Alternative Dispute Resolution

Chapter One

General Overview of ADR

I. Meaning

Alternative Dispute Resolution /ADR/

The word Alternative refers to:

- all permitted dispute resolution mechanisms other than litigation;
- It implies the existence of dispute settlement mechanisms other than formal litigation;
- ADR is *not an alternative to the court system* but only meant to supplement the same aiming on less lawyering.

Cont..

- Litigation Vs Surgery
- 1970 negative effect of litigation became a concern in the US
- Mandatory ADR emerged (Mandatory Mediation and Arbitration)
- Mandatory *ADR* Vs. *Rule of Law* and *Access To Justice* was an issue.
- Litigation default process, why?

Definition

- Alternative dispute resolution, or ADR, is *a process* in which *a neutral third party*—a *mediator or arbitrator*—helps parties who are embroiled in a dispute come to an *agreement*.
- involve non-violent dispute resolution outside of the *traditional court system.*
- The field of conflict resolution has broadened recently to include efforts in *schools, work places and communities to reduce violence* and help young people develop communication and problem solving skills.

- Settlement outside judicial process
- NMCA/MT/Adj

A-D-R
Alternative

- *Alternative Vs. Amicable*
- Alternative to what?
- *Litigation Vs Court*

Americans: Alternative to Court: Here ADR includes arbitration

-Europeans: Alternative to Litigation: Here ADR excludes Arbitration

-In Ethiopian legal vocabulary arbitration is translated in three distinct

words: "የግልግል ዳኝነት"፣ "ሽምግልና" and "የዘመድ ዳኛ" terms which

Are not interchangeable

A-D-R
Dispute

- What is dispute?
- *Dispute Vs. Conflict,* Any Difference?
- Conflict/dispute Personalities?
- Types of disputes
- Conflict handling styles
- Human existence – struggle – dispute – resolution

Dispute is:-

- *an assertion of right, claim or demand on one side met by the contrary claims or allegations on the other;*
- *the subject of litigation;*
- *the matter for which a suit is brought and which issue enjoined; and in relation to which jurors are called and witness examined"*

Cont..

- ***Dispute Vs. Conflict*, Any Difference?**
- According to John Burton (1990),
- **a dispute** is a *short-term* disagreement that can result in the disputants reaching some sort of resolution; it involves issues that are ***negotiable***.
- **Conflict**, in contrast, is ***long-term*** with deeply rooted issues that are seen as "**non-negotiable**"
- Substitutable for the purpose of this course.

Cont..

Conflict:

- A state of opposition or hostilities
- A fight or struggle
- The clashing of opposed principles
- The opposition of incompatible wishes or needs in a person.

Dispute:

- A debate, argument or quarrel
- To question the truth, correctness, or validity of a statement or alleged fact
- To strive to win
- A disagreement between management and employees.

cont…

- *Conflict/dispute Personalities?*

1. The Turtle (avoidance)- they do all they can to avoid the conflict

2. The Shark (competitive)- they fight to win the conflict

3. The Teddy Bear (accommodating)- they value relationships more than their personal goals

4. The Fox (compromising)- they seek to find middle-of-the-road approach

5. The Owl (collaborating)- they try to find a solution that makes everyone

Cont…

- It is helpful for a mediator to understand, acknowledge and recognize the different types of conflict personalities, as this will help communicating with them, and to understand how to work effectively with the different personality traits.

- *Types of Dispute*
- *Interest Vs. Right*
- *Interpersonal Vs. Intrapersonal*
- *Intrapersonal – role conflict or role ambiguity*
- *Interpersonal – between two persons (Competition, personality, Value)*
- *Focus on the idea not on personal differences*
- *Intergroup Vs. Intragroup*
- *(workplace conflict)*
- *Resource limitation among two departments*

- *Is conflict/dispute always bad?*
- Accepting that conflict is inevitable, we need to question our perception of conflict as only being negative.
- Paradoxically, conflicts can offer positive benefits:
- it gives parties opportunities to be creative, to learn, to consider different ideas and viewpoints
- people in conflict can learn to participate in healthy dialogue and beneficial competition

2A3C

- *Conflict handling styles*
- Avoidance
- Denial of the existing conflict
- Less competitive and no cooperation
- Accommodation
- Just accepting others opinion without questioning it.
- Cooperative but not assertive “let’s do it your way”

Cont….

- Compromise
- Middle ground express their own interest and listen to others view
- Both persons are willing to sucrefy something
- Competition

Reach your goal without considering others opinion

Poor relationship and weak teamwork.

Outcome in my way only.

- Collaboration

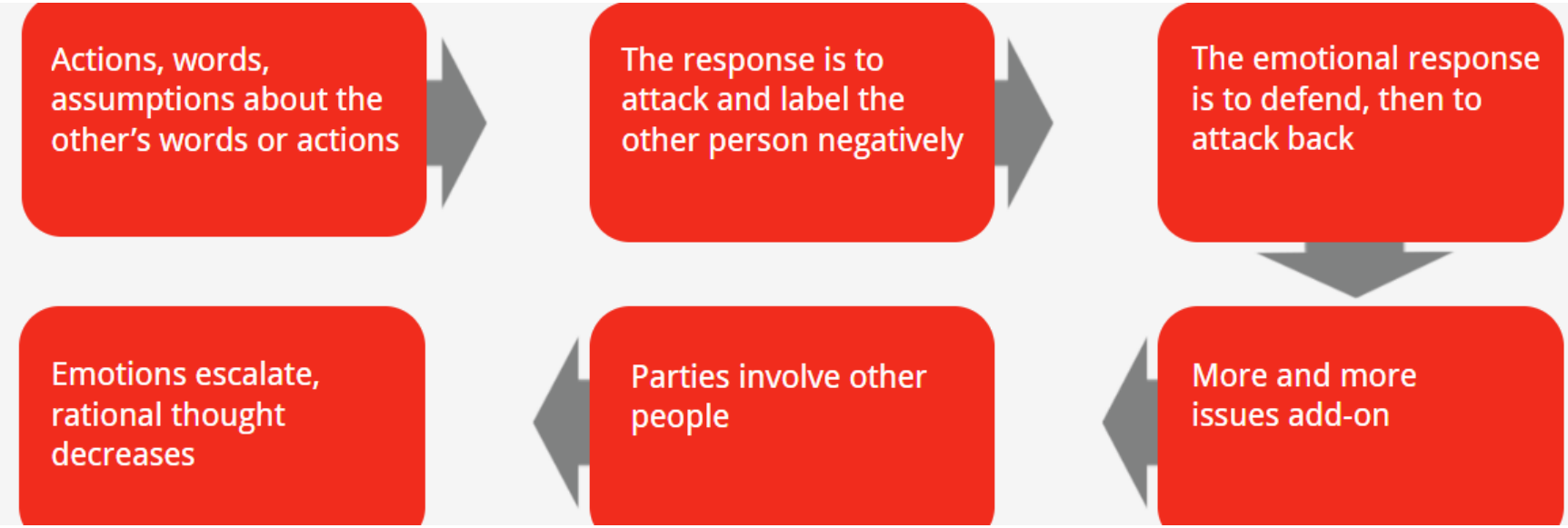
Highest assertiveness and cooperation

Both parties or all parties argue for their position supplemented by fact and listen and consider the idea of the other party.

Challenge points of disagreement not personal

✓ *Best? Depend on the situation.*

The Conflict Spiral: usually it follows a particular pattern



BEING IGNORED	If you believe you are not being listened to; not respected; not included in some way (e.g. in a group, shared activity, a family event). If the other person does not seem to be taking account of your needs and only acting in their own self-interest.
COMPETENCE	When you believe that someone is questioning your abilities or skills and finding them lacking in some way
WORTHINESS	When you feel your worth as an individual is being questioned or denigrated. You are judged as being unworthy or deficient in some way, whether that be as a spouse, partner, child, parent, friend, etc.
AUTONOMY	If someone appears to be trying to control you, keeping you from something you need, or threatening your independence or safety.

Resolution may be understood as:-

- the act of resolving or ***settling*** a problem, dispute, controversy etc.

❖ In short; ADR can be defined as methods to resolve legal problems out of court.

II. Purpose of ADR

- What are the advantages of ADR?
- The recourse to legal actors/court litigation/ and proceedings is ***costly*** , ***emotionally devastating***, and potentially ***counterproductive;***
- The problem is not of a load alone. The deficiency lies in the ***adversarial nature*** of judicial process which is ***time consuming*** and more often ***procedure oriented***.
- There is growing awareness that in the bulk of cases court action is not appropriate recourse for seeking justice.

- In Judicial process each party’s case is presented before the judge by the advocators, who are expert in court craft, in straight jacket of rules of procedure and substantive law. The Judge perceived the dispute (or the issue involved) in the backdrop of known legal concepts , sifts evidence to arrive at the truth, hears arguments to determine as to how logically the parties stand in terms of applicable legal concepts and pronounce his verdict accordingly. The parties are bound by the verdict, at the peril of legal sanctions, if disobeyed. Represented by lawyers (especially in developed countries) the parties are kept at a distance not only from the judge but also) from each other. The end result is a win–lose litigation

Purposes of ADR

1) **Reduction of Cost and Time /saves time & other resources**
2) **Improve or Maintain the Relationship**
3) **Satisfactory Outcome**
4) **Deal with Emotion**
5) **Avoid Future Disputes**

Demerits (Shortcomings) of Litigation

1) Cost of Litigation
2) Time
3) Emotional Cost
4) Litigation is Public
5) Absence of creative solutions
6) Little Opportunity for the Parties to voice Frustration
7) Unpredictability
8) Expertise of Decision Maker
9) Control over the Process
10) Win/Lose
11) Decisions are Imposed
12) Damage to Relation

Demerits of ADR

1) In balance of power
2) Lack of legal expertise
3) No system of precedent
4) Enforcement

TYPES OF ADR AND THEIR PROCEEDING WITH SPECIAL EMPHASIS ON COMMON ADR MECHANISMS:

- The types of Alternative Dispute Resolution can be categorized in to three categories based on the **procedures** we follow in each dispute resolution mechanisms. These categories are formed by considering the kind of work product resulting from ADR and how the parties participate. The categories of ADR procedures are ***agreement***, **decision** and ***advice***.

- **Procedure of agreement-** negotiation, mediation, facilitation and mini-trials are all procedures of ***agreement***. The work product or result from these procedures is ***based on the agreement of those who take part.*** If there is no agreement, there is no outcome.
- Participants in ADR process of agreement are ***actively involved*** in working together to create an outcome that is superior to any outcome that they could individually create. Specific procedures of agreement includes; negotiation, mediation, facilitation, partnering and mini-trial.

- **Procedure of decision –**Arbitration is dominant procedure of decision. The work product or result from this procedure is based on the decision of an ***outsider*** about how the dispute is to be resolved.
- The ***outsider's job*** is specifically to render that decision. Participants in this process may be collaboratively involved to design the process or to ensure its efficiency. However, when it comes to taking in the ultimate decision process, the participants' roles are not collaborative but ***competitive*** and limited to putting forward facts and argument.

- **Procedure of Advice** –neutral case evaluation or early neutral evaluation , non-binding arbitration , fact finding or investigation , and expert opinion are all procedures of advice; the work product or result from these procedures is intended to inform or advice the participants .

Negotiation

Meaning

- Negotiation can be defined as: a non-binding procedure involving direct interaction of the disputing parties where in a party approaches the other with the offer of a negotiated settlement based on an objective assessment of each others position.

Legal effects of negotiation agreement.

- Settlement agreement has legal effect provided that parties respect what the law prescribed as ***requirements***. The law not only imposes limits that shape both the ***procedure*** and ***substance*** of negotiation, but also its ***effects*** among the negotiating parties.
- In some situations the law prohibits negotiated settlement**.** The most obvious example is where the agreement requires one or more parties to engage in ***unlawful*** conduct such as a non complete agreement or other agreement which might constitute a restraint of trade.
- Settlement agreement is, therefore, considered as ***contracts*** between negotiating parties;
- Terms of agreement lawfully concluded by the negotiating parties shall be binding on them as though they were law

Mediation /Conciliation

- Mediation can be defined as the processes by which the participants, together with the assistance of neutral person or persons, systematically isolate disputed issues in order to develop optional alternatives and reach a consensual settlement that will accommodate their needs.
- Mediation/conciliation is a process that emphasizes the participants' own responsibility for making decisions that affects their lives. It is therefore a self-empowering process. Thus , it is purely different from negotiation so long as there exist a third party involvement.

- Mediation / conciliation is negotiation by nature, the only difference being the appointment of one or more neutral third parties to the conduct of the negotiation.
- In mediation proceeding there are different processes in which the mediator performs different activities starting from setting the table for parties discussion to proposing alternative solutions for parties agreement.

Features of Mediation /Conciliation

- Mediation, differ from arbitration where the outsider decides for the parties (their behalf) how the matter is to be resolved. Although a mediator may recommend or try to influence a party, he or she has no comparable decision making powers and practical or legal ability to compel any party to do or refrain from doing any thing. This is to mean that mediation is not binding.

- Mediation could be annexed to the court system, so as to become a judgment of the court if the agreement is reached.
- The parties may define the issues to be settled by themselves or the mediator may assist them in this regard. The extent to which the mediator interferes in the negotiation process can vary widely , on a continuum ranging from mere as chairperson , to very structured process in which the mediator go so far as to suggest settlements to the parties.

Perceived advantages of mediation

- When used in the contested of on going relation ships, mediation allows underlying issues and emotion to be addressed and resolved , and so ***allows the relation ship to be continued in the future*** . Thus, mediation is commonly used in the area of family law.
- As the decision is reached by the parties to the dispute instead of being imposed on them, there is a great satisfaction with the dispute resolution process and out come, and consequently, greater ***compliance with the result.***
- The process is less confrontational than adjudication and so ***reduces the likely hood of win or loss mentality*** and provides a frame work for the future dispute between the parties.
- As opposed to adjudication, mediation process is faster, cheaper and less formalized, both in terms of process and in tailoring results. This increased ***flexibility*** allows the needs of particular parties to be addressed.

Perceived disadvantages of mediation

As of the perceived advantages, there are also short comings of mediation:

- it is inappropriate where parties to a dispute are at an imbalance of power, or where there is a history of physical violence**,** as one intimidate the other**;**
- it also increase cost if mediation fails and arbitration follows;
- unrepresented party by a lawyer may be disadvantaged than the presented one. It is also questionable whether the perceived advantages of mediation are possible if the process is ***involuntary***.
- There are concerns regarding the ability and qualification of mediators, and whether they should be subject to professional standards.
- Finally, the use of mediator as alternative to court adjudication may result in second class justice for low – income and disadvantaged peoples.

- Both in negotiation and mediation if parties reached in terms of agreement to settle their difference, their agreement would bind them and has legal effect based on law of contract.