

Chapter 7

Alternative Dispute Resolution: A Legal Perspective

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ABSTRACT

This chapter covers a lot of groundwork and provides a quick and thorough introduction to the concepts and underlying discussions on Alternative Dispute Resolution (ADR). The chapter provides a detailed discussion based on extant literature in an effort to differentiate between disputes and conflicts. Then some of the common confusions between terms commonly used in ADR are addressed. Following which various key government acts and reports that shape the state of ADR are discussed. Because of their length, therefore only those concerns within the documents that directly address ADR or are related to ADR are discussed. It remains a burden on the readers to access these documents themselves to fully appreciate their content.

INTRODUCTION

Disputes are common amongst today's organizations. It is therefore important to understand how to resolve them and to appreciate the law and regulations defining the canvas of dispute resolution. This chapter focuses on disputes in general and Alternative Dispute Resolution mechanisms and processes in particular. We begin with a background discussion on dispute resolution and make the case for studying this topic further. Then the discussion presents a critical review of the literature pertaining to disputes. The purpose of this is to arrive at a common understanding and definition of a dispute and to differentiate between disputes

and conflicts. Although, this chapter is about the alternative methods of resolving organizational conflicts and disputes. However, because of the close relationship of Alternative Dispute Resolution (ADR) to conventional dispute resolution and to establish the context for further discussion on ADR some of the discussion focuses on the conventional methods of resolving disputes. After providing a background to dispute resolution and differentiating between disputes and conflicts and defining disputes the chapter then follows with a discussion detailing the processes of mediation and arbitration. In this section the focus is on the ADR techniques, however because of ADR's close association with the litigation process

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some elements of the legal system (as it relates to ADR) are also discussed. For all purposes the adjudication process seems to be an anomaly process because it resides on the boundary of the standard legal system and the alternative system. The process of mediation, adjudication, and arbitration are discussed and the reader is provided with an overview of the process. Then our focus turns to alleviating common misunderstandings between the various methods used in ADR. This includes a discussion on: mediation vs. arbitration and arbitration vs. adjudication. The discussion then focuses on various acts passed by the UK government and other important acts and reports that have had a significant impact in defining the state of ADR as we know it today. Areas where the UK legal system differs from that of the USA are also pointed out. The documents and acts covered in this chapter include: The Housing Grants, Construction and Regeneration Act (HGCRA) and the Right to Adjudication, Admissibility of hearsay Evidence and the Civil Evidence Act of 1995, The Human Rights Act of 1998 and its Relevance to Adjudication, The Arbitration Act of 1996, United Nations Commission International Trade Law (UNCITRAL) Model Law on International Commercial Arbitration, Alternative Dispute Resolution and the Civil Procedures Rules 1998 (including the new legal terminology that replaced the one in effect prior to 1999), and the Access to Justice Act of 1999. These were chosen for inclusion in the chapter because of their explicit relevance to the topic of discussion and the significant impact that they have had on ADR. In this discussion the genesis of ADR is outlined and the present state of ADR is clarified. Finally, future research directions are provided before the chapter is concluded.

BACKGROUND

Conflicts and disputes are nothing new, we as humankind have been experiencing conflicts and

disputes from the onset. The oldest conflicts that we read or hear about are mostly biblical, some examples include the conflicts between God and the devil, followed by conflicts between brothers Cain and Abel, and between God and the Babylonians. Needless to state, the cause, nature, and durations of conflicts have varied over the times and so have their outcomes. Conflicts and disputes if managed or resolved lead to stronger and longer-lasting relationships (Jehn, 1994), to an expedited and judicious conclusion (Fenn, 2006), and to a greater readiness to work together in the future (Rahim, 2001). Conversely, if not managed properly, they can wreak havoc and may lead to actions causing impairment or death, and destruction as seen in the case of wars.

Although, in general usage the terms conflict and dispute are used interchangeably, however they are two markedly distinct concepts. Each consisting of its own unique life-cycle, management and resolution mechanisms, tools of analysis, etc. (Fenn, 2006). It is therefore important to differentiate between them. The term conflict, it so happens, is in wider use compared to the term dispute (Fenn, Lowe, & Speck, 1997). Conflicts are interest driven (Burton, 1993), and as interests often vary conflicts therefore are pandemic. Disputes on the other hand are distinctly associated with issues of justice, and although not as prevalent as conflicts, require immediate and serious efforts to achieve resolve (Fenn, Lowe, & Speck, 1997). These concepts will be discussed in more detail in section 3.

The terms management and resolution may be used as suffixes to both conflict and resolutions. However, the intent of management and resolution would vary depending on whether it is associated with a conflict or a dispute. In the case of conflict management, the concern is the management of the interests of the parties involved and ensuring that agreed interests continue to be maintained (Rahim, 2001). Whereas, conflict resolution is concerned with resolving concerns arising from any perceived or actual disparity of interests (Fenn, 2006). In

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