



A MANUAL FOR DEVELOPING A DISPUTE MANAGEMENT PLAN FOR GOVERNMENT MINISTRIES, DEPARTMENTS & AGENCIES (MDA)

NAIROBI CENTRE FOR INTERNATIONAL ARBITRATION (NCIA)

January 2024

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Introduction

This Manual is designed to support the development of Dispute Management Plans by Government Ministries, Departments and Agencies (MDAs.). The Manual is aimed at encouraging the increased use of flexible, creative, and constructive approaches to dispute resolution in MDAs.

The Manual offers the opportunity for MDAs to demonstrate a best practice approach to business, and how they resolve disputes. It provides a guide for MDAs to have in place a framework of disputes avoidance where possible and to effectively manage and resolve disputes quickly and effectively by utilizing the most suitable dispute resolution mechanisms.

All too often Court has been the first, rather than the last, resort for dealing with disputes. MDAs and the public can all find themselves involved in court litigation when their disagreement or dispute might be better resolved at a much earlier stage and with a much more satisfactory outcome, rather than the adversarial 'winner takes all' approach provided by litigation.

There is already a range of alternatives to court available to the MDAs and the public, these include Negotiation, Mediation, Early Neutral Evaluation, Adjudication, Conciliation and Arbitration. The intervention of the court should where appropriate be sought when a genuine point of law exists or when property, people or MDA is at risk.

The MDAs through the approach in this Manual are to use appropriate and proportionate dispute resolution techniques, the key objective being to actively consider and attempt the use alternative dispute resolution techniques whilst making going to court to resolve the dispute a last resort wherever possible. In the event of a dispute between a MDA and another organization, business, or individual, the MDA, will be prepared to actively explore with that party, resolution of the dispute through the range of dispute resolution techniques before considering or pursuing litigation. However, if either party believes that the dispute is not suitable for dispute resolution techniques, or if such techniques do not produce results or a settlement agreement satisfactory to the parties either party may proceed to litigation.

It is however recognized that there may be cases that are not suitable for settlement through alternative dispute resolution mechanisms, for example cases involving intentional wrongdoing, abuse of power, Public Law, Human Rights, and vexatious litigants. There will also be disputes where, for example, a legal precedent is needed to clarify the law, or where it would be contrary to the public interest to settle.

Where the MDA is in doubt on whether a dispute is amenable to alternative dispute resolution reference should be made for advice to the Office of the Attorney General and Department of Justice (OAG&DOJ).

The Manual consists of several information forms. These forms can be read independently from each other and provide practical information to assist the MDAs in thinking about, developing, and using their Dispute Management Plan. Each Dispute Management Plan will need to be adapted to suit the needs and specific circumstances of each agency and the Manual provides minimum standards for approaches and strategies to assist the MDAs.

A clear Dispute Management Plan will assist the Ministries, Departments and Agencies **effectively, flexibly, and cohesively manage and resolve disputes.**

What is a Dispute?

The Ministries, Departments and Agencies are encouraged to take a wide view of disputes. In practice focus is placed on the disruptive effects of disputes. The negative effect of disputes is self-evident in delayed, incomplete, or abandoned projects, programmes, pending bills, regulatory chill (uncertainty in rule or decision making) loss of valuable time, the public good and often at great expense and slowed development. But disputes are not always negative, some positive aspects include providing opportunity for clarification on contentious issues, upsetting untenable status quo with possibility of mutually generated creative re-engagement and inform MDAs on public expectations and policy changes amongst others.

The definition of a dispute may appear unimportant at first. Everyone knows the meaning of a dispute and one may presume that one will recognize a dispute when one sees it. However, in actual practice, the existence of a dispute maybe in doubt or be disputed.

A dispute can be defined as *a continuing disagreement carried on between two or more parties*. The parties may be people, or they may be organizations or even countries. Disputes can last a long time, and they can have serious consequences. Disputes need not include expressions of dissatisfaction or concern, such as complaints about an issue, although such information can be relevant from a quality control perspective and assist in devising strategies for avoiding disputes altogether.

It is therefore important to have a Dispute Management Plan (DMP) in place which should help one identify and deal with the potential for a dispute arising or manage and resolve it when it does eventually arise. The DMP for an organization addresses both internal disputes for example between staff in the workplace, the employer-employee relationship, and external business-related disputes, for example disputes with suppliers and contractors, and external service provision disputes.

Disputes can be about matters such as:

a.) Claims for Injury

A "tort" is a wrongful act, other than a breach of contract, that results in injury to someone, property, or reputation for which the injured person is entitled to compensation. Cases involving claims for compensation due from personal injury, battery, negligence, defamation, medical malpractice, fraud, and many others, are all examples.

b.) Breach of Contract claims

A breach of contract case typically results from a failure to perform some term of a contract, whether the contract is written or oral, without some legitimate legal excuse. Cases involving claims from non-completion of a job, not paying in full or on time, failing to deliver goods sold or promised, and many others, are all examples.

c.) Equitable claims

An "equitable claim" asks the court to order a party to take some action or stop some action. It may or may not be joined with a claim for monetary damages. Cases where a party is seeking a temporary restraining order or injunction to stop something (perhaps the destruction of property, the improper transfer of land) are examples.

d.) Constitutionality of Actions

Increasingly claims challenging the constitutionality of executive or legislative action are made to redress complaints by individuals, groups, or corporates. It may or may not be joined with a claim for monetary damages. Cases where appointment to public office, enacted legislation seen as curtailing certain rights are examples.

e.) Judicial review of Administrative procedures & subsidiary legislation

Judicial review is a means of enforcement of the law: the court reviews legislative and executive action or inaction of government to ensure that it is in accordance with the law and powers of the office. The types of administrative conduct and decisions able to be reviewed, the grounds of review, the intensity of review and the remedies available will vary depending upon the source and the terms of the right of judicial review.

Regulatory agency or governmental body responsible for administering the statute may also pursue correction of a breach that involves a failure to comply with a statutory obligation to do or not to do something under the statute or a failure to comply with an administrative order issued under the statute.

Generally, the exercise of legislative powers and functions will be less amenable to the use of ADR than the exercise of executive powers and functions. This is not to say that ADR is always incapable of being used in relation to disputes about the exercise of legislative powers and functions, only that it is apt to be inappropriate at the stage when the dispute has moved to the court in judicial review proceedings.

ADR in the form of negotiated rulemaking or regulation negotiation has been used, and successfully, to formulate consensually arrived at legislative or regulatory recommendations to the decision-makers, in advance of the exercise

of legislative powers and functions, so as to pre-empt the need for judicial review proceedings challenging a subsequent exercise of legislative powers and functions.

f.) International Dispute Settlement

The involvement of foreign investment in development projects is typically preceded by treaty agreements between the host (recipient state) and the investor (capital exporting State). The foreign investor benefits from the protections guaranteed in these treaty agreements by adapting the provisions in contracts with MDAs.

Whenever a dispute arises concerning protected acts or omissions between the foreign investor and the MDA reference is to be made to the stipulations in the treaty and the contract. Such disputes include a change in regulatory policy, claims of expropriation of investment, discriminatory treatment among other measures taken by the host state often through the actions of an MDA. The preferred method of settlement of the disputes is investment arbitration. This does not obviate the opportunity to explore other alternative dispute resolution methods.

a. Arbitration

International arbitration is the process of resolving disputes between or among transnational parties using one or more arbitrators rather than through the courts. It requires the agreement of the parties, which is usually given via an arbitration clause that is inserted into the contract or business agreement. The decision of the arbitrator(s) is binding.

b. Mediation

Once a dispute has been submitted to arbitration, arbitration can be combined with mediation, a non-binding procedure in which a neutral intermediary assists the parties in reaching a negotiated settlement of the dispute. In a growing number of cases parties agree to first try to settle their dispute through mediation, and to resort to arbitration only if the dispute has not been settled within a certain period. While both arbitration and mediation are usually private dispute resolution procedures based on a party agreement they differ in a few important aspects. Arbitration is an adjudicative procedure and, in this respect, resembles court litigation. Once the parties have submitted a dispute to arbitration, neither party can opt out unilaterally, and any decision rendered by the arbitral tribunal will be binding on both parties. Mediation in contrast, is a voluntary process which depends on the continuing cooperation of both parties since either party can withdraw at any time.

INFORMATION SHEET 2

Dispute Avoidance

The expense and disruption caused to any legal relationship such as a contract when a dispute arises, and the importance of following dispute avoidance techniques cannot be over-emphasized. The disruption caused by disputes includes delayed, incomplete, or abandoned projects, programmes, pending bills, regulatory chill (uncertainty in rule or decision making) loss of valuable time, the public good and often at great expense and slowed development.

Early identification, documentation and intervention for disputes helps deescalate the potential for the disruptive effects. This process is referred to as dispute avoidance or prevention.

Contractual Matters

For Contractual matters, the first important step is to have clear wording in the contract that reflects the intentions of the parties. That wording should include provision for the appropriate dispute resolution techniques to be applied in the event of a dispute arising, with suitable arrangements for escalation. It is important to bear in mind however that overly prescriptive provision may reduce the options available to parties if there is a dispute.

Once the contract is in place good contract management is key. Contract management techniques should include monitoring for the early detection of any problems. In any contract both parties should be required to give the earliest possible warning of any potential dispute and regular discussions between the parties should include reviews of possible areas of conflict.

When a contract is initially established the importance of bearing in mind how the expiry of the contract is to be managed (especially if there is a need for ongoing service delivery, not necessarily by the contractor) should be borne in mind and reflected in the contract.

Non-contractual Matters

For a dispute relating to a non-contractual matter made by an organization or individual(s) against an MDA, there is a risk of high costs to both parties in terms of both time and money and hence the need to emphasize the importance of following dispute avoidance techniques.

For non-contractual disputes, the first important step is to establish and promote a clearly defined framework of dispute resolution techniques and processes within the organizations complaints handling and/or their dispute resolution policy or procedure. That wording should include provision for the appropriate dispute resolution techniques to be applied in the event of a dispute arising, with suitable arrangements for escalation.

The complaints or dispute handling procedure should include monitoring processes for the early detection of any problems. For example where an initial complaint is made by party, clearly defined processes should be in place to deal with this expediently, in order where possible to resolve the area of conflict or dispute and thus prevent the issue escalating from a minor complaint to a much larger formal complaint or claim against an MDA.

INFORMATION SHEET 3

Why Dispute Management is important

Not all disputes are negative. Disputes in the public sector can provide information about the needs and perceptions of the stakeholders and the quality and standards that operate in different government settings. They play a critical role in improving government services and interactions with stakeholders. Disputes can improve the conduct and decisions of the MDA's when:

- i. Management use dispute information in planning, quality improvement and to inform professional development.
- ii. Management are quickly notified of all disputes with significant or severe risk and action is taken; and
- iii. Policies and Practices about dispute management are regularly reviewed with stakeholders to ensure that they are effective.

The overarching purpose of an MDA's Dispute Management Plan is to **ensure that they adopt a coordinated, consistent, and effective approach to preventing and managing disputes**. Preventing and managing disputes well reflects on the MDA's commitment to excel in providing quality service to members of the public and organizations.

The Dispute Management Plan presents a recommended approach to dispute management organized around three practical objectives:

i. Identify and manage complaints early

The MDA's have a responsibility to minimize the escalation of issues and complaints into disputes by being fair and flexible, and engaging with concerns as early as possible (within the bounds of applicable laws, Government requirements and other relevant considerations).

ii. Foster a culture of active dispute management

The MDA's have a responsibility to.

- a.) Assess (and continue to assess) each dispute (including risks) promptly and identify the most appropriate way to manage it.
- b.) Take genuine steps to resolve or clarify disputes;
- c.) Manage disputes in the simplest, most appropriate, and most cost-effective way; and
- d.) Using dispute resolution processes, including as early as possible and both before and throughout any court or tribunal proceedings, except where it is not appropriate.

iii. Record and use information about disputes in an appropriate and meaningful way

The MDA's have a responsibility to:

- a.) Accurately record and report information about disputes; and
- b.) Analyze information collected about disputes to assist in improving policies and practices about dispute management.

Good dispute handling and reporting are essential components of effective risk management and quality control. The specific aims of dispute management include improving policy and administration, reducing error, and complying with government and stakeholder requirements or expectations. Identifying and managing disputes effectively can also prevent disputes from arising or becoming intractable and help ensure that issues are promptly identified and analyzed.

Unnecessary delays and inefficiency can lead to a rapid escalation of the disputes and the associated costs in terms of time, money, and resources in dealing with it and achieving a settlement. Unnecessary delays may also cause the initial dispute to escalate to a point where the use of dispute mechanisms outside of court are not deemed possible, as the other party may become unwilling to utilize a less formal, flexible approach. As such the dispute may unnecessarily end up being dealt with in court, with the associated costs and time involved in undertaking resolution via litigation.

Effective dispute management provides an opportunity to foster better relations, provide information about services and enhance the reputation of government.

Cultivating a positive culture towards Dispute Management

For disputes to be managed properly, a positive attitude towards disputes must be fostered.

The MDA's should endeavour to build a culture of acceptance, resilience, and genuine responsiveness in relation to disputes. Disputes should be viewed as 'opportunities' to improve quality, identify risk or areas of improvement and to support the MDA's values.

MDA's are strongly influenced by professional ethics, such as honesty and integrity. Staff are trained for a high level of efficiency and strive for effective decision-making practices. Some staff may have a strong emotional response to a dispute because they may feel that their competence or commitment has been questioned.

A common response is to see a dispute as unjustified and a distraction. Promoting positive attitudes to feedback about the quality of government services, including disputes, is therefore crucial. The way disputes are resolved can be as important as the outcome. Good communication about dispute resolution processes, and positive staff attitudes, are critical factors in successful dispute management.

An effective Dispute Management Plan should include clear strategies so that staff at the MDA's are committed to improving the quality of interactions with disputants. Taking a strategic approach to resolving disputes has many benefits, including:

- a.) Increasing access to justice for staff and external stakeholders.
- b.) Improving productivity.
- c.) Reducing expenditure.
- d.) Reducing errors and risk in handling disputes.
- e.) Enhancing government's reputation; and
- f.) Encouraging better communication between staff, and with external stakeholders.

Commitment to dispute management within the MDA's requires that:

- i. Leaders in the MDA's promote, and are responsible for, effective dispute resolution as part of quality improvement.
- ii. All managers in the MDA's have assigned responsibility for effective dispute management.
- iii. The contents of an MDA's Dispute Management Plan are understood and used by staff.

- iv. Staff are trained, resourced, and supported when handling disputes; and
- v. The MDA's have an appropriately skilled senior member of staff who has responsibility for the Dispute Management Plan and who reports to senior management.

In developing their own Dispute Management Plan MDA's should focus on:

- a.) Encouraging senior leadership to endorse the initiative and, later, the plan.
- b.) Investigating the types of disputes the MDA comes across.
- c.) Identifying and addressing causes of disputes.
- d.) Clearly defining the dispute management goal.
- e.) Considering what processes, policies, regulations, and protocols already exist and identifying how these could be improved; and
- f.) Building evaluation and review mechanisms into the plan.

Objectives of Dispute Management

The objectives of effective dispute management are to:

- i. Reduce the number of disputes.
- ii. Resolve or limit disputes effectively and efficiently.
- iii. Use a process which is considered by the parties to be fair and is proportionate to the matters in dispute.
- iv. Achieve sustainable outcomes.
- v. Help preserve ongoing relationships and reduce future disputation.
- vi. Use resources effectively.

Apart from improving services and playing an essential role in risk management, effective dispute management can also provide an opportunity to:

- a.) Enhance the reputation of government.
- b.) Promote policies and processes to deal with disputes as part of a quality improvement program.
- c.) Address issues that may impact upon the well-being of individuals and organizations; and
- d.) Provide information about services.

In formulating the objectives of a Dispute Management Plan, MDA's may also include information that will help manage disputants' expectations of outcomes. This may include statements that:

- i. Ensure timeframes are well understood.
- ii. A fair outcome may not necessarily be compatible with the outcome the disputant is seeking; and
- iii. Dispute management does not require an MDA to delay legitimate action to protect its interests.

Accessible, informed Dispute Management

To be useful, a Dispute Management Plan should support accessible dispute management. Strategies to achieve this include:

- i. Responding promptly and sensitively to disputes. The Plan may include timeframes, for example, an MDA might indicate all disputes not resolved at the point of service will be acknowledged within 5 days of any notification.
- ii. Assessing all disputes to determine the appropriate dispute management mechanism.
- iii. Resolving disputes in a timely manner. For example, a Dispute Management Plan may set realizable guidelines about the resolution of disputes such as “80% of disputes will be resolved within 100 days”.

Long timeframes and a lack of information on progress to those involved in a dispute results in major discontentment with dispute management. Responsive Dispute Management Plans will usually include policies on timeframes. If a dispute is not acknowledged at the point of service level, information should be provided to the disputant about the next steps, who to contact, how the MDA will acknowledge communication and communicate with disputants, and what to do if the disputant is not satisfied. It is always important to keep disputants informed.

A Dispute Management Plan should also support an informed approach to dispute management which requires each MDA to consider how they might:

- i. Record disputes, review and identify trends and risks, and report on improvements.
- ii. Use disputes to improve services and evaluate the processes they use to manage disputes.

Roles and Responsibilities in Dispute Management

It is vital that senior management in MDA's be involved and are responsible for Dispute Management Plans.

The Accounting Officer of an MDA should develop and publicly endorse their Dispute Management Plans. As the overall person responsible for dispute management in the MDA the head should direct and oversee the promotion and regular review of the Dispute Management Plan.

The Dispute Management Plan should be cascaded to Staff at all levels in the MDA. The Staff assigned responsibility for the Plan or identified to undertake tasks will require skills and in some case specialized expertise in dispute resolution.

Dispute Management Committee (DC)

Comprehensive dispute management is an organization-wide initiative. For effective implementation of a Dispute Management Plan the MDA should appoint a Committee comprised of the following members.

1. Accounting Officer – Chairperson
2. Director/Head Legal Services – Member
3. Corporation Secretary/Company Secretary - Member
4. Departmental/Unit/Section Heads - Members
5. Dispute Manager – Member/Secretary
6. State Counsel (Representing the Office of the Attorney General in the MDA)

Where an alternate representative is designated to the Committee the MDA will ensure that the Officer is a senior management staff.

The role of the Dispute Management Committee is to:

- i. Oversight of the Dispute Management Plan implementation, monitoring and evaluation.
- ii. Assessing institutional/organizational disputes' risk mapping, profile, and mitigation measures.
- iii. Integration of the strategies in the Dispute Management Plan to the organizational Strategic Plan and Performance measurement.
- iv. Ensure resourcing the dispute management training and capacity development.
- v. Consider departmental/unit dispute management reports and propose incentives for recognition.

Dispute Manager

For effective planning and coordination of the Dispute Management Plan the MDA should designate a Dispute Manager appointed from the senior management level.

A Dispute Manager needs to:

- i. Have skills in assessing a dispute, gathering information, managing the process, communicating, negotiating and being impartial.
- ii. Be ethical – in eliciting information, ensuring participation, exhibiting a lack of bias, maintaining confidentiality and impartiality.
- iii. Have a cooperative approach to communication with all relevant staff and the disputant, and be able to identify and acknowledge concerns, show understanding through listening and questioning skills, and use appropriate language and terminology.
- iv. Be accessible, well organized, and consistent.
- v. Have sufficient authority and be in a senior enough position to ensure cooperation and to address issues.
- vi. Report to senior management on a regular basis.

Dispute Management Champions

Appropriate trained staff should also be delegated as champions for the MDA's Dispute Management. The Dispute Management Champions (DMC) assist the Dispute Manager in integrating the Dispute Management Plan within the various departments and units in the MDAs.

The DMCs work within the reporting structures of the MDA to enhance accountability and inculcation of the Plan into the DNA of everyday work. The DMCs can be leaders of teams and a useful resource for sensitization and awareness creation within the departments and units.

DMCs will require specific training to equip them with tools necessary to identify, communicate and activate responses to deal with disputes.

Dispute Management Principles for Resolving Disputes

Early conflict detection and prevention will help minimize many disputes. Where disputes cannot be prevented, there are many ways to attempt to resolve them. Methods of resolution range from informal discussion and negotiation to formal determination by a court, and include dispute resolution processes like mediation, conciliation, and arbitration.

The Dispute Management Principles (DMPs) set out a fundamental approach to dispute resolution that is consistent with better access to justice. The principles address people involved in dispute, MDAs, and service providers.

For specific information on the principles, the differences between dispute resolution processes, and what to expect when using different dispute resolution processes, the guide to DMPs for Resolving Disputes should be consulted.

The Dispute Management Principles (DMPs) are:

- i. People have the responsibility to take genuine steps to resolve disputes and should be supported by MDA's to meet that responsibility.
- ii. Disputes should be resolved in the simplest, most cost-effective way and within a short period.
- iii. People who attend a dispute resolution process should show their commitment to that process by considering all the options available for resolution.
- iv. Disputants should have access to, and seek out, information that enables them to choose suitable dispute resolution processes and informs them about what to expect from different processes and service providers.
- v. Disputants should aim to reach an agreement through dispute resolution processes. This should be consensual, and should they be unable to resolve the dispute, people should have access to courts and tribunals.
- vi. Effective, affordable, and professional alternative dispute resolution services which meet acceptable standards should be readily available to people as a means of resolving their disputes.
- vii. Terms describing dispute resolution processes should be used consistently to enhance community understanding of, and confidence in them.

INFORMATION SHEET 9

Dispute Management Strategies

The most appropriate action to be taken will vary according to the nature and size of the MDA and the types of disputes it commonly deals with.

Often the dispute can be resolved at the point of notification or at the time it arises. This may be through an apology, explanation and/or copies of documents or administrative remedies.

Approaches to consider in resolving disputes may include:

- i. Internal review mechanisms.
- ii. Referring disputes (**see information sheet 10**).
- iii. Alternative dispute resolution process (**see information sheet 11**).
- iv. Negotiation using problem-solving approaches (**see information sheet 12**).
- v. Assisted negotiation with a third party (this may involve an internal or external facilitator through mediation) (**see information sheet 14**).
- vi. Advisory processes which may involve investigation and advice. (**see information sheet 15**).
- vii. Decision-making by an objective third party (for example, senior internal staff, external tribunal) (**see information sheet 16**).

The process used to resolve the dispute, should be:

- i. Conducted in a fairly and impartially manner.
- ii. Transparent and timely.
- iii. Equitable – while considering any power imbalance that might exist.

INFORMATION SHEET 10

Assessing and Referring Disputes

On receiving a complaint, an initial assessment and decision needs to be made about whether the dispute can be dealt with at the point of notification, what process should be used and if a further review or investigation is required.

To assess how to deal with a dispute, the MDA staff needs to:

- i. Review and understand the dispute.
- ii. Assess the risk, severity, and complexity of the dispute.
- iii. Find out what the issues are and how many people are involved.
- iv. Be informed about what processes are available, what the timeframes are likely to be, what the disputant wants and whether they have capacity to negotiate.

Understanding the dispute

Disputes may be received in written or oral form which may not reflect the real issues. Therefore, to understand the real issues, the staff needs to:

- i. Listen to the complainant and record the details.
- ii. Acknowledge receipt of the complaint.
- iii. Be attentive and respectful to all the disputants.
- iv. Set a timetable by explaining the next steps which must be delivered,
- v. Resolve the dispute or commit to ensuring that it receives attention within the set timelines.
- vi. Follow up with the disputant to confirm that they are satisfied with the process.

Assessing risk and incident monitoring

The dispute needs to be assessed, using risk management strategies, if not resolved at the point of notification or referred on for further action. Assessing disputes for risk helps in the ease of their administration. (**see Resource Form 1**).

External Referral

All MDA's should ensure that they can access external dispute processes at any time. It is important that all MDA's understand how external bodies in each area operate and what timeframes are involved.

INFORMATION SHEET 11

Alternative Dispute Resolution (ADR) Processes

ADR is usually an umbrella term for processes, other than judicial determination, in which an impartial person (an ADR practitioner) assists those in a dispute to resolve the issues between them.

ADR processes may be **facilitative, advisory, determinative** or, in some cases, a combination of these. The main types of ADR are arbitration, mediation, and conciliation.

Facilitative dispute resolution processes are processes in which a dispute resolution practitioner assists the parties to a dispute to identify the disputed issues, develop options, consider alternatives and endeavor to reach an agreement about some issues or the whole dispute. Examples of facilitative processes are mediation, facilitation and facilitated negotiation.

Advisory dispute resolution processes are processes in which a dispute resolution practitioner considers and appraises the dispute and provides advises to the facts of the dispute, the law and in some cases, possible or desirable outcomes, and how these may be achieved. Advisory processes include conciliation, expert appraisal, case presentation, mini-trial and early neutral evaluation.

Determinative dispute resolution processes are processes in which a dispute resolution practitioner evaluates the dispute (which may include the hearing of formal evidence from the parties) and decides. Examples of determinative dispute resolution processes are arbitration, expert determination, and private judging.

The advantages of ADR

ADR can support a practical approach to resolving disputes early through communication, openness to other views, negotiation, and reasonableness. Compared to litigation, ADR can offer many benefits as listed below:

- i. ADR can support the earlier and speedier resolution of disputes, and offer parties more privacy, confidentiality, and cost-saving benefits.
- ii. Resolving disputes through ADR can allow participants to have an element of control on the process and a say in the outcome resulting their satisfaction and empowerment.
- iii. Even if a dispute is not resolved through ADR, the process can help draw out facts, identify issues and explore new options. This means that even if litigation is ultimately commenced, its duration and distress can be reduced.

- iv. The less adversarial nature of ADR processes can support personal and professional relationships. This is especially important in MDA's need to assist in the maintenance of proper and effective relationships between the government and the public.

Negotiation using problem solving approaches

Assisted negotiation involves another person who can help to facilitate the discussion, clarify interests, and develop options.

A dispute coordinator may take on this role in a large organization. In a smaller organization, a facilitator or mediator could be drawn from another area (such as the NCIA) or an external facilitator or mediator could be used.

Problem solving negotiation requires staff within the MDA to:

- i. Prepare.
- ii. Have knowledge about the subject matter.
- iii. Be able to think and communicate clearly.
- iv. Listen actively and ask questions.
- v. Identify the issues and the underlying interests and not just the demands.
- vi. Separate the person from the content.
- vii. Explore what would happen if there was no agreement.
- viii. Develop a range of options.
- ix. Ensure that any agreement is workable.

Training and capacity development in ADR

The government is committed to mainstreaming Dispute Management in MDA's through a coordinated approach that will be integrated in all Government programmes. Increasing the capacity of systems and individuals to meaningfully collaborate and problem-solve offers a proactive strategy for conflict and disputes management.

The government recognizes the indispensability of promoting the culture of alternative dispute resolution as the preferred choice for the amicable settlement of disputes while noting that such dispute resolution processes are increasingly used in international and domestic commercial practice as an alternative to the adversarial process.

The Constitution has recognized the role played by ADR by embedding the practices within Articles 189 and 159 (2) (c). The Nairobi Centre for International Arbitration was established by Act No 26 of 2013 to promote arbitration and ADR. The Nairobi Centre for International Arbitration (NCIA) will be a key component of training and capacity development of MDAs' staff and Committees involved in the implementation of the Dispute Management Plans.

Training and capacity development in ADR are important aspects of dispute management plans for MDA's. To facilitate training and capacity development in ADR for the MDA's, the following measures should be undertaken.

- i. Development of an institutional Dispute Management Plan (DMP). This will be anchored on the guidelines provided in this Manual. Technical support will be offered by Nairobi Centre for International Arbitration
- ii. Preparation of an annual implementation plan for the dispute management policy.
- iii. Implementation of the plan with key components which include the following:
 - a. MDA's to constitute a Dispute Management Committee to steer dispute management mainstreaming within the MDAs.
 - b. Conduct a technical training for members of the Dispute Management Committee
 - c. Sensitize the Management team and all members of staff on dispute management
 - d. Include mechanism for monitoring and evaluating compliance and reporting non-compliance of the dispute management plan.

Training and Capacity Development Structure

The established Dispute Management Committees in the respective MDA's will ensure the following measures are undertaken to facilitate effective training and capacity building through the Nairobi Centre for International Arbitration.

- i. Conduct a training needs analysis to determine what dispute management training programs would be best for their MDA.
- ii. Develop a policy on training and development for the MDA.
- iii. Use data on staff's performance to identify those who would benefit from the ADR training programs.
- iv. Consider varying levels of ability for their staff (including literacy) and adapt training programs accordingly.
- v. Ensure all managers and supervisors are trained in their roles relating to dispute management.
- vi. Develop training plans, implement, and evaluate the plans.
- vii. Document and record attendance and outcomes of all ADR training courses; and
- viii. Provide refresher training programs as appropriate.

Objective of the Training and Capacity Development

The overall objective of training and capacity building in ADR include.

- i. Building capacity in alternative dispute resolution processes for MDA's dispute management committees and staff.
- ii. Gain support and promote ADR within the MDA.
- iii. Provide information and opportunity to overcome objections and resistance to the use of alternative dispute resolution methods; and
- iv. Provide specific knowledge and skills needed by personnel to implement ADR methods and procedures effectively.

Recording information about disputes

The objective in any dispute is to prove what a party seeks to assert (or to disprove it if appropriate). Collecting and recording information about disputes in a systematic and concise manner promoted quality improvement in terms of services provided and assist to improve dispute management practices. Information on disputes could be maintained in paper or electronic form and could cover anything from site diaries to variation orders to photographs.

Information of disputes should be kept in such a way that it is easily accessible and searchable – to locate categories of documents, and documents with specific content. There ought to be a structure to any record keeping system.

The structure adopted should ensure that high quality and useful information is captured about disputes and an assessment made about the value of the information kept.

Effective records of dispute information enable:

- Easy tracking of progress of investigation of a dispute
- Necessary follow-up action and referral
- Identification, reporting and referral of serious disputes
- Identification of trends for management's action
- Identification of lessons learnt, and impact of recommendations evaluated

The information recorded will include data like:

- Dispute numbers
- Description of dispute
- Remedy requested
- Due date for a response
- Organization level that the disputes were dealt with
- How the dispute was resolved
- Time taken to resolve the dispute
- What action the MDA took
- Demographic data, where applicable
- Additional Information relating to the complaint.
- Any immediate action that has been taken.

Monitoring and Evaluating Dispute Management Plans

A monitoring and evaluation (M&E) plan will help the MDAs to track and assess the results of the interventions throughout the life of dispute management plans. This will be a living document that should be referred to and updated on a regular basis. While the specifics of each dispute management M&E plan will look different, they should all follow the same basic structure and include the same key elements.

Regular monitoring of the Dispute Management Plan can help ensure that it works effectively and fairly, that timelines are being met and recommended action has been taken. For a sample checklist for monitoring performance (**see resource form 3**).

The idea monitoring plan should involve reference to statistics and reports on filed to check how a Dispute Management Plan is operating. Evaluating the Dispute Management Plan may involve looking at files, statistics, policies and seeking information from staff, users and potential users about their experiences and knowledge about the Dispute Management Plan.

There should be feedback mechanism from parties including those who get a negative outcome from the dispute resolution process. This could be in form of open-end questionnaires to get feedback which helps in ensuring that the Dispute Management Plan improves and is responsive to the needs of the users.

Criteria that can be checked when evaluating the Dispute Management Plan include whether the processes are:

Accessible – is the Dispute Management Plan easily accessible to all without barriers? What information is provided and how? Who is responsible for providing this information? Does the Dispute Management Plan use a range of appropriate techniques to resolve disputes?

Accountable – are systemic problems and risks identified? Are reports and information disseminated? Who prepares the reports? Is feedback from users received and processed?

Fair – is procedural fairness followed? How do users view the Dispute Management Plan? Is there a complaint mechanism?

Efficient – does the Dispute Management Plan keep track of disputes? Are timelines met? Are appropriate processes used? What disputes are resolved at the point of service, by negotiation and facilitation, following investigation?

Effective – are the policies and processes effective in terms of their scope? Is the Dispute Management Plan monitored and evaluated?

What changes have occurred because of the Dispute Management Plan?

The information obtained from the evaluation of the Dispute Management Plan will be useful for MDAs to understand as it addresses the perception of the MDAs, identify where the problems lie, scrutinize the reporting structures and identify areas of improvement.

Reporting on the Dispute Management Plan

Once all of the data have been collected and analyzed, it is important to have it compiled and reduced to a report which should be available to management and staff of MDA's to use on a regular basis.

The report should include statistical information on disputes in terms of

1. Numbers and categories of disputes,
2. Statistics on dispute trends,
3. Challenges encountered and how solutions have been implemented
4. The impact the changes have had in risks and action taken.

Trends and patterns

To determine the trends and strategies, it is advisable that MDA's employ dispute issue coding in the Dispute Management Plans. (see Resource form 2)

How to report?

Reporting can take several forms and the reporting strategy should suit each MDA's standards of procedures on reporting.

An ideal reporting mechanism should focus on among others:

- categories and statistics of each dispute received and processed.
- narrative case studies which can be particularly helpful in assisting staff to consider what quality improvement measures could be undertaken.
- challenges encountered in dispute management.
- specific improvements needed to improve service delivery; and
- feedback from users.

Awareness creation of the Dispute Management Plan

The Dispute Management Plan will be an effective tool if it is readily available and easily accessible by anyone who want to raise a dispute within the MDA. To this end, it will be necessary to promote the Dispute Management Plan as well as create awareness to all the members of staff and stakeholders.

Each MDA will be expected to create an awareness strategy to suit its specific standard of procedures and this may include designated telephone numbers, email address and web-based information, brochures, notice boards, workshops and seminars that are easily available to all stakeholders.

It will be of utmost importance to ensure that information about the Dispute Management Plan is presented in a clear, succinct, straightforward, large print form on how, when, where and to whom dispute issues can be directed.

Each MDA will be encouraged to assign dedicated staff to deal with the awareness creation and to report on a quarterly basis on the steps taken in promoting and creating awareness of the Dispute Management Plan.

MDA's Commitment to Alternatives to Litigation

This Manual seeks to engender a culture for alternative dispute management and resolution and commitment from the MDA's to cover two main areas of dispute.

- a. Contractual disputes for goods and services – through the insertion of relevant alternative dispute resolution clauses in all contracts, stating a clear intention to use resolution techniques as an alternative to court in the event of a dispute; and
- b. General claims brought by individuals or organizations against Government Ministries, Departments and Agencies.

The MDA's adaption and commitment to the alternatives to litigation will ensure that.

- i. The MDA's are proactive in the management of potential disputes and working to prevent disputes arising or escalating, to avoid the need to resort to the use of formal dispute resolution mechanisms.
- ii. The MDA's recognize that the use of appropriate dispute resolution processes can often avoid the high cost in time and resources of going to court.
- iii. The MDA's adopt appropriate dispute resolution in their contracts with other parties.
- iv. That the MDA's choose processes appropriate in style and proportionate in costs to the issues that need to be resolved.
- v. The MDA's include dispute resolution mechanisms within their complaints and disputes handling procedures.
- vi. The MDA's use prompt cost effective and efficient processes for undertaking and completing negotiations and resolving disputes.
- vii. The MDA's engage in a process of appropriate dispute resolution in respect of any dispute which has not been resolved through their normal complaint's procedure, as an alternative to litigation.
- viii. The MDA's educate their employees and officials in appropriate dispute resolution techniques to enable the best possible chance of success when using them; and
- ix. The MDA's make informed choices by considering the benefits to both them and to whomever they are in dispute, of all the available processes in achieving resolution.

The Need for a Corporate Policy Statement on Alternatives to Litigation

The purpose of a Corporate Policy Statement on Alternatives to Litigation (**Resource form 5**) is to encourage the early resolution of disputes with creative settlements achieved through mediation or other alternative dispute resolution procedures. Once a dispute has erupted, emotions are at a high pitch and parties quickly assume an adversary stance. Each is likely to be concerned that suggesting private resolution will be viewed by the other as a sign of weakness. This danger is minimized when parties have adopted a corporate policy calling for exploration of ADR options before resorting to full-scale litigation.

The Policy Statement helps to get over the most important strategic hurdle to quick settlement: it lets the parties concerned make the first move. Negotiations can begin early — before litigation takes on a life of its own. That is the essence of the Policy Statement. Those who adopt it can choose from the full spectrum of available ADR techniques. These include but are not limited to the minitrial, mediation and neutral fact-finding each has proven its value in helping parties arrive at economical, expeditious, mutually acceptable results.

Both the non-binding minitrial and mediation have been used successfully to resolve complex multimillion-shilling disputes involving, for example, commercial contracts, patents, construction contracts, joint ventures, and transnational issues. Most mediations and minitrials have resulted in prompt settlements and dramatic reductions in legal costs and delay.

The MDA's should however note the following with regards to the Corporate Policy Statement on Alternatives to Litigation.

- a. The Policy Statement is not a binding commitment to engage in negotiations or ADR but is an expression of corporate policy. Subscribers undertake to act in good faith and to genuinely consider ADR. It is not intended, however, to create legally enforceable rights.
- b. The Policy Statement does not preclude an MDA from taking those preliminary actions advisable to protect its access to the courts for example, filing a complaint for statute of limitations or venue purposes. Even when such actions have been taken, negotiation or ADR techniques can still be used.
- c. Vigorous advocacy is compatible with negotiation and ADR.
- d. Not every dispute is suitable for resolution through ADR techniques. If either party concludes that ADR would be inappropriate in a particular case for example, if judicial determination of a critical legal issue is deemed essential that party is not bound to explore ADR.

- e. The Policy Statement raises the consciousness of parties regarding the use of ADR and encourages the systematic review of disputes for their ADR potential.
- f. MDAs may choose to modify the wording of the Policy Statement in ways that do not change its spirit or intent. Even if ADR does not lead directly to a resolution, the effort increases chances of later settlement by establishing a channel of communications between parties and by giving each a better understanding of the other's position.

Resource Form 1: Assessing Risk

LIKELIHOOD		CONSEQUENCES				
		INSIGNIFICANT	MINOR	MODERATE	MAJOR	CATASTROPHIC
		1	2	3	4	5
ALMOST CERTAIN	A					
LIKELY	B					
MODERATE	C					
UNLIKELY	D					
RARE	E					

Consequences

1. **Insignificant** Little or no damage, none, or low financial loss
2. **Minor** Medium financial loss
3. **Moderate** Outside assistance is involved, high financial loss
4. **Major** Major financial loss
5. **Catastrophic** Huge financial loss and significant detrimental effect

Likelihood

- A. **Almost Certain** The event is expected to occur in most circumstances
- B. **Likely** The event will probably occur in most circumstances
- C. **Moderate** The event should occur at some time
- D. **Unlikely** The event could occur at some time
- E. **Rare** The event may only occur in exceptional circumstances

SEVERE RISK	Detailed research and management planning required at senior levels
SIGNIFICANT RISK	Senior Management attention needed
MODERATE RISK	Management responsibility must be specified
LOW RISK	Manage by routine procedure

Resource Form 2: Issue coding

Where possible, coding disputes into categories can assist an MDA to identify problem areas and work toward systemic improvements across the organization. Examples of coding categories appear below.

Access to service - A variety of dispute types can be coded such as – an MDA failing to keep an agreed appointment, unavailable services, transit issues or unreasonable waiting times for procedures.

Communication - Could refer to inadequate information (including incomplete and incomprehensible information), misleading or incorrect information, or failure to provide interpretive or special needs support.

Corporate services- Could include a reference to administrative processes, licenses, permits, car parking, cleaning, catering, unsanitary conditions, noise, lighting, security and accommodation.

Cost - Could include billing practices, insufficient or wrong information, government waivers information, overcharging and other decisions.

Grievances- Relating to inadequate responses to disputes, action against consumers or staff in relation to disputes or lodging disputes.

Privacy and discrimination - Including restricting access to records, discrimination, failure to treat with respect or a failure to ensure personal privacy or confidentiality.

Professional conduct - Such as failure to provide certificates and reports or other information, bogus claims, sexual misconduct, incompetence, aggressive or violent actions as well as a failure to complete and maintain adequate and accurate records.

Resource Form 3: Self Audit Checklist

This checklist can be used as one tool to rate performance. The checklist uses a 5-point rating and is intended to be used as a self-assessment tool and to assess the impact of changes made to the system. The checklist is an example and may vary according to the Dispute Management Plan that an MDA adopts.

1. A rating of 1 means that your agency or department is rating at the highest level and your processes are best practice in this area.
2. A rating of 2 means that your agency or department is meeting and exceeding the indicator.
3. A rating of 3 means that your agency or department is complying with the guidelines.
4. A rating of 4 means that you have not yet attained the benchmark areas but have policies and processes in place to reach the indicator.
5. A rating of 5 means that your agency or department has not yet met this indicator.

Commitment to improvement					
Are leaders in your Ministry, Department or Agency promoting, and responsible for appropriate dispute processes?	1	2	3	4	5
Are there policies on effective communication and dispute management that are understood and used by staff?	1	2	3	4	5
Are staff trained, resourced, and supported when handling disputes?	1	2	3	4	5
Do you make it easy for stakeholders to complain and is information made available on disputes processes?	1	2	3	4	5
Do you provide assistance to those who need it and encourage those who might not otherwise complain as a result of culture?	1	2	3	4	5
Do you ensure disputes can be made anonymously?	1	2	3	4	5
Is feedback actively sought from all stakeholders?	1	2	3	4	5
Accessibility					
Is information about the disputes system presented in a clear, uncomplicated, large-print format on how, when, where and to whom disputes can be made?	1	2	3	4	5
Are there simple and accessible arrangements for lodging disputes?	1	2	3	4	5
Are staff responsive and treat all disputes seriously?	1	2	3	4	5
Do you promote and advertise your disputes scheme and provide information for potential users?	1	2	3	4	5
Do you ask for feedback when talking to users?	1	2	3	4	5
Do you have verbal dispute forms and written dispute forms available?	1	2	3	4	5
Do you ensure that any information provided is simple and easy to understand?	1	2	3	4	5
Do you check who raises disputes and whether disputants are representative of your stakeholder base?	1	2	3	4	5

Responsiveness					
Can all staff recognize disputes and assist to avoid or minimize disputes?	1	2	3	4	5
Is it made clear that dispute handling is the responsibility of everyone in the organization?	1	2	3	4	5
Are all disputes that are not resolved at the point of service acknowledged within a set timeframe and are disputants told about the system, what to expect and given external referral information?	1	2	3	4	5
Are disputes resolved within reasonable timeframes set out in your policy? Are all disputes tracked and complainants informed about what is going on?	1	2	3	4	5
Assessment and Accountability					
Do you assess all disputes to work out which processes are most appropriate, considering complexity, seriousness, and the wishes of the disputant?	1	2	3	4	5
Do you have a rapid notification system so that senior management can be notified quickly?	1	2	3	4	5
Does your policy set out when disputes will be referred to external dispute resolution?	1	2	3	4	5
Effective Resolution					
Does your approach to dispute handling emphasize joint problem solving?	1	2	3	4	5
Are all disputes not resolved at point of service investigated to determine what happened, the underlying causes and any corrective strategies?	1	2	3	4	5
Is any investigation process clear so that everyone can follow it?	1	2	3	4	5
Are the processes fair and equitable?	1	2	3	4	5
Do you provide appropriate outcomes that are objectively fair?	1	2	3	4	5
Privacy and Accountability					
Do you manage investigations in a confidential manner?	1	2	3	4	5
Do you ensure disputants know how their personal information will be used?	1	2	3	4	5
Do you store disputes records separately from other records and only use personally identifying information for dispute resolution?	1	2	3	4	5
Do you provide disputants and staff with known facts during an investigation, a summary of factors contributing to the dispute, information about what changes have been made (or will be made) and how those changes will be monitored?	1	2	3	4	5
Gathering and Using Information					
Do you record all disputes so that individual disputes can be tracked and to identify trends and patterns?	1	2	3	4	5
Do you monitor your system against the policy set out in your Dispute Management Plan?	1	2	3	4	5
Do you regularly provide information to staff about disputes so that staff learn about how recommendations have been implemented and monitored?	1	2	3	4	5
Do you periodically report information to the public?	1	2	3	4	5

Monitoring and Improvement

Do leaders and senior staff use disputes information in planning, quality improvement and to inform professional development?	1	2	3	4	5
Are senior management quickly notified of all disputes with significant or severe risk and is action taken?	1	2	3	4	5
Are policies and practices on disputes regularly reviewed with stakeholders to ensure that they are effective?	1	2	3	4	5
Are disputants satisfied with the processes?	1	2	3	4	5
Do the dispute processes work and are they monitored and audited against criteria?	1	2	3	4	5

Resource Form 4; Dispute Management Plan Checklist

Section of Plan	Notes and Examples
Introduction	Proactive, fair, coordinated, and consistent
	Endorsed by MDA head
	Consistent with Legal Services Directions
	Process of review
	Dealing with requests for assistance and information
Objectives of an MDA's DMP	Overriding objective/s of Dispute Management Plan
	Realistic short-term objectives
Types of Disputes	Identify source, nature, and extent of main areas of dispute affecting the agency
	Features of various categories of disputants
	Links or reference to documents, resources, and knowledge regarding disputes
Key Principles	MDA's key or overriding principles
	Are there different types of disputes that require differing principles?
	Values and principles of public service may be adapted as key principles for MDA'S (see Chapter 13 of the Constitution of Kenya, 2010)
	Reference to and relationship with Dispute Management Plan (DMP) Principles for Resolution of Disputes
Dispute Management Strategies	General and specific strategies for managing disputes
	General strategies may include: <ul style="list-style-type: none"> ➤ Use of a dispute assessment matrix ➤ Form and style of communication with disputants ➤ Setting responsiveness targets in communicating with disputants ➤ Tracking of disputes ➤ Development of a dispute resolution toolkit for use within an agency ➤ Provision of appropriate training for staff
	Specific strategies may include: <ul style="list-style-type: none"> ➤ Letters of engagement sent to an MDA's lawyers including a standard paragraph seeking written advice on settlement and alternative dispute resolution options ➤ Special reporting requirements for particular sorts of disputes ➤ Trialing a pilot program in particular areas of disputation
	Consideration of alternative dispute resolution in both general and specific strategies
	Allows flexibility
Roles and Responsibilities	Explicitly assign roles and responsibilities to. <ul style="list-style-type: none"> ➤ Achieve the Dispute Management Plan's overall objectives ➤ Implementing general and specific strategies ➤ Keep the Dispute Management Plan under review
	Generally stated roles and responsibilities for staff in relation to dispute management
	Specific roles and responsibilities assigned to staff, such as to whom disputes shall be referred when appropriate
	Roles and responsibilities to be incorporated into performance plans of relevant staff
Evaluation and Review	Include provisions to ensure the implementation of the Dispute Management Plan is properly evaluated
	Results from the evaluation to inform revision of all aspects of the Dispute Management Plan and assessment of the performance of staff with roles and responsibilities under the Plan

Awareness and Promotion	How will the content of the Dispute Management Plan be promoted to staff and stakeholders?
	<p>Mechanisms for promotion may include:</p> <ul style="list-style-type: none"> ➤ A communication strategy ➤ Integrating dispute management principles into MDA's training and publications ➤ Providing the Dispute Management Plan as part of induction materials for new staff ➤ Including the Dispute Management Plan on MDA's intra-net sites ➤ Requiring staff to pledge support for the Dispute Management Plan. Appointing a dispute management leader or 'champion' of the Dispute Management Plan within the MDA

Resource Form 5: Corporate Policy Statement on Alternatives to Litigation

CORPORATE POLICY STATEMENT ON ALTERNATIVES TO LITIGATION

(Insert name of MDA)

We recognize that for many disputes there is a less expensive, more effective method of resolution than the traditional lawsuit. Alternative dispute resolution (ADR) procedures involve collaborative techniques which can often spare the high costs of litigation.

In recognition of the foregoing, we subscribe to the following statements of principle on behalf of **insert name of MDA**.

In the event of a dispute between **insert name of MDA** and other party(s) we are prepared to explore with that other party resolution of the dispute through negotiation or ADR techniques before pursuing full-scale litigation. If either party believes that the dispute is not suitable for ADR techniques, or if such techniques do not produce results satisfactory to the disputants, either party may proceed with litigation.

(Insert name of Cabinet Secretary and Signature)

(Insert name of Accounting Officer/Attorney General and Signature)

(Insert Date)