

# **Regulator's use of Alternative Dispute Resolution (ADR)**

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# Introduction

- The courtroom continues to provide the public with an important means of justice but other options exist that may offer the parties to a dispute, a quicker result and a solution that better meet their needs.

# ADR defined



- Alternative Dispute Resolution (ADR) sometimes referred to as Appropriate Dispute Resolution is a reference to a series of problems solving or conflict resolution processes which are used in lieu of the adversarial processes that is the judicial process before the courts or Quasi-Judicial process before an Administrative Tribunal.
- The distinction is that ADR is more collaborative and settlement oriented while litigation is adversarial



# Dispute Resolution Processes

- The following are some of the most common dispute resolution processes.
- **Prevention**
- **Negotiation**
- **Mediation**
- **Arbitration**
- **Trial**

# Negotiation styles



- ***Competing or win-lose strategy***
- The parties each pursue their own interest and objectives at the expense of the other believing that the final outcome of the dispute would be in their favour thereby winning and the other party losing.
  
- ***Accommodating or lose-win strategy***
- One party neglects his interest and objective, easily yielding to the other's points of view thereby satisfying the interest of the other party to the detriment of his own.
  
- ***Avoiding or lose-lose strategy***
- The parties do not deal with the conflict. They withdraw or sidestep issues or postpone discussions.



## Negotiation styles contd.

- ***Compromising or partial win –partial win strategy***
- The parties seek solutions which partially satisfy their needs and usually this is done by splitting the difference.
  
- ***Collaborative or win-win strategy***
- The parties seek to find solutions that fully satisfy their individual needs. The collaborative strategy achieves an amicable settlement and gives the parties a sense of accomplishment and satisfaction that they resolved the issues without losing and attain their objectives.
- **The collaborative or win-win strategy of negotiation is often used and is recommended as the most appropriate for Mediation.**

# Mediation



- Mediation is a voluntary and confidential dispute resolution process in which a mediator helps the parties to resolve their conflict through negotiation, basically mediation is facilitated negotiations.
- The terms facilitation and conciliation are often used interchangeably in mediation as essentially the processes are the same.
- Parties can enter the mediation process either under a mediation clause of a contract entered into prior to the dispute, or they may agree to mediation after the dispute arises. In some cases, a court will order mediation after litigation has started.

# Mediation styles



- Mediation styles can be evaluative, facilitative or transformative or all depending on the mediator and the needs and wishes of the parties to the dispute.
- ***Evaluative Mediation***
- Parties to a dispute may sometimes request the mediator to evaluate the arguments on both sides and this is referred to as rights based or evaluative mediation.

# Mediation styles contd.



- ***Facilitative Mediation***

- Parties to a dispute may request the mediator to facilitate the discussion and negotiation and to help the parties find an acceptable solution to both parties and this is referred to as interest based or facilitative mediation. These mediators concentrate on enhancing parties' communication and creating an atmosphere conducive to conciliation.

- ***Transformative Mediation***

- A third approach to mediation is referred to as transformative and is closer to the facilitative approach. A transformative mediator while facilitating to resolve the dispute, also focuses on improving the relationship between the parties during the mediation process.

# Mediation Process



- Mediation is a process which facilitates settlement between the parties and most parties develop a plan which:-
- Identify, discuss and define the problem and the issues;
- Identify and prioritize the parties interest;
- Identify all options available to the parties;
- Explore basis for agreement and the consequences of not agreeing to a settlement.



# Mediation Process contd.

- In the first mediation session the mediator describes the ground rules and the procedure to be followed in the mediation process. Each party present their side of the dispute what they want and why.
- The mediator tries to understand each party's views, interest, options and alternatives. Discussions and negotiations take place between the parties with the mediator guiding the parties to explore common grounds and settlement.
- The mediator during the process attempts to clarify facts, move the parties away from firm positions and focus on issues, get the parties to listen to each other and to explore alternative solutions. The mediator helps the parties to narrow their differences and agree on as many issues as possible.



## Mediation Process contd.

- Once the parties agree the mediator makes certain that the terms of settlement to the dispute are clear and complete
- encourages the parties to prepare a written agreement. If a settlement is not possible, the parties may agree to arbitration or go directly to litigation.
- Mediation is a highly effective and efficient way of resolving most disputes provided that the parties act in good faith and believe in the confidentiality of the process.

# Benefits of ADR



- cost and expense for an ADR process are lower than litigation
- ADR structure is flexible and facilitates a resolution more readily than the procedures involved in litigation.
- parties have control of the decision making process since there is no imposed decision.
- ADR process is less stressful to the parties as apposed to the court proceedings
- ADR process is more efficient and outcomes are more timely. At the end of the ADR process the parties have a better chance of continuing a working and business relationship as apposed to the adversarial process.

# ADR in Utility Regulation



- ADR appears to work better when the issues are technical.
- Utility Regulators whether by the authority of their enabling legislation (for example Trinidad and Tobago the Regulated Industries Commission) or by the authority of their regulations (for example Jamaica the Office of Utilities Regulation) utilize the ADR mechanisms in resolving consumer complaints against utility service providers in the Water, Electricity and Telecommunication Sectors and also resolving interconnection agreement issues between telecommunications service providers.

## ADR in Utility Regulation contd.



- Delays in conflict resolution can hurt both business and consumers. Consumers may be denied service until the dispute between them and the utility service provider is resolved.
- Similarly the utility service provider could be put out of business if their competitors are allowed to engage in practices that violates competition and utility regulation laws



# ADR in Utility Regulation contd.

- Although ADR is effective, the key to avoiding disputes and ultimately litigation is prevention. ADR will help even before disputes arise. An organization goal should be to educate and train its management staff in alternative dispute resolution methods and techniques.
- The principles and skills that are acquired from attending training courses, for example personal and business communication skills, **facilitation of discussion and debate, negotiation and mediation can be employed long before a dispute arises and it is effective to defuse the dispute at its inception**



## Conclusion

- The likelihood of parties to a dispute agreeing on the method of resolving their dispute is greatly reduced once the dispute has arisen. It is therefore important if using ADR is desirable, to ensure that an appropriate ADR clause is drafted into agreements, **regulations**, **standards** and **licence**. These ADR clauses are typical and usually few issues are raised on them when they are included in documents at inception.