“Application of Alternative Dispute Resolution Mechanisms in the Hospitality Industry.”

Presentation notes by
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What is ADR?

• Alternative Dispute Resolution typically denotes a wide range of dispute resolution processes and techniques that act as a means for disagreeing parties to come to an agreement short of litigation: a collective term for the ways that parties can settle disputes, with the help of a third party.
Basis of ADR in Kenya

• According to Article 159 of the Constitution of Kenya, in exercising judicial authority, the courts and tribunals shall be guided by among other principles—
  – “(c) alternative forms of dispute resolution including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms shall be promoted, subject to clause (3);”
ADR to promote Justice

• The ends of justice must be met in promoting alternative forms of dispute resolution, to ensure that justice must:
  – not be delayed;
  – apply equally to all persons regardless of status;
  – be administered without due regard for procedural technicalities; and
  – promote and protect the purpose and principles of the Constitution.
What is a trade dispute?

Sec 2 of the Labour Relations Act:
A “trade dispute” means a dispute or difference, or an apprehended dispute or difference, between employers and trade unions, or employers organization and employees concerning any employment matter and includes disputes regarding dismissal, suspension or redundancy of employees allocation of work or recognition of trade union.
Forms of ADR

- Arbitration.
- Mediation.
- Conciliation.
- Traditional Methods of Dispute Settlement.
- Early Neutral Evaluation.
- Pre-Trial Direction and Conference.
Arbitration


• Kenya is a signatory to the East African Community Treaty which provides for arbitration as one of the available means of settling disputes under Article 32.
Arbitration agreements

• An arbitration agreement must meet the requirements set out in Section 4 of the Arbitration Act to be valid.
  – It must be in writing and may form a separate agreement or be included as a clause within a contract.
  – It may be incorporated by reference to another document, may be contained in an exchange of letters, telex, telegram, facsimile, email or other means of telecommunications.
Judicial support and enforcement

• The judiciary fully supports the arbitration process and recognizes the sanctity of the process and the contractual terms in addressing parties’ selection of the forum and the governing law.

• Awards are filed under a miscellaneous application for enforcement by the Commercial Division of the High Court.
Powers, obligations, liability, etc

• What powers and obligations do arbitrators have?
  – In addition to the powers granted under Sections 18, 20, 26, 27 and 28 of the Act, parties are free to grant the tribunal any additional powers provided that these do not conflict with the Act.
  – Section 16B of the act grants an arbitrator immunity from liability for all acts carried out in good faith in the discharge or purported discharge of his or her duties as an arbitrator.
Mediation

• Mediation, as used in law, is a form of (ADR), a way of resolving disputes between two or more parties with concrete effects.

• Mediation is a dynamic, structured, interactive process where a neutral third party assists disputing parties in resolving conflict through the use of specialized communication and negotiation techniques.
Party Centered

• Mediation is a "party-centered" process in that it is focused primarily upon the needs, rights, and interests of the parties and all participants are encouraged to actively participate in the process.

• The mediator uses a wide variety of techniques to guide the process in a constructive direction and to help the parties find their optimal solution.
The Mediator

• A mediator is-
  – facilitative in that she/he manages the interaction between parties and facilitates open communication.
  – evaluative in that the mediator analyzes issues and relevant norms ("reality-testing"), while refraining from providing prescriptive advice to the parties (e.g., "You should do... .").
Techniques and Training

• Mediators use various techniques to open, or improve, dialogue and empathy between disputants, aiming to help the parties reach an agreement. Much depends on the mediator's skill and training.

• As the practice gains popularity, training programs, certifications and licensing have followed.
Conciliation/Reconciliation

• Conciliation is another (ADR) process whereby the parties to a dispute use a conciliator, who meets with the parties both separately and together in an attempt to resolve their differences.

• Conciliators lower tensions, improve communications, interpret issues, encourage parties to explore potential solutions and assists them to find a mutual outcome.
Conciliation -vs- Arbitration

• Conciliation differs from arbitration in that the conciliation process, in and of itself, has no legal standing, and the conciliator usually has no authority to seek evidence or call witnesses, usually writes no decision, and makes no award.
Conciliation -vs- Mediation

• Conciliation differs from mediation in that in conciliation, often the parties are in need of restoring or repairing a relationship, either personal or business.

• The conciliator can propose a solution to end the conflict while the mediator assists the parties throughout the mediation process to help them find a solution to their dispute by themselves.
Conciliation techniques

• A conciliator-
  – assists each of the parties to independently develop a list of all of their objectives;
  – assists each of the parties separately prioritize their own list from most to least important;
  – goes back and forth between the parties encouraging them to "give up" the objectives one at a time, starting with the least important and working toward the most important for each party.
Working on priorities

• The parties rarely place the same priorities on all objectives, and usually have some objectives that are not listed by the other party. Thus the conciliator can quickly build a string of successes and help the parties create an atmosphere of trust which the conciliator can continue to develop.

• Most successful conciliators are highly skilled negotiators.
Traditional mechanisms

• Traditional dispute resolution mechanisms not be used in a way that—
  – (a) contravenes the Bill of Rights;
  – (b) is repugnant to justice and morality or results in outcomes that are repugnant to justice or morality; or
  – (c) is inconsistent with this Constitution or any written law.

(Article 159 (3) of the Constitution).
Why ADR in the Hospitality Industry

- Parties autonomy.
- Flexibility.
- Time saving and Expeditious.
- Cost effective.
- Devoid of procedural technicalities.
- Favours resolutions as opposed to settlement.
Why ADR in the Hospitality Industry

• The hospitality industry is a sensitive industry that does not need the drama of disputes.
• Quick resolution of disputes avoids escalation of conflict leading to breakdown of relations. ADR preserves the parties’ relationships.
• ADR in most cases leads to “win/win” results.
• This promotes and becomes the bedrock of Social Dialogue much needed in the industry.
Conclusion

• ADR employs non-adversarial ways to adjudicate legal controversies.
• ADR methods are informal, cheaper and faster, in comparison to the traditional litigation process.
• Let us promote arbitration, conciliation, mediation and social dialogue in the hospitality industry as “Justice delayed is justice denied”.
Questions and Answers
Thank you and God bless you.

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