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qLegal Online Publication

Alternative Dispute Resolution

This online publication explains what Alternative Dispute Resolution is and why it could be convenient for businesses.

Alternative Dispute Resolution, or "ADR", is used to describe various methods of settling a dispute. Arbitration, Mediation and Conciliation are all different types of ADR.

Parties involved in commercial transactions recognize that problems may arise at some point in their relationships. The best way to address this problem is to have well-drafted contracts with clauses and conditions designed to resolve future disagreements. However, despite having drafted a good and comprehensive contract that anticipates the most likely disputes, there could be overlooked issues which, in the future, put the parties in a conflicting situation. This is usually the point at which a dispute resolution strategy is needed, and the moment in which the parties must decide what is the best method to resolve their disputes. Many contracts will include dispute resolution provisions in which the parties agree to handle unanticipated future disputes in a certain way. Where there is no contractual provision in place, the parties will have to decide at the time of the dispute how to resolve their differences.

ADR can only be applied if all parties agree to submit their dispute to the procedure. This agreement can take place in advance, such as a term in a contract where the parties agree ahead of time to resolve future disputes via ADR, or after a dispute has arisen when the parties decide at that time to try ADR. Sometimes parties will agree – either ahead of time in the contract or at the time that a dispute arises – to a multi-tiered approach to ADR. For example, they could agree: (1) to try negotiating amongst themselves for a specific number

of days; (2) if negotiation fails to resolve all the issues, to try mediation or conciliation for a specific number of days; and (3) if mediation or conciliation also fail to resolve all the issues, to then resort to arbitration or litigation in court. For a helpful additional resource with tips for conducting negotiations, please review this qLegal online publication: *Tips for Negotiation*.

The benefits of ADR include time and cost-efficiency, flexibility, party control including the selection of the neutral mediator or arbitrator, neutrality, a single procedure which is not able to be appealed, confidentiality and expertise (in fact, in alternative dispute resolution, like in litigation, parties will engage experts depending on the subject matter at issue).

Alternative dispute resolution is the use of methods to resolve the dispute instead of having a court decide the matter. ADR usually involves a neutral third party and can help find a creative solution to resolve an issue. ADR is often defined as alternative dispute resolution or amicable dispute resolution. This, however, is a limitative interpretation that restricts its true potential. A more inclusive approach is to consider mediation, conciliation and arbitration all being parts of the same thing: appropriate dispute resolution.

The ADR option may provide businesses with a potentially quick and inexpensive alternative to going to court. ADR can help businesses solve problems quickly and inexpensively, avoiding the debilitating effects that court cases can have upon a business.

There are different kinds of ADR, they can be explained in detail as follows:

ARBITRATION:

One of the most important types of Alternative Dispute Resolution is arbitration. Arbitration is a procedure in which parties submit their dispute to one or more chosen arbitrators, for a binding and final decision (called an award) based on the parties' respective rights and obligations and enforceable as an award under arbitral law.

Arbitration is a process whereby a neutral third party gathers information from both parties and makes a decision that is intended to be legally binding and final. Arbitration is more formal or "court-like" than other ADR mechanisms such as Conciliation and Mediation. With Arbitration, parties agree (either before or after the dispute arises) to be bound by the final decision of the third-party arbitrator who is a figure comparable to a judge in litigation. In conciliation and mediation, on the other hand, decisions are agreed upon by the parties

themselves rather than imposed by the third party and for this reason these are also known as Consensual Methods, the consent of the parties being mandatory.

Arbitration has some main features/characteristics. They are as follows:

- There can be a pre-agreement to arbitrate such as a clause in a contract, or parties can agree to submit to arbitration after a dispute has arisen (known as 'ad-hoc' arbitration).
- It must include a suitable subject matter.
- In arbitration proceedings, there should be choice of arbitrator or an agreed manner of appointment of the arbitrator.
- It should abide by the rules, language and forum chosen by the parties.
- It should be decided by the applicable law chosen by the parties.

An arbitration is a private, non-state-based system of dispute resolution by an impartial tribunal. The main advantage is privacy and confidentiality and a binding and enforceable award. There are two sides to every coin.

The fundamental advantage is that the parties to the arbitration have practically complete control over the structure and method of the proceedings.

Full control of the process — the parties can agree on the course of the proceedings. This can result in the method being streamlined to meet the specific needs of the case at hand.

Finality – the grounds for challenging an arbitrator's decision are severely limited by the Arbitration Act 1996. The decision of the arbitrator is agreed to be final which can bring proceedings, which could have continued for years through the court system, to a swift conclusion.

Arbitrations are private, whereas court procedures are open to the public. If the subject matter is sensitive, such as proprietary technology or trade secrets, the parties would benefit from limiting the number of people who have access to the evidence before the arbitration panel.

Convenience - In litigation, trial dates are set by the court with little consideration for the parties' convenience. There can often be a long wait for trial dates, especially when a case takes multiple court days. During the arbitration procedure, the parties might agree on dates that are most convenient for them and their witnesses.

There are some disadvantages of arbitration; they are as follows:

It requires the parties' consent. Whereas a court has broad authority to penalise litigants who are obstructive or dilatory in their conduct of court proceedings, an arbitrator's powers are not as powerful as those of a judge to find someone in contempt of court and are generally limited to financial penalties; pre-arbitration procedures are not always as clear and direct as those outlined in the civil procedure rules.

There is little room for an arbitrator's ruling to be challenged. An aggrieved party would have to demonstrate that:

1) the arbitrator was not able to rule in the specific subject matter (in fact, there are certain circumstances in which ADR is not a possible choice as indicated under Section 67 of the Arbitration Act 1996); or
2) there was a major irregularity in the proceedings that justifies the award being set aside; or
3) the arbitrator erred on a specific issue of law.

The arbitration decision is final. There is no formal appeals process available. Even if one party feels that the outcome was wrong or unfair, they cannot appeal it. Arbitration may be a cost-effective legal settlement option, but it could reach a significant amount of money if the issue requires special experts. The arbitration process often consists of documents rather than witnesses, which eliminates the potential to cross-examine.

MEDIATION

Mediation is the most used method of Alternative Dispute Resolution. It is a process in which the parties meet with an independent and trained mediator who liaises between the parties to identify issues and facilitate an agreed settlement which is only binding if agreed by both parties and recorded in writing.

The mediation method brings several advantages. The main two are the speed and the relative affordability of the process when compared with the timing and cost of litigation. Not only this, but mediation is also a method which is able to protect confidentiality: parties can avoid adverse publicity. When parties are dealing with litigation, they are obliged to disclose in a public trial all the documentation which is relevant to enable the Court to reach a decision. In mediation, parties are not obliged to disclose anything they do not wish to and usually only disclose documentation they consider relevant. These documents remain private between themselves and the mediator and not with the general public. Furthermore, parties

involved in a mediation process could opt to sign a non-disclosure agreement in which they assume a non-disclosing contractual obligation.

However, mediation also has some disadvantages. Engagement in mediation is voluntary, parties cannot be compelled to mediate. The process may not lead to an agreement or resolution. The settlement agreement is only binding if both parties agree to it and when it is recorded in writing. The settlement agreement carries the same weight as a contract, so requires a court to enforce it if one party does not perform their obligations. This is in contrast to an Arbitral Award which is enforceable domestically and internationally in around 24 countries around the world.

CONCILIATION:

Conciliation is the intervention of an independent third party in bringing two disputing parties together. Conciliation is an Alternative Dispute Resolution method in which a third party (the conciliator) is appointed as a neutral and unbiased individual to assist parties involved in a dispute in reaching an agreeable settlement by guiding conversations to a mutually acceptable conclusion.

Conciliation is a form of alternative dispute resolution that is similar to mediation but has one significant variance. The most noticeable distinction between conciliation and mediation is the different role of the conciliator when compared with a mediator. A mediator will try to find common ground between parties without taking on responsibility for devising or presenting any offers for resolution. The mediator's priority is to facilitate the discussion between the parties.

A conciliator, in contrast, will play a more active role. In fact, the conciliator will weigh up each party's position, offer their assessment concerning the relative merits and make recommendations with respect to the terms of settlement. It is then for the parties to choose whether or not they acknowledge the conciliator's proposition on the grounds that the conciliator won't force any of their ideas upon the parties.

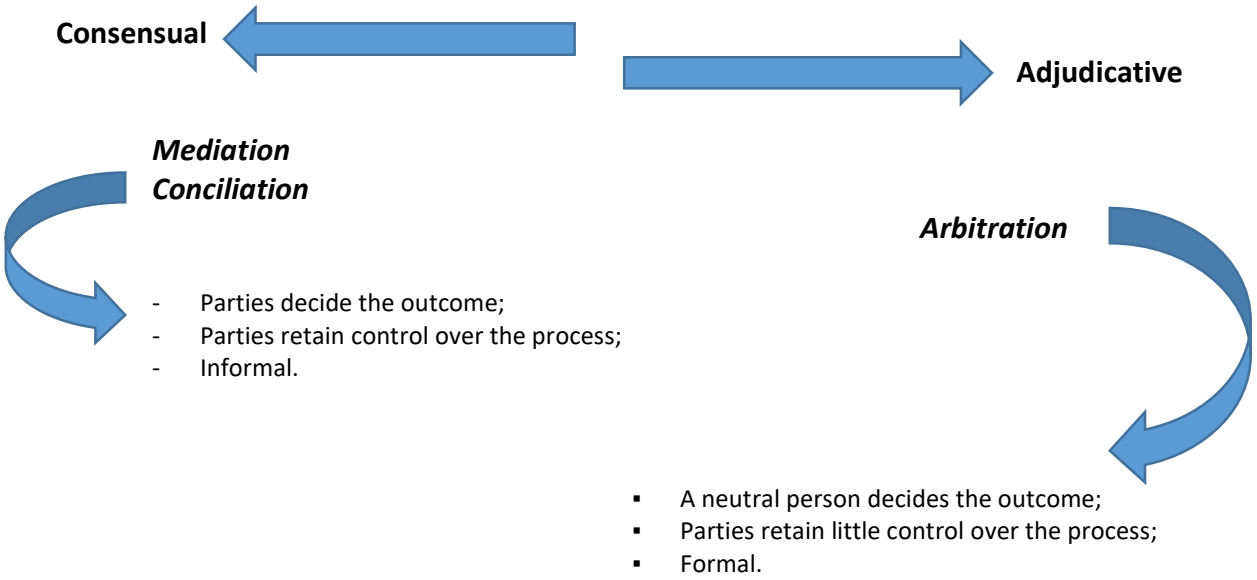
The advantages of the conciliation process are that conciliation is conducted in a confidential and non-prejudiced manner, so that if a solution is not reached, the reasons for this are not shared beyond the parties involved.

The primary drawback/disadvantage of conciliation is that it depends on the parties tolerating the authority of the conciliator and needing to accomplish a goal. In the event that

either or both of the parties included do not enter the interaction with the right mentality, then, at that point it might demonstrate an exercise in futility and waste of money.

To sum up, entrepreneurs have several different options to avoid the considerable time, cost and publicity of litigation in court. Alternative Dispute Resolution is a bundle of methods that practically constitute an alternative to litigation. Among them, however, it is important to choose among Arbitration, on the one hand, and Conciliation and Mediation on the other hand. The former method is closer to a litigation process than the latter two methods.

ALTERNATIVE DISPUTE RESOLUTION IN A NUTSHELL



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