

Chapter Three

THE STRUCTURE AND JURISDICTION OF THE COURTS

This chapter considers the structure and jurisdiction of the criminal and civil courts as well as the nature of contemporary Alternative Dispute Resolution within the Ghanaian Legal System.

The criminal justice system comprises of various courts with criminal jurisdiction, the lowest in the hierarchy is the District Magistrate Court and the highest is the Supreme Court. In between these courts are the Court of Appeal, the Regional Tribunal and the Circuit Court.

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Articles 125 – 133 of the 1992 Constitution and the Courts Act, Act 459, as amended by Act 620 covers the respective composition and jurisdiction of the Supreme Court, the Court of Appeal, the High Court, the Circuit and District Court. This chapter also deals briefly with Alternative Dispute Resolution (ADR) mechanisms for settling civil disputes. Upon completion of this topic, you will master the various types of courts, their composition and jurisdiction and ADR as it relates to dispute resolution.

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1.0 INTRODUCTION

The Ghanaian court system comprises the following courts in a descending order of importance:

- The Supreme Court
- The Appeal Court
- The High Court (Fast Track Division; Commercial Division and; Land Division; Human Right, Labour Division and the Financial Crimes Division).
- The Circuit Court, and
- The District Court

There are, however, a number of administrative and quasi-judicial institutions such as the National Labour Commission (“NLC”), the National Media Commission (“NMC”), and Commission of Human Rights and Administrative justice (“CHRAJ”).

3.1 THE GHANAIAN JUDICIARY

The Constitution and the Courts Act provide for a Judiciary that is headed administratively by a Chief Justice, and a court system that is structured into two broad divisions, namely, the “Superior Courts of Judicature” on the one hand and the “inferior” or “Lower Courts and Tribunals” on the other.²

² The Chief Justice functions as the Administrative head of the Judiciary, with relatively wide supervisory powers. Thus Section 104 of the Courts Act, 1993 (Act 459) for example, reserves exclusively in the Chief Justice the power to transfer and thereby take away the jurisdiction of any judge, magistrate or tribunal to hear and determine any pending cause or matter to another competent judge, magistrate or tribunal be it a part-heard or a fresh matter, although, under section 104(1) of Act 459 the transfer order should be under the hand and seal of the Chief Justice. And although under section 104(2) of Act 459 the Chief Justice in a case of urgency could order a transfer by means of a telegraphic, telephonic or electronic communication, but section 104(3) of Act 459 required that unless such an order was confirmed immediately by a written order signed and sealed by the Chief Justice, it would have no effect. When a judge’s jurisdiction over any matter was taken away by the Chief Justice, the only manner by which the jurisdiction might be restored was by another formal transfer or retransfer under the hand and seal of the Chief Justice under section 104 of Act 459.

The Superior Courts, consisting of the Supreme Court, the Court of Appeal, the High Court and Regional Tribunals, are creatures of the Constitution,³ while the Lower Courts namely the Circuit Courts, District Magistrate Courts, Judicial Committee of the National House of Chiefs; the Judicial Committee of the Regional House of Chiefs and the Judicial Committees of the various Traditional Councils, are creatures of the Courts Act.⁴

In the exercise of their judicial functions, in both civil and criminal matters,⁵ all Courts are empowered to issue any orders and directions that are necessary to enforce their judgments, decrees or orders. Indeed to cement their judicial independence, Article 127(1) of the Constitution, provides expressly that, in the exercise of their judicial function, the Judiciary cannot be subject to the control or direction of any person or authority in Ghana.

3.2 THE SUPREME COURT

The Supreme Court established under the 1992 Constitution, is a Superior Court of Record and is the highest court of the land; and it has both criminal and civil jurisdictions.⁶ The Constitution empowers the Court to exercise jurisdiction in five main areas: General, Supervisory, Appellate, Review and Original jurisdiction. Historically, the first Supreme Court was created in the Gold Coast under the Supreme Court Ordinance of 1876. That court inherited the jurisdiction that the fused English High Court had under the Supreme Court of Judicature Act, 1873 thus our Supreme Court acquired jurisdiction in both common law and equity.⁷ The Supreme Court was

³ Article 126

⁴ Section 29 of Act 459

⁵ Civil matters relate to disputes between private individuals arising from a contract or tort etc. Criminal matters on the other hand are those matters that relate to crime or activities and which are punishable either by a fine or imprisonment or both a fine and imprisonment.

⁶ The Supreme Court is also Ghana's Constitutional court.

⁷ But not the review jurisdiction of the old Court of Chancery which had been transferred to the Court of Appeal established under the Judicature Act. 1873. And since the common law court had no review jurisdiction, the earlier Supreme Court could not be said to have inherited one under section 11 of the Ordinance.

presided over by the Chief Justice who sat with puisne judges appointed by the Governor.

3.2.1 COMPOSITION OF THE SUPREME COURT

The Supreme Court consists of the Chief Justice and not less than nine other Justices of the Supreme Court, but is duly constituted for its work by not less than five Supreme Court Justices. The Chief Justice presides at sittings of the Supreme Court and in his absence, the most senior of the Justices of the Supreme Court presides. No person qualifies for appointment as a Justice of the Supreme Court unless he/she is of high moral character and proven integrity and is of not less than fifteen years' standing as a lawyer.

3.2.2 JURISDICTION OF THE SUPREME COURT

General Jurisdiction

Article 129 of the Constitution, 1992 provides that:

- (1) The Supreme Court shall be the final court of appeal and shall have such appellate and other jurisdiction as may be conferred on it by this Constitution or by any other law.
- (2) The Supreme Court shall not be bound to follow the decisions of any other court.
- (3) The Supreme Court may, while treating its own previous decisions as normally binding, depart from a previous decision when it appears to it right to do so; and all other courts shall be bound to follow the decisions of the Supreme Court on questions of law.
- (4) For the purposes of hearing and determining a matter within its jurisdiction and the amendment, execution or the enforcement of a judgment or order made on any matter, and for the purposes of any other authority, expressly or by necessary implication given to the Supreme Court by this Constitution or any other law, the Supreme Court shall have all the powers, authority and jurisdiction vested in any court established by this Constitution or any other law.

Original Jurisdiction

Article 129 of the Constitution, 1992 provides that:

- (1) Subject to the jurisdiction of the High Court in the enforcement of the Fundamental Human Rights and Freedoms as provided in article 33 of this Constitution, the Supreme Court shall have exclusive original jurisdiction in
 - (a) all matters relating to the enforcement or interpretation of this Constitution;
 - (b) all matters arising as to whether an enactment was made in excess of the powers conferred on Parliament or any other authority or person by law or under this Constitution.
- (2) Where an issue that relates to a matter or question referred to in clause (1) of this article arises in any proceedings in a court other than the Supreme Court, that court shall stay the proceedings and refer the question of law involved to the Supreme Court for determination and the Court in which the question arose shall dispose of the case in accordance with the decision of the Supreme Court.

Appellate Jurisdiction

Article 129 of the Constitution, 1992 provides that:

- (1) An appeal shall lie from a judgment of the Court of Appeal to the Supreme Court,
 - (a) as of right in a civil or criminal cause or matter in respect of which an appeal has been brought to the Court of Appeal from a judgment of the High Court or a Regional Tribunal in the exercise of its original jurisdiction; or
 - (b) with the leave of the Court of Appeal, in any other cause or matter, where the case was commenced in a court lower than the High Court or a Regional Tribunal and where the Court of Appeal is satisfied that the case involves a substantial question of law or is in the public interest.
- (2) Notwithstanding clause (1) of this article, the Supreme Court may entertain an application for special leave to appeal to the Supreme Court in any cause or matter, civil or criminal, and may grant leave accordingly.
- (3) The Supreme Court shall have appellate jurisdiction, to the exclusion of the Court of Appeal, to determine matters relating to the conviction or otherwise of a person for high treason or treason by the High Court.

(4) An appeal from a decision of the Judicial Committee of the National House of Chiefs shall lie to the Supreme Court with the leave of that Judicial Committee or the Supreme Court.

Supervisory Jurisdiction

Article 129 of the Constitution, 1992 provides that:

Article 132 of the Constitution confers jurisdiction on the Supreme Court to supervise pending adjudication in any courts and by all adjudicating authorities. In the exercise of that jurisdiction, it can issue orders and directions including orders in the nature of habeas corpus, certiorari, mandamus, prohibition and quo warranto for the purpose of enforcing or securing the enforcement of its supervisory power.

Review Jurisdiction

Article 132 of the Constitution, 1992

Article 132 of the Constitution confers jurisdiction on the Supreme Court to review its own decisions. This jurisdiction is not frequently used. It is, however, exercised by the court only in exceptional circumstances, for instance, in situations where the Supreme Court has inadvertently committed a fundamental error of law, and if left uncorrected will occasion a gross miscarriage of justice.

3.3 THE COURT OF APPEAL

The Court of Appeal is immediately below the Supreme Court but above the High Court. It hears only cases on appeal for example from the High Court, Regional Tribunal and Circuit Courts. It has both criminal and civil jurisdictions but no supervisory jurisdiction and no original jurisdiction.

COMPOSITION OF THE COURT OF APPEAL

Article 136 of the Constitution, 1992 provides that:

(1) the Court of Appeal consists of:

- (a) the Chief Justice,
- (b) not less than ten Justices of the Court of Appeal, and
- (c) such other Justices of the Superior Court of Judicature as

the Chief Justice may by writing signed by him, request to sit in the Court of Appeal for any period.

CONSTITUTION OF THE COURT OF APPEAL

The Court of Appeal is duly constituted by any three of its Justices and when so constituted, the most senior of the Justices presides.

No person qualifies for appointment as a Justice of the Court of Appeal unless he is of high moral character and proven integrity and is of not less than twelve years standing as a lawyer. The Court of Appeal is not bound by its own precedents, and all courts below it are bound to follow its decisions on questions of law.

JURISDICTION OF THE COURT OF APPEAL

Article 136 of the Constitution, 1992 provides that:

(1) The Court of Appeal has jurisdiction throughout Ghana to hear and determine, appeals from among others judgments, decrees or orders of the High Court and Regional Tribunals. In general, an appeal lies, as of right, from a judgments decrees or orders of the High Court and Regional Tribunal to the Court of Appeal; and for the purposes of hearing and determining the appeal the Court of Appeal by law` assumes all powers, authority and jurisdiction vested in the Court from which the appeal emanates.

The court of appeal, is the final court of appeal in election petitions.⁸

3.4 THE HIGH COURT

In a descending order of importance, the High Court is next court after the Court of Appeal. The Court has both criminal and civil jurisdictions. Within the High Court, there are, however, specialized divisions, namely the Fast Track, Commercial, Finance, Land, Industrial/Labour, and Human Rights Divisions.

⁸ See *In re Parliamentary Election For Wulensi Constituency; Zakaria v.Nyamikan* (2003-2004) SCGLR 1

COMPOSITION OF THE HIGH COURT

Article 139 of the Constitution provides that:

The High Court consists of:

- (a) the Chief Justice,
- (b) not less than twenty Justices of the High Court, and other Justices of the Superior Court of Judicature as the Chief Justice by writing signed by him, request to sit as a High Court Judge.

CONSTITUTION OF THE HIGH COURT

The High Court is constituted by

- (a) a single Justice of the Court;
- (b) a single Justice of the Court and jury;
- (c) a single Justice of the Court with assessors; or
- (d) three Justices of the Court for the trial of the offence of high treason or treason as required by article 19 of this Constitution.

No person qualifies to be appointed as a High Court Judge, unless he is a person of high moral character and proven integrity and is of at least ten years' standing as a lawyer.

JURISDICTION OF THE HIGH COURT

1. The High Court exercises original jurisdiction in all civil and criminal matters, and other appellate jurisdiction conferred on it by law.
2. It has appellate jurisdiction in any judgment of the Circuit Court in criminal matters, and appellate jurisdiction in any judgment of the District Court or Juvenile Court;
3. The High Court also has exclusive jurisdiction to try acts of piracy;⁹ and enforce the Fundamental Human Rights and Freedoms guaranteed by the Constitution. In a high treason or treason trial, the High Court has only power to convict a person for high treason or treason, and

⁹ See S.21 of Act 459

4. The High Court exercises supervisory jurisdiction over all lower courts and adjudicating authorities, and in its exercise of that jurisdiction, it can issue orders and directions for enforcing its supervisory powers. And for hearing and determining appeals assume all the powers, authority and jurisdiction vested in the Court from which the appeal emanates.
5. In relation to its jurisdiction in relation to infants or persons of unsound mind

- (1) High Court may

- (a) on an application by a person, and after hearing the objections to the application, appoint a person as a guardian or as joint-guardian for an infant, make an order concerning the custody of an infant, the right of access to an infant, and weekly or other periodic payments towards the maintenance of an infant, or may, remove a guardian or joint-guardian and appoint a new guardian or joint-guardian; or may, in respect of an infant or person of unsound mind, make the orders and give the directions for the control and administration of the estate of that infant, including the investment of money, that the Court considers desirable having regard to the welfare of the infant; make the orders and give the directions permitting the use of moneys for the education of the infant, or for setting the infant up in an occupation or a career, that the Court considers desirable having regard to the welfare of the infant.

6. In relation to its jurisdiction in maritime matters

- (1) The High Court may, hear and determine

- (a) questions as to the title to, or ownership of, a ship, or the proceeds of the sale of a ship, arising in an action relating to possession, salvage, damage, necessaries, or wages; and

- (b) questions arising between the co-owners of ships registered in Ghana as to ownership, possession, employment or earnings of that ship, or a share of it, with power to settle an account outstanding and unsettled between the parties in

relation to it, and may direct the ship, or a share of it, to be sold, or make an appropriate order.

The Commercial Court

In fact, in order to make it easier for local and foreign investors can enforce their rights in Ghana the judiciary in 2005 set up Commercial Courts (a division of the High Court) whose function is essentially to adjudicate on commercial matters only. Special rules govern proceedings at the commercial courts, notable among which is the 30 day compulsory mediation. The judges who sit in the commercial court have been specifically trained to mediate disputes and this has gone a long way to resolve disputes that would otherwise have taken so much time and money to resolve.

3.5 THE REGIONAL TRIBUNAL

The Regional Tribunal was first created by the 1992 Constitution and is the court immediately after the Court of Appeal. The Tribunal has both criminal and civil jurisdictions and also co-ordinate jurisdiction with the High Court.

3.6 3.5.1 COMPOSITION OF THE REGIONAL TRIBUNAL

In terms of Article 142 of the 1992 Constitution, the Regional Tribunal consists of:

- (a) the Chief Justice,
- (b) one Chairman, and
- (c) members who may or may not be lawyers designated by the Chief Justice to sit as panel members.

3.7 3.5.2 CONSTITUTION OF THE REGIONAL TRIBUNAL

A Regional Tribunal in the exercise of its original jurisdiction is duly constituted by a panel consisting of the Chairman and not less than two and not more than four other panel members. No person qualifies to be appointed as a Chairman, unless that person is

qualified to be appointed a Justice of the High Court; and no person qualifies to be appointed a panel member unless that person is a person of high moral character and proven integrity. The Chief Justice or a Justice of the High Court or of the Court of Appeal nominated by the Chief Justice can sit as Chairman.

3.5.3 JURISDICTION OF THE REGIONAL TRIBUNAL

Articles 142-143 of the Constitution and Section 24 of Act 459

Regional Tribunal has concurrent original jurisdiction with the High Court in criminal matters, but has no civil or supervisory jurisdiction. The jurisdiction of the Tribunal is spelt out in detail in Articles 142-143 of the Constitution, for example, the Tribunal has jurisdiction to try offences specified under the following statutes — Chapter 4 of the Criminal Code, 1960 (Act 29); the Customs, Excise and Preventive Services Management Law, 1993 (P.N.D.C.L. 330)], the Income Tax Decree, 1975 (S.M.C.D. 5); the Narcotic Drugs (Control, Enforcement and Sanctions) Law, 1990 (P.N.D.C.L. 236)] and any other offence involving serious economic fraud, loss of State funds or property. A Regional Tribunal however is permitted by law to try criminal offences requiring the participation of a jury or assessors. The decisions of a Regional Tribunals rest upon the majority opinion of the members hearing the case. Appeals against the decisions of the Tribunal go directly to the Court of Appeal.

3.8 THE CIRCUIT COURT

This court is located immediately below the High Court and Regional Tribunal but above the District Magistrate Court. The Circuit has both criminal and civil jurisdictions and forms part of the inferior or lower courts.

3.8.1 JURISDICTION OF THE CIRCUIT COURT

Section 42 of Act 459

The Courts Act provides that the jurisdiction of the Circuit Court consists of:

- (a) Original jurisdiction in civil matters;
 - (i) in personal actions arising under a contract or a tort, or for the recovery of a liquidated sum of money, where the amount claimed is not more than 100 million cedis;
 - (ii) in actions between a landlord and a tenant for the possession of land claimed under a lease and refused to be delivered up;
 - (iii) in [causes and matters] involving the ownership, possession, occupation of or title to land;
 - (iv) to appoint guardians of infants and to make orders for the custody of infants;
 - (v) to grant in an action instituted in the Court, injunctions or orders to stay waste, or alienation or for the detention and preservation of property which is the subject matter of that action, or to restrain breaches of contract, or the commission of a tort;
 - (vi) in claims of relief by way of interpleader in respect of land or any other property attached in execution of an order made by a Circuit Court;
 - (vii) in applications for the grant of probate or letters of administration in respect of the estate of a deceased person, and in [causes and matters] relating to succession to property of a deceased person, who had, at the time of death, a fixed place of abode within the area of jurisdiction of the Circuit Court, and the value of the estate or property in question does not exceed 100 cedis; and

3.6.2 Criminal Jurisdiction of the Circuit Court

Section 43 of Act 459

A Circuit Court has original jurisdiction in criminal matters other than treason, offences triable on indictment and offences punishable by death.

3.6.3 Appeals from the Circuit Courts

Section 44 of Act 459

(1) A person aggrieved by a judgment of a Circuit Court in a civil action may, subject to this Act and the Rules of Court, appeal to the Court of Appeal.

(2) A person aggrieved by a judgment of a Circuit Court in a criminal trial may, subject to this Act and the Rules of Court, appeal to the High Court.

3.7 THE DISTRICT COURT

Section 45 of Act 459

These are Courts that are set up by the Chief Justice in respective Districts of the country. District Court has both criminal and civil jurisdictions and are presided over by Magistrates who are appointed, subject to the approval of the President, by the Chief Justice on the advice of the Judicial Council. However, a person does not qualify to be appointed a Magistrate of a District Court unless that person is of high moral character and proven integrity and is a lawyer of not less than three years' standing.

3.7.1 CIVIL JURISDICTION OF THE DISTRICT COURT

Section 47 of Act 459

A District Court has civil jurisdiction in the following matters:

- (a) Personal actions arising under a contract or a tort for the recovery of a liquidated sum of money where the amount claimed does not exceed ten million cedis;
- (b) Granting of injunctions or orders to stay waste or alienation, or for the detention and preservation of property which is the subject matter of that action, or restrain a breach of contract or the commission of a tort;
- (c) Claims for relief by way of interpleader in respect of land or any other property attached in execution of [a decree] [an order] made by the District Court;
- (d) Civil actions relating to the landlord and tenant of premises, or a person interested in the premises as

required or authorised by a law relating to landlord and tenant;

- (e) Actions relating to ownership, possession or occupation of land, where the value of the land does not exceed ten million cedis;
- (f) Divorce and other matrimonial [causes or matters] and actions for paternity and custody of children;
- (g) Applications for grant of probate or letters of administration in respect of the estate of a deceased person, and in [causes and matters] relating to succession to property of a deceased person, who had at the time of death a fixed place of abode within the area of jurisdiction of the District Court and the value of the estate or property in question does not exceed ten million cedis; and
- (h) hear and determine charges and dispose of any other matters affecting juveniles, that is persons under the age of eighteen.

3.7.2 CRIMINAL JURISDICTION OF THE DISTRICT COURT

Section 48 of Act 459

(1) In criminal matters, a District Court has jurisdiction to try summarily:

- (a) an offence punishable by a fine not exceeding five hundred penalty units or a term of imprisonment not exceeding two years or both the fine and the imprisonment;
- (b) any other offence, except an offence punishable by death or by imprisonment for life or an offence declared by an enactment to be a first degree felony, if the Attorney-General thinks that the case is suitable to be tried summarily, considering
 - (i) the nature of the offence,

- (ii) the absence of circumstances which would render the offence of a grave or serious character, and
- (iii) any other circumstances of the case;
- (c) an attempt to commit an offence to which paragraph (a) or (b) applies;
- (d) abetment of or conspiracy in respect of that offence.

3.8 THE JUVENILE COURT

The Juvenile Court is a specialized District Court that hears and determines actions under the Children's Act 1998(Act 560). It have both criminal and civil jurisdictions jurisdiction in matters concerning parentage, custody of children, access to and maintenance of children. It hears cases concerning children in need of special care and protection. It can make care and supervision orders. The Tribunal sits with a panel consisting of a chairman and not less than two members, one being a Social Welfare Officer.

3.9 THE FAMILY TRIBUNAL

The Family Tribunal hears criminal or civil cases involving persons under the age of eighteen (18) years. The court is constituted by a District Magistrate and two other persons, one of whom must be a Social Welfare Officer. The Chief Justice designates a District Court Judge to preside over the court.

3.10 THE MOTOR COURT

The Motor Court is a specialised District Court created and mandated to handle motor traffic cases. It is therefore a special court for motor offences and traffic violations.

3.11 THE CHIEFTAINCY TRIBUNAL

Under the 1992 Constitution chieftaincy disputes are to be heard by the Judicial Committees of the Traditional Authorities. Matters heard by Traditional Councils can be appealed to the Regional House of

Chiefs and a further appeal to the National House of chiefs. The Supreme Court serves, however, as the final court of appeal for all Chieftaincy Tribunal cases.

3.12 BUSINESS DISPUTE RESOLUTION IN THE GHANAIAN LEGAL SYSTEM

3.12.1 Litigation

Litigation is the conduct of a lawsuit in a court of law. It is important because it offers disputing parties an opportunity to resolve legal disputes in accordance with law. Litigation is an intensely procedural process. It is governed by rules and generally starts when one or more parties (called the plaintiff or plaintiffs) or their lawyers file a claim against one or more parties (called the defendant or defendants) for certain specified reliefs in a court of law.

The 1992 Constitution and the Courts Act¹⁰ provide the composition and jurisdiction of the courts. The Constitution itself indorses the courts as the final location for resolution of legal disputes. Indeed, by virtue of Article 125 (3) of the Constitution, judicial power, that is the power to adjudicate, or resolve disputes in accordance with legal rules, vests ultimately in the Judiciary.¹¹ According to Clause 3 of Article 125, no President of Ghana, Parliament and any other organ or agency created by the President or Parliament, power to exercise the final say in any judicial matter. In a criminal case therefore, where a party is to be adjudged guilty of any offence, Article 125 (3) implies that, final or ultimate determination of that party's guilt in terms of law, can only be made by a duly constituted court exercising criminal jurisdiction.

¹⁰ Act 469 of 1993 as amended by the Courts (Amendment) Act of 1993 (Act 464)

¹¹ In *Akainyah v. The Republic* (1968) GLR 548, it was decided that an essential attribute of judicial power, was the power to decide on claims by disputing parties in accordance with established legal principles, as well as, the power to enforce those claims.

The Code of Ethics of the Ghana Bar Association, however, makes it is the professional obligation of lawyers to advise their clients to avoid or terminate litigation whenever the controversy admits of fair settlement.¹² In Ghana, given that litigation could be a costly, harmful to reputation and time-consuming, many companies are now opting for alternative forms of resolving disputes in or outside court.

3.13 ALTERNATIVE DISPUTE RESOLUTION

Alternative Dispute Resolution (ADR) refers to a range of procedures that serve as alternatives to traditional litigation for the resolution of disputes and generally involves the assistance of a neutral or impartial third party.

Generally, ADR applies to civil matters between private persons not criminal matters, which are matters between the Republic and a person. With the passage of the Alternative Dispute Resolution Act (Act 798) of 2010 ADR practice has now received a major boost. Certain courts like the Commercial Court require all disputing parties to resort to ADR of some type, usually pre-trial [mediation](#), before permitting a case to be tried. The rising popularity of ADR is explained by the increasing caseload of traditional courts, as well as awareness that ADR imposes lesser costs than [litigation](#), there is also confidentiality, and parties could have greater control over the selection of the third party who can decide their disputes.¹³

3.13 TYPES OF ADR MECHANISMS

There are various methods of resolving disputes using ADR. These methods include; arbitration, negotiation, conciliation, mediation,

¹² Section 43 (1) and (2)

¹³ http://en.wikipedia.org/wiki/Alternative_dispute_resolution

customary-arbitration, mediation-arbitration and neutral case evaluation.

3.13.1 Arbitration

Arbitration is an out of court settlement of a dispute by an independent person chosen by the disputing parties themselves. Where a contract has a clause requiring the parties to submit dispute arising between them first to arbitration, the court will enforce it and will not permit a party to proceed in breach the clause, unless the matter has been first being dealt with through arbitration.

One significant advantage of arbitration is that the parties themselves are involved in choosing the person who is going to settle their dispute. This means that they can request the services of an expert in the particular commercial area they operate in.

Another merit of arbitration is that it is less formal, fully private, quicker and less expensive in comparison with litigation. Where a particular dispute covers for example a commercially sensitive matter, this may actually be more helpful to avoid negative publicity. Courtroom proceedings on the other hand are usually placed on record and are accessible by the public.

3.13.2 Negotiation

Negotiation is a process by which the parties to a dispute or their representatives discuss the issues in dispute with the intention of settling the dispute without the intervention of one or more third parties.

For negotiation to succeed, the parties must be willing and ready to compromise. And they must act in good faith and be responsive to the legitimate interests, concern and fears of each other.

3.13.2 Mediation

Mediation is a process by which a neutral or impartial third party, known as a mediator, acts to assist the disputants to find ways to resolve their dispute. The duty of the mediator is to facilitate dialogue between parties to assist them to arrive at a mutually acceptable settlement. The mediator works with the parties to find the situation that best fits them all and not to decide who is right or wrong (Kelsey, 2013).

There are three types of mediation approaches that the mediator can opt for. The amount of control the disputing parties have is the main difference between these types:

- **Evaluation Mediation:** This type focuses on the legal rights of the parties disputing. The mediator hears the different sides of the issue and evaluates it based on the legal rights and fairness to bring out a solution that fits all. The mediator used in this type needs to have a legal background.
- **Facilitative Mediation:** The parties here have more control over the process. The mediator does not give an opinion about the solution but ensures that the parties come to an agreement of their own.
- **Transformative Mediation:** Like the facilitative mediation, the power of settling disputes lies with the disputing parties. The parties determine and layout the process and the mediator only helps them understand each other's values and point of views. This type is mostly used to resolve interpersonal disputes (Legal Service Article, 2011).

Mediation offers the various parties the confidentiality needed to settle their case. The confidentiality involved is such that mediators cannot be forced to testify in court about the case. Parties can have the privacy to settle their differences without spewing it out in public.

During mediation there is a mutual attempt to arrive at a solution that suits all parties involved. This goes a long way to maintain and repairing the relationship between the disputants. The main characteristics of mediation are, however, as follows:

- **It is a confidential procedure.** This means the parties cannot be compelled to disclose information that they prefer to keep confidential. That information cannot be provided to anyone including even a court outside the context of the mediation.
- **It is a non-binding procedure controlled by the parties.** This means that a party to mediation cannot be forced to accept an outcome that it does not like. Unlike an arbitrator or a judge, the mediator is not a decision-maker. The mediator's role is, rather, to assist the parties in reaching a settlement of the dispute. Indeed, even when the parties have agreed to submit a dispute to mediation, they are free to abandon the process at any time after the first meeting if they find that its continuation does not meet their interests. However, parties usually participate actively in mediations once they begin. If they decide to proceed with the mediation, the parties decide on how it should be conducted with the mediator.

3.13.4 Customary Arbitration

Customary Arbitration involves a voluntary submission of a dispute to one or more arbitrators acting under customary law or according to customary traditional norms.

The the process of voluntary submission of a dispute to one or more neutral persons for a final and binding determination or settlement. Arbitration can start only if there exists a valid Arbitration Agreement between the parties prior to or after the emergence of the dispute. Usually it is advisable if such an agreement is in writing.

3.13.5 Conciliation

Conciliation is similar to mediation. In this type of dispute resolution, a third party (Conciliator) helps the parties to reach a resolution and the third party plays a more active role in bringing the parties together and suggesting solutions.

Conciliation is a less formal form of arbitration. Conciliation does not require the existence of any previous agreement. Any party may request the other party to appoint a conciliator. A single conciliator can be appointed but two or three are also acceptable. Where there are multiple conciliators, all must act jointly. Where a party rejects the offer to conciliate, no conciliation can be held.

Parties may submit statements to the conciliator describing the general nature of the dispute and the facts in issue, and to each other. The conciliator may request further details, and the parties may even submit suggestions for the settlement of the dispute to the conciliator. Where the conciliator finds that settlement exists, he can draw up the terms of settlement and serve it to the parties for their acceptance. If the parties accept to sign the terms of settlement it becomes final and binding on them.

The effects of conciliation include the fact that the parties involved maintain their autonomy and control over the process. Conciliation is also a good way of saving time and cost due to the fact that the parties have the advantage of doing things to suit their time and financial situations. Parties involved also enjoy the confidentiality that comes with having to settle the dispute with only the other parties and the conciliator.

3.14 THE ADVANTAGES OF ADR FOR CORPORATE BUSINESSES

ADR is increasingly being used, locally and internationally. In many countries it has been integrated into the legal system. Among its merits are the following:

- ADR is suitable in multiparty disputes
- ADR is flexible in procedure as the process is determined and controlled by the parties to the dispute
- ADR costs tend generally to be lower
- ADR processes are less complex
- ADR parties have choose their own third party “judge” to direct negotiations/adjudicate

- ADR has greater likelihood of generating speedier settlements
- ADR solutions can be tailored to suit the parties' interests
- ADR has a better likelihood of obtaining a durable agreement
- Confidentiality is assured with ADR
- The preservation of relationships and the preservation of reputations

3.15 INTERNATIONAL BUSINESS ORGANIZATIONS AND COMMERCIAL DISPUTE RESOLUTION

International Chamber of Commerce (ICC)

The **International Chamber of Commerce (ICC)** was created in 1919 to serve international business by promoting trade and investment, open markets for goods and services, and the free flow of capital. The organization's international secretariat was established in Paris and the ICC's International Court of Arbitration was created in 1923.

The ICC also produces and promotes trade standards relating to carriage and the passage of risk called **Incoterms**. These standards may specifically be included in international agreements entered into by contracting parties.

3.15.1 Incoterms

Incoterms are international terms used in international sales contracts. They were developed mainly to address certain issues on which buyer and seller need to have agreement if the contract is to be performed satisfactorily. These issues include:

- How far **insurance costs** are included in the contract price
- The **time at which risk and property** in the goods **pass**
- How far **carriage costs** are included in the contract price
- How bears the **risk of damage** or loss at any particular point in time
- Who has **responsibility for raising customs documentation, and**

- How far **customs are** included in the contract price among others.

3.15.2 International Court of Arbitration (ICA)

The ICA promotes and facilitates the use of **arbitration in commercial disputes**, as an alternative to litigation. The ICA engages in arbitral proceedings, maintains a list of arbitrators, decides challenges involving arbitrators, approves arbitral awards and fixes arbitrator fees. States which have ratified the ICC's New York Convention of 1958 agree to recognize arbitration agreements, and also agree not to submit such disputes to national courts.

3.15.3 World Trade Organization (WTO)

The World Trade Organization (WTO) is an international organization which deals with rules of international trade between nations. The **WTO** emerged out of the General Agreement on Tariffs and Trade (GATT) of 1995. WTO has more than 150 members and is devoted to the **promotion of international free trade**, in goods, intellectual property and services. The WTO assists with the **settlement of international trade disputes** through its Dispute Settlement Body (DSB). The DSB comprises of a panel of experts. A ruling by the panel is binding but is subject to an **appeal**.

The **panel of experts** is appointed by the DSB in consultation with the countries in dispute. Panelists for each case are chosen from a permanent list of well-qualified candidates, or from elsewhere, but they serve in their individual capacities and cannot receive instructions from any government. Any **appeal** is heard by three members of a permanent seven-member Appellate Body set up by the DSB and broadly representing the range of WTO membership.

3.15.10 United Nations Commission on International Trade Law (UNCITRAL)

The United Nations Commission on International Trade Law (UNCITRAL) is a body within the UN which focuses on international trade law. **UNCITRAL** was created in 1966, when the General Assembly recognized that differences in national laws governing international trade were hampering trade.

3.15.4 The International Institute for the Unification of Private Law (UNIDROIT)

The International Institute for the Unification of Private Law (UNIDROIT) set up in 1926 is an independent intergovernmental organization based in Rome which studies the needs and methods for modernizing, harmonizing and coordinating commercial law between States and groups of States and to formulate uniform law instruments, principles and rules to achieve those objectives. Uniform rules prepared by UNIDROIT are concerned with substantive law rules; they will only include uniform conflict of law rules incidentally.

Since UNIDROIT in an intergovernmental structure, its rules take the form of international conventions. These apply automatically in preference to a state's national law once all the state's formal requirement for their entry into force has been completed. However, states often regard international conventions as a low priority and therefore take their time to implement them. In an attempt to avoid this, UNIDROIT has favored alternative where a binding instrument is not essential, such as:

- **Model laws** to be adopted or adapted when drafting domestic legislation on the subject covered.
- **General principles** addressed directly to judges, arbitrators and contracting parties who are then left free to decide whether to use them or not.

- **Legal guides**, typically on new business techniques, on new types of transaction or on the framework for the organization of markets at both the domestic and the international level.

Many UNIDROIT drafts have resulted **in international instruments** produced alongside other UN bodies such as the UNCITRAL Convention on Contracts for the International Sale of Goods.