MEDIATION, ADJUDICATION, ARBITRATION & LITIGATION – *John Carr-Hartley (Partner)*

Many commercial contracts being prepared today contain clauses requiring any disputes between the parties to be referred to mediation and/or arbitration, however, few of the parties to the contracts know the difference between mediation, arbitration and litigation or the consequences of each.

A number of contracts provide that, in the event of a dispute arising between the parties, the dispute must first be referred to mediation.

Mediation

Mediation is a process in terms of which an independent third party (the mediator) attempts to negotiate a settlement between the parties. The mediator is usually appointed by the parties themselves, however, sometimes the contract provides for a third person to appoint the mediator.

There is no fixed procedure which a mediator must follow, however, a good mediator will ascertain the nature of the dispute and then meet with each of the parties separately in order to establish their respective positions, contentions and points of disagreement. Having ascertained the parties' respective positions, a good mediator will then take some time to think about these in order to try and determine where there is common ground and where each of the parties might be prepared to compromise. Thereafter, the mediator will again meet with the parties separately and provide his/her thoughts on the areas of common ground and where each of the parties might be prepared to compromise in order to achieve a settlement.

In the event that the parties are willing to compromise their positions in order to achieve a settlement the mediator will then usually arrange to meet with the parties together. At this meeting, a good mediator will often be able to persuade each of the parties to compromise further and ultimately broker a settlement between the parties.

Mediation is normally held on a without prejudice basis so that, if during the mediation process, one or more of the parties make concessions but ultimately a settlement is not achieved, the concessions made cannot then be used at a later date in legal proceedings to the prejudice of the party which made the concessions. In addition, mediation is non-binding except and until a settlement is reached in which the parties agree to settle their dispute.

In the event that a settlement is not achieved, no interim agreements or concessions made by the parties during mediation is binding on them.

The success of mediation is dependent largely on the willingness or desire of both of the parties to reach a settlement. In the event that the parties (or either of them) have a hard and fixed position or in the event that the parties are very hostile towards each other then, frankly, mediation is a waste of time.

Adjudication

The process of adjudication is a loose form of legal proceedings. The adjudicator is again an independent third party, usually appointed by agreement of the parties or by a third person.

An adjudicator is not an arbitrator even though there are features in the position of adjudicator that are common with that of the position of an arbitrator. Usually, an adjudicator is selected because he or she is an expert in the particular field to which the dispute relates. The adjudicator gives his or her decision as an expert.

Most contracts provide that the adjudicator will determine the procedure to be followed in the adjudication proceedings, and the object is to achieve a decision from the adjudicator in the least possible time, at the least possible cost and with little formality. For this reason, adjudication proceedings are usually less formal and do not require strict compliance with the rules of procedure and evidence. An adjudicator may or may not hear evidence and may or may not hold an oral hearing.

At the end of the adjudication process (whatever form that takes) the adjudicator gives a decision on the issues in dispute. The contract or Adjudication Agreement will provide whether the decision of the adjudicator is to be final and binding or not. In the event that the decision is not final and binding then (subject to what is contained in the contract) the dispute can be referred by either party to arbitration or may proceed to litigation.

In the event that the contract or Adjudication Agreement provides that the decision of the adjudicator is to be final and binding then, and in that event, the decision of the adjudicator cannot be appealed and the only right of recourse to the aggrieved party is to seek to review and set aside the adjudicator's decision. In our opinion, there are very limited grounds upon which the decision of an adjudicator can be reviewed and set aside by the Court. The Court decisions on this issue appear to state that an adjudicator's decision will only be reviewed and set aside by the Court if the adjudicator did not have jurisdiction to make the decision which he/she did, or if the decision was *mala fides, ultra vires* or as a result of fraud. If the decision was arrived at honestly, the Court will not set the decision aside even if the decision is, in the view of the Court, wrong.

Arbitration

Arbitration is a form of legal proceedings where the parties refer any dispute to one or more arbitrators for him or them to decide the dispute. Once again, the arbitrator is an independent person usually appointed by agreement between the parties or who is appointed by a third party. Arbitrations are almost always private and only attended by the parties, their legal representatives and the arbitrator.

Arbitrations take many forms from being quite informal to being largely formal and very similar to High Court litigation. In most instances, arbitration is quite formal and the parties exchange a Statement of Case and Statement of Defence respectively to which are annexed copies of the documents on which the parties intend to rely for their respective case, and the giving of evidence by witnesses.

Although there are various forms of Rules which may govern the arbitration proceedings (such as the Rules for the Conduct of Arbitrations, as published by the Botswana Institute of Arbitrators), all arbitrations in Botswana are governed by the Arbitration Act, Cap 06:01. There are two noteworthy provisions in the Arbitration Act which require mention. These are:

- that the referral to arbitration must be in the form of a written Submission to Arbitration; and
- that the Court will only set aside an Award of an arbitrator if the arbitrator has misconducted the proceedings or the Award has been improperly procured.

Where a contract provides that disputes shall be referred to and resolved by arbitration, this will suffice as a submission to arbitration as required by the Act, but, where the parties agree outside of their contract to submit a dispute to arbitration, they must record this in writing, usually in an Arbitration Agreement.

At the conclusion of the arbitration proceedings, the arbitrator hands down an Award which is his decision on the dispute and which may, or may not, be open to an appeal. Normally, arbitrations are final and binding and as a result, can only be set aside by a Court on review, and then only on the grounds set out in section 13(2) of the Act. It has been held in a number of judgments in which arbitrators' Awards were sought to be reviewed that in order to succeed in an application to review and set aside an arbitrator's Award, there must be some wrongful, dishonest or improper conduct on the part of the arbitrator. The issue of whether the decision is right or wrong is irrelevant and the Court will not set aside an arbitration Award on the grounds that it is wrong, even manifestly so, unless there is misconduct.

Litigation

Litigation is the most prevalent form of legal proceedings. Given that litigation is the most prevalent and well-known form of dispute resolution, it is not intended to deal with the forms of Court litigation in this article.

Litigation is always formal and involves the parties ventilating their disputes in front of a judge or magistrate.

The principal difference between litigation and adjudication or arbitration is that an appeal always lies against the decision of a magistrate or judge to a higher Court, provided the decision is a final decision or is final in effect. A purely interlocutory decision or order is not appealable and is one granted by a Court at an intermediate stage in the course of litigation, settling or giving directions with regard to some preliminary or procedural question that has arisen in the dispute between the parties.

The Court of Appeal is the highest Court in the land, and its decision is final.