

WHY MEDIATION IS IMPORTANT

Introduction

Mediation is a form of dispute resolution that provides an alternative to the conventional adversarial court system of determining disputes. It is the process by which a neutral third party facilitates communication and negotiation between disputing parties to aid them reach a mutually agreed resolution of the dispute among them.¹ This form of alternative dispute resolution (ADR) is most commonly preferred to other forms of ADR and litigation due to its special features such as informality, voluntariness, confidentiality and non-binding nature.²

In Uganda, the High Court Commercial Division was the first to formally embrace mediation as an ADR mechanism under the Judicature (Commercial Court Division) (Mediation) Rules 2007. Later, the Judicature (Mediation) Rules of 2013 introduced mediation as a compulsory component in all Courts of Judicature. However currently, mediation is no longer compulsory in the Courts of Judicature unless directed by Court when issuing directions to disputing parties. Nonetheless mediation is still widely used in resolution of disputes especially by Local Councils, Legal Aid Clinics and in litigation when directed by Court. Therefore, mediation can be used to settle disputes both at the community level as well as the Court level.

The following segment of this article highlights the advantages of mediation over the formal adversarial court system. Further, the benefit of mediation to legal practitioners is also examined. In sum, it gives an overview as to why parties should choose to mediate their disputes.

Advantages of Mediation

Mediation is a faster and cheaper method of resolving disputes as compared to litigation. Court annexed mediation ought to take place within a period of sixty days, unless the parties agree to have this timeline extended for not less than ten days.³ In contrast, as observed by Justice Wangutusi in *Sudhir Ruparelia & Anor vs. Crane Bank Limited*,⁴ hearing of an ordinary suit without mediation can start six to nine months from the time of its institution. This indicates the prolonged nature of litigation as parties do not have clear timelines regarding when hearing may

¹ Judicature (Mediation) Rules, 2013, SI 10 of 2013, Rule 3.

² Kenneth R. Feinberg, “*Mediation - A Preferred Method of Dispute Resolution*”, (1989) 5 Pepp. L. Rev. 16, p.6.

³ Judicature (Mediation) Rules, 2013, SI 10 of 2013, Rule 8.

⁴ [2019] UGCOMM 21.

commence or be concluded. The protracted litigation comes along with extra costs such as escalating legal fees and transportation of witnesses among others. Therefore, parties who opt for mediation opt for a quick and less costly form of resolving their dispute.

Under mediation, the disputing parties have control over the process and they actively engage in the resolution of their dispute. The neutral third party (a mediator) merely facilitates communication between the parties but does not decide for them.⁵ Mediation being a voluntary process, the parties have the opportunity to mutually agree to tailor-made solutions that speak to their needs – unlike litigation where court has to decide for the parties.⁶ Therefore, parties can have a say in how their matter is resolved when they opt for mediation.

Another benefit of mediation is that it offers the parties involved confidentiality as between themselves and the mediator. Unlike court procedure which is public, information obtained in mediations is confidential and is never disclosed unless required by law, or if the parties in writing consent for the mediator to disclose that information.⁷ Further, none of the parties to the disputes can summon the mediator as their witness in the event that mediation fails. Confidentiality makes mediation an appropriate method of dispute resolution for cases with sensitive information such as some family matters. Similarly, the confidentiality offered in mediation can protect the reputation of institutions and corporations if they opt to undertake mediation in case of likely damaging allegations/disputes. Mediation is confidential whether or not the process results into a settlement.

Further, mediation preserves business and social relationships. This is because parties to a dispute can continue with their business relationships after resolving disputes.⁸ As explained above, under mediation parties negotiate and mutually come to an agreed resolution thereby creating a win-win situation for all those involved in the dispute. This is an advantage over litigation where Court has to decide who the winner and the loser are. Further litigation comes with the tension of parties disclosing their dirty linen in public thereby leaving little or no room for reconciliation. As such, mediation does away with the stress and friction that comes with

⁵ Judicature (Mediation) Rules 2013, Rule 3.

⁶ Hrishikesh Jaiswal and Pragati Mandloi, “*Mediation as a Form of Alternate Dispute Resolution and its Advantages*”, [2020] 1 White & Black Legal 16, p.10.

⁷ Judicature (Mediation) Rules 2013, Rule 18(1).

⁸ Oksana Melenko, “*Mediation as an Alternative Form of Dispute Resolution: Comparative-Legal Analysis*”, [2020] 2 European Journal of Law & Public Administration 46.

litigation. Under the mediation process, the mediator facilitates communication between estranged parties and helps them discover areas of common interest for smooth resolution of issues. Therefore, it is easier for such parties to reconcile and resume their business or social relationships upon resolution of the dispute.

Mediation is also a suitable dispute resolution mechanism for parties who find the formal Court system intimidating. Mediation is an informal process which does not require the parties to take the stand and testify. It is more of a conversational procedure where the mediator ensures that all parties are comfortable – in fact, sometimes the mediator undertakes caucusing in order to unearth underlying issues that the parties may not be comfortable saying in the presence of one another.

Additionally, parties who pursue mediation have the option of reaching several outcomes.⁹ For instance, they can reach a full settlement of the dispute or a partial settlement whereby they refer part of the dispute back to Court for determination. Where the parties reach a settlement, the ultimate outcome is a consent judgment which is binding upon the parties. This judgement, unlike the one obtained from litigation, is not subject to appeal unless there are exceptional circumstances such as fraud, duress, coercion or mental incapacity.¹⁰ Where the parties do not reach a settlement, the mediator refers the matter back to court for determination.

Why lawyers should encourage parties to mediate

Mediation can also benefit legal practitioners just like it does the parties to disputes. Since mediation is time saving, lawyers who encourage their clients to mediate can have their matters disposed of to the satisfaction of their clients within a short time. Therefore, this makes the lawyer efficient.

Further, the fast rate of conclusion of cases under mediation by lawyers can ensure that the lawyer has a fast and regular income from the cases handled. This is because cases under litigation are often given long adjournments and can take long to be concluded for the lawyer to realize their legal fees.

⁹ Justice Geoffrey Kiryabwire, “*The Role of Advocates in Mediation*”, 21st October 2018.

<<https://geoffreykiryabwire.com/download/the-role-of-the-advocate-in-mediation/>>, accessed 25th May 2023.

¹⁰ Ibid.

Conclusion

Parties who opt to resolve their disputes under mediation benefit from the numerous advantages of mediation. These include the fact that mediation is time saving and cost effective, gives parties control over how to resolve their dispute, guarantees confidentiality, preserves business as well as social relationships, is informal and less intimidating, and results into binding consent judgements which can only be appealed under exceptional circumstances. Lawyers who embrace mediation also embrace efficiency, and this in turn guarantees them fast and regular income as opposed to some protracted litigation cases which are prone to long adjournments.

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