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Alternative Dispute Resolution: Concept, Criticism and Future of Arbitration and Mediation

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Abstract: *Settlement of disputes either in the courtroom or outside the courtroom requires the expeditious dispensation of justice as "justice delayed is justice denied" and "justice hurried is justice buried." While maintaining the thin line between hurried and delayed dispensation of justice, the alternative dispute resolution processes are in trends in legal markets and are embellished with the characteristics of amicable, inexpensive, and expeditious resolution of conflict, hence, attracting the aggrieved parties to resolve their disputes through "arbitration, mediation, conciliation, and hybrid processes". With this intent, this article explores the concept of alternative dispute resolution processes in general and arbitration and mediation in particular. Rendering qualitative methods, this article critically describes the difference between arbitration and mediation and spent ink to point out the in-depth criticism of the processes and to predict the future of techniques of alternative dispute resolution.*

Key Words: Alternative Dispute Resolution, Arbitration, Mediation, Settlement, Parties, Court

Introduction

The resolution of disputes outside the courts through amicable settlement involves the techniques of alternative dispute resolution (ADR) in which there are no formal court proceedings and the verdicts are not made by the judges but the third party plays the role of neutral or umpire that help in the resolution of the conflicts between the parties. Humans, organizations, corporate enterprises, governments, and states used to resolve their disputes through it, albeit, there is the conception of the pluralism processes in which the first consideration is given to courts for dispute resolution. Nowadays, the alternative processes are in trend despite they were also very active in history. Informality, clarity, less complex and less expensive processes are being promoted with the passage of time. These methods of alternative dispute resolution include "arbitration, conciliation, mediation, and negotiations". This article inspects the concept of these methods but specifically pays heed and is limited to arbitration and mediation. In the case of arbitration, "a single third party or a panel of arbitrators, most often chosen by the parties themselves, renders a decision, in terms less formal than a court, but often with a written award (Klug et al., 2009)." In mediation "a third party (usually neutral and unbiased) facilitates a negotiated consensual agreement among parties, without rendering a formal decision (Steffek, 2011)." To fulfill the purpose of exploration into the techniques of alternative dispute resolution, this article not only inspects the concept of these techniques but also critically analyses the hybrid process including the mini-trails, summary trials, med-arb, neutral evaluation of the dispute and rent-a-private judge for settlement of disputes. Further, this article comparatively analyses the difference between arbitration and mediation to highlight the nature and scope of these techniques. Then, this paper provides criticism of these techniques to pinpoint how these techniques have privatized the legal landscape and how the effectiveness of these methods could be disturbed, and how the legislature is endeavoring to formalize these informal techniques. In the end, the paper predicts the future of processes of alternative

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dispute resolution and culminates the discussion in a reasonable conclusion.

Disclosure of the Core Concepts

Throughout history and till today, people competently founded various methods for the amicable settlement of their disputes. Not only the people but also nations, corporations, and organizations have ascertained their method of conflict settlements. There is the concept of pluralism processing in the form of the courts in formal settlements with the involvement of the legal system and alternative dispute resolution techniques in the informal process could be highlighted. Informal settlements usually involve family settlements, private contracts, arrangements, private transactional matters, and the system of internal grievance at the organizational levels. However, there exist some delimitations that bind the parties to select any specific type of dispute settlement while pursuing an informal technique for private dispute settlements (Katsh, 2022). These delimitations bound the parties after resting well with the rule or laws or a specific provision of the contract or contractual terms bound the parties to select a specific method for settlement.

At the individual level, the primary actions that are utilized by the parties are avoidance, negotiations or bargaining, and the assistance of a third party in order to mediate the dispute or another third party i.e. umpire involvements in case to resolve the matter through arbitration. At the secondary level, the parties choose the hybrid alternative processes that include the med-arb in which the negotiation follows the verdict. Summary trials preceded in court, are also selected by the parties in which the mock jurors look into the cases, hear the evidence, and give a kind of advisory decision for the resolution of the dispute (Shapiro, 2010). Mini-trails, in other words a very short proceedings, that involve the hearing of evidence, also attract the disputed parties. At the secondary level, the parties also take consultations from experts, third parties, and lawyers that hear the case facts, and seek evidence and pieces of advice. This process of neutral evaluation is also preferred by the disputed parties. The trend of dispute resolution through courts is mandatory despite the presence of the litigation system, the parties also prefer another hybrid process that is rent-a-judge. In this system, the retired judges play their role in the settlement of the disputes of the parties through alternative techniques either through arbitration or by adjudicating the proceedings of the matters privately. Private renting of the judges, in some countries, is officially authorized by the states (McEwen, 2012).

Menkel (2012) stated that, dispute processes are also characterized by the extent to which they are voluntary and consensual (whether in pre-dispute contract agreements, ADR *ex ante*, or voluntarily undertaken after the dispute ripens, ADR *ex post*), or whether they are mandated (by a pre dispute contract commitment) or by court rule or referral. The ideology that contributed to the founding of modern mediation urges that mediation should be entered into voluntarily and all agreements should be arrived at consensually. It is found that the courts have been burdened with caseloads and to reduce this burden, the courts are looking into alternative dispute resolution processes and splitting cases into various fora like promoting arbitration and mediation.

The characteristics and the taxonomy of the dispute settlement technique are different from each other and these differences can also be based on their binding and non-binding procedures and awards or decisions. For instance, arbitration, in general, is formulated and characterized in either way. Like in some statutory and contractual terms or schemes the arbitrators' awards are considered binding and these awards earn the status of finality. However, it is subjected to judicial reviews while arbitration is considering matters of corruption, fraud, or any other misconduct of the arbitrator. Additionally, in various states, arbitration is considered for judicial review in matters of justice miscarriage or in cases of mistake of the law (Sander, 2009). Contrary to it, some awards of the arbitrators are non-binding, giving the power of the appeals to the aggrieved parties. This process also permits the parties to select another method for the settlement of their dispute and parties are open to selecting litigation or mediation in some cases. It can be seen that many courts use to annex the process of arbitration as for example, "allow a *de novo* trial following arbitration if one party seeks it, often having to post a bond or deposit for costs. The process of mediation itself is non-binding, in that, as it is a consensual process, a party may exit at any time; on the other hand, once an agreement in mediation is reached, a binding contract may be signed, which will be enforceable in a court of law" (Fisher, 2009).

In short, the resolution of the disputes requires some characteristics that depend upon whether the settlement of the matter will be made by the private settlement processes or the domain of the court will be the proper forum for adjudication of the matter. The alternative dispute resolution technique annexed by the court or related by the courts has gained a display of conflict settlement processes and generally be subjected to various legal provisions which include the

arbitrators credentialing, selection, and training, and in case of mediation it may involve confidentiality and ethics.

The process and techniques of Alternative dispute resolutions are identified from each other by the nature and the extent of the control on the proceedings or award or the formality of the proceedings, whether the proceedings have been formally or informally conducted and the role of the third party was very formal/informal while hearing evidence. Moreover, the arbitrators' caucus with the aggrieved parties, in which it is observed whether in the meetings with the parties, how many principal disputants were in the meetings; whether the meetings have been conducted without their participation of them; if they were in the meeting then what were their participation numbers (Salacuse, 1998). Susskind observed that the Alternative Dispute Resolution techniques are being applied increasingly to diverse kinds of conflicts, disputes, and transactions, some requiring expertise in the subject matter such as scientific and policy disputes and spawning new hybrid processes such as consensus building which engage multiple parties in complex, multi-issue problem solving, drawing on negotiation, mediation and other non-adjudicative processes (Delgado, 2017). It is a factual reality that many efforts have been made to develop a reasonable justified framework or model that describe a scale or taxonomy that could be dealt as the predictive measure for the assignment of the specified natured suit to a particular process and many courts have tried to develop that mechanism in which they use to prohibit the assignment of some particular cases to a specific process. However, Sander & Goldberg, (2020) has broadly considered these efforts of the courts as fitting a specific process into a fuss. The acquiescence of the dissimilar matter to a dissimilar settlement technique or more clearly it is the attitude of the disputant/parties to select the technique for the settlement of their dispute. They are free to choose either arbitration or court proceedings; it is entirely of their will. Likewise, they are free to select their arbitrator or lawyer for the settlement through arbitration or litigation respectively.

Arbitration versus Mediation

As there are many processes of alternative dispute resolution and all of them have their concept, purpose, logic, and the so-called kind of jurisprudential reasons. For instance, mediation is a way for the betterment of communications between the parties in disagreement. It is a method of the re-orientation of the disputed parties. Moreover, it presents amicable solutions for future conflicts and rejuvenated the relationship between the parties (Fuller, 2018). Arbitration is another process that is very similar to adjudication. It is used to settle the commercial disputes that transpired from commercial contractual matters or arose in case of contractual terms interpretation (Merry, 1993).

Moreover, alternative dispute techniques are being referred to treat complex disputes concerning mass tort, economic and political disputes, human rights conflicts, environmental issues, issues regarding budgeting, and public policy issues. In America, it is being promoted more and more as it is called a process that relieves anyone from the pressure of the court and its system. Moreover, in many cases, like in arbitration, certain qualifications are required for the neutral third party which is an arbitrator for arbitrating the issue. Hence, it is stated that the third party like in arbitration may be more competent in amicable settlement of the dispute. In the case of mediation, such qualifications are not as required but it is considered that the arbitrator should be trained (Menkel, 2012).

Generally, due to less formality in comparison with arbitration, mediation is a road that is considered continuously and it is stated that arbitration has been overtaken by mediation. However, this is not always true, because arbitration is commonly used in a wider variety of cases; it also covers labor disputes, contractual matters, and corporate and commercial transactional suits. It is stated that "in the United States, mandatory pre-dispute contractual commitments to arbitrate a wide variety of consumer, health care, securities, and employment disputes have been sustained by the United States Supreme Court against claims these clauses violate due process or other constitutional rights to trial for disputes" (Menkel, 2011). It has been observed that disputes in the matter of sports or games are nowadays being arbitrated through arbitration. The disputes arising during FIFA or the Olympics are administered by the special tribunal that exists in Switzerland. Hence, the methods of alternative dispute resolution are very popular.

Criticism

Alternative Dispute Resolution in general and arbitration and mediation in specific face serve criticism and these techniques are considered controversial on various grounds that are discussed below.

First criticism on these alternative processes is that these processes have privatized legal jurisprudence. Fiss (2018) says that the increasing trends of the settlement of disputes through mediation

and arbitration have decreased the availability of the cases to the courts. Fiss (2018) has related the courts with the public arena as he considers that the case in courts for the settlements mean that the cases, its facts, hearing, evidence and judgment is open to the public while the resolution of dispute privately by the utilization of the alternative dispute resolution techniques hide the case from the public arena. The courts' decisions in the views of Luban (2020) are the precedents and could have more value for the public at large. However, the plea of confidentiality in the alternative dispute resolution techniques deprives the public of knowing the mistake or breach of any duty or obligation by the defendants whose wrong is shielded from being exposed to the public. Kritzer (2018) states that "settlements may be based on non-legal criteria, threatening compliance with and enforcement of the law. Whether there is more privatization or secrecy in the settlement of legal disputes than at some previous time remains itself a subject of controversy as empirical studies document relatively stable rates of non-judicial case terminations" (Susskind, 1999). Felstiner, Abel, & Sarat (1980-81) stated that the privatization of the legal system may give more and more chances for the state to enter into the domain of the public indirectly. This entry has been considered an intervention. The interference of the state hurts the rights of the citizen when the rich are not encountered with the damages or fines but the weak party is pressured and fined. The direction of this debate is moved to a query that whether the system is competent of serving the concurrently disputants' private interest in front of them and the need for the state's enunciation of openly imposed customs and standards.

Second criticism on Alternative dispute resolution is that the processes of these techniques are deformed and distorted. It has been stated that the nascent ADR profession there is concern that the early animating ideologies of ADR are being distorted by their assimilation into the conventional justice system. Within a movement that sought to de-professionalize conflict resolution, there are now competing professional claims for control of standards, ethics, credentialing, and quality control between lawyers and non-lawyers (Burger, 2018). It was considered that mediation is the process of alternative dispute resolution which is considered more consensual and this process is nominated as the voluntary settlement of the dispute (Sander, 2020). However, it has now been mandated by the rules and the regulations of the courts and sometimes it is mandated by the contracts and arrangements. This has destroyed the image of being flexible, creative, ingenious, and facilitative that was made for these processes in general and mediation in specific. Now, these processes are becoming more and more statutory or ruled-based. The rigidity has been increased and above all the alternative dispute resolution processes definition has been affected. The definition is that the resolutions of disputes outside the courts now are being more and more judicialized. Courts are promoting the creation of common laws regarding alternative dispute resolution. Similarly, many enactments by the legislatures have been passed concerning alternative dispute resolution. Consequently, the criticism is more concerned when the processes created to play a role in the traditional courts' system are now being overwhelmed by the culture of the adversary system.

Third criticism on the alternative dispute resolution processes is that they do not provide ample space for equal power of bargaining. It is recommended by various scholars that alternative dispute resolution is not a proper forum for the people of the subordinated groups. The people who are living in any specified class or belong to any ethnicity and gender will face disproportionation when their matter will be decided through alternative dispute resolution processes because the private third parties can be partial and fail to give a neutral award or decisions. Moreover, the aggrieved party will not be able to be saved as he or she could be protected by the judges in the courtrooms. Furthermore, it is stated that

"responses from ADR theorists suggest that there is little empirical evidence that less advantaged individuals or groups necessarily fare better in the formal justice system, and that sophisticated mediators and arbitrators are indeed sensitive to power imbalances and can be trained to correct for them without endangering their neutrality in the ADR process. Many private ADR organizations have begun developing standards for good practices and Due Process protocols to protect the parties and ensure the integrity of the process" (Woolf, 1996).

Fourth criticism on alternative dispute techniques is the effectiveness of the system. In various jurisdictions including America, it has been noticed whether the method of alternative dispute resolution saves the time of the party as these methods are more effective in the context of the time saving of the parties than the courts. However, in England, it has been noticed by Genn, in some cases, the alternative dispute resolution method consumes more time than the formal court system. Hence, if the alternative dispute resolution techniques consume more time than courts then the effectiveness of this system will be questioned because it has been introduced to save the time of the parties among other advantages (Genn, 1998).

Moreover, it has also been noticed by Menkel that alternative dispute resolution techniques, if executed properly, satisfy the parties much more than any other system of resolution. To this end, the questionable object is the effectiveness of alternative dispute resolution techniques. When processes are effective, the parties have more attraction to them and the rate of their compliance is increased. He further stated that the arbitration users seem more satisfied by the awards than mediation (Menkal, 2012). However, Menkel stated that due to less empirical data on the effectiveness due to confidentiality issues, it is not possible to accurately and precisely make any possible statement about the effectiveness and time consumption of the alternative dispute resolution processes (Menkel, 2010).

Conclusion

It is a fact that various new methods for dispute resolution are being introduced for the amicable settlement of conflicts related to governmental, financial, political, social, organizational, commercial, and disputes of corporate nature. The realm of such amicable settlement is increasing over time and this enhancement could also share the burden of the courts. The new trends in the form of hybrid alternative dispute resolution are also being promoted nowadays. For instance, the mediators mediate the conflict and settle the dispute between the parties on the internet. More and more parties are being encouraged to resolve their disputes through the process of alternative dispute resolution. Public policy issues are being resolved through alternative techniques. Mediation is considered vastly as the source for the building of the consensus of the conflicting parties. Not only the developed states but also the developing states are resolving their disputes through alternative techniques with greater satisfaction and greater interest. Moreover, corporate firms and big organizations are trying to create their own methods that resolve their internal private disputes. The parties clearly like the settlement of their disputes through arbitration and mediation. Globally, arbitration and mediation are considered for conflict settlement as the states are also interested to find out any simple, easy, creative method that may not be annexed with any substantive law's jurisdictional issues. Hence, for them, alternative dispute resolution methods are the best and most reasonable solution albeit some of these techniques consider the issues regarding the jurisdiction for instance arbitration consider the seat of arbitration in a specific jurisdiction if such provision is present in the arbitration agreement or arbitration clause. The employment of these techniques is more liked because they are fair, simple, and less expensive, take less time for settlement, are private, maintain secrecy, have clarity, are not complex, and are very creative.

However, these techniques are required to promote justice, equality and reasonably settle disputes. The third party may play a neutral and impartial role. It should not promote the rich or powerful parties as in the case of arbitration the arbitrator is required to be qualified. He should know the nature of the dispute and maintain the effectiveness of the process. Moreover, it is also submitted that these techniques are informal hence these cannot be compared with the formal court system but these are required to maintain their effectiveness. It is true that these techniques have privatized the legal structure and jurisprudence and in some cases, the third parties are unable to maintain equality among the parties but that does not mean these processes are useless. In cases where the third party has done any misconduct then parties can openly challenge in the courts. Additionally, coating alternative dispute resolution processes in form of codes, rules, and regulations may dissolve the originality of these processes but the legislature is making a bridge of formality over the road of informality.

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