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PEACE AND CONFLICT RESOLUTIONS

BOOK CHAPTER:

TOPIC: ALTERNATIVE DISPUTE RESOLUTION STRATEGIES

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INTRODUCTION:

Alternative dispute resolution (ADR) refers to a set of practices and techniques aimed at permitting the resolution of legal disputes outside the courts. It is normally thought to encompass mediation, arbitration, and a variety of amalgam processes by which an unbiased facilitates the resolution of legal disputes without formal adjudication. The term alternative dispute resolution (ADR) according to Obiora, (2018) the concept is often used to describe a wide variety of dispute resolution mechanisms that are short of, or alternative to, full-scale court processes. The term can refer to everything from facilitated settlement negotiations in which disputants are encouraged to negotiate directly with each other prior to some other legal process, to arbitration systems or minitrials that look and feel very much like a courtroom process. Disputes are inevitable facts of life. Different commercial, legal and even social expectations can be sources for disagreement. Genuine differences can concern the meaning of contract terms, the legal implication of a contract and the respective rights and obligations of the parties. Extraneous factors and human frailties, whether through mismanagement or over-expectation, will also interfere with contractual performance. However, ADR systems may be generally categorized as negotiation, conciliation/mediation, or arbitration systems. Negotiation systems create a structure to encourage and facilitate direct negotiation between parties to a dispute, without the intervention of a third party. Mediation and conciliation systems are very similar in that they interject a third party between the disputants, either to mediate a specific dispute or to reconcile their relationship.

HISTORY OF ALTERNATIVE DISPUTE RESOLUTION (ADR)

The history of dispute resolution probably goes back to the dawn of time. Humans have been negotiating and settling disputes formally and informally well before historical journals recorded human endeavour in the field of dispute resolution. The inherent desire of humans to resolve conflicts means that dispute resolution is one of the oldest disciplines known to mankind. The formalization of ADR was arguably brought about by an American Litigation lawyer called Eric Green, who first used the term ADR in an

article entitled “Settling Large Case Litigation: An Alternative Approach (Igboaka, 2018, Lederch, 1997)

Eric Green was instructed on a large-scale commercial dispute involving the alleged infringement of certain patent devices. Legal proceedings had been commenced, He estimated that both parties had spent several hundreds of thousands of dollars during the two and half years of preparation for the hearing of the case for which a date had not been set at the time they were looking out for an alternative method of resolving the dispute, without recourse to litigation. The parties agreed to run a mini-trial that involved the two parties attending a two-day information exchange chaired by a neutral third-party advisor, who was a former judge. The information exchange was to present each party’s version of the dispute. The third party’s neutral role was to moderate proceedings and not to effect a compromise of the dispute. Certain rules as to the proceedings were agreed upon by the parties. After two days settlement was reached that saved parties in excess of dollars, in further litigation costs and possibly years of anxiety waiting for a hearing and judgment. Green’s approach went on to become what we now know as alternative dispute resolution (ADR) often used to describe a wide variety of dispute resolution mechanisms that are short of or alternative to full-scale court processes (Miller, 2003)

CHARACTERISTICS OF ALTERNATIVE DISPUTE RESOLUTION (ADR)

The Characteristics of ADR approaches although the characteristics of negotiated settlement, conciliation, mediation, arbitration, and other forms of community justice vary, all share a few common elements of distinction from the formal judicial structure. These elements according to Rahim (2002) permit them to address development objectives in a manner different from judicial systems.

(1) Informality: Most fundamentally, ADR processes are less formal than judicial processes. In most cases, the rules of procedure are flexible, without formal pleadings, extensive written documentation, or rules of evidence. This informality is appealing and important for increasing access to dispute resolution for parts of the population who may

be intimidated by or unable to participate in more formal systems. It is also important for reducing the delay and cost of dispute resolution.

(2) Application of Equity: The advocate of equity is equally important; ADR programs are instruments for the application of equity rather than the rule of law. Each case is decided by a third party, or negotiated between disputants themselves, based on principles and terms that seem equitable in the particular case, rather than on uniformly applied legal standards. ADR systems cannot be expected to establish legal precedents or implement changes in legal and social norms. ADR systems tend to achieve efficient settlements at the expense of consistent and uniform justice. In societies where large parts of the population do not receive any real measure of justice under the formal legal system, the drawbacks of an informal approach to justice may not cause significant concern.

(3) Direct Participation and Communication between Disputants: Other characteristics of ADR systems include more direct participation by the disputants in the process and in designing settlements, more direct dialogue and opportunity for reconciliation between disputants, potentially higher levels of confidentiality since public records are not typically kept, more flexibility in designing creative settlements, less power to subpoena information, and less direct power of enforcement. The participation of disputants in the settlement decision, the opportunity for reconciliation, and the flexibility in settlement design seem to be important factors in the higher reported rates of compliance and satisfaction.

TYPES OR FORMS OF ADR:

Thus, the five different methods of ADR can be summarized as follows: -

(1) Arbitration (2) Conciliation (3) Mediation (4) Judicial Settlement and (5) Lok Adalat/ Peoples Court.

1 ARBITRATION:

Arbitration, a form of alternative dispute resolution (ADR), is a technique for the resolution of disputes outside the courts, where the parties to a dispute refer it to one or more persons – arbitrators, by whose decision they agree to be bound. It is a resolution

technique in which a third party reviews the evidence in the case and imposes a decision that is legally binding for both sides and enforceable. There are limited rights of review and appeal of Arbitration awards. Arbitration is not the same as judicial proceedings and Mediation. Arbitration can be either voluntary or mandatory. Of course, mandatory Arbitration can only come from a statute or from a contract that is voluntarily entered into, where the parties agree to hold all existing or future disputes to arbitration, without necessarily knowing, specifically, what disputes will ever occur (Ibe,2018)

The advantages of Arbitration can be abridged as follows:

(a) It is often faster than litigation in Court. (b) It can be cheaper and more flexible for businesses. (c) Arbitral proceedings and an arbitral award are generally nonpublic and can be made confidential. (d) In arbitral proceedings, the language of arbitration may be chosen, whereas in judicial proceedings the official language of the competent Court will be automatically applied. (e) There are very limited avenues for appeal of an arbitral award. (f) When the subject matter of the dispute is highly technical, arbitrators with an appropriate degree of expertise can be appointed.

Disadvantages of the Arbitration.

(a) Arbitrators may be subject to pressures from the powerful parties. (b) If the Arbitration is mandatory and binding, the parties waive their rights to access the Courts. (c) In some arbitration agreements, the parties are required to pay for the arbitrators, with an additional cost, especially in small consumer disputes. (d) There are very limited avenues for appeal, which means that an erroneous decision cannot be easily overturned etc.

(2) CONCILIATIONS:

Conciliation is an alternative dispute resolution process whereby the parties to a dispute use a conciliator, who meets with the parties separately in order to resolve their differences. Similarly, Conciliation can be seen as a voluntary process whereby the conciliator, a trained and qualified neutral, facilitates negotiations between disputing parties and assists them in understanding their conflicts at issue and their interests in order to arrive at a mutually acceptable agreement (Jones & George 2008)

Conciliation involves discussions among the parties and the conciliator with an aim to explore sustainable and equitable resolutions by targeting the existent issues involved in the dispute and creating options for a settlement that is acceptable to all parties.

The conciliator does this by lowering tensions, improving communications, interpreting issues, providing technical assistance, exploring potential solutions and bringing about a negotiated settlement. The process is flexible, allowing parties to define the time, structure and content of the conciliation proceedings. These proceedings are rarely public. The conciliator does not decide for the parties but strives to support them in generating options in order to find a solution that is compatible with both parties. The process is risk-free and not binding on the parties till they arrive at and sign the agreement. There is a win-win situation in the mediation.

The advantages of the mediation are: - (1) The agreement which is that of the parties themselves. (2) The dispute is quickly resolved without great stress and expenditure (3) The relationship between the parties is preserved, and (4) confidentiality is maintained.

3. MEDIATION

According to Frank et al (2019), Mediation is defined as a third-party intervention development that aims at helping the revelries to a dispute reconcile their variance, reach a compromise and attain settlement of their conflict. In mediation, a neutral third party tries to help controversialists resolve disagreements and negotiate settlements. Mediation focuses on the interests, needs and rights of the parties to the conflict. The mediator manages the interaction between the parties and facilitates open communication and dialogue. Usually, parties to a conflict accept that they have a conflict situation and are willing and committed to resolving it. The mediator then enters to provide assistance and create an enabling environment for parties to iron out their differences.

THE ROLE OF THE MEDIATOR

According to Galtung (2000), the role of the moderators includes but is not limited to the following: 1. To plan the conflict development (parties, goals, inconsistencies) (2) To

assess the validity or not of all goals (3) To link genuine goals by a creative protuberance, imagining a new reality with illogicalities excelled and conflicts changed. Furthermore, the mediator creates the enabling environment for the parties to carry out dialogue sessions leading to the resolution of conflicts (Best, 2006). Mediation is a voluntary process and does not impose any resolution on the disputants but he makes a mediator's proposal which may be accepted, modified or rejected.

ADVANTAGES OF MEDIATION

(1) It helps to elucidate the actual matters in the conflict. (2) It enables agreement to be stretched on most or all the points of divergence. (3) It allows the determination of some or all the issues. (4) It classifies and ensures that the needs and interests of all parties are seen. (5) It distributes respect and offers an occasion for controversialists to preserve and continue their relationship.

(4) JUDICIAL SETTLEMENTS:

The Civil Procedure Code also refers to the Judicial Settlement as one of the modes of alternative dispute resolution. Of course, there are no specified rules framed so far for such a settlement. However, the term Judicial Settlement is defined in Section 89 of the Code, which, has been provided therein that when there is a Judicial Settlement the provisions of the Legal Services Authorities Act, 1987 will apply.

It means that in a Judicial Settlement, the concerned Judge tries to settle the dispute between the parties amicably. If at the instance of the judiciary, any amicable settlement is resorted to and arrived at in the given case then such settlement will be deemed to be decree within the meaning of the Legal Services Authorities Act, 1987.

JUDICIAL SETTLEMENT GUIDELINES

The following are guidelines for judicial settlement ethics:

(1) Separation of Functions: Where feasible, the judicial functions in the settlement and trial phase of a case should be performed by separate judges. (2) Impartiality and Disqualification: A judge presiding over a settlement conference is performing judicial functions and, as such, the applicable provisions of the code of judicial conduct,

particularly the disqualification rules, should apply in the settlement context (3) Conference Management: Judges should encourage and seek to facilitate settlement in a prompt, efficient, and fair manner. They should not, however, take unreasonable measures that are likely under normal circumstances to cause parties, attorneys, or other representatives of litigants to feel coerced in the process. The judge should take responsibility for settlement conferences. (4) Setting Ground Rules on Issues Such as Confidentiality, Disclosure and Ex-Parte Communications: In settlement conferences, judges should establish ground rules at the onset, either orally or in writing, informing parties and their attorneys of the procedures that will be followed. The rules should include ground rules governing issues such as confidentiality, disclosure of facts and positions during and after conferences, and ex parte communications. (5) Focusing the Discussions: A judge should use settlement techniques that are both effective and fair, and be mindful of the need to maintain impartiality in appearance and in fact (6) Guiding or Influencing the Settlement: The judge should guide and supervise the settlement process to ensure its fundamental fairness. In seeking to resolve disputes, a judge in settlement discussions should not sacrifice justice for expediency (Faleti, 2006)

5 LOK ADALAT or PEOPLE'S COURT

The concept that is gaining popularity is that of Lok Adalats or people's courts as established by the government to settle disputes through conciliation and compromise. It is a judicial institution and a dispute settlement agency developed by the people themselves for social justice based on settlement or compromise reached through systematic negotiations.

BINDING AND NON-BINDING ALTERNATIVE DISPUTE RESOLUTION (ADR)

It is important to distinguish between binding and non-binding forms of ADR. Negotiation, mediation, and conciliation programs are non-binding and depend on the

willingness of the parties to reach a voluntary agreement. Arbitration programs may be either binding or non-binding. Binding arbitration produces a third-party decision that the disputants must follow even if they disagree with the result, much like a judicial decision. Non-binding arbitration produces a third party decision that the parties may reject.

GOALS OF ALTERNATIVE DISPUTE RESOLUTION (ADR)

According to Collier (2000), the goals and possible uses of the ADR system may be designed to meet a wide variety of different goals. Some of these goals are directly related to improving the administration of justice and the settlement of particular disputes. Some, however, are related to other development objectives, such as economic restructuring, or the management of tensions and conflicts in communities. For instance, developing an efficient, consensual way to resolve land disputes may be critical to an AID mission not because of its commitment to strengthening the rule of law, but because land disputes threaten the social and economic stability of the country. Likewise, efficient dispute resolution procedures may be critical to economic development objectives where court delays or corruption inhibit foreign investment and economic restructuring. Within the context of rule of law initiatives, ADR programs can support and complement court reform in the following ways

1. By-pass ineffective and discredited courts
2. Increase popular satisfaction with dispute resolution
3. Increase access to justice for disadvantaged groups
4. Reduce delay in the resolution of disputes ·
5. Reduce the cost of resolving disputes in the context of other development objectives.
6. Increase civic engagement and create public processes to facilitate economic restructuring and other social change.
7. Help reduce the level of tension and conflict in a community. etc.

CONCLUSION

This chapter considered the methods of resolving conflict and disagreement among disputants at different levels; family, group, community, national or international. From

the foregoing, it can be safely posited that the concept of ADR in the resolution of disputes has come to stay. The number of methods considered is not exhaustive. There are other methods such as ombudsman, family group conference, and traditional African arbitration processes, neutral fact-finding where a neutral third party investigates a dispute and makes a formal report or testifies in a court of law. However, the introduction of the ADR approach to conflict resolution is adopted in resolving conflict, as an ultimate aim is ensuring that the root causes of the conflict are laid bare, fully acknowledged by all parties and a sincere commitment is made to resolve the conflict. Where this is not done and there is a win-lose situation, conflict may still erupt, escalate and turn violent leading to disruptions, dislocations and avoidable crises. Adoption of the methods considered as ADR (alternative dispute resolution) to litigation would create greater chances for de-escalation and resolution of conflicts.

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