CMR University Journal for Dispute Settlement and Arbitration
Vol. 3 (01), June 2024, PP. 01-16

ADR (Alternate Dispute Resolution) Mechanism in India

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Abstract

ADR (Alternate Dispute Resolution) mechanism is fast emerging dispute redressal and mitigation mechanism in India today as an alternative of litigation resolution through court proceedings which is very lengthy, time consuming, highly formal and costly affairs. In this Article, the Authors, having the experience of the practical world in corporate as well as academic world has analyzed the growth of ADR Mechanism in India, its different types, the present day scenario as well as what impediments, it had experienced after coming into force of the Arbitration and Conciliation Act' 1996.The Authors have also attempted to analyze what challenges are lying ahead and what actions are warranted to make this mechanism of ADR as more practical, result oriented and successful.

Keywords: dispute, conflict, arbitration, mediation, negation, Lok Adalat

Preliminary: Understanding Alternative Dispute Resolution (ADR) – A Panacea

"Resolving conflict is rarely about who is right. It is about acknowledgement and appreciation of differences." – Thomas Crum

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Introduction: Having an Understanding of Alternative Dispute Resolution Mechanism as an Effective Tool of Dispute Mitigation

Even a toddler in the world of social science would agree with us that predicaments do arise in a society in a natural way and over the decades the world has devised various ways and means by which these conflicts are attempted to be resolved, some socially within the boundaries of civil society and some legally through the intervention of the court. Disputes although inevitable, litigation is not and hence the modus operandi system may be subject to variable changes and also guided by social dynamics.

One such method is known as the Alternative Dispute Resolution (hereinafter referred to as "ADR") may be defined as a "procedure for settling a dispute by means other than litigation, such as arbitration or mediation." ADR is not "alternative" in real sense but just a complementary provision which can be utilized, and which can co-exist along with existing traditional court system and institutions of legal jurisprudence.

From the above introductory para, we observe that ADR is a mechanism of dispute resolution which is non adversarial as it works on the principles of working together in close cooperation with each other to find out the best possible resolution of the issues in question which is acceptable for everyone.

Why ADR Was Evolved as an Effective Tool of Dispute Mitigation

- Abnormal pendency of litigation in different courts and their functioning in a rigid, formal and water tight compartment was also causing huge addition of litigation as against actual reduction. Under this backdrop, ADR emerged as a very effective tool in mitigating and reducing the burden of litigation in different courts. As it generally takes care of the needs of both the litigating parties, it developed more and more acceptance as well as the satisfying experience for the parties involved.

- ADR provides much broader domain to the contesting parties for presentation of their issues in a more comprehensive manner as compared to the court proceedings which is extremely rigid in nature and the contesting parties may expect through creative, interactive and collaborative bargaining during ADR proceedings, to safeguard their interests and driving home their demands.

- As far as India is concerned, the system of dispensing and delivery of justice was under great stress mainly because of the huge pendency of litigation matters in different courts from lowest level to the highest level. This was a world phenomenon as well inasmuch as the number of cases filed in the courts the world over has shown a tremendous increase in recent years resulting in pendency and delays which forced judicial institutions, judges and scholars in the field of legal jurisprudence to look for alternative means of dispute resolution which resulted in the evolution of ADR methods.

Alternative Dispute Resolution Mechanism and its Classification

Arbitration

It is a process of dispute resolution as per the prescribed modalities under the Arbitration and Conciliation Act, 1996.

The features of arbitration include:

- First of all, an "arbitration agreement" is made by the parties to submit to arbitration all or certain disputes which may have arisen or may arise between the parties who are bound by a defined legal relationship.
- Such legal relationship may or may not be contractual.
- As per prescribed provisions under Section 10(1), parties by mutual consent determine the number of arbitrators which shall not be an even number. That is how the Arbitral Tribunal is constituted.

- In the event of failure of determination of arbitrator under Section 10(1), the Arbitral Tribunal shall consist of a single person who is called Sole Arbitrator.
- The parties submit their dispute/statement of claim vis-à-vis-defense statements to the arbitral tribunal which holds its proceedings, passes its final order (an "award") on the dispute which is binding on the parties unless appealed before higher judicial institution.
- Proceedings before the Arbitral Tribunal are not as formal as in the case of a trial. The requirements of the Evidence Act, 1872 are not strictly followed though the Arbitral Tribunal adheres to the Principles of Natural Justice while conducting its proceedings.
- Generally, the award of an Arbitral Tribunal is binding on the parties and enforceable in the same manner as if it were a decree of the Court [Section 35 read with Section 36 of the Arbitration and Conciliation Act 1996 (“Act”) but is appealable on certain prescribed conditions under Section 34 read with Section 37 of the Act.
- Except for some interim measures as prescribed under Section 9 of the Act, the possibilities for judicial intervention in the arbitration process is limited.

Arbitration and Arbitration Award: What the Two Terms Connote

Arbitration, as explained above, is a statutory mechanism of Alternative Dispute Resolution under The Arbitration and Conciliation Act,1996 wherein the conflict/disputes/issues under contest between the parties with each other are referred to a neutral party called the arbitrator for resolution. The arbitrator hears both the sides, takes on records their individual claims with evidence and upon conclusion of proceedings, he passes his orders resolving the disputes which is called award, and it is binding upon the contesting parties, but the aggrieved party is at liberty to move before superior legal institutions challenging the award. Hence, an arbitrator’s role is to exhibit fairness, neutrality and judicious mind in passing his award based on reasoned analysis of evidences adduced so that it stands the test of law, if challenged.

Whereas, “arbitration agreements” are contracts between the two parties mutually agreed, consented in writing and duly signed thereby agreeing for referral of any future disputes to a Neutral Person, appointed by both as Judge-cum-Arbitrator and his decisions, in the form of a

reasoned order called "Award", on the issues referred to him shall be final and binding upon both the parties and enforceable in the same manner as if it were the decree of a Court. Such clauses in contracts are called "arbitration clause"

The arbitration agreements and related clauses must be carefully drafted and clearly worded to eliminate any ambiguity as its principal role is to reduce litigations by arranging an outlet for out of court settlement/resolution/mitigation of disputes by avoiding litigation with savings on use of resources, time and money.

The underlying legal principle which has allowed the Arbitral Tribunal to rule and decide on its own jurisdiction is the essential necessity for striking a balance between Tribunal discretion and independence on issues of administrative jurisprudence vis-à-vis recourse to the court permitted to an aggrieved party when is felt necessary for an effective justice delivery system.

Many a time, it has been observed that under the garb of fracture of justice, one of the contesting parties to the litigation had been appealing and questioning the jurisdiction of the Arbitrational Tribunal which was stalling the process of Arbitration. Hence to overcome such bottlenecks, through Section-16(1) of the new Act, powers have been given to the Arbitration Tribunal to rule on its jurisdiction. Under Section-16(5), they were also empowered to pass such orders on questions related to its jurisdiction and such orders are not appealable if claim questioning jurisdiction is rejected. However, appeal under Section-37(2) can be filed if the Tribunal accepts such claim and upon adjudication by the Appellate Court, the subject issues may be referred back to the original Arbitration Tribunal.

Such vested powers have its own pros and cons, as enlisted below.

Advantages of Arbitration

1. More authority now as order of Arbitrational Tribunal rejecting a plea on jurisdiction is not appealable.
2. Expediting justice delivery system.

3. Avoidance of unwanted litigation.

Disadvantages of Arbitration

1. The powers are not absolute. An appellate court may refer back the non-entertained matter to the original Arbitration Tribunal.
2. No powers when Arbitrator decided by Chief Justice or his designate as ruled by Apex Court.

Conciliation

The term "Conciliation" refers to a process of dispute resolution without formal litigation. The concept of conciliation was included in the Arbitration and Conciliation Act 1996 as a statutory recourse for dispute resolution/mitigation based on the UNCITRAL Model.

Some of the essential features of conciliation are:

- A non-binding procedure wherein a neutral and impartial third party, renders his services and assists the parties to a dispute in arriving at a mutually acceptable, satisfactory and agreed settlement of the dispute.
- The third party, who renders his services in resolving the dispute, is called a conciliator.
- As compared to arbitration, it is less formal.
- In India, it was first experimented by Himachal Pradesh High Court as a project for dispute resolution as they started insisting for pre-trial conciliation in all the fresh cases. The project was highly successful.
- The parties are free to accept or reject the recommendations of the conciliator.
- However, if both parties accept the settlement document drawn by the conciliator, it shall be final and binding on both.
- In case the parties fail to arrive at a mutually acceptable resolution of disputes, the Conciliator submits his Failure of Conciliation (FoC) Report to the appropriate authorities.

Mediation

According to Black's Law Dictionary, "Mediation is a method of non-binding dispute resolution involving a neutral third party who tries to bring the disputing parties to reach a mutually agreeable solution".

Mediation, as a process of dispute resolution, is more voluntary in nature where the third party or the mediator does not give his decision on the dispute by himself and rather, he renders his assistance to the disputing parties in resolving their disputes by themselves by working out a mutually agreeable and acceptable resolution to the dispute.

Some of the essential features of mediation are:

- The impartial third party called a "mediator" renders his assistance to the disputing parties to try and reach a mutually acceptable resolution of the dispute.
- The mediator does not decide the dispute by himself but acts as a chain of communication between the two parties so that they can understand each other points of views on the issues, develop a better understanding of each other contention for arriving at a mutually acceptable settlement of the dispute and mitigate the issues.
- Any person who undergoes the required 40 hours training stipulated by the Mediation and Conciliation Project Committee of the Supreme Court (SC) can be appointed as a mediator.
- As per the Mediation and Conciliation Project Committee guidelines, such person is also required to have at least ten mediations resulting in a settlement and at least 20 mediations in all to be eligible to be accredited as a qualified mediator.
- Mediation is completely a non-coercive process where the Mediator merely acts as a facilitator, and he leaves control of the dispute resolution process upon the parties in a much-improved semi formal environment. The essence of mediation is flexibility.
- The process is completely voluntary.

Mediation as a form of alternative dispute resolution, a third-party acts as a bridge between the two contesting parties and he persuades them to come to some agreement by utilizing his goodwill, knowledge and skills. The concept found its essence in Section-89 of the Code of Civil Procedure,

1908 which speaks about court annexed and court referred mediations, but it is still a more informal process for dispute's resolution and not legally enforceable as acceptability of settlement during mediation depends upon the willingness of the parties.

Arbitration, on the other hand, is an established and structured legal procedure under Arbitration and Conciliation Act, 1996 while it was introduction of Section-89 in Code of Civil Procedure, 1908 wherein the concept of court annexed, and court referred mediation made its entry in legal jurisprudence. In an arbitration, the arbitrator examines the legal rights and wrongs of the disputes and the claims of the contesting parties based upon which he arrives at his own independent decision and passes an award which is binding upon the contesting parties unless appealed by the aggrieved contesting party before superior judicial authority on some reasonable and lawful grounds.

As against some formalized process under arbitration, in mediation, the nediator helps the parties to settle their disputes by a process of discussion and dialogue for narrowing differences and thereby the contesting parties arrive at an agreed position. The enforceability of the mediator's settlement depends upon the willingness of the parties as it is still not a legally enforceable instrument.

However, mediation and arbitration, as distinct techniques of ADR, may be also combined in cases where upon mediation, the contesting parties have come to some agreed solutions or where the impasse continues. In such cases, the Mediator may be appointed as An Arbitrator with mutual consent of the parties which allows him to give his decisions quickly and pass a binding Award as an Arbitrator. This process is known as "Med-Arb" or "Med-Arbiter".

Negotiation

The simplest meaning of negotiation is that of initiation of discussion between the disputing parties with a view to bring amicable settlement to a dispute. As per Pepperdine University of USA, the term "negotiation has been defined in the following way:

"Negotiation is a communication process used to put deals together to resolve conflicts. It is a voluntary, non-binding procedure in which the parties control the outcome as well as the procedures by which they will make an agreement. Because most parties place very few or rather limited restrictions or limitations on the negotiation process, it allows for a wide range of possible solutions maximizing the possibility of joint gains."

Some essential ingredients of negotiations are:

- Presence of two or more parties, groups, individuals or organizations
- Interaction is an interpersonal or intergroup process.
- Presence of conflict of interest between parties
- Desire of the conflicting parties to work out a mutually acceptable resolution of the issues under conflict to mitigate the dispute.
- A voluntary exercise and a give and take process.
- A non-binding procedure in which discussions between the parties are initiated without the intervention of any third party.
- The object of negotiation is to arrive at a negotiated settlement to the dispute. It is the most common method of alternative dispute resolution.
- Negotiation occurs in every walks of life, in our day-to-day routine, in business, non-profit organizations, government branches, legal proceedings, among nations and in personal situations such as marriage, divorce, parenting, and everyday life.

Lok Adalat

The Legal Services Authorities Act was passed in 1987 to encourage out-of-court settlements which paves the way for the institution of a new judicial mechanism for settlement of disputes in India. The new Act gave birth to the new judicial institution of Lok Adalat by prescribing detailed provisions under its Section 19 to Section 22 for the organization of Lok Adalats, their powers, jurisdiction and functioning. The process of cognizance of cases by Lok Adalats was prescribed under Section 20. Powers of Lok Adalats or Permanent Lok Adalats were prescribed under Section 22.

Ever since its inception, Lok Adalats have been very successful in reducing litigation and pendency of cases before different courts. In 2024, the first national Lok Adalat was organized by National Legal Services authority (NALSA) on March 24 and over 11.3 million cases were settled which proves its effectiveness as an alternative mechanism for dispute resolution.

It can, therefore, be inferred with utmost confidence now that Lok Adalat or "people's court" is now a well- established judicial system in India for resolving disputes and mitigating litigation. It comprises an informal setting which facilitates negotiations in the presence of a judicial officer wherein cases are dispensed without undue emphasis on legal technicalities.

The beauty of the justice delivery system through Lok-Adalat is that the order of the Lok-Adalat is final and binding on the parties and is not appealable in a court.

Plea Bargaining as an Alternative Dispute Resolution Mechanism in Criminal Proceedings

- The concept of Plea-bargaining can be best described as a "pre-trial negotiation between the accused and the prosecution during which the accused agrees to plead guilty in exchange for certain concessions by the prosecution."
- Procedure for plea-bargaining was included in the Code of Criminal Procedure in 2005.
- It is today a highly effective alternative dispute resolution mechanism in India as it provides benefits to the accused (one Party) as well as to the victim (the other party) without extended court proceedings and legal battle. Under Plea-bargaining, the victim can easily get compensation in a less time consuming and money consuming process. The accused, by accepting his guilt under plea-bargaining, gets much lesser punishment than what is prescribed.
- Plea bargaining is, however, available only for offences where the prescribed punishment is imprisonment up to seven (07) years.
- Plea bargaining is also not allowed for offences that affect the socio-economic conditions of the country.

- Plea bargaining is also not permitted when offence is committed against a woman or a child below 14 years of age.

Compounding of Offences as ADR

By making amendments in CrPC, Section 320 has been introduced which has provided a detailed list of offences which can be compounded directly and some other which can be compounded only with the permission of the court. The provisions for compounding of offences have also been provided under the Companies Act 2013 read with the Companies (Compounding of offence) Rules 2016.

These provisions for "compounding of offences" have today emerged as very effective tools for settlement and redressal of disputes at pre-trial stage saving lots of time, money and energy in extended court battles and are therefore highly efficient tools for alternate dispute resolution. The most significant attribute of "compounding of offence" is that once the offence is compounded and order is passed, the issues under dispute attain finality and no appeal stands against such compounding.

Advantages of ADR

1. Maintenance of confidentiality as ADR proceedings take place outside court room and is an inhouse proceedings.
2. More economic, less time consuming, more viable, effective and efficient.
3. No strict requirements of following the Evidence Act procedures and such procedural flexibility saves valuable time and money.
4. Greater say to the parties under dispute as they chose the Arbitral Tribunal by mutual consent and the Tribunal also adheres to the principles of natural justice and allows the disputing parties to freely present their cases.
5. A stress-free environment as compared to a conventional trial where parties are represented only through their advocates before a Judge.

6. Less procedural rigidity as compared to a conventional trial.
7. The decisions arrived at through ADR Mechanism generally provide more creative solutions, improved relationships, greater satisfaction, and sustainable outcomes.
8. The possibility of ensuring that specialized expertise is available in the persona of an Arbitrator or arbitration tribunal or mediator, conciliator or neutral adviser as he or she may be a domain expert and need not necessarily be a person with a legal background.
9. A judicial decision need not be acceptable to both the contesting parties and the possibility of further litigation is always bright as the aggrieved party may always approach the higher judicial institution against a judicial order but in case of ADR, the possibility of future litigation is much lesser as the disputing parties, through constant dialogue and interactions, have greater control over the outcome of ADR through meeting of minds and finding out mutually acceptable resolution to the issues under dispute.

Online Dispute Resolution (ODR): The Future

ODR or Online Dispute Resolution is a new form of ADR mechanism where the proceedings are conducted virtually, and technology is used for faceless presentation of the statement of claims and statement of defense by the disputing parties and holding of arbitration proceedings by the Arbitral Tribunal by sitting in a virtual office.

In its budding phase, ODR as an ADR technique has shared its fundamentals with existing ADR mechanisms of negotiation, mediation and arbitration also uses ICT tools to enable parties to resolve their disputes. It was first practiced in the USA and later adopted by other countries. Today, Singapore's seat of arbitration has been offering an ODR platform for dispute resolution in a big way.

Advantages of ODR

Some of the advantages of ODR are:

1. Possibility of resolving disputes remotely.
2. Cost effective as administrative cost is reduced and there is no need to travel as well.
3. More efficient
4. Time saving
5. Convenient
6. Flexible. Today, there are a number of platforms which accommodate a variety of dispute types and can be tailored to suit the specific requirements of industries and organizations.

Disadvantages of ODR

1. Lack of trained Arbitrators to meet the volume of cases
2. Faceless interaction often creates lack of trust
3. Dealing with people who are not well conversant with the digital platform and digital working is a big challenge
4. Lack of awareness

Some Other Developments in the Field of ADR

- In 2021, the Arbitration and Conciliation (Amendment) Bill, 2021 was passed by the Lok Sabha with an objective to check abuse by "fly-by-night operators" who take unfair advantage of the existing laws to get favourable awards by fraud.
- The Arbitration and Conciliation (Amendment) Bill, 2021 intends to replace the Arbitration and Conciliation (Amendment) ordinance issued in November, 2020.
- Further in July 2022, the Parliamentary Standing Committee on Law and Justice recommended substantial changes to the Mediation Bill, 2021.
- The NITI Aayog in 2023 has also released a report titled "The Future of Dispute Resolution" wherein it has discussed the concept of Online Dispute Resolution (ODR) and has also analyzed its evolution, significance and present status in India.

ADR As It Stands Today

One of the great successes of ADR as a dispute resolution tool lies in the fact that it has been exceedingly successful in clearing the backlog of cases at various levels of the judiciary. Lok Adalats alone have been disposing off more than 50 lakh cases every year on an average in the last three years.

However, the Authors observe that there seems to be still a lack of awareness about the availability of different ADR mechanisms as well as its effectiveness in mitigating disputes for which mass awareness programme is required.

Accordingly, the Authors suggest that the National and State Legal Services Authorities, Judicial institutions, Scholars, Jurists should propagate more information regarding these, so that the potential litigants are more and more encouraged to explore ADR tools as the first option to resolve and mitigate disputes.

The future of dispute resolution revolves around ICT innovations, AI modules and new ideas to make dispute resolution more and more efficient, user friendly and easily accessible for every section of the society.

The Authors also feel that ODR as an ADR technique has the vast potential and capabilities for decentralizing dispute resolution mechanism from court rooms, few ADR Centers to virtual interactive faceless ADR procedures and processes in India and thereby empowering innovators across communities to create targeted ODR processes to resolve disputes efficiently.

Alternate Dispute Resolution is today a well-established and codified legal procedure for disputes settlement through the processes like arbitration, mediation, negotiation, conciliation, Lok Adalat and Nyaya Panchayat, aiming for reducing litigation and burden on Judicial system. ADR has many advantages like allowing contesting parties to deal with the underlying issues of disputes in more cost effective and efficient manner, reduction of hostility, improved communication for future business deals, saving of time and money etc.

However, it is still not a widely practiced legal module and some reasons are as follows:

1. **No guaranteed disputes' resolution**: Either party may disagree with the final Award and being aggrieved, may move to superior legal institutions.
2. There is also **absence of trained adjudicators functioning as Mediator** in India as a result there is acute shortage of personnel who can function as **Facilitators.**
3. **Absence of Judicial referrals**: As per the recommendations of the Malimath Committee, a new Section-89 was introduced under the Code of Civil Procedure, 1908 through which concept of Court Annexed and Court Referred mediation was introduced but such referrals are still rarely practiced by Judiciary resulting into Mediation being still not an enforceable legal instrumentality.
4. **Lack of awareness:** Rural India with low literacy level is not much aware about ADR. Awareness level is also low amongst practicing Advocates, Judges and litigants about the usefulness and effectiveness of ADR and in particular Mediation as an effective and efficient ADR technique.
5. **Negative Mindset of Industries:** Industry professionals, being suspicious of results and implications, still prefer to prolong litigation than to agree for ADR or implement any Award.

The Concluding Words

Based on detailed deliberations as presented above, the following is observed:
The Authors would like to emphasize the need for strengthening the mechanism of "Mediation" more for which we advocate that this arm of ADR may be supported by some new legislative measures as well as it is more efficient and less time- consuming methodology of dispute resolution.

The Authors feel that if mediation is administered through a new law, we can cause Mediation Settlement as compulsory obligation and binding upon the parties and only after failure of mediation proceedings litigation may be referred for Arbitration, Pre-litigation mediation may be

made compulsory business clause followed by arbitration if mediation fails. Such proactive endeavors would result in:

1. More teeth to Mediation and legal force to Mediation Agreements.
2. Reduction in litigation matters. A practical scenario is that large number of cases are filed regularly and simply due to the fact that one party to mediation does not honour mediation settlement and prefer to get the other party engaged in litigation one after another.
3. Savings on litigation cost, time and resources. With mediation agreements becoming binding and enforceable, unwanted litigation and prolonged lawsuits shall be greatly reduced.
4. Reduced litigation and time pendency for parties would lead to improving the Justice delivery system of Judiciary.