Summary of Findings: Alternative Dispute Resolution in The Gambia

I. Executive Summary

Alternative Dispute Resolution, or the process of resolving a dispute without litigation, is more time effective, cost effective and private than resolving a case in the courtroom. For these reasons, out of court procedures such as mediation and arbitration are increasingly being used in legal systems around the world. The Gambia, however, is lagging in this trend, which, for reasons set forth in this paper, is seemingly hindering the development of the country’s legal system.

Recognizing as much, the West African Law Institute (hereinafter “WALI”) conducted a one day training seminar for Gambian legal practitioners on ADR best practices. As part of this seminar, participants were not only provided with a toolbox of techniques for resolving cases outside of the courtroom, but also took part in a lively discussion on the current state of ADR in The Gambia. This paper presents the most pertinent weaknesses identified by participants, including: (i) awareness; (ii) structure; (iii) capacity of lawyers; (iv) judicial capacity; and (v) enforcement. Additionally, this paper sets forth WALI’s recommendations for enhancing the use and effectiveness of ADR in the country.

II. Background

On November 16, 2013, as part of its Seminar Series, WALI conducted a one day legal seminar on alternative dispute resolution (hereinafter “ADR”) (the “ADR Seminar”). This ADR Seminar was carried out in furtherance of WALI’s stated mission to enhance the legal capacity of Gambian lawyers, through continuing legal education programming. Saadi Siddiky, a certified negotiator with years of experience practicing ADR, both in developing and developed countries, was the guest lecturer for the seminar.

WALI’s first seminar focused on ADR due to popular demand from Gambian lawyers, as well as its current relevance as one of the fastest growing areas of law, and one which the Gambian judiciary has recently demonstrated particular interest in. Furthermore, this seminar came at a time when the Gambia’s Alternative Dispute Resolution Act (hereinafter the “ADR Act”) is in the
The day long seminar began with an introduction by Mr. Siddiky on the most pertinent techniques for successful negotiation. These techniques included necessary preparation which must take place prior to a negotiation, such as prioritizing objectives; handling difficult cases, such as those involving gender or race sensitive issues; listening and speaking techniques; and making an offer. Following this comprehensive introduction, Mr. Siddiky then led a role play, where participants were divided into two groups and given two different, secretive fact patterns. They then participated in a simulation, with Mr. Siddiky adding his input as to participants’ strengths and weaknesses throughout.

The day ended with a structured discussion as to the current state of ADR in The Gambia and suggested next steps for improvement. The purpose of this discussion was to gather the perspective of Gambian legal professionals on how their practice could be better improved by enhanced usage of ADR. As a starting point, participants were provided some best practice examples from other jurisdictions, both in Africa and elsewhere in the world. Many participants had also had previous experience in ADR in other jurisdictions, particularly in the United States and the United Kingdom; experiences which they shared with the group to enhance the conversation.

A summary of the participant identified weaknesses is set forth below, in specific detail. Additionally, WALI’s suggested reforms, based on the discussion with participants, are also highlighted herein.

III. Identified Weaknesses

WALI, based on the feedback of participants at the ADR Seminar, has identified five primary weaknesses of the Gambian ADR system. Each is set forth and described in detail below. While there exists a substantial number of additional weaknesses, WALI has chosen to highlight the following as those most in need of reform, so as to establish a solid foundation for ADR in The Gambia.

1. Awareness

Perhaps the most prominent weakness of the Gambian ADR system is a lack of awareness. Average Gambian citizens, businesses and government officials all appear to have a misconception as to the legal process, believing that litigation is the only way to settle legal disputes. Few seem to view ADR as a viable option for dispute resolution. In other words, there is a belief in The Gambia that court proceedings are the only manner in which to resolve disputes.
The general population, particularly the vast number of Gambians living outside of the greater Banjul area, are unaware that there are alternatives to litigation, or even to taking a dispute directly to court. They are unaware that ADR may be used to their advantage, saving them time and money in having disputes resolved. While WALI’s experience demonstrates that a predominant number of disputes in The Gambia (not unlike other countries) may be resolved without any formal judicial process whatsoever, and many could simply be resolved at the community level, few people seek out such resolutions.

Businesses in The Gambia also fail to utilize the ADR system within the country. In fact, the participants at WALI’s Seminar noted that many businesses take their cases to the United Kingdom for settlement, rather than utilize the local ADR system. While this is perhaps a result of a lack of confidence in the system, as will be further discussed below, it also has to do with a lack of awareness on the part of Gambian businesses that there are lawyers and community mediators in the country, many of whom practice corporate and business law, who are trained in settlement and other forms of ADR.

Finally, there appears to be a top to bottom culture of viewing ADR as a lesser option to court proceedings. The Gambian government, particularly the judiciary, for reasons that will be discussed in greater detail below, seem to view ADR as a threat to their viability. This is substantially hindering, in the opinion of WALI and the participants, the effectiveness of the Gambian legal system, particularly Gambian courts. This issue is rooted in an unawareness amongst government officials as to the potentials and importance of ADR, something that more developed countries have long been aware and made substantial use of.

2. Structure

The Gambia’s current ADR system was developed under the ADR Act of 2005. This Act is what established the ADRS. While the Secretariat was established in order to increase the usage of ADR in the country, the manner in which it was established has hindered its ability to play any major role in the Gambian legal system.

Most notably, there is a fundamental weakness in the manner in which the ADRS was set up under the ADR Act. Particularly, the ADRS is under the supervision and control of the Ministry of Justice. This essentially makes the ADRS a governmental body, substantially decreasing its ability to be viewed as an independent body, something that is essential to the success of what is supposed to a neutral third party in dispute resolution.

The current structure of the ADR system also impedes on the ability of stakeholders to actually utilize it. Many lawyers, including a number of participants at WALI’s Seminar, have expressed concern that ADR is handled through the Secretariat, attached to the Ministry of Justice, and not by a fully independent body, or, at the very least, one operated through what is supposed to be
the independent branch of government, the judiciary, which will be discussed in greater detail below.

3. Capacity of Lawyers

There are few Gambian lawyers who are certified mediators and nearly as few who have received formal training on ADR. Many of those who have received training did so over a decade ago and have received little to no follow up training since. Many participants stated that the WALI Seminar was extremely helpful, for the specific reason that it gave those who had no formal training a brief background and those who had some past training a refresher course. However, this was only a one day seminar, with only a small number of legal professionals present. There remains, therefore, a noticeable lack of knowledge on the part of Gambian lawyers in regards to ADR. ADR remains something outside of the comfort zone of many lawyers, which results in a dismal number of cases settled outside of court.

In addition to a lack of knowledge amongst lawyers, there is also an almost alarming misconception as to the value of ADR, particularly as to the cost benefit of settlement in civil cases. As many of the WALI’s ADR Seminar participants, particularly private practitioners, pointed out, ADR can reduce the time spent on cases and result in the same, if not more, profit for a lawyer. Even in those cases where there is not a higher gain in profit, the fact that lawyers who use ADR are able to close cases, without a drawn out court process, allows them to spend more time handling more cases, rather than stuck in a court room all day. Therefore, this too may result in a greater profit margin. However, few lawyers recognize this reality, making them less likely to utilize ADR.

4. Judicial Capacity

Just as with lawyers, there is a gaping hole in the ADR knowledge of Gambian judges and magistrates. Additionally, while the current Chief Justice is keen on enhancing the number of cases referred to an ADR process, there is little continuity within the judicial system as to when ADR should be used. No laws exist regarding settlement in civil cases, nor are there any procedures or allowances for plea bargaining in criminal cases. There is also no mention of ADR or any sort of dispute settlement in the rules and regulations of lower courts, including magistrate courts, which hear a notable percentage of all civil and criminal cases.

Most alarming to WALI, regarding the judiciary, was the participant’s belief that judges are given a certain quota as to the number of cases they must hear and write judgments for, over a set period of time. This is alarming, not only because it puts into question the quality of judgments, but also because it encourages judges to push litigants into contentious, adversary procedures, rather than encouraging them to settle, in an amicable way. While settlement is becoming largely popular in many places in the world, the nature of The Gambia’s judiciary seems to be hindering
efforts in this country. The perception of judges that litigation is the only way to resolve conflicts must shift if the ADR system in the country is going to evolve.

WALI would like to take this opportunity note that, in lines with the current Chief Justice’s perspective, participants did point out that there has been one pre-trial judge assigned to ADR, who oversees all cases that go to settlement. This is seemingly a step in the right direction and WALI commends such efforts, as it does the effort of the current Chief Justice to enhance the usage of ADR in the country. However, participants also noted that this one judge is overwhelmed with the number of cases she has to handle and that this is only a short term solution to a much larger problem. That said, it remains to be seen the impact that the current Chief Justice, only recently appointed, may have on the ADR system in the country.

5. **Enforcement**

A number of participants, particularly those who shared that they do use settlement and other forms of ADR in their daily practice, expressed great concern over the lack of enforcement of settlement agreements. Without consistent judicial enforcement of settlement agreements, ADR is certain to fail in The Gambia. If parties cannot expect their out of court agreements to be respected, the same as a litigated judgment, they will be less likely to attempt to resolve disputes outside of the court room. Lack of enforcement is, therefore, one of the most apparent weaknesses of ADR in The Gambia.

IV. **Proposed Reforms**

As a result of the above stated weaknesses, there is arguably little confidence in ADR in The Gambia. This lack of confidence, on the part of lawyers and litigants, coupled with an apparent lack of understanding on the part of the government, is hindering the effectiveness of ADR in the country. WALI, in its efforts to enhance legal capacity and strengthen the legal system in The Gambia, proposes the following reforms or “next steps,” all aimed at enhancing the effectiveness of ADR within the country. WALI would like to note that each of these recommendations was originally brought forward by participants at the ADR Seminar; therefore, WALI is simply expanding on these ideas and presenting them herein in written form. Additionally, WALI notes that the following are intended as a general overview of recommendations and do not contain comprehensive details as to how each recommendation should be carried out.

1. **Awareness**
In order to build public awareness of what ADR is and how it can be used to resolve disputes, WALI proposes a country wide sensitization tour. This tour should be focused on educating local community members on situations in which ADR may be used. As part of this, and in the interest of enhancing overall legal understanding amongst the general population, community members should also be provided with a basic overview of the Gambian legal system, so as to understand where ADR fits within it.

Additionally, as a follow up to this general awareness tour, WALI proposes the training of community mediators. These community mediators should be trained to handle community based disputes, which need not involve court procedures. For example, a number of familial disputes, such as property disputes, are often times resolvable through mediation or negotiation, rather than through a formal legal process. Community mediators should be numerous enough so as to be easily accessible to community members in all villages throughout the country, but need not number one per village. These mediators should be both men and women and should be selected based on their reputation within the community, as well as their intellectual capacity.

Finally, assuring the greatest awareness amongst all potential litigants, WALI proposes a business sensitization campaign. This campaign should be carried out in collaboration with stakeholders such as the Gambian Chamber of Commerce and Industry and the American Chamber of Commerce, The Gambia. Similar to the community sensitization tour, this campaign should be focused on enhancing understanding amongst business owners as to how ADR may be used to their benefit in order to resolve disputes. In addition, such programs could and should include some basic training on settlement and negotiation techniques, similar to those introduced in the ADR Seminar.

2. Structure

Many of WALI’s most substantial proposals for reform involve structural reorganization of the current ADR landscape in The Gambia. Before delving into its recommendations, however, WALI would like to point out that the ADRS is currently, at the date of this writing, working on amending the ADR Act. WALI has been involved in the discussions regarding these amendments and is aware that many of the recommendations set forth herein are already being considered as part of such amendment. That said, for the purpose of being all inclusive, WALI will now briefly explain its own proposed structural reforms, as also supported by the ADR Seminar participants.

First and foremost, WALI proposes an amendment to the ADR Act that will make the ADRS an independent body, separate from the government. As stated above, this move would increase confidence in the system and make both litigants and lawyers more likely to utilize ADR, as it would remove apprehensions as to the involvement of the government in the process. This said,
WALI does recommend adding a provision to the law that would link ADR agreements to the judiciary, for the purpose of assuring enforcement, as will be discussed in greater detail below.

As part of the amendments to the ADR Act, and with the same purpose of assuring independence of the ADR system, participants suggested that the ADRS be overseen by a board of legal professionals, comprised of both private practitioners and members of the judiciary. This board should assure the proper functioning of the ADRS and oversee ADR programming, such as those proposed herein. In addition, WALI recommends that the board assure that the ADRS maintains a list of qualified ADR practitioners and make this list readily available to the general public, including businesses, and Gambian lawyers.

Other structural amendments, recommended by participants and now proposed by WALI, include certain amendments to other laws and regulations, apart from the ADR Act. Specifically, WALI suggests that rules and regulations regarding ADR procedures be built into subordinate court rules, as well as those for the high court. Furthermore, a number of participants mentioned their belief that the criminal law system in The Gambia could be greatly enhanced should the Criminal Code allow for plea bargaining.

3. **Capacity of Lawyers**

In order for more litigants to utilize ADR, Gambian lawyers need to start viewing ADR as a viable option for concluding a case. As mentioned above, there are currently a number of misconceptions regarding the effectiveness of ADR, both for resolving cases and as per its profitability. Therefore, WALI is proposing that its ADR Seminar be replicated and expanded upon, providing Gambian lawyers with an extensive, comprehensive training on all matters related to ADR. This training should cover everything from cost/time effectiveness of using ADR in daily practice, to specific techniques, as Mr. Siddiky covered during the ADR Seminar. The participants made the suggestion that there should be a full week long training session, arranged in collaboration with the judiciary. WALI would also support this idea, as one week would allow sufficient time for both educational lectures and simulation activities, which strengthen comprehension.

4. **Judicial Capacity and Enforcement**

To strengthen judicial capacity, with regards to ADR, WALI believes that the laws proposed above need to be followed up with judicial trainings, similar to what was proposed for lawyers, for judges and magistrates, at all levels, and in all courts. This should include training of chiefs who sit as judges in District Tribunals, The Gambia’s customary law courts, as well as judges at the Islamic courts, known as Kadhi Courts. As with the training proposed for lawyers, the focus for these trainings should be to demonstrate to the judges the benefits of ADR to their own practice, including a reduced case load that will allow them to focus more substantially on the cases that
do go before them. As judges in many courts around the world can attest to, ADR can benefit them as substantially as it can lawyers and litigants. This needs to be made clear to the Gambian judiciary.

In order for this judicial training to be successful, however, the passing of certain rules and regulations pertaining to ADR, as mentioned above, must also be introduced. These rules and regulations should include a procedure judges should follow when referring a case for ADR and should provide certain support staff to the judiciary, for handling out of court settlement and other negotiated or mediated agreements. While WALI is aware that a similar procedure does currently exist, in theory, the participants pointed out, as was mentioned above, that there is only one pre-trial judge assigned to overseeing the process and that, overall, the current system leaves much to be desired in terms of the number of cases successfully being completed through the ADR process. At the very least, there should be more permanent positions added to the judiciary, specifically for overseeing the ADR process from start to finish.

Each of these proposed reforms would also enhance the enforceability of out of court settlements and other agreements, which, as stated, is an essential requirement for assuring the success of an ADR system in the country.

V. Conclusion

In support of the above suggested reforms, and in furtherance of its stated mission, WALI will continue to plan and carry out programming aimed at bolstering the Gambian legal system. This will include targeted, follow up training on ADR that will reinforce the efforts of the ADR Seminar. Additionally, WALI looks forward to making itself available to the Gambian judiciary and legislature, in whatever capacity necessary, to assist in increasing awareness of ADR and incorporating out of court procedures into Gambian law. As participants at the ADR Seminar pointed out, a successful legal system relies on a sound, widely used ADR system.