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Kenya Branch

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YOU MISS 100% OF THE SHOTS YOU DO NOT TAKE

THE 'DISPUTE RESOLUTION SPECTRUM' APPROACH TO
JUSTICE

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INTRODUCTION

As the relevant stakeholders continually engage on how to keep the doors to justice open regarding court operations, it is an inevitable fact that as a consequence of the overall scaling down court operations, there will be without a doubt, a greater backlog of matters and a potential clamor for extra time in a bid to clear what has been put on hold during this period before any current matters are addressed. This being the position, there has never been a more appropriate moment to consider alternatives to the court system in one's access to justice.

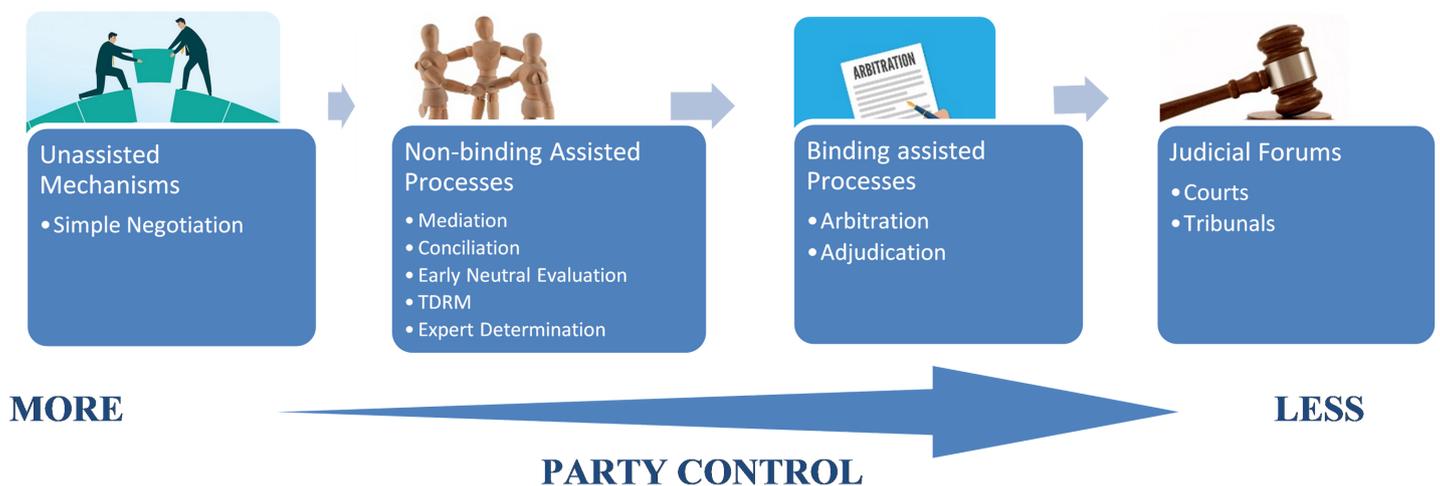
The Constitution of Kenya recognises Alternative Dispute Resolution (ADR) as an avenue to justice in Kenya. Article 159 states that, *'in the exercise of judicial authority, courts and tribunals shall be guided by alternative forms of dispute resolution including mediation arbitration and traditional dispute resolution mechanisms.'*

This paper will seek to discuss the the dispute resolution spectrum as the appropriate approach as well a mentality that everyone should adopt in the overall resolution of their disputes. It will break down the dispute resolution spectrum and assess the effectiveness of each mechanism in light of the current circumstances within the Kenyan context. In particular, it will highlight the most popular modes of ADR in Kenya, in particular; Negotiation, Mediation, and Arbitration as well as briefly point out other applicable mechanisms.

THE DISPUTE RESOLUTION SPECTRUM

Dispute resolution mechanisms cannot be viewed to the exclusion of each other. They can be categorized from consensual processes where the parties retain control and decide the outcome to formal/ adjudicative processes where the parties cede control and the neutral decides the outcome.

In a bid to relieve the courts from the anticipated pressures that will arise from the resumption of normal operations, it is the point of paper to induce a mentality shift that will view dispute resolution as a series of pre-determined steps to be considered by parties that will incorporate the avenues addressed above as opposed to a premature leap to the courts that may possibly delay justice further. This in takes into consideration the time and resources that may be averted or reduced if the dispute resolution spectrum is followed.



Above is a info-graphical representation of the dispute resolution spectrum

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In a bid to relieve the courts from the anticipated pressures that will arise from the resumption of normal operations, it is the point of paper to induce a mentality shift that will view dispute resolution as a series of predetermined steps to be considered by parties that will incorporate the avenues addressed below as opposed to a premature leap to the courts that may possibly delay justice further.

This approach takes into consideration the time and resources that may be averted or reduced. Issues for determination may also reduce as parties progress through the spectrum while others are resolved in their entirety at any stage before approaching the courts.

It is perhaps easy to assume that by adopting multiple approaches as opposed to simply taking a matter to court, the costs of going through the other mechanisms spectrum will be comparatively higher. It is important to note that it is not the aim nor the intention of the parties to go through the whole spectrum in order to meet the ends of justice. The intended purpose of adopting the spectrum approach is to expose the parties to the different approaches available to them.

It is entirely possible that simple dispute can drag on for years in court. It is also entirely possible a complex dispute can be resolved at the negotiation stage and where there are unresolved issues, they can easily be dispensed with through mediation for example, the costs of which will be comparatively lower than prolonged litigation in courts.

POPULAR ADR METHODS IN KENYA

Negotiation

Unbeknown to many, we do this every day. We interact with each other from time to time with opposing positions on a matter in a bid to come to an mutual understanding. This is the very definition of negotiation.

Within the context of a dispute, negotiation is severely underrated with respect to its effectiveness as a dispute resolution mechanism. Aggrieved parties are usually quick to report to a third party not realizing that a simple conversation between the aggrieved parties may just be the action that saves both potential time and resources that would have been lost in resolving the dispute through other assisted mechanisms.

Time and resources during this period are even more constrained within the court system. Parties must now aim to view the larger picture in light of these limitations and asses the most efficient way to go about their dispute and the best place to start is through negotiation.

Mediation

Mediation as a mode of ADR, if conducted properly, is one of the most efficient avenues of dispute resolution. A matter that would have spanned for years can be concluded in a matter of days. It is entirely party-driven with the assistance of a neutral party. The neutral party can only guide the process and not dictate the course of it.

In Kenya, it is now a common misconception that mediation is part of the court process. This can be owed to the great success of Court Annexed Mediation programme steered by the Kenya Judiciary. Court Annexed Mediation as the term denotes is the incorporation (annexation) of Mediation into the court system. Mediation can in fact be conducted outside the Court system.

Arbitration

Arbitration is a highly regulated mode of ADR. Both law and corresponding rules guide the process. However, it is still party driven as is the case for most mechanisms of ADR identified in this paper. Parties get to select the neutral party referred to as the arbitrator as well as the option of rules that will guide the process.

The arbitrator will hear the parties' positions and will thereafter render its decision on the form of an award which is binding. Unlike mediation, the arbitrator does not just guide the parties through the process but also dictates the outcome after an independent assessment of the parties' positions as presented. Disputes arising under Kenyan law will be governed by the Arbitration Act, 1995.

It is the case that many arbitrations are still proceeding within this period. This is because the number of cases per arbitrator are comparatively lower and thus easier to handle through online means compared to the court system. Additionally, parties are in control with respect to the decision making on how their matters can proceed even in the current circumstances.

OTHER ADR MECHANISMS

Traditional Dispute Resolution Mechanisms (TDRMs)

This simply refer to mechanisms that have always existed amongst communities for the management of conflicts that incorporate the modern methods as we know them today such as mediation and negotiation with the traditional context.

Conciliation

This is similar to mediation. The difference between mediation and conciliation is that the conciliator, unlike the mediator who is supposed to be neutral, may or may not be totally neutral to the interests of the parties. A conciliator mainly clarify perceptions, and pointing out misconceptions as the parties deliberate on the dispute at hand.

Adjudication

Particular to the construction industry, adjudication can be defined as as a dispute settlement mechanism where an impartial, third-party neutral person known as an adjudicator makes a fair, rapid and inexpensive decision on a given dispute arising under a construction contract.

Early Neutral Evaluation

Early Neutral Evaluation involves an informal presentation by the parties to a neutral with respected credentials for an oral or written evaluation of the parties' positions. The evaluation may be binding or non-binding.

Expert Determination

This is where the parties submit their dispute to an expert in the field of dispute for determination and makes a decision based on his expertise in the area. It is applicable where there are disputes of a technical nature where the expert can apply a fast, informal and cost efficient technique.

Hybrid Methods

Hybrid ADR is any creative adaptation and/or combination of ADR techniques for dispute resolution. An example of such includes Mediation-Arbitration (Med-Arb), a combination of mediation and arbitration. This is where a neutral third party initially mediates a dispute until the parties reach an impasse. Thereafter a neutral third party issues a binding or non-binding arbitration decision on any unresolved issues. Court Annexed Mediation can also be considered as a Hybrid approach

CONCLUSION

The dispute resolution spectrum should be considered in all dispute resolution arrangements. It is already the case that many contractual agreements incorporate a number if not most of these mechanisms in the spectrum. However in reality, enforcement of the same will not be adequately effected as a result of a lack of a substantial understanding of the provisions owing to culture of blatantly adopting contract templates without an indepth understanding of the dispute resolution clauses.

It is the intended goal of the adoption of this multifaceted approach to dispute resolution that a substantial number of disputes will be resolved outside the courts lessening their already overwhelming burden during this time and in the foreseeable future even after the resumption of normal operations. However, this cannot be achieved if these alternative methods are not considered and attempted in the first place. In a nutshell, you miss 100% of the shots you don't take.