



ALTERNATIVE DISPUTE RESOLUTION MECHANISM(ADR)

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“Discourage litigation. Persuade your neighbors to compromise whenever you can. Point out to them how the nominal winner is often a real loser- in fees and waste of time. As a peacemaker, the lawyer has a superior opportunity of being a good man. There will still be business enough.”- Abraham Lincoln. Words of wisdom from one of the greatest statesman who used a unique strategy to deal with his critics and to deflect the prejudices of his supporters without yielding to him. Try as we can, disputes are an unavoidable part of any relationship or organization. Disputes can be resolved through either through litigation i.e., in a court of law or through Alternative Dispute Resolution(ADR) Mechanism. Alternative Dispute Resolution includes resolution processes and techniques that act as a means for disagreeing parties to come to an agreement short of litigation. It is a collective term for the ways that parties can settle disputes, with the help of a third party. ADR has gained widespread acceptance among both the general public and the legal profession in recent years. The rising popularity of Alternative Dispute Resolution Mechanism is because ADR imposes fewer costs than litigation, there is a preference of confidentiality, and the desire of some parties to have greater control over the selection of the individual or individuals who will decide their dispute. Indian Judiciary is one of the oldest judicial system

and there are lots of pending and long unsettled cases. ADR provides scientifically developed techniques to Indian judiciary which helps in reducing the burden on the courts.

The modes of Alternative Dispute Resolution are:

- A) Arbitration
- B) Conciliation
- C) Mediation
- D) Negotiation

LEGISLATION OF ADR IN INDIA 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 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 endeavour to assist the parties in the first instance, in arriving at a settlement in respect of the subject-matter of the suit.¹

The second schedule related to Arbitration in suits while briefly providing Arbitration without intervention of a court.² Order 1, 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 judgement is pronounced apply to the court for an order of reference. This schedule supplemented the provisions of Arbitration Act, 1899. The most important legislation in India with respect to Alternative Dispute Resolution Mechanism was The



Arbitration and Conciliation Act, 1996. The government enacted The Arbitration and Conciliation Act, 1996 in an effort to modernize the 1940 Act. 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. In India, the Model Law has been adopted almost in its entirety in the 1996 Act. Its primary purpose was to encourage 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. Arbitration, as practiced in India, instead of shortening the lifespan of the dispute resolution, became one more 'inning' in the game. Not only that, the arbitrator and the parties lawyers treated arbitration as "extra time" or overtime work to be done after attending to court matters. This resulted in elongation of the period for disposal.

MODES OF ADR IN INDIA

1. Arbitration- The definition of Arbitration in section 2(1)(a) reproduces the text of Article 2(a) of the model law- 'Arbitration means an 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 which is known as an "award" on the dispute that is binding on the parties.³ It is a private, generally informal and non-judicial trial procedure for adjudicating disputes. There are four requirements of the concept of Arbitration:

- A) An arbitration agreement.
- B) A dispute

- C) A reference to a third party for its determination.
- D) An award by a third party.

Types of Arbitration:

A) 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 arbitration like the number of arbitrators, manner of their appointment etc provided that the parties approach the arbitration in a spirit of cooperation, ad-hoc proceedings can be more flexible, cheaper, faster than an administered proceeding.

B) 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. 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.⁴

The amended Arbitration and Conciliation Act 2015 has provided for a decrease in judicial intervention of the court process. It has narrowed down the scope of challenge to an arbitral award and has done away with the automatic suspension of the arbitral award till the review of the courts was complete. Judicial intervention has been reduced by restricting the scope of pre-arbitration review by courts to a



‘prime-facie’ review of the existence of an arbitration agreement.⁵

2. 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 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. The concept of mediation is not foreign to Indian legal system as there existed different aspects of Mediation. The Village Panchayat and Nyaya Panchayat are good examples of this. In India, mediation has not been popular. One of the main reasons for this is that mediation is not a formal proceeding and it cannot be enforced in a court of law.

3. Conciliation- Conciliation is a form of arbitration but it is less formal in nature. It is the process of facilitating an amicable resolution between the parties, whereby the parties to the dispute use conciliator who meets with the parties separately to settle their dispute. According to Section 62(1) of The Arbitration and Conciliation Act, 1996 ‘The party initiating conciliation shall send to the other party a written invitation to conciliate under this Part, briefly identifying the subject of dispute.’ Conciliation proceedings shall commence if the other party accepts in writing the invitation to conciliate. The conciliator shall assist the parties in an independent and impartial manner in their attempt to reach an amicable settlement of their dispute. The conciliator may, at any stage

of the conciliation proceedings, make proposals for a settlement of the dispute.

4. Negotiation- Negotiation-communication for the purpose of persuasion is the pre-eminent mode of dispute resolution. Compared to processes using mutual third parties, it has the advantage of allowing the parties themselves to control the process and the solution. The essentials are:

- A) It is a communication process
- B) It resolves conflicts.
- C) It is a voluntary exercise.
- D) It is a non-binding process.
- E) Parties retain control over outcome and procedure.

In India negotiation doesn’t have any statutory recognition. Negotiation is self-counselling between the parties to resolve their dispute. Negotiation is a process that has no fixed rules but follows a predictable pattern.

PROBLEMS OF IMPLEMENTATION OF ADR IN INDIA

Any implementation is always conferred with problems. Some of the problems faced during implementation of ADR are:

1. Attitudes- Although Indian law favors dispute resolution by arbitration, Indian people has always abhorred the finality attaching to arbitral awards. Aid and abetted by the legal fraternity, the aim of every party to an arbitration is: “try to win if you can, if you cannot do your best to see that the other side cannot enforce the award for as long as possible.” An arbitration award should only be permitted to be set aside for reasons extraneous to its contents- such as, lack of jurisdiction of the



arbitrator, fraud or corruption of the arbitrator or fundamental miscarriage of justice in the conduct of arbitral proceedings. The spirit of ADR mechanisms is to create a WIN-WIN situation, but the attitude of the people is changing it into a WIN-LOSE situation.

2. Lawyer and Client Interests- Lawyers and client often have divergent attitudes and interests concerning settlement. This may be a matter of personality or money. In some circumstances, a settlement is not in the clients interests. Still, a satisfactory settlement is always in the clients interest. It is the inability to obtain such settlement, that impels a client to seek the advice of the counsel in the first place. The lawyer must consider not only what the client wants but also why the parties have been unable to settle their dispute.

3. Legal Education- Law schools train their students more for conflict than for the arts of reconciliation and accommodation and therefore serve the profession poorly. A serious effort to provide cheaper methods of resolving disputes will require skilled mediators and judges, who are trained to play a much more active part in guiding proceedings towards a fair solution. An understanding of the adversarial system, stare decisis, and the process of litigation remains critical. At the same time, students need to enhance their skills as negotiators and to appreciate. Law students also need to understand the suitability and advocacy issues in ADR at more sophisticated levels and to understand the important keys to problem solving.

4. Ignorance- One of the major reasons for the failure in implementation is the ignorance of the existing provisions of law. Legislators have made the necessary laws, but have never thought of implementing them at the grass-root level. They do not help in building up the awareness of those laws, so that people will utilize them. ADR provisions are well known only in the big business circles in India. Most of the educated elite are also unaware of the availability and possibility of such mechanisms in India. Ignorance of laws is not an excuse in our country.

5. Corruption- Corruption is not a new issue in our country. It has always been a virus to the nation and is sucking out the very purpose of independence. Today, not a single gets done without having to bribe the way through even in our legal system. ADR mechanisms have a great risk of being ridden by corruption. Thus, corruption can be a raging problem in ADR.

CONCLUSION

Because justice is not executed speedily men persuade themselves that there is no such thing as justice. Chief Justice said in his speech on Law Day, "I am pinned to observe that the judicial system in the country is on the verge of collapse. These are strong words I am using but it is with considerable anguish that I say so. Our judicial system is cracking under the weight of errors." Arrears cause delays and delays means negating the accessibility of justice in true terms to the common man. Countless rounds to courts and the lawyers chamber can turn any person insane. With the advent of Alternate Dispute Resolution, there is



new avenue for people to settle their disputes. There is an urgent need for justice dispensation through ADR mechanisms. The ADR movement needs to be carried forward with greater speed. The recent trend is to shift from litigation towards Alternate Dispute Resolution. It is a very practical suggestion which if implemented, can reduce the workloads of civil courts by half. It is important here to mention the statement made by John F. Kennedy, “ Let us never negotiate out of fear but let us never fear to negotiate.

