



**ciarb.**  
Uganda Chapter

**Newsletter**  
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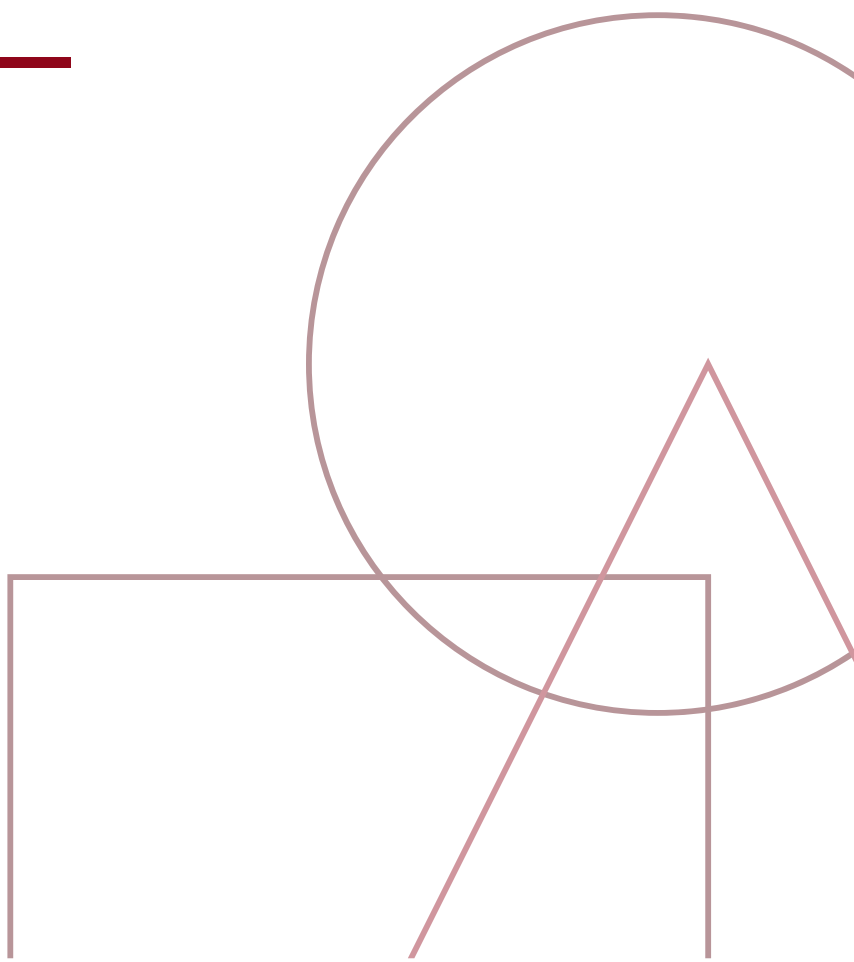
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# WORD FROM the Chairman

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**David Kagawa,  
FCI Arb, FICCP**



**This quarter has been marked by significant milestones and events within the Arbitration Community.**

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Dear Members,

Greetings from the Chartered Institute of Arbitrators – Uganda Chapter.

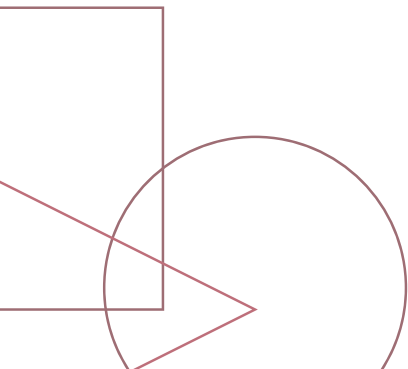
On behalf of the Chapter leadership, I thank you for the overwhelmingly positive reviews and the feedback we received when we launched our inaugural quarterly newsletter in March 2024. We pledge to keep you abreast with the latest in the arbitration space, regionally and internationally.

I am pleased to present the second edition of our quarterly newsletter. From reports on our events this quarter to insightful thought leadership on different issues, this newsletter is highly exciting, engaging, and worth the read.

This quarter has been marked by significant milestones and events within the Arbitration Community. In Uganda, we have seen a remarkable increase in membership, reflecting the growing interest and trust in arbitration as a viable means of resolving disputes. With our membership now standing at 104 professionals and steadily heading to our desired target of 150 members by the end of 2024, we are proud of the vibrant and dynamic community that we are building.

Our training programs and webinars have been particularly successful, drawing participants from diverse sectors. Our Introduction to Arbitration Module for this year at 21 participants garnered the highest ever since the Chapter started offering it. We also held our first webinar for this year under the theme “Enforcement of Foreign Arbitral Awards”. It was well-attended and highly engaging.

We were also privileged to join The Arbitration Fund for Students (AFAS) on 19th April 2024 as they held an ADR Student Connect Training with students from Makerere University School of Law. An article published herein shares the details of this event.



Regionally, we were honored to join our Mother Branch, CIArb-Kenya Branch, on 15th-17th May 2024 as they celebrated 40 years of existence.

It was a great learning curve as we gleaned from the shoulders of the giants who carried the Branch from inception with a handful of members to their current membership of over 1000 members. It was also a great learning experience as we heard from global industry experts as they shared knowledge with respect to ESG and Arbitration, Public Policy as a Ground for setting aside arbitral awards, and arbitration as a mechanism for resolving construction disputes, among other very insightful topics. The conference was crowned by the launching of several books published by the membership, notable of which was one published by the Chief Justice of the Republic of Kenya, Hon. Justice Martha Koome, FCIArb.

High on these heels was the first-ever International Chamber of Commerce (ICC) Africa Conference in East Africa, held in Kenya between 29th and 31st May 2024. Notable arbitrators and arbitration practitioners shared insights on many topics, including unpacking the current trends in international arbitration, the future of construction dispute resolution in Africa, and arbitration and investment trades in Africa.

The Conference was crowned with the Africa Construction Law Conference, which was held in Kenya on the 03rd and 04th of June 2024. This was a critical event for the Arbitration Community because Arbitration is still the most preferred method of resolution of all construction disputes.

With a backdrop theme of “Infrastructure development and Financing in Africa’s construction sector”, the Panelists explored topics notable of which were Legal and Regulatory Frameworks for Green and Low Carbon Construction in Africa and Infrastructure Development & Financing in Africa’s Construction Sector.

We would also like to congratulate our Member, Mr Albert Mukasa FCIArb, who was awarded for his contribution to developing construction law and practice in East Africa.

Additionally, we have been actively engaging with different professional bodies with similar goals and objectives to foster collaborations that would benefit our membership. The progress we have made in these discussions is promising, and we shall keep you updated in subsequent newsletters on the traction made. Our commitment to fostering excellence and knowledge-building in the Alternative Dispute Resolution Space continues to be our foremost priority. To that end, please look out for more engaging webinars, pathway and non-pathway training, and knowledge sharing. Kindly follow us on all our social media handles so you don't miss out on any event or training.

Please look out for registration for our “Accelerated Route to Membership” pathway course, which will open next quarter. This intense but very rewarding course automatically qualifies successful participants to apply for membership with the Chartered Institute of Arbitrators.

We are also excited to announce that CIArb Uganda Chapter is a strategic partner for one of the largest gatherings of Arbitrators in the world: the 11th East Africa International Arbitration Conference scheduled for 19th-20th September 2024 in Addis Ababa, Ethiopia. We encourage all members to attend this very important event.

Finally, to give our membership a more insightful and educative event, the “Arbitration Award Training Writing” which was scheduled for 10th June 2024 has been rescheduled to a two day event to be held on 21st and 22nd November 2024. Registration and participation details shall be shared in the course of next quarter and I urge us all to attend this very impactful training conducted by Mr. Philip Alier; a Barrister and Chartered Arbitrator.

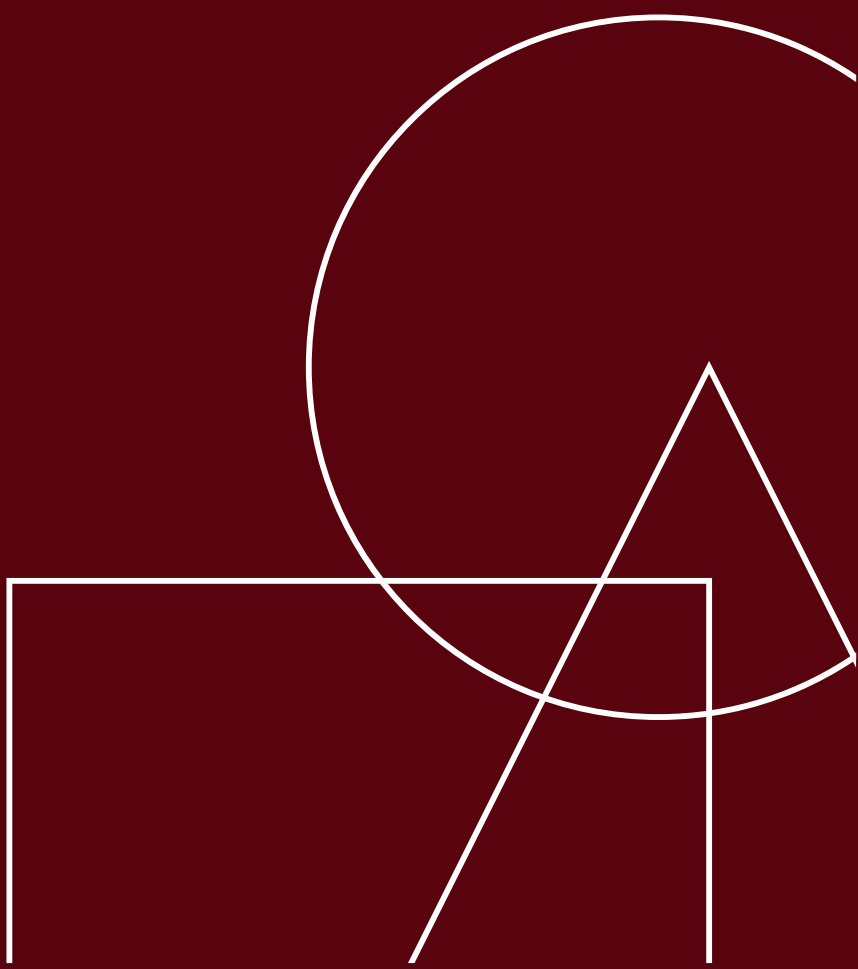
I would wish to extend my sincere appreciation to the Chapter Steering Committee for their tireless efforts in ensuring that the Chapter runs smoothly. I would also wish to extend my deepest gratitude to the Chapter Education and Training Committee for their tireless efforts in ensuring that all events & trainings of the Chapter are smoothly conducted and for also ensuring the timely release of this newsletter whilst maintaining the highest level of quality of content.

A warm thank you to our membership, whom we are privileged to serve and pledge to continue doing so. We will keep you abreast on all issues concerning alternative dispute resolution as we go ahead, shining the beacon of alternative dispute resolution as the best and most preferred global form of dispute resolution.

**I thank you.**



# 01 Events





## CIArb Kenya's 40th Anniversary Conference

Our mother branch CIArb Kenya celebrated 40 years of excellence in Arbitration and ADR and commemorated the event by holding a two day anniversary conference filled with enriching discussions, networking opportunities and celebrations.

We congratulate our mother branch on this special milestone and we were happy to have been included in the festivities





The Chapter Chairman, Mr. David Kaggwa, FCIArb, was one of the esteemed speakers and he ably explored the topic of "The Intersection of Public Policy and the Enforcement of International Arbitral Awards" as part of a panel discussion.



Jacqueline Waihenya, C.Arbitrator, FCIArb, Chairperson of CIArb Kenya speaking at the anniversary conference



Our member, Francis Gimara, MCIArb, presenting a certificate to a participant at the conference. He was also a distinguished speaker on a panel discussing "Solving Financial Disputes to Foster Commerce and Development in Africa"



Francis Gimara, MCIArb sitting next to Philip Alikier, C. Arbitrator, FCIArb intently listening to the proceedings of the conference



# The 8th ICC Africa Conference on International Arbitration

The 8th ICC Africa Conference on International Arbitration took place on the 29th to the 31st of May 2024 in Nairobi, Kenya. This conference brought together leading practitioners, academics and industry experts to discuss key trends and developments in arbitration across Africa.



A section of the CIArb-Uganda chapter representatives. (L-R) Albert Mukasa, FCIArb, David Kagwa, FCIArb, Philip Aliker, C.Arb, FCIArb, Philip Kaheru, FCIArb and Gavamukulya Charles, MCIArb.



Diamana Diawara, the Director, Arbitration and ADR for Africa at ICC enjoys a light moment with other attendees of the conference.

# AFRICA CONSTRUCTION LAW Conference '24

## Building Resilience in Africa's Construction Sector



## The Africa Construction Law Conference 2024

"Building Resilience in Africa's Construction Sector" was the theme of the Africa Construction Law Conference which was held from the 3rd to the 4th of June, 2024 in Nairobi, Kenya. This premier event featured comprehensive discussions on critical topics such as infrastructure development and financing, procurement strategies and the use of FIDIC contracts within the African context.

The Chapter Chairman, Mr. David Kaggwa engaged in a Oxford style debate on the topic "This house believes that liquidated damages clauses are a fair and efficient way of allocating risk in construction contracts.



Mr. Kaggwa, FCIArb who proposed the debate standing with Noella Lubano, the opposer and Philip Aliker, C. Arb, FCIArb who was the moderator.



Albert Mukasa, FCIArb, was honoured with a prestigious award at the conference for his exceptional contribution to Construction Law and Practice in East Africa.



## Arbitration Fund For African Students roundtable discussion 2024

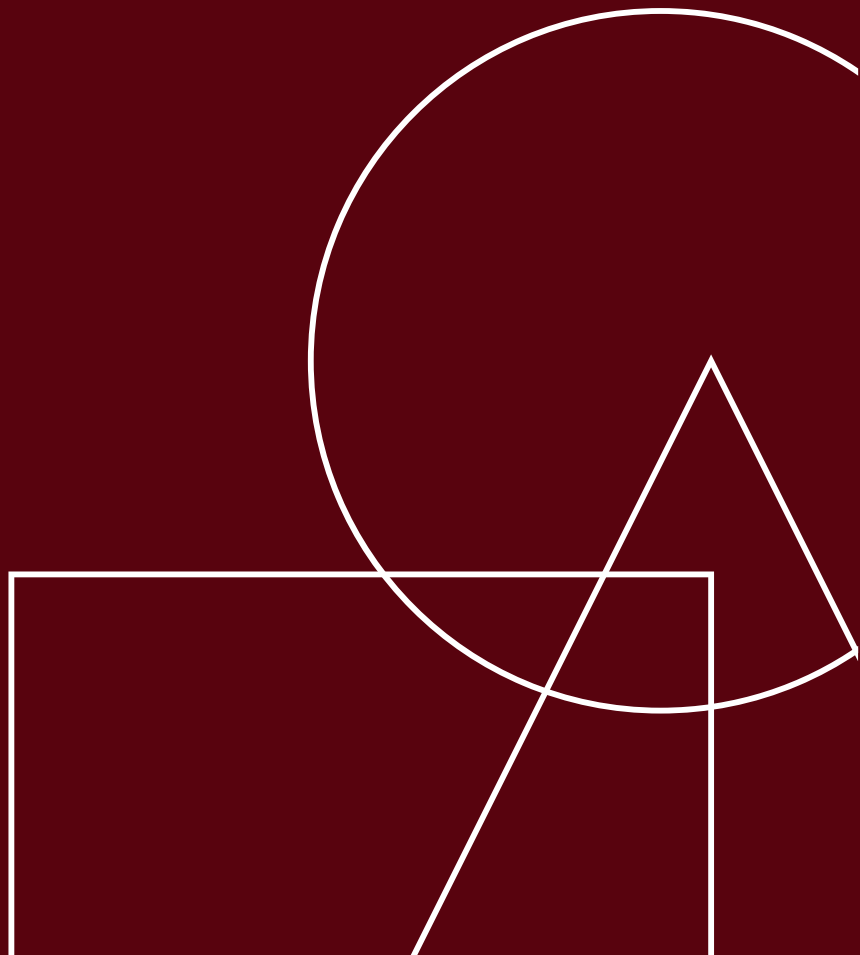
On the 19th of April, 2024, CIArb Uganda was invited by the Arbitration Fund For African Students to participate in a roundtable discussion.

The Chapter was represented by its Chairman Mr. David Kaggwa FCIArb, Mr. Jeffrey Kaddu MCIArb, Mr. Isaac Ssekabanja MCIArb, Ms Nansamba Mariam Iga MCIArb and Mr. Alexander Ssensikombi ACIArb. Other panelists included Prof. Chrispas Nyombi.



# 02

## Thought Leadership



# Enforcement of Intellectual Property Rights through ~~Alternative~~ Appropriate Dispute Resolution mechanisms

## Introduction: Where IP meets ADR

Intellectual Property Rights (IPRs) present a quagmire of sorts. This is because they are considered as territorial in nature, in the sense that they are only enforceable in the country where such rights have been registered for protection. However, on the other hand, IPRs are intangible or unseen rights that are mainly embodied in works that easily transcend natural boundaries, spurred on by technological developments and the ever-growing digital environment. Such works include literary, musical and graphical works which embody copyright protection. However, cross-border trade also includes physical products that include technological goods. These embody patent protection as well as trademarks edified by the businesses from which such goods and services originate.

IP Rights therefore go together with trade, whether local, regional or international. As such, effective aspects of trade that make it attractive, carry with them the ingredients of reliability, consistency and trust in the system – to mention but a few. Naturally, infringements of IPRs occur quite often, with the inevitable outcome being that this stalls the smooth flow of trade and business relations.

Needless to mention that where IP infringement occurs across borders, the costs involved in enforcing one's rights through an adversarial system are quite high. This is thus where what are considered as Alternative Dispute Resolution (ADR) mechanisms come into play. It is rather more accurate to refer to such mechanisms as "Appropriate" rather than "Alternative".

This is based on the argument that these mechanisms provide the ideal set up for a smooth and convenient way in which to deal with any form of dispute that may arise from IP infringement going by the nature of IP Rights and the effect they have on domestic and international trade.

## The International landscape on Intellectual Property ADR

The legal structures that come closest to being considered as the international framework in the handling of IP disputes through ADR mechanisms, are the World Intellectual Property Organization (WIPO) Mediation, Arbitration, Expedited Arbitration and Expert Determination Rules, respectively. These rules are administered by the WIPO Arbitration and Mediation Center (Center) which is based in Geneva, Switzerland, with a further office in Singapore.



## ABOUT THE AUTHOR

**Dr. Anthony C.K. Kakooza**

- An Intellectual Property Law Scholar, current Head of the Intellectual Property Cluster of the Uganda Law Society and Partner in the Law firm of Byenkya, Kihika & Co. Advocates.
- He is an Associate Member of the Chartered Institute of Arbitrators and a WIPO-accredited IP Arbitrator.

The WIPO Rules are considered appropriate in offering guidance towards resolution of IP related disputes because they are tailor-made ADR tools for such disputes and include provisions on confidentiality and how to address technical evidence.

The Mediation and Arbitration mechanisms under the respective rules are no different from similar dispute resolution processes under other fora. It is therefore not the intention of this article to dwell deeper into their explanation. However, the unique aspects of IP ADR through the WIPO Center lie in the Expedited Arbitration and Expert Determination rules.

### **WIPO Expedited Arbitration Rules**

The process of Expedited Arbitration is such that arbitration is carried out in a much shorter period than ordinary arbitration and at a reduced cost.

Five key aspects relate to the Expedited Arbitration Rules and these are as follows;

- Registration and Administration fees are much lower than those envisaged in the WIPO Arbitration Rules. There are fixed arbitrator fees that are applicable to IP disputes valued up to a maximum of USD 10 million.
- The Statement of Claim, as opposed to being filed later, must accompany the Request for Arbitration. In the same vein, the Statement of Defense accompanies the Answer to the Request for Arbitration.
- A sole Arbitrator is assigned to handle the dispute, unless otherwise agreed.
- Hearings before the Arbitrator are condensed to run for not more than three days, save for exceptional circumstances.
- The proceedings have shortened time limits. Ideally, the expedited arbitration proceedings are tailored to last not more than three months as opposed to the WIPO Arbitration procedure which is tailored to last not more than nine months. The final award has to be issued within one month compared to the three-month timeline given under the WIPO Arbitration Rules.

According to the WIPO Center, the WIPO Expedited Arbitration is deemed appropriate for copyright, software, R&D (Research and Development) and trademark disputes.

Expedited Arbitration is therefore considered as an appropriate dispute resolution procedure where it is not necessary to engage in extensive dispute resolution procedures judging by the value in the dispute; the dispute involves a limited number of issues; the parties require a short period of time within which to resolve and enforce the dispute; and, the parties need to undertake an ambitious time/cost framework, subject to any matters arising as the case develops.

However, an even shorter mechanism in resolving IP disputes is the expert determination procedure.

### **WIPO Expert Determination Rules**

The Expert Determination process is consensual in nature and involves the submission of a specific matter, such as a technical issue, by the parties, to one or more experts for determination. The outcome of this determination is agreed upon by the parties as binding. Normally, this can be propelled by an "Expert Determination" clause in an IP-related contract or in the form of a separate contract.

It therefore follows that reliance on the WIPO Rules guarantees certainty and practical flexibility. Parties are thus able to expeditiously resolve any IP-related dispute while maintaining confidentiality. This gives them lee way to determine whether to engage further in a commercial relationship at a later stage. It is noteworthy that as of 2020, the majority of users relying on WIPO's ADR mechanisms were from the technological field, with patent-related disputes taking up 25% of WIPO cases, followed by Information and Communication technology (ICT) disputes taking up 22%, then followed by trademark disputes taking up 20% and lastly copyright disputes which take up 13%

However, by mid-2022, the trajectory had changed, with about 29% of ADR cases involving patent-related disputes, 24 % concerning copyright matters, 20% concerning trademarks, 14% on ICT and other commercial areas, including distribution disputes (12%).

The flexibility of these IP – ADR mechanisms means that they are also easily adaptable to both domestic and international disputes. Nonetheless, the position on resolution of IP disputes through ADR is not as specific at the domestic level.

## **The National landscape on Intellectual Property ADR**

The national legal framework on IP in Uganda does not give specific attention to the role of ADR in the resolution of IP disputes. For starters, the National Intellectual Property Policy of 2017 does not have any reference to ADR when discussing enforcement of IP disputes. As for the legislations on IP, it is only the Copyright and Neighbouring Rights Act, No. 13 of 2006 (CNRA), that refers to ADR mechanisms in the resolution of IP disputes.

Section 79 of the CNRA is to the effect that any copyright related dispute under the Act involving a Collecting Society, its members and any other registered Collecting Society, shall be referred to an arbitrator or arbitrators under the Arbitration and Conciliation Act.

Considering that ADR procedures are confidential in nature, it is not ascertained as to how many copyright-related disputes in Uganda that involve Collecting Societies, have gone through statute-based arbitration under the CNRA. The case of *Julius Bwanika and others versus Uganda Registration Services Bureau and Uganda Federation of Movie Industry* (Misc. Cause No. 083 of 2018) involved members of a Collecting Society filing an application in the High Court for a Judicial Review against the Uganda Federation of Movie Industry and its supervising agency, URSB.

When the Bwanika application came up before Justice Musa Ssekaana, he advised the parties to try to have the matter mediated. The parties then approached this author and went through an unsuccessful mediation process before going back to court for a resolution of the dispute. It is noteworthy, however, that Mediation and Arbitration are two separate matters. Nonetheless, in the Bwanika case, there was no reference to arbitration, much as statutory arbitration would have been ideal in handling the dispute, as provided for under section 79 of the CNRA.

It is therefore yet to be seen, on public record at least – through enforcement of an arbitration award - as to how various parties in an IP dispute in Uganda will seek the favorable channels through ADR in endeavoring to resolve their IP disputes.

### **Conclusion**

It has often been stated that ADR is the way of the future. In other channels, this statement has been qualified further to state that ADR is here and now. The same is true for matters related to Intellectual Property disputes. IP rights are purely commercial in nature and where disputes arise, every moment counts towards the profits that the IP owner would have been or should be entitled to if it was not for the infringement. It therefore follows that dispute resolution mechanisms such as mediation and arbitration, are appropriate avenues to undertake in bringing such disputes to an end. However, the option to apply ADR in IP disputes should not come as an afterthought when the dispute has already arisen. The parties should be able to have an eagle-eye perspective when negotiating their transactions so as to include contractual clauses that are favorable to ADR in the event of a dispute arising.



# The Critical Role Played by ADR in the management of disputes in the Land, Water & Built Environment

## Understanding Alternative Dispute Resolution (ADR)

Alternative Dispute Resolution (ADR) is the term used to describe ways of resolving a dispute without resorting to litigation. ADR offers more flexible, cost-effective, and quicker resolutions compared to court proceedings. Key types of ADR include negotiation, adjudication, mediation, arbitration, and expert determination. Each type has its unique processes and applications.

### KEY TYPES OF ADR

#### **Adjudication**

Adjudication is a common method for resolving construction disputes. Originating in the UK through the Housing Grants, Construction and Regeneration Act 1996, adjudication allows any party in a construction contract to refer a dispute to an impartial adjudicator. The process is designed to be swift, usually resolving disputes within 28 days. Although the adjudicator's decision is binding, it is not final. Further, adjudication embodies the principle of "Pay Now, Argue Later" which means that the party contesting an adjudication award is required to pay the sum as adjudged in the award before commencing arbitral proceedings.

In Uganda, adjudication is contractually based, with 80% of construction disputes being resolved through this method.

#### **Arbitration**

Arbitration involves the resolution of disputes by an independent arbitrator or panel of arbitrators which the disputing parties have agreed to. This method is formal and private, akin to court proceedings, but maintains confidentiality and promotes party autonomy. Arbitrators are typically experts in the relevant field, ensuring informed decisions. The parties present their cases to the arbitrator who assesses the evidence and makes a determination on which party's case is most persuasive.

The arbitrator's award is final and legally binding, with only limited circumstances under which an award can be set aside. This makes arbitration a preferred method for parties seeking conclusive resolutions without further court appeals. Arbitration is known for being more cost-effective and faster than traditional litigation.



**ABOUT THE AUTHOR**  
David Kaggwa, FCI Arb, FICCP

- Chairman, CI Arb Uganda Chapter
- Executive Director, Construction Law Institute
- Senior Partner, Kaggwa & Kaggwa Advocates

### Expert Determination

In expert determination, an independent technical expert, appointed by the parties or an appointing authority like Centre For Arbitration & Dispute Resolution (CADER) or The International Centre For Arbitration & Mediation in Kampala (ICAMEK) investigates and resolves disputes. The role of the expert is to conduct their own investigation and reach a decision on the dispute. This method is particularly useful for technical rather than legal issues such as boundary, quantity or valuation disputes. The expert will be required to use their expertise, knowledge and experience to reach a decision. The expert's decision can be either binding or non-binding, and the process does not require consultation with the parties, saving time and resources. Expert determination is often used alongside other ADR processes like mediation and arbitration.

### Dispute Avoidance

FIDIC Contracts have been adopted by major development banks like the World Bank, European Investment Bank, Islamic Development Bank, Asian Development Bank, European Bank for Reconstruction and Development, Development Bank of Latin America (CAF), Inter-American Development Bank Group, and African Development Bank (AfDB).

It is pertinent to note that the Revised Edition of the FIDIC 2017 "Rainbow Suite" makes it mandatory for the parties to a construction contract to constitute Dispute Avoidance and Adjudication Boards (DAABS) upon execution of the contract. These Boards are constituted at the execution of a contract and on a retainer basis for the duration of the project.

According to the Dispute Resolution Board Foundation which is a non-profit organization dedicated to promoting the avoidance and resolution of disputes worldwide using the Dispute Board (DB) method, the pledge of the DAABS is to collaboratively work and adopt early intervention techniques through the supply chain, to resolve differences of opinion before they escalate into disputes. The Foundation also recognizes the importance of embedding conflict avoidance mechanisms into projects in order to identify, control and manage potential conflict whilst preventing the need for adversarial dispute resolution -

procedures-this can be done through adopting tiered ADR Clauses in contracts (Negotiation, Mediation, Adjudication and Arbitration as the last resort) and finally, members of DAABS commit to working proactively to avoid conflict and to promote early resolution of potential disputes.

### ADR and Commerce in Uganda

Uganda's economy is projected to reach a GDP of \$ 60 billion by 2025. The African Continental Free Trade Area (AfCFTA) is a free-trade area outlined in the African Continental Free trade Agreement; the largest in the world since the formation of the World Trade Organization in 1995. It connects 1.3 billion people from around the continent with a combined GDP of approximately USD 3.4 trillion. This economic integration is likely to increase disputes in infrastructure, oil and gas, energy, trade and land transactions. ADR provides an efficient framework for managing these potential disputes, ensuring smooth commercial operations and fostering economic growth.

### Water Disputes in Africa

Water disputes are prevalent in Africa due to shared water resources. Notable examples include the conflict over fishing rights on Lake Victoria; Migingo Island, the River Senegal conflict between Mauritania and Senegal), the River Zambezi conflict involving Zambia, Zimbabwe and Botswana, and the River Nile conflict between Egypt and Ethiopia. ADR mechanisms are essential in resolving such disputes, preventing escalations, promoting cooperative water management and most importantly, ensuring the preservation of mutually cordial inter-state relations.

### ROLE OF SURVEYORS IN ADR

#### Land Surveyors

The Surveyors Registration Act Cap 275 mandates only registered surveyors with valid practicing certificates to engage in surveying (Section 19(3)). This ensures professionalism and reliability in the alternative resolution of disputes involving land.

This critical requirement was buttressed in the case of *Jennifer Nsubuga v Michael Mukundane & Shine Asiimwe CACA No. 208 of 2018* wherein a survey report co-authored by an unregistered surveyor and a supposed surveyor

who did not take part in the survey was declared to be invalid.

### Valuation Surveyors

The case of *Attorney General & NEMA v DMW (U) Limited CACA No. 314 of 2020* highlights the importance of qualified valuers in asset valuation. The Court stated that a qualification in geology does not qualify one to undertake the valuation of assets since that is the prerogative of a qualified valuer or valuation surveyor. The Court further stated that the qualified valuer or valuation surveyor may procure the services of a geologist when conducting an earth valuation but that does not render the geologist akin to a valuer.

The Court emphasized that only certified valuation surveyors, not geologists, are authorized to undertake asset valuations, reinforcing the need for specialized expertise in ADR processes.

### Quantity Surveyors

Often times, Quantity Surveyors are called upon to give expert opinions/prepare expert reports that aid the resolution of construction disputes. The case of *Andreas Wipfler T/A Wipfler Designers & Co. v Meera Investments Ltd, HCCS No. 28 of 2005* demonstrates the acceptance of expert reports in dispute resolution. The Court stated that when parties agree to be bound by an expert's report, it effectively serves as the appointment of the expert as an arbitrator, ensuring that the expert's findings are upheld and enforced.

### Conclusion

ADR plays a vital role in managing disputes in the land, water and built environment sectors. By offering efficient, cost-effective and specialized dispute resolution methods, ADR supports economic growth and sustainable development in Uganda and across Africa.

The proactive adoption of ADR mechanisms, coupled with professional expertise and early intervention strategies, ensures the effective management of potential conflicts in the land, water and built environment, fostering a stable commercial landscape.



# THE ROLE OF ARBITRATION IN RESOLVING SHAREHOLDER DISPUTES

The Uganda Companies Act of 2012 establishes fundamental shareholder rights including attending general meetings, voting, receiving dividends, election of the board of directors, access to financial statements & minute register books and protection of minority shareholders among others. However, conflicts often occur as a result of dissatisfaction by some shareholders with the manner in which a company is run and sometimes due to personal differences. The problem is even more pronounced among small and medium size enterprises (SMEs) which are usually founded and run by closely knit groups of friends or family members. Effectively, resolving such disputes necessitates a focus on robust dispute and modern resolution mechanisms. Against this backdrop, this article examines the role of arbitration as a dispute resolution mechanism for shareholder disputes in Uganda.

## The choice of arbitration

Arbitration is increasingly becoming a key dispute resolution mechanism for business related disputes. It provides a faster, effective and party driven alternative to litigation. A dispute which often takes years in courts of law may be determined in a matter of months ensuring minimal disruption to the operations of the company.

The dispute is handled by a subject matter expert selected by the parties pursuant to an arbitration agreement. It also ensures that important company and business secrets are kept confidential as besides the arbitrator, only the parties, their lawyers and some witnesses are allowed access to the proceedings.

## Making use of arbitration in company matters

The relationship between shareholders and the company on one hand and between and among the shareholders themselves on the other is a contractual one governed by the company's -

Memorandum of Association and Articles of Association (section 21 of the Companies Act 2012).

It is a common practise however for the shareholders to enter into an additional contract known as the Shareholders Agreement to further buttress their rights and obligations and spell out in detail how the company will be managed and operated. An arbitration clause may be incorporated in either of the two contractual instruments or simultaneously in both of them. In ***Fulham Football Club (1987) Ltd vs Richards [EWCA] civ 855***, the Court of Appeal of England and Wales held that a claim for breach of articles of association of a company or a shareholders agreement was arbitrable with Patten L J observing that:

*"A dispute between members of a company or between shareholders and the board about alleged breaches of articles of association or a shareholders agreement is an essentially contractual dispute which does not necessarily engage the rights of creditors or impinge on any statutory safeguards imposed for the benefit of third parties".*



## ABOUT THE AUTHOR

**Francis Tumwesige Ateenyi,**  
MCIArb

Partner, Meritas Advocates

In ***NDK Ltd v HUO Holding Ltd [2022] EWHC 1682 (Comm)***, an arbitration clause contained in the shareholders agreement and not in the articles of association was held to apply to all disputes emanating from the parties' relationship as the two instruments were meant to operate together. This was partly based on the supremacy clause in the shareholders agreement declaring the agreement to supersede the articles where the two conflicted. The court specifically rejected the argument that the shareholders agreement as a private contractual document was subordinate to the articles of association which is a statutory contract and the ratio decidendi for this was the supremacy clause.

For clarity and to avoid ambiguity and conflicting modes of dispute resolution, it is advisable that the shareholders incorporate arbitration clauses in both the articles of association and shareholders agreement. However, non-inclusion of an arbitration clause in either the articles of association or the shareholders agreement does not mean the door to arbitration is permanently shut. The parties can agree at any time prior to a dispute, in the midst of a dispute or even during court proceedings to enter into an arbitration agreement and submit the dispute to arbitration.

### Arbitrable disputes

Not all disputes are arbitrable as arbitration may be excluded by statute or a given dispute may fall outside the scope of the arbitration agreement. It must be said that defining what is and is not arbitrable is a bit of a grey area more so when it comes to exercise of shareholder rights which are both statutory and contractual rights.

The English case of ***Riverrock Securities Ltd v International Bank of St Petersburg ([2021] 2 All ER (Comm) 1121)*** outlined three categories of shareholder disputes which are not subject to arbitration namely:

- claims for an order for winding up a company on just and equitable grounds;
- claims for relief which impact shareholders who are not parties to the arbitration agreement; and
- claims that "represent an attempt to delegate to the arbitrators what is a matter of public interest which cannot be determined within the limitations of a private contractual process".

It is however important to bear in mind that reference to the above non-arbitrable categories of disputes is only of persuasive value to the Ugandan practitioner because they are not specifically incorporated in our laws.

Instead, there are powers relating to exercise of shareholder rights which are reserved for courts of law under various provisions of the Companies Act 2012. Examples include: the power to order rectification of the company register to add or remove a member (section 125), the power to order holding of a company meeting where it is impracticable for members to hold one (section 142), the power to order inspection of the minute books of the company (section 153) and cancellation of orders varying shareholder rights (section 82). Others relate to inspection of the debenture registers and mortgage instruments under sections 82 and 99 respectively. There are also provisions designed for the protection of minority shareholders from oppressive and prejudicial conduct by those running the company. Section 248 of the Companies Act 2012 empowers a member of a company to petition court for an order that the affairs of the company are being conducted in a manner which is unfairly prejudicial to the interests of the members generally or to some of the members including the petitioner. In ***Olive Kigongo vs Mosa Courts Apartments High Court Company Cause No. 01 of 2015***, Justice Musota explained that the right to seek remedies under section 248 accrues to the petitioner as a member of the company and are premised on the contractual rights stipulated in the company's articles of association and any shareholder agreements. Oppressed minority shareholders are also entitled to petition the Registrar of companies under section 247 of the Companies Act 2012.

The question then is can the shareholders seek such remedies through arbitration? This question ought to be answered in the affirmative. The wording of the rights to petition or seek the intervention of the court are couched in the discretionary language of "may" which leaves open the possibility that the parties may opt for another dispute resolution mechanism. Moreover, there is no provision either in the Companies Act 2012 or the Arbitration and Conciliation Act Cap 4 prohibiting arbitration in such matters.

This proposition is supported by court decisions both in Uganda and England. In **Mary Matovu (as the Sole Surviving Administrator of the Estate of the Late Mathias Bazitya Matovu Bazitya) vs Century Bottling Company Limited (HCCS 202 of 2016)**, it was argued that the dispute was beyond the scope of the arbitration clause in the defendant company's articles of association because one of the remedies sought was rectification of the company's register which could only be granted by court under section 125 of the Companies Act. Hon. Justice Musa Ssekaana rejected this argument reasoning that the arbitrator's decision was as good as a decision of court and could be enforced by the registrar of companies.

The Persuasive English case of **NDK Ltd v HUO Holding Ltd [2022] EWHC 1682 (Comm)**, offers further clarity. While upholding the parties' arbitration agreements in a dispute involving the status of shareholders, rectification of a public shareholder register, public policy and third-party rights, Mr. Justice Foxton concluded thus:

- The fact that one of the reliefs sought, rectification of the register of members, could not be obtained from the parties' chosen tribunal is a matter of practical consequence of their choice which does not preclude the arbitral tribunal from determination of the underlying dispute. Where a particular form of statutory relief can only be obtained from court, the relevant facts are determined by the parties' chosen tribunal and the relief then sought from court on the basis of the arbitrator's determination.
- English courts will not lightly preclude the right to arbitrate on grounds of public policy, unless there are compelling reasons to do so. Issues concerning the transfer of shares and pre-emption rights of a shareholder are essentially private and commercial disputes and registration is simply a means of giving effect to valid transfers once the relevant entitlement to the shares has been established.
- The fact that an arbitration agreement cannot bind non-parties is no reason not to give it effect as between the signatories. It is open to a court of law enforcing an arbitral award to refuse on the grounds that third party interests are adversely impacted.

These decisions all demonstrate the commitment of courts to uphold arbitration agreements even in respect of matters which appear to be the preserve of courts.

### Conclusion

The evolving landscape of corporate governance in Uganda necessitates a nuanced understanding of the available dispute resolution mechanisms. While courts of law remain the default forum for resolution of shareholder disputes, the growing role played by arbitration in the resolution of business-related disputes cannot be overstated.

As commercial and shareholder disputes continue to get more complex and diverse, and courts get stretched with case backlog, arbitration presents a viable alternative for businessmen and women.



# ARBITRATION FUND

## FOR AFRICAN STUDENTS

To advance education in the knowledge, skills, techniques, use and methods of arbitration.

### THE ARBITRATION FUND FOR STUDENTS (AFAS): A REPORT ON THE ROUNDTABLE DISCUSSION ON ARBITRATION IN AFRICA AND CAREERS IN DISPUTE RESOLUTION

The Arbitration Fund For African Students (AFAS) was founded on 14th February 2019 by Dr. Emilia Onyema, FCIArb, Professor of International Commercial Law at SOAS University of London, in response to a need for career development for African Students in the practice of arbitration which was being hindered by unaffordability of arbitration conferences and events. The Fund's major objective is to provide funding for students in Africa to attend arbitration related conferences, workshops & moots and to also provide a website that would enable information relating to arbitration to be made available and accessible to the general public. It is also intentional in mentorship of students; both Secondary School and University; in the development of a career in arbitration. The Fund is managed by Four Trustees.

On the 19th of April, 2024, in furtherance of its mission of mentorship and career development, AFAS, organized a roundtable discussion at Makerere University. The theme of the roundtable discussion focused on Arbitration in Africa and Career Development. The roundtable discussion was part of the AFAS "ADR Student connect Network Project."

The Chartered Institute of Arbitrators (CIArb) - Uganda Chapter, was a key participant, contributing to the discourse on the prevailing status quo of Arbitration practice in Uganda and career opportunities within the field.

The Chapter was represented by among others; David Kaggwa, FCIArb, Chairman of CIArb-Uganda Chapter, Mr. Jeffrey Kaddu, MCIArb, and Mr. Isaac Ssekabanja, MCIArb. Mr. Chrispas Nyombi, Professor of International Commercial Law at Derby University and one of the trustees of AFAS, was part of the Panel as well. The discussion was adeptly moderated by Dr. Emilia Onyema, FCIArb.

The panelists engaged in an in-depth discussion on various aspects including the status of Arbitration practice in Uganda and their views about the Arbitration and Conciliation Act Cap 4("The Act"); evaluating its current state and considering potential reforms.

They emphasized the necessity of amending the Act to incorporate critical provisions for example; third-party funding. Citing the example of Nigeria which has recently enacted a new Arbitration Act (The Arbitration and Mediation Act, 2023 and in it had had included pertinent sections for example third-party funding, the panelists emphasized that such a key reform would enhance the financial feasibility of arbitration for more parties and ensure that our laws align with the developments in the International Alternative Dispute Resolution space.

Another proposed area for amendment was in respect to the absence of specific provisions for the protection of arbitrators under the Act. It was pointed out that unlike Uganda, countries like -



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Kenya, Nigeria and the United Kingdom have explicit laws safeguarding arbitrators from legal suits, suggesting that Uganda should adopt similar provisions to ensure the immunity and privilege of arbitrators.

Citing Tanzania's Arbitration Act Cap 15, the Panelists further proposed that the Act be revised to allow an arbitration proceed with a sole arbitrator in circumstances where each party were to appoint an arbitrator but one of the parties declined or failed to do so within the stipulated time.

Further proposed amendments included; the potential benefits of incorporating provisions for online arbitrations, emergency arbitrations, "peer award reviews" before delivery of awards and costs.

In addition, the Act was critiqued for its lack of detailed guidelines on the enforcement and recognition of arbitral awards. It was noted that whilst the Act domesticated the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958, the Kenya Arbitration Act Cap 49 even when it domesticated the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958, explicitly states in detail; the grounds for refusal to enforce a foreign arbitral award. This is in effect reduces or eliminates all manner of ambiguity in relation to the enforcement process.

Contrary to the calls for amendment, a section of the Panelists argued that the Act is adequate given the nature of Uganda's commercial disputes. They stated that Uganda's cases do not present complexities that would necessitate major revisions of the Act. They stated that the lacuna was in respect to implementation which should be the main focus as opposed to amendments.

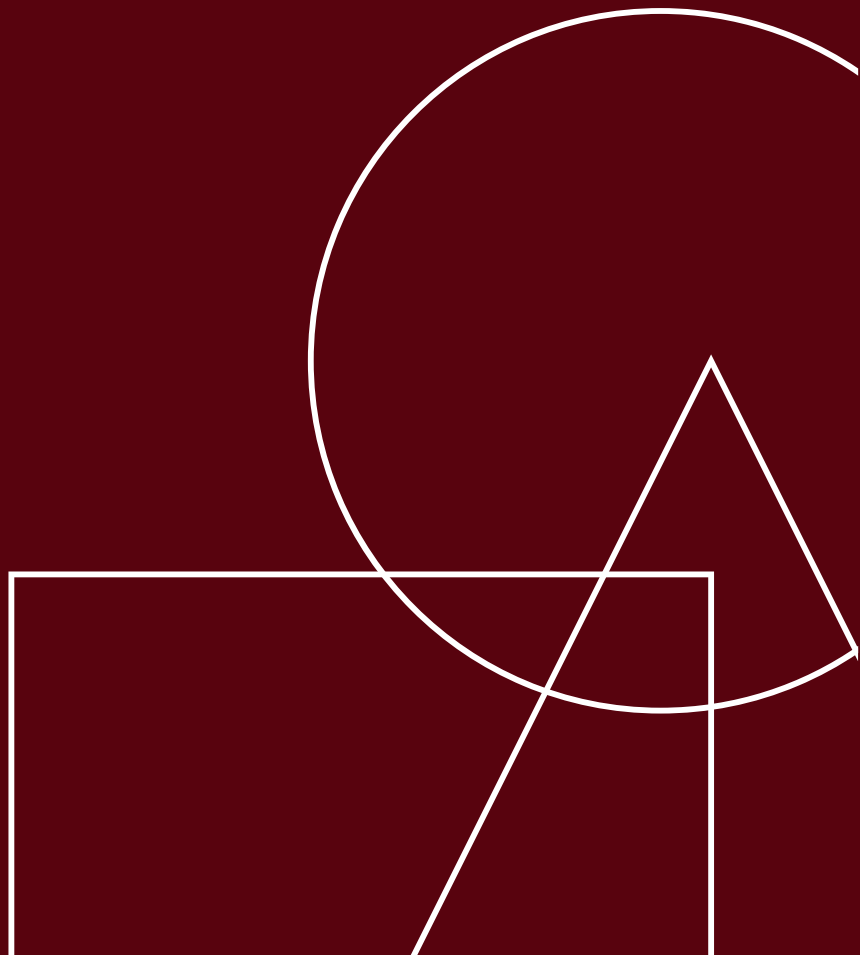
Dr. Emilia Onyema offered a perspective on utilizing judicial interpretation as a means of reforming arbitration practices without immediate legislative amendments. She suggested that courts could play a pivotal role in evolving the application of the Act through progressive interpretations.

The Panelists also discussed the way forward in respect to integrating Alternative Dispute Resolution (ADR) as part of the curriculum in Universities; emphasizing the need for a mindset change in respect to ADR as the best alternative to resolution of dispute and pointing out that the frequent recourse to courts is a symptom of the lack of a robust culture of dispute resolution. The Panelists also advocated for the inclusion of ADR in secondary school curricula, stressing the importance of early education in building a culture of alternative dispute resolution. They argued that developing an ADR curriculum suitable for secondary schools is long overdue and essential for the economy.

Finally, the Panelists spoke in unison in respect to establishing a culture of dispute resolution that would fundamentally change the landscape of arbitration in Africa because ADR is the "future" in regard to quick and efficient resolution of disputes. They noted that when such a culture is ingrained, the primary concern for parties involved in a dispute would be whether they lost fairly, rather than the efficacy of the dispute resolution process itself. This cultural shift, they argued, would then put Africa on a level playing field as the rest of the world which has already established an effective and trusted arbitration environment.

This event not only fostered a rich exchange of ideas but also highlighted the collaborative efforts between institutions like AFAS, Makerere University and the Chartered Institute of Arbitrators-Uganda Chapter; in advancing the practise of ADR in Uganda and Africa as a whole.

# 04 Upcoming Events



# Upcoming Events

## The 11th East Africa International Arbitration Conference 2024

The 11th East Africa International Arbitration Conference is going to be held on the 19th and 20th of September, 2024 in Addis Ababa, Ethiopia.

CIArb Uganda Chapter is proud to be their strategic partner. This year's theme is "International Arbitration in Africa: Arbitrating in a New Age," focusing on the evolving landscape of arbitration in Africa.

The conference will bring together arbitration practitioners, private lawyers, government officials, academics and corporate counsel from across the continent to discuss arbitration in a new world of technological advancements, greater regional integration and a push for green growth in Africa. A highlight of EAIAC 2024 will be the Gala Dinner at which this year's Africa Arbitration Awards will be presented. Do not miss out. Register at [www.eastafricaarbitration.com](http://www.eastafricaarbitration.com) to be part of this premier event.

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