SUITABILITY OF ALTERNATIVE DISPUTE RESOLUTION FOR SHAREHOLDERS DISPUTES

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Abstract

Most companies listed in the United Kingdom are closely held corporations whose shares are not publicly traded. Apparently, these small quasi-partnership types of private limited companies play an essential role in the United Kingdom economy. Even though the power of personal/family relations offers advantages for shareholders to work together in a privately held business, minority shareholders are vulnerable as compared to the majority shareholders. Therefore, minority shareholder disputes are of concern principally to private companies with management ownership concentrated in the hands of a small group of family members (Mak, 2017). There could be several plausible the underlying reasons for shareholder disputes such as family issues may cause the irretrievable breakdown in relations in a small private company (Farrar, Watson & Boulle, 2013). Court-based shareholder proceedings are not appropriate way to prevent the relational breakdown due to unresolved personal conflicts among shareholders and are costly and complex regarding evidentiary and procedural rules. This paper explores the suitability of Alternative Dispute Resolution Methods for shareholders disputes.

Indeed, shareholders disputes can be resolved not only through court but also through various extra-judicial methods such as negotiation, mediation, arbitration and similar methods. Every method has its own characteristics. Traditionally, as the principle of party autonomy, shareholders and their legal adviser are free to agree on

choosing dispute resolution methods to resolve their disputes. In general, the basic processes for resolving shareholder disputes are listed as follows:

- Negotiation: Negotiation is one of the most common and basic forms of alternative dispute resolution. It is believed that most people do not even realize that they are negotiating in day-to-day life. The efficiency of negotiation may be considered in a formal situation for instance in a business meeting or when buying a car. The basis of negotiation can be described that no third party involved in any communication between two or more people when parties try to resolve their dispute (Lodder & Zeleznikow, 2010). In a pure negotiation, disputants try to reach an agreement without a neutral body helping or guidance (Rule, 2002).
- Mediation: Mediation is another type of method to resolve disputes out of the court. The main aim of mediation is to offer the parties to settle their disputes in a sustainable and self-determined way. In the past years, mediation was often used more in the fields of family and labour conflicts. Nevertheless, because of several advantages of the use of mediation such as procedural flexibility, cost-efficient, time-efficient compared to other both judicial and extra judicial methods of dispute resolutions, it has been used in shareholder disputes. Mediation is an extrajudicial method that a mediator attempts to assist two or more disputants to resolve their dispute. Parties are free to decline to continue the process at any time. The neutral third parties or mediators do not have the authorisation to enforce a final binding decision on parties. Mediation is based on the voluntary participation of the parties.
- Arbitration: Arbitration is an out of court method that a neutral third party, called `arbitrator`, gives a final binding decision on both parties. This method has increasingly been chosen by parties for resolving disputes, especially in international disputes due to jurisdictional complexity. Parties (in most cases businesses) usually prefer to go to arbitrate their disputes because an arbitral award can be efficiently recognised and enforced in 159 signatories to the New York Convention 1958.

The New York Convention usually imposes rigorous recognize enforcement of both international arbitration agreements and arbitration awards, subject to limited grounds focused on procedural improprieties or lack of a valid arbitration agreement. However, the convention authorizes nations to reject the recognition or enforcement of the award based on "non-arbitrability of the subject matter" or where enforcement "would be contrary to the public policy" (The New York Convention Article V). On this point, the UNCITRAL Model Law on International Commercial Arbitration, 1985 (as amended in 2006) also contains that an arbitral award may be aside by the competent court, as well as being refused recognition and enforcement, if: "the court finds that: (i) the subject-matter of the dispute is not capable of settlement by arbitration

under the law of this State; or (ii) the award is in conflict with the public policy of this State" (Article 34 (2)(a) (i), 34 (2)(b) (i and ii)).

In the words, the New York Convention, for arbitrability, dispute must not concern a subject matter which is 'capable of settlement by arbitration'. The term 'capable of settlement by arbitration' does not refer as an adverse reflection on arbitrators or the arbitral process. (Redfern, Hunter & Blackaby, 2004) Arbitrators should be as 'capable' as judge of determining a dispute. However, national laws may concern particular disputes as more proper for determination by the courts rather than by a private dispute resolution system (Blackaby, Redfern, Hunter & Partasides, 2015).

Regarding the arbitrability of shareholder disputes in the UK, it states that it should be allowed to resolve the disputes through arbitration if the dispute is related to 'enabling/facilitative aspects of company law'. However, if the dispute is linked to 'mandatorny/prohibitory aspects of company law', the court should decide whether the disputes can be arbitrable (Chiu, 2006). It is indicated in the White Paper on the reform of company law that the UK Government is considering whether to introduce mediation or arbitration as dispute resolution mechanisms for shareholder disputes which are increase workload of courts. Nevertheless, it is not possible to find any additional discussion about which types of cases will fit arbitration and how UK law may provide for alternative dispute resolution processes for shareholder disputes (Chiu, 2006). It is worthy note that the Company Law Review Steering Group (CLRSG) advised the development of arbitration to increase the protection of minority shareholders under UK company law but it was not adopted (Company Law Reform, 2005). Additionally, the relationship between arbitration and the unfair prejudice petition was discussed in Fulham Football Club (1987) Limited v Sir David Richards and Ors. This case involved a corporate dispute between the parties. Mr Richards was alleged to have acted as broker in a player transfer, something that was not allowed under the Premier League's articles of association. The articles also contained a dispute resolution clause. In view of this fact, Fulham as a shareholder of the League determined to bring a legal action against the defendants on the grounds of an unfair prejudice petition, based on Section 994 of the Companies Act 2006.A discussion arose as to whether the claims in an unfair prejudice petition were arbitral since the provision of Sections 994 and 996 stated an 'application to the court' and 'powers of the court'. Furthermore, the debate encompassed the influence of orders under Sections 994 and 996 of the Companies Act 2006 on third parties which cannot be party to the arbitration agreement. Therefore, there was a public interest and public policy concern about the court`s decision because a court decision under Section 994 was linked to third parties which meant that the state of affairs could not be accepted through arbitration. The court adopted the view that arbitration was limited to the claims under Sections 994 and

996. As seen in this case, even if there was no provision in the Arbitration Act, it did not prevent other mechanisms from determining the limits to arbitration. Hence, the system in the UK has statutory provisions using phrasing like 'courts will decide' and 'courts will order' such as Section 996 of the Companies Act does (Oliveira, 2016).

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