

ALTERNATIVE METHODS OF DISPUTE RESOLUTION FOR SMALL BUSINESSES

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ABSTRACT

The traditional method of resolving business disputes is through litigation. In most cases litigation is considered the least efficient and most expensive way to solve business disputes. In view of this businesses are increasingly resorting to Alternative Dispute Resolution, or ADR. ADR is a term coined by corporate managers to describe any means of resolving a dispute without a court trial. These include arbitration, mediation and conciliation, negotiation, and other forms of ADR such as minitrials, expert fact finders, and hybrid forms. The paper specifically deals with each of these methods. This is followed by Concluding Remarks.

INTRODUCTION

The traditional method of resolving business disputes is through litigation. This is a process whereby one or more of the parties to the dispute initiate legal proceedings in a court of law against the other party to the dispute. The parties are bound by the rules of civil procedure. The court has wide authority to order various remedies against the offending party. These include monetary damages and other orders such as injunctions and specific performance. Litigation is a confrontational process. Lawyers are engaged by each party to the dispute. These lawyers represent their clients in court through an adversarial process which involves an examination and cross-examination of evidence. The outcome of litigation is that there is usually only one winner. Very often this results in the end of a business relationship. The reason is that, except in cases where litigation is the method specified by parties in contract, by the end of the litigation process, there is too much enmity between the parties which makes it difficult to maintain their business relationship.¹

Although litigation is still a common method of dispute resolution, other methods of a non-judicial nature are gaining favor in the business world today. These are generally referred to as Alternative Dispute Resolution or by their acronym, ADR. The term is used to describe any means of resolving a dispute without a court trial. The boundaries of ADR are fixed only by the imagination of creative managers and their counsel, but six methods are said to have gained widespread acceptance: arbitration, negotiation, mediation, use of neutral expert fact finders, minitrials, and hybrids of these methods.²

The categories mentioned are by no means definitive as the processes overlap and the terms used to describe the categories vary according to writers. Thus according to another writer, there are six alternative methods to litigation for the settlement of commercial disputes: negotiation, good offices, mediation, conciliation, arbitration and alternative dispute resolution.³ According to yet another writer, ADR encompasses: negotiation, mediation, conciliation, best case scenario, mini trial, expert evaluation, arbitration and hybrid models of "arb/med" or "med/arb".⁴ While any or a combination of these may be suitable to large corporations, small businesses may find that some methods are more suitable to them than others.

SELECTING A DISPUTE RESOLUTION METHOD

In view of the fact that there are several methods of dispute resolution, it is for the parties to a dispute to consider and select the method which is the most appropriate for their particular dispute. It is best to select a dispute resolution method at the beginning of a business relationship. In most business agreements, parties specify their chosen method upon entering the contract, well before the dispute has arisen. This has certain advantages. First, it provides for certainty. The parties from the start are aware that all disputes relating to the agreement must be resolved in a certain way, for example by litigation. This means that parties know that if disagreements are not resolved, they will lead to litigation. The prospect of having to resort to dispute resolution by itself may be stimulus of solving disagreements as they arise. Second, specifying a dispute resolution method at the start of a business relationship allows the parties to be more objective in their choice.⁵ Choosing a method after the dispute has arisen is likely to prove to be more difficult. At worst, the parties may not agree at all, leaving no other choice but litigation. A brief description of some of the alternative methods of dispute resolution is given below.

ARBITRATION

Arbitration is by far the oldest and the most popular alternative method of business dispute resolution. The parties agree to submit any dispute arising out of their contract to one or more impartial parties for a binding decision. Long before the courts were established, merchants had already evolved an informal system of referring their disputes to fellow merchants for settlement. Arbitration is favored by some because of its claim to speed, privacy and lower costs. The UNCITRAL Arbitration Rules, promulgated in 1976, have achieved great authority and influence and have become acceptable to countries with different economic, social and legal backgrounds. It is particularly favored in international commercial disputes because arbitral awards are generally more readily enforced in foreign countries compared to court judgments.

One major advantage of arbitration is that, unlike litigation where the adjudicatory system is prescribed and imposed by the state, the arbitration system to be followed in the particular case is the one settled by the parties themselves. Arbitration is always a creature of contract. There can be no arbitration without an arbitration agreement concluded before or after the dispute arises. Thus the parties are free to design their own arbitration system subject to the applicable law. The other major advantage of arbitration is that the parties have the right to choose their own judge or judges. This right includes the right to reject the judges that one does not want. Further, it is possible for the parties to choose different types of judges for different types of disputes that may arise under one and same contract. Thus the disputes that may arise under the contract may be classified as technical, financial, and legal to be decided by engineers or technical experts, accountants and financial experts, and legal experts respectively.⁶

Recourse to arbitration has been made much easier in modern times by the adoption, at the international, regional, and national levels, of elaborate ready-made arbitration systems and the establishment of international arbitration centers. In addition to the traditional centers like New York, London, Paris, Geneva and Stockholm, a number of new arbitration centers have been established in the Pacific Rim, viz., Los Angeles, San Francisco, Vancouver, Hong Kong, Kuala Lumpur, Singapore, Sydney and Melbourne. These centers generally permit greater party autonomy, and use the UNCITRAL rules. They may also provide a wealth of information

on the ADR process. For example, the Singapore International Arbitration Center maintains a web site that includes legal authorities, model clauses and quarterly updates on recent developments in ADR along with upcoming events at the Centre.⁷

MEDIATION AND CONCILIATION

The terms mediation and conciliation are often used interchangeably because of the similarity of their processes. In mediation the parties will engage a mediator to help them to resolve the dispute by clarifying the issues, facilitating the negotiation of key points to reach an amicable settlement. In mediation, the outcome is decided by the parties with the assistance of the mediator. Conciliation differs from mediation in that, in conciliation, the conciliator will give a non-binding opinion as to the likely outcome of the dispute if the parties fail to reach settlement. The distinction between these two methods and arbitration is that the decision of the arbitrator is binding upon the parties. This is not the case in conciliation and mediation. In conciliation, the opinion given by the conciliator is usually not binding, and in mediation, there is no opinion or decision handed down by the mediator.

Mediation is essentially a process whereby an independent third party helps disputing parties to negotiate an amicable settlement. Mediation is popular because of its voluntary, non-binding, confidential, and without prejudice to the parties' respective positions. If it fails, the parties are free to pursue other means of settlement including arbitration or litigation. Since mediation is voluntary, it is not necessary for the parties to a dispute to have a prior agreement to mediate. Alternatively, even where the parties have included an arbitration clause in their contract, it is still open for them to agree to mediation as a first step – on the understanding that, if mediation did not resolve the dispute, the parties may then proceed to arbitration. The key is that both parties must voluntarily agree to the mediation. By the same token, because mediation is totally non-binding, a party can pull out of a mediation process at any time without any penalty.

Even when parties have achieved what appears to be an acceptable settlement, the settlement is not binding until such time that it constitutes a binding agreement between the parties. It is only then the settlement will be enforceable as a separate contract between the parties, with all the rights and obligations of an enforceable contract. If the mediation took place in Singapore within the context of an arbitration under the International Arbitration Act (IAA), the settlement would be recorded in the form of an arbitral award which could be enforced under s 18 IAA just like any other arbitral award.⁸ Although all mediations are different, it is noted that they tend to move through six overlapping stages: initial contact between the disputants and the mediator; entry of the mediator into the dispute and the settling of ground rules; issue identification and agreement on an agenda; creation of settlement opinions, evaluation and comparison of options; and negotiation of the terms of the agreement and the steps to implement it. The parties must freely and openly confide in the mediator their priorities, options and weaknesses so that the mediator can discover the common ground necessary for an agreement while allowing the parties to avoid any appearance of weakness.⁹

Mediation as a form of dispute resolution is attractive because the process: allows the parties to focus on mutual interests rather than just individual rights; is not dependent on findings of facts or the "truth"; is consensual; allows parties to develop options acceptable to the parties rather than solutions known to the law; preserves relationships; and can be a process of dispute resolution as well as dispute prevention.¹⁰

NEGOTIATION

Although in this section we see negotiation as a separate dispute resolution method, it should be noted that negotiation pervades all modes of dispute resolution such as litigation, arbitration and mediation. The difference is a matter of degree. Some disputes are settled entirely by negotiation by the parties without the assistance of third parties.

Other disputes involve negotiation but require the assistance of third parties in a consensual process, such as arbitration and mediation. In the case of litigation, the amount of negotiation involved is significantly less but nevertheless forms a part of the process.

Negotiation involves direct communication between the managers most directly involved with or knowledgeable about the events leading up to the dispute. No fixed rules or formalities are associated with negotiation. There are probably as many styles of negotiation as there are negotiators. Some are cooperative while others are competitive; some are hard liners and others are more accommodating. Thus the nature of negotiation is likely to differ depending on the personality of the negotiators.

While most negotiations are unstructured some writers have offered a principled negotiation approach.¹¹ This emphasizes objective criteria rather than subjective considerations as a means to conduct negotiations. It includes: (a) attacking the problem rather than the person. The dispute is de-personalized by disassociating it from concerned persons and placing it on neutral ground; (b) discussing interests, not positions. This calls for determining the rationale behind a particular position, rather than attempt to stand by a position at any cost. It is possible that a position can be sacrificed without affecting the interests of the party holding the position; and (c) focusing on objective criteria when evaluating options. This means that alternative solutions should be evaluated using, as much as possible, independent, objective criteria rather than subjective values.

In this context, experienced negotiators have used the two concepts of BATNA (best alternative to no agreement) and WOTNA (worst outcome to no agreement) to assist the parties to reach a relatively more objective solution acceptable to them. The former is a means of identifying what is a party's next best alternative assuming that no negotiated agreement is reached. The latter identifies the worst position that a party could find itself in if no negotiated agreement is reached.¹² These concepts in effect define the upper and lower position of a party, if there is no agreement. By this means a party should be in a position to determine the range of possible outcomes which he would be willing to accept as a result of the negotiation process.

OTHER FORMS OF ADR

A brief mention may be made of some of the other modes of ADR. These include minitrials, the use of neutral expert fact finders and the use of hybrids where parties can choose two or more consecutive or overlapping ADR methods.

Minitrial

A minitrial is somewhat like a "moot court". They are somewhat formal proceedings used primarily in situations involving large, complex disputes or when stakes are high. Much like arbitration, each side presents the highlights of its case through counsel to a "court" consisting of the parties' chief executive officers or other high-level company officials not involved in a

dispute. The executives are joined by a third party who generally presides. At the conclusion of the presentations, the neutral third party presents his conclusion to the court. The executives then discuss the dispute among themselves, negotiate an agreement or move the dispute forward through mediation.¹³

Use of neutral expert fact finders

Sometimes it may not be possible to reach an agreement because of the differences in interpreting important facts, events or processes. To overcome this situation the parties may retain a neutral third person to investigate, analyze and interpret. Such a person would be an expert in his particular field who would be able to provide non-binding findings that are then used by the parties for further negotiation or mediation as they think fit. Such would be the case especially where appraisals and opinions are needed on complex scientific or technical issues.

Hybrid forms of ADR

These involve two or more consecutive or overlapping methods. For example, the agreement can provide that if a dispute arises, the parties shall engage in negotiations as a condition to arbitration or to litigation. Negotiation can be joined with mediation in a two step process. In large, complex cases, negotiation followed by mediation and arbitration or minitrial can improve the likelihood of finding common ground. The combination of arbitration/mediation or mediation/arbitration appears to be popular. The choice lies with the parties who can choose the particular combination/s which best serve their purpose.

The Small Claims Tribunal

A mention may also be made of a quasi-judicial body in Singapore, the Small Claims Tribunal. It is open to everyone, whether individuals, sole proprietors, partnerships and companies. It is empowered to hear and determine any disputes arising from any contract for the sale of goods or the provision of services. The parties may be individuals or business entities. The Tribunal provides a cost effective means of recovery of sums below \$5,000 or sums up to \$10,000 where both parties consent that the Tribunal hear their case. The action is commenced by filing a claim, followed by consultation and hearing. One of the primary functions of the Tribunal is to ascertain whether the parties could have their dispute mediated amicably instead of having a hearing. Usually hearing takes place within two or three weeks after the consultation. The parties present their own cases and at the end the Referee makes an order of the Tribunal as he deems appropriate. This order has the same status and effect as an order from the Magistrate's Court and may thus be similarly be enforced.¹⁴

CONCLUDING REMARKS

Alternative Dispute Resolution is attractive for small businesses because of its speed, informality and the lower costs. However it is proper to issue a caveat in this regard. While the above statement is generally true, it must not be assumed that ADR is always better vis-a-vis litigation. For instance, while people prefer arbitration to litigation because of its speed and lower costs, in Singapore these advantages may not be so clear.

In Singapore due to the increasing efficiency of the court system, in some cases litigation process can be as fast as the arbitration process. As to costs, in arbitration, the parties are required to meet the costs of the arbitration, including the cost of the meeting rooms and the arbitrators' fees. This may result in some arbitrations incurring substantial costs when compared to litigation. Hence the parties must make a considered choice in the matter of

selecting a method of dispute resolution.

Where ADR is chosen as the method of dispute resolution its advantages are clear: they allow the parties to maintain an ongoing business relationship; they enable the parties to focus on the big picture; they involve the decision makers more quickly and thereby provide for a much faster resolution than litigation; they make a win-win situation more likely; they save money; they avoid the necessity of educating a judge or jury about industries, companies and products; they guard against after-the-fact criticisms that sometimes occur with settlements by allowing both parties to put forth their best case; they guarantee confidentiality in the proceedings and results; and they provide extreme flexibility.¹⁵

There is now a universal trend among businesses of all sizes and all over the world to resort to ADR rather than to litigation. Where an informed decision is made to resort to ADR, its benefits outweigh its disadvantages. There is a range of alternative methods, each with a levels of sophistication to suit the needs of every small business.

Footnotes

1 See generally, Benny S Tabalujan, "Managing and Resolving Disputes", in Shenoy & Toh (Ed), *Legal Aspects of Doing Business in Singapore*, 1996, Addison-Wesley Publishing Company, p 235.

2 David G Scalise and Kevin P Farmer, "ADR in the Pacific Rim: Modern Means of Achieving Traditional Goals", 20 *AsiaBLR* 3, April 1998.

3 P.K Irani, "International Commercial Dispute Resolution through Arbitration – I", 1 *AsiaBLR* 9, January 1993.

4 Lim Chuen Ren, "Mediation in Construction Disputes", 15 *AsiaBLR* 60 at 61-62, January 1997.

5 Note 1 above, at p 237.

6 Note 3 above, at p.11.

7 Note 2 above, at p 7.

8 Note 1 above, at p 253.

9 Note 2 above, at p 4.

10 Note 4 above, at p 62.

11 Roger Fisher, Bruce Patton, and William Ury, *Getting to Yes*, 2 nd Ed., 1992, pp 3 ff, 97ff.

12 Bevan, A., *Alternative Dispute Resolution*, 1992, Sweet & Maxwell, London, pp 3-6.

13 Note 2 above, at p 5.

14 Harry Tan and Assafa Endeshaw, "The Businessman, His Lawyer and the Courts", in Shenoy & Toh (Ed), *Legal Aspects of Doing Business in Singapore*, 1996, Addison-Wesley Publishing Company, pp 321ff.

15 Note 2 above, at p 4.