

# The Range of Dispute Resolution Processes

ADR refers to a range of processes which have two primary objectives:

- (a) Dispute Avoidance or Prevention
- (b) Dispute Resolution

## (a) DISPUTE AVOIDANCE/PREVENTION

Preventive dispute resolution mechanisms recognize that conflict is inevitable and involve the parties in establishing at the outset how any disagreement or conflict will be handled. The goal of these mechanisms is to channel disagreements into a problem-solving arena early enough to avoid escalation into full-blown disputes. Preventive ADR mechanisms include:

- (i) ADR Clauses
- (ii) Partnering
- (iii) Negotiated Rule Making
- (iv) Dispute Resolution Systems Design
- (v) Conflict Resolution Training

### (i) ADR Clauses

- \* The most basic way to provide dispute resolution mechanisms before disputes emerge is to insert clauses into contracts which contain specific provisions for dealing with possible future disputes.
- \* An ADR clause may provide for how the parties will give each other notice of a dispute; which mechanism(s) they will use to try to resolve their dispute (contracts may provide for multi-step dispute mechanisms, for example, the parties may negotiate for a certain period of time, then mediate, and then submit any unresolved issues to arbitration); how they will select the appropriate intervenor; how they will deal with internal versus external disputes; who will pay the expenses related to resolving the dispute; location; which law will govern if the dispute involves more than one jurisdiction, etc.

### (ii) Partnering

- \* This dispute avoidance and resolution process was developed by the U.S. Corps of Engineers to deal with construction disputes.
- \* “Partnering” recognizes that construction is a team project and encourages team building before the project begins.

- \* A neutral facilitates team building sessions with several goals in mind: establishing relationships and developing trust between the various players (architect, general contractor, subcontractors, material suppliers etc.); and producing a charter which commits each signatory to completing the job on time and on (or under) budget and which contains a dispute resolution framework with time frames.
- \* If the parties cannot negotiate an agreement between themselves, a “project mediator,” who is usually named in the charter, is asked to convene a mediation.

### (iii) Negotiated Rule-making

- \* A broad concept encompassing all processes (facilitation, negotiation, mediation...) in which a rule-maker, usually a government department, incorporates input from all those with an interest in a proposed rule or regulation into the substance of the rule.
- \* The term may be extended beyond the government context to any negotiation focusing on the structuring of future relations between the parties.

### (iv) Dispute Resolution Systems Design

- \* A diagnostic intervention into an organization or system to identify the nature of disputes, and to analyze underlying conflict so that dispute resolution mechanisms can be designed or improved to ensure that future disputes are settled effectively and efficiently.
- \* Systems design typically involves four stages:
  - (1) **Diagnose** the nature of disputes and the underlying conflict;
  - (2) **Design** processes to be used in resolving disputes by focusing on whether, when, and how to incorporate dispute resolution processes into the conflict management system (this is done with the participation of all affected stakeholders);
  - (3) **Implement** the new system through education about the program and training in the skills necessary to use it successfully, by allocating the necessary resources to permit the operation of the program, and by modifying it based on ongoing feedback from the individuals affected; and
  - (4) **Evaluate** the program using such criteria as efficiency (cost and time); effectiveness (nature of outcomes, durability of resolutions, impact on environment); satisfaction (of users with process and outcome); functional organization (co-ordination and sufficiency of resources to implement program; guidelines, procedures, standards...); service delivery (access to system, selection of cases); and program quality (training and education, selection and competence of neutrals).<sup>1</sup>

### (v) Conflict Resolution Training

---

<sup>1</sup> Costantino, Cathy A. and Christina Sickles Merchant. Designing Conflict Management Systems (San Francisco : Jossey-Bass Inc., 1996).

- \* Organizations are increasingly training their staff in conflict management techniques with a view to improving both internal relationships and relationships with consumers, and reducing the time and costs of resolving conflict.
- \* Training is typically reflective and skills based: increasing awareness of the nature and sources of conflict; individual and institutional responses to conflict; potential choices in conflict management; improving communication skills; developing negotiation techniques; and learning mediation practices.

**(b) DISPUTE RESOLUTION**

Dispute resolution processes should be thought of as a complement to litigation, rather than as an alternative to it. Dispute resolution options can be viewed as falling along a continuum ranging from the least invasive where the parties retain the most control over the process and outcome (such as negotiation and mediation) to the most invasive where the parties have little control over the process and outcome (such as arbitration).

These processes include:

- (i) Fact-finding
- (ii) Negotiation
- (iii) Facilitation
- (iv) Conciliation
- (v) Mediation
- (vi) Med-arb
- (vii) Arb-med
- (viii) Early Neutral Evaluation
- (ix) Mini-trial
- (x) Summary Jury Trial
- (xi) Arbitration

**(i) Fact-finding**

- \* A process in which a designated person determines facts relevant to a dispute.
- \* The fact-finder may be selected by the parties or provided by a public body and may be an expert or a neutral third person.
- \* Prior to the fact-finding, the parties decide whether the results are to be treated as conclusive or advisory.

- \* Fact-finding is often used to gather information and to address scientific or technical issues.
- \* Fact-finding may be used in conjunction with other dispute resolution processes such as negotiation, mediation, or arbitration.

## **(ii) Negotiation**

- \* A process in which parties communicate directly or indirectly (through representatives) for the purpose of reaching an agreement.
- \* Negotiation may be based on legal rights and/or interests (underlying values, concerns, needs, desires and fears).
- \* Approaches to negotiation include competitive (win-lose) and principled (win-win) negotiation.

## **(iii) Facilitation**

- \* A non-binding process in which a neutral third person, the facilitator, manages the discussion between parties (usually a group) to assist them in problem-solving and decision-making.
- \* The facilitator's main task is typically to help a group to increase its effectiveness by improving its process (i.e., how members talk to each other, how they identify and solve problems, how they make decisions, and how they handle conflict).
- \* The facilitator has no decision-making authority.
- \* Types of facilitation include: **basic facilitation** in which a facilitator helps a group temporarily improve its process long enough to solve a specific, substantive problem; and **developmental facilitation** in which a facilitator helps a group to learn how to continually improve its process so that it can generally solve problems more effectively.

## **(iv) Conciliation**

- \* An informal process in which a third party is positioned between the parties to create a channel for communication by conveying messages between the parties (also called "shuttle diplomacy").
- \* The goal of conciliation often includes identifying common ground with a view to re-establishing direct communications between the parties.
- \* This term is often interchanged with mediation, however, a conciliator generally takes a more passive role than a mediator.
- \* The conciliator may prepare a report describing the scope of the agreement and disagreement.

**(v) Mediation**

- \* An assisted negotiation in which an impartial person, the mediator, assists disputing parties to try to reach a voluntary, mutually acceptable resolution of some or all of the issues in dispute.
- \* Participation may be voluntary (by private agreement) or mandatory (under a contract or through a public program like court-connected mediation).
- \* The process may involve counsel but direct communication between the parties is often encouraged.
- \* Settlement discussions are generally confidential and without prejudice.
- \* The mediator has no power to impose a decision or make findings of liability or responsibility-- settlements are crafted by the parties and are reached in a consensual manner.
- \* Models of mediation include **rights-based or evaluative mediation** wherein the mediator evaluates the claims or rights of the parties having regard to the applicable legal rules, and **interest-based or facilitative mediation** wherein the mediator's task is to assist the parties to resolve their “joint problem” through facilitating communication and creative problem-solving.
- \* Settlements may be incorporated into a binding agreement between the parties.

**(vi) Med-arb (Mediation-arbitration)**

- \* This process commences as a mediation of a dispute by a neutral third party.
- \* If the dispute is not resolved through mediation, the third party assumes the role of arbitrator and imposes a (typically binding) decision upon the parties.
- \* To avoid potential bias, a different person may be selected as arbitrator-- one who has not been privy to confidential and “without prejudice” communications made during mediation.

**(vii) Arb-med (Arbitration-mediation)**

- \* This process commences as an arbitration in which a mutually acceptable third party conducts a hearing and renders a decision.
- \* The decision is placed in a sealed envelope and the parties try to settle their differences through mediation.
- \* If the parties fail to reach an agreement through mediation, the sealed envelope is opened and the parties are bound by the decision of the arbitrator.

**(viii) Early Neutral Evaluation**

\* A non-binding process in which the parties present the factual and legal bases of their cases to a neutral third party who provides an objective assessment which is used to stimulate settlement.

\* The neutral is often a judge, lawyer, or person with substantive expertise.

**(ix) Mini-trial**

\* A non-binding, informal process (usually no witnesses with a relaxation of the rules of evidence and procedure) held either privately or by a court.

\* A judge or neutral advisor presides over or moderates the one to two day hearing.

\* After the hearing, the parties try to negotiate settlement, usually with the help of the neutral advisor who may mediate the settlement discussions, offer opinions on the strengths and weaknesses of each side's case, and make suggestions for settlement.

\* This is a hybrid process which combines negotiation, mediation, and non-binding arbitration.

\* If a settlement is not reached, the parties proceed to a conventional trial.

\* This process is commonly used in long and complex commercial disputes.

**(x) Summary Jury Trial**

\* This process is similar to a mini-trial, except that it involves each side presenting their cases to a jury and using the jury's decision as a basis for settlement discussions, which are usually facilitated by the judge that presided over the summary jury trial.

**(xi) Arbitration**

\* An adjudicative process in which a mutually acceptable third party, the arbitrator, is empowered to render a decision on the merits of the case, after an informal hearing which typically includes the presentation of evidence and oral argument.

\* Arbitral decisions are generally binding and subject to limited judicial review.

\* Arbitration may be voluntary (by private agreement) or mandatory (pursuant to terms of a contract or provisions in a statute).

\* Arbitrators are often selected for their specialized knowledge in the substantive area of the dispute.

\* This process is used extensively in labour and commercial disputes.