ADVANTAGES OF ALTERNATIVE DISPUTE RESOLUTION (ADR) OVER LITIGATION IN DISPUTE RESOLUTIONS

Nor'Adha Bt Abdul Hamid [1,*], Tuan Nurhafiza Raja Abdul Aziz[2], Norazla Ab Wahab[3], Siti Noor Ahmad[4], Roslinda Ramli[5]

[1, 2, 3]Faculty of Syariah and Law, Kolej Universiti Islam Antarabangsa Selangor (KUIS), Bandar Seri Putra, 43000 Kajang Selangor, Malaysia
[4 ,5] Faculty of Science and Information Technology, Kolej Universiti Islam Antarabangsa Selangor (KUIS), Bandar Seri Putra, 43000 Kajang Selangor, Malaysia

[*]For correspondence; Tel. + (60) 193096889, E-mail: noradha@kuis.edu.my

ABSTRACT: *The alternative dispute resolution mechanism is an innovation that stands apart from the traditional judicial system that is enforced in a country. While litigation has been present and popularly used before, in stark contrast to ADR, the public is aware of the disadvantages and discrepancies presented by the traditional system, like the burden placed on concerned parties, the long-winded resolution process, the complex procedures involved and the immense amount of time it takes. Due to these factors, an alternative, non-litigation, dispute resolution process which is faster, easier and consumer-friendly has been formulated. This article aimed to explain the significant alternative dispute resolution system which provides an opportunity for the disputing parties to be more involved in the proceedings of their dispute conducted through the means of documentation. The paper will discuss the arbitration as part of ADR system. The system also offers various options in terms of methods, procedures, costs, representation, and location. As this system works faster than the courts, indirectly it can help reduce the burden of delayed cases in court. Being a library based-research, reference will be made to relevant authoritative texts, case studies and applies the method of literature review through content analysis of documents. Overall, the study highlighted that since the arbitration is of the cheaper cost, it could indirectly contribute to help limit certain costs, such as the exorbitant cost of hearing proceedings and the high legal expenses incurred, which in some cases is quite excessive and unreasonable.*

Keywords: Alternative Dispute Resolution (ADR), litigation, disputing parties, disputes

1. INTRODUCTION

There are various ways and approaches to resolving disputes in the field of trade, and it can be divided into two (2) conditions and major categories [1] which are: Power of settlement given to the parties of the dispute itself, and dispute resolution to be decided by a neutral third party. For the first category, the means of the settlement includes mediation, negotiation, tribunal, summary-jury-trial, and mini-trials. As for the second category, it involves cases through hearing by means of arbitration, private judging and mediation and arbitration hybrids such as the 'med-arb'. In both circumstances, the disputing parties typically will attempt to resolve their dispute through a process in which both of them can still control the process of their trial until the case could not be resolved at which point they refer to a third party to help in resolution.

For both categories, the methods of consultation and discussion will be used to reach a settlement. These elements have its own advantages when the two parties discuss and negotiate with each other in finding solutions and to decide on both measures and decisions that have been agreed upon without the intervention of a third party. However, this process can also involve the intervention of a neutral third party if the decision cannot be reached. It is not necessary for the third party to have the power to make decisions, because they only serve as a facilitator or mediator to oversee the process of negotiations or as advisers especially as experts in a said particular field. As such, is the neutral third party which does not favor any party to the dispute, serving only as a mediator to control the process and help both parties to reach a settlement, or they are empowered to make decisions in the talks held? This question arises in the settlement through mediation and arbitration which uses a middleman who acts as a 'conduit' that specializes in a particular field. Other forms of resolution that combine key processes such as negotiation, mediation, and adjudication, also known as hybrids, are essential for certain situations. Among such forms is adjudication which is combined with consultation through a process of a mini-trial. A Mini-trial involves the presentation of evidence and submissions of both parties to establish their case. While the 'rent-a-judge' or 'private-judging' is a combination of arbitration and adjudication in the courts. Among the other, combined processes are the 'ombudsman'. This involves a mediator, investigator, neutral-expert, early-neutral evaluator and summary jury trial [2].

2. TYPES OF ADR: PRIMARY AND SECONDARY OR 'HYBRIDS'.

The division of ADR process categories is based on the level and degree of control and authority the parties in dispute has over the progress and results. They have classified these processes for mediation, negotiation, conciliation, unilateral action, the evaluative process, the adjudication process and hybrid processes [3]. They argue that the ADR procedure usually involves the disputing parties as a whole without any exception, also involving their lawyers (if any) to reach a solution together. These factors are the main cause of the success of the mediation process in many cases. Up till now mediation has become a successful ADR process and is advanced when compared with other processes [3]. Such factors should be taken into account by the authorities in Malaysia to enact a better ADR mechanism while keeping in mind the atmosphere and the situation of the people in Malaysia. No doubt different geographical conditions, a variety of political, moral and social values of different people will also influence the different mechanisms that can be broken down into the decisional, facilitative and advisory forms which include primary and secondary ADR.

Most of the writings by several scholars have divided the primary ADR process to three (3) main categories, namely negotiation, mediation and adjudication [2]. While there are

also experts who have categorized ADR into six (6) major categories, which are the negotiation, mediation, judicial process, arbitration and the administrative and legislative process [4]. The usage of the three (3) main processes differs from each other and meets the differing and various trade disputes. ADR practitioners should know the appropriate use of ADR processes when taking into account the real needs of the parties in dispute. This is consistent with the goals and objectives of ADR in theory and practice, which is not to yield to any party in a dispute as takes place in the litigation process, but rather to settle disputes peacefully while achieving a good solution for both parties. This solution would not destroy the existing relationship in trade between disputing parties.

The most ideal approach in achieving a settlement through the ADR process is to have a non-formal consultation with the disputing parties in the efforts of getting clear and complete facts and evidence regarding the issues raised. However, the disputing parties should be allowed to negotiate and debate their case independently with the aim of reaching mutually beneficial decisions. Through this approach, the ADR process will run smoothly and does not burden either of the disputing parties. This process is sometimes more effective when combined with additional processes or secondary processes known as hybrids. Among that which could be categorized in this secondary process are mini-trials, med-arbs, neutral expert fact-finding, early-neutral evaluations, multi-door courthouse means, and court-annexed arbitration. The combination of key processes and the adjudication process is known as hybrid methods and it can be divided into two (2) categories:

i. that which is in connection with the adjudication process involving a neutral third party to decide on a solution that can bind both parties in the dispute.
ii. that which is related to a consensual process in which both parties in the dispute have the authority and power of its own to control any decision and terms of settlement agreements that are reached.

For both categories mentioned the disputing parties are assisted and facilitated in the settlement process to assess the issues raised, and whether or not they are able to obtain a solution. This process must be carried out with the assistance of a neutral third party. Among the many classification divisions made, the majority of researchers agree with the division of ADR classes put forth by NADRAC [5] or the National Alternative Dispute Resolution Advisory Council, which identified three (3) main categories of ADR processes, namely:

3. RESULTS AND DISCUSSION

First - Determinative / Decisional Process

This ADR process involves a third party who has the power and control to make decisions on behalf of the parties in dispute. The result put forth by them is binding, of which the degree of binding or can be ascertained through the degree of compliance. The power of the third party or 'intervener' appointed is certified and outlined under a specific Act or by a contract agreed upon by both parties (such as the clause of an agreement to refer to arbitration). In Malaysia the role played by RCAKL as 'intervener' for each case referred to them proves its acclaim and increasing public trust as there is an increase of cases handled each year. The usual processes for this category are arbitration and several other types of resolution such as expert-determination. These processes are directly associated with the rights-based approach to dispute resolution and it simplifies the interest-based elements. This primary process is considered as a base process and is foremost when compared with other processes.

Second – Facilitative Process

This process involves a third party that assists and facilitates the process of settlement through ADR. Such third parties will assist the parties in the dispute with their inherent expertise to achieve a mutually agreed solution, without damaging the existing relationships. The third party has no authority or qualifications to make decisions that are binding on the parties in the dispute. Reasonable assistance can be provided by the third party, such as helping both sides of the conflict equally on the negotiating table and providing the things necessary for the proceedings. They also act as a spokesperson for the disputing parties in a productive way and actively discuss issues of the dispute together, while thinking of mutual action and choices that can be taken to resolve these issues and deal with the related problems. Among the usual processes of the facilitative form of ADR are mediation and conciliation. In certain circumstances, the decision making and assistance process can also be categorized as advising. In certain circumstances, this process is backed by the interest-based and preventive approach to dispute resolution. Secondary processing in some cases can act as hybrids to the main and primary process.

Third - Advisory Process

This process involves the intervention of a third party in the dispute that only seeks to guide the parties in the dispute to reach a reasonable mutual decision. Third parties do not have the qualifications and the authority to make any decision that could bind the disputing parties. Among the guidelines that can be given is related to the facts of dispute and issues facing the parties involved, certain laws which can be referred to, technical problems or specific expertise, or suitability for a referral to a higher source, such as the courts. This can be achieved if enough information can be given by both parties, given the range of views and opinions, their suggestions and ideas and practical insights that are critical but constructive. The functions performed by these third parties, although purely advisory in nature, can be very important and act as a guide to the disputing parties to reach a resolution.

The process of advising differs from the facilitative or decision-making process. This process requires a major criterion of experience and expertise in the issues and the substantive problems pertaining to the dispute. Examples of this type of advice are case appraisals, non-binding expert determinations, early-neutral evaluations, dispute counseling, investigation and the many provisions under the jurisdiction of the judicial and legal system of a said country. This process is backed up by the rights-based approach to dispute resolution but it also embodies an interest-based element. This process is secondary in nature and in many situations can be a hybrid form as it supplements the primary process.

4. ARBITRATION: DEFINITION

In Malaysia, the Arbitration Act of 1952 (Act 93) which is amended to the Arbitration Act 2005 (Act 646) does not provide any definition of the term 'arbitration' [6]. Article 2 (a) of the UNCITRAL Law Model defines arbitration as "any arbitration whether or not administered by a permanent arbitral institution". Sundra Rajoo (2003) explicated some definitions and views on the purpose of arbitration from the perspective of Plato and Aristotle. For example, Plato was indirectly referring to arbitration when he said [7],

"If a man fails to fulfill an agreed contract... An action should be brought in the tribal courts if the parties have not previously been able to reconcile their differences before arbitrators (their neighbors that is)" [8].

While Aristotle stated that:

It bids us remember benefits rather than injuries, and benefits received rather than benefits conferred; to be patient when we are wronged; to settle a dispute by negotiation and not by force; to prefer arbitration to litigation - for an arbitrator goes by equity of a case, a judge by the law, and arbitration was invented with the express purpose of securing full power for equity [9].

Arbitration is a private mechanism for the resolution of a dispute that took place privately by means of an agreement between the two sides [10]. They have agreed to jointly refer the dispute to an arbitrator and comply with the decision after a hearing that is fair to both parties. The decision is enforceable by law. Arbitration is a consensual system of laws that lead to the resolution of commercial disputes privately. Meanwhile, the comments received from a French scholar reads *"L'arbitrage est I'institution par laquelle les parties confient a des arbitres, librement designes par elles, la mission de trancher leurs litiges"* [11] which means "arbitration is an institution in which all parties involved put their trust in the arbitrators who have been voluntarily chosen to resolve the dispute that they face".

Romily in the case of *Collins v. Collins (1858) 28 LJ Ch, pg. 186)* defines arbitration as a reference to get results from one or more persons of a point of dispute or disagreement between two parties. Walker [12] described arbitration as the adjudication of a dispute or controversy in the aspect of fact or law or both, done outside of the normal civil court proceedings, by one or more persons or who has been appointed by both parties to the dispute as they wanted a resolution to their dispute. According to Hunter [13] the definition given can be used to help find the features and advantages of an actual arbitration, and is listed as follows: it is a form of adjudication, though not part of the normal process of the court system; it is a procedure for resolving disputes, and the result garnered was a binding decision.

According to some views and definitions are given by some experts, arbitration can be summed up as a kind of judicial adjudication where disputes between two parties are referred to a third party acting as an appointed arbitrator. The arbitrator will consider the evidence and arguments provided by both parties. After examining all the facts of the case and the supporting information available, the arbitrator shall give his decision with regards to the emphasis on the principles and laws, including any conventions and unwritten law that outlines specific guidelines that should be followed.

THE ARBITRATION PROCESS: STAGE AND PHASE

Normally arbitration cases are referred voluntarily by both parties of the dispute. No form of coercion may be inflicted upon them to refer to arbitration, provided that both of them have agreed to respect the clauses of the initial agreement. The findings of the facts of the case are based on evidence obtained through the procedures that have been given to both sides through equal opportunity to debate the evidence and personal issues (either personally or through an appointed representative). If this situation is not compatible with the facts of the case, then the arbitrator will investigate further using his/her existing skills and expertise. The decision will be binding on both parties. In acting as an arbitrator, they should be free from bias and only focus on total justice in the trial procedures and decisions. The two disputing parties must have full confidence in the system and compromise by complying with the decision made based on the facts and issues of the case. The situation of injustice and elements in favor of one party, especially the party's bargaining power is to be avoided in accordance with the law maxim *'nemo judex in re sua'* which means - no one may be judged in his own cause'. A fair trial allows both parties to be given sufficient equal opportunities to allow the judges to give a good and fair judgment. Each party should be allowed to give oral evidence and proof [14]. An impartial judge is a person who is not easily distracted and they make decisions based on the relevant provisions of the Arbitration Act.

'Award' is defined as a decision or determination made by the arbitrator or commissioner, or any external party that acts as the decision maker for any controversy which was brought to them; which also includes the writing or document containing the decision [15]. This definition has since been used by the courts in deciding on cases such as *Jeuro Development Sdn. Bhd. v. Teo Teck Huat (M) Sdn. Bhd* (1998. 6 MLJ 545 at 551 per Augustine Paul J) in which the court said "therefore, 'award' is a decision made by an arbitrator against any controversy brought by them. Because the 'award' follows the controversy brought to arbitration, a decision must be decided on all the issues involved in the controversy". This principle is also stated in Russell's book on Arbitration as it states "any word that led to the decision of the questions referred is well known as the 'award'. There is no technical expression that is needed." In this case as well, the Arbitration Act of 1952 does not specify any requirements and substantive provisions important to form a valid award. In general, the court will not enforce the 'award' unless it is clear, complete, accurate, final and enforceable. As such, the terms of the award must be unconditional, non-contradictory, unambiguous and unimpeachable [6].

A valid 'award' is final and binding on all parties or claimants. Otherwise, the 'award' becomes invalid, in which case the decision can be cancelled and does not carry any impact according to the law. Similarly, the 'award' that has been set aside does not have any effect on the legally. Though so, an 'award' that is legally 'voidable' has a legal effect under the provision of law similar to a valid 'award', unless and until there is a party seeking to legally void said 'award' or if the court voids the award. Section 27 of the Arbitration Act of 1952 provides that an 'award' if valid can be enforced on the party being fought in the case. In the arbitration

agreement, it is implicitly stated that both parties would abide by the awards issued. Enforcement of awards is adheres to the clause of this agreement. A valid 'award' is a legitimate right of action to the party successful in their suit brought. All claims will be grouped in a single award, and the rights and liabilities of both parties will also be expressed in the 'award'. The 'award' is given to create a new right to remove or supersede former rights. Sutton, Kendall and Gill [16] concluded that the 'award' is generally implemented without the need for further implementation. Enforcement proceeding is usually done when there is any party that refuses to comply the award issued. However, Mustill and Boyd [6] explicates that the legitimacy of an 'award' denies the involved parties from filing the same claim again under new arbitration proceedings.

Discussing the advantages of arbitration requires an appreciation of its differences when compared with litigation, although it is argued that it is somewhat similar to litigation. At first glance, arbitration has elements similar to litigation, but in fact it is better than litigation due to the following aspects as further explained by L.M. Ponte and T.D. Cavenagh [1]:

First - Comprehensive Control over Process

Arbitration boasts a more thorough control by both parties. They are able to choose the arbitrator and control procedures carried out during the proceedings. They can decide on the procedures that should be followed by the arbitrators, or select a standard to be followed while deciding the award. In contrast to litigation, both parties must submit to the authority and scope of the court in determining the trial procedure and the judge in charge, based on the legal provisions available.

Second – Element of Confidentiality

The documents of a trial, the course of said trial and its results can be accessed by outsiders or the public. Sometimes unpleasant publicity about the case at hand can cause a drop in the reputation of the company or business. This situation can be avoided through arbitration proceedings which emphasizes on the element of confidentiality, secrecy and lack of publicity, leading to decisions that are not influenced by external pressure.

Third - Saving Time and Money

Costs and time can be saved as the time taken and costs incurred from the initiation till the completion of the trial of a case can be shortened to the highest extent possible through arbitration. The litigation process is known require more time and as a result higher costs will be incurred. Therefore, this factor makes choosing arbitration more plausible compared to choosing litigation proceedings.

Fourth - Arbitration Expertise

Arbitration proceedings require the use of arbitrators agreed upon for handling such cases. The arbitrator is not appointed from the general public, as they must be able to handle and provide insights using their expertise in the issues in dispute. On the other hand in litigation, the judge handling a case is sometimes unable to delve into issues of problems facing a case, as certain technical matters or issues related to certain industries may be unfamiliar to them.

Fifth - 'Final' Award

Award given by the arbitrator is final and has been agreed by both parties. Arbitration cases are rarely submitted under appeal for a retrial, and the award given are adhered to by the parties. However, the litigation system does not promise the same conditions. Litigation allows for appeal and therefore the costs incurred and time spent will be prolonged, as if without end.

Sixth - Providing social values

The concept of arbitration indirectly benefits the public at large. Through this means, the cases pending in the courts can be reduced and hence, the effectiveness of the courts can be increased.

In conclusion, the advantages of arbitration over litigation can be summarized in theory as follows; provision of expert arbitrators, final and binding decision made, confidentiality of proceedings ensured, informal procedures makes for minimum cost and fast turnaround time [2]. Hunter [13] also listed the principal advantages and importance of arbitration as follows:

i. If the dispute involves technical matters and requires specific expertise such as construction contracts, the parties elected to conduct the arbitration process must basically have relevant qualifications and specialties.
ii. The process can be carried out more efficiently and quickly compared to the process of a trial in court.
iii. The cost of the trial can be saved.
iv. Unnecessary publicity among the public / third parties can be avoided.
v. The suitability of the place, the time and energy devoted can be prioritized within the comfort of both parties in dispute.
vi. The arbitrator can observe the subject of a dispute at any time or when deemed necessary, in order to provide a fair result.

From the statement above and its comparison with various other methods of dispute resolution, arbitration offers decisions that are binding and final for each party involved. Though litigation also provides a decision which is binding and enforceable there still is a deficiency in the context of trade disputes. Additionally, the confidentiality of a case is also emphasized in the arbitration process. There are suggestions given in the case of *Esso v. Plowman* [17] for each of the parties entering into an arbitration agreement requiring a clause for the maintenance of secrecy by both parties. Among the elements of confidentiality that should be given special attention as follows:

i. Information and material things that need to be considered confidential, such as evidences of the case, the oral arguments and that which is in writing, facts, the identity of the arbitrator and the award that is given.
ii. Establish guidelines to ensure information and the trial are kept confidential.
iii. If information is provided through the use of electronic machines, it is necessary to ensure clear procedures for maintaining confidentiality.
iv. The conditions that may be allowed for any element of secrecy is notified, whether partially or as a whole, when

required by specific legislation or specific enforcement agencies or as information in the public domain.

5. CONCLUSION

The conclusion to be drawn between the advantages of arbitration as part of ADR over litigation is as follows:

i. Arbitration offers the parties a method to resolve their dispute in accordance with the formalities as agreed upon. It is also able to act to resolve the dispute and give a fair decision as well as to avoid a long drawn out process. Litigation involves many formalities and therefore there is a delay the trial process and results. It also involves high costs. Although the cost of arbitration is growing due to the use of specific expertise that needs to be paid, but the short duration of processes efficiently and successfully assists in cutting costs that would have to be borne if litigation was chosen.

ii. The arbitrator selected by the parties is qualified in terms of knowledge, skills and specific expertise. This situation does not occur in the litigation process.

iii. Most cases of trade involve many stakeholders. The situation is manageable through the choice of arbitration as said dispute can be properly handled without going through the complicated process involving a lot of testimonies, as it is commonly practiced in the litigation process.

iv. Arbitration proceedings are usually conducted privately and only require the presence of the related parties involved, and any party who agreed to attend. The two parties also generally agree to keep secret all the facts, evidence and information that have been produced throughout the process. The opposite is true in the litigation process.

v. For arbitration in the international level, it is very beneficial as everyone involved usually comes from various other countries. As many disputing parties do not want to take their case to the courts of each country for reasons of their own, arbitration can be chosen as a neutral platform, which is a unique and effective way to garner justice for their cases.

The above guideline to choosing ADR demonstrates opportunities for practical implementation of ADR and not just a mere theoretical success frame. The situation is however not easy to be realized if not carried out earnestly and without the involvement and support of all the parties involved, as the saying goes, 'you can't make brick without straw'.

6. ACKNOWLEDGEMENT

The writing of this proceedings is a part of the academic research results under the GPIK 2017/2018 – GPM KUIS Internal grant that have been given to the writers. The GPIK 2017/2018 research period begins in December 2017 and will end in November 2018. The writers would like to express their gratitude and thanks to 'Kolej Universiti Islam Antarabangsa Selangor – KUIS' for providing an opportunity and space to conduct this academic research under the GPIK – GPM Grant entitled: A Model on Sulh-Based Community Mediation Centre Using Online Dispute Resolution (ODR).

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*For correspondence; Tel. + (60) 193096889, E-mail:noradha@kuis.edu.my