ADR & ARBITRATION GUIDE 2022

CHAPTER 1

ADVANTAGES OF ALTERNATIVE DISPUTE RESOLUTION

1. ADR in general

When engaging in business and entering into commercial relations, both parties wish for the smoothness in the transaction, best interests from the affairs, and look forward to long-term cooperation. Nevertheless, in the process of commencing or performing such practices, the occurrence of conflicts is inevitable. In the event of a dispute, it is of the utmost importance to opt for the most legitimate dispute resolution method in order to best ensure the rights and interests as well as the relationship between both parties. Conventionally, as in a traditional legal context, parties refer to bringing the dispute to the courts of competent jurisdiction. Even so, burgeoning court dockets, traditional confrontational processes, and spiraling litigation costs have caused dissatisfaction in this mode.

To meet the urgent need for optimal dispute resolution methods, new types of proceedings have been developed for the rescue known as Alternative Dispute Resolution mechanisms ("ADR"). ADR is used to describe an array of resolution mechanisms on legal disputes as alternatives to full-scale court processes or judicial processes, namely mediation, arbitration, and additional kinds of ADR designed for specific cases and subject matters. They provide procedures overcoming the inadequacies of the judicial system and quickly gain traction in dispute resolution for offering great help to the parties in leading to a settlement without going to court, or without litigation on the said matter. These methods involve the engagement of a neutral third party in resolving conflicts. In addition, it minimizes the interference of the third party in the results of dispute settlement, the parties have full discretion in such cases. To this end, prior to that, parties involved in the dispute may agree on the preferred method of resolution through the conclusion of a binding clause in their agreement. However, the parties may also agree on an alternative method after a dispute has arisen.

The next section will demonstrate how ADR mechanisms show a whole range of advantages on the parties over the conventional method of dispute resolution by courts, ensure to work wonders for the parties involved and spur the proliferation of interest in and use of these mechanisms.

2. Advantages

2.1. Speedy Resolution

In general, litigation often includes many complicated procedures, the litigants are often drawn into tactical games to delay proceedings, force opponents to pay unnecessary expenses, or gain benefits unrelated to the case. Judges can impose fines on the party who abuses the proceedings, however,

court backlogs and staff shortages make it difficult to keep shady practices under control. In other words, this method has traditionally emphasized procedure and process, the requirement for strict adherence to rules of evidence, the opportunity to appeal against unfavorable judgments, and other features that often make lawsuits prolonged and more complicated.

According to the Civil Procedure Code 2015, litigation includes procedures for settling a case at the first instance and procedures for appellate trial if there is an appeal. The first instance procedure consists of various processes, namely initiating a lawsuit, accepting the case, conciliation and trial preparation, and opening a court hearing. Likewise, the appellate procedure begins with the acceptance of an appeal, preparation for appellate trial, appellate court session, and pronouncement of appellate judgment. On the basis of the two-level adjudication principle, the parties can only request first-instance and appellate trial by the Court. However, in order to ensure the legitimate rights and interests of both parties, and to ensure the fairness and strictness of the laws, disputes can be resolved according to special procedures such as cassation and retrial.

In contrast, ADR provides streamlined procedures to accelerate case disposition, more time-efficient than taking a matter to court. Most of its processes are agreed upon in accordance with the timetable of both parties. Moreover, the delays are rare and can occur only if the parties agree to postpone or do not prepare submissions on time.

Regarding the arbitration process, as prescribed in VIAC Rules of Procedure, on a case-by-case basis, the procedure is as follows:

(i) in case the parties have reached an arbitration agreement that includes the selection of the Sole Arbitrator and stipulations on the procedures for conducting arbitration, the arbitration will be conducted according to the agreement of the parties;

(ii) in case the parties do not agree, arbitration proceedings include one (01) procedure with six (06) processes as follows:

- petition submitted to the Arbitration Cente by the Claimant;
- statement of Defence submitted by the Respondent;
- Constitution of an Arbitral Tribunal comprising a Sole Arbitrator *(The Plaintiff and the Claimant agree to appoint the Sole Arbitrator or request the President of the Arbitration Center to appoint one)*;
- pre-trial investigation;

- selection of the trial date;
- end of the trial.

(iii) if the parties do not agree that the dispute should be resolved by the Sole Arbitrator, the dispute will be resolved by the Arbitral Tribunal consisting of three Arbitrators. The procedure is similar as mentioned above except that the constitution of an Arbitral Tribunal will now consist of three Arbitrators. *(The Plaintiff and Claimant each appoint one Arbitrator or request the President of the Arbitration Center to appoint one Arbitrator. Two appointed Arbitrators will elect the third Arbitrator to act as the Chairman of the Arbitration Council. In case two Arbitrators fail to elect the Chairman of the Arbitration Council within the prescribed time limit, the President will appoint another Arbitrator to act as the Chairman of the Arbitration Council).*

The mediation process in accordance with Decree No. 22/2017/ND-CP include the following:

(i) the mediation agreement established in the form of a mediation clause in the contract or in the form of a separate agreement, made in writing;

(ii) selection and appointment of commercial mediators;

(iii selection of the Mediation Rule;

(iv) select the date of mediation; and

(v) reception of results.

2.2. Reduced Expense

There are obvious advantages for parties to elect ADR in comparison to litigation in terms of costs.

Firstly, in terms of the economic interests of the parties, court proceedings take a lot of time to settle, many cases need years to be resolved, causing delays in business activities, directly affecting profits not only from the time the dispute occurs but also into the future with no estimated end time. On the contrary, the decreased amount of time that it takes to resolve a dispute using ADR has a big impact on the lower costs for factors such as consultation fees, costs of witnesses, and days booked away from proceeding work like the aforementioned method. Also, investigations and appeals are limited, which means possible future cost savings.

Secondly, in the long run, the costs associated with ADR tend to be significantly lower than those of court proceedings when compared with the cost sequence from first-instance court to appellate court. In some special-nature cases, there will be additional court procedures such as cassation and

retrial, adding up to the total cost of the whole dispute settlement, eating up enormous sums of money, time, and talent whilst in the beginning, the cost of each separate litigation proceeding is actually lower than that of ADR.

2.3. Flexible Solutions

The flexibility of ADR procedures allow parties to focus on issues which matter to them, as opposed to their strict legal rights and obligations. The parties often have the choice of the ADR method to be used. The process is also very flexible, according to what best suits the parties.

Regarding how the ADR process is to be conducted and it is possible to agree that an arbitration proceeding is 'ad hoc', that is the rules are designed by the parties with the appointed arbitral tribunal unless an agreement or contract specifies otherwise, and there is normally no institutional supervision of the process. This may include procedural and discovery rules, any relevant industry standards, applicable law, language of proceedings, time limitations, and so forth. Parties may specify their own terms in the arbitration agreement Parties may also choose an arbitrator who is an expert on the relevant subject matter at hand, which can be beneficial in circumstances that require expertise and specific knowledge.

In the mediation process, although the mediation involves the mediator playing an important role in guiding, persuading, helping, and facilitating in the whole process, in essence, the parties still resolve disputes through negotiation based on the parties' wills and wishes. The result of this process is a mutual agreement voluntarily reached by the parties. As long as it does not violate the prohibitions of the law, does not infringe upon the national interests, public interests of society, does not infringe on the legitimate rights and interests of third parties, there will be no problems on the legitimacy of the content of the mediation agreement.

2.4. Privacy

ADR mechanisms can be advantageous for commercial parties due to the privacy and confidentiality that arbitration and mediation can offer in comparison to the public nature of court litigation. The need to preserve confidentiality, in practice, is a critical factor in any kind of disputes, as it allows parties to focus on the merits of the dispute without concern over its public impact. In ADR, parties have significant choice at the onset in deciding what information they wish to make public. Parties can agree that any or all of the ADR procedure, such as the hearing, evidence and any disclosures, be kept confidential.

2.5. *Preservation of Business Relationships*

When it comes to the purpose of preserving the business relationship, mediation is indeed the optimal ADR method. Mediation does not limit its focus to the discrete legal claims asserted by the parties. This mode looks beyond the legal issues to explore the relationship between the parties in an attempt to find a true resolution to the problem between them. Furthermore, the potential outcomes of the mediation process are not limited to pre-existing legal remedies, or by the requirement that one or the other party be found in the wrong. Thus, a wide range of creative resolutions of the problems is possible to create win-win situations.

2.6. *Minimizing Harm to Business*

Release of Information

The parties are free to differ in their opinion and can discuss their opinions with each other, without any fear of disclosure of this fact.

Regarding Law on Commercial Arbitration 2010, arbitrators must keep secret the content of the dispute they settle, except for cases where they must provide information to competent state agencies as prescribed by law. Likewise, according to Law on Grassroots Mediation 2013, the mediator must keep the information of the parties confidential, except in the case of serious disputes or conflicts that may lead to violent acts affecting the health and life of the parties or cause public disorder; in case of detecting a conflict or dispute showing signs of violation of the law on handling of administrative violations of the criminal law, it must promptly notify the leader of the mediation group to report to the competent individual or agency the right to timely settlement. Meanwhile, the legitimacy of the judgment should be ensured through publicity, publicity being the general case, non-publicity being the exception.

Protecting Public Image

Publicized disputes can tarnish a company's reputation, contract disputes and accusations of fraud can force a company to put the business on hold, ultimately decline a company's value, drive down sales, or even cause a business to fold. Therefore, ADR has established a strict and absolutely secret settlement mode in order to protect the public image of the parties involved. Both arbitration and mediation proceedings provide the ultimate confidentiality of information exchanged related to the dispute settlement process.

2.7. Controlling Damages

Generally, parties engaged in ADR processes should have greater satisfaction in the outcome as opposed to bringing the matter through the court system. This may be attributable to the fact that in ADR, parties exercise greater control over the outcome and directly participate in constructing the terms of their settlement.

3. Role of Counsel

A significant part of a lawyer's work involves advising and assisting clients to settle disputes. Lawyers can advise clients on and represent them in ADR processes. The various forms of ADR involve different consulting work for lawyers as follows:

3.1. Lawyers and arbitration

In reality, the duties of lawyers in the process of assisting clients in resolving disputes by arbitration includes the following steps:

Performing situation assessment

Lawyers will determine whether an arbitration against an opposing party is worthwhile from the laws, as well as the financial state and point of view of the client, and to develop an appropriate case strategy. In detail, such practices involving numerous tasks to be mentioned below:

Firstly, lawyers have to assess the strengths and weaknesses of the client's legal case, including the claims and defenses that may be validly made.

Secondly, the assessment of legal issues as well as the enforcement of such matters that may arise should also be carried out by lawyers.

Thirdly, it is necessary for lawyers to make predictions about the possible or actual position of the other party's strengths and weaknesses.

Lastly, it is to advise clients on whether to initiate arbitration, as well as the potential risks of carrying out such practice.

The act of performing a pre-arbitration review from lawyers ensures that the client will be able to avoid unfavorable situations or at least make the client more aware of the risks they are going to deal with, especially in terms of arbitration costs, and provides a strategy that best maximizes the interests of customers when participating in dispute resolution.

(iii) assisting in the collection of relevant and authentic evidence, including the drafting and selection of documents to be translated;

(iv) preparing written submissions including factual evidence, governing law, witness statements, and expert reports;

(v) performing analysis of submissions and evidence submitted by the opposing party;

(vi) preparing necessary correspondence and responding to procedural incidents;

(vii) preparation for hearings includes core arguments, opening statements, and cross-examination;

(viii) preparation of submissions on expenses; and

(ix) assisting the recognition and enforcement of an arbitrator's award in favor of the client, especially if such award is not voluntarily complied with.

3.2 Lawyers and mediation

Mediation can be conducted by either the parties performing such practice by themselves or by mediators. In both of these matters, the involvement of lawyers is essential. In addition, lawyers can participate in the mediation process directly or in authorized cases. Whichever the case, the duties will be as follows:

Preparing documents and evidence

Before participating in the mediation, the lawyer will collect and analyze documents and evidence of the client so that during the mediation process, the client can present appropriate evidence to illustrate their explanation. In the mediation stage, the use of evidence will help persuade the other party to make concessions in order to quickly and definitively resolve the dispute without going to trial. Such practice also helps the client understand the reason why they have to give in and what will they gain or lose on the basis of their actual rights and interests.

Discussing the requirements and issues to be achieved and conceded

Before mediation, the lawyer will discuss with the client numerous requirements to be achieved during the mediation phase. On that basis, the client will decide to give in to the opponent or not. At what point, to what extent, and what are the requirements to be achieved after the concession is made. Lawyers will further analyze the provisions of the law, the time of the procedure, and issues

related to the enforcement process. The lawyer must show the litigants the benefits of making concessions over upholding their initial intentions or wishes. The final decision rests with the parties. During the discussion, the lawyer will inform the client about their legal status, analyze the advantages and disadvantages of the client as well as the opponent, thereby planning the mediation and choosing the best solution.

Agreement on court fees

In many cases, the parties can reach an agreement on the content of dispute settlement but cannot agree on the legal fees, especially in high-value cases. Depending on the case, the lawyer advises the client to accept how much of the court fee is appropriate and necessary to create favorable conditions for the other party. If the client have benefited from the mediation, then they should accept a little more loss in the court fee agreement. If only because both parties cannot agree on the legal fees, all efforts and goodwill of the involved parties will become meaningless.

Participating in mediation

As defenders of the client's legitimate rights and interests, lawyers have the right to participate in mediation. In this case, the lawyer must have an agreement between the client and the lawyer, the recommendation letter of the bar association, or the lawyer card. While participating in mediation, lawyers can at any time consult with their clients so that they can make legal demands or concessions, especially making requests in accordance with the legal requirements agreed before. The client should not be allowed to decide all issues but should discuss them with a lawyer. In cases where there are disagreements on the same issue, the right to decide is still the client's, but before that, the lawyer should still carefully present the arguments, views, and options of the client together with the analysis of the advantages and disadvantages of the options that the lawyer proposes for the client to consider.

In case authorized by the client to participate in the mediation on their behalf, the lawyer will present the authorization contract between the client and the lawyer. Lawyers are entitled to perform rights and obligations within the scope of authorization to protect the legitimate rights and interests of clients. However, for new incidents arising in the mediation process that has not yet reached an agreement between the lawyer and the client, the lawyer will discuss with the client before making the final decision. Even if being authorized to participate in the whole mediation process, it does not mean that the lawyer has the right to make all the decisions that are contrary to the interests of the client. This is not only professional ethics but also the principle of a professional lawyer.