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*With Premier ADR no Conflict or Dispute is Intractable*

# Drafting Dispute Resolution Clauses



- Why should we pay attention to the form and content of dispute resolution clauses?
- What form should they take?
- What should such clauses provide for?

# Litigation versus ADR – Which Way to Go



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

Sandra Day O’Conner

Associate Justice of the Supreme Court of the United  
States

# The Judiciary's Attitude Towards ADR in Kenya



Honourable Justice J.B Ojwang' (as he then was) had this to say in *Oyugi vs. Law Society of Kenya & Another* [2005] 1 KLR p.463 at pp. 471 - 2

*“ arbitration issues are essentially contractual matters. As the law, in such a private domain, primarily seeks to effectuate private choice, it is a matter of public interest and of judicial policy, that the parties in dispute be accorded wide opportunities for seeking solutions outside the restrictive procedures of the judicial process.”*

# The Conceptual Imperatives of ADR



Market mechanisms for conflict management and dispute resolution  
serve to maximize –

- Party control
- Expedition
- Quality procedures
- Quality outcomes
- Proportionality of costs
- Consumer satisfaction

# What Then Should Parties Do to Realize this Ideals



- Take control of the dispute resolution process right from the start
- Minimize judicial intervention
- Minimize technical barriers
- Simplify procedures to save time and costs

# Where Do We Begin



- Ensure that all contractual documents contain a comprehensive dispute resolution clause
- An ideal dispute resolution clause should contemplate that a dispute will arise and make provision for various ADR mechanisms such as
  - Mediation, Conciliation, Adjudication and Arbitration
  - Consider the appropriate mechanism or mechanisms in the ADR spectrum

# What Principle Should Guide Your Decision



*“An ounce of mediation is worth a pound  
of arbitration and a ton of litigation.”*

Joseph Grynbaum

Engineer and International Mediator

# What Should an Ideal Dispute Resolution Clause Contain



- The appropriate mechanism or mechanisms for managing emerging conflicts as they emerge and resolving escalated disputes
- Qualification and composition of the Tribunal (in arbitration)
- Procedure for appointment
- The appointing authority (if any)
- Applicable rules or law of arbitration
- Consider comprehensive provisions to eliminate or minimize court intervention

# What to Consider in Choosing an Appointing Authority



- Reputation and experience of the Institution
- The role and extent of engagement of the institution in the arbitral process
- The professional qualifications and experience of its panel of arbitrators or mediators
- The scale of fees and costs and the basis of computation

# Do Not Leave Anything to Chance



- The absence of a dispute resolution clause in a contract exposes parties to complex, time consuming and costly litigation
- A minimalist provision exposes them to court intervention and delay in appointment of the tribunal

# Additional Matters to Consider in Arbitration Agreements

- Always purpose to have a comprehensive dispute resolution agreement before the dispute arises
- Consider providing for an appointing authority
- Specify the seat of arbitration and the applicable Arbitration Rules
- Expressly provide for or exclude the right of appeal

# What to Consider in Relation to International Arbitration



- Most international arbitrations are governed by agreements that specify the appointing authority
- The composition of the tribunal
- The law and seat of arbitration
- If possible, negotiate the seat and composition of the tribunal to minimize the costs

# Conclusion



*“ Conflict resolution is first mindset  
and then skill set.”*

Anonymous