

Emerging Issues in Arbitration, Mediation and Conciliation

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Abstract: *The resolution of disputes through alternative dispute resolution mechanisms has gained momentum over recent decades. It has increasingly occupied space in the academic literature as the “new” method to achieve “justice” for disputing parties. It is important to note that a variety of definitions of “justice” can be relied upon. However, in many cases, justice will mean the parties being able to resolve their dispute fairly, justly and amicably by applying law or legal principles. Traditional legal mechanisms for resolving disputes have been increasingly questioned as to whether they are actually capable of achieving justice in individual cases. Resolution in the courts is not only the method of resolving disputes. If the parties can resolve their own disputes then there will arise no need for court system in world. All though court system is good and fair way of dealing with civil disputes yet it might not be the best method to resolve the disputes. Basically there are four ways to of alternate dispute resolution. They are Negotiation, Mediation, Conciliation and Arbitration. The of ADR is to resolve the matters in a cost effective manner and foster long term relationship.*

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

1. Introduction

The origin of arbitration can be traced back to the old age system of Village Panchayats prevalent in ancient India. The decisions of Panchas while sitting collectively as Panchayat commanded great respect because of the popular belief that they were the embodiment of voice of God and therefore had to be accepted and obeyed unquestionably. In course of time this mode of divine dispensation of justice through Panch Parmeswar underwent radical changes with the changing pattern of society and growth of human knowledge and civilization.

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. The delay in disposal of cases in Law Courts, for whatever reason it may be, has really defeated the purpose for which the people approached 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. So 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.¹

Further, in this paper we will discuss what different modes of ADR adopted in India are and what are the emerging issues in those modes.

2. What is Alternate Dispute Resolution?

The term "alternative dispute resolution" or "ADR" is often used to describe a wide variety of dispute resolution mechanisms that are short of, or alternative to, full-scale court processes. The term can refer to everything from facilitated settlement negotiations in which disputants are encouraged to negotiate directly with each other prior to some other legal process, to arbitration systems or minitrials that look and feel very much like a courtroom process. Processes designed to manage community tension or facilitate community development issues can also be included within the rubric of ADR. ADR systems may be generally categorized as negotiation, conciliation/mediation, or arbitration system

Negotiation systems create a structure to encourage and facilitate direct negotiation between parties to a dispute, without the intervention of a third party. Mediation and conciliation systems are very similar in that they interject a third party between the disputants, either to mediate a specific dispute or to reconcile their relationship. Mediators and conciliators may simply facilitate communication, or may help direct and structure a settlement, but they do not have the authority to decide or rule on a settlement. Arbitration systems authorize a third party to decide how a dispute should be resolved.

It is important to distinguish between binding and non-binding forms of ADR. Negotiation, mediation, and conciliation programs are non-binding, and depend on the willingness of the parties to reach a voluntary agreement. Arbitration programs may be either binding or non-binding. Binding arbitration produces a third party decision that the disputants must follow even if they disagree with the result, much like a judicial decision. Non-binding arbitration produces a third party decision that the parties may reject.

It is also important to distinguish between mandatory processes and voluntary processes. Some judicial systems require litigants to negotiate, conciliate, mediate, or arbitrate

¹Madhubhushi Sridhar, LexisNexis Butterworths, Alternative Dispute Resolution: Negotiation and Mediation, at 1, (1st Ed. 2006).

prior to court action. ADR processes may also be required as part of a prior contractual agreement between parties. In voluntary processes, submission of a dispute to an ADR process depends entirely on the will of the parties.

Modes of ADR

Thus, the five different methods of ADR are –

- 1) Arbitration
- 2) Conciliation
- 3) Mediation
- 4) Judicial Settlement &
- 5) Lok Adalat

1) Arbitration

Arbitration, a form of alternative dispute resolution (ADR), is a technique for the resolution of disputes outside the courts, where the parties to a dispute refer it to one or more persons – arbitrators, by whose decision they agree to be bound. It is a resolution technique in which a third party reviews the evidence in the case and imposes a decision that is legally binding for both sides and enforceable. There are limited rights of review and appeal of Arbitration awards. Arbitration is not the same as judicial proceedings and Mediation.

Arbitration can be either voluntary or mandatory. Of course, mandatory Arbitration can only come from a statute or from a contract that is voluntarily entered into, where the parties agree to hold all existing or future disputes to arbitration, without necessarily knowing, specifically, what disputes will ever occur.²

The advantages of Arbitration can be summarized as follows: -

- a) It is often faster than litigation in Court.
- b) It can be cheaper and more flexible for businesses.
- c) Arbitral proceedings and an arbitral award are generally nonpublic, and can be made confidential.
- d) In arbitral proceedings the language of arbitration may be chosen, whereas in judicial proceedings the official language of the competent Court will be automatically applied.
- e) There are very limited avenues for appeal of an arbitral award.

However, there are some disadvantages of the Arbitration, which may be summarized as follows:

- a) Arbitrator may be subject to pressures from the powerful parties.
- b) If the Arbitration is mandatory and binding, the parties waive their rights to access the Courts.
- c) In some arbitration agreements, the parties are required to pay for the arbitrators, which add an additional cost, especially in small consumer disputes
- d) There are very limited avenues for appeal, which means that an erroneous decision cannot be easily overturned.

²http://shodhganga.inflibnet.ac.in/bitstream/10603/44117/9/09_chapter%203.pdf

- e) Although usually thought to be speedier, when there are multiple arbitrators on the panel, juggling their schedules for hearing dates in long cases can lead to delays.

2) Conciliation

Conciliation is an alternative dispute resolution process whereby the parties to a dispute use a conciliator, who meets with the parties separately in order to resolve their differences. They do this by lowering tensions, improving communications, interpreting issues, providing technical assistance, exploring potential solutions and bring about a negotiated settlement. It differs from Arbitration in that. Conciliation is a voluntary proceeding, where the parties involved are free to agree and attempt to resolve their dispute by conciliation. The process is flexible, allowing parties to define the time, structure and content of the conciliation proceedings. These proceedings are rarely public.

The following types of disputes are usually conducive for conciliation:

- Commercial,
- Financial,
- Family,
- Real Estate,
- Employment,
- Intellectual Property,
- Insolvency,
- Insurance,

Apart from commercial transactions, the mechanism of Conciliation is also adopted for settling various types of disputes such as labour disputes, service matters, antitrust matters, consumer protection, taxation, excise etc

3) Mediation

Now, worldwide mediation settlement is a voluntary and informal process of resolution of disputes. It is a simple, voluntary, party centered and structured negotiation process, where a neutral third party assists the parties in amicably resolving their disputes by using specified communication and negotiation techniques. Mediation is a process where it is controlled by the parties themselves. The mediator only acts as a facilitator in helping the parties to reach a negotiated settlement of their dispute. The mediator makes no decisions and does not impose his view of what a fair settlement should be

In the mediation process, each side meets with a experienced neutral mediator. The session begins with each side describing the problem and the resolution they desire – from their point of view. Once each sides' respective positions are aired, the mediator then separates them into private rooms, beginning a process of "Caucus Meeting" and thereafter "joint meetings with the parties". The end product is the 48 An Article "Disputes among Business Partners should be Mediated or Arbitrated, Not Litigated" by William Sheffield, Judge, Supreme Court of California (Ret.) published in book "Alternative Dispute Resolution – What it is and how it works" Edited by P. C. Rao and William Sheffield, page No.291 - 71 - agreement of both the sides.

The mediator has no power to dictate his decision over the party. There is a win – win situation in the mediation.³

4) Lok Adalat

The concept that is gaining popularity is that of Lok Adalats or people's courts as established by the government to settle disputes through conciliation and compromise. It is a judicial institution and a dispute settlement agency developed by the people themselves for social justice based on settlement or compromise reached through systematic negotiations. The first Lok Adalats was held in Una aim the Junagadh district of Gujarat State as far back as 1982. Lok Adalats accept even cases pending in the regular courts within their jurisdiction. Section 89 of the Civil Procedure Code also provides as to referring the pending Civil disputes to the Lok Adalat. When the matter is referred to the Lok Adalat then the provisions of the Legal Services Authorities Act, 1987 will apply. So far as the holding of Lok Adalat is concerned, Section 19 of the Legal Services Authorities Act, 1987.

3. Emerging Issues in Various Modes of ADR

The various types of issues developing in different modes of Alternate Dispute Resolution are been discussed below-

1) Emerging Issues in Arbitration as a mode of ADR

The government of India has been trying to make the arbitration regime of the country more flexible. It has taken a lot of measures to make it happen but was not able to realize a attractive business environment to its satisfaction. In 2001 it tried to amend the arbitration laws of the country but failed. Then again it tried in 2010, but even that attempt was aborted. Finally on October 23, 2015 an ordinance was promulgated by the President incorporating the essence of major rulings passed in the two decades, inclusive of the recommendations of the 246th Law Commission Report. Subsequently the Arbitration and Conciliation Bill 2015, was passed in the Lok Sabha on December 17, 2015 and Rajya Sabha with minor additions to the amendments introduced by the ordinance. Eventually the Presidents signed it on December 31st, 2015 and the Arbitration and Conciliation (Amendment) Act, 2015 came into effect, from October 23, 2015.

Even with the recent amendment which did bring some stark change in the arbitration laws of India, a lot of issues have been still left unanswered. The issues of Indian parties having foreign seats and arbitration in case of oppression and mismanagement within a company are matters which are still suffering from conflict of opinions of various high courts.

2) Emerging issues faced by Mediation as a mode of ADR

The various issues that are arising in the Mediation process are as follows-

- a) Lack of trained mediators
- b) Lack of trainers

- c) Lack of referrals
- d) Lack of infrastructure
- e) Absence of suitable legislation
- f) Resistance amongst basic actors i.e. Judges, Lawyers and Litigants

The brief description of these issues is been discussed below-

a) Lack of Trained Mediators

The essence of mediation lies in the role of the mediator as a facilitator. The role of the mediator is to create an environment in which parties before him are facilitated towards resolving the dispute in a purely voluntary settlement of agreement. As a facilitator, the mediator has to understand the underline issues between the parties. In order to do so, the mediator has to open up communication between the parties and between the parties and himself.

Considering the techniques of mediation, imparting formal training for mediators is a necessary. Now, it is accepted and put into practice by the various legal systems in the world that training is being imparted to the persons for becoming mediators to mediate between the parties. So far as India is concerned, the Mediation and Conciliation Project Committee, Supreme Court of India is conducting the training programme.

b) Lack of Trainers

This point is co-related with the point regarding lack of trained mediators. The training for mediation is being imparted by the trained persons who have got Training for Trainers (TOT). The numbers of persons who are expertized in providing trainings of mediation are not enough in number. The MCPC has prepared the training manual and the period of training is described for 40 hours. As there is lack of adequate numbers of trainers, it hampers the training programme of mediation and ultimately creates obstacles in the implementation of the mediation. Hon'ble Mr. Justice Sunil Ambawani⁴, has pointed out certain challenges in implementation of mediation. One of which is regarding non availability of adequate numbers of trainers.

c) Emerging Issues in Conciliation as a mode of ADR

Although conciliation services are available to civil litigants through the innovation of Lok Adalats (panels of conciliators) and Conciliation Committees, several problems remain unsolved.

Firstly, India generally lacks obligatory mediation such as early neutral evaluation utilized in the United States which is especially useful when imposed shortly after litigation is filed. Conciliation processes in India require the consent of both parties, or the request of one party and the decision by the court that the matter is suitable for conciliation.

Secondly, the subject matter of disputes that may be sent to Lok Adalats is limited to auto accidents and family matters.

³http://shodhganga.inflibnet.ac.in/bitstream/10603/44117/9/09_chapter%203.pdf

⁴ Judge, High Court of Allahabad, report of the Third National Conference on Mediation held at New Delhi on 8th July, 2012 page 9.

Thirdly, the conciliation process normally involves the lawyers, not the disputing parties themselves. This problem is particularly acute in writ proceedings in which the government is the responding party, since counsel frequently claims to lack authority to make decisions about terms of settlement.

Fourthly, current conciliation processes do not require the parties to meet and confer prior to entering either traditional litigation venues or their alternatives. No joint statement of the specific points of disagreement is required. The absence of meeting, conference and/or joint statements requirement is required. The absence of meeting, conference or joint statement requirements allows competing sides to remain insulated from one another.

Fifthly, the Lok Adalats themselves have experienced backlog, and some defendants agree to conciliation as a way of further delaying the litigation process. Finally, there is no set time or point within the litigation process at which a decision is made, by the courts, the parties or otherwise regarding referral of the case to some form of alternative dispute resolution.⁵

4. Conclusion

I hope different modes of ADR would bring up an alternative/additional and efficacious remedy to resolve dispute and would also overcome the challenges faced by court system of delays. It is need of the day to maintain social harmony and peace in community. It is of utmost importance that "Mediation be taken up as a movement in the dispute resolution process". There is a need to create an environment of dispute resolution through mutual settlement.

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⁵ <http://iosrjournals.org/iosr-jhss/papers/Vol4-issue3/A0430107.pdf>