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THE ADVANTAGES AND DISADVANTAGES OF MEDIATION PROCESS

Abstract

One of the alternative dispute resolutions is mediation. Mediation is a very practical and flexible method for resolving disputes. It has a special superiority when the parties have ongoing relations that must continue after the dispute is managed. Because the settlement agreement is by consent and none of the parties should have reason to feel they are the losers. Despite the fact that mediation provides the basis for the restoration of relations after a specific issue is resolved, it is actually a method that is not often used by disputing parties. So, the main purpose of researching the characteristic features of the mediation process as one of the alternative dispute resolutions is to show the advantages of this procedure and perspective of applying to a mediator for resolution of disputes without going to court. As well, besides all these positive aspects, showing the negative aspects of the mediation process that may arise in some cases.

Keywords: *alternative dispute resolution, mediation session, mediator, independence, voluntary, confidentiality, advantage, disadvantage*

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Mediasiya prosesinin müsbət və mənfi cəhətləri

Xülasə

Mübahisələrin alternativ həll yollarından biri də mediasiyadır. Mediasiya mübahisələrin həlli üçün çox praktiki və çevik üsuldür. Tərəflər arasında mübahisə həll edildikdən sonra münasibətlərin davam etməsində xüsusi üstünlüyə malikdir. Çünki barışıq sazişi razılıq əsasında bağlanır və tərəflərdən heç birinin özünü uduzmuş tərəf kimi hiss etməyə əsası olmur. Mediasiya prosesinin mübahisə həll edildikdən sonra münasibətlərin bərpası üçün zəmin yaratmasına baxmayaraq, mübahisə edən tərəflərin əksəriyyədən müraciət etməyi bir üsuldür. Odur ki, mübahisələrin alternativ həlli üsullarından biri kimi mediasiya prosesinin xarakterik xüsusiyyətlərinin araşdırılmasında əsas məqsəd bu prosedurun üstünlüklərini və mübahisələrin məhkəməyə getmədən həlli üçün mediatora müraciət etməyin perspektivini göstərməkdir. Eləcə də, bütün müsbət cəhətlərlə yanaşı, mediasiya prosesinin bəzi hallarda yarana biləcək mənfi cəhətlərini də göstərmək lazımdır.

Açar sözlər: *mübahisələrin alternativ həlli, mediasiya sessiyası, mediator, müstəqillik, könüllülük, konfidensiallıq, müsbət cəhət, mənfi cəhət*

Introduction

Alternative dispute resolution is a process in which a neutral third party - a mediator or an arbitrator - helps parties who are participated in a dispute come to an agreement. One of the main types of alternative dispute resolution is the mediation process. Although the mediation process is one of the new methods for the legislation of Azerbaijan Republic, but it is considered the main tool for resolving disputes without going to court.

Mediation is providing mutually satisfactory results. It may be faster in some cases, more effective and cheaper than other adjudicative processes. Due to their specific and collaborative nature, mediation techniques can produce high value solutions to a conflict that may not even be available through the judicial process. A third party, such as a court, that is foreign to the parties and operating within the procedural constraints that normally exist in any legal proceeding, may be able to work out more creative or facile solutions. In turn, it reminds us that mediation is a more flexible and convenient process (Guide to Mediation for Lawyers, 2018).

A number of advantages of this process are highlighted for the parties to resolve the dispute through the mediation process without resorting to court. First of all, it should be noted that, mediation can be conducted relatively quickly compared to litigation. Thus, if the name of the mediator is determined and the proposal sent by one of the parties to the other is not answered within 10 days, that party applies to the mediator. If the parties do not participate in the mediation session after that session is notified to the parties by this mediator, the mediator shall submit to those people the instruction on "Not participating in the mediation session". If the parties agree to participate in the process, then the contract is signed and the procedure begins. The notice must be given to the parties at least 5 days before the date of the mediation session ("Law on Mediation" of Azerbaijan Republic, 2019).

As well, the independence is another advantage of mediation session. The mediator who will participate in the mediation process is chosen independently and the mediator's main task is to give advice to the parties for solution of disputable matter, they cannot make any decision that is binding for the parties. Because the main purpose of the mediator's presence is to facilitate and direct the discussions between the parties for resolving of the dispute. Thus, the final decision for the process is not made by the mediator, but by the parties involved in the mediation process.

The mediation process is less expensive than other procedures, especially the court process. Also, after paying the fee for the mediation process, if the parties do not reach an agreement and want to apply to the court, then they are released in the amount of the fee which they paid for the mediation process beforehand.

Actions taken during the mediation process remain confidential. In particular, court decisions and acts are a public record that is usually accessible to someone. However, the mediation process is confidential, meaning that the dispute remains between the parties and a neutral party (Smith, David, 2008: 49).

Also, ensuring the confidentiality of the process is one of the requirements of the Law on Mediation. Thus, according to Article 8 of this law, unless a separate condition has been established between the parties, the mediation is closed and the confidentiality of all information obtained during the mediation is protected by the session participants and other people participating in the mediation. It is also noted that the violation of the confidentiality rules provided for in Article 8 of this Law by the participants of the mediation leads to the liability provided by the law.

The mediation process is considered more informal by the parties than the court procedures. It is true that there are more formal alternative dispute resolution methods. But the reality is that it is often simpler and more informal than going to court. In most cases, parties will not need to worry about rules of evidence or other court rules.

The essential advantage of the mediation process is that there is a mutual desire to resolve the dispute, the parties are interested in the peaceful settlement of the dispute and demonstrate such a position. So, if other legal procedures, such as litigation usually result in one of the parties winning and the other losing, if the relations between the parties are further disturbed and the foundation of greater dissatisfaction is laid, though everything is voluntary in mediation, there is no room for such cases and the winner-loser party is not determined. A win-win formula usually applies here (Abdullayev, 2019: 3-4).

Along with all these positive aspects, it should be noted that there are some disadvantages of the mediation process. It is known that applying to mediation depends on the parties; that is voluntary. However, depending on the nature of legal relations, this application can be mandatory.

Thus, according to Article 3.2 of the law, parties to commercial disputes, as well as disputes which are arising from family and labor relations must participate in a preliminary mediation session before applying to the court (5). It should be noted that mediation does not always result in a settlement agreement. If no agreement is reached, the parties may be subject to time-wasting. So, they will have to go to court again for resolution. Therefore, according to some lawyers, preferring mediation poses some risk. In addition, if mediation fails, besides wasting time, the parties allow the other side to familiarize with the evidence in the case. It can reduce the usefulness of these evidences in a subsequent trial for the restoration of violated rights (6).

Another negative aspect of the mediation process is choosing an incompetent person or a person with insufficient experience in this field as a mediator. Because it can cause the process to be prolonged, misdirected and not achieve to the desired result and even sometimes deepen the dispute between the parties.

Conclusion

As a final result, it can be noted that the merits of the mediation process have been highlighted in the relevant case. So, it is showing that this process requires less costs than other methods especially court litigation, the dispute can be resolved in a short time, the independent third party is impartial, and the mediator can be selected by the disputing parties. Also it is indicated that during the mediation session, the protection of confidentiality and the liability for the party who violates it are provided in the manner established by the legislation.

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