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Alternative Dispute Resolution Clause: A Way of Solving Case

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Keywords

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International;

Abstract

In this article, the alternative dispute resolution concept is adequately represented. The author explains why people more prefer the ADR and what advantages can Parties have referring their case to ADR. Moreover, the types of ADR and the difference between them are deeply studied and explained. Alternative dispute resolution is the set of means and methods used by the parties to reach an agreement, if necessary with the involvement of a third, independent entity whose final judgment on the merits of the dispute is advisory and, in some cases, binding.

1. Introduction

Alternative means of resolving business disputes can be defined as a non-judicial form of protection of the law (Cardozo & Kaufman, 2010). In the event of various disputes, it is unreasonable to restore the opponent against immediately, it is recommended to make a claim and justify their claims, taking into account that the parties themselves can resolve the dispute without recourse to the court of general jurisdiction (Born, 2012).

2. Material and Method

The current paper is a kind of literature review that proposes a way in solving a case. The three main elements of a literature review are typically: description, critical analysis and assessment

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(Yulduzkhon, 2020). It is a kind of critical review, not a report or summary. In other terms, it shares author's viewpoint on the worth and quality of the issue.

3. Discussion

The two most common types of ADR are arbitration and mediation (Coltri, 2010), both of which can be broken down further into different variations:

1. **Arbitration**: Arbitration utilises the help of a neutral third party, and is similar to a free trial. When the third party has heard each argument, it takes a determination which may be binding or not binding by the disputing parties. If the ruling is binding, the Court will impose it and it is deemed final. The arbitrator, although an active facilitator and making a decision, is yet less formal than a clear trial because of many of the rules of proof that do not apply;
2. **Mediation**: Mediation is remarkably close at first sight. The key distinction is that an neutral mediator or third party can not compel the parties to compromise on the resolution of the conflict and can not determine the result of the conflict. The mediator meets with the sides to reach a mutually acceptable compromise, which is usually not binding. Courts may request agreement, but the process itself is optional such that the participants can fail to consent. The parties maintain substantial influence over the mechanism during mediation. Mediation is fully private and, because it is non-binding, the Parties shall have the option to continue following the mediation;
3. **Med-Arb**: This type of ADR in which the arbiter acts as a mediator, but the arbiter shall enforce a binding judgment if mediation is ineffective. Med-Arb is a mediation and arbitration mix, which derives its advantages;
4. **Mini Trial**: A mini-trial is not so much a trial as it is a settlement process. Each party presents their highly summarized case. At the end of the mini-trial, Representatives are seeking to address the issue. If they are unable, a non-partisan consultant can act as mediator or declare a non-binding view of the probable outcome of the trial issue. A mini-trial is a special type of ADR, which sometimes occurs during structured trials rather than before;
5. **Summary Jury Trial (SJT)**: A SJT is like a mini-treatment. The case is therefore sent before a ludicrous tribunal. An advisory opinion is provided by the mock jury. In fact, the decision is not the parties but the court. Usually the court requires the parties to at least try to resolve their decisions before processe after hearing the verdict.; or
6. **Negotiation**: Often this type of ADR is ignored because of its evidentness. There is no unbiased third party in negotiations to help the parties negotiate, so that the parties can work together to arrive at a compromise. During negotiations, the parties may decide to be represented by their lawyers.

   There are some advantages of arbitration over the litigation:

   1. **Speed of inquiry -** allows parties to focus on their core business rather than on disputed legal relationships;
   2. **Flexibility** - the parties have the right to agree on the procedural aspects of the arbitration;
   3. **Competence** - the parties may appoint Arbitrators who have specialised knowledge in contentious legal matters;
   4. **Privacy** - the details of the dispute will not be disclosed;
   5. **Efficiency -** the arbitral award is enforceable in more than 150 countries (1958 New York Convention).

Next, the difference between Arbitration, Mediation, and litigation is presented in Table1.

Table 1

№	Mediation	International arbitration	Litigation
1	Non-binding form of dispute resolution	Binding form (but with some exceptions)	Binding form if prescribed by law
2	Mediator or conciliator is not a decision-maker, they just give advice	An Arbitrator is a non-governmental decision-maker. However, issued awards are binding	An Arbitrator is a governmental decision-maker
3	Mutually agreed on a decision	Third-party decision	Third party's decision
4	An expert determination does not include formal adjudicative procedures, but its investigations	Use of adjudicative procedures	Use of more utilises rules than in arbitration
5	Quicker and cheaper resolution of a dispute, use of creative solutions	More speedy and cheaper dispute resolution process, but not always	May take a long time and money
6	Mutually agreed by parties mediator or conciliator	Selection by parties an Arbitrator, who may be a professional of the industry, what a case is about	Parties cannot select a judge
7	Non-public and confidential	Non-public and confidential	Usually open for public
8	An expert determination is often enforceable by parties; no one will force parties to implement the final decision	Arbitral awards are more readily enforceable and interpreted	Judgments are involuntarily enforceable
9	"Fair" dispute resolution that will suit both parties` interests (in the majority cases)	More "democratic" dispute resolution than litigation, but the final award may be unpleasant	Procedural uncertainties, risks of corruption

Moreover, here are some advantages and disadvantages of the arbitration that are listed in table 2 (Nolan-Haley, 2013).

Positive	Negative
Neutral judicial procedures	Difficult to appeal
An Arbitrator is a non-governmental, independent decision-maker	Parties have to pay for Arbitrators and other personnel working on the case
A full and warranted opportunity of parties	A possibility for parties to present a case

to present its case.	incorrectly and wrongly influence to an award
A vast space for Arbitrators to make a fair decision	Prohibition on formal discovery (unless parties agree to it in an agreement)
Choice of "rules of the game" (parties can choose the language, place and other details of a procedural part in the arbitration clause)	Too detailed arbitration clauses, i.e. the name of Arbitrators may lead to unpleasant consequences. (the chosen Arbitrator may die, and then the arbitration will not be held until another Arbitrator is chosen by mutual agreement of parties)
Final and binding decisions	May arise problems with the enforcement of an arbitral award in foreign countries.
Faster and cheaper rather than in national courts	Not always, in some cases, the process may last much longer than in litigation.
Confidential and private procedures	The standards used by Arbitrator are not as bright as in national courts
Less formal procedures than in national courts	But there is a possibility of being cheated by fake evidence
More exceptional ability to liaise on timetable, procedures, and venue in arbitration, as opposed to the stricter requirements in litigation.	-

4. Conclusion

To conclude, Alternative dispute resolution (ADR) is simply shorthand for "solving a dispute without going to court". They have many advantages, such as flexibility, cost-efficiency, time-effectiveness, and give the parties more control over the process and the results. Referring a case to ADR Parties will be treated more constantly and thanks to the principles of these types of dispute resolution, they can be sure for the awards.

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