



## ADR Mechanism in India: Achievements and Challenges

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### ABSTRACT

Article 21 of the Constitution ensures just, fair and reasonable procedure. Sooner the disputes are resolved the better for all the parties concerned in particular and society in general. Denial of justice through delay is the biggest mockery of law, but in India it is not limited to mere mockery; the delay in fact kills the entire justice dispensation system.

Alternative Dispute Resolution mechanisms have become more crucial for businesses operating in India as well as those doing businesses with Indian firms. There are various reasons for which ADR is preferred over the conventional way of resolving the disputes. India being a developing country, going through major economic reforms within the framework of the rule of law, for expeditious resolution of disputes and lessening the burden on the courts, alternative mechanisms for resolution (ADR) are the only alternative through arbitration, conciliation, mediation and negotiation.

### KEYWORDS

Arbitration, Conciliation, Mediation, Dispute, Resolution

### Introduction

Desire for quick and affordable justice is universal. Right to speedy trial is a right to life and personal liberty of every citizen guaranteed under Article 21 of the Constitution, which ensures just, fair and reasonable procedure. "Any conflict is like cancer. The sooner it is resolved the better for all the parties concerned in particular and society in general. If it is not resolved at the earliest possible opportunity, it grows at a very fast pace and with time and the effort required to resolve it increases exponentially as new issues emerge and conflicting situations galore. One dispute leads to another. Hence, it is essential to resolve the dispute, the moment it raises its head.<sup>1</sup> Disposal of cases in time is the necessity to maintain the rule of law and providing access to justice, which is a fundamental right of every citizen guaranteed by the Constitution. "Behind almost every human conflict someone feels dismissed, discounted, disenfranchised or disrespected. Unresolved tensions that may have immersed below the surface can resurface and make situations difficult."<sup>2</sup>

Denial of justice through delay is the biggest mockery of law, but in India it is not limited to mere mockery; the delay in fact kills the entire justice dispensation system of the country. This has led to people settling scores on their own, resulting in a growing number of criminal syndicates and mob justice in various parts of the country and reflecting the loss of people's confidence in the rule of law.<sup>3</sup> In 1996, the Indian Legislature accepted the fact that in order to lessen the burden on the courts, there should be a more efficient justice delivery system in the form of arbitration, mediation and conciliation as an Alternative Dispute Resolution (ADR) options in appropriate civil and commercial matters. Thus, Parliament enacted Arbitration and Conciliation Act, 1996, with a view to provide quick redressal to commercial dispute by private Arbitration. Speedy decision of any commercial dispute is essential for the smooth functioning of business and industry. ADR has been recently referred in many areas as "Appropriate Dispute Resolution" and not as "Alternative". In fact litigation is being referred as "Judicial Dispute Resolution" or JDR. ADR is also being referred as a global system as it is not restricted by territorial jurisdiction, which is a major hurdle in litigation process.<sup>4</sup>

### Various Forms of ADR

There are various forms of ADR mechanisms exist in India for resolving disputes outside the courts. It is the nature of the dispute and relation of the parties which decide the choice of ADR method either by arbitration, conciliation, mediation, *Lok Adalat* etc. "Arbitration is a process used by the agreement

of the parties to resolved disputes. In arbitrations, disputes are resolved, with binding effect, by a person or persons acting in a judicial manner in private, rather than by a national court of law that would have jurisdiction but for the agreement of the parties to exclude it.<sup>5</sup> The process of arbitration can start only if there exists a valid Arbitration Agreement between the parties prior to the emergence of the dispute. As per Section 7, such an agreement must be in writing. The object of arbitration is settlement of disputes in an expeditious, convenient, inexpensive and private manner so that they do not become the subject of future litigation between the parties.

As a mechanism of ADR (Alternative Dispute Resolution), conciliation has acquired statutory recognition in the Arbitration and Conciliation Act, 1996. As against arbitration, it is neither based nor controlled by existence of a prior agreement between the parties. That apart, recourse to conciliation can be held even after parties have resorted to litigation and the case is pending before a Court. Conciliation is a less formal form of arbitration; it does not require an existence of any prior agreement. Any party can request the other party to appoint a conciliator. Conciliation is an alternative dispute resolution mechanism with the help of conciliator. Conciliator assists the disputing parties to explore potential solutions and find a mutually acceptable solution by lowering tensions and improving communications. Conciliation is an alternative dispute resolution mechanism which has been given statutory recognition by incorporating provisions in Sections 61 to 81 of Part III of the Arbitration and Conciliation Act, 1996.

Mediation has been defined as a private, informal dispute resolution process in which a neutral third person, the mediator, helps disputing parties to reach an agreement. In USA, mediation is the most popular form of ADR. Mediation is a process of dispute resolution focused on effective communication and negotiation skills. The mediator acts as a facilitator assisting the parties in communicating and negotiating more effectively, thereby enhancing their ability to reach a settlement. Mediation is a process of dispute resolution in which one or more impartial third parties intervenes in a conflict or dispute with the consent of the participants and assists them in negotiating a consensual and informed agreement. Mediation is a method of dispute resolution wherein a neutral person known as mediator brings the people who have a dispute, together and makes them to talk to each other. However, he makes no binding decisions on the contrary the parties to the dispute themselves ultimately determine whether the process results in a resolution of the dispute. The role of the mediator

is limited to help the disputing parties communicate with each other in the hope that they can find a way to work out their disagreements and differences. Mediation has been defined as a private, informal dispute resolution process in which a neutral third person, the mediator, helps disputing parties to reach an agreement.

*Lok Adalat* is constituted under National Legal Services Authority Act, 1987, pursuant to the constitutional mandate in Article 39-A of the Constitution of India, which contains various provisions for settlement of disputes, including *Lok Adalat*. The concept of *Lok Adalat* is not a new phenomenon, but an ancient concept is given now statutory basis. One of the unique features of *Lok Adalat* is that dispute are settled summarily without going through the complexities of legal proceedings of the routine Courts.

In 1987 Legal Services Authorities Act was enacted to give a statutory status to the institution of *Lok Adalat*. Chapter VI of the Act contains provisions providing for organization of *Lok Adalats*; the power and functions of the *Lok Adalat* and the effect of the award made by the *Lok Adalat*. Under section 19 of this Act, anybody can get his dispute referred to *Lok Adalat* for its settlement through mediation and conciliation. Once a compromise or settlement is arrived at before the *Lok Adalat*, then the award based thereon, acquires the force of a decree of a civil court. It attains finality and binds the parties to the dispute. The Act forbids filing of appeal to any court against such an award except on the ground of fraud. In *Lok Adalats*, justice is dispensed with free of cost and it is faster. The majority of the Indian population dislikes approaching the regular Court to resolve their disputes, reason being illiteracy, economic condition and lengthy procedures to be followed. Therefore, *Lok Adalats* could be a boon as an additional mechanism to the judicial institution, thereby reducing the backlog of cases, which keeps on mounting day by day. The *Lok Adalats* can settle all civil cases and compoundable criminal cases.

### Advantages

Over the last few decades, there is significant increase in international trade and commerce which has in turn resulted in considerable increase in the number of commercial disputes, and India is not an exception. However, growth of dispute resolution mechanisms could not be at the same pace as the industrial growth, modernization, and improvement of socio-economic circumstances. Thus, Alternative Dispute Resolution mechanisms have become more crucial for businesses operating in India as well as those doing businesses with Indian firms. There are various reasons for which ADR is preferred over the conventional way of resolving the disputes. Courts resolve disputes via a binding process by applying legal and equitable principles to findings of fact. Any Court system is governed by strict rules of pleading and of evidence. With a backward-looking approach, the outcome of Court efforts depends largely upon discovering the truth about something that occurred in the past. Subject to rigid procedural and evidentiary rules, Courts provide legal answers to questions of entitlements and of rights.<sup>6</sup>

ADR encourages the participation of people in the process of dispute resolution thus; it creates legal awareness and respect for rights of others and promotes self-reliant development. ADR processes have the advantage of providing parties with the opportunity to reduce hostility, regain a sense of control, gain acceptance of the outcome, resolve conflict in a peaceful manner, and achieve a greater sense of justice in each individual case. The resolution of disputes takes place usually in private and is more viable, economic, and efficient.<sup>7</sup> One of the foremost advantages of the Alternative Dispute Resolution process is that the dispute remains under the control of the parties themselves and any settlement entered into is their own and do not represent a dictate from an outsider. The process of Alternative Disputes Resolution be it arbitration, mediation, negotiation or *Lok Adalats* implies a greater involvement of the disputing parties. The parties are actively involved in the process of dispute resolution and can, therefore, more effectively reach a settlement of the dispute.

### Disadvantages

Everything is the mixture of black & white, and nothing is perfect, so the Alternate Dispute Resolution Mechanism is not an exception to this general rule. Parties cannot be compelled to go in for ADR unless they sign an agreement or mutually agree to resolve their disputes by ADR. "Arbitrators were frequently and strongly attacked as partial and immature in resolving the disputes. Probably many persons involved in the legal world are blissfully ignorant of the Alternative methodology in dispensing the even justice process through Arbitral process. So the arbitral justice system has co-extensively remained with the legal system but without much expected success."<sup>8</sup>

Nearly one and half decades after the enactment of the Arbitration and Conciliation Act, 1996 (hereinafter "the Act"), there are whispers in the air that the Act has lost its basic structure and identity and is no longer what its legislators intended it to be.<sup>9</sup> Success of ADR depends upon the good faith of the parties and their attorneys; however, unrepresented and/or uninformed party are at disadvantage of succeeding in an ADR. ADR does not any precedent value. Usually in ADR proceedings, precedents are not given much importance. The outcomes of ADR can vary, depending on arbitrator / mediator and other factors. Poor mediator / arbitrator (qualifications, style and attitude) can result in unsuccessful resolution, and can defeat the purpose of ADR. However, looking at the advantages as against the disadvantages of ADR, the balance lies in favour of advantages.

### Conclusion

Indian courts suffer from a serious backlog of cases, which is mainly due to less number of judges and insufficient infrastructure which is unable to handle the caseload. India being a developing country, going through major economic reforms within the framework of the rule of law, for expeditious resolution of disputes and lessening the burden on the courts, alternative mechanisms for resolution (ADR) are the only alternative through arbitration, conciliation, mediation and negotiation. By virtue of Code of Civil Procedure amendment in the year 2002, Section 89 has been included, which gives importance to mediation, conciliation and arbitration. This section makes it obligatory on the part of the Court to refer the matter for settlement either before the *Lok Adalat* or other methods enumerated in that section. Now it has become an international phenomenon to resolve commercial disputes through arbitration and not through normal judicial system. Majority of the persons do not want to become involved in lawsuits due to delays, high costs, unwanted publicity, and ill will. ADR, on the other hand, is usually faster and less expensive, and it is also conclusive. In addition to reducing the burden on the Courts and giving speedy justice to people, Alternative Dispute Resolution mechanism have been introduced and are being utilized for a number of other reason. Alternative Disputes Resolution mechanisms are relatively inexpensive in comparison with the ordinary legal process. These mechanisms, therefore, help litigants who are unable to meet the expenses involved in the ordinary process of dispute resolution through Courts. Furthermore, ADR mechanisms enhance the involvement of the community in the dispute resolution process.

Alternative Dispute Resolution mechanism (ADR) is not a replacement of litigation, rather it would be used to make our traditional court systems work more efficiently and effectively. We have to formulate effective Alternative Dispute Resolution mechanisms to ease the present burden of judicial functioning. The backlog of cases is increasing day by day; however, judiciary alone is not responsible for the same. It must be noted that the backlog is a product of "inadequate judge population ratio" and the lack of basic infrastructure. The government has to play a pro-active role in this direction. The researcher is of the view that in order to make Alternative Dispute Resolution Mechanisms more effective and taking it out of very narrow and limited area of application and widening the area of its operation. Further the lawyers have to play a very active and positive role and they should never forget that dispute is a problem, which needs to be solved and not contest, which needs to be won.