ALTERNATIVE DISPUTE SYSTEM

A CONVENIENT WAY TO RESOLVE DISPUTES

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INTRODUCTION

What is Alternative Dispute Resolution? The term Alternative Dispute Resolution is also known as external dispute resolution. By the name it can be understood that disputes arising between the parties are solved externally or outside the court of law or is an alternate solution to sort the disputes between the parties other than going and appealing to the court of law. It is the most widely accepted form of dispute resolution and most the efficient settlement technique for resolving the disputes.

The most widely accepted forms of ADR that deal with consumer disputes are Arbitration, conciliation and mediation. Therefore, it would be appropriate to elucidate on the three forms of ADR mentioned above. Alternative Dispute Resolution is completely an external affair to judicial proceedings that are traditionally carried on in the courts of law. In India, arbitration and conciliation is governed by the Indian Arbitration and Conciliation Act, 1996. The arbitration process is a form of Alternative Dispute Resolution and this process can trace its roots back to the ancient times where people would go to the king's court asking for justice and to settle their differences. It can be said that the King or his nobles played the role of arbiters for the people in the kingdom. As modern civilization began to emerge, the Panchayat system replaced the King's era. Generations leaped and so the new techniques evolved. People would either elect their arbiter which is often known as 'Sarpanch' in the Panchayat committee or the legacy of holding the position of 'Sarpanch' was passed through the generations in the family. This system is still prevalent in India in villages and remote areas. Due to the modern civilization, the role of Panchayat system is played by the process of Arbitration, conciliation and mediation.

Arbitration as an institution of dispute resolution has been in existence and practiced in many civilized societies since time immemorial. With time, newer and more enlightened methods of dispute resolution emerged. Much work has been done in this sphere in the past two decades. The United States took the lead in refining and accelerating arbitral procedures and evolving some well new structured procedures. These new procedures came to be known as Alternative Dispute Resolution (ADR).

SCOPE & NEED

In every society there have been discord and tensions between people and groups of people due to their ideological difference in every kind of field may it be economics, politics,

ethnicity etc. Some disputes are simple while some are multi-faceted. It is essential for the human beings to learn how to resolve disputes and resolve their conflicts that would offer better outcome in today's society. The judiciary system is not a simple but a complex process. The litigation process is extremely tedious and cumbersome, it takes approximately 10-15 years for a case to wind up and come up with a Judgment. The back-log of the cases is increasing at an alarming rate and thus there is a long wait for the compensation and the justice. To overcome these problems, an Alternative Dispute Resolution mechanism is adopted. Alternative Dispute Resolution is a prudent mechanism that has become widely used set of processes that continues to grow as means of resolving even the most complex, high stake cases. In fact, most of the civil court cases can be effectively solved through the ADR process. Litigating a case means running up obscene bills as the attorneys and expert witnesses are expensive. ADR process is less formal than what is followed in the courts. It saves the parties from the adversarial trials and the cost involved in the ADR process is relatively less than what is spent in the judicial proceedings which includes attorney fees, court fees, etc. Thus, ADR is also time-saving and due to non-adversarial process the parties could preserve their trade-relations and can continue to work in harmony. ADR provides for the speediest redress to the parties, the sittings go for months but not years. Confidentiality is maintained in the proceedings unlike the traditional judicial system where the trials are open to the public. The confidentiality is observed so as to protect the parties from any harm that would cause to their reputation.

Attorneys may also benefit from ADR by being seen as problem-solvers rather than combatants. Quick, cost-effective, and satisfying resolutions are likely to produce happier clients and thus generate repeat business from clients and referrals of their friends and associates.

ADVANTAGES OF USING ADRS

The main advantages of using an ADR are:

1. You may resolve your problem
2. You may be awarded compensation
3. The procedure is less formal than going to court
4. In some schemes, the decision may be binding on the trader but not on you, leaving you free to pursue through court if you wish.
5. It may cost you less than going to court
6. The procedure is confidential.

Alternative dispute resolution offers both parties alternative means of resolving differences outside actual courtroom litigation. Speed and cost are two compelling reasons to rely on an ADR clause for resolving disputes. Alternative Dispute Resolution (mediation. Conciliation, arbitration etc) would not only give a speedy redress but it would help in making the attorney-client relationship built up to the superior and a very strong level.

AREAS

ADR techniques can be resorted into almost all types of contentious matters capable of resolution by agreement between parties under the law where both the parties are generally interested in settlement. It can be invoked in civil, commercial, industrial and family disputes. It is particularly useful in all types of business disputes and it is considered to offer the best solution in respect of commercial disputes of international character.

There are various forms of Alternative Dispute Resolution (ADR) mentioned as below:

1. Arbitration
2. Conciliation
3. Mediation
4. Negotiation
5. Collaborative divorce
6. Collaborative law
7. Party directed negotiation
8. Restorative justice
9. Conflict resolution
10. Dispute resolution

A brief description of some widely used and well recognized ADR procedures is as follows:

❖ Mediation /Conciliation

In mediation, an impartial person called a "mediator" helps the parties try to reach a mutually acceptable resolution of the dispute. The mediator does not decide the dispute but helps the parties communicate so they can try to settle the dispute themselves. Mediation leaves control of the outcome with the parties.

Mediation is a commonly used process to resolve business disputes. Mediation can be used in a variety of business situations, union negotiations, employment issues, and contract disputes. Mediation or non-binding arbitration may not be a suitable form of A.D.R. in big commercial cases involving heavy amounts. Mediation or arbitration does not come easily to anyone, whatever height he/she attains in legal knowledge and experience. Mediation especially involves the use of a facilitator trained in conflict resolution. The mediator must know the techniques of encouraging the parties to discuss their positions with greater candor and he/she must also know how to foster compromise. Mediation involves a thorough training for a few days.

❖ Arbitration

In arbitration, a neutral person called an "arbitrator" hears arguments and evidence from each side and then decides the outcome of the dispute. Arbitration is less formal than a trial, and the rules of evidence are often relaxed.

Arbitration may be either "binding" or "nonbinding." Binding arbitration means that the parties waive their right to a trial and agree to accept the arbitrator's decision as final. Generally, there is no right to appeal an arbitrator's decision. Nonbinding arbitration means that the parties are free to

request a trial if they do not accept the arbitrator's decision.

❖ **Negotiation**

It is a non-binding procedure in which discussions are initiated between the disputing parties without any intervention of any third party with the object of arriving at a negotiated settlement of the dispute. It involves direct interaction of the parties to the dispute where they retain control over both the procedure as well as the outcome.

INTERNATIONAL ARBITRATION

International arbitration is a leading method for resolving disputes arising from international commercial agreements and other international relationships. The practice of international arbitration has developed so as to allow parties from different legal and cultural backgrounds to resolve their disputes, generally without the formalities of their respective legal systems. International arbitration has enjoyed growing popularity with business and other users over the past 50 years. There are a number of reasons that parties elect to have their international disputes resolved through arbitration. These include the desire to avoid the uncertainties and local practices associated with litigation in national courts, the desire to obtain a quicker, more efficient decision, the relative enforceability of arbitration agreements and arbitral awards (as contrasted with forum selection clauses and national court judgments), the commercial expertise of arbitrators, the parties' freedom to select and design the arbitral procedures, confidentiality and other benefits. The use of international arbitration is done under the International Court of Arbitration of International Chamber of Commerce (ICC). The rules and regulation are to be followed in accordance with the ICC- International Court of Arbitration.

PROCESS

The expression Alternative Dispute Resolution or ADR means dispute resolution by alternative means other than taking resource to the established formal courts of justice. Broadly speaking ADR procedures fall into two categories, namely adjudicatory ad non-adjudicatory or consensual. In its wide sense the terms ADR encompasses both types of procedures. In a narrow sense ADR includes only consensual procedures. In adjudicatory procedures like arbitration and binding expert determination it is the ruling given by the arbitrator or expert, as the case may be, which is binding on the parties, the decision is an imposed one, in other words parties do not participate in the decision making. But in consensual procedures like conciliation, mediation and good offices the parties retain their freedom to decide the outcome of their dispute. The best time for initiating consensual ADR or amicable settlement procedure is when the parties are still cordial and speaking terms because that is the time when a responsible

solution to the dispute is more likely to be found by collaborative effort.

How does the ADR process actually work?

Generally, the ADR Specialist is contacted by one or more parties in a dispute. They discuss the issue/s involved to determine whether the case is appropriate for ADR and how the issue should be addressed. If the initiating person decides that a facilitated discussion with the other person could be helpful, the second person is contacted. This person decides whether participation would be productive and acceptable. If the parties and the ADR Specialist agree that ADR is desired and appropriate, they identify the ADR process(es) to be used, designate an ADR neutral or a process for selecting one, and provide a date by which ADR will be completed. The parties may agree on the terms of a confidentiality agreement. The parties proceed using the agreed-upon ADR process until the case is resolved or one or both of the parties opts out. If a resolution is reached, it is usually recorded in a written agreement. If no resolution is reached, the parties may choose to use another process.

ARBITRATION

The term arbitration has been derived from the nomenclature of Roman law. The concept of arbitration is of very early origin. It has developed with time and is still a progressive subject which has considerable importance over the years. Today it is a popular means of settling disputes in international, national and commercial spheres and an arbitration clause is usually incorporated in almost all business transactions and employment contracts. The Indian equivalent for arbitration is 'panchayat'.

Rules governing arbitral proceedings

The first stage in arbitration commences with arbitration agreement, it ends with the making of the award and then the second stage relates to the enforcement of award.

Commencement of arbitral proceedings:

The Parties are given the liberty to determine the date of commencement of the arbitral proceedings. If any mode has been laid down by the parties in the arbitral agreement, then the proceedings will commence in accordance with the agreement.

Manner of fixing the venue:

The parties are given the freedom to agree the place of arbitration.

Language:

The parties are given the liberty to decide by mutual agreement as to what language or languages are to be used in the arbitral proceedings.

Arbitral award:

The instrument embodying the decision given by the arbitral tribunal after adjudicating upon the disputes

referred, in a quasi-judicial manner is known as arbitral award. An award must be certain; it should elucidate the tribunals meaning intent and give precise directions as to the nature and extent of the duties imposed by it on the parties. It must not be vague, ambiguous or unintelligible.

Decision making by panel of arbitrators:

If the parties do not agree with one arbitrator, then there must be more than one arbitrator by which the decision of the arbitral tribunal should be made by a majority of all its members. Hence the panel of arbitrators must be in odd numbers.

Recourse against arbitral award:

Recourse means resort to a court of law with the object of actively attacking against the arbitral award for having it set aside. In other words, if the parties are not satisfied with the arbitral award then the parties can appeal to the court of law.

Arbitration is an entirely private system of adjudication established by agreement in which parties have the right to provide their own forum and also to lay down their private procedure. The courts of law have no inherent jurisdiction to interfere or correct procedural errors. In proceedings of arbitration there must be adherence to justice, equity, law and fair play in actions. The proceedings must adhere to the principles of natural justice and must be in consonance with such practice and procedure which lead to proper resolution of the dispute and create confidence of the people for whose benefit these processes are resorted to.

CONCILIATION

The most common type of ADR is conciliation. Although the word "conciliation" is also used in A.D.R. terminology, there is virtually no distinction between mediation and conciliation, because mediation includes conciliation. Mediation is a completely voluntary and non-binding process of settlement of disputes between parties. It is an informal, flexible, confidential, non-adversarial and consensual procedure in which the Code of Civil Procedure or any law of evidence does not apply. The proceedings are immune from disclosure in any court of law. An impartial, disinterested and neutral person acts as a mediator.

PROCEEDINGS

Commencement of proceedings:

There is a written proposal and acceptance by the parties that brings about an agreement between the parties to the dispute to settle the same by conciliation. Conciliation proceedings will commence when the other party confirms in writing his willingness to agree the proposal. The invitation may or may not be accepted by the other party.

Number of conciliators:

The parties agree upon the number of conciliators and in the manner to be appointed. Usually there is only one conciliator or a mediator but the parties can agree to have two or three

conciliators. When there is a sole conciliator, the parties may appoint one conciliator. Two conciliators- each party may appoint one conciliator. Three conciliators- each party may appoint one conciliator and the parties may agree on the name of the third conciliator.

Conduct of conciliation proceedings:

The role of a conciliator is to principally make efforts which may assist the parties to reach an amicable settlement of their disputes. He acts independently and impartially. A successful conciliation proceeding comes to an end only when the settlement agreement is signed by the parties is final and binding on the parties and persons claiming under them.

MEDIATION

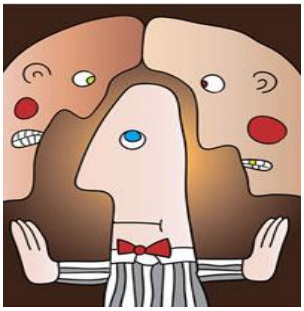
It is a process of dispute resolution that involves a trained third party who works with both sides of the dispute in an informal discussion, to help resolve the dispute. The mediation process is also non-binding; neither party is required to accept the mediator's proposed agreement. The parties to mediation may or may not have an attorney present; attorneys are advisors and not participants in the mediation process. Mediation is used in many business disputes, including labor negotiations, business contracts, and employment disputes.

TYPICAL MEDIATION PROCESS

- The mediator begins by welcoming the parties and introducing himself/herself. The mediator then outlines the process and the roles of the mediator, the parties, and attorneys (if present). The mediator ends the introduction by explaining the ground rules for the process.

- The mediator then asks for statements from each party. Both parties have an opportunity to tell their story about what happened, from their viewpoint. Often, these stories are emotional. The mediator may ask clarifying questions, but typically the parties do not question each other.

- After both parties have spoken, the mediator may ask more questions, both to clarify the issues and to provide the other party with greater understanding .



- At this point, the mediator may ask the parties to caucus (separate for the purpose of discussion). The mediator talks with each party, proposing solutions, trying out scenarios, trying to get commitment to a settlement by both parties. The mediator goes back and forth between the parties during this time, clearing up misunderstandings, and carrying information, proposals, and points of agreement.

- The mediator works to find points of agreement between the parties, in an effort to reach an agreement. At some point, the mediator may pose

a final agreement for the parties and urge them to accept.

The distinction between mediation and conciliation is widely debated among those interested in ADR, arbitration and international diplomacy. Some suggest that conciliation is a 'non-binding' arbitration whereas mediation is merely 'assisted negotiation'. Others put it this way conciliation involves a third party's trying to bring together the disputing parties to help them reconcile their differences, whereas mediation goes further by allowing the third party to suggest terms on which the dispute might be resolved. Others reject the attempts at differentiation and contend that there is no consensus about what the two words mean and that they are generally interchangeable.

Conciliation/Mediation & Arbitration is a procedure which combines sequentially, conciliation/mediation and arbitration. In this the parties agree to settle their dispute by first attempting a conciliation/mediation within a specific period of time agreed in advance, and if this fails then by arbitration.

THE ROLE OF ADR IN THE CORPORATE WORLD

When a dispute arises, what is in the best interests of the company? The answer is to resolve it effectively, expeditiously, and efficiently. Corporations have progressively engaged in the development of alternatives to traditional adjudication in response to weak enforcement, the lack of trust in the judiciary system, the high costs and delays of trials, the difficulties of enforcing non-binding standards, and reputational costs. Conflict has the potential to be constructive, by bringing to the surface issues, interests, perspectives, and concerns that need to be addressed so that the corporation can perform more effectively and efficiently. Mediation can also help manage conflicts and, therefore, prevent disputes.

MEDIATING CORPORATE CONFLICTS

Mediation skills and techniques can improve governance and board effectiveness by fostering discussions and collaboration on decisions, while surfacing and working through disagreements and personality issues. By doing so, the directors build up a stronger & more constructive working relationships. In more practical terms, mediation is about mending fences and finding a constructive approach to conflict resolution that brings to the surface issues of mutual concern; reviews the various angles of the issue at stake; and, allows the conflict to be used as a learning tool and as a basis for improved relations among the parties. Mediation enables parties to resume, or sometimes to begin, negotiations. Mediation is flexible and allows the parties to control both the process and the outcome of the dispute. The parties own their dispute and own the solution. One important aspect of mediation is that liability doesn't have to be admitted to reach a settlement. Unless it has been made binding by a contract or imposed by a court, mediation is a voluntary process triggered by such external constraints as time, reputation, cost, and the

uncertainty of an imposed decision. Parties engage in a private, cooperative process that enables them to influence each other to act in a way that is mutually beneficial and, thereby, controls damage for both sides. Instead of coming out of a dispute with a winner and a loser, mediation helps create a win-win solution. Because of its relatively flexible approach, mediation can often produce outcomes that better satisfy participants than adjudication does. In some cases, an unforeseen creative solution might even emerge. Adjudication is often said to lead Mediating Corporate Governance Conflicts and Disputes to an adversarial atmosphere that can hurt or break down ongoing relations. This risk is clearly diminished with a mediated approach to a dispute. There are many ways that mediation can be used as an efficient, effective way to prevent or resolve disputes while avoiding costly, timely, and relationship damaging litigation. Various types of mediation include consensus-building, fact-finding, evaluation, mini-trial, etc. Parties can gain a more objective, detached view of their positions before their views solidify and the battle lines are drawn, which makes a resolution more difficult to achieve. Further, the parties' circumstances may have altered from those prevailing when the conflict occurred, thus allowing for an interim assessment.

Mediation has often been regarded as a variation of arbitration and handled by lawyers. Adjudication is unquestionably a matter for lawyers, but mediation requires different skills. Although lawyers can become good mediators (and law practices increasingly offer mediation services), they are trained to support clients, beat opponents' lawyers, and win a dispute. Other kinds of professionals (e.g. business consultants, investment analysts, accountants, auditors, board directors, and managers) could develop the skills required to be a good mediator.

In order to improve countries' corporate practices and enforcement, stock exchanges, and capital market regulators should consider introducing ADR mechanisms such as arbitration panels to deal with disputes arising from listing rules, corporate governance codes, and other similar requirements.

BENEFITS & DRAWBACKS

Why resort to ADR techniques to resolve conflicts?

Participants report many benefits from using ADR, including:

- Increased respect and trust;
- More creative, satisfying, and enduring solutions;
- Greater compliance with settlement agreements;
- Reduction in costs and emotional energy;
- Faster resolution of issues;
- Improved communication and working relationships; and
- A sense of empowerment.

When is ADR not appropriate?

Cases in which the ADR technique will not be suitable are:

- A definitive or authoritative resolution of the matter is required for precedential value;
- The matter involves or may bear upon significant questions of Government policy;
- Maintaining established policies is of special importance;
- The matter significantly affects persons or organizations that are not parties to the ADR;
- A full public record is important; or
- The Agency must maintain continuing jurisdiction over the matter with authority to alter the disposition of the matter in light of changed circumstances.

How does a workplace benefit from ADR?

ADR can:

- Generate broader support for the Agency's mission and programs;
- Improve internal morale;
- Increase employee retention, productivity, and confidence in management; and
- Support a diverse workforce because differences are addressed constructively.

PROS & CONS OF MEDIATION AS AN ALTERNATIVE DISPUTE RESOLUTION

Benefits of Mediation:

- The process can solve many disputes in a short time; most mediation sessions are only one or two days long.
- Mediation is less expensive than litigation.
- Mediation allows the parties to deal directly with each other, rather than relying on attorneys.

Drawbacks of Mediation:

- Because the decision of the mediator is not binding, the parties must be committed to reaching an agreement. If one or more parties is not ready to agree, the mediation process is frustrating and waste of time.
- Sometimes, attorneys must still be involved, which increases the cost of the mediation.
- A lot depends on the skill of the mediator. An unskilled or poorly trained mediator can do more damage than help.

Benefits-Drawbacks: Arbitration

Advocates of arbitration claim that it has these benefits over litigation :

- The speed and informality of the process and its low cost, comparative to civil litigation, and
- The control that the parties have over the selection of the arbitrator.

Drawbacks:

- The lack of a formal evidence process, which means parties are relying on the skill and experience of the arbitrator to sort out the evidence, rather than a judge or jury. No interrogatories or depositions are taken, and no discovery process is included in arbitration.

- The lack of a formal appeals process, and the binding nature of the process. If a party to a binding arbitration wants to protest the decision of the arbitrator, the party may not be able to do so unless there is some reason to believe the arbitrator acted with malice or was biased.

very nature, truly limits the range of possible resolutions of the disputes that come before it. However, ADR offers only an alternative option to litigation and not a substitute as the process could be non-binding and parties to the dispute may not get relief by the ADR process. It is intended only to supplement and not supplant the legal system. The ADR system seeks to provide quick and accessible at low cost by encouraging the disputants to arrive at a negotiated understanding with a minimum of outside help. It offers alternative options for amicably resolving disputes although it is not intended to replace the litigation. Even if the ADR proceeding fails it is never a waste since it helps the parties to see each others view point and understand the case better.

CONCLUSION

Alternative processes are portrayed as agencies of settlement or reconciliation, peace rather than war. ADR can be an alternative to, but clearly not a replacement for, the judicial process. The adversarial system is limited; too, in its ability to address and satisfy all of the needs of litigants. Through the courts, one can obtain money, put a halt to certain action, force other action, or declare the meaning of a document or statute. Litigation cannot formulate an agreement or propose a solution. And, in some ways, it may well disregard the real needs of people or entities before it. The adversary system, by its