

The Role of Alternative Dispute Resolution

In Promoting Access to Justice and
Fostering Economic Growth



THE UNITED
REPUBLIC OF
TANZANIA

MINISTRY OF
CONSTITUTIONAL AND
LEGAL AFFAIRS



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INTRODUCTION

Disputes happen. Regardless of size, value or type of project/works, disputes can cause significant consequences. If you are in a commercial dispute with another person or business, you may be considering going to court. However, litigation can be intimidating, expensive, time-consuming, too technical and inappropriate for your particular concern. Instead, you may wish to consider using alternative dispute resolution.

This publication explains what Alternative Dispute Resolution (ADR) is and respond to frequently asked questions about ADR methods in Tanzania.

WHAT IS ALTERNATIVE DISPUTE RESOLUTION?

Alternative Dispute Resolution (ADR) refers to processes, other than a court decision, in which parties can resolve their dispute on their own or through the assistance of an impartial and neutral person.

ADR can also be used to mean ‘assisted’ or ‘appropriate’ dispute resolution. While when the ‘A’ in ADR stands for ‘Alternative’ it excludes litigation, when the ‘A’ in ADR stands for ‘Assisted’ or ‘Appropriate’ it includes litigation.

These alternative approaches are a response to the need for:

- More flexibility and less formality
- Privacy and confidentiality
- More specialised and innovative solutions
- Greater participant involvement and empowerment
- Early resolution of a dispute
- Greater procedural timeliness

ADR has the following intrinsic benefits include:

- General efficiency and process control
- Saves time, saves money
- Allows parties to resolve disputes themselves
- Provides a more satisfactory process

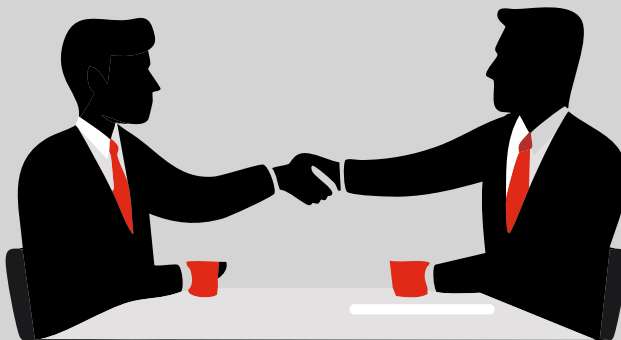
- Preserves privacy and confidentiality
- Gives more satisfactory settlements and provides more durable resolutions (compared to litigation)
- Preservation of relationships
- Uses expertise of third party neutral

TYPES OF ADR MECHANISMS AVAILABLE IN TANZANIA?

ADR can be conducted on ad-hoc or institutional basis. Ad-hoc ADR involves the disputing parties directly approaching an ADR practitioner on their own and that practitioner would be responsible for the administration of the ADR process. Institutional ADR involves parties approaching an institution from which they would select an ADR practitioner, and which would be responsible with administration of the process. Whether ad-hoc or institutional the most common ADR mechanisms available in Tanzania are:

Negotiation

Negotiation is usually the first approach to take on the list of ADR methods. It includes any form of direct communication whereby parties who have opposing interests discuss the form of any joint action which they might take to manage and ultimately resolve the dispute between them.



It is more informal and affords the parties flexibility and control as it involves only those parties with an interest in the matter and their representatives, if any. It is only parties to the dispute who have decision-making power.

Negotiation requires the parties to define the dispute, draw out the underlying interests and agree to a resolution. This can take the form of a simple compromise, no agreement, victory for one party or an integrative agreement (win-win).

To effectively negotiate and reach a successful resolution, consider the following tips and strategies:

- **Build mutual trust with the other party:** Establishing trust and a positive relationship can facilitate open communication and increase the likelihood of finding a mutually acceptable solution.
- **Understand the other party's perspective:** By empathizing with their concerns and interests, you can identify potential areas of compromise and work towards a resolution that satisfies both parties.
- **Know when to compromise:** Recognizing when to make concessions and finding a middle ground is essential for reaching an agreement in negotiations.
- **Develop good communication skills:** Active listening, clear expression of your interests, and maintaining a respectful tone are crucial for effective negotiation.
- **Keep calm:** If emotions run high or communication breaks down, take a step back, regroup, and approach the situation with a calm and rational demeanour.
- **Focus on the issues:** It is important to understand and focus on the contested issue instead of personalities. Do not let the negotiations become personal. This would help you to empathise, compromise when appropriate, communicate effectively and keep calm.

Mediation

Mediation is a confidential flexible process conducted with the assistance of a neutral person, who actively assists the parties to achieve a negotiated agreement of a dispute or difference, with the parties themselves remaining in ultimate control of the decision to settle and the terms of resolution. It is a form of assisted negotiation and so it requires a lot of involvement from all the parties involved and the parties come to their own settlement agreement.



Mediation may be undertaken voluntarily, under a court order, or subject to an existing contractual term referring disputes to mediation. The decisions made by the parties are usually longer lasting compared to the judge in litigation or the arbitrator in an arbitration.

Mediation can carry many advantages, including:

- **Cost-effectiveness:** Mediation is typically less expensive than arbitration and litigation due to reduced legal fees and court costs.
- **Time-efficient:** Resolving disputes through mediation often requires less time compared to lengthy court proceedings.
- **Flexibility:** Mediation allows parties to tailor the process and outcome according to their needs and preferences.

- **Confidentiality:** Mediation proceedings are private, ensuring sensitive information remains confidential.
- **Preserving relationships:** The collaborative nature of mediation helps maintain or rebuild relationships between disputing parties.

However, there are some disadvantages to consider:

- **Unenforceable outcomes:** Unlike arbitration or litigation, mediated agreements formalized in a contract are not enforceable on their own and any breach would require arbitration or litigation to birth an enforceable decision.
- **Unequal power dynamics:** Mediation might not be suitable if there is a significant power imbalance between the parties.
- **No guarantee of resolution or finality:** If the parties fail to reach an agreement, they would need to resort to arbitration or litigation and even if an agreement is reached, due to such agreements non-enforceability such secondary process for enforcement purposes may be required.

Conciliation

Conciliation is a process in which the parties to a dispute, with the assistance of a neutral conciliator, identify the disputed issues, develop options, consider alternatives and endeavour to reach an agreement.



Unlike in mediation, the conciliator may have an advisory role on the content of the dispute or the outcome of its resolution, but not a determinative role. The distinction between mediation and conciliation is rarely clear and can be used interchangeably with the consent of the parties involved.

Construction Adjudication

Adjudication is a form of ADR most used in the construction industry, but it can be applied outside of construction if it's stipulated in a contract. It is intended to be quicker and more cost effective than litigation or arbitration. It is normally used to ensure payment (although most types of disputes can be adjudicated).

The Adjudicator must generally decide the dispute in less than 42 days. The Adjudicator's decision is binding on parties but not necessarily final if a party is aggrieved, they would typically escalate the dispute to arbitration. The enforceability of the Adjudicator's decision is usually upheld by the Courts as if it were an Award, which is recognized as if it were a court judgement.



Arbitration

Arbitration is a binding form of dispute resolution, equivalent to litigation in the courts, and is entirely distinct from the various forms of non-binding dispute resolution such as negotiation, mediation, or non-binding determinations by experts. In Arbitration both disputing parties agree for a decision to be made by an independent arbitrator (or a panel of arbitrators). The process is formal, similar to court



proceedings – but, unlike open court, it is private and confidential. The arbitrator can will be an expert in the subject of the dispute. The parties put forward their case to the arbitrator, who will assess the evidence and decide which party's case was most persuasive.

Arbitration is often included as a condition of commercial contracts. For an arbitration to take place, the disputing parties must agree to take their dispute to arbitration. In practice, this agreement is often made before any dispute arises as arbitration clauses are often included in various business contracts. By signing a contract with an arbitration clause in it, the parties are agreeing that any dispute arising from the contract will not be heard by a court but will instead be heard by a private individual or a panel of several private individuals. If the parties have agreed to arbitration, they will generally have to

proceed with an arbitration rather than litigation since courts will normally require the parties to honour their agreement to arbitrate.

The arbitrator's decision (called an award) is final, legally binding, has a status similar to a court judgment and is enforceable in a similar manner. This means that if a party doesn't like the arbitrator's findings, it is not possible for them to try and get a better outcome by taking the case to court. Arbitral Awards made in Tanzania are enforceable through the courts of most of the world's trading nations under the New York Convention for enforcement of foreign arbitral awards 1958. Equally, foreign awards can be recognized and enforced in Tanzanian courts.

Arbitration might be preferred over litigation in various situations, such as:

- Streamlined procedures
- International disputes/enforcement: Parties from different countries may choose arbitration to avoid potential biases within foreign court systems or unfavourable laws.
- Technical or specialized disputes: Arbitrators with specific industry expertise can provide a more informed decision.
- Confidentiality concerns: Parties that wish to keep sensitive information private may opt for arbitration due to its confidential nature.
- Finality and limited Appeals

Arbitration can be classified into two main categories:

- Binding arbitration: The arbitrator's decision is final and legally binding, with limited options for appeal. Parties must comply with the decision, and it is enforceable in court if necessary.
- Non-binding arbitration: The arbitrator's decision serves as a recommendation but is not legally binding. Parties can choose to accept the decision and settle their dispute in line with the award or proceed to binding arbitration or litigation.

WHICH ADR METHOD IS “APPROPRIATE” FOR A PARTICULAR DISPUTE?

The particular ADR type/method that you choose to take will depend on:

- Your desired costs.
- The amount of time you wish to spend.
- The confidential nature of your dispute.
- The nature of the relationship you have with the other party or parties involved; and
- The nature of your dispute and desired outcome.

The key matters that distinguish these forms of dispute resolution are whether:

- you and the other party, or parties, control the process and outcome.
- a neutral third party assists you in achieving the outcome; or
- a neutral third party imposes a decision.

WHAT JURISDICTION DOES ADR HAVE?

ADR methods are used outside of the court system, and opting for ADR has important legal consequences. For instance, parties that have agreed by contract to be subject to binding arbitration give up their constitutional right to go to court, save for interim measures and enforcement. All ADR methods are a product of contract, and while with non-binding ADR methods that consequence is not absolute, the requirement to honour contractual obligations can delay access to court.

WHAT TYPES OF DISPUTES CAN BE RESOLVED THROUGH ADR?

The types of disputes that are amenable to ADR are of course not unlimited. The following categories of cases can be settled through ADR process:

- All cases relating to business, trade, commerce and contracts.
- Family related disputes except divorce, administrator or executor appointment and custody.
- Labor disputes
- Personal injury claims (tort)

HOW EFFECTIVE IS THE ADR IN TANZANIA?

ADR can be beneficial if done correctly. At times, ADR will be more appropriate than litigation, as it is typically more cost-effective, flexible and less time-consuming. The expedience and cost effectiveness can be observed in the 2023 statistics presenting the time consumed by litigation and ADR mechanisms.

Table 1; 2023 Timeline for Resolving Cases Statistics

		Number of Days		
		Lowest	Highest	Average
Litigation	High Court	90	493	264
	Resident Magistrates Courts	74	571	216
	District Courts			127
	Primary Courts			30
ADR	Mediation			
	Arbitration			

Effectiveness of ADR in Tanzania however subjected to the public perception of dispute resolution. The perception that participating in ADR is a sign of weakness, the desire to use legal process as an intimidation technique and making disputes personal instead of ensuring that disputes remain to be about the substance are some factors which affect the effectiveness of ADR in Tanzania.

WHAT DOES ADR MEAN FOR SMES/MNES AND WOMEN OWNED BUSINESSES?

Alternative dispute resolution can offer:

- **Flexibility:** the opportunity to agree more creative, flexible settlement options than a Court could order.
- **Speed:** a faster, more efficient path to resolution in most situations unlike courtroom proceedings which are generally protracted.
- **Control:** Clients have very little control over court proceedings once they have commenced. In ADR, the parties have opportunities to

direct the process (such as agree the mediator or arbitrator, the venue, the timetable, the procedure and the agenda) and thus more control over the decision-making process.

- **Confidentiality:** court judgments are typically on the public record. In sensitive matters, ADR is a process that can ensure your dispute is kept confidential. ADR is entirely private, so potentially unwelcome publicity can be avoided and any agreed settlement will not set a precedent.
- **Cost efficiency:** the cost of legal and court fees means that litigation can result in a financial loss even for the winning party, especially considering how long resolution can be pending. ADR can often save significant costs in the long-term.
- **Preservation of business relationship:** while litigation is adversarial, ADR can ensure negotiations stay amicable, constructive, and amenable to preserve the parties' ongoing relationship.
- **Neutral guidance:** ADR may offer you an unbiased, third-party who can lead negotiations and steer you toward the best resolution.

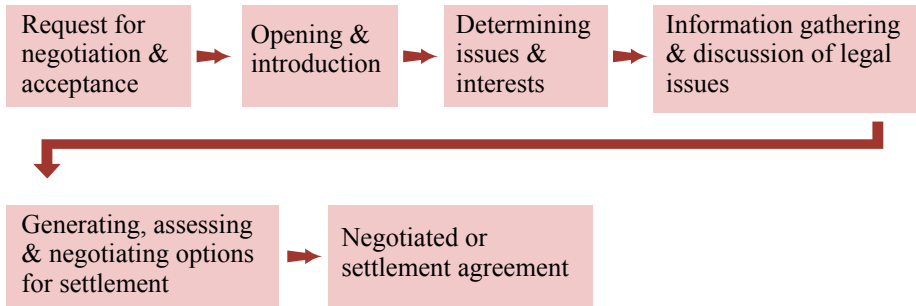
HOW DOES THE ADR PROCEDURE WORK?

There is no prescribed format. The exact process will depend on the type of ADR chosen, but typically it will involve an impartial and independent ADR Practitioner with specific expertise – such as a surveyor, lawyer or other technical specialist – who is tasked with resolving the issue between the parties.

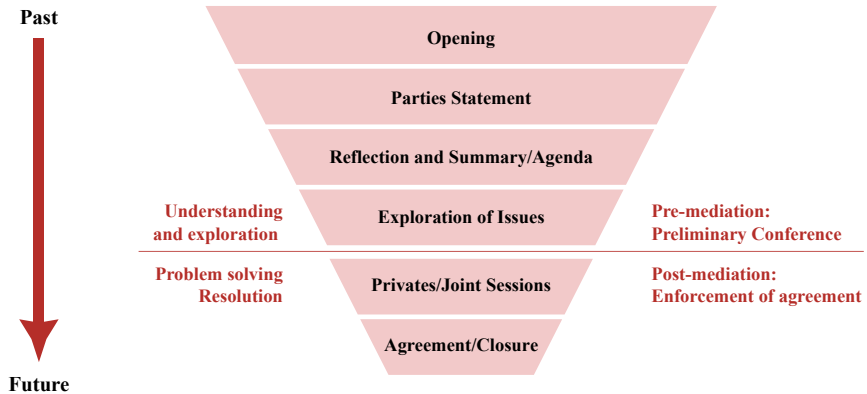
This will be done either by:

- examining evidence submitted by the parties to the dispute, judging whose is the most persuasive and issuing a decision – as in arbitration, adjudication or expert determination, or
- facilitating discussions between the parties so that they can come to a mutually acceptable agreement – as in mediation.

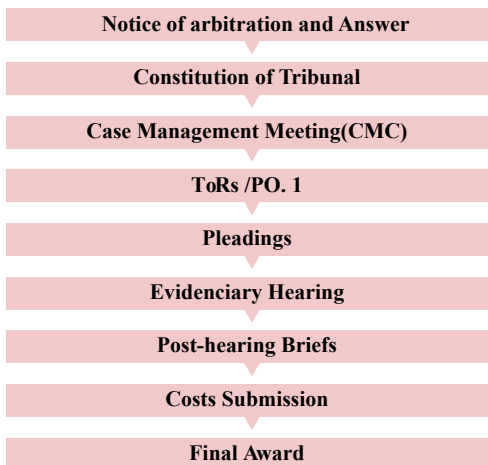
i. The Negotiation Process



ii. Mediation Process¹



iii. The Arbitration Process



¹ <http://darrencaulfield.com.au/services/the-mediation-process/>

WHERE CAN I FIND AN ADR PRACTITIONERS AND ACCREDITED NEUTRALS(NEGOTIATORS/MEDIATORS/ ARBITRATORS/CONCILIATORS)?

In both institutional or ad-hoc ADR processes, the parties have to agree to appoint the same arbitrator or mediator in case only one neutral is required or appoint their respective neutral would together appoint a third neutral if three neutrals are required, before the arbitration or mediation can commence.

There are 4 professional membership associations specifically for dispute resolution practitioners:

- Tanzania Arbitration Centre (TAC) (not operational)
- Tanzania Institute of Arbitrators (TIArb)
- Tanzania international Arbitration Centre (TIAC)
- National Construction Council (NCC)

Some practitioners are also members of the Mainland Bar Society (Tanganyika Law Society) and other professional associations (i.e. Engineer Registration Board -ERB, Architects and Quantity Surveyor Registration Board -AQRB). There are private dispute resolution practitioners, but most are sole practitioners.

DO I NEED LEGAL REPRESENTATIONS IN MEDIATION OR ARBITRATION?

Parties are generally not required to be represented by lawyers during mediation, which can save on legal costs and sometimes create a more conducive environment to reaching consensus.

Legal representation is recommended and is likely to be helpful if the case involves points of law that the party does not fully understand or is complicated.

If a legal representative is opted for in a mediation, the representative must have full written authority to settle the dispute alone, without needing to consult the party she/he is representing.

HOW DO I DRAFT A PROPER CONTRACT REGARDING DISPUTE RESOLUTION?

SMEs should include a dispute resolution clause specific to the contract, based on negotiation among the parties. If not included in an existing contract, a separate contract specific on dispute resolution can be made.

In drafting a dispute resolution clause or contract be mindful of the type of parties involved, the transaction in question and remember to indicate:

- a.* The type of dispute resolution method you want, whether one or multiple.
- b.* How and when the different methods are engaged, if more than one method is opted.
- c.* The law to be used.
- d.* An uneven number of persons you would want to assist with the dispute resolution, in the case of mediation, conciliation, adjudication or arbitration.
- e.* The place where the resolution will be conducted; and
- f.* All the essential details such that the clause or contract would be self-explanatory without being too rigid.

Often binding arbitration arises from contract clauses providing for final and binding arbitration as the method for resolving disputes.

Examples of alternative dispute resolution clause are as seen below:

Mediation Clause

“In the event of any dispute, controversy, or claim arising out of or relating to this contract, or the breach, termination, or invalidity thereof, the parties agree to first attempt to resolve the dispute amicably through mediation. The mediation shall be conducted in accordance with the rules of [*mediation institution or organization*]. If the dispute is not resolved within [*specified timeframe*] from the commencement of mediation, either party may initiate binding arbitration or pursue other available legal remedies.”

Arbitration clause

“Any dispute arising from this contract or which relates to it, including any question relating to its existence, validity, interpretation, performance or termination, shall be subject to the decision of [*sole arbitrator / three arbitrators*], with the administration of the arbitration to be referred to the [*Insert name of Institution*], in accordance with its Rules in force at the date when the request for arbitration is filed. The arbitration shall be in law. The language of the arbitration shall be [*specify language*]. The place of arbitration shall be [*city*].”

Multi-tier DR Clause

Option 1: “In the event of any dispute arising out of or in connection with this Agreement, the parties shall first attempt to resolve the dispute through amicable negotiations within [*specified timeframe*] days of written notice. If no resolution is reached through negotiations, the parties shall proceed to mediation...”

Option 2: “If any dispute arises in connection with this agreement, directors or other senior representatives of the parties with authority to settle the dispute will, within [*specify timeframe*] days of a written request from one party to the other, meet in a good faith effort to resolve the dispute.

If the dispute is not resolved at that meeting, it shall be settled by Mediation in accordance with the Rules of Mediation of the Tanzania Institute of Arbitrators (TIArb).

Unless otherwise agreed between the parties, the mediator will be nominated by TIArb. No party may commence any court proceedings or arbitration in relation to any dispute arising out of this agreement until the dispute has been referred to mediation and either the mediation has terminated, or the other party has failed to participate in the mediation, provided that the right to issue court proceedings or arbitration is not prejudiced by a delay. In case of failure of the mediation process, the parties agree to refer the dispute to arbitration in accordance with the Arbitration Rules of TIArb.”

HOW CAN ADR FOSTER ECONOMIC GROWTH?

An effective dispute resolution mechanism holds a paramount position within the domains of investment, trade, and cross-border business transactions. It not only serves as a crucial avenue for resolving disputes but also substantially improves the confidence of business activities. This, in turn, plays a pivotal role in fostering economic development. ADR offers significant benefits, such as reducing case backlogs, lowering litigation costs, and promoting peaceful dispute resolution. These advantages enhance justice system effectiveness and accessibility, aligning with values of fairness, equity, and access to justice.

Being that ADR processes can adapt to the many legal systems of trading nations and cross-border complexity, they are especially helpful in international trade. In totality, ADR improves the integrity and stability of international economic relations in addition to hastening the resolution of disputes, things which foster economic growth.

THE USE OF TECHNOLOGY AND ARTIFICIAL INTELLIGENCE (AI) IN ADR

The development of information and communication technology fostered the evolution of different business processes, including those pertaining to ADR. While ADR has mostly been done in the physical presence of the parties and their representative before a third neutral or a panel of neutrals, as applicable, technology has revolutionized ADR by facilitating the conduct virtual or Online Dispute Resolution (ODR). The use of technology to this effect has allowed quicker exchange of documents and notifications, reduced the need to and the costs of travel so as to convene in one location for ADR session, increased access to ADR and reduced the number of grounds for session adjournment. Such benefits from use of technology work to reduce the time consumed through ADR, costs involved and helps in creating more cordial environment where more fruitful negotiations can be conducted.

In Tanzania, the use of technology to facilitate ADR has been adopted by private practitioners who participate in virtual ADR sessions and run ODR services. In like manner, the Mediation Centre of the High Court of Tanzania uses technology to facilitate its ODR service for court annexed mediation. This use

of technology, paired with other initiatives, has been instrumental in increasing mediation session appearances.

The introduction of AI to the public revolutionized the way individuals undertake tasks and the way companies plan and do business. This effect is true across all industries, including the legal and specifically the ADR practice. Generative AI allows users to formulate ideas, translate and summarise documents, conduct topic specific searches with better precision and so much more.

If you are interested to resolve your dispute through ADR mechanism, generative AI can be an effective research tool. It can be used as the first step to familiarize yourself with the mechanism which are available, the advantages and disadvantages of each, the possible amount of time needed and financial implications, and vetted materials for you to read to better acquaint yourself with ADR in general.

However, caution should be used when using generative AI as a research tool. This is because, generative AI and especially the free version of the same can be inaccurate as it is limited to the information it already has. Over time and the more AI is used the more its accuracy increases. Moreover, use of AI sourced information should not replace sound legal advice from a certified professional.

FREQUENTLY ASKED QUESTIONS.

Q: Is a willingness to mediate an indication of weakness?

No – quite the opposite. A willingness to talk through a problem rather than to keep your arguments in reserve is indicative of confidence in the case – and the defendant will recognise this.

Q: Is an agreement reached by mediation binding?

An agreement reached at mediation is binding on all parties once it has been signed. All discussions up to this point are conducted without prejudice and are therefore non-binding.

Q: How confidential is it?

The whole process is treated as a ‘without prejudice’ negotiation. All discussions and documents generated in connection with an ADR process will be privileged communications and will not be referred to in any court hearing that might subsequently take place.

Q: What do you do if no mediated settlement agreement is reached?

Currently, about 70%-80% of voluntary mediations result in settlement. Even if a settlement is not achieved, ADR has more benefits than risks. In all likelihood, most of the work carried out in preparing for ADR would have been undertaken during the litigation anyway. Furthermore, the information obtained from the other side during the process may well assist in narrowing the issues and highlighting the real areas of dispute. If ADR does not work, then litigation can be commenced or continued.

Quotes to use:



Unajua hukumu inaleta uchungu na maumivu kwa anayehukumiwa, kwa yule ambaye haki haiendi upande wake, lakini Usuluhishi wote wanakubaliana, kwahiyo inaondosha machungu na makovu.

(Judgment brings pain and suffering to the one who is judged, to the one who is not favoured by justice, but through mediation parties agree, so it removes pain and scars)

– H.E. Dr. Samia Suluhu Hassan
President of the United Republic of Tanzania, Law Day,
1st February 2024.

Matumizi ya njia hizi mbadala uharakisha upatikanaji wa haki kwa haraka na kwa watu wote, huokoa muda na gharama za wadaawa ambazo zinaweza kutumika katika uzalishaji wa uchumi. Pia njia hizi mbadala zina faida nyingine kubwa kama vile ushiriki wa wenye mgogoro katika kutafufa suluhu wao wenyewe, kuwepo kwa usiri na faragha kwa wadaawa, kutumia njia zisizo na utaratibu mgumu ambazo hukubalika kwa pande zote mbili pamoja na kuhifadhi mahusiano baina ya wadaawa

(The use of these alternative methods accelerates the access to justice quickly and for all people, saves time and costs of the parties that can be used in economic activities. Also, these alternative methods have other great advantages such as the direct participation of parties in finding their own solutions, the existence of confidentiality and privacy for the parties, the use of more acceptable less technical procedures as well as preserving relations between parties)

— Hon. Prof. Ibrahim Hamis Juma
Chief Justice of Tanzania, Stakeholders Use of Mediation in
Dispute Resolution Appreciation/Award Ceremony
16th January 2024.

Utatuji wa migogoro kwa usuluhishi sio tu jukumu la kikatiba bali pia njia hiyo ya utatuji imeonekana kuwa nyenzo inayoweza kupunguza gharama na muda wa wadaawa kuendesha mashauri yao na kudumisha maelewano ..., mambo ambayo hupunguza athari kwa uzalishaji na kufanya ukuaji wa uchumi kuwa endelevu.

(The resolution of disputes through mediation is not only a constitutional responsibility but also that method of resolution has been observed to be a tool that capable of reducing the cost and time used by parties to prosecute their cases and maintaining harmony ..., things that reduce the impact on production and make economic growth sustainable)''

— Hon. Mustapher Mohamed Siyani
Principal Judge of the High Court of the United Republic of
Tanzania, 7th Tripartite Plus Meeting Inaugural Speech
14th July 2023.

“ADRs are an integral part of the policies aimed at improving access to justice. These processes complement court procedures, insofar as the ADR methods are often better suited to the nature of the disputes involved.”

— Hon. Zahra Maruma

Judge in Charge, High Court of Tanzania Mediation Centre.

“Mediation and arbitration, while less structural than courtroom proceeding, have a very high success rate. While the processes may seem too “loose” compared to standard business negotiations, they can provide a valuable option to express all concerns in a dispute. In addition, all sides will save a great deal of time, money, and effort compared to the months and possible years needed to pursue litigation in our courts.”

— Madeline Kimei,

President Tanzania Institute of Arbitrators (TIArb)



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