ADR on the Rise- The Pros and Cons

In consideration that disputes are inevitable in commercial life, overcoming the conflicts and devastation with minor distress is substantial. In this respect, knocking the door of litigation in order to solve the discordance before the court, seems to be relatively inconvenient in comparison with alternative dispute resolution mechanisms, which are commonly abridged as "ADR", provided by various law regulations. Alternative dispute resolution methods have been commonly used in various communities over the world throughout history. For instance, mediation has been advised in Islamic Law (Shariah), as well as in ancient Roman history which call mediators in different names such as "internuncios, me-dium, intercessor, philantropus, interpolator, conciliator, interlocutor, interpres", and "mediator". (Roman law in 530-533CE).

In resolution of international maritime law disputes, Court of England and Wales are commonly opted and/or any dispute is agreed to be settled through London Arbitration. Many disputes linked with sea trade, which may be arising from either disagreement on charter party terms, bill of ladings, contracts of affreightment, ship sale or other incidents such as collision etc.may canalize parties to solve the matter through London Arbitration by incorporating such mutual preference into related agreements.

As a matter of fact, English law strongly motivates controversial parties to apply to alternative systems rather than long going court proceedings. Although there are various mechanisms to resort, the most common ADR methods can be summarized as negotiation, mediation and arbitration. As per the Arbitration Act 1996 ("the Act"), this process aims to obtain a fair resolution by an impartial tribunal without unnecessary delay or expense. In a case where the parties chose to reach a consensus through arbitration mechanism, they may either chose an adhoc settlement to decide specific procedures, or surrender a standard set of rules of present arbitration organizations such as International

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Chamber of Commerce International Court of Arbitration (ICC) or London Maritime Arbitration Association (LMAA). Although arbitration is a swift and binding way for disagreed parties, the most significant negative side of this method is its costliness which makes the concerned parties think twice before heading towards the arbitration gate. Given the fact that parties who would like to enforce an arbitration award will need some additional proceedings before the court, it is relatively complicated and unfamiliar in comparison to a court verdict.

Given the fact that statistic data of Ministry of Justice demonstrates apparently that when parties go litigation at Istanbul commercial courts specialized in Maritime, granting a definite (unappealable) decision takes approximately 4 years, it would be significantly practical to seek an alternative to settle arisen problems. In fact, in 14.06.2007 "Insurance Arbitration Institution" was established through article 30 of Turkish Insurance Act which had entered in force at that time. Although this institution has been terrifically successful and swift in solving insurance linked disputes, due to very specific field of technical knowledge in Maritime area, these institution remained short in resolving such disputes. On the other hand, this institution requires at least one to be an "insurer" and this limits the width of parties to apply.

There are also two other arbitration organizations called Istanbul Arbitration Center(ISTAC) and Istanbul Ticaret Odası Tahkim ve Arabuluculuk Merkezi ("İTOTAM"), however these are not specifically working on Maritime as well. As İTOTAM requires at least one of the party in dispute to be member of ITO (Istanbul Commerce Centre), this is also a limited dispute resolution way out.

As per data given by ISTAC, marine linked disputes solved through this arbitration organization consists %7 amongst all. This institution brought fast track arbitration rules which is quite suitable and time saving to keep up with the spirit of marine field, nevertheless this alternative is still not used as frequent as it must be. Actually, in present court system, marine disputes are solved through expertise of court experts and judges mostly follow their comments and conclusions on the matter. That being the case, we are completely of the opinion that there must be a specific Maritime arbitration center in Turkey which includes known experts in the business.

When we throw a quick glance at mediation, this ADR method seems to be swifter, handier and more practical, however as the mediator does not go deep into the merits of the case, this resolution method can be "much more flexible" than needed. In other words, the over-flexible and without prejudice sprit of mediation can leave some doors open as there is no definite decision to enforce. In Turkey, The Code of Arbitration in Civil Law Disputes ("Hukuk Uyusmazlıklarında Arabuluculuk Kanunu") was accepted in June, 2012 and through revision made in Turkish Commercial Code (TCC) in December, mandatory meditation has been accepted as condition of the commercial cases. In other words, the court shall not accept to hear a commercial case unless parties initially apply meditation. This compulsion was already existing in Turkish Labor Law as through "Code of Labor Court" dated 12.10.2017, mandatory mediation entered into force. In consideration of heavy work load of the courts as well as the time and money consumed for long running law battles at the courts, this developments are quite affirmative for each parties involved.

In a nutshell, alternative dispute resolution methods which features a swift and impartial substitution to the long-drawn out judicial proceedings are on the rise in both internal and international commercial life. As the saying goes; "Agreement made on the worse terms is always better than disagreement".