Alternative dispute resolution "ADR"

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Alternative dispute resolution

Mediation, negotiation and conciliation process : advantages and disadvantages of different types of ADR.

Introduction

In this chapter I want to talk about arbitration companies to litigation, this subject had a lot of articles and idea. It is not really easy to develop idea without knowledge

So, first start with this question, this question remains, then as to the purpose of alternative dispute resolution (ADR) ?

« Alternative dispute resolution (ADR) refers to the different ways people can resolve disputes without a trial. Common ADR processes include mediation, arbitration, and neutral evaluation . These processes are generally confidential, less formal, and less stressful than traditional court proceedings.

ADR often saves money and speeds settlement. In mediation, parties play an important role in resolving their own disputes. This often results in creative solutions, longer-lasting outcomes, greater satisfaction, and improved relationships. »

The process of dispute resolution is largely governed by arbitration which is a law in its own right. ADR is a method of resolving disputes among international traders, the other question that can we ask it is voluntary er coercive?

Of course, ADR is defined as a consensual form of dispute, without any hesitation. And it is free from coercive powers. However it could be crasted with arbitration, which is a form of dispute resolution.

By the way, The ADR it does contain a coercive component. The only thing different here is, when we talk about enforcement and more specifically when it comes to arbitration, because arbitration, it allows for the enforcement of its decisions and in many case, it looks like a court procedure and I we could say in these times.

Arbitration of course, it become without any hesitation popular methods of resolution, we can understand that in many case.

So, nowadays we called “ international commercial arbitration, as well as the arbitration between investors, specifically between companies and states, it is so important.

This is the way to solve disputes between investors and state. We should say that The ADR procedure has a aim to resolve the dispute between parties and it should be not forgetting that in a more amicable and less formal way. This is specifically true for the way that I will talk about in this paper. There is a different way to resolve dispute.

Let’s talk about this first method of ADR, it is mediation,

Chapter 1. Mediation

1. Mediation

a. voluntary

The mediation is method which is voluntary, non-binding confidential method. As we mentioned before, mediation is a voluntary process, we should say that, participants have the option to withdraw at any point during the process.

We have one exception, to this role, this lonely exception is when the contract includes a prior agreement to mediate, it becomes binding. It is really important to note that “ the parties are not bound by the decision. Furthermore, in the event that there is a conflict of interest, the parties may opt to appeal the decision. “

If we have negotiated settlement which is reached, both parties are totally free to reach agreement or discord regarding it.

b. Private

Of course, we should say this that Mediation is private, why ?

Because, the parties communication should stays private. It could have any consequences outside of the process, which is very attractive for many companies. Because companies don’t want facing damages of their identity because of this process.

c. The mediation process considers both parties interests

Personal interest, including financial interest, which may or may not go beyond the purely legal

Now, talk about mediator and the process of mediation

2. The mediator and the process of mediation

The actors of mediation should be neural, this is called third party known as the mediator and the parties to the dispute.

The mediator of course assumes the big responsibility of acting in a neutral way with the parties

The main objective and we can say also the big rule of the third party “ mediator” is to achieve a compromise of course after having conducted private negotiations with each party.

The mediator should research a compromise after having private negotiation an amicable dispute settlement that would satisfy both sides which is the aim of mediator “ achieve amicable dispute which is satisfy both sides.”

That should be said that, the mediator does not take any decision on his own. We observe two kind of types of mediation in many case, we could call them “ facilitative and evaluative. The mediator offers a non-binding assessment of the dispute also.

The main goal is to solve the problem in a formal way. This solution will be of course written down in a contract or agreement that everyone will agree and follow it.

The process happens in private as we said before, which can be very nice in some situations of course.

In addition, we should say that, the mediator does not judge on the right of the parties and behavior.

Now let’s talk about the advantages and dis advantages of mediation

3. The main advantages and disadvantages of mediation

A. The advantages

a. The benefits of mediations

The first thing that we should mentioned here, it is that the mediation is very flexible, this character of flexibility, it could be in some way very attractive for the parties.

b. The ability

The other potential benefit is the ability to preserve the primacy of mediating parties. In this way, we could say that this kind of ability keeps the parties aways from litigation which is searching the mediator. Because, the litigation could be long and expensive for the parties. And we should ad in this way that this is the aim of the Wolf reforms of the theory of procedure in the United Kingdom.

B. The disadvantages

Now we focus on the disadvantages of mediation. In many cases, the parties may want to tell everyone what happened, if the party is seeking vindication or public apology, this could be very unwilling things for the parties. This could be big issue.

By the way, it is not ideal if the dispute requires a decision based on a previous legal ruling, or if any of the parties require a legal opinion. Mediation might be more and more efficient and effective if the dispute isn’t based on a specific clause or legal base, but on a specific happening.

Let’s focus on mediation in different countries

C. Germany case

It could be strange for many but German law does not regulate mediation. But that’s not mean that there is no rules of mediation. The rules of mediation can therefore be set up by the parties.

We could say that, there is a lot of freedom, the rules of course can be suggested by the mediator, any way the parties are obliges to accept them, the parties could refuse them. That’s mean that the parties are free to choose to have their mediation proceedings administered by an institution.

The role of the mediator is not regulated, so this mean we don’t have in germane any specific qualification for the mediation.

D. England

In England, mediation is one of the method which is voluntary, by the way, there is a prior contractual agreement to mediate. We could say that, all mediation conducted in a confidential manner.

“ The parties to the litigation are not under an obligation to mediate instead of litigate, but at the beginning of the proceedings, they’re obligated to consider whether they could settle the dispute by ADR”

“ This is encouraged by the court, which is empowered to stay proceedings so parties have time to mediate. A party should be careful not to fail to mediate and reasonably, because this may prompt the court to impose sanctions on it” .

E. The European mediation directive

The European Mediation Directive says

“ If a settlement agreement is reached, it can be enforced just as a contract would be. If the agreement refers to a cross-border contract and hence a cross-border mediation, the parties may need to apply to a court to apply it, basing its request on the European Mediation Directive.

The EU Mediation Directive (2008/52/EC) promotes amicable settlement of disputes, including mediation.

It applies to cross-border disputes and provides for the enforcement of agreements reached through mediation.

Although it encourages mediation, under the Directive, the parties are not obliged to mediate, and they are no sanctions for a failure to mediate. • In the UK of note are the Cross-Border Mediation (EU Directive) (EU Exit) Regulations 2019, which took effect on 31 January 2020, this was the date when the UK formally left the EU. As a result, all cross-border mediation after 31 January 2020 will be subject to UK domestic rules on mediation “

“ This is encouraged by the court, which is empowered to stay proceedings so parties have time to mediate. A party should be careful not to fail to mediate and reasonably, because this may prompt the court to impose sanctions on it” .

Chapter 2. Conciliation

A.Conciliation

In this chapter we will focus on the conciliation, first start with the definition of the conciliation

Conciliation is an alternative dispute resolution. That supposed to say that settling a disagreement on the good points of the disagreement. That means that the conciliator expected to provide a usually provisional opinion of the case on the aim to facilitate the negotiation of the settlement parties. The conciliator could share his opinion but in order to help the parties teach a solution.

In the same way of mediation, conciliation can be done voluntarily, of course with some flexibility, and should keep information private and in the same time the conciliation should base on the interests of the parties.

As we mentioned before, it is voluntary, the parties are not obliged to resolve the dispute through conciliation. We should add to, the process of conciliation is flexible, the parties could decide how king the process will take.

The conciliation could be conducted privately, which can be very nice for the parties. So we talk here about confidentiality of process, which is very benefic for the parties in some case.

1. Benefits and disadvantages of conciliation

a. Benefits

It is anonymous

Parties can choose an expert conciliator suiting their needs

It is cost and time efficient

It is confidential

It is appropriate for and often used in employment law disputes.

b. Disadvantages

Not appropriate if one of the parties wants to make the dispute public. This could happened if party want vindication or seeking public apology

Not suitable if the dispute needs to be decided in the basis of a legal precedent or if both or any of the parties need a legal opinion .

2. Case of Germany

In Germany, parties of course are free to elect among “model clause” Offred by ADR institutions but it does mean they are not obliged. What it is clear that , anyone can be a conciliator and the conciliation settlement proposal will be written and this conciliation settlement is not enforceable.

3. Cross border

Art 1 of the Regulations on the Procedure of International Conciliation, The Institute of International Law defines cross-border conciliation as

“A method for the settlement of international disputes of any nature according to which a Commission set up by the Parties, either on a permanent basis or an ad hoc basis to deal with a dispute attempts to define the terms of a settlement susceptible of being accepted by them or affording the Parties, with a view to its settlement, such aid as they may have requested.”

Chapter 3 : Negotiation

1. Negotiation

We could give a definition of negotiation in easy way but it is generally defined as any form of direct or indirect communication of course between parties. The parties have a dispute or different goals could talk about how they can find a solution to their disagreement.

So Negotiation does not have any prejudice, which will be very benefit for the parties. Negotiation is one of the method of ADR.

A. Advantages of negotiation

As we have been mentioned before, mediation, conciliation and negotiation is voluntarily

By the way, negotiation does not need a neutral third person.

B. Disadvantages of negotiation

If there is imbalance between the parties, it could be very difficult to find equitable solution.

On the other hand, the lack of a third party may lead to no decision or inequitable decision.

The parties, one or both parties could have a decision to leave the negociation.at any point of negotiation.

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