ADR NOTES

Basically conflict happens when A feels his interests are being threatened by B

There should be a claim by a party being disputed by another party

CONFLICT MANAGEMENT

- Conflict is a sense or feeling, whether real or imagined, by one entity that its primary self-interests are being threatened by another entity.
- D. Foskett: "an actual dispute will not exist until a claim is asserted by one party and disputed by the other"
- Conflicts may promote communication, problem solving and positive changes. To transform destructive conflict into a dispute with positive outcome, it is necessary to explore the cause of that dispute, to analyse the conflict and to think about the category of the conflict.

Causes of Conflict

1. Data/information disputes
2. Structural disputes i.e. changes that occur in institutions in society upon the introduction of policies/interventions/measures
3. Values/faith religious disputes i.e. based on people's beliefs or convictions; it doesn't matter whether they are right or wrong.
4. Relationship disputes. ADR can be traced to relationship disputes i.e. the observation that litigation was destroying essential relationships. It was thus necessary to have a dispute resolution mechanism which preserved relationships. RD may be personal or business.
5. Behavioural disputes

- In addition to the 5 causes above, the following also cause conflicts.

1. Apathy, neglect, avoidance
2. Values and belief system
3. Unacceptable behaviour: abuse & mistreatment
4. Misinformation
5. Displaced anger and anxiety
6. History; residual effects from previous conflict
7. Pride

Indicators of Conflict

- Indicators of conflict are generally behavioural patterns which announce the presence of conflict. They are generally divided into Intentional and Unintentional Behaviours.
- Intentional Behaviours:
  - A. Avoidance
  - B. Withholding information
  - C. Withdrawing
  - D. Not returning messages
  - E. Silent treatment
  - F. Threats
- Unintentional Behaviours:
  - A. Facial expressions e.g. frowning ones face
  - B. Agitation
  - C. Fidgeting
  - D. Getting others to take sides
  - E. Hostile gestures
  - F. Perspiring
  - G. Body postures that suggest anger.

Levels of Severity of Conflict

Hot Hotter Hottest

- Conflict usually travels through three main stages. They are: Blip, Clash and Crisis stages.

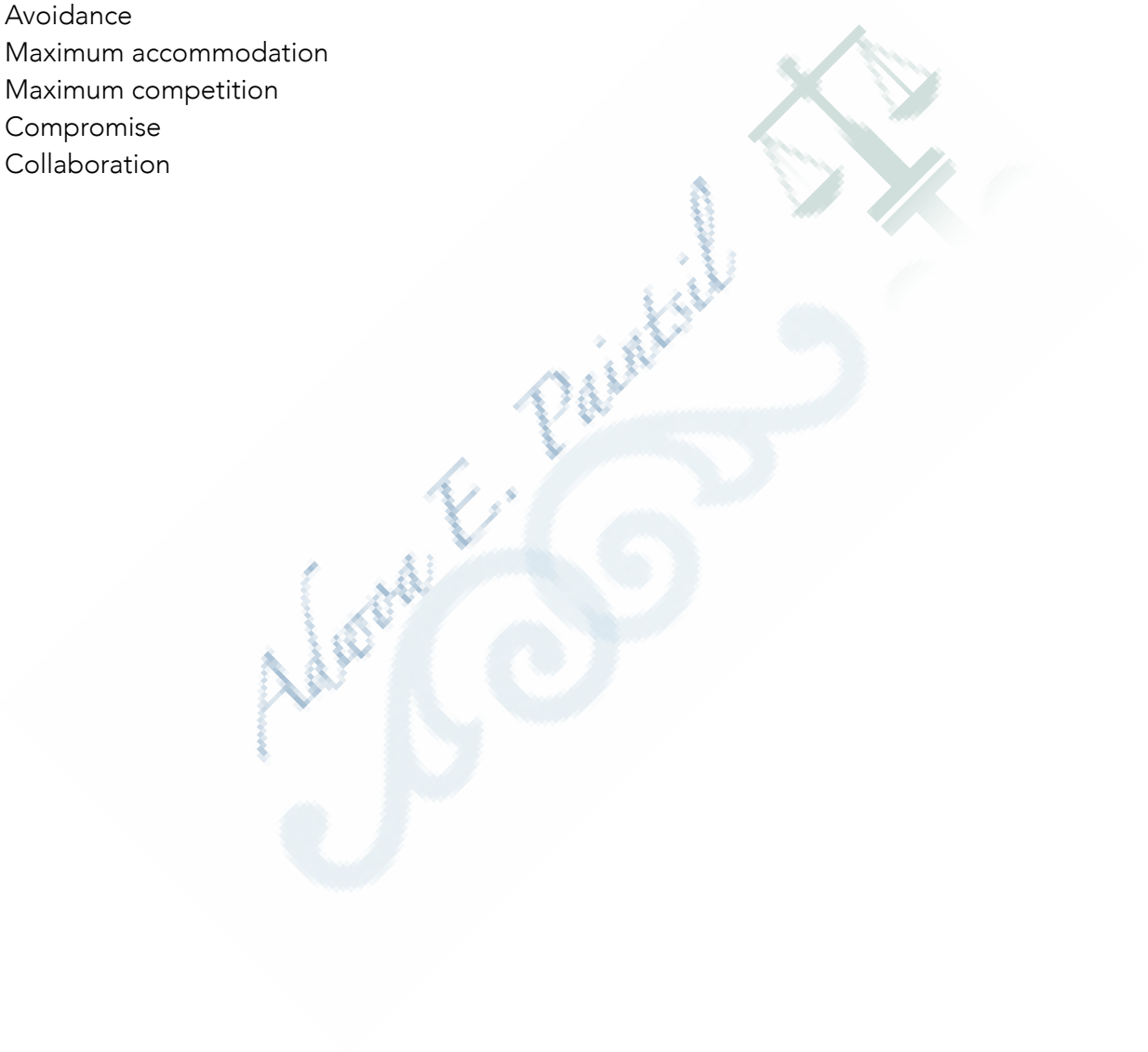
A. Blip: Conflict is a blip when anger is mild and passes away quickly. In other words, because anger is mild, it is easily done away with; there is no continuing pattern of feeling annoyed with the same person over the issue. Consequently, the disputing parties are able to maintain sufficient trust, liking and openness to keep working together effectively. Blips are usually resolved by self mediation i.e. mediation without a third person.

B. Clash: Conflict is a clash when parties engaged in the conflict use Distancing (walk-away) or Coercion (power play) as routine strategies for handling the conflict. One could observe that there is tension, stress or anger when the disputing parties clash. In order to resolve this sort of conflict, a third person, a mediator is sometimes needed.

C. Crisis: Conflict is a crisis when parties engaged in the conflict are so emotionally charged that they cannot control themselves any longer. At this stage therefore, there is risk of physical violence, extreme retaliation or reaction as the relationship between the parties becomes very strain. Depending on the severity, conflict of this nature could either be resolved by a mediator or a team of mediators.

Behaviours in Conflict or Styles of Conflict Management

1. Avoidance
2. Maximum accommodation
3. Maximum competition
4. Compromise
5. Collaboration



LITIGATION

The traditional mode of dispute resolution is through litigation in the law courts

1. Enforcement: Or 43-44 Ci 47
2. Public: Or 2 Ci 47
3. Consistency: Stare decisis, Precedents, Legal Principles
4. Interpretation: Art 2, 130 Constitution, S I Act 798
5. Due Process: ADR allows parties choose their own procedure
6. Law reformation and transformation See Mensah v Mensah on equity
7. Estoppel res Judicatem & end to the matter

Advantages of Litigation

1. Rights can be enforced
2. Due process of the law is applied
3. There is consistency and predictability Formal and professional
4. Public and accountable
5. Coercive and binding

Disadvantages of Litigation

1. Its impersonal and cold
2. Its time consuming
   - Adu v Kyeremeh: Per Adade JSC, is a serious indictment on the administration of justice in this country that a case of such simple dimensions should take as long as 26 years to see itself through the courts. It started in November 1960; it is now, in April 1987, being given hopefully its final farewell. 24 out of these 26 years were spent in the Court of Appeal alone.

All the latin bs

3. Jargons used are unintelligible to the parties
4. Its confrontational and destroys relationships. The resolution is win-lose
5. Lack of privacy and confidentiality
   - Rule 1 & 2 of CI 47
6. Fees involved make the process expensive
   - CI 86: The Court fees,
7. Lawyers exaggerate the issues at stake
8. The rules are rigid, thus its possible to have a case thrown out on petty technicalities

1. Impersonal: Focus is on Locus not emotions, Re Sackittey's Caveat
2. Jargons: ADR allows parties choose language.
3. No privacy: Or 2 CI 47
4. Rigid rules: Or 81
5. Time consuming: Adu v Kyeremeh, Agyeman (Sub by Banahene) v Anane-40yrs

Causes of Unnecessary Expense and Delay In Civil Litigation

1. Civil cases are now more complex and protracted with multiple parties, numerous issues, etc.
2. Increase in judicial resources has not kept pace with the massive expansion of litigation
3. Existing rules of court are flouted on a vast scale and costs awarded in violation of rules are not deterrent enough.
4. The time table scheduled for cases are not adhered to
5. Orders for costs which do not apply immediately have proved to be an inefficient sanction.

Solution for Eliminating Unnecessary Expense and Delay in Civil Litigation

1. Creation and expansion of less costly ADR methods
2. Active judicial case management

The essence of case management is that "ultimate responsibility for the control of litigation must move from the litigants and their legal advisers to the court".

JUDICIAL CASE MANAGEMENT IN THE TRIAL COURT

- Judicial case management is the power of a judge to manage the judge's own court or to control litigation.
- Lord Woolf

> *"Case management for the purpose of this report involves the court taking the ultimate responsibility for progression of litigation along a chosen track for a pre-determined period during which it is subjected to select 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 where trial is unavoidable, to ensure that cases proceed as quickly as possible to a final hearing which is itself of strictly limited durationCase management covers such matters as identifying the issues in the case,*

summarily disposing of some issues and deciding in which order other issues are to be resolved, fixing timetables for the parties to take particular steps in the case, and limiting disclosure and expert evidence."

Elements of Judicial Case Management

1. Judges abdicate the previous passive role they play and become active in the role judicial process to ensure greater judicial efficiency
2. There is early judicial involvement in identifying the principal, factual and legal issues
3. The judge also plans with lawyers and clients to manage the future conduct of cases

The Process

A case management conference is called and administered by the court to plan the future conduct of the dispute before the court

1. It is administered by the Court
2. Parties and their lawyers in preparation for the case management conference will meet and plan the resolution of the case. This an activity between the parties and their lawyers, it does not include the judge. The purpose is to identify the claims and defenses and to explore the possibility of a settlement

Part of preparation

3. They may exchange information relevant to their claims and defenses
4. Discovery for exchange of evidence and a discovery plan
5. After the meeting of Counsel they are required to file a case management report prior to the case management, after which they appear before the judge for the case management conference
6. Imposition of deadlines to limit the time for amendment of pleadings, addition of parties, provision of disclosures, and all pre-trial motions.
7. At the conference, the trial judge may stay the proceedings and refer the parties to ADR
8. At the conference a pre-trial timetable and date will be agreed or set by the judge

1. Court Order
2. Parties & lawyers meet to plan resolution
   3. Exchange of relevant information
   4. Discovery
5. filing of a case management report
6. Appearance before the judge
7. Imposition of deadlines to limit time for pre-trial motions
8. Trial begins, judge may stay proceedings for ADR

ALTERNATIVE DISPUTE RESOLUTION

- ADR refers to dispute resolution processes and techniques that act as a means for disagreeing parties to come to an agreement short of litigation. It is a collective term for the ways that parties can settle disputes, with (or without) the help of a third party.
- It is a complementary system to litigation.
- S 135, ADR Act 2010, Act 798: "Alternative Dispute Resolution" means the collective description of methods of resolving disputes otherwise than through the normal trial process
- S 43(1), GBA Code of Ethics: It is the duty of the lawyer to advice his client to avoid or terminate litigation whenever the controversy will admit of fair settlement

Advantages of ADR

1. Time saving
2. Money Saving
3. Increase in control over the process and the outcome: Party Autonomy
4. Preservation of relationships
5. Awards are binding and enforceable in court
   - S 57 ADR Act 2010, Act 798
6. Guaranteed confidentiality and privacy S 79 ADR Act 2010, Act 798
7. Arbitrators typically understand the nuances underlying commercial transactions and are better placed to act as referees in a dispute than a judge/ subject matter expertise
8. No strict adherence to precedents, each case is determined on its merits and facts
9. Parties choose their own language as opposed to ligation where the language chosen may not be understood by the parties as well as the inadequate supply of interpreters

Disadvantages of ADR

1. Lack of consistency. In other words, there's no precedent to be followed, each case is determined separately. The process is subjective, no judicial precedent.
2. Even Where Beneficial, Parties Cannot Be Compelled to go in for ADR, save for compulsion by operation of law S 135 Act 798: Arbitration is voluntary submission, mediation also voluntary
3. Extra Cost Where ADR Is Unsuccessful
4. Parties who are unhappy with awards cannot appeal it
5. In ADR techniques like mediation and negotiation a party may walk away and make a sham of the entire process and waste time too
6. Some matters cannot be resolved by ADR. E.g. the ADR Act, 2010, Ghana S. 1
7. It doesn't help in the development of the law since no precedents set

Court Connected ADR

If ADR is possible, Court must be in full support

- This is guided by the principle that if it is possible for the Court to help parties to a trial/litigation resolve their differences by other equally desirable means save for litigation whilst ensuring integrity, then the Courts should make it possible for them to do so.
- S 7 (1,5) ADR Act 2010, Act 798: Any court in which an action is pending may, with the consent of the parties in writing, refer the dispute to arbitration if the action or part of the action can be resolved in that manner. When a court realises a pending action is the subject of arbitration, that court shall stay the proceedings and refer the parties to arbitration.
- S 72, Courts Act 1993, Act 459: Any court with civil jurisdiction shall promote reconciliation, encourage and promote the settlement of disputes in an amicable manner.
- S 73, Courts Act 1993, Act 459: Any court, with criminal jurisdiction may promote reconciliation, encourage and facilitate a settlement in an amicable manner of any offence not amounting to felony and not aggravated in degree.

Legal Basis

S 72 &73: courts must promote ADR

OR 58, Commercial cases must have a pre-trial settlement conference and can choose their own ADR.

Other Statutes mentioning ADR
1. Free Zones Act S 32
2. Copyright Act
3. Matrimonial Causes Act S 8
4. GIPC Act
5. Or 58 Cl 47

Pros of Court Connected ADR

Advantages of Court Connected ADR

1. Decongestion of the Courts
2. The process provides a healthier method for resolving disputes
3. The process gives the parties some control over the outcome of the dispute and empowers them
4. It serves as an inducement for parties to voluntarily comply with agreements reached as they are part of the resolution process

Disadvantages of Court Connected ADR

1. No right of appeal
2. Absence of procedural protections for the parties
3. Absence of opportunities to measure the objectiveness of the process
4. Dependent on the will and whims of the parties

OVERVIEW OF ADR ACT 2010, Act 798

- Part 1: Arbitration
- Part 2: Mediation
- Part 3: Customary Arbitration
- Part 4: Establishment of ADR Centre
- Part 5: Financial, Administrative and Miscellaneous Matters
- Presence of 5 schedules

Scope of Application

- S 1 ADR Act 2010, Act 798: The Act doesn't apply to matters affecting the following:
  1. National or public interest
     - Article 2951992 Constitution: Public interest is any right or advantage which inures or is intended to inure to the benefit generally of the whole of the people of Ghana.
     - S 98 Public Procurement Act 2003, Act 663: National interest is a condition where the nation attaches high value, returns, benefit and consideration to the matter in question.
  2. The environment
  3. Enforcement and interpretation of the constitution
  4. Any other matters which cannot be settled by an ADR method

Challenges Under the Act Also Drawbacks

1. The exceptions are imprecisely defined and this may lead to extensive and persistent litigation. Failure to define "national or public interest", "the environment", and "any other matters which cannot be settled by ADR risks
2. Limiting the scope of the Act and thus restricting the range of circumstances under which the many benefits of the Act may be taken advantage of
3. Prompting protracted legal argument in respect of challenges to arbitral awards and applicability of theAct.
4. Government entities and parastatals may challenge unfavourable awards on the ground of public interest.
5. There is no territorial limitation to the matters excluded under the Act, thus where Ghana is only the lex fori or lex loci arbitri, S 1 of the ADR Act may be triggered to exclude the disputed matter from arbitration, leading to jurisdictional battles before local and international courts.

ALSO,
* The Act fails to regulate negotiation, It omits it actually.
* There is no provision that limits the intrusiveness of the courts in arbitration
* Establishment of the ADR Centre under the control of government:
* Too much stress on position of parties, rather than the interests during mediation (S 73).

NEGOTIATION

- Negotiation is a process whereby disputants communicate with each other, directly, or indirectly, about the issues in disagreement in order to reach a settlement of their differences without the intervention of a 3rd party.
- It may involve competitive bargaining(hard or positional bargaining), cooperative bargaining(soft bargaining) or principled bargaining which focuses on the interest of the negotiators and uses an objective criteria

Characteristics of Negotiation

1. It is a direct communication between two persons who may be represented by lawyers or their duly authorised representatives
2. There is no third party neutral. The process is between the two parties alone.
3. Lawyers can represent the parties
4. Negotiation can be used for any type of dispute, except where it is difficult for the parties to come together or the subject matter is excluded by law.

Managing The Negotiation Process

1. Preparing for the negotiation
2. Development of strategies
3. Getting started
4. Building understanding
   A. What assurances will you give the other side?
   B. What assurances will you expect from the other side?
5. Bargaining
6. Closing

Types of Negotiation/Negotiation Styles

1. Soft Bargaining
   A. In a soft negotiating game the standard moves are to make offers and concessions, to trust the other side, to be friendly, and to yield as necessary to avoid confrontation
   B. Parties attempt to prevail by being agreeable/nice
   C. The goal is to reach an agreement
   D. Willingness to concede on issues so as to maintain relationship
   E. The negotiator is soft on the people and the problem.
   F. The negotiator changes position easily and yields to pressure.
   G. Advantages of Soft Bargaining
      1. Quick conclusions
      2. Builds and maintains relationships
      3. Easy and amicable settlements
      4. Negotiator acquires a good reputation
      5. Tendency for gesture to be reciprocated
   H. Disadvantages of Soft Bargaining
      1. Failure to get a good deal
      2. The negotiator is a potential victim of manipulation
      3. Reluctance to walk away from the negotiating table
      4. No credibility with constituents
      5. Will not work with aggressive opponents
      6. May erode longterm credibility because of the suspicion that the relationship was maintained to be exploited.

2. Hard Bargaining *Aim is to WIN AT ALL COST!!!! NOT SOFT IN ANY SENSE*
   A. Confronts counterparts as adversaries
   B. ~~adversaries.~~
   C. The goal is victory.
   D. The negotiator demands concessions as a condition of the relationship.
   E. The Negotiator is hard on the problem and the people.
   F. Seeks to achieve goals through power, pressure, fear, and intimidation
   G. The negotiator demands one-sided gains as the price of agreement.
   H. The negotiator is uncompromising and inflexible and insists on his position.
   I. Advantages of Hard Bargaining
      1. Convincing clarity
      2. Convincing if coming from credible source
      3. Takes advantage of the indolence of others
      4. Better substantive deals
      5. No risk of manipulation
      6. Builds a tough reputation
   J. Disadvantages of Hard Bargaining
      1. Damages relationships
      2. Risk attracting other hard bargainers
      3. Risk losing credibility once soft spots are exposed
      4. Non-sustainability of decisions
      5. May miss some good bargains because they may find it difficult to settle for other settlement that may be more desirable.

3. Tit-for-Tat Bargaining
   A. A.k.a. reciprocal bargaining
   B. It removes personality from the bargaining behaviour
   C. It is cautious
   D. Adopts a wait and see attitude
   E. Requires the other party to move first
   F. Rewards a positive move with a positive one and vice versa
   G. Advantages of Tit-for-Tat Bargaining
      1. Gives a sense of predictability and encourages cooperation because actions may be anticipated
      2. Reduces the other party's personality in the bargaining
      3. Makes the other party responsible for his/her behaviour
      4. Not easily intimidated by rough and tough talk
   H. Disadvantages of Tit-for-Tat Bargaining
      1. A lot of control may be relinquished when negotiators allow the other side to always make the first move
      2. Potential lack of control over the situation
      3. Costs can be high [how long can you wait to know the other's move

4. Principled Bargaining *The Ideal Form of Negotiation* 🎉🎉🎉 *WHOOOOOOOPPPPP!!!!!!*
   A. Based on 3 Pillars
      1. Separate the people from the problem
      2. Focus on interests, not on positions
      3. Generate options for mutual gain
   B. Use objective of standards

C. Participants are problem-solvers.
D. The negotiator is soft on the people, hard on the problem.
E. The focus is on interests, not positions.
F. Advantages of Principled Bargaining
   1. Focuses on problem-solving
   2. The negotiator need not rely on the strength or attractiveness of his/her personality
   3. Discovery of mutual interests
   4. Mutual gains and objectivity
   5. Provision of excellent methods for the weaker party to confront the more powerful party
   6. It attempts to satisfy the interests of both parties.
   7. Achieves positive gains because it recognises the legitimacy of the other side.
G. Disadvantages of Principled Bargaining
   1. The problem may not be about issues but about the person(s)
   2. Adopting objective standards often refers to the status quo; when there may be the need for change
   3. Where personality is rejected and principles are adopted, there may be no personality goodwill or enthusiasm left to work with after the process (this could lead to the decision to deal with a person on strictly official terms).

Principled Negotiation

Approach was developed by Fisher and Ury, authors of "Getting to Yes". Cross between soft and hard negotiation. Based on identifying the needs and interests of parties. It is decides issues based on merits by identifying mutual gains where possible. Where the interests of the parties conflict, the result has to be based on above standards instead of the independent will of the party.

Principled/Interest Based Negotiation

It is a negotiation theory in which the goal of the negotiation is the maximum satisfaction of each side's interests to the greatest extent possible (IOW a win-win situation).

Pillars of Principled/Interest Based Negotiation

1. Don't Bargain over Positions

Arguing over positions produces unwise agreements and endangers relationships. As more attention is paid to positions, less attention is devoted to meeting the underlying concerns of the parties. More impractical for complex negotiations

2. Separate the People from the Problem

   Typically the 'people problems' are distinct from the 'substantive problem'. The issue around which the dispute revolves is the substantive problem. However, people problems, on their own, may cloud the substantive problems. In order to deal with the latter, the people problems must first be dealt with. People problems are of three kinds: Perception (Preconceived ideas, whether it is true or false); Emotion; Communication. Perception may be dealt with by: a) Empathy, b) Not assigning blame, c) Looking for opportunities to act inconsistent with their perception, d) Encouraging participation from the other party. When dealing with emotions, recognise and understand the source of the emotions and how best the matter may be resolved. IRO communication, There are three big problems in communication: misunderstanding, inattention, misinterpretation. These problems may be solved by active listening, not attacking the other party, clarity in speech, and purposeful speech.

3. Focus on Interest Not Positions

   Interests are the basic things that people need to protect or upon which they need to obtain gain (it is a WHY question). Interests define the problem. Issues are the context within which negotiation discussions take place (it is a WHAT question). Positions are the actual methods by which issues are to be addressed and interests satisfied. The most powerful interests are basic human needs: a) Aesthetic needs, b) The need to know and understand, c) Self-actualisation, d) Self-esteem needs, e) Love and belongingness, f) Safety and security needs, g) Physiological needs. During a negotiation, focus on interests (yours and the other party's). Put the interest before the answer to the problem

4. Invent Options for Mutual Gain

The aim of every negotiation process is to arrive at a mutually acceptable solution to the problem at hand.Typically during a negotiation, the following problems are attendant; a) Premature judgment; b) Searching for a single answer; c) The assumption of a fixed pie; d) Thinking that 'solving the problem' is their problem. To deal with the above, you may do the following; Brainstorm, broaden options, Look for mutual gain

5. Insist on Using Objective Criteria

   Objective criteria includes, expert opinions, scientific indexes etc. An objective criterion is one which is neutral with respect to the self-interests of the disputants. Fair standards and fair procedures should guide the development of objective criteria. When negotiating with an objective criteria, do the following; Frame each issue as a joint search for objective criteria; Ask "what is your theory?"; Agree first on principles; Reason and be open to reason; Never yield to pressure; Be open to suggestions

Converting positional bargaining into principled negotiation

1. Focus on what you as a party can do. Concentrate on the merits rather than on the respective positions, change your strategy.
2. Focus on the actions of the other party. Counter their arguments and avert their minds to the merits of the matter at hand.
3. Consider the presence of a third party trained to focus the discussion on interests, open options, and adoption of objective criteria.

The BATNA (Best Alternative to a Negotiated Agreement)

- The concept of BATNA was developed by negotiation researchers Roger Fisher and William Ury. The BATNA is the course of action to be taken by a party if the current negotiations fail and an agreement cannot be reached. A party should generally not accept a worse resolution than its BATNA.
- The BATNA is often seen by negotiators not as a safety net, but rather as a point of leverage in negotiations.
- In theory, a negotiator's alternative options should be straightforward to evaluate. Most managers overestimate their BATNA whilst simultaneously investing too little time into researching their real options. This can result in poor or faulty decision making and negotiating outcomes. Negotiators also need to be aware of the other negotiator's BATNA and to identify how it compares to what they are offering.
- The BATNA permits far greater flexibility and allows much more room for innovation than a predetermined bottom line. When a negotiator has a strong BATNA, they also have more power because they possess an attractive alternative that they could resort to if an acceptable agreement is not achieved.
- A strong BATNA may be developed in the following manner:
  A. Inventing a list of actions you might take if no agreement is reached
  B. Converting some of the more promising ideas and transforming them into tangible and partial alternatives
  C. Selecting the alternative that sounds best
- A BATNA is not disclosed unless it's beneficial. **Don't disclose your batna unless its importanter**

Complex Negotiations

Complex Negotiations involves Coalitions, interests groupings or multi-party conflicts. Complex negotiation can be dealt with in the following ways:

1. Identify the organisational structures present. Are the parties informal bodies? Do they belong to a Union?

2. Identify the head of the organisation. Are the leaders also important opinion makers?
3. Identify the important issues. Find a general agreement. Reach a consensus, but only after hearing everyone out. Don't reject anyone's idea While brainstorming to reach consensus watch for non-verbal communication and draw out the opinions of the seemingly uninterested ones. Reaching a consensus is not the same as majority rule **Caucus: Each group meeting separately to discuss outcomes**
4. Should unexpected proposals or objections arise, retreat for caucusing. Caucusing refers to the private meetings meant to discuss these unexpected outcomes. The retreat to caucus could also arise when tensions begin to get high to allow the teams take a break.

"Tips" for Negotiators

1. Attitude is all-important. Assume a cooperative sense of power so that all players can negotiate from a position of strength. People support what they help create. Be receptive to others' ideas, and make sure to include as many of their suggestions as possible and appropriate.
2. Show respect for other's dignity and professionalism.
3. Act rather than react. Your statements have value, so don't relegate them to the status of simply being "reactions". Proactive is much better than reactive.
4. Shift the focus of the discussion from defeating each other to defeating this mutual problem. Remain cool and calm. Getting angry or upset does not resolve the conflict, but could make it worse. Most people do not think as clearly when they are angry, and you need remain logical and make your point.
5. Stick to the issue at hand. Although it may be tempting to bring to other issues or past conflicts, you will be most effective by staying with one issue at a time.
6. Don't be judgmental. Stick to the facts and restate your position calmly.
7. Work on being objective.
8. Keep things in perspective, and use the time as opportunity to educate the other person on your point of view.
9. If you cannot make progress or come to resolution on an issue after considerable discussion, move on to other areas where you can reach agreement. Do the easy things first.
10. Never make personal attacks. This damages your credibility and that of your argument. It can create lasting scars unnecessarily. It also may be the end of any real communication
11. On same issues, it is all right to agree or disagree. Arguing on principle or "winning" just for the sake of being right is seldom productive.

From the LATIN WORD "MEDIARE" : To Heal

MEDIATION

- Mediation aka assisted negotiation refers to a facilitative process in which the disputing parties engage the assistance of an impartial third party who helps them arrive at an agreed resolution of their dispute. The mediator is a neutral third party who has no legal power to render a judgement or award. The power or authority of the mediator is limited to that given by the parties expressly or impliedly.
- The word is generated from the latin word, "Mediare" which means to heal
- The purpose of mediation is neither to judge guilt or innocence, nor to decide who is right or wrong. Its primary goal is to accomplish healing of the relationships involved in the dispute. The mediator does not make decisions for the parties. Rather, mediation gives opportunity to the parties to do the following:
  A. Vent and diffuse their feelings.
  B. Clear up misunderstandings.
  C. Determine underlying interests or concerns.
  D. Find areas of agreement.
  E. Ultimately incorporate the areas mentioned above into solutions devised by the parties themselves.
- Mediation provides a safe place for people to talk as it is confidential and conducted by individuals who have no interest in the outcome. The mediator facilitates the negotiation but is not a negotiator.

Mediation is CONFIDENTIAL and by a NEUTRAL third party

- S 71, ADR Act: A party to a mediation may be represented by a lawyer, an expert or any other person chosen by the party. The mediator in such an instance must be notified in writing of the other parties the name, address and the extent of the authority of any representative within 7 days of the representative's appointment

Mediator's authority is derived from the parties

Advantages of Mediation

1. Mediation is relatively inexpensive as compared to court action.
2. Rapid settlement: Mediation does not run by a clogged court schedule and sessions can be easily scheduled any time at the mutual convenience of the parties and the mediator, and can take place in a variety of locations.
3. Mediation is relatively simple. There are no complex procedural or evidentiary rules which must be followed. While most would agree that a general rule of fairness applies, the maximum penalty a party can impose for foul play is to walk away from the mediation and take his chances in court.
4. High rate of compliance: Since the parties themselves reach their own agreement, generally, they are more likely to follow through and comply with its terms than those whose resolution has been imposed by a 3rd party decision maker.
5. Preservation of ongoing relationships/termination of relationships in a more amicable way
6. It is confidential
   - S 79, ADR Act 2010, Act 798: A record, a report, the settlement agreement, except where its disclosure is necessary for the purpose of implementation and enforcement, and other documents required in the course of mediation shall be confidential and shall not be used as evidence or be subject to discovery in any court proceedings.

Disadvantages of Mediation

1. Mediation does not always result in a settlement agreement. Parties might spend their time and money in mediation only to find that they must have their case settled for them by a court.

Further, if mediation fails, much of a party's "ammunition" might have already been exposed to the opposing party, thereby becoming far less useful in the ensuing trial.

2. Mediation lacks the procedural and constitutional protections guaranteed by the federal and state courts.
3. Mediation between parties of disparate levels of sophistication and power, and who have disparate amounts of resources available, might result in an inequitable settlement as the less-well positioned party is overwhelmed and unprotected.
4. Legal precedents cannot be set in mediation.
5. Mediation has no formal discovery process. There is no way to compel disclosure of such information. The party seeking disclosure must rely on the other party's good faith, which may or may not be enough.
6. Parties may walk away at any time because the process is entirely consensual

Fundamental Principles of Mediation

1. The role of a mediator is to create a dynamic that does not exist when only the parties themselves or their reps undertake negotiation. According to Edward de Bono, in any dispute, the disputing parties are logically incapable of reaching a resolution; thus the need for a third party.
2.]The mediator must have no interest in the outcome nor be associated with any of the parties in a way that would inhibit effective even-handed intervention.
3. Authority is derived from the parties; the mediator has no authority to make binding determinations on the issues, what power he does have relates to the process and management functions.
4. Consensual resolution: the only binding outcome is that which all the parties agree to. If the parties are unable to reach a consensus, they would have to seek redress in another forum.
5. Provision of a secure negotiation environment. There should be conditions that are conducive to discussion negotiation and exploration of settlement options. Parties need to be able to negotiate without fear or harassment.

S 83, Act 798: As soon as them mofos submit to mediation, they cannot while it is pending submit the same matter to arbitration or litigation or any other judicial process
Essilfie v Tetteh, Boyefio v NTHC Proprties, Neequaye v Ghana Film Industry

Reference to Mediation

1. By agreement of the parties Yaaaaay???
   - S 63 ADR Act 2010, Act 798: A party to any agreement may with the consent of the other party submit any dispute arising out of that agreement to mediation by an institution of any person of their choice
   - Submission to mediation may be in writing, telephone or other verbal communication, fax, telex, email or any other electronic mode of communication and shall briefly state the nature of the dispute.
   - A submission to mediation by verbal communication shall, unless the parties otherwise agree, be confirmed in writing and shall state the names, addresses and phone numbers of the parties and a brief nature of the dispute.
   - Mediation proceedings commence when the other party accepts the invitation for mediation. Acceptance may be by letter, phone or other verbal communication, fax, telex, email or other electronic communication. Acceptance by phone or other verbal means shall be confirmed in writing but failure to confirm an acceptance in writing shall not invalidate the proceedings.
   - Failure by the other party to accept the invitation within 14 days or any other time specified in the invitation after receipt of the invitation shall be deemed to be a rejection of the invitation.

Submission may be via writing, orally, telex etc. Where should be communication

Agreement is important but acceptance is importanter

2. Reference by the court at any stage of a pending action.

- S 64, ADR Act 2010, Act 798: The Court may refer the matter or a part of it to mediation, if it is of the view that the mediation will facilitate resolution of the matter. Likewise a party may with the agreement of the other party, and at any time before final judgment is given, apply to the court on notice to have the whole action or part of the action referred to mediation.
- The reference shall state the following and shall have attached copies of the pleadings and any other docs the court considers relevant:
    1. Nature of the dispute;
    2. Monetary value of the claim if any;
    3. Reasons for the reference;
    4. The remedy sought
- The reference under is a stay of proceedings of the court action. Where a reference leads to settlement of the dispute or part thereof, the dispute settlement shall be drawn up and filed in the court; recorded by the court as a judgment of the court and enforced by the court as its judgment
- If the reference to mediation is unsuccessful, then the trial continues from the point at which the reference was made.
- A reference by a court shall specify the time within which a report on the reference shall be submitted to the court.

Appointment of a Mediator

- S 66, ADR Act 201, Act 798: The parties to a mediation may appoint any person or institution the parties consider acceptable to serve as a mediator. They may request the assistance of a suitable institution or person in the appointment of a mediator and may in so doing request the institution or person
    A. To recommend the names or provide a list of suitable persons to serve as mediator; or
    B. To conduct the mediation.
- Similarly the parties may agree to adopt the Mediation Rules in the Fourth Schedule to the Act on the appointment of a mediator.
- S 65, ADR Act 2010, Act 798: Unless the parties otherwise agree, there shall be one mediator. Where there is more than one mediator, the mediators shall act jointly.
  S 67, ADR Act 2010, Act 798: In recommending a person to be a mediator, an institution or person shall consider the independence and impartiality, particularly any interest in the outcome of the dispute of that person and the background of the parties.
- S 68, ADR Act 2010, Act 798: A person appointed a mediator shall before accepting the appointment, or if it arises during the mediation, disclose any circumstance relating to that person that may
    A. Create a likelihood of bias
    B. Affect the conduct of the mediation.
    C. Affect the impartiality of the mediator

Qualities of a Mediator

1. Impartiality
2. Honesty
3. Gentility
4. Good Judgment
5. Intuitiveness
6. Creativity
7. Empathy
8. Trustworthiness
9. Flexibility/accommodating
10. Independence

Roles of the Mediator

1. Facilitator of communication

2. Translator and transmitter of information
3. Agent of reality
4. Separating interests and positions
5. Developing options
6. Building trust and understanding
7. Allowing venting of emotions
8. Establishing a positive emotional climate

A mediator should also be evaluative. An evaluative mediator assists the parties in reaching resolution by pointing out the weaknesses of their cases, and predicting what a judge or jury would be likely to do.
Evaluative mediators are concerned with the legal rights of the parties rather than needs and interests, and evaluate based on legal concepts of fairness.
Evaluative mediators meet most often in separate meetings with the parties and their attorneys, practicing "shuttle diplomacy". They help the parties and attorneys in evaluating their legal position and the costs versus the benefits of pursuing a legal resolution rather than settling in mediation.
The evaluative mediator structures the process, and directly influences the outcome of mediation

Powers of a Mediator

- S 74, ADR Act 2010, Act 798

1. A mediator shall in an independent and impartial manner do everything necessary to help the parties to satisfactorily resolve their dispute.
2. A mediator may conduct joint or separate meetings with the parties and make suggestions to facilitate settlement.
3. A mediator may where necessary and if the parties agree to pay the expenses, obtain expert advice on a technical aspect of the dispute. A request for the services of an expert may be made by the mediator or by one party with the consent of the other party.
4. A mediator shall be guided by principles of objectivity, fairness and justice, and shall give consideration to, among other things, the rights and obligations of the parties, the usages of the trade concerned and the circumstances surrounding the dispute, including any previous business practices between the parties.
5. A mediator may conduct the mediation proceedings in a manner that the mediator considers appropriate, but shall take into account the wishes of the parties including any request by a party that the mediator hear oral statements, and the need for a speedy settlement of the dispute.
6. A mediator may end the mediation whenever the mediator is of the opinion that further mediation between the parties will not help to resolve the dispute between the parties.
7. S 76, ADR Act 2010, Act 798: The mediator may invite the parties to meet the mediator and may communicate with them orally or in writing and may meet or communicate with the parties together or with each of them separately.

Ethical Conduct of Mediators

- The ADR Act makes mediation a profession and a code of ethics have been developed to guide mediators. The purpose of the Standards of Practice for Mediators are to/for:
  A. Provide model standards of conduct;
  B. Inspire excellence in practice;
  C. Guide mediation participants, educators, policymakers, courts, etc in establishing policies and practices
  D. Provide a foundation for any mediation credentialing program that may be contemplated by specifying conduct that helps to define ethical, competent, appropriate and effective dispute resolution;
  E. Promote public understanding and confidence in mediation

Mediation in Practice

- After a mediator has been agreed and appointed, a date, time and venue for the mediation must be fixed.
- The opening statement is used by mediators to calm the parties down, relax and to inform them of what they would be doing.

Opening statement

1. Introduction of the mediator and if appropriate the parties
2. Commendation on the willingness to cooperate and seek a solution to their problems
3. Definition of mediation and the mediator's role
4. Statement of impartiality and neutrality
5. Description of the mediation process
6. Explanation on the concept of caucus: Caucusing is advantageous for the following reasons
   A. It reduces the hostility between both parties
   B. It opens discussions into areas previously not considered or adequately developed
   C. It affords the mediator the opportunity to probe and uncover additional facts and the real interest of the parties
   D. It helps the parties explore alternatives and search for solutions
   E. It Helps the parties identify what is important and what is expendable
   F. It helps the parties communicate positions or proposals in understandable or more palatable terms
7. Definition of the parameters of confidentiality
8. Description of logistics
9. Answering questions asked by the parties
10. Joint Commitment to begin

S 76 ACT 798

SEE ALSO S 8 OF THE 4TH SCHEDULE OF THE ACT

NB: S 73, ADR Act 2010, Act 798, "The parties must within 8 days before the first session or within such period of time as the parties may mutually agree upon, present to the mediator and the other parties a memorandum setting out the party's position with regard to the issues which require resolution. The mediator may request each party to submit a written statement of that party's position and the facts and grounds in support of that position, supplemented by any documents and other evidence that the party considers appropriate. At any stage of the mediation proceedings, the mediator may request a party to submit additional information as the mediator considers necessary."

Settlement and Agreement

1. The purpose of the settlement agreement is to summarise and write down the resolution of all the issues. Using your notes, restate what the parties have agreed, making sure that all issues have been resolved.
2. Encourage the disputants to improve on solutions to meet all the interests. Balance the agreement so that each party is doing something in the contract. Clearly define the role of each party in the settlement agreement.
3. Discuss and clarify the details of compliance i.e. who will do what, when, how, where, disposition of the suit, counter-suit. Be specific. Write it all in the agreement. Don't assume anything.
4. Additionally, discuss and clarify the consequences of not keeping the agreement i.e. default judgment for X amount, or whatever enforcement they have agreed to. Be specific. Write it all in the agreement.
5. However, be flexible enough to back up if new issues arise or where there is an omission on the part of the mediator.
6. Write the agreement in a positive framework.
7. Read the agreement out loud as you write it. After each point of agreement, get verbal confirmation on the details.

Mediation is OVER when
1. There's a settlement
2. The Mediator terminates
3. Parties and mediator agree it is a waste of time
4. Parties terminate mutually

S 81, Act 798: If the parties reach a settlement, it may be put in writing and signed. When the parties sign the settlement agreement, the parties shall be deemed to have agreed that the settlement shall be binding

8. S 80 ADR Act 2010, Act 798: Mediation ends when:
   A. The parties execute a settlement agreement;
   B. The mediator terminates the mediation proceedings
   C. The mediator after consultation with the parties makes a declaration to the effect that further mediation is not worthwhile;
   D. The parties jointly or unilaterally address a declaration to the mediator to the effect that the mediation is terminated
9. S 82, ADR Act 2010, Act 798: A settlement agreement is binding if the parties so agree.

Mediation Ground Rules

1. The parties shall take turns speaking and not interrupt each other
2. The parties shall call each-other by or first-names not 'he' or 'she'
3. The parties shall not blame, attack, or engage in put-downs and will ask questions of each other for the purposes of gaining clarity and understanding only.
4. The parties shall stay away from establishing hard positions and express themselves in terms of their personal needs and interests and the outcomes they wish to realise
5. The parties will listen respectfully and sincerely and try to understand the other person's needs and interests.
6. The parties shall recognise that even if they don't agree, each is entitled to his own perspective
7. The parties will not dwell on things that didn't work in the past but will focus on the future
8. The parties must make a conscious effort to refrain from unproductive arguing, venting or narration and at all times agree to use their time in mediation to work towards what we perceive to be their fairest interest.
9. The parties shall request a break when needed
10. While in mediation, the parties will refrain from pre-emptive manoeuvres and adversarial legal proceedings (except in the case of an emergency necessitating such action)
11. The parties will not try to convince the mediator of anything.

Observer Rules

- S 77, ADR Act 2010, Act 798: 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.
- A party may come with observers if it's so agreed. As a general rule observers are not permitted in mediations; mediation is typically limited to parties, and in some cases their lawyers. The client's friend may be disruptive to the process. Thus, where they are allowed, they must observe the following rules

1. An observer can only be present with the consent of the other party
2. An observer is allowed only if there is a trainer present during the process.
3. The observer must be as quiet as possible during the mediation.
4. He/She must make no facial, hand, or body gestures or stare at the mediators.
5. They are not to ask any questions
6. They cannot speak to any of the disputants during the session
7. They may write down their questions and ask the mediator after the session.

ARBITRATION

- S 135, ADR Act 2010, Act 798: "Arbitration" means the voluntary submission of a dispute to one or more impartial persons for a final and binding determination. S 52, Act 798: Arbitration Awards are binding
- S 13 ADR Act 2010, Act 789: Third party neutral or odd numbered panelled neutrals decide the case based on its merits.
- Brown & Marriot: Arbitration is a private mechanism for the resolution of disputes which takes place in private, pursuant to an agreement between two or more parties, under which the parties agree to be bound by the decision to be given by the arbitrator according to law, after being enforceable at law
- Bremer Vulkan SchiTau v South India Shipping Corp Ltd: Courts and arbitrators are in the same business, namely the administration of justice. The only difference is that the courts are in the public and the arbitrators in the private sector of the industry
- Arbitration could be based on a contract or on a treaty. Where it is based on a contract (Commercial Arbitration), it may further be divided into ad hoc and institutional arbitration. In an ad hoc arbitration as opposed to an institutional arbitration, the parties themselves administer the case, whilst in the former, an institution is hired to administer the case.

Bremer Vulkan v South India Shipping

Features of an Arbitration

1. Existence of a dispute
2. Agreement by the parties to submit the dispute to arbitration, it is consensual.
3. Parties choose arbitrator(s)
4. The tribunal must make a decision/award
5. The award must be capable of being enforced

Differences & Similarities between Arbitration and Litigation

Differences	
Arbitration	**Litigation**
A dispute will only be referred to arbitration if it's agreed between the parties	Litigation does not require consent of the defendant
Arbitrators are appointed by the parties or through a mechanism agreed by the parties	The judge is appointed by the state with no input from the parties
Rules of court are applied	Parties are at liberty to determine the rules governing the arbitration
Period for completing the arbitration is agreed	There is no agreed period for completion of litigation
Court room language mystifying and many litigants cannot follow the procedure.	Parties choose their own language
Court room hearings are public with no privacy for litigants	Private hearings and arbitrator must treat the proceedings with confidentiality.
Similarities	
1. There is a third party neutral 2. It's governed by rules and procedure 3. It results in a win-lose outcome	

Consent

Terms of appointment

Rules applied

Duration

Language used

Privacy

Difference between Arbitration and Mediation

	Arbitration	Mediation
Nature of award	The arbitrator renders an award which is binding and final	The mediator has no authority to render an awards. The parties craft their own solution
Control	The arbitrator manages the process and ensures it is expeditious and fair	A mediator attempts to give control and ownership of the process itself to the parties
Venting	Ventilation is inappropriate	Ventilation is encouraged
	The arbitrator is responsible for maintaining decorum and the dignity of the process	

Advantages of Arbitration

1. Expertise of decision maker
2. Finality of decision
3. Privacy of proceedings
4. Procedural informality
5. Speed
6. Parties have some control over the process
7. Guarantee of privacy and confidentiality

S 34 (5) Act 798: The Arbitrator shall ensure confidentiality during proceedings

Disadvantages of Arbitration

1. It's not necessarily a cheaper method of resolving disputes than litigation. The fees and expenses of the arbitrator(s) (unlike the salary of a judge) must be paid by the parties.
2. Arbitration can be as 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. 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 e.g. to enforce an award, or to resolve some procedural issues.

Article V of New York Convention and 58 of ADR

4. The arbitrator's power 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 certain orders such as an injunction.

Customary Arbitration

- S 89 & 91 ADR Act 2010, Act 798: A party to a dispute may submit the dispute to customary arbitration unless it is a criminal matter subject to the order of the court.
- S 90 ADR Act 2010, Act 798: A dispute is submitted for customary arbitration when one of the parties to the dispute reports the dispute to a qualified person agreed upon by the other party to resolve it. The arbitrator then invites both parties to pay fee or taken for the arbitration. Payment of the fee is deemed submission to the customary arbitration and endorsement of the "qualified person" as arbitrator.
- Failure to accept the invitation after 21 days is rejection of the invitation to customary arbitration.
- S 109 &111 ADR Act 2010, Act 798: 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. The award is enforceable like a judgement of the HC.
- A customary arbitration award for record and enforcement purposes may be registered at the nearest District Court, Circuit Court or High Court

Awards are binding and enforceable. Registration of awards isn't compulsory

S 112 act 798: The award may be set aside on
1. Breach of natural justice
2. Miscarriage of justice
3. Contrary to customs and practices of the area concerned

Elements of Customary Arbitration

- Budu II v Caesar: Caesar brought action against Budu for trespass of land, while it was still pending, the Omanhene intervened and purported to settle the dispute between the two parties. According to Budu's subsequent evidence, the dispute was settled; according to Caesar it was never concluded. The action was struck out upon representation by Caesar that the matter had been concluded. Counsel for Caesar later had the case re-listed. Among the issues for determination was whether there had been a valid arbitration between Caesar and Budu. Justice Ollenu held that in customary law there are five essential characteristics of an arbitration:

1. A voluntary submission of the dispute by the parties to arbitrators
2. A prior agreement by both parties to accept the award of the arbitrators;
3. The award must not be arbitrary, but must be arrived at after the hearing of both sides in a judicial manner;
4. 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; and
5. Publication of the award

A. Voluntary Submission: Parties to the dispute must submit their differences voluntarily to the arbitrator. S 105 Act 798: Once you submit, you can't withdraw

S 135, S 90:customary arbitration" means the voluntary submission. Payment of token is deemed submission

- Nyaasemhwe v Afibiyesan: Nyaasemhwe gave land to Afibeyesan's predecessor to farm. On the death of the predecessor, Afibiyesan stepped in his steed and continued the farming whereupon Nyaasemhwe lodged a complaint with the Chief of the area who invited the defendants for a settlement of the dispute. Nyaasemhwe in his evidence did not indicate whether there was a voluntary submission or an agreement to submit to the chief's proposed arbitration. The chief found of Nyaasemhwe. On realising subsequently that Afibiyesan was not abiding by the result of the alleged arbitration, the Nyaamsemhwe sued the Afibiyesan. The trial court held inter alia that there had been a valid arbitration. On appeal, the appeal court held that, mere presence was not proof of submission to arbitration and that failure to prove voluntary submission by the parties invalidated the arbitration.

B. Prior Agreement to be bound by the award. The Parties must undertake to be bound by the award and the arbitration agreement.

S 113, the diff between negotiated settlement and customary arbitration is the fact that the parties agree to be bound only after the settlement

- Nyaasemhwe v Afibiyesan: The question of a prior agreement to be bound by the decision of the arbitrators in an alleged arbitration was a question of fact to be determined by the evidence
- Gberbie v Gberbie: The plaintiffs sued the defendant in a local court for £G68.13s. 4d. being an amount found due to them at an alleged arbitration held 11 years earlier. The local magistrate gave judgment for the plaintiffs. Held, there must be a prior agreement by both parties to accept the award of the arbitrators…For should the parties not have previously agreed to accept the award, no decision in the particular proceedings binds them unless they subsequently accept it.

C. The practice and procedure must follow customary law and the rules of natural justice

- Budu II v Caesar
- Gberbie v Gberbie: A further characteristic was revealed in the case of Budu II v. Caesar, namely, that the award must not be arbitrary, but must be arrived at after the hearing of both sides in a judicial manner, and secondly that 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…It would appear from it that where the practice and procedure of the native (or in later days local

and now perhaps district) court or tribunal in the area has been followed as nearly as possible, this in itself is evidence that there has been a hearing of the dispute in a judicial manner…And this new characteristic, upon consideration, turns out to be no more than the recognition of that fundamental principle of natural justice—audi alteram partem—as a necessary part of our customary arbitration procedure.

- S 98 ADR Act 2010, Act 798: A person requested to be a customary arbitrator shall disclose any circumstance likely to give reasonable cause to doubt as to the independence or impartiality of that person. this obligation subsists throughout the proceedings

D. The award should not be arbitrary. The arbitrator is expected to give a reasoned decision based on the evidence adduced by the disputing parties.

E. The Award must be published. Awards are binding decisions of an arbitrator made at the end of the arbitration process.
   - S 108 ADR Act 2010, Act 798: Except where a party requests for a written award and pays for the written award or the reference to arbitration is made by a court, the award in a customary arbitration need not be in writing.

International Arbitration

- International or transnational arbitration transcends national boundaries; on the other hand, domestic arbitration involves claims by private individuals within a given territory
- Article 1 UNCITRAL Model Law: An arbitration is international if,
  A. The parties to an arbitration agreement have, at the time of the conclusion of the agreement, their places of business in different states;
  B. One of the following places is situated outside the state in which the parties have their places of business
     1. The place of arbitration if determined in, or pursuant to, the arbitration agreement
     2. Any place where a substantial part of the obligations of the commercial relationship is to be performed or the place with which the subject matter of the dispute is most closely connected
     3. If a party has more than one place of business, the place of business is that which has the closest relationship to the arbitration agreement; if a party does not have a place of business, reference is to be made to his habitual residence.
  C. The parties have expressly agreed that the subject matter of the arbitration agreement relates to more than one country.

Recognition and Enforcement of Foreign/International Awards

Each state shall recognise int'l arbitration agreements and clauses

- Article II New York Convention: Each contracting state shall recognise an agreement in writing under which the parties undertake to submit to arbitration all or any differences which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration…the term "agreement in writing" shall include an arbitral clause in a contract…"

Each State shall recognise and enforce awards in accordance to its rules of procedure

- Article III New York Convention: Each contracting state shall recognise arbitral awards as binding and enforce them in accordance with the rules of procedure of the territory where the conditions laid down in the following articles. there shall not be imposed substantially more onerous conditions or higher fees or charges on the recognition or enforcement of arbitral awards to which this convention applies than are imposed on the recognition or enforcement of domestic arbitral awards"

- To successfully get a member state to recognise and enforce of a foreign arbitral award under the New York Convention, the applicant must obtain the duly authenticated original award or in the alternative a duly certified copy of it. If the award is in a language alien to the country where the application is made, the award must be accompanied by a translation in a language understood and spoken in the said country
- Article 53 of the ICSID Convention: The award shall be binding on the parties and shall not be subject to any appeal or to any other remedy except those provided for in this convention. Each party shall abide by and comply with the terms of the award except to the extent that enforcement shall have been stayed pursuant to the relevant provisions of this convention.
- Under the ICSID Convention, the applicant needs to submit a copy of the award signed by the ICSID Secretary-General.

ICSID awards are binding on State parties.

Advantages of International Arbitration

1. It permits the parties to choose persons with specialised knowledge in arbitration to judge their disputes as against judges or lawyers with little skill and knowledge in arbitration
2. Arbitrators are chosen for specific disputes and are thus thoroughly familiar with the facts.
3. The procedure is flexible and is changed to adapt with each set of facts
4. There is no right of appeal
5. Privacy is guaranteed
6. Avoidance of uncertainties of foreign litigation

Arbitration in Practice

- In order to have a successful arbitration, certain vital issues must bead dressed at the pre-heading stage.
    1. The date, time, place, language and estimated duration of the proceedings must be determined.
    2. The need for discovering, production of documents or the issue of interrogatories and the establishment of how these shall be done must be addressed.
    3. The applicable laws and rules of evidence must be well defined.
    4. The exchange of witnesses' statements and all other related issues must be determined.
    5. The form of the award must be defined.
    6. Cost and Arbitration fees must be determined.
    7. Any other issues relating to the arbitration must as well be addressed.
    8. In arbitration, a party may be represented by a lawyer or any other person. Unless otherwise agreed by the parties the hearing shall be in private.
- In order to have a successful and a fruitful arbitration process, it is important to observe the following points.
    1. A party may be represented by a lawyer or any other person of his choice.
    2. Unless otherwise agreed by the parties, the arbitration hearing shall be in private.
    3. The arbitrator may at the beginning of the hearing ask for opening statements from the parties to clarify the issues involved in the Arbitration.
    4. The claimant shall first present evidence in support of his claim. If there are any questions or issues for clarification, the respondent is permitted to seek clarification. The respondent then takes his turn to present his case followed by questions or clarifications from the claimant. The Arbitrator may vary the order of presentation depending on the circumstances surrounding the case.
    5. The Arbitrator must give sufficient notice of any hearing and an opportunity to inspect documents and other materials relevant to the resolution of the dispute.

6. An Arbitrator may grant an interim relief that he considers necessary for the protection or preservation of property at the request of a party pending the final Award.
7. The Arbitrator shall decide the dispute in accordance with law or other considerations agreed by the parties.
8. The Award pronounced by the arbitrator is final and binding on the parties and any person claiming through or under them.
9. An Arbitrator may refuse to deliver an Award to the parties till there is full payment of the fees charged for the arbitration as well as any other expenses

Submission to Arbitration

- Disputing parties may refer their differences to arbitration in three main ways:

A. In a written agreement, which is usually in the form of an arbitration clause (S 2 &5, ADR Act 2010, Act 798).
B. By application to the Courts on grounds that there is an existing arbitration agreement between the parties (S 6 ADR Act 2010, Act 798).
C. Where the court is of the view that the matter can be resolved by arbitration subject to the consent of the parties (S 7 ADR Act 2010, Act 798)

- Where the matter is referred to arbitration either on application by the parties or suo moto by the court, it acts as a stay of proceedings.
  - Khoury v Khoury: The parties entered a partnership agreement in 1930. The agreement contained an arbitration clause which covered "all disputes and questions whatsoever which shall either during the partnership or afterwards arise between the partners . . . or any account valuation or division of assets, debts or liabilities." The parties agreed to dissolve the partnership, but differences arose as to the distribution of assets and, the appellant refused to sign the dissolution agreement. Both parties appeared willing to submit to arbitration under their partnership agreement but before the submission had been finalised, the respondent issued a writ in the HC against the appellant. Counsel for the appellant filed an application for an order to stay proceedings pending reference to arbitration

Appointment and Qualification of an Arbitrator

- S 12 ADR Act 2010, Act 798: The arbitrator must be appointed by either the parties or a person or institution authorised by the parties to do so.

There must be consent from the parties either ways

- The arbitrator may be a person with the experience or qualification that the parties may agree on, however he/she need not be experienced or qualified IRO the subject of the dispute if the parties agree so.
- The arbitration may be of any nationality unless otherwise agreed by the parties
- The following considerations shall be made in the appointment of an impartial arbitrator:
  A. The personal, proprietary, fiduciary or financial interest of the arbitrator in the matter to which the arbitration relates;
  B. The relationship of the arbitrator to a party or counsel of a party to the arbitration;
  C. The nationalities of the parties; and
  D. Any other relevant considerations
- S 14 ADR Act, Act 798: Unless provided for in the arbitration agreement, the parties are at liberty to agree on the procedure for appointing an arbitrator. If the Arbitration agreement fails to set out a procedure, or the parties fail to agree on the procedure to be adoptedand the arbitration agreement does not provide for the settling of the disagreement, each party in an arbitration which requires the appointment of 3 arbitrators, shall appoint 1 arbitrator and the 2 newly appointed arbitrators, shall appoint the third arbitrator who shall be the chairperson.

- In an arbitration which requires the appointment of a sole arbitrator, if the parties fail to agree on the arbitrator within fourteen days after the receipt of a request for arbitration by one party from the other party, the appointment shall be made by the appointing authority upon a request by a party.
- S 15 ADR Act 2010, Act 798: Where a person is requested to be an arbitrator, that person shall disclose in writing any circumstances likely to give reasonable cause to doubt as to the independence or impartiality of that person. He must from the time of appointment and throughout the arbitral proceedings ~~shall~~ without delay, disclose to the parties in writing any such circumstance. His appointment may be challenged only if
  A. Circumstances exist that give rise to reasonable cause to doubt as to the arbitrator's independence or impartiality; or
  B. The arbitrator does not possess the qualification agreed on by the parties.

Arbitrator can be challenged on
1. nemo judex in causa sua
2. Lack of qualification

Adai v Anane: An arbitrator's position should not offend one of the rules of natural justice, that is, he should not be a judge in his own cause.

Code of Ethics for Arbitrators

1. An arbitrator should uphold the integrity and fairness of the arbitration process. S 31 Act 798
2. An arbitrator should disclose any interest or relationship likely to affect impartiality or which might create an appearance of partiality or bias. S 15 (1) Act 798
3. An arbitrator in communicating with the parties should avoid impropriety or the appearance of impropriety.
4. An arbitrator should conduct the proceedings fairly and diligently. S 31 (2) Act 798, Arbitrator must avoid unnecessary delay
5. An arbitrator should make decisions in a just, independent and deliberate manner.
6. An arbitrator should be faithful to the relationship of trust and confidentiality inherent in that office.

7. S 34(5) Arbitrators should do confidentiality 8. S 18 Act 798, parties can challenge on competence, qualification etc.

Arbitration Clauses and Agreements

- S 135 ADR Act 2010 Act 798: "Arbitration agreement" means an agreement to submit to arbitration present or future dispute;
- Article II New York Convention: The term "agreement in writing" shall include an arbitral clause in a contract…"
- When an arbitration clause is drafted in a way so as to defeat its purpose or to make unenforceable the award it is referred to as a pathological arbitration clause. An arbitration clause may be pathological for the following reasons
  1. The clause fails to appoint an arbitrator or set out the procedure for appointing an arbitrator
  2. The clause provides conflicting or unclear procedures for the arbitration
  3. The clause provides too much specificity with respect to whom qualifies as an arbitrator
  4. The clause misnames or mentions a non-existent institution as the arbitrator

Pathological clauses, well because they lie!!!

- A pathological clause may be dealt with in the following manner:
  - State the intent to submit to binding arbitration clearly and unequivocally
  - Verify the existence and proper name of the institution designed to administer the arbitration
  - Avoid mentioning a particular person as arbitrator
  - Avoid too much specificity
  - Ensure the procedure laid out is simple, clear, workable
- The UNCITRAL Model Law suggests the parties consider adding to an arbitration clause, the following information:
  1. The appointing authority (whether person or institution)
  2. The number of arbitrators

A clause may also be pathological for the following reasons:
* The submission to arbitration is optional
* There are impracticable
* The scope of arbitrable matters is narrow
* The number of arbitrators is an even number
* Use of UNCITRAL Model law and not UNCITRAL rules which are binding on member parties

3. The place of arbitration
4. The language to be used in the arbitral proceedings shall be

- The following are some guidelines in drafting an arbitration agreement
  1. The agreement must contain the circumstances for when arbitration must be resorted to.
  2. The parties must clearly and unequivocally state their intention to submit to arbitration. The agreement to submit must have a mandatory ring to it not a permissive tone.
  3. Concerning the subject matter, avoid phrases and words that restrict the scope of the arbitration
     agreement. Avoid adjectives that seek to qualify the disputes and as such restrict the clause. However, if the parties want to submit only SOME disputes to arbitration, then their desires must be met.
  4. The parties must decide on the following specificities:
  5. Must the arbitration institutional or ad hoc? If the former, then by which institution?
  6. Choice of arbitrators and the procedure to be adopted
  7. Rules of procedure. This may be a new set of rules or refer to existing rules
  8. The seat or place of arbitration. This is significant because it determines the procedural law determinable to the proceedings in so far as the parties have not in themselves chosen a procedural law other than the law of the seat of arbitration.
  9. Rules for termination of the arbitration

- The law applicable to the agreement or clause governs the formation, validity, enforcement and termination of the arbitration agreement. The following are the most common criteria considered in determining the law applicable to the agreement or clause
  C. The law chosen by the parties
  D. The law applicable to the contract
  E. The procedural law applicable to the arbitration
  F. The law of the place of the arbitration

Terminologies Used in Arbitration

1. Separability of Arbitration Clause
   - Separability means that the arbitration clause within a contract may be regarded as an agreement separate and distinct from the other contractual provisions, so disputes between the parties may be arbitrated pursuant to that clause, even if the contract is null and void ab initio.
   - Separability could be IRO the validity of the main contract or the arbitration clause under substantive law and its implications on both.
   - Separability could also be IRO the law that governs both the main contact and the law that governs the arbitration under the contract.
   - S 3 of the ADR Act 2010, Act 798: Arbitration clauses/agreements are separable from the main agreement unless otherwise agreed by the parties. An arbitration clause/agreement is irrevocable except by agreement of the parties.

2. Party Autonomy
   - Parties should be free to decide how the dispute should be resolved; arbitration is a consensual process based on agreement between the parties to refer their dispute to an impartial arbitral tribunal.

AG v Balkan: The gov't entered into a PPA with Balkan Energy without prior approval of parliament according to the Constitution. The PPA included an arbitration clause, and which clause was invoked after a dispute. The AG (gov't rep) at proceedings contended that since the PPA was unconstitutional, the arbitration clause was also unconstitutional and as such the arbitral tribunal did not have jurisdiction.

The arbitral tribunal held that it had jurisdiction, but expressed a willingness to take account of the interpretation of the constitutional provision in question by the Ghanaian Courts, whereupon the AG brought an action before the SC for the constitutionality or otherwise of the PPA and the Arbitration clause. The Court held inter alia that, "An international commercial arbitration is not by itself an autonomous transaction. An international commercial arbitration draws its life from the transaction whose dispute-resolution it deals with and thus could not be separated from the main agreement.

Prima Paint v. Flood Conklin:
As a matter of substantive federal arbitration law, an arbitration provision is severable from the remainder of the contract

See AG v Balkan Energy

Also Ekow Russel v The Republic: The Court departed from Iboman alias Frimpong, mentioning that Case law should be in consonance with Statute.

- S 5(1), ADR Act 2010, Act 798: A party to a dispute governed by an arbitration agreement may refer it to any person or institution for arbitration or to the ADR Centre.
- S 12 ADR Act 2010, Act 798: Parties are free to appoint arbitrators and determine their experience, qualifications, nationality, etc.
- S 13 ADR Act 2010, Act 798: Parties are free to determine the number of arbitrators, but it must be an odd number
- S 17, ADR Act 2010, Act 798: Parties have power to determine how the powers of the arbitrator may be revoked, and, acting jointly, may terminate the appointment of the arbitrator.
- S 48(1) ADR Act 2010, Act 798: Parties can decide on the governing law for the substance of the arbitration.
- S 31 ADR Act 2010, Act 798: Parties have right to agree on any matter of procedure.
- S 29 ADR Act 2010, Act 798: Parties may decide whether an arbitration management conference should be conducted as well as the expected outcomes including the issues to be resolved, date, time, & place.

3. Amiable Compositeur (Amiable Composition)
   - It is a civil code principle, formerly unknown in the common law system.
   - By submitting to amiable composition, the parties accept their disputes are not exclusively resolved on the basis of the rules of the applicable substantive law, but also equity and fairness.
   - It does not mean that the arbitrator can refuse to apply municipal law at all; it means the arbitrator is not strictly bound by the applicable substantive law
   - S 50 ADR Act 2010, Act 798: An arbitrator may within the scope of the arbitration agreement grant any relief that the arbitrator considers just and equitable including specific performance

4. Kompetenz-Kompetenz
   - It is the power given to the arbitral tribunal to decide on its own competence.
   - Challenges to the arbitrator's jurisdiction are dealt with by the arbitrator or arbitral tribunal.
   - S 24 ADR Act 2010, Act 798: Unless otherwise agreed by the parties, the arbitral tribunal may rule on its own jurisdiction IRO
     A. The existence, scope or validity of the arbitration agreement;
     B. The existence or validity of the agreement to which the arbitration agreement relates;
     C. Whether the matters submitted to arbitration are in accordance with the arbitration agreement.

S 26 Act 798: A person dissatisfied with the arbitrator's ruling on jurisdiction may on notice to the arbitrator and the other party apply to the appointing authority or the High Court for a determination of the arbitrator's jurisdiction

5. Arbitrability concept
   - It is IRO which type of disputes can or cannot be resolved by arbitration.
   - Article V New York Convention: An award may be challenged on grounds that the subject matter of the dispute is not capable of settlement under the law of the country where recognition and enforcement is sought.
   - S 1 ADR Act 2010, Act 798: All matters are arbitrable except matters IRO
     A. National or public interest;
     B. The environment;
     C. Enforcement and interpretation of the Constitution; or
     D. Any other matter that by law cannot be settled by an alternative dispute resolution method.
   - S 73 Courts Act 1993, Act 459: Felonies and offences of aggravated degree are not arbitrable

- Beyond a statutory statement IRO arbirtability, the following also determine arbitrability:
  A. Where the parties have or have not agreed or consented to arbitration
  B. Where a party lacks the requisite capacity to submit a matter to arbitration
  C. Where the scope of the matter submitted to arbitration is not covered by the agreement
  D. Capacity or jurisdiction of the arbitrator(s) to hear the matter

Arbitral Awards

- The award is the final decision arrived at by the arbitrator after examining the evidence adduced by both parties.
- S 52 ADR Act 2010, Act 798: Subject to the right of a party to set aside an award an award is final and binding as between the parties and any person claiming through or under them
- S 57 ADR Act 2010, Act 798: The award may, by leave of the High Court, be enforced in the same manner as a judgment or order of the Court to the same effect. Leave to enforce an award shall not be given where, or to the extent, that a person against whom the award is sought to be enforced shows that the arbitrator lacked substantive jurisdiction to make the award.
- S 58 ADR Act 2010, Act 798: The award may be challenged on the following grounds
  1. A party to the arbitration was under some disability or incapacity;
  2. The law applicable to the arbitration agreement is not valid;
  3. The applicant was not given notice of the appointment of the arbitrator or of the proceedings or was unable to present the his/her case;
  4. The award deals with a dispute not within the scope of the arbitration agreement
  5. There has been failure to conform to the agreed procedure by the parties;
  6. The arbitrator has an interest in the subject matter of arbitration which the arbitrator failed to disclose.
  7. The subject-matter of the dispute is incapable of being settled by arbitration or the arbitral award was induced by fraud or corruption.
- S 27 ADR Act 2010, Act 798: A party who takes part or continues to take part in an arbitral proceeding, knowing that, the arbitrator does not have jurisdiction; the proceedings are improperly conducted; the arbitration agreement has not been complied with; or there is an irregularity in respect of the arbitrator or proceedings and who fails to promptly or within the time specified in the arbitration agreement to object to the proceedings shall be deemed to have waived the right to raise the objection.
- Structure of awards: The award must have the following information,
  1. The title of the award
  2. The names of the arbitrators
  3. The names and addresses of the parties and their solicitors
  4. A summary of the facts of the dispute
  5. A summary of the terms of the arbitration agreement or clause
  6. The place of arbitration
  7. The applicable law as chosen by the parties
  8. The order of filing of documents
  9. Summary of evidence
  10. Decision of the arbitrator(s) or arbitral tribunal
  11. Date the award was given
  12. Signatures of the parties, witnesses and arbitrator(s) or arbitral tribunal

HYBRID PROCESSES IN ADR

- Hybrid processes have been developed out of the 3 primary branches of ADR i.e. negotiation, mediation and arbitration.

Mediation is followed by arbitration . Same 3rd person neutral

A. Med-Arb

This is a cross between mediation and arbitration.

The parties appoint a mediator in the event of a dispute, however, where the mediation fails, the person appointed as mediator becomes an arbitrator and the matter continues but under arbitration.

S 83 ADR Act 2010, Act 798: Parties while under mediation cannot submit the same matter to arbitration or litigation.

S 84, ADR Act 2010, Act 798: The parties can agree can agree prior to the mediation process that the mediator can act as a witness or arbitrator in a subsequent arbitration IRO the same subject matter.

Advantages

1. Guaranteed resolution of the dispute
2. Parties may try harder to be reasonable and to resolve the matter during the mediation phase; hence no time wasting
3. If an adjudication is required, there will be no loss of time or cost in having to re-acquaint a new neutral with facts of the case and the issues between the parties.

Challenges

1. Parties often disclose important confidential information to a mediator during the settlement negotiation process and will have legitimate reasons not to want the same information in evidence. However, when the case goes from mediation to arbitration, all the information presented cannot be erased from the neutral's mind.
2. The neutral is faced with having to hear the entire case presented in a different manner as adversarial process, and must try to ignore volumes of information received in mediation.

B. Arb-Med

Total opposite of Med-Arb

- The parties agree to appoint a person as an arbitrator and may decide that the arbitrator should become a mediator and subject the matter to mediation.
- S 47 ADR Act 2010, Act 798: In an arbitral proceeding the arbitrator may encourage settlement of the dispute with the agreement of the parties using mediation or other procedures at any time during the arbitral proceedings.
- If during the proceedings the parties settle the dispute, the arbitrator shall terminate the proceeding and with the agreement of the parties, record the settlement in the form of an arbitral award on agreed terms.
- S 30 ADR Act 2020, Act 798: The appointing authority or any institution or individual may, with the consent of the parties at any time during the arbitration process, arrange a conciliation conference to facilitate the resolution of the dispute, except that an arbitrator in the dispute shall not be a conciliator.
- S 135 ADR Act 2010, Act 798: A conciliator is an impartial person appointed to preside over a conciliation conference where conciliation is the submission by the parties of a dispute which is the subject of an arbitration during the course of the arbitration to an impartial person who is not the arbitrator to facilitate the resolution of the dispute between the parties.

conciliation" means the submission by the parties of a dispute which is the subject of an arbitration during the cause of the arbitration to an impartial person who is not the arbitrator to facilitate the resolution of the dispute between the parties;

C. Settlement Conference

- It's annexed to the court system and is a form of structured negotiation.
- It's usually provided that before parties go for trial, they must attend a settlement conference and try to resolve their dispute peacefully. It's only when this fails that the parties may opt for trial.
- The conference may be conducted by judges or by experienced trial lawyers.
- Or 58 High Court (Civil Procedure) Rules 2004 CI 47: Actions brought before a commercial court must be first subject to a per-settlement conference before actual trial may begin. After pleadings have closed, the administrator of the commercial court is required to refer the case to a judge for a pre-trial settlement. The judge has a total of 2 months to settle issues for trial.
- Settlement conferences are often more coercive than mediation; the goal is the closure of the case and the freeing up of the court's docket.

Settlement Weeks

- In some jurisdictions, a period of time is set aside for cases before the court to be mediated by judges and volunteer lawyers in order to encourage settlement. The courts are therefore closed for settlement weeks.
- The results have been quite successful. However, there is anecdotal evidence which suggests that the settlement rate in court-annexed mediation is significantly higher than in settlement weeks.

D. Neutral Expert Fact Finder

- Where a case involves technical, scientific, accounting, economic or other specialised issues, the parties and the court will generally be dependent on expert advice and evidence in arriving at a proper conclusion. The purpose of the neutral is to give an evaluation of the facts of the case to enable the parties or court to make a decision on the matter.
- The neutral may be selected jointly by the parties or by the court.
- The parties can agree to be bound by the findings of the expert or it could be a purely advisory role.

E. Early Neutral Evaluation

- It involves the respective legal teams putting a case at a relatively early point to a neutral or a group of neutrals to obtain for the client a forecast of the possible judicial outcome with a view to encouraging settlement.
- It is informal, relatively inexpensive and allows each party the opportunity to reach a mutually acceptable settlement.

F. Rent a Judge a.k.a. Private Judging.

- The parties usually use the services, at a fee, of a retired or former judge who hears the case and renders a decision.
- The parties select and hire a private neutral party to try the case, just as it would be in a court of law. Usually parties do this where they do not have time for the case to be heard in the normal court.
- The rules of evidence are followed strictly, including the application of strategy and precedents.
- The decision of the private neutral party is treated as a judgment of a court of competent jurisdiction and subject to the same appeal processes as court cases.

G. Summary Jury Trial

- It involves the presentation of an abbreviated version of the evidence to an advisory jury.

- The evidence presented to them is a summary of the case for each party. Attorneys may present closing arguments based on the abbreviated evidence.
- The jury would offer a non-binding verdict which may be used as a basis for further settlement negotiations.

Advantages

1. Provides parties with valuable insights as to how a jury might find in a contested case
2. It's faster than protracted trial

Disadvantages

1. Time wasting if a settlement is not reached using this method
2. May not accurately predict the result of trial

H. Mini-Trial

- It's a hybrid of negotiation, mediation and case evaluation.
- Attorneys meet with an expert and all parties present their 'best case'. Subsequently, direct negotiation by the corporate executives follow, usually without the attorneys or the neutrals.
- If unsuccessful after a predetermined amount of time, the expert advisor provides a non-binding opinion or evaluation regarding the merits of the case.
- The executives, armed with the additional information, negotiate again. If no agreement reached, the neutral may be asked to act as a mediator to assist them to reach a settlement.

Negotiated Settlements

S 113 of Act 798: The provisions on customary arbitration as are appropriate shall apply to the customary dispute settlement procedure known as negotiation for a settlement except that in a negotiation for a settlement,

1. The parties do not pay the settlement fees, until the end of the settlement, if they agree with the terms of the settlement, unlike customary arbitration where the parties agree to be bound by the award prior to the arbitration.

2. the parties may withdraw from the settlement proceedings at any time;

3. the parties are not bound to accept the settlement arrived at in the proceedings;

4. the payment of the settlement fees is acceptance of the settlement and makes the settlement binding on the parties.

• Unlike customary arbitration, a decision in a negotiated settlement need not be on the respective merits of the claims of the contestants. In a negotiated settlement "King Solomon" is come to judgment." The main aim is to reconcile the parties by offering them what is fair and reasonable in the circumstances.

VICTIM–OFFENDER MEDIATION

- Sometimes referred to as transformative justice or restorative justice, it is used in criminal cases.
- It's aimed at restoring damaged 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 would treat each other in future.
- It 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.
- The use of victim offender mediation is based on a specific enabling legislation.
- S 73 Courts Act 1993, Act 459: 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.
- S 64 ADR Act 2010, Act 798: 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.

S 89 (2) Act 798: Apart from a court order it is impossible to submit a criminal offence to customary arbitration

Underlying Reasons

1. The criminal justice system leaves the accused, the complainant and some members of the society dissatisfied with the outcome of criminal cases disposed of by court trial
2. Not all offences need to be disposed of by the conventional trial methods e.g. trivial methods
3. It 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.
4. Sentencing officials must change their attitudes towards criminals and what constitutes modern punishment and sentencing
5. Crime is first harm against an individual but the individual is usually neglected in the process.

Advantages

1. Saves parties from pursuing trivial matters in open court
2. Secures privacy
3. Helps decongest the prisons
4. Encourages family members and neighbours to live peacefully
5. Prevents retaliation by reintegrating offenders into the community
6. Enables offenders to assume active responsibility for their actions
7. Creates a working community that supports the rehabilitation of offenders and victims thus preventing future offences

Victim-offender mediation proceeds on the following premises;

a. That the hurt to complainant should be recognised

b. That the harm to offender should be recognised

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.

Q & A

Party Autonomy and Judicial Control Under the ADR Act

I. Autonomy: Parties should be free to decide how the dispute should be resolved; ADR is a consensual process based on agreement between the parties

II. Illustrations of Party Autonomy

A. S 5 (1), ADR Act 2010, Act 798: A party to a dispute governed by an arbitration agreement may refer it to any person or institution for arbitration or to the ADR Centre.

B. S 12 ADR Act 2010, Act 798: Parties are free to appoint arbitrators and determine their experience, qualifications, nationality, etc.

C. S 13 ADR Act 2010, Act 798: Parties are free to determine the number of arbitrators, but it must be an odd number

D. S 17, ADR Act 2010, Act 798: Parties have power to determine how the powers of the arbitrator may be revoked, and, acting jointly, may terminate the appointment of the arbitrator.

E. S 48(1) ADR Act 2010, Act 798: Parties can decide on the governing law for the substance of the arbitration.

F. S 31 ADR Act 2010, Act 798: Parties have right to agree on any matter of procedure.

G. S 32 ADR Act 2010, Act 798: Parties have the right to choose language in Arbitration

H. S 29 ADR Act 2010, Act 798: Parties may decide whether an arbitration management conference should be conducted as well as the expected outcomes including the issues to be resolved, date, time, & place.

I. S 63 ADR Act 2010, Act 798: Parties may agree on more than 1 mediator, the default number is one though

J. S 66 ADR Act 2010, Act 798: Parties are free to appoint their own mediator agree on more than 1 mediator, the default number is one though

K. Fourth Schedule, ADR Act 2010, Act 798: Where the parties name a mediator or specify a method of appointing a mediator in an agreement, the Centre shall appoint the person named or follow the specified method.

III. Judicial Control/Limitation of the Court over Autonomy

A. S 7(5) ADR Act 2010, Act 798: Where in any action before a court the court realises that the action is the subject of an arbitration agreement, the court shall stay the proceedings and refer the parties to arbitration.

- Tetteh v Essilfie:

B. S 64 (1) ADR Act 2010, Act 798: 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

C. S 89 (1) ADR Act 2010, Act 798: Except otherwise ordered by a court and subject to any other enactment in force, a person shall not submit a criminal matter to customary arbitration or be an arbitrator in such a matter.

D. S 1 ADR Act 2010, Act 798: Excluded matters

E. In nearly all the provisions where the parties are given autonomy, should the parties fail to act, the arbitral tribunal, or court or other relevant institution with authority to do so, steps in to break the impasse in order to move the arbitration process forward. E.g. Even though the parties are free to agree on the time for the exchange of pleadings under S 33(1), in the event of their failure to do so, under S 33(2) the arbitral tribunal is empowered to determine the time for delivery of pleadings.

F. A party who takes part or continues with the arbitration in the circumstances stated in S 27 or fails to raise a timely objection to the arbitral proceedings is deemed to have waived the right to do so later.

Drawbacks and Commendable efforts of the ADR Act 2010, Act 798

I. Commendable efforts AKA Novel provisions

A. By including customary arbitration, the Act gives statutory legitimacy to an existent custom of submitting disputes to traditional heads and leaders of the various communities.

B. The Act incorporates the New York Convention (1st Schedule) to give the law an international character

C. The provisions of Schedule five provides ready guidelines for practitioners in drafting arbitration agreements and clauses.

D. Written Agreement is made to cover letters, telex, fax, e-mail or other means of communication which provide a record of the agreement (S 2).

E. The Act aligns itself with international standards in S 24 to grant arbitral tribunals power to rule on its own jurisdiction particularly in respect of the existence, scope or validity of the arbitration agreement; effectively empowering the arbitral tribunal to assert its independence without reference to a court to determine the jurisdiction of a tribunal once it is constituted.

F. The introduction of the concept of amiable composition: By submitting to amiable composition, the parties accept that their disputes are not exclusively resolved on the basis of the rules of the applicable substantive law, but also equity or what the arbitrator believes to be just and fair (S 50)

II. Weaknesses or Drawbacks

A. Limitation of Arbitrability: S 1 provides that the Act applies to everything except those IRO national/public interest, the environment, enforcement & Constitutional interpretation; or any

Also these matters which are excluded are not properly defined

other matter that by law cannot be settled by ADR methods. National/public interest is ambiguous, and the specific exclusion of criminal cases (which can be subsumed under national interest) from ADR is particularly unexplainable considering the fact that the Courts Act provide for mediation in criminal cases under Victim Offender mediation (S 73, Act 459).

the long title of the ADR Act clearly omits negotiation: AN ACT to provide for the settlement of disputes by arbitration, mediation and customary arbitration, to establish an Alternative Dispute Resolution Centre and to provide for related matters.

Under Section 135 of the Act, negotiation is not defined, although the Act says that ADR=Collective non-litigation measures

B. The Act fails to regulate negotiation, It omits it actually.
C. There is no provision that limits the intrusiveness of the courts in arbitration
D. Establishment of the ADR Centre under the control of government: The President is vested with power to appoint and revoke the appointment of the chairperson and members of the governing Board of the Centre. Also the Centre is supported by funds from the consolidated fund (125)
E. Too much stress on position of parties during mediation (S 73). Each party must present to the mediator a memo setting out the party's position. The mediator may request each party to submit a written statement of that party's position and the facts and grounds in support of that position, supplemented by any documents and other evidence that the party considers appropriate.

ADR Ethics

I. Definition: The word "Ethics" is derived from 2 greek words, "ethos" which means character and "mores" which mean customs

II. Arbitration Ethics

A. S 31 ADR Act 2010, Act 798: An Arbitrator should uphold the integrity and fairness of the arbitration process.
B. An Arbitrator should disclose any interest or relationship likely to affect impartiality or which might create an appearance of partiality or bias. Section 15(1) of Act 798
C. An Arbitrator in communicating with the parties should avoid impropriety or the appearance of impropriety
D. An Arbitrator should conduct the proceedings fairly and diligently
E. An Arbitrator should make decisions in a just, independent and deliberate manner
F. Arbitrator should ensure the expeditious resolution of the dispute- section 31(2).

III. Ethical Standards for Mediators

A. S 14, Fourth Schedule ADR Act 2010, Act 798: Confidentiality
B. S 4 & 5, Fourth Schedule ADR Act 2010, Act 798: Conflict of Interests & disclosure
C. Fairness S 74 (5) Act 798
D. Power Imbalance

E. Fees

F. Competence

G. Impartiality

H. Assurance of party self-determination

Consent Under the ADR Act

* Arbitrable matters under S 1, Act 798 exclude any other matter not allowed under law, which includes caselaw

#Parties to ADR are free to determine to a finality the facts, but not of legal rights or law, that is contrary to public policy or interest, S 1 Act 798

+Essilfie v Tetteh: The Defendant's wanted to set aside the Plaintiffs; writ on the grounds that the grievance procedure under the agreement between them and the Plaintiffs had not been followed. The Court held that, there cannot be complete ouster of the courts' jurisdiction since it is against public policy

* Also S135 definition of arbitration means voluntary submission, if submission cannot be proven to be voluntary then issa no. Consent will not lie in case of duress under Act 29 (S 42) or Civil law itself. Consent will also not lie if unconscionable (CFC Construction v Rita Mead, If a person by reason of sickness etc is disadvantaged then the agreement wont stand)