

NATIONAL AND INTERNATIONAL INITIATIVES IN INDIA TOWARDS ADR

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INTRODUCTION

In India, ADR has an important place, because of historical reasons. In regard to the global perspective, the international business community realised that court cases was not only time consuming but also very expensive. Various methods were adopted to solve the disputes. They are arbitration, conciliation, mediation, negotiation and the Lok Adalats¹.

Alternative Dispute Resolution is today being increasingly acknowledged in the field of law as well as in the commercial sector.² The very reasons for origin of Alternative Dispute Resolution are the tiresome processes of litigation, costs and inadequacy of the court system. It broke through the resistance of the vested interests because of its ability to provide cheap and quick relief. In the last quarter of the previous century, there was the phenomenal growth in science and technology. It made a great impact on commercial life by increasing competition throughout the world. It also generated a concern for consumers for protection of their rights.

The purpose of ADR is to resolve the conflict in a more cost effective and expedited manner, while fostering long term relationships. ADR is in fact a less adverse means, of settling disputes that may not involve courts. ADR involves finding other ways (apart from regular litigation) which act as a substitute for litigation and resolve civil disputes. These procedure are widely recommended to reduce the number of cases and provide cheaper and less adverse form of justice, which is a lesser formal and complicated system. Off late even Judges have started recommending ADR to avoid court cases.³

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¹ Dutta Advocate, 'Origin of Alternate Dispute Resolution in India', available at http://www.academia.edu/4371674/ORIGIN_OF_ALTERNATIVE_DISPUTE_RESOLUTION_SYSTEM_IN_INDIA (Accessed on 02.08.16)

² Meena Ajatshatru B.S. 'Perspective of Alternate Dispute Resolution', Legal Service India, available at <http://www.legalserviceindia.com/article/1167-Alternate-Dispute-Resolution.html> (accessed on 02.08.16).

³ Rout Chintamani, 'Alternative Dispute Resolution System In Justice Delivery System; Its Advantages In Disposing Of Civil Cases' International Journal of Political Science, Law and International Relations (IJPSLIR), Vol.2, Issue 2, Sep 2012 -11, ISSN 2278-8832

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 conflicts between European countries. Many international initiatives are taken towards alternative dispute resolution. The growth of international trade is bound to give rise to international disputes which transcend national frontiers and geographical boundaries.⁴ 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. It is now a growing and accepted tool of reform in dispute management in American and European commercial communities. This can be considered as a co-operative problem-solving system. The biggest stepping stone in the field of international ADR is the adoption of UNCITRAL (United Nations Commission on International Trade Law) model on international commercial arbitration.⁵ 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. General Assembly of UN also recommended its member countries to adopt this model in view to have uniform laws for ADR mechanism.⁶ Many international treaties and conventions have been enacted for establishing ADR worldwide. Some of the important international conventions on arbitration are:

- The Geneva Protocol on Arbitration clauses of 1923.
- The Geneva Convention on the execution of foreign award, 1927.
- The New York Convention of 1958 on the recognition and enforcement of foreign arbitral award.

In India, Part III of Arbitration and Conciliation Act, 1996 provides for International Commercial Arbitration. Another step in strengthening the international commercial arbitration is the establishment of various institutions and organizations such as:

⁴ Justice Verma Jagdish Sharan, 'Defining the Proper Limits of Judicial Intervention in and Assistance for the Arbitral Process; How A-National Can an International Arbitration Be?', WIPO, Biennial IFCAI Conference, October 24, 1997, Geneva, Switzerland.

⁵ Dr. Padma. T., 'Utilise ADR Mechanism to the Possible Extent-For Reduction of Pending Cases And Litigations', April 4, 2013; Available at <http://businessandmanagementarticlesofkpcrao.blogspot.in/2013/04/utilise-adr-mechanism-to-possible.html>.

⁶ Mr. Hasurkar Bhargava, 'ADR- The Need of The Hour', Manupatra; Available at <http://www.manupatrafast.com/articles/PopOpenArticle.aspx?ID=314a9bc7-686d-4d8d8e8f357562cc7cce&txtsearch=Subject:%20Arbitration/>

- International Court of Arbitration of the International Chamber of Commerce (ICC).
- Arbitration and Mediation Centre of World Intellectual Property Organization.
- American Arbitration Association (AAA).
- Tehran Regional Arbitration Centre (TRAC).
- International Centre for Dispute Resolution (ICDR).
- Organization of American States (OAS), etc.

The alternative modes of disputes resolution include- Arbitration, Negotiation, Mediation, Conciliation, Lok Adalat, National and State Legal Authority. ADR strategies which facilitate the development of consensual solution by the disputing parties are therefore considered a viable alternative.⁷ ADR methods such as mediation, negotiation and arbitration along with many sub-strategies are increasingly being employed world over in a wide range of conflict situations, ranging from family and marital disputes, business and commercial conflicts, personal injury suits, employment matters, medical care disputes, construction disputes to more complex disputes of a public dimension such as environmental disputes, criminal prosecutions, professional disciplinary proceedings, inter-state or international boundary and water disputes.

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.⁸ Lastly, 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.

⁷ Mr. Chandrachud Abhinav, 'Alternative Dispute Resolution: Is It Always an Alternative', Manupatra Articles; Available at <http://www.manupatrafast.com/articles/PopOpenArticle.aspx?ID=116c966f-2c9d-432e-be91-d5b1ea5fae50&txtsearch=Subject:%20Arbitration> .

⁸ Annual Report 2012-2013, The International centre for Alternative Dispute Resolution New Delhi, Available at <http://icadr.nic.in/file.php?123?12:1393479972>

The Apex Court in the case of *Food Corporation of India v. Joginder Pal*,⁹ also laid emphases on ADR system of adjudication through arbitration, mediation and conciliation as a modern innovation into the arena of the legal system and it has brought revolutionary changes in the administration of justice. It can provide a better solution to a dispute more expeditiously and at a lesser cost than in regular litigation.

The Supreme Court realized the scope of ADR in procedural as well in family law in *Jag Raj Singh v. Bripal Kaur*,¹⁰ the Court affirmed and observed that the approach of a court of law in matrimonial matters is much more constructive, affirmative and productive rather than abstract, theoretical or doctrinaire. The Court also said that matrimonial matters must be considered by the courts with human angle and sensitivity and to make every endeavour to bring about reconciliation between the parties.

In India, to reduce the burden of the already overburdened courts the Alternative Dispute Resolution Mechanism has been put into practice and is gaining its popularity as days are passing by. The best example of the same is the use of **Online Dispute Resolution (ODR)** for resolving these disputes and misunderstandings. Online Alternative Dispute Resolution (OADR) or ADR online, refers to the use of internet technology, wholly or partially, as a medium by which to conduct the proceedings of ADR in order to resolve commercial disputes that arise from the use of the Internet. Neutral private bodies operate those proceedings under published rules of procedure. Thus ADR emerged as a powerful weapon for resolution of disputes at domestic as well as international level. It is developing as a separate and independent branch of legal discipline.

The judgment of the Supreme Court in *State of Maharashtra v. Dr. Praful B. Desai*¹¹ is a landmark judgment as it has the potential to seek help of those witnesses who are crucial for rendering the complete justice but who cannot come due to “territorial distances” or even due to fear, expenses, old age, etc. The Courts in India have the power to maintain anonymity of the witnesses to protect them from threats and harm and the use of information technology is the safest bet for the same. The testimony of a witness can be recorded electronically, the access to which can be legitimately and lawfully denied by the Courts to meet the ends of justice.

⁹ AIR 1989 SC 1263

¹⁰ AIR 2007 2 SCC 564

¹¹ AIR 2003 4 SCC 601

The judiciary in India is not only aware of the advantages of information technology but is actively and positively using it in the administration of justice, particularly the criminal justice. Thus, it can be safely concluded that the '*E-justice system*' has found its existence in India. It is not at all absurd to suggest that Online Dispute Resolution Mechanism (hereinafter referred as, ODRM) will also find its place in the Indian legal system very soon.

In court system, time zones and physical locations are obstacles to justice. It is very expensive as well as time consuming. Whereas, in ODRM all the procedures is carried over through online and so the matter is solved or rather settled within a few days or which may take a week or so, but shall not extend to months or year after years. With the help of this mechanism a wide range of disputes are solved in a very short time, where disputes includes inter-personal disputes i.e. consumer to consumer, business to business, business to consumer; marital separation; court disputes and inter-state disputes.

CONSTITUTIONAL BACKGROUND OF ALTERNATIVE DISPUTE RESOLUTION

"It is settled law that free legal aid to the indigent persons who cannot defend themselves in a Court of law is a Constitutional mandate under Article 39-A and 21 of the Indian Constitution. The right to life is guaranteed by Article 21."¹² The law has to help the poor who do not have means i.e. economic means, to fight their causes.

Indian civilisation put at about 6000 years back, at the dawn of civilisation (i.e. the age of the Vedas), when habitation was growing at river banks, was devoid of urbanization, where the Creator was presumed to be the head of humanity. With the dawn of industrialization, man was walking into orderly society, State and nation, dependence on law for orderly conduct gained momentum. With Indian Courts piling up cases for millennium (in the place of indigenous system which was cheap and quick), alternative dispute systems had to be found. Thus this system took birth. Once the dispute was resolved, there was no further challenge.¹³

The Constitutional mandate rescue operation began with *Justice V.R Krishna Iyer* and *Justice P.N. Bhagawati's* Committees' Report; weaker section thus became enabled to approach law courts, right from Munsiff Courts to the Supreme Court. Committee for the Implementation

¹² Ramaswamy K, J while delivering his key note address at Law Ministers' Conference, at Hyderabad on Sat. 25-11-1975, Para 6

¹³ Singh, Dr. Avtar; Law of Arbitration and Conciliation (including ADR Systems), Eastern Book Company, Lucknow, 7th Edition (2006), p. 397

of Legal Aid Services (CILAS) also came on to the scene and initiated methods of solving civil disputes in non-legal for a and non-formal fora.¹⁴

Based on this, States adopted (through State Legal Aid and Advice Boards) Lok Adalats and Legal Aid Camps, Family Courts, Village Courts, Mediation Centres, Commercial arbitration, Women Centres, Consumer Protection Forums, etc. which are the various facets of effective Alternative Dispute Resolution systems.¹⁵

The soul of good Government is justice to people. Our Constitution, therefore, highlights triple aspects of Economic Justice, Political Justice and Social Justice. This requires the creation of an ultra-modern disseminating infrastructure and man-power; sympathetic and planned; need for new technology and models; and remedy-oriented jurisprudence.¹⁶

LEGISLATIVE RECOGNITION OF ALTERNATIVE DISPUTE REDRESSAL

In India, laws relating to resolution of disputes have been amended from time to time to facilitate speedy dispute resolution. The Judiciary has also encouraged out of court settlements to alleviate the increasing backlog of cases pending in the courts. To effectively implement the ADR mechanism, organizations like ICA, ICADR were established, Consumer Redressal forums and Lok Adalats revived. The Arbitration Act, 1940 was repealed and a new and effective arbitration system was introduced by the enactment of the Arbitration and Conciliation Act, 1996. This law is based on the United Nations Commission on International Trade Law (UNCITRAL) model law on International Commercial Arbitration.

In *Sitanna v. Viranna*¹⁷, the Privy Council affirmed the decision of the Panchayat and Sir John Wallis observed that the reference to a village panchayat is the time-honoured method of deciding disputes. It avoids protracted litigation and is based on the ground realities verified in person by the adjudicators and the award is fair and honest settlement of doubtful claims based on legal and moral grounds.¹⁸ The legislative sensitivity towards providing a

¹⁴ *Ibid.* Para. 8

¹⁵ *Supra* Note 13 at p. 399

¹⁶ *Ibid*

¹⁷ AIR 1934 P.C. 105

¹⁸ *Supra* Note 3

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 **Code of Civil Procedure (CPC)**.¹⁹

The adoption of the liberalized economic policy by India in 1991 has paved way for integration of Indian economy with global economy. This resulted in the enactment of the Arbitration and Conciliation Act, 1996 (new Act) by the legislature as India had to comply with well-accepted International norms. It superseded the obsolete and cumbersome Arbitration Act, 1940. The new Act has made radical and uplifting changes in the law of arbitration and has introduced new concepts like conciliation to curb delays and bring about speedier settlement of commercial disputes. The new Act has been codified on the lines of the Model Law on International Commercial Arbitration as adopted by the United Nations Commission on International Trade Law (UNCITRAL). One of the most commendable objects of the new Act is to minimize the role of the courts in the arbitration process. The Arbitration and Conciliation Act, 1996 laid down the minimum standards, which are required for an effective Alternative Dispute Resolution Mechanism. 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 *Civil Procedure Code (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.²⁰

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’.²¹ 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 Hon’ble Supreme Court of India in number of cases. The rationale for such

¹⁹ Supra Note 13 at pp. 394- 395

²⁰ Justice Sinha. S. B., ‘ADR: Mechanism and Effective Implementation’, Available at <http://mediationbhc.gov.in/PDF/ADR.pdf>

²¹ See Justice R.C. Lahoti, Keynote address delivered at the Valedictory Session of two days Conference on “ADR, Conciliation, Mediation and Case Management” organised by the Law Commission of India, Available at: http://www.lawcommissionofindia.nic.in/adr_conf/Justice_Lahoti_Address.pdf

an establishment ostensibly was speedy and efficacious disposal of certain types of offences.²²

Shri M.C. Setalvad, former Attorney General of India has observed: “....equality is the basis of all modern systems of jurisprudence and administration of justice... in so far as a person is unable to obtain access to a court of law for having his wrongs redressed or for defending himself against a criminal charge, justice becomes unequal, ...Unless some provision is made for assisting the poor men for the payment of Court fees and lawyer’s fees and other incidental costs of litigation, he is denied equality in the opportunity to seek justice.”

RECENT DEVELOPMENTS

- **London Court of International Arbitration (the “LCIA”) in India Goes Alive**

In April 2009 the LCIA launched its first independent subsidiary in New Delhi. The LCIA is one of the longest-established arbitral institutions in the world and the LCIA in India offers all the services offered by the LCIA in the UK and is expected to extend the same care to ensure the expeditious, cost effective and totally neutral administration of arbitration and other forms of alternate dispute resolutions (ADR). Disputes can be resolved according to LCIA India's own rules, or the UNCITRAL rules, or any other procedures agreed by the parties. The LCIA published the LCIA India Arbitration Rules and the LCIA India Mediation Rules (both adopted to take effect for arbitrations/mediations commencing on or after 17 April 2010) rendering the LCIA India operational with this. Currently the following options are available to resolve disputes in India: the Indian court system, which is well-known to be a lengthy process; ad hoc arbitration in India, also subject to delays, expense and excessive judicial intervention; and arbitration using an offshore institution, notably the LCIA, ICC and SIAC in Singapore. The effectiveness of the LCIA in India will go a long way in allaying the fear of litigation delays in India and will help reduce litigation costs for the parties.

- **New Dispute Resolution Opportunities Offered By Investment Treaties**

²² Dutta Advocate, 'Origin of Alternate Dispute Resolution in India', p. 11, Available at http://www.academia.edu/4371674/ORIGIN_OF_ALTERNATIVE_DISPUTE_RESOLUTION_SYSTEM_IN_INDIA (Accessed on 02.08.16)

India has entered into bilateral investment treaties with a number of countries including Australia, France, Japan, Korea, the UK, Germany, Russian Federation, The Netherlands, Malaysia, Denmark and OPIC of the U.S. Each agreement makes provision for settlement of disputes between an investor of one contracting party and an investor of the other contracting party through negotiation, conciliation and arbitration. India is a party to the Convention establishing the Multilateral Investment Guarantee Agency (MIGA), which provides for settlement of disputes between parties of members states under the Convention and the MIGA through negotiation, conciliation and arbitration. Under Indian law, the following types of differences cannot be settled by arbitration, but must be settled only through civil suits: matters of public rights; proceedings under the Foreign Exchange Management Act, 1999 which are quasi-criminal in nature; validity of IPR granted by statutory authorities; Taxation matters beyond the will of the parties; winding up under the Companies Act, 1956; and disputes involving insolvency proceedings.

- **Mandatory Submission to Alternate Dispute Resolution Mechanism**

Since arbitration in India is expensive and time consuming given the delays and lack of arbitrators, businesses are resorting to innovative methods of resolving disputes. It has now become imperative to resort to ADRM as contemplated by Section 89 of the Code of Civil Procedure 1908. There is a requirement that the parties to the suit must indicate the form of ADR, which they would like to resort to during the pendency of the trial of the suit. If the parties agree to arbitration, then the provisions of the Act will apply and that will go outside the stream of the court. (*Shree Subhlaxmi Fabrics Pvt. Ltd. v. Chand Mal Baradia*, Civil appeal no: 7653 of 2004). The popularity and use of ADRM is increasing but it can achieve its best only if the same is integrated with the information technology. The ADR techniques are extra-judicial in character. ADRM is not proposed to displace in total the long-established means of resolving disputes by means of litigation. “It Only Offers Alternatives To Litigation”. Constitutional law and criminal law are areas, where ADR cannot surrogate courts - one has to take route of the existing traditional modes of dispute resolution.

- **Online Dispute Resolution in India (ODRM)**

Section 16 of the Act provides that the arbitral tribunal may rule on its own jurisdiction, including ruling on any objections with respect to the existence or authority of the arbitration agreement. Thus, the base provided by the Act is sufficient to accommodate the mandates of

ODRM. The ADR system can be efficiently used to settle online disputes by modifying it as per the requirement. It is time effective and cost efficient. It can also conquer the geographical obstacles. A complete techno-legal support is recognized and is being geared up beforehand.

- **Dispute Resolution Panel Gets Life in India to Settle Transfer Pricing Disputes**

Speedy resolution of tax disputes and certainty in tax aspects has been a long-standing demand of foreign companies doing business with/in India. The Indian Government finally reacted to this demand and announced ADRM in the form of a Dispute Resolution Panel (DRP) in the last budget. The DRP mechanism applies to Indian companies where the tax authorities have proposed to make an adjustment to the arm's length price in relation to their transactions with overseas affiliates. It also applies to all foreign companies who are assessed to tax in India. However, it does not apply to withholding tax orders passed by the tax authorities. The DRP as an ADRM would be welcomed by MNCs who either are reeling under the cumbersome, time consuming and expensive tax litigation process or have heard about India's reputation as a notorious tax jurisdiction. If the government can iron out procedural lacunas and provide sufficient capacity and competent officers to the DRP, it will finally be walking the talk on an ADRM.

- **Consultation Paper on Changes to the Indian Arbitration Act, 1966**

In April this year, the Indian Ministry of Law and Justice tabled a consultation paper on changes to the Indian Arbitration Act, 1966. The consultation paper acknowledges that in certain cases the Arbitration Act has been interpreted in ways that "defeated the main object" and also recognizes issues in the current law. In view of this several amendments have been proposed and some important changes are listed below:

- A clearer definition of 'public policy' as a ground for refusing enforcement of a foreign arbitral award. This will be a welcome change as an earlier Supreme Court decision had been viewed as authorising greater judicial interference in foreign awards;
- stricter timelines in arbitration; and

- Mandatory institutional arbitration in disputes of over Rs 5 crore (US\$1.11 million) unless expressly excluded by the parties in writing.

CONCLUSION

The business world has rightly recognised the advantages that the ADR in one form or the other is a right solution. It is felt that it is less costly, less adversarial and thus more conducive to the preservation of business relationships which is of vital importance in the business world. The use of ADR has grown tremendously in the international including tremendous expansion of international commerce and the recognition of global economy. Many governments around the world have supported the demand for ADR as an efficacious way of handling international commercial disputes. Many experts in this field are of the strong opinion that the impact of ADR on international commerce is great and will continue to expand. Numbers of ADR institutions are being established. In this background, the number for setting up the International Centre for Alternative Dispute Resolution, though was felt sometime, came to be true by the inauguration of the International Centre in India.²³

Even in international commercial arbitration with the risk of enforcement of the awards being held up indefinitely in the courts of the country where the award is sought to be executed, there is an increasing awareness of the utility of conciliation.²⁴

In the Far East, in particular in Japan and China, conciliation has long since been a preferred method for resolving disputes- this applies also to commercial disputes.

It is generally accepted that *res judicata* doctrine is also applied in the context of international arbitration, such that a final award has *res judicata* effect. *Res judicata* has been identified as a legally binding principle. There are four pre-conditions for the doctrine of *res judicata* to apply in international law, they are-

- i. Proceedings must have been conducted before courts or tribunals in the international legal order.
- ii. Involve the same relief.

²³ Rao, P.C & Sheffield William, 'Alternative Dispute Resolution- What it is and how it works?' Universal Law Publishing Co. Pvt. Ltd. New Delhi- India, 1997 Edition, Reprint 2011; Reddy Jayachandra K. 'Alternative Dispute Resolution', pp. 79-80

²⁴ Ibid at pp. 53-54

- iii. Involve the same grounds.
- iv. Between the same parties.²⁵

Res judicata in international law relates only to the effect of a decision of one international tribunal on a subsequent international tribunal.

The ICJ has recognised and applied the principle of *res judicata* in various cases. Few cases are as such: In 1960, *Honduras v. Nicaragua*²⁶ arbitral award case concerning the arbitral award made by the King of Spain.

In its most recent practice the ICJ has relied on the *res judicata* principles in a matter of course fashion in the request for interpretation of the judgement of 11th June, 1998 in the Land and Maritime Boundary case between Cameroon and Nigeria and in the boundary dispute between Qatar and Bahrain case.

²⁵ Malhotra, Indu; 'Res judicata in Arbitration', NYAYA DEEP, Vol. V, Issue 01, Oct. 2004, p. 117

²⁶ (1986) ICJ 14