Alternative Dispute Resolution

CONCISE E BOOK

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Alternative Dispute Resolution: Meaning, Nature and Origin

Indian judiciary is one of the few very old judiciaries throughout the globe and is a carefully designated one under the Constitution of India. Even after being efficient enough, the Indian courts are known worldwide for their slow judicial procedure. More than 43 lakh cases are pending in the high courts all over the country and it was reported to the Rajya Sabha in 2019 that over 8 lakhs of these cases are over a decade old. This is a big problem and the major reason for it is the increasing population and with it the 'unsatisfactory' proportion of judges to citizens.

Long unsettled cases disturb the mental as well as the financial health of both the parties. This problem persists long after establishing more than a thousand fast track Courts but the filing of a case requires a day, but disposal of cases take months. So, Courts alone efficiently handling pending cases while disposing of new ones is possible only in a Utopian country.

What is ADR?

ADR I.e. alternative Dispute Resolution as it very well may be effectively comprehended by the words that ADR is an alternative technique to resolve disputes now first, we need to comprehend that what is the conventional method that is "court". There are a great deal of cases pending and courts can't resolve all the cases. To manage this sort of circumstance ADR can assume an extremely indispensable job. ADR can resolve the dispute swiftly and the decision that gets through this ADR is acknowledged by both the parties. ADR is generally acknowledged on the grounds that it settles the dispute in practice a wide range of issues like commercial, civil, family and industrial issues, and so on.

Hence, dealing with such problems requires external help other than Judicial setups and in such Alternative Dispute Resolution (ADR) can be a helpful one, it is an umbrella term for various methods that resolve conflict in a peaceful manner acceptable to both the parties. ADR as a concept can be substituted to the conventional methods in order to resolve disputes. ADR as a process can efficiently resolve all types of matters – civil, commercial, family, companies etc. ADR uses the assistance of a neutral third party who helps both the parties to communicate as well as discuss the differences in order to reach a settlement that will take into consideration

the arguments of both the parties. This includes Arbitration, Mediation, Negotiation as well as Conciliation (the most popular ADR methods).

Arbitration

Arbitration is a substitute to court trials, it cannot exist without a valid arbitration agreement clause, inserted before the dispute emerges. In this kind of ADR system, the proceedings shall be with arbitrators (substitute to judges in Court), they can be one or two in number. The decision of an arbitrator is binding on the parties (just like Court proceedings) and the decision is called 'Award'. The sole object of Arbitration proceedings instead of conventional one is to obtain a just and fair settlement of disputes outside court without necessary delay and expense that is expected out of Court trials.

Either of the parties (in a contract with arbitration clause) can invoke the clause either himself or by way of an authorized agent. Here, the arbitration clause is a clause that mentions the course of actions in case a party wants to go for arbitration, language involved, number of arbitrators to be seated, and place where the arbitration is to be conducted.

Mediation

Mediation is another form of Alternative Dispute resolution where a third neutral party aims to resolve disputes between the parties and assist them in reaching an agreement. It is an easy and uncomplicated process, extremely party centred. A third party is appointed as a mediator to resolve the dispute amicably by using appropriate communication and negotiation techniques. Mediator's sole objective to help parties reach a common point, he doesn't impose his views and make no such decision imposing on the parties, what a fair settlement should be. Four stages of mediation are- Opening statement, Joint session, Separate session and finally Closing.

Conciliation

Conciliation can be called as another form of arbitration but it is comparatively less formal in nature. It is different because 'clause' for conciliation to be invoked by either of the parties is not a mandate of this ADR, but since a conciliator does a similar job to an arbitrator, the proceedings work on similar lines. Also, it is actually not possible for the parties to have a conciliation agreement before the dispute. It is stated in Section 62 of The Arbitration and Conciliation Act, 1996 that,

- If a party wishes to initiate conciliation, it shall send to the other party a written invitation to offer the same, along with a brief introduction of the subject of the dispute.
- The proceedings shall commence only when the other party accepts the same
- If the other party wishes to reject the invitation, there will be no question of conciliation proceedings.

Nature of ADR: Explained-

'Alternative dispute resolution' as a word literally means to solve the dispute by alternative mechanisms. As mentioned above, these are techniques of dispute settlement outside of the government judicial process and solve disputes by mutual understanding. ADR extra supports the judicial system by easing the burden on the same. It is less expensive and time-efficient. According to Justice Mustafa Kamal, "it is a non-formal settlement of legal and judicial dispute as a means of disposing of cases quickly and inexpensively"

ADR process are-

• Settled with the assistance of a neutral third person

• the third person is familiar with the nature of the dispute

• involved with proceedings that are informal,

• consumed with lesser procedural technicalities

• cost and time-efficient

• efficient because the confidentiality of the subject matter (related to the dispute) is maintained to a great extent

Genesis of ADR: Explained-

Alternate Dispute Resolution System is not a new experience for the people in our country. It has been prevalent for a long time. System of Dispute Resolution, anciently, made a significant contribution in matters related to family, social groups, and trade and property. Disputes were also resolved at village level where elders comprised the 'Panchayat' and performed the informal 'mediation'. More such institutions like Kulas, Srenis and Parishads adjudicated disputes before 'kings'. Further with the entry of East India Company, Modern Arbitration Law was introduced by way of Bengal Regulation of 1772, 1780 and 1781 In the common law

countries, ADR has its roots in the English legal development. Charters and documents reveal that some respected male members in the community often resolved disputes as extended legal authorities of kings, creating one of the first forms of arbitration. In the modern times, dispute resolution refers to both Alternate Dispute Resolution subsequent to which is the Online Dispute Resolution. ADR system includes the mechanism, short of litigation, rather with the help of a third party. This may refer to Arbitration, Mediation, and Negotiation and Conciliation, sometimes. With technology seeping into this whole arena of ADR, Online dispute resolution is the new face of Dispute Resolution.

ADR in India

The ADR mechanism has proven to be one of the most effective mechanisms to resolve disputes of commercial matters. In India, laws relating to resolution of disputes are three in number. The Judiciary itself also encourages out-of-court settlements to meet with the pending cases in the courts. Few important provisions related to ADR in India-

- Section 89 of the Civil Procedure Code, 1908 – It provides the opportunity to people to settle matters outside the court by way of Arbitration, Conciliation, Mediation or Lok Adalat.
- The Acts dealing with Alternative Dispute Resolution are Arbitration and Conciliation Act, 1996 and,
- The Legal Services Authority Act, 1987
- To effectively implement the ADR mechanisms throughout India, organisations like the Indian Council of Arbitration (ICA), The International Centre for Alternative Dispute Resolution (ICADR) were established in the year 1965 and 1993 respectively. The ICADR is an autonomous organisation, working to promote and develop ADR facilities and techniques throughout India. While the main objective of the Indian Council of Arbitration- ICA is to promote amicable and quick settlements of matters by arbitration. Arbitration and Conciliation Act, 1996, law, is based on the United Nations Commission on International Trade Law (UNCITRAL) model of the International Commercial Arbitration Council.

Applicable Laws in International Commercial Arbitration

With the growing pace of Globalization, transitions between companies or parties of two different countries have gradually increased over the years. But these increased global transitions have also contributed towards disputes among the parties involved. Some parties prefer to approach the International Court of Justice, National Courts, and International Dispute Resolution Centers while some prefer to follow Arbitration and various other International Conventions and Treaties for the resolution of disputes. Most of the companies are now a day's optimistically opting for Arbitration centres for the resolution of disputes because normal court settlement takes more time and money to settle the minimal disputes which could be easily sought out by the companies out of court. Arbitration centres usually focus more on the material facts of the case while resolving any matter. Material facts in the international commercial arbitration cases include the hearing witnesses, zest of the meetings, and clauses of the agreement or contract. In this article, I will be focusing on the possible mechanisms that arbitrators usually refer to while hearing a matter concerning International commercial transition.

Need for International Commercial Arbitration

1. **Surpassing National Frontiers:** Whenever any individual crosses the boundary of two nations he automatically enters in one legal system from another and the things which are permissible in one nation might not be necessarily permissible in another. In the same way, when two companies from different nations engage in any kind of business activity the applicable laws concerning nations automatically get applicable and companies often end up violating such laws and hence the need for the arbitration cell is established.

2. **Doctrine of Autonomy of Parties:** So far as international contracts are concerned the 'Doctrine of autonomy of Parties' prevails, which purposefully states that parties are free to choose by themselves what laws will be applicable to their contract. Now, the problem with this doctrine is that in each and every business transition there will be one party who is in the superior bargaining position, and every time that party will try to have such clauses and laws in the contract which will eventually benefit them only. Here comes the need for arbitration cells to act as a watchdog where one party is unjustly enriching its interests. Also in such a

situation, the contract is declared as 'Unconscionable Contract' which doesn't adhere to the principles of Justice, Equality, Good Conscience, and Fairness.

3. **Recognition by International Convention:** Generally if parties tend to seek resolution of disputes at courts in one or the other nation to which the party belongs, lex terrae i.e. Law of the Land applies and also it takes a longer time to get the disputes resolved but, if companies opt for resolution by arbitration then they can have the freedom to choose the applicable international law on their contract. There are various International Conventions available for this purpose such as The European Convention (1961), The UNCITRAL, rules of International Criminal Court, The Washington Convention (1975), The New York Convention (1959) and United Nations Convention on Contracts for International Sale of Goods [CISG] (1980).

Applicable Laws

Let's discuss some of the applicable laws in the arena of International Commercial Arbitration:

1. **National Law:** National Law is applicable in the cases where the state or state-sponsored entity is a party to the contract and at the same time party to the dispute. In such cases, the law of that country will be applicable to which the state the sponsored company belongs to. But, over a period of time, it seems that the dispute remains unresolved if both the parties or companies are government-sponsored, in such a case it is very difficult to decide which country's law will prevail and a dispute remains unsettled for a longer period of time. Other than dispute related to 'National Law', there are also some other disputes which could remain the contract unsettled are:

a) Unsuitability of International Trade

b) Unfair Treatment by one of the party or government concerned

c) Conflicting National Interests

In the event of such issues certain 'Stabilization Clauses' were included at the later stage so that disputes could be settled and an agreement could be performed in a harmonious manner.

2. **Public International Law:** As per the older applications either Public International Law is acceptable or National Law is acceptable. In Serbian loans case the permanent court held that "any matter in which the state is not a party, will come under the ambit of International Law". But, presently this narration doesn't hold true because Public International is no longer

limited to states, it does also include organizations like UN, ICC, etc. and also the emergence of Transnational Laws gives room to new International Commercial Trade Law.

3. **Concurrent Law:** It often seemed in the International Commercial Arbitration that after signing the contract states have moulded the contract according to the advantages of the state. For settling such disputes Arbitration often uses National Laws or International Conventions.

4. **The Tronc Commun Doctrine (or Combined Laws):** This doctrine is based on the proposition that parties are free to choose their own 'National Laws' in order to establish a common consensus over International Commercial Arbitration. In such cases arbitration cells draft contracts in lieu of the combined laws prevalent in both the nations so that any kind of dispute could be avoided at the later stages.

5. **The Islamic Shariat Law:** Most of the contracts and agreements in the Islamic countries are governed according to the Shariat Law as per the holy Quran but, with the emergence of International Laws and Conventions many Islamic countries have shifted towards UNCITRAL and CISG for settling disputes through International Commercial Arbitration Mechanism.

6. **Transnational Laws:** The positive idea of Arbitrators behind shifting to Transnational Laws is to minimize the efforts and to provide the exact solutions of disputes concerning the matters specifically related to conventions and laws. For example, the concept of 'Lex Mercatoria' is referred by the whole International Business Community in order to settle any dispute related to International Business Transition, General Principles of Law were being referred by the International Criminal Court in order to settle any criminal the dispute between two or more nations and in the same way UNIDROIT principles were being referred by International agencies to draft the contract on International platforms so that uniformity could be achieved.

7. **Principles of Equity and Good Conscience:** As I have already mentioned about the 'Unconscionable Contracts', the International Commercial Arbitration often gives decisions on moral grounds and award compensation because the clauses of the contract or the intentions of one of the parties or both the parties involved don't adhere to the principles of Justice, Fairness, Equality, and Good Conscience.

Meditation: A Tool for Access to Justice

What is the Significance of Access to Justice?

In 1999 the then chief justice of the family court Alastair Nicholson, and sue lynch wrote: “any conversation of access to Justice should be set inside a more extensive setting than that of the legal framework alone and in the time of 2009 the access to justice task force in the commonwealth attorney, journals dept. Published ‘ a key structure for access to justice in the federal civil justice framework. Access to justice is key to the standard of law and basic to the enjoyment regarding fundamental human rights, it is a basic precondition to social incorporation and a basic component of a well-working majority rule government. An effective justice system must be available in the entirety of its parts without this, the framework dangers losing its significance to, and the regard of the network it serves availability is about more than straightforward entry to land stone structure or getting legal advice. While courts are a significant part of the justice system, there are numerous circumstances courts are the last spot individuals will get the result they are searching for to determine issues.

The basic test is whether our justice system is simple, reasonable, and affordable. It is additionally significant that the framework gives viable early mediation to assist individuals with settling issues before they raise and lead to digging in a disservice. (3)

An alternative mechanism to improve value and access to justice and accomplish lower cast civil dispute resolution, in both metropolitan regions and provincial and remote communities and the expense and advantages of these.

Where parties can’t arrive at a private resolution, the civil justice system gives them different approaches to determine the dispute and mediation is one of the ways.

What is Mediation?

Mediation is one of the methods of alternative dispute resolution (ADR) accessible to parties. Mediation is basically a negotiation encouraged by an impartial third party. Unlike arbitration, which is a procedure of ADR fairly like a trial, mediation doesn’t include decisions by the impartial third party. ADR techniques can be started by the parties or might be constrained by enactment, the courts, or legally binding terms.

Advantages of Mediation

Mediation is one of a few ways to deal with resolving disputes. It contrasts from the antagonistic resolution process by temperance of its simplicity, familiarity, flexibility, and economy. Mediation gives the chance to parties to concur terms and resolve issues without anyone else, without the requirement for legal representation or court hearings.

Why mediation is important and how it is a tool for access to justice, following are some of the benefits which typically associated with mediation:

1. Recognition
2. Empowerment
3. Speedy trial
4. Economical
5. Confidentiality
6. Quality of settlement
7. Avoid bad outcomes

The prior is only a portion of the convincing reasons to mediate disputes. Besides, there is only here and there any genuine drawback to mediation. While some may hesitate “to lay it all out there” in mediation, in this period of disclosure driven litigation, the old “trial by ambush” long stretches of civil litigation are progressively turning into a relic of times gone by. Mediation works not just on the grounds that it centres around the parties, own interests, and agendas. yet in addition since it gives the chance to parties to move beyond dispute proficiently and graph their own future.

Is Mediation right for you?

At the point when parties are reluctant or unable to resolve a dispute, one great option is to go to mediation. Mediation is commonly a short term, structured, task-situated, and “hands-on” process.

In meditation, the disputing parties work with an unbiased third party, the mediator, to determine their disputes. The mediator encourages the resolution of the parties’ disputes by

regulating the exchange of information and the haggling procedure. The mediator enables the parties to discover shared opinions and manage unrealistic desires. The individual may likewise offer inventive arrangements and help with drafting a final assessment. The role of the mediator is to decipher concerns, transfer information between the parties, outline issues, and characterize the issues

When Is Mediation Required?

Mediation is generally a voluntary procedure, albeit now and again resolutions, rules, or court orders may require participation in mediation. Mediation is regular in small claims courts, housing courts, family courts, and some criminal court projects and neighbourhood justice systems.

Dissimilar to the litigation procedure, where a nonpartisan third party (normally a judge) imposes a decision over the issue, the parties and their mediator commonly control the mediation process – choosing when and where the mediation happens, who will be present, how the mediation will be paid for, and how the mediator will interface with the parties. (4)

What is the role of Mediator?

Every time the last decision is taken by the parties and the mediator doesn't decide anything and he has no power to decide the dispute between the parties and essentially put he is the guardian of the procedure and he can't give his recommendation given it is evaluative mediation. Be that as it may, what does the mediator do is he simply offer his input and attempt to come to a conclusion which is generally of the parties by their own points.

Procedure

- Opening statement
- Joint session
- Separate session
- Closing

In the opening statement, the mediator just gives all the information about his appointment and he proclaims that he is an unbiased individual and he has no interest in the subject matter. In the joint session, the mediator attempts to comprehend the facts and the issues of the case and

he assembles each data identified with the dispute by welcoming both the parties and parties present their case and give their point of view looking into the case.

In the separate session fundamentally, the mediator accumulates information by taking both the parties in confidence separately and he attempts to comprehend the core of the dispute. In the wake of hearing both the parties and when he comprehends the entire dispute, he attempts to make alternatives for settlement through parties on the statement, facts which are given by the parties subsequent to being asked by the mediator.

Mediation is not quite the same as conciliation as conciliation is the formulation of opinion and conveyance of verdict. Be that as it may, in mediation, a mediator is just a facilitator and just render his opinion in the dispute and he can convey his verdict with respect to the contest anyway the conciliator plays more interventionist role and make a proposition for the dispute and this was decided in the case of Salem Advocate Bar Association v. U.O.I; in this case, SC held that mediator is merely a facilitator while the conciliator by making proposals for a settlement of the dispute and by reformulation the conditions of the settlement assume a progressively dynamic the mediation is the procedure of structured negotiation including various stages like a joint session, introduction, separate session and so on.

How is Mediation a Tool for access to Justice?

As we already understood what is the significance of access to justice and how it is related to ADR now let's try to understand how it is a tool for access to Justice.

At the point when parties can't arrive at a private resolution then the civil justice system gives them different approaches to determine the contest mediation at that point turns into the most embraced structure for this since it is the nonbinding decision by the mediator. Parties can without much of a stretch access the Justice through their own particular manner by giving the fact to the mediator and thus resolve the dispute, access to Justice implies the capacity to get Justice by any individual and the most ordinary method for getting justice is through a court of law yet nowadays courts are overburdened by loads of cases at the principal example court alludes the parties to determine the dispute through mediation.

As has just been expressed that a mediator is a nonpartisan third party that goes about as a guardian of the procedure without mediating in the topic makes it a method for settling disputes agreeably and it additionally is a swift and adaptable method for resolving disputes with sets aside both money and time. Since mediation isn't a procedure to be recorded for the public

record there for it likewise spares the generosity of the parties from being discoloured. Every one of these highlights of mediation makes it the fittest method for resolving disputes between parties in today's time when the courts are troubled with cases.

Qualities of Negotiator, and Process of Negotiation

What is "negotiation"?

It is a process through which parties solve disputes amicably by looking at each other's profit. It is basically based on compromise and agreements, mutual understanding is must to negotiate between parties. From bargaining with a vegetable wander or the deals between two Nations, all these small to large contracts are based on negotiation because everyone wants the ball to favour them in their court. Negotiation starts from the time when the parties meet each other and they discuss what they want and at what cost.

A good negotiator is one who can make the deal in his favour without harming what he wants.

The one who has the following qualities is a good negotiator:

- **Effective Speaker:** The one who can state his views clearly in front of everyone and can state what he wants and at what terms he has to speak to the point with effective communication showing confidence that yes he is there to deal and will get the deal.
- **Listening:** He has to listen to the other party also so that he can know what they want and also that they are there for the business and want to make the profit. Effective listening can help him communicate and negotiate in the best way.
- **Preparation:** He has to prepare with all the matters and subjects he is going to negotiate where he can relax what the most important terms and what are the least important terms where he can be more flexible and give relaxations.
- **Positive Attitude:** Dealing with a positive attitude that we want the deal and will do everything to negotiate and get the deal in favour is one the important thing and makes the other party think that yes, the man is really interested in the deal and will do all the work efficiently.

- **Respect:** One has to respect the other party also he must bear in mind that they are also for the business and want to earn profit and will negotiate only when they are getting something. Sense of humour plays an important role as it makes both the parties comfortable with each other, when the things get sour one has to think from the other parties view.
- **Knowledge and Planning:** It plays an important role, knowledge for the issue helps the negotiator to plan how much he can negotiate on the particular issue. Knowledge for other similar deals also helps to leave the deal at the correct time.
- **Patience:** Every detail should be analysed properly with great precaution, one has to give time to the other party also and let them decide as we want to grab the deal and also want deals in the future also a mutual understanding has to be established so that none of the party is at loss.

Process of Negotiation

Stage wise process of negotiation:

- Preparation: From time, place, members of the discussion team, rules etc. everything is to be kept prepared so that no last hurries are there. If preparation of thoughts and deal is at par then we will definitely get a better deal.
- Discussion: It involves exchange of thoughts between the parties put up by them so that they can know if they are interested or not in the deal, it saves time and also makes parties comfortable with each other. The negotiator should be confident while discussing and not arrogant with his tone.
- Bargaining: The start of negotiation, all the negotiations are stated by parties and the deal is finalized by stating what could be bargained and what not.
- Closing: Final of the deal if it is made or not then both of the parties start working on their part of the deal.

Examples of Some of the Negotiation

Payment of dues of employees during lockdown

The Honourable Supreme Court said that both the employer and employee must negotiate with one another on how they will solve the problem and an amicable solution should be accepted by both of them. Similar suggestions were given to the tenants and the owner of the house so

that they can decide how much and when to pay the rent when they were not accommodating in the house during the period of the lockdown.

Joint Comprehensive Plan of Action (JCPOA)

Two permanent members of the UN and Iran were parties to the deal, where Iran said that they will use nuclear power only for power generation and restrict the use of Uranium. The deal was finalized in the year 2015, but after some time Iran started testing nuclear missiles which led to breach of trust hence the U.S. unanimously pulled itself out from the deal and made sanctions on Iran also on the countries who will do business with Iran. Proper negotiation and follow of the rules could have avoided sanctions and would have been better for the citizens of the country of Iran.

Denuclearization of North Korea

Where the U.S. and North Korea were the parties and the deal was very near to finalization after three decades of talks between the officials but America wanted complete denuclearization without giving any relief in sanctions to North Korea hence the deal was not finalized. This was a very important deal for the whole world which could have benefitted all if finalized.

Babri Masjid

To settle the dispute amicably outside every possible negotiation was decided by the parties but it was not finalized and hence decided by the Supreme Court of India.