Alternative Dispute Resolution (ADR) and It's Need in Contemporary Indian Legal System

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Introduction

"Discourage litigation. Persuade your neighbours to compromise whenever you can. Point out to them how the nominal winner is often the real loser, in fees, and expenses, and waste of time. As a peace-maker the lawyer has a superior opportunity of being a good man. There will still be business enough." – Abraham Lincoln

Justice is the foundation and object of any civilized society. The quest for justice has been an ideal which mankind has been aspiring for generations down the line. Preamble to our Constitution reflects such aspiration as "justice-social, economic and political". Article 39A of the Constitution provides for ensuring equal access to justice. Administration of Justice involves protection of the innocent, punishment of the guilty and the satisfactory resolution of disputes.

It is now widely acknowledged that our litigation system requires drastic spring-cleaning. This is not to minimize the role our courts, especially the superior courts, play in the promotion of the rule of law. There is always a great rush for interim orders of courts. Not many in India can afford litigation. This state of affairs makes people cynical about the judicial process, often subjecting it to ridicule. Where do we go from here?

We have no other choice but to vigorously and quickly devise effective alternative options to litigation to ease the present weight of judicial business.The world has experienced that litigation is not the only means of resolving disputes. Congestion in court rooms, lack of manpower and resources in addition with delay, cost, and procedure speak out the need of better options, approaches and avenues. Alternative Dispute Resolution mechanism is a click to that option.

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, established by the Sovereign or the State. 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 mini trials that look and feel very much like a courtroom process. It included arbitration, as also conciliation, mediation and all other forms of dispute resolution outside the courts of law, which would all fall within the ambit of ADR.

The primary object of ADR movement is avoidance of vexation, expense and delay and promotion of the ideal of "access to justice" for all. In other words, the ADR system seeks to provide cheap, simple, quick and accessible justice. The desirability and necessity of encouraging ADR on a large scale is hardly in dispute.

The ADR procedures consist of negotiation, conciliation, mediation, arbitration and an array of hybrid procedures, including mediation and last-offer arbitration (MEDOLA), mini-trial, med-arb and neutral evaluation. In countries like the USA, several federal and state judges have incorporated ADR techniques in their court room practice and are calling upon litigants to utilize them; legislation was also enacted to promote the use of ADR by state instrumentalities. The three wings of the Government - the Executive, the

Legislature and the Judiciary - are thus committed to the encouragement of ADR movement.

ADR techniques are extra-judicial in character. They can be used in almost all contentious matters which are capable of being resolved, under law, by agreement between the parties. They have been employed with very encouraging results in several categories of disputes, especially civil, commercial, industrial and family disputes. In particular, these techniques have been shown to work across the full range of business disputes: banking; contract performance and interpretation; construction contracts; intellectual property rights; insurance coverage; joint ventures; partnership differences; personal injury; product liability; professional liability; real estate; and securities. ADR offers the best solution in respect of commercial disputes of an international character.

Alternative dispute resolution is not intended to supplant altogether the traditional means of resolving disputes by means of litigation. It offers only alternative options to litigation. There are still a large number of important areas, including constitutional law and criminal law, in respect of which there is no substitute for court decisions. ADR may not be appropriate for every dispute even in other areas; even if appropriate, it cannot be invoked unless both parties to a dispute are genuinely interested in a settlement.

The Advantages of ADR

There are several advantages of ADR; some of them are as follows:-

First, it can be used at any time, even when a case is pending before a court of law, though recourse to ADR as soon as the dispute arises may confer maximum advantages on the parties; it can be used to reduce the number of contentious issues between the parties; and, it (except in the case of binding arbitration) can be terminated at any stage by any one of the disputing parties.

Second, it can provide a better solution to disputes more expeditiously and at less cost than litigation. It helps in keeping the dispute a private matter and promotes creative and realistic business solutions, since the parties are in control of the ADR proceedings. ADR procedures take only a day or a few days to arrive at a settlement.

Third, ADR programs are flexible and not afflicted with rigors of rules of procedure.

Fourth, the freedom of the parties to litigation is not affected by ADR proceedings. Even a failed ADR proceeding is never a waste either in terms of money or time spent on it, since it helps the parties to appreciate each other's case better.

Fifth, ADR can be used with or without a lawyer. A lawyer, however, plays a very useful role in identification of the contentious issues, exposition of the strong and weak points in a case, rendering advice during negotiations and over-all presentation of his client's case.

Sixth, ADR procedures help in the reduction of the work-load of the courts and thereby help them to focus attention on the cases which ought to be decided by courts.

Seventh, ADR procedures permit parties to choose neutrals who are specialists in the subject-matter of the dispute. This does not mean that there will be a diminished role for lawyers. They will continue to play a central role in ADR processes; however, they will have to adapt their role to ADR requirements.

A number of ADR procedures are hybrids that combine two or more well established ADR procedures. ADR procedures can he broadly divided into two categories, namely, adjudicatory and non-adjudicatory. The adjudicatory procedures such as arbitration and binding expert determination lead to a binding ruling that decides the case. The non-adjudicatory procedures contribute to resolution of disputes by

agreement of the parties without adjudication.

Of the several ADR techniques, "mediation" seems to be the most widely-used one; it is the same dispute resolution process as conciliation, except that in the case of the former the neutral third party plays a more active role in putting forward his own suggestions for the settlement of the dispute. Sometimes, the terms "conciliation" and "mediation" are used interchangeably. Other ADR techniques can be used where appropriate and what form is appropriate depend upon the facts and circumstances of each case.

A Brief Description of ADR Procedures

ADR can be broadly classified into two categories; court-annexed options (it includes mediation, conciliation) and community based dispute resolution mechanism (Lok- Adalat).

The mechanism of Arbitration and Conciliation was introduced in India through the Arbitration and Conciliation Act, 1996: Part I of this act formalizes the process of Arbitration and Part III formalizes the process of Conciliation. (Part II is about Enforcement of Foreign Awards under New York and Geneva Conventions.).

***Negotiation*:** A non-binding procedure in which discussions between the parties are initiated without the intervention of any third party with the object of arriving at a negotiated settlement of the dispute.

***Conciliation/Mediation*:** A non-binding procedure in which an impartial third party, the conciliator/mediator, assists the parties to a dispute in reaching a mutually satisfactory and agreed settlement of the dispute.

***Med-Arb*:** A procedure which combings, sequentially, conciliation/mediation and, where the dispute is not settled through conciliation/mediation within a period of time agreed in advance by the parties, arbitration.

Arbitration: 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.

***Fast-track Arbitration*:** A form of arbitration in which the arbitration procedure is rendered in a particularly short time and at reduced cost.

***Medola*:** A procedure in which, if the parties fail to reach agreement through mediation, a neutral person, who may be the original mediator or an arbitrator, will select between the final negotiated offers of parties, such selection being binding on the parties.

Mini-trial: A non-binding procedure in which the disputing parties are presented with summaries of their cases to enable them to assess the strengths, weaknesses and prospects of their case and then an opportunity to negotiate a settlement with the assistance of a neutral adviser.

Lok Adalat in Form of Adr

The Lok-Adalat system is a uniquely Indian approach. The Constitutional duty of the State to provide legal aid, prompted by the decisions of the apex court, led to the formation of a **Committee for Implementing Legal Aid Schemes (CILAS).** The legal legitimacy of Lok Adalat flows from the Legal Services Authorities Act, 1987. It roughly means "People's court". This is a non-adversarial system, where by mock courts (called Lok Adalats) are held by the State Authority, District Authority, Supreme Court Legal Services Committee, High Court Legal Services Committee, or Taluk Legal Services Committee, periodically for exercising such jurisdiction as they thinks fit. These are usually presided by retired judge, social activists,

or members of legal profession. It does not have jurisdiction on matters related to non-compoundable offences. There is no court fee and no rigid procedural requirement (i.e. no need to follow process given by Civil Procedure Code or Evidence Act), which makes the process very fast. Parties can directly interact with the judge, which is not possible in regular courts. A case can be transferred to a Lok Adalat if one party applies to the court and the court sees some chance of settlement after giving an opportunity of being heard to the other party.

Lok Adalats were organized and over fifteen million cases were settled. These cases related primarily to motor accidents, land acquisition, family disputes, mutation of land, encroachments on forest land, bank loans, workmen's compensation and compoundable criminal offences.

The focus in Lok Adalats is on compromise. When no compromise is reached, the matter goes back to the court. However, if a compromise is reached, an award is made and is binding on the parties. It is enforced as a decree of a civil court. An important aspect is that the award is final and cannot be appealed, not even under Article 226 because it is a judgment by consent. All proceedings of a Lok Adalat are deemed to be judicial proceedings and every Lok Adalat is deemed to be a Civil Court. Main condition of the Lok Adalat is that both parties in dispute should agree for settlement. The decision of the Lok Adalat is binding on the parties to the dispute and its order is capable of execution through legal process. Lok Adalat is very effective in settlement of money claims. Disputes like partition suits, damages and matrimonial cases can also be easily settled before Lok Adalat. Lok Adalat is a boon to the litigant public, where they can get their disputes settled fast and free of cost.

Legislative Efforts Towards ADR

The legislative sensitivity towards providing a speedy and efficacious justice in India is mainly reflected in two enactments. The first one is the **Arbitration and Conciliation Act, 1996** and the second one is the incorporation of section 89 in the traditional **Civil Procedure Code (CPC).**

The recent amendments of the CPC will give a boost to ADR. Section 89 (1) of Civil Procedure Code, 1908 deals with the settlement of disputes outside the court. It provides that where it appears to the court that there exist elements, which may be acceptable to the parties, the court may formulate the terms of a possible settlement and refer the same for arbitration, conciliation, mediation or judicial settlement. While upholding the validity of the CPC amendments in ***Salem Advocate Bar Association v. U.O.I*** **,** the Supreme Court had directed the constitution of an expert committee to formulate the manner in which section 89 and other provisions introduced in CPC have to be brought into operation. The Court also directed to devise a model case management formula as well as rules and regulations, which should be followed while taking recourse to alternative dispute resolution referred to in Section 89 of CPC. All these efforts are aimed at securing the valuable right to speedy trial to the litigants.

ADR was at one point of time considered to be a voluntary act on the apart of the parties which has obtained statutory recognition in terms of CPC Amendment Act, 1999, Arbitration and Conciliation Act, 1996, Legal Services Authorities Act, 1997 and Legal Services Authorities (Amendment) Act, 2002. The access to justice is a human right and fair trial is also a human right. In India, it is a Constitutional obligation in terms of Art.14 and 21. Recourse to ADR as a means to have access to justice may, therefore, have to be considered as a human right problem. Considered in that context the judiciary will have an important role to play.

The Supreme Court of India has also suggested making ADR as 'a part of a package system designed to

meet the needs of the consumers of justice'. The pressure on the judiciary due to large number of pending cases has always been a matter of concern as that being an obvious cause of delay. The culture of establishment of special courts and tribunals has been pointed out by the SC of India in number of cases. The rationale for such an establishment ostensibly was speedy and efficacious disposal of certain types of offences Of the enactments having a bearing on the subject of conciliation, special reference may also be made to the Code of Civil Procedure, 1908 which contains provisions enjoining a duty on courts to make efforts and to assist the parties in arriving at a settlement in certain categories of suits/proceedings such as litigation by or against the Government or public officers in their official capacity, litigation relating to matters concerning the family such as suits/proceedings for matrimonial relief, guardian and custody, maintenance, adoption, succession, etc. Similar provisions are also contained in the Hindu Marriage Act, 1 955 and the Family Courts Act, 1984. The Industrial Disputes Act, 1947, also makes provisions for settlement of disputes through conciliation.

Recently, the Supreme Court of India in the case of **A. Ayyasamy v. A. Paramsivam,** said such categories of no arbitrable subjects such as disputes relating to rights and liabilities which give rise to or arise out of criminal offences, matrimonial disputes relating to divorce, judicial separation, restitution of conjugal rights and child custody, insolvency and winding up etc are carved out by the courts, keeping in mind the principle of common law that certain disputes which are of public nature etc are not capable of adjudication and settlement by arbitration and for resolution of such disputes, Courts are better suited than a private forum of Arbitration.

Government Role to Encourage The ADR Process

Government contracts generally provide for compulsory arbitration in respect of disputes arising there under and usually the arbitrators appointed to decide such disputes are senior government officers. The large number of public sector under-takings also follows a similar procedure. There is also Government of India's Scheme, evolved on the directions of the Supreme Court, with regard to settlement of disputes between one Government Department and another and one Government Department and a Public Enterprise and between Public Enterprises themselves. This Scheme provides for the constitution of a standing Committee of senior officers to ensure that no litigation involving such disputes is taken up in a court or a tribunal without the matter having been first examined by the said Committee and the Committee's clearance for litigation obtained. The Ministries concerned in specific cases are also represented in the said Committee. The Committee assesses the reasonableness of the rival stands before it makes up its mind. This procedure has helped in an amicable settlement of a large number of disputes which would have otherwise ended in litigation.

There is also a permanent machinery of arbitrators constituted by the Government of India to settle all current and future commercial disputes between public sector undertakings inter-se as well as between a public sector undertaking and a Government Department. The award of the arbitration in such a dispute is binding on the parties to the dispute. Any party aggrieved by the award may make a reference for setting aside or revision of the award to the Union Law Secretary whose decision binds the parties finally and conclusively.

The International Centre for Alternate Dispute Resolution (ICADR) works for promotion and development of Alternative Dispute Resolution (ADR) facilities and techniques to help early resolution of disputes. Detailed information about the international conferences, workshops or seminars, services,

procedures and training programmes etc. is provided. Users can download brochure, annual reports, individual and institutional membership forms, model clauses, and model agreement etc. Information on members and panel of arbitrators, conciliators or mediators as well as experts is available. The Chief Justice of India and the Union Minister of Law and Justice are the Ex-Officio Patrons of ICADR. At the regional level, the Chief Justice of the concerned High Court is the Patron of the Regional Centre of ICADR. Dr. H.R. Bhardwaj, Former Governor of Karnataka and Union Law Minister is the Chairman of ICADR. The Governing Council of ICADR comprises of several eminent personalities drawn from various fields.

Courts in India also appoint arbitrators of their choice in certain eventualities. There are also a number of commercial organizations which provide a formal and institutional base to commercial arbitration and conciliation. There are several merchant associations which provide for in-house arbitration facilities between the members of such associations and their customers. In all such cases, the purchase bills generally require the purchasers and sellers to refer their disputes in respect of the purchase or the mode of payment or the recovery thereof to the sole arbitration of the association concerned, whose decision is final and binding on the parties. Stock exchanges in India also provide for in-house arbitration for resolution of disputes between the members and others. The Board of Directors of each stock exchange constitutes the appellate authority for hearing appeals from the award of the arbitral tribunal. It appears that these in-house facilities have proved quite effective.

India has recently entered into bilateral investment protection agreements with the United Kingdom, Germany, Russian Federation, The Netherlands, Malaysia and Denmark. Each agreement makes provision for settlement of disputes between an investor of one Contracting Party and the other Contracting Party in relation to an investment of the former through the following ADR procedures: negotiation, conciliation and arbitration. India is also a party to the Convention Establishing the Multilateral Investment Guarantee Agency which provides for settlement of disputes between States parties to the Convention and the Multilateral Investment Guarantee Agency through negotiation, conciliation and arbitration. There are a number of agreements in other sectors to which India is a party containing provision for dispute-resolution through ADR procedures.

Suggestions and Conclusion

Barring arbitration and conciliation, other ADR procedures are virtually unknown in India. For a successful pursuit of ADR movement in India, three things are absolutely necessary: good law; infrastructural facilities for holding ADR proceedings; and, professionally trained ADR practitioners. There are, however, no trained ADR practitioners in India at present and those who are doing ADR work are largely self-taught. Nor are the infrastructural facilities for holding ADR proceedings very attractive. There are also no institutions which have teaching or research programs on ADR.

It is in this context that certain eminent people in the legal, administrative and commercial fields have come together and established an institution known as "The International Centre for Alternative Dispute Resolution" (ICADR). The International Centre was registered as a society under the Societies Registration Act, 1860 on 31st May 1995. It is an independent non-profit making organization. The International Centre is intended to spread ADR culture in this part of the world. Though it is seated in Delhi at present, it has plans to function through offices set up in other parts of the country. The main objectives of the Centre are:

(I) to propagate, promote and popularize the settlement of domestic and international disputes by

different modes of ADR;

(II) to provide facilities and administrative and other support services for holding conciliation, mediation, mini-trials and arbitration proceedings;

(III) to promote reform in the system of settlement of disputes and its healthy development suitable to the social, economic and other needs of the community;

(IV) to appoint conciliators, mediators, arbitrators, etc., when so requested by the parties;

(V) to undertake teaching in ADR and related matters and to award diplomas, certificates and other academic or professional distinction;

(VI) to develop infrastructure for education, research and training in the field of ADR;

(VII) to impart training in ADR and related matters and to arrange for fellowships, scholarships, stipends and prizes.

ADR is quicker, cheaper, and more user-friendly than courts. It gives people an involvement in the process of resolving their disputes that is not possible in public, formal and adversarial justice system perceived to be dominated by the abstruse procedure and recondite language of law. It offers choice: choice of method, of procedure, of cost, of representation, of location. Because often it is quicker than judicial proceedings, it can ease burdens on the Courts. Because it is cheaper, it can help to curb the upward spiral of legal costs and legal aid expenditure too, which would benefit the parties and the tax payers.

It is one of the most important duties of a welfare state to provide judicial and non-judicial dispute-resolution mechanisms to which all citizens have equal access for resolution of their legal disputes and enforcement of their fundamental and legal rights. Poverty, ignorance or social inequalities should not become barriers to it. The workload of Indian Judiciary increased by leaps and bounds and has now reached a stage of unwieldy magnitude, which has in fact led to a large backlog of cases. Due to this ADR has become the need of the hour for Indian Judiciary.

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Other Measures Suggested For Making Arbitration More Effective:

1. An infrastructure should be Set up for Research, Education and Training in Alternative Dispute Resolution for various fields including Technical savvy Arbitrators, Techno savvy Mediators; Counselors who can amicably resolved the dispute between the parties.
2. Encouraging pro-active means of ADR by adopting innovative methods and technology with flexible procedure.
3. Strengthening Regulatory Mechanism for professional service by Arbitrators, Mediators, Counselors who can counsels through Institutional Arbitration and Mediation.
4. There is need to frame proper Arbitration Clause, particularly in Govt. and Public Sector Undertaking, specifying qualification as Technical Professional, Detailing Procedure of arbitration and fees of Arbitrator.
5. Lok Adalats should be strengthening in the Judicial Mechanism of India.