



# **GENERAL OVERVIEW OF THE ADR SPECTRUM**

**BY**

**Dr. JOSIAH ROMAN AKETCH (PhD), CPM.**



- WHAT
- HOW
- TYPES
- ADVANTAGES



- The term **ADR** comprises a variety of processes that provide alternatives to the traditional methods for resolving disputes through **litigation** and are generally characterized by **informality, flexibility and control by the parties** to a dispute.

# ADR AND ITS ADVANTAGES.



- **Self Determination/Personal Control** - Unlike litigation, ADR allows the parties substantial control over all aspects of the resolution of their dispute.
- **Cost Savings** - ADR may permit disputants to avoid some of the expense of litigation, including attorney fees, expert witness fees, and other costs associated with protracted litigation and appeals.

# Expeditious Resolution



- Because of the large number of cases filed, court cases often takes a year or more, then an appeal looms as a possibility. The likelihood of resolving a conflict expeditiously is far greater with ADR than with courts .

# Voluntary and Non-Binding Status



- ADR is not intended to replace the judicial system, but instead functions as an aid to the system. All forms of ADR except binding arbitration are voluntary and non-binding, unless the parties agree otherwise.



- **Qualified Neutrals** - ADR participants select the neutral. This helps to ensure that an experienced, qualified neutral will facilitate the resolution of any technical or complex case.
- **Satisfactory Resolution** - The “**all or nothing**” premise of the common law generally results in at least one of the parties to a lawsuit losing, and being dissatisfied. The voluntary nature of ADR advances the prospect that where agreement is reached between the parties, each party is likely to be more content with the results.

# Reduced Emotional Trauma



- -Litigation is, by its nature, adversarial. Often, litigants are not prepared to deal with emotional strain and pressure of protracted litigation. ADR affords a means of resolving disputes in an atmosphere which is less hostile or adversarial than a courtroom.



# Enhanced Accessibility



- The expense of litigating disputes through the courts is frequently so substantial that only those persons or companies with considerable means can pursue resolution of their disputes to completion. ADR will frequently be more accessible to most disputants because the expenses associated with ADR are generally far less.



- **Preservation of Relationships** - ADR techniques allow the parties to a dispute the opportunity to avoid the “**blood letting**” which accompanies many types of litigation. This may be particularly important where the parties are involved in personal, professional, or commercial relationships which they desire to maintain.
- **Privacy** - Except in unusual circumstances, trials in the judicial system are open to the public, with the testimony and evidence becoming a matter of public record. ADR enables the parties to maintain confidentiality in the proceedings.



- **Judicial Economy** - Utilization of ADR techniques affords the court system more opportunity to concentrate on “high impact” litigation and public policy disputes. Issues are often narrowed in ADR with litigation available for those not settled.
- **Reality Awareness** - Parties to traditional litigation often have unrealistic expectations about their cases. The neutral third person is able to question and challenge these unrealistic expectations, and hopefully assist the parties in developing more realistic expectations. Disputants with realistic expectations of their cases often are more likely to reach reasonable settlements.



- **Informal Proceeding** - ADR is more informal than traditional litigation. As a result, ADR typically affords the disputants the opportunity to participate personally in the proceedings rather than forcing them to participate only through their attorneys and only in compliance with court rules.
- **Flexibility** - There are several standard ADR procedures, such as mediation and arbitration (binding and non-binding). All ADR procedures may be combined and modified to meet the particular needs of the disputants. Thus, ADR affords a high degree of flexibility, a benefit not available in the traditional judicial system.



- **TYPES OF ALTERNATIVE DISPUTE RESOLUTION  
PROCESS**

# NEGOTIATION



- In negotiation, the parties themselves attempt to settle their differences using a range of techniques from **concession** and **compromise** to **coercion** and **confrontation**



- Negotiation is basic means of getting what you want from others
- A process in which parties attempt to resolve their difference.



There are two negotiation theories





**POSITIONAL NEGOTIATION**- competitive or compromise.



- Positional negotiation strategy is essentially , a manipulative approach designed to **intimidate** the other party such that they **lose confidence in their own case** and are **pressured into accepting** the other side's demands .

## This approach is characterized by the following:-



- a, High opening demands
- b, Threats , tension and pressure
- c, Stretching the facts
- d, Sticking to positions
- e, Being tight lipped
- f, Desire to outdo , out- manoeuvre the other side.
- g, Desire for clear victory



- **PRINCIPLED NEGOTIATION** – interest based , co-operative , **collaborative** .



- Main points of principled negotiation include:-
- a, Separate the **people** from the **problem**
- b, Focus on **interests** , not **positions**

## Advantages of principled negotiation



- a, Maintains relationships
- b, Achieves satisfactory /efficient agreements
- c, Is flexible

## Disadvantages.



- Principled negotiation can take time to reach a settlement . Parties engaged in principled negotiation may need to be prepared to exercise patience.

# MEDIATION



- A private and non –binding form of dispute resolution method where an independent third party (neutral) facilitates the parties reaching their own agreement to settle a dispute .Mediation is often a structured process where the settlement becomes a legally binding contract .





- Mediation is a private process in which a neutral third party, the mediator, assists disputing parties in reaching a mutually acceptable agreement to their **dispute**. Mediation sessions are intended to identify pertinent issues, clarify any misunderstandings, and seriously explore agreement between the parties.



- The mediator does not render a decision or impose a solution on any party; rather, the mediator facilitates discussions among the parties to assist them in resolving the dispute themselves. When parties agree on a solution, it is written in a document that parties sign, and becomes a binding agreement.



❖ Mediation is the most widely used and accepted ADR technique

## Types of mediation:



- - Workplace mediation
- -Community mediation
- -Victim offender mediation(restorative justice)
- -Civil mediation /commercial mediation /court mandated mediation



- Family mediation (Divorce and separation mediation)
- Peer mediation in schools
- Mediation for law enforcement officers (Police)
- Environmental conflicts Mediation
- Mediation for constructions disputes and many others

# CONCILIATION



- Conciliation is a voluntary process in which the parties to a dispute agree to avail to a neutral and impartial third party to assist them in resolving their differences.
- Is a process of mediation where a neutral , **proposes a solution .**



- Participation in the conciliation process is voluntary, and so too are the outcomes. Solutions are reached only by consensus,

## **MED-ARB**



- In Med/Arb, parties begin with mediation then use binding arbitration if they have not been able to come to agreement during the mediation session.





- First, a mediator tries to bring the parties closer together and help them reach their own agreement. If the parties cannot compromise, they proceed to arbitration—before that same third party or before a different arbitrator—for a final and binding decision.

# ARB/MED



- Arb/Med begins with arbitration, but at the conclusion of the process the award is not disclosed to the parties. The parties then mediate the dispute, having acquired a full knowledge of the issues, and of each side's position and the relative strengths and weaknesses involved. If the mediation is unsuccessful, the arbitrator's award is then entered.

# NEUTRAL EVALUATION



- A private and non –binding technique where a third party neutral (often legally qualified) gives an opinion on the likely outcome at trial as a basis for settlement discussions



- Early neutral evaluation (ENE) is a non-binding process in which **a neutral person with experience in litigating** the type of matter in dispute, usually an **advocate or retired judge, reviews** the case with the litigants and their advocates and candidly assesses the **strengths and weaknesses** of their relative positions.



- The evaluation provided by the ENE evaluator will often **educate the unrealistic client or advocate** and promote a frank exchange of information and settlement discussions

# FACT-FINDING



- In fact-finding, a neutral third party **reviews information submitted by the parties, and/ or conducts independent research regarding the facts and submits findings to the parties** (or perhaps to the court).
- Fact-finding may be used in almost any situation where factual issues are unresolved;
- The neutral may be a subject matter expert selected for his or her special knowledge.

## MINI TRIAL



- The mini-trial process is most often used to resolve complex business disputes. It may be employed both in and out of the judicial context. It is typically structured to be confidential and non-binding.



- The process involves an informal **presentation of the case before a senior management representative of each party and before a third-party neutral advisor who may function as a mediator**. The disputants present the case (within an agreed-upon time frame), then the management representatives attempt to **negotiate** a resolution of the dispute, **drawing upon the advice and opinion of the neutral advisor/mediator**.





- The neutral is often an advocate with expertise in the specific technical, legal or business areas in controversy.
- The mini-trial allows management representatives to focus on reaching business solutions that are in the best interest of their respective companies. Any complex or technical case being litigated in the subject.

# ADJUDICATION



- *Adjudication is a procedure where power is given by the contractor to an independent third party to make interim decisions on disputes between the parties arising under the contract*
- Decisions of an adjudicator are **binding on the parties until a further process is invoked** (arbitration or litigation) It is common in **construction disputes**

# ARBITRATION



- Arbitration is a **private process** where the dispute is submitted to a **neutral third party** during a hearing. The hearing is less formal than at court, and usually conducted in a room with a table for the parties and the arbitrator.



- Parties may represent themselves in arbitration or have an advocate. The parties present their respective evidence and arguments to the arbitrator (or panel of arbitrators) who later issues a written decision called an “award.”



- An arbitrator in a **private extraordinary judge** between party and party, chosen by their mutual consent to determine controversies between them.

# ADVANTAGES OF ARBITRATION



- decision of arbitrator is binding upon the parties, whereas parties must agree to a solution in mediation
- less expensive than litigation
- parties can choose their arbitrator, whereas they cannot choose their judge in litigation
- parties can set some of their own rules for the conduct of the hearing



- faster than litigation in resolving disputes
- can be done at times more convenient to the parties
- less stressful than litigation
- private

# LITIGATION



- The formal processes whereby claims are taken through court and conducted in public .Judgments are binding on the parties, subject to rights of appeal



# WHEN ADR IS MOST EFFECTIVE



- **ADR can be particularly effective in the following circumstances:**
- 1. Traditional processes do not ensure the issues will be determined efficiently among the disputants.
- 2. Value of the disputed issue itself is lost due to the potential cost and disruption to both sides in a trial by judge.
- 3. Disputants desire to avoid publicity.



- 4. Disputants wish to maintain or re-establish a professional or personal relationship.
- 5. Parties desire a quick resolution of the dispute.
- 6. Subject matter of the dispute involves complexities that may be understood and managed most effectively by a neutral with knowledge and expertise in the area rather than by a judge or jury.
- 7. Dispute involves numerous factual issues.



- **ADR may not be as effective when any of the following circumstances is present:**
- 1. Disputants prefer for strategic reasons to litigate.
- 2. Parties perceive a need to establish a precedent or develop a policy for future disputes.
- 3. Constitutional issues are involved.



## ASSIGNMENT

Identify cases/disputes in your county/department that can best be resolved through ADR?

What do you envisage as challenges of implementing ADR in your County/Organisation?

What is your recommendations for the identified problems?