

Alternative Dispute Resolution with special reference to “Arbitration”

By

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Introduction:

As the supreme law of the country that is the Constitution based on welfare state concept it becomes its prime duty to secure access to justice to its citizens that can be ensured by timely and speedy justice through both judicial as well as non-judicial forums of dispute resolution. In recent years the Alternative Dispute Resolution (hereinafter ADR) comprising of different techniques such as Negotiation, Mediation, Conciliation and Arbitration etc have emerged as the effective tool for amicable solution of dispute.

The ADR was first time introduced via insertion of section 89 into the Code of Civil Procedure, 1908 brought into effect by the CPC Amendment Act 1999 that became effective since 1st July 2002. The section provides for the reference of case pending before courts to the ADR such as

- (a) arbitration; (b) conciliation; (c) judicial settlement including settlement through Lok Adalat; or (d) mediation etc.

The method of Arbitration and Conciliation are additionally governed by the Arbitration and Conciliation Act, 1996. In addition to these the supreme court in Salem Advocate Bar Association V Union of India, (2005) 6 SCC 344 approved for Model Civil Procedure Mediation Rules and directed 25 high courts in the country to framed their Mediation & Arbitration Rules. Other provision of CPC, 1908 : Order X Examination of party by the Court; Order 32(A) and Order 23 Rule 3 Compromise of suit

Although these legislation are the basis of ADR there are certain other statutes that advocate for compulsory recourse of either mediation, conciliation or arbitration. These are:

1. The Indian Contract Act, 1872
2. The Negotiable Instrument Act, 1882
3. The Industrial Disputes Act, 1947
4. The Hindu Marriage Act, 1955
5. The Family Courts Act 1984
6. The Motor Vehicle Act, 1988
7. The Legal Service Authority Act 1987
8. The Companies Act, 2013
9. The Companies (Mediation and Conciliation) Rules, 2016
10. The Commercial Courts Act, 2015
11. The Commercial Courts (Pre-Institution Mediation and Settlement) Rules, 2018
12. The Real Estate (Regulation and Development) Act, 2016
13. The Consumer Protection Act, 2019
14. The Consumer Protection (Mediation) Rules, 2020
15. The Consumer Protection (Mediation) Regulations, 2020

Anyone possessing sound mind may facilitate the resolution to the concerned dispute therefore there are no rigid formalities prescribed for imparting

role as a dispute resolution providers. Since India follows either court referred ADR or Private ADR, the accreditation is necessary for empanelment with court and tribunal mediation panels. The person can be a certified accredited dispute resolution provider either in the category of Mediator, Conciliator or Arbitrator after successful completion of training course.

Brief history of the Arbitration and Conciliation Act 1996:

Prior to arrival of british to India, the East India Company had enacted several laws of one such act called the Regulation Act, 1787. The act empowered the court to promote the arbitration. Further in 1857 arbitration became the part of Code of Civil Proceudre, 1858 which was later replace in 1882 vide enactment of Code of Civil Procedure, 1882.

In about 1889 an independent act governing the arbitration was passed namely the Indian Arbitration Act, 1899. As with the passing of time more flexibility needed for effectiveness therefore the Code of Civil Procedure, 1882 later in 1908 replace with the Code of Civil Procedure, 1908. The code brought back all the provisions of the Indian Arbitration Act, 1899 and incorporated them in the second schedule appended to the code. However the schedule provision re-enacted under the Arbitration Act 1940- which suffer defect for instance too much intereference of the court at every state of arbitration proceedings. For all this reason there felt a need for arbtration legislation that will have complete freedom from court intervention and make the decision/award final and executable.

Hence the Arbitration and conciliation Act of 1996 vide incorporating the law commission recommendation and the UNCITRAL model law and rules was enacted

The brief Composition of the act is as under:

- Total parts IV

- Total section 87
- Total schedules Seven
- Definition section 2 (1) (a) to (j)
- Part-I contains general provisions on arbitration.
- Part-II deals with enforcement of certain foreign awards.
- Part-III deals with conciliation.
- Part-IV contains certain supplementary provisions.

Recent amendment in the arbitration act

- The most recent effort was the enactment of the **Arbitration & Conciliation (Amendment) Act 2021** effective since 4th november 2020
- An ordinance was passed on 4th november 2020 namely the Arbitration and Concliation (amendment) ordiance 2020
- Later the said ordinance was repealed by the **Arbitration & Conciliation (Amendment) Act 2021** effective retrospectively since 4th november 2020
- It is said that such amendment was pass *to address the concerns raised by stakeholders after the enactment of the Arbitration & Conciliation (Amendment) Act, 2019*
- the two changes introduced by the 2020 Amendment were Section 36(3): Additional grounds for an unconditional stay on enforcement & Amendment to Section 43J of the Act
- The act specifies that a stay on arbitral award can be provided (even during the pendency of the setting aside application) if the court is satisfied that:
 - (i) the relevant arbitration agreement or contract, or
 - (ii) the making of the award, was induced or effected by fraud or corruption. This change were effective from October 23, 2015.

- the 2019 Amendment had disqualified foreigners (such as a foreign scholar, or a foreign-registered lawyer, or a retired foreign officer) from being an accredited arbitrator under the Act.
- This was because of the limitations imposed by the Eighth Schedule to the Act, that was introduced by the 2019 Amendment.
- The Eighth Schedule specified the qualifications, experience, and norms for accreditation of arbitrators and these norms were largely biased in favour of Indian lawyers, cost accountants, government officers, etc.
- For instance The requirements under the schedule include that the arbitrator must be:
 - (i) an advocate under the Advocates Act, 1961 with 10 years of experience, or
 - (ii) an officer of the Indian Legal Service, among others.
- The 2020 Amendment directly addresses that concern by removing the Eighth Schedule altogether from the Act and replacing it with “*the regulations.*”

The Code of Criminal Procedure 1973 (CRPC) -

Traditionally the ADR Mechanism was not available to the cases of criminal nature but the law commission of India in its 142nd report stated that it is desirable to infuse life into reformatory provisions embodied in section 360 of Cr.P.C and the Probation of Offenders Act, 1958. Today CRPC allow compromise and settlement in criminal case by use of plea bargaining, Lok Adalat and Mediation.

Section 320 (Compounding of offences) -

- There are certain offences which can be compromised between victim and the offender. This process of reaching of compromise without wasting court’s time is called compounding.

- At present there are 56 compoundable offences : 43 without the permission of the court and 13 with the permission of the court. It should be noted that only the victim has the right to compound the offence

Chapter XXIA (Ss. 265A - 265L) Plea Bargaining –

- The 2006 amendment in CRPC 1973 added the new chapter XXIA on plea bargaining, it refers to pre-trial negotiations between the defendant usually conducted by the counsel and prosecution during which the accused agrees to plead guilty in exchange for certain concession by prosecutors.

The process ADR in India is divided into two one is court referred and other is private, although both advocate for prior consent of disputing parties, the later is certainly more flexible to opt for.

It truly depict the voluntary nature of ADR as the party themselves to decide where to go for recourse of their dispute. There are numerous ADR institutions and facilitators which are further classified into two that is Ad hoc and Institutional meaning administered and not administered.

For instance Ad hoc Arbitration means which is not administered by any forum and the parties are generally required to terms of procedure, appointment etc. whereas on the other hand institutional arbitration means the process of which is governed by the respective guidelines, rules prescribed by such institution/forum.

You are just one google search away from the Mediation, conciliation & Arbitration institution.

With the development of ADR in country there is certainly increase in the institutions facilitating dispute resolution and therefore in the arbitration institutions or forum that increases their competition.

For this reason the 2019 amendment introduced in the Arbitration and Conciliation Act 1996 led for the establishment of Arbitration Council of India who shall provide grading of arbitral institution based on criteria such as infrastructure, quality and calibre of arbitrators, performance and compliance of time limits for disposal of domestic or international commercial arbitrations. Although it does it mean that the arbitral institution be governed by such council and are certainly operate on voluntary basis. One can rightly conclude this is indeed a positive step taken for strengthening the ADR and improving the quality of dispute resolution.

WEBSITES

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5. ASSOCHAM International Council of Alternate Dispute Resolution (AICDR) - www.assocham.org
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7. Centre for Advanced Mediation Practice - www.ciac.in
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12. Algeria Centre de conciliation et d'arbitrage de la Chambre algerienne de commerce et d'industrie Contact: cabinetharoun@yahoo.f
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137. Zimbabwe Commercial Arbitration Centre, email
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Thank you!