



INTERNATIONAL INITIATIVES TOWARDS THE DEVELOPMENT OF ALTERNATIVE DISPUTE RESOLUTION

*By Sujeet Prakash (L.L.M in Corporate & Commercial Laws)
From Chanakya National Law University*

ABSTRACT

Alternative dispute resolution encompasses a range of means to resolve conflicts short of formal litigation. The modern ADR movement originated in the United States in the 1970s, spurred by a desire to avoid the cost, delay, and adversarial nature of litigation. For these and other reasons, court reformers are seeking to foster its use in developing nations. The interest in ADR in some countries also stems from a desire to revive and reform traditional mediation mechanisms.

ADR today falls into two broad categories:

- Court-annexed options
- Community based dispute resolution mechanisms

Court-annexed ADR includes mediation/conciliation the classic method where a neutral third party assists disputants in reaching a mutually acceptable solution as well as variations of early neutral evaluation, a summary jury trial, a mini-trial, and other techniques. Supporters argue that such methods decrease the cost and time of litigation, improving access to justice and reducing court backlog, while at the same time preserving important social relationships for disputants.

CHAPTER 1: INTRODUCTION

The history of Alternative Dispute Resolution forum at international level can be traced back from the period of Renaissance, when Catholic Popes acted as arbitrators in solving conflicts arising between European countries. International law can be determined through a great variety of procedures of which the main classes are both the national and the international adjudicative bodies. In particular, in the context of international courts and tribunals the character of most interstate adjudication as a kind of arbitration agreed between the states concerned became visible. Traditional interstate adjudication provides the procedural means which the state parties consider appropriate to facilitate their desire to settle the issue in a flexible manner. Although the procedural authority lies generally with the international courts reflecting the national model of a fixed and unalterable *lex fori proceduralis* it is never authoritatively exercised against the state parties. The basic idea is to facilitate dispute settlement rather than executing and enforcing an overarching international legal order. One major reason for this character of international adjudication is the lack of authority granted to international courts reflected in the most meagre and rare submission of states to jurisdiction according to Article 36(2) of the ICJ Statute. No enforcement of judgments against the will of the judgment debtor may be expected. The other major reason is that



international law's incoherent structure is more apt and ready to settle disputes than to enforce coherent doctrines rarely endorsed by the states as the ultimate standard of their international behaviour.

ADR has given fruitful results not only in international political arena but also in international business world in settling commercial disputes among many co-operative houses for e.g. settling of long standing commercial dispute between General Motors Company and Johnson Matthey Inc. which was pending in U.S District Court since past few years. ADR is now a growing and accepted tool of reform in dispute management in American and European commercial communities. ADR can be considered as a co-operative problem-solving system. ADR is an alternative to adjudication, for example, court annexed arbitration or court annexed conciliation, but it may be complimentary to the court procedures. There was a time when civil litigation was considered to be time consuming and costly method of dispensing justice and commercial people preferred to resort to arbitration. Now ADR has become popular and desirable in USA, UK, Canada, Hong Kong and Australia as it is effective, cost efficient and speedy form of dispute resolution. It has been observed that ADR is able to produce better outcomes than the traditional courts because firstly different kinds of disputes may require different kind of approaches which may perhaps be not available in the courts. Second factor for resorting ADR techniques to resolve the disputes is direct involvement and intensive participation by the parties in the negotiation to arrive at a settlement. Third advantage of accepting ADR is the intervention of a skilled neutral Adviser which is always very helpful in arriving at a settlement.

The increasing growth of global trade and the delay in disposal of cases in courts under the normal system in several countries made it imperative to have the perception of an Alternative Dispute Resolution System (ADRS), more particularly, in the matter of commercial disputes. When the entire world was moving in favour of a speedy resolution of commercial disputes, the United Nations Commission on International Trade Law way back in 1985 adopted the UNCITRAL Model Law of International Commercial Arbitration and since then a number of countries has given recognition to that model in their respective Legislative systems. An important feature of the said model is that it has harmonized the concept of arbitration and conciliation in order to designate it for universal application.

CHAPTER 2: TREATIES AND CONVENTION AND ADR

• 1927 Geneva Convention on the Execution of Foreign Arbitral Awards:

In this Geneva Convention, it is stated that even if the conditions led down in Article 1 are fulfilled, recognition and enforcement of the award shall be refused if the Court is satisfied that certain grounds as mentioned in Article 2 are not fulfilled. They are:

- a. That the award has been annulled in the country in which it was made;
- b. That the party against whom it is sought to use the award was not given notice of the arbitration proceedings in sufficient time to enable him to present his case; or that, being under a legal incapacity, he was not properly represented;
- c. That the award does not deal with the differences contemplated by or falling within the terms of the submission to arbitration or that it contains decisions on matters beyond the scope of the submission to arbitration.



The present Convention applies only to arbitral awards made after the coming-into-force of the Protocol on Arbitration Clauses, opened at Geneva on September 24, 1923. It does not apply to the Colonies, Protectorates or territories under suzerainty or mandate of any High Contracting Party unless they are specially mentioned.

- **1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention):**

Recognising the growing importance of international arbitration as a means of settling disputes, the **Convention on the Recognition and Enforcement of Foreign Arbitral Awards** or rather can also be recognised as **New York Convention** seeks to provide common legislative standards for the recognition of arbitration agreements and court recognition, are treated as “foreign” under its laws because of some foreign element in the proceedings. The Convention’s principle aim is that foreign and non-domestic arbitral awards will not be discriminated against and it obliges parties to ensure such awards are recognised and generally capable of enforcement in their jurisdiction in the same way as domestic awards. An ancillary aim of the Convention is to require courts of parties to give full effect to arbitration agreements by requiring courts to deny the parties access to court in contravention of their agreement to refer the matter to an arbitral tribunal. The Convention deals with the field of application, i.e. the recognition and enforcement of foreign arbitral awards (arbitral awards made in the territory of another State). It sets forth the obligation for the Contracting States to recognize an arbitration agreement in writing. That obligation plays a role in the two actions contemplated by the Convention. It defines the term “agreement in writing” as “an arbitral clause in a contract or an arbitration agreement, signed by the parties or contained in exchange of letters or telegrams”.

- **1961 European Convention on International Commercial Arbitration (Geneva Convention):**

This Convention shall apply to arbitration agreements concluded for the purpose of settling disputes arising from international trade between physical or legal persons having, when concluding the agreement, their habitual place of residence or their seat in different Contracting States.

In this Convention foreign nationals are given the right to be designated as arbitrators. The Convention in this Article deals with the organization of the arbitration. The arbitrator’s decision on the delay in raising the plea, will, however, be subjected to judicial control. Subject to any subsequent judicial control provided for under the *lex fori*, the arbitrator whose jurisdiction is called in question shall be entitled to proceed with the arbitration, to rule on his own jurisdiction and to decide upon the existence or the validity of the arbitration agreement or of the contract of which the agreement forms.

- **1962 Agreement relating on Application of the European Convention on International Commercial Arbitration (Paris Agreement):**

Agreement shall be open for signature by the member States of the Council of Europe. It shall be ratified or accepted. Instruments of ratification or acceptance shall be deposited with the Secretary-General of the Council of Europe. After the entry into force of this Agreement, the Committee of Ministers of the Council



of Europe may invite any State which is not a member of the Council and in which there exists a National Committee of the International Chamber of Commerce to accede to this Agreement. Accession shall be effected by the deposit with the Secretary-General of the Council of Europe of an instrument of accession, which shall take effect, thirty days after the date of its deposit. The entry into force of this Agreement in respect of any State after ratification, acceptance or accession shall be conditional upon the entry into force of the European Convention on International Commercial Arbitration in respect of that State. Any Contracting Party may, in so far as it is concerned, denounce this Agreement by giving notice to the Secretary-General of the Council of Europe. Denunciation shall take effect six months after the date of receipt by the Secretary-General of the Council of such notification.

- **1975 Inter- American Convention on International Commercial Arbitration (Panama Convention):**

The Inter-American Convention on International Commercial Arbitration, signed in Panama on 30 January 1975, is one of the main arbitral conventions for the American continent. As for the others, these are the New York Convention of 12 June 1958 on the Recognition and Enforcement of Foreign Arbitral Awards and the Inter-American Convention on Extraterritorial Validity of Foreign Judgements and Arbitral Awards, signed in Montevideo on 8 May 1979. The Panama Convention lays down the principle of validity of the arbitration agreement. Any such arbitration agreement must be in writing. As regards the constitution of the arbitral tribunal, the Convention specifies that national or foreign arbitrators may be appointed, by the parties themselves or by a third party. The third party may be either a person or a juridical institution. The parties themselves can establish the procedural rules of the arbitration by agreement. In the absence of agreement, the rules of procedure of the Inter-American Commercial Arbitration Commission should be followed.

CHAPTER 3: WTO'S UNCITRAL MODEL LAW

- **1976 UNCITRAL Arbitration Rules:**

Adopted by UNCITRAL on 28 April 1976, the UNCITRAL Arbitration Rules provide a comprehensive set of procedural rules upon which parties may agree for the conduct of arbitral proceedings arising out of their commercial relationship and are widely used in ad hoc arbitrations as well as administered arbitrations. The Rules cover all aspects of the arbitral process, providing a model arbitration clause, setting out procedural rules regarding the appointment of arbitrators and the conduct of arbitral proceedings and establishing rules in relation to the form, effect and interpretation of the award.

- **1980 UNCITRAL Conciliation Rules:**

Adopted by UNCITRAL on 23 July 1980, the UNCITRAL Conciliation Rules provide a comprehensive set of procedural rules upon which parties may agree for the conduct of conciliation proceedings arising out of their commercial relationship. The Rules cover all aspects of the conciliation process, providing a model conciliation clause, defining when conciliation is deemed to have commenced and terminated and addressing procedural aspects relating to the appointment and role of conciliators and the general conduct of proceedings. The Rules also address issues such as confidentiality, admissibility of evidence in other



proceedings and limits to the right of parties to undertake judicial or arbitral proceedings whilst the conciliation is in progress.

- **1982 Recommendations to assist arbitral institutions and other interested bodies with regard to arbitrations under the UNCITRAL Arbitration Rules:**

Adopted by UNCITRAL in 1982, the Recommendations are designed to provide information and assistance to arbitral institutions and other relevant bodies, such as chambers of commerce, in using the Arbitration Rules. This may include cases where the Arbitration Rules are being used as the basis for preparing or revising institutional rules, where arbitral institutions or other bodies are acting as an appointing authority as envisaged under the UNCITRAL Arbitration Rules, or in the provision of administrative services of a secretarial or technical nature for an arbitration conducted pursuant to the UNCITRAL Arbitration Rules.

- **1985 UNCITRAL Model Law on International Commercial Arbitration:**

The UNCITRAL Model Law on International Commercial Arbitration was prepared by UNCITRAL, and adopted by the United Nations Commission on International Trade Law on 21st June 1985. The model law is not binding, but individual states may adopt the model law by incorporating it into their domestic law. The UNCITRAL Model Law provides a pattern that law-makers in national governments can adopt as part of their domestic legislation on arbitration. The Model Law is directed at States.

- **2002 UNCITRAL Model Law on International Commercial Conciliation with Guide to Enactment and Use:**

Adopted by UNCITRAL on 24 June 2002, the Model Law provides uniform rules in respect of the conciliation process to encourage the use of conciliation and ensure greater predictability and certainty in its use. To avoid uncertainty resulting from an absence of statutory provisions, the Model Law addresses procedural aspects of conciliation, including appointment of conciliators, commencement and termination of conciliation, conduct of the conciliation, communication between the conciliator and other parties, confidentiality and admissibility of evidence in other proceedings as well as post-conciliation issues, such as the conciliator acting as arbitrator and enforceability of settlement agreements.

- **1985 UNCITRAL Model Law on International Commercial Arbitration, with amendments as adopted in 2006:**

The Model Law is designed to assist States in reforming and modernizing their laws on arbitral procedure so as to take into account the particular features and needs of international commercial arbitration. It covers all stages of the arbitral process from the arbitration agreement, the composition and jurisdiction of the arbitral tribunal and the extent of court intervention through to the recognition and enforcement of the arbitral. Amendments to articles 1 (2), 7, and 35 (2), a new chapter IV A to replace article 17 and a new article 2 A were adopted by UNCITRAL on 7 July 2006. The revised version of article 7 is intended to modernize the form requirement of an arbitration agreement to better conform to international contract practices. The newly introduced chapter IV A establishes a more comprehensive legal regime dealing with interim measures in support of arbitration. As of 2006, the standard version of the Model Law is the amended version. The original 1985 text is also reproduced in view of the many national enactments based on this original version.



- **2010 - UNCITRAL Arbitration Rules (as revised in 2010):**

The UNCITRAL Arbitration Rules provide a comprehensive set of procedural rules upon which parties may agree for the conduct of arbitral proceedings arising out of their commercial relationship and are widely used in ad hoc arbitrations as well as administered arbitrations. The Rules cover all aspects of the arbitral process, providing a model arbitration clause, setting out procedural rules regarding the appointment of arbitrators and the conduct of arbitral proceedings, and establishing rules in relation to the form, effect and interpretation of the award.

The original UNCITRAL Arbitration Rules were adopted in 1976 and have been used for the settlement of a broad range of disputes, including disputes between private commercial parties where no arbitral institution is involved, investor-State disputes, State-to-State disputes and commercial disputes administered by arbitral institutions. In 2006, the Commission decided that the UNCITRAL Arbitration Rules should be revised in order to meet changes in arbitral practice over the last thirty years. The revision is aimed at enhancing the efficiency of arbitration under the Rules and does not alter the original structure of the text, its spirit or drafting style. The UNCITRAL Arbitration Rules, as revised, have been effective since 15 August 2010. They include provisions dealing with, amongst others, multiple parties arbitration and joinder, liability, and a procedure to object to experts appointed by the arbitral tribunal. A number of innovative features contained in the Rules aim to enhance procedural efficiency, including revised procedures for the replacement of an arbitrator, the requirement for reasonableness of costs, and a review mechanism regarding the costs of arbitration. They also include more detailed provisions on interim measures. It is expected that the Rules, as revised, will continue to contribute to the development of harmonious international economic relations.

CHAPTER 4: THE INTERNATIONAL PERSPECTIVE OF ADR IN INDIAN LAWS

THE ARBITRATION AND CONCILIATION ACT, 1996: THE SHADOW OF LAW

The first Indian Arbitration Act was enacted in 1899. This Act was largely based on the English Arbitration Act of 1889 and applied only to cases where, if the subject matter of a suit, the suit could, whether with leave or otherwise, be instituted in what was then known as a Presidency town. The scope of this Act was confined to arbitration by agreement without the intervention of a court. The Code of Civil Procedure, 1908 originally omitted the arbitration proceedings in the hope that they would be transferred to the comprehensive Arbitration Act. The year 1940 is an important year in the history of law of arbitration in British India, as in that year the Arbitration Act, 1940 was enacted. It consolidated and amended the law relating to arbitration as contained in the Indian Arbitration Act, 1899 and the Second Schedule to the Code of Civil Procedure, 1908. It was largely based on the English Arbitration Act, 1934. But it was noticed or rather observed that certain cases were still pending and there were some drawbacks on the enactment of this Act. Thus then led to the enactment of the Arbitration and Conciliation Act, 1996.

- **THE FORM AND CONTENT:**

This Act contains 85 Sections, besides the Preamble and three Schedules. The Act is divided into four Parts. Part-I contains general provisions on arbitration. Part-II deals with enforcement of certain foreign awards. Part-III deals with conciliation. Part-IV contains certain supplementary provisions. The Preamble



to the Act explains the biases of the proposed legislation. The three Schedules reproduce the texts of the Geneva Convention on the Execution of Foreign Awards, 1927; The Geneva Protocol on Arbitration Clauses, 1923; and the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958 respectively.

Part-I closely deals with the provisions of the UNCITRAL Model Law but some of them differs from that of the Model Law. Some of the Sections are mentioned below:

- a. Section-10(1) deals with the number of arbitrators in an arbitral tribunal and provides that that the number of arbitrators shall not be of even number. Section-10(2) provides that the arbitral tribunal shall consist of a sole arbitrator.
- b. Section-11(10) empowers the Chief Justice of India or the Chief Justice of the High Court, as the case may be, to make such scheme as he deem appropriate for dealing with the appointment of arbitrators.
- c. Section-13 does not permit the challenging party to approach the Court when the challenge made to the arbitral tribunal is not successful. However after the award is made, the party could challenge the award on the ground that the arbitrator has wrongly rejected the challenge.
- d. Section-16 states that if the arbitral tribunal turns down the plea that it has no jurisdiction then the Act does not make the provision for approaching the Court at that stage.
- e. Section-31(7) contains detailed provisions on award of interest by the arbitral tribunal. It deals with the costs of arbitration.
- f. Section-36 provides that under two situations, namely- a) where an award is not challenged within the prescribed period, or b) where an award has been challenged but the challenge is turned down, the award shall be enforced in the same manner as if it were a decree of the court.
- g. Section-37 makes provision for appeals in respect of certain matters
- h. Section-38 enables the arbitral tribunal to fix the amount of deposit or supplementary deposit, as the case may be, as an advance for the cost of arbitration.
- i. Sections 39 to 43 are largely based on the corresponding provision in 1940 Act.

Part-II contains sections 44-60. It incorporates provisions of the Arbitration (Protocol and Convention) Act, 1937 and the Foreign Awards (Recognition and Enforcement) Act, 1961. It states that any award given outside India, whether or not made in an arbitration agreement covered by the law of India, will henceforth be treated as a foreign award.

Part-III deals with conciliation. It does not define what conciliation is. Conciliation is one of the non-litigative dispute resolution processes. Conciliation process aims at securing a compromise solution rather than solution according to the law. It is a voluntary, non-judicial, speedy and confidential process. The cost of conciliation is much less than the costs of litigation. Above all, conciliation process allows the parties to be more directly involved in the resolution of the dispute; consequently in this process, the parties retain freedom of action with regard to initiating, conciliation, adapting the proceedings to their particular case, and discontinuing it if there is any such violation.

Thus to make arbitration and conciliation a success story in India, three things are needed:

- 1) A good law that is responsive to both domestic and international requirements.
- 2) Honest and competent arbitrators and conciliators without whom any law or arbitration or conciliation can succeed.



- 3) Availability of modern facilities and services such as meeting rooms, communication facilities, administrative and secretariat services.

Lastly, the establishment of the International Centre for Alternative Dispute Resolution (ICADR), an independent non-profit making body, in New Delhi on May 1995 is a significant event in the matter of promotion of ADR movement in India.

CONCLUSION

In the ultimate analysis it may be concluded that the widening gap between the common people and the judiciary is indeed a serious cause of concern for all those who deal with the judiciary is indeed a serious cause of concern for all those who deal with the administration of justice. The effective utilization of ADR systems would go a long way in plugging the loophole which is obstructing the path of justice. The concepts of alternative modes of dispute resolution should be deeply ingrained in the minds of the litigants, lawyers and the judges so as to ensure that ADR methods in dispensation of justice are frequently adopted. Awareness needs to be created amongst the people about the utility of ADR and simultaneous steps need to be taken for developing personnel who would be able to use ADR methods effectively with integrity.

*In the Preamble, the words 'justice, liberty, equality and fraternity these four pillars form the infrastructure, supporting the whole Indian system to be built. Breaking or damaging or weakening any one of these pillars will damage the entire structure since everyone is a fundamental pillar and each is tightly interlinked to each other and these four forms a single interdependent reality. The system of dispensing justice in India has come under great stress for several reasons mainly because of the huge pendency of cases in courts. In India, the number of cases filed in the courts has shown a tremendous increase in recent years resulting in pendency and delays underlining the need for alternative dispute resolution methods. Alternate Dispute Resolution is rapidly developing at national and international level, offering simpler methods of resolving disputes. Increasing trend of ADR services can easily be inferred from the growth of "Arbitration clause" in majority of contracts. There has been a significant growth in number of law school courses, diplomas, seminars, etc. focusing on alternate dispute resolution and rationalizing its effectualness in processing wide range of dispute in society. Lastly, the importance of ADR mechanism can be aptly put in the words of **Abraham Lincoln**:*

"Discourage litigation persuade your neighbours to compromise whenever you can point out to them how the nominal winner is often a real loser, in fees, expenses, waste of time..."
