

BRINGING SUSTAINABILITY INTO DISPUTE RESOLUTION PROCESSES

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Abstract. The goal of this research is to formulate the notion of sustainable dispute resolution and distinguish main characteristics of those dispute resolution procedures that can be considered to be sustainable having an idea of bringing together sustainability, law and dispute resolution. Thus the object of the research – dispute resolution procedures, their main features and capability to be qualified as sustainable. The research is composed of introduction, two parts and conclusions. Introduction provides a brief overview of the object of that research and its goal, part one describes main criteria for distinguishing the sustainable dispute resolution, in part two analysis of sustainability in main dispute resolution processes (negotiation, mediation, conciliation, arbitration and litigation) is presented. Conclusion gives main ideas of the assignment of that work in brief.

Keywords: sustainability, sustainable development, alternative dispute resolution (ADR), mediation, law, litigation

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JEL Classifications: O1, K00, K2

1. Introduction

Despite of the fact that nowadays the term sustainability is widely used, it should be noted that mostly people still associate it with environmental context. We typically think of sustainability as it relates to protecting environment, going green, conserving energy, avoiding pollution (e.g. Makštutis *et al.* 2012; Vosylius *et al.* 2013; Mačiulis, Tvaronavičienė 2013; Vasiliūnaitė 2014; Prause, Hunke 2014; Baublys *et al.* 2014). Phrases ‘sustainable environment’ and ‘sustainable development’ tend to become part of our everyday lexicon not only for the scientists but also for men on the street. Thus still the amplitude of this concept in society is not clearly conceived and the need to understand it not only as a necessity to preserve natural resources is noticeable.

The concept of sustainability and sustainable devel-

opment first was introduced by the United Nations Organization World Commission on Environment and Development (also known as Brundtland Commission) in year 1987 in the report ‘Our Common Future’ (United Nations Organization 1987). It has stated in the Report that sustainable development is a development that meets the needs of the present without compromising the ability of future generations to meet their own needs (Article 27). This statement changed the ideological attitude towards development in general. The primary goal of the Commission was to reconcile physical sustainability, need satisfaction and equal opportunities, within and between generations.

Step by step the idea of sustainable development had spread around the world as the main vision for the development of the word community. Gradually sus-

tainable development has become a political task for many international organizations. European Union brought the notion of sustainable development into the list of the priority goals in year 1997 after enacting Treaty of Amsterdam (European Union 1997) (Article 1¹). Through the international policy in this field, ideas of the sustainable development concept were spread in national strategic documents and brought these requirements into the life of every individual. The striking feature of the sustainable development is that it ties together different areas of our life and activities, including but not limited to environmental concerns: social, political, and economic. These three dimensions of the sustainable development ideology cover almost all areas of societal life. The United Nations Millennium Declaration (United Nations 2000) identified principles and treaties on sustainable development, including economic development, social development and environmental protection.

The harmonious development of all three elements of sustainable development – environmental, economic and social – has to be done in a complex, bearing in mind permanent interaction of different social systems. That is why the problems of sustainable construction, tourism, energetics, agriculture, industry etc. are being raised (Tvaronavičienė 2012: 199).

The last few decades brought great changes into European societies, their social and economic life. Acceleration of our daily life, the desire to limit the financial costs, the willingness to resolve disputes effectively and to regulate the workload in the courts has brought changes to the legal system of most of the European countries. As a consequence, naturally the idea of the sustainability and sustainable development could become relevant to one of the most important area of social life – law and dispute resolution. But what does the issue of sustainability has to do with law and dispute resolution? This is essential problematic question of this research. Dispute resolution is an activity of parties to a dispute and third people, involved depending on selected method, which may be oriented toward protection of violated individual rights as well as towards restoration of re-

lationship between people. This option rebuilds social peace and in fact may be evaluated as bringing sustainability back into interrelations.

As long as social peace and social justice constitutes an inherent part of the conception of sustainable development (Langhelle 2000: 318), the goal of this research is to formulate the notion of sustainable dispute resolution and distinguish main characteristics of those dispute resolution processes that can be considered to be sustainable having an idea of bringing together sustainability, law and dispute resolution. Thus the object of the research – dispute resolution procedures, their main features and capability to be qualified as sustainable.

The subject matter of this article has not been addressed in legal literature yet. You can easily find lots of sources about sustainability and sustainable development in non-legal matters (for example Redclift 2005; Beckerman 1994; Norgaard 1988 and etc.) also about alternative dispute resolution and improving civil justice (for example Riskin and Westbrook 1997; Nolan-Haley 2001; Kaminskienė 2011) but the review of accessible legal literature leads to a conclusion that the question of linking together sustainability, law and dispute resolution, that is discussed in this paper, is very rear. For instance, Langhelle (2000) has dedicated his research to examine relationship between social justice and conception of sustainable development, Barry - to analysis of sustainability and intergenerational justice (Barry 1999), Dobson has linked together conceptions of environmental sustainability and theories of distributive justice (Dobson 1998), Thompson (1996) combined sustainability, justice and market relations. Several works dedicated to the topic of social peace and peacebuilding methods of conflict transformation, conditions for sustainable peace are written by Bond in the context of mining enterprises (Bond 2014), by Kaw in the context of multilateral international conflicts in Asia and Middle Eastern space (Kaw 2011), by Wade in the context of armed conflicts in El Salvador (Wade 2008), by Gauthiera and Moita (2011) in the context of on-going Justice reform in Haiti. More subject oriented and closest works to the subject analyzed in this work are the works of Spiroska (2014), who focused on mediation as conflict management strategy linked with successful outcomes aimed to sustainable development of the society; Siedel (2007), who focused on business

¹ „[...] 2) The existing seventh recital shall be replaced by the following: “DETERMINED to promote economic and social progress for their peoples, taking into account the principle of sustainable development and within the context of the accomplishment of the internal market and of reinforced cohesion and environmental protection, and to implement policies ensuring that advances in economic integration are accompanied by parallel progress in other fields, [...]”

deal-making and ADR as promising models for fostering peaceful societies and contributing to sustainable peace; and Odidison (2003), who analyzed use of preparation strategies for establishing a foundation for sustainable conflict resolution outcomes, to be an objective of ADR processes.

The authors present their research based on the following classical methods of social research: historical, logical analytical, systematic, document analysis method and method of generalization.

2. Main Criteria for Distinguishing the Sustainability of Dispute Resolution

In order to have capacity for distinguishing sustainability aspect in different dispute resolution processes it is essential to find out what criteria identifies such characteristics.

- Privacy and confidentiality. Judicial proceedings are generally open to public and documented, though civil cases are often associated with private information, sometimes even shameful disagreements. Hence, privacy is particularly valuable in civil cases where disclosure of unpleasant private affairs or commercial secrets is important. Only when dispute resolution process allows ensuring privacy and confidentiality of the dispute, the parties engage in open conversations about true needs and desires standing beside legal positions. Thus it allows discovering true reasons of disagreement more easily. So, the first criterion for distinguishing if the dispute resolution process is sustainable is its privacy and confidentiality.

- Preservation and continuity of good relationships. Only such dispute resolution process that seeks to reduce conflict and increase harmony can be named sustainable. In most cases, protracted dispute and litigation can irreparably destroy relationships between the parties, while truly sustainable dispute resolution process can repair, maintain or improve ongoing relationships. In order to settle the conflict the parties must cooperate and jointly find a solution. That could help them to build communication and problem-solving skills not only for instance, but also for preserving good relationship in the future.

- Making it easier to resolve emotional aspects of the dispute. This is especially important in disputes involving family members. Both informality and confidentiality of the process of dispute resolution helps in this case. Disputes over family matters are often

caused by long-repressed family problems. Often in such cases the parties do not seek more than certain emotional outcome – perhaps an apology or just vent the anger about the situation, which is considered as unfair. The truly sustainable dispute resolution process leads to a better understanding between the parties, an opportunity to express their views and be heard. The court will not investigate personal issues, only legal rights and legally significant facts. According to Madoff, a mere communication only sometimes helps to regulate some of the disputes (Madoff 2004: 710). Thus it is possible to accept the view that the main purpose of sustainable dispute resolution process is not always to seek for a mutually acceptable agreement. More important result can be mutual understanding achieved among the parties.

- Opportunity for the parties to create an individual dispute solution. Sustainable dispute resolution process encourages parties to take responsibility for their future life and actions, gives them control over settlement procedures and conditions of the final agreement. Such an autonomous final dispute resolution is considered to be a guarantee that the parties will follow this agreement voluntary, and assess the agreement as honest. This flexibility is an important criteria to determine if dispute resolution process is sustainable. There are two major disadvantages in the judicial process. In most of the cases court decision is favorable to only one party and the other becomes disappointed. Secondly, in litigation process the outcome of the dispute is strictly limited only to legal alternatives. Sustainable dispute resolution process eliminates these disadvantages of the judicial process and allows the parties themselves to decide what final solution is acceptable to both of them and meets their needs.

- The possibility to find a solution that will be considered as fair by all the parties. It will be more satisfactory decision than a formal court resolution because it will be consistent with parties' values and will take into account the feelings of not only legal, but also non-legislative side of the dispute. It should be noted, that the recognition of fair decision is very important, because the principle of good faith is a fundamental principle of law recognized by the courts. The law requires diligence, honesty, parties' cooperation, informing each other, taking into account the legitimate and reasonable interests of the other party. In some cases, recognition of bad faith in legal rela-

tions implies invalidity of the transaction. It is obvious that the inner beliefs of the parties' impact on their behavior and decisions vary significantly, so it is crucial to keep in mind that legal rules and judicial practice may have very little importance, but their inner beliefs dominate and lead to further decisions.

- Dispute resolution efficiency could be presented as another advantage of sustainable dispute resolution process. Efficiency is usually associated with reduced legal dispute resolution costs and shortened duration of dispute resolution (Radford 2000: 642). Sustainable dispute resolution process is quicker than court and even arbitration proceedings, it is easier to appoint and hold meetings, and decisions are made faster. It might be even possible to reach mutually acceptable agreement in one meeting or session. Of course, the operative decision making reflects in reduced legal costs, which is especially important in cases where costs can become disproportionately high compared with the value of the estate.

- Another criteria for sustainable dispute resolution is its' convenience. It may be important to those who work long hours or are disabled and therefore of a reduced mobility. As the sustainable dispute resolution process is not linked to specific location, date and time, and serve for the needs of the parties alone, it can be determined by the free consent of participants.

- Perception of situation in different manner. It can be noted, that even if through dispute resolution process a peaceful agreement is not achieved, sustainable dispute resolution process can have positive value and benefit for both parties in being able to open the eyes both to a lawyer and a client in understanding the core reasons of the dispute. In this way, the perception of the situation is expanded, which is likely to lead closer to the resolution of the dispute.

Concluding this chapter it is worth to present visual scheme of main characteristics of sustainable dispute resolution that were provided (Figure 1).



Fig.1. Characteristics of sustainable dispute resolution

Source: authors

3. Verifying Sustainability in Main Dispute Resolution Processes

In temporal society individuals or groups of people are empowered to make their decisions about the

methods of their conflicts resolution. Depending on their knowledge and experience in this area, they are ought to select negotiation, mediation, arbitration, litigation or wide range of other less popular globally methods of dispute resolution. Generally all dispute

resolution procedures may be divided into two big groups: adversarial (adjudicative) and compromise based (consensual) processes. Adversarial system of dispute resolution relies on the contest between each party's positions and involves an impartial person or group of people, usually a jury or judge, trying to determine the truth of the case (DeBarba 2002). Compromise based dispute resolution processes are such methods, where a right to make a decision is not delegated to any third person. During such processes the main aim mostly is to restore relationship to such level, when people would be able to communicate and find out mutually agreeable solutions. The main methods of such processes in big part coincide with ADR methods. ADR basically is an alternative to a formal court hearing or litigation. It is a collective term for the ways that parties can settle disputes with (or without) the help of a third party (Udoh, Sanni 2014). To compare adversarial and compromise based dispute resolution processes, the main difference is

connected with almost opposite attitudes: the philosophy behind litigation is to apportion blame; and the philosophy behind ADR on the other hand is to build relationship (Udoh, Sanni 2014). It should be stated that people, who are able to communicate constructively tend to find solutions naturally even before the conflict escalated into legal dispute. Hence we may conclude that litigation (as classical form of adversarial processes) is granting a restoration of violated rights, meanwhile compromise based methods work for restoration of social connections between people.

The main methods of adversarial (adjudicative) dispute resolution are litigation and arbitration. Mediation, facilitation and negotiation may be named as basic forms of compromise based (consensual) dispute resolution methods. In practice some hybrid methods are applied. One of the most popular mixed processes is mediation-arbitration (also known as 'med-arb'). In the Figure 2 below the classic ADR continuum scheme is provided.

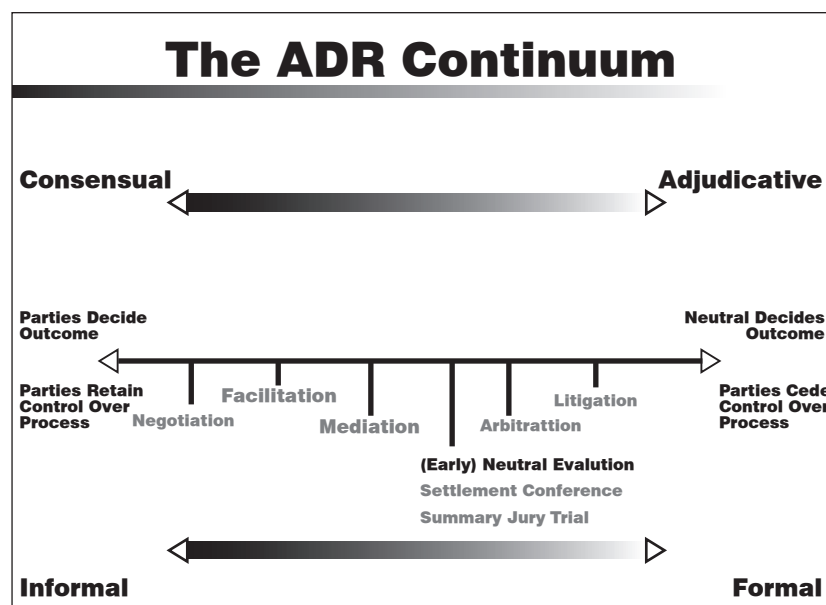


Fig.2. The classic ADR continuum scheme

Source: ADR Continuum (2000)

It can be noted that all spectrum of applicable dispute resolution methods all over the world find their place in presented picture. Having in mind that the most popular processes in contemporary world are litigation, arbitration, mediation-arbitration, mediation and negotiation, further analyses of their conformity to sustainability criteria presented above in this article will be fulfilled.

3.1. Adversarial dispute resolution processes in the light of sustainability

As it was mentioned before, the main methods of adversarial (adjudicative) dispute resolution processes are litigation and arbitration. Both methods of dispute resolution have in fact only few main characteristics. First of all, during the litigation and arbitra-

tion processes the third party is authorized to take a decision, which is legally binding. Secondly, the executing of arbitration award as well as court decision may be a subject to state enforcement. Compromise based dispute resolution methods as mediation or negotiation never enjoy such characteristics.

From one hand, the classic (adversarial) model of civil justice, which is applied broadly, is usually characterized as rather expensive, lengthy and in most of the cases unpredictable for the parties, according to its results, process of dispute resolution, dependable on the ruling of a third person – the judge. One of the main goals of litigation is to establish legal, but not social peace between the parties. As a consequence, the parties tend to be disappointed with litigation results and try to avoid following the decision of the court *bona fide*. Another example of adversarial dispute resolution process is arbitration or quasi-judicial way of solving legal disputes. Though having its own peculiarities that soften formality and publicity of litigation (confidentiality, organizational flexibility etc.), which allow arbitration to stand apart from litigation, arbitration, despite of other its advantages, still must be conceived as adversarial way of solving legal disputes, mostly connected with commercial activities of professional business entities. Both litigation and arbitration processes mostly concentrate on application of law while qualifying the issues of the dispute between the parties. Preservation of good relationship between the parties, their psychological wellness is usually left outside the sight of such processes. Withal remembering huge caseloads of the courts, the effectiveness of dispute resolution processes of adversarial nature is obviously questionable. Respectively the sustainability of adversarial dispute resolution processes is doubtful.

From other hand, society cannot live without a system that has to provide a formal framework and act as enforcer of civilized behavior. Thus litigation must remain the last resort for solving disputes after the other ways of peaceful dispute resolution, whose goal is to establish social peace, appeared to be unsuccessful or inapplicable in certain matters. In case of arbitration – in the field of commercial activities it is substantial to provide an instrument for more effective as litigation dispute resolution, even if it is adversarial. Arbitration always is less time consuming and more specialized to compare with ordinary courts. Thus parties, who are interested in compro-

mise based solutions, should avoid arbitration, as well as litigation.

Litigation cannot be treated as sustainable dispute resolution process also because it does not confirm almost all sustainability criteria, which were provided earlier in this article. Process in ordinary state court in most cases is public and do not take into account emotional side to a conflict. Cases are investigated in formal manner with an aim to find “guilty” person and restore the factual status of parties to a conflict, which was before infringement of certain rights or obligations. Thus such restitution does not involve personal relations, which are essential in big number of cases: family, labor, succession, consumer disputes as well as commercial disputes between long term partners. Quite the same situation is in case of arbitration. Despite of the confidentiality of the procedures and bigger effectiveness of it, arbitration in big part continues to be alike litigation. It lead to a conclusion that adversarial dispute resolution methods cannot be named sustainable, thus they should be used in cases when dispute is found impossible to be solved through more socially oriented and more sustainable compromise based dispute resolution procedures.

3.2. Compromise based dispute resolution processes in the light of sustainability

As a counterweight to adversarial processes such dispute resolution methods as mediation and negotiation, in other words – ADR procedures – are interest oriented, relatively low-cost, relationship-friendly, speedy and controlled by parties themselves, speaking about the results of such processes. The level of satisfaction with these ADR procedures is usually rather high, even in cases when parties do not reach a decision. Because of these characteristics these processes can be characterized as sustainable because seek to establish social, but not legal peace.

In the context of sustainable dispute resolution mediation fits very well. In general mediation can be defined as the attempt to settle a legal dispute through active participation of a third party (mediator) who works to find points of agreement and make those in conflict agree on a fair result. The intervention of the third party in case of mediation differs a lot to compare with litigation or arbitration. Mediator has no right to make a binding decision, he just helps parties to communicate and diverts them towards mutual acceptable

decisions. In mediation in order to gain success parties must be active and ready to compromise. That's why in countries, where adversarial dispute resolution methods prevail, it is quite difficult to make mediation work. The main difficulties are connected with emotional side of the conflict. Parties to a highly escalated dispute mostly cannot communicate between each other. Every attempt to discuss the situation, even in first stages of mediation, often ends unsuccessfully. Thus mediator is a person, who has necessary skills and characteristics, able to help parties to cope with their emotions and start investigate situation more objectively. Mediation is more oriented to societal needs as other dispute resolution methods, because works towards restoration of inter relations of people. Presenting the Scandinavian or reflexive model of mediation Vindelov (2012: 15) describes her view towards mediation: 'Even though, naturally, mediation cannot 'save the world', an approach to conflicts in which one recognizes the needs both of the individual and of society and the essential connection between them – in both major and minor conflicts – is a necessary development. The reflexive mediation model thereby takes longer view and has a sustainable perspective'. Mediation fully satisfies all criteria, which were selected for defining sustainable dispute resolution.

The most popular dispute resolution method all over the world is negotiation. To compare with mediation it enjoys all positive characteristics, thus does not involve the third party. Despite of the fact that the biggest part of legal disputes are successfully resolved without any special procedures, just by negotiation, this alternative dispute resolution method also cannot be named as panacea in all cases. Universally admissible in case of appearance of any disagreement to hold up interpersonal negotiations. Due to these characteristics negotiation generally can be named a sustainable method of dispute resolution. Though in case of unsuccessful performance in it, parties are searching another methods for their dispute resolution. Thus negotiation always require personal active involvement and friendly attitude towards opponent. In case of highly escalated conflicts negotiation in most cases is inclined to fail. In regard to these reasons negotiation appears to be less effective than other compromise based dispute resolution procedures.

3.3. Mediation-arbitration as a mixed process in the light of sustainability

Mediation-arbitration hybrid (also referred to as med-arb) is a relatively new alternative dispute resolution method known since the 1970's. It is argued that this method combines the advantages of both mediation and arbitration and eliminates most of their disadvantages (Vorys 2007). In recent years a lot of variations of mediation and arbitration applied together appeared: at first mediation, if unsuccessful, then arbitration; arbitration begins but certain degree of mediation is allowed; mediation is applied to deal with particular issues, arbitration with others; mediation begins, then arbitration is addressed to the issues on which agreement was not reached, then mediation re-applied; the mediation is carried out and if there is a failure, then the mediator is asked for an "advisory opinion", which is mandatory, unless any of the parties within a period of time vetoes it (Oghigian 2003). Med-arbitration, as we have seen from the above, combines many possible variations and is quite flexible procedure. In principle, both methods of alternative dispute resolution (mediation and arbitration) in terms of sequence and procedural specificities depend on a will and general consensus of the parties, and on the selected mediator's practice as well. This controversial hybrid method combines the ultimate decision-making guarantee (this is achieved through arbitration), and the subtle management of delicate issues, which ensures mediation. Basically med-arbitration eliminates the biggest disadvantage of mediation – final decision is guaranteed and there is no need to litigate. It should be noted that arbitration, if used alone, is not considered to be appropriate to deal with disputes for example from family law or succession, but in combination with mediation, is thought to be a functional tool helping parties to solve it. The largest med-arbitration advantage – time and cost efficiency (Vorys 2007). The reason of cheaper procedure is also the double med-arbiter role. It is argued that because the med-arbiter performs both the role of mediator and arbiter, this also saves parties' time and finances. Despite the fact, that med-arbitration is a relatively new process, it gets a lot of criticism and is not used often, some authors argue that this method is avoided without reason, because, according to its potential and flexibility, there is no reason to ignore it (Vorys 2007).

In the light of sustainable dispute resolution media-

tion-arbitration mixed processes should be evaluated as having a potential to bring parties to a restoration of social peace. Thus here two scenarios mostly are possible. First of all in the case of successful mediation stage such dispute resolution method may be no doubly announced to be sustainable. However, despite of a fact that mediation has potentiality to deal with wide range of disputes, it is also established that it is not panacea and number of dispute will always not be settled during mediation and will request arbitral stage. In case mediation-arbitration process it can be easily done by ending mediation stage and having an opportunity to ask for binding decision in arbitral stage without additional efforts. Thus national legislation often creates some legal obstacle in certain disputes to use arbitration. For example according to the Law on Commercial Arbitration (1996) of the Republic of Lithuania, cases, which should be investigated by administrative procedure, cases, which must be investigated by Constitutional Court of Lithuanian Republic as well as disputes, which raise out of family law or registration of patents, trademarks, designs. Another concern about relationship between sustainability and arbitration-mediation dispute resolution is connected with adversarial nature of arbitration. In case dispute was not settled during the mediation stage, all weaknesses of arbitration in the light of fulfillment of indicated sustainability issues are going to manifest. In regards of this statement, mediation-arbitration may not be considered as fully confirming the requirements for sustainable dispute resolution.

Conclusions

In the context of necessity to implement the concept of sustainable development in all fields of political, social and economic life of every society, the topic of sustainable dispute resolution was raised. Despite of the fact that such concept was almost never researched in the legal aspects, the connections between sustainability and dispute resolution as a way out of socially undesirable situations were already noted. In order to have capacity for distinguishing sustainability aspect in different dispute resolutions processes, main criteria for such assessment were selected and reasoned: 1) Privacy and confidentiality of the process; 2) Preservation and continuity of good relationships between parties to a dispute; 3) necessity to deal with emotional part to a conflict during the dispute

resolution process; 4) necessity of providing individual approach towards possible dispute solutions; 5) need to ground solution on mutual compromise; 6) efficiency of dispute resolution procedures; 7) convenience and accessibility of dispute procedures and 8) perception of situation in different manner.

The research enabled to state that litigation cannot be treated as dispute resolution process bringing to sustainability. The same situation with few apprehensions was determined in case of arbitration too. Despite of such presumptions of sustainability as privacy and confidentiality of the process as well as effectiveness of it, in general arbitration is an adversarial process, where decision is taken by the third party and may be enforced to be implemented by state. In case of compromise based or consensual dispute resolution processes (in other words ADR), the different situation was observed. Negotiation and mediation, as improved form of it, confirm all criteria listed for sustainable dispute resolution. Though in case of negotiation only one main apprehension was found. In case of high level escalation of conflict parties often are not able to communicate constructively and it leads to decreasing of effectiveness of such dispute resolution. In case of one of the most popular adjudicative and consensual dispute resolution processes mediation-arbitration, all advantages of mediation stage covers criteria set up for sustainable dispute resolution processes, thus arbitral stage in case of the dispute reaches it brings the processes back to adversarial model, what cannot be treated to be sustainable in regards of it outcomes.

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