

PREREQUISITES FOR AN EFFICIENT ALTERNATIVE DISPUTE RESOLUTION (ADR)

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“DISPUTE / CONFLICT”

- specific scientific field (social sciences/law) – name/blame/claim paradigm vs. multiparty, interconnected issues
- the magnitude criteria
- the (number of) actors involved
- the facts covered by the scope of the “dispute/conflict” (causation, history)

“RESOLUTION” OF THE DISPUTE/CONFLICT

- lawyers’ view
- other social scientists’ view (International Relations)

ALTERNATIVE v. MAIN(STREAM) – Judicial litigation

ALTERNATIVE v. APPROPRIATE (form and function of dispute resolution processes – LON FULLER, “The Form and Limits of Adjudication”)

THE ACTORS INVOLVED

The Parties Affected

The Persons indirectly affected



The Government

The third party that intervenes in the dispute in order to try to resolve it

Every analysis of the dispute resolution process must check every actor's perspective on the dispute in order to correctly assess the process' possible efficiency

WHAT TO DO WITH THE DISPUTE/CONFLICT?

What the parties want to do? Solve it/ Not to solve it/ How do they want to solve it

What the Government/society wants to do?

OUTCOMES OF THE DISPUTE RESOLUTION FOR PARTIES:

win/lose, lose/lose, win/win

**relativization: the scope of what is to be won or lost (long term/short term),
uncertainty**

DIFFERENT DESCRIPTIVE CLASSIFICATIONS OF THE WAYS TO SOLVE A DISPUTE

1) Mary Parker Follett: Domination / Compromise / Integration

2) Morton Deutsch: Competition / Cooperation

3) Kenneth Thomas: Avoidance / Compromise-Sharing / Competition-Domination / Accommodation / Collaboration-Integration

Where does legal (rules-based) dispute resolution stand? Rules application: prospective / retrospective

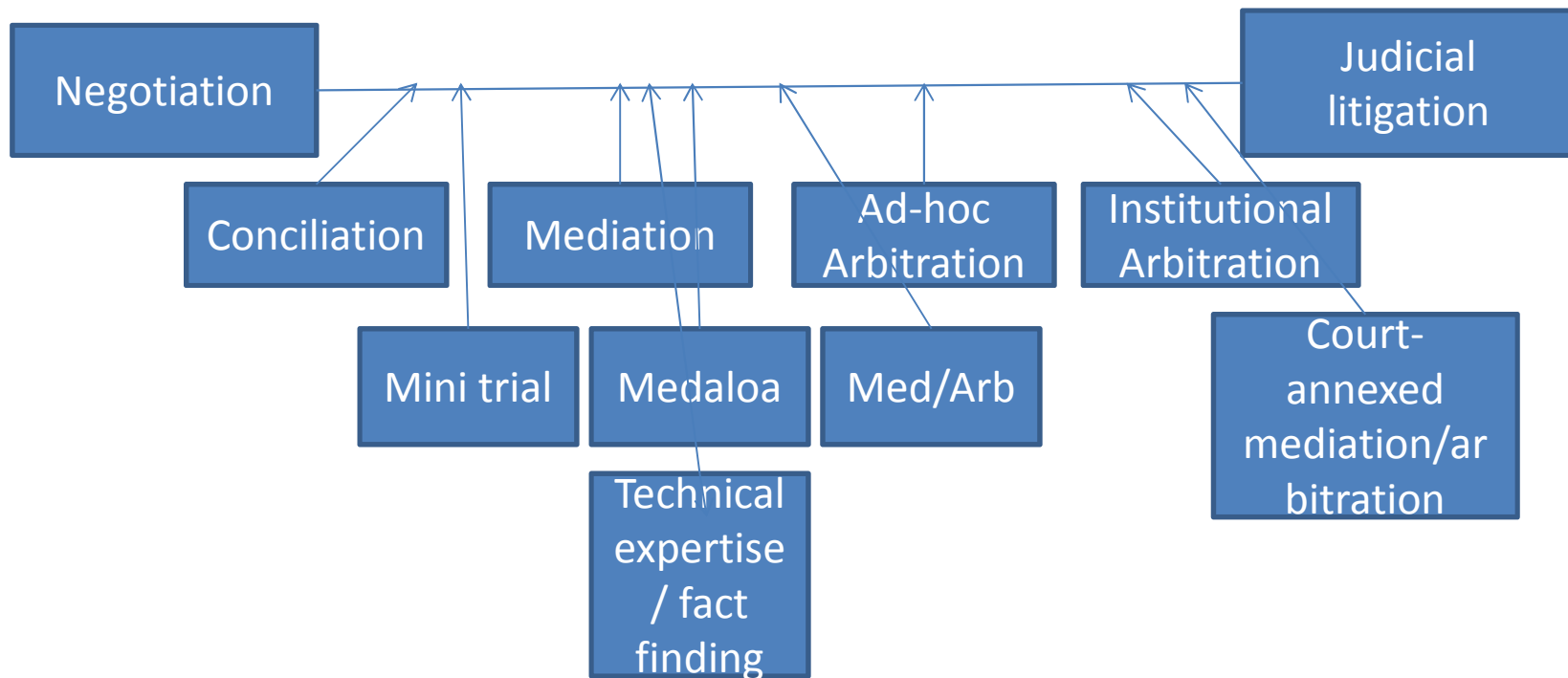
FROM THE POINT OF VIEW OF THE INSTRUMENTS USED :

Direct party negotiation / Violence / Third party assistance (with different powers and tasks for the third party)

Affected parties' perspective (externalization)

Government / society's perspective: "the object of the rule of law is to substitute for violence peaceful ways of settling disputes" (L. Fuller).

DISPUTE RESOLUTION CONTINUUM (degree of the third-party intervention):



NEGOTIATION

The seven elements to understand and analyze negotiation:

- interests (not to be confused with positions/demands – the ‘orange’); framing the issues of a dispute (‘broadening’ or ‘tightening’ the apparent scope); shared vs. conflicting vs. complementary interests
- fairness / legitimacy (perceived)
- relationship (actual/desired)
- alternatives (BATNA – Best Alternative to a Negotiated Agreement)
- options (the possible agreements)
- commitments (offers, demands, etc.)
- communication

Types of negotiation:

- positional bargaining (“the dance of concessions”); hard/soft
 adv: simplicity, benefits for favorable position; disadv: no creative solutions, slow, promote adversarial relationship, perception of w/l or l/l outcome
- favors and ledgers
- chicken game
- problem-solving negotiation (reverse process: exploring, then committing)

MEDIATION

- complete party autonomy (self-determination)
 - flexibility as to the procedure
 - flexibility as to the outcome (creative solutions – impossible in the DR processes with strong third-party: arbitration, jurisdiction; possible win-win situation)
 - save time
 - save money
 - secrecy/confidentiality
 - avoid emotional drain from engagement in conflict
 - impartiality of arbitrator but familiarity with the parties
- WHY can't the parties do this in a normal negotiation?
- communication, trust in the mediator
 - needs parties agreement (exception: mandatory or court-annexed mediation)

ARBITRATION

- relative flexibility as to the procedure
- relative rigidity as to the outcome (win/lose situations: yes-or-no, more-or-less, binary logic)
- relative party autonomy (appointment of arbitrators, determination of rules of procedure) – ad-hoc arbitration vs. institutional arbitration; informational asymmetry; intra-industry bodies and outside bodies
- international arbitration (neutrality)
- impartiality of the arbitrator (party-appointed arbitrators)
- expertise (merchants, intra-industry bodies)
- *trust* and the *impartiality/expertise* trade-off
- save time (?) – fast arbitration
- save money (?) – small claims arbitration
- secrecy/confidentiality
- non-appealable (final award), but must be enforced by tribunals
- adjudicatory in nature (opportunity for a fundamentally fair hearing); presentation of proofs and reasoned arguments (Lon Fuller); no necessary motivation
- class-action arbitration
- needs parties agreement (compromis v. clause of arbitration)

LITIGATION (ADJUDICATION):

- highly structured and formal process (vs. flexibility)

 - adv: predictability; disadv.: tactics to delay

- outcome and key-issues in the third's party control (judge) – v. party autonomy

 - adv: opportunity to redress if the other (stronger) does not want to negotiate; disadv.: less freedom

- lawyers dominate the case (US)

 - adv: better knowledge of the field; disadv.: agent-principal issues

- incompleteness of information exchanged (compared to mediation) – can conceal real interests and goals of the parties

- can escalate the conflict (competitive position, polarized perspectives) – may destroy the opportunity to continue the relationship

- publicity

- decision final and binding (after appeal)

- rigid outcome dictated by legal norms

 - adv: predictability; disadv.: binary logic, one version of fairness (cf. possibility to conciliate 2 versions)

- create legal norms that apply in subsequent disputes (precedent) – social function of adjudication

APPROPRIATENESS:

From the party's point of view before the dispute has arisen (abstract option between arbitration and adjudication):

1) Parties are comparable in **resources** and **knowledge**, are within the same **trade** and on the same **territorial market**: **arbitration** (trade association arbitration or even ad-hoc arbitration)

2) Parties are comparable in resources and knowledge, are not within the same trade, but are on the same territorial market / in different trades but on the same market: **institutionalized arbitration** or **adjudication**

3) One party is in disadvantage from the point of view of resources or knowledge: **adjudication** (eliminates the risks associated to asymmetry) - for the other party, is preferable the arbitration (see the consumer topic); repeat players/one shot players

From the plaintiff point of view after the dispute arose:

- if the “defendant” is not cooperative: **adjudication**
- if the topic involves issues of public policy or interest: **adjudication** (because of publicity)
- if the relation with the defendant is long or is intended to continue: **mediation**, and then **arbitration**
- if it’s a one-shot relation but there is a certain trust with the defendant: **mediation**
- cross-border (international relation): **arbitration**, but must be carefully assessed, especially within the EU (cost, time and value of litigation)
- if the topic is to be kept confidential: **arbitration**
- if the dispute involves “fundamental issues” (ideology, etc): **adjudication**
- if the issue is “polycentric”: **mediation**

From the defendant's point of view, after the dispute arose:

- if he doesn't want to cooperate (he knows he's guilty and he has no pressure to cooperate): **adjudication**
- if he is subject to multiple dubious claims (and wants to deter them): **adjudication** (because of publicity)
- if he believes he's innocent and it's an honest misunderstanding: **mediation** (because of cost and time saving)
- if the relation with the plaintiff is long or is intended to continue: **mediation**, and then **arbitration**

From a social (government's) point of view:

- if it's a case involving important social values: **adjudication**
- if it's a case with little public relevance and state tribunals have too much workload: **ADR**

ADR AND CONSUMER (B2C) CONTRACTS

Situation in U.S.A.:

- 69% of the companies in the field of banking, credit card, investment have arbitration clauses with the consumers
- 92% of the insurance contracts have arbitration clauses
- a study on 21 companies from Top 100 Forbes (sample contracts they use with consumer and non-consumer [materials providers]): 75% of consumer contracts had arbitration clauses, 10% of non-consumer contracts had arbitration clauses !!!
- most consumer contracts are adhesion contracts

Advantages for businesses from arbitration clauses with consumers:

- no juries – no high damages risks (for US only)
- reduces public exposure
- may eliminate (or control) the possibility of class actions

Why arbitration is inadequate for consumers related disputes

- informational asymmetry – repeat players vs. one shot players
- parties don't have a common culture (they come from different worlds)
- secrecy may favor unfair commercial practices

“Historically, the arbitration was designed for sophisticated parties (merchants) with relatively equal bargaining power”.

EU Members Legislation concerning arbitration agreements B2C

Austria: arbitration clauses – prohibited, *compromis* - allowed

Belgium: allowed

Czech Republic: allowed

Germany: allowed

Spain: allowed, but prohibited arbitration *ex aequo et bono*

France: unclear

U.K.: prohibited for cases under GBP 5000

E.U. rules on arbitration agreements B2C

Council Directive 93/13/EEC on unfair terms in consumer contracts:

Article 3 (1). A contractual term which has not been individually negotiated shall be regarded as unfair if, contrary to the requirement of good faith, it causes a significant imbalance in the parties' rights and obligations arising under the contract, to the detriment of the consumer.

(3). The Annex shall contain an indicative and non-exhaustive list of the terms which may be regarded as unfair.

Annex. Terms which have the object or effect of:

(q) excluding or hindering the consumer's right to take legal action or exercise any other legal remedy, **particularly by requiring the consumer to take disputes exclusively to arbitration not covered by legal provisions [...]**.

Case-Law concerning arbitration agreements B2C

Mylcrist Builders Ltd v Buck [2008] - *High Court of England and Wales*

Elisa Maria Mostaza Claro v. Centro Movil Milenium SL –
European Court of Justice, C-168/05, Decision of 26.10.2006
Asturcom Telecomunicaciones SL v. Cristina Rodriguez Nogueira –
European Court of Justice, C-40/08, Decision of 06.10.2009

AT&T Mobility LLC v. Concepcion – *United States Supreme Court*,
09-893, Decision of 27 April 2011

DIRECTIVE 2008/52/EC OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 21 May 2008 on certain aspects of mediation in civil and commercial matters – ensures the possibility of enforcement of mediation agreements between cross-border actors; time limitation; court-annexed mediation

DIRECTIVE 2013/11/EU OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL on alternative dispute resolution for consumer disputes (Directive on consumer ADR) – top-down perspective of promotion of “ADR”; entities that must be authorized and monitored by State agencies

REGULATION 524/2013 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL on online dispute resolution for consumer disputes (Regulation on consumer ODR)