

Commercial

Commercial Disputes Methods of Alternative Dispute Resolution

The following are methods of Alternative Dispute Resolution ("ADR") that are widely accepted as effective ways of resolving disputes and are recognised alternatives to court-based litigation.

Arbitration

Arbitration is a form of ADR where the dispute between the parties is heard by an impartial third party known as an 'arbitrator,' without recourse to litigation. In the case of arbitration, the arbitrator, after reviewing the dispute between the parties, comes to a settlement. A decision made by an arbitrator shall be binding on all of the parties. Unlike other methods of dispute resolution, once the parties have commenced arbitration proceedings, neither can withdraw from the procedure.

Arbitration can either be voluntary or compelled. In the case of compulsory arbitration, the parties to the dispute enter into Arbitration either under a statute, an order of the court, or through a specific clause included in the contractual agreement between the parties. This is often the case in many commercial contracts and construction-related disputes. Whereas, voluntary arbitration is up to the discretion of parties to enter into arbitration. The outcome of arbitration is known as an 'arbitral award.'

The Advantages of Arbitration

- Flexibility: Arbitration proceedings are flexible and more cost effective compared to litigation.
- Time: Arbitration proceedings are resolved much quicker than Litigation; therefore, it saves both parties the time and stress associated with litigation.
- Confidentiality: Disputes which are subject to arbitration are not released to the public.
- Arbitrator: The parties are able to choose an arbitrator to handle their arbitration.

The Disadvantages of Arbitration

- If arbitration is mandatory as per the contract between the parties, then they are unable to use the courts to settle the dispute.
- There is a very restricted right to appeal arbitration decisions.
- Arbitration does not allow the use of interlocutory applications. Such applications are usually filed when you ask for some urgent relief or to bring certain new facts to the knowledge of the court.
- Arbitration awards are not directly enforceable; they are executable subject to judicial sanction.



Mediation

Mediation is a method of dispute resolution, where an amicable decision arises with the facilitated assistance of a third party known as a 'mediator,' without recourse to the court. It is a voluntary process, and unlike arbitration, it is more flexible; therefore, the parties to the dispute are under no obligation to agree to the settlement. With mediation the parties are in total control over their final settlement. Here, the mediator only acts as a facilitator and does not interfere in the decision of the dispute. However, mediation has a very high success rate, in the region of 90%, so parties that are subject to the process, will often settle.

The Advantages of Mediation

- Parties have control over the settlement.
- Mediation is much less stressful as compared to litigation and arbitration.
- The relationship between the parties is often preserved using this method of settlement.
- The process settles cases expeditiously, which saves on costs.
- Mediation is a confidential process.

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The Disadvantages of Mediation

- Since there is an element of good faith involved with mediation, there is the possibility that a settlement between the parties may not arise.
- It lacks the support of any judicial determination in its conduct.
- Mediation proceedings are lacking in any procedural formality.
- If the process is unsuccessful, it can increase costs, if litigation is necessary thereafter to determine the dispute.

Conciliation

Conciliation is a form of dispute resolution wherein the parties to a dispute come to a settlement with the help of a conciliator. The conciliator meets with the parties both together and separately to enter into an amicable agreement. It is a flexible process, allowing the parties to define/carve out the content and purpose of the proceedings. It is risk-free and is a non-determinative process, where it will only be binding on the parties, if they both agree to settlement.

The Advantages of Conciliation

- It is flexible process.
- The Conciliator is often an expert in the specific area in dispute.
- Conciliation proceedings, like any other form of ADR, are cost effective compared with litigation.
- The parties to the dispute have the liberty to apply to the court, if unsatisfied with the conciliation outcome.

The Disadvantages of Conciliation

- The process is not binding upon the parties to the dispute.
- There is no appeal process.
- The parties may not achieve a settlement to their conflict and this may well then result in increased costs.

Negotiation

Negotiation is a method of dispute resolution where a dispute between two individuals or groups is settled by an impartial third party called a negotiator, using various techniques. The negotiator, in this form of resolution, uses various communication methods to bring the parties of the dispute to a settlement. The primary aim of this type of dispute resolution is to reach an agreement that is fair and acceptable to the parties.

The Advantages of Negotiation

- Flexibility: since negotiation is an informal process, it is flexible.
- Quick resolutions as compared to litigation.
- It often maintains a healthy relationship between the disputing parties after settlement.
- Takes place in a private environment.

The Disadvantages of Negotiation

- The parties to the dispute may not reach a settlement.
- Lack of legal protection of the parties to the conflict.
- Imbalance of power between the parties is possible in negotiation.

Summary

The various methods of ADR have many similarities as well as differences. These methods provide diverse techniques, which help facilitate settlement of their dispute. These modes of dispute resolution are now widely accepted within the profession and are often applied to save costs and to successfully resolve a dispute without going through the courts. In practice the two most used methods of ADR are mediation and Arbitration.

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