



ALTERNATIVE FORMS OF DISPUTE RESOLUTION

Each time a legal dispute arises, individuals or enterprises are usually inclined to believe that litigation is the only way to resolve their problems. Whilst this may be the case, there are however other alternatives available to resolve conflicts without resorting to civil litigation.

At Acutus, we are pleased to shed some light to the alternatives available and our perspective on some of the drawbacks to these options:

1. **Negotiation**

Resolving disputes through negotiation would probably be the most simple and cost effective way to resolve conflicts. Negotiation can take place in any commercial setting between affected parties without the need to engage a lawyer. Parties can work out a solution that they are both satisfied with, often giving offers and counter-offers before arriving at an amicable solution to resolve their disputes. It is not unusual that if each party is willing to accept certain compromises in the course of negotiation, the likelihood of resolving disputes would be much easier and practical.

In certain cases, negotiations may also take place with the help of lawyers, accountants or any intermediaries, so long as they are mutually accepted by the parties concerned. Under such circumstances, their roles will be confined to those of a negotiator or a middle person who proposes and counter proposes offers with the objective of arriving at a solution to resolve such disputes. The engagement of a middle person to resolve disputes is sometimes useful in situation where the parties involved are not prepared to face each other at the negotiation table. Notwithstanding the cost involved in engaging a negotiator, a successful negotiation will be more cost effective as compared to the legal fees of having to go through a trial in court.

Upon reaching a settlement, a lawyer will usually be engaged to formalise the agreement as an official settlement, minimising the likelihood of anyone renegeing over what was mutually agreed.

Drawbacks:

- There are no fixed rules to mediation. Parties with unequal power or the weaker parties may sometimes be placed at a disadvantage.
- Successful negotiation requires each party to have a clear understanding of the negotiation mandate. If uncertainty exists regarding the limits of a party's bargaining or negotiating authority, the party will not be able to participate effectively in the negotiation process.

- Unless a middle person is engaged as a neutral party, the absence of such neutral party can result in parties being unable to reach an agreement as they may be incapable of defining the issues at stake, let alone making any progress towards a solution.
- The negotiation process cannot guarantee the good faith or trustworthiness of the parties.
- Negotiation may be used as a stalling tactic to prevent another party from asserting its rights to court litigation.
- Unsuccessful negotiation will ultimately mean a hearing in court. This will indeed prolong matters.

2. **Arbitration**

Arbitration is another form of alternative dispute resolution where two parties agree not to take their dispute to court. This process is similar to litigation but it tends to be less formal. In an arbitration, parties usually agree to a parameter of process, including the appointment of a person or persons (known as “arbitrators”) who will ultimately decide the case. The advantage is that parties have control over the selection of arbitrators where in the case of a court litigation, the judge selection is out of the hands of either parties.

The arbitrator or arbitrators selected usually possess the background knowledge and experience in the relevant areas of law (such as shipping law, family law, and commercial or construction law). They usually comprise retired judges or senior lawyers who possess the necessary experience and the number of arbitrators appointed could range from one to usually three. Each party will engage their respective lawyers to assist them in presenting and arguing their case before the arbitrators. The cost of arbitrators will usually be borne between the parties concerned.

The process is very similar to those of a court trial. The parties participate in discovery. During arbitration, the arbitrator accepts evidence and hears testimonies. He or she may also ask questions during the proceeding and at the end of an arbitration, he or she will make a final decision on the case. Usually in an arbitration, the case is often completed much faster than those of litigation.

Arbitration may not be cheap, but it could cost significantly lower than litigation. The lower cost is primarily attributable to the fact that the rules of evidence do not apply in arbitration and as such many of the procedures of evidence are not included. The approach that parties could agree to narrow the scope and approach to discovery would also principally translate to lesser hours charged by lawyers. There is also a greater sense of finality because the decisions cannot be challenged unless very specific circumstances apply.

Drawbacks:

- The lack of formal evidence process, which means parties have to rely on the skills and experience of the arbitrator to sort out the evidence, rather than a judge.
- There is no right to a formal appeal which means that parties will not be able to appeal against the decision of an arbitrator if he or she makes a mistake on the interpretation of the law.
- The process could become expensive particularly when there is a panel of arbitrators appointed.

3. Mediation

Similar to an arbitration, parties in dispute could chose to resolve their disputes through mediation. In this instance, parties could decide to appoint a trained mediator to assist them to negotiate their dispute in an orderly manner. It should however be noted that the role of a mediator is different from those of an arbitrator. In arbitration, the arbitrator is the decision-making authority whereas in mediation, a mediator has no ability to make decisions. A mediator does not decide in disputes but attempt to bring both parties to an agreement that is satisfactory to both parties

Other than facilitating communication, another significant role of a mediator is to provide an objective opinion on the case. He or she can listen to each side of the dispute and identify the strengths and weaknesses of the case presented. In this way, it helps to manage unrealistic expectations harboured by the parties concerned. A mediator can also bring relevant information back to parties and funnel proposals back and forth. On settlement, he or she will often assist to draft the final settlement agreement to resolve the matter.

It should be noted that mediation must be voluntarily entered into. The parties are not coerced to resolve their dispute. They only sign the mediation agreement if they agree to do so. The process of mediation is confidential and anything discussed during mediation cannot be used in court subsequently if the negotiation fails.

Mediation requires a different amount of time depending on the complexity of the matter. It is much cheaper and often encouraged as a first step towards attempting dispute resolution. Ultimately if mediation fails, parties could still be able to turn to the court to have their dispute resolved.

Drawbacks:

- As there are no formal rules, the process is not designed to get into the truth of the matter.
- The mediator cannot make decisions and parties must be committed to reach an agreement. If one party is not committed, the process could be frustrating and could be a pure waste of time.
- Sometime, the services of lawyers are involved and thus the cost could also increase whether or not an agreement is reached.
- The skills of a mediator also play an important role in a successful mediation. An unskilled or poorly trained mediator can do more damage than help.
- If a matter is not successful resolved and parties are unable to reach an agreement, it would be time consuming and expensive to bring the matter to court.

If you wish to understand more on dispute resolution, please feel free to approach:

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Disclaimer: While every effort has been made to ensure the accuracy of this article, it is not intended to substitute any form of legal advice as situations and governing laws of each jurisdiction may differ entirely. Hence, readers are encourage to seek legal advice from a lawyer prior to choosing the right form to resolve their disputes.

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