A Comparative Study on Key Mechanisms of ADR - Negotiation, Mediation, Conciliation and Arbitration

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Abstract

This paper attempts to study how **Alternate Dispute Resolution** has started to share the burden of the formal judiciary and is facilitating means through **Negotiation, Mediation, Conciliation and Arbitration to** face a conflicting situation and to create harmony in our society and neighbourhoods. Alternate Dispute Resolution (herein after as ADR) is necessary as a substitute to existing methods of dispute resolution such as litigation, conflict, violence and physical fights or rough handling of situations. It is a movement with a drive from evolving positive approach and attitude towards resolving a dispute.Mediation in India is traced back to the Panchayat system that existed since the Vedic Ages. It is believed to be the oldest mode of out-of-court settlements in India. However, the modern-day methods of alternative dispute resolution in India cannot be directly linked to the Panchayat system due to the colonization of the Indian subcontinent by the British. During the colonial period, various legislations were passed by the British rulers to regulate the locals, especially those that lived near the Presidency towns. Arbitration was widely promoted as a means of settling disputes. The Civil Procedure Code of 1859 and various Regulation Acts such as the ones in 1781, 1787 and 1793 laid down the procedure for arbitration in India Settlement of disputes through reference to a third party is a part of the volkgiest of India since times immemorial. It has undergone a phenomenal metamorphosis, growing from the stage of village elders sitting under a banyan tree and resolving disputes to the stage of gaining a statutory recognition.

The Parliament enacted the Arbitration and Conciliation Act of 1996 with a view to making arbitration less technical and more useful and effective, which not only removes many serious defects of the earlier arbitration law, but also incorporates modern concepts of arbitration. What it now needs is inculcation of the culture of arbitration within the bar, the bench and the arbitral community. ADR is not immune from criticism. Some have seen in it a waste of time; others recognize the risk that it be only initiated to check what is the minimum offer that

the other party would accept.he delay in disposal of cases in Law Courts, for whatever reason it may be, has really defeated the purpose for which the people approach the Courts for their redressal. In many parts of India, rapid development has meant increased caseloads for already overburdened courts, further leading to notoriously slow adjudication. As a result, alternative dispute resolution mechanisms have become more crucial for businesses operating in India as well as those doing businesses with Indian firms.

Key words: ***Arbitration****, Conciliation,* ***Mediation****,* ***Dispute****,* ***Resolution, ADR***

Introduction

"I realized that the true fiction of a lawyer was to unite parties… A large part of my time during the 20 years of my practice as a lawyer was occupied in bringing out private compromise of hundreds of cases. I lost nothing thereby- not even money, certainly not my soul."

– Mahatma Gandhi

In India, the law and practice of private and transactional commercial disputes without court intervention can be dated back to ancient times. Arbitration or mediation as an alternative to dispute resolution by municipal courts has been prevalent in India from Vedic times.

The earliest known treatise is the *Bhradarnayaka Upanishad*, in which various types of arbitral bodies viz (i) the *Puga* (ii) the *Sreni* (iii) the *Kula* are referred to. These arbitral bodies, known as *Panchayats*, dealt with variety of disputes, such as disputes of contractual, matrimonial and even of a criminal nature. The disputants would ordinarily accept the decision of the *panchayat* and hence a settlement arrived consequent to conciliation by the *panchayat* would be as binding as the decision that was on clear legal obligations.

The Muslim rule in India saw the incorporation of the principles of Muslim law in the Indian culture. Those laws were systematically compiled in the form of a commentary and came to be known as *Hedaya.* During Muslim rule, all Muslims in India were governed by Islamic laws- the *Shari'ah* as contained in the *Hedaya.* The *Hedaya* contains provisions for arbitration as well.

The Arabic word for arbitration is *Tahkeem*, while the word for an arbitrator is *Hakam*. An arbitrator was required to posses the qualities essential for a *Kazee*– an official Judge presiding

over a court of law, whose decision was binding on the parties subject to legality and validity of the award. The court has the jurisdiction to enforce such awards given under Shari'ah though it is not entitled to review the merits of the dispute or the reasoning of the arbitrator.

ADR picked up pace in the country, with the coming of the East India Company. The British government gave legislative form to the law of arbitration by promulgating regulations in the three presidency towns: Calcutta, Bombay and Madras. Bengal Resolution Act, 1772 and Bengal Regulation Act, 1781 provided parties to submit the dispute to the arbitrator, appointed after mutual agreement and whose verdict shall be binding on both the parties. These remained in force till the Civil Procedure Code 1859, and were extended in 1862 to the Presidency towns.**Code of Civil Procedure**

The Code of Civil Procedure, 1859 in its sections 312 to 325 dealt with arbitration in suits while sections 326 and 327 provided for arbitration without court intervention. The Code of Civil Procedure (Act 5 of 1908) repealed the Act of 1882. The Code of Civil Procedure, 1908 has laid down that cases must be encouraged to go in for ADR under section 89(1). Under the First Schedule, Order XXXII A, Rule 3 a duty is cast upon the courts that it shall make an endeavor to assist the parties in the first instance, in arriving at a settlement in respect of the subject matter of the suit.

The second schedule related to arbitration in suits while briefly providing arbitration without intervention of a court. Order I, Rule 1 of the schedule says that where in any suit, all the parties agree that any matter in difference between them shall be referred to arbitration, they may, at any time before judgment is pronounced; apply to the court for an order of reference. This schedule, in a way supplemented the provisions of the Arbitration Act of 1899.

Indian Arbitration Act, 1899: This Act was substantially based on the British Arbitration Act of 1889. It expanded the area of arbitration by defining the expression 'submission' to mean "a written agreement to submit present and future differences to arbitration whether an arbitrator is named therein or not".

Arbitration and Conciliation Act, 1996:

The government enacted the Arbitration and Conciliation Act, 1996 in an effort to modernize the 1940 Act. In 1978, the UNCITRAL Secretariat, the Asian African Legal Consultative Committee (AALCC), the International Council for Commercial Arbitration (ICCA) and the International Chamber of Commerce (ICC) met for a consultative meeting, where the participants were of the unanimous view that it would be in the interest of International Commercial Arbitration if UNCITRAL would initiate steps leading to the establishment of uniform standards of arbitral procedure.

The preparation of a Model Law on arbitration was considered the most appropriate way to achieve the desired uniformity. The full text of this Model Law was adopted on 21st June 1985 by UNCITRAL. This is a remarkable legacy given by the United Nations to International Commercial Arbitration, which has influenced Indian Law. In India, the Model Law has been adopted almost in its entirety in the 1996 Act.

This Act repealed all the three previous statutes. Its primary purpose was to encourage arbitration as a cost-effective and quick mechanism for the settlement of commercial disputes. It covers both domestic arbitration and international commercial arbitration. It marked an epoch in the struggle to find an alternative to the traditional adversarial system of litigation in India.

Objective:

This paper intends to exploreand analyze **Alternative Dispute Resolution (ADR) mechanism of dispute resolution that is non adversarial**, i.e. working together co-operatively to reach the best resolution for everyone. Also how ADR can be instrumental in reducing the burden of litigation on courts, while delivering a well-rounded and satisfying experience for the parties involved.

MODES AND PRACTICES OF ADR IN INDIA AND ITS GROWTH

ADR can be broadly classified into two categories: court-annexed options (Mediation, Conciliation) and community based dispute resolution mechanism (Lok-Adalat).

The following are the modes of ADR practiced in India:

1. Arbitration
2. Mediation
3. Conciliation
4. Lok Adalat

Arbitration:

The definition of 'arbitration' in section 2(1) (a) verbatim reproduces the text of article 2(a) of the Model Law-'arbitration means any arbitration whether or not administered by a permanent arbitral institution'. It is a procedure in which the dispute is submitted to an arbitral tribunal which makes a decision (an "award") on the dispute that is binding on the parties.

It is a private, generally informal and non-judicial trial procedure for adjudicating disputes. There are four requirements of the concept of arbitration: an arbitration agreement; a dispute; a reference to a third party for its determination; and an award by the third party.

The essence lies in the point that it is a forum chosen by the parties with an intention that it must act judicially after taking into account relevant evidence before it and the submission of the parties. Hence it follows that if the forum chosen is not required to act judicially, the process it is not arbitration.

Types of arbitration are:

Ad Hoc Arbitration

An ad hoc arbitration is one which is not administered by an institution and therefore, the parties are required to determine all aspects of the arbitration like the number of arbitrators, manner of their appointment, etc. Provided the parties approach the arbitration in a spirit of cooperation, ad hoc proceedings can be more flexible, cheaper and faster than an administered proceeding. The advantage is that, it is agreed to and arranged by the parties themselves. However, the ground realities show that arbitration in India, particularly ad hoc arbitration, is becoming quite expensive vis-à-vis traditional litigation.

Institutional Arbitration

An institutional arbitration is one in which a specialized institution with a permanent character intervenes and assumes the functions of aiding and administering the arbitral process, as according to the rules of that institution. It is important to note that these institutions do not arbitrate the dispute, it is the arbitrators who arbitrate, and so the term arbitration institution is inapt and only the rules of the institution apply.

Incorporation of book of rules in the "arbitration agreement" is one of the principle advantages of institutional arbitration. Institutional Arbitration, throughout the world, is recognized as the primary mode of resolution of international commercial disputes. It is an arbitration administered by an arbitral institution.

Further, in many arbitral institutions such as the International Chamber of Commerce (ICC), before the award is finalized and given, an experienced panel scrutinizes it. As a result, the possibilities of the court setting aside the award is minimal.

Statutory Arbitration

When a law specifies that if a dispute arises in a particular case it has to be referred to arbitration, the arbitration proceedings are called "statutory arbitration". Section 2(4) of the Arbitration and Conciliation Act 1996 provides, with the exception of section 40(1), section 41 and section 43, that the provisions of Part I shall apply to every arbitration under any other act for the time being in force in India.

Fast track arbitration

Fast track arbitration is a time-bound arbitration, with stricter rules of procedure, which do not allow any laxity for extensions of time, and the resultant delays, and the reduced span of time makes it more cost effective. Sections 11(2) and 13(2) of the 1996 Act provides that the parties are free to agree on a procedure for appointing an arbitrator and choose the fastest way to challenge an arbitral award respectively. The Indian Council of Arbitration (ICA) has pioneered the concept of fast track arbitration in India and under its rules, parties may request the arbitral tribunal to settle disputes within a fixed timeframe.

Mediation:

Mediation is a process in which the mediator, an external person, neutral to the dispute, works with the parties to find a solution which is acceptable to all of them. The basic motive of mediation is to provide the parties with an opportunity to negotiate, converse and explore options aided by a neutral third party, to exhaustively determine if a settlement is possible.

Mediation is negotiation carried out with the assistance of a third party. The mediator, in contrast to the arbitrator or judge, has no power to impose an outcome on disputing parties.

Despite the lack of 'teeth' in the mediation process, the involvement of a mediator alters the dynamics of negotiations. The concept of mediation is not foreign to Indian legal system, as there existed, different aspects of mediation.

The Village Panchayats and the Nyaya Panchayats are good examples for this. A brief perusal of the laws pertaining to mediation highlights that it has been largely confined to commercial transactions. The Arbitration and Conciliation Act, 1996 is framed in such a manner that it is concerned mainly with commercial transactions that involves the common man rather than the common man's interest.

In India, mediation has not yet been very popular. One of the reasons for this is that mediation is not a formal proceeding and it cannot be enforced by courts of law. There is a lack of initiative on the part of the government or any other institutions to take up the cause of encouraging and spreading awareness to the people at large.

Conciliation:

Conciliation is "a process in which a neutral person meets with the parties to a dispute which might be resolved; a relatively unstructured method of dispute resolution in which a third party facilitates communication between parties in an attempt to help them settle their differences".

This consists in an attempt by a third party, designated by the litigants, to reconcile them either before they resort to litigation (whether to court or arbitration), or after. The attempt to conciliate is generally based on showing each side the contrary aspects of the dispute, in order to bring each side together and to reach a solution.

Section 61 of the 1996 Act provides for conciliation of disputes arising out of legal relationship, whether contractual or not and to all proceedings relating thereto. After its enactment, there can be no objection, for not permitting the parties to enter into a conciliation agreement regarding the settlement of even future disputes.

There is a subtle difference between mediation and conciliation. While in meditation, the third party, neutral intermediary, termed as mediator plays more active role by giving independent compromise formulas after hearing both the parties; in conciliation, the third neutral intermediary's role, is to bring the parties together in a frame of mind to forget their animosities and be prepared for an acceptable compromise on terms midway between the stands taken before the commencement of conciliation proceedings.

Lok Adalat

NALSA along with other Legal Services Institutions conducts Lok Adalats. Lok Adalat is one of the alternative dispute redressal mechanisms, it is a forum where disputes/cases pending in the court of law or at pre-litigation stage are settled/ compromised amicably. Lok Adalats have been given statutory status under the Legal Services Authorities Act, 1987. Under the said Act, the award (decision) made by the Lok Adalats is deemed to be a decree of a civil court and is final and binding on all parties and no appeal against such an award lies before any court of law. If the parties are not satisfied with the award of the Lok Adalat though there is no provision for an appeal against such an award, but they are free to initiate litigation by approaching the court of appropriate jurisdiction by filing a case by following the required procedure, in exercise of their right to litigate.

There is no court fee payable when a matter is filed in a Lok Adalat. If a matter pending in the court of law is referred to the Lok Adalat and is settled subsequently, the court fee originally paid in the court on the complaints/petition is also refunded back to the parties. The persons deciding the cases in the Lok Adalats are called the Members of the Lok Adalats, they have the role of statutory conciliators only and do not have any judicial role; therefore they can only persuade the parties to come to a conclusion for settling the dispute outside the court in the Lok Adalat and shall not pressurize or coerce any of the parties to compromise or settle cases or matters either directly or indirectly. The Lok Adalat shall not decide the matter so referred at its own instance, instead the same would be decided on the basis of the compromise or settlement between the

parties. The members shall assist the parties in an independent and impartial manner in their attempt to reach amicable settlement of their dispute.

The evolution of ADR and recommendation

The evolution of ADR mechanisms was not of that much success. Thereby, the trend is the imposition of responsibility and duty on Court

i) Courts are authorized to give directives for the adoption of ADR mechanisms by the parties and for that purpose Court has to play important role by way of giving guidance. Power is also conferred upon the courts so that it can intervene in different stages of proceedings. But these goals cannot be achieved unless requisite infrastructure is provided and institutional frame work is put to place.

ii) The institutional framework must be brought about at three stages, which are:

1. Awareness: It can be brought about by holding seminars, workshops, etc. ADR literacy program has to be done for mass awareness and awareness camp should be to change the mindset of all concerned disputants, the lawyers and judges.

2. Acceptance: In this regard training of the ADR practitioners should be made by some University together with other institutions. Extensive training would also be necessary to be imparted to those who intend to act as a facilitator, mediators, and conciliators. Imparting of training should be made a part of continuing education on different facets of ADR so far as judicial officers and judges are concerned.

3. Implementation: For this purpose, judicial officers must be trained to identify cases which would be suitable for taking recourse to a particular form of ADR.

iii) ADR Mechanisms to be made more viable: The inflow of cases cannot be stopped because the doors of justice cannot be closed. But there is a dire need to increase the outflow either by strengthening the capacity of the existing system or by way of finding some additional outlets.

iv)Setting up of Mediation Centres in all districts of each state with a view to mediate all disputes will bring about a profound change in the Indian Legal system. These Mediation centres would function with an efficient team of mediators who are selected from the local community itself.

v) Not many Indians can afford litigation. This kind of state of affairs makes common people, especially rural people, cynical about judicial process. We must take the ADR mechanism beyond the cities. Gram Nyayalayas should process 60 to 70 percent of rural litigation leaving the regular courts to devote their time to complex civil and criminal matters.

vi) More and more ADR centres should be created for settling disputes out-of-court. ADR methods will achieve the objective of rendering social justice to the people, which is the goal of a successful judicial system.

vii) The major lacuna in ADR is that it is not binding. One could still appeal against the award or delay the implementation of the award. “Justice delayed is justice denied.” The very essence of ADR is lost if it is not implemented in the true spirit. The award should be made binding on the parties and no appeal to the court should be allowed unless it is arrived at fraudulently or if it against public policy.

Conclusion

With the advent of the alternate dispute resolution, there is new avenue for the people to settle their disputes. The settlement of disputes in Lok Adalat quickly has acquired good popularity among the public and this has really given rise to a new force to ADR and this will no doubt reduce the pendency in law Courts. There is an urgent need for justice dispensation through ADR mechanisms.

The ADR movement needs to be carried forward with greater speed. This will considerably reduce the load on the courts apart from providing instant justice at the door-step, without substantial cost being involved. If they are successfully given effect then it will really achieve the goal of rendering social justice to the parties to the dispute.

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