PNG CONTINUING LEGAL EDUCATION FOR MEDIATION AND COMMERCIAL LAW[1]

By Ambeng Kandakasi*

Introduction

1. Peace in societies and the world is dependant amongst others on the prompt, efficient and effective resolution of disputes. The world has evolved from an history of an eye for an eye and a tooth for a tooth to a more civilized and structure form of resolving conflicts. At the highest for many have been and still is the formal courts. Much of the resources and focus has been and continues to be given to the formal courts and rightly so. Naturally this has and continues to cause more and more disputing parties to turn to the courts for a resolution of their conflicts. That has in turn caused the problem of backlogs in the courts' lists worldwide with final outcomes arrived at, after much delay. By than some parties have died or a have been liquidated whist others have adjusted to pursue other businesses or pursuits, or in the worst-case scenario, armed conflicts as the only inevitable consequences. In that context, there is compulsion for the courts, judges, and magistrates worldwide to adjust their processes and procedures to enable a prompt resolution of all matters getting into their lists.

Outline of the presentation

2. In this presentation, we will talk about:

(a) mediation a form of alternative dispute resolution (ADR).

(b) drivers of mediation and ADR.

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[1] This is a modified version of a paper presented by the writer in Jeju Island, South Korea in early November 2019.

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(c) Mediation and ADR law and practice in PNG and commercial law and practice.

(d) Legislative framework for mediation and ADR

(e) Mediation and ADR case law

(f) Lawyers' duty

(g) Steps taken by the PNG Judiciary to promote and encourage the use of mediation and ADR.

(h) Finish with concluding remarks.

What is Mediation?

3. Mediation is defined as:

"means the process a mediator uses to help the parties in a dispute to jointly identify their disputed issues, develop and evaluate options, and enable them to make their own decisions about how to move forward and or enhance their communication in a way that addresses their mutual needs and individual interests with future actions and outcomes and reach their own agreement or make a decision based on the principle of self-determination which may include a blended or a customary form of mediation."

4. A "mediator" is defined as:

"means a neutral third party who is accredited as such and holds a current practising certificate under these Rules and has the necessary expertise who uses the mediation process or a blended process, facilitates and helps parties in a dispute to respectfully communicate with each other and helps them to jointly identify, clarify and explore issues, develop and evaluate options, consider alternative process to settle their dispute and enable them

to reach an agreement or make their own decisions about how to move forward and or enhance their communication in a way that addresses their mutual needs and their individual interests with future actions and outcomes for them to reach their own agreement or make a decision based on the principle of self-determination."

5. Mediation is part of what is normally referred to as alternative dispute resolution (ADR). However, in PNG we have come to take ADR to also mean and include other forms of dispute resolution which are not necessarily an alternative but "*appropriate*", "*active*", or "assisted"[2] dispute resolution.

6. Influential statements made and steps taken by world leaders and institutions such as the then Secretary General of the United Nations, Ban Ki-moon with his circular statement made on 23rd May 2012, which asked member states to embrace and use mediation as a preferred form of conflict resolution[3] are contributing to a fast spread and use of mediation and ADR. Others like the European Union have issued a similar encouragement by way of a directive in similar terms issued on 13th June 2008.[4] Following the EU directive, Italy enacted legislation for compulsory mediation before litigation. In 2011. Several countries like Australia passed its *Civil Procedure Act 2011*, requiring litigants to attempt to resolve their disputes through mediation first before litigation. Nearly all the South Pacific Island countries have embraced ADR[5] and mediation with some form of mediation skills training and awareness workshops, mainly sponsored by the World Bank through its business arm, the International Finance

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[2] See: https://www.pngjudiciary.gov.pg/images/pdf/national-court/listings/civil/adr/act-rules/COURT_ANNEXED_ADR_-_POMCC_Breakfast_Talk_10072011_1.pdf; https://www.lexology.com/library/detail.aspx?g=b5744cee-ef54-4b10-8b97-abcd749c04e6. See also https://www.lerners.ca/lernx/appropriate-dispute-resolution/?utm_source=Mondaq&utm_medium=syndication&utm_campaign=LinkedIn-integration.

[3] "*Saying an 'An Ounce of Prevention is Worth a Pound of Remedy', Secretary General"* UN General Assembly GA/11242 (found at http:www.un.org/News/Press/docs/2012/ga11242.doc.htm

[4] EU Directive 2008/52/EC on certain aspects on civil and administrative matters (reference in http:www.kennedys-law.com/article/mediationineurope.

[5] Graham Hassall "*Alternative Dispute Resolution in Pacific Islands Countries"* located at http://www.paclii.org/journals/fJSPL/vol09no2/4.shtml

Corporation (IFC) and the Pacific Judicial Development Program funded by the Australian and New Zealand Governments.

Drivers of Mediation and ADR

7. Mediation was first formally introduced, promoted, and used in the United States of America (USA) since the 1970s. Since then, the process has spread globally alongside the formal courts and tribunals like wildfire. This wildfire is caused by the many well accepted benefits or otherwise known as "drivers of ADR" namely:

(1) speedy resolution of disputes;

(2) no unnecessary delays;

(3) no backlogs;

(4) less costs to resolve and arrive at final and lasting outcomes;

(5) less harm and less damage to personal and business interests;

(6) parties' autonomy in choosing either one or more combination of a number dispute resolutions process that best meets their needs;

(7) parties having a direct say and choice in the outcomes that would better meet their needs which a formal court might not be able to grant;

(8) equal access to justice and eventual outcomes; and

(9) in most cases, lasting finality in the resolution.

8. For many judiciaries now, ADR and mediation form an integral part of the courts case management processes, promptly and economically resolving many cases on the court's lists. Papua New Guinea is one country in which ADR and mediation form an integral part of the judiciary's case management process.

Legislative Framework for ADR and Mediation

9. Mediation and other forms of dispute resolution or ADR is not a new concept for PNG as is elsewhere in the Pacific. From time immemorial, Papua New Guineas have been using other forms of dispute resolution or ADR including med-arb[6] and still is the case for many, given that more than about 80% of the population is rural. Only the formally introduced system is new. Surprising however, ADR and or mediation is not compulsory in PNG as there is no Act of Parliament making ADR and mediation mandatory.

10. That is not the same to say there is a lack of legislation encouraging and enabling the use of ADR and mediation. There is a long list of legislation. At the highest for instance is ss. 333 - 336 of the *Constitution* and ss. 42, 44 and 118 of the *Organic Law on Provincial and Local-level Governments*. For the higher and the lower judiciaries are the *District Courts Act* (as amended) and *National Court Act 1975* (as amended), especially for civil cases. In the District Courts, ss. 22B to 22D provide for mediation, whilst the *National Court Act* per ss. 7B to & 7E (introduced by an amendment to the National Court Act 1975) provide for ADR and mediation. These provisions empower the Courts to order mediation at any stage of a proceeding with or without the consent of the parties.

11. Under rules promulgated by the Judges pursuant to s. 184 of the *Constitution* (rulemaking powers) and s. 7E of the *National Court Act*, there is a detailed set of ADR rules. They were first promulgated in 2010. Twelve years later in April 2022, those rules were repealed and replaced by a more detailed and modern set of rules, now headed *ADR Rules 2022*. Those Rules came into operation last Thursday, 01st September 2022. As the accompanying memorandum on the Rules, state:

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[6] For a description and discussion of the concept of med-arb see Kunai v. Papua New Guinea Forest Authority [2018] PGNC 439; N7570 at [9] to [27]:

> "Court-annexed mediation has become an entrenched function of the National Court system. Mediation as a means of dispute resolution and case management tool has matured."

12. Order 2, r. 2 of the Rules is most important. This rule requires mediation to be exhausted first before any further step is taken in any proceeding and provides with some detail how this must be done. Firstly, by subrule (1) the court is called upon to refer a matter to mediation upon the occurrence of anyone of three events occurring in any proceeding. The three events are:

> "(a) the filing of the Defence;
>
> (b) the expiry of the time for filing of the Defence; or
>
> (c) the first appearance in Court."

13. Secondly, by subrule 2, it provides for only one exception in these terms:

> "Unless one of the parties applies for and has been granted leave to dispense with the requirement for mediation, the proceeding may proceed to mediation, for which purpose the Court may issue appropriate orders under Order 2 rule 3 whether or not a formal application for mediation has been filed and moved."

14. Thirdly, subrule 3 (a) provides as to how an application for leave to remain in the litigation track could be made. It requires such applications to be made formally and supported by affidavit evidence. The supporting affidavit must come "from a person who has direct knowledge of the relevant facts of the case and who is able to demonstrate why the case should not be referred to mediation". Not only that, fourthly by subrule 3 (b) stipulates that, in a case where a party is legally represented, there must also be an "affidavit from the lawyer having carriage of the matter deposing with the support of appropriate evidence that they have discharged their duties under rule 8(7) of the *Professional Conduct Rules*

1989[7] (or any rule enacted in substitution thereof) for lawyers". Fifthly, the same subrule requires the lawyer to also depose to the case falling under one or more of the following categories for the grant of leave:

"(i) there are legal issues that have not previously been determined by a Court in Papua New Guinea; or

(ii) an out-of-court settlement is not in the interest of National security; or

(iii) there is no reasonable cause of action; or

(iv) a case warranting immediate declaratory relief where the facts are not contested; or

(v) a case involving a history of violence; or

(vi) a case where a Court sanction or order is statutorily required; or

(vii) one or more of the parties are in a state of mind that renders them incapable of negotiating for themselves or others; or

(viii) there is a real dispute over the meaning and application of a particular provision in a contract or an instrument; or

(ix) a public sanction as in a criminal case or other case is required for public health, safety, and good order; and

(x) subject to subrule (4), there is:

(A) a preliminary issue such as a question on jurisdiction, a condition precedent, or a statutory time bar; or

[7] The rule reads: "(7) A lawyer shall, when in his client's best interests, seek his client's instructions to endeavour to reach a solution by settlement out of court rather than commence or continue legal proceedings."

(B) an immediate protective order such as an injunction is required."

15. Subrule 4 goes on to stipulate that, where a matter comes under Rule 2 (3) (b) (x)(A) or (B) above, "the substantive matter shall be referred for resolution by mediation unless a question of the kind referred to in Rule 2 (3) (b) (i) to (ix) is presented. Sixthly, subrule 6 then states in clear terms that leave may not be granted unless:

> "(a) the parties establish to the Court's satisfaction that a meritorious issue raising the kinds of issues listed [under Rule 2] (3) (b) (i) to (x) exists; and
>
> (b) the applicant for leave establishes to the satisfaction of the Court that it has made real and good faith effort to resolve the dispute either by direct negotiations or through a prior mediation."

16. Finally, subrule 7 of Rule 2 requires the Court to "take into account the matters set out in subrule (3)(b)(i) to (x)" in determining whether to order mediation and the appointment of a mediator or to dispense with the requirement for mediation.

17. As could be seen from these rules, unless leave is granted in accordance with Rule 2 (3) to (7), mediation is effectively mandatory for all cases after the occurrence of anyone of the three events provided for under Rule 2 (1).

18. These Rules have been informed and based on ADR and mediation law and practice since 2008. It also incorporates judicial pronouncements and decisions of the Chief Justice and the Judges. At this juncture, it is then necessary to turn to a consideration of the cases.

19. Prior to the promulgation of the new *ADR Rules 2022* a practice direction issued for by the Chief Justice on 1st February 2022 for the management of cases filed in a new *Integrated Electronic Case Management System* (IECMS) (*IECMS*

Practice Direction) provides for ADR and mediation in Direction 16 (2) to 8 in these terms:

> "(2) Parties are encouraged to explore and exhaust all prospects of settlement through direct negotiation between the parties themselves, mediation, or a form of ADR prior to filing of any matter in the Court.
>
> (3) Where a matter is filed after completion of mediation in good faith as confirmed by an Accredited Mediator's Certificate in Form 2 under the ADR Rules (Mediators Certificate), the Court shall have the matter expedited to a resolution of the issues presented in the case by Judicial Dispute Resolution or by trial or hearing on the earliest available date.
>
> (4) In cases where the parties have not exhausted pre-filing mediation, they will be required to go to mediation unless the parties are able to make out a case in accordance with sub-rule (5) below that the case presents an issue that must be judicially determined.
>
> (5) The parties will not be required to go to mediation if:
>
> (a) the matter presents a real possibility of setting a legal precedent through a judicial determination which would clarify the law or inform public policy;
>
> (b) settlement out of court is not in the public interest;
>
> (c) protective orders such as interim injunctions are immediately required;
>
> (d) there is a clear case warranting summary judgment;
>
> (e) a genuine dispute requiring the Court to give declaratory relief is presented;

(f) a family dispute involving child abuse, domestic violence, etc. is presented;

(g) parties are in a severely disturbed emotional or psychological state such that they cannot negotiate for themselves or others;

(h) a genuine dispute requiring interpretation of a constitutional or other statutory provision is presented;

(i) a genuine dispute is presented as to the interpretation and application of a particular provision in a contract or an instrument, a determination of which will finally determine the dispute;

(j) a preliminary issue is presented such as an issue relating to jurisdiction, conditions precedent, statutory time bars or a complete failure to disclose a valid cause of action which requires a threshold determination; or

(k) a case for public sanction is presented as in a criminal case relating to matters of public health, safety, or good order.

(6) Where sub-rule (4) applies, the parties shall specifically state to the Court the nature and scope of the issues presented which identify why mediation should not be ordered.

(7) In cases where mediation is required:

(a) the Court will at the first mention of the matter or at the first directions hearing make appropriate orders for mediation in accordance with the ADR Rules and issue such other orders and directions as are necessary to enable a prompt disposal of the matter;

(b) before attending Court, the parties or their lawyers shall discuss and settle the terms of a draft consent order for mediation using the most appropriate pro forma order used by the ADR Service for the Court's consideration and endorsement;

(c) the order for mediation shall ensure that the mediation process commences and concludes within 40 days from the date of the order; and

(d) if the parties fail to have the matter settled at mediation in whole or in part, they shall with the assistance of the mediator:

(i) identify what if any meritorious legal issue is presented;

(ii) how the issue is beyond resolution by mediation;

(iii) how the issue is one not already determined by any Court in Papua New Guinea such that the parties are left with no guidance; and

(iv) agree and settle the relevant facts upon which such an issue is presented.

(e) where a matter is not resolved at mediation, the Court may deal with the issues presented and have them disposed of by JDR or by trial.

(8) For the purpose of JDR under sub-rules (2) and (6)(e):

(a) the Court shall first seek and secure the consent of the parties for the JDR process to apply and to be bound by its outcome;

(b) the parties shall agree on the relevant facts and the issues presented for resolution; and

(c) the Court shall receive the submissions of the parties on the issues presented and shall endeavour to enable the parties to reach a settlement agreement but failing any settlement agreement, the Court shall make a final and binding determination of the issues presented."

Mediation and ADR Case law

20. The Supreme Court at the highest in *Public Officers Superannuation Fund Board v. Sailas Imanakuan* (2001) SC677,[8] stated the obvious:

> "… Courts are there only to help resolve or determine disputes that cannot be resolved by the parties themselves despite their best endeavours to do so. All human conflicts and disputes are capable of settlement without the need for court action. That is possible only if the parties are prepared to allow for a compromise of their respective positions. People in other jurisdictions are already recognizing the benefits of settling out of court as it brings huge savings to the parties in terms of costs and delay and help maintain good relations between the parties. This is why in other jurisdictions, out of court settlements are actively being pursued through what has become known as Alternative Dispute Resolutions or ADRs."

21. Later in 2010 after the enactment and inclusion of ss. 7A – 7E of the National Court Act, the National Court in *PNG Ports Corporation Ltd v. Canopus No 71 Ltd* (2010) N4288, the National Court commented:

> "Recognizing the importance of having matters resolved out of Court, the Parliament in 2008, amended the National Court Act and added sections 7A – 7E. These provisions, amongst others empower the National Court to order mediation and other forms of ADR at any stage of a proceeding.

[8]Effectively endorsed by the Supreme Courts subsequent decision in NCDC v. Yama Security Services Pty Ltd (2003) SC707

These provisions also empower the Court to promulgate appropriate rules to give effect to the legislative intent of making ADR/Mediation an integral part of the Court's process. In accordance with that mandate, the Judges on 30th March 2010 promulgated the "Rules Relating to, Accreditation, Regulation and Conduct of Mediators."

22. The Court went to observe:

"All these now make it abundantly clear if not already done, the need for parties to seriously explore and exhaust out of Court settlement before coming to Court. If all parties involved in a dispute did that, they would be only appropriately reserving the courts for the hearing and determination of cases, which have merit that warrant only judicial consideration and determination….Thus, unless a case falls into such a category, most of the disputes should be settled and should never get to court. Hence, if they enter the courts without first exhausting out of court settlement options, the very first issue for the courts and the parties to address and resolve should be resolution of the matter through out of court settlement discussions which should take place under the shadow of the Court…. If such discussions fail, parties should be able to agree on what the relevant facts are and which of those facts are disputed and why and clearly set out or disclose the existence of a meritorious issue or issues, which warrant judicial consideration and determination. The parties should then be able to persuade the Court that, there is such an issue for the Court's consideration. Then on being satisfied that there is such an issue for trial, the Court can allow the parties to progress their matter to trial expeditiously."

23. In the context of the case then before it, the Court addressed the question of what do all these development in the ADR front mean in the following way:

"What this means then is that, a party who fails to give any serious consideration and fails to make good faith efforts toward resolving a dispute out of Court should be responsible for the other party's costs. Whereas in this case, one of the parties has taken all of the right steps toward having a dispute resolved through the parties own negotiations or with the assistance of a mediator or an independent and neutral third party and the matter subsequently settles after much costs have been incurred, the party concerned should be responsible for the costs thrown away on a solicitor and client basis, unless the parties otherwise agree."

24. About 4 years later, the National Court in its decision in *Abel Constructions Ltd v. W.R. Carpenter (PNG) Ltd (2014) N5636*, pointed out, all cases are capable of resolution by negotiation or ADR or mediation except only for cases that a:

"• real possibility of setting a legal precedent through a judicial determine which would clarify the law or inform public policy;

- case of any settlement out of court is not in the public interest;
- case in which protective orders such as injunctions are required immediately;
- clear case warranting summary judgment;
- genuine dispute requiring the Court to give a declaratory relief;
- family disputes especially involving child abuse, domestic violence, etc, is presented;
- a case of either or both of the parties are in a severely disturbed emotional or psychological state, such that they cannot negotiate for themselves or others;
- a genuine dispute requiring interpretation of a constitutional or other statutory provision;

- a genuine dispute over the meaning and application of a particular provision in a contract or an instrument, a determination of which will help finally determine the dispute;
- preliminary issue such as questions on jurisdiction, condition precedents, statutory time bar and issues of disclosure of valid cause of action which require determination before anything else; or
- case in which public sanction as in a criminal case is needed for public health, safety and good order."

25. The Court also noted that, in some cases, and more so after a determination of preliminary issues such as the ones presented in the third dot point and the second last item in the above list, the substantive matters could still be referred to mediation[9] unless such reliefs are permanent in nature. The Court has since granted interim injunctive orders in several cases and directed the parties to resolve their disputes through mediation. This the parties did successfully which resulted in a final disposal of the cases within two to six months of filing.

26. As may be noted, the decision in the *Abel Constructions Ltd v. W.R. Carpenter (PNG) Ltd* (supra) is the foundation for Order 2, Rule 2 (3) (i) to (x) of the *ADR Rules 2022*.

27. Young, in what could be taken as detailed look at this aspect in her article "*The 'What' of Mediation: When Is Mediation the Right Process Choice?*" concludes and this author agrees that:

> "As mediators, lawyers, and their clients gain more experience with mediation, fewer and fewer types of disputes will seem less amenable to the process. Even if mediation only succeeds in improving the parties' communication, in identifying their underlying interests, in narrowing the

[9] See the decision of the PNG Supreme Court in *Heni Totona v Alex Tongayu* (2012) SC1182 as an example of a case on point.

issues in conflict, or in helping them to more carefully evaluate their litigation option, it can move the dispute towards a quicker, more cost effective resolution."[10]

28. Given that position of the law, in *PNG Ports Corporation Ltd v. Canopus* (supra) case, the Court ordered a party who failed to take any meaningful step to have the matter resolved promptly meet the other party's costs on a party's own solicitor and client costs or on full indemnity basis. Similar orders and decisions have been arrived at in several subsequent cases. In *Alex Awesa & Anor v. PNG Power Limited* (2014) N5708, the Court ordered the parties to go to mediation for the second time, but this time with the defendant meeting the mediator's and parties' costs for its earlier failure to take meaningful steps to have the matter mediated.

29. The National Court has also gone a step further in providing some clarity as to what could amount to bad faith at mediation. That was in *Hargy Oil Palm Ltd v. Ewasse Landowners Association Incorporated* (2013) N5441. There, the Court considered the then available international jurisprudence and scholarly work on the subject of "bad faith" at mediation. Then ultimately, the Court found scholarly work on the subject like that of Professor Kimberlee Kovach as pointed out by Professor John Lande in an article entitled "*Using Dispute System Design Methods to Promote Good-Faith Participation in Court-Connected Mediation Programs*," as providing some useful guide. That work proposed the following list of behaviours that would protect against a finding of a party acting in "bad faith":

(1) complying with legislative and other rules, standing orders or practice directions' or provisions that govern mediation;

(2) complying with orders referring a matter to mediation;

[10] October 2006, http://www.mediate.com/articles/young18.cfm.

(3) personal attendance (excluding attendance by telephone) at the mediation by all parties who are fully authorized to settle the dispute;

(4) preparation for mediation by the parties and their representatives, which includes the exchange of any documents requested or as set forth in a rule, order or request of the mediator;

(5) participation in meaningful discussions with the mediator and all other participants during the mediation;

(6) acting in accordance with all contractual terms regarding mediation that the parties may have agreed to;

(7) following the rules set out by the mediator during the introductory phase of the process;

(8) remaining in the mediation process until the mediator determines that the process is at an end or excuses the parties;

(9) engaging in direct communication and discussion between the parties to the dispute, as facilitated by the mediator;

(10) engaging in accurate and honest representations to the other parties or the mediator during and for the purpose of the mediation; and

(11) in pending lawsuits, refraining from filing any new motions until the conclusion of the mediation.

30. The Court accepted that list and then expressed the view:

> "It should be obvious that, engaging in conduct or behaviour that is the opposite of the matters listed above would form the foundation for a finding of "bad faith." These sets of behaviors could be summarized … to read in terms of the parties being required to do everything possible and within their power or ability to ensure that the mediation proceeds from

start to finish is unimpeded but fully supported by them. As Thomas J. Sartory and Gary M. Ronan, suggest, "conforming with these behaviors is prudent in light of the uncertainty about how any individual judge will determine whether a party has acted in good faith". One thing is, however, very clear and that is this. "Good faith" is not about forcing a party to settle. Rather, it is about parties being asked to explore fairly and fully and then exhaust all possible options of resolving their conflicts out of court, without insisting on fixed positions and or engaging in conduct that leads to a frustration of a mediation taking off the ground and or otherwise prevent the mediation process from proceeding smoothly."

31. The decision in *Hargy Oil Palm v. Ewasse Landowners Association* (supra) has formed the basis for the National Court determining "bad faith" at mediation in several cases. It has also considered what consequences should follow any such conduct. One of the first cases doing that was in *Koitaki Plantations Ltd v. Charlton Ltd* (2014) N5656. There, the Court dismissed the plaintiff's claim and ordered judgement in a cross claim filed against it by the defendants. That was based on the plaintiff acting in bad faith which impeded a court ordered mediation from taking place. The Court was of the view that the case did not present any issue that was inappropriate for resolution by mediation or the parties direction negotiations and was one that warranted only a judicial consideration and determination.[11]

32. At the same time, the National Court has demonstrated a readiness to uphold mediated agreements provided the basic essential elements for a legally binding contract or agreement are present and deal with a party acting in bad faith

[11] For other cases on point see: Illius v. Bias [2018] PGNC 514; N7618; Taru v Pacific MMI Insurance Ltd [2016] PGNC 122; N6305; Wantok Gaming Systems Ltd v National Gaming Control Board [2014] PGNC 165; N5809; Awesa v PNG Power Ltd [2014] PGNC 114; N5708; Nibabe v Soli [2017] PGNC 232; N6886; Wantok Gaming Systems Ltd v National Gaming Control Board [2017] PGNC 71; N6685;

decisively and precisely.[12] The Supreme Court has endorsed the position taken by the National Court in its recent decision in *Chris Bias & PNG Power Ltd v. John & Niam Illius* (2022) SC2328. This readiness to uphold mediated agreements exist even in cases where an individual fails to sign a mediated agreement on an issue that concerns an individual's interest or rights which are exercisable through the sanctioning, approval or endorsement by his group as against others as in the case of a clan or tribal setting.[13]

33. The judicial pronouncement in the case of *Abel Constructions Ltd v. W.R. Carpenter* (supra) is perhaps the only judicial pronouncement there is on what kinds of cases that are appropriate and inappropriate for mediation. As already noted, that pronouncement forms substantially the basis for the provisions of Order 2, r. 2 (3) (a) to (x) of the ADR Rules 2022. This provides a clear guidance on the kinds of questions or cases that are inappropriate for resolution by mediation. In turn, this means any kind of case or question that is not on the list are appropriate for resolution by mediation in respect of which the Court can order mediation at any stage of the proceedings, with the consent of the parties, or on one of the parties' application or on the Courts own volition.

34. What the Court did in *Able Constructions Ltd v. W.R. Carpenter* (supra), is a clear indication by the National Court of its readiness to give effect to the parties' autonomy and choice as to how they wish to have their disputes resolved. In that case, although the dispute resolution clause imbedded in the contract was not properly constructed or worded to give effect to the parties' choice, the Court was prepared to give meaning and effect to the intention of the parties in terms of employing a system of dispute resolution promoted and supported by the Court, namely court annexed mediation. The Supreme Court on its part in its most recent decision in *Bluewater International Ltd v. Mumu* [2019] PGSC 41; SC1798

[12] *Hargy Oil Palm Ltd v. Ewasse Landowners Association Inc* (2013) N5441; Bewani Palm Oil Development Ltd v. Bewani Oil Palm Plantations Ltd [2019] PGNC 122; N7855; Unung-Siite Ltd v Gilford Ltd [2022] PGNC 30; N9475;

[13] See *Nathan Koti & Others v. His Worship David Susuame & Nabura Morrisa & Others* (2017) N6586.

decided to give effect to the parties' choice to have their dispute resolved by arbitration and made the following orders to see to that being done:

> "(4) The National Court proceedings be stayed pending an exhaustion of the process provided for under Clause 3.11 "Disputes and Arbitration" contained in the Contract between the parties.
>
> (5) The matter be assigned to the ADR track in CC2 to manage the process referred to term (4) of these orders.

Lawyer's duty

35. There are number of National Court decisions on the duty of lawyers regarding mediation. One such decision is the one in *Kanga Kawira & Ors v. Kepaya Bone* (2017) N6802. There the court stated at [94]:

Emphasize

> "I note with concern that Mr. John Kumara a very senior lawyer has deliberately failed to discharge his duties under the *Lawyers Professional Conduct Rules*, r. 8 (6) and (7) to his client and to this Court under r. 15 (2), (4) (a) and (b) and (10). These rules require all lawyers to take all steps necessary to promptly dispose of their client's claims and to avoid a wastage of the Court's time. In particular, lawyers are require to settle their clients claim and avoid delaying proceedings and therefore increase costs to their clients. This provisions were enacted or promulgated long before the ADR Rules. The ADR Rules helps to provide a clear and better avenue for the lawyers to discharge their duties promptly and bring about lasting, efficient and effective outcomes to their client as opposed to Court proceedings which can go around in a vicious circle, without any finality in sight for some time. A lawyer who fails and worse still, take the kind of position Mr. Kumara took in this case would clearly be in breach of his

duty to his client and the Courts. Such a conduct could attract personal liability both in costs and the substantively on account of the breaches."

(Emphasis added)

36. Lawyers are important gate keepers. Parties go to them for appropriate legal advice sometime before and during business and contract negotiations, sometimes when a dispute as arisen, sometime before and after going to court, and sometimes whilst pursing a matter in Court through its final outcome. A lawyer so engaged has the duties under their own professional conduct rules and advice their client of the need to use mediation and ADR and thereafter assist their clients to better use the mediation and ADR processes to help their clients to resolve their disputes promptly. The Courts in PNG have demonstrated their willingness to readily uphold party choices in selection of dispute resolution mechanisms in their commercial and other agreements, provide a clear list of matters not appropriate for mediation and hence only for resolution by judicial determination, ready enforced mediated agreements and deal with bad faith at mediation decisively and precisely.

Steps Taken for ADR and Mediation by the Judiciary

37. The PNG Judiciary took several practical steps to prompt and support the use of ADR. Firstly, it established an ADR Committee in 2001. The committee comprises of judges, magistrates, lawyers in both the public and private sectors, and academics in the law.[14] The committee's task was and is to assist the judiciary in the development and implementation of a system of court annexed ADR. Through the workings of the Committee a detail system of court annexed ADR and mediation has been development and is presently functioning full time alongside the formal Court system.

[14] Founding members include the current Chief Justice, Sir Gibuma Gibbs Salika and this author as the chairman.

38. Secondly, through the workings of the Committee in collaboration with development partners like the International Finance Corporation and others, a strategic ADR implementation plan was arrived at and successfully implemented. A new one is now due to enable the Judiciary to take the ADR developments to the next level.

39. Thirdly, almost a home grown set of ADR Rules was developed, adopted, and implemented. As noted already, those rules were recently revised, and the more modern *ADR Rules 2022* has been promulgated and has going into operation recently. The Rules amongst others provides for mediator code of conduct, training and accreditation and discipline for breach of any of the code of conduct, referral of cases to mediation from the courts and back, enforcement of mediated agreements and bad faith at mediation.

40. Fourthly, an ADR Division has been created with permanent offices, officers, and a mediation conference room. The division is headed by an Assistant Registrar who is supported by more than 5 other officers. The ADR division with the assistance of its ADR Committee, has a system of recording cases referred to mediation, conduct of mediation, the outcomes in each case with stakeholder and other users of the process feedback has been developed and is being implemented. Once fully developed, we will have near accurate figures on the number of cases referred to mediation, which of them have been mediated with their respective outcomes. Work is in progress for a system of capturing the number of cases resolve by Judicial Dispute Resolution of JDR, effective case management techniques and parties' own direct negotiations without any court intervention.

41. Present feedback from the users of mediation alone is very encouraging. Over 90 % of respondents suggested the courts should continue to support and encourage the use of mediation because mediation:

- has increased their confidence in the judiciary;

- less costly and with lasting outcomes or solutions;
- is safe, comfortable, user friendly and more secure;
- enables the parties to understand each other better;
- assists the parties to identifying the real issues in dispute between them;
- gives the parties opportunity to develop their own options for settlement and settle upon an option that is a win-win for both and an outcome they can live with and long lasting with no appeals or reviews.
- Additionally, given these benefits of the mediation process, more than 95% of respondents say they would use the process again if they are involved in another dispute. They have also stated they would recommend the use of the process to a friend or relative involved in a dispute.

42. Fifthly, the Judges resolved to dispose of 60% of the civil cases both pending and incoming by mediation except only for cases which present the kinds of questions or issues captured by Order 2, r. 2 (3)(a) to (x) of the *ADR Rules 2022*. However, only a few of the Judges are referring cases to mediation. The current Judicial Leadership through the ADR Committee is working on strategies to enable more of the judges to achieve the object of their resolution.

43. Sixthly, with a view to successfully implementing the judges' resolution and as a strategy to overcome the Court's backlog, and enable expedited, efficient, and effective resolution of cases at less costs, the current judicial leadership has made increased use of mediation as one of its objectives. Mediation weeks with mediators are now featured for one week each month in the Judiciaries Annual Calendar. The recent covid-19 pandemic and other events

have prevented maximum use of that allowance. These will be fully utilised in the new year. The ADR Committee is working on to recommend to the Chief Justice for consideration and approval.

44. Seventhly, the judiciary has decided to adopt and implement an Integrated Electronic Case Management System. That decision was made with the objective amongst others of enabling, prompt efficient and effective disposal of cases at less costs to the parties and the judiciary. Until all the backlog under the old case management system called Case Docketing System (CDS) are disposed, the cases filed with the IECMS are managed centrally by one judge. Each of the cases under the IECMS goes through a set of directions in accordance with Direction 16 of the *IECMS Practice Direction* with the aim of disposing each of the cases within 24 months of their filing. The directions would direct the parties to take certain steps within specified timeframes ranging from 7 to 60 days. Typically, the directions would require:

- The parties to file and serve on each other affidavits of all the evidence they respectively rely upon within a specified timeframe.
- Unless the affidavits already do so, the parties to give discovery of documents within a specified timeframe.
- Unless the parties can demonstrate to the satisfaction of the Court the existence of an issue that warrants resolution by trial having regard to the judgment in the matter of *Able Constructions Ltd vs. WR Carpenter Ltd* (supra), they are directed to settle the matter.
- The parties will then be given timeframes for settlement offers to and from each other and thereafter for them to meet in settlement conference to discuss and resolve any may in dispute between them after the exchange of their proposals.

- If the settlement conference does not result in settlement, the parties are required to settle upon a draft statement of the relevant facts and issues for resolution and return to the Court ready to address the court on the points in contention for the Courts consideration and determination or resolve the dispute through JDR or have the matter referred for resolution by mediation or a form of ADR.
- For the purposes of any mediation order, directions are also given requiring the parties to come with a draft consent order with agreements on the mediator to be appointed, all fees payable and the dates for the various steps to be taken including, the actual mediation conference dates which should commence and conclude within a period of 30 to 60 days.
- A return date would then be fixed for a return of the matter to the Court on the occurrence of which the court will check on compliances and make the appropriate orders, either extending the previous orders, final orders disposing of the matter or make orders for mediation.

45. Finally, the Judiciary developed and uses a system of mediator training and accreditation, like those offered in Australia and elsewhere in the world but with two important differences. The first of the two exception is a requirement for the newly trained mediators to work in co-mediation with other experience mediators in at least 5 cases or until the mediators have mastered the skills of mediation and have acquired some experience and confidence to mediate on their own. Upon completion of the co-mediation requirements a provisionally accredited mediator applies for full accreditation with the support and endorsement of the experienced mediators the applicant has worked with. The ADR Committee considers the application and if all requirements are met, a recommendation would then be made to the Mediator Accrediting Council to have the applicant accredited. The

second exception is a system of mediator discipline for any breach of the mediator's code of conduct. So far we have received and dealt with only two complaints and resolved using the disciplinary process. One of them was serious. That resulted in the mediator resigning and being remove from the listed of Court Accredited Mediators. The other was a based on a misunderstanding of the process and role of mediators and parties and got resolved.

Remarks in conclusion

46. For a long time, the formal court system has been the main process for resolving disputes and has been inundated with many cases quite unnecessarily resulting the process being overburden with cases. Now mediation with other forms of ADR is fast becoming accepted worldwide as preferred forms of dispute resolution. All these have one purpose. That purpose is to deliver justice to our people. That being the case, there is an imperative for the formal court process and those involved with it to accept mediation and ADR as useful as friends and work in collaboration or in cooperation with them to better deliver justice. Mediation and other forms of ADR are very useful tools or friends if used appropriately, can produce outcomes that can speak well of the judicial system and all involved with, it provided, it is properly developed and applied with good and strong judicial leadership. A failure to appreciate, befriend and make good use of mediation and other forms of ADR either by inadvertence or by a deliberate choice is a choice to remain with the problems of backlog and its varied related adverse consequences.

47. Lawyers as gatekeepers have an important role to play in enabling clients, our people, to make choices for the use of mediation and other appropriate, active and assisted (ADR) forms of dispute resolution. Those choices need to be made at the point of business or commercial negotiations leading commercial or other agreements, well before anyone is in court. Then when one is in court, clients need to be made aware of mediation ADR process that are available and assist

them to make maximum use of the most appropriate process. All of these is necessary to assist clients make informed choices to minimise the wastage of their time and money that could be used for business and other worthy pursuits.

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