THE INEFFICIENCIES OF THE DISPUTE SETTLEMENT SYSTEMS IN ZAMBIA:

ALTERNATIVE DISPUTE RESOLUTION, AS A SUPPLEMENT TO LITIGATION.

BY

SYLVIA MUTALE MULENGA

UNZA 2004
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Directed Research paper presented at the University of Zambia, Law faculty in partial fulfillment of the requirements of the Degree of Bachelor of Laws (LLB).

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Supervisor

December 2004
DECLARATION

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Supervisor
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DEDICATION

“If your brother sins against you go and show him his fault, just between the two of you... but if he does not listen to you, take with you one or more...”
(Matthews 18:15-16)

This paper is dedicated to my mum and dad. I am fully indebted to you for the giving life to me. God chose you, to give me whatever I longed for and because of you I am what I am. God has the greatest reward for you.

To my uncle, Fr. Justine Mulenga, I am extremely grateful for all the support you have rendered.
ACKNOWLEDGEMENTS

Firstly, I would like to sincerely thank my God, the Lord Almighty, whose love for me endures forever. He has greatly blessed me and molded my life. For this I am very grateful.

My supervisor, Mr. Steven Lungu, at the expense of his awesome commitments he has given form to this essay; I also thank him for all the encouragements and most importantly for supervising me. To you sir, I say thank you. Sincere thanks go to Mr. N K Mutuna, for being my mentor.

I shall forever thank Mum, Chileshe, Mukuka, Chisanga, Chanda and Musonda for rendering special support through out my academic life. When all is said and done I can always turn to you.
Sincere thanks go to Fr. Justine Mulenga and Fr Remmy Lesa; to you I say God has a great reward for you, for what you have done for me.
To the Muchindika’s, you are more than a family to me. Thank you for providing a wonderful home to me. James and Kabwe, thank you.

Pandaida, thank you for choosing not only to persevere with me but also to encourage me.

To my faithful friends, Hannah, Ngao, Jeff, Bubala, Kachilani, Mwansa, Kanyembo, Chishimba, Bwalya, Chipili and Michelle. You are close to my heart. Bwalya, my roomy, thank you for allowing me use your computer and for being a lovely friend. Abigail, thank you very much for printing my work.

To the Navigators family, thank you guys for offering such wonderful spiritual guidance.

Those not specifically mentioned, thank you too.
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<th>Abbreviation</th>
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<tr>
<td>ADR</td>
<td>Alternative Dispute Resolution</td>
</tr>
<tr>
<td>CIA</td>
<td>Chattered Institute of Arbitration</td>
</tr>
<tr>
<td>DSI</td>
<td>Development Services Initiative</td>
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<tr>
<td>FICA</td>
<td>Foundation for International Commercial Arbitration</td>
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<td>ICA</td>
<td>International Court of Arbitration</td>
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<td>ICSID</td>
<td>International Center for the Settlement of Investment Disputes</td>
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<td>MIGA</td>
<td>Multilateral Insurance Guarantee Agency</td>
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<td>LDC</td>
<td>Less Developed Countries</td>
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<td>UNCITRAL</td>
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ABSTRACT

As a result of development and growth of International and domestic trade over the years, there has been a large number of disputes. This is because of the interaction that exists between people or entities. The traditional legal response to settle these disputes has been for a lawyer of one of the parties to initiate or lodge a complaint in court. The litigation process has therefore been the major forum for settling disputes. This is so, notwithstanding, the fact that for as far back as 70 years ago, Zambia has had in her statute books, other arena for dispute settlement. However, the litigation process has been criticized as being inefficient and ineffective, hence the business community is increasingly demanding for a quicker and cheaper method of resolving disputes. It is this outcry that has spearheaded the need to popularization and sensitization of Arbitration and Alternative Dispute Resolution mechanisms (thereinafter called ADR) as alternative means of resolving disputes.

This essay recognizes, Adjudication, which is the traditional legal system of settling disputes. It has also identified the use of ADR in the Zambian system. The paper therefore endeavors to make an imperative study of the adjudicative system and the methods that have been adapted to supplement and not compete with it, so as to improve the overall dispute settlement systems that have been placed in this country.

The first chapter will basically introduce the reader to the Adjudicative process, by giving an overview of the Judiciary in Zambia. It will further discuss the way in which this
branch of the Government has been administered, because administration has an impact on the delivery of justice. This chapter will be the basis of all the proceeding chapters.

The second chapter will look at the alternative methods of resolving disputes and their evolution. It will also look at the reasons for adoption of these alternatives.

The third chapter will consider broadly Alternative Dispute Resolution, ADR, giving the various types in which it exists, the key elements or characteristic features in which its advantages lie. The last part of this chapter will critically analyze ADR vis a vis, the extent to which it has been implemented and utilized.

Chapter four is the final chapter, which will contain the conclusion and recommendations based on the research.
CHAPTER ONE

The Judiciary is the mirror of society. It should not lag behind current, political, social and economic development. In the current scenario of multi-partism the judiciary should remain the fountain of justice, where people can run to for the resolution of disputes”

(Lingapa v. State of Maharashtra, AIR 1985 SC 389) at 392

1.1 INTRODUCTION

When two or more people or entities interact, it is inevitable that a dispute may arise. Once this happens most people will initially attempt to meet and settle their dispute but usually the aggrieved party will instruct his or her lawyer to lodge a complaint in court. Some of the reasons for resorting to litigation are that there are assured outcomes, established procedures and the effective enforcement of the decisions.

This chapter seeks to consider in general the adjudicative process in Zambia and the way in which it performs its function as a dispute settlement mechanism.

1.2 WHAT IS ADJUDICATION

Adjudication is a public process of resolving disputes that are instituted by any affected party, in the courts of law. An adjudicator can therefore be said to be the person who resolves disputes brought to him/her, publicly through the government instituted courts of law. The role of an adjudicator is simply to arrive at a decision through the indulgence of the law obtaining on the matter.
In making the decision the adjudicators strictly apply the law, their decision is influenced by what the law and decided cases state. This ensures that when a dispute is brought before the court, the parties are assured of a consistent outcome. This is done through a process of stare diceises, a principle at which all future cases will be based\(^2\). A judge will apply the principle used in a similar decided case, to arrive at a similar conclusion. Thus, since all cases decided on an issue follow a particular procedure a case decided on an issue that is similar to another case helps to be an authority to the new case. This is a system with a catalogue of rules to facilitate predictability, certainty and fairness, and it is one of the major functions of a legal order\(^3\). To illustrate this, a classical example of a case is *Donoghue and Stevenson*\(^4\), which raises the issue of duty vis a vis, the limited range of situation to which a complainant can be the entitled to a remedy. The neighborhood principle under this case is established.

Hence Lord Gardner; in the practice statement of the house of the Lords\(^5\) states that *precedent is an indispensable foundation upon which to decide what the law is and its application to individual cases.*

The role that adjudicators play is illustrated in the following quotation:

> Judicial decisions are made for human society. To resolve issues justly... judges must be faithful to the principles of the rule of law equality, rationality and comprehensibility in decision-making, what is called due process. A judge should be insightful and realistic, put aside belief and individual preferences and retreat to the cloister of the law, guardian of the realities of existence amid images of man in society. The judges bear a heavy burden and a dramatic responsibility. The true judges is a philosopher who accepts the burden of making the decision for society\(^6\)
The system of adjudication entails the case of lawyers in the administration of justice. However, their role is only in the appellant courts. They are representatives of the parties to a dispute. Lawyers will establish a strategy using the facts available and their skill and knowledge of the law, in arguing the case on behalf of their clients.

1.2 ADJUDICATIVE SYSTEM IN ZAMBIA

Modern day Zambia is a creation of British Colonialism. Colonial rule was imposed in the 1890s through the agency of the British South Africa Company, led by John Cecil Rhodes. Initially the territory was divided into two parties; Northeastern and Northwestern Rhodesia, all administered by the company. In 1911, the two territories amalgamated to form Northern Rhodesia.

During this period, there was a unified Judiciary. The High court was created with full jurisdiction over all civil and criminal cases, over all persons and over all matters in Northern Rhodesia. But Acts of the United Kingdom Parliament enacted after the amalgamation did not apply to the territory. Magistrate courts were also created. The appointing authority, the manner, the power and privileges of judges and magistrates were a replica of those in the North Eastern Rhodesia in 1900 order in council. Appeals lay from the magistrate the magistrate court to the high court and then to the Privy Council. The British Government took over administration in 1924 to 1963. The governor created the native commissioner’s courts. Hence forth, appeals lay from the native courts being the lower court. In 1936, the native courts ordinance was created which administered African customary law. District officers and provincial commissioners were empowered to review the local court decisions.
In 1964 when Zambia became independent, the 1964 constitution had all the laws enacted during the colonial period, except for changes in nomenclature, it continued into force by virtue of the Zambia Independence Act and the Zambian Independence Order of 1964. Amongst other additions, it enshrined independence of the judiciary. Therefore, almost 40 years of independence, Zambia has basically maintained an institutional and organizational framework of the judiciary. The first republic maintained the structure of colonial administration, but the dawn of the second republic saw some changes, which have been maintained to date.

1.3 CURRENT SITUATION

The Judiciary being one of the branches of Government has been recognized as the machinery to administer justice in Zambia through the courts of law. The constitution has arranged the court system into a hierarchical structure, with the Supreme Court at the apex and local courts at the base. Article 91 states, the judiciary structure of the republic shall consist of:

a. The supreme court of Zambia
b. The high court of Zambia.
c. The industrial relations court
d. The subordinate courts
e. The local courts
f. Such lower courts as may be prescribed by an act of parliament.

It is in the same way that the strength, powers and jurisdiction have been vested, except that the high court and industrial relations court are at par. Adjudication in Zambia has largely remained through the court system. Thus, this part of the chapter shall endeavor to give a framework of the courts in which day to day disputes are settled.
a. THE SUPREME COURT OF ZAMBIA

The Supreme Court is the highest court of the land. The preamble of Chapter 25 of the laws of Zambia provides that its "an Act to provide for the constitution, jurisdiction, procedure of the Supreme Court of Zambia; to prescribe the powers of the court; and to provide for matters connected therewith or incidental thereto". Article 92(1) provides that there shall be a Supreme Court of Zambia which shall be the final court of appeal... and shall have such jurisdiction and powers as may be conferred on it by this constitution or any other law. It is therefore mainly a court of appeal, however not entirely so because it can act as a court of first instance. For instance in the case in which the legitimacy of the election of President Mwanawasa was questioned, in 2001, this was heard in the Supreme Court.

The Supreme Court Act Chapter 25 of the laws of Zambia regulates the Supreme Court. According to section 7 of the Act, its jurisdiction is to hear and determine appeals in civil and criminal matters and such appellant or original jurisdiction as may be conferred upon it by or under the constitution.

Additionally, some cases have alluded to its jurisdiction in a much illustrative manner. In the case of Godfrey Miyanda and The High Court, in which his Lordship Deputy Chief Justice explained its jurisdiction in civil matters as; "The original civil jurisdiction of the Supreme Court is very limited indeed and would appear to cover such matters as the granting of injunctions, pending appeal, the making of orders to extended time or for leave to appeal or as to costs or security for costs of appeal... make orders requiring the
fulfillment of an undertaking given to it and an inherent power to strike out an incompetent appeal....to prevent abuse of process and to protect its authority and dignity.”

The Supreme Court consists of 9 judges, who include the Chief Justice and the Deputy Chief Justice\(^\text{12}\). The Chief Justice doubles as the judge in charge of the Supreme Court and thus called the ‘Judge President’ who is responsible for allocating cases and deciding the quorum or composition of the court. Nevertheless, the Chief Justice still exercises the function of the Judge President, especially in stern cases.

b. THE HIGH COURT FOR ZAMBIA

Creating the High Court for Zambia is Chapter 27 of the laws of Zambia, which is the High Court Act, under its preamble it states “an Act to amend the law with respect to the jurisdiction and the business of the High Court and with respect to the officers of the High Court and otherwise with respect to the administration of justice and the validation of certain acts”\(^\text{13}\). Under the Constitution Article 94 provides that “there shall be a High Court for the Republic which shall have, except as to the proceedings in which the Industrial and Labour Relations Court has exclusive jurisdiction under the Industrial and Labour Relations Act, unlimited and original jurisdiction to hear and determine any civil and criminal proceedings under any law and such jurisdiction and powers as may be conferred to it by the law\(^\text{14}\).”

The High Court has 30 judges, otherwise referred to as puine judges, a term meaning that they are subordinate to the Supreme Court judges. A judge-in-charge is placed at each
High Court wherever situated in the Republic of Zambia. Prior to the passing of the Statutory Instrument No.71 of 1997, he was responsible for the allocation of cases to fellow judges. However, this function was dissolved to the Registrar of the High Court, so as to eliminate biasness and favoritism in the allocation of cases but there are instances where the Chief Justice has determined which judge would handle which matter in appropriate cases\(^{15}\). Also in his ex-officio capacity, can allocate to himself a case at High Court level. It can also proceed in accordance with the judges' specialization in an area of the law.\(^{16}\)

c. THE INDUSTRIAL RELATIONS COURT

This court was created to settle disputes arising from labour and industrial relations. Labour and industrial relations are interactions between the parties and players in labour and industry. Arising from these interactions are disputes involving:

- The employee and employer
- The employer and the employee representatives such as trade unions
- The trade unions.

The Act governing this court is the Industrial and Labour Relations Act, Chapter 269, which according to its preamble, is "an Act to provide the law relating to trade unions, the ZCTU, a employers association, the Zambia Federation of Employers; recognition agreements, settlement of collection disputes, strikes, lockouts, essential service and the Tripartite Labour Consultative Council; repeal and replacement of the Industrial Relations Act 1990, and to provide for matters connected with or incidental to forgoing\(^{17}\)."

This court is at par with the High Court, in that a complaint arising from such relations can lodge their grievances in either court. In the IRC this is pursuant to section 85A. The High Court can also entertain these disputes by virtue of its original and unlimited jurisdiction in all matters.
d. THE SUBORDINATE COURT

Chapter 28 of the Law of Zambia creates the Subordinate Court, *this is an Act to provide for the constitution, jurisdiction and procedure of the Court; to provide for the appeals from such courts to the High Court and to provide for matter incidental to or connected with the foregoing*\(^{18}\). They are sometimes referred to as Magistrates Court. They are situated at every provincial center and some of the district. There are two classes of magistrates; these appear to be reminiscent of the British Stipendiary or professional magistrate. The former are qualified advocates with a degree in law and postgraduate practicing certificate. The latter are not qualified advocates but have undergone a magistrate diploma course.

e. THE LOCAL COURTS

Establishing Local Courts is the Local Courts Act, Chapter 29 of the laws of Zambia. Under its preamble, it states "*its an Act to provide for the recognition and establishment of Local Court, to amend and consolidate the laws relating to the jurisdiction and procedure to be adopted to the by Local Court and provide for matters incidental thereto*\(^{19}\)."

Local Courts are found in all towns and are classified as ‘A’ and ‘B’ Grades; whose jurisdiction is determined by warrant assigned to them. The jurisdiction of the courts is restricted to civil and criminal matter but matters of matrimonial claims are not so restricted\(^{20}\). There are certain cases however that are excluded from its jurisdiction, the local court shall have no jurisdiction to try any case in which a person is charged with an offence in consequence of which death a person is alleged to have occurred or which is
punishable by death\textsuperscript{21}. Additionally Local Courts are primarily authority to apply and enforce customary law by section 12 (a) and by-laws and regulations promulgated under the Local Government Act Chapter 281. In the case of \textbf{Kaniki v. Jairus}, the court held that, \textit{there is customary law provided the latter is not in conflict with or repugnant, with natural justice, morality, equity and good conscious...The court is to apply the subjective test of what is repugnant and the objective test, if it cast its mind wider whether such a custom is valid.}\textsuperscript{22}

\textbf{1.4 THE ADMINISTRATION OF JUSTICE}

The public expects a lot from the judiciary, therefore the need for it to command respect cannot be over-emphasized. It is important to have in place, a system that performs its functions to the full satisfaction of the public. Thus, the rule of law places special emphasis upon the ordinary courts and their relative independence from politicians and the Executive. The principle of separation of power is particularly important for the Judiciary if the rule of law is about ensuring that government keeps its promises, there must be an independent arbiter to provide checks.\textsuperscript{29}

One of the hallmarks in dispensation of justice, to be independent and autonomous.\textsuperscript{30} Judges, members, magistrates and justices shall be independent, impartial and subject to only the constitution. This must reflect in the administration of justice and also in the personal attributes of judges, that is, their objective principles; whether they are consciously or unconsciously applying personal prejudice based upon their own special and political backgrounds. Laws are often vague and uncertain in their meaning and competing principles often have to be balanced. Biases may be implicated \textsuperscript{31} for example
magistrates go on strike, this does not auger well with the maintenance of law and justice. These judicial officials perform an indispensable service, which must be appreciated. Additionally, it must be acknowledged that the level of funding made available by government has a direct bearing on the independence of the judiciary.

1.5 CONCLUSION

Although the judiciary is one of the important arms of government, other arms have tended to relegate the judiciary to a somewhat inferior position in relation to them. The position can only change if the role of the judiciary is better appreciated. Apart from these shortcomings there are also other factors that diminish the quality of the delivery of justice, which is, has a resulted in extreme delays. It is because of these inefficiencies and ineffective that has led to be finding other alternatives to resolving disputes, which will be discussed in the next chapter.
ENDNOTES

4. (1932) AC 562.
5. Gardner, Practice Statement of the House of Lords, 26th July 1966, p. 32.
7. Granville Williams, Proof of Guilt, Steven and Sons Ltd, London, 1958, p. 44.
8. Northern Rhodesia Order in Council 1911.
9. Northern Rhodesia Order in Council 1924.
13. CAP 25
18. Supreme Court and High Court (Number of judges) Act.
19. CAP 27
20. Op. cit, Chapter 1, Art. 94.
23. IRC Preamble
24. CAP 28 Preamble
25. The Local Court Act Chapter 29 of the Laws of Zambia.
26. Ibid sec 8&9 and 38&68.
27. Ibid sec 11.
28. (1967) 2 LR.
30. Ibid p. 16.
32. Ibid p. 21.
CHAPTER TWO

"Having often discoursed with lawyers and others about the delays, burdens and uncertainties of trial at law ...I very seldom found any averse to merchants court for what a ridiculous thing it is that judges in chancery must determine of the parties negotiations, transacted in foreign parts, which they understood no better than do the seats they sit on...." W.Cole in A Rod of Lawyers, (Marl. Miscell IV 323)

2.1 INTRODUCTION

We are taught that the only way to settle important disputes is to take them to court. It is our constitutional right to sue if we are injured, deceived or wronged in some way. Televisions, movies, newspaper articles all give a report of the huge sums of money awarded in court-ordered damages, reinforcing the “see you in court” mentality as the only acceptable response to conflicts.

As the burgeoning court queues, rising costs of litigation and time delays continue to plague litigants, more states have began experimenting with Alternative Dispute Resolution, thereafter called ADR. Some of these programmes are voluntary others are mandatory.

ADR, as a methodology has in the past decades become a popular term as a means of avoiding the court systems, which are over burdened, costly and time consuming. ADR refers to any means of settling disputes outside of the courtroom. It offers an opportunity to resolve disputes creatively and effectively in a non-threatening way and can result in
saving time energy and expenses associated with protracted conflict and litigation. As a result more organizations are now considering the use of ADR methods to handle the explosion in employee disputes and claims that could otherwise lead to litigation. ADR has been greatly encouraged and supported by the courts, but it depends also on the attitude of the judge. In the case of Frank Cowl & others and Plymouth City Council the court held that courts should not permit, except for good reasons, proceeding to go ahead if a significant part of the issue between the parties could be resolved outside litigation process. Lawyers on both sides are heavily obliged to resort to litigation only if it was unavoidable.

This chapter seeks to examine and provoke a more critical thought about other methods of settling disputes aside the court system. It therefore provides an overview of what ADR is, the reasons for its adoption as well as the historical background. Finally a summary of the various types of ADR that exist will be outlined.

2.2 FORCES UNDERLYING CURRENT FORMS OF DISPUTE RESOLUTION

In many parts of the world there had been a struggle to find alternatives to court based system of dispute resolution. This was partly because of the colonial character of the adjudication system that most countries had inherited, though their cultural and social framework demanded a less confrontational and more informal mode of dispute settlement. Such trends have long existed, albeit for essentially different reasons. However, over the past two decades, there has been a growing interest amongst advocate’s world wide in the use of ADR, which has been seen to be very effective and efficient.
The major cause of ADR mechanisms in Zambia has been the increasing globalization of the modern business world. The effect of which is that more commercial transactions occur between entities; parties or even countries in order to realize common ends, emanating from this are potential disputes.⁵ The changes in the economy naturally affect the way in which disputes will be resolved. Increased growth of population worsens the situation because the more the people, the more the disputes, this of course includes domestic and employment cases apart from commercial cases.

The courts cannot handle the number the of cases arising from the business world. It has therefore became clear that courts in Zambia are backlogged with cases dating back many years. As Warren Burger stated “we read in the newspapers of cases that continue not weeks or months but years. Can it be that the authors of our judiciary ever contemplated cases that monopolize one judge for many months or even years? All litigants standing in line behind a single protracted case are denied access to that court⁶.”

The judiciary being the major branch of the government creating courts to settle disputes must be considered, because it is in the courts where the problem lies. Although not solely but significantly.

2.2.1 PROCEDURAL DELAYS

Firstly, the formality of the process and bureaucratic procedures create delays in dispensing of justice.⁷ This obviously means that people are denied speedy access to justice, as the saying goes ‘justice delayed is justice denied’. The procedures are so
formal that a case may take years to be settled. Situations have occurred where judges are even sued for delaying in the delivery of judgment. In the case of Godfrey Miyanda and Matthew Chaila (judge of the High Court)\(^8\). The petitioner filed a writ on 10th of September, 1981. The hearing of the suit commenced before the respondent on the 22nd of August 1983. The hearing of the case was concluded on the 7th of September 1983, but judgment was not delivered until the 18th October 1984. Dissatisfied with the length of time which it took the judge to prepare and deliver, the applicant brought an action, contending that by failing to deliver judgment within reasonable time the judge was in breach of Article 20(9) of the Constitution of Zambia.

Although it was held that a judge cannot be sued for such reasons, since upholding the independence of the judiciary was imperative. The case aims at showing the extent to which the problem has continued to be exhibited although it is conceded that there has to be independence of the judiciary, it is contended here also that it must not be at the expense or sacrifice of justice.

It is also visible here that the independence of the judiciary is undermined by even having such cases before the court, this further makes the court system lose its popularity amongst the people. Delays necessarily mean expenses and so a lengthy case can lead to such high expenses that it is no longer worthwhile for the parties concerned to bring their disputes before the courts. Parliament Secretary at the Lord Chancellor’s Department of Scotland recently made it clear that, although local authorities are not bound by the government pledge, they are still expected to consider ADR where appropriate. If a quarter of the disputes where referred to ADR, each council saves about 625,000 pounds
a year, because the average cost for taking a council dispute to court is about 25,000 pounds and ADR can typically cost half as much. 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.9

The problem of delays has been exacerbated by other factors, which are discussed herein under:

2.2.2 THE NUMBER OF JUGDES

The number of judges is also a reason for the backlog of cases. There are to be 9 judges ideally in the Supreme Court, for instance, but in reality there are vacancies, therefore only about 7 are available of whom some are merely acting.10 The High Court is supposed to have 15 judges, but even so these have proved to be insufficient because of the number of cases especially in Lusaka. The number of judges hence cannot meet the number of cases to be heard which are presented every now and then, as the number of qualified lawyers in the country continue to rise exponentially.

The same judges available also service other sessions such as Chipata sessions, Mongu sessions and Luapula sessions as there are no resident judges there. Initially the provincial chambers had judges and High Court Commissioners who acted as part time judges but they were withdrawn except for Kitwe, Livingstone, Ndola and Kabwe. The reasoning put forward for such withdrawal was not clear but it seemed to be that at that time the capital city did not have adequate judges, conversely the provincial centers did not have such workload as to warrant a location of judges, so it was decided that they would be serviced periodically.11 However, the situation has changed, that even provincial
centers now have so many cases that need particular attention whilst also maintaining the efficient delivery of justice even in others provincial centers.

2.2.3 NUMBER OF COURT ROOMS

Due to luck of funds, court buildings especially in the Subordinate court and local courts are not enough and even the ones existing are not maintained. Many of them are in a dilapidated state. Even some High Court buildings can do with a coat of paint.\textsuperscript{12} In fact, even the office allocation of judges' chambers are not sufficient. It must be noted that society has and is changing, therefore as there are more cases there must be more judges and consequently additional buildings. The High Court buildings for instance were built in the colonial period and were established in correspondence with the number of judges who were available then, how can it be that several decades latter the same ones are being used?

2.2.4 FUNDING

Government has a strict budget, as a result it has constricted its financial support to the Judiciary, hence the courts cannot be maintained as well as they ought to be. According to court officials, \textit{"Government funding is never sufficient, the monthly funding received fluctuates. This year the High Court has only received two funding one of which was only K45m. This was not adequate because of areas that it owed to other third parties, debts, rentals, which need to be settled. These funds are usually not up to date to deal with other demands such as fuels and servicing of judges and utility vehicles for 15 judges. There are also instances when court sessions are disrupted because of lack of}
Court fees are paid for such purposes and yet the problem still persists, as a result there is no promptness.

2.2.5 WORK STOPPAGES

Like most Government departments, the supporting stuff and unionized workers go on strike so frequently, because of much dissatisfaction in terms of State support and incentives, remuneration and allowances. Moreover, they lack motivation, its no wonder most LLB holders opt to go private rather than in public service or on the bench.

The modern trend is that all judicial personnel should be computer literate, but of late the majority of the work in the registry has been manual. In a research conducted by Development Services Initiative Southern Africa, (DSI) in May 2004, it was found that in rural areas they still desire old typewriters almost as if it’s not a widespread phenomenon that computers and electronic typewriters are now essential elements of any efficient operation. On a brighter note though, there is a project which is being formed called Records and Documents Project Management Process, which is the pilot project in the High Court and the Chikwa Courts with the aim of computerizing the documentation system in the judicial registries. Unfortunately, the project consultants are just in the process of digging out all the information in the districts registries and the organization has not yet been formed. Yet again its only in our hope that there is computer literacy and appreciation amongst the court officials in the registry.

The problem of delays is not only manifest in the above but also in the frequent adjournments of cases that should have otherwise been decided swiftly, “even when an acceptable result is finally achieved in a civil case, that result is often drained of its value
because of the lapse of time, the expense and the emotional stress of the litigation process."  

Adjournments occur as a result of many reasons, some of which have been alluded to, such as striking, luck of courtrooms, loss of documents, luck of facilities and luck of judges. However, adjournments are not only at the instance of the courts but also by the parties or the lawyers, who may do so to prepare themselves or even as a strategy to delay the case. This is because some lawyers are usually money oriented as oppose to accomplishing a mission that the parties are seeking.

There are other reasons for the development of ADR, other than within the realm of the judicial system. Some of which are as follows:

Most of the cases brought before the courts could easily be resolved between the parties themselves without the need to resort to litigation. Such cases are just a waste of valuable court time which could be spent on more deserving cases. However, this perpetuates the cycles because a case to be seen as easily resolved. It has to came to court and as a result it will take long more and more adds to the Load.

People who are aggrieved have been discouraged by the above factors and hold little hope or indeed confidence in the ability of the courts to address their grievances and come up with a satisfactory resolution to the problem. Thus, the parties to dispute seek to yield over their own disputes as they view them as being personal, “courts or administrative actions displaces our power over our own disputes.”

Additionally most businesses and professional relationships have to endure and survive after the resolution of disputes at hand. It can well be said that, personal relationships that
clients have between each other and the type of dispute influences the type of relationships. This is because relationships may breakdown as Singer said, “the emphasis of the courts and other traditional forums on pronouncing right and wrong, and naming winners and losers, necessarily destroy almost any pre-existing relationships between the people involved”. The has been in conflict with the high desires of conciliatory compromise between the parties, for instance in custody cases, the parties might want to maintain their relationships for the sake of their children, who might be in the custody of one of them whilst the other parent just has access, therefore they need a harmonious relationship as there is an expectation of valuable interaction in the future. This is also subject to public policy. Another situation is in a corporate entity and its auditors over fees, such need to have their disputes away from public eye. In this event they will preserve their reputable businesses and the parties will work together again as though nothing happened.

2.3 HISTORICAL AND LEGAL EVOLUTION OF ADR

2.3.1 TRADITIONALLY

The use of ADR, specifically Mediation is equally justified from a historical perspective. It predates to the formal creation of the law and its enforcement, for humans in the social states seem to have had a natural instinct to seek the guidance of others in settling differences, the submission of disputes to an independent adjudicator is a form of ordering human society and is as old as society itself. In Zambia, just like in most African societies, a traditional form of mediation has always formed the basis of the societal dispute resolution structure. There were a number of people who were considered to have a role to play in the distribution of justice and the resolution of disputes and
conflicts within the communities, some of whom where, village elders, chiefs village headmen and councilors. For instance if there was a dispute over land, the headman would be asked to have an authority over it and give boundaries for each party and as people regarded them with respect, they obeyed these decisions as a matter of negotiations conducted by the third party who does not have any interest over the land. Or when there was a matrimonial problem, elders would sit the couple down to try and reach a conclusion in private. Further, even in other cultures mediation was recognized, “the classical Chinese viewed the use of mediation as superior to recourse to the law for the settlement of disputes.”

2.3.2 INTERNATIONALLY

Historically, the framework of foreign investment in third world reveals that it handicapped the indigenous people who were its subjects. The investment regimes of the colonial territories and their indigenous peoples were treated as geographic extensions of those in the imperial nations. Consequently, investment was not truly foreign in the judicial sense, because commercial entities were trading with and investing in areas that belonged to the ‘Host States’, which became responsible for granting charters or licenses that allowed the trading or investing entity to exploit the resources of distant parts of its own dominion. Not surprising though, concessionary grants to exploit third world resources were made without much recourse to the indigenous population. It is from such an account that disputes arose and mechanisms designed to resolve disputes between the trading entities (both national and foreign) and the state existed. Both legally and ideologically such disputes were resolved within the framework of mutually agreed upon, but essentially alien principles of dispute resolution.
"A cursory inspection of colonial legal regimes reveals laws concerning investment, arbitration and establishment of institutional mechanisms designed to resolve commercial disputes."

The above experience taught a number of lessons to the international community because nationalisation did not manage to alter the imbalances in the investment equation. Less developed countries realized there need to familiarize themselves with the current investment regime and most importantly to minimize those disadvantages, meaning not only appreciating intricacies of problems such as debt crisis but learning how to exploit existing structures and develop alternative mechanisms of solving these problems.

Provided that the existing imbalances in the international investment regime continue and that the global economic crisis intensifies exploiting or reforming existing mechanisms of dispute resolution will remain important. ADR has therefore become an extremely sophisticated multi dimensional area of international interaction, which is constantly evolving through out the world. Justice Neil Kaplan has noted that the growth of ADR in Hong Kong as an important center for arbitration because of the shift in focus of business and trade power. There is no reason, he argues, for Asian traders to go to the expense and in convenience of settling disputes in some European capital when they can have their own.

With the field of international investment becoming more open ADR will become an all-important concern for LDC lawyers.
2.3.3 ORGANISATIONAL DEVELOPMENT

The World Bank had also adopted ADR pursuant to global mandate "to promote private foreign investment by means of guarantees to participants in norms and other investment, made by private investors; and when private capital ids not available on reasonable terms to supplement private investment by providing suitable conditions; provide finance for productive purposes out of its own capital funds; to promote the long range of balanced growth in inter national trade; the maintenance of equilibrium in balance of payment; in encouraging international investment for the development of productive resource, thereby assisting in raising productivity, the standard of living and the conditions of labour in there territories".30

The World Bank for the above purposes has set up the international center for the settling of investment disputes (ICSID), which is the arbiter between the internationalizing states and the nationalized expropriated corporate entity. It has also established the multi lateral insurance guarantee agency (MIGA) to insure foreign investment as a way of insulating foreign investment from the aspect of socialism.31

ADR first assumed the attributes of a law reform movement in the early 1970's when many observers in the legal and academic communities in America began to have serious concerns about the negative effects of increased litigation. By the 1970's the first Mediation and Arbitration programmes had been implemented in the district courts in the United States .The American Bar Association established a special committee on dispute resolution.32Title 9 of the US Code establishes the US Federal Law supporting Arbitration .It is based on congress's plenary power over state law, so that Arbitration agreement and decision of the arbiter may be enforceable under state and federal law33.
2.4 EVOLUTION OF ADR IN THE ZAMBIAN CONTEXT

During the pre-colonial period, the machinery of justice was based on customary law. People lived in close-knit societies and the promotion and maintenance of the societal harmony were of paramount importance. The need to maintain relationships was therefore an important aspect of societal life, just as it is today. Once men begin to live together, to trade and to depend upon each other for goods and services, which joint effort alone produces, inevitably, the forms of adjudication emerges and grows. Whether the community is that of a family, the tribe or the state, the need for a method of adjudication forces the growth of courts. Hence, the judicial system was built around this objective.

As Justice Silungwe noted "the indigenous judicial system was characterised by informal and simple procedures of compensation. Peaceable reconciliation and mediation and in some cases arbitration, rather than punishment."\(^{34}\)

After the British came, there were new institutions for settling disputes, through Anglo-Saxon common law system, which co-existed with the native urban courts.\(^{35}\) This created the adversarial system of litigation, up until after independence when a number of milestone were seen, which had an important impact on the history of dispute resolution in the country. The judiciary was more emphasized in that the independence of the judiciary was enshrined in the constitution, whilst the native courts were divorced from the provincial administration and brought under the aegis of the judiciary under the local courts. Additionally, there was the newly acquired freedom of movement, which meant that rural dwellers began flocking to urban areas.\(^{36}\) As a result of this exodus
society became more impersonal and fragmented and at the same time more complex. Traditional institutions broke down and people resorted to litigation.

The court system was of course congested. "The penchant for litigation has been described as adjudication; monomania, has precipitated the backlog of cases in the courts system resulting in increased court delays."\(^{37}\)

From this background, it became clear that there was a major attention focused on the success of alternative awareness of disputes resolution. With insightful accuracy, certain members of the bar and the bench began calling for reform in the law to introduction ADR mechanisms into the judiciary in Zambia began its steady progress.

2.5 THE ADR MOVEMENT

Alternative Dispute Resolution has existed for many years now. \(^{38}\)There are a number of methods ADR, which have achieved prominence and recognition. Some of these are; Arbitration, Mediation, Negotiation, Conciliation, Med-Arb, Ombudsmen, Fact-finding, Mini-trails and Early Natural Evaluation. However, out of this list only two processes have been singled out in the Zambian jurisdiction, are Mediation and Arbitration.

Arbitration has been on the Zambian statute books for over 70 years now. It was under the Arbitration Act Chapter 40 of the Laws of Zambia, which was enacted in 1933 by the colonial regime. Although this Act was enacted as far back as 1933, it needed to be re-examined with a view to bringing it more in line with international accepted norms of Arbitration practice. Furthermore, it did not have any finality because the court could
come in at any stage and impose its will, thus people ignored the Act, they simply filed their complaints in courts despite the fact there was a clause in their contract to refer the matter for arbitration. Accordingly, the new Arbitration Act no. 19 of 2000 was enacted and superseded the former Act, which addressed many of the inadequacies of the former Act. The current Act provides for resolution of disputes outside the confines of the court system.

There is also a provision under the High Court Rules under Order 45, which allows parties before the High Court to apply to the judge to refer it to Arbitration. A similar provision also exists in the Subordinate Court Rules Order 43.39

The current drive towards the introduction of ADR mechanisms into the Zambian judicial system may be traced back to 1990, as the then Chief Justice Silungwe addressed the first judicial and Law Association of Zambia (LAZ) seminar, at which he emphasized the promotion of ADRMs as not only desirable but also urgent.40

Zambia’s drive for a responsive legal and judicial system has captured the interest of the international community. Thus, LAZ in 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 introduce or re-activate appropriate dispute resolution methods to improve the Zambian judicial system.41
The success of the initial part of ADR began to show its fruits within a relatively short period of time. 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 alternatives disputes resolution procedure into the Zambian judiciary. The ADR drive gained further momentum with the result, 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. After some delays due to some logistical problems relating to the implementation of the system, the commercial list was effectively launched into the Zambian judicial system on the 3rd of April 2000.42

2.6 THE MAJOR METHODS OF ADR

ADR refers to a variety of techniques for resolving disputes without resort to litigation. It therefore encompasses a wide variety of techniques and subjects.

(a). ARBITRATION

This is a process for the determination of disputes by adjudicators or neutral third parties, chosen by the parties to a dispute to whom they submit and who is empowered to render a decision after reviewing evidence. This ruling is known as an award. It is a voluntary process in the sense that parties may insert an Arbitral clause in their contract as a contractual agreement to refer their disputes to an arbitrators. On the other hand, it is possible that the courts may order the parties to submit to the arbitrator under its supervision. This is known as compulsory arbitration. It therefore operates in mandatory public context as well as voluntary private settings.43
The parties’ lawyers are involved to present their clients case to a single arbiter or a panel of arbiters, who may be three in number. Each side is given an opportunity to be heard, it is during the proceedings that parties present evidence either orally or in writing. Thereafter, the arbitrator evaluates and makes a decision.

The outcome of the process is binding and enforceable since the parties stipulate in advance that the decision of the arbitrator is binding upon them. Conversely, it may also not be binding depending on prior agreement, for instance they agree that any party may decide to pull out if he/she is not content with the decision, yet this is uncommon.

(b). MEDIATION

The parties settle their disputes by involving of a third party neutral who facilitates and assist the parties to reach a mutual agreements. The process usually begins with the parties giving their side of the story. During this phase the mediator is not to evaluate or give an opinion but merely to act as a facilitator in the communication of positions, information exchange and in exploring possible solution.

This may be done in private session or joint session or even a combination of them, but in whichever process taken, the mediator is to determine confidential information, for the reason that confidentiality is one of the hallmarks of mediation. A mediator ordinarily, does not have power to impose any solution; the matter is settled by the parties according to their desired results. Usually parties voluntarily enter into mediation and chose a mediator, nonetheless, mandatory mediation exists.
Mediation is therefore appropriate in all types of disputes and can be effective at any level.\textsuperscript{45} It is therefore of particular value as an alternative to litigation.

(c). NEGOTIATION

Negotiation is a consensual bargaining process and is therefore the foundation of any course of ADR, which is done through discussions. It has been said to be a fundamental skill that all lawyers require as they negotiate their way through most of the situation and at times they do so unconsciously.\textsuperscript{46} It has been argued that a vast majority of civil cases are settled by negotiation.

Negotiation is defined as a voluntary and usually informal process, whereby the parties attempt to arrive at a mutually accepted agreement.\textsuperscript{46} The discussions are conducted between the parties or through a representative. If a neutral third party facilitate the discussion the process then are called mediation.

(d). CONCILIATION

Professor Clive Parry defines conciliation as a process of settling a dispute by referring it to a commission of persons whose task is to eliminate the facts and to make a report containing proposals for a settlement but not having the binding character of an arbitral award or court judgment.\textsuperscript{47}

The term conciliation is sometimes used interchangeably with mediation, but it is meant to refer to a less formal process or to a less active role for the neutral. It involve a third party neutral called a conciliator.
The aim of the conciliator may differ depending on whether it is conducted in a private setting or a court setting. A conciliator is designed by potential litigants to help them reconcile their differences by performing the role of a goal between, depicting the negative aspects of their respective positions, so that all approaches to characterize and resolve the problems will be articulated and perceived for what reasonableness they actually convey.48

(e). MED-ARB

The various processes mentioned earlier may be blended to create a completely new device, which is termed as a hybrid. 49 Med-Arb is one such process, which is a two step process involving Arbitration and Mediation. Med-Arb begins as Mediation Process then if the parties fail to reach an agreement, they can then proceed to Arbitration, which may be performed either by the same person who conducted the Mediation or by another third party. In effect the third party neutral functions as a catalyst for the settlement process, because the presence of the neutral who may ultimately have to make a decision, in this case gives the parties a realistic incentive to settle. The final result in Med-Arb is a combination of any agreement reached in the mediation phase and the award in the arbitral phase.

The Med-Arb process originated in the collective bargaining context, were it was referred to as a muscle mediation50. Now it offers the parties the best of both worlds, the opportunity to take control of the process, with an assurance that if they cannot resolve their dispute, an arbitrator will do it for them and that the parties will not resort to litigation.
(f) OMBUDSMEN

An ombudsman is an official appointed by an institution whose job is to investigate complaints, prevent disputes or facilitate the resolution of conflicts within that institution. This method includes investigating, publishing and recommending.

(i) FACT-FINDING

Under this process a neutral is selected to find facts. This process can aid in negotiation, mediation or adjudication.

(j) MINI-TRAILS

These are otherwise referred to as structured settlement negotiations and it is a specially designed process usually employed to resolve disputes that would otherwise be the subject of protracted litigation. Thus it is not really a trail on its meaningful sense of the word.

Mini-trails consists of abbreviated presentations by advocates made directly to the parties, the purpose of the presentation is to allow the parties access the strengths and weaknesses of both sides and decide whether to proceed to trail or to settle. The neutral adviser then acts as a facilitator and gives an opinion on advisory basis. The parties subsequently proceed to with or without the neutral adviser.

The success of Mini –Trails is illustrated by the following case.

"Xerox Corporation entered into a distribution agreement with a Latin American Company. The distributor construed the contract as applying not to one line of computers only, but to all computers sold by Rank Xerox thought Latin America rather than in a more limited territory. One year after proceedings had been started to resolve the disputes, an extremely quick trail took place, (Rank Xerox presenting its case in one hour
forty minutes), which produced a positive result ending in a promptly performed settlement."

(k) EARLY NEUTRAL EVALUATION

Here the neutral identified issues on which parties agree and disagree and provide an evaluation of each side’s case. The neutral may predict the probable outcome if the case goes to trial and may offer to assist the parties in settlement discussions. Early neutral evaluation combines elements of mediation and non-binding court annexed arbitration.⁵³

2.7 CONCLUSION

It can be said that support for an increase in the use of ADR, therefore can be tied to a legal policy of not only expending but also encouraging settlement.

One thing that has been realized is that there are limits to the judicial system vis a vis high legal costs, long delays and more often the affected parties are on the sidelines. A remedy will be fashioned by a neutral third party, applying a rule of law to their disagreement, principally on the party’s own initiative and impetus⁵⁴. Indeed, many lawyers in Developing Countries will recognise ADR methodologies because prior to the importation of the alien mechanisms that presently characterize post-colonial legal regimes, most of these alternative resolution mechanisms were common to their cultures within their own countries.

ADR seeks to intervene early in a dispute to eliminate the ill feelings that can lead to litigation. It is not therefore a replacement to the Judicial system but a complimentary process.
ENDNOTES

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6. Burger W, Isn't there a better way? 1982
8. (1985) ZR 193 HC
10. Interview with the Deputy Registrar (HC) Mr. SIULAPWA.
11. Ibid
12. Supra note 6
13. Supra note 8
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17. Goldberg et al, Dispute Resolution, in L Riskin & James West Brook (1978) at 454
18. Supra note 4
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22. Matibini, Mediation, An Alternative Dispute Resolution Process, P.32
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26. Supra note 3 UNITAR AT 11
27. Ibid at 13
28. Ibid at 9
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31. Art 1((1) 1990 at 421
32. Ibid at 421
33. Supra notes 8 CIA
34. The Post 6th Jan 2002 at 6
36. Ibid
37. Supra note 22
38. CAP 27 and CAP 28
41. Ibid
43. Op. cit Matibini
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45. Supra note 41
46. Ibid
48. Supra notes 2
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32Rubino-samaratano, ADR, Chapter 1 in International Arbitration, Art 1 (11) 1990 at 421.
CHAPTER THREE

PART I

"It is probably an 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, so fluid that the choice may ultimately have to be made in a more intuitive fashion." (J.S Murray Est. Al, Process of Dispute Resolution, 1996 at 54)

3.1.1 INTRODUCTION

It is important to note that there are various modes of ADR mechanisms; hence a keen understanding of the processes will provide the necessary 'know how' to make the appropriate choice. Choosing the 'best process' for a particular dispute therefore demands much more than deciding whether or not to negotiate, mediate or arbitrate, but to decide also how best to carry out a given process in order to achieve their objectives.

3.1.2 A DEEPER LOOK

As observed in the previous chapter, there are primary dispute resolution processes as well as hybrid processes, which are a combination of the primary ones. However, all ADR processes may be categorized into three major types; Adjudicative, Evaluative and Mediative.
(a) Adjudicative Process

This procedure is like formal litigation. It is the basis of the legal system that when a case is submitted to the courts, someone other than the parties makes a decision. Sometimes, the hearings may be held in an informal setting, under more relaxed rules of evidence and procedures, with no witnesses and sometimes with lawyers representing the parties. The decision can be varied; therefore non-binding or advisory decisions are possible. The most common processes are Arbitration, Neutral Fact Finding and Rent-a-judge.

(b) Evaluative Process

This is a process where advocates present their version of the case to one or more third party neutrals who then evaluate the strengths and weaknesses of each the case. The primary purpose is to provide an objective, non-binding, confidential evaluation of the case that may be used by the lawyers and clients in future settlement negotiations. Examples are Peer Evaluation and Ley Evaluation.

(c) Mediative Process

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. This process can be an empowering and self-determining tool; in that it permits persons to speak for themselves and make their own decisions. As a result the parties and not their lawyers determine their own fate. There are three common meditative processes namely; Mediation, Conciliation and Consensus Building.
The knowledge of making appropriate choices to resolve disputes and how to settle them depends largely on the legal aspect. Thus, it is important to trace the use of an individual process and what disputes may be settled therein, from the law itself. The dangers in not doing so have been seen in situations where a dispute is not referred to Mediation or Arbitration because there is no provision for such reference in the statutes. Further, some lawyers consider Arbitration as the only alternative to litigation and as such may inappropriately steer too much of their alerts into Arbitration and consequently away from other alternatives.

3.1.3 THE LAW AND MEDIATION

To give a brief recap of the process; Mediation can be described as negotiation carried out with the assistance of a third party called an Mediator, who in contrast to an Arbitrator has no power to impose an out come on disputing parties. The mediator is expected to make his own recommendation on settling the dispute but the parties are not bound to accept them. However, should the parties accept the mediator’s recommendation and execute an agreement, then it will have the effect of a consent judgment which can be enforced as such.

In Zambia, mediation is court annexed and it is triggered pursuant to a statutory provision in the High Court Act. Order 31, rule 4 reads,

*Except for cases involving constitutional issues or the liberty of an Individual or an injunction or where the trial judge considers the Case to be unsuitable for referral, every action may upon being Set down for trial be referred by the trial judge for mediation.*

35
And where mediation fails, the trail judge shall summon the parties

to fix a hearing date.4

However, the parties are not compelled to settle the matter during the mediation session, thus the characteristic of being voluntary is still inherent in the process.

The question regarding whether participation in a court annexed mediation programme should be voluntary or mandatory for certain types of cases is one of the most hotly debated issues in the mediation field. Many of those who advocate voluntary participation in mediation programmes do so on philosophical grounds, pointing to what they see as a fundamental conflict between mediation's ideals of party determination outcomes and forced participation.5 Along these lines, concerns have been expressed that parties participating in mandatory mediation programmes may feel pressured into accepting undesirable settlement terms, especially in situations where the mediator makes recommendations to the court regarding resolutions, when the parties themselves do not reach an agreement. Proponents of a mandatory mediation support it for reasons largely based on efficiency. Mandatory mediation is more likely to generate a case volume large enough to lighten the caseloads thereby justifying the costs of a mediation programme.6

3.1.4 THE LAW AND ARBITRATION

Arbitration may be defined as a method of settling disputes and differences between two or more parties. Such disputes are submitted to one or more third parties specially nominated by the parties for the purpose of settling disputes, instead of having recourse to an action at law or by an order of the court.7
An Arbitration Agreement is a written agreement to submit present or future differences to arbitration, whether an arbitrator is named therein or not. It may be oral, in which case the Act will not apply. This clause is of special significance. It is treated as a separate and independent agreement that generally survives the termination of the underlying contract. This is known as the doctrine of seperability. This doctrine has never been better expressed than by Lord Macmillan in the case of Heyman v. Darwins Ltd, when he observed as follows;

An arbitration clause in a contract is quite distinct from other clauses. The others set out the obligations, which the parties undertake towards each other. But the arbitration clause does not impose on one of the parties, an obligation in favor of the other. It embodies the agreement of both parties, that, if any dispute arises with regard to the obligations that the one party has undertaken to the other, a tribunal of their own constitution shall settle such disputes. What is commonly called repudiation or total breach of a contract does not abrogate the contract, though it may relieve the injured party of the duty of further fulfilling the obligation, which he has by the contract undertaken to the repudiating party. The contract is not put out of existence, though all further performance of the obligations undertaken by each party in favor of the other may cease. It survives for the purpose of measuring the claims arising out of the breach and the arbitration clause survives for determining the mode of their settlement. The purpose of the contract has failed, but the clause is not one of the purposes of the contract.\(^8\)

Arbitration is deemed to be commenced when one party to the Arbitration agreement serves on the other a notice requiring the appointment of an arbitrator or alternatively notice requiring them to submit the dispute to the designated arbitrator\(^9\). However, the Limitations Act applies and as such the making of a submission, after a claim has become statutory barred, does not prevent the statute from being pleaded. In the case of Re Ashley & Tyldsley Coal Co.,\(^10\) where the submission was made of trespasses that were committed 20 years before the action and only came to the knowledge of the two
companies, 11 and 3 years respectively after the action. It was held that the submissions to arbitration did not preclude the setting up of the Statute of Limitations as a defense. On the other hand, the parties may provide in their agreement that commencement must be within a shorter period than that allowed by the statute.

**WHAT MATTERS MAY BE REFERED**

It has long been a principle of our law that disputes affecting civil rights, in which only damages are claimed may be referred to arbitration. “Generally, in all actions where disputes are of personal chattels or personal wrongs, arbitration is a good plea.” However, where the subject matter of a reference is illegal, no award can be of any effect.

As regards matters of criminal nature, “causes criminal are not arbitrable, because they ought to be punished for the common good. If the offence is of a public nature, no agreement can be valid that is founded on the consideration of stifling a prosecution for it.”

This is still correct law with regard to all felonies and all matters where the offences are of a public nature. But where a party injured has a remedy by action as well as by indictment, nothing can deter such party from referring the adjustment of the reparation that he is to receive, to arbitration, although a criminal prosecution may have been commenced.

Many misdemeanors may validly be made the subject of reference, with the sanction of the court and such references have been common.
PART 2

"Lawyers must consider if they want to become more than bit players in ADR. They must familiarize themselves with the pros and cons of ADR by studying the evolution of critical doctrines and learning practical methods to employ and challenge that doctrine."


3.2.1 INTRODUCTION

There are a number of benefits arising out of ADR mechanisms, inherent in their characteristics. These advantages make ADR a suitable alternative to litigation.

3.2.2 ADVANTAGES

(i) CONFIDENTIALITY

The major attraction for Arbitration and Mediation over litigation is its removal from public scrutiny. Statements made during Mediation are confidential and privileged and so must not be used as evidence in any matter. Order 31, rule 10 of the High Court (amendment) rules provide that "the mediator shall not be required to keep a record of the proceedings and any document prepared by the mediator shall, where the mediation fails, be destroyed at the end of the mediation process in the presence of the parties."

Many litigants in intellectual property disputes, for example, would favors arbitration, because if parties to an agreement are relying on the courts to resolve their disputes, they must not only ensure that the judgment be enforced in any jurisdiction where it is desirable but should also mitigate the effect of the decisions on the established good will.
of the affected business\textsuperscript{3}. Thus due to the private nature of Arbitration, many consider that it is also confidential, as a result the contract between the parties, the evidence, the documents, the award are private matters and resolved in a manner agreed by the parties, subject to certain safeguards. These cannot be divulged to third parties unless specifically authorized by each party. Parties may decide the extent to which their communication will be kept confidential; otherwise the mediator may discuss the limits.

Confidentiality enables, the relationships of the parties, which may be based on trust to be protected, in the same vein protecting their reputation. It also allows the parties to disclose information more freely, without the feeling that the other party is using it as a discovery expedition. There are numerous other incentives steering conflicts towards Arbitration and Mediation, such as preservation of trade secrets, personalizing embarrassing facts and the luck of binding precedence.

(ii) PRESERVATION OF RELATIONSHIPS

Adjudication is more likely to produce a win-lose situation; thereby creating a decisive precedence that may be harmful to one or all the parties in the future. Whilst the need to preserve the parties relationships is a major factor in selecting an ADR process, it also provides the means by which parties can maintain their on-going and prior relationships\textsuperscript{3}. It can well be said that personal relationships that clients have between each other and the type of dispute influences the type of resolution. Thus parties that seek a continuing and existing relationship will chose mediation, for commercial matters, the parties might want to maintain their relation for the sake their future transactions, therefore they need a harmonious relationships as there is an expectation of valuation interaction in the future.
It therefore provides for the parties to resolve their disputes in an amicable manner, where the parties might otherwise have been reluctant to come forward with their problems.

"Adjudication, by contrast seems ill-suited for that task since it can easily sour future relationships by escalating conflict and focusing on symptoms rather than on the underlying causes." Therefore parties that are seeking remedies that will be tailored to their particular and individual needs are more often referred to mediation.

(iii) LESS TIME

ADR is an expeditious process, it provides a clear time frame within which a resolution must be reached, thus eliminates long delays, because there are no pre trial procedures such as preparation of writs submissions, discoveries and many others. In Arbitration due to party autonomy and the fact that arbitrators can be selected and each case stands on its own, there is no backlog of cases. Further the parties can contractually set time limits for dispositions, which will be enforced. With regard to Arbitration a private arbitration panel can be convened, to review evidence and decide an issue in less time than a judge. However, it should be noted that the more elaborate the arbitration is, the slower it will be. Some arbitration also suffer from "arbitration arthutis" and are slower than trails, yet, these are very rare expectations.

With regards Mediation, the clear frame work is under rule 7 of Order 31 of the High Court, it provides that "the mediator shall after collecting the record, contact the parties and give them the date, time and the venue of the mediation and shall in not more than sixty days from the date of collecting the records and completing the mediation process. Further, if
mediation fails, the mediator will return the record to the judge, that mediation has failed, after closing it within 10 days." 7

(iv) SATISFACTION

ADR focuses on achieving a resolution that is mutually satisfactory to the parties involved. The parties achieve procedural, psychological and substantial satisfaction 8. Psychological satisfaction by expressing themselves effectively through emotions, disappointments, sadness, anger and frustrations, this enables them to thereafter focus on working out a resolution. Substantive satisfaction arises from the acknowledge that the mediation agreement belongs to the parties and not the mediators. It focuses on achieving a solution that is mutually satisfactory to the parties involved, the underlying philosophy of the mediation process is that any agreement should be voluntary arrived at the by parties, this will lead to the parties to be more likely to abide by their agreement because it's their own, unlike where a judgment is imposed on him 9. In essence, the mediator has no interest in the outcome.

(v) SUITABILITY FOR INTERNATIONAL TRANSACTIONS

There is often distrust of a foreign court and sometimes the courts are unsuitable for certain kinds of transactions, thus parties are often unwilling to submit to the National courts of the other party or to any National Court in any event 10. Parties are drawn from jurisdictions across the world, all with diverse legal, political, cultural and ethnical systems. Arbitration hence presents a forum in which all of these interests can be protected and respected whilst determining the most appropriate way to resolve the dispute between the parties.
Courtrooms may be ideal solution if the parties share the same nationality, understanding of the legal regime and the judicial system to which the dispute is submitted. On the other hand, some commercial cases take up to eight years to be concluded in court. This, especially in the context of an unsuitable currency, is a major disincentive to investment in the country\textsuperscript{11}. Investors seek prompt dispute resolution systems of integrity and quality. Therefore when an investment dispute involves an international party, alternative mechanisms of resolution warrant consideration. As Redform stated, "\textit{Where the dispute is set in an international context, the balance comes down firmly in favor of arbitration}\textsuperscript{12}". Courts are inadequate and ineffective for investment.

International organizations such as the International Center for the Settlement of Investment Disputes (ICSID) and the Multilateral Investment Guarantee Agency (MIGA) have offered advantages to Less Developed Countries (LDCs). ICSID provides a specialized, autonomous and self-contained system of arbitration and conciliation with greater degree of latitude for them. MIGA encourages the flow of investment to and among third world countries by issuing guarantee against non-commercial risks and carrying out promotions\textsuperscript{13}. Both institutions prove an avenue for LDCs to submit disputes for resolution.

\textbf{(vi) LESS EXPENSIVE}

ADR techniques are economical. Court fees and other fees are not involved, unlike in litigation. As Lord Phillip M.R. Cerhaman observed, "\textit{the adversarial system is a Rolls Royce system. It is too luxurious to be justified when you are dealing with small}
claims...a typical case of about 10,000 dollars should require two solicitors, two barristers, a judge and an expert witness\textsuperscript{14}. In response the law society said it was committed to alternative dispute resolution and encouraged lawyers to seek fair results at the lowest cost and earliest opportunity\textsuperscript{15}.

According to Order 40 of the High Court rules costs include the whole expenses necessarily incurred by either party on account on any cause or matter and enforcing the decree...The costs are a discretion of the courts. Rule 6 states that the court may order the successful party notwithstanding his success, to pay costs. In the case of Susan Jane Dunnet v. Railtrack plc\textsuperscript{16}, S sued Railtrack for having negligently failed to lock the gate between her paddock and the adjoining railway line, which resulted in the mutilation and death of three of her horses. The Judge held that S had failed to establish liability against Railtrack and therefore dismissed her case. S’s appeal failed. However, to the great surprise of all concerned Railtrack was left to bear the majority of the costs of the application although was the winning party, because it had refused to attempt private resolution of the disputes. This case emphasizes the point that litigation can cost a great deal even for the succeeding party.

(vii) ACCES TO JUSTICE

ADR broadens access to justice because it communicates possible options for settlement as it provides alternatives to dispute settlement. When the dispute involves technical points or requires experience of a particular trade or business, it can be submitted to persons specially selected as having the requisite knowledge and experience. If thought desirable, it may be expressly provided in the submission that
the arbitrator shall review property, which is the subject of the dispute\textsuperscript{17}. Moreover, if an agreement is not reached, the parties have an option of continuing with litigation or to pursue their claim in another ADR forum.

(viii) FLEXIBILITY AND IMFORMALITY

Mediation is generally both informal and flexible, features that are non-existent in the court system. Informality entails a relaxed mode of adherence to rules, conventions, and procedures, whilst flexibility connotes, easily changing to suit or adapt to new conditions. Since the system deals with human behavior and motivation, it must also be adaptable to individual differences, with the result that although there is a structure to the process, it is not rigid but fluid in nature\textsuperscript{18}. ADR is not bound to any principles of stare dicises.

Although there are some rules under the High Court Act for mediation as well as rules under the Arbitration Act, which give a formal aspect of the ADR mechanisms, they are merely guidelines that need not be strictly adhered to. This is where the role of the law comes into play. Thus, for instance, the commercial courts have been robust at case management of forcefully pointing parties to mediation, requiring each party to inform it of what steps were taken and subject to matters of privilege, why they failed to reach an agreement\textsuperscript{19}. Reporting back is an important factor in promoting resolution in court annexed mediation, as no party wants to admit that the process failed because they were uncooperative or unwilling to go for mediation. While some believe that actively pushing the parties, when the process is meant to be consensual, can never result in success, but the opposite seems to be the case because
it has the effect of opening up communication between parties and avoid the fear of showing weaknesses by being the first to suggest settlement.

Arbitration is more procedural but the extent of formality cannot be compared to litigation. The arbitrator as a general rule hears the evidence, conducts a judicial inquiry and determines the dispute based on the evidence and entirely on merit. The parties may call witnesses and examine them. The arbitrator will then decide a case by issuing a written decision called an Award\textsuperscript{20}. This may seem too formal but in essence adherence to judicial evidence is not usually required. The flexibility aspect of it is that, different parties may originate from different parts of the world which have different legal systems and also arbitrators from different jurisdictions but there is no rigidity in procedure each will have a special procedure because arbitration is private, parties agree on the procedure which can be tailored in such a way as to meet the characteristics of the case as well as the needs of the parties, in default the parties can resort to the model law. Further, parties can arrange time and place of Arbitration and Mediation, to suit their convenience, thus making it even more informal.

\textbf{(ix) LESS ADVERSERAL}

The ADR processes are less adversarial in that the parties do not approach each other as enemies or opposing sides, this encourages the parties to communicate freely. Further, the mediator is just a facilitator assisting to identify the real issues and will help to reach an agreement. The principle characteristic is that parties have ultimate control. Party autonomy is the power determining the form, structure, system and other details of the arbitration, the laws are largely permissive and only seek to
supplement and support the agreement with the parties for their dispute to be resolved, rather than to intervene\textsuperscript{21}. It is only where the parties are silent as to some aspect of the ADR processes, will national laws impose their provisions. Hence many people are drawn to mediation and arbitration because, them, and not their lawyers, are in charge of their destinies.

(x) HUMAN RIGHTS ASPECT

Litigation system having been found to be facing a lot of problems with regard to caseload, ADR thus offers the best alternative. Many commercial, employment and family disputes are referred to Arbitration and Mediation resulting in reduction of the number of cases that need the courts attention. Consequently, the focus is on the well deserving and involving cases. From this it can be said that although criminal matters may not be referred for either Arbitration or Mediation, this aspect of the law also benefits because the courts will be prompt in determining such criminal cases, with very minimal delay, as there are less cases to handle. As is usually the case, people are locked up in prisons for years awaiting judgment, this infringes on their individual rights, as it is trite law that a person is innocent until proven guilty. Accordingly, justice must be delivered as quickly as possible, thus ADR will uphold human rights.

Apart from all the traits that have been discussed above, ADR has proved beneficial in its performance in other aspects of social life. The employer-employee relationships are worth considering at this point.
Additionally collective disputes also require the assistance of ADR. These arise when the collective bargaining relating to the terms of the contract between the employee’s representative and employer’s representatives, is not fruitful\textsuperscript{23}. Sections 76-79 of the Industrial and Labour Relations Act sets out a lengthy procedure to resolve their particular disputes through conciliation and when this fails through the courts\textsuperscript{24}. The effect of this is that it distorts the relationships between the representative organizations thus reducing the chances of settlement.

The Arbitration Act no.19 of 2000, under section 6 alludes to the fact that all disputes may be referred to Arbitration, of course except those specifically exempted under section 6 (2). It’s states particularly that “subject to subsection (2) and (3), any dispute which the parties have agreed to submit to arbitration\textsuperscript{25}.”

Hence ADR plays an important role in the employment related disputes.

3.2.3 PRACTICLE PERFORMANCE

In the case of Frank Cowl & Others v. Plymouth City Council\textsuperscript{26}, Lord Woolf, laid particular stress on the indefensibility of failing to adopt ADR and seemed to expect such a level of acquaintance with it, that its merits would be apparent in any suitable case.

From the above merits it is apparent that this paper also looks at how practical ADR processes have been through the statistics. The figures show that of the cases that have been ordered 52% have been settled, 5% proceed to trial following unsuccessful ADR. In London, commercial courts have recorded 83% settlement rate of cases
referred to Arbitration, as at 19th April 2000, it made 241 orders and only 20 cases failed to be resolved.27

The graph below shows the statistics for the period February 2000 to March 2004. It shows Mediation has slowly but positively gained ground in helping to reduce the caseload in the courts.28

<table>
<thead>
<tr>
<th>COURTS CourtIRC</th>
<th>High</th>
<th>REFERRED</th>
<th>SETTLED</th>
<th>FAILED</th>
<th>ONGOING</th>
<th>NONAPPEARANCE</th>
</tr>
</thead>
<tbody>
<tr>
<td>Lusaka</td>
<td>2,424</td>
<td>914</td>
<td>664</td>
<td>565</td>
<td>281</td>
<td></td>
</tr>
<tr>
<td>Ndola</td>
<td>725</td>
<td>276</td>
<td>206</td>
<td>177</td>
<td>72</td>
<td></td>
</tr>
<tr>
<td>Kitwe</td>
<td>446</td>
<td>169</td>
<td>117</td>
<td>96</td>
<td>64</td>
<td></td>
</tr>
<tr>
<td>L/stone</td>
<td>190</td>
<td>98</td>
<td>76</td>
<td>0</td>
<td>16</td>
<td></td>
</tr>
<tr>
<td>Industrial Relations Court (Lusaka &amp; Ndola)</td>
<td>1,664</td>
<td>507</td>
<td>528</td>
<td>520</td>
<td>109</td>
<td></td>
</tr>
<tr>
<td>TOTAL</td>
<td>5,449</td>
<td>1,964</td>
<td>1,591</td>
<td>1,358</td>
<td>542</td>
<td></td>
</tr>
</tbody>
</table>

3.2.4 DRAWBACKS

To every aspect there may be corresponding arguments to the contrary; this also applies to ADR. Thus, there may be arguments to show for instance that the judicial process is the finer mechanism for resolution of all sorts of disputes and that ADR is not in itself achieving the best it should.

Firstly, theirs need for public awareness. The Financial Times reported on November 25th 2002 in US, that only 24% respondents said they referred disputes to mediation and just 8% knew of anyone within their council trained in mediation and that more than 85% said they had received no training in mediation skills29. Although this report was based in the US, the same situation prevails even in this country; this clearly shows that there is need for greater awareness and training. There is need for the society at large to be familiar with ADR and the benefits that it might bring, in
order to aid its use. Lord Woolf recognized that "it is going to take a substantial period before we get to where we really want to with ADR. One reason for this is that not all the processes have been made compulsory". However, he observed that there was a fundamental conflict with the philosophy that people should be able to go to courts if that's what they really want but that judges should be able to encourage litigants to go mediation by asking them to act reasonably or by denying them some of the costs\textsuperscript{30}. Further, Arbitration for instance has been on the statutes books since 1933 in Zambia. Its use has been, to say the least, sporadic and rather ineffectual. As one report for the LAZ observed, although a number of contracts, particularly in the construction industry, include an arbitration clause, the system has been under-utilized. The concept and practice is almost unheard of in the commercial, legal and professional communities.\textsuperscript{31}

In spite of the comments supporting ADR, it is still necessary for the parties to embrace it. This process is slow and cannot happen overnight. The courts hence have a role to play; the High Courts and Subordinate Courts have been proactive in promoting ADR.

This brings us to the next point. Which is that the attempts have been made under the above-mentioned courts only but not in the Supreme Court or the Local Courts. But the fact is that these courts also face the same problems of caseload. In the UK the Court of Appeal established the ADR scheme was established in 1996, it has been a success. Between November 1997 and April 2002, 38 appeal cases were mediated.
Fifthly, the ADR laws of many LDCs are out-molded and often wholly irrelevant to the present demands\textsuperscript{36}, so too are the Arbitration and Mediation laws in Zambia. This laws need to be repealed and replaced with legislation that reflects present concerns. More still should examine the potential benefits of ADR in the International arena. For these reasons, the country’s involvement should not be restricted to studying and promoting ADR but should include active contribution to ensure the country’s concerns. Thus, various existing model laws should be examined, amended and modified. For example some laws have certain bureaucratic procedures causing delays and may present unreasonable burdens to both parties in the dispute.

3.2.5. **CONCLUSION**

Even in the face of these criticisms, ADR has continued to grow because the benefits are overwhelming. Almost all cases can be resolved through Arbitration and Mediation, though a few are unsuitable. The essential question is whether the parties and their legal representatives are willing to set aside age-old prejudices and embrace ADR as a modern and viable alternative to litigation. ADR merely needs a bit of polishing up so as to overcome the drawbacks that it faces. Which can be done by taking a deeper study of the extent of its effectiveness. It may take a long time but the ultimate goal is to achieve the objectives of better delivery of justice.

A number of things have been done to bring Arbitration and Mediation to good use. For instance the Arbitration process which has been in Zambia since 1933, has done a tremendous job, the 1933 Act has since been re-examined and replaced by the
Arbitration Act no. 19 of 2000. This Act has addressed many of the inadequacies that the former Act was facing.

Additionally, the Law Association of Zambia (LAZ) and the Zambia Association of Chambers of Commerce and Industry (ZACCI), have set up a massive campaign to develop ADR in Zambia. The main emphasis is on Arbitration in the hope that it will stimulate other forms of ADR. To this effect there has been a number of consultative workshops and seminars, as well as programmes on the national television. This is just the beginning; the end is not yet within sight.
ENDNOTES

PART ONE
2 Ibid p.32
3 Ibid p.34
4 The High Court Rules Cap 27, Subsidiary Legislation
6 Supra note 1
7 David .ML and William J.M, A Treatise on the Law and Practice of Arbitration and awards, p.8
8 Ibid p.8
10 (1899) 68LJ QB 252
11 Supra note 7 p.9
12 Per Denman L.J, Keir v. Leeman (1844) 6 QB 308
13 Op cit, David M.L., p.11
14 Ibid
15 Section 6 of the Arbitration Act
16 Op cit, David, p.11

PART TWO
1 High Court (Amendments) Rules CAP 27
3 Young P. Alternative Dispute Resolution, vol. 32, at 24
4 Ibid at. 32
5 CIA, The Journal of the Chattered Institute Vol. 70 at 24
6 Ibid at 26
7 Supra note 1
8 Supra note 3
9 Risian, Dispute Resolution and Lawyers, at. 43
10 UNITAR, Geneva 1993 at.29
11 Ibid at 29
12 Op .cit at 29
13 bid at.29
14 Supra note 5
15 bid at .19
16 2002) EWCA
17 http://knowlegde point.com
18 Op .cit Young at 16
19 Matibini. Mediation; An Alternative Dispute Resolution Process
20 Hinchey W J, When ADR May Not Work, p.120
21 Ibid at. 19
22 Mutuna, N.K. The Role of ADR in IRC, at 12
23 Industrial Relation Court Act. CAP 269 sec 75
24 Ibid sec. 76 of IRC CAP 269
25 Arbitration Act no.19 of 2000
26 (2001) EWCA
27 http://www.Courtinfo.co.ca/selfhelp.htm
29 Colman J. in “Mediation post Woolf: can America assist? (2001) at 67
30 Ibid at 22
32 Op. cit at22
33 http://www.Negotiation.com/03ni.html-9k
34 Ibid
36 Op.cit UNITAR
CHAPTER FOUR

4.1 RECOMMENDATIONS

This Chapter seeks to draw up ways of developing the subject of Alternatives Dispute Resolution as an option to litigation. The conclusion merely sums up the high lights of the discussion.

When Arbitration was introduced in 1933, it was not attractive as compared to the courts. It became just another segment of litigation, merely a step towards litigation. People began to ignore it because it could not give the final determination. Thus, when it was repealed and replaced, one of the main issues identified was to exclude the right of appeal against awards, making the courts perform a supportive role as oppose to the interventionist role it previously played. Yet, the attitude of the people hardly changed.

The litigation process must not be sidelined even in the effort to assimilate ADR mechanisms. As Professor Owen Foss said, “civil litigation is an institutional arrangement for using state power to bring a recalcitrant realist closer to our chosen ideals we turn to court 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 take special pleasure in combat.”

However, as we have seen from the previous chapters, the judicial process has limitations, such as high-level costs, long delays that put a damper on the exercise of individual rights to go to court and also the fact that the major participants who are the parties to the disputes are sidelined. It is here that the alternative to dispute resolution fits
in as a remedy. The two extremes of litigation on one hand and ADR on the other, must therefore work side by side.

i. Role of Court

The courts have a role to play in this process, for instance court annexed mediation schemes have been set up. This has been seen in the way in which the parties have been referred to mediation pursuant to Order 31 of the Subordinate Court and Order 45 of the High Court. With regard to Arbitration section 10(1) of the Arbitration Act No. 19 of 2000 which says that a court before which legal proceedings are brought in a matter which is the subject of an arbitration agreement. Also where their agreement a clause on Arbitration, the courts have tended to enforce the agreement shall if a party so requests, at any stage of the proceedings and not withstanding any written law, stay the proceedings and refer the parties to arbitration, unless the agreement is null and void, inoperative or incapable of being performed. In the case of Cable and Wireless (C & W) PLC v. IBM United Kingdom Ltd, where the parties had a contract which provided for a clause that the parties shall attempt in good faith to resolve the dispute through ADR procedures. C&W argued that the clause was analogous to the agreement and therefore unenforceable for uncertainty. The court rejected this argument and concluded that the C&W’s refusal to proceed to ADR was a breach of the contract. The court held that the agreement to refer disputes to ADR was analogous to the contract, “strong cause could have to be shown before a court could be justified in declining to enforce an agreement to try ADR.” ADR could address not only issues of construction of a contract but also wider commercial considerations.
ii. Stretching to Other Courts

It is necessary for all courts especially the local courts to do so. Imagine on a hot day, with up to 40-60 cases to manage, all in a file on the desk and a number of worried people waiting for their cases to be determined. Under such circumstances an alternative has to be suggested even if there is no law to provide for the local court justice to consider his initiative to seek for an alternative and neither of the parties has asked for it. Local courts are essentially a process of mediation and arbitration because; they are merely village concepts in their nature. Need arises to make people aware of this fact, so that they readily accept it in lower courts once it is introduced. Perhaps the culture in these courts needs to be changed by attaching Arbitration and Mediation to all the court and civil trail centers, urgently. Although, this would cost a lot of money.

iii. Decentralization

Furthermore, it is submitted that ADR mechanisms must be decentralized to extend to other provinces; ADR is more in Lusaka than anywhere else. This is possible only with funding and availability of manpower. The latter can be achieved by broadening the professions to include even the teachers who are found in all areas. The Zambia Chamber of Small and Medium Businesses Enterprises, which is a USAID project, had in the same vein asked ZCDR, to train businessmen and teachers, to help arbitrate disputes in chambers, which are spread to most towns.

iv. Reformulation of Rules

Having discussed the irrelevance of some of the rules, it is now recommended that the rules that govern the Arbitration and Mediation be revised. Though they seem well
arranged, there are some hiccups. Arbitration has a lot of rules, this seems to be very procedural and too formal, they is need to make them flexible, as flexibility is one of the hallmarks of ADR. Some rules have been abused, for example the courts have referred cases that are not amenable to mediation. Also the rules regarding fees are out dated. The cost for settling a dispute is 100 pounds, equivalent to K300, 000.00, equally apportioned amongst the parties. Most arbitrators are unwilling because the fees are insufficient to cover all the expenses incurred especially for those cases that drag on for two to three weeks.

Mediation was introduced in 1997; there are obviously, a lot of other experiences undergone since its enactment, 7 years ago. These changes must be interpreted into rules; they should be synchronized and developed further to suit the economics and social changes.

In the effort to revise the law, all various aspects of ADR must be examined in order to know how best to tie them to the legal framework. To start with the framework itself must have a firm foundation, with all the changes in society. This can be done by conducting a research before enacting the laws and by inviting all interested parties to submit their responses to the committee.

v. Awareness

Public awareness is an element that has been stressed in the previous chapter. This applies to both the would-be parties to a dispute as well as the mediators and arbitrators. There are a number of institutions established to recruit mediators and
arbitrators, from different professions. Yet once the mechanism is spread country wide there will be need for manpower that will require training. Thus the institutions may not be enough to provide for a larger number of people than anticipated, it is only possible if there are institutions with branches established in most parts of the country. It can also be recommended that courses on ADR be introduced; it has been done in the law school, but as we observe the movement is not only restricted to the legal profession but cuts across various professions therefore, courses must be introduced in other schools such as medicine, engineering and public administration, to mention but a few. Until now there had been not enough trained Arbitrators and Mediators, although anyone can be an Arbitrator, they must be qualified so that the parties have confidence on the process. Now there are about 150 arbitrators, the problem is that there are no cases, thus they feel their training has been in vein. This is because the economy has worsened resulting in very few disputes; hence the arbitrators have no business.

Further, for the practice of Arbitration to take its root, the lawyers must insert clauses to that effect and advise their clients. But the lawyers instead advice them to go straight to court because its seen as a formal way of making money. This is common especially amongst senior lawyers. Not so long ago some senior official refused to go to mediation because he thought it was against the principles of the constitution; it took the Chief Justice to persuade him.
Although there were a number of campaigns, people still felt that one needed to have authority and dressed in a gown, to settle a dispute, because they felt that an arbitrator could not have authority to give in decision to realize their rights.

The people at large must embrace the knowledge of ADR programme, for them to submit to it with confidence. Instead of going to court or because they have no money to go to court, they end up not excising their rights to sue or they go to the police or the victim support unit.

vi. Use of Other ADR Mechanisms

Introduction of other forms of ADR, other than Mediation, Conciliation and Arbitration, is another consideration that needs special attention. An example would be Early Neutral Evaluation (ENE), which involves evaluation by an impartial person or panel of experienced advocates whose evaluation is non-binding. This procedure encourages the settlement of civil disputes whilst still at pre trial stage. This impartial and confidential forum evaluate in the absence of the parties. After which they identify the areas of weaknesses and the merits of the case, they then assist the parties to conduct discoveries. This evaluation can be of use in future negotiations. This method and of course many others, can be of use to provide a wider variety of alternatives if adopted in Zambia.

vi. Funding

Finally, the financial constraints are to be dealt with well in advance before all the above recommendations can be administered. The ZDCR is funded by USAID,
unfortunately by the end of December it will cease to assist because the organization will then focus on another pressing issue of HIV/AIDS. There is a great danger of the center collapsing for lack of sponsorship. Perhaps it would be helpful to obtain funds from the Government. This movement is a public one and it provides for an alternative to the functions of the Judiciary (a Government organ), it follows from this, that it is a responsibility of the Government and must be allocated adequate funds in order for it function well and in its course lessen the burden on the Judiciary.
4.2 CONCLUSION

The Zambian legal system has adopted alternative methods of resolving disputes, these are Arbitration and Mediation. This is in response to the overwhelming setbacks that the judicial system, which is the major dispute settlement organ, has experienced. The problems encountered by it are as a result of globalization of the modern business world and the political changes that took place brought with it different economic policies, such as the free market enterprise and privatization. Additionally, the increase in population has made the number of cases more than what the courts can contain. All the above contribute in, one-way or another, directly or indirectly, to the back log of cases that have overburdened judges and magistrates. This makes delivery of justice almost unachievable, hence delaying and further denying justice to the people of Zambia.

ADR mechanisms have addressed these problems because of their characteristic features: flexibility, expeditious, inexpensiveness, confidentiality, preservation of relationships, informality and satisfaction as they are party oriented.

Although the concept is not wide spread and has experienced some drawbacks, it has been proven to be effective and must be developed even further. In addition it must work in conjunction with the courts, in pursuing the parties to settle disputes out of court, as well as to enforce these agreements as being binding, by for instance enforcement of awards.
Society has had occurrences of settling disputes on their own, with the help of another party who has no interest in the matter. It can be said that it is a natural instinct in human beings to seek guidance of others. Thus it would not be so much of a problem to make the entire nation fully aware of the legal framework of ADR and its advantages; they will readily accept it.

ADR has a number of benefits that must not be overlooked but used to settle all kinds of conflicts, except matters of public policy.
ENDNOTES

1 Prof. Fiss is one of the major critics to ADR, in his article called Against Settlement Dispute Resolution & Lawyers (1987), which was a source of much debate amongst ADR lawyers.

2 Arbitration Act no. 19 2000

3 (2002) EWHC 2059

4 Interview with Mr. Simukoko, chairperson for Zambia Center for Dispute Resolution (ZCDR)

5 Institutions such as ZCDR and ZAA

6 Op. cit Mr. Simukoko

7 Ibid
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The High Court Rules (subsidiary legislation) CAP 27.
The Subordinate Court Act, Chapter 28
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The Arbitration Act, Chapter 40
Northern Rhodesia Order in Council 1911 and 1924

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http://knowledge point .com
<table>
<thead>
<tr>
<th>COMPARISON OF DISPUTE RESOLUTION PROCESSES</th>
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<tbody>
<tr>
<td><strong>ADJUDICATION</strong></td>
</tr>
<tr>
<td>Non-voluntary</td>
</tr>
<tr>
<td>Binding</td>
</tr>
<tr>
<td>Imposed, third party neutral decision maker, with no specialized expertise in dispute subject</td>
</tr>
<tr>
<td>Highly procedural: formalized and highly structured by predetermined rigid rules</td>
</tr>
<tr>
<td>Opportunity for each party to present proof supporting decision in its favor</td>
</tr>
<tr>
<td>Win or lose result</td>
</tr>
<tr>
<td>Expected of reasoned statement for particular interest</td>
</tr>
<tr>
<td>Process emphasizes attaining substantive consistence and predictability of results</td>
</tr>
<tr>
<td>Public process: lack of privacy of submission</td>
</tr>
</tbody>
</table>

[C.P.R.]
LITIGATION

JUDGE
(Appointed by the State)

DECISION

Party A  

Party B
CONCILIATION/MEDIATION

MEDIATOR/CONCILIATOR
(Appointed by the parties)

SETTLEMENT

Party A

Party B

ARBITRATION

ARBITRATOR
(Appointed by the parties)

DECISION

Party A

Party B