

ALTERNATIVE DISPUTE RESOLUTION (ADR); BEYOND LITIGATION.

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Abstract:

This study explains the various alternatives to resolving disputes outside the court room. As court queues, rising costs of litigation and time delays continue to plague litigants, it has become expedient to look beyond litigation and adopt some other measures of resolving disputes among warring parties. There are three major forms of alternative dispute resolution processes which are Arbitration, Mediation and Negotiation. All these forms of alternative dispute resolution are voluntary and open for different categories of disputers who prefer to resolve their differences and come to a settlement and mutual agreement between the parties involved. This study also helps to define the peculiarities between the various Alternative Dispute Resolution methods with a clear analysis as to why it is preferable than litigation.

Keywords: *Alternatives, Arbitration, Litigation, Mediation, Negotiation, Resolution.*

1. INTRODUCTION:

In general definitions, dispute is referred to as a disagreement, argument or conflict between parties. Dispute resolution on the other hand is an indispensable process for making the society peaceful. Dispute resolution process tries to resolve conflicts which enables parties to maintain co-operation. Alternative dispute resolution (ADR) refers to any means of settling disputes outside of the court room. As problems associated with the normal litigation are becoming numerous - delay in court proceedings, time and effort wastage, high cost of litigation, stringent technicalities and many other issues, it is of high

importance to adopt many other alternatives to resolving disputes.

Dispute resolution is an indispensable process for making social life peaceful. Dispute resolution process tries to resolve and check conflicts, and also enables persons and group to maintain co-operation. It can thus be alleged that it is the *sine qua non* of social life and security of social order, without which it may be difficult for the individuals to carry on the life together.¹

ADR is beneficial for resolving any critical dispute. However, the results vary from situation to situation, depending on the matter at hand. ADR possesses some key benefits which include:

(a) Cost saving: unlike litigation, ADR carries a lower cost. This is due to the fact that judicial processes which involves the payment of court fees, appearance fees, documentation fees and the likes are not included in ADR.

(b) Saves Time: In resolving conflicts via ADR, parties involved decide when it is more convenient for them to meet in order to resolve their disputes. However, adjudicative processes for resolving conflicts are quite lengthy since the hearing is dependent on court decisions. Litigation takes years to resolve due to incoherent dates and time. Matters deliberated using the ADR method may take few months or even just weeks to be resolved.

(c) Control: The parties have control over some of the processes in ADR. Decisions such as choosing the preferred method of ADR, selecting the panel for the dispute resolution, the length of the process, and, in mediation cases, even the outcome is controlled and maintained by the parties. In a lawsuit process, the control is totally possessed by the court and supreme authority.

¹ R. E. Park and E. W. Burgess, Introduction to the Science of Sociology, (The University of Chicago Press 1921)

(d) Confidentiality: Privacy is fully secured when it comes to Alternative Dispute Resolution. ADR is conducted in private, therefore avoiding publicity from the media. The public are also unable to attend.

(e) Experienced Neutral Panelists: The Panelists are professional mediators and arbitrators with training and expertise in dispute resolution. Disputing parties are able to select their panellist from a list of qualified individuals who are specialized in specific aspects and areas as it concerns the matter for dispute.

(f) Cooperative Approach: All ADR services take place in a more informal, less confrontational atmosphere. This enables the parties involved to continue in a good and undistorted relationship at the end of the process.

2.0 ALTERNATIVE DISPUTE RESOLUTON METHODS

2.1 Definition and Scope of Arbitration

Arbitration is one of the oldest methods for the resolution of disputes between the parties. It has existed in one form or the other, in every country at all times. Arbitration as a process of dispute resolution offers many advantages to both the parties.²

Arbitration is one of the various methods of dispute resolution but undoubtedly the most popular. It is defined in the Halsbury's Laws of England as "the reference of a dispute or difference between not less than two parties for determination, after hearing both sides in a judicial manner, by a person or persons other than a court of competent jurisdiction"³

Similarly, Bernstein in his book on Arbitration practice said – "where two or more persons agree that a dispute or potential

2 V. Agarwal (2001). "Alternative Dispute Resolution Methods" Paper written following a UNITAR Sub-Regional Workshop on Arbitration and Dispute Resolution published in Geneva, March 2001.

3 Halsbury's Laws of England, 3rd Edition, Volume 2 at pg.2 para 2.

dispute between them shall be decided in a legally binding way by one or more impartial persons in a judicial manner upon evidence put before him or them, if it's a panel. the agreement is called an **arbitration agreement or a submission to arbitration.**

Arbitration also involves a neutral third party (the arbitrator) who is responsible for running the process and making the decisions necessary to resolve the dispute. Unlike litigation where a judge (a public official) is appointed by the court to sit on a case, the arbitrator is typically a private person chosen by the parties. Such person is usually a specialized expertise on the matter for dispute. A dispute that might otherwise go to court becomes subject to binding arbitration only by the agreement of the parties. In this sense, arbitration is a creature of contract, and the terms of the parties' particular arbitration agreement are generally controlling.

An agreement to arbitrate can also be made after a dispute arises, as the result of a negotiation between parties already in conflict. Binding arbitration in lieu of judicial adjudication is voluntary in the sense that it is only by agreement that one is required to arbitrate; but once there is an agreement it is involuntary in the sense that courts will enforce it against a reluctant party by refusing to adjudicate disputes which are within the scope of the arbitration agreement.

2.2 Benefits of Arbitration

In an arbitral proceeding, the procedural rules may be set by the parties in their arbitration agreement. Pre-trial discovery is typically limited or eliminated and each party is given an opportunity to present proofs and arguments at a hearing where the procedures are typically much less formal than those found in court. Depending upon the parties' agreement, the arbitrator may or may not be asked to render a principled decision supported by a reasoned opinion. Often the arbitrator is free simply to announce the award without any explanation. In "final-offer" arbitration, by agreement of the parties the arbitrator is required to resolve the dispute by choosing one or

the other of the “final-offers” submitted by the disputants – the arbitrator lacks all power to impose any other result (Farber 1980)⁴. (This is sometimes called “baseball arbitration” in the United States because it is used to resolve salary disputes in major league baseball.)

3.0 Definition and Scope of Mediation

Mediation, as one of the most important and also most common form of Alternative Dispute Resolution, is a procedure in which the parties discuss their disputes with the assistance of a trained impartial third person(s) who assists them in reaching a settlement.⁵ Mediate is from the Latin word "mediere", meaning to be in the middle.

Generally, it is like a negotiation, presided over by a third party. Regarding this definition, we can conclude that mediation occurs every day in human's life. For example, a mother trying to settle a dispute or quarrel for her children or a manager settling a dispute between two members of staff are said to be mediating.

According to the Black's Law dictionary, mediation is the act of a third person, interfering between two contending parties with a view to reconcile them or persuade them to adjust or settle their disputes.⁶

According to the Madison Law, mediation is a form of ADR where a neutral third-party assist disputing parties in resolving conflict through the use of specialized communication and negotiation techniques.⁷

⁴ Farber, H. S. “An Analysis of Final-Offer Arbitration.” [1980] *Journal of Conflict Resolution*; 24 page 683-705.

⁵ What is Mediation and how does it work?
<<https://corporate.findlaw.com/litigation-disputes/what-is-mediation-and-how-does-it-work>> accessed on 6 November 2020.

⁶Black, H. Campbell: Black's Law dictionary, West Publishing Co. St. Paul, Minnesota, USA 1990.

⁷ Megan Smoak and Nichole Hill: Madison Law, Create Space Independent Publishing Platform, ISBN-10: 1478151897. 2012.

It is also important to note that a mediator cannot impose his decision/s on the parties involved. He only stands as a facilitator in the mediation process.

The most common disputes that lead to mediation are the ones that involve contracts, disputes in commercial transactions, family law matters, employment disagreements, workers compensation, divorce, domestic relations or any other matters which do not involve complex procedural issues like criminal cases.⁸

Mediation can be an informal meeting lasting for some hours or rather, can be a planned settlement conference that lasts for some months. It is volitional to the two parties which makes it different from arbitration where an arbitrator, just like a judge, can make decision that is binding on the both parties.

3.1 Benefits and Advantages of Mediation

There are many advantages to using mediation as an Alternative Dispute Resolution (ADR).

1. **Mediation is not Cost Effective:** One of the biggest advantages of mediation is that the costs are significantly lower. The English Courts have a very strong endorsement to mediation at early stages, mostly in cases where litigation costs more than the amount in dispute. In **Egan v Motor Services (Bath) Ltd**,⁹ the amount in dispute was only €6,000 but the parties spent almost €100,000 on the litigation. Ward LJ regarded the parties as "completely cuckoo" to have engaged in such expensive litigation with so little at stake. So, litigation and court cost can be very expensive and the cost of mediating is greatly reduced in

⁸ Find Law Attorney Writers, What is Mediation and how does it work. (2016) accessed on 6 November 2020.

<<http://Corporation.findlaw.com/litigation-disputes/alternative-dispute-resolution-which-method-is-best-for-you>>

⁹ *Egan v Motor Services* (Bath) Ltd, England and Wales Court of Appeal (Civil Division)1002. 18 Oct, 2007

comparison with pursuing the matter through the courts or arbitration.

2. It is Private and Confidential: Confidentiality in mediation has such importance that the legal system cannot force a mediator to testify in court as to the content or progress of mediation.¹⁰ What you say during mediation cannot legally be revealed outside the mediation process, however with few exemptions. Whatever said in a mediation meeting is kept between the two parties and the mediation. The proceedings are concluded in private and the parties are in control of their own position.

3: Mediation ends amicably: Lawsuits ruin relationships, thus an advantage of mediation is its ability to resolve disputes without ruining the relationship. Mediation allows the two parties to resolve their disputes in a friendly manner. It gives the two parties a way to solve disputes in ways agreeable to both sides.¹¹ And obligations under agreement are more likely to be fulfilled than obligations imposed by a court.

4: Time Saving: While an average case going through proper legal procedure can last for years, a case handled through mediation lasts for less than three months. Moreover, meeting sessions can be easily fixed at any time that suits the either parties and can take place in variety of locations. It is also very helpful in family cases where prolonged law disputes can cause psychological and emotional imbalance for the children involved. Studies have shown that trials that take months to prepare have detrimental effect and cause tension for the children.¹²

5: Compliance: Studies show that people who reach an agreement mutually will not look for ways to violate the

¹⁰Megan Smoak and Nichole Hill: Five benefits of mediation, Madison Law, Create Space Independent Publishing Platform, ISBN-10: 1478151897. 2012.

¹¹ David Jones: The advantages and disadvantages of mediation (2019) accessed on 6 November 2020 <<https://www.glaisyers.com/adantages-and-disadvantages-of-mediation>>

¹² Law reform commission-alternative dispute resolution: Mediation and conciliation. Dublin, Ireland (2010)

agreement. As such, agreements reached through mediation are more likely to be carried out than those imposed by a judge because both parties mutually agreed to them.

3.2 Disadvantages of Mediation

There are disadvantages of mediation that lead people to use other options such as litigation, arbitration, conciliation and so on, to solve their problems.

1: Either Party may Withdraw: One of the disadvantages of mediation is that either of the parties can withdraw at any time while mediating. Moreover, either party can choose to go with the agreement or not. In litigation, for example, the only party that can withdraw is the plaintiff, if they drop lawsuit. But in mediation, even the party that is at fault can withdraw if they are not happy with what might be the probable outcome of the meeting.¹³

2: The Mediator is a Third Party: The mediator is an outside party. The mediator has no previous knowledge of what the case is and has never met the parties before. This can be like a problem in mediating an issue. In contrast, a lawyer that is called to defend a client in a criminal case knows much about what a criminal case is before getting into the court. Furthermore, the mediator cannot decide for the parties he or she is trying to mediate for. He just brings up pieces of advice on what the two parties can agree on.

3: There are no Guarantees: In mediation, negotiations fall through. There is no assurance that the issue will be settled if a side is adamant and refuses to listen to what is being mediated, the matter will end up in court and even regardless of the cost

¹³ Mediation Disadvantages (accessed on 6 November, 2020)
<<https://www.lawfirms.com/resources/lawsuits-and-disputes/mediation/mediation-disadvantages>>

spent on mediating, the cost of going to court will be added if negotiations fall through.¹⁴

4.0 Negotiation

Negotiation is one of the most commonly used means of Dispute Resolution.

Negotiation can be defined as a strategic discussion that resolves an issue in a way that both parties find acceptable. In a Negotiation, each party involved tries to persuade the other with his/her point of view. By negotiating, all involved parties try to avoid arguing but agree to reach some form of compromise.

We participate in negotiations every day. We negotiate disputes and responsibilities. Negotiation is a bargaining process between parties when both try to arrive at an understanding agreement that settles matter of common concern or resolves conflict. Though conducting a negotiation has some objective principles that can guide its success, it is an art. Steve Gates, CEO of The Gap Partnership, an international workshop provider and organizer, wrote "...there is no right or wrong way to negotiate an agreement, there is an appropriate way."¹⁵

In negotiation technique, the serious bargaining negotiator accomplishes his goal by endeavoring to persuade his opponent that their case is not strong and that they should seek a solution as fast as could reasonably be expected. Instead of approaching a negotiation like an exercise in joint problem solving so that all parties benefit, the competitive negotiator views negotiations as a zero-sum game; one party must win and another will have to lose.

¹⁴ David Jones, The advantages and disadvantages of mediation (2019) accessed on 6 November 2020. <<https://www.glaisyers.com/adantages-and-disadvantages-of-mediation>>

¹⁵ Steve Gates, The Negotiation Book: Your Definitive Guide to Successful Negotiating, published by John Wiley & Sons (2011) p.19 accessed on 9 November, 2020.

5.0 Conciliation

Conciliation is the process by which one or more independent person(s) selected by the parties to an agreement generally by mutual consent, either at the time of making the agreement or subsequently when a dispute has risen between them, to bring about a settlement of their dispute through consensus between the parties by employing various persuasive and other similar techniques. The conciliator is supposed to be impartial and conduct the conciliation proceedings in an impartial manner. He/she is guided by the principles of objectivity, fairness and justice, and by the usage of the trade concerned and the circumstances surrounding the dispute, including any previous business practices between the parties. The conciliator is not bound by the rules of procedure and evidence. It is a process of confidence and faith. Sometimes, and in some systems, it is also called mediation. There may be technical or legal differences between the two expressions, namely, conciliation and mediation, but for the present purpose the expression “conciliation’ is used to refer to both the processes, namely, the conciliation and mediation.

6. CONCLUSION

For a negotiation process to start and end well, consistency matters in ensuring the negotiation are as effective as possible. Furthermore, if the steps of preparing for a negotiation is thoroughly followed, there is an assurance of a successful negotiation. We’ve defined negotiation and examined the alternatives strategies for conflict resolution. Alternative Dispute Resolution is indeed an emerging sector in the litigation process. With the various types and ways of resolving dispute such as mediation, negotiation, arbitration, as discussed earlier, it is absolutely possible to engage in a judicial process without stepping into the court of law, the litigation process has become so easy as these steps help to hasten the judicial process, as it is known that justice delayed is justice denied. The different steps to Alternative Dispute Resolution help to fasten the judicial

process, reduces the cost of litigation significantly, foster unity even after the process.

