

**UNIVERSITY OF CAPE TOWN**  
**FACULTY OF LAW**  
**DEPARTMENT OF COMMERCIAL LAW**

**Student Name: Frank Edgar Kapanda**

**Student Number: KPNFRA002**

**Master of Laws (LLM) 'Commercial Law'**

**A CRITICAL EVALUATION OF JUDICIAL MEDIATION IN MALAWI**

**Supervisor: Professor Alan Rycroft**

Research dissertation presented to the University of Cape Town for the approval of Senate in fulfilment of the requirements of the Master of Laws degree in approved courses and a minor dissertation. The other part of the requirement for this qualification was the completion of a programme of courses.

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## CHAPTER 1

### INTRODUCTION

#### 4. Introduction

At the time of writing of this dissertation, I had been on the High Court of Malawi bench for 13 years. Of these years, six of them I had been sitting as Judge of the High Court of Malawi adjudicating and conducting mediation sessions at the commercial division of the High Court of Malawi (the Commercial Division) until 9 July 2013 when I became a Supreme Court Judge. I took some time off to explore new ideas on how to effectively mediate in the courts. This is more so now that I no longer sit in the High Court which enables me to critically examine judicial mediation in Malawi with the benefit of hindsight and detachment.

There were four of us at the Commercial Division sharing the matters that came before the division. It was required of us, and it is still the case, that apart from adjudicating on the matters that came before us for trial that we make an attempt at mediation. As a judge of this Court, sitting and presiding over matters that dealt with commercial disputes, my ambition was to enrich myself with advanced legal knowledge in commercial law, including in particular mediation, so that I could be better equipped to apply the knowledge to the cases that come for settlement at the Commercial Division.

This dissertation considers the place of mediation within the constitutional framework of Malawi, with particular reference to the High Court (Commercial Division) (Mandatory Mediation) Rules, 2007 (the Commercial Division mediation rules). These rules prescribe the process of mediation that is presided over by the Judges of the Commercial Division. Of particular interest is the question whether the High Court mandatory mediation rules are in keeping with the spirit and purpose of mediation. Further, the research critically examines the current practice of mediation in the Commercial Division.

On 18 May 1994 Malawi adopted a Constitution<sup>1</sup> which is founded on various underlying principles and policies. These include a commitment to actively promote the welfare and development of the people of Malawi by adopting and implementing policies and legislation aimed at achieving the peaceful settlement of disputes. In order to achieve this goal an attempt has been made to adopt mechanisms by which differences can be settled through negotiation, good offices, mediation, conciliation and arbitration.<sup>2</sup> In particular, Malawi through its judicial arm of government has adopted mediation as part of the process of settling disputes.<sup>3</sup> Further, in 2007, the Malawi judiciary established the Commercial Division to deal with commercial matters. The jurisdiction of the Commercial Division is provided under Rule 5 of the High Court (Commercial Division) Rules (the Commercial Division rules).<sup>4</sup> And, through subsidiary legislation the Malawi Judiciary has what are called the Commercial Division mediation rules.<sup>5</sup> Accordingly, it is expected that, except where the rules allow it, every matter that comes before the Commercial Division must first go through a process of mediation.<sup>6</sup> Such a process has to be overseen by Judges who sit in the Commercial Division.<sup>7</sup>

## 5. Aims of the study

The main question that this research intends to answer is whether the Commercial Division mandatory mediation rules are in keeping with the spirit and purpose of mediation. Further, the research intends to find out whether the rules governing mediation make the mediation process in the Commercial Division mandatory. Put differently, this dissertation seeks to find out whether the mediation process in the Commercial Division is mandatory as is suggested by the name of the rules governing mediation in the Commercial Division. There will also be explored the question whether judges are better suited (qualified) than other mediators to mediate in the particular disputes that come before them.

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<sup>1</sup> Section 215 of the of the Republic of Malawi Constitution (the Constitution).

<sup>2</sup> Section 13(*l*) of the Constitution; S. Gloppen and E. Kanyongolo ‘The Role of the Judiciary in the 2004 General Elections in Malawi’ Chr. Michelsen Institute in *Development Studies and Human Rights*. Available at <http://www.eldis.org/go/display&id=18958&type=Document#.UIQdDIOITms> (accessed 8 October 2013).

<sup>3</sup> Courts (Mandatory Mediation) Rules Government Notice No. 9 of 2004.

<sup>4</sup> Order 1(5) Commercial Division Rules.

<sup>5</sup> Made on 3 April 2007.

<sup>6</sup> Rule 2 as read with Rule 3 of the Commercial Division Mediation Rules.

<sup>7</sup> *Ibid*; see also Order 1(3) of the Commercial Division Rules.

As stated earlier, this thesis will set out the legal framework of mediation in Malawi. Further, the impact of the constitutional provision in the Republic of Malawi Constitution, the separate rules governing mediation in both the General Division of the High Court of Malawi (the General Division) as well as the Commercial Division will be analytically examined. In addition, the Commercial Division mediation rules will be critically investigated so as to see their impact on mediation. The thesis will further compare the rules obtaining in the General Division with those in the Commercial Division and assess their effect on mediation in the Commercial Division. Finally, the thesis will explore if there are any challenges respecting mediation the rules in the General Division in general and the application of the rules in the Commercial Division specifically. In particular, the thesis will seek to find out the strengths and weaknesses inherent in the mediation method that has been adopted by the Malawi Judiciary respecting mediation in the Commercial Division.

## 6. Methodology

The American Bar Association's (the ABA's) 1976 conference on the 'Causes of Popular Dissatisfaction with the Administration of Justice' sparked a new consciousness about alternative ways of resolving legal disputes.<sup>8</sup> In its wake neighbourhood justice centres and multi-door courthouse programmes were started across the USA, legitimizing alternative ways to resolve disputes. A culture of settlement began to take root to such an extent it began to generate its own problems. In the ABA's report the American Bar Association drew attention to some problems in its 2003 "Vanishing Trial project".

Various authors have analysed and critiqued alternative ways of resolving legal disputes.<sup>9</sup> Thus, a literature review of what various authors have written on mediation is necessary and has informed this research.

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<sup>8</sup> Menkel-Meadow C 'Mothers and Fathers of Invention: The Intellectual Founders of ADR (2000) 16 *Ohio State Journal on Dispute Resolution* 1; P S Adler 'Is ADR a social movement?' (1987) 3 *Negotiation Journal* 59; JA Scimecca 'Theory and Alternative Dispute Resolution: A Contradiction in Terms?' in D Sandole and H van der Merwe (eds.), *Conflict Resolution Theory and Practice* (Manchester: Manchester University Press, 1993) 211.

<sup>9</sup> Ibid. see also Douglas Yarn, 'The Death of ADR: A Cautionary Tale of Isomorphism Through Institutionalization' (2004) 108 *Pennsylvania State Law Review* 929 at 930–931 (discussing historic evolution of dispute resolution in England and analogizing it to institutionalizing alternative dispute resolution in American courts); see also James J. Alfani et al. *MEDIATION THEORY AND PRACTICE* 1 (2d ed. 2006); Nancy A. Welsh 'The Thinning Vision of Self-Determination in Court-Connected Mediation: The Inevitable Price of Institutionalization?' (2001) 6 *Harvard Negotiation Law Review* 1 at 3–4 (examining role of self-determination in alternative dispute resolution as it adapts to court culture).

This dissertation largely draws on desk-top research. The general scholarly literature on mediation is used. The various sources of Malawian law, such as the Constitution, Acts of Parliament and subsidiary legislation, are analysed and critiqued. The study also draws on my experience of the mediation procedure in Malawi as noted earlier.

The study will also draw some lessons from the practices of mediation in the United States of America (the USA) as well as the Republic of South Africa (South Africa). Both the USA and South Africa are open democratic societies. Furthermore, these two countries have functioning and forceful means of settling disputes through alternative dispute resolution (ADR). South Africa is one of very few African countries which have adopted a holistic procedure of mediation. Malawi and South Africa share several key constitutional values. The USA has been chosen mainly because mediation gained formal recognition first there before it spread to other common law systems.

It is however observed and acknowledged that as a methodology the comparison of laws is mainly functionalist in that it seeks to identify problems / causes of legal change and to replace an existing law or search for a 'better' law. Comparative law attempts to assess which law offers the best solution to the problem. The method has a traditional deficiency in that, while comparing legal approaches, it neglects empirical factors which might explain the failure of a law in a particular setting, such as bad judges, slow courts, and poor procedural law. To assume 'functional equivalence' is to suggest that problems should be solved in the same way in all jurisdictions, or to assume that one jurisdiction's solution will achieve a better result elsewhere. It is accepted that legal transplants are highly contentious.<sup>10</sup> Indeed, one of the acknowledged difficulties of comparative law is that all too often there is the assumption that all societies have the same problems and assume that domestic legislation was enacted to deal with assumed shared problems. However, political will, illustrated well in South Africa's arbitration law, is a neglected aspect of comparative law that cannot be ignored.

Many authors from the USA have written on mediation. This dissertation has benefitted from the literature review. In sum, this dissertation will be informed by the Constitution; Statutes;

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<sup>10</sup> See O Kahn Freund 'On Uses and Misuses of Comparative Law' (1974) 37 *Modern Law Review* 1; A Watson 'Legal Transplants and European Private Law' (2000) 4(4) *Electronic Journal of Comparative Law*. Available at <http://www.ejcl.org/ejcl/44/44-2.html> (Accessed 20 August 2013); P Legrand 'The Impossibility of "Legal Transplants"' (1997) 4 *Maastricht Journal of European and Comparative Law* 111.

the Commercial Division Rules; the Commercial Division mediation rules; what others have written on the subject especially where the concept of mediation by judges has been practiced for a long time.

#### **4. Chapter Synopsis**

This chapter has outlined the topic of this thesis, which is to investigate and critique the nature and practice of mediation in Malawi.

Chapter 2 defines what mediation is and traces its history in general and its Malawian context in particular. Thereafter, it provides a background to the adoption of mediation by the Malawi Judiciary and examines the nature of the mediation that was adopted. In addition, the global trend towards judicial mediation will be traced. Thereafter, Malawi's commitment to mediation is discussed.

Chapter 3 will discuss the statutory framework of the High Court of Malawi. Pertinent provisions of the Commercial Division rules and its mediation rules will be critically examined. Thereafter, the values and perceived dangers of mediation will be discussed.

Chapter 4 reviews the merits and demerits of mandatory mediation with particular reference to the Commercial Division. Further, the chapter explores whether the provisions of the Commercial Division mediation rules are achieving their purpose of making the mediation mandatory in view of what happened in the case of *National Bank of Malawi v Msindo*.<sup>11</sup> Additionally, the chapter will examine the case law relating to meditation in Malawi. There is also analysed the problems and the advantages of legal transplants in driving law reform. This chapter also draws some lessons from the USA and South Africa on mediation. There is also discussed in this chapter the question whether judges are better suited to mediate. Moreover, the chapter deals with the issue of mediation by judges and why the Commercial Division needs to retain the mandatory approach to mediation.

The last chapter makes some conclusions and relevant recommendations.

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<sup>11</sup> Commercial Cause Number 108 of 2008 High Court decision, 7 August 2009, unreported.

## CHAPTER 2

### AN INTRODUCTION TO THE HIGH COURT OF MALAWI AND ITS COMMERCIAL DIVISION

#### 4. Introduction

Mediation is a process in which a third party called a mediator assists disputing parties to reach their own consensual resolution of their dispute. The mediator facilitates rather than directs the process. In legal language mediation is a form of alternative dispute resolution (ADR). It is a way of resolving disputes between two or more parties where a third party assists the parties to negotiate a settlement. Mediation occurs in various kinds of disputes such as in commercial matters. Put differently, the term "mediation" broadly refers to any instance in which a third party helps others reach an agreement. The process of mediation is usually private and confidential, possibly enforced by law and participation in a mediation process is in general, although not always the case, voluntary. However, some mediation processes are court driven.

This chapter provides a contextual background within which mediation occurs in the Malawi judicial system. Further, it examines the relevant legal provisions that have a bearing on mediation in particular and the settlement of disputes through other means generally. Thereafter, the chapter gives a background to the adoption of mediation by the Malawi Judiciary and the reasons for its adoption, and discusses the nature of mediation that was adopted. The chapter also defines the traditional role of judges and the confusion that arises when judges mediate. Further, in this chapter there is an analysis of the type of mediation that is conducted in the Commercial Division i.e. whether it is evaluative or facilitative or a mixture of both.

#### **2. Traditional methods of dispute resolution: A brief introduction to mediation in Malawi**

Following a period of social unrest in the late 1800s and early 1900s when it was moving from a pastoral to an industrial power, the USA experienced disruptive as well as aggressive labour disputes.<sup>12</sup> Thus, as the USA wanted to deal with this change, there was a call to use mediation to settle the disputes.<sup>13</sup> As already observed, the late 1960s through to the early 1970s was yet another period of social transformation and heightened distrust of authority, during which lawyers started calling for the use of mediation to resolve community and family disputes.<sup>14</sup> It has been noted by Michael Moffitt that in 1976, judges, lawyers, and others gathered at a conference where a Harvard Professor delivered a speech advocating a variety of dispute resolution techniques including mediation.<sup>15</sup>

Has mediation any roots in Malawi's history? Mustafa Kennedy Hussein,<sup>16</sup> writing on mediation in conflict situations in Africa, notes that "in most African countries traditional authorities (chiefs) are an embodiment of the culture, customs, values and practices of the country, including those related to conflict prevention, resolution and peace building."<sup>17</sup> He further observes as follows respecting conflict resolution in Malawi:

Traditional authorities called *mafumu* (chiefs) preside over the *bwalo*, which is an open community gathering attended by community members and opinion leaders. This forum offers conflict prevention and resolution opportunities and initiatives that are based on indigenous principles and wisdom. The *bwalo* embraces contemporary notions of alternative dispute resolution, namely conciliation, negotiation, mediation, arbitration and adjudication. ...The chiefs work hand in hand with counsellors (*nduna za mfumu*) who act as advisors and facilitators of community-level dialogues between parties involved in a conflict. They promote 'people to people peace-making processes' by encouraging parties involved in a conflict to reach agreements among themselves and only seek the counsellors' and chiefs' intervention should reconciliation fail.<sup>18</sup>

The above ably captures the fact that mediation has some historical antecedents in Malawi's traditional dispute resolution mechanism. Further, it shows that in Malawi there are

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<sup>12</sup> Mary Parker Follett 'Constructive Conflict' in Pauline Graham (ed.) *From the Prophet of Management: A Celebration of Writings* (Boston, Massachusetts: Harvard Business School Press, 1995) 69.

<sup>13</sup> Ibid.

<sup>14</sup> Menkel-Meadow 'Mothers and Fathers of Invention: The Intellectual Founders of ADR (note 8); Owen Fiss 'Against Settlement'(1983-1984) 93 *Yale Law Journal* 1073; JA Scimecca 'Theory and Alternative Dispute Resolution: A Contradiction in Terms?', in D Sandole and H van der Merwe (eds.), *Conflict Resolution Theory and Practice* (note 8); see also Douglas Yarn, 'The Death of ADR: A Cautionary Tale of Isomorphism Through Institutionalization' (note 9); see also James J. Alfani et al. MEDIATION THEORY AND PRACTICE 1 (note 9); Nancy A. Welsh 'The Thinning Vision of Self-Determination in Court-Connected Mediation: The Inevitable Price of Institutionalization?' (note 9).

<sup>15</sup> Michael L Moffitt 'Before the Big Bang: The Making of an ADR Pioneer', (2006) 22 *Negotiation Journal* 437 at 437-438.

<sup>16</sup> Mustafa Kennedy Hussein 'Intra-state Conflict and Indigenous-based Conflict Resolution Mechanisms in Malawi: the Role of the Public Affairs Committee' (2011) 20 (1) *African Security Review* 26.

<sup>17</sup> Ibid.

<sup>18</sup> Ibid.

traditional methods of dispute resolution at community level. Thus, mediation plays a critical role in the Malawian society, particularly in rural areas, and it has been essential to the communities when it comes to the settlement of disputes. This is the case as approximately 85 per cent of Malawi's population lives in rural areas, out of reach of formal courts. Hence, in order for them to enjoy the right of access to justice, many Malawians resort to mediation when they want to settle their disputes quickly and cheaply through local forums they understand and can access. Accordingly, chiefs have been providing access to justice for Malawians through conciliation, negotiation, mediation, arbitration and adjudication.<sup>19</sup> Thus, it is not surprising that in 1994 the constitution enjoined the state to adopt and implement policies as well as legislation aimed at achieving the peaceful settlement of disputes through negotiation, good offices, mediation, conciliation and arbitration.<sup>20</sup>

### **3. Malawi's commitment to ADR**

The Malawi Constitution guarantees the rule of law<sup>21</sup>; the right to equality before the law<sup>22</sup> and the right of access to justice.<sup>23</sup> However, as in most African countries and many elsewhere in the world, the reality is that to litigate before the Malawi courts can be expensive and lengthy.<sup>24</sup> Hence the adoption of mechanisms through which differences should be settled via negotiation, good offices, mediation, conciliation and arbitration.<sup>25</sup> Thus, as early as 2004, the Malawi committed itself to ADR as part of the formal process of settling legal disputes.

### **4. The creation of the High Court of Malawi and the Commercial Division**

The High Court of Malawi (the High Court) is a creature of the Republic of Malawi Constitution<sup>26</sup> (the Constitution). It has various registries including a Commercial Division

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<sup>19</sup> Ibid.

<sup>20</sup> Section 13(l) of the Constitution.

<sup>21</sup> Section 12(v) of the Constitution.

<sup>22</sup> Section 12(vi) of the Constitution.

<sup>23</sup> Section 41 of the Constitution.

<sup>24</sup> See World Bank Group's *Doing Business Reports*, 2012; see also Gloppen and Kanyongolo, 'The Role of the Judiciary in the 2004 General Elections in Malawi.' (note 2).

<sup>25</sup> Section 13 (l) of the Constitution; Gloppen and Kanyongolo, 'The Role of the Judiciary in the 2004 General Elections in Malawi.' (note 2).

<sup>26</sup> Section 108 (1) of the Constitution, amongst others, provides that there shall be a High Court for the Republic which shall have unlimited original jurisdiction to hear and determine any civil or criminal proceedings under any law.

with offices in Blantyre and Lilongwe. The Commercial Division was established in 2007 in response to the concerns of the business community that commercial matters were not being given as much attention as the other cases. As will be seen later, the Judges of the Commercial Division have to mediate on various types of cases. These include in the areas of insurance; the operation of stock and foreign exchange markets; banking; contracts of all kinds and general corporate law. This is the case as part of their responsibilities is to mediate on matters that fall under the jurisdiction of the Commercial Division. The Judges do this pursuant to the Commercial Division mediation rules and any other replacement rules.<sup>27</sup>

As stated earlier, Malawi has a Constitution that promotes the peaceful settlement of disputes<sup>28</sup> through negotiation, good offices, mediation, conciliation and arbitration.<sup>29</sup> It is accepted that principles of national policy are directory in nature but courts are still entitled to have regard to them when interpreting and applying any provision of the Constitution.<sup>30</sup> Thus, through its judicial arm of government, Malawi adopted mediation as part of the process of settling disputes.<sup>31</sup> Further, in 2007 the Malawi judiciary established a Commercial Division<sup>32</sup> of the High Court to deal with commercial matters.<sup>33</sup> Through subsidiary legislation the judiciary enacted the High Court mediation rules mentioned earlier.<sup>34</sup> The promulgation of these Rules is an indication of how the Malawi legislature through the delegation of its powers to the Judiciary to make subsidiary legislation<sup>35</sup> is implementing and giving effect to the constitutional goal to achieve the peaceful settlement of disputes.

## 5. The change in the role of judges

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<sup>27</sup> Order 1(5) of the Commercial Division rules.

<sup>28</sup> See note 19.

<sup>29</sup> *Ibid.* See also Gloppen and Kanyongolo ‘The Role of the Judiciary in the 2004 General Elections in Malawi’ (note 2).

<sup>30</sup> Trevor P. Chimimba ‘The Search For Identity And Legitimacy: The Evolution Of Malawi’s Constitution’ (2012) *Malawi Law Journal* Vol. 6 (1) 19, 60

<sup>31</sup> Courts (Mandatory Mediation) Rules Government Notice Number 9 of 2004

<sup>32</sup> ‘Commercial Division’ means the division of the High Court of Malawi dealing with commercial matters

<sup>33</sup> It is provided in the Commercial Division rules, that : “ ‘commercial matter’ means a civil matter of commercial significance arising out of or connected with any relationship of commercial or business nature, whether contractual or not, including but not limited to (a) the formation or governance of a business or commercial organization; (b) the contractual relationship of a business or commercial organization; (c) liabilities arising from commercial or business transactions; (d) the restructuring or payment of commercial debts; (e) the winding up of companies or bankruptcy of persons; (f) the enforcement or review of commercial arbitration award; (g) the enforcement of foreign judgments of commercial matters subject to the provisions of the law; (h) the supply or exchange of goods and services; (i) banking, negotiable instruments, international credit and similar financial services; (j) insurance services; or (k) the operation of stock and foreign exchange markets...

<sup>34</sup> See note 28 above. These rules only apply to the Commercial Division.

<sup>35</sup> Section 58(1) of the Constitution.

The traditional role of a Judge is to adjudicate and not mediate legal disputes. According to Julie McFarlane:

Judges are understood to exercise discretion under certain practical constraints that are accepted without question (for example, what evidence is available, what written record or textualization exists of the conflict). An adjudicated outcome, whatever the actual result, vindicates the notion that a normative battle was fought here. The process of judge-made determination imbues the conflict with the procedure (presentation of arguments, cross-examination) and the language of moral rights and duties.<sup>36</sup>

However, the traditional role of judges has changed and this change was first experienced in the USA. Marc Galanter observes that from the end of 1920 when a Municipal Court judge in New York started experimenting with the idea of using his office to mediate and conciliate on cases that came before him, there was increased judicial participation in the settlement of disputes by judges through mediation.<sup>37</sup> Thereafter, the use of judges as mediator was institutionalised in 1983.

As noted earlier, the Judges who sit in the Commercial Division are enjoined to make an attempt at mediation before commercial disputes can be resolved by litigation.<sup>38</sup> This is new a development that came with the establishment of the Commercial Division.

The questions that arise are: firstly, whether the mediation process in the Commercial Division is mandatory. Secondly, whether the rules in providing that the mediation should be within 14 days it means that parties are coerced by the Judge- Mediator into settling thereby making the settlement non-consensual.

The rules only exempt a few cases from the process including where by law or practice the trial is expedited; where there is an application for summary judgment; where there is an application for judgment on admissions; where the Court makes an order on an application by a party requesting the Court to exempt the action from these Rules; or where the Court, in its discretion, so orders.<sup>39</sup> The involvement of the court in mediation does not take away the fact that this is a voluntary process ie: disputants are free to leave the process at any point, with or without settlement, and without coercion.<sup>40</sup> Timothy Hedeem points out that “given

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<sup>36</sup> Julie Macfarlane ‘Why Do People Settle?’ (2001) 46 *McGill Law Journal* 663.

<sup>37</sup> Marc Galanter ‘The Emergence of the Judge as a Mediator in Civil Cases’ (1985) 69 *Judicature* 257.

<sup>38</sup> Order 1(3) of the Commercial Division Rules and Rule 2 as read with Rule 3 of the Commercial Division mediation rules

<sup>39</sup> Rule 3 of the Commercial Division mediation rules.

<sup>40</sup> Timothy Hedeem ‘Coercion and Self-determination in Court-Connected Mediation: All Mediations Are Voluntary, But Some Are More Voluntary than Others’ (2005) 26 (3) *The Justice System Journal* 273

that mediations are often conducted in courthouses, it should not be surprising to learn that many disputants may have difficulty distinguishing between mediation and adjudication.”<sup>41</sup>

Indeed, Timothy Hedeem instructively notes that:

Mediation proponents often point to self-determination as the key to the broad applicability and acceptance of mediation in courts. While early mediation programs relied on voluntary participation, many courts now require litigants to try mediation before proceeding to court. Even in mandatory mediation, self-determination is essential: disputants are free to leave the process at any point, with or without settlement, and without coercion. While voluntary mediation may be highlighted in policy and theory, it is not always realized in practice. Research and appellate court filings demonstrate that many disputants experience substantial pressure: judges may pressure parties to enter mediation, mediators may pressure them to continue with mediation, and any number of actors and factors may pressure them to settle. Questions remain about the appropriate level of pressure, however: when does encouragement become coercion? Courts must ensure that court-connected mediation is delivered as promised-that self-determination is maintained throughout.<sup>42</sup>

The above notwithstanding, Timothy Hedeem concedes that proponents of mandatory mediation argue that this type of mediation remains a voluntary process so long as no coercion takes place during the mediation session itself.<sup>43</sup> However, he is quick to add that the assertion that an entry into mediation can be easily distinguished from the actions taken within the process is not universally accepted.<sup>44</sup> He therefore argues that this is the case since “a broader view of mediation's place within larger dispute resolution processes, most of which involve substantial punitive power, shows that the expectation of an imposed settlement will inevitably alter the meaning of the event for all the actors, more especially where the disputants do not participate freely at all stages of the resolution process.”<sup>45</sup> The point being made here is that coercion into mediation is acceptable than coercion during the process of mediation.

In the High Court of Malawi, including the Commercial Division, there is no coercion during the mediation itself but parties are, except in a few cases,<sup>46</sup> enjoined to mediate once their matter is filed with the court. According to rule 2, subject to rule 3 the Commercial Division mediation rules shall apply to all proceedings commenced through Writ Of Summons in the Commercial Division. Rule 3 then stipulates that the Commercial Division mediation rules shall not apply to any of the following proceedings viz.: where by law or practice, the trial is expedited; or where there is an application for summary judgment; or where there is an

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<sup>41</sup> Ibid. 277.

<sup>42</sup> Ibid. 273.

<sup>43</sup> Ibid. 277.

<sup>44</sup> Ibid. 278.

<sup>45</sup> Ibid. 278.

<sup>46</sup> See Rule 3 as read with Rule 2 of Commercial Division mediation rules.

application for judgment on admissions; or where the Court makes an order on an application by a party requesting the Court to exempt the action from these Rules; or where the Court, in its discretion, so orders. Accordingly, it is not in all cases that there will be mediation in any event. This rule shows that mediation is mandatory to the extent that the rules require the parties to make an attempt at mediation or to submit to mediation procedure. However, the mediation is not mandatory in the sense that parties are not obliged to reach a compromise or other amicable solution.

Thus, although the Commercial Division mediation rules mentions the word “mandatory” it does not mean that disputants are forced to settle during the mediation process itself. The judges of the Commercial Division are there to facilitate the mediation and not force parties to compromise their cases at mediation or any other stage.

Further, the rules allow for termination of mediation either at the instance of the parties or the judge.<sup>47</sup> Therefore, even during the process of mediation itself the parties are free to call for termination of the process. In addition, judges may terminate the mediation if they form the view that it will not be meaningful to continue with mediation.<sup>48</sup> The answer to the first issue is that the mediation in the Commercial Division is mandatory.<sup>49</sup> Indeed, Justice Katsala, commenting on the provisions of the Commercial Division mediation rules, in *National Bank of Malawi v Nsindo*,<sup>50</sup> amongst other observations, remarked that these rules should be understood as saying that a party does not have the choice whether he/she should go through mediation or not. The Judge added that a party wishing not to go through mediation is obliged to apply for an order exempting the matter from mediation. Further, the Judge warned that simply ignoring the Mediation Rules was not an option. It is however not an adjudication process although handled by a judge. It still remains a mediation process and voluntary.

Finally, the question that remains is whether the rules, by providing that the mediation shall be conducted for a period of 14 days, it means that parties are coerced into settling within

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<sup>47</sup> Rule 14(1) of the Commercial Division mediation rules provides that mediation shall end when either of the following occurs -(a) when the parties execute a settlement agreement; or (b) where the Judge cancels a mediation session under rule 6 (4) and rule 9 for non-compliance on the part of any party; or (c) where the Judge, after consultation with the parties, makes a declaration to the effect that further mediation is not worthwhile; or (d) if the parties jointly address a declaration to the Judge that the mediation is terminated; or (e) if a party makes a declaration to the Judge and the other party to the effect that the mediation is terminated. Rule 14 (2) then states that a declaration under sub-rule (1) may be in writing or orally, but that where a declaration is made orally, the Judge shall record it in writing.

<sup>48</sup> Ibid.

<sup>49</sup> *National Bank of Malawi v Msindo*, (note 11)

<sup>50</sup> Ibid.

such period.<sup>51</sup> According to Rule 13 of the Commercial Division mediation rules, a mediation period shall not exceed a period of 14 days from the date of the first session of mediation. There is actually no provision for extension of this period by the Judge-Mediator. The fact of the matter is that the rule uses the word “shall” which suggests that the parties are obliged to settle within the given period or else any agreement outside this time frame could as well be a nullity. Further, the rules of mediation in the Commercial Division do not provide for parties or any aggrieved party to appeal against a settlement recorded by a Judge-Mediator if the settlement agreement is signed by the parties.<sup>52</sup> Thus, if a party feels that the mediator's actions were inappropriate or coercive and explained this to be the basis for his/her wishes to rescind the agreement there will be no appeal. The only solution in those circumstances would be to commence a fresh action<sup>53</sup> and thereby incur further expense.

The answer to the last issue herein is given further when reviewing the Commercial Division rules of mediation in chapter three. Further, the conclusion and recommendations part of this thesis offers a solution to the problem raised above respecting the challenge arising from the requirement that mediation be conducted within 14 days.

## **6. The origins of judicial mediation**

As stated earlier, mediation is a process in which a third party called a mediator assists disputing parties to reach their own consensual resolution of their dispute. Further, as mentioned above, mediation has existed in the United States for some time. There are actually many authors who have written of the story of mediation in the USA.<sup>54</sup> It is observed that subsequent to a period of social unrest in the USA in the late 1800s and early 1900s, when the USA was moving from a pastoral to an industrial power it experienced disruptive as well as aggressive labour disputes, the USA started using mediation to settle the disputes.<sup>55</sup> Further, in the late 1960s and early 1970s there was yet another period of social

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<sup>51</sup> Rule 13 of the Commercial Division mediation rules.

<sup>52</sup> Rule 11(4) of the Commercial Division mediation rules.

<sup>53</sup> *Ainsworth v Wilding* [1896] 1 Ch. 673; *Kinch v Walcott* [1929] AC 482; *Wilding v Sanderson* [1897] 2 Ch. 534 (CA).

<sup>54</sup> Menkel-Meadow, ‘Mothers and Fathers of Invention: The Intellectual Founders of ADR, (note 8) 2, 5 (examining early contributions of social theorists and empiricists as “Intellectual Founders of ADR”); see also Douglas Yarn, ‘The Death of ADR: A Cautionary Tale of Isomorphism Through Institutionalization’ (note 9); see also James J. Alfini et al. *MEDIATION THEORY AND PRACTICE* 1 (note 8); Nancy A. Welsh ‘The Thinning Vision of Self-Determination in Court-Connected Mediation: The Inevitable Price of Institutionalization?’ (note 9).

<sup>55</sup> See Mary Parker Follett, ‘Constructive Conflict’ in Pauline Graham (ed.) *From the Prophet of Management: A Celebration of Writings* (note 12) at 71.

transformation and heightened distrust of authority hence advocates started calling for the use of mediation to resolve community and family disputes.<sup>56</sup> Furthermore, the need for alternative ways of settling disputes in the sixties was succinctly put by Laura Nader thus:

[T]he sixties have been described as confrontative, a time when many social groups felt encouraged to come forward with their agendas: civil rights, consumer rights, environmental rights, women's rights, and American Indian rights. It was also a period of sharp critique of law and lawyers in relation to issues of rights and remedies. The law was declared unsatisfactory in dealing with the explosion of rights consciousness....Two reform agendas emerged: those who thought that Americans might improve legal services....,and those who thought that Americans were becoming too litigious and who sought to remedy what they saw as a confrontational mode.... Solutions were proposed to meet the needs of these various and often opposing constituencies, and although there were a plethora of experiments, the sum total began to be known as Alternative Dispute Resolution. Alternative dispute resolution usually encompasses programs that emphasize non-judicial means for dispute handling: the focus is commonly on mediation and arbitration.<sup>57</sup>

Today, mediation is an integral part of the civil litigation process in the United States.<sup>58</sup> Further, it is noted that in 1976, judges, lawyers, and others gathered at a conference which called for the advocacy of a variety of dispute resolution techniques including mediation.<sup>59</sup> Furthermore, it has previously been seen how the American Bar Association's 1976 conference on the 'Causes of Popular Dissatisfaction with the Administration of Justice' bolstered the new consciousness about alternative ways of resolving legal disputes.<sup>60</sup> Lawyers who were first introduced to the process in mandatory court-connected mediation programs now support its use on a private, voluntary basis.<sup>61</sup>

Further, judicial mediation is a topical issue in many jurisdictions including Malawi. It is now proposed that this thesis looks at the trend towards judicial mediation. For reasons that will shortly become obvious, the discussion will start with the United States of America (the USA).

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<sup>56</sup> Menkel-Meadow 'Mothers and Fathers of Invention: The Intellectual Founders of ADR (note 8); Fiss 'Against Settlement' (note 13) at 1089 -1090; JA Scimecca 'Theory and Alternative Dispute Resolution: A contradiction In Terms?' (note 8).

<sup>57</sup> Laura Nader 'The ADR Explosion-The Implications of Rhetoric in Legal Reform' (1988) 8 *Windsor Yearbook of Access to Justice* 269 at 272.

<sup>58</sup> Ibid.

<sup>59</sup> Michael L Moffitt 'Before the Big Bang: The Making of an ADR Pioneer' (note 15); See also Menkel-Meadow 'Mothers and Fathers of Invention: The Intellectual Founders of ADR (note 8); Fiss, 'Against Settlement' (note 13); JA Scimecca 'Theory and Alternative Dispute Resolution: A Contradiction in Terms?' (note 8).

<sup>60</sup> Menkel-Meadow 'Mothers and Fathers of Invention: The Intellectual Founders of ADR (note 8); Fiss 'Against Settlement' (note 13) at 1089-1090; JA Scimecca, 'Theory and Alternative Dispute Resolution: A contradiction in Terms?'(note 8).

<sup>61</sup> Ibid.

Judicial mediation was popularised in the USA due to crushing dockets that the American courts were experiencing. By the late 1980s, largely in response to these crushing dockets, courts in the USA were beginning to adopt mediation to resolve small claims, family, and non-family civil cases. Moreover, it is noted above that in 1976, judges, lawyers, and others gathered at a conference where Harvard Professor Frank Sander delivered a telling speech on mediation. The speech is now remembered principally for its advocacy of a "multi-door courthouse" ie a variety of dispute resolution techniques that could be fit to the needs of the dispute that would include mediation.<sup>62</sup> Michael L. Moffitt records it in the following terms:

Frank Sander's 1976 speech at the Pound Conference on "The Causes of Popular Dissatisfaction with the Administration of Justice" ...is widely seen, particularly within the legal academy, as the "big bang" moment in the history of alternative dispute resolution.... At the Pound Conference, Frank articulated his observation that traditional litigation systems process only certain kinds of disputes effectively. He suggested that the remaining types of disputes might better be addressed through other mechanisms. Frank wondered aloud whether the courts of the future (in particular, courts around the year 2000) might help to screen incoming complaints, sorting them according to criteria aimed at matching the case with the most appropriate form of resolution. Within Frank's vision, some disputes would go to trial. Others would go to arbitration, to mediation, to fact-finding, or to some other mechanism well tailored for the particulars of the dispute in question. The cover of a magazine reporting on Frank's speech at the Pound Conference showed a courthouse with a series of separately labelled doors, and thus the term "multi-door courthouse" was born. From this idea, that disputes might be "processed" in different ways, the story of modern ADR explodes forward, with burgeoning activity in courthouses, in scholarship, in law school curricula, in legislation, and in practice.<sup>63</sup>

Further, it is accepted that most writers recognize the American Bar Association's 1976 conference on the 'Causes of Popular Dissatisfaction with the Administration of Justice' as the pivotal moment which gave encouragement to a new consciousness about alternative ways of resolving legal disputes.<sup>64</sup> In its wake, neighbourhood justice centres and multi-door courthouse programmes were started across the USA, legitimizing alternative ways to resolve disputes. A culture of settlement began to take root, to the extent that the American Bar Association drew attention to some problems in its 2003 "Vanishing Trial project."<sup>65</sup>

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<sup>62</sup> Michael L Moffitt 'Special Section: Frank Sander and His Legacy as an ADR Pioneer' 2006 *Negotiation Journal* 437.

<sup>63</sup> Ibid.

<sup>64</sup> Menkel-Meadow 'Mothers and Fathers of Invention: The Intellectual Founders of ADR (note 8); Fiss op cit (note 13) at 1089; JA Scimecca 'Theory and Alternative Dispute Resolution: A contradiction In Terms?' (note 8); see also Laura Nader 'The ADR Explosion-The Implications of Rhetoric in Legal Reform' (note 57).

<sup>65</sup> Marc Galanter, 'The vanishing trial: An examination of trials and related matters in federal and state courts' (2004) 1(3) *Journal of Empirical Legal Studies* 459; see also Judith Resnik 'Migrating, morphing, and vanishing: The empirical and normative puzzles of declining trial rates in courts' (2004) 1(3) *Journal of Empirical Legal Studies* 783.

## **7. Conclusion**

This chapter has defined the notion of mediation as a process in which a third party called a mediator assists disputing parties to reach their own consensual resolution of their dispute. It has also been shown that mediation has historical roots in Malawi and that there is constitutional commitment to ADR by the state. Further, the movement towards judicial mediation was examined. Additionally, there has been a brief examination of how mediation became part of the legal system in Malawi in the settlement of disputes. There was also a discussion whether the mediation adopted in the Commercial Division is mandatory or not. It has been concluded that the mediation in the Commercial Division is mandatory. Further, it is mediation that is consensual notwithstanding that it must be completed within 14 days. It is still voluntary as it is universally accepted because there is no coercion on the parties to settle.

The next chapter discusses the pertinent provisions of the Commercial Division rules as well as its mediation rules. These are critically examined to find their meaning and see whether there is anything that is lacking in them. Further, reference is made to the judicial interpretation that has been given to some of these provisions and the challenges that have arisen from such decided cases. There is also highlighted the drawback with the general division rules of mediation as they relate to the list of mediators. Thereafter, the values and perceived dangers of mediation will be discussed.

## CHAPTER 3

### MEDIATION IN MALAWI

#### 1. Introduction

This chapter will discuss the pertinent provisions of the Commercial Division rules and its mediation rules. These are critically examined to find their meaning and see whether there is anything that is lacking in them. Further, reference is made to the judicial interpretation that has been given to some of these provisions and the challenges that have arisen from such decided cases. There is also highlighted the drawback with the general division rules of mediation as they relate to the list of mediators. Thereafter, the values and perceived dangers of mediation will be discussed. It is now proposed that the relevant rules be analysed.

#### 5. The jurisdiction of the Commercial Division and the objectives which it seek to achieve

The Commercial Division rules start with setting out the rationale behind their promulgation. Under Order 1(2) of the Commercial Division rules it is provided as follows:

- (1) These Rules are a procedural code with *the overriding objective of enabling the Court to deal with commercial matters justly.*
- (2) Dealing with case justly includes, so far as is practicable –
  - (a) ensuring that the parties are on an equal footing; (b) *saving expenses*; (c) dealing with a case in ways which are proportionate – (i) to the amount of money involved; (ii) to the importance of the case; and (iii) to the complexity of the issues; (d) *ensuring that it is dealt with expeditiously and fairly*; and (e) allotting to it an appropriate share of the Court's resources, while taking into account the need to allot resources to other cases.
- (3) The Court shall seek to give effect to the overriding objective when it (a) exercises any power conferred on by these Rules; or (b) interprets any rule.
- (4) The parties shall help the Court to further the overriding objectives. [Emphasis supplied]

As it clear from this provision, the paramount purpose of the Commercial Division rules is to enable the Court to deal with commercial matters justly and fairly. Such justice and fairness can be ensured by reducing the cost of litigation as well as ensuring that cases in the Commercial Division are dealt with expeditiously. It is therefore incumbent upon litigants to help the Court realise these overriding objectives. Further, in terms of Order 1(3), of the said rules, the Commercial Division is enjoined to further its overriding objective by actively

managing cases. In Order 1 (2)(e) and (f) of the said Rules, active case management has been defined as including encouraging parties to use an alternative dispute resolution procedure if the Court considers that appropriate. It further includes facilitating the use of such procedure and helping the parties to settle the whole or part of the case.

According to Order 1(4) the Commercial Division rules are intended to apply to all proceedings in the Commercial Division. In addition, the rules state that no commercial matter over which the Commercial Division has jurisdiction should be commenced in any other Court or Division.<sup>66</sup> Order 1(5) of the Commercial Division rules define a “commercial matter.”<sup>67</sup>

Order 1 (6) states that for the Commercial Division to assume jurisdiction the commercial matter must concern an amount or the subject matter of a value worth not less than one million Malawi kwacha. Where the matter concerns bankruptcy, winding up of a company or other applications related to commercial matters, the amount in dispute or value of the subject matter shall not matter. In *The Liquidator of Finance Bank Ltd v Kadri Ejaz Ahmed and Sheith Aziz Issa*,<sup>68</sup> the Malawi Supreme Court of Appeal held that the jurisdiction conferred by Order 1 (4) as read with and Order 1 (6) of the Commercial Division rules exists only for the purpose of promoting good case management practice. It continued to hold that these rules do not seek to oust the jurisdiction conferred on the general division by Section 108 of

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<sup>66</sup> The full provision of Order 1(4) is as follows: “(1) These Rules shall apply to all proceedings in the High Court (Commercial Division) and all other rules of practice and procedure shall apply to those proceedings subject to the provisions of these Rules. (2) Subject to Order 1(3) no proceedings shall be commenced in the Commercial Division unless the same relates to a commercial matter. (3) No commercial matter over which the Commercial Division has jurisdiction in terms of these Rules shall be commenced in any other Court or Division of the High Court.”

<sup>67</sup> The relevant part of Order 1(5) is as follows: “...commercial matter” means a civil matter of commercial significance arising out of or connected with any relationship of commercial or business nature, whether contractual or not, including but not limited to—

- (a) the formation or governance of a business or commercial organization;
- (b) the contractual relationship of a business or commercial organization;
- (c) liabilities arising from commercial or business transactions;
- (d) the restructuring or payment of commercial debts;
- (e) the winding up of companies or bankruptcy of persons;
- (f) the enforcement or review of commercial arbitration award;
- (g) the enforcement of foreign judgments of commercial matters subject to the provisions of the law;
- (h) the supply or exchange of goods and services;
- (i) banking, negotiable instruments, international credit and similar financial services;
- (j) insurance services; or
- (k) the operation of stock and foreign exchange markets.

In the event of any doubt as to whether a matter is commercial or not, the Judge at the outset or during the course of the action, shall have power to resolve the issue of opinion and the Judge’s decision shall be final...”

<sup>68</sup> MSCA Civil Appeal No.39 of 2008, 24 November 2009, unreported.

the Republic of Malawi Constitution.<sup>69</sup> In their judgment, the Malawi Supreme Court of Appeal observed as follows:

It may be necessary to make it abundantly clear that we are unable to accept the view taken by Potani J., in the case of *Aziz Mahomed Issa and Another v. New Building Society Bank* Civil Cause No. 2860 of 2008, unreported. In that case the learned Judge said: - '*In conclusion, the present matter is a commercial matter suitable for determination by the Commercial Division which has exclusive jurisdiction.*' The learned Judge came to that conclusion following his interpretation of and giving effect to Order 1 (4) (3) of the High Court (Commercial Division) Rules. The court believes that the scheme of section 108 of the Constitution was to give unlimited power to every judge of the High Court to hear and determine any case. To empower a sub rule of the Commercial Division to take away such power by excluding the majority of the High Court judges from exercising jurisdiction over commercial matters would be tantamount to amending or modifying a provision of the constitution by a sub- rule of a Commercial Division of the High Court. What will remain of the unlimited trial jurisdiction of the High Court once divisions of the High Court such as the Family Division, Criminal Division, administrative Law Division and Employment Law Division are created and similar sub rules are in place? This court takes the position that Order 1 (4) (3) has a tendency to undermine the basic principles and values of our constitution, if interpreted and given effect in the manner Potani J., did. We find that approach unacceptable.<sup>70</sup>

Accordingly, as matters stand now, the relevant provision of Order 1 (4) of the Commercial Division rules do not give the Commercial Division exclusive jurisdiction over commercial matters.

While this decision is constitutionally sound and valid, it did not articulate very clearly what the relationship between the general division of the High Court and the Commercial Division. In substance, the Commercial Division does not limit the jurisdiction of the High Court as it is the High Court itself. Rather, for administrative reasons, it would be rational to encourage litigants to commence proceedings concerning commercial matters first in the Commercial Division. Otherwise the whole underlying principle of creating this division will be defeated. This rationale relate to the advantages of a specialised court alluded to above and its constitutional function to encourage litigants to resolve matters amicably and using ADR methods.

Further, the objective for which the Commercial Division was established, namely, encouraging parties to use an alternative dispute resolution procedure in the settlement of

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<sup>69</sup> Section 108 of the Republic of Malawi Constitution provides as follows:

“(1) There shall be a High Court for the Republic which shall have unlimited original jurisdiction to hear and determine any civil or criminal proceedings under any law.

(2) The High Court shall have original jurisdiction to review any law, and any action or decision of the Government, for conformity with this Constitution, save as otherwise provided by this Constitution and shall have such other jurisdiction and powers as may be conferred on it by this Constitution or any other law.”

<sup>70</sup> *The Liquidator of Finance Bank Ltd v Kadri Ejaz Ahmed and Sheith Aziz Issa* MSCA Civil Appeal ( note 68) at pages 7-8

commercial disputes is being defeated or thrown in disarray. Actually, following this decision the path that the Malawi Judiciary had taken of establishing specialised courts and encouraging specialisation is in serious doubt. The advantages of encouraging speedy disposal of cases and therefore reducing litigation costs have been jeopardised.

Thus the provision in Order 1(6) must be read together with Order 1(4) if one is to understand the jurisdiction of the Commercial Division. The meaning of these two rules has already been discussed above in *The Liquidator of Finance Bank Ltd v Kadri Ejaz Ahmed and Sheith Aziz Issa*.<sup>71</sup> In light of what the Malawi Supreme Court of Appeal has said, and my comment on same, it is not necessary that the views expressed above should be repeated here. Suffice to say that this case holds that the Commercial Division does not have exclusive jurisdiction over all commercial matters. Any benefits disputants could therefore have of mediation by judges in the Commercial Division are therefore thrown away. Professor Danwood M Chirwa raises a similar debate in relation to the jurisdiction of the Industrial Relations Court in Malawi.<sup>72</sup> He rightly argues that specialised courts should not be undermined on the excuse that the High Court of Malawi has unlimited jurisdiction.<sup>73</sup>

## 6. The mediation procedure

As stated earlier in chapter two, the Chief Justice, in exercise of the powers conferred by section 67 of the Courts Act, promulgated the Commercial Division mediation rules.<sup>74</sup> As regards their application, Rule 2 states that "subject to Rule 3 the rules shall apply to all proceedings commenced by way of Writ of Summons in the Commercial Division." The Commercial Division here means the division of the High Court dealing with commercial matters.

Order 5 (4) of the Commercial Division mediation rules provides that the mediation shall take place after the close of pleadings. In Malawi, pleadings are deemed to be closed when the

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<sup>71</sup> (note 68)

<sup>72</sup> DM Chirwa, *Human Rights under the Malawian Constitution* (Cape Town: Juta & Co, Ltd, 2011) 331-335. (Discussing the troublesome legal issue of the proper forum for determining employment cases arising from a reading of ss108 (1) and 110(2) of the Constitution).

<sup>73</sup> Ibid.

<sup>74</sup> Government Notice Number 6 of 20 April 2007

parties to the dispute have filed their claim and defence and/or counterclaim and reply to counterclaim. This typically happens between one to four months after issuing the Writ of Summons.<sup>75</sup> More specifically, Order 5 (5) of the Commercial Division mediation rules states that mediation shall take place within seven days from the time the pleadings are closed and the matter should proceed to mandatory mediation. For purposes of mediation all parties are required to lodge statements of mediation as provided for by Rule 6 of the Commercial Division mediation rules.

Respecting the actual procedure that must be observed, Order 5 (6) requires a Judge within two days from the time the pleadings are closed to issue a notice to the parties advising them of the date of the mediation session. Further, this order stipulates that the mediation session must in any event not to be held more than 21 days from the date the pleadings are closed. During mediation the Judge-Mediator together with the disputants must explore the possibility of settlement. At this stage there is no adjudication of the matter on its merits although parties together with their lawyers as well as the witnesses appear the Judge-Mediator. As regards the lawyer's role, it is to confer and give legal advice to the instructing party. The lawyers are not expected to actively participate in the mediation process as they normally do during trial. The disputants, and their witnesses if any, give a narrative of their interests and needs but neither of them gives the said narrative under oath nor are they examined or cross examined. Hearsay evidence is accepted. This, in my judgment, is meant to ensure that cases in the Commercial Division are dealt with expeditiously without the delay that is associated with litigation and that the Court realises the overriding objective for which it was established.

However, there are administrative challenges that come with Order 5 (5) and (6) of the Commercial Division mediation rules. Firstly, the notices are not issued by the judges personally but through their respective clerks or the Assistant Registrar. Thus, monitoring on whether a notice has in fact been issue is not easy. This leads to delayed commencement of mediation process. Secondly, it has not been easy to ensure that there is a mediation process commencing before a Judge within two days from the closure of pleadings and that mediation takes place within seven days from the time the pleadings are closed. This then raises the question whether a mediation that is held after the lapse of two day is still valid or should be considered a nullity. It is suggested that to circumvent the problem the Judge should cause the

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<sup>75</sup> Order 3(6) and (7) of the Commercial Division rules.

matter to be called to consider extending the period. This will to ensure that the Judge does not lose the jurisdiction to mediate in the matter. The Judge-Mediator should then, on such terms as are deemed just, extend the period within which parties are required or authorised to appear for mediation. The absence of any rule allowing the issuance of a notice after the two days creates a problem.

In sum, there is need to review the provisions of Order 5 (5) and (6) of the Commercial Division mediation rules. This will ensure that mediation does not take place outside the allowed time-frame. Put differently, the review will ensure that there is no doubt as regards the issuance of a notice after the period allowed under the said Order 5 (5) and the commencement of mediation within seven days from the time the pleadings are closed under order 5(6) of the said mediation rules.

#### **4. The nature of the mediation and the role of the judges**

As stated earlier in chapter one, the rules do provide for exemption from mediation of certain matters. In other words not all proceedings before the Commercial Division go through mediation process. Thus, Rule 3 provides that the rules shall not apply to proceedings in either of the following instances: where by law or practice the trial is expedited; or where there is an application for Summary Judgment or Judgment on Admissions; or where the Court makes an order on an application by a party requesting the Court to exempt the action from these Rules; or where the Court, in its discretion, so orders.

However, Rule 4 then states that all proceedings to which the Rules apply should first go through mediation in accordance with the said Rules. Thus, making mediation in the Commercial Division a mandatory process. As regards the type of mediation that should be conducted by the Judge, Rule 5(1) of the Commercial Division mediation rules is apt. It states that in conducting any mediation session under the Rules the parties shall strive to reduce cost and delay in litigation, and facilitate an early and fair resolution of disputes; and the Judges are called upon to facilitate communication between or among the parties to the dispute in order to assist them in reaching a mutually acceptable resolution.

#### 4.1 The nature of the mediation

Rule 5(2) of the Commercial Division mediation rules regulates the nature of nature of mediation and the role the judges are expected to perform. According to rule 5(2) (a), the Judge-Mediator is expected to assist the parties resolve their dispute in an independent and impartial manner. Rule 5(2) (b) calls upon the Judge-Mediator to conduct joint or separate meetings with the parties and is expected to make recommendations for a settlement.

In terms of Rule 5(2) (d) the Judge-Mediator is to be guided by principles of objectivity, fairness and natural justice, and should give consideration to, among other things-(i) the rights and obligations of the parties; (ii) the usages of the trade concerned; and (iii) the circumstances surrounding the disputes, including any previous business practices between the parties. Rule 5(2)(e) allows the Judge-Mediator to consider and take into account, at any stage of the mediation proceedings and in a manner that is appropriate, the wishes of the parties, including any request by either of the parties that the Judge should hear oral statements for a speedy settlement of the dispute. Finally, in terms of rule 5 (2) (f) the Judge-Mediator may, at any stage of the mediation proceedings, make proposals for the settlement of the dispute.

The rules do not dictate the type of mediation that should be conducted by judges. There is no empirical evidence regarding the type of mediation that is conducted by the Judges at the Commercial Division. Thus, as Judge-Mediator I was intuitively inclined to conduct an evaluative type of mediation because parties were allowed to be represented by Counsel at such proceedings. Accordingly, if the parties raised legal issues, as Judge-Mediator I considered offering a legal opinion. This is in the nature of the work of Judges who adjudicate.

Although the rules do not prescribe a rigid form of mediation, they do suggest a composite form that involves various strands of mediation. According to Rule 5(1) of the Commercial Division mediation rules, the rules do not exclude an evaluative type of mediation. This is more so when judges are expected to make recommendations for a settlement; to take into account the wishes of either of the parties; where appropriate, to hear oral statements for a speedy settlement of the dispute; and may, at any stage of the mediation proceedings, make proposals for the settlement of the dispute. This should intuitively make them go the evaluative route but at the same time appear to adjudicate. It is therefore a mixture of both

evaluative and facilitative mediation. This can cause confusion to both the Judge-Mediators and the disputants.

The authority to settle is a matter of paramount importance in mediation proceedings. Thus, Rule 8 (1) of the Commercial Division mediation rules states that a party to a mediation session shall have authority to settle any matter during the mediation session. Further, Rule 8 (2) of the Commercial Division mediation rules provides that a party requiring the approval of another person before agreeing to a settlement should, before the mediation session begins, arrange to have ready means of communicating to that other person throughout the session. This is whether the mediation takes place during or after regular business hours.

Generally, this Rule 9 is innocuous and sets out some kind of ground rules of mediation. It could be argued that Rule 9 has nothing to do with the voluntariness of mediation as it only provides that if there is non-appearance before mediation proceedings a litigant incurs costs or risks an action or defence being struck out. Further, it might be said that this Rule does not deal with mediation *per se* as attendance at a mediation hearing does not require one being compelled to reach an agreement. However, this Rule should be seen in light of the fact that it regulates the nature of mediation in the Commercial Division. It runs counter to the voluntariness of a mediation process. The power that the Judge-Mediator exercises to order the dismissal of an action; strike out of the defence; or to order payment of costs should be used when a Judge-Mediator is exercising adjudicative functions. This is more especially when the action or defence can be struck out without a trial of the action on its merits. It is an outlandish penalty to be imposed when the action is liable to be dismissed or the defence struck out on account of failure to attend mediation. The rule does not say what type of costs are payable. The Rule could have been better if it described the nature of expenses to be imposed on the defaulting disputant rather than just say a Judge-Mediator may impose costs. As the costs are not defined, one is left wondering whether these are party and party costs or they are the client and own lawyer costs. The latter can only be done when the Judge-Mediator is wearing the hat of a Judge and there is a trial or a hearing. However, as said earlier, possibly this is done because of the mandatory nature of the mediation in the Commercial Division.<sup>76</sup> It is also done so as to ensure that there is expeditious disposal of

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<sup>76</sup> *National Bank of Malawi v Msindo*, Commercial (note 53) (It is mandatory as the disputants do not have any choice whether or not to attend mediation.)

commercial disputes and thereby reduce costs. Ronan Feehily<sup>77</sup> actually advises that if you have parties that are unwilling and reluctant to settle the threat of imposition of costs so as to cut the costs of commercial litigation is required.<sup>78</sup> Ronan Feehily further observes that in England the Judiciary changed its approach to case management by encouraging parties to settle through the use of costs sanctions.<sup>79</sup> It is trusted that by providing for the imposition of costs the mediation rules will “encourage” parties to settle. Therefore, Rule 9 should be retained so as to encourage settlement through mediation.

It must be added that at the Commercial Division, if mediation fails, all documents along with notes used during mediation are removed from the court file. This is done before the Clerk of the Court takes the docket to another judge for the trial of the action. The removal of all documents and the Judge-Mediator’s notes is to retain the confidentiality of the process. Rule 10 of the Commercial Division mediation rules provides for the confidentiality of the mediation process. Such confidentiality applies to all communications at a mediation session and the mediation notes and records of the Judge. Jonathan M. Hyman<sup>80</sup> observed that if there was no confidentiality rule in mediation:

People would be reluctant to mediate if they envisioned going through the gruelling and time consuming experience of being questioned later about what happened during the mediation....If they believed that their statements made during mediation were being held in confidence, but subsequently discovered that the statements were to be used against them, they would feel betrayed. This would promote distrust of the mediation process, which in turn would be extremely detrimental to its effectiveness; the participants must have confidence in the process if the mediation is to be successful.<sup>81</sup>

He further argues that where confidentiality is compromised, disputants find it difficult to successfully settle hence diminishing the availability and effectiveness of a mediation process results in injustice.<sup>82</sup> It is accordingly argued that mediation does serve justice as it allows disputants to reach a fair and just result to their dispute with less cost and aggravation than litigation.<sup>83</sup> Under the Commercial Division mediation rules the rationale of the

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<sup>77</sup> Ronan Feehily ‘Costs Sanctions: The Critical Instruments in the Development of Commercial Mediation in South Africa’ (2009) 126 *South African Law Journal* 291.

<sup>78</sup> *Ibid.*

<sup>79</sup> *Ibid.*

<sup>80</sup> Jonathan M Hyman ‘The Model Mediator Confidentiality Rule: A Commentary’ (1988-1989) 12 *Seton Hall Legislative Journal* 17.

<sup>81</sup> *Ibid.* 21.

<sup>82</sup> *Ibid.* 42.

<sup>83</sup> *Ibid.* 42.

confidentiality rule has been retained.<sup>84</sup> The confidentiality rule is retained so as to ensure that people are not disinclined to mediate.

Further, there is in Rule 10 (2) (b) (ii) of the Commercial Division mediation rules protection given to the Judge-Mediator. This is in keeping with the protection that mediators should be given if they are to handle the process freely. Further, the rule protects the process, the parties and the Judge-Mediator from being used for ulterior ends. The rule explicitly creates immunity for mediators and the mediation process itself. It is recommended that this rule must be retained. Its retention is consistent with the general law of mediation.

#### **4.2 The role of the Judges**

Rule 5 (2) (c) of the Commercial Division mediation rules prescribe the role of the Judge-Mediator. It charges the Judge-Mediator with the responsibility of requesting for the services of an expert. This is to be done should the Judge-Mediator require such service or if any party, with the consent of the other party or parties, requests such service. This rule is apparently the answer to the issue of qualification of Judges a mediators but it comes with a price. If services of an expert are required, such services may be obtained at a cost, and parties should agree to pay such costs or expenses. Yet mediation is meant to serve justice by allowing the disputants reach a fair and just result to their dispute with less cost and aggravation than litigation.

The Judge-Mediator in the Commercial Division wields a lot of powers to coerce compliance with the mandatory nature of the mediation. For example, Rule 9 stipulates that if it is not practical to conduct a scheduled mediation session because a party fails without good cause to attend within the time appointed for the commencement of the session, the Judge-Mediator may either: (a) dismiss the action, if the non-complying party is a Plaintiff, or strike out the defence, if the non complying party is a Defendant; or (b) order a party to pay costs; or (c) indeed make any other order that is deemed just.

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<sup>84</sup> The application of the rule as regards the confidentiality of the process of mediation was applied in the cases of *JF Investments Limited v First Merchant Bank Limited* : Commercial Case No. 55 of 2010, 19 March 2010, unreported; *Trust Securities Ltd. v Finance Bank of Malawi (In Liquidation)* (HC) Commercial case No. 51 of 2007, unreported.

The responsibility to draw the settlement agreement rests on the Judge- Mediator. This is the case notwithstanding the fact that the parties are allowed to appear with their advocates/ lawyers. This is what is portrayed by Rule 11 of the Commercial Division mediation rules. Rule 11(1) states that where it appears to the Judge that there exist elements of a settlement which may be acceptable to the parties, the Judge-mediator should formulate the terms of a possible settlement and submit them to the parties for their consideration. And, after receiving the observations of the parties, the Judge-Mediator can reformulate the terms of a possible settlement in the light of those observations and resubmit them to the parties as it appears to him expedient. According to Rule (2) (a) and (b), if the parties reach agreement on a settlement of the dispute, the Judge-Mediator should immediately draw up a settlement agreement in conjunction with the parties; and the parties are expected to sign the settlement agreement in the presence of each other. The Judge-Mediator should also sign the settlement agreement in the presence of the parties. Then Rule 11(3) requires the Judge-Mediator to furnish a copy of the signed settlement agreement to each of the parties and the agreement is deemed to be a judgment of the Court and may be enforced as such. Finally, Rule 11 (4) stipulates that no appeal shall lie against a signed mediation settlement agreement under Rule 11 (3).

It must be added that, although it is the duty of the Judge-Mediator to draw the settlement agreement, the agreement can as well be drawn by the advocates/lawyers under the supervision of the Judge-Mediator. This is the case notwithstanding the use of the word “shall”. Further, it would appear that the provision states that once a settlement is reached a party to mediation proceedings may find that there are no avenues to correct any errors the Judge-Mediator might have committed. This is in keeping with the settled general law that says that a consent agreement can only be set aside through the institution of a separate cause of action suit and if a party proves, inter alia, that there was fraud. The above notwithstanding this rule should be construed in light of what generally obtains at law. It is settled law that a judgment by consent cannot, after it has been passed and entered, be set aside under this rule on the ground that the consent was given under a mistake<sup>85</sup> but it can be set aside in a fresh action for the purpose on grounds that would suffice to set aside a contract.<sup>86</sup> Further, it is

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<sup>85</sup> *Ainsworth v Wilding* [1896] 1 Ch 673; *Kinch v Walcott* [1929] AC 482

<sup>86</sup> *Wilding v Sanderson* [1897] 2 Ch 534 (CA).

noteworthy to point out that, in terms of Rule 11 (3) of the Commercial Division mediation rules, the signed settlement agreement of the parties is deemed to be a judgment of the Court and may be enforced as such. Thus, the court could still feel inclined to use its coercive powers to assist in the enforcement of a settlement as it would have done if there was judgment after a full trial by upholding the doctrine of estoppel. In addition, it is settled law that a judgment by consent is binding until set aside, and acts as an estoppel<sup>87</sup> but if an agreement is, by consent, embodied in a Judge's order, but if no judgment is signed, there is no estoppel.<sup>88</sup> However, no order made by consent of parties is appealable without leave but a consent order can be set aside in an action commenced for the purpose on any ground that would invalidate an agreement.<sup>89</sup> Further, it must be noted that if consent has been given by mistake then it may be withdrawn at any time before the judgment is passed and entered.<sup>90</sup> Nevertheless, it is important to remember that when a final judgment has been passed and entered, the Court cannot set it aside unless a fresh action is brought for that purpose although it has been entered by mistake.<sup>91</sup> A Court therefore has no power to vary a consent judgment or order made previously in that Court. Thus, the only means open to a party to set aside a consent judgment or order on the ground of fraud or mistake is to bring a fresh action for that purpose.<sup>92</sup> The rule is that a consent given by authority of the client cannot be arbitrarily withdrawn unless there has been a mistake or surprise.<sup>93</sup> Further, it is must be understood that at law if a party applies to have a consent order set aside on the ground that it was made without consent, and the application is made either before or contemporaneously with its being perfected, the court has a discretion to set aside the order where grave injustice would be done by allowing it to stand.<sup>94</sup> It is also important to realise that a judgment obtained by consent cannot be set aside, at the instance of either the Plaintiff or Defendant, to the prejudice of a third party.<sup>95</sup> Finally, it should nonetheless be pointed out that at law a party cannot arbitrarily get out of a consent order but such an order, even if approved by the Court,

<sup>87</sup> *Kinch v Walcott* [1929] AC 483; *Re S. American, etc., Co.* [1895] 1 Ch 37; *Stewart v Kennedy* (1890) 15 AC 108, and *Wilding v Sanderson* [1897] 2 Ch. 534; *Law v Law* [1905] 1 Ch 140 (CA).

<sup>88</sup> *Rice v Reed* [1900] 1 QB 54.

<sup>89</sup> *Huddersfield B. Co. v Lister* [1895] 2 Ch 273 (CA); *Re S. American, etc., Co.* [1895] 1 Ch 37(CA).

<sup>90</sup> *Holt v Jesse* (1876) 3 Ch 177; *Rogers v Horn* (1878) 26 WR 432; *Lewis v Lewis* (1890) 45 Ch 281; *Hickman v Berens* [1895] 2 Ch 638; *Stewart v Kennedy* (1890) 15 AC 75, 108; *Neale v Gordon-Lennox* [1902] AC 465; *Moore v Peachey* (1892) 66 L.T. 198, (where a garnishee order made by consent was set aside; *Shepherd v. Robinson* [1919] 1 KB 474 (CA), applying *Holt v Jesse*, above and distinguishing *Strauss v Francis* (1866) LR 1 QB 379.)

<sup>91</sup> *Ainsworth v Wilding* [1896] 1 Ch 673; *Wilding v Sanderson* [1897] 2 Ch 534; *Huddersfield B. Co. v Lister* [1895] 2 Ch 273 (CA) (but compare with the judgment of Lord Lindley, *Neale v. Gordon-Lennox*, above).

<sup>92</sup> *de Lasala v de Lasala* [1980] AC 546

<sup>93</sup> *Harvey v Croydon R.S.A.* (1885) 26 Ch 249; *Elsas v William* (1885) 52 LT 39

<sup>94</sup> *Marsden v Marsden* [1972] 2 All ER 1162(CA).

<sup>95</sup> *The Bellcairn* (1885) 10 PD 161.

may be set aside where it appears that the consent was given under a misapprehension or upon a misrepresentation, however innocent, or from want of materials. This is provided that the order has not been perfected.<sup>96</sup>

In sum, a Judge-mediator is advised that Rule 11 of Commercial Division mediation rules should not be read in isolation of the general law. The position is not simply that once a settlement is reached a party to the mediation proceedings has no avenues to correct any errors the Judge-Mediator might have committed. A consent agreement can be set aside notwithstanding rule (4) saying that no appeal shall lie against a settlement agreement under Rule 11 (3) where a copy of the signed settlement agreement is deemed to be a judgment of the Court.

Further, the rules provide for situations where there is failure to reach an agreement, and the duration of the mediation. It is provided in Rule 12 that if at the conclusion of mediation no settlement agreement is reached, the action should be referred to another Judge. The other judge should then continue with the proceedings from the point where and at which the action was referred for mediation. Moreover, pursuant to the principle that matters at the Commercial Division are handled expeditiously, Rule 13 states that a mediation period shall not exceed a period of 14 days from the date of the first session of mediation. The question that vexes the mind is what should happen in the event that that the period of 14 days has expired but there is still a chance that the disputants will reach a settlement. Should the Judge-Mediator terminate mediation or extend the period? If there is an extension will the settlement reached therefrom be valid or be considered a nullity on the ground that it was reached outside the requisite 14 days? This need rule needs revisiting this so that it provides for an extension of the period of mediation. Alternatively, this rule should be made clearer so that disputants and the Judge-Mediator are advised of the consequences of proceeding with mediation outside the 14 days period.

Finally, Rule 14(1) of the Commercial Division mediation rules instructively states that mediation shall end when:

- (a) the parties execute a settlement agreement; (b) the Judge cancels a mediation session....for non-compliance on the part of any party; (c) the Judge, after consultation with the parties, makes a declaration to the effect that further mediation is not worthwhile; (d) the parties jointly address a declaration to the Judge that the mediation is terminated; or (e) a party makes a declaration to the Judge and the other party to the effect that the mediation is terminated.

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<sup>96</sup> *Dietz v Lennig Chemicals Ltd.* [1969] 1 AC 170 (HL).

It must be added though that, in terms of Rule 14(2) of the Commercial Division mediation rules, an end to mediation must be witnessed by a declaration in writing or orally. However, where the declaration is made orally then the Judge-Mediator should record it in writing.

The discussion above, of the two sets of rules governing the procedural law in the Commercial Division shows that the Judge is at the centre of things. The Judge drives the pace as well as the process of litigation and facilitates the settlement of commercial disputes through the process of mediation. Both mediation and litigation is Judge driven to ensure that the cases that are filed at the Commercial Division are disposed of efficiently and speedily.

## **5. Active mediators and mediation training**

In Malawi, for one to be a mediator there is no need for a person to be a certified mediator or to undergo any formal training. There is no professional body that regulates or licenses who can be a mediator. It is well to observe though that at the Law School of the University of Malawi, mediation is taught as part of the law of Civil Procedure. It is however focused on the Courts (Mandatory Mediation) Rules of the General Division. Thus, ADR is taught in Clinical Legal Education. However, mediation is not taught as a foundational course in the legal studies at the said Law School.

In the High Court of Malawi it does not require special training for one to become a mediator. There is no institution that accredits or examines people to be recognised as mediators. Further, in the Commercial Division the default position is that the Judges of the division become mediators on account of their position as Judges of the Commercial Division. However, in the General Division there is a mixture of mediators from different disciplines. It should be added though that there has been no rigorous research into the question of the effect of the professional origin or substantive knowledge or skill as a mediator in the types of cases that have been dealt with at the General Division. In addition, there has been no empirical investigation to find out who disputants prefer between Judge-Mediators or the other mediators that obtain under in the mediation process in the General Division.

Nevertheless, in the Commercial Division for one to qualify as a mediator one needs to be a Judge of this division. Except for short courses on mediation, Judges of the Commercial Division have not received extensive training on commercial mediation. These short courses

were actually during the early days of the establishment of the division when the World Bank sponsored judges to undergo short training courses on mediation. The funding from the World Bank has since stopped. The new Judges assigned to this Court will have to learn how to mediate on their own.

For the General Division, under section 67 of the Courts Act G.N. 9/2004, the process is not facilitated by judges but other people other than the current sitting Judges of the general division. In this division, pursuant to Rules 7, 8 and 9 of the Courts (Mandatory Mediation) Rules, the Assistant Registrar, with the approval of the Chief Justice, compiles and maintains a list of mediators and a list of experts. There is every reason to believe that maintaining a list of experts in various fields was intended to show that the Chief Justice wanted to tap from their expertise should that be required in the cases that come before the general division. Therefore, one's attention is drawn to General Notice 74 that lists the former Chief Justices; former Judges; Accountants; Lawyers; Chartered Insurers; Bankers; Management Strategist; Business Management Experts; and Economist and interestingly members of the Clergy, as those who may qualify to be mediators. However, it is observed that the list of current mediators from the ADR Registry is very old. Further, the list has some non active members. The only active mediators as at the time of writing this thesis were as follows: 1. Mr. I. Kamunga of P & S Associates; 2. Martha Kaukonde of Nampota & Company; 3. Mr Masiku of Russel & Smith; 4. Mr Gulumba of Naphambo & Associates; 5. Mr Mumba of Golden & Law; 6. Mr L. Kwakwala of Kwakwala & Agatha Associates. This is the hazard of putting the list of mediators in legislation. The statutory approach of listing the active mediators does not allow for the rules to respond to changing needs. The list is associated with delays that typically go with amendment of legislation.

In addition, rather interestingly and unfortunately, all these current mediators are lawyers. This observation is made in light of the fact that it was envisaged that mediators in the general division would be from a pool of former Judges; Accountants; Lawyers; Chartered Insurers; Bankers; a Management Strategists, Business Management Experts; and Economists and interestingly members of the Clergy.<sup>97</sup> However, the list of the active mediators in the General Division clearly shows that it is not a reflection of what the rules say as there are

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<sup>97</sup> Rules 7, 8 and 9 of the Courts (Mandatory Mediation) Rules indicate that the Assistant Registrar shall, with the approval of the Chief Justice, compile and maintain a list of mediators and a list of experts. See General Notice 74 that lists former Chief Justices, former Judges, Accountants, Lawyers, Chartered Insurers, Bankers, a Management Strategist, A Business Management Expert, and Economist and interestingly members of the Clergy.

only lawyers in the list of active mediators. Further, it is clear that those entrusted with the responsibility of compiling and maintaining a list of mediators have not been doing their work. It is time for the responsible Assistant Registrar, with the approval of the Chief Justice; to do something about this otherwise the picture painted is that the Malawi Judiciary is not serious about mediation in the general division.

Further, it is noted that there is a difference in the mediation process obtaining in the general division and the Commercial Division. These two divisions, as was held by the Malawi Supreme Court, have the same jurisdiction as their being referred to by different names is merely administrative.<sup>98</sup> However, the two divisions apply two different sets of rules of mediation. In the Commercial Division, mediation is facilitated by Judges. While in the General Division, under the Courts (Mandatory Mediation) Rules made under Section 67 of the Courts Act G.N. 9/2004, the process is not facilitated by current sitting judges but former Judges as well as other people.<sup>99</sup> Why this difference? There is no rationale behind the difference in the mediation process obtaining in the general division and the Commercial Division. The other issue that arises is whether the Judges who facilitate mediation proceedings in the Commercial Division are better suited to mediate than those in the general division.

It has been noted earlier that no formal training is required for one to be a successful mediator. Indeed, one need not be an expert in a particular field to mediate on matters that are mediated by Judges. However, there is a school of thought that is of the view that mediators should acquire knowledge of the mediation process, including ethics, standards and responsibilities.<sup>100</sup> Further, it is contended that just as is the case with many professions, the practice of mediation changes and advances hence a mediator is encouraged to participate in continuing education activities to maintain professional competence.<sup>101</sup>

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<sup>98</sup> *The Liquidator of Finance Bank Limited (in voluntary liquidation) v Kadri Ejaz Ahmed and Sheith Azizi Issa* (MSCA) Civil Appeal No. 39 of 2008, unreported.

<sup>99</sup> In the Commercial Division mediation is conducted by Judges of that Court whereas under Rule 7, 8 and 9 of the Courts (Mandatory Mediation) Rules which the General Division follow demonstrate the difference in treatment as regards who may facilitate the mediation. Rules 7, 8 and 9 indicate that the Assistant Registrar shall, with the approval of the Chief Justice, compile and maintain a list of mediators and a list of experts. See General Notice 74 that lists former Chief Justices, former Judges, Accountants, Lawyers, Chartered Insurers, Bankers, a Management Strategist, a Business Management Expert, and Economist and interestingly members of the Clergy.

<sup>100</sup> Robert B Moberly 'Ethical Standards for Court-Appointed Mediators and Florida's Mandatory Mediation Experiment' (1993-1994) 21 *Florida State University Law Review* 701 at 717.

<sup>101</sup> *Ibid.* 718.

What should one make of what obtains in Malawi especially at the Commercial Division? It is noted that Rule 5(2) of the Commercial Division mediation rules allows the Judge-Mediator to request for the services of an expert should the Judge-Mediator require such service or if any party with the consent of the other party or parties so requests such service. Rule 5(2) (c) of the Commercial Division mediation rules is perhaps the answer to the issue of qualification of Judges as Mediators. But, as noted earlier, this rule comes with a price. The services of an expert if required may be obtained at a cost, and parties would have to agree to pay such costs or expenses. However, the question then becomes does the calling of experts not amount to making mediation expensive? It must be remembered that mediation is touted as being inexpensive compared to litigation.

## **6. The role of mediation**

Mediation process fulfils various fundamental values. These include participation, which allows the parties take an active role in finding a solution to the dispute. Dignity, which requires that disputants treat each other with a lot of respect and decorum. That is participatory and being listened to as there is not much note taking during mediation. Autonomy, which accords the disputants a sense of ownership of the process of settlement of the disputes.<sup>102</sup> And, accountability, whereby disputants hold each other accountable to an impartial third party. The undertaking that disputants make not to discuss what went on during settlement negotiations builds trust between the disputants as well as a sense of being accountable to the mediator. These assist in ensuring that parties settle their dispute by developing a momentum towards settlement.<sup>103</sup>

In addition to other fundamental values, mediation fulfils a number of roles. First, it facilitates peaceful settlement to disputes. Second it is cost effective in that it reduces time disputants spend litigating in courts. Third, these days lawyers do not sue anyhow. They have realised that suing can be expensive and time-consuming.<sup>104</sup> Thus, litigants are knowledgeable that their lawyer has an open mind about alternative means to resolve a problem such as through mediation which is said to be less expensive and not time consuming. It is observed by Bobbi McAdoo that just like in bankruptcy, the use of certain "traditional neutrals", as for example custody investigators, referees, conciliators, costs of

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<sup>102</sup> Julie Macfarlane 'Why Do People Settle?' (note 36)at 696-700

<sup>103</sup> Ibid. 700

<sup>104</sup> Ibid. 704-707

litigation have been curtailed in many jurisdictions as the judiciary has since developed a preference for the consensual and flexible process of mediation.<sup>105</sup> Further, Bobbi McAdoo has rightly and particularly commented that: "there is no question that many judges perceive mediation as a dispute resolution process in which clients are given the opportunity to be active participants in negotiated solutions, and that these solutions may be better and more durable than those reached in the litigation process without mediation."<sup>106</sup>

Although mediation has these benefits, judges have raised concerns regarding court connected mediation.<sup>107</sup> Bobbi McAdoo observes that no cogent data is available to show that the settlements that have come about are a result of the court-connected mediation and whether the settlements in these courts connected mediations justify the need to encourage judges to use mediation as an alternative to dispute settlement.<sup>108</sup> Bobbi McAdoo contends that there is no way of telling the added costs of mediation.<sup>109</sup> Thus, it is suggested by him that the court rules should allow parties to elect not to participate in mediation notwithstanding there being a mandatory mediation.<sup>110</sup> He further cautions that court mediated settlement should ensure that the process itself is monitored so that it is seen to promote justice and not injustice for the parties.<sup>111</sup> He adds that a good ADR mechanism is one that encourages the monitoring and evaluation of the process of mediation in the area of the number of cases that are going through mediation; the result of the mediation; feedback from the attorney and clients; whether or not the settlements are not as a result of coercion and not appreciation by the clients.<sup>112</sup>

However, as shall soon be demonstrated below, notwithstanding the above views respecting the values implicit in the mediation process, others are of the contrary view. It is said that a mediation process, which is consensual and more like a private settlement of a dispute, has shortcomings. This is more especially to be found in the arguments of Owen Fiss<sup>113</sup> who

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<sup>105</sup> Bobbi McAdoo 'All Rise, the Court Is in Session: What Judges Say About Court-Connected Mediation' (2006) 22 *Ohio State Journal on Dispute Resolution* 377.

<sup>106</sup> Ibid. 424-425

<sup>107</sup> Ibid. 424-425.

<sup>108</sup> Ibid.425-431.

<sup>109</sup> McAdoo 'All Rise, the Court Is in Session: What Judges Say About Court-Connected Mediation' (note 105).

<sup>110</sup> Ibid.425-431.

<sup>111</sup> Ibid.425-431.

<sup>112</sup> Ibid.425-431.

<sup>113</sup> Owen Fiss 'Against Settlement' (note14)

criticises settlements. Julie McFarlane<sup>114</sup> is equally minded that settlements in some instances do not benefit society at large. She is of the same mind as Fiss and contends:

If conflict is understood as synonymous with ethical disagreement, it is easy to understand why Owen Fiss describes settlement as morally objectionable, and why for many parties the idea of settlement involving any kind of compromise or accommodation appears totally unacceptable. If positions are stated in moral terms, it becomes the obligation or duty of the party adopting a contrary position to resist. This equation of disputing with fighting "injustice" further hardens attitudes towards settlement.<sup>115</sup>

The mediation in the Commercial Division does not however require the interests or needs of the parties being stated in moral terms. The matters before the Commercial Division are basically contractual in nature and do not require the disputants to advance moral positions. Thus, the mediation in the Commercial Division is worthwhile as generally there is no hardening of attitudes towards mediation. This has assisted in decongesting its workload thereby promoting Court's duty to manage cases an objective for which it was established.<sup>116</sup>

## 7. Perceived dangers of private settlement

Mediation process, which is usually touted as promoting a sense of either participation by or dignity to the disputants; being listened to; a sense of ownership of the process of settlement of the dispute; compromise; and accountability to the mediator, has perceived dangers. Firstly, settlements in some instances do not benefit society at large. Trina Grillo<sup>117</sup> observes this in the area of family court processes where he says a settlement obtained pursuant to a mediation process does not at times reflect societal or cultural values as well as principles of justice.<sup>118</sup>

Secondly, Owen Fiss explores the reasons why parties settle in order to underscore the failings in private settlements and doubts that society benefits anything from settlement of disputes than it does if it were to use the adjudicative powers of the courts.<sup>119</sup> As is the case with Trina Grillo<sup>120</sup> he doubts if there is any sense of justice if parties settle. Owen Fiss is the view of that when parties settle they get less than what they would have obtained if they

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<sup>114</sup> Julie Macfarlane 'Why Do People Settle?' (note 36) (See discussion below on perceived dangers of private settlements.)

<sup>115</sup> Ibid at 690

<sup>116</sup> Order 1(3) of the Commercial Division rules.

<sup>117</sup> Trina Grillo 'The Mediation Alternative: Process Dangers for Women' (1991) 100(6) *The Yale Law Journal* 1545.

<sup>118</sup> Ibid. 1559-1560.

<sup>119</sup> Owen Fiss 'Against Settlement' (note 14)

<sup>120</sup> Trina Grillo 'The Mediation Alternative: Process Dangers for Women' (note 117).

proceeded to full trial.<sup>121</sup> Regarding the disadvantages of settlement to the disputants, the following aptly captures it:

Judges often announce settlements not with a sense of frustration or disappointment, as my account of adjudication might suggest, but with a sigh of relief. *But this sigh should be seen for precisely what it is: It is not a recognition that a job is done, nor an acknowledgment that a job need not be done because justice has been secured. It is instead based on another sentiment altogether, namely, that another case has been "moved along," which is true whether or not justice has been done or even needs to be done.* Or the sigh might be based on the fact that the agony of judgment has been avoided. There is, of course, sometimes a value to avoidance, not just to the judge, who is thereby relieved of the need to make or enforce a hard decision, but also to society, which sometimes thrives by masking its basic contradictions.<sup>122</sup> [Emphasis in italics supplied]

Further, Owen Fiss argues that asking courts to mediate has the unintended consequence of burdening the courts with more workload. He adds that there is the potential danger of litigation against the officers of the court if courts are allowed to delve into mediation. Owen Fiss further contends that a settlement makes a negotiated settlement appear as a perfect substitute for judgment by trivializing the remedial dimensions of a lawsuit, and also by reducing the social function of the lawsuit to one of resolving private disputes.<sup>123</sup> Thus, he then argues that the purpose of adjudication should be understood in broader terms as it uses public resources, and employs public officials who possess a power that has been defined and conferred by public law, not by private agreement. He further says that public officials do not maximize the ends of private parties but give force to the values embodied in authoritative texts such as the Constitution and statutes: to interpret those values and to bring reality into accord with them which duty is not discharged when the parties settle. Owen Fiss further contends that a settlement does deprive a court of an occasion and the ability to render an interpretation or give meaning to disputes that have a bearing on statutes or the Constitution. He continues to claim that to settle for something implies to accept less than some ideal. Further, Owen Fiss says this respecting why he does not favour the compromising of a legal suit: "Settlement is a poor substitute for judgement; it is an even poorer substitute for the withdrawal of jurisdiction."<sup>124</sup> He adds that settlement of a case through ADR is not preferable to a judgment handed down by the court at the end of trial. Owen Fiss further argues that although settlement amounts to reduction of caseload it is as good as plea bargaining where consent is often coerced at the expense of justice as the settlement is often an admission of defeat.<sup>125</sup>

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<sup>121</sup> Owen Fiss 'Against Settlement' (note 14) at 1076

<sup>122</sup> Ibid. 1086.

<sup>123</sup> Ibid. 1082.

<sup>124</sup> Ibid. 1089.

<sup>125</sup> Ibid. 1075.

Owen Fiss contends that in a settlement through the process of ADR, legal suits are compromised on account of who has more financial resources. He put it thus:

The disparities in resources between the parties can influence the settlement in three ways. First, the poorer party may be less able to amass and analyze the information needed to predict the outcome of the litigation, and thus be disadvantaged in the bargaining process. Second, he may need the damages he seeks immediately and thus be induced to settle as a way of accelerating payment, even though he realizes he would get less now than he might if he awaited judgment... an indigent plaintiff may be exploited by a rich defendant because his need is so great that the defendant can force him to accept a sum that is less than the ordinary present value of the judgment. Third, the poorer party might be forced to settle because he does not have the resources to finance the litigation.<sup>126</sup>

There is no equality between the contending parties as regards the resources each may employ thus the terms of settlement are a function of the resources available to each party to finance the litigation, and those resources are frequently distributed unequally.<sup>127</sup> Accordingly, the distribution of financial resources, or the ability of one party to pass along its costs, does affect the bargaining process with the result that the settlement produces an unjust result.<sup>128</sup>

It is the further argument of Owen Fiss that the danger with a settlement is that it is presumptuous. There is an assumption that where there is a dispute the protagonists are individuals who are capable of giving an informed decision as regards the efficacy of a settlement.<sup>129</sup>

Owen Fiss again warns that in some cases, especially when one is dealing with a group or an organisation, it is not easy to identify the persons who are supposed to speak on behalf of a group or an organisation where the other part to the dispute involves a group.<sup>130</sup> He argues that in such situations the question becomes who should really give consent to the terms of an agreement if it is to be considered as binding and representing the views of the all the members of the group or an organisation.<sup>131</sup>

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<sup>126</sup> Ibid. 1076.

<sup>127</sup> Ibid. 1077-1078.

<sup>128</sup> Ibid. 1077-1078; see also Julie McFarlane 'Why Do People Settle?' (note 36) at 669 (where she equally notes that parties settle as a result of economic; cultural pressure and not from an informed decision. She further argues that disputants sometimes settle in order to satisfy the need for harmony in society and the rewards or recognition a settlement brings)

<sup>129</sup> Ibid. 1079; see also Julie McFarlane's arguments (note 132 above).

<sup>130</sup> Ibid. 1079.

<sup>131</sup> Ibid. 1079-1080.

It is Owen Fiss's further contention that in a settlement that rests on a judge's approval whether or not a judge approves it sometimes can depend on what a judge thinks as regards whether the proposed settlement incorporates what would have been his own judgment after a trial of the legal.<sup>132</sup> Thus, in his view in most cases the settlement is not premised on an informed consent of the litigants but rather on what a judge thinks and whether the settlement is as good as a judgment.<sup>133</sup> He then continues to argue that the settlement would be approved while equating it with a judgement when there has been no trial; without the benefit of testing the respective strengths of the cases of the litigants; which is only available through the testing of the testimony of witnesses in a full trial of the issues.<sup>134</sup>

Owen Fiss is also of the view that if parties settle the court is denied the opportunity to get involved in the proper and final settlement of disputes between the parties. Thus, he compares a judgment and a settlement as follows:

The entry of judgment will then not end the struggle, but rather change its terms and the balance of power. One of the parties will invariably return to the court and again ask for its assistance, not so much because conditions have changed, but because the conditions that preceded the lawsuit have unfortunately not changed... The parties may be ignorant of the difficulties ahead or optimistic about the future, or they may simply believe that they can get more favourable terms through a bargained-for agreement. Soon, however, the inevitable happens: One party returns to court and asks the judge to modify the decree; either to make it more effective or less stringent....The allure of settlement in large part derives from the fact that it avoids the need for a trial. Settlement must thus occur before the trial is complete and the judge has entered findings of fact and conclusions of law. As a consequence, the judge confronted with a request for modification of a consent decree must retrospectively reconstruct the situation as it existed at the time the decree was entered, and decide whether conditions today have sufficiently changed to warrant a modification in that decree. ..Settlement also impedes vigorous enforcement, which sometimes requires use of the contempt power...But courts hesitate to use that power to enforce decrees that rest solely on consent, especially when enforcement is aimed at high public officials. Courts do not see a mere bargain between the parties as a sufficient foundation for the exercise of their coercive powers...<sup>135</sup>

Owen Fiss indeed argues that where a legal suit is settled the court does not feel inclined to use its coercive powers to assist in the enforcement of a settlement as it would have done if there was judgment after a full trial.<sup>136</sup> It must be added though that this argument does not take into account the fact that a settlement agreement might have a default clause. These types of clauses do provide what should happen in the event of non-compliance including a party being given the liberty to enforce compliance of the settlement agreement just like a court judgement.

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<sup>132</sup> Ibid. 1082.

<sup>133</sup> Ibid. 1082.

<sup>134</sup> Ibid. 1082.

<sup>135</sup> Ibid. 1082-1084.

<sup>136</sup> Ibid. 1084.

Further, in response to the arguments by Owen Fiss it is perfectly in order to examine what Michael Moffitt<sup>137</sup> says in response to Owen Fiss. The following statement by Michael Moffitt says a lot about where it is said Owen Fiss missed the point about his view against settlement:

Against Settlement deserves robust opposition to the extent it suggests a binary choice between settlement and litigation... If Against Settlement means what its language implies - that one could do away with settlement, retain litigation, and be better off for the change - then the article's thesis is flawed both as a theoretical and as a practical matter. We should celebrate the beauty in each process's internal narrative of justice, of truth, of efficiency, of predictability, and even of morality. Proponents of settlement believe not merely in settlement's efficiency, but also in its ability to bring justice, to discover truth(s), and to provide stability. Proponents of litigation embrace the same values. We might usefully engage the empirical question of whether one process or the other does a better job of promoting each of these values. Both settlement and litigation fail on each of these measures with some reliability, and both processes continue to undergo reforms aimed at improving their performances as measured by these values. But to characterize either as unconcerned with any one of these values is simply false. If we set out to compare settlement with litigation, we should do so responsibly. We should compare the idealized vision of settlement with the idealized vision of litigation. Or we should compare the sloppy reality of settlement in practice with the sloppy reality of litigation in practice. But more than anything, we should recognize that settlement and litigation are no longer separate - in practice or in theory. Because settlement and litigation are co-evolved symbiotic processes, to stand against one is to stand against the other...<sup>138</sup>

Thus, as earlier observed, Mediation process fulfils various fundamental values. These include participation, dignity, being listened to, accountability to the mediator, ownership of the outcome, compromise, opportunity to the disputants to settle their dispute in a less costly and more satisfactory manner. Further, a settlement has the ability to bring justice, to discover truth(s), and to provide stability which are same values found in litigation.<sup>139</sup>

## 8. Conclusion

The two sets of rules governing the procedural law obtaining in the Commercial Division were reviewed. It is seen that the rules have put the Judge at the centre of things. The Judge drives the pace as well as the process of litigation; facilitates the settlement of commercial disputes through the process of mediation. Both mediation and litigation is Judge driven to ensure that the cases that are filed at this court are disposed of efficiently and swiftly. The objectives of these rules are commendable and should be promoted by everyone including the Malawi judiciary itself. However, there are noticeable challenges arising from the interpretation and application of some provisions of the rules. It is trusted that the Malawi

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<sup>137</sup> Michael L Moffitt 'Three Things to Be Against ('Settlement' Not Included) - A Response to Owen Fiss' (30 May 2009). *Fordham Law Review*. Available at <http://ssrn.com/abstract=1412282> (accessed on 13 August 2013).

<sup>138</sup> Ibid.

<sup>139</sup> Ibid.

Judiciary will think about these challenges and review the rules accordingly. Otherwise the gains made with the establishment of the Commercial Division will be lost.

The highlights of the discussion and the conclusions were as follows: as matters stand now, Order 1 (4) of the Commercial Division rules does not give the Commercial Division exclusive jurisdiction over commercial matters. This is arising from of the Malawi Supreme Court of Appeal decision in *The Liquidator of Finance Bank Ltd v Kadri Ejaz Ahmed and Sheith Aziz Issa*.<sup>140</sup> This decision has had the undesirable effect of bringing uncertainty as to the forum a litigant should litigate commercial disputes. And, the objective for which the Commercial Division was established has been thrown into confusion.

The rules do not prescribe a rigid form of mediation. They do suggest a composite form that involves various strands of mediation. However, the wording of Rule 5(1) of the Commercial Division mediation rules imply that the Judges may conduct facilitative and evaluative type of mediation.

Further, it has been concluded that the Judge-Mediator in the Commercial Division wields a lot of powers to coerce compliance with the mandatory nature of the mediation. This is observed in Rule 9 of the Commercial Division mediation rules. However, generally Rule 9 runs counter to the voluntariness of a mediation process. The power that is exercised by the Judge-Mediator to order the dismissal of an action; or strike out of the defence; or to order payment of costs is instructive in that regard. It is trusted that by providing for the imposition of costs parties will be “encouraged” to settle. This provision should be retained so as to encourage settlement through mediation.

It is found that Rule 10 of the Commercial Division mediation rules offers protection to the Judge-Mediator and the disputants. Thus, in keeping with the confidentiality rule in mediation it is recommended that this rule be retained. This is in keeping with the general law in mediation.

There is a question that is still troubling the mind. This is regarding the period during which mediation should be conducted and completed. The rules provide for the period of 14 days. It is recommended that there be a revision of this rule so that it provides for an extension of the period of mediation. Alternatively, this rule should be made clearer so that disputants and the

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<sup>140</sup> (note 68).

Judge-Mediator are advised of the consequences of proceeding with mediation outside the 14 days period.

There was also an analysis of the various fundamental values of mediation process and the dangers of private settlement. The research has been found that although mediation is touted as good for disputants, not all settlements through mediation are advantageous to the disputants and the courts.

The next chapter investigates the potential and the problems of mandatory mediation. There is an extensive discussion of the literature on mandatory mediation. The review informs this research on how the problems can be avoided and how the potentials can be retained by the Malawi judiciary. Further, there is also discussed in the following chapter the suitability of judges as mediators.

## CHAPTER FOUR

### MANDATORY MEDIATION: THE POTENTIAL AND PROBLEMS

#### 1. Introduction

The preceding two chapters above have made conclusions of this thesis. Thus far, Chapter two discussed the notion of mediation as a process in which a third party called a mediator assists disputing parties to reach their own consensual resolution of their dispute. It also showed that mediation has historical roots in Malawi and that there is constitutional commitment to ADR by the State. Further, it showed that the movement towards judicial mediation was in reaction to the delays that were being experienced in the settlement of disputes. Accordingly, the thesis examined how mediation became part of the legal system in Malawi in the settlement of disputes also as a response to the delays that were being experienced in the Malawi Judiciary in the disposal of civil suits. There was additionally a discussion whether the mediation adopted in the Commercial Division is mandatory or not. It has been concluded that the mediation in the Commercial Division is mandatory. Further, it has been concluded that the mediation that is consensual albeit that it must be completed within 14 days as there is no coercion on the parties to settle.

Further, in Chapter Three the two sets of rules governing the procedural law obtaining in the Commercial Division were reviewed to find their meaning and see whether there is anything that is lacking in them. It is seen that the rules have put the Judge at the centre of things. The Judge drives the pace as well as the process of litigation; facilitates the settlement of commercial disputes through the process of mediation. Both mediation and litigation is Judge driven to ensure that the cases that are filed at this court are disposed of efficiently and swiftly. Further, it has been concluded that the Judge-Mediators in the Commercial Division wield so much power to coerce compliance with the mandatory nature of the mediation. This is observed in Rule 9 of the Commercial Division mediation rules. The power exercised by the Judge-Mediators to order the dismissal of an action; to strike out a defence; or to order payment of costs is enlightening. It is found that the confidentiality rule in Rule 10 of the Commercial Division mediation rules offers protection to the Judge-Mediator and the disputants.

However, there are challenges arising from the interpretation and application of some provisions of the rules. The judicial interpretation that has been given to Order 1 (4) of the Commercial Division rules that this provision does not give the Commercial Division exclusive jurisdiction over commercial matters<sup>141</sup> has resulted in bringing uncertainty regarding the forum litigants should litigate their commercial disputes. Further, arising from this decision, there is uncertainty as regards the purpose of this specialised court that was meant to deal with commercial disputes. It has to share jurisdiction with the general division.

As regards the nature of mediation, the study has found that the rules do not prescribe a strict form of mediation. There is a composite form of mediation that involves various strands of mediation. However, the language of Rule 5(1) of the Commercial Division mediation rules necessitate that the Judges conduct both facilitative and evaluative mediation.

There was also an analysis of the various fundamental values of mediation process. It was found that these comprise participation, dignity, autonomy,<sup>142</sup> and accountability. These assist in ensuring that parties settle their dispute by developing a momentum towards settlement.<sup>143</sup>

However, the research has found that not all court mediation is advantageous to the disputants and the courts. Firstly, settlements in some instances do not benefit society at large as disputants sometimes settle against what society stands for. Secondly, it has been concluded that asking courts to mediate has the inadvertent consequence of burdening the courts with more workload and that there is the potential danger of litigation against the officers of the court if courts are allowed to mediate. Further, a settlement trivializes the remedial dimensions of a lawsuit, and reduces the social function of the court to one of resolving private disputes. Thus, a settlement deprives a court of an occasion and the ability to render an interpretation or give meaning to disputes that have a bearing on statutes or the Constitution. If parties settle the court is denied the opportunity to get involved in the proper and final settlement of disputes between the parties.

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<sup>141</sup> *The Liquidator of Finance Bank Ltd v Kadri Ejaz Ahmed and Sheith Aziz Issa.* (note 68).

<sup>142</sup> Julie Macfarlane 'Why Do People Settle?' (note 36) at 696-700

<sup>143</sup> *Ibid.* 700

Further, it has been argued that although settlement can reduce caseloads of courts it is comparable with plea bargaining where consent is often coerced at the expense of justice as the settlement is often an admission of defeat.<sup>144</sup> Fiss adds that to settle entails to accept less than some ideal and that a settlement is not as good as a judgement; it is a bad substitute for the abandonment of jurisdiction.<sup>145</sup>

This chapter now reviews the potential and problems of mandatory mediation with particular reference to the Commercial Division; how these can be retained and avoided by the Malawi Judiciary. It also discusses the question whether judges are better suited to mediate.

Further, the chapter critically explores whether the provisions of the Commercial Division mediation rules are achieving their purpose of making the mediation mandatory in view of the decision in *National Bank of Malawi v Msindo*.<sup>1</sup> Additionally, there will be an examination of case law to see if there have been any challenges that have come about as a result of court decisions and how these can be remedied.

There is also discussed and analysed in this chapter the problems as well as the advantages of legal transplants in driving law reform. Moreover, the chapter deals with the issue of mediation by judges and why the Commercial Division needs to retain the mandatory approach to mediation.

## **2. Mandatory Mediation: Potential and Problems**

As stated in chapter two above, mediation is a form of alternative dispute resolution where a third party facilitates rather than directs the process and assists disputants to negotiate a settlement. Further, participation in a mediation process is generally voluntary. It is worth noting what Roselle Wissler's findings were on a study that examined the effects of mandatory mediation in small claims and general civil cases.<sup>146</sup> Roselle Wissler, amongst other findings, noted that settlement rates were rather lower where mediation was mandatory as compared to where disputants opted to mediate with intermediate settlement rates if only

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<sup>144</sup> Owen Fiss 'Against Settlement' (note 14) at 1075.

<sup>145</sup> Ibid. 1089.

<sup>146</sup> Roselle Wissler 'The Effects of Mandatory Mediation: Empirical Research on the Experience of Small Claims and Common Pleas Courts' (1997) 33 *Willamette Law Review* 565.

one party requested mediation.<sup>147</sup> The statistics in the Commercial Division show that, except between its inception in 2007 and 2008, there has been a gradual decrease of number of cases that are resolved through mediation.<sup>148</sup> This information is true as of 15 March 2013. The expectation was that as time went by more cases would be settled through mediation process but the opposite is true.

Further, Colleen Kotyk<sup>149</sup> advises as follows with regard to mandatory mediation generally and mandatory mediation in divorce proceedings in particular:

Voluntary participation, roughly equal bargaining power, and a nonbinding outcome are the cornerstones of the foundation of mediation. Mediation provides many benefits for parties who choose to avail themselves of the advantages....If legislatures or courts misuse mediation by making it mandatory, it ceases to be a useful tool. In fact, when courts or legislatures impose mediation on parties who want to resolve their dispute in court, mediation can become a bar to the enjoyment of the constitutional guarantee of due process....To ensure that statutes and courts do not run afoul of the fundamental right to due process, mediation can never be mandatory. It must always be voluntary---otherwise, it is a contradiction in terms. The very premise of mediation is its voluntary nature, which in theory makes the parties more willing to reach an agreement. ...Mediation is an excellent option when it is truly an option. When a court or statute mandates mediation, however, a cornerstone of its foundation is removed, causing serious structural flaws.<sup>150</sup>

The sentiments expressed above were with regard to mediation in divorce disputes but can as well be used in respect of any mediation that is mandatory. However, in a mediation process where the disputants have no choice, hence mandatory, the question that has further vexed authors has been why in certain circumstances mediation is mandatory yet it is supposed to be a voluntary process and thus should not ordinarily be compelled by the courts. There is an explanation offered by Campbell Hutchinson<sup>151</sup> as follows:

At first blush, the concept of mandatory mediation appears to be an oxymoron. How can you force someone into a nonbinding procedure? Should not mediation always be a mechanism voluntarily elected by the disputants? The answer is that parties to a dispute are too often reluctant to initiate settlement discussions for fear that the other side will perceive a sign of weakness on the part of the initiating party...Mandatory mediation eliminates this barrier because neither party is seen as the initiator... The fact that mediation is not appropriate for all situations should not preclude the adoption of legislation or court rules mandating mediation if the legislation or rule provides an escape hatch.

<sup>147</sup> Ibid.

<sup>148</sup> Summary of all commercial matters for Blantyre Registry from 14 May 2007 to 15 March 2013

YEAR	CASES REGISTERED	CONSENT JUDGMENT	DEFAULT JUDGMENT	MEDIATION AGREEMENT	DISPOSAL JUDGMENT/RULINGS	BY	DISPOSAL BY MOTION	PENDING CONCLUSION
2007	97	19	31	7	37		3	0
2008	210	31	58	31	50		38	2
2009	251	39	85	29	40		45	13
2010	226	33	101	20	28		36	8
2011	156	28	52	15	16		31	14
2012	209	14	59	12	22		9	93
2013	31	0	4	0	0		0	27

<sup>149</sup> Colleen N Kotyk 'Tearing Down the House: Weakening the Foundation of Divorce Mediation Brick by Brick' (1997) 6 *William & Mary Bill of Rights Journal* 277.

<sup>150</sup> Ibid. 308 -309

<sup>151</sup> Campbell C Hutchinson 'The Case for Mandatory Mediation' (1996-1997) 42 *Loyola Law Review* 85.

Any statute or court rule requiring the parties first to seek resolution through mediation should provide that either party may move to avoid mediation upon the showing of good cause. The onus should be on a party seeking to avoid mediation to explain to the court why mediation should not be attempted. Requiring parties to attempt mediation before trial does not deny them the right to litigate their claims. Mediation by its very nature is nonbinding; neither the mediator nor the court can force a party to settle. All that is required in mandatory mediation is that the parties make a good-faith effort to resolve their dispute with the assistance of a mediator. Finally, one may argue that mandated mediation will not work if one side is reluctant to engage in the process and will merely go through the motions. However, sometimes it takes a compulsory process to educate a reluctant adversary of the merits of ADR. A skilled neutral may be able to convince the reticent attorney or party of the advantages of mediation. At the very least, the process should cause even the skeptic to realistically assess his case at an early stage, which could enhance settlement opportunities down the line.<sup>152</sup>

The Commercial Division mediation rules do not allow parties to avoid mediation except upon the showing of good cause. As advised by Hutchinson, the rules should allow disputants to opt out and then oblige them to explain to the court why mediation should not be attempted.<sup>153</sup> Hutchinson's view should be understood as suggesting that mandatory mediation does not per se mean that the process has no place in the sphere of mediation. Accordingly, the Commercial Division mediation rules are in keeping with the trend to make mediation mandatory in certain circumstances. It allows the disputants to opt out of mediation if there are good reasons shown. In fact, it has always long been recognized that the fact that mediation is mandatory does not mean that the agreement reached at the end of the process is obtained involuntarily.<sup>154</sup> Further, David Winston instructively says that:

Mandatory mediation may seem to be something of an oxymoron because mediation is fundamentally a voluntary process. However, mandatory mediation is still a voluntary process despite the fact that the parties are not participating voluntarily. The right to decline settlement preserves the fundamental fairness and voluntariness of mediation. As long as a settlement is entered into voluntarily by the parties, the process is mediation.<sup>155</sup>

However, Andreas Nelle recognises the point that the trend towards mandatory mediation raises both law and policy issues and thus proposes that there is need to determine under what circumstances mediation should be made mandatory through either statute; court rules or by agreement.<sup>156</sup> Further, Andreas Nelle argues that mandatory mediation is suitable in cases where the benefits of the mediation agreement outweigh the costs and risks of mandatory mediation.<sup>157</sup> It is said that mandatory mediation works well if circumstances are such that

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<sup>152</sup> Ibid. 89-92.

<sup>153</sup> Ibid.

<sup>154</sup> Andreas Nelle 'Making Mediation Mandatory: A Proposed Framework' (1991-1992) 7 *Ohio State Journal on Dispute Resolution* 285.

<sup>155</sup> David S Winston 'Participation Standards in Mandatory Mediation Statutes: You Can Lead a Horse to Water' (1996) 11 *Ohio State Journal on Dispute Resolution* 187.

<sup>156</sup> Andreas Nelle 'Making Mediation Mandatory: A Proposed Framework' (note 154) at 286-288.

<sup>157</sup> Ibid. 290.

the case itself would benefit from mediation but there are barriers to it.<sup>158</sup> The example given is where there are differences in information and assessment of the situation and the purpose is to remove those barriers or where the parties do not feel inclined to settle a dispute expeditiously due to the self interests of lawyers and yet this runs counter to the objectives of mediation.<sup>159</sup> In Malawi, more especially in the Commercial Division, the Judiciary was trying to deal with the problem that had been identified of commercial matters taking long to be resolved. Thus, the choice of the mandatory nature of mediation is not wrong. It should be retained to assist in disposing matters expeditiously. The retention is advocated although there are no current statistics to show that mandatory mediation has assisted in the speedy disposal of cases.

As regards when mediation should be mandatory, Andreas Nelle says that the question can be answered by looking not only at the number of cases that are actually settled but also at the need to reduce those cases that are not properly mediated as a result of an improper imposition of mediation.<sup>160</sup> Andreas Nelle further argues that the way a matter is settled in both instances has cost implications for the disputants.<sup>161</sup> Moreover, Andreas Nelle contends that as a matter of principle mandatory mediation is justified if the matter to be mediated warrants and where the power imbalance between the disputants are insignificant or can be remedied.<sup>162</sup> The author nevertheless says that mandatory mediation is not suitable: where there is power imbalance between parties; and where it has the undesirable result of perpetuating the power imbalance unless the mediation is modified to empower the weaker party.<sup>163</sup> It is again contended that a court mandatory mediation is undesirable where there is danger that the court is robbed of the opportunity to reform itself as regards speedy delivery of justice since matters are settled without the court's adjudication of the rights.<sup>164</sup> Finally, Andreas Nelle advises as follows:

Before mandating mediation, the legislators, judges, or parties who contemplate it should analyze the type of controversy concerned, check for significant power imbalances and clarify which barriers to mediation they want to overcome. It will not always be possible to discover all potential power imbalances and barriers to mediation on a general level. However, the analysis performed will yield a better basis for mandating mediation than considerations of just a single dimension, such as the backlog of court cases. If this initial analysis indicates mandatory mediation is warranted; legislators, judges, or

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<sup>158</sup> Ibid.

<sup>159</sup> Ibid. 295.

<sup>160</sup> Ibid. 290.

<sup>161</sup> Ibid. 290.

<sup>162</sup> Ibid. 290.

<sup>163</sup> Ibid. 295.

<sup>164</sup> Ibid. 292.

parties should tailor the content of the duty (presence, information, or good faith participation) to the barriers they have identified... *Investigating different types of controversies has shown that mandatory mediation is appropriate in cases where the parties have an ongoing relationship, often on a contractual or institutional basis.* This pattern suggests that mandates to mediate should be rooted in the legal and institutional structures of specific relationships rather than in the general framework of a court's procedural rules, applicable to all disputes brought before it. The court's procedural rules may extend only as far as informing parties about mediation at a screening session without, however, imposing mediation.<sup>165</sup> [Emphasis supplied]

In sum, Andreas Nelle advises that mandatory mediation should only be employed in appropriate cases; when power imbalances are insignificant; and when the mandatory mediation process is itself designed to get rid of barriers to the use of mediation.<sup>166</sup> Thus, in order to avoid the barriers to settlement, like for example where lawyers do not show interest, it is necessary to have mandatory mediation. Further, Andreas Nelle argues that mandatory mediation has been found to be effective in cases where the parties have an ongoing relationship often on a contractual or institutional basis. Accordingly, since the Commercial Division deals with commercial disputes where essentially the disputants have ongoing contractual relationships it was in order for the Malawi Judiciary to make mediation mandatory in this court. Nevertheless, Andreas Nelle advises that mandatory mediation should be premised on the legal and institutional structures of specific relationships rather than in the general framework of a court's procedural rules which are made to apply to all disputes brought before it and that the said procedural rules should be aimed at informing parties about mediation without, however, imposing mediation.<sup>167</sup> The Commercial Division mediation rules fail on this argument. They are made to apply to all commercial disputes except those that are exempted by the rules.<sup>168</sup>

Further, David Winston<sup>169</sup> has argued that there are criticisms levelled at mandatory mediation. These are that mandatory mediation may be an exercise in futility where one of the parties enters into the process of mediation determined not to settle and the process simply creates another legal obstacle for the parties to overcome as they litigate their disputes. Thus, if mediation fails but is thereafter followed by litigation it only adds to the costs of the legal action by forcing parties to double their efforts in settling a case.<sup>170</sup> This is

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<sup>165</sup> Ibid. 312

<sup>166</sup> Ibid. 296

<sup>167</sup> Ibid. 312

<sup>168</sup> Rule 3 and 4 of the Commercial Division mediation rules

<sup>169</sup> David S Winston 'Participation Standards in Mandatory Mediation Statutes: You Can Lead a Horse to Water' (note 152).

<sup>170</sup> Ibid. 190-193.

exactly what is happening at the Commercial Division. Disputants incur expenses as they prepare for mediation and add on these costs during trial when settlement through mediation fails.

David Winston nonetheless advises that mandatory mediation can be advantageous in certain circumstances viz.: that it may accelerate the settlement process as it shifts the settlement impetus by requiring parties to think about compromise at earlier stages in the dispute process; it requires parties, initially hostile to the process of mediation, to participate and possibly settle their dispute through mediation; and it provides a legal system an opportunity to reduce the number of cases going to trial; it does in certain situations provide an effective means of obtaining a binding, out-of-court settlement; it overcomes the sign of weakness that is often associated with mediation; it increases the exposure and hence the familiarity with the process thus parties are more likely to take advantage of its cost-savings and efficiency even when the process is not a result of a court order.<sup>171</sup> There are no statistics in the Commercial Division to show whether or not the mandatory mediation has resulted in some of the benefits recognised by David Winston viz. acceleration of settlement; reduction of number of disputes going to trial;<sup>172</sup> exposure or familiarity with the process therefore resulting in saving costs to disputants. However, that the mediation provides the disputants an opportunity to obtain an obligatory out-of-court settlement is unquestionable.<sup>173</sup>

Generally, David Winston concludes that if used appropriately mandatory mediation can help in decongesting case dockets of an overburdened judicial system.<sup>174</sup> He however warns that mandatory mediation should not be used to push parties to settlement but rather to provide them with an opportunity to settle in an alternative forum that is less costly as well as more efficient; and that mandatory mediation is not the alternative to litigation but it is rather a valuable alternative to litigation.<sup>175</sup> There is no data to show that mandatory mediation has assisted in decongesting case dockets of the Commercial Division. However, there have been no known cases where parties were pushed by the judges to settle their disputes.

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<sup>171</sup> Ibid. 190-193.

<sup>172</sup> See note 148 above

<sup>173</sup> See Rule 11(3) of the Commercial Division mediation rules

<sup>174</sup> David S Winston 'Participation Standards in Mandatory Mediation Statutes: You Can Lead a Horse to Water' (note 152) at 205.

<sup>175</sup> Ibid. 206.

### 3. Whether judges should be allowed to mediate

As discussed in chapter three, in Malawi the qualification for one to be a mediator in the Commercial Division is different from that in the General Division. In the Commercial Division, mediation is done by Judges unlike in the General Division.

It has been noted that a Judge's traditional role has since changed.<sup>176</sup> Judges do mediate as well and there is now increased judicial participation in the settlement of disputes through mediation by judges.<sup>177</sup> Judges of the Commercial Division now adjudicate and mediate upon commercial disputes. The advantage of this is that the judges control the pace of litigation instead of letting the litigants or their lawyers control the process. The judges of the Commercial Division do this by actively managing the cases that are assigned to them from the time the legal suits are filed with the court. The case docket is assigned to a judge who keeps the file until its disposal either by way of hearing or mediation.<sup>178</sup> Active case management requires the judge to encourage the parties to use ADR procedure if the Court considers that appropriate and facilitating the use of such procedure in addition to helping the parties to settle the whole or part of the case.<sup>179</sup> The downside of letting judges mediate is that since their traditional role is to adjudicate, they have the tendency of bringing their adjudicative skills to the mediation process. Hence, their leaning towards evaluative type of mediation when mediating. Further, the case of *National Bank of Malawi v Msindo*<sup>180</sup> demonstrates the hazards of mediation by judges in the Commercial Division. There was neither evidence called by either party nor were the parties' allegations tested through the normal process of examination of witnesses that is available during trial. Yet the Judge-Mediator in this matter proceeded to dismiss a legal action without hearing the litigants on the merits of their respective allegations of fact in the case.

As regards the issue whether judges should be allowed to mediate, Torstein Eckhoff<sup>181</sup> offers an instructive answer. Eckhoff is of the view that there is nothing wrong for judges to

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<sup>176</sup> Macfarlane, Julie 'Why Do People Settle?' (note 36).

<sup>177</sup> Marc Galanter 'The Emergence of the Judge as a Mediator in Civil Cases' (note 37).

<sup>178</sup> Order 3(5)(4) of the Commercial Division rules

<sup>179</sup> Order 1(3) (e) and (f) of the Commercial Division rules.

<sup>180</sup> Commercial Cause Number 108 of 2008, 7 August 2009, unreported.

<sup>181</sup> Torstein Eckhoff 'The Mediator, the Judge and the Administrator in Conflict-Resolution' (1966) 10 (1:2) *Acta Sociologica*, 148. See also Marc Galanter 'The vanishing trial: An Examination of Trials and Related Matters in Federal and State Courts' (note 69) who instructively advised as follows:

"Finally, we come to the bottom line: what difference does it make? Are settlements arranged by judges any different than those arranged by lawyers? Do they have more influence on the underlying behaviour? How does this participation affect the way judges act in other settings? How does it affect public perceptions of law?"

occasionally act as mediators.<sup>182</sup> The point being made is that judges need not be knowledgeable in a particular field of study if they have to mediate in the disputes that come before them. However, in some jurisdictions there is a preference for those with expertise in Intellectual Property (IP) to mediate in those types of disputes. There is evidence to suggest that in IP disputes litigants and lawyers tend to prefer those who have expertise in IP law to mediate.<sup>183</sup>

There is nonetheless no empirical evidence in Malawi to suggest that litigants prefer a particular category of people or professions, including judges, if they have certain particular qualifications for them to mediate in their disputes. In the General Division there is though a spread of mediators from other professions and calling.<sup>184</sup> These include lawyers, insurance experts, construction industry experts, bankers, management strategists, business management experts, economist and interestingly members of the Clergy.<sup>185</sup> The list of mediators from the ADR Registry of the general division is however very old and outdated. It is not surprising as the list was published at the time the rules were promulgated in 2004. There has not been an updated list of the mediators at the general division. There is no such spread of mediators in the Commercial Division. Mediation in the Commercial Division is facilitated by judges who are mediators by virtue of their being assigned to the Commercial Division where the process is facilitated by them by virtue of their office as judges of the division.

There has been no study to find out which division settles more cases than the other or whether there is any difference between settlements by Judges in the Commercial Division and those mediating in the General Division. Indeed, there has been neither practical study

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Studies of the effects of judicial participation have been confined to the impact on delay and on judges' productivity—that is, they have remained within the tradition of research inspired by the "cool" theme of court efficiency. But in a system that is in large measure a system of settlements, there is much more to be learned from the shift represented by increased judicial participation”

<sup>182</sup> Ibid. 158.

<sup>183</sup> Lisa Claire Cohn ‘Mediating Intellectual Property Disputes’ (2003) 6 (2) Article 3 *ADR Bulletin*. Available at <http://epublications.bond.edu.au/adr/vol6/iss2/3>. (accessed 2 November 2013)

<sup>184</sup> see Courts (Mandatory Mediation) Rules made under Section 67 of the Courts Act Government Notice Number 9 of 2004

<sup>185</sup> In the Commercial Division mediation is conducted by Judges of that Court. However, in terms of Rule 7, 8 and 9 of the Courts (Mandatory Mediation) Rules, which the general division follow, demonstrate the difference in treatment as regards who may facilitate the mediation. Rules 7, 8 and 9 indicate that the Assistant Registrar shall, with the approval of the Chief Justice, compile and maintain a list of mediators and a list of experts. See General Notice 74 that lists former Chief Justices, former Judges, Accountants, Lawyers, Chartered Insurers, Bankers, a Management Strategist, A Business Management Expert, and Economist and interestingly members of the Clergy.

done to find out if Judges have any influence on the underlying behaviour of disputants during mediation nor whether Judges in the Commercial Division have an influence on the settlements that are reached. The disparity notwithstanding, between what obtains in the two divisions, what matters is whether or not there is a settlement through mediation in either of them. Further, there is need for a study so that it is known what the impact has been of Judge's participation in mediation in the Commercial Division. Until that is done there is no way of knowing whether it was a good idea to have Judges as Mediators instead of just having a court-annexed mediation process conducted on the same lines as is done in the general division. However, it has been observed by the judges of the Commercial Division that asking them to mediate means that there is more work on them as, apart from adjudicating, they have to mediate as well. This is unlike their colleagues at the General Division. Yet there is no extra remuneration paid to the judges of the Commercial Division for this additional workload i.e. mediating on the commercial disputes besides adjudicating on the said disputes.

#### **4. Critical analysis of mediation procedure in the Commercial Division**

As mentioned earlier, the Malawi Judiciary adopted mediation as part of the process of settling disputes<sup>186</sup> and it established the Commercial Division to deal with commercial matters where, under its mandatory mediation rules,<sup>187</sup> Judges who sit in this division are required to mediate upon commercial disputes.<sup>188</sup> Except where the rules provide otherwise, it is expected that every dispute that comes before the Commercial Division must first go through a process of mediation.<sup>189</sup> The mediation is compulsory under the statute governing procedure in the said Commercial Division. The statistics show that as at 15 March 2013, out of a total of 1180 cases registered since 14 May 2007 only a paltry 114 cases have been disposed of through mediation.<sup>190</sup> Thus, although mediation is mandatory and was intended to assist the Commercial Division actively manage the legal suits filed at the division; the mediation's contribution has been negligible. The settlement of commercial disputes is largely through litigation and other means than through mediation.

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<sup>186</sup> Courts (Mandatory Mediation) Rules Government Notice Number 9 of 2004

<sup>187</sup> High Court (Mandatory Mediation) Rules, 2007

<sup>188</sup> Ibid. Rule 5

<sup>189</sup> Ibid. Rule 3

<sup>190</sup> See note 148 above.

Regarding whether the mediation rules are achieving their purpose of making the mediation mandatory, the issue came for discussion in the case of *National Bank of Malawi v Msindo*.<sup>191</sup> The parties appeared before the Judge-Mediator and one of them wanted a declaration that the case was not fit for mediation and/or that mediation was not necessary. The Judge emphatically ruled that in the Commercial Division mediation was mandatory in proceedings commenced by way of Writ of Summons. The Judge emphasised that a party does not have the choice of whether to go through mediation or not. He continued to observe that a litigant must go through mediation except if the matter falls under five exceptions given in Rule 3 of the Commercial Division mandatory mediation rules. The Judge added that a party wishing not to go through mediation even though his matter falls within Rule 2 was obliged to proceed as provided for in the Commercial Division mediation rules through an application to a Judge under Rule 3 (d) for an order exempting the matter from mediation. Further, the Judge warned that simply ignoring the Commercial Division mediation rules and/or appearing on the mediation day and purport to make a declaration under Rule 14 (1) (e), as the Defendant did, was not an option. The Judge further said that the decision whether a matter goes through mediation or not rests with the Judge and not a party. Justice Katsala observed thus:

As things are, it is difficult to appreciate his decision to terminate mediation. Rule 14 (1) (e) of the Mediation Rules provides; “A mediation shall end when a party makes a declaration to the Judge and the other party that the mediation is terminated.” The defendant thus purports to make a declaration under this rule. In my opinion one can only get the full meaning of this rule when it is read with the backdrop of the of the Commercial Court Rules. The overriding objectives of the Commercial Court Rules would be a good starting point. I have always understood rule 14 (1) (e) to mean that a party can make the declaration if there is a mediation taking place. Mediation must be in progress. And in my view there is no mediation unless and until the parties have presented their cases to the mediator and a discussion has ensued. That is when a party can make a declaration under the rule. I do not think that the rule empowers a party to make the declaration even when mediation has not been given a chance. The principle behind both the Commercial Court Rules and the Mediation Rules is that parties must have the opportunity to resolve their dispute outside the court room but with the assistance of a judge through mediation. Therefore an earnest attempt at utilising that opportunity must be made by both parties. Subject to what I will say later I have no doubt in my mind that an outright refusal by a party to go through mediation offends both the principle and spirit of the two sets of rules. Further, I do not think that a party that wishes to make such a declaration is exempted from complying with Order 5 r.5 (1) of the Commercial Court Rules and Rule 6(1) of the Mediation Rules. He must do everything that is required of him by these provisions...As I have already stated above a party can only make the declaration when there is mediation and there can be mediation only if the parties have filed their statement of issues. It is also my considered view that the declaration under rule 14 (1) (e) must be made responsibly and in good faith. This means that it must be made on grounds that are reasonable in the circumstances. The grounds must be spelt out to the judge and the other party. I am saying this because in this court mediation is mandatory in proceedings commenced by way of writ of summons. ...A party does not have the choice of whether he should go through mediation or not. He must go through mediation except in the five instances given in rule 3 of the Mediation Rules... the court, on a party’s application, makes an order exempting a matter from mediation; and where the court in its

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<sup>191</sup> Commercial Cause Number 108 of 2008, 7 August 2009, unreported.

discretion exempts a matter from mediation. Therefore, a party wishing not to go through mediation even though his matter falls within rule 2 must proceed as provided for in the Mediation Rules, that is, he must make an application to a judge under rule 3 (d) for an order exempting the matter from mediation. Simply ignoring the Mediation Rules and/or appearing on the mediation day and purport to make a declaration under rule 14(1) (e) as the defendant did is not an option. The decision whether a matter goes through mediation or not rests with the judge and not a party. Thus, it is not for no reason at all that rule 4 seems to repeat what is stated in rule 2, viz, that all proceedings to which the Mediation Rules apply *shall first* go through mediation. This repetition in my view emphasises the compulsoriness of mediation in this court. Otherwise why would the Rules carry such emphasis if mediation is at the discretion of the parties? The defendant did not file his statement of issues. He has not explained why he has not done what Order 5(5) of the Commercial Court Rules and the Mediation Rules command him to do as a litigant in this court. I am left in no doubt that his failure is deliberate. Further, he advised the court that he does not want to go through mediation. He thinks mediation will be fruitless. He has not said why he thinks so. Both the plaintiff and I are left to speculate. Looking at the defendant's conduct as a whole, I am in no doubt that the defendant is not serious about the whole court process. It seems he is determined to frustrate the process. ...He therefore wants to terminate the mediation in a manner that offends the Rules. ...The defendant's conduct cannot be condoned. It is a deliberate and calculated disregard of express provisions of the rules that govern the procedure in this court. The court views such conduct with disgust and contempt and unequivocally condemns it. To do otherwise would offend the overriding objective of the Commercial Court Rules where under the Mediation Rules were promulgated. It is the duty of this court to deal with cases justly. The court must, among other things, ensure that parties conduct their matters on an equal footing. If one party is allowed to flout rules (which, among other things, are intended to level the playing field) and or to frustrate the matter without reproach, then certainly the court would be failing in this sacred duty. Rules must apply equally to all the parties before the court. A party that fails to comply with the rules must face consequences as stipulated in the rules.<sup>192</sup>

The Judge-Mediator showed his disapproval of the conduct of one of the disputants by proceeding to strike out the Defendant's defence and entered judgment for the Plaintiff. He further made an award of interest at 29.5 per cent. The interest awarded was at commercial bank lending rate. The Judge also condemned the Defendant to pay the costs of the proceedings. This case demonstrates how seriously the Judges take the mediation process in the Commercial Division.

It is important to note that nobody has yet challenged this provision that makes mediation mandatory so as to find out whether it does not violate parties' rights to access the courts and have an effective remedy as they deem fit as provided for under section 41 of the Constitution.<sup>193</sup> There is of course recognition that section 13(l) of the Constitution is only a policy direction as the state is merely directed to actively and progressively promote policies and legislation aimed at achieving the peaceful settlement of disputes by adopting mechanisms by which differences are settled through, inter alia, mediation. Nevertheless, section 41 (2) and (3) of the Constitution confers a right to access the courts and get an

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<sup>192</sup> Ibid.

<sup>193</sup> Section 41 of the Constitution states: "(1) Every person shall have a right to recognition as a person before the law. (2) Every person shall have the right of access to any court of law or any other tribunal with jurisdiction for final settlement of legal issues. (3) Every person shall have the right to an effective remedy by a court of law or tribunal for acts violating the rights and freedoms granted to him or her by this Constitution or any other law."

effective remedy. If a person chooses to litigate fully to get what the litigant feels will give that person an effective remedy why should a subsidiary legislation tell that person to mediate first. Indeed, assuming a litigant were to say that there is a conflict between the relevant provisions of sections 13 and 41 of the Constitution as read with the Commercial Division mediation rules, how would a court approach that apparent conflict? Is there no possibility of the court coming with a similar observation made by the Malawi Supreme Court in *The Liquidator of Finance Bank Ltd. v Kadri Ejaz Ahmed and Sheith Aziz Issa*<sup>194</sup> discussed above? The argument being that the Commercial Division rules are only for the purpose of promoting good case management practice and that these rules cannot competently oust the jurisdiction conferred on the General Division of the High Court of Malawi by section 108 of the Constitution.

## 5. Legal transplants: problems of comparative studies

This chapter also examines what obtains in other countries that have adopted the type of mediation found in Malawi so as to see whether or not it was appropriate. Further, it is trusted that a comparison with these other countries will inform this research on what can be averted or used by the Malawi Judiciary. It is accepted that this methodology has its disadvantages. Pierre Legrand<sup>195</sup> actually warns that, since laws do reflect a culture of entire different communities, a wholesale transferring of a law and comparison of different laws as well as legal systems cannot offer a proper understanding of what a particular law is unless one transplants the culture as well from where the law is taken.<sup>196</sup> In this regard, Pierre Legrand says:

No rule in the borrowing jurisdiction can have any significance as regards the rule in the jurisdiction from which it is borrowed. This is because, as it crosses boundaries, the original rule necessarily undergoes a change that affects it *qua* rule...In sum, any argument reducing change in law to the displacement of rules across boundaries is little more than an exercise in 'reification as false determinateness': in fact, the shifting complexity of development in the law cannot be explained through a rigid and jejune framework such as that propounded by the 'legal transplants' thesis...All that one can see is that law reformers on occasion find it convenient, presumably in the interest of economy and efficiency, to adopt a pre-existing form of words which may happen to have been formulated outside of the jurisdiction within which they operate - not unlike the way writers on occasion find it convenient to quote from other authors some of whom will be foreigners. What is at issue here is a rhetorical strategy involving the ordinary act of repetition as an enabling discursive method. To say that change in law is in large part driven by mimesis is not to say any more - or any less - than that

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<sup>194</sup> (note 68).

<sup>195</sup> Pierre Legrand 'The Impossibility of "Legal Transplants"' (note 10).

<sup>196</sup> *Ibid.* 124.

individuals will turn to the past to help them construct the present. This is as evident in law as it is in literature or mathematics. This observation is hardly the stuff of legal theories about interactions across legal cultures.<sup>197</sup>

Pierre Legrand, in this quote advises against the wholesale transferring of a law from one legal system to another as laws do reflect a culture of a people. Thus, unless one transplants the culture too the law cannot offer any meaning to where it is transferred. However, what Pierre Legrand is saying must be seen in light of what Watson counsels in *Legal Transplants and European Private Law*.<sup>198</sup> Watson instructively says that:

Massive successful borrowing is commonplace in law...that borrowing is usually the major factor in legal change...I find it difficult to imagine that anyone would deny that legal borrowing is of enormous importance in legal development. Likewise I find it hard to imagine that anyone would believe that the borrowed rule would operate in exactly the way it did in its other home....In no way should one neglect the differences. They are also fundamental in understanding how, why and when law changes, the direction of legal change, and how law develops in the society in which it operates. I would insist, contrary to what seems to be Legrand's approach in his paper, that it is not abstract legal philosophy about 'what must be' that enables us to understand the relationship of law to society, but detailed examination of law and legal change (and legal stability) in a number of systems that have been in contact.<sup>199</sup>

Thus, with the advice of Legrand as well as the response of Watson, the discussion herein of what the USA and South Africa have in the area of mediation need to be examined to find out if there is anything Malawi can learn from these countries. In doing this it is acknowledged that this methodology has its disadvantages as well as advantages. Further, sight is not lost of the fact that as a methodology the comparison of laws is mainly functionalist in that it seeks to identify problems /causes of legal change and to replace an existing law or search for a 'better' law. The comparative law methodology being used attempts to assess which law offers the best solution to any problems that are there in Malawi. Further, it is accepted that the method being employed here has a traditional deficiency in that, while comparing legal approaches, it neglects empirical factors which might explain the failure of a law in a particular setting, such as bad judges, slow courts, and poor procedural law. Indeed, to assume 'functional equivalence' is to suggest that problems should be solved in the same way in all jurisdictions, or to assume that one jurisdiction's solution will achieve a better result elsewhere. One of the acknowledged difficulties of comparative law is that all too often there is the assumption that all societies have the same problems and assume that domestic legislation was enacted to deal with assumed shared

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<sup>197</sup> Ibid. 120-121.

<sup>198</sup> A Watson 'Legal Transplants and European Private Law' (note 9).

<sup>199</sup> Ibid.

problems. Further, as noted above, legal transplants are highly contentious.<sup>200</sup> The above notwithstanding legal transplants still help in legal reform.<sup>201</sup>

The issue that then arises is why choose the USA and South Africa as comparators. The answer is that the provisions of the Constitution are instructive in providing an answer to this question. In Section 11(2) (a) (c) of the Constitution it is provided that when *interpreting the provisions of the Constitution a court of law shall promote the values which underlie an open and democratic society; and where applicable the court is to have regard to current norms of public international law and comparable foreign case law.* [Emphasis added]

Further, Section 13 of the same Constitution sets out principles of national policy in Malawi. And, amongst others, it is provided that:

The State shall actively promote the welfare and development of the people of Malawi by progressively adopting and implementing policies and legislation aimed at achieving the following goals—...

(l) Peaceful Settlement of Disputes

To strive to adopt mechanisms by which differences are settled through negotiation, good offices, mediation, conciliation and arbitration.

It is an undeniable fact that both the USA and South Africa are open as well as democratic societies. Further, these two countries have functioning and robust alternative means of settling disputes. Thus, if one has to understand what the framers of the Malawi Constitution desired when they called upon the state to adopt; implement policies and legislation aimed at achieving peaceful settlement of disputes through negotiation, good offices, mediation, conciliation and arbitration, one cannot avoid to use these two countries viz. the USA and South Africa as comparators. As for the USA it is well to add that there are many authors that have written on the story of mediation. Thus, this dissertation has benefitted from what has been written about mediation in the USA.

## **6. Lessons from the USA and South Africa**

It is of note to observe that Malawi's adoption of mandatory mediation was neither an original idea nor accidental. Thus, there is need to discuss what other countries have adopted mediation that is either facilitated by judges or is mandatory. These are namely the USA and

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<sup>200</sup> Freund 'On Uses and Misuses of Comparative Law' (note 10); A Watson 'Legal Transplants and European Private Law' (note 10); Legrand 'The Impossibility of "Legal Transplants"' (note 10) at 115-120.

<sup>201</sup> A Watson 'Legal Transplants and European Private Law' (note 10).

South Africa. These two countries adopted mediation much earlier than Malawi. They are therefore good reference points on how the problem of delay in the settlement of disputes was dealt with in the USA and how the policy of adopting ADR as a peaceful means of settling disputes is seen in statutes in South Africa.

### **6.1 United States of America**

It has already been observed that mediation has existed in the USA for a long period. The USA adopted mediation largely in response to crushing dockets. The courts began to adopt mediation to resolve small claims, family, and non-family civil cases. Today, mediation is an integral part of the civil litigation process in the United States.

Now this part of the thesis discusses the actual interventions that the USA judiciary undertook in the alternative settlement of disputes. Writing in 1985, Marc Galanter observed that there was increased judicial participation in settlement negotiations by Judges in the USA.<sup>202</sup> He traces the origins of the engagement of judges in dispute settlement through mediation to the end of 1920 when Justice Edgar J Lauer of the Municipal Court in New York started experimenting with the idea of using his office of a judge to mediate and conciliate on cases that came before his court. It is said that thereafter the use of the office of judge as mediator was institutionalised in 1983 when it was then required as a matter of federal law that judges should use their offices to settle cases without the need for trial. Further, Galanter acknowledges that Resnick<sup>203</sup> depicts a picture of judicial participation in the settlement of disputes where there is a paradigm shift of a judge's role from that of being

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<sup>202</sup> Marc Galanter 'The Emergence of the Judge as a Mediator in Civil Cases' (note 37).

<sup>203</sup> Judith Resnik 'Managerial Judges' (1982) *Faculty Scholarship Series*. Paper 951. Available at [http://digitalcommons.law.yale.edu/fss\\_papers/951](http://digitalcommons.law.yale.edu/fss_papers/951) (accessed 22 August 2013). says at pages 4-5 in the introductory remarks:

"UNTIL recently, the American legal establishment embraced a classical view of the judicial role. Under this view, judges are not supposed to have an involvement or interest in the controversies they adjudicate. Disengagement and dispassion supposedly enable judges to decide cases fairly and impartially. The mythic emblems surrounding the goddess Justice illustrate this vision of the proper judicial attitude: Justice carries scales, reflecting the obligation to balance claims fairly; she possesses a sword, giving her great power to enforce decisions; and she wears a blindfold, protecting her from distractions. Many federal judges have departed from their earlier attitudes; they have dropped the relatively disinterested pose to adopt a more active, "managerial" stance. In growing numbers, judges are not only adjudicating the merits of issues presented to them by litigants, but also are meeting with parties in chambers to encourage settlement of disputes and to supervise case preparation. Both before and after the trial, judges are playing a critical role in shaping litigation and influencing results."

a traditional common law judge to a manager who takes control of the cases.<sup>204</sup> He then concluded thus:

This usefully points out the connection between the increasing respectability of settlement participation and the development of court management, the rationalization of assignments, calendars, record keeping, etc. It is not clear to me, however, that the shift to active participation in settlement can be subsumed as part of a drive towards managerial efficiency. It may also be a response to a shift in the character of common law adjudication. The trial has been displaced from its central place in common law litigation. The "case" no longer centres (did it ever?) around a discrete plenary trial to which were attached some preliminaries and addenda; instead, it is a series of proceedings (discovery, motions, hearings, conferences, negotiations, pre-trial, fee hearing, etc.) only rarely including a trial. This diffusion is marked by the fact that many American lawyers are now described as litigators in contra-distinction to trial lawyers." Yet another possibility is that the change is impelled not by the management ideology of the court or the changing character of its business, but by the growth and increasing mobility of the legal profession. ...Connections with other changes legal institutions can only be the beginning of an explanation. They lead us to the wider setting of the changing demands and expectations brought to legal institutions by their various sets of users and audiences. During the period we have so hastily surveyed, there was a great proliferation of new regulation by the government, utilizing the legal system to carry out an expanded set of purposes. And there has been a growth in the use of litigation, by citizens, organizations and interest groups. A satisfying explanation of the shift in judicial participation may require that it be linked with these "external" factors. External demand may, for example, better explain why judicial participation gained acceptance first in state courts and only later in federal courts. It may turn out that more than one explanation is called for. ...Finally, we come to the bottom line: what difference does it make? Are settlements arranged by judges any different than those arranged by lawyers? Do they have more influence on the underlying behaviour? How does this participation affect the way judges act in other settings? How does it affect public perceptions of law? Studies of the effects of judicial participation have been confined to the impact on delay and on judges' productivity—that is, they have remained within the tradition of research inspired by the "cool" theme of court efficiency. But in a system that is in large measure a system of settlements, there is much more to be learned from the shift represented by increased judicial participation.<sup>205</sup>

A reading of the provisions of the Commercial Division rules, more especially the rules regarding the overriding objectives for which the Commercial Division was established; and the court's duty to manage cases as respectively provided in Order 1(2) and Order 1(3); one sees that the procedural rules are intended to shift the role of Judges from that of an observer to one that requires the Judge to take an active role and ensure that cases are disposed of expeditiously.<sup>206</sup> The effect is to ensure judicial participation, reduce delay and increase judges' productivity as well as making the courts efficient where judges are increasingly involved in the settlement of disputes. The role of Judges in the settlement of disputes in Malawi has been institutionalised just like in the USA. It must continue that path in other

<sup>204</sup> Marc Galanter 'The Emergence of the Judge as a Mediator in Civil Cases' (note 37) at 261

<sup>205</sup> Ibid.

<sup>206</sup> Order 1 (2) (1) of the Commercial Division rules, amongst others provides that the Rules are a procedural code with the overriding objective of enabling the Court to deal with commercial matters justly. Further, Order 1 (2) (2) (d) states dealing with case justly includes, so far as is practicable, ensuring that it is dealt with expeditiously and fairly. And, Order 1 (3) (1) provides that the Court shall further the overriding objective by actively managing cases. Under Order 1 ( 3) (2) (e) (f) it is stated that Active case management includes encouraging the parties to use an alternative dispute resolution procedure if the Court considers that appropriate and facilitating the use of such procedure; and helping the parties to settle the whole or part of the case.

types of cases and not only commercial disputes if the problems of delay and crushing dockets are to be dealt with. The point is that this judge led mediation should not exclude other actions. The Malawi Judiciary should adopt the judge led mediation to resolve small claims, family, and non-family civil cases.

## 6.2 South Africa

There is need for this thesis to discuss what obtains in South Africa regarding alternative dispute resolution. As said earlier, the purpose is show how the policy of adopting ADR as a way of settling disputes has been done in South Africa. The discussion will assist and benefit Malawi in the area of ADR mechanisms.

There are 49 South African statutes in diverse areas that require or recommend the mediation / conciliation of disputes.<sup>207</sup> It is accepted that legislation is only a declaration of intent and that there is a serious systemic problem with the institutionalisation of mediation. However, the fact that there are 49 South African statutes in diverse areas requiring or recommending the mediation/conciliation of disputes suggests that legislative policy overwhelmingly favours mediation as the default method of dispute resolution in public and private disputes. This is worth emulating by Malawi as it reviews its various laws so that they are in keeping with what section 13 of the Constitution advocates regarding the peaceful settlement of disputes.

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<sup>207</sup> Antarctic Treaties Act 60 of 1996; Child Justice Act 75 of 2008; Children's Act 38 of 2005; Commission on Gender Equality Act 39 of 1996; Companies Act 71 of 2008; Constitution of South Africa, 1996; Consumer Protection Act 68 of 2008; Development Facilitation Act 67 of 1995; Electricity Regulation Act 4 of 2006; Estate Agency Affairs Act 112 of 1976; Extension of Security Tenure Act 62 of 1997; Financial Advisory and Intermediary Services Act 37 of 2002; Financial Services Ombuds Scheme Act 37 of 2004; Further Education and Training Colleges Act 16 of 2006; Gas Act 48 of 2001; Health Professions Act 56 of 1974; Higher Education Act 101 OF 1997; Human Rights Commission Act 54 of 1994; Income Tax Act 58 of 1962; KwaZulu-Natal Ingonyama Trust Act 3 of 1994; Labour Relations Act 66 of 1995; Land Reform (Labour Tenants) Act 3 of 1996; Local Government: Municipal Finance Management Act 56 of 2003; Local Government: Municipal Systems Act 32 of 2000; National Credit Act 34 of 2005; National Environmental Management Act 107 of 1998; National Forests Act 84 of 1998; National Land Transport Act 5 of 2009; National Land Transport Transition Act 22 of 2000; National Payment System Act 78 of 1998; National Ports Act 12 of 2005; National Sport and Recreation Act 110 of 1998; National Water Act 36 of 1998; Pan South African Language Board Act 59 of 1995; Pension Funds Act 24 of 1956; Petroleum Pipelines Act 60 of 2003; Post Office Act 44 of 1958; Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998; Probation Services Act 116 of 1991; Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000; Promotion of National Unity Act 34 of 1995; Public Protector Act 23 of 1994; Recognition of Customary Marriages Act 120 of 1998; Rental Housing Act 50 of 1999; Restitution of Land Rights Act 22 of 1994; Short Process Courts and Mediation in Certain Civil cases Act 103 of 1991; Skills Development Act 97 of 1998; South African Institute for Drug-Free Sport Act 14 of 1997; State Information Technology Agency Act 88 of 1998; Telecommunications Act 103 of 1996.

Further, the pre-eminent example of the successful institutionalisation of mediation is in the Labour Relations Act of South Africa which requires the conciliation of unfair dismissal and unfair labour practice disputes as a pre-requisite to arbitration.<sup>208</sup> The Commission for Conciliation, Mediation and Arbitration (CCMA) has maintained an average settlement rate of 60 per cent over three years.<sup>209</sup> Apart from the statistics shown in the Commercial Division,<sup>210</sup> there is no data available from other institutions respecting the success rates of ADR. Further, in the case of the Commercial Division the statistics do not show that mediation has helped to expedite the settlement of cases.

It needs to be noted that the CCMA in South Africa is a free service, funded by the State, with an enviable track record in dispute resolution. This is again worth emulating in Malawi if access to justice is to be meaningful. In Malawi, for parties in dispute outside the employment relationship, there is modest infrastructure to support mediation which is either self-funded or set up privately.

## 7. Conclusion

The chapter has discussed the problems that are associated with mandatory mediation. This chapter has informed this research on how the problems of mandatory mediation can be avoided and how its potential can be retained by the Malawi judiciary. It also dealt with the advantages of mandatory mediation. There was a discussion of the literature on mandatory mediation so as to inform this thesis on both the advantages and dangers of mandatory mediation that Malawi has adopted. The views of Andreas Nelle have been illuminating and are to the effect the trend towards mandatory mediation raises both law and policy issues hence there is need for policy makers to determine under what circumstances mediation should be made mandatory through either statute; court rules or by agreement.<sup>211</sup> Nevertheless, Andreas Nelle argues that mandatory mediation is suitable for those cases where the benefits of mediation agreement outweigh the costs and risks of mandatory mediation.<sup>212</sup> Mandatory mediation has been found to work out well where circumstances are

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<sup>208</sup> See Section 191 Labour Relations Act 66 of 1995

<sup>209</sup> CCMA Annual Report 2009-2010; for a more historical analysis, see J Brand 'The CCMA: Achievements and Challenges – Lessons from the First Three Years' (2000) 21 *Industrial Law Journals* 77.

<sup>210</sup> See notes 148 and 190 above

<sup>211</sup> Andreas Nelle 'Making Mediation Mandatory: A Proposed Framework' (note 154) at 286-288.

<sup>212</sup> *Ibid* 290.

such that cases benefit from mediation but there are barriers to it. Thereafter the decision in *National Bank of Malawi v Msindo*<sup>213</sup> was examined in light of Order 5(5) of the Commercial Division rules.

In sum, the following was highlighted and concluded: mediation rules of the Commercial Division do not generally allow either party to avoid mediation. Further, the discussion in this chapter has shown that in adopting mandatory mediation, more especially in the Commercial Division, the Malawi Judiciary was dealing with problems of delay in the settlement of commercial disputes. Thus, the choice of the mandatory nature of mediation was not wrong. It is therefore recommended that this kind of mediation should be retained. However, for it to positively contribute towards the expedited disposal of commercial disputes there is need for the division to engage into it seriously as the statistics do not make good reading.

It is observed that the mediation in the Commercial Division is mandatory under the rules governing its procedure. The Commercial Division mediation rules are in keeping with the trend to make mediation mandatory. In addition, as to whether the provisions of the Commercial Division mediation rules are achieving their purpose of making the mediation mandatory the case of *National Bank of Malawi v Msindo*<sup>214</sup> has been instructive. The Judge categorically held that in the Commercial Division mediation is mandatory in proceedings commenced through writ of summons. Further, the Judge warned that simply ignoring the Commercial Division mandatory mediation is not an option. The Judge further concluded that the decision whether a matter goes through mediation or not rests with a Judge-Mediator and not a party.

In this chapter the dissertation also investigated what the USA and South Africa have done in the area of ADR. Then thereafter there was an analysis of the efficacy of the mediation obtaining in Malawi. Further, lessons were drawn on what needs to be borrowed from these countries. Accordingly, this chapter looked at what obtains in the USA and South Africa in the area of ADR. The objective of this chapter was to look at what methods have been used by these countries so as to analyse and assess the efficacy of the mediation obtaining in Malawi. It is observed that institutionalisation of ADR can help judiciaries deal with delayed disposal of cases. Judge's mind set shift from the traditional role of adjudicators to using their offices in ADR can help in ensuring that access to justice is meaningful. The role of

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<sup>213</sup> Commercial Cause Number 108 of 2008, 7 August 2009, unreported.

<sup>214</sup> Ibid.

Judges in the settlement of disputes in Malawi has been institutionalised. The Malawi Judiciary must adopt ADR in other types of cases and not only in commercial disputes if the problems of delay and crushing dockets are to be dealt with. The point is that judge led mediation should not exclude other actions. The Malawi Judiciary should therefore adopt the judge led mediation to resolve all types of civil cases.

Further, this chapter has concluded that South Africa's approach to alternative dispute resolution mechanism is something worth emulating. This is observed when it is realized that there are 49 South African statutes in diverse areas that oblige the mediation / conciliation of disputes. The CCMA has maintained an average settlement rate of 60 per cent over three years.<sup>215</sup> For Malawi, however, excepting the statistics shown by the Commercial Division,<sup>216</sup> there is no data available from other institutions respecting the success rates of ADR. Further, in the case of the Commercial Division the statistics do not show that mediation has facilitated expeditious settlement of cases.

The thesis found that the CCMA in South Africa offers free services, its funded by the State, and has an enviable track record in dispute resolution. This should be emulated in Malawi if access to justice is to be realised. In Malawi, for parties in dispute outside the employment relationship, there is modest infrastructure to support mediation. ADR is neither self-funded nor set up privately. Accordingly, Malawi could investigate its laws and take the route of legal reform in the laws that are the equivalent in South Africa. Hence satisfy the policy direction of the Constitution.<sup>217</sup>

Finally, it is noted that in Malawi there is the equivalent of Section 191 of the South African Labour Relations Act 66 of 1995 in the Labour Relations Act of the Laws of Malawi which deals with dispute settlement. There is a definition of a labour dispute.<sup>218</sup> Then section 43 states that any labour dispute, whether existing or imminent, may be reported to the Principal Secretary responsible for labour by, or on behalf of, any of the parties to the dispute. Further, section 44 says that if a dispute is reported to the said Principal Secretary and the latter is satisfied that the dispute settlement procedures established in a collective agreement covering the parties to the dispute have been exhausted, unless all parties have consented to waive

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<sup>215</sup> (note 209).

<sup>216</sup> See notes 148 and 190 above.

<sup>217</sup> See section 13(l) of the Constitution that has set out principles of national policy in Malawi on settlement of disputes through ADR.

<sup>218</sup> Section 42 of the Labour Relations Act in Chapter 54:01 of the Laws of Malawi

those procedures, the Principal Secretary responsible shall endeavour to conciliate the parties. However, where one of the parties to the dispute is the Government, including any public authority or commercial enterprise in which the Government has a controlling interest, the parties shall agree upon a conciliator, who shall endeavour to conciliate the parties.<sup>219</sup> Further, where the parties are not able to agree on a conciliator within seven days of the dispute being reported, the Industrial Relations Court shall, on the application of either party designate an independent arbitrator.<sup>220</sup> As regards unresolved disputes, section 45 provides that if a dispute is unresolved and concerns the interpretation or application of any statutory provision or any provision of a collective agreement or contract of employment; or an essential service, then either party to such dispute, or the said Principal Secretary may apply to the Industrial Relations Court for determination of the dispute.

There is no empirical evidence of success rates of arbitration or any enviable track record in dispute resolution through conciliation under the Labour Relations Act of the Laws of Malawi. Further, Malawi has no equivalent of the CCMA in South Africa. In addition, the question is, if pursuant to section 44(3) of the Labour Relations Act a matter goes for arbitration who pays for it? Is it a free service; or is it envisaged that it will be funded by the State? In any event, in Malawi, for parties in a dispute outside the employment relationship there is little infrastructure to support them through mediation or arbitration. Mediation is neither self-funded nor set up privately. In Malawi mediation or arbitration comes with an expense which is an added cost that cannot easily be met by a person outside employment. In the spirit of section 13 of the Constitution, it is suggested that the Labour Relations Act of Malawi should be reviewed so that the state should be responsible for the payment of arbitration or mediation expenses.

An issue was raised whether judges should be allowed to mediate. Regarding this question, opinion suggests that there is nothing wrong with judges being mediators. There is generally no need for formal training of mediators for them to be successful mediators. However, it is recommended that mediators should acquire knowledge of the mediation process, including ethics, standards and responsibilities.<sup>221</sup> It has been found and concluded that as is the case with any profession, the practice of mediation changes and advances. Hence, mediators are

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<sup>219</sup> Section 44(2) of the said Labour Relations Act.

<sup>220</sup> Section 44(3) of the said Labour Relations Act.

<sup>221</sup> Moberly 'Ethical Standards for Court-Appointed Mediators and Florida's Mandatory Mediation Experiment' (note 100) at 717.

encouraged to participate in continuing education activities to maintain professional competence.<sup>222</sup>

The next chapter is the last chapter of this dissertation. It sets out the conclusions and relevant recommendations made in this thesis.

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<sup>222</sup> Ibid. 718.

## CHAPTER FIVE

### CONCLUSION AND RELEVANT RECOMMENDATIONS

This thesis has critically evaluated judicial mediation in Malawi. Thus, the impact of the constitutional provisions in the Constitution respecting alternative dispute resolution were appraised. Further, the effects of the separate rules governing mediation in both the General and Commercial Divisions, of the High Court of Malawi, were analytically examined. To find out the answers to these questions and attain the objectives of the thesis, it was firstly acknowledged that various authors have written on, and analysed, the alternative ways of resolving legal disputes. Thus, a literature review on mediation became necessary and informed this research. Therefore, the methodology adopted in answering the questions was through desk-top research. Then the thesis focused on the law of mediation obtaining in Malawi respecting the Commercial Division as well as the General Division. Thereafter, there was an analysis of what impact the Commercial Division mediation rules have had on the mediation process in this division.

The study also examined what obtains in the USA and South Africa that could inform the mediation processes in Malawi. This was done whilst accepting that legal transplants are highly contentious.<sup>223</sup> However, a study of mediation in these countries was not ignored as lessons from these countries could drive law reform in Malawi.

The above is how the study has been informed. It is now necessary that some conclusions and recommendations of this research be pointed out.

The main purpose of the dissertation was to find out whether the mediation process in the Commercial Division is really mandatory. Thus, it analysed the impact the Commercial Division mediation rules have made on the mediation process in the Commercial Division. Further, it examined the subsidiary legislation that has a bearing on mediation and how the Judges in the Commercial Division administer mediations on commercial disputes. Thus, the thesis analysed the legal framework of mediation in Malawi. Further, the research explored the question whether judges are competent to mediate in the disputes that come before them. It has been concluded that there is nothing wrong with judges being mediators. Further, the

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<sup>223</sup> See Freund 'On Uses and Misuses of Comparative Law' (note 10); A Watson 'Legal Transplants and European Private Law' (note 10); P Legrand 'The Impossibility of "Legal Transplants"' (note 10).

thesis has shown that there is generally no need for formal training of mediators for them to be successful. However, it is recommended that mediators should acquire knowledge of the mediation process, including ethics, standards and responsibilities.

The thesis also examined and compared the rules obtaining in the General Division with those in the Commercial Division and assessed their effect on mediation in the Commercial Division. It concluded that there is only one High Court of Malawi with unlimited original jurisdiction. Therefore, it does not speak well that there are two sets of Rules that regulate mediation in divisions having concurrent jurisdiction. This is more so regard being had to the fact that a matter may be transferred between the two divisions of the High Court of Malawi. Thus, it is proposed that changes be made to the rules of mediation to avoid matters being mediated twice by different mediators i.e. in the Commercial Division by Judge-Mediators and other experts in the General Division. This observation is made as the Commercial Division mediation rules do not provide anything concerning what should happen, as regards mediation, to matters that are transferred to the Commercial Division from the General Division or vice versa. The rules should be synchronised. Alternatively, the Commercial Division should have a Court-annexed centre for mediation as is the case with the General Division. This should allow the Judges to refer matters for mediation instead of them actually mediating the matters.

Finally, the thesis explored the question whether there are any challenges respecting the rules of mediation in the General Division generally and the application of the rules in the Commercial Division specifically. As regards the rules of mediation in the General Division, it is concluded that the list of the active mediators in the General Division clearly shows that it is not a reflection of what the rules say as there are only lawyers in the list of active mediators. Further, it is clear that those entrusted with the responsibility of compiling and maintaining a list of mediators have not been doing their work. It is time for the responsible Assistant Registrar, with the approval of the Chief Justice; to do something about this otherwise the picture painted is that the Malawi Judiciary is not serious about mediation in the General Division. There is need to ensure that the list of mediators at the General Division is up-to-date. Thus, to avoid the problems that are associated with the amendment of legislation the list should be updated every time lawyers' licences are being renewed. Respecting the mediation rules in the Commercial Division, there are specific issues raised below.

The thesis sought to find out the strengths and weaknesses inherent in the mediation method that has been adopted by the Malawi Judiciary in the Commercial Division. It has been found that although the mediation is mandatory the statistics show that as at 15 March 2013, out of a total of 1180 cases registered since 14 May 2007 only a measly 114 cases have been disposed of through mediation. Hence, while mediation is mandatory and was intended to assist the Commercial Division to actively manage the cases filed at the division, the mediation's contribution has been minor. The settlement of commercial disputes is basically through litigation and other means than through mediation. Further, the data at the Commercial Division show that as of 15 March 2013, except between its inception in 2007 and 2008, there has been a steady decrease of number of cases that are resolved through mediation. Yet the anticipation at the time of establishing the division was that a significant number of cases would be settled through mediation but the converse is true.

If mediation is to be meaningful and embedded in Malawi, as suggested by the Constitution as well as alluded to in the statutes analysed herein, then there is need to seriously revisit the laws that deal with mediation. There is certainly lacuna in many of the Malawi statutes that deal with mediation which require reviewing. Further, there is need to revisit the curriculum at the Law School of the University of Malawi. There are currently no foundational courses in ADR offered at the only Law School in Malawi. The Law School has been training lawyers in the adversarial system and the method of practicing the profession of law since the 1960s. It should now also introduce foundational courses in ADR processes. The foundational course should be taught from 1st year through to 3rd year. This is notwithstanding that Mediation is taught as part of procedural law focusing on the Mandatory Mediation Rules in the General Division.

In addition, this thesis has interrogated and made the following recommendations that should make mediation in Malawi meaningful and effective:

There is need to review the provisions of Order 5(5) of the Commercial Division mediation rules. This will ensure that mediation does not take place outside the time allowed by statute.

Order 5(6) of the Commercial Division mediation rules provides the time when a mediation session is expected to commence before a Judge. Pursuant to this rule, a Judge-Mediator should within two days from the time the pleadings are closed, issue a notice to the parties advising them of the date of the mediation session. The mediation session is invariably to be

held no more than 21 days from the date the pleadings are closed. Thus, the Judges as well as the parties are obligated to comply. This is meant to ensure that cases in the Commercial Division are dealt with expeditiously and that this court realises the overriding objective for which it was established. The challenge has been to ensure that there is indeed a mediation process commencing within two days from the closure of pleadings. The question that rises is whether a mediation that is held after the lapse of two days is still valid or should be considered a nullity. It is suggested that to circumvent the problem, Order 5 of Commercial Division mediation rules should be reviewed so as to ensure that mediation does not take place outside the period allowed under the rules.

The Commercial Division mediation rules allow disputants to opt out of mediation. Further, the rules do not properly describe the kind of mediation that goes on in the Commercial Division. It is accordingly recommended that the rules should be revisited so as not to leave any room for doubt that the mediation in the Commercial Division is mandatory. The Commercial Division mediation rules should also be made clear as to the nature of mediation that is to be conducted i.e. whether it is evaluative or facilitative or a mixture of both types of mediation.

In order to ensure that matters at the Commercial Division are handled expeditiously but at the same time allow that in terms of the Rules the mediation period exceeds the 14 days allowed by statute, where there here is a chance that the disputants will reach a settlement; the Judge-Mediator should not terminate but extend mediation. Indeed, if the mediation settlement reached is to be considered valid and not a nullity on the ground that that it was reached outside the requisite 14 days there is need for revisiting the Rules so they provide for an extension of the period of mediation.

The Commercial Division mediation rules permits either party to avoid mediation upon showing good cause. The rules should continue allowing disputants to opt out and then oblige them to explain to the court why mediation should not be attempted.

The Commercial Division mediation rules are in keeping with the trend that makes mediation mandatory. Accordingly, the use of the word “mandatory” does not mean that the agreement reached at the end of the process is obtained involuntarily.<sup>224</sup> However, it is well to point out that mandatory mediation raises both law and policy issues. Thus, it is proposed that there is

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<sup>224</sup> Andreas Nelle ‘Making Mediation Mandatory: A Proposed Framework’ (note 154).

need for the Malawi Judiciary to determine under what circumstances mediation should be made mandatory through either statute; court rules or by agreement.<sup>225</sup>

It is said that mandatory mediation is suitable for those cases where the benefits of the mediation agreement outweigh the costs and risks of mandatory mediation.<sup>226</sup> Andreas Nelle has further suggested that mandatory mediation works well in cases where the parties do not feel inclined to settle a dispute expeditiously due to self interests.<sup>227</sup> It is therefore advisable for the Commercial Division to retain mandatory mediation if it is to ensure that commercial matters are resolved speedily. Again, mandatory mediation is effective in cases where the parties have an ongoing relationship often on a contractual or institutional basis. Since the Commercial Division deals with commercial disputes where essentially the disputants have ongoing contractual relationships it is in order that the mediation process in this court is mandatory. However, Andreas Nelle instructively advises that mandatory mediation should be premised on the legal and institutional structures of specific relationships rather than in the general framework of a court's procedural rules and has counselled that mandatory mediation should only be employed in cases where power imbalance is insignificant; and when the process is itself designed to get rid of barriers to the use of mediation.<sup>228</sup> The procedural rules of the Commercial Division take this into account.

However, it has been noted that nobody has yet challenged the provision that makes mediation mandatory so as to find out whether or not it violates the rights to access the courts and have an effective remedy as stipulated under section 41 of the Constitution. There is of course acknowledgment that section 13(*l*) of the Constitution is only a policy direction since the state is simply directed to actively and progressively promote policies and legislation aimed at achieving peaceful settlement of disputes by adopting mechanisms by which differences are settled through ADR mechanisms including mediation. But, section 41 (2) and (3) of the Constitution confers a right to access the courts and an effective remedy. Should a party choose to litigate fully to get what the litigant feels will give that person an effective remedy must a subsidiary legislation dictate that person to mediate first? If a litigant says that there is a conflict between the relevant provisions of sections 13 and 41 of the Constitution as read with the Commercial Division mediation rules, how should a court approach that apparent conflict? The argument of a litigant refusing mediation so that the

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<sup>225</sup> Ibid. 286-288.

<sup>226</sup> Ibid. 290.

<sup>227</sup> Ibid. 295.

<sup>228</sup> Ibid. 296

litigant wants an effective remedy is a real possibility considering that a legal scholar has argued that a mediation agreement is a poor substitute for a judgment.<sup>229</sup> There is a possibility of the court coming with a similar observation made by the Malawi Supreme Court in *The Liquidator of Finance Bank Ltd. v Kadri Ejaz Ahmed and Sheith Aziz Issa*.<sup>230</sup> The argument being that the Commercial Division rules are only for the purpose of promoting good case management practice and that these rules do not oust the jurisdiction conferred on the High Court of Malawi by section 108 of the Constitution. The existence of the possibility discussed herein demonstrates that mediation, which has been adopted by the Malawi Judiciary, potentially raises a legal problem.

It is an incontrovertible fact that the USA and South Africa are open as well as democratic societies. Further, these two countries have functioning and robust means of settling disputes through ADR methods. Thus, if one has to understand what the framers of the Constitution desired when they called upon Malawi to adopt and implement policies and legislation aimed at achieving peaceful settlement of disputes through negotiation, good offices, mediation, conciliation and arbitration, one cannot avoid drawing lessons from these two countries to see what can or cannot work. Thus, Malawi would benefit immensely from what obtains in these two countries. However, one has to be wary of wholesale transferring of the laws from these jurisdictions as laws do reflect a culture of a people. This is despite Watson's<sup>231</sup> advice that massive successful legal borrowing is commonplace in law and usually drives legal change as well in legal development.<sup>232</sup> But, with the advice of Legrand<sup>233</sup> as well as the response by Watson,<sup>234</sup> the discussion of what the USA and the South Africa have in the sphere of ADR is nonetheless instructive. It can properly drive legal reform in Malawi in ADR law.

The Malawi Judge's role in the use of ADR methods to settle disputes has been institutionalised. It is like in the USA. This must permeate in other types of cases and not only commercial disputes if the problems of delay and crushing dockets are to be dealt with. The point is that judge led mediation should not exclude other actions. The Malawi Judiciary

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<sup>229</sup> Owen Fiss 'Against Settlement' (note 14) at 1075.

<sup>230</sup> (note 68).

<sup>231</sup> A Watson, 'Legal Transplants and European Private Law' (note 9)

<sup>232</sup> Ibid

<sup>233</sup> Ibid.

<sup>234</sup> See note 229 above.

should adopt this judge led mediation to resolve small claims, family, and non-family civil cases.

It is a fact if you cannot measure something you cannot repair it. It is therefore recommended that there be mechanisms of knowing and measuring what the Malawi institutions responsible for the peaceful settlement of disputes are doing. Further, there is no State funded institution to handle arbitration, conciliation or mediation where disputants can access it for free. In the spirit of section 13 of the Constitution all laws in Malawi that have a bearing on ADR should be reviewed so that the State should be responsible for the payment of expenses associated with them.

Lastly, in Malawi, no specialised training is required for one to be a mediator. Thus, Judge-Mediators and other mediators need not be experts in a particular field to mediate on matters. However, mediator's acquisition of knowledge of mediation process, ethics, standards and responsibilities<sup>235</sup> is essential. This is the case as the practice of mediation is constantly changing. Hence, mediators should be encouraged to participate in continuing education activities to maintain professional competence.<sup>236</sup> Accordingly, there is need for the judges and lawyers in Malawi to continuously attend courses in mediation. Further, it is proposed that mediators should attend educational programs and related activities to maintain and enhance their knowledge and skills in mediation.<sup>237</sup>

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<sup>235</sup> Moberly, 'Ethical Standards for Court-Appointed Mediators and Florida's Mandatory Mediation Experiment' (note 100) at 717.

<sup>236</sup> Ibid. 718.

<sup>237</sup> See generally, American Bar Association's American Arbitration Association Association For Conflict Resolution "The Model Standards of Conduct for Mediators, August 2005"

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