

THE LIMITATIONS OF LITIGATION

In most legal systems, once a conflict has arisen, the courts resolve it by applying relatively inflexible legal rules in order to determine which party's case is superior in law, thereby producing a winner and a loser.

In some instances courts are the most appropriate forum for resolving conflicts, for example where the conflict is governed by clear legal rights and/or obligations that define a 'guilty' and an 'innocent' party or where there is a need for punishment, deterrence or redress. This is particularly relevant where there is an imbalance of power (e.g. economic or political) and the less powerful party could be forced into an unfair settlement.

However, in the case of many of the conflicts that arise it is not possible or even desirable, to stipulate rigid rules to determine who is 'right'. Resolving conflicts of this nature require a balancing of interests in the context of a wide range of flexible criteria, which themselves may not be wholly consistent.

The litigation process has been described as 'decide, announce, defend'. The parties to the dispute confront each other in a court, a judge or arbitrator considers the evidence and, based on predetermined legal rules, imposes a binding decision on them as to which party's case is superior in law, thus producing a so-called 'win-lose' outcome. The parties relinquish control over the process by which the dispute is heard as well as the decision that is reached.

The *main disadvantage* is that it produces piecemeal, incremental decision-making by a judge, based on narrow points of law, without taking wider related issues into account.

As litigation is ostensibly directed at narrow procedural and legal issues instead of the underlying relationship questions, it often fails to resolve the real differences between the contending parties.

There are a number of *other significant disadvantages* to applying adversarial techniques to the resolution of conflicts. For example, adversarial techniques frequently -

- encourage conflict between groups and generate anger;
- force people into entrenched positions;
- make one group suspicious of the motives of another;
- lead to long delays in decision-making;
- impose a 'solution', rather than producing an efficient and equitable settlement;
- create winners, losers and divisions;
- are expensive, in terms of both human energy and economic resource costs;
- take control of the outcome away from the parties, increasing the likelihood of subsequent claims of bias and of non-compliance with the rule;
- make no provision for policy review or monitoring of the decision on behaviour in the future.

THE ADVANTAGES OF MEDIATION

One of the *main objectives* of MEDIATION is to create consensus by satisfying the interests of the people most concerned with the outcome. Mediation aims to help people with opposing views to work together to seek solutions that they can all support, allowing time for trust to build up between the participants so that they all feel part of a team seeking solutions together.

The *main characteristics* of mediations are:

- they are less formal and generally more private than court litigation;
- they permit the disputing parties to have more active participation in, and more control over, the processes for solving their own problems;
- they have been largely developed in the private sector, but are now being increasingly borrowed and adapted by courts and administrative agencies.

A number of *significant advantages* result from these characteristics:

- results can be gained more quickly and cheaply;
- in a non-adversarial atmosphere, communication between alienated parties can be restored, leading to increased mutual understanding;
- since the interested parties retain control, substantive issues of importance to them can be discussed and the roots of the problem tackled;
- interested parties that are involved in the issues at stake bring to the bargaining table a much deeper understanding of the technical and institutional dimensions of the problem than an external judge would, and are in a better position to explore different solutions and analyse their consequences;
- decisions can be tailored to the needs of the parties, who are free to fashion any deal that accommodates their interests, without regard to past disputes;
- the prospects for successful implementation of the decisions/solutions produced by the interested parties themselves are enhanced and, as they have a better understanding of and a greater investment in the settlement, any subsequent problems that do arise can often be expeditiously resolved, rather than becoming the subject of further litigation.