

THE USE OF ALTERNATIVE DISPUTE RESOLUTIONS (ADR) IN EMPLOYMENT CONFLICT – MALAYSIA CASE

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INTRODUCTION

The discussion in this paper will explore the definition of ADR and its' significance in dispute resolutions. The discussion will also highlight on types and the arrangement of ADR for Malaysia. The methods of ADR are becoming increasingly popular mechanism to resolve disputes (Zack, 1997; Abraham, 2006; Purcell, 2010). As defined by Purcell (2010) ADR is the use of third parties in conciliation, mediation and arbitration prior to a court hearing or simply a 'third party intervention' (Jefferys et al., 2010). He further noted that 'in no country is one method relied on to the exclusion of others' (Purcell, 2010: 4). Further, he explored a growth in use of ADR and strong support for ADR development by social partners and States in 17 European countries.

Abraham (2005) also agreed that litigation process is time consuming and the use of ADR would reduce time and costs besides resolving disputes without causing any ill will or animosity as often happens when a dispute is heard in court. According to BRE – PWC Administrative Burden Database 2006, the average cost of defending an employment tribunal claim estimated to be around £9,000 in the UK (Gibbons, 2007).

A broader definition of ADR allows governments and respective parties to narrow down on the areas where the dispute resolution mechanism can be developed. The increased reliance on a variety of ADR can decrease the costs incurred by government and speed up time consumed to resolve the dispute (Zack, 1997). Sexton (1996) suggests that the ADR should be used in conditions such as during the time when the economic and psychological costs are increasing more than expected due to damages suffered; when the formal channel become more expensive or the possibility of harming the survival of the company or agency by continuing the disputes through the more formal channels.

It is widely agreed that the notion of ADR is generally faster and cheaper for parties than a formal court hearing (Denenberg and Denenberg, 1994; Sexton 1996; Zack, 1997, Colling, 2004; Purcell, 2010). Purcell (2010) argued that, the trend data on growth in ADR used for countries such Germany and Greece, showed a ‘benchmark’ on the successful use of the conciliation conducted in either formal or informal ways. In other words, the indicator to the success of ADR depends on the number of tribunal or court hearing (Purcell, 2010). As Gibbons proposed that ‘it is clear that the earlier a dispute is settled, the better it will normally be for all concerned e.g. in terms of disruption to business and lives, and associated costs’ (Gibbons, 2007: 9). This indicator is also used by the institutions and agencies to measure their performances and to determine the need for new strategy to meet their target. However, in arguing for effectiveness of the ADR, Zack (1997) contends that ‘the awareness of the procedures, and evidence that they have worked in various environments may be the first step in determining whether they will be helpful in cutting costs, reducing delays

and backlogs, deterring litigation and bringing greater justice and more equity to more workers than existing system of dispute resolution (Zack, 1997: 108).

TECHNIQUES OF DISPUTE RESOLUTION

There are many ADR techniques used in dispute resolution which centered around closer coordination among the dispute resolution agencies so that discussions and debate can occur. The increase of individual employment rights lead to growth in the number of dispute regarding job and other aspect of employment which necessitates a reasonable means of dispute resolution (Denenberg and Denenberg, 1994). New closer methods of working with firms are required so that they can establish clear ground rules on what constitutes acceptable and unacceptable practice in relation to particular employment rules.

As defined by Gibbons (2007), conciliation is ‘an independent third-party, helping people involved in a dispute to resolve their problems’ and mediation is where ‘an independent third party helps disputing parties settle their differences and the parties to the dispute decide how the dispute will be resolved’. Further, Purcell (2010) identified that the difference between conciliation and mediation are usually difficult to explain. The conciliation and mediation machinery provided by the institutions which endeavours to settle a conflict by assisting the parties in reaching a voluntary agreement and the ultimate decision is made by the parties themselves. When an aggrieved worker makes an application to the third party for a decision which is legally binding, it is called Arbitration (Aminuddin, 1949; Ayadurai, 1996; Zack, 1997; Abraham, 2006; Purcell, 2010). However, Purcell (2010) explored the fact that

arbitration is always used as a 'last resort'. Purcell (2010) argued that in some countries, the use of arbitration depends on the decision of the parties to the particular dispute. For instance, in Spain, it is up to the worker and employer to choose either to use mediation or arbitration.

In order for the effective usage of the ADR, the practitioners must prepare to proof how ADR can assist to cope with conflicts that are influenced by the growth in economic, demographic and technological change, the experts should be ready to create or initiate a new ADR application to modifying existing techniques and adjust it to the changing format of conflict (Denenberg and Denenberg, 1994). By the intervention of such an impartial third party and through discussion conducted at the negotiation table and various techniques and initiatives, all thoughts of industrial action and court hearing can be avoided.

Teague (2006) argues that with the increase of employment legislation introduced in public dispute resolution institutions and agencies, the greater need to emphasis on the prevention of employment disputes. Agreeing with Teague, Purcell (2010) noted that the workers will suffer in silent of the use of sophisticated ADR arrangement, especially to address workplace dispute. He continued that by creating awareness of ADR to the workers would preserve and promote their confidence in the ADR system where almost all the dispute resolution mechanism is provided by the public institutions.

THE MECHANISM OF ADR IN MALAYSIA

Malaysia employment conflict resolution is distinguishable through the segmentation and specialization of different departments and institutions. Another significant element, which characterized Malaysia employment conflict resolution, is its relatively high use in ADR as their important tools in dispute settlement. Therefore, the procedures and process are clearly identified by all of the related departments to prevent overlapping of areas of responsibilities. The system provided one department for conciliation of industrial disputes – Industrial Relations Department. Further, a significant role played by the Labour Department as main enforcement agency for major employment legislations in Malaysia which provides machinery of labour inspection and inquiry over monetary claims at the Labour Court.

Conciliation is the main form of ADR used in the Industrial Relations Department. Conciliation becomes as a main indicator of the department's effectiveness in reducing the number of cases referred to Industrial Court for arbitration. As the dismissal complaints are the highest cases received by the department, an effective conciliation can be described as the main key performance indicator for every officer.

Further, the intervention of the third party not only limited at this level. The intervention of the state in accordance to the relevant statute to resolve the dispute reaches to the next level, which is the Minister himself. The 'second layer conciliation must be fully exhausted before the reference by Minister to the Industrial Court.

The same mechanism used for collective disputes in which the parties in dispute must exhaust all avenues before they go for conciliation and the intervention of IR officers

to assist for a settlement. The officer or the third party will be randomly selected decided by the Director of Industrial Relations, without the parties knowing who is the assigned conciliator. The introduction of unfair dismissal and other employment-related legislation has contributed to significant growth of cases lodged in conflict resolutions bodies in Malaysia. The process up to this point is voluntary for a mutual settlement until a deadlock is reached. Both parties or either party or the Minister may also refer the unresolved dispute to the Industrial Court for arbitration. Arbitration is the last frontier of ADR form used by the state in dispute resolutions.

The approaches to dispute resolution and the ADR mechanism are different in the Labour Department. Labour officers are empowered by the Director General of Labour to administer, enforce and solve employment conflicts under their jurisdiction provided in Employment Act 1955 and other labour legislation enforced by the Department. Even though, the officer has the power to enforce, recommend penalties and to hear disputes in Labour Court, the emphasize is put more on persuasion through negotiation. The use of non-judicial ADR form, which is negotiation, has been identified to have major impact on the number of resolved dispute settlement. It also guarantees the speediest way of conflict resolution where in cases which the employee is still in the employment, there is a need for immediate settlement is paramount to avoid any serious damages. Sometimes issues can be resolved just by a telephone call by the labour officer to the employer or through meetings at the workplaces.

CONCLUSION

The discussion had explored significant features of ADR in employment conflict resolution for Malaysia. The notion is once a labour dispute has arisen, the purpose of public policy in one country must be to encourage a prompt and fair resolution of the dispute. In the context of Malaysia, conciliation is the most effective means of achieving this end. However, the mechanisms used in conciliation processes are slightly different. The state intervention through conciliation reaches to the ministerial level. With the range of labour legislation, the use of ADR assists the process of negotiations and persuasion to achieve voluntary compliance and mutual settlement.

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