ALTERNATIVE DISPUTE RESOLUTION (ADR) TEACHING MANUAL FOR THE GHANA SCHOOL OF LAW

CONTENTS

ALTERNATIVE DISPUTE RESOLUTION (ADR) TEACHING MANUAL FOR THE GHANA SCHOOL OF LAW

The Alternative Dispute Resolution Course involves a detailed examination of the Theory and Practice of ADR Methods in the Context of the adversarial legal system that pertains in Ghana.

The Course seeks to give students a thorough understanding of the various ADR Theories and Practices and to access their value and practical application in law practice in Ghana within the context of the Alternative Dispute Resolution Act, Act 798 of 2010 as well as other Legislations that provides for the application of ADR processes.

The Course will consist of Thirteen (13) distinct modules which will be taught over the Academic year.

The Course will be practice based and students will engage in practical ADR exercises through role plays and simulation questions.

LEARNING AND TEACHING ACTIVITIES

The Course will involve five (5) contact hours every week, consisting of two (2) Lectures each lasting two (2) hours and one hour of tutorials.

The lecture period will be used to cover legal theory and audio visual presentations whilst the tutorial hours will be spent on acting out role plays and student presentations to enable students acquire practical skills in all the Basic ADR processes.

LEARNING RESOURCES

REQUIRED LEGISLATION
Alternative Dispute Resolution Act of Ghana 2010, Act 798

RECOMMENDED MATERIALS

- Fiadjoe, Albert, "Alternative Dispute Resolution, A Developing World Perspective"
  (Routledge Cavendish Press)
- Amegatcher, Nene, "The Emergence Of Alternative Dispute Resolution As A Tool For Dispute Resolution In Ghana"
- Amegatcher, Nene, "A Daniel Come to Judgment"
  Torgbor, Edward, "Ghana's Recently Enacted Alternative Dispute Resolution Act 2010 (Act 798): A Brief Appraisal"
- Dapaah, Diana Asonaba, "Fairness and Integrity of the Arbitrator under the Alternative Dispute Resolution Act of Ghana, 2010, Act 798" GIMPA L R (2015) 1(1): 125-139
- Nolan Haley & Annor- Ohene, "Procedural Justice Beyond Borders: Mediation in Ghana"
- Nolan-Haley, Jacqueline, "Alternative Dispute Resolution In A Nutshell", 3rd Edition (2008)
- Fisher & Ury, "Getting to Yes: Negotiating Agreement Without Giving In "(1991)
- Brown and Marriott, "ADR Principles and Practice", Second Edition (Sweet & Maxwell)
- Mante Joe & Issaka Ndekugri, "Arbitrability in the context of the Ghana's New Arbitration Law"
- "ADR and Commercial Disputes", edited by Russell Caller (London Sweet & Maxwell-2002)
- Memorandum to the ADR Bill

COURSE LEARNING OUTCOMES

At the end of the Course, the students will be expected to understand the legal theory in relation to all the Basic and Hybrid ADR processes. Students will in addition be expected to have acquired practical skills to enable them draft ADR Clauses and represent clients competently in ADR proceedings.

CHAPTER 1

An introduction to Alternative Dispute Resolution

1.1 Defining Alternative Dispute Resolution (ADR).The definition of ADR as encompassing all the processes that have evolved over the years as alternatives to litigation (adjudication) which is the established or main means of resolving disputes. Students are to note the following as regards the definition of ADR;

1.1.1 ADR processes as alternatives to litigation with emphasis on the meaning of alternative as 'additional' not substitution.
The emphasis ought to be made that ADR processes are proposed as additional means of resolving disputes and not as a replacement for litigation.

1.1.2 ADR as Appropriate Dispute Resolution; seeking and using the most appropriate process after careful analysis.
The proponents of ADR make the point that litigation is not the appropriate means of resolving certain disputes. For that reason, they have developed a spectrum of processes which are deemed to be the more appropriate means of resolving certain disputes.

1.1.3 ADR as African Dispute Resolution emphasizing the consensual nature of African Dispute Resolution processes and the modernization of customary law arbitration.

1.1.4 Dispute Resolution as an alternative to adjudication; a resolution based on reconciling interests rather than a determination based on rights. Students are to note that the proponents of ADR insist that the pronouncement of a judgement determining who is right and who is wrong at law may not necessarily result in a resolution satisfactory to the parties. ADR processes therefore seek to find out the real needs and concerns of the parties to the dispute and try to satisfy these to the greatest extent possible.

1.2 Is there a need for ADR?

1.2.1 The advantages of litigation with emphasis on this is the reason why it has been so popular.

1.2.2 The nature of the litigation process and its inherent weaknesses.

The aim of litigation is to reach a correct decision about the respective rights and liabilities of parties in a specific situation. The assumption is that there can only be one correct conclusion not a range of them.

Any decision of a court involves proof of the facts and, thereafter, the application of the law to those facts.

A decision on the facts, depends on the judge's evaluation of evidence. This is not an exact science. Indeed, it is not even an identifiable skill in which judges are trained. No matter what intellectual power a judge possesses, the assessment of evidence is fraught with difficulty and the process remains a mystery in legal literature and practice.

Evidence may be flawed in many ways, Honest evidence may be incomplete, based on faulty observation or fading memory, or distorted by various forms of suggestion such as discussion between witnesses, or influenced by the manner in which evidence is elicited in court.

Dishonest evidence is commonplace. It may range from outright perjury to subtle deceptions or material omissions. The traditional assumption that a witness's demeanour is a guide to his credibility does not have the slightest foundation in psychology or physiology.

A judge's skill is most manifest in his decisions about the validity of competing legal arguments. But despite the prestige of such judgments and the credence given to them, fallibility cannot be excluded.

Undeniably, alternative views of the same legal point are held at various stages of any action in court. This starts with the initial contradictory advice given to each litigant by advocates. It continues through the adversarial confrontations in court, and perhaps, up to the highest appeal court in the land.

Ascertaining the relevant law, the basis of the process, is the initial difficulty. Sources of the law may range from ancient libraries festooned with cobwebs

to storage by modern information technology where the proliferation of data develops the need to know the solution before tackling the problem. Once the law has been found, the whole question of interpretation arises. If legal judgments are so clear and so sure, why must they be expressed in so many words on so many pages?

The perfection of judgments cannot be assumed. Nor indeed, is this ever claimed. It is enough for civil judgments to satisfy the criterion of the balance of probability, namely that they are more likely to be right than wrong.

Litigation is an attempt to reach a conclusion by logic, where a crucial part of the process, the ascertainment of the facts, is non-logical. This, in itself, is illogical. On this basis is superimposed legal argument which may often be regarded fairly, as unsound sophism.

1.2.3 The disadvantages of litigation with emphasis on this being the reason for seeking solution in new alternatives.

I Cost

Enormous costs may be incurred in litigation, especially if an unsuccessful party has to pay those of his opponent. Costs escalate and can hardly be controlled, once the action is running.

Often, the costs exceed the amount of any award. Even where this is not so, that costs are often excessive in comparison with the sum in dispute is beyond doubt.

II Delay

Typically, actions in court may drag on for years, with serious consequences for the parties. In personal injury claims, victims may be deprived of compensation at the time when they need it most.

A winner in a commercial dispute may achieve a Pyrrhic victory after a long period when he obtains a favourable judgment which he cannot enforce against an impoverished or bankrupt loser.

IV Effort and Waste of Time

Litigation, and especially preparing for trial, usually consume a great deal of a client's time and effort especially in complex business disputes. It may be necessary to attend meetings, answer telephone enquiries, search for

and photocopy documents and do many things which are, in themselves, unproductive. This can be a distraction from essential business activities.

V Stress

The factors of cost, delay and risk already mentioned together with other problems discussed below, are sure to produce stress in those involved in litigation.

This applies, not only to the principals on each side who are concerned about the outcome, but also to witnesses whom they employ. Even truthful witnesses may suffer stress in anticipating the need to testify and personal attacks on their reliability or credibility. Employees may worry about the effect of their testimony on their positions and prospects in their companies.

VI Control

Inevitably and progressively, parties lose control of their cases to their lawyers, their opponents, the litigation process and the judge, until in a completed action a decision is imposed which they may not want.

VII Publicity

Adverse publicity or invasion of privacy which often accompany litigation may affect some litigants greatly. Although publicity may be muted while the case is sub judice, the floodgates are opened after the judgment has been given. Reputations can be ruined, markets for products may be destroyed, and many unpleasant effects may flow from the open court situation.

VIII Relationships

To litigate at all, is already an expression of hostility, but as the contest continues, with mutual attacks on credibility or obstructive tactics, relationships worsen. Where parties previously enjoyed a mutually beneficial business relationship, such as that of supplier and customer or landlord and tenant, all this may be ruined by the court process.

The parties to a litigation are unlikely ever to do business together again.

1.3 An introduction to the history of the development of ADR

History of ADR generally and in Ghana

- Started in US only some 45 years ago
- Started as a legal movement to address the problems associated with litigation.

- According to Nolan-Hayley, Abramson and Chew, "serious concern about a 'litigation explosion' and lack of access to justice led to a search for alternatives to the judicial adjudication of disputes."
- ADR as already established has been with Ghana and for that matter, Africa, since time immemorial
- Prior to colonisation, one of the peaceful methods that natives of the then Gold Coast employed to resolve disputes was through ADR.
- During that time, ADR was evident by the use of a neutral who helped parties to peacefully resolve their disputes
- Perhaps, it is the spirit of community that influenced these methods of dispute resolution
- Even during colonisation, these ADR methods continued to be employed by natives
- Post colonisation, the power of the chiefs to act extra-judicially in the form of customary arbitration was expressly preserved in the Courts Act of 1961, Act 81 thus: *"The power of any chief to act extra-judicially as an Arbitrator under customary law in any dispute in respect of which the parties thereto consent to his so acting is hereby preserved."*
- Order 72 of the High Court Civil Procedure Rules 1954 provided the procedure by which the High Court could refer disputes to arbitration.
- Order 64 of the High Court Civil Procedure Rules 2004, C.I. 47
- Arbitration Act No. 38 passed by Parliament in 1961 to regulate arbitration in Ghana.
- Courts Act 1993, Act 459
- At present, we have the ADR Act of Ghana, 2010, Act 798 which has given legal backing to ADR as a form of dispute resolution

ADVANTAGES OF ADR PROCESSES

1. One important advantage of ADR over conventional litigation is ***PRIVACY.*** The humiliation a tenant who has committed no crime has to face in coming to open court to plead for time to vacate a premises in such a hostile environment is an important human value which conventional litigation ignores. As a result, some decide that rather than embarrass themselves in court; they would withhold valuable information. People value highly the privacy ADR provides. This is because where the matter is heard in the open, the media may pick it up and place it in the public domain. This makes the parties involved susceptible to all types of comments and even public ridicule.

2. ADR induces parties to voluntarily comply with agreements. People who design solutions to their own conflicts are more satisfied with the outcome than people who have the solutions thrust upon them. They therefore have a stronger commitment to maintaining such agreements than those in which they have had no say.

3. Another advantage is that ADR provides a healthier method for resolving disputes. People whose conflicts arise within an ongoing relationship such as families, landlords and tenants, neighbours, and business associates appreciate techniques which support the positive maintenance of the relationship and often find that the process itself teaches them new ways to deal with future conflict and new ways to communicate. In family, workplace and business disputes, it is important to preserve future relationships and therefore a procedure, which is not disruptive of the normal life of relationship, is preferred to litigation.

4. ADR also helps decongest the courts enabling Judges to have more time in handling cases, which are not amenable to ADR and producing better and lasting decisions. It therefore makes the judiciary efficient. Efficiency of the justice system is one of the elements investors watch out for when deciding whether to invest in a particular country. They desire a place where their investment can be protected judicially. The availability of these processes assist Judges to maintain a high sense of integrity. ADR practitioners i.e. Negotiators, Mediators, Arbitrators, etc. must must be men of high moral probity and integrity. A good number of them have been legal practitioners, retired judges and other court officials. Those who have once served in public office in particular are likely to be called upon to provide these services so long as their past record is impeccable.

5. ADR offers great savings in financial and emotional costs to the parties. The neutrality helps the parties to clarify issues, exchange information, be open to each other, identify and analyse issues and options, test the reality of their views, evaluate the strength and weaknesses of their respective cases and the risks involved in litigation all with a view to reaching an agreement mutually beneficial to the parties.

6. ADR cuts down the cost of litigation and thereby makes justice more accessible to a greater number of people.

7. ADR enables emotional needs to be expressed i.e. hurts, disappointments, anger, resentments, misunderstanding, fears, shame, humiliations, are addressed.

8. ADR empowers the individual. In litigation with its well-structured and inflexible rules of procedure, the individual hardly has any control. Apart from giving evidence, his voice is never heard. ADR gives the satisfaction of having been really heard and contributed to a mutually beneficial outcome. That is why after closure the parties congratulate themselves and the neutral.

9. ADR is also beneficial to Lawyers in the sense that they tend to have happier clients. Clients are likely to be more satisfied with Lawyers who help them select and implement appropriate and cost effective options for resolving disputes. Satisfied clients are likely to be repeat clients and recommend the Lawyer to others.

10. There is also greater professional satisfaction for Lawyers who would like to have a broader set of problem-solving skills than simply litigation. Using ADR can help resolve appropriate cases early so that you have more time for those cases that require litigation.

1. PRACTICAL EXERCISE ON THE ADR SPECTRUM

The exercises in this segment is designed to test the students understanding of the ADR Spectrum and their ability to select the optimal process in a given situation as a test of their ability to apply the theory taught.

Students will be given a number of scenarios/case studies and will be required to select the process they will recommend and to give reasons for their choice.

CHAPTER 2

INTRODUCTION TO CONFLICT, CONFLICT ANALYSIS AND CONFLICT MANAGEMENT TECHNIQUES

2.1 What is conflict?

Conflict is behaviour intended to obstruct the achievement of some other persons' or groups' goal. Conflict is based on the incompatibility of goals and arises from opposing behaviour.

OUR WORKING DEFINITION

Conflict is a sense, whether real or perceived, by one entity that its primary self-interests are being threatened by another entity. At its most primary level conflict is a competition of interest satisfaction.

This definition recognizes that conflict may be real or may just be a perception not based on objective reality. Conflicts based on perception occur normally as a result of three perceptual problems. The three perceptual problems are discussed and explained below.

THE THREE PERCEPTUAL PROBLEMS

1. Selective Attention:

This problem arises as a result of the tendency for people to screen most of the information to which they are exposed. It is a cognitive process in which a person attends to one or a few sensory inputs while ignoring the other ones. The result is that different people exposed to the same sensory inputs may experience them differently. People focus on what they deem important and ignore the rest.

2. Selective Distortion:
This refers to the tendency of people to interpret information to suit what they already believe. Each person fits incoming information into an existing mind set. It is a tendency to interpret information in ways which reinforce existing attitudes or beliefs. The process occurs when people subconsciously make new information fit their old ideas about something.

3. Selective Retention:
This is the tendency of people to retain only part of the information to which they are exposed. Usually, people retain only information that supports their attitudes or beliefs. When this occurs, people will remember more accurately messages that are closer to their interests, values and beliefs by selecting to keep them in memory and forget the rest.

The three perceptual problems may lead to interpretations which are totally at variance with the objective reality; leading to conflicts when none ought to exist.

2.2 Is Conflict good or bad?

Conflict is seen as a necessary evil whenever human interactions take place. Conflict is neither good or bad. The outcome of conflict depends on how it is handled by the parties involved in the conflict, hence the need to master the art of conflict analysis and management/ resolution.

A CONCEPTUAL FRAMEWORK FOR ANALYSING CONFLICTS

A definition of conflict that accurately captures all its various facets or forms will be very difficult to formulate. In order to understand the concept of conflict and be able to analyze the same we present the following conceptual framework for analyzing and managing conflict. Under this framework, conflicts are categorized into 5 main groups based on the causes from which they emanate.

These are:

i. Data Disputes
ii. Value Disputes
iii. Relationship Disputes
iv. Behavioural Disputes
v. Structural Disputes

The idea behind the categorization of conflict is that the five different categories are each handled best in a particular way. Similarly there are five potential ways to react to conflicts effectively based on several factors. These are:

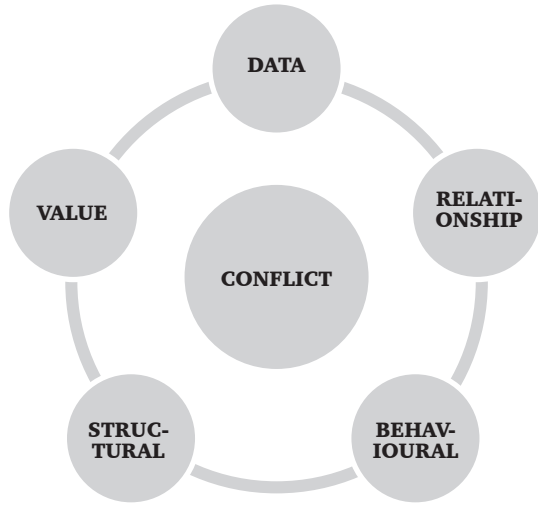
i. Avoidance (lose-lose)
ii. Accommodation (lose to win)
iii. Competitive (win-lose)
iv. Collaborative (win-win)
v. Compromising (split the difference)[1]

The key to successfully resolving a conflict therefore lies in:

1. Understanding the conceptual framework and response to conflict.
2. Identifying and categorizing a conflict into the various categories of disputes. (Problem or Conflict Fractionation).
3. Adopting the appropriate strategy to resolve the conflict.

We explore how to use this conceptual framework in the few succeeding paragraphs.

Fig. 1 **THE CONCEPTUAL FRAMEWORK OF CONFLICTS**



[1]Lewicki et al, Negotiation; Readings, Exercises and Cases, 6th edn. p.16-17

1. Data Disputes

Data disputes revolve around or are created by information. It may arise out of one or more or all of the following aspects of information:

a. Lack of information
b. Incomplete information
c. New information
d. Misinformation
e. Information regarded as non-credible
f. Information which cannot be verified
g. Complex technical information

Information is very vital to the creation, management, prevention or resolution of data conflicts. Data conflicts are optimally managed or resolved by using data or information. For instance, conflicts caused by lack of information, can only be resolved or managed by providing the information which is lacking. Likewise, conflicts caused by complex technical information for instance can be resolved or managed by providing the disputants with an explanation of the complex technical information. The appropriate response will depend on the kind of data conflict being dealt with.

2. Value Disputes

Values may be defined as the principles or standards of behaviour or one's judgment of what is important in life. Values may also be explained as important or lasting beliefs or ideals shared by members of a culture about what is good or bad and desirable or undesirable. Values have major influence on a person's behaviour and attitude and serve as broad guidelines in all situations.

Value Disputes are those that arise from a clash of ideas, beliefs and belief systems. They arise when people attempt to force their values on others.

Values are normally characterized as either 'nominal' or 'fundamental'. Fundamental values are those that a group considers to be absolutely essential and without which they believe their identity will be lost. Fundamental values are by their nature, so steeped in the culture and lifestyle of a group that that group is unwilling to compromise on such values. Conflicts that involve fundamental values are therefore very difficult to resolve and the best approach is one of conflict management.

A 'successful resolution' of a conflict arising from fundamental value disputes is more often than not a suppression of one party's fundamental values by the

other party. This usually results in a temporary 'resolution' as sooner than later, the dominated party will find a way of asserting its suppressed fundamental values.

Nominal values on the other hand may be described as goals or principles a group aspires to. Since these are aspirational, a group may negotiate or may be willing to negotiate on their nominal values if other factors make the attainment of these goals or aspirations impracticable. A party may be willing to compromise on its nominal values in order to obtain a resolution of a conflict.

In conflicts arising out of nominal values, one may attempt a resolution since one or all of the parties may be willing to compromise on their nominal values to achieve a greater goal. In other words, as opposed to a conflict management approach where the conflict is based on fundamental disputes, a conflict resolution approach may be attempted when dealing with nominal value conflicts.

3. Behavioural Disputes

These are caused by clashes or differences in behavioural habits, customs, culture and personality. Behaviour that is acceptable in one setting is repeated in another setting where it is unacceptable, most times unconsciously and with no ill motives. It causes people to take offence even if none is intended. In dealing with behavioural conflicts, a resolution may be achieved by getting the parties to develop cross-cultural awareness and simply learning to accept that people are different and so behave differently.

4. Structural Disputes

These occur within or between institutions and bureaucracies. It is caused by oppressive patterns of human relationship. These may arise as a result of laws, policies and regulation. The erstwhile apartheid laws in South Africa is an example of a structural dispute. It may also be caused by differences in gender and gender needs. It may also affect generations of society differently. They are caused by forces external to the people in the conflict. Structural conflicts will often have structural solutions.

To deal with structural disputes, we need to ask and answer a number of questions:

1. Why the structure in question was created in the first place, in other words, why was the law, policy or regulation passed?
2. Is the structure still relevant?

a) If it is still relevant then we need to educate the parties to the dispute on its continued relevance.
b) If it is no longer relevant, how do we negotiate a change in the law, policy or regulation to satisfy the parties in the dispute?

5. Relationship Disputes

These are disputes that occur within the context of special relationships. Some of these relationships are parent and child, husband and wife, labour and management and government and opposition. They are fundamentally caused by stereotyping and the expectations that come with these stereotypes. They may also be caused by strong negative emotions, and misconceptions and the actions and reactions of people to same.

To deal with relationship disputes, one must be consciously aware of the stereotypes and the false assumptions that are made of other people based on these stereotypes.

THE FIVE BEHAVIOURAL PATTERNS/RESPONSES TO CONFLICT

As stated earlier, people respond to conflict in different ways and these responses have been placed in five categories. These five categories of responses also double as the five strategies for the resolution of conflicts. The two main issues that arise in conflict resolution in terms of utilizing these strategies are:

i. How does one decide which strategy or strategies to employ in resolving a conflict, and
ii. When does one use one or more or all of these strategies in conflict resolution?

These two issues are normally dependent on the relative importance of the relationship with the other party and the outcome of the dispute resolution process to the party considering the choice of strategy. For some parties, having a good working relationship will be paramount and more important than the outcome of the resolution process. For others, the need to achieve a good outcome will far outweigh the importance of a good relationship. Again, for some other parties the optimal resolution will be a balance between a good working relationship and a good outcome.

Achieving these different outcomes will require the adoption of different strategies. The conceptual framework posits that in deciding the optimal

negotiation strategy, a party must consider the strength or importance of each of these two concerns and their relative priority. We will now examine the five typical responses and how they are related to the outcome or goals of the parties.

1. Avoidance (Lose-Lose)

This strategy involves totally ignoring the other party by refusing to engage in negotiation or withdrawing from active negotiation. The Avoidance strategy is best utilized in the situations where:

a) The issues are not important.
b) There are more pressing issues to tackle.
c) There is no chance of achieving your objectives.
d) The potential "aggravation" of negotiating outweighs the benefits.
e) People need to cool down and regain their composure.
f) Others can resolve the conflict more effectively.
g) You need time to collect more information.
h) There is a very strong alternative outcome which is available to the avoiding party.

In the Avoidance strategy, the expectations of the parties on both the outcome and relationship is very low and therefore the party or parties resolve that pursuing the resolution of the conflict is not important.

2. Accommodation (Lose to Win)

This typically involves giving the other side everything they want while expecting little or nothing in return. In this strategy, the maintenance of a good working relationship is of a higher priority than the outcome of the process. Accommodation is best employed when:

a) You find out you are wrong.
b) You wish to be seen as reasonable.
c) The issues are more important to the other party.
d) You wish to build "credits" for later issues.
e) You wish to minimize your loss when you are in a weak position.
f) Harmony and stability are more important.

The Accommodation strategy may be used to encourage a more interdependent relationship or to cool off hostilities where there is tension in the relationship. It is often recommended as a short term strategy.

3. Competition (Win to Lose)

This involves extending no cooperation to the other side, with all effort of a party expended to exert gain on their own behalf. Maximum competition is best utilized when:

a) Quick, decisive action is vital.
b) An important issue requires unpopular action.
c) You know you are right.
d) The other party will take advantage of your co-operative behaviour.
e) There will be no future relationship or that relationship will not be important.
f) The other party has a reputation for hard negotiation.

This is a strategy that is frequently used when a party places a higher priority on the outcome of the process rather than maintaining a good relationship between the parties.

4. Collaborative (Win-Win)

The collaborator's approach to conflict is to manage it by maintaining interpersonal relationships and ensuring that both parties to the conflict achieve their personal goals. It is a win-win approach. The parties work together to realize the maximization of their interests to the greatest extent possible. Collaborating is best used when:

a) The issues are too important to be compromised.
b) The objective is to integrate different points of view.
c) You wish to build or maintain an important relationship.

In the collaborative strategy, the parties are able to satisfy their respective interests optimally and are therefore willing to abide by the outcome. The willingness to abide by the outcome also directly results in the maintenance of a good working relationship.

5. Compromising (Split the Difference)

This is seeking the middle ground. It is a win some - lose some approach. In compromising, the parties work together but each will be seeking to maximize their own interests. Concessions that are made are as a result of rational self-interests rather than seeking to promote the interests or well-being of the other side. Compromising is best when;

a) Issues are important but you cannot afford to be too controlling.
b) The relationship is important but you cannot afford to accommodate.
c) Opponents of equal power are committed to mutually exclusive goals.
d) You need to achieve temporary settlements to complex issues.
e) You need to find an expedient solution within time pressure.
f) It is the only alternative to no solution.

CONFLICT ANALYSIS AND MANAGEMENT; APPLYING THE FRAME WORK

The conceptual framework discussed above provides us with a simple but effective way of undertaking conflict analysis and deciding what will be the optimal way in managing that conflict. First, we need to examine whether the conflict is real or just perceived. If our analysis convinces us that the conflict is merely perceived, then we need to deal with it by employing our knowledge of the three perceptual problems. This way, we may convince the party perceiving the conflict to realize that no conflict exists.

If the conflict is real and one entity's interests are actually threatened, then we need to examine the conflict and evaluate same according to the five categories of conflict and ask ourselves the following questions:

a) What category (or categories) does the conflict fall into?
b) What steps can be taken to resolve the same bearing in mind the type(s) of conflict we are dealing with?
c) What style will be the best approach given the circumstances?

These insights can assist us in designing a resolution strategy that will have a higher probability of success than an approach based exclusively on trial and error.

CHAPTER 3

THE ADR SPECTRUM

3.1 Introduction – Viewing ADR processes as a spectrum from consensual (interest-based) processes to adjudicating (rights-based) processes.

3.1.2 The primary ADR processes
Negotiation
Mediation
Conciliation
Arbitration

3.1.3 Other outgrowths of ADR
Partnering
Dispute Review Boards
Consensus building/Collaborative problem solving

3.1.4 Hybrid ADR Methods
Med arb
Arb med
Med rec
Rent a judge
Early Neutral Evaluation
Judicial settlement conference
Summary Jury Trial
Mini Trial

THE ADR PROCESSES

3. ADJUDICATORY PROCESSES (RIGHTS-BASED)

3.1 ARBITRATION

The competitive presentation of evidence to a decision-maker selected by the parties for an award (win/lose decision). The arbitrator is typically selected based on the arbitrator's substantive expertise. The arbitration is held according to procedural and evidentiary rules the parties agree upon. Arbitration decisions typically cannot be appealed, but may be set aside or refused recognition and enforcement on limited grounds.

3.2 PRIVATE TRIBUNALS (RENT A JUDGE)

By statute in some states in the U.S.A parties can appoint any person as their judge, with full judicial powers. The private tribunal's decision is entitled to entry as a judgment and may be appealed. This is not available in Ghana.

4. CONSENSUAL PROCESSES (INTEREST BASED PROCESSES)

4.1 **OMBUDSPERSON** – an official appointed by and paid for by an institution, who investigates problems, seeks to prevent conflict and assists parties to resolve disputes. The ombudsperson is not a true mediator due to the institutional affiliation which, to some extent, compromises his or her impartiality and neutrality. In Ghana, the state ombudsperson is the Commissioner for Human Rights and Administrative Justice (CHRAJ).

a. EXPERT/NEUTRAL FACT-FINDING

– an agreed-upon neutral finds facts as an assist to some other processes – negotiation, mediation, or adjudication. Fact-finding is often used in the labor-management context. It is also a useful process in disputes that relates to technical issues such as assert valuation, bio-technical data, scientific methods and processes and construction specifications. The fact-finding expert or neutral may make his findings public, with the parties' consent, to increase pressure for settlement. Alternatively, the fact-finders' recommendations may, by the parties agreement, be confidential and non-admissible in any subsequent contested hearing.

4.3 **NEGOTIATION** – communications for an agreement directly between the parties or through their representatives, intended to reach agreement for the future (transactional negotiation) or to resolve a past dispute (dispute negotiation). In negotiation, the desired objective is an agreement, which is typically, but not always, enforceable under law.

4.4 **MEDIATION** – facilitated communications for agreement, resolving a past dispute and/or creating agreement for the future, with the assistance of an impartial facilitator. Decision-making power always resides with the participants in mediation. The desired result in mediation is agreement, sometimes, but not always, enforceable under law.

4.5 **CONCILIATION** – conciliation typically consists of independent communications with parties in their separate contexts (their home or work environment), either to improve relations or pave the way for some other process, e.g mediation. It is usually employed where the relationship between the parties is so damaged that it is difficult or impossible to get them to communicate with each other.

4.6 EARLY NEUTRAL EVALUATION

It is a process where parties submit their case to a neutral third party who undertakes an assessment of the same and renders an advisory opinion as to the relative merits of each party's case. Each disputant presents its claim or defenses and describes the principal evidence on which its claims or defenses are based. The evaluator then renders an advisory opinion and the parties use this as basis for exploring an early settlement of the case.

4.7 JUDICIAL SETTLEMENT CONFERENCE

This is a settlement avenue that is provided for by the rules of court. In Ghana it is provided for by the commercial court rules. At the judicial settlement conference, the judge typically holds discussions with the lawyers and the parties to review the law and the pleadings with a view to seeking compromises and admissions that may help facilitate a complete or partial settlement of the issues set down for trial.

5. MIXED PROCESSES (HYBRID PROCESSES)

5.1 **MED-REC** – Mediation-Recommendation begins as mediation, but, if the parties do not come to an agreement, the mediator makes a recommendation to the court or another decision-maker as to a recommended resolution.

5.2 **MED-ARB** – Mediation-Arbitration begins as mediation. If the parties fail to come to agreement, the process transforms into an arbitration, with the former mediator assuming the role of decision-maker. The process may be modified so that parties may elect out of the process at the close of the mediation component, or the parties may select another person to act as arbitrator for their dispute.

5.3 **MINI-TRIAL** – This is not often used in business disputes and while there are many types of abbreviated mock or mini trials, they usually involve the attorneys of the parties making summary presentations of evidence to one or more expert neutral facilitator(s) in the presence of executives or others with decision-making authority. Following the summarized presentation of evidence and a questioning period, the decision-makers and facilitator will meet for confidential settlement discussions. If resolution is not reached the advisory panel is asked to render decision as to the likely outcome of the matter it litigated .

5.4 **SUMMARY JURY TRIAL** – The Summary Jury Trial is another type of mock trial (really a settlement event) using one or more advisory juries. Summary jury trial usually include the abbreviated presentation of complex litigation to advisory juries who then render one or more advisory verdicts for executives with decision-making authority to consider in their settlement discussions, again typically facilitated by an expert advisor or facilitator.

6. OTHER OUTGROWTH'S OF ADR

The success of using non-judge neutrals in solving conflicts has led to other new techniques evolving out of arbitration and mediation. A few are described here.

6.1 DISPUTE REVIEW BOARDS

Dispute Review Boards are primarily used in large construction projects. The project owner, whether the government or a private owner, appoints a review arbitrator as does the general contractor. The two then appoint a third arbitrator.

Typically the arbitrators are engineers who have been provided plans and specifications for the project before construction begins as they need to be familiar with the project. The board members meet on the job site monthly, and are also on call, to review any potential claims or other disputes that have arisen during that time. The Dispute Review Board will issue an advisory, non-binding opinion as to what they believe would happen if the case went to trial or arbitration and make recommendations. Dispute Review Boards allows for a quick resolution of disputes, avoid claims at the end of the job and help prevent complex post-project litigation.

6.2 **PARTNERING**

Partnering may be described as pre-mediation of disputes. In complex projects it is possible to predict that something will go wrong in spite of the fact that it is impossible to predict where and when. Partnering entails convening all the major stakeholders on a project for a workshop specifically designed for the project. Areas of potential problems and mistrust are discussed. Exercises in trust and team building take place. Authority is extended to the lowest possible level, with quick decision ladders developed for questions not allowing low-level determination. Lines of rapid communications between the organizations are developed and every participant's legitimate interests are discussed and recognized. Primarily used in the construction industry, particularly in government projects and in highway construction. Partnering allows difficult projects to be brought in on time and on budget. Partnering has also been used on private projects and even for corporate restructuring and process reengineering.

6.3 **COLLABORATIVE PROBLEM SOLVING**

Collaborative problem solving utilizes mediation techniques when there may be no claims or litigation, where blame may be irrelevant or even when there is no actual dispute but a major problem to solve. In Ghana, it will be particularly suited for use by District Assemblies and other Local Government Authorities.

Collaborative problem solving is highly facilitative and interest-based. Collaborative problem solving entails people working together when they have conflicting self-interests or capabilities due to a recognition that there is a larger goal to be achieved. It is used in both the private and public sectors.

3.2 The Advantages of ADR processes
3.3 The disadvantages of ADR processes
3.4 ADR under Ghana Law
Acts that contain ADR provisions

CHAPTER 4

NEGOTIATION

COURSE DESCRIPTION AND OBJECTIVES

Negotiation is the first stage of conflict resolution. Negotiation in its simplest form means the back and forth communication between parties to a conflict with the ultimate aim of resolving an existing conflict. In this module, participants will be taken through the different styles and types of negotiation. The module focuses on Interest-based negotiation as the optimum type of negotiation for dispute resolution. It will also consider in detail the principles of Interest-based negotiation which examines how to deal with the issues arising out of conflict by:

- separating the people from the problem
- focusing on interests and not rights or positions
- creating options for mutual gain
- insisting on an objective criteria for the resolution; and
- formulating a Best Alternative to the Negotiated Agreement (BATNA).

At the end of the lesson, participants will be able to identify the different types and styles of negotiation. They will be able to resolve disputes through negotiations by the use of the various skills they will acquire through the demonstrations and simulation exercises. Participants will also be able to create a BATNA where necessary in a conflict situation.

WHAT IS NEGOTIATION?

To begin our discussions let us consider a few definitions of 'Negotiation':

a) Negotiation is a process of engaging with another person or entity to achieve an advantage that is not possible by unilateral action. Negotiation involves a back and forth communication geared towards this end.

b) It is also defined as communication for the purpose of persuasion.

c) It is defined as a basic means of getting what you want from others. It is back and forth communication designed to reach agreement when you and the other side have interests that are shared and others that are opposed.

WHY STUDY NEGOTIATION WHEN WE DO IT EVERYDAY?

Negotiation is an intellectual skill. It combines thinking and doing. The more you understand about the skill, the more you will understand how you and others operate and see the ways in which you can become more skilled. Just practicing negotiation without any understanding of the theory means you merely reinforce your existing methods of negotiation probably ingrained from childhood. You do not extend your range of techniques and you may well reinforce bad habits.

A BRIEF THEORETICAL BACKGROUND

Categorizing Negotiation

For our purposes, we may categorize negotiation into two main categories; deal-making or transactional negotiation and dispute-resolution or conflict-prevention negotiation.

Deal making/ transactional negotiations involve negotiating the terms of a contract or business deal or some other relationship of a commercial nature. In this kind of negotiation, the parties are now entering into the transaction and are negotiating the terms of their future relationship.

Dispute-resolution / Conflict-prevention negotiations on the other hand, involve dealing with a dispute that has already arisen or preventing a potential dispute from occurring within ongoing relationships. In this training, our focus will be on techniques relating to dispute-resolution / conflict-prevention negotiation.
Distributive / Integrative Negotiation

We may further clarify negotiations into distributive or integrative bargaining/ negotiation.

Distributive bargaining/negotiation exist where the parties believe there are limited resources to divide. The parties therefore seek their individual gain

rather than look for mutual gain in the negotiation process. Typically, the negotiator engages in positional bargaining, claiming a particular position and arguing for it throughout the negotiation process. To ensure that the position is realized, the negotiator would usually stake out an extreme position, make few concessions before ultimately arriving at the desired position. There is a zero-sum mindset in distributive bargaining—"more for you automatically means less for me so I can't and won't cooperate with you."

On the other hand, in integrative bargaining/negotiation, the parties see each other as having goals that are not necessarily at odds with each other so that mutual gain is possible and often times desirable. Integrative bargaining usually involves multiple issues so that there is the possibility of developing alternative and mutually beneficial solutions. The negotiators would engage in interest based negotiation and focus on the underlying needs and concerns that informs a position. The negotiators explore these interests and seek to develop solutions that satisfy these needs.

Styles of Negotiation / Approaches to Negotiation

The literature on negotiation identifies two major approaches to conducting negotiations. Various taxonomies have been used with respect to these two major approaches. They are:

a) Adversarial/Competitive / Value Claiming / Positional Negotiation Approach

b) Problem Solving / Collaborative / Value Creating/ Interest Based Negotiation Approach

The Adversarial / Competitive / Value Claiming / Positional Negotiation Approach

This category of negotiator engages in negotiation with a view to maximize individual gain. To achieve this end, the negotiator engages primarily in "positional bargaining". Positional bargaining is a negotiation process in which the negotiator adopts a particular position and advances arguments to support that position, makes some concessions and finally reaches a solution out of compromise. It is a linear journey from a stated position to a bottom line. There leaves very little room for the consideration of the inputs made by the other party as well as for innovative solutions.

Competitive negotiators have been described as "value claimers" for whom the object of negotiation is to convince the other party that he wants what you have to offer more than you want what he has to offer. They perceive the negotiations as distributive and so the process is conducted as a zero-sum game in which there can be only one winner at the end. Their whole aim in the negotiation is to be that winner.

The competitive negotiator is characterized as one who is perceived as dominating, forceful, aggressive, tough, arrogant and uncooperative. The strategy is to make high demands and offer few concessions. They use threats, are willing to stretch the facts and will stick doggedly to their positions. They love to create doubts about the validity of the other side's position and treat their interests as being of no consequence.

The Problem Solving / Collaborative / Value Creating/ Interest Based Negotiation Approach

The negotiator with this orientation is interested in maximizing opportunities for joint rather than individual gain. This negotiator views the dispute or transaction as a mutual problem that has the potential of being resolved to the parties' mutual satisfaction. The focus of the negotiation is to explore ways of creating joint value for the mutual benefit of the parties. The goal of negotiation therefore is viewed as a means of solving the problem rather than winning the problem and making the other party a loser.

Problem solving negotiators have been described as "value creators" who advocate exploring and cultivating shared interest in substance, in maintaining a working relationship, and in having a harmonious negotiation process based on mutually held norms and principles.

They are also described by other text writers as 'cooperative negotiators' and have the following attributes; conducting themselves fairly, maximizing the possibility of a settlement, avoiding litigation and making or establishing a good personal relationship with the other side.

In the book, "Getting to Yes", the proposal is a bargaining model for using the problem-solving approach to negotiation. The authors suggest that as an alternative to the competitiveness of positional bargaining, negotiators should rather engage in interest-based negotiations. This model, which will be what will be studied in this course requires that the negotiator distinguishes the issues or problems from the parties involved in the dispute and then concentrates

on responding to the parties' underlying interests and needs rather than their stated positions. To do this, the parties will list the issues at stake and invent options for resolving each issue through brainstorming sessions. At the end of the day, each option will be evaluated based on objective criteria of fair standards and fair processes.

THE THEORY OF INTEREST BASED NEGOTIATIONS

INTRODUCTION

This is a negotiation theory in which the aim of the negotiation process is to maximize the interest satisfaction of both parties to the greatest extent possible. Interest based negotiation is also referred to as principled negotiation.

The method of principled negotiation is to decide issues on the merits rather than through a haggling process based on what each side says it will or will not do. It suggests that you look for mutual gain whenever possible and that where your interest conflict, you insist that the solution be based on some fair standards independent of the will of either party.

The authors argue that typically negotiators bargain over positions and they tend to lock themselves into those positions and expend considerable energy defending and justifying their positions. As more attention is paid to positions, less attention is devoted to meeting the underlying concerns of the parties that cause them to take those positions in the first place. As a result, the negotiated agreement usually reflects a mechanical splitting of the final decisions of both parties rather than a solution carefully crafted to meet the legitimate interest of the parties. The result is frequently an agreement that is less satisfactory to each side than it could have been.

WHY USE INTEREST BASED NEGOTIATIONS?

1. **Arguing over positions is inefficient.**
   When negotiators argue over positions, they tend to start out with an extreme position, making small concessions grudgingly. Where each decision involves yielding a little to the other side's position, feet-dragging, threats to withdraw, stone-walling and other such dilatory tactics are seen as desirable. In reality, what this actually does is to increase the cost and time of reaching an agreement as well as the risk that no agreement will be reached at all.

2. **Arguing over positions endangers ongoing relationships.**
   Positional bargaining is a contest of wills. Each negotiator asserts what they will and will not do. Each tries to bend the will of the other. The end result is a strain on the relationship between the parties.

3. **Being unconditionally nice is no answer.**
   In a bid to maintain ongoing relationships, some negotiators tend to be unconditionally nice. They are generous, trade concessions easily, they trust the other side and are friendly to the other side. This may result in giving away concessions on the substance of the matter at stake that they can ill afford. The end result is what is commonly called "buyer's remorse"— a realization that they have entered into a bad agreement and a resulting reluctance to carry out their side of the bargain.

THE ANSWER: ENGAGING IN PRINCIPLED NEGOTIATION

Principled negotiators are presented as being both hard and soft. They are soft when they are dealing with the people in the negotiation, but they are hard when dealing with the substance of the problem. They treat people with respect, they are courteous and principled, but they will never concede on the substance unless the other party can give a good reason why the concession must be made based on principles.

The authors of "Getting to Yes" suggest five principles that must guide interest-based negotiators. Each principle deals with a basic element of negotiation and suggests what people should do about it.

The first principle is: separate the people from the problem. This principle recognizes the fact that negotiators are human beings. As a result, they are creatures of strong emotions who often have radically different perceptions and have difficulty communicating clearly. Emotions typically become entangled with the objective merits of the problem. Taking positions makes this worse because people's egos become identified with their positions. To deal with these human problems, the principle suggests that before working on the substantive problem, "the people problem" should be disentangled from the problem and dealt with separately.

The second principle is: focus on interests not positions. This principle is designed to overcome the drawback of focusing on people's stated positions when the object of negotiations is to satisfy their underlying interests. A position

in negotiation often obscures what people really want. Compromising between positions is not likely to produce an agreement which will effectively take care of the human needs that led people to adopt those positions. The principle therefore advocates that negotiators should concentrate on the interest behind their stated positions and work towards satisfying them.

The third principle is: invent options for mutual gain. This principle responds to the difficulty of designing optimal solutions while under pressure. Trying to decide in the presence of an adversary narrows your vision. Having a lot at stake inhibits creativity. The end result is the tendency to search for the one right solution from the outset. To deal with these difficulties, this principle suggest that negotiators should set aside a designated time in the negotiation process which will be devoted to the exercise of thinking up a wide range of possible solutions that advance shared interests and creatively reconcile differing interest.

The fourth principle is: insist on objective criteria. This principle is designed to overcome the situation where a hard negotiator attempts to impose their will on another by dictating that the option they prefer should be the one that is selected as the solution to the problem. To counter this, the principle suggests that you insist that the terms of any agreement must reflect some fair standard or arrived at through a fair procedure independent of the will of any of the parties by selecting the preferred option. By measuring it against such objective criteria neither party will be seen as bending the will of the other party to their own.

The last principle is: you must know your BATNA and where possible, develop your BATNA. This principle is premised on the fact that if you have not thought through what you will do if the negotiations were to fail, you will be negotiating at a disadvantage. Your BATNA determines what you will ultimately accept and what you will be better off rejecting.

These five principles will now be discussed in detail in the succeeding sections of the manual.

1. SEPARATE THE PEOPLE FROM THE PROBLEM

The Premise

Negotiators are human beings, not robots. They have emotions, deeply held values, different backgrounds and viewpoints. Failing to deal with them

sensitively as human beings prone to human reactions can be disastrous for a negotiation. Throughout the negotiation process, each negotiator must ask the question, “am I paying enough attention to the people problem?”

The authors indicate that every negotiator has two kinds of interests; in the substance and in the relationship. These two interests often become entangled. People negotiate when they need something they cannot attain through unilateral action. This implies that a relationship with the other side is important. In this context of ongoing relationships, it is important that negotiations are carried out in a way that will help rather than hinder future negotiations; this is the relationship interest.

The negotiator also needs to reach an agreement that satisfies his substantive interest. That explains why they are engaged in the negotiation process in the first place. A good outcome in respect of the substantive problem to be resolved is therefore important.

A major tendency of the people problem in negotiation is that the party’s relationships tend to become entangled with their discussion of the substance. We tend to treat the people and the problem as one. For example, anger over a situation may lead to expression of anger towards a person associated with it in your mind.

Another reason why substantive issues become entangled with the people problem is that people draw unfavorable inferences from comments on the substance, which they then treat as facts about that person’s interests and attitudes towards them. This is almost always automatic hence the adage to consciously deal with this as a separate problem.

The answer: separate the relationship from the substance; deal directly with the people problem.

We need as good negotiators to learn the techniques of how to deal with the substantive problem and maintain a good working relationship. Dealing with the substantive problem as well as managing a good relationship need not be seen as conflicting or incompatible goals if we learn how to separate the people from the problem.

People problems are placed into three categories:

a. perceptions
b. emotions
c. communication problems.

These people problems are psychological problems and they are best resolved using psychological techniques. Where perceptions are inaccurate, you can look for ways to educate. If emotions ran high, you can find ways for each to let off steam and where misconceptions exist, you can work to improve communication.

We will examine each one of these problems in turn and suggest ways to deal with them.

The Perception Problem

Conflict lies not in objective reality but people's perception. It is ultimately the 'reality' as each side sees it that constitutes the problem in a negotiation. To deal with the perception problem, you need to do the following:

1. **Put yourself in their shoes.**
   The ability to see the situation as the other side sees it is difficult and is one of the most important skills a negotiator can possess. It is not enough to know they see things differently. If you want to influence them, you also need to understand empathetically the power of their point of view and the emotional force with which they believe it.

2. **Don't deduce their intention from your fears.**
   Stop putting the worst interpretation on what the other side says or does.

3. **Discuss each other's perceptions.**
   As long as negotiators do this in a frank and honest manner without either side blaming the other for the problem, such a discussion may provide the understanding needed to further the negotiation.

4. **Look for opportunities to act inconsistently with their fears.**

5. **Give them a stake in the outcome by making sure that they participate in the process.**

6. **Make your proposals consistent with their values.**

The Emotion Problem

People often come to the negotiation table with heightened emotions. These emotions often generate similar high emotions in the other side. If not handled properly this blows up and destroys the negotiation ruining both the negotiation and any chance of resolution of the substance of the dispute. To prevent emotions from having this disastrous effect, the following actions are prescribed:

1. **First, recognize and understand emotions** — yours and theirs. Ask yourself how you are feeling emotionally and think through the best way to handle these emotions. Then consider their emotions and prepare to handle their behaviors which will be the likely consequence by those emotions you have identified.

2. **Make emotions explicit and acknowledge them as legitimate.** Having identified emotions - theirs and yours - there is the need to acknowledge them as an important aspect of the resolution process. Rather than behaving in the normal way in which emotions are deemed to be a sign of immaturity, you make the emotions you have identified an explicit focus of discussions early on in the discussion. This not only underscores the seriousness of the problem, it will also make the negotiation less reactive and more proactive. Freed from the burden of unexpressed emotions, people are likely to work on the problem.

3. **Allow the other side to let off steam.** People obtain psychological release through the simple process of recounting their grievance. Affording people the opportunity to let of steam may make it easier to talk rationally later. Ventilation of emotions is therefore to be encouraged.

4. **Do not react to emotional outburst.** Skilled interest-based negotiators know the value of ventilation and the therapeutic effect it is has on the other side. They therefore do not treat emotional outburst as a personal attack on them and they therefore do not react to emotional outbursts with emotional outbursts of their own. This may be the first real opportunity for you to feel the full force of the emotions they have invested in the substantive problem.

5. **Use symbolic gestures.** There are symbolic gestures that can be used to diffuse hostile emotional situations. A note of sympathy, a statement of

regret, a visit to a funeral, a speech condemning unacceptable behavior from a member of your group or a word of apology; all these may be small ways of diffusing emotions.

The Communication Problem

Communication is never an easy thing even between people who have an enormous background of shared experiences. It is not surprising therefore to find poor communication between people who may not know each other well and who may feel hostile or suspicious of one another.

In principled negotiation, we identify three main communication problems:

1. **Not talking to each other.** People break off communication with people with whom they have a problem. Without communication there can be no negotiation.

2. **Not hearing each other.** A second problem with communication is that people often do not pay enough attention to what each other says. But if you are not hearing what the other side is saying, there is no communication.

3. **Misunderstanding.** The third communication problem is misunderstanding. We ascribe different meaning to what each other says. Where the parties speak different languages or come from different countries, the chance for misunderstanding is compounded.

To deal with these problems, the interest-based negotiator must do the following:

i. **Listen actively and acknowledge what is being said.** The need for listening is obvious. Yet it is difficult to listen well especially under the stress of an ongoing negotiation. Make a point to listen attentively when the other side is speaking. Listening enables you to understand their perceptions, feel their emotions and hear what they are trying to say. Active listening improves not only what you hear but also what they say. People try to communicate well if they have the feeling they are being listened to. They will also feel the satisfaction of being heard and understood. It has been said that the cheapest concession you can make to the other side is to make them know that they have been heard. Having listened carefully, try to relate to them what you have heard and your understanding of the same so that they can correct any misconceptions.

ii. **Speak to be understood.** In a negotiation, try to imagine that you were sitting on a panel of judges discussing how to write a common judgment. In this context, it will clearly be unpersuasive to blame anyone on the panel, engage in name calling or raise your voice.

iii. **Speak about yourself not about them.** In many negotiations, each side explains and condemns at great lengths the motivations and intentions of the other side. It is more persuasive however to describe the problem in terms of its impact on you, than in terms of what they did or why they did so. Discuss the problem in terms of how you feel. This conveys the same message without provoking a defensive reaction that will prevent them from taking it in.

iv. **Speak for a purpose.** Sometimes the problem is not too little communication but too much. When anger and misperception are high, some thoughts are better left unsaid.

2. FOCUS ON INTERESTS NOT POSITIONS

For a wise solution reconcile interests not positions.
For most negotiators, the conflict is about the different positions that the parties have taken, and the goal is to arrive at a compromised position. For this reason, negotiations tend to revolve around positions and nothing else. However, the reality is that the basic problem in negotiation lies not in conflicting positions but in the conflict between each side's needs desires, concerns, fears, what they seek too gain, what they are afraid to lose among others.

Such desires, needs, concerns are the real interests of the parties. They are the reason the people have taken the positions they have. In other words, a position is something that you demand. Your interests are what cause you to make those demands.

Interests define the problem.
In interest-based negotiation, the negotiators are advised to focus on the interest that informs the positions. They are advised to reconcile the differences in their positions rather than expending energy in bargaining over positions. Reconciling interests rather than positions works for two reasons. First, for every interest, there usually exist several possible positions that could satisfy it. All too often, what people do is simply to adopt the first solution that come to their mind and adopt it as their only position. However, when you look behind

opposed positions for the motivating interests, you can usually find an alternate position which meets not only yours, but theirs as well.

Another reason why reconciling interests rather than compromising between positions also works well is that behind opposing positions lies shared and compatible interests as well as conflicting ones. We tend to assume that because the other sides' positions are opposed to ours, their interests must also be opposed. But this is not always true. Indeed, in many negotiations, a careful examination of the underlying interests will reveal the existence of many more interests that are shared than ones that are opposed.

How do you identify interests?
Whereas a position is likely to be concrete and made explicit, the interest underlying it may very well be unexpressed, intangible or even deliberately hidden. The question then is, how do you go about identifying the interests involved in the negotiation?

One basic technique is to put yourself in their shoes. Examine each position they take and ask yourself 'why?' and 'why not?' In the appropriate circumstances, you may put these questions directly to them. The answers to these questions will unlock what their true interests are.

The most powerful interests are basic human needs.
In searching for the basic interests behind the declared position, look particularly for those bedrock concerns which motivate all people. If you can take care of such basic needs, you increase the chances of reaching an agreement. For an agreement to be reached with a fair chance of the other side keeping to it, you may use psychologist Abraham Maslow's theory of needs. He stated that in a hierarchical order, the basic needs were as follows:

1. Basic survival/ physiological needs.
2. Security and safety needs.
3. Love and belonging needs.
4. Self-esteem needs which includes seeking the esteem of others, self-actualization needs, the need to know and understand and finally, aesthetic needs.
5. Self-actualization needs.

How to Discuss Interests Constructively.

i. **Make your interest come alive.**
Be specific about what your interests are and convey this adequately to the other side.

ii. **Acknowledge their interests as part of the problem.**
If you want the other side to appreciate your interests, you must begin by showing that you appreciate theirs. In addition to this, it helps to acknowledge that their interests are part of the overall problem you are trying to solve.

iii. **Put the problem before your answer.**
Rather than proposing a solution (position) and thereafter the reasoning and underlying interests, first, put out the interest that underlies that position. Then, you go ahead to justify how your position satisfies the identified interest.

iv. **Be hard on the problem, soft on the people.** Remember to apply all the people problem skills we discussed earlier at this stage of the negotiation while at the same time, advocating forcefully that your interests are important and must be satisfied.

3. **INVENT OPTIONS FOR MUTUAL GAIN**

Skill at inventing options is one of the most useful assets a negotiator can have. As valuable as it is to have many options before deciding which one is the best one, people involved in a negotiation rarely sense a need for them. In a dispute, people usually believe they know the right answer. Their view should prevail. In an interest-based negotiation, after identifying the various interests of the parties, the negotiators will need to fashion out a solution that satisfies the interests identified. In so doing, they will be well served by inventing creative options that satisfies the varying and competing needs.

The Obstacles That Inhibit the Invention of Options and Their Solutions

1. **Premature judgment.**
One thing that inhibits the creation of options is premature judgment. If as soon as a party puts up an option the option is shot down by criticisms, other people will feel inhibited from suggesting other options. To avoid public criticism,

people will rather keep their options to themselves fearing they will be subjected to the same ridicule that the other person suffered. This is what happens in most negotiations. To deal with this problem, separate the act of inventing options from the act of judging them. Since judgment hinders imagination, separate the creative act from judging them; separate the process of thinking up possible decisions from the process of selecting among them. Set aside a time in the negotiation process where all you do is to create a list of options without any assessment as to how viable they are. This is best done in brainstorming sessions. You then set up a separate time to evaluate the options.

2. **Searching for the single answer.**
In most people's minds, a negotiation process is to narrow the gap between two positions. They see inventing options as unnecessarily complicating this simple process. They reckon that since the end product of negotiation is a simple decision, free floating discussions will only complicate and delay the process. By looking from the outset for the single best answer, negotiating parties often short change themselves.

To resolve this problem, broaden your options. You may approach the problem by looking through the eyes of different experts and professions. You may also consider the problem from different viewpoints. If you are negotiating a business contract, you may consider what might occur to a banker, a stockbroker, a tax expert or a corporate lawyer. You may consider this same contract through the eyes of the shareholders as well as the regulators in the relevant industry.

You may further broaden your options by inventing arguments of different strengths. If you cannot have a substantive agreement, you may try to reach a procedural agreement. You may consider entering into a provisional agreement, trying it for a while before you make it permanent.

3. **The assumption of a fixed pie.**
For negotiators who see the process as a zero-sum gain, there is the assumption of a fixed pie: the less for you equals the more for me. Any gain of yours therefore represents a loss to me. For this reason, they fail to see the need for inventing options for mutual gains. Rarely, if ever, is this assumption of a fixed pie true. First, a badly conducted negotiation can leave both parties worse off so at the very least, there is a shared interest in averting joint loss. To resolve this problem, parties are advised to identify their shared interests. Find out: do the parties have a shared interest in preserving the relationship? Are there

opportunities for future cooperation that will be mutually beneficial? Are there common principles that both parties can respect?

Parties may also dovetail their differing interests. People generally assume that differences between two parties create the problem. Yet differences can also lead to a solution. In many situations, a satisfactory agreement is made possible because each side wants different things or sees the situation differently. Consider this, are there any difference in interests? Do the parties have different beliefs? Are there differences in matters such as aversion to risk and differences placed on the value of time? All these can be exploited. Look for items that are of low cost to one party and high benefit to the other and do the trade off.

4. **Thinking that 'solving their problem is their problem'.**

The final obstacle to inventing realistic options lies in each party's concern with only its own immediate interest. For a negotiator to reach an agreement that meets his own self-interest, he needs to develop a solution which also appeals to the self-interest of the other. To overcome this, think of options that makes their decision easy. Think of options that satisfy your interests as well as their interests substantially. Avoid tabling options which does not accord with their fundamental values or principles.

4. **INSIST ON OBJECTIVE CRITERIA**

As stated earlier, trying to reconcile differences on the basis of the will of one party has serious costs. No negotiation is likely to be efficient or amicable if you put your will against theirs and either you have to back down or they do.

If trying to settle differences of interest on the basis of will has such high costs, the solution is to negotiate on some basis independent of the will of either side. That is, on the basis of objective criteria. Objective criteria are fair standards and fair procedures that all reasonable people can relate to. Some fair standards which you can make the bases of objective criteria in your negotiations are the market value of the item in dispute, scientific standards, professional standards, what a court will decide, moral standards (if the parties have a shared morality), reciprocity and the like.

Fair procedures such as tossing a coin, throwing a dice, drawing lots, one party divides the other picks first are some of the procedures generally accepted as fair. When these are brought to bear as the basis of resolving conflicting interests, neither party has to yield to the will of the other.

NEGOTIATING WITH OBJECTIVE CRITERIA

Having identified some objective criteria and procedures, how do you go about discussing them with the other side? Negotiating on the merits has three basic elements:

1. Frame each issue as a joint search for objective criteria.
   The parties should ask, 'what would be a good objective criteria to base the discussion of this issue on?'
2. Reason and be open to reason as to which standards are most appropriate and how they should be applied.
3. Never yield to pressure, only to principle.

5. KNOW YOUR BATNA AND WHERE POSSIBLE, DEVELOP YOUR BATNA

BATNA is the acronym for Best Alternative to a Negotiated Agreement. Before you begin a negotiation, you need to have a backup plan in case you fail to reach an agreement with the other side. This backup is your BATNA. Your BATNA is what you will get outside the negotiation. It is what you will get if you leave the negotiation without an agreement.

Your BATNA is a key determinant of your negotiation power. The better your BATNA, the better the offer the other side must make to entice you to reach an agreement. The weaker your BATNA, the higher the number of concessions you may have to make in order to reach a negotiated agreement which is better than your BATNA.

Having a clear BATNA helps prevent you from accepting a deal that you will be better off not taking. Knowing your BATNA protects you from accepting an agreement that will make you worse off than when you started the negotiations. Having identified your BATNA, it may be useful to do two things:

1. **Determine your breakoff point.**
   This is the worst agreement you will be willing to accept before ending the negotiations and resorting to your BATNA.

2. Develop your BATNA if you can, between the preparation time and the negotiation. Springing a surprise on the other side in terms of your improved BATNA can work very well.

Practice exercises

Students will be introduced to the practical dynamics of interest based negotiations. Students will be given scenarios that will give them the opportunity to develop practical skill in separating people from the problem, develop analytical skills in identifying the interest as opposed to the positions of parties in given scenarios.

Students will be divided into groups to conduct negotiations based role plays and will be monitored for how well they use objective criteria in assessing the options proposed by the opposing side and how well they identify and make use of their BATNA.

CHAPTER 5

THE THEORY AND PRACTICE OF MEDIATION

1. **What is Mediation?**

Mediation is sometimes referred to as assisted negotiation. It is a process for resolving disputes whereby a third party, known as the mediator, assists the parties to the dispute to negotiate a solution to their dispute.

2. **Why Mediation?**

Mediation is opted for as a method of dispute resolution for the following reasons:

a. Outcome remains in parties own hands. The mediator is neither a judge nor an arbitrator. The mediator does not hand down a judgment or award. The mediator only assists the parties to come up with their own resolution.
b. Procedures are relaxed, informal and flexible, giving parties the best chance to speak and be heard by the other side.
c. Less time is often required than other means of resolving disputes.
d. Privacy of the matter remains intact.
e. Cost is usually reduced
f. Creative options for settlements are often identified
g. Relationships between the parties are preserved, which is especially important where the relationship will have to survive the negotiation.

THE MAIN MEDIATION PRINCIPLES

1. **Mediation is Voluntary**

Mediation is voluntary in several respects; first, a party is free to decide whether

or not to adopt mediation as a means of resolving a dispute. A person therefore cannot be mandated to choose mediation as a means of dispute resolution. Secondly, it is the parties who choose their mediator. A party must therefore voluntarily submit to the jurisdiction of a particular mediator. Thirdly, a party may also withdraw from the mediation process at any time before an agreement is reached.[3]

Section 63(1) of the ADR Act, 2010 provides that the submission of disputes to mediation should be with the consent of the parties to the dispute. Where one party invites another to submit a dispute to mediation, the failure by the invited party to accept the invitation is considered to be a rejection of the invitation to mediation.[4] In Section 64 of the ADR Act 2010, a court before which an action is pending may at any stage in the proceedings, if it is of the view that mediation will facilitate the resolution of the matter or a part of the matter in dispute, refer the matter or that part of the matter to mediation. Even then, mediation is still voluntary as a party cannot be compelled to take a decision or settle at mediation.

2. **Mediation Is Private and Confidential**

There are several aspects of the private and confidential nature of mediation. First, as between the parties, there is generally an agreement to keep all matters disclosed in the mediation private and confidential. Typically, the parties will sign a confidentiality agreement which will be binding on them to that effect. Secondly, the matters which are disclosed to the mediator during a caucus are also confidential and are not to be disclosed to the other party except with the express consent of the caucusing party.

The third aspect of confidentiality in mediation relates to the mediator himself. He is bound to keep confidential matters disclosed to him or her by the parties.[5] Indeed he cannot be presented by the parties as a witness in any arbitral or judicial proceedings arising out of or in connection with the dispute mediated upon.[6] He is precluded from acting as an arbitrator or a representative or counsel for either of the parties in any judicial or arbitral proceedings in respect of a dispute that was the subject matter of the dispute mediated upon.[7]

---

[3] Section 63(1) of the ADR Act, 2010
[4] Section 63(7) of the ADR Act, 2010
[5] Section 79 (2)
[6] Section 84(b)
[7] Section 84(a)

The fourth aspect of confidentiality in mediation relates to the evidence, whether testamentary or documentary, which are adduced in the mediation proceedings. These are also generally confidential and cannot be introduced as evidence in arbitral or judicial proceedings whether or not the proceedings relate to the dispute that is the subject matter of the mediation proceedings.[8]

Mediation is private in the sense that only parties to the dispute can attend the mediation proceedings. Except where the parties agree and the mediator consents, a person who is not a party to the mediation shall not attend a mediation session.[9]

3. Mediation is Conducted Without Prejudice to Parties Rights and Liabilities

In mediation proceedings, views expressed and admissions made will have no effect unless and until the parties finally sign a mediation agreement. Unless that occurs, the parties' rights and liabilities will remain exactly as they were before the mediation process was started and such views and admissions cannot be used to the detriment of a party. Because mediation discussions are conducted without prejudice, even if the information were to be disclosed it will have no effect at law.

TYPES OR CLASSIFICATION OF MEDIATION

Mediation strategies vary very widely. However, all these various techniques may be discussed under two broad categorizations;

a. Facilitative/Interest-based mediation.
b. Evaluative/Rights-based mediation.

1. Facilitative/Interest-Based Mediation

In facilitative mediation, the role of the mediator is limited to assisting the parties to negotiate a resolution of the dispute presented by utilizing their skills to get the parties to focus on their interests and generate options that promote a settlement that satisfies their interests. They avoid any comments on the merits of either party's case as well as making value judgments on the choices made by the parties.

2. Evaluative/Right-Based Mediation

[9] Section 77

In Evaluative mediation, the mediator in addition to playing the role of a facilitator of negotiations leading to a resolution, will at certain stages of the mediation, make evaluations of the merits of the case presented by the respective parties and may even make predictions as to the likely outcome of the dispute if it did not end in mediation. On the basis of this, they may make suggestions of possible settlement options based on what they perceive to be the legal rights of the parties to the dispute. Except in limited circumstances, evaluative mediations are not desirable for the simple reason that parties who choose mediation out of the wide spectrum of processes in ADR are usually looking for something other than a right-based resolution.

Benifits of Mediation

Mediation offers one means of turning acrimonious negotiations into productive, problem-solving sessions. Hence, the primary purpose then is to maximise the parties' joint gains. In popular parlance, this is known as "win-win" negotiation; search for "integrative" solutions.

Mediation generally produces or promotes:

1. **Economical Decisions:** Mediation is generally less expensive when contrasted to the expense of litigation or other forms of fighting.

2. **Rapid Settlements:** In an era when it may take as long as a year to get a court date, and multiple years to complete hearing and go through the appeal process, the mediation alternative often provides a more timely way of resolving disputes. When parties want to get on with business or their lives, mediation may be desirable as a means of producing rapid results.

3. **Mutually Satisfactory Outcomes:** Parties are generally more satisfied with solutions that have been mutually agreed upon, as opposed to solutions that are imposed by a third party decision-maker.

4. **High Rate of Compliances:** Parties who have reached their own agreement in mediation are also generally more likely to follow through and comply with its terms than those whose resolution has been imposed by a third party decision-maker.

5. **Comprehensive and Customized Agreements:** Mediated settlements are able to address both legal and extra-legal issues. Mediated agreements often cover procedural and psychological issues that are not

necessarily susceptible to legal determination. The parties can tailor their settlement to their particular situation.

6. **Greater Degree of Control and Predictability of Outcome:** Parties who negotiate their own settlements have more control over the outcome of their dispute. Gains and losses are more predictable in a mediated settlement than they would be if a case is arbitrated or adjudicated.

7. **Personal Empowerment:** People who negotiate their own settlements often feel more powerful than those who use surrogate advocates, such as lawyers, to represent them. Mediated negotiations can provide a forum for learning about and exercising personal power or influence.

8. **Preservation of an Ongoing Relationship or Termination of a Relationship in a More Amicable Way:** Many disputes occur in the context of relationships that will continue over future years. For parties who may deal with one another again in the future, maintaining credibility and trust may be as important as obtaining any particular substantive gain. The maintenance of a working relationship is of particular importance when the disputing parties are neighbours, family members, or business associates. Mediation can also make the termination of a relationship more amicable.

9. **Workable and Implementable Decisions:** Parties who mediate their differences are able to attend to the fine details of implementation. Negotiated or mediated agreements can include specially tailored procedures for the manner in which the decisions will be carried out. This fact often enhances the likelihood that parties will actually comply with the terms of the settlement

10. **Decisions that Hold Up Over Time:** Mediated settlements tend to hold up over time and if a later dispute results, the parties are more likely to utilize a cooperative form of problem-solving to resolve their differences than to pursue an adversarial approach.

11. Settlements are reached without the need for repeated intervention of law enforcement, government agencies and/or the courts.

12. Reduces anxiety, embarrassment, stress, medical, emotional, psychological impact of the conflict.

13. Flexibility of scheduling; informal.

Qualities of a Mediator

1. **Understanding:** The ability to understand with sensitivity the issues, often complex, and the concerns and aspirations of the parties, explicit and implicit.

2. **Judgement:** A sound judgement, a judicious and rational approach and shrewd common sense.

3. **Intuition:** Ability to sense information without any rationalisation, obtained through perceptiveness to verbal and other signals received.

4. **Creativity:** A creative and inventive response to the problems of the case, generating options and encouraging the parties to explore ideas.

5. **Trustworthiness:** Integrity coupled with a sense that trust can be reposed in the mediator.

6. **Authority:** A firmness of touch in managing the process effectively and constructively.

7. **Empathy:** An ability to relate in a sympathetic way to the parties and to reflect an awareness of and respect for their concerns.

8. **Constructiveness:** A practical turn of mind that sees positive possibilities and can motivate the parties to deal constructively with settlement options.

9. **Flexibility:** An ability to cope with unusual situation, ideas and solutions, and with rapidly varying circumstances.

10. **Independence:** This includes an ability to work autonomously, without support or feedback, and to maintain a neutral and independent stance.

The Role Of The Mediator

I. Facilitator

Mediators keep the process moving in many different ways- they reframe the conflict so that it energizes and creates positive movement, refocus attention on areas of possible agreement and model and encourage the use of active listening skills.

II. Opener Of Channels Of Communication

When parties are not talking to each other, mediators intervene to re-establish communication just the presence of a mediator has a benign effect because parties may be much more ready to talk to the mediator than the other party. Gradually the mediator will get the parties to speak more directly with one another.

III. Translator And Transmitter Of Information

If parties are talking but no "hearing" one another, a mediator may coach then on the importance of demonstrating to the other party that they understand what was said. Parties might be unaware of certain facts or they might have different perceptions of the meaning of facts. Mediators can transmit new information or translate the meaning of information into new terms. Both functions are important.

IV. Distinguisher Of Wants From Needs

Usually parties cannot settle a dispute without modifying the content of their original demands. The mediator will help then distinguish their true underlying needs (interests) from their original desires (positions).

V. Mediators assist parties to generate options

Although it is not necessarily the mediator's job to create solutions mediators should be prepared to help parties generate and articulate as many realistic options for settlement as possible. If this is done skillfully, the mediators will not seem responsible for generating options. The parties will retain ownership of their settlement and later will not find that better solution to the dispute went unexplored.

VI. Agent Of Reality

Parties bargaining positions are sometimes based on unrealistic ideas about practical matters, external forces or the role of other important players. Mediators can carefully assist parties to assess how realistic their options are

in order to change the tore of negotiations. In addition the mediator's job occasionally is to help the parties consider what will happen if they choose not to resolve their dispute in mediation.

VII. **Conflict Assessor**

A mediator must attempt to understand as much as of the conflict as possible. In the role of a conflict assessor the mediator will examine and analyze the dispute from the point of view of all the disputants.

VIII. **Impartial Convenor**

Being a neutral involved in a facilitating a negotiation process the mediator is also an impartial convenor. The mediator will help establish a positive resolution seeking atmosphere and set the tone for the process. The mediator will help establish the ground roles which can led to procedural agreements and other agreements. The mediator will help maintain civility between the parties and work to keep the process going and keep the parties at it until finally and agreement is reached if agreement is possible.

IX. **Expander of Resources**

A mediator helps the parties to expand resources by assisting the parties find the information they need to make intelligent decisions. The mediator may refer the parties to outside sources such as a valuer, planner, surveyor etc.

X. **Obtain Closure**

The mediator will assist the parties to obtain closure. Although the elements that contribute toward closure are present at the outset of the process. With the first procedural agreements, the agreement to mediate, and continuing with an entire series of small agreements during the course of the mediation, closure on all of the issues is the goal. Parties must understand the terms of agreement that is actually reached, and the mediator should be confident that the parties are able to perform as the agreement stipulates. Mere closure is not sufficient; agreements need to be durable and long lasting. It does parties no good if the agreement is breached once it is implemented. Parties should have long-term satisfaction with the settlement and the mediation process.

XI. **Guard The Mediator Process**

A mediator will guard the mediation process. Mediation is a very powerful device with direct effect upon the lives of human beings. It is an ethical process with its own set of difficulties and complexities. Mediators must not only guard their neutrality, but also insure that mediation is not abused or used to oppress.

The ethical construct of mediation needs to be observed and respected by the mediator is that the process actually serves the parties. The mediator is a guardian of this process.

Phases of Mediation

I. Opening Statement

Purpose:

- Establish a comfortable environment
- Develop rapport – trust in the Mediator/Process
- Clarify roles (Mediator controls the process and parties control the outcome)
- Time constraints
- Agreement to mediation Confidentiality
- Establish role of attorneys if any
- Explain the caucus
- Explain the voluntary nature of the process
- Establish appropriate communication guidelines
- Agreement to comply with guidelines.

II. Telling the Story/Venting and Summarizing

Purpose:

- To allow for parties to share their side of the story without interruptions
- To explore the issues and feelings surrounding the dispute
- To summarise relevant information/issues
- Discuss the impact of what has happened
- To create the environment or foundation for understanding

Mediator Tasks:

- Ensure agreement on who speaks first
- Listen
- Take salient and confidential notes (notes are normally destroyed at the end of the process before the parties)
- Clarify facts and feelings

III. Defining the Problem/Prioritizing Issues and Interests/Establishing Mutual Understanding

Purpose:

- Set the stage for problem solving by clearly naming the issues to be resolve
- Focus parties' attention on mutual interests and away from positions
- Promotes understanding and agreement

Methods:

- List and prioritize the issues
- Frame the issues to create acceptance and not resistance
- Work the agenda, but no problem solving at this stage
- Draw out underlying interests
- Look for common ground
- Promote dialogue among parties

IV. The Search for Solution – Innovation and Problem Solving

Purpose:

- Look for agreement
- Promote effective communication between parties
- Brainstorm options
- Establish criteria for judging options
- Select workable and mutually acceptable options for adoption
- Draft selected option into an agreement

Method:

- Select item from the agenda
- All solutions must come from the parties and not the mediator
- Consider all suggested options, judge options with the standard criteria established
- There should no criticism of options suggested
- Narrow options by merging ideas, building on ideas etc
- Negotiate in good faith the specifics of each option selected as solution, what, how, when, how much

V. Finalising the Agreement

Purpose:

- To clarify agreement
- To write Agreement
- To supervise the signed Agreement

Method:

- Use plain and simple language
- Identify parties and representatives or witnesses by their full names
- Specify dates
- Specify method of payment if any, or any other activity
- List each provision separately
- Omit any mention of blame, fault or guilty
- Do not involve third parties on payment implementation
- Include the parties' intentions
- Check for the three satisfactions (Simplicity, Fairness, and Acceptability)

VI. **Closure**

- Thank and Congratulate parties on success or their attempt if no solution is reached
- Distribute copies of agreement
- Referral back to the appointing authority if no agreement is reached.
- Educate and encourage parties on using mediation in the future if other disagreements occur

The opening statement usually contains approximately eleven points.

These include:

1. Introduction of the mediator and, if appropriate, the parties.
2. Commendation of the willingness of the parties to cooperate and seeka solution to their problems.
3. Definition of mediation and the mediator's role.
4. Statement of impartiality and neutrality.
5. Description of mediation procedures.
6. Explanation of the concept of the caucus.
7. Definition of the parameters of confidentiality.
8. Description of logistics.
9. Answering question posed by the parties.
10. Joint commitment to begin:

1. **Mediator Introduction:**

First, the mediator introduces himself or herself and the parties, and explains how he or she became the mediator in this negotiation. "Good morning, my name is……and I have been asked to be your mediator and to assist you in discussing issues that have brought you to mediation. I work as a mediator and

have a background in helping people work out their own solutions to situations they would like to change."

2. **Affirmation of Willingness to Cooperate:**
Second, the mediator should commend the willingness of the parties to cooperate and to try mediation to settle their differences. "I would like to congratulate you both for coming here today and trying to negotiate your own agreement to some issues which may have been hard in the past to discuss. It is an affirmative indication on your part that you want to take responsibility for making your own decisions."

3. **Definition of Mediation and the Mediator's Role:**
Third, the mediator should define mediation and the mediator's role in dispute resolution. Mediators usually try to explain mediation and the mediator's role in the most informal language possible. Explanations vary considerably, but they usually cover:

a. A brief description of what the parties will do during the next period of time,
b. What a mediator is,
c. What the mediator can do for the parties, and
d. The potential outcome of mediation.

A sample explanation follows: "During the next (specified period of time) you will be engaging in negotiations and searching for a joint solution that will meet your needs and satisfy your interests. My role as mediator will be to help you identify problems or issues that you want to talk about, help you clarify needs that must be met by a solution, assist you in developing a problem-solving process that will enable you to reach your goals, and keep you focused and on the right track."

Next, the mediator should describe his or her authority relationship with the disputants. "As I told each of you previously, mediation is a voluntary process. You are here because you want to see if you can find solution to issues that divide you. My role is to assist you in doing this.

I do not have the power to, nor will I attempt to, make decisions for you. My role is to advise you on procedure, and on how you might best negotiate. If you reach an agreement, we (or I) will write it down in the form of a memorandum of understanding. I you do not reach a settlement; you are free to pursue other

means of dispute resolution that you feel are appropriate. You do not lose any rights to go to court if you use mediation and are unable to reach an agreement."

4. **Statement of Impartiality and Neutrality:**
The mediator should explain that he or she is impartial in his or her views and neutral in his or her relationship to the parties. This neutral role and impartiality would not be affected by the fact that at times the mediator may need to spend more time with one than with another during caucus. "Before proceeding, I would like to clarify both my position on the issues at hand and what my relationship has been with both of you. During this mediation, I will be impartial in dealing with the substantive issues at hand. I do not have any preconceived biases towards any one of you over the other. If at any time you feel that I am acting in an un-neutral manner, please call my attention on my behaviour. I will try to change it. If at any time you feel that I am not able to remain impartial and am unable to assist you, you may cease negotiations, find another mediator, or pursue another means of settlement."

In claiming impartiality and neutrality toward issues and the parties, a mediator should disclose any relationship with one or more disputants that might influence his or her behaviour or raise a question in the minds of the disputants as to whether the mediator can in fact remain impartial while assisting in discussions of these particular issues.

5. **Description of Mediation Procedures:**
Next, the mediator should describe the procedures to be followed. If he or she has worked these out with the disputants in the pre-negotiation interview, this description is no more than a reiteration of previous agreements. If, however, the mediator has taken the initiative to design negotiation procedures independently of the parties, he or she should present the proposal in a way that the parties are most likely to accept. The strategy, of course, must be adjusted to meet the idiosyncrasies of the particular issue at hand"At this time, I would like to briefly describe the process that I propose you follow to begin the session.

Both of you have a significant amount of information about the problems you are dealing with. Although I have read the statement each of you presented about this situation, I do not have the detailed understanding that each of you does. I suggest that we begin the discussion today with a brief description from each of you of how you see the situation that brought you to mediation. This will educate both you and me about the issues and give us a common

perception of the problem. Each of you will have a chance, roughly (specify time) minutes, to present how you see the problem. I request that you do not interrupt the other while he or she is explaining a viewpoint, and that you hold your questions until the end of the presentation. A pencil and a pad have been provided for each of you to note observations or question so that they do not get lost prior to the question-and-answer time.

"During your presentations, I may ask some clarifying questions or probe your description so that I can gain a greater understanding of how you perceive the situation. My probing is not to put you on the spot, but rather to broaden the general understanding of the problem. At the end of each of your presentations, there will be a time for the other party (or parties, or give name) to ask question of clarification. This is not a time to debate the issues, but to clarify issues and perceptions about the problem(s) at hand.

"At the end of the presentation and questions, I will turn to the other (or next) person (or party) to repeat the process until a representative of each view has had an opportunity to speak. At this point, we will clearly identify the issues that you would like to discuss in more depth, identify the interests that you would like to have satisfied, generate some potential solutions, and assess whether one or more of these alternatives will meet your needs."

The mediator should clearly explain the stages of the problem-solving process and should take care not to appear as an authority figure toward the disputants. It is their process, not the mediator's.

6. **Explanation of Caucus:**
Next the mediator should explain the procedure for conducting separate meeting, known as Caucusing and special provision regarding confidentiality of matters discussed during those private sessions and the fact that nothing told by either party to the mediator in the separate meetings will be disclosed by the mediator to the other party without authority.

"There may be a need, some time in the course of our meetings, for each of you to take some time out and meet with other members of your group (if it is a group dispute) or meet with me as a mediator. The need for this type of break or meeting is not unusual. It allows you time to reflect on alternatives or proposals, gather your facts to develop new settlement options, or reach a consensus within your group (if applicable). At times, I may call such a meeting, but you may initiate them also. If I call a separate meeting, it is not to make a

deal, but to explore options that might be more comfortable for you to discuss in private. What is discussed in these separate meetings will be considered by me to be confidential. I will not reveal what we have talked about with the other party (or parties) unless you instruct me to do so."

"I will attempt to maintain this confidentiality to the best of my ability. On occasion, I may want to discuss this problem with a colleague so that I may gain greater insight into the conflict. I request that you grant me this privilege in that it will better enable me to assist you in reaching an agreement."

7. **Advantages of Caucuses:**
   a. Gaining certain knowledge or facts from these meetings, a mediator can selectively use the information learned from each side:

   b. Reduce the hostility between the parties and help them engage in a meaningful dialogue on the issues at hand.

   c. Open discussions into areas not previously considered or inadequately developed.

   d. Communicate positions or proposals in understandable or more palatable terms.

   e. Probe and uncover additional facts and the real interest of parties.

   f. Help each party to understand better the other party's views and evaluations of a particular issue, without violating confidences.

   g. Narrow the issues and each party's position and deflate extreme demands.

   h. Explore alternatives and search for solutions.

   i. Identify what is important and what is expendable.

   j. Prevent raising of surprise issues.

   k. Structure a settlement to resolve current problems as well as to meet future needs of the parties.

8. **Description of Logistics:**
The mediator should now describe any relevant logistics: time schedule for the entire process length of session, and note taking. The mediator often describes how much time he or she estimates will be necessary to settle the dispute. … An initial commitment should also be gained from the parties for a specific period of time for the first session. Later meeting dates and times can be established as needed.

9. **The Parties Presentation:**
The most usual procedure is for the mediator to ask each party or their respective lawyers to present an outline of their case.

The initiator of the complaint usually begins, although the decision on who speaks first may vary depending upon the nature of the parties.

This opening address is intended not only to inform the mediator, but to allow the other party or parties to hear each party's views and perception of the position. It will explain why the party makes a claim or feels aggrieved.

During or following, each of these presentations the mediator may raise questions in a non-partisan way to help clarify or amplify relevant aspects.

E.g.: "Do I understand you Mr. Wilson to be saying that you are not upset with the construction of the garage in Mrs Mahama's backyard, but only object to the workmen starting at 6.00 a.m. when you are still sleeping?"

E.g.: "As I understand it from what you both said, you have been doing business together since 1979, thus relationship has been of financial benefit to both of your companies and you both would like to find a way to resolve this matter so you can keep doing business together. Is that correct?"

10. **Questions:**
Questions and interruptions by other parties are not usually allowed during a presentation; the mediator should make this clear in advance.
E.g.: "Mr. Hesse, we agreed at the outset not to interrupt. You'll have as much time as you need when she is done."

The mediator at this stage is to exercise authority and judgement to ensure that discussions do not degenerate into hostile exchanges which might make the following stages more difficult.

Mediator Skills

- Active listening
- Proactive enquiry
- Reframing
- Reflecting
- Non-verbal communication
- Non-judgmental stance
- Ability to gain trust of parties

- ***Impasse and breaking impasse***
- ***Role of a lawyer in mediation***

- As a mediator
- As an advocate

- ***Act 798 on Mediation***
- ***Simulation on Mediation***

MEDIATION PRACTICAL EXERCISES

- Students will be introduced to the mediation rules of the various ADR Institutions with special emphasis on Ghanaian Institutions and the court connected Mediation Practice Manual. Students will be taught pre-mediation negotiation and mediation arrangement techniques.
- Emphasis will be placed on the importance of setting in mediation.
- Students will be taught how to make the mediation opening statement and also how to draft the agreement to mediate and the mediation confidentiality agreement.
- Student will be taught how to draft a mediation settlement agreement and how Mediation Agreements are enforced under the ADR Act.

CHAPTER 6

VICTIM -OFFENDER MEDIATION (RESTORATIVE JUSTICE)

INTRODUCTION

Restorative justice is an approach to justice in which one of the responses to a crime is to organize a meeting between the victim and the offender, sometimes with representatives of the wider community. The goal is for them to share their experience of what happened, to discuss who was harmed by the crime and how, and to create a consensus for what the offender can do to repair the harm from the offense. This may include a payment of money by the offender to the victim, apologies and other amends, as well as other actions to compensate those affected and to prevent the offender from causing future harm.

A restorative justice program aims to get offenders to take responsibility for their actions, to understand the harm they have caused, to give them an opportunity to redeem themselves and to discourage them from causing further harm. For victims, its goal is to give them an active role in the process and to reduce feelings of anxiety and powerlessness. Restorative justice is founded on an alternative theory to the traditional methods of justice, which often focoses on retribution. However, restorative justice programs can complement traditional methods.

Victim-offender mediation is one of the popular processes Restorative Justice. In essence, it is part of ADR but takes the form of mediation used to settle some types of criminal cases without having to fully try or hear them in court.

LEGAL BASIS FOR USE OF VICTIM OFFENDER MEDIATION

In many jurisdictions, the use of victim offender mediation is based on a specific enabling legislation. In Ghana, the provisions are contained in two Acts of Parliament and one Practise Direction.

These could be classified as sufficient justification for the use of victim offender mediation in the settlement of criminal cases.

These are :

1) Courts Act, 1993 (Act 459)
2) Alternative Dispute Resolution Act, 2010, Act 798
3) Practise Direction (Discloses and Case Management in Criminal Proceedings)

Section 73 of Act 459 says:

"any court with criminal jurisdiction may promote reconciliation encourage and facilitate a settlement in an amicable manner of any offence not amounting to a felony and not aggravated in degree on payment of compensation or on other terms approved by the court before which the case is tried and may during the pendency of the negotiations for settlement stay the proceedings for a reasonable time and in the event of settlement being enforced shall dismiss the case and discharge the accused person."

Section 64 (1) of the ADR Act, 2010 798 provides that

"a court before which an action is pending may at any stage in the proceedings if it is of the view that mediation will facilitate a settlement or part of the matter in dispute, refer the matter or that part of the matter to mediation"

Practice Direction (Disclosures and case management in Criminal Proceedings).

Section 16 of the Practice direction provides:
'at the case management conference, first of all, the judge or magistrate must consider whether the offence in question is amenable to amicable settlement under the law and if it is, then amicable settlement ought to be be vigorously explored and the court must refer the case to ADR and adjourn for the outcome of

the amicable settlement subject to the provisions of Section 169 (2) of Act 30.

UNDERLYING REASONS FOR USING OF VICTIM-OFFENDER MEDIATION

There are many reasons which make the application of victim-offender mediation essential for effective criminal justice system, three of which may be cited. Firstly, the present criminal justice system is unsatisfactory in many respects. It leaves the accused, the complainant and some members of the society dissatisfied with the outcome of criminal cases disposed of by court trial.

Secondly, it is not all offences that need to be disposed of by the conventional trial methods. There are some court cases which are so trivial in nature that after they have been called in court, people considering them objectively often conclude that they should not have been sent to court in the first place.

It becomes more tragic when the outcome of such cases result in imprisonment of the accused, knowing very well that imprisonment will not serve the interest of the complainant, the accused or the society.

Such cases make custodial sentences grossly inappropriate, considering in particular the fact that the prisons are already congested with inmates; are expensive to maintain and breed more criminals by grouping together criminals and perpetrators of minor crimes.

All these make imperative application of alternative means of dealing with criminals beside imprisonment or a fine.

Thirdly victim-offender mediation provides alternative means of disposing of some of the criminal cases in the manner that will be satisfactory to all concerned with the criminal process.

BASES OF VICTIM-OFFENDER MEDIATION

For the effective use of the criminal justice system, it is important that judges, magistrates, lawyers and sentencing officials change their attitudes towards criminals and revise their conceptions of what constitute modern punishment and sentencing.

Some of the factors that demand such changes in attitude are the following:

Crime begins by harm to the person or right of the individual.
After the individual has been hurt and has complained the suspect may be arrested. Prosecution now follows and this is the time that the state comes in.

If the individual decides not to complain there will be no basis for prosecution and the states intervention. Therefore crime is firstly harm against the individual or personal right before it becomes an offence against the state.

Victim Offender Mediation proceeds on that order of priority.

That order accords with the concept of privatization and individualism that pervades modern society.

On these premises victim offender mediation requires a reversal of the emphasis placed on the individual and not (or before) the state when dealing with certain types of crimes.

It demands that the emphasis in criminal justice should be on the individual rather than on the state. This is particularly important when dealing with crimes that involve hurt or injury to the individual who is bound to continue to live with the suspect and who invariably is his neighbor, co tenant or even a family member.

Victim Offender Mediation concentrates on the feelings of the individuals and the necessity to consider future relationships between the victim and the offender with the hope that broken relationships brought about by the harm may be restored.

That restoration will ensure continued social peace and harmony.

PROCESS OF VICTIM-OFFENDER MEDIATION OR RESTORATIVE JUSTICE

Victim-offender mediation is the process that is aimed at restoring damaged or broken relationships by providing opportunity for the victim and the offender to meet face-to- face for the purpose of making things as right as possible and for them to decide how they will treat each other in the future

When they meet face to face, opportunity will be offered to every party to narrate fully his own side of the story, discuss in detail the causes, and effects of the offence and, together, both the complainant and the accused will determine how to relate to each other in the future which is of paramount importance as far as society is concerned.

It is the system that encourages dialogue and responsibility for past behaviour, an understanding of the problems created by the offence, while focusing on future problem solving so as to ensure future continuing relationships.

Victim-offender mediation proceeds on the following premises;

a. that the hurt to complainant should be recognized
b. that the harm to offender should be recognized

c. That as primary stakeholders, both the accused and the complainant should have equal access to and participation in the system for solving their problems -including the selection of their own "judges" or "neutrals", determination of the venue, procedure etc. This is where the value of mediation comes in

d. That sanction for offences should be compensatory and intended not only to restore the victim, as much as possible, to his previous position but goes beyond restitution and embodies an apology and atonement by the offender.

e. That crime is first and foremost a violation of individual's rights; next, as an infraction of social relationship and social values before, lastly, becoming an offence against the law and the state

f. That punishment should seek to change forms of behaviour that society cannot accept because morality is a corporate affair that affects the whole community.

g. That victim-offender mediation applies best to crimes involving personal relations, while leaving strict offences against the state like treason, felonies to be dealt with in open court in the adversarial system.

Examples of such crimes are petty assault, insulting behavior, acts tending to disturb the peace, causing unlawful damage to property. These offences are classified as petty criminal offences or misdemeanors.

At the same time they affect relationships of people in the society where they live and have to continue to relate to each other like disputants who are family members, rivals married to one person, neighbours in the same community, co tenants of a house or owners of adjoining lands.

ADVANTAGES OF VICTIM OFFENDER MEDIATION

The most obvious advantage is that it saves parties in pursuing in open court matters that may often be considered as trivial yet find their way into the court system.

The process effectively secures their privacy in seeking to settle disputes and saves them from washing their dirty linen in public.

It attends fully to victim needs , that is, material, financial, emotional and social including those personally close to the victim who may be similarly affected. Thus it encourages family members and neighbours to live together in peace.

It helps to decongest the prisons.

It provides a means of avoiding escalation of legal justice and the associated costs and delays. Above all it assists the court to rid the system of trivial or less serious cases so as to give more time to concentrate on grave offences that are to be tried through the adversarial system of justice.

It prevents retaliation by reintegrating offenders into the community.

It enables offenders to assume active responsibility for their actions.

It recreates a working community that supports the rehabilitation of offenders and victims thus active in preventing crime.

Victim offender Mediation/ Restorative justice

- The 4 “Rs” of Restorative Justice
  i. Reconciliation
  ii. Restitution
  iii. Reintegration
  iv. Restoration

Restorative justice policy of Ghana

CHAPTER 7

ARBITRATION

General Overview of arbitration

Arbitration compared to litigation

- Like the judge, an arbitrator renders a decision called an award
- The outcome of arbitration and litigation is binding on the parties and in some cases on parties claiming through them.
- Evidence is taken in both arbitration and litigation
- Parties are subjected to the same evidential procedures.

Advantages of arbitration

1. **Expertise of decision maker:**
   The parties are given the opportunity to participate in and select their own arbitrator(s). They can thus choose an arbitrator who is an expert in the subject matter of the dispute.

2. **Finality of decision:**
   The courts will nearly always respect a provision that the decision is final and binding. This serves to discourage appeals to the courts, and to make provisions for finality meaningful. Arbitration awards can only be set aside on limited grounds provided by law

3. **Privacy of the proceedings:**
   Arbitration is a private forum and so proceedings are held in private, enabling parties to avoid publicity for their dispute. Dirty linen may be washed, but it will be washed discreetly and not in public. Arbitration therefore places the highest value upon confidentiality

4. **Procedural Informality:**
   Parties opt for their own procedure and so can opt for simple and informal procedures

5. **Low Cost:**
   Simplified procedures cut down costs. Costs are also reduced by lack of opportunity to appeal the arbitrator's decision

6. **Speed:**
   It is faster than litigation because the procedures are flexible and once the hearing days are fixed and the parties and Arbitrator are ready the case progresses to speedy resolution

Disadvantages of Arbitration

1. Arbitration is not necessarily a cheaper method of resolving disputes than litigation. First, the fees and expenses of the arbitrator(s) (unlike the salary of a judge) must be paid by the parties; and in commercial arbitration, these charges may be substantial. Secondly parties may also have to pay administrative fees of an arbitral institution, the expenses of the arbitrators to travel to and attend hearings and hire rooms for meetings and hearings, rather than making use of the public facilities of the courts of law

2. Arbitration can also be time consuming as litigation; a dispute may raise complex issues of fact or technical points of fact or law which require considerable time to be set aside for arguments

3. Further, although the court's power to intervene in arbitration proceedings are now limited, they are not wholly excluded and in some circumstances the parties may need to invoke the court's assistance, for instance to enforce an award, or to resolve unforeseen procedural problems

4. A particular disadvantage of arbitration is that the arbitrator's powers to make interlocutory orders are much more limited than those of the court; a party may therefore have to invoke the assistance of the court to obtain orders covering such matters as security for costs, the preservation of evidence or the subject matter of the dispute or interim injunctions.

Role of a lawyer in arbitration

- As an arbitrator
- As an advocate

International legal context of arbitration

a. MEANING OF INTERNATIONAL ARBITRATION
b. KEY ELEMENTS IN INTERNATIONAL ARBITRATION
c. TYPES OF INTERNATIONAL ARBITRATION REGIMES

(1) **UNITED NATIONS CONVENTION AND AD HOC RULES**

- United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards
- UNCITRAL Rules of arbitration
- UNCITRAL Model Law.

(2) **INSTITUTIONAL RULES OF ARBITRATION**

- International Court of Arbitration of the International Chamber of Commerce (ICC);
- London Court of International Arbitration (LCIA);
- International Centre for Dispute Resolution(ICDR);
- International Centre for Settlement of Dispute Resolution (ICSID);
- Ghana Arbitration Centre
- Ghana Alternative Dispute Resolution Hub.

d. **DRAFTING INTERNATIONAL ARBITRATION CLAUSES**

(1) Categories of arbitration agreement
(i) Arbitration Clause
(ii) Submission Agreement

(2) International Standards or requirements for determining a valid arbitration agreement

(i) Agreement should be in writing
(ii) Should deal with existing or future dispute
(iii) Dispute should arise out a defined legal relationship
(iv) Subject matter is capable of settlement by arbitration
(v) Capacity of parties to enter into agreement
(vi) Agreement must be valid under the law the parties have subjected themselves or the law of the country where the award was made.

(3) Basic Elements of arbitration agreement
(i) Scope of arbitration agreement
(ii) Reference to institutional or ad hoc rules of arbitration
(iii) The number of arbitrators and the method of appointment of arbitrators
(iv) Place of arbitration
(v) Governing Law or Applicable Law
(vi) Language
(vii) Other procedural issues e.g. filling of vacancies, default by a party etc.
(4) Defective/Pathological Arbitration Clauses

(e) ENFORCEMENT OF FOREIGN AWARDS LOCALLY AND INTERNATIONALLY

- New York Convention
- Bilateral Treaties
-

(f) SPECIAL ISSUES IN INTERNATIONAL ARBITRATION

- Arbitrability
- Concept of Separability
- Competence-competence
- Amiable compositeur and ex aequo et bono
- Stay of proceedings

(i) Arbitration under the Alternative Dispute Resolution Act, 2010 (Act 798)

- Overview of the Act as it relates to international standards of arbitration law
- Challenges of the Act
- Arbitration proceedings under the Act
- Enforcement of domestic and foreign arbitral awards under the Act

Arbitration Practice Exercises

1. Drafting arbitration agreements and submission agreements.

2. Drafting Request/demand for arbitration under Arbitration Rules of Ghanaian and other foreign arbitration institutions.

3. Drafting an answer to the request/demand for arbitration under the said rules.

4. The special considerations involved in drafting pleadings in arbitral proceedings

5. Drafting applications under Section 6 of the ADR Act to stay proceedings and refer parties to arbitration.

6. Drafting a application for the determination of a legal point under Section 40 of the ADR Act.

7. Drafting an agenda for an arbitration management conference.

8. Drafting procedural orders in arbitral proceedings.

9. Drafting an application to enforce an arbitral award under Section 57 of the ADR Act.

10. Drafting an application to challenge an award under Section 58 of the ADR Act.

11. Drafting an application to enforce a foreign award under Section 59 of the ADR Act.

12. Guidelines (Settled Arbitration Practical)

i. IBA Guidelines for drafting international arbitration clauses (2010).
ii. IBA Guidelines on Party Representation in International Arbitration.
iii. IBA Guidelines on the Taking of Evidence in International Arbitration (2010)
iv. IBA Guidelines on Conflict of Interest in International Arbitration.
v. UNCITRAL Notes on organizing Arbitral Proceedings. (1996)
vi. CPR Protocol on Disclosure of witnesses in Commercial Arbitration. (2009)

CHAPTER 8

CUSTOMARY ARBITRATION

1. WHAT IS CUSTOMARY ARBITRATION?

- Definition of customary arbitration in Section 135 of Act 798.
- In the case of PONG v. MANTE (1964) GLR 593 at 596, Lassey J (as he then was) described customary arbitration as:

"The practice whereby natives of this country constitute themselves into ad hoc tribunals popularly known and called arbitrations, for the purposes of amicably setting disputes informally between them or their neighbours. This has long been recognized as an essential part of our legal system; provided all the essential characteristics of holding a valid arbitration are present the court will enforce any valid award published by such ad hoc bodies".

2. WHAT ARE THESE ESSENTIAL CHARACTERISTICS OF A VALID CUSTOMARY ARBITRATION?

A) The decided cases hold that before any proceedings can be accepted by the Court as constituting a valid and enforceable customary law arbitration it must satisfy certain essential characteristics.

B) BUDU II v.CAESAR (1959) GLR 410 held the essential characteristics to be as follows:

(i) A voluntary submission of the dispute by the parties to arbitrators for the purpose of having the dispute decided informally, but on its merits.

(ii) A prior agreement by both parties to accept the award of the arbitrators.

(iii) The award must not be arbitrary, but must be arrived at after hearing both sides in a judicial manner.

(iv) The practice and procedure for the time being followed in the native Court or tribunal of the area must be followed as nearly as possible.

(v) Publication of the award.

- In the case of Dzasimatu v. Dokosi (1993-94) 1GLR 463, the Supreme Court on the issue of the essential characteristics of a customary law arbitration the supreme court had this to say:

A purported arbitration is binding if :

- The submission of the dispute was voluntary
- The parties agreed to be bound by the decision whichever may it went
- The rules of natural justice were observed although the arbitration did not need to follow any formal procedure.
- The arbitrator acted within jurisdiction.
- The decision or award was made known

D) We may therefore list the five essentials or requisites for a valid customary arbitration as follows:

- Voluntary submission of the dispute for settlement.
- Prior agreement to be bound by the outcome of the settlement.
- Due observation of the rules of natural justice.
- Compliance with rules on jurisdiction.
- Publication of the award.

Voluntary Submission Of The Dispute For Settlement

What will amount to a voluntary submission is a question of fact to be determined on the evidence, the conduct of the parties and the circumstance surrounding each case.

However there should be no compulsion, threat, duress, coercion, fraud or trickery.

Ref: Section 90(6) of Act 798
Some Specific Instances

- Merely appearing before the panel or arbiter will not be sufficient to amount to voluntary submission. This is because the persons appearing may have only done so out of respect for the panel or arbiter and with the view to respectfully inform the panel or arbiter of their unwillingness to submit to arbitration.

- When a person appears before the panel is or arbiter, there should be a full explanation by the panel or arbiter to the parties appearing that it proposed to settle the matter through arbitration, that there will be an award published and then seek the consent of the parties to voluntarily consent to the proceedings.

- It is customary to demand that the parties pay a fee to signify their voluntary submission to the arbitration proceedings. Ref: Section 90(2) of Act 798.

- Note that one of the ways of initiating customary arbitration proceedings is for one party to the dispute to lodge a complaint against his opponent to a would-be-arbitrator with the request that he should arbitrate over it. But to amount to arbitration, it must be shown that the other party agreed to submit to arbitration after it had been explained to him that his opponent had made a complaint and a further request that the arbitrator should preside over the dispute to settle it. Ref: Section 90 of Act 798.

- Another way is where a party swears the oath and the other responds to it, resulting in the parties appearing before the chosen arbiter. Here there is a presumption of voluntary submission.

Prior Agreement To Be Bound By The Award

Another requirement essential to validate customary arbitration is that there should be evidence of prior agreement of the parties to be bound by the decision or award of the customary arbitration.

It is important that before proceedings commenced, it was made clear that parties would be bound by the award and the parties accepted this. There should be no room for the fact that any party who was not satisfied with the award could seek redress anywhere else. (Adwubeng v. Domfeh(1997)1GLR 282

This agreement to be bound should be made a precondition for the arbitration taking place. (Akunor v. Okan (1977) 1 GLR 173 C.A.). The parties should be made to commit themselves to accept any award published, abide by it, and not to relegate the matter.

It is highly desirable these days that this prior agreement should be in writing and signed by the parties where they can read and write or thumb-printed after it has been read over and interpreted to them if they cannot read and write.

Rules Of Natural Justice

Customary law arbitrators are enjoined to observe the rules of natural justice. **Ref: Section 93 of Act 798**

There are two rules of natural justice:

I. Hear the other side; audi alteram partem rule
II. A person should not be a judge in their own cause; nemo judex non causa sua

A. Hear The Other Side

In practice this principle means that each party to the dispute should be given an equal hearing. It enjoins the arbiter(s) to give each party an equal chance to state their case fully, freely and voluntarily.

B. Non Interest, Bias, Prejudice etc

In practice, this principle enjoins a person not to sit in arbitration over a matter if he is interested in the outcome, is biased against one party, is involved in a conflict of interest, or is being a judge in his own case.

The requirement to comply with rules of natural justice does not imply that the proceedings of customary arbitration must take any particular form of hearing, like the format of trial in Court. All that is needed is to give each side the opportunity to state their case, call their witnesses and to cross-examine the witness of the other side.

Jurisdiction (generally)

For the award of the customary arbitration to be valid, it should have been given by arbitrators who acted within their jurisdiction.

Jurisdiction By Law

Customary law may be used to settle cases raising customary issues and to which customary law is to be applied. It cannot be used to settle any case of a constitutional nature or a dispute involving legal interpretation, application of strict common law rules or one raising complicated legal issues, even if it is civil in nature. **Ref: Section 1 of Act 798.**

Customary law may be used to settle cases of a criminal nature but the jurisdiction is circumscribed. It is limited only to criminal cases which has been taken to court and the court decides to invoke its powers under S73 of the Courts Act, to allow a criminal case which is not a felony or a misdemeanor aggravated in degree to be settled. **Ref: Section 89(2) of Act 798.**

Jurisdiction By Subject Matter

(c) Every arbitrator is duty bound to confine his arbitration to determining the exact dispute that the parties have referred to him. Any matter outside the specific reference cannot be enforced (ref).

Customary law arbitration cannot be used to settle a chieftaincy dispute; that is a cause or matter affecting chieftaincy. This is reserved exclusively to the judicial committees of the houses of chiefs and the Courts. **Ref: Chapter 22 of the 1992 Constitution**

Geographical Jurisdiction

(d) Jurisdiction may be decided by the physical area within which the panel is permitted to accept disputes to be settled. This is the geographical jurisdiction and is usually confined to the place which has the closest connection with where the dispute arose, where the subject matter of the dispute is situated or where the disputants reside.

One very important determining factor is the customary law to be applied in the settlement of the dispute. Prima facie, that should be the customary law of the disputants themselves, the place where the dispute arose, or where the subject matter of the dispute is situated. The arbiter or the panel should be familiar with the customary law to be applied.

Publication

Publication within the meaning of customary arbitration means that the judgment should be pronounced in public for the whole world to know its contents.

It is best to pronounce the award publicly at the same venue the arbitration was held.

If publication is deferred to another day, the date, time, venue should be made known to all parties.

An award in a customary arbitration is binding between the parties and a person claiming through and under them; and need not be registered in a court to be binding. **Ref: Section 109 of Act 798**

Withdrawal From Participation

Once a party has given the initial consent and arbitration is under way, there is no right in the parties to rescind from it, even before it is concluded and the award is given. **Ref: Section 105 of Act 798.**

If a party stays away, the hearing may proceed in that parties' absence and an award rendered will not be invalid only for the reason that one party decided to boycott the proceedings once it was under way.

Also, when both parties to an arbitration had voluntarily submitted to an arbitration, had given evidence with their respective witness and an award is published, there has been a valid arbitration and the award will be binding on the parties whether they accepted it or not and they could not resile after the award has been published. **Ref: Section 109(a) of Act 798.**

There is no appeal from an arbitration award. A party may only set the award aside. **Ref: Sections 111 and 112 of Act 798**

Enforcement

An award delivered out of customary arbitration may be enforced in the same manner as a judgment of the Court. **Ref: Section 111 of Act 798.**

Where an arbitration has been properly conducted and valid award pronounced, the parties will be bound by the award. In that sense the parties are estopped from going back to reopen the dispute in another customary arbitration or in another Court. Their privies are also estopped.

Setting Aside An Award

Because customary arbitration is based on consent of the parties and, their voluntary submission and prior agreement to be bound by the outcome, it is not easy to set aside its award or decision.

Grounds For Setting Aside

A party aggrieved by an award may apply to the nearest District, Circuit or High Court to set aside the award on the grounds that the award:

(a) was made in breach of the rules of natural justice,
(b) constitutes a miscarriage of justice, or
(c) is in contradiction with the known customs of the area concerned.

(2) An application under subsection (1) shall be made to the court within three months of the award, and on notice to the other party to the arbitration. **Ref: Section 112 of Act 798**

NOTE

Mistake of fact or law generally is not a ground for setting aside an award. That is the fact that the award is not in accordance with law or that it is not supported by the evidence led at the proceedings is no ground for setting it aside.

Effect Of A Valid Customary Law Arbitration

(i) The parties are bound by the award and they cannot appeal.
(ii) The parties are also estopped from relitigating the same matter
(iii) Their privies are also bound and thus estopped from starting a fresh action in respect of the same subject matter.

CHAPTER 9

ADR ETHICS

THE CODE OF ETHICS FOR ARBITRATORS

An Arbitrator Should Uphold The Integrity And Fairness Of The Arbitration Process.

i. Fair and just processes for resolving disputes are indispensable in our society.

ii. Arbitrators should conduct themselves in a way that is fair to all parties and should not be swayed by outside pressure, by public clamor, by fear of criticism or by self-interest.

iii. When an arbitrator's authority is derived from an agreement of the parties, the arbitrator should neither exceed that authority nor do less than is required to exercise that authority completely.

iv. An arbitrator should make all reasonable efforts to prevent delaying tactics, harassment of parties or other participants, or other abuse or disruption of the arbitration process.

v. The ethical obligations of an arbitrator begin upon acceptance of the appointment and continue throughout all stages of the proceeding and even after the decision in the case has been given to the parties.

An Arbitrator Should Disclose Any Interest Or Relationship Likely To Affect Impartiality Or Which Might Create An Appearance Of Partiality Or Bias.

Disclosure

i. Persons who are requested to serve as arbitrators should, before accepting, disclose:

(a) Any direct or indirect financial or personal interest in the outcome of the arbitration;

(b) Any existing or past financial, business, professional, family or social relationships which are likely to affect impartiality or which might reasonably create an appearance of partiality or bias. Persons requested to serve as arbitrators should disclose any such relationships which they personally have with any party or its counsel, or with any individual whom they have been told will be a witness. They should also disclose any such relationships involving members of their families or their current employers, partners or business associates.

ii. The obligation to disclose interests or relationships is a continuing duty which requires a person who accepts appointment as an arbitrator to disclose, at any stage of the arbitration, any such interests or relationships which may arise, or which are recalled or discovered.

iii. Disclosure should be made to all parties unless other procedures for disclosure are provided in the rules or practices of an institution which is administering the arbitration. Where more than one arbitrator has been appointed, each should inform the others of the interests and relationships which have been disclosed.

iv. In the event that an arbitrator is requested by all parties to withdraw, the arbitrator should do so. In the event that an arbitrator is requested to withdraw by less than all of the parties because of alleged partiality or bias, the arbitrator should withdraw unless either of the following circumstances exists.

(a) If an agreement of the parties, or arbitration rules agreed to by the parties, establishes procedures for determining challenges to arbitrators, then those procedures should be followed; or,

(b) if the arbitrator, after carefully considering the matter, determines that the reason for the challenge is not substantial, and that he or she can

nevertheless act and decide the case impartially and fairly, and that withdrawal would cause unfair delay or expense to another party or would be contrary to the ends of justice.

An Arbitrator In Communicating With The Parties Should Avoid Impropriety Or The Appearance Of Impropriety.

i. Discussions may be had with a party concerning such matters as setting the time and place of hearings or making other arrangements for the conduct of the proceedings. However, the arbitrator should promptly inform each other party of the discussion and should not make any final determination concerning the matter discussed before giving each absent party an opportunity to express its views.

ii. If a party fails to be present at a hearing after having been given due notice, the arbitrator may discuss the case with any party who is present.

Unless otherwise provided in applicable arbitration rules or in an agreement of the parties, whenever an arbitrator communicates in writing with one party, the arbitrator should at the same time send a copy of the communication to each other party. Whenever the arbitrator receives any written communication concerning the case from one party which has not already been sent to each other party, the arbitrator should do so.

An Arbitrator Should Conduct The Proceedings Fairly And Diligently.

i. An arbitrator should conduct the proceedings in an evenhanded manner and treat all parties with equality and fairness at all stages of the proceedings.

ii. An arbitrator should perform duties diligently and conclude the case as promptly as the circumstances reasonably permit.

iii. An arbitrator should be patient and courteous to the parties, to their counsels and to the witnesses and should encourage similar conduct by all participants in the proceedings.

iv. Unless otherwise agreed by the parties or provided in arbitration rules agreed to by the parties, an arbitrator should accord to all parties the right to appear in person and to be heard after due notice of the time and place of hearing.

v. An arbitrator should not deny any party the opportunity to be represented by counsel.

vi. If a party fails to appear after due notice, an arbitrator should proceed with the arbitration when authorized to do so by the agreement of the parties, the rules agreed to by the parties or by law. However, an arbitrator should do so only after receiving assurance that notice has been given to the absent party.

vii. When an arbitrator determines that more information than has been presented by the parties is required to decide the case, it is not improper for the arbitrator to ask questions, call witnesses, and request documents or other evidence.

viii. It is not improper for an arbitrator to suggest to the parties that they discuss the possibility of settlement of the case. However, an arbitrator should not be present or otherwise participate in the settlement discussions unless requested to do so by all parties. An arbitrator should not exert pressure on any party to settle.

An Arbitrator is however not prevented from acting as a mediator or conciliator of a dispute in which he or she has been appointed as arbitrator, if requested to do so by all parties or where authorized or required to do so by applicable laws or rules.

ix. When there is more than one arbitrator, the arbitrators should afford each other the full opportunity to participate in all aspects of the proceedings.

An Arbitrator Should Make Decisions In A Just, Independent And Deliberate Manner.

i. An arbitrator should, after careful deliberation, decide all issues submitted for determination. An arbitrator should decide no other issues.

ii. An arbitrator should decide all matters justly, exercising independent judgment, and should not permit outside pressure to affect the decision.

iii. In the event that all parties agree upon a settlement of issues in dispute and request an arbitrator to embody that agreement in an award, an arbitrator may do so, but is not required to do so unless satisfied with the propriety of the terms of settlement. Whenever an arbitrator embodies a

settlement by the parties in an award, the arbitrator should state in the award that it is based on an agreement of the parties.

An Arbitrator Should Be Faithful To The Relationship Of Trust And Confidentiality Inherent In That Office.

i. An arbitrator is in a relationship of trust to the parties and should not, at any time, use confidential information acquired during the arbitration proceeding to gain personal advantage or advantage for others, or to affect adversely the interest of another.

ii. Unless otherwise agreed by the parties, or required by applicable rules or law, an arbitrator should keep confidential all matters relating to the arbitration proceedings and decision.

iii. It is not proper at any time for an arbitrator to inform anyone of the decision in advance of the time it is given to all parties. In a case in which there is more than one arbitrator, it is not proper at any time for an arbitrator to inform anyone concerning the deliberations of the arbitrators. After an arbitration award has been made, it is not proper for an arbitrator to assist in post-arbitral proceedings, except as is required by law.

Ethical Standards For Mediators

(ii) Confidentiality
- Confidentiality distinguished from privacy

(iii) Conflict of interest
(iv) Fairness
(v) Power imbalance
(vi) Fees
(vii) Competence
(viii) Impartiality
(ix) Assurance of party self-determination.

CHAPTER 10

A. ADR HYBRID METHODS

(x) Med arb
(xi) Arb med
(xii) Med Rec
(xiii) Rent a judge
(xiv) Early neutral evaluation
(xv) Settlement week
(xvi) Judicial Settlement conference
(xvii) Summary jury trial
(xviii) Mini Trial

CHAPTER 11

ROLE OF JUDGES IN ADR / CASE MANAGEMENT

Judicial Case Management- Judges taking ultimate responsibility for the control of litigation from the litigants and their lawyers from the day it is file to when it is finally) disposed of.

JUSTIFICATION:-

(a) Increase in judicial resources such as more judges and more courtrooms have not kept pace with massive expansion of litigation.

(b) Court congestion, increased costs, excessive delay

(c) Timetables are not adhered to and other Orders are not complied with if it does not suit the parties to do so. Orders for costs which do not apply immediately have proved to be ineffective sanction and do nothing to deter parties from ignoring the courts directions.

(d) Practitioners are involved in game playing and oppressive behaviour, procedural maneuverings and breach of the procedural rules and orders with impunity.

(e) Traditional role of the judge has been that of a passive referee allowing lawyers the lawyers and parties to control the progress and pace of litigation.

(f) In Case Management, the trial judge has emerged from a passive pre-trial role to an active case manager in an effort to conduct the business of the courts with greater judicial efficiency.

(g) The basic concept behind case management is for early judicial involvement in identifying the practical, factual and legal issues in dispute between the parties, and working with them and their attorneys to plan for and manage the conduct of future proceedings to achieve the earliest and most cost effective resolution of the dispute.

(h) Lord Woolf summarizes the whole objective thus:

"Case management for the purpose of this report involves the court taking the ultimate responsibility for progression litigation along a chosen track for a pre-determined period during which it is subjected to selected procedures which culminate in an appropriate form of resolution before a suitable experienced judge. Its overall purpose is to encourage settlement of disputes at the earliest appropriate stage, and, here trial is unavoidable, to ensure that cases proceed as quickly as possible to a final hearing which is itself of strictly limited duration."

(i) CONCLUSION: The practice of active judicial case management in combination with the utilization of ADR programs has substantially reduced excessive litigation costs and undue delay in the resolution of civil cases. Effective case management tailored to each particular case enables the parties to evaluate their positions sooner and less expensively. Without active case management, the courts would be hampered in achieving the just, efficient, and inexpensive resolution of civil disputes.

CHAPTER 12

REVIEW OF ACT 798

References:

Amegatcher, Nene, "The Emergence Of Alternative Dispute Resolution As A Tool For Dispute Resolution In Ghana"

Torgbor, Edward, "Ghana's Recently Enacted Alternative Dispute Resolution Act 2010 (Act 798): A Brief Appraisal"