THE ROLE OF THE INSTITUTION OF MEDIATION IN ALTERNATIVE DISPUTE RESOLUTION

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ABSTRACT

The article considers with establishment of modern forms of ADR, history of mediation and preferred aspects of mediation.

Keywords: *ADR, Mediation, Conciliation, Adjudication, Arbitration, Privacy and confidentiality, Flexibility, Control, Cost minimization.*

АННОТАЦИЯ

В статье рассматривается создание современных форм АРС, история медиации и предпочтительные аспекты медиации.

Ключевые слова: *ADR, посредничество, примирение, судебное разбирательство, арбитраж, неприкосновенность частной жизни и конфиденциальность, гибкость, контроль, минимизация затрат.*

INTRODUCTION

The rise of modern forms of ADR can be traced back to the 1970s in the US. It was fueled by an increasing dissatisfaction with the court system. High litigation costs, and high attorneys, fees, lengthy proceedings and uncertain and potentially ruinous awards, for example, with jury trials in civil actions and punitive damages – prompted the search for alternatives to litigation. A milestone in the development was the “Pound Conference” in April 1976[1]. It brought together academics, practitioners and policy-makers who reflected on the future of the justice system in the US. Arbitration had traditionally been an important form of ADR, with great practical relevance for commercial B2B disputes[2]. The rise of modern forms of ADR is therefore primarily a rise of mediation and other processes with third party intervention that do not lead to a binding solution imposed on the parties. Mediation gained traction in the US in particular in the 1970s and 1980s. It can now be considered a cornerstone of the US justice system. Europe and other countries followed suit with a time-lag of approximately 10 to 20 years. However, given that resolving disputes before the state courts has never been considered to be as ineffective in Europe as in the US, mediation has never attained the same popularity in Europe than it has received in its “birth state”. By now, the ADR landscape is highly differentiated and specialized. Special, tailormade proceedings such as,

adjudication in construction disputes, and hybrid procedures, mediation, arbitration are increasingly used.

DISCUSSION AND RESULTS

Conciliation is another form of ADR involving a third-party neutral who is not empowered to impose a solution on the parties. As in a mediation, the conciliator assists the parties to negotiate an amicable solution. One might say that party autonomy plays an even greater role in mediation as compared to conciliation: a mediator will typically be very reluctant to make proposals as to how the dispute could be resolved. By contrast, a conciliator, who is typically chosen for her expertise in the subject matter of the dispute and not so much as a professional 'process agent', will be less hesitant to move in this direction. In 1980, the United Nations Commission on International Trade Law (UNCITRAL) adopted model rules upon which parties may agree for the conduct of conciliation proceedings arising out of their commercial relationship[3], and in 2002, UNCITRAL passed a model law on international commercial conciliation.

Adjudication is an ADR procedure that was developed in England for the cost efficient resolution of construction disputes[4]. In essence, the procedure aims to establish an expert opinion on alleged building defects. The expert has wide-ranging powers to examine the case. Her opinion is binding until the dispute is finally resolved by litigation, arbitration or party agreement. Mediation and adjudication may be combined to "Med Adj": the parties attempt mediation first and resort to adjudication with respect to those issues that could not be resolved in mediation.

Neutral evaluation is not a negotiation process. Rather, it involves an independent third-party expert who provides an opinion on the best way to resolve the dispute. Neutral evaluation is a process that may happen before a court or tribunal process is started. Sometimes your professional adviser, such as a lawyer or accountant, will suggest that you may benefit from using neutral evaluation. Courts and tribunals sometimes refer people to neutral evaluation.

Arbitration is an important mechanism of resolving disputes relating to international commercial transactions. Its crucial feature is that the arbitral tribunal is normally empowered by the arbitration agreement to render a decision that is binding on the parties. Arbitration clauses usually are part of the contract that gives rise to the dispute, sometimes in the form of escalation clauses according to which direct negotiations are followed by mediation, and mediation is followed by arbitration, whereby the next step is reached failing an amicable resolution of the dispute on the

preceding one. If the parties use an arbitration institution as a service provider to handle administrative issues, this is characterized as being 'institutional arbitration' as opposed to an arbitration without involvement of such an institution ('ad hoc arbitration'). A crucial feature in every arbitration is the "place of arbitration" designated by the parties. It determines the origin of the arbitral award and also the state law rules applicable to the proceedings as a backup to the parties' chosen rules. Transnational enforcement of arbitral awards and other important legal issues are governed by the New York Convention on the Recognition and Enforcement of Foreign Arbitral Award.

The history of the institution of mediation goes back a long way. In particular, we can see the ancient signs of the institution of mediation in Phenicia, Ancient Babylon, China, Japan, as well as in Ancient Egypt, Greece and Ancient Rome. Also, the current form of the mediation institute originated in the United States in the 1970s and 1980s[5]. Later it became popular in other European countries, in particular, in Australia, Great Britain, Germany, France and other countries. But mediation is more developed in the United States than in other European countries. It should be noted that mediation in Uzbekistan is also developing. This stage became the legal basis with the adoption of the Law on Mediation on July 3, 2018[6]. At the same time, in recent decades, the practice of mediation in the post-Soviet countries has developed rapidly and is reflected in the legislation. In particular, Russia (2011), Kazakhstan (2011), Moldova (2015), Belarus (2014), Kyrgyzstan (2018), Uzbekistan (2018), Azerbaijan (2019). In addition, mediation is developing as a private practice in countries such as Georgia, Ukraine, Turkmenistan, Tajikistan, and Armenia, although no special laws have been developed[6].

Alternative dispute resolution processes, such as mediation offer you the following benefits to varying extents such as privacy and confidentiality, flexibility, control, cost minimization.

Privacy and confidentiality

ADR processes are generally private and largely confidential in contrast to court processes. Most court processes are open to the public, which means that anyone, including the media, can observe your trial and report it. In contrast, participants in ADR processes are bound to keep information about what happens in mediation confidential. This requirement gives disputants a lot more freedom to say what they want without fearing that it could be used against them later. In addition, the principle of confidentiality means that information revealed during ADR cannot be used as evidence in a later court process. The privacy of ADR makes disputants more

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comfortable to discuss the dispute without fearing that someone could form opinions or negative judgments about them.

Flexibility

ADR processes offer different types of process structure. At the same time, the private nature of ADR permits you to tailor each ADR process to suit your needs. For example, depending on the specific ADR process, you may be able to have input into such as time, place, level of formality, choice of ADR professional, cost of the process and other procedural aspects.

A court process usually has a rigid framework one must operate within, and you must seek permission from the judge if you want to change something. In contrast, mediation is bound neither by strict legal rules of evidence nor by set procedures of presenting your case.

Control

When you manage your dispute in court, the most active people will be the judge and the lawyers. You will passively participate, usually doing what your lawyer advises and accepting what the judge says. ADR can give you more control of managing your dispute. Depending on the ADR process, you may be able to make choices such as these:

The type of process to use

The ADR practitioner to help you

The extent to which professional advisers are involved

The issues to discuss (including nonlegal issues)

Most important, your choice of ADR process influences the type of solution that will be available for your dispute. In court, you either win and get what you want or you lose and have to accept the decision of the judge. In ADR, different processes will offer different types of outcomes. For example, in mediation you control the outcome of the dispute and are empowered to find a creative solution that fulfills your needs. Such agreements are usually more reliable and durable than decisions imposed by a judge, which can be appealed. Mediation also allows for the continuation of your relationship with the other side and for the preservation of your reputation and goodwill. For example, a company can keep a trustworthy relationship with its customers or investors. Moreover, you will improve your conflict resolution skills and possibly prevent disputes in the future.

Cost minimization

The cost of legal advice, legal representation, and court fees is usually high. The long duration of court cases also means that costs add up. ADR has the advantage of

being cheaper than litigation in most cases. The more formal and legalistic the ADR process, the more expensive it becomes (although it is usually still less expensive than court). For example, arbitration is a relatively formalistic and legalistic ADR process. Arbitration is generally more expensive than mediation, the latter process being characterized by high levels of flexibility and informality. In mediation, your dispute may be resolved in just a few weeks (preparation for the mediation and the mediation session itself). There is usually a high level of satisfaction with mediation, and this satisfaction leads to mediated settlement agreements that are sustainable.

CONCLUSION

In conclusion, mediation is an effective mechanism for alternative dispute resolution. Now, mediation has its place in almost all developed countries.

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