

General Overview as to the Distinction between Litigation and Alternative Dispute Resolution Methods

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Abstract

A variety of dispute resolution processes exist so as to settle disputes stemming from the course of business. As a dating back tradition, some of the processes, such as litigation, are more familiar to considerable amount of businesspersons, while alternative dispute resolution (“ADR”) methods may be less well understood. However, the survey with regard to the corporate attitudes and practices to international arbitration conducted by the School of International Arbitration, Queen Mary College, University of London, and PricewaterhouseCoopers in 2006 has been revealed that, of the 73% of respondents who preferred international arbitration as their dispute resolution mechanism; either alone (29%) or in combination with ADR mechanisms in a multi-tiered, or escalating, dispute resolution process (44%). On the other hand, only one out of ten (10%) corporations prefers transnational litigation whilst resolving their disputes at stake¹.

Keywords: Litigation, Alternative Dispute Resolution, Advantages and Disadvantages of Litigation and Alternative Dispute Resolution Methods

¹ International Arbitration: Corporate Attitudes and Practices 2006, available at www.pwc.com/en_BE/be/publications/ia-study-pwc-06.pdf. The question does not appear to have been repeated in the Queen Mary/PwC survey, completed in 2008 and most recent in 2010 sponsored by White and Case.

1. Introduction

Litigation includes a case, controversy, or lawsuit being brought in the court. The filing party is named as claimant/plaintiff while being sued in a civil case, or who is being prosecuted in a criminal case, is called the respondent/defendant. The trial is an adversarial process in which each party usually represented by its attorney/-ies, submit all necessary evidence and call witnesses in order to represent its case and convince the judge and/or jury for in favour of themselves.

The losing party is usually entitled to appeal to the relevant appellate court for seeking annulment of the verdict issued by the relevant court of first instance. Both trial/first instance courts and appellate courts are limited by the law in terms of the type of cases they can hear and the remedies that can be awarded.

In addition to that the entire litigation process is subjected to the strict procedural rules of which the parties of the dispute at stake should abide. Litigation effectively delegates power and control of the dispute to a third party and the parties involved do not retain full control over the dispute. Some litigating parties become relatively passive, disempowered and often disillusioned by the entire process².

There are two models of litigation systems which are used around the world: the adversarial (common law) model and the inquisitorial (civil law) model. The adversarial system, which is generally used in the United States (“US”), comprises the introduction of evidence in a process governed by extensive procedural rules following which a jury renders a judgment on the basis of legal instructions given by a judge³.

The inquisitorial system considers evidence, as well as the adversarial system, but in distinctive ways and distinctive ends. It is possible to attribute distinctions between the adversarial and inquisitorial system on three bases.

² Law Reform Commission, *Alternative Dispute Resolution: Mediation and Conciliation*, November 2010, p.50

³ Lucille M. Ponte, Thomas D. Cavenagh, *Alternative Dispute Resolution in Business*, West Educational Publishing Company, 1991, p. 4

The first is the source of law from which the systems draw their direction⁴. The adversarial approach, which is adopted in common law systems such as US and United Kingdom (“UK”), draws from many sources of legal regulation, including but not limited to: constitutional law, treaties, municipal ordinances, administrative regulations and precedential case law. These various sources of law are interpreted and applied by judges at both the trial and appellate levels. On the other hand, the inquisitorial approach, which is adopted in civil law systems, is based on relevant codes and/or regulations. These statutes attempt to distil all legal authority into an orderly and comprehensive code of law.

As a result, while adversarial common law systems develop over time as judge interpret and apply the various authorities to which they are subject, inquisitorial civil law is contemporaneous, with statutes developed on an “as needed” basis⁵. Furthermore, judges in common law system are not applying the law written in the statutes; they develop the law by their interpretations. However, in civil law system judges have considerably less power to develop the law by their interpretation, due to the fact that the boundaries of the law are determined in the relevant codes and judges shall not be entitled to cross the lines by their interpretations.

The second is the process that used to resolve disputes. Adversarial law countries rely heavily on the trial because the various sources of law have a common nexus in the judge, who applies the laws to individual litigants⁶. In contrary, civil law countries use a wide range of ADR mechanisms which will be examined later in this thesis.

The third basis for distinction is the outcomes available under each system. Common law countries normally use juries in order to settle legal disputes and provide complete authority to jury in this regard. However, civil law system does not provide jury trial and empowers competent judge to determine on procedural and substantives issues of the dispute in question via applying the law indicated in the laws of the country.

⁴ Lucille M. Ponte, Thomas D. Cavenagh, *Alternative Dispute Resolution in Business*, West Educational Publishing Company, 1991, p. 4

⁵ Lucille M. Ponte, Thomas D. Cavenagh, *Alternative Dispute Resolution in Business*, West Educational Publishing Company, 1991, p. 4

⁶ Lucille M. Ponte, Thomas D. Cavenagh, *Alternative Dispute Resolution in Business*, West Educational Publishing Company, 1991, p. 4

In common law countries, juries may award punitive damages and a fairly wide range of compensatory damages such as for pain and suffering.

In civil law systems damages are much more limited, normally excluding punitive damages and very significantly restricting noneconomic compensatory damages⁷.

Each system has its benefits and drawbacks. The common law system is less consistent, more costly and more acrimonious than the civil law system.

However, the common law system provides a wider and therefore more complete range of remedies, a greater degree of flexibility to address the exigencies of a particular case and the opportunity for plaintiffs to create new causes of action by successfully relying on the novel application of precedent and the broad legal dictates of the common law⁸. The civil law system is more consistent, easily accessible and significantly less expensive. However, there is a spectacular gap between harm encountered and recompense paid. Owing to that the injured party may bear the risks of dissatisfaction of the results.

2. Advantages and Disadvantages of Litigation

Prior to determine the process which will be used to settle a dispute, parties shall weigh all necessary advantages and disadvantages of the processes and also consider which mechanism fits best for the dispute in question. Each dispute resolution mechanism has its own advantages and disadvantages. However, in this part the author solely focuses on the benefits and drawbacks of litigation.

i. Advantages of Litigation

The advantages of litigation are as follows:

- There is a significant body of substantive law and procedure that exists and automatically controls a lawsuit and parties do not have to create the rules that will govern the lawsuit.

⁷ Lucille M. Ponte, Thomas D. Cavenagh, *Alternative Dispute Resolution in Business*, West Educational Publishing Company, 1991, p. 5

⁸ Lucille M. Ponte, Thomas D. Cavenagh, *Alternative Dispute Resolution in Business*, West Educational Publishing Company, 1991, p. 6

- The judge, by law, must be impartial and the judge's pay check is not dependent upon whether the parties ever use that particular judge in another matter. The judge is not personally affected by the outcome of the case.
- Either party of a dispute is entitled to appeal whole or any part of the decision issued by trial/court of first instances.

One out of ten corporations prefers to rely on litigation instead of ADR methods. Those corporations that are preferred to rely on litigation tend to fall into one of two categories:

- Corporations operate principally in developed countries, where they believe that they will have access to an independent, impartial judicial system, and
- Corporations from developing countries that may be inexperienced with and apprehensive about the arbitration process and feel more comfortable resolving disputes in their own court systems⁹.

ii. Disadvantages of Litigation

As per the survey with regard to the corporate attitudes and practices to international arbitration conducted by the School of International Arbitration, Queen Mary College, University of London, and PricewaterhouseCoopers in 2006, the most common anxieties about litigating under a foreign law before a court far from home are as follows;

- **Lack of familiarity with local court procedures and language.** In the event that the disputants established in different countries, they usually do not prefer to defend or submit their case to the local court which is unfamiliar with respect to the law governing, procedures and language.

⁹ International Arbitration: Corporate Attitudes and Practices 2006, available at www.pwc.com/en_BE/be/publications/ia-study-pwc-06.pdf. The question does not appear to have been repeated in the Queen Mary/PwC survey, completed in 2008 and most recent in 2010 sponsored by White and Case.

- **Lack of confidentiality surrounding proceedings.** Although each jurisdiction stipulates distinctive rules as to the confidentiality of court proceedings, these proceedings are usually open to public and also media.
- **Long lasting trials and appeal processes.** There is no doubt that court proceedings last longer than that of ADR mechanism due to the existence of wide range of appellate proceedings and high volume docket numbers.
- **Excessive cost of pursuing litigation overseas.** Following a case in overseas may engender considerable amount of expenditures and also cause considerable wearing upon the foreign party.
- **Lack of independent or impartial judiciary and corrupted system.** There is no doubt that local courts usually remained close to the local party and such unfair attitudes jeopardize their credibility before foreign parties.
- **Difficulties with regard to the foreign judgments.** Each country has its own sovereignty right and may cause significant problems while enforcing and/or recognizing foreign court judgements.

3. ADR Methods

a. Introduction

There are several methods available for the settlement of a dispute between two parties. When a dispute arises between two parties belonging to the same country, there is an established forum available for the resolution of the same. The parties can get the said dispute resolved through the courts established by law in that country.

Generally, this has been the most common method employed by the citizens of a country for the resolution of their disputes with the fellow citizens¹⁰. Nonetheless, applying domestic courts shall not be deemed as a best option, if the parties of a dispute belonging different countries. At this stage, it might be recommended for parties of a dispute to consider applying ADR methods which fits best for their dispute at stake.

ADR mechanisms should aim at preserving the flexibility of the process. This provisional recommendation reflects the position stated in the European Commission's 2002 Green Paper on ADR that:

“ADRs are flexible, that is, in principle the parties are free to have recourse to ADRs, to decide which organisation or person will be in charge of the proceedings, to determine the procedure that will be followed, to decide whether to take part in the proceedings in person or to be represented and, finally, to decide on the outcome of the proceedings¹¹.”

All ADR processes share several features which are illustrated below;

- they are typically less formal than litigation,
- they provide a rapid, relatively inexpensive alternative to litigation,
- they usually encourage negotiated settlement rather than adjudicated decisions,
- they are often highly confidential in relation to litigation,
- they are flexible enough to be adapted on a case-by-case basis, because they are not governed by legal rules, and
- they are typically provided by private practitioners for a fee, rather than by judges and lawyers¹².

¹⁰ Vinod K. Agarwal, Alternative Dispute Resolution Methods, Document No. 14, Geneva March 2001

¹¹ Green Paper on alternative dispute resolution in civil and commercial matters COM/2002/0196 Final. Available at <http://eurlex.europa.eu>

¹² Lucille M. Ponte, Thomas D. Cavenagh, Alternative Dispute Resolution in Business, West Educational Publishing Company, 1991, p. 28

b. Definition and General Scope of the Term “ADR”

In the consultation paper, the law reform commission defined ADR as:

“... a broad spectrum of structured processes, including mediation and conciliation, which does not include litigation though it may be linked to or integrated with litigation, and which involves the assistance of a neutral third party, and which empowers parties to resolve their own disputes.”¹³”

ADR is an umbrella term which includes various sorts of processes, except litigation, used to resolve disputes between parties. Differences include: levels of formality, the presence of lawyers and other parties, the role of the third party (for instance the mediator), and the legal status of any agreement reached¹⁴. Despite these differentials mentioned above, it is possible to identify some common features for ADR methods;

- there is a wide range of ADR processes,
- ADR excludes litigation,
- ADR is a structured process,
- ADR normally involves the presence of an impartial and independent third party,
- depending on the ADR process, the third party assists the other two parties to reach a decision, or makes a decision on their behalf; and
- a decision reached in ADR may be binding or non-binding.

In its Green Paper¹⁵ on alternative dispute resolution in civil and commercial law the European Commission defined alternative methods of dispute resolution as out-of-court dispute resolution processes conducted by a neutral third party, excluding arbitration.

¹³ Law Reform Commission, Alternative Dispute Resolution: Mediation and Conciliation, November 2010

¹⁴ Lewis and McCrimmon, 'The Role of ADR Processes in the Criminal Justice System: A view from Australia', Paper presented ALRAESA Conference, Uganda, September 2005 at 2. Available at: <http://www.justice.gov.za>.

¹⁵ Green Paper on alternative dispute resolution in civil and commercial matters COM/2002/0196 Final at 29. Available at <http://eurlex.europa.eu>

c. Advantages and Disadvantages of ADR

ADR methods involve considerable benefits as well as significant drawbacks. Due to this reason, it is highly recommended for disputants to assess current situation and position of their case as to whether it fits any of the ADR method or not. In order to understand advantages of ADR methods, advantages and disadvantages are examined below separately.

Advantages of ADR:

- **Allow Access to Justice.** ADR methods can be more accessible to those who have limited economical sources.
- **Efficiency on Time and Cost.** Even though, there are still numerous discussions with regard to the efficiency of ADR methods by means of time and cost. It might be possible to mention that, ADR methods are more or less efficient than that of adjudicative dispute resolution methods.
- **Flexible and Creative.** The parties can choose the ADR process that is best for them. For example, in mediation the parties may decide how to resolve their dispute. This may include remedies not available in litigation (e.g. a change in the policy or practice of a business)¹⁶.
- **Confidential.** Unlike the court system where everything is on the public record, ADR can remain confidential. This can be particularly useful, for example, for disputes over intellectual property which may demand confidentiality¹⁷.
- **Win-Win Nature.** ADR methods are non-adversarial. In order to establish long-lasting business relationship, it is quite important to resolve dispute in amicable way and produce win-win outcomes.

¹⁶ Victorian Law Reform Commission, Civil Justice Review Report, March 2008, p.214

¹⁷ Victorian Law Reform Commission, Civil Justice Review Report, March 2008, p.214

Disadvantages of ADR:

- **Suitability.** ADR methods sometimes do not fit well for the disputes at stake. For example, if a party wishes to have a legal precedent or it is a public interest case, judicial determination may be more appropriate.
- **Lack of Court Protection.** As the name implies, the ADR methods do not provide protections of which should be granted in litigation.
- **Lack of Compulsion.** Parties are entitled to walk away from negotiations whenever they deem necessary. This possibility brings significant questions up to the mind with regard to the efficiency of ADR methods.
- **Disclosure of Information.** There is generally less opportunity to find out about the other side's case with ADR than with litigation. ADR may not be effective if it takes place before the parties have sufficient information about the strengths and weaknesses of their respective cases.

d. Types of ADR

The major dispute resolution processes consist of two main classes: those that reserve authority for resolution to the parties themselves and those in which a third party decides the matter¹⁸. The first class comprise of negotiation, mediation, the summary jury trial and minitrial.

The second class includes arbitration, private judging and a hybrid mediation process entitled as med-arb. The ADR methods indicated in second class provides competent authority the power to reach and enforce a resolution to a dispute.

¹⁸ Lucille M. Ponte, Thomas D. Cavenagh, *Alternative Dispute Resolution in Business*, West Educational Publishing Company, 1991, p. 29

4. Conclusion

In the light of aforesaid explanations, it might be recommended for disputants evaluate existing position of their case and their needs prior to determine the best method to be used while resolving the dispute at stake. Each method has its own benefits as well as drawbacks. Due to this ground, it is not possible to reach a conclusion that any of the methods absolutely circumvent others. However, there is a clear intention in the business world to apply ADR methods while dealing with the conflicts arisen from international commercial contracts. On the other hand, there are still considerable amount of business people who does not prefer to break their routine on applying litigation.

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