafter referred to as “the Act”), Chapter 40 of the Laws of Zambia, which was first enacted on April 5, 1933. There is general consensus amongst commentators that although the Act has essential provisions for an effective arbitration system, and is basically sound, it is in need of modernisation, as might be expected for legislation of that era.²⁰⁴

These essential elements include provisions with regard to:

- the appointment and dismissal of an arbitrator or arbitrators;²⁰⁵
- the powers of arbitrators;²⁰⁶
- the right of a party to an arbitration agreement to obtain a stay of execution of court proceedings pending the arbitration hearing;²⁰⁷
- court assistance to the arbitrator in summoning witnesses and determining a point of law²⁰⁸; and
- powers of the courts in relation to the time for making an award, setting aside an award and awarding costs²⁰⁹.

The Act also includes provisions for the enforcement of foreign awards, through local filing in the High Court Registry.

One major drawback of the Act is that it enables the Court, under S.13, to enlarge the time for making awards, even though under the first Schedule it is provided that the Arbitrator shall make an award within three months. The ability to enlarge the time for making awards would appear to go against the basic principles of arbitration in

²⁰³ Martin, R, op. cit.

²⁰⁴ See Martin R, *The Potential for the Development of Arbitration and Alternative Dispute Resolution Systems in Zambia, and Proposals for Implementation*; Matibini P, *Alternative Dispute Resolution*; and the Rapporteur’s Report submitted to the Council of the Law Association of Zambia, September, 1998.

²⁰⁵ S.5, Arbitration Act, Cap. 40 of the Laws of Zambia. See also S.7 and S.9.

²⁰⁶ op. cit., S.10.

²⁰⁷ op. cit., S.6.

²⁰⁸ op. cit., S.12

terms of speed and economy. S.13 is drawback because it does not state the circumstances under which such enlargement may be done, and this leaves the empowerment open to abuse.

Another ambiguous provision of the Act is S.15, which enables the Court to set aside an arbitral award where an arbitrator has misconducted himself or an award has been improperly procured. This section is broad and ambiguous as it does not define “misconduct”, nor the circumstances that would invite court intervention. However, it would appear that the certification of arbitrators would do much to remove the element of uncertainty in this regard, and this section may simply become regulatory in nature.

Under the Act, where the parties have agreed to submit any dispute for arbitration, that submission shall be irrevocable, except by leave of court.²¹⁰ Generally, the Arbitration Act lays down procedural guidelines for the conduct of an Arbitration hearing, and the First Schedule of the Act provides certain provisions that shall be implied in any submission, unless a different intention is expressed therein.²¹¹

The Arbitration Act also provides for supervisory jurisdiction of the courts in particular instances, such as, where the parties fail to agree upon an arbitrator, or where one of the parties fails to appoint an arbitrator. The High Court rules make provision for such supervisory jurisdiction, in accordance with the provisions of the Arbitration Act.

An interesting point to note is that under the Companies Act, Cap 388 of the Laws of Zambia, provides under S.322 (4) and (7) for the appointment of an Arbitrator in accordance with the Arbitration Act, in matters relating to shareholders’ or liquidator’s sale of company assets. The introduction of the Commercial list will obviously augment the use of these provisions.

²⁰⁹ S.11, S.16 and S.18.

²¹⁰ S.3, *Arbitration Act*, Cap. 40 of the Laws of Zambia.

²¹¹ *Ibid*, S.4.

However, as Zambian society becomes more aware of the nature and advantages of arbitration, it is suggested that, given that the Arbitration Act itself was enacted as far back as 1933, this area of the law needs to be re-examined, with a view to bringing the Act more in line with internationally accepted norms of arbitration practice.

2. International Standards

In this context, perhaps it would be apt to point out that the United Nations Commission on International Trade Law (UNCITRAL) has been involved in the process of unification and harmonisation of international trade law.²¹² The UNCITRAL model law on International and Commercial Arbitration²¹³ was developed for the needs of international arbitrations, but in recent times, the UNCITRAL arbitration rules and the UNCITRAL model law have been adapted and used to form the basis of domestic legislation in many jurisdictions around the world. The UNCITRAL model law provides detailed guidance on arbitral procedure and thus gives statutory protection to the parties. It is a detailed document that has stood the test of time and application in many jurisdictions, with modifications as necessary.

Another international standard relating to arbitration is the New York Convention of 1958 on the Recognition and Enforcement of Foreign Arbitral Awards, which is probably the most important convention of its kind, world-wide, because it provides a means by which awards can be readily enforced in other jurisdictions in many cases more effectively and expeditiously than the enforcement of foreign court judgments. This Convention has now been ratified by all the major industrialised countries, and a great number of developing countries.

It is suggested that the UNCITRAL model law be adapted to the Zambian jurisdiction, and that Zambia should accede to the New York Convention. This is crucial for foreign investment, and is vital for the future success of arbitration in Zambia. This is discussed in further detail in the next chapter.

²¹² UNCITRAL was created by the United Nations General Assembly through Resolution 2205 (XXI) to enable the United Nations to play a more active role in reducing or removing legal obstacles to the flow of international trade.

²¹³ United Nations Document A/40/17, Annex I (As adopted by the United Nations Commission on International Trade Law on 21 June 1985).

3. An Institution

Although, as earlier noted, the Law Association of Zambia has established an ADR Committee, anchored by Mr Patrick Matibini, there is much more that needs to be done in order to establish an institution that is recognised as one responsible for the control and administration of all the needs of an ADR system in the country.

For example, as Martin states, there is no institution to undertake any of the following activities²¹⁴:

- training and accrediting of arbitrators;
- offering a service to the parties in connection with the appointment of an arbitrator(s); either in terms of providing a list of persons suitably qualified from which the parties may select, or making an appointment;
- offering a facility to manager the arbitration process;
- taking responsibility for the development of appropriate rules or representing a focal point for ADR in Zambia.

All these are essential components of a formalised arbitration system, and indeed, in many other jurisdictions, such an institution is a vital part of their judicial system as it offers complementary support to the traditional administrative systems of the courts. It also goes a long way towards ensuring that the right types of cases are submitted to ADR processes, or to litigation, as the case may be.

4. Rules for the Conduct of Arbitrations

The Arbitration Act, Cap. 40 of the Laws of Zambia does not lay down any rules for the conduct of arbitrations in Zambia. In effect, this means that the parties to arbitrations are likely to work without rules, under conditions of extreme informality. This poses innumerable difficulties in the case of disputes, and could indeed give rise thereby, to actions of professional negligence against the arbitrator.²¹⁵ At

²¹⁴ Martin, R, the Potential for the Development of Arbitration and Alternative Dispute Resolution Systems in Zambia and Proposals for Implementation, September, 1998.

²¹⁵ Such was the case in the matter of an Arbitration between John Sweatman, Sandra Sweatman and Kariba Marina Limited (1st, 2nd and 3rd Claimants respectively) and Lake Kariba Inns Limited, Patricia Townsend, and Andrew Hadjipetrou (1st, 2nd and 3rd Respondents, respectively); 1997/HP/477 (unpublished). In that case, after an award by the Arbitrator, Mr Ali Hamir, in favour of

present, the parties use as an alternative, the Rules of the High Court, but it has been observed that these Rules are to all intents and purposes inappropriate to arbitrations, and indeed, can cause unnecessary costs and delays.²¹⁶

5. Skilled Arbitrators

As at September, 1998, it was reported that there were no arbitrators working in Zambia with an internationally recognised qualification in arbitration.²¹⁷ However, the situation has since changed, as a result of the current drive towards the development of ADR and the revitalisation of arbitration in Zambia. LAZ reports that in January 1999 and June, 1999, training courses in arbitration were undertaken in Lusaka and Ndola respectively, with participants being drawn from the accounting, construction, medical, engineering, surveying, legal and architectural professions. The training was carried out by FICA in conjunction with the Zambia Institute for Advanced Legal Education (ZIALE) and USAID, and the participants are now due to be certificated.²¹⁸

Although hard data is not readily available in terms of the numbers of cases that have been referred to arbitration, it seems clear that although in the past, arbitration has been under-utilised in Zambia, with the current activity and the new awareness of ADR systems, the use of arbitration in Zambia as a means of dispute resolution will steadily increase. In construction for instance, Arbitration is the principal form of dispute resolution in most major building contracts in Zambia.²¹⁹ Also, in an increasing number of lease agreements, an arbitration clause is inserted into the lease agreement as a matter of course.

the claimants, the Respondents lodge an Originating Notice of Motion Pursuant to Order 73 Rule 5 of the Rules of the Supreme Court, claiming inter alia, misconduct of the Arbitrator.

²¹⁶ See previous note.

²¹⁷ Martin R, op cit.

²¹⁸ Paper presented by the Honorary Secretary of the Law Association of Zambia to the Monthly General Meeting of the Bankers Association of Zambia, on the Revitalisation of Arbitration in Zambia (1999).

²¹⁹ F N M Songolo, *Resolution of Disputes in Construction Contracts in Zambia* (1994).

Business executives have cited the fear of extensive and costly litigation as a major reason for choosing to submit to arbitration rather than litigation.²²⁰ They feel that they are more likely to resolve the matter amicably across an arbitrator's table than in the courts of law, and in today's economic climate, business relationships are more likely to be nurtured than severed.

The law relating to Arbitration must be modernised and amended to suit the interests of its major users, both national and international. In this regard, LAZ reports as follows:

“On the repeal and replacement of the Arbitration Act, a committee was set up to overhaul the current act which has been in place since 1933 and is therefore archaic. The committee prepared a layman's draft of the Act to repeal and replace the current Act and same has been submitted to the Ministry of Legal Affairs for consideration along with the Association's proposal giving the rationale for the need to repeal and replace the current Act. We are informed that our proposal is being circulated to all interested ministries, following which it shall be presented to cabinet for approval.”²²¹

However, government's response has yet to be received, and the current status of the law on arbitration remains the same. It must be stressed at this point that the need to bring Zambian laws relating to arbitration up to international standards is now stronger than ever. As Matibini notes, the last decade has seen an increasing trend toward the internationalisation of arbitration.²²² With the current trend towards global harmonisation and unification of arbitration laws, it seems clear that once Zambia adopts a uniform law on arbitration, it will encourage investors and inspire confidence in the system.

²²⁰ The author conducted personal interviews with several independent business executives in this regard, and all were unanimous on this point.

²²¹ Paper Presented by Honorary Secretary of the Law Association of Zambia to the Monthly General Meeting of the Banker's Association of Zambia on the Revitalisation of Arbitration in Zambia, July, 1999.

²²² Matibini, P, “What is Arbitration?”, An Article from The Legal Desk of the Sunday Mail.

C. MEDIATION

Mediation is generally acknowledged as being one of the fastest growing forms of dispute resolution in the world, and Zambia is no exception. Mediation is a recent addition to the Zambian Judicial system, having been introduced in the jurisdiction on 28 May, 1997, under Statutory Instrument Number 71, of 1997, the High Court (Amendment) rules of 1997, which, *inter alia*, amended Order 31 of the Rules of the High Court relating to the place and mode of trial and setting down for trial.

Some of the highlights of these amendments are as follows²²³:

- Order 31, Rule 5, of the High Court (Amendment) Rules provides that there shall be kept by the Mediation office or proper officer, a list of mediators who have been trained and certified by the court to act in this capacity with the field or fields of bias or experience indicated against each of their names. The mediators shall be of not less than seven years working experience in their respective fields.
- Order 31, Rule 8 of the High Court (Amendment) rules provides that the parties shall appear in person at the mediation. If they are represented, their advocates shall accompany them. If a party is a corporation, partnership, government agency or entity other than an individual, an officer or director of sufficient rank to settle the matter shall attend.
- Order 31, Rule 11 provides that if the mediation fails, the mediator shall not more than ten days after the close of the mediation proceedings, return the record to the mediation officer stating that the parties have failed to reach a settlement and requesting the mediation officer to remit the record to a trial judge within seven days.
- If the mediation succeeds, Order 31 Rule 12 provides that a mediation settlement stating that the parties have agreed to settle the disputes or differences shall be signed. The same shall stipulate the terms of the settlement, and which settlement shall have the same force and effect for all purposes as a Judgment, Order or decision and shall be enforced in like manner.
- Order 31, Rule 14 provides that no appeal shall lie against a registered mediated settlement.

²²³ For an extensive discussion on the provisions of SI No. 71 of 1997, see the series of articles by Patrick Matibini, entitled, "Mediation Laws should be Revisited"; in The Legal Desk column of the Sunday Mail.

On the 18th October, 1997, a bench/bar meeting was convened to discuss and consider the amendments to the High Court Rules, between members of the Judiciary and the Law Association of Zambia, at the Mulungushi International Conference Centre.

At this meeting, various criticisms were levelled against the amendment of Order 31, but these criticisms were not aimed at the introduction of mediation per se, rather, they were aimed at stream-lining the mediation process in Zambia and making it more amenable to the principal objectives and principles of mediation itself.

For example, Matibini raises the fundamental question as to whether or not mediation should be a compulsory pre-litigation procedure in Zambia. He states: “It is my considered view...that mediation should precede litigation. In a word, it should be compulsory. If parties to a dispute fail to reach an agreement during a mediation session, they still remain at liberty to proceed to litigation in any event.”²²⁴

Furthermore, in his article, “Mediation Laws should be Revisited”, Matibini states:

“The High Court rules relating to mediation should be reviewed. For instance, Order 31, rule 6 which requires mediators inter alia, to collect bundles of documents is predicated on the assumption that pleadings are necessary in mediation. Although there is need to prepare for mediation by assembling essential evidence and documentation necessary to support the case, it is not necessary to have the range of documents required for a trial. The use of pleadings defeats the aims of creativity and flexibility. Order 31, rule 13 ... provides that the mediation fees should be agreed upon between the parties and in default of agreement should be referred to the trial judge for determination. This provision is capable of delaying resolution of matters. Fees based on a pre-determined and prescribed scale would be more appropriate instead.”

Skilled Mediators

It should be noted that although the High Court Rules introducing Mediation into the system effectively came into operation in November, 1997, implementation was

²²⁴

Matibini, P, *Alternative Dispute Resolution* (unpublished) (1998).

delayed by a lack of trained mediators in this jurisdiction.²²⁵ In this respect, a training programme has been initiated by USAID in conjunction with LAZ. Indeed, training in both Arbitration and Mediation is amongst the top priorities of the current drive for the development of ADR in Zambia, and the Steering Committee is currently drawing up schedules for this programme.

Further, it was reported that the United States Information Services (USIS) offered the services of a US Judge to conduct mediation training for lawyers who wish to conduct mediations required in connection with the new High Court Rules.²²⁶ Indeed, with the help of USAID, FICA and the ITC, the first training of mediators took place between the 17th and 21st April, 2000, although this training will not lead to certification.

Settlement Week²²⁷

A culmination of all the events surrounding the introduction of mediation into the Zambian Judicial system, took place in Lusaka between Tuesday 25th April and Friday 28th April, 2000, in what was called "Settlement Week." Upon completion of the mediation training, High Court Registrar Mrs G Chawatama, assigned from the High Court Registry almost 200 disputes, to be handled by mediation trainees. The trainees undertook the actual resolution of these disputes through the process of mediation, with the purpose of attempting to come to a final settlement in each case.

The results of this exercise were astounding. By the end of the week, an astonishing 64% of the cases that were actually called and attended to, were settled and concluded to the satisfaction of the disputants. This compared with the average rate of settlement in the United States of 50% provides us with yet further proof that mediation is a viable alternative to litigation.

²²⁵ Martin, R, op. cit.

²²⁶ Martin, R, op. cit.

²²⁷ It should be noted that Settlement Week, having taken place just days before this write-up, has yet to be reported on by the relevant authorities. This information was provided in an interview with one of the senior participants, Mr Patrick Matibini, who has been an integral part of the ADR Movement in Zambia.

Commenting on the results of Settlement Week, Patrick Matibini described the response of both the participants and the disputants as enthusiastic, and that there was much cause for optimism. He observed that the results were most favourable, particularly in view of the fact that many of the cases that had just been settled, had been tied up in litigation for an undue length of time. In fact, one of the cases has lasted as long as ten years. Matibini further pointed out the need for the whole process to be properly structured, with possibly a day or more to be set aside each week or each month, for mediation. On the whole, he observed that the future of mediation “holds a lot of promise.”

Matibini stressed the need to educate the bar generally, and that the whole process could have been even better arranged if provision had been made to “sell the process to the bar, because they are the critical participants.” Hence the need to develop a culture of negotiation. As Matibini observes, negotiation is the key to every ADR process; and mediation is itself, facilitated negotiation - free from the rigorous rules of litigation, but highly effective. For the successful implementation of ADR in Zambia, there is need to develop a culture of negotiation rather than confrontation. In the majority of cases, there is rarely the need for litigation, and lawyers must realise that only cases where the issues are of high complexity, or where there is need to vindicate the rights of the disputants, should the parties proceed to litigation.

Given the significance of all these events, it appears that the programme for the establishment of mediation as a viable ADR process for Zambia, is well under way.

However, as noted earlier, although the steering committee on ADR set up by LAZ is responsible for the continuity of the ADR drive in Zambia, there is still need for some institutional framework for the administration and management of mediation in Zambia, particularly if the parties concerned, the end-users, are to benefit from all the positive aspects of Mediation in proper accord with its principles and objectives.

We examine this and other recommendations with regard to mediation and indeed, ADR in Zambia, in the following Chapter.

CHAPTER V

CONCLUSION AND RECOMMENDATIONS FOR THE IMPLEMENTATION OF ADR IN ZAMBIA

"The courts of this country should not be the place where the resolution of disputes begin. They should be the place where disputes end - after alternative methods of resolving disputes have been considered and tried."

Sandra Day O'Connor²²⁸

"A mind, once stretched by a new idea, never regains its original shape."

Oliver Wendell Holmes

I. INTRODUCTION

This chapter seeks to draw in all the threads of the foregoing chapters, and, based upon this discussion, highlight the importance and indeed, the relevance of ADR in Zambia. In addition, based on our previous discussion, we shall lay down our recommendations for the further implementation and establishment of ADR in Zambia

As we have seen, a principal problem in the Zambian Judicial system has been congestion in the courts, which has led to delays in the dispensation of justice. This congestion has been exacerbated by the lack of manpower, and this is due in most part to the low income and poor conditions of service in the judiciary, which have failed to attract lawyers from private practice to the bench. Further, not only do the problems caused by congestion in the courts result in the denial of speedy justice, but it also creates an unfavourable investment climate in the country. This obviously has a serious impact upon the domestic business community, which has to battle with a dwindling economy in the face of rising inflation.

²²⁸ Address delivered at Consumer Dispute Resolution Conference, Exporting the Alternatives, January 21, 1983.

Another major problem is that the congestion in courts obviously means an increased workload upon the already overburdened members of the bench, and a natural consequence of this is a deterioration in the quality of decisions made. Judges make decisions based not on their careful contemplation of the merits of the case but rather, on the need to dispose of cases. Given this scenario, there is little room for specialisation in the Zambian courts, and, as pointed out in one LAZ Report²²⁹, the result of this is a failure by some presiding judges to appreciate some of the complex issues relating to commercial transactions.

However, the problem of congestion in our courts is deep-rooted and goes back as far as 1990, when the Honourable Mr Justice Annel M Silungwe, then Chief Justice of the Republic of Zambia, called for a “systematic and meaningful campaign aimed at educating the public...to settle their disputes through ... conciliation/mediation, arbitration and other forms of ADRMs (Alternative dispute resolution mechanisms)”²³⁰ in order to:

- relieve court congestion, as well as undue costs and delays;
- enhance community involvement or participation in the dispute resolution process;
- facilitate access to justice to a greater number of the populace; and
- provide an effective and efficient dispute resolution.

The then Chief Justice stated that Zambia’s need to build on her traditional ways of dispute resolution was “both urgent and imperative”. He observed:

“...most people involved in disputes, especially those of a minor nature, want quick and inexpensive resolution under the ADRMs which tend to promote co-operation and harmony among the disputants. Efforts should thus continue to be made in earnest to promote a much greater use of ADRMs.”²³¹

²²⁹ Rapporteur’s Report Submitted to the Council of the Law Association of Zambia, September 1998.

²³⁰ Hon. Mr Justice Annel M Silungwe, Alternative Dispute Resolution, A paper presented by the Chief Justice of the Republic of Zambia at the First Judicial and Law Association of Zambia Seminar, held at Lusaka in October, 1990.

²³¹ Ibid.

Over the past decade, there has been an increasing awareness of the various ADR mechanisms as a means to ease court congestion and inspire the public's flagging confidence in the general ability of the courts to dispense justice fairly, and indeed, in the judiciary's ability to dispense justice at all. This is because some cases take many years in the system before they finally come to conclusion; by which time, not only has interest of the parties waned, but also the judgments have taken so long as to render any enforcement meaningless. As a result, many litigants have failed to enjoy the fruits of their judgments. The area of commercial law has been most hard-hit in this regard, because huge amounts of money may be tied up in litigation for an indefinite period of time, and this coupled with the rapidly devaluing Kwacha, has meant that especially banks and other lending institutions have suffered the most.

In 1997, Mediation was introduced into the jurisdiction, vide Statutory Instrument No. 71 of 1997, and, although it may be criticised for some shortcomings and although the rules relating to mediation need to be revisited, nevertheless, the introduction of mediation was long overdue and most welcome indeed.

In 1998, Patrick Matibini, stressed the need "to seriously consider the establishment of a commercial court or a commercial list, as a specialised division of the High Court"²³² to adjudicate on cases involving contract law, commercial law and business corporate law. The year 2000 is therefore a momentous year for the Courts in Zambia. 3rd April, 2000 saw the introduction of the commercial list in the High Court, which is part of the reforms aimed at expeditious dispensation of justice. The Commercial list was introduced by Statutory Instrument No. 29 of 1999, being the High Court (Amendment) rules of 1999. The Commercial list is to be adjudicated upon by judges specially trained in commercial law. Further, under the High Court (Amendment) Rules, judges may refer the disputing parties to pre-litigation mediation or arbitration, if they deem fit.

In the meantime, the judiciary, in conjunction with the Law Association of Zambia (LAZ) is in the process of establishing a training programme, with the assistance of

²³² In his paper, "Alternative Dispute Resolution", presented to the Judges Seminar in July, 1998.

the United States Agency for International Development (USAID) and The Foundation For International Commercial Arbitration (FICA), to conduct courses in mediation. These courses are targeted not only at lawyers, but also professionals in other fields such as doctors, engineers, accountants, architects and surveyors.

The overwhelming response of the professional community to the establishment of ADR in Zambia is a clear indication of the recognition that ADR is an important component of any judicial system. The current trend appears to support the idea that both mediation and arbitration are becoming very much a permanent feature in the Zambian Judicial System.

The assistance of USAID, FICA and the ITC with regard to the revitalisation of arbitration in Zambia has been vital in allowing LAZ to break new ground in the advancement of law reform in Zambia. The fact that arbitration has been on the Zambian statute books for almost seventy years, and yet has been sparingly utilised during this time, underscores the need for revitalisation and amendment of the arbitration law in Zambia.

It is perhaps fortuitous in this respect that, in her quest for a new arbitration law, Zambia has but to look to a host of countries that have over the past decade had cause to modify and amend their existing laws to carry them into the new millennium, and the UNCITRAL model law and model rules, provide a firm basis for the enhancement of a new Arbitration Act for Zambia. It would not be amiss to emphasise at this point that even where a country does not adopt the model law per se, the model law can in itself be of persuasive value in the development of a new law. Further, the model law can be used in order to fill the gaps in an agreement, and indeed, in the domestic law itself, relating to arbitration. Certainly, as Sanders points out, the impact of the model law is such that no state, modernising its arbitration law will do so without taking it *inter alia* into account.

It must be stated that administration of justice is not simply a matter of applying the law within its rigid confines. Rather, the administration of justice involves a whole spectrum of elements which, each in turn must be taken into consideration and

weighted in accordance with the interests of all concerned. Lawyers should not rush off to court to file suit for every dispute. Rather, one must stop and consider the best interests of his client. A lawyer must consider the value of the relationship between the parties and how best the relationship can be preserved. Further, a lawyer must consider how much control the client wishes to have over the dispute resolution process. Speed, expense and autonomy are also factors to be taken into account. Only as a last resort should the traditional court system be considered, but otherwise, always, the lawyer should ask the question first raised by Justice Burger: “Isn’t there a better way?”²³³

The wide range of ADR devices as illustrated and outlined in this research paper need not necessarily be introduced into the system at once. The implementation of an institutional framework in the form of a permanent dispute resolution centre offers the advantage of giving parties concise and clear information on the advantages and disadvantages of a particular mode of dispute resolution. Thus, in building and implementing their dispute resolution system, the disputants must use their freedom to consider what is ideal for them. It seems clear that the choice is dependent upon the nature of the dispute and the objectives of the disputants.

We have stated earlier and it is reiterated that mediation or arbitration, or indeed, other alternative dispute resolution devices cannot be considered to be separate and apart from the traditional litigation process, or indeed from the courts. ADR clearly is a complementary process that will inevitably claim its rightful place in any judicial system that is progressive and forward-looking.

We would adopt for our purposes, the reasoning of Butler and Finsen, as to the indicating factors that will allow arbitration to overcome its past problems and retain its place alongside litigation as an effective and accepted method for resolving disputes, as follows:

²³³ W Burger, “Isn’t There a better Way?” (1982).

First, ADR in Zambia will lead to the development of new techniques or lead to the revival of techniques used when arbitration was less formal and legalistic. These techniques can be applied, with or without adaptation, thereby saving time and costs.

Secondly, further changes in our law relating to civil procedure may be anticipated and it is likely that these will have a positive impact on arbitration and other ADR procedures. The arbitration industry will not be able to justify the use of High Court rules in arbitrations, as such rules in application to arbitration are thereby rendered obsolescent.

Thirdly, the attitudes of lawyers are changing and there is a growing realisation that they will have to give attention to making their services in relation to ADR more cost-effective, or risk losing clients.

Fourth, clients are going to take a more active interest in the conduct of proceedings and their cost-effectiveness. The arbitration industry must have regard to the legitimate expectations of its users. When a disputant agrees to take a dispute to arbitration rather than to court, it is most unlikely that he will anticipate that the procedure will closely approximate that of the Supreme Court.

Fifthly, arbitrators themselves, as a result of better training, will adopt a more interventionist and active role, both in stages prior to the hearing and during the hearing itself, and this is likely to receive the support of the parties.

Sixthly, training in arbitration and ADR techniques is now more readily available, and there is a growing body of literature on the subject.

Although ADR has had its critics in the past, particularly with respect to its claim as a solution to court congestion and delays in the delivery in justice²³⁴, these critics are fast being drowned out by the overwhelming support and impetus of the global ADR drive. In Zambia, the introduction of mediation into the judicial system, the

²³⁴ One example of such criticism is the admonition to caution by one South African Judge in the debate surrounding drive towards the introduction of ADR into the area of civil practice in South Africa. In Mr Justice Astbury's adage: "Reform! Reform! Aren't things bad enough already?"

introduction of the commercial list with its statutory provisions in respect of mediation, as well as the current initiative with regard to a new Arbitration Act based on the UNCITRAL model laws - all this, would appear to point to one conclusion: that ADR is not simply a possibility in Zambia; it is *inevitable*.

RECOMMENDATIONS FOR THE IMPLEMENTATION OF ADR IN ZAMBIA

In light of the foregoing discussion, we now examine the issues raised in previous chapters, and make our recommendations for the implementation of ADR in Zambia. In other words, how best to integrate ADR into the Zambian Judicial System, to formalise and firmly establish its position as an important and viable alternative to the process of traditional litigation.

As we noted in the previous chapter, the introduction of the commercial list on April 3, 2000 is just the first step in the much needed reform of the Zambian Judicial System. As the Zambian Judiciary awakens to a new awareness of the importance of alternative dispute resolution mechanisms, the need to establish some institutional framework for ADR should be examined now, more than ever; and with the on-going co-operation between the United States Agency for International Development (USAID) and the Law Association of Zambia (LAZ) with regard to various aspects of ADR, and in particular, training programmes in arbitration and mediation, it seems clear that the next logical step must be the establishment of an autonomous centre for dispute resolution.

In this section, we lay down our recommendations for the legal and institutional framework for ADR in Zambia. We examine not only the possibility of a dispute resolution centre, but also how such a centre would relate to the current system. Further, we examine the possible legal framework within which such a centre might be introduced and regulated. In this respect, it is clear that human resource or manpower development as well as enhancing bar/bench co-ordination will be major considerations, within this institutional framework.

SUMMARY OF RECOMMENDATIONS

A basic summary of our recommendations in this context is as follows:

1. The Legal Framework

The need for amendment of the current laws relating to arbitration and mediation, in a form that is both harmonised and uniform. We emphasise the necessity for an appropriate legal framework that will become the foundation for a viable system of ADR in the Zambian Judicial System. In this regard, it is therefore necessary to briefly examine the international standards upon which our own laws may be modelled, especially in view of the increasing trends towards internationalisation of arbitration, and the general inclination towards a uniform law.

2. The Institutional Framework

The creation and establishment of an appropriate dispute resolution centre, to take up the responsibilities as listed in the previous chapter, is another essential component for the administration of ADR in Zambia. We stress that although at present the steering committee of LAZ is co-ordinating and to a certain extent managing the development of ADR under the auspices of both LAZ and USAID, there is need for a permanent body to be housed in a physical centre to support the ADR process. We give a brief outline of the basic operation and activities of such a centre.

3. Requirements for Skilled Manpower: Education and Training

It is obvious that in order to establish a permanent dispute resolution centre, skilled manpower is essential for the success of the establishment. In this respect, we make our recommendations with regard to training in Arbitration and Mediation, noting that a programme for the same is already under way,

and is being conducted by LAZ with the assistance of USAID, FICA and the ITC.

4. Funding

Any project of this proportion will require financing on a fairly large scale. In this light, we examine the ways in which funding for the dispute resolution centre might be raised, particularly given the fact that funding from USAID is obviously limited up to a given amount²³⁵, and from which point it will be necessary to seek funds elsewhere with a view to eventually becoming self-sustaining.

We now explore these recommendations in further detail.

I LEGAL FRAMEWORK

We have seen in the previous chapter that although the laws relating to ADR mechanisms, specifically, arbitration and mediation, are adequate, there is much to be done in this respect. For example, the Arbitration Act, Cap. 40 of the Laws of Zambia, is almost seventy years old, and with only one amendment, which was made in 1965, the law remains archaic and to a large extent, fragmented. Secondly, the introduction of Mediation into the Zambian Jurisdiction has not fully taken into account the basic principles that founded the mediation process in the first place. The Amendments to the High Court Rules, though commendable for the very fact of their coming into existence, still needs to address the fundamental issues that underlie mediation as a viable alternative to litigation. It is perhaps for this reason, that well before the rules relating to mediation actually came into practice, the legal fraternity has found reason to criticise the provisions and call for their amendment to make the system more suitable to its purposes and intent.²³⁶

²³⁵ Hon. Secretary of the Law Association of Zambia Reports in his Paper Presented to the Bankers Association that support by USAID is only limited to two years.

²³⁶ P Matibini, "Mediation Laws should be Revisited"; On 18 October 1997, at a meeting convened between the Judiciary and the Law Association of Zambia concerning the amendments to the

There is need therefore, not only for amendments to the existing statutory provisions relating to arbitration and mediation, but also, for a complete examination of all the various aspects of ADR, in order to determine how best to tie in all these aspects into a legal framework that is co-ordinated and harmonised. Such a framework must necessarily provide a firm foundation, a “building frame”, so to speak, upon which to build up, block by block, different facets of ADR mechanisms, as and when it is perceived that the system is ready for it. Clearly, it cannot be expected that in one fell swoop, a whole array of ADR mechanisms will suddenly be made available. Rather, the process is incremental, and, despite the urgency, it must be carefully structured in order for the system to stand the test of time.

It has been stated in this regard that one of the goals of ADR is to provide affordable and appropriate dispute resolution institutions and procedures in different communities of society. Laws - any laws, relating to any aspect of community life in all areas of the law - cannot be made in a vacuum. The needs and requirements of all the end users must be taken into consideration when drawing up statutes, as this is the only way in which to promote more effective access to justice for all the people concerned.

In this respect, South Africa, for example, in an effort to develop an affordable and appropriate dispute resolution system, has been engaged in an investigation into arbitration since 1995.²³⁷ Rather than dashing head-long into the implementation of an ADR system, the South African Law Commission was instructed to broaden its investigation into arbitration, to include all facets of alternative dispute resolution, to provide a framework within which ADR could be discussed in an orderly fashion. In December 1996, it published, as a first step, a draft International Arbitration Act for information and comment, and published a Working Paper to submit comments on their older, 1965 Act, inviting all interested parties to submit their response to the Issue Paper. The manner in which the investigation continued depended to a large extent upon the response received.

High Court Rules (in particular, SI No. 71 of 1997; being the High Court (Amendment) Rules, which, inter alia, introduced mediation into the jurisdiction), this issue was the subject of much debate.

Such a plan of action is obviously more suited to the cosmopolitan environment of South Africa, but is however not suited to the Zambian situation - particularly because of our much smaller population, and indeed, the obvious limitations in terms of being able to reach large numbers of people to respond to such investigation, to provide a fair picture of what is actually required. There is, too, the consideration of the need firstly to educate the general public on ADR mechanisms, in order to allow people to make an informed and meaningful contribution, in particular, given the relative novelty of ADR to the Zambian jurisdiction, before any such study could be undertaken.

The efforts of the Law Association of Zambia with regard to the development of a viable ADR system in Zambia must be highly commended; particularly given the constraints both financially and in terms of the many logistical drawbacks. LAZ has had to contend with such drawbacks as, for example, the sluggish response of government regarding the many applications and recommendations made by LAZ in respect of amendments to the existing laws, the accession to international instruments relating to ADR; as well as the possibility of incorporating the UNCITRAL model law into the Zambian Judicial system. Against this background, we would make the following recommendations.

1. Arbitration

That the Arbitration Act, Cap. 40 of the Laws of Zambia, needs to be amended is a matter of common consensus in the legal fraternity. In this regard, it has been recognised that the UNCITRAL model law²³⁷ provides the best legal framework upon which to base our own laws relating to arbitration. Indeed, as Pieters Sanders points out, *“the impact of the model law is such that no state, modernising its arbitration law will do so without taking it inter alia into account.”*²³⁹

²³⁷ South African Law Commission: Issue Paper 8 Alternative Dispute Resolution, downloaded from the Internet site location: <http://www.law.wits.ac.za/salc/issue/ip8.html>.

²³⁸ United Nations document A/40/17, Annex I (As adopted by the United Nations Commission on International Trade Law on 21 June 1985).

²³⁹ Pieter Sanders, “Unity and Diversity in the Adoption of the model law”, *Arbitration International*, Vol. 11, No. 1 (1995).

As we noted earlier, although the UNCITRAL model law was prepared to cater for the needs of International Commercial Arbitration, it provides such detailed guidance on arbitral procedure, and so effectively protects the parties, that it has been adapted into the national laws of many countries for use of domestic arbitrations of different complexity. The flexibility of the model law makes it easily adaptable to the needs of almost any arbitral system, with of course, necessary modifications, and it is perhaps for this reason that it has stood the test of time and application in a great number of jurisdictions. The following is a list of “model law Countries”²⁴⁰:

COUNTRY	Year adopted model law
Canada	1986
Cyprus	1987
Bulgaria, Nigeria	1988
Australia, Hong Kong	1989
Scotland	1990
Peru	1993
Bermuda, the Russian Federation, Mexico, Tunisia	1993
Egypt, Ukraine, Bahrain, Singapore, Hungary	1994
Kenya	1994
Zimbabwe	1996
Germany	1998

In Zambia, there has been, to a certain extent, some debate concerning whether to simply annex the UNCITRAL model law to the existing Act, in the manner adopted by Zimbabwe²⁴¹, or, to drastically revise the Arbitration Act itself, to incorporate the most important elements of the model law.²⁴² In this regard, it is strongly recommended that Zambia adopt the model law, with modifications and adaptations as necessary to the Zambian situation.

The advantages of such a course of action in this regard are two-fold:

²⁴⁰ Source: Pieters, Sanders, Unity and Diversity in the Adoption of the model law, op cit. Other countries not included in the above list that have now adopted the model law, or are in the process of doing so, include, Japan, Malta, New Zealand, Poland, England and Wales.

²⁴¹ Arbitration Act of Zimbabwe, 1996, simply annexes the model law as the First Schedule.

- i. By basing the new Arbitration Act on the UNCITRAL model law, with modifications as necessary, the drafting time for the new legislation would be drastically reduced; and
- ii. This in turn is likely to reduce delays in the actual passage of the legislation.

Furthermore, the model law has been found internationally to have a harmonising effect, and it has been pointed out that this effect will obviously only increase as the number of States adopting the model law is still growing.²⁴³ Certainly, the adoption of a uniform law will be of advantage to the country, and will be a major step towards the encouragement of foreign investment in Zambia. As Matibini states:

“The existence of uniform laws contribute to the removal of barriers to trade among the countries in the world and adoption of international instruments to govern international trade. As many countries as possible should be involved in this process.”

This argument is incontrovertible, and would appear to provide the best framework for arbitration in Zambia.

2. Mediation

Mediation is fast becoming one of the major dispute resolution devices in Zambia, and for this reason, due regard must be had to providing an environment within which widespread recognition of its implementation and usage is quickly achieved. Although mediation is not referred to in the model law, it has been noted that several states, upon adoption, have made additions to include provisions relating to mediation and other ADR procedures.²⁴⁴ A standard formula is to include a provision as follows:

For the purpose of encouraging settlement of a dispute, an arbitral tribunal may, with the agreement of the parties, employ mediation, conciliation or other procedures at any time

²⁴² Martin, R, op. cit.

²⁴³ Sanders, P, op. cit.

²⁴⁴ Sanders, P, Op. cit.

during the arbitration proceedings and, with the agreement of the parties, the members of the arbitral tribunal are not disqualified from resuming their roles as arbitrators by reason of the mediation, conciliation or other procedure.²⁴⁵

While this is just one option for the inclusion of mediation and other ADR procedures into the adopted model law, it is recommended that this provision or a similar provision be included.

As regards the High Court (Amendment) Rules, relating to Mediation, it is recommended that these be revisited in order to lay down particular guidelines for the conduct of mediation, as well as the enforcement of mediated agreements.

3. State Control Vs State Support

One of the major considerations with regard to the development of legislation for a complete ADR system is the level of state control in terms of the various processes and devices. It is essential to recognise a fundamental difference between adjudication at the hands of public authorities and ordinary forms of ADR. Arbitration, mediation and other forms of alternative dispute resolution rely for the effectiveness on the willingness of the parties to submit to the process. They do so by agreement. On the other hand, the compulsory jurisdiction conducted at the hands of the state relies for its effectiveness on the ability of one party to compel the other to submit to the jurisdiction of the state.²⁴⁶

This distinction raises a fundamental issue regarding the extent to which ADR processes should be introduced into the formal and compulsory jurisdiction of the courts administered by the state. This writer supports the view, and indeed recommends, that the compulsory jurisdiction of the courts be exercised in order to make ADR in certain instances, a pre-requisite for litigation. For example, as regards mediation, the question is, whether or not it should be a compulsory pre-litigation procedure in Zambia. Litigation, in many instances, should be seen as a last resort, and therefore, reference to mediation should be compulsory. Certainly it should be

²⁴⁵ Canada: Federal Arbitration Act, which came into force, 10 August 1986.

²⁴⁶ This issue is raised in the SA Law Commission Issue Paper 8 on Alternative Dispute Resolution, and is the subject of much debate in other jurisdictions as well.

noted that in any event, if parties to a dispute fail to reach an agreement during a mediation session, they still remain at liberty to proceed to litigation.²⁴⁷ Indeed, settlement by mediation will be more easily achieved if the parties are acutely aware that failure to come to some form of agreement will result in an imposed solution in the very near future.²⁴⁸

4. Accession to International Conventions Relating to Arbitration

As pointed out earlier, the adoption of uniform laws will encourage foreign investors and inspire confidence in the system. Certainly, the case has been that the peculiarities and unpredictability of some national legal systems has, as Matibini states, reinforced the attraction of international arbitration over national courts because international arbitration can provide a system with which all the parties are familiar, whilst the rules of domestic courts may be less acceptable to at least one of the parties.

Accession to international Conventions in this regard may alleviate the problems surrounding the reluctance of foreign investors to invest in the country. In this respect, it is recommended that Zambia accede to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958.²⁴⁹ This convention has been the single most important force in the increasing trend toward the internationalisation of arbitration.²⁵⁰ In this connection, it is interesting to note that the provisions of this convention have been introduced into the domestic law of South Africa, in accordance with practice in most common law countries. The preamble to this law specifically indicates the aim of the law which is: *“to provide for the recognition and enforcement of foreign arbitral awards and matters connected therewith.”*²⁵¹

²⁴⁷ For further discussion on this aspect, see, Matibini, P, *Alternative Dispute Resolution* (unpublished) (1998).

²⁴⁸ Lord Donaldson, “Alternative Dispute Resolution”, (1992) 58 *Arbitration* 102.

²⁴⁹ 7th June, 1959, No. 4739; United Nations, Treaty Series, vol. 330.

²⁵⁰ Matibini, P “What is Arbitration?”; an article from The Legal Desk Column of the Sunday Mail.

²⁵¹ See Roland Amossou-Guenou, “International Commercial Arbitration in Subsaharan Africa: Law and Practice”; The ICC International Court of Arbitration Bulletin, Vol. 7, No. 1, May 1996.

It should be noted that Zambia is already a Signatory to the Convention on the Settlement of Investment Disputes between States and Nationals of Other State.

II INSTITUTIONAL FRAMEWORK

In the previous chapter, we observed that with the growing awareness of the need for a fully integrated ADR system in Zambia, there is a need for a dispute resolution centre which would provide an institutional framework to undertake the following duties which are considered to be vital components of an ADR system:

- training and accrediting arbitrators and mediators;
- offering a service to the parties in connection with the appointment of suitable qualified arbitrators or mediators,
- offering a facility to manage the appropriate ADR process
- taking responsibility for the development of appropriate rules or representing a focal point for ADR in Zambia.

The LAZ Steering Committee is at present examining the possibilities of establishing an institutional framework. However, it is obvious that as ADR in Zambia continues to develop, there will be the need for a more permanent institutional framework; and a permanent body with headquarters preferably in Lusaka and possibly a branch in Ndola, in the Copperbelt Province.

1. Dispute Resolution Centre

It is recommended that the proposals for a new Arbitration Act should include the establishment of a centre for dispute resolution. Its main functions should be:

- the promotion, co-ordination, regulation, facilitation, administration and monitoring of ADR mechanisms in Zambia, which would be chosen by the parties or proposed by the centre, or as designated by the Chief Justice in accordance with the High Court rules.

- to maintain and up-date a list of arbitrators and mediators for purposes of selection by parties seeking to submit to mediation or arbitration.
- to provide training courses for the certification of arbitrators and mediators.
- to prescribe a code of conduct for arbitrators and mediators.
- to prescribe rules and regulations for the conduct of arbitrations and mediations.
- to provide accommodation for the conduct of arbitrations and mediations.

Basically, the centre would act as a secretariat for ADR by setting dates for the hearings, collecting fees for the arbitrators and mediators.

Some examples of dispute resolution centres are the Japan Commercial Arbitration Association, which is also a member of the International Federation of Commercial Arbitration, a global federation of commercial arbitral institutions²⁵²; and the American Arbitration Association, which has a notable history of over 70 years²⁵³. The American Arbitration Association maintains a national roster of Arbitrators and Mediators, whose conduct is guided by the Association's *Code of Ethics*, prepared by the Joint Committee of the American Arbitration Association and the American Bar Association; and the *Model Standards for Conduct of Mediators*, developed by the American Arbitration Association, the American Bar Association and the Society of Professionals in Dispute Resolution.

Another example is the Arbitration Institute of the Stockholm Chamber of Commerce, whose objects are²⁵⁴:

- to assist in the settlement of domestic and international disputes in accordance with the rules of the Institute;
- to assist in the settlement of disputes in accordance with other rules adopted by the Institute²⁵⁵;

International Trade Centre Background Materials; "Setting Up a dispute resolution centre": The Japan Commercial Arbitration Association.

International Trade Centre Background Materials; "Setting Up a dispute resolution centre": A Brief Overview of the American Arbitration Association;

Rules of the Arbitration Institute of the Stockholm Chamber of Commerce.

It should be noted that The Arbitration Institute of the Stockholm Chamber of Commerce has adopted Conciliation Rules and Rules for Procedures under the UNCITRAL Arbitration Rules.

- to assist , pursuant to its own decision in each case, in proceedings which take place in a manner that differs wholly or partly from that contemplated by the rules referred to above; and
- to provide information concerning arbitration matters.

In South Africa, there are a number of specialised organisations, which actively promoted the use of arbitration as a means of resolving disputes, and these include the Association of Arbitrators, with objectives similar to the American Association of Arbitrators in the United States of America. Its aims include the following:

- a. the promotion of arbitration as a method for resolving disputes;
- b. the compilation of model rules for the conduct of arbitration proceedings;
- c. the making available of experienced arbitrators and the supervision of the conduct of members when acting as arbitrators; and
- d. the training of arbitrators.

Other organisations in South Africa include²⁵⁶: The Independent Mediation Service of South Africa (IMSSA) - a non-profit organisation specialising in mediations and arbitrations in labour disputes; The Alternative Dispute Resolution Association of South Africa (ADRASA), formed by a group of attorneys and advocates to promote the use of alternative dispute resolution techniques in South Africa and to train members of the legal profession as mediators and arbitrators²⁵⁷; and finally, the ADR Centre (Pty) Ltd, a professional service organisation based in Johannesburg, which provides the physical facilities, documentation and personnel to resolve commercial and other disputes through various ADR methods, including arbitration.

In sum, there are many models of dispute resolution centres around the world, and in examining the various models we can determine the best options for the establishment of a dispute resolution centre in Zambia, in order to develop one that is viable and adaptable to the needs of the Zambian society.

²⁵⁶

See Butler and Finsen, *Arbitration in South Africa: Law and Practice* (1993).

III. EDUCATION AND TRAINING

As stated earlier, the training of professional arbitrators and mediators is a necessary or essential component for the successful establishment of a permanent dispute resolution centre.

Professionally trained arbitrators and mediators are vital, in that they inspire confidence in the ADR system, and encourage the use of ADR devices by especially the business community, who are the main beneficiaries of the implementation of a formalised system of ADR.

It should be noted that training sessions in arbitration leading to the certification of arbitrators, began in Lusaka in January, 1999 and in Ndola in June, 1999. Participants in the arbitration courses were drawn from various fields, including the accounting, construction, medical, engineering, surveying, legal and architecture professions. The training was conducted under the auspices of LAZ, and carried out by FICA in conjunction with ZIALE and USAID. Further, training of mediators has also begun, with the first sessions having taken place in Lusaka in April, 2000.

It is further recommended that High Court Judges be similarly trained, not as mediators or arbitrators, but rather, inducted to arbitrations and mediations. This is especially important, in view of the recent modifications to the law.

Given the major developments relating to ADR in Zambia, it has become clear also that it is necessary to change the curriculum at the University of Zambia (UNZA) and the Zambia Institute for Advanced Legal Education (ZIALE), in order to expose law students to the knowledge of alternative dispute resolution mechanisms. Lawyers need to review their traditional perception of themselves as “boxers” who believe that dispute resolution means “winning or losing”.²⁵⁸ This concept is wrong, and there is urgent need for lawyers to re-orient their culture. To do this, it is necessary to

²⁵⁷ Membership of ADRASA is also open to non-lawyers.

²⁵⁸ See the remarks of the Hon. Minister of Legal Affairs Mr V Malambo, when he officially opened a seminar on Alternative Dispute Resolution, in Lusaka in September 1998, taken from the Rapporteur's Report on the Seminar, Law Association of Zambia.

provide the right foundation at the ‘grass roots’ - in the Law schools that churn out the lawyers of the future.

Many Law Schools, in Universities all over the world, now teach ADR as part of the law curriculum. In some schools, ADR is taught as a course on its own. Other schools approach the teaching of ADR as an ‘integrative’ concept; thus, for example, at the University of Missouri-Columbia (UMC) School of Law, dispute resolution is integrated into required first year courses rather than rely exclusively on separate courses²⁵⁹. An overview of dispute resolution and mediation, for example, is taught in civil procedure. This is done in order to expose students to dispute resolution knowledge, perspectives, and skills, at the time when they are beginning to decide how to live their professional lives.

As the ADR drive in Zambia comes to fruition, the Law Schools must be prepared to complement this process by providing their students with a wider perspective of their role as lawyers. Certainly, with the introduction of the Commercial list, and the new provisions relating to mediation, more and more people in Zambia are becoming aware of the advantages of ADR. As Murray states, *“It is obvious that lawyers today must have a grounding in ADR in order to provide adequate advice and representation in many areas of the law.”*²⁶⁰

IV. FUNDING

Any recommendation for the implementation of ADR will involve not only alteration or amendment to existing laws, but also, funding. One cannot, call for the implementation of ADR in Zambia, advocate for the changing of laws, the institution of a dispute resolution centre, the training of skilled manpower in ADR and the need for integration of ADR into the curriculum of the Law School, without paying due attention to the question of funding. As initiators of the ADR drive, the legal fraternity itself must come together to determine how best to generate the necessary funding for the various aspects of the implementation of ADR in Zambia.

²⁵⁹ Riskin and Westbrook, Dispute Resolution and Lawyers (1997)

necessarily dictate the choice of model upon which the dispute resolution centre will be based, and it may well be that its beginnings will be rather more humble than envisaged.

It is further recommended that funds be solicited from legal and accounting practices, and other professional practices, such as architectural, medical and engineering firms, who make up a large part of the parties that have a vested interest in the setting up of a dispute resolution centre. These contributions may be made in the way of either, a lump sum contribution, or, a monthly contribution similar to membership fees. The idea would be to emulate such institutions as the Arbitration Foundation of South Africa, which was started in 1993, with funds predominantly from large legal and accounting practices; and whose initial funding is supplemented by monthly contributions to the Foundation by way of subsidy²⁶².

It should be noted however, that in today's dwindling economy, the issue of funding is one that can cause grave difficulties in the implementation of a full-blown programme of ADR in the country. There are few business houses in Zambia with sufficient income to make any meaningful and long-lasting commitments, financially, to an institute which they may or may not need in the future. The task therefore lies in convincing business houses not of their own need for such an institution, but rather, of the 'spin off' benefits to be attained from establishing a credible and viable dispute resolution centre in the country. Such benefits, for example, as the enhanced confidence of the foreign business community in the legal system. Another 'spin off' effect may be renewed interest in Zambia by investors.

Finally, given the current recognition both at home and internationally of the importance of ADR in any judicial system, we need no longer emphasise the reasons or justification for ADR in Zambia. Our focus now must be, not on the "whys' and wherefores", but rather, on "how and when."

²⁶¹ Report of the Honorary Secretary of the Law Association of Zambia, to the Monthly General Meeting of the Bankers Association of Zambia, held on July 13, 1999 on the Revitalisation of Arbitration in Zambia.

²⁶² Martin, R, op. cit.

BIBLIOGRAPHY

- ARNHEIM, Micheal, *Drafting Settlements of Disputes*, Tolley Publishing Company Ltd, Croydon, 1994
- BUTLER, David, and Eyvind Finsen, *Arbitration in South Africa: Law and Practice*, Juta & Co., Johannesburg, 1993.
- DIAS, R W M, *Jurisprudence*, Butterworths, London, 1985.
- FISHER, Roger, William Ury and Bryce Patton, *Getting to Yes*, Houghton-Mifflin Company, New York (1991).
- HAILSHAM, Lord, of St Marlylebone, *Halsbury's Laws of England*, 4th Edition (Reissue), Vol. 2, Butterworths, London, 1991.
- KOVACH, Kimberlee K, *Mediation Principles and Practice*, West Publishing Co., St Paul, Minn., 1994.
- NOLAN-HALEY, Jacqueline M, *Alternative Dispute Resolution*, West Publishing Co., St. Paul, Minn., 1992.
- MITCHARD, Paul; *A Summary of Dispute Resolution Options*, Martindale Hubbell International Arbitration and Dispute Resolution Directory, England, 1997.
- MURRAY, John S, Alan Scott Rau and Edward Sherman, *Processes of Dispute Resolution: The Role of Lawyers*, 2nd Edition, University Casebook Series, The Foundation Press, Westbury, New York, 1996.
- PLAPINGER, Elizabeth and Donna Stienstra, *ADR and Settlement in the Federal District Courts*, Federal Judicial Centre & CPR Institute for Dispute Resolution, 1996.
- PRITCHARD, John, *Guide to the Law*, 2nd Edition, Book Club Associates, London, 1985.
- RISKIN, Leonard L and James E Westbrook, *Dispute Resolution and Lawyers*, American Casebook Series, West Publishing Co., St Paul, Minn., 1987.

SINGER, Linda R, *Settling Disputes*, 2nd Ed., Westview Press, Boulder, 1994.

SUTTON, David St John, John Kendall and Judith Gill, *Russell on Arbitration*, 21st Edition, Sweet & Maxwell, London, 1997.

ACADEMIC ARTICLES AND PAPERS

AMOUSSOU-GUENOU, Rolan, “*International Commercial Arbitration in Sub-Saharan Africa: Law and Practice*”; *The ICC International Court of Arbitration Bulletin* Vol. 7 No. 1; May 1996.

MATIBINI, Patrick, *Alternative Dispute Resolution*, A Paper presented to the Judges Seminar at Livingstone, July, 1998.

SANDERS, Pieter, “*Unity and Diversity in the Adoption of the Model Law*” *Arbitration International*, Vol. 11, No. 1, 1995.

SILUNGWE, The Honourable Mr Justice Annel M., “*Alternative Dispute Resolution*”, a Paper presented before the First Judicial and Law Association of Zambia Seminar, October, 1990.

Various materials for the US/Africa Legal Exchange Program, developed by the American Bar Association Section of Dispute Resolution and the International Centre for Dispute Resolution.

REPORTS AND OTHER PAPERS

International Trade Centre (UNCTAD/WTO); background Material entitled “*Setting Up a Dispute Resolution Centre*”.

International Trade Centre (UNCTAD/WTO); background Material entitled “*Drafting An Arbitration Act*”.

MARTIN, R, “*The Potential for the Development of Arbitration and Alternative Dispute Resolution Systems in Zambia, and Proposals for Implementation*”: A Report for the Law Association of Zambia, September 16, 1998

MUTUNA, Nigel Kalonde; Paper Presented by Honorary Secretary of the Law Association of Zambia to the Monthly General Meeting of the Bankers

Association of Zambia, held on 13th July, 1999 on Revitalisation of Arbitration in Zambia.

MUTUNA, Nigel Kalonde; Rapporteur's Report Submitted to the Council of the Law Association of Zambia, on the Seminar on Alternative Dispute Resolution, September, 1998.

JOURNALS

Saint Louis University Law Journal, Vol. 37, No. 4, Summer 1993.

Ohio State Journal on Dispute Resolution, Vol. 13, No. 3, 1998.

RESEARCH PAPERS

SONGOLO, Friday Nasilele Mawaya, Resolution of Disputes in Construction Contracts in Zambia, Thesis Project for the Degree of Bachelor of Science (Building), Copperbelt University (1994)

SPEECHES

Speech by His Lordship Mr Justice M M W S Ngulube the Chief Justice on the Opening Ceremony of the Mediation Training at Pamodzi Hotel on 17th April, 2000.

NEWSPAPER ARTICLES

MATIBINI, P; Articles From "The Legal Desk" Of The Sunday Mail, as follows:

"Alternative Dispute Resolution"

"Mediation Rules Should be Revisited"

"What is Arbitration?"

"LAZ and Government Should Jointly Promote ADR"

"Promote Commercial Mediation"

"Zambia should Brace for International Commercial Arbitration"

ZAMBIAN STATUTES

Arbitration Act, Chapter 40 of the Laws of Zambia.

High Court Act, Chapter 27 of the Laws of Zambia.

Companies Act, Chapter 388 of the Laws of Zambia.

Statutory Instrument No. 71 of 1997; The High Court (Amendment) Rules of 1997.
Statutory Instrument No. 29 of 1999; The High Court (Amendment) Rules of 1999.

FOREIGN STATUTES

South Africa: The Arbitration Act, No. 42 of 1965.

Kenya: The Arbitration Act, No. 4 of 1995.

Zimbabwe: The Arbitration Act, 1996.

INTERNATIONAL CONVENTIONS

The UNCITRAL Arbitration and Conciliation Rules, United Nations General Assembly Resolution 31/98.

The UNCITRAL Model Law on International Commercial Arbitration

The New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 7 June 1959, No. 4739, United Nations, Treaty Series, vol. 330.

Convention on the Settlement of Investment Disputes between States and Nationals of Other States.