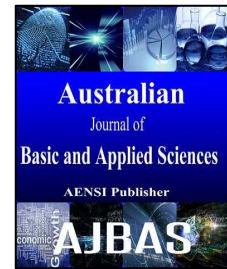




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Alternative Dispute Resolution (ADR): Important Mechanisms of Consumer Dispute Resolution

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ABSTRACT

The issues in dispute among disputing users and consumers are fundamental and important in diagnosing the problems faced, which in turn can help determine the most efficient ADR procedures that can be implemented by the disputing parties. The business trade is among the most fortunate of fields as it has benefited greatly by the presence of ADR mechanisms in the Malaysian legal field, especially in dealing with consumer issues and trade relations. To consumers, the attraction towards choosing an ADR method grows in relation to the perceived good that can be potentially achieved by said method. This paper examines the extent to which the ADR process is able to assist consumers in terms of cost, through reasonable and minimal payments, and the efficacy of its processes in terms of time and energy. Comparisons will be made with the process of litigation which in most cases are unable to provide compensation and remedy that is expected by the community of the consumers involved. However, issues may arise when dealing with certain specific circumstances, such as cases involving a large number of claims that may not be determined or resolved through the ADR process. These issues will be described in detail in this paper with a focus towards the forms of ADR, such as mediation (mediation), consultation (negotiation) and arbitration (arbitration) while establishing the best method in handling of such issues.

INTRODUCTION

When implementing ADR solutions, it is important to take into account the issues that had led to the dispute between the two disputing parties to identify the optimum and reasonable compensation and establish the best suited solution mechanism. The Issues of dispute are fundamental in the diagnosing of problems and the choosing of efficient ADR procedures that are best suited for both the disputing parties. The business trade is among the most fortunate of fields as it has benefited greatly by the presence of ADR mechanisms in the Malaysian legal field, especially in dealing with consumer issues and trade relations (Dwight, 1989). To users and consumers communities, the attraction towards choosing an ADR method grows in relation to the perceived good that can be potentially achieved by the said method. The factors of import that affect this choice are lowered costs and minimal and reasonable charges incurred, in addition to the efficiency of processes in terms of time and energy. This situation is in sharp contrast with the litigation process that is unable to compete with the ADR processes that can provide suitable compensation and remedy that is expected by the community of the consumers involved. This can be evidenced by the widespread and in depth use of ADR in disputes of various stages and circumstances. Although the usage of ADR methods does promote a more protracted and sustainable relationship between traders and consumers, in some specific circumstances, such as in cases involving a large

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number of claims, the ADR process may not be able to successfully determine an optimal resolution (Sable, 2001). Due to this reason most consumers choose litigation to resolve trade disputes faced, over ADR mechanisms though it has many advantages.

Adr Philosophy:

The term 'ADR' refers to the varied mechanisms or alternative dispute resolution techniques that serve a singular purpose, to resolve disputes through an alternative mechanism and technique which differs from the litigation trial method through the courts of law (Stone, 2000). According to Ranjan Chandran and Chitravathy Balasingham, Alternative Dispute Resolution, or more popularly known as ADR, is a method which seeks to resolve any dispute between two or more disputing parties through the achieving of a quick, mutually benefitting and prudent solution" (Chandran and Balasingham, 1998). According to Vinayak Pradhan, ADR refers to the various dispute resolution techniques which is carried out without the use of litigation through the court system (Pradhan, 1999). On the other hand, Karl Mackie, David Miles and William Marsh (1995) explicated that ADR is a dispute resolution method which involves a structured process with the intervention of a third party, but it does not lead to a binding outcome towards the parties involved. Therefore, it can be accepted and viewed as an intermediary procedure that provides an alternative to litigation adjudication and arbitration procedures to resolve a dispute, which generally, but not always, involves the help of a neutral third party to facilitate a solution.

There are varied ADR mechanisms that differ from each other in many aspects. There are circumstances in which these mechanisms operate in the litigation system itself, for instance when a public tribunal, that boasts additional resources which is not available in the litigation system (i.e. specific expertise not possessed by the judge) is used. There are also mechanisms that operate independently as a whole without being bound to the litigation system but are yet able to resolve disputes effectively. It is undeniable that ADR plays an important role in the providing of alternative channels and options to disputing parties specifically when traditional mechanisms are unable to meet the interests of the disputing parties. Since ADR is implemented as an optional procedure that is associated with reference cases that discuss specific issues, the intervention or intercession and assistance of a neutral party who has no interests in the matters of dispute, and no direct link to the case cannot be avoided (Brown and Marriot, 1999). In a few alternative definitions of ADR that are generally accepted, it is defined as a method that does not involve litigation and all manner of adjudication.

Taking into account the in-depth definition of ADR, it is clear that the emphasis, when implementing such a method is placed on the field of dispute and issues and motives involved. When a specific expertise is required, the emphasis on the need for a third-party expert to act as mediator, negotiator or arbitrator should be clear, regardless of the fact that any kind of recommendations proposed are not binding on both disputing parties. For example, mediation is an ADR process that requires the expertise of a particular third party, but it does not require both parties to be bound by the recommendations given by said third party. This situation, however, is different from the Ombudsman mechanism, in which the decision made by the third party is binding on the industry, but not for consumers. The common practice in the construction industry is that the dispute settlement panel or adjudicator panel can decide on an issue that was discussed and can be binding to both parties of a conflict, if both parties are willing to debate the case within the prescribed time.

From the definitions and descriptions given above, the arising questions regarding the meaning and scope of ADR is clearly answered. ADR can be defined as a dispute resolution process that is free from the assistance of the courts of law. Although it is difficult to clearly and precisely define ADR, its mechanisms are important and are of significant value and impact. For example, for legal practitioners, ADR are the main guidelines in improving access and the justice system even though its processes are not subject to inquiry, as it is with court trials, which clearly require detailed investigations to obtain the facts of the case. The ADR system is able to function in providing a fair solution to the conflict or dispute at hand even without the process of inquiry. The theories of ADR clearly highlight the many advantages and values that ensue due to the usage of ADR mechanisms. Disputing parties can also clearly identify their needs of specific expertise in handling the issues relating to the dispute through the main ADR mechanisms such as mediation proceedings, arbitration, negotiation and the hybrid methods like med-arb, mini-trial and many more. Generally, a hybrid dispute resolution process combines elements of two or more traditionally separate processes into one, such as in med-arb, where the mediator will act as an arbitrator if he is unable to resolve matters. As in mini-trial, the process is by combining between negotiations and mediation by both disputing parties in an unbinding adjudication process.

Alternative dispute resolution mechanisms or ADR boasts a variety of terminological categories, all of which lead to solutions that differ from the adjudication process. The various different forms and formats of ADR mechanisms reveal the real objective of ADR, which is to facilitate the choice of disputing parties towards an alternative resolution best suited to their case. Among the terms commonly used in countries that practice ADR are as follows (Stone, 2000):

First – Mediation:

Mediation refers to the process that involves a neutral third party acting as a mediator in the handling of the issues disputed by the parties involved. Any and all communication and consultation is carried out through intermediaries and the decision made is not that of the mediator, but that which is reached by the disputing parties themselves as a result of the discussions held. The mediator acts only as a conduit or facilitator. Among the bodies established in Malaysia to resolve disputes through mediation are the Financial Mediation Bureau (FMB) and the Insurance Mediation Bureau (IMB).

Second – Negotiation:

Negotiation refers to the bargaining or negotiating process that takes place between the two disputing parties in an effort to reach an agreement. This process requires the continued interaction and communication between disputing parties to help reach a solution and understanding towards the dispute at hand. In Malaysia, the negotiation process is widely practiced by tribunals, for example the Consumer Claims Tribunal and the Tribunal for Homebuyer Claims, as well as in mediation processes by the FMB and IMB.

Third – Arbitration:

Arbitration refers to a dispute resolved by one or more arbitrators who are appointed experts in the matters pertaining to a dispute. In most trade agreements, specific clauses that enable the arbitration mechanism are incorporated into the agreement and are known as the arbitration clause. This clause provides power to both parties to refer disputes to an arbitrator to be resolved. In Malaysia, among the Acts related to the allocation towards referring to an arbitrator is the Arbitration Act of 1952 (Revised in 1972). In Malaysia, RCAKL acts as the body that handles domestic and international arbitration proceedings.

Development of Adr Philosophy And The Evolution of Its Advantages:

ADR had started almost 30 years ago, when a group of judges in the United States who had contributed their views and ideas towards establishing a specified system during the Pound Conference in 1976. This system then led to the establishment of ADR mechanisms that exist now. The Pound Conference was the beginning point of the modern ADR movement. This phenomenon spread to England, Australia and a few other countries who then went on to accept ADR as the best alternative to dispute resolution other than litigation. The establishment of ADR in Australia proves this statement true. ADR was introduced for the first time in Australia in the year 1986. The effort and support given by Sir Laurence Street, resulted in the establishment of the Australian Commercial Disputes Centre or ACDC. This body, among its other functions, offers ADR mechanisms as services to each business community (Harris, 1993). The recommendations made by the Chief Justice Burger to reform the judicial system and provide space and greater responsibility to the ADR movement became the starting point for the development of ADR. He stressed on the diversion of litigation to other channels (Burger, 1982).

ADR has evolved through the ages along with the needs of the community taking into consideration the advantages and disadvantages that arises along with it. The issue of the usage suitability of ADR is a central part of the debated ADR philosophy. This philosophy is enhanced through the emphasis on different ADR guidelines and procedures, while taking into account the specific issues that had been raised in order to provide the best alternative option or channel for those in need. This philosophy embraces the continuous ever present need towards the efficiency and results of the ADR system, which is also a major selling point for ADR to be the best alternative compared to the existing, age old litigation system - Robert Coulson, President of the American Arbitration Association (American Bar Association, 1989). Henry and Arthur (1999) also noted that all ADR practitioners accept the fact that it is better and much more preferable for all disputing parties to resolve their disputes and differences of opinion through agreements concluded or negotiated agreements. This ideal can only be realized through ADR compared to the means of litigation trials or contentious proceedings. These statements reflect on the disputes that have been resolved through ADR means which by all means seeks to maintain positive trade relations between the two parties who have been in dispute. Furthermore, after the ADR processes the disputing parties value and appreciate their relationship even more. The chances of the same happening through the means of normal litigation are close to zero. However, this does not mean that ADR can only be used for cases and issues affecting trade relations alone. In fact ADR is also effective in addressing issues that is not linked to trade relations as in the case of construction contracts (Padmanabha, 1997).

Most practitioners of ADR mechanisms share the same experience that disputing parties who have implemented ADR mechanisms are capable of achieving solutions that are more creative in addition to gaining the desired interests and a prolonged satisfactory relationship compared with those resolved through judicial system of litigation. Henry and Arthur (1999) clarified the fact that dispute resolution calls for a system that is not giving advantage and can save cost. This problem is associated with the procedures of mediation and negotiation that deals with the bargaining between the two sides in order to get the best mutual solution. ADR also functions as a forum where the parties involved are given help and support to carry out an integrated

problem solving approach and find solutions that lead to win-win or mutual outcomes. This forum approach involves a neutral party who functions as a mediator in order to find arguments and facts that are acceptable towards the resolution of the discussed issue in dispute while taking into account the advantages it proposes for both parties.

Consequently, a new question arises: are the elements pertaining to the problem solving approach sufficient to beget a fair resolution, as the lack of critical aspects in the processes involved is clear? The critical element is quite significant in a sense that it helps in the establishing of a more transformative experience and promotes the repair of existing potential while providing a more effective system for both parties in the dispute to prove and reinforce the issues of dispute that should be resolved. The answer to this question is that ADR mechanisms are not mechanisms that are purely ideal theoretically, but are ideal when practically applied or practiced. This situation is also refined and supported by the view of Goldberg, Sander and Roger (1999) who expressed their crystal clear justification on the ideals of choosing ADR mechanisms compared to litigation:

To reduce postponed and high expense cases, reducing expenditure and optimizing the time spent by parties to provide a quick solution to the dispute that disrupts society, community or family; increase public satisfaction with the existing justice system, promotes the appropriate and timely resolution between the disputing parties, enhances mutually agreed upon solutions; maintaining communal relationships and protecting the moral values of the neighborhood from negative elements; providing a forum that is more approachable and more open to the society, while imparting knowledge and educating the public in finding and approaching a more effective resolution than violence and litigation in resolving their disputes.

Other references and approaches, that are more abstract and ambitious, view ADR as a mechanism to achieve the practical goal of the practice of law as a branch towards maximizing the quality of emphasis on 'problem-solving'. It is also to achieve a higher sense of justice and excellence by emphasizing the need to establish the needs and objectives of disputing parties, while limiting the resolution of the issue in line with the actual existing rights under the law. It may perhaps also function to promote and maximize the interaction between mankind in a more creative, integrated and significant way compared to the provoking of conflicts and disputes that have been experienced. All of this leads to a universal value of integrating social justice and peace in society. Henry Brown and Arthur Marriott (1999) also outline certain important philosophical gems of ADR:

ADR compliments litigation and other adjudications, establishing a process that can stand alone or be used as an adjunct to adjudication. This enables legal practitioners to choose the procedures (either adjudicatory or consensual) that are more suited to individual disputes. ADR provides both parties to a dispute with extensive power and control in resolving the issues between them while encouraging more approaches to solving problems. ADR also provides sufficient space to resolve matters dealing with various nuances. ADR also seeks to strengthen cooperation and make it more conducive to better maintain existing relationships. The role played by the chosen third parties, who are skilled experts of specific fields, assist in simplifying and speeding the process of resolution while reducing cost, postponement and risk of litigation. The ADR process, similar to the adjudicatory procedures, has advantages and disadvantages that make it suitable for some cases but not for others.

There is truth to this statement because not all types of cases can be resolved through ADR. ADR can undoubtedly help resolve disputes and is appropriate in dealing with conflicts and disputes faced by disputing parties in related and like cases, for example cases of consumerism in the context of this paper. However, there are also cases that cannot be addressed and resolved through ADR, such as those involving criminal elements and serious offenses, which can be effectively handled should litigation be chosen as a solution.

The philosophy of ADR has developed positively in Malaysia and the responsible authorities have set strategies in improving access to the justice system and to realize the implementation of ADR mechanisms. The establishment of bodies such as the Kuala Lumpur Regional Centre for Arbitration (RCAKL), the Tribunal for Consumer Claims Malaysia (TTPM), the Tribunal for Homebuyer Claims (TTPR), the Financial Mediation Bureau (FMB) and Insurance Mediation Bureau (IMB) are the best evidence to the fact. Among the positive views held is that the use of ADR accelerates progress and is a process that appeals to the disputing parties' efforts to find a mutually beneficial resolution. ADR can also reduce postponed cases and court tailbacks, while giving justice to the oppressed and promote inexpensive access to justice, apart from being a more efficient solution that increases tolerance. Based on the development and philosophy of ADR it is apparent and undeniable that the ADR mechanism is a mechanism that can help resolve disputes efficiently. The history of the evolution of ADR also contributes to this development with the criticisms made against the court process. The evolution of ADR has been stimulated as a result of the culture of negative litigation processes, such as the delay in trials, costly, inefficiency and the overly formal environment that causes phobia among some litigants.

The overview of the negative overtones of litigation resulted in the introduction of the ADR system and its garnered positive support. On the other hand, ADR emphasizes fully on positive elements and is thus well accepted by most. ADR offers a structured system which functions either with the help of a neutral third party or the consent of both parties in the dispute. All this is offered as a choice to the disputing parties, taking into account the suitability of the case and the issues of their dispute. For example arbitration, mediation and

negotiation is considered appropriate to issues involving trade relationships that often involve amicable settlements proposed as a resolution. This situation clarifies that the purpose and objectives of ADR is non-adversarial. It is obvious from the discussion that ADR is armed with the diversity of mechanisms for varied issues and is accessible by all levels of users in society. The diversity of these mechanisms demonstrates the gravity of the evolution and development of ADR philosophy that has grown from an ideal into a reality that is part of the universal system of justice.

ADR is a simplified solution which maintains the values of confidentiality, without prejudice to any of the parties involved. The methods that are native to ADR mechanisms focus on helping both parties of the dispute find a solution to their dispute with the assistance of a neutral third party. The ensuing decision can be either binding as in the case of arbitration or non-binding as practiced in mediation and negotiation. These elements have their own advantages, although in certain circumstances it may be the cause of some other deficiency. There are many apparent advantages to ADR and most practitioners do not deny it. Among the advantages of ADR mechanisms are (Ponte and Cavenagh, 1999):

First – Time Flexibility:

The ADR process can begin as soon as the disputing parties are ready to begin the process of mediation or negotiation between each other, with the involvement of a third party. It differs from the cases filed in court that take months or years to initiate move on to proceedings and reach trial. The time flexibility in ADR is easily realized because this process does not require any pre-trial procedures, preparation of various motions, witnesses or any appeal proceedings. However these aspects are crucial in the litigation process and thus contribute to the time delay and prolonging of the duration of dispute.

Second - Lower Cost:

The cost of settlement through ADR is significantly cheaper than the cost of litigation trial proceedings. The reduced cost of ADR is clear and apparent as:

- i. Legal fees are less because of the amount of case preparation which is very little and expedited, and in some instances the disputing parties decide to negotiate without the assistance of lawyers.
- ii. Expert witnesses are rarely called to give evidence in the ADR process and therefore, this specific cost can be avoided.
- iii. There is no jury system usage such as in the litigation process, and this can help avoid the payment of costs for the jury appointed.
- iv. ADR focuses on solutions and results that can be achieved by both parties to the dispute. There are no pre-trial motions or motion of discovery costs.

Third - Productive Results:

Most of the ADR mechanisms emphasizes on solutions that can satisfy both parties of the dispute. Mutual agreement and benefit and close ties are fostered between the two parties with the win-win situation method. This kind of fostering is not given focus in the litigation process. ADR does not solely focus on the approach of 'one size fits all' as used by the litigation, but rather towards the achieving of the needs and interests of the individuals involved in the dispute.

Fourth - Elements of Confidentiality:

ADR mechanisms are usually confidential in nature, and emphasize on the resolution of disputes through means that are peaceful and does not cause disturbances in addition to not being noticed by the public, media or any other unrelated parties. Some parties take steps to resolve the issues in dispute through ADR mechanisms for fear that the relationship between disputing parties become strained due to the public and media attention, which results in negative effects which are unfavorable for their relationship, especially in trade relations involving both consumers and merchants. However, this situation is inevitable if disputing parties choose litigation as a solution.

Fifth – Flexible:

Most ADR mechanisms are implemented flexibly and in accordance with the consent of the disputing parties. For instance, mediation can be done in one session or multiple sessions as agreed on by both parties, whereas litigation has no such provision and disputing parties have to adhere to and maintain certain procedural rules from the beginning of the trial until the end.

Sixth - International Nature:

Consumer issues in the present era of trade births and thrives on competition, not only nationally but internationally. Many companies are involved with foreign companies in their trade dealings. As such, should a dispute arise between them, which pertains to complicated issues, ADR can offer advantages that can never be

obtained through litigation, namely a quick, economical and flexible solution which is in line with the interests of consumer issues and the global nature of trade which needs to be solved immediately. The obvious advantages of ADR were highlighted by Russel Caller supplemented by the adding of a few advantages that are considered to encourage the development of ADR (Russel, 2002). He said that through ADR, both parties can maintain their sensitivity and understanding among each other regarding their interests and problems that are to be discussed. It also gives greater focus and concentration to both parties of the dispute, because they understand the needs of each other. Indirectly, the two sides will give a full commitment in resolving the dispute.

However among the many advantages that exist, there are also some things that need to be given specific attention, especially aspects involving of the constitution of due process, public access and equal protection. This aspect still can be improved by the related authorities through immediate steps to resolve them. Among which are (Ponte and Cavenagh, 1999):

First - Procedural Aspects:

Due process is the responsibility to enact laws and certain procedures that are to be applied, which includes the process of fair and reasonable trial. This method is used in formulating the rules of civil and criminal procedures. In Malaysia, due process is based on a system of oppositions. Existing deficiencies in the ADR mechanism is the due process that is less practiced because this mechanism takes the approach of the amicable resolution or mutual agreement by the parties in the dispute. Since ADR processes are not formal and private in nature, thus, it is not influenced by the principles of due process. As a result, in some cases, the resulting progresses through ADR are not consistent and biasness can take place. On the other hand, through litigation, litigants are guaranteed consistent results and the same treatment for a same case, based on a relevant law.

Second - Public Policy Issues:

Basically ADR processes are carried out off the record, in a private setting and with no public access, which causes the public and the media to have a reservation towards this process. This situation is however not the case in the litigation process in which the public has full access and is allowed to participate and be present in trial litigation at court openly.

Third - Implementation Aspects:

The question frequently asked of the ADR mechanism is whether or not the results of an ADR mechanism effort can be properly sanctioned or otherwise. This situation may be binding for cases involving arbitration, but for other types of ADR mechanisms the loopholes pertaining to the processes can bring it back to dispute. Basically the agreement that has been made in the ADR process is considered as a contract. Therefore, in case of any dissatisfaction of any of the involved parties, the contract can be renegotiated subject to the defenses and study from a judicial standpoint. This situation demonstrates the existing loophole in the aspects of ADR decision implementation. Russel Caller stated that there is a delay in implementing the agreement and decisions issued during a settlement. He also believes that the solution could not be implemented properly because of the lack of commitment by both parties in the dispute. This situation is unlikely to happen in the litigation process because the decision will be binding upon both parties under certain laws, and they are subject to sanctions if they disobey (Russel Caller, 2002).

Conclusion:

In conclusion, in view of the many advantages of the ADR settlement mechanism, there is no denying that many people will put their trust and confidence in the system introduced. Though so, some existing deficiencies should be corrected so that the values on the advantages that exist are not destroyed by the lack of an airtight closure. It also helps to ensure that the two disputing parties are satisfied and enjoy access to true and unbiased justice through the ADR mechanism. Therefore, some of the alleged defects that exist in the ADR mechanisms must be handled wisely and promptly.

The philosophy and good values held by the ADR mechanisms should be realized through the reform of the legal system and the theoretical and practical exposure of ADR and its related processes to the consumers and users community at large. The need to justify the use of ADR in harmony with Malaysia's legal system must be emphasized. Conflicts and disputes which occur in many places and trading environments require an immediate, simple, flexible and cheap resolution, this is achievable through ADR. In addition, the relationship between the disputing parties should also be maintained, particularly when it comes to valuable consumer issues and trade relationships. Although there are some questions and challenges brought up by a handful of scholars against ADR, it is apparent that the ADR mechanisms can be repaired and improved. ADR possess a variety of advantages which makes it distinctive and better when compared to the means of resolution through the litigation system. The justification for change in the current avenue of trade dispute settlements involving consumers requires Malaysia and other countries to work together and switch focus on the efforts of realizing the benefits offered by the ADR mechanism. This is easier said than done as many parties should work together

to make it a success. By joining forces learning from the example of other countries which have successfully introduced the ADR system, Malaysia can be able to successfully and efficiently be able to deal with consumer issues fairly and properly.

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