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## The Setting and Matching of Alternative Dispute Resolution (ADR) Mechanisms: The Compatibility with Disputes

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### Abstract

Humans cannot avoid from facing various trials, problems misunderstandings and disputes while carrying on with daily lives. In resolving a dispute, the disputants need to be provided the best redress avenues for the dispute resolution. This may include the option of having various choices of Alternative Dispute Resolution (ADR) mechanisms. Each ADR mechanisms must be closely matched to the disputes brought and the governing parameters need to be established due to the presence of a variety of mechanisms. The paper aims to analyse the question of compatibility between the setting and the matching of ADR mechanism, and the disputes involved. The literature highlights the opinions and views of researchers who have raised the topic and issues in the study and in relation to questions of this article. Hence, the analysis used was based on the content analysis especially previous academic studies conducted based on four (4) questions as follows: Q1 - Who is responsible for resolving disputes? Q2 - What is the main source of the establishing of levels and standard solutions? Q3 - How are the disputing parties represented? Q4 - What is the nature of the situation and to what extent can the discovery of facts and standard discovery is taken in this scenario? The paper will discuss the related issues by focusing on some forms of ADR. The findings of the study show that the answers to these questions are available in various forms, and the obvious possibilities are the differences of opinion that exist as result of the existence of different mechanisms. Ultimately, the final decision garnered must lead to actual ADR values that are required.

**Keywords:** Theory of Justice, Alternative Dispute Resolution, Litigation, Dispute

### Introduction

#### Gaining Momentum for Justice Through Alternative Dispute Resolution (ADR)

The concept of justice has become the focus in creating a civilized society since the beginning of time. The difficulties in getting to the access justice have always been debated, encompassing various issues that require resolution. And today, the concept of universal justice is prioritized and taken more seriously. It includes judgment in choosing the best resolution mechanism, methods to hasten dispute resolutions and using legal services

without involving complicated bureaucracy through various alternative techniques (Hamid et. Al., 2020). In the years 1995 and 1996, Lord Woolf has carried out a comprehensive survey to increase access to justice in English Courts. His last report suggested a new civil justice landscape to be introduced wherein the litigation process must be avoided as best as we can, and the landscape will include a less adversarial and complex resolution mechanism besides providing a stricter case management process by judges (Woolf, 1997). Sothi Rachagan & Mimi Kamariah (1993) stated that the term 'access to justice', in the context of consumers is 'encompassing all existing channels provided to amend any offence, if committed and detected, or to prevent from any oppression in the future.' Fox (1999) too mentioned that 'access to justice' includes access to courts and tribunals involved in providing justice. Justice for governance and manifestation must be made opened as well as easily accessible by all, in a level of equal power and position.' Alternative Dispute Resolution (ADR) is a process of resolving any disputes using methods other than legal ones (Lucas, 2014). Today, ADR is seen as a modern and commercial resolution method that is ever-changing to fulfil the needs of the society. ADR places more importance in fixing the relationship between disputing parties that is seen appropriate for parties who want to maintain their personal reputation. Syed Khalid Rasyid (2006) opined that there are three trigger factors that stimulate the fast growth of ADR: (1) The dilemma faced by the government and public that the judicial justice system is dying and is not able to handle the burden of thousands of cases to be decided, (2) Demands of professionals and other parties wherein they feel there is a need of a specific forum that can fulfil their needs, especially a Commercial Arbitration, and (3) Confidence that the court justice system can no longer provide justice for everyone.

The modern world is moving fast and requires all disputes to be solved quickly and delays will bring a loss to the parties involved. Every individual wants all disputes involving them are solved immediately without inhibiting their activities. Therefore, the practice of said legal provision has caused dissatisfaction among the poor. The justice without court trial is one of the methods for certain parties to obtain decisions that side with them. As a result, the arrival of an alternative method to legal action, especially conciliation and arbitration is successful since solutions according to this method can lessen the feeling of dissatisfaction among involved parties. Both have been said to be fast, cheap procedures and can avoid delays during the trial period which will cause higher cost to produce a legal action (Dahlan et al., 2018). Syed Khalid Rashid (2006) stated that the term ADR is believed to come about by those involved in the corporate world in their efforts to resolve issues occurred among them without involving trial at court which ultimately will bring bad reputation to the institution. According to Idris Abdullahi (2017) alternative dispute resolution also known as External Dispute Resolution (EDR) that is one of the techniques used by dissatisfied parties to achieve a decision without involving any court processes. The objective of this paper is to analyse the question of compatibility between the setting and the matching of ADR mechanisms, and the disputes involved. Four (4) questions were analysed through the content analysis and literatures.

### **Methodology**

The literature review highlights the opinions and views of researchers as regard to the objective of the study, which were collected and then processed qualitatively according to the questions to achieve the objective of this research, namely finding the answer of the compatibility between the setting and the matching of ADR mechanisms and the disputes

involved. The analysis used was based on the content analysis especially previous academic studies conducted based on four (4) questions as follows: Q1 - Who is responsible for resolving disputes? Q2 - What is the main source of the establishing of levels and standard solutions? Q3 - How are the disputing parties represented? Q4 - What is the nature of the situation and to what extent can the discovery of facts and standard discovery is taken in this scenario? Some forms of ADR are also discussed. The findings of these studies show that the answers to these questions are available in various forms, and the obvious possibilities are the differences of opinion that exist as result of the existence of different mechanisms. Ultimately, the final decision garnered must lead to actual ADR values that are required.

### **Analysis and Discussion**

#### **The setting and matching of ADR mechanisms - The Compatibility with Disputes.**

Cound et al., (1989) explained that each alternative dispute resolution mechanisms must be closely matched to the disputes brought and the governing parameters need to be established due to the presence of a variety of mechanisms. The question of compatibility between the setting and the matching of ADR mechanisms and related issues can be resolved by answering the issues related. Among the possible answers to the questions put forth is as follows:

#### **Question 1 - Who is responsible for resolving disputes?**

Among the possible answers: A professional in the field of law, educated and has professional qualifications, expert in a particular field pertaining to represented dispute. They act as a mediator and facilitator and help the disputing parties by facilitating the provision of facts and evidence is clear on every issue they represent.

#### **Question 2 – What is the main source of the establishing of the levels and standard solutions?**

Among the possible answers: The regulations established by the legal system, ADR bodies and agencies as well as the court and existing practices that has been decided on similar cases. Apart from that, solutions are also affected by the values drawn from community life and elements influencing the dispute, either before or after the outbreak of the dispute.

#### **Question 3 - How are the disputing parties represented?**

Among the possible answers: Lawyer or expert of a specific field that is related to the issue in the dispute. Additionally, any stakeholders that hold no professional qualifications formally and legally but has had good exposure in law, or those who are party to a dispute itself may be appointed.

#### **Question 4 - What is the nature of the situation and to what extent can the discovery of facts and standard discovery is taken in the scenario?**

Among the possible answers: the disputing parties or parties that represent them are responsible for conducting studies and surveys of the issues discussed, in addition to collecting data related to the facts of the case. At this stage the mediator, arbitrator or negotiator who acted as a dispute resolver hold the role to help both parties and improve on their efforts where necessary and needed.

How then to ensure that any disputed issues in the case can be matched with a specific procedure or mechanism of ADR? This question can be answered by identifying and matching

each function objective and mechanism of the types of conflicts and disputes faced by both parties. According to Victoria (1993), there are some elements that enable the disputing parties to resolve their dispute by matching a mechanism to a dispute based on the following methods: (1) Taking into accounts the opinions and views of the representing lawyers on the best mechanism to be followed. The selected process must be compatible with the dispute at hand, and not take a stand practiced in the litigation process that adheres to the one size fits all structure (McLaren & Sanderson, 1995), (2) Having chosen an appropriate mechanism, both parties must have full trust and confidence that this method can resolve their disputes with the best result, (3) Control over the mechanism chosen must still be in the hands of the disputing parties and the neutral third party that has been appointed, (4) The mechanism chosen cannot help if the two sides do not tolerate each other and work together to find solutions, (5) ADR mechanisms consistent with any disputes will provide an atmosphere that is conducive to both sides to resolve their problems, and (6) Appropriate ADR mechanisms gives both parties a full awareness and they will voluntarily work together to resolve the dispute.

Of the several suggestions made, various good resolutions can be achieved if the disputing parties have full trust and cooperation in the search for solutions accordingly. Resolutions and decisions agreed on is more important for the preservation of existing trade relations compared to the feeling that there can only be one party winning and the other loses as conceptualized in litigation. Bush (1988) listed several factors that must be considered to further improve the matching of ADR mechanisms to the types of disputes and provides a guideline to encourage the perfect use of ADR such as: Individual satisfaction, Individual Autonomy, Social Control, Social justice, social cohesion and personal transformation. This approach needs to be adopted and internalized by each individual layer, particularly for groups of users either directly or indirectly involved in trade (Brown & Marriot, 1999). Although ADR mechanisms cannot be practiced in all forms of disputes, at least the emphasis of it can become a cause for concern against the consumer disputes in the field of trade involving consumerism. The existence of various dispute resolution processes in cases of trade provides a variety of solutions in accordance the needs of the user.

### **Alternative Dispute Resolution (ADR) and Niche Analysis**

There are many concepts, classifications and niche analysis that can be made to resolve existing disputes, and the division of ADR process categories is based on the level and degree of control and authority of the parties in dispute has over the progress and results. The analysis shows that there are various ways and approaches to resolving disputes, for example in the field of trade, and it can be divided into two (2) conditions and major categories (Ponte & Cavenagh, 1999) which are: Power of settlement given to the parties of the dispute itself, and dispute resolution to be decided by a neutral third party. The discussion on some form of ADR analysis as stated below:

#### **A) Negotiation**

The most familiar resolution method dispute, which has been used for a long period of time, is negotiation. This is an important method that can be used as the initial method used in most ADR processes. It is a discussion process involving both parties in the efforts to identify point of agreement and disagreement between them as well as any importance they will agree upon together. It is a process of joint decision making in which the disputants discuss

their contradictory interests. In this way, they are searching for a mutual agreement which most likely can satisfy their interests. The negotiation session is a unique process in which it does not involve external parties and the involved parties will control the direction of their negotiation. The success obtained through the negotiation process essentially depends on the parties themselves and the role played by the negotiators. The interesting thing is, through this method, no formality procedures are needed. Parties are free to negotiate either face to face, through telephone conversation, through mail email or a combination of any of the above. Negotiation must be the first among equal dispute resolutions processes, standing firm as its own right, as well as being into traditional frames. Negotiations on individuals who communicate with one another are to arrange their affairs in commerce and everyday life, establishing areas of agreement and reconciling areas of disagreements.

### **b) Mediation**

Mediation is a process to achieve an agreement where all the involved parties are aided by a third party known as the mediator (Boulle & Hwee, 2000). Mediation is one of the informal methods that require the agreement of both parties and is very flexible as it requires the active participation a neutral third party who helps in making the mediation process a success. It must be reminded that only the parties that have the authority can control the smoothness of the mediation process. A mediator chosen among them must have extensive knowledge about the disputed matter, such as a senior lawyer or any of the community leaders. A joint agreement is the result obtained from a mediation process, but the results achieved do not bind anyone or can be enforced.

In Malaysia, mediation is done with full willingness. The Mediation Act 2012 is enforced on August 1, 2012 with the purpose to coordinate the mediation process and ensure that it is not shadowed by the court's litigation process or arbitration. The 2015 Practice Order No.5 issued by the Chief Registrar Office of the Malaysian Federal Court has allowed judges to order parties solving their disputes through the mediation method (Tiang Joo & Yin Faye, 2014). The Mediation Act 2012 does not provide for mandatory mediation. Parties can mediate concurrently with any civil court action or arbitration. The judiciary has set up its own mediation centre to cater for court-annexed mediation as set out in the Chief Justice's Practice Direction. The AIAC, apart from arbitration, also provides mediation services under the AIAC Mediation Rules 2018. The AIAC Mediation Rules 2018 is a set of procedural rules covering all aspects of the mediation process to help parties resolve their domestic or international disputes (Sundra Rajoo, 2020). In an interesting way, mediation here offers to work through this principle of the rule of law by going against the failure of the formal adjudicatory process to provide such natural justice (Alberstein, 2011). In the Alternative Dispute Resolution Best Practices for Judges, in Michigan's Judiciary (<https://courts.michigan.gov/Administration>), the following guidelines are to be considered:

#### **1. Consider ADR in most cases.**

Effective use of ADR allows parties to resolve their conflict in the least amount of time and at the lowest cost.

#### **2. Consult with parties as early as possible about the best process for their case.**

In an early case or scheduling conference, discuss which ADR processes may be most appropriate for the case, when it should occur, and who the neutral service provider will be.

**3. Have parties identify a mediator early in the case.**

Parties' reaching agreement on who their mediator will be establishes maximum mediator credibility. Selected early in the litigation, a mediator may be able to help parties remove obstacles to reaching a later full settlement of the case.

**4. Schedule mediation to take place before case evaluation.**

Mediation can be expected to dispose of approximately 75% of cases referred, significantly reducing the number of cases required to be set for case evaluation.

**c) Arbitration**

The arbitration method is also acknowledged as an alternative dispute resolution method. Arbitration is one of the dispute resolution methods used when both disputing parties will ultimately need a binding award or decision. However, it must be placed under the supervision of the court and the power to make the decision is still given by the judicial body if the dispute does not reach an agreeable solution (Dahlan et al., 2018) The award given by the arbitrator is binding to both parties and can be enforced as well as becoming part of the court's judgment. An arbitrator is subjected to the procedural methods in the written law or directives, or circulation issued by the Kuala Lumpur Regional Centre for Arbitration (KLRC). In Malaysia, the law regulating the arbitration process is under the 2005 Arbitration Act. Beginning from October 24, 2013, the KLRC i-Arbitration is introduced to allow arbitration process for dispute issues related to Islamic law. Most commercial disputes often resort either to court or to arbitration. Other forms of ADR are gaining popularity. Although the AIAC is the leading arbitral body and ADR provider in Malaysia, it operates in a competitive environment where arbitrations, both domestic and international, and other niche forms of ADR, are also administered by other associations and professional bodies. They include the Malaysian Institute of Architects ('PAM'), the Institution of Engineers Malaysia ('IEM'), the Institution of Surveyors Malaysia, the Malaysian International Chamber of Commerce, and the Kuala Lumpur and Selangor Chinese Chambers of Commerce, as well as commodity associations like the Malaysia Rubber Board and the Palm Oil Refiners Association of Malaysia ('PORAM') (Sundra Rajoo, 2020).

**d) Conciliation**

Conciliation is another alternative for parties who do not accept to submit to jurisdiction, whether it is the jurisdiction of another state or of an arbitrage tribunal. It is a non-competitive method, but litigation is not. Additionally, the business relationship between the disputant is more likely to be preserved. Moreover, conciliation may even develop the relationship between the parties, "since the scope of conciliation and the ultimate agreement of the parties may go beyond the strict confines of the dispute that gave rise to conciliation." (Fulton, 1989).

Suherman (2019) quoted as according to Lord Wilberforce, he defines conciliation in the aspect of commercial dispute resolution as: "... *the process which the parties to a dispute are helped by a neutral and independent third party, who may be either and official provided by the state or a private person, to reach a mutually acceptable settlement.*" The conciliation process, like mediation, parties will be assisted by the neutral and independent third party to bring them together and define a solution to achieve the satisfactory agreement. The third person role is trying to conciliate the parties rather than resort to litigation. However, the

process of conciliating the parties can be done whether they have already used litigation or not" (Murray et. al., 1989).

### Conclusion

In conclusion, by gathering all the answers to these questions and putting them together a perfect ADR mechanism can be formed. It should be aimed at forming resolutions even though the mechanism that should be applied is different from one issue to another. As understood, ADR is not intended to bind both parties to decisions and solutions that are intolerant and forced, but rather is primarily to enable the reaching of mutually agreed decisions and meeting the needs and wishes of both parties. Consequently, there would be no negative elements such as the two sides failing to comply with what was agreed upon or violating the collective agreement that has been reached. The ADR mechanism focuses on solutions that allow its impact to better assess the disputing parties, to respect and appreciate the progress that has been made jointly. The justice without court trial is one of the methods for certain parties to obtain decisions that side with them. As a result, the arrival of an alternative method to legal action can be a successful solution since the mechanism can lessen the feeling of dissatisfaction among involved parties. The setting and matching of ADR mechanisms by looking into its compatibility with the disputes involved, focussing on the niche and all guidelines in choosing ADR, will eventually demonstrate opportunities for practical implementation of ADR and not just a mere theoretical success.

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