

PARTY AUTONOMY IN MEDIATION PROCEEDINGS

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ABSTRACT

The objective of this work is to analyze mediation as an alternative dispute resolution method with much emphasis on the autonomy of the parties. Notwithstanding the fact that the traditional way of dispute settlement has been in the court of law, mediation and other out of court settlement methods have gained widespread acceptance among both the public and the legal profession in recent years. This method of dispute resolution is mostly used by disagreeing parties who cannot come to an agreement short of litigation, Hence a third party is called upon to resolve the issue between them. The objective of this paper is to examine the existence of party autonomy at the different stages of the mediation process. The Methodology employed in this work is mainly analytical in nature. This methodology permits us to analyze various literature related to the field of study. Our findings reveal that, despite court settlement being the primary method of dispute resolution, the workload in courts have provided a fertile ground for the growth of mediation as an alternative dispute resolution method which provides autonomy to the litigants.

Keywords: Party Autonomy, Mediation

INTRODUCTION

Mediation is an efficient and cost-effective alternative to resolving disputes and pending litigation. Instead of having to go through trial, both parties can compromise and find a solution that is much less stressful than a court case. There are three main approaches a mediator can take which are evaluative, transformative, and facilitative mediation. Evaluative mediators take much control of the mediation proceedings and concentrate much on the party's strengths and weaknesses. They mostly make recommendations at the end of the process based on their experiences. This form of mediation is mostly common with divorces and corporate cases.

Transformative mediators on the other hand do the opposite of evaluative mediators by giving the parties total control in the situation. They give time for each party to present their case and find a common ground to resolve the issue. This form of mediation is ideal when parties intend to keep a good relationship after the dispute is settled. However, for this form of mediation to be effective, the parties must be willing to work together towards resolving the dispute.

Facilitative mediation is the most commonly used. This form of mediation is a mid-way between evaluative and transformative mediation. Here, the mediator maintains control of the mediation process but the parties have control of the outcome of the process. Facilitative mediators use techniques of the other two mediation types.

DIFFERENT FORMS OF ALTERNATIVE DISPUTE RESOLUTION METHODS

Traditionally Alternative Dispute Resolution has been divided into different methods of resolving disputes out of court and informal methods linked with legal judicial mechanisms. The functioning of nearly all Alternative Dispute Resolution methods are similar and they have been divided into four different types including negotiation, mediation, collaborative law, and arbitration.ⁱ Some studies involve conciliation as a fifth type, while other sees it as part of mediation. Alternative Dispute Resolution is an alternative to court proceedings and has as their major aim to resolve the dispute within the parties.ⁱⁱ

Arbitration

One of the most important aspects of arbitration is consent, the parties must voluntarily accept to use arbitration as a means to settle their dispute. Here, there is a third party who, as a private judge, imposes a resolution. An arbitration agreement can be met in two instances, in the first case the parties can state in their contract that they will submit to arbitration in case disputes arise out of their transaction. In this case, we have a “submission clause”. In the second instance, it is only after a dispute erupts that the parties choose to settle it through arbitration. This leads to what has been termed an “Arbitration Clause”.

Conciliation

Conciliation is an alternative dispute resolution process where the parties to a dispute solicit the services of a conciliator, who meets with them separately and together with the aim to settle their differences. This method reduces tension between the parties and improves communication as well. It also helps in interpreting issues and encourages parties to see possible solutions to lead to mutual resolution of the dispute.

Collaborative law or collaborative divorce

In collaborative law or collaborative divorce, each party has a lawyer who aids him\her in reaching a resolution within specifically contracted terms. An agreement is reached by the parties through the aid of their Lawyers or experts and the resolutions of the process are not imposed on the parties.

Negotiation

Unlike the other forms of Alternative Dispute Resolution, Negotiation does not involve any third parties to facilitate the resolution process. Participation of voluntary in negotiation hence consent is an important element.

Mediation as an ADR Method

Mediation involves a third party known as the Mediator who facilitates the mediation process and may even make proposals to resolve the problem. Such proposals are known as the “mediator’s proposal”. He however, does not impose any resolution on the parties. Some even

think Mediation is synonymous to Alternative Dispute Resolution. Traditionally, parties would stay together throughout the mediation process. But with recent innovations, parties are separated before or after a joint session. Today mediation can even be conducted without the parties being in the same area.

Lawyer-supported mediation

Lawyer-supported mediation is mostly used to settle family issues such as divorce or separation. It can include aspects of child support, custody of children, division of property etc.ⁱⁱⁱ it is a "non-adversarial method of alternative dispute resolution to resolves disputes."^{iv}

Party-directed mediation

Party-directed mediation gives the parties much control in the dispute resolution process. It enables the parties to have a direct control towards resolving the conflict. The intended prospect of party-directed mediation is to improve on the willingness of disputants to come to a compromise.

Advantages of Mediation over court settlement

The first advantage of mediation over court settlement is that the process is an informal one. The gives it a degree of flexibility which is uncommon with court settlement. Lawyers are not a necessity and the rules of evidence used in court proceedings are not used here. In addition, Witnesses are not needed in mediation.

Confidentiality of mediation as an alternative dispute resolution also gives it an upper hand over court settlement. Mediation is a confidential process because the mediators do not disclose anything discovered during the dispute settlement. Mediation sessions are not recorded in any form. At the end of the mediation, all notes taken by mediators in relation to the mediation are destroyed.

Mediation is also speedy and less costly than court settlement. Mediation is the best option for parties who are impecunious and want a speedy process so that they can go back to their day to day business. Mediation is usually faster allowing a speedy means for problem solving. In addition, all procedural bottlenecks are avoided.

Mediation is very Flexible as the parties have more freedom in the mediation process unlike court proceedings. Contrary to what happens in court where there are many rules to follow and judges are assigned to cases, the parties to a mediation choose the mediator and can also design their mediation procedures. They can choose between facilitative, evaluative or transformative. Different cases warrant different mediation types hence the parties choose the style they believe is best suited to their case.

Mediation is also the best form of dispute resolution for parties who intend to preserve their relationship after the dispute is settled. Not only are the proceedings private, they also help parties to come to an agreed settlement without holding grudges thereafter.

The results produce by mediation proceedings are also mutually satisfactory to all the parties. This is due to the fact that parties contribute and are generally satisfied in decision they contributed in making unlike court proceedings where decisions are imposed on the parties by the judge.^v

The notion of Party autonomy in mediation proceedings

Parties to mediation have the freedom to choose for example the procedure to be followed, the mediator and to actively participate in the proceedings. Party autonomy is one of the most important factors that distinguish mediation from other methods of dispute resolution. This is due to the fact that, the parties have much control of the mediation process. The parties also choose the mediator who is a neutral person. He hears the facts of both parties and legally analysis. He makes suggestions and finally help the parties with a proposed solution on how their minds can meet and resolve the dispute. Mediation is confidential. Therefore, if negotiations fail, anything discussed during the mediation process cannot be used in litigation.^{vi}

The expression of Party autonomy at the different stages of the mediation process:

The Mediation Convention is based on the acknowledgement of party autonomy to finalize and settle their dispute without the requirement of any court approval. Therefore, the basic element of mediation is that the mediator does not have any authority to impose a solution on the parties and they retain their autonomy whether to settle it by consent.^{vii}

Accordingly, the mediator is an impartial professional facilitator who

- Establishes a relationship between the disputants to enable a dialog regarding their conflict;
- Approves their capability to freely negotiate toward a settlement in good faith;
- Conducts negotiations in a fair manner; and
- Attests that they freely reach an informed consent consensus settlement.

Hence, mediation is not a mere negotiation but rather a dispute resolution mechanism, constituted by an agreement to mediate, in which the parties' settlement *prima facie* means that they finalize their dispute by a binding agreement. This is stated in the model law as "If the parties conclude an agreement settling a dispute, that settlement agreement is binding and enforceable."^{viii}

Stages of mediation:

Stage 1: The proceeding starts with an opening statement made by the mediator. After the parties are ready to begin the dispute settlement, the mediator makes an introduction of everyone, he tells them the goals and regulations of the proceeding and encourages them cooperatively towards resolving the dispute.

Stage 2: The mediator then gives the parties the opportunity to make opening statements. They are all given a chance to present their cases, explain the consequences it has had and what elements may be part of the potential settlement. Each party speaks in turns, whilst the mediator may ask questions and see how receptive both parties are to a resolution.

The most important aspect of the opening remarks is that the principle of party autonomy is highly respected at this stage. They have the right to have their say and others involved in the discussion may not interrupt them at this stage.

Stage 3: Joint discussion. The mediator might encourage the parties to respond directly to the opening statements, depending on the participants' receptivity, in an attempt to further define the issues.

Stage 4: Private caucuses. The private caucus is a chance for each party to meet privately with the mediator. Parties are mostly placed in separate rooms. The mediator then visits both chambers to discuss the strengths and weaknesses of each and to exchange offers. The mediator

continues the exchanges as needed during the time allowed. Again at this stage, party autonomy is greatly upheld.

Stage 5: Joint negotiation. After caucuses, the mediator might bring the parties back together to negotiate directly, but this is unusual. The mediator usually does not bring the parties back together until a settlement is reached or the time allotted for the mediation ends.

Stage 6: Written Settlement Agreement. If both sides reach an agreement, the mediator will put the main points of this settlement in writing. This is known as a settlement agreement and once both sides sign the document it becomes a legally binding contract. This can also be used to end court proceedings if they have already begun, with a Tomlin order enforcing what has been agreed. If both parties did not reach an agreement, the mediator will help arrange another meeting if it is seen to be beneficial or help enable negotiations by phone.

CONCLUSION

Mediation is one of the most used alternative dispute resolution methods in the world today alongside arbitration. Unlike court settlement, mediation does not impose the resolution on the parties. Party autonomy is an integral part of the mediation process as parties are allowed to choose the mediator and they take active part during the mediation proceedings with the aim of reaching an agreement.^{ix} Mediation is ideal in settling family issues such as divorce or separation, child support, custody of children, division of property etc. The parties have much control in the dispute resolution process. It enables the parties to have a direct control towards resolving the conflict.

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ENDNOTES

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^{vii} Article 2 of the Mediation Convention.

^{viii} This is stated in article 15 of the UNCITRAL Model Law.

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