



ALTERNATIVE DISPUTE RESOLUTION

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Areas of Conflict



Conflicts within the Context of County Governments



What are the areas of Conflicts:

- With other stakeholders: Suppliers, Employees, Intercounty conflicts,
- With the National Government

What does the law/ Constitution say about conflict resolution within the Context of County Governments

The Constitution and Dispute Resolution in Counties



The constitution states that in any dispute between the two levels of government, reasonable efforts shall be made to settle the dispute by negotiation, mediation and arbitration. In terms of legislation, the Intergovernmental Relations Act establishes a framework for consultation and co-operation between the national and county governments and amongst county governments. It establishes mechanisms for the resolution of intergovernmental disputes pursuant to Articles

Introduction & Forms of ADR



ADR refers to the process of resolving disputes other than litigation. This Includes use of :

- a) Arbitration
- b) Negotiation
- c) Mediation
- d) Conciliation
- e) Adjudication
- f) Expert Determination

Introduction & Forms of ADR



Basis For ADR

- Constitutional provision, Article 159 entrenches ADR as part of Kenya's dispute resolution mechanism.
- The Civil Procedure Act Section 59 (court Annexed mediation)
- Article 33 of United Nations Charter.

Arbitration



- It is subject to statutory controls: Arbitration Act 1995 & The Civil Procedure Act.
- It arises where a private tribunal or an individual is appointed to determine a dispute and render a final binding decision called an award enforced by courts. It is adversarial and in many ways resembles litigation.

Arbitration Cont.



- Must be agreed to in writing by the parties either in the dispute resolution clause or as a separate agreement.
- Enforcement of International Arbitral Awards: Signatories to the New York Convention.
- UNICITRAL model of Arbitration law: Brief Highlight

Enforcement of Arbitration Awards



- Enforcement of International Arbitration awards is available in all countries that are signatories to New York Convention
New York Convention” means the Convention on the Recognition and Enforcement of Foreign Arbitral Awards adopted by the United Nations General Assembly in New York on the 10th June, 1958, and acceded to by Kenya on the 10th February, 1989, with a reciprocity reservation.

Enforcement of Arbitration Awards



- Domestic Awards are enforced by the courts upon application by the parties according to the Arbitration Act 1995 section 36.
- Arbitration Awards can be set aside by the high court upon application by the parties and as per the provisions of the Act.

Negotiation



- It's any form of communication between two or more people for purposes of arriving at a mutually agreeable solution to a dispute.
- The disputants may represent themselves or may be represented by agents. The disputants have control of the negotiating process.
- The objective is to arrive at a “win- win” solution

Mediation



- It's a non binding process in which an impartial party (Mediator) facilitates negotiation process between the disputants.
- The mediator has no decision making powers and the parties maintain control over the process and the substantive outcome of the mediation process.
- The parties are assisted to voluntarily reach their own mutually acceptable settlement

Conciliation



- Conciliation is not universally defined mechanism.
- Locally it is described as a mechanism used to test the possibility of two disputing parties making up and assuming prior cordial relationship.
- The Commission for conciliation, mediation & arbitration of S. Africa defines it process where a commissioner meets with parties and explores ways to settle the dispute by agreement

Conciliation Cont.



- The 3rd party, a Conciliator separately discusses the dispute with each party , then prepares a solution based on what he considers to be just & optimal compromise.
- Conciliation is used to restore the parties to the pre- dispute relationship after which other ADR technique may be applied.
- The conciliator is the Architect & designer of the solution.

Adjudication



- It's defined as a dispute settlement mechanism where an impartial 3rd party (Adjudicator) makes a fair, rapid and inexpensive decision on a dispute arising from a construction project.
- It's thus limited and appropriate to unique needs in construction industry, which usually involves Engineering and civil contracts.
- Adjudicator's decision is a binding order unless the matter is referred to Arbitration or litigation.

Expert Determination



- This is a process where Parties submit issues and dispute to an expert knowledgeable in a particular field of dispute for determination.
- The expert evaluates the dispute & makes a decision based on his expertise, e.g an accountant determining the net profit of a business.
- It is also used in the construction industry to determine issues of a specific technical nature.

Benefits of ADR



- It is private
- It is fast.
- Preserves business relations
- Is a factor in determining ease of doing business in a jurisdiction
- Promotes International trade.
- It is cost effective***
- Helps reduce backlog in the court systems

Word from the Expert



The courts of this country should not be the places where resolution of disputes begins. They should be the places where the disputes end after alternative methods of resolving disputes have been considered and tried.

Sandra Day O'Connor

QuoteMaster.org

Activating ADR in a Dispute



Any of the parties in a dispute can kickstart the dispute resolution process by notifying the other party/parties of their desire to do so as per the dispute resolution clause in the contract.

This makes the Dispute resolution clause one of the most important aspects of a contract negotiation. It should be precise and also capture the real desire of the parties.

Dispute Resolution Clause



A dispute resolution clause is an agreement within a contract which sets out the mechanism for the resolution of disputes between the contractual parties

- Refer to notes & Case Study
- <https://www.fenwickelliott.com/research-insight/adjudication-case-notes/ericsson-ab-v-eads-defence-and-security-systems-limited>

Dispute Resolution Clause



DRC should be clear, concise, and workable

Courts and tribunals are keen to uphold the prior agreement of the parties and therefore parties must make it easy for this to happen;

Important Aspects:

- Methods to be taken and in which order
- Appointment of the dispute resolver, method and appointing authority
- Notice period

Dispute Resolution Clause



- The cost of dispute resolution: Whose cost is it?
- The Applicable law
- Tied methods clearly stating what period is spent on each before escalating to the next usually starting with the most informal with litigation and/or arbitration being the last result.
- Must clearly state the optional and compulsory clauses. Careful with words like 'may' and 'shall'

Word from the Experts



“When two wise men are blaming one another,
then time has come for you to be the third
one.”

— Toba Beta, Master of Stupidity

ADR IN KENYA



□ The Law

- Constitutional provision, Article 159 & 189 entrenches ADR as part of Kenya's dispute resolution mechanism.
- The Civil Procedure Act Section 59 (court Annexed mediation)
- Nairobi Centre for International Arbitration Act 2013
- Article 33 of United Nations Charter.

ADR IN KENYA Cont.



❑ Training of ADR Practitioners

- Chartered Institute of Arbitrators: Arbitration(Sole trainer), Mediation, Construction Adjudication. Affiliated to UK CIArb.
- Mediation Training Institute:Trains in mediation. Accredited to train for the court annexed mediation process.
- Nairobi Centre for International Arbitration

ADR IN KENYA Cont.



□ Practice of ADR as a Profession

ADR in Kenya can be practised through:

- Direct Appointment by the parties
- Chartered Institute of Arbitrators
- Court Annexed Mediation
- Nairobi Centre for International Arbitration

Other centres in the region: Kigali, Cairo

Around the world: Dubai, London, KL, Beijing,

Opportunities for Accountants in ADR



- Arbitration: Accountants are sought after in the Arbitration profession due to pivotal place of their technical knowledge in business. Accountants can train to be Arbitrators. It is a very lucrative profession especially in the international trade arena. Appointment directly by parties or through the various institutes panels as guided by the Dispute resolution clause

Oppourtunities for Accountants in ADR Cont.



- Practice in Mediation: Court Annexed program, Chartered Institute, NCIA and other panels. Appointment either directly by parties or as per the Dispute resolution clause.
- Court Annexed Mediation has so far released about kes500M of the kes5B held in commercial disputes back to the economy Less than 200 mediators listed on the MAC list as at last year.

Oppourtunities for Accountants in ADR Cont.



- Expert Determination: This is especially for those who are in active practice of the proffession. One can put themselves out there as capable of providing expert determination on matters touching on accounting.
- Training, examination and lecturing on this new frontier once you have mastered the ropes.

What more can Accountants Do?



- Sensitization of the Public on ADR.
- Drafting clear Dispute Resolution clauses for contracts in their organizations
- Professionals from an Accounting and/or Finance background have a higher chance of making it to CEO positions according to research hence need the knowledge while contracting and in actual dispute resolution

Thank
you

