EXODUS FROM LITIGATION TO ADR

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ABSTRACT

Access to justice is an inalienable right that has been conferred to every person with no exception left. This justice must be fair, quick, simple and accessible. As the old axiom goes "*Justice must not only be done, but also seen to be done*", a slow paced and time-consuming and expensive justice redressal system kills the essence of justice. At umpteen instances, litigations can stretch up to generations. In such challenging circumstances, where access to justice becomes a luxury, ADR has come as a champion of justice dispensation. In this paper, the author undertakes to introduce, elaborate and underscore the concept of ADR and the recent trends that have been followed in ADR. Also, the author shall make an analysis of the pre and post COVID scenario with regard being held to ADR as a dispute resolution system.With the approach of the British control and the presentation of the British legal framework in India starting from the Bengal resolution of 1772, the customary assortment of debate determination techniques in India steadily deteriorated. The progressive CPC ordered in 1859, 1877, and 1882 which schematized the working of common courts, manages both mediation between parties to a suit and claims without the intercession of a court.[i]

The main arbitration act of India was in 1889. The act was under the light of the English arbitration act of 1889. This act was limited to mediation by mutual understanding without any intervention by the court. The CPC 1908 initially casted off the interference methods with the hope that they would be substituted to the comprehensive arbitration act.

A landmark year is the year 1940 as the arbitration act was formulated in the year. It unified and modified the law dealing withthe intervention as mentioned in the arbitration act 1899 and the second schedule of the CPC 1908. It was to a great length in the light of the British arbitration act 1934. Ergo, it was realized that certain cases were pending and there were multiple shortcomings on the foundation of the act. This provided a fillip to the materialization of the 1996 act. [ii]

INTRODUCTION

Alternative dispute resolution or ADR refers to the method of judicial settlement in which the dispute is resolved without intervention of the court. In courts the cases can continue to go unresolved for years, ADR provides an expeditious conduit to justice. The parties to ADR agree to resolve their disputes outside the court through various institutions like **Arbitration, mediation, conciliation, and negotiation**. Dispute resolution outside of judicial courtrooms is not a new concept in India, the roots of ADR can be traced back to rural and ancient India from where it stems out.

Village level institutions (panchayats) were the informal forms of mediation and arbitration and were the preferred forms of justice redressal institutions where the disputes were resolved by the elders of the village keeping in mind the standpoint of both the parties and a solution conceivable to both of the parties was reached at, maintaining the amity and rapport among the villagers.

In the earlier times, the disputes were amicably resolved by the intervention of *kulas* (family or clan assemblies*), srenis* (a group of men following the same vocation) and *parishads* (horde of wise and learned men)[iii]

What we witness today is a modified, governed and more formal version of the dispute resolution system than what we had earlier. Alternate dispute resolution, as the name itself suggests, makes possible the resolution of the dispute maintaining the amity between party by the intervention of a neutral third party which understands the perspective and the expectation of both the parties and helps in concluding to a neutral result that may be in favour of both the parties thus both the parties stand on a equal footing, there is no winner of loser, an egalitarian approach is adopted and both the parties win. Furthermore, it is a more hassle-free, fast and cheap mode of resolution. Laws of evidence have no applicability here, thus the proceedings are less formal. Rural and many urban people are afraid of going to a courtroom because of the inherent dreadful image of courts that's deep seated in their minds, such is not the case in ADR, due to the extreme casual nature and the more active role of the parties involved, these are the most kosher and befitting methods of dispute resolution for Indian crowd. ADR has its scope not hemmed in to a bi-party dispute, its ambit encompasses and stretches to multiple parties, all of who can be easily redressed. ADR is a flexible mode where parties can easily and befitting to their schedule the proceedings, ADR provides the

parties to have a confidential proceeding. The most important and significant aspect of ADR is that it does not dig a hole of the parties to a litigation. The ADR provides a more cost-efficient mode of justice delivery system. A significant endeavour made in Indian perspective was the amendment of CPC and the adding of section 89(1) that confers the power to the court to refer the dispute to ADR machinery for a peaceful, amicable and mutual settlement between all the parties. A landmark judgement was delivered in this respect by the supreme court in Afcons infrastructure and Anr. VS Cherian Varkey construction co.[iv] it was decided that all the cases of civil nature especially cases relating commerce and contract or cases arising from stained or sourced relationship and all consumer disputer or cases touching on tortious liability and those cases where a continuous maintenance of relationship is required are eligible for an ADR process. In another landmark supreme court case Jagdish chander v. Ramesh Chander[v] the court held that the case cannot be referred to arbitration under CPC section 89 (1) unless both the parties' consent to it. The 222-law commission report[vi] had pressed upon the formation of ADR mechanisms in India owing to the impotency of courts to meat out speedy and effective justice. The previous arbitration act 1940 was replaced with The Arbitration and Conciliation act 1996. Major forms of ADR practiced in India are arbitration, conciliation, mediation, negotiation and Lok Adalats.

There is a sudden upsurge in the cases which prefer ADR to conventional and dilated litigation owing to the multiple perks which ADR has to offer.

Types of ADR

- **Arbitration** in India is represented by The Arbitration and Conciliation Act, 1996. It is a type of dispute resolution where at least one parties are named to mediate the dispute. They act as outsiders. This third-party ought to be unbiased and this gathering is alluded to as a 'referee' while the decision of the judge, which is basically an assurance of benefits for the situation, is known as 'arbitration grant'. The arbitration procedure is casual, and this procedure permits the dispute to be settled agreeably and effectively as it requires some investment and includes lesser expenses for the parties. In this way, parties much of the time decide to mediate when disputes emerge, particularly in the business world. Enormous enterprises would prefer to settle disputes rapidly, as opposed to battling long cases in the courts.

Before the arbitration procedure starts, an arbitration agreement is required to be shaped. This agreement sets out the terms and conditions on which the arbitration procedure is done. It is resolved through this agreement with respect to how the procedure will be made less expensive, proficient and how the principles of proof would be applied and so on. This agreement ought to be substantial according to The Indian Contract Act 1972 and the parties must have the ability to contract under Sections 11 and 12 of a similar Act.

Arbitral decisions are conclusive and authoritative on the parties, who have constrained extent of questioning the decisions. Non restricting arbitrations likewise exist wherein the gathering can demand a preliminary on the off chance that it isn't happy with the arbitrator's decision.[vii]

- **In mediation,** a third impartial party aims to assist two disputants in arriving at a settlement. This outsider is alluded to as the middle person. The mediator needs to appropriately speak with both the parties and use legitimate exchange techniques, to make one party completely mindful of the other party's perspective, through sympathy and discourse. This process is constrained by the parties.

  One of the characteristics of this kind of dispute resolution is that the middle person is not permitted to give a result of the dispute. The solution is given commonly, and the agreements are by and large nonofficial. Parties are in significant control of the mediation process and it is strictly classified. The parties can even go for suit on the off chance that they are not satisfied with the mediation process.

  It must be observed that the primary point of the mediation process is to assemble relationships, and not to settle on a decision. It is a greater amount of a neighbourly resolution of differences with potential structure future business between the parties.

- **Negotiation** is also a type of dispute resolution, however there is no outsider to adjudicate the issue, accordingly the parties cooperate to discover a commonly adequate solution or a compromise. The parties may choose to be represented by their attorneys during their negotiations. Negotiation is not statutorily perceived in India. There are no set rules for leading a negotiation.

  Essentials of negotiation-

  1. It very well may be gone into intentionally and its result is non-authoritative.

2. The parties are profited here as they have power over the result and system and the process is done remembering their interests.

- **conciliation**, the third party, who is known as the conciliator, talks to the parties included separately so that the parties can show up at a commonly adequate solution through encouraging talks between the parties. Conciliation is also administered in India under The Arbitration and Conciliation Act, 1996. Under Section 61, conciliation is accommodated disputes arising out of lawful relationships, regardless of whether they are contractual or not.

  In a country like India where there are many illiterate people, the concept of *Lok Adalats* is a necessity. This was first introduced in 1982 in Gujarat. This concept mainly focused on reducing the burden of pending cases on the Courts and has incorporated the concept keeping in mind various factors like social justice.

  Lok Adalats are governed under The Legal Services Authorities Act,1987. Sections 19, 20, 21 and 22 specifically deal with Lok Adalats. They have been organised by the State Legal Aid and Advice Boards with the aid of District Legal Aid and Advice Committees. These have helped poor people to avoid the inefficiencies of litigation. The aim of The Legal Services Authorities Act was to provide access to justice for all, whether he be poor or rich. Since the poor masses of the society were not being delivered on this promise, this Act was formed. This access has been further strengthened by judgements of various courts, such as the Delhi High Court, in the case of Abul Hasan and National Legal Service Authority v. Delhi Vidyut Board &Ors. AIR 1999 Del 88, where it gave an order for setting up permanent Lok Adalats. Further, the decision given by the Lok Adalat is binding and shall be treated akin to the order of a civil court., thereby increasing poor people's access to justice.

What is ODR? How is it the answer to the contemporary bottleneck?

ONLINE dispute resolution or ODR is rather a concept still in its embryonic stages, but it is a promising mode of resolution of disputes which adds more comfort to an already feasible ADR. ODR contemplates to exploit the power of internet and engage it in dispute resolution by making the presence of parties obsolete, hence the parties can are not required to travel in order to attend the arbitral proceedings or any other proceedings which they had opted for, they can simply solve the disputes form their home. A prerequisite of such dispute resolution in that the parties must have

contemplated for ODR mechanisms in a situation of a dispute in their contract. The parties must therefore approach a firm that provides for online dispute resolution and provides an online platform, keeping in mind the privacy of the parties and shall also provide to them an impartial arbitrator. [viii]

Not only does the ODR save the cost and time of travelling, it is the best option we have presently, considering the nation-wide lockdowns, it has been rendered impossible to approach the courts, even approaching the arbitrator has become well-nigh impossible. People must now get used to the new normal and acknowledge ODR as their primary dispute resolution mechanism. This would save a huge amount of time, money, and resources. A lot of time and resources of an organisation that were to be consumed by the dilated litigation process would be significantly curtailed. It would also reduce the burden from the shoulders of the courts.[ix]

In state of Maharashtra v. Dr. Praful B. Desai, the supreme court said that video conferencing could be resorted to for taking evidence of witnesses by stating that recording of evidence satisfies the object of section 273 of CRPC that the evidence be recorded in the presence of the accused.[x]

Contractual and the economic challenges post COVID world.

The current pandemic has put the world economy at a stall. It has become well-nigh impossible for the parties to respect their contractual obligation be it either sale-purchase of goods, property or rendering or availing services. This inevitable and unforeseeable breach of multiple contracts has put the parties in a predicament as to how to respond to this stalemate. Parties, who were willing and able to execute their contracts are forced for non-performance of the contract.

Many businesses may be pushed to insolvency and they might never be able to re-instate the *status quo ante.* The thinly capitalised businesses are under a cash flow restraint. In Indian perspective, parties to those contracts may be rescued which had envisaged a *force majeure* clause as one of the stipulations. The language of the force majeure clause, if general, must be elaborate enough to encompass the contemporary pathogenic crisis and id specific, must be clear enough that an intention to include the inability to perform out of the present times can be extracted. Although the Indian Contract Act which governs the conduct of contracts in India makes no mention of the *force majeure,* yet the *force majeure* clause empowers itself by the virtue of section 32 and section 56 of the Indian contract act.

Challenges to ADR & ODR

1- Awareness

As mentioned earlier, ADR&ODR machinery are in their embryonic stages and thus there is lack of awareness which is a major factor leading to its failure. There is a significant need of awareness amongst the public to acknowledge ADR & ODR as their preferred mode of dispute settlement. For this, the court may play an active role in increasing awareness, the section 89 of CPC talks about the court referring the case to ADR if it deems is to be fit. Other institutions like law schools, NGO's and law firms may also become good-Samaritans and raise awareness in the rank and file about this relatively new mode of dispute resolution. [xi]

2- Infrastructure.

Ina country like India where the infrastructure of courts is in shambles, the trail courts have lack of infrastructure, there raises a need to provide for new infrastructure for the ADR mechanisms. Furthermore, the ODR mode would require courts to work with IT in tandem, thus significant technological changes are required to imbibe it into the contemporary judicial infrastructure.

3- Arbitrators.

Since most of the arbitrators, mediators etc. are retired judges, there is observed an idiosyncratic behaviour at part of the judges to follow the conventional mode of submission of documents as is followed in courts, this often gravels the path of expeditious dispute resolution. [xii]

4- Validity of The Arbitral Award.

The validity of the award becomes an important factor dependant on multiple factors. Interpretation of the law that governs the arbitral proceedings especially the international arbitral proceedings is one assumes great significance on the binding factor of the arbitral award. Since attaining a common standard might be against the parties of different cases, element of fairness is highly dependent on the facts and circumstances.[xiii] There exists a scope for the setting aside of the arbitral award.[xiv] Validity of the arbitral proceeding is mainly dependent on the applied law on the arbitration, the venue chosen and the interpretations of the contract between the parties.[xv] In absence of a substantive reasoning explained in the award, it is impossible to make out whether the award is in consonance with the law. reason stated must be proper, enough and justifiable.[xvi]

5- Lack of Legislation

The only act governing the ADR process in India is arbitration and conciliation act,1996. Even though the quantum of arbitral award has been, at umpteen instances, decided to be an equivalent to the courts' order, people are a bit vacillating in taking the leap of faith. Albeit, multiple guidelines have been issued by the instates like the India Arbitration forum and the Indian council of Arbitration etc. there has been a vacuum of law to implement these guidelines.[xvii] This seems to be unfair, since the ADR is a promising form of dispute resolution, it has to be more systematic and in order to evade any confusion engendered, more laws must be formulated in that regard.

B2B & B2C DISPUTES. How is ADR answer to them?

Dispute in business are though undesirable and unwanted yet are not uncommon. B2B disputes are those which usually arise between the enterprise and its suppliers for ex. nonperformance of the obligations of a contract.

B2c disputes on the other hand are the common types of dispute arising between the enterprise and the customers. For ex. Poor performance of a contract or non-payment for the goods and services.

If parties opt for litigation to address their B2B or B2C dispute, it may prove deteriorator to their business as well. the long-stretched litigation proceedings often engrain a sense of detestation among parties which only aggrandizes with time, if they opt for an ADR proceeding instead, they may continue to be well in business with each other because the arbitral decision is delivered keeping in mind the needs of both the parties.

Recent amendments in the Arbitration and conciliation act.[xviii]

- The Arbitration and conciliation amendment bill were ushered in the Lok Sabha by Mr. Ravi Shankar prasad in July 2019. The new amended act intends to deal with local and international arbitration and it also demarcates the law for conducting the hitherto untouched upon, conciliation proceedings. Its key features are:
- **Arbitration council of India:**

The bill intends to establish an independent structure called the Arbitration Council of India (ACI) with the task of promotion of ADR mechanisms in public. It is also assigned with the task to-

1- Formation of policies for grading arbitral institution and accreditation of arbitrators.

2- Formation of policies for the establishment, working and maintenance of analogous professional standards for all AD cases.
3- Maintenance of a depository of arbitral awards of India and abroad.

- **Composition of ACI**

The ACI is composed of a chairperson who:

1- Is either a judge of SC; or
2- Is a judge of High Court; or
3- Is a chief justice of High court; or
4- Is an eminent person with expertise in conduct of arbitration.

Further, academicians, legal scholars, eminent arbitration practitioners, etc. will be a member of the council.

- **Appointment of arbitrators:** under the new act, the Supreme and the High court may appoint arbitral institutions and these institutions can be approached by the parties and they will be appointed an arbitrator by these institutions. In case of international commercial arbitrations, the arbitrator will be appointed by the institution which is been conferred the duty to do so by the supreme court. The high court designates the institutions in case of the domestic or local arbitrations. In a condition where there are no such institutions, the CJI of the concerned court may maintain a council of arbitrators who undertake the function of arbitral institutions. An application concerning the appointment of an arbitrator must be done away within a time frame of 30 days.
- **Relaxation in the time limit of the arbitral award-** before the amendment, all arbitral tribunals were supposed to give the award within a duration of 12 months but now, the international arbitration bodies are not bound by this time limit but they must make endeavors to dispose of the cases before them within 12 months.
- **Confidentiality-** keep for certain circumstances, the arbitral proceedings will be kept confidential. Disclosure will be made only if it is imperative for the implementation of the award.
- **Written submissions-** previously, there was no time limit for the written submission but now, there is a time limit set for the written complaint and the defense to the complaint which should be completed within 6 months of the appointment of the arbitrators.Aditi

CONCLUSION

In this juncture, few things are most required to be done for furtherance of smooth ADR mechanisms. Few of them are:

Creation of awareness and popularizing the devices is the first thing to be done. NGOs and medias have prominent part to play in this respect. For Court- annexed mediation and conciliation, required personnel and infrastructure shall be needed for which government backing is essential.

Training programs on the ADR mechanism are of vital importance. State level judicial academies can assume the role of facilitator or active doer for that purpose. Although the Courts are never exhausted of providing access to justice for the teeming millions of this country, it would not be improper to state that the objective would be well-nigh impossible to achieve without reform of the justice dispensation mechanism. There are two ways in which such reform can be achieved- through changes at the structural level, and through changes at the operational level. Alterations at the structural level challenge the very framework itself and requires an examination of the feasibility of the alternative outlines for dispensing justice. It might necessitate an amendment to the Constitution itself or various statutes. On the other hand, variations at the operational level necessitates one to work within the framework trying to recognize various ways of refining the efficacy of the legal system.

This will considerably reduce the load on the courts apart from providing instant justice at the doorstep, without substantial cost being involved. This is also to avoid procedural technicalities and adjournments and justice will hopefully be based on truth and ethics, as per acknowledged contemplations of delivering social justice.

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[iv][2010 (8) SCC 24]

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[xii]REASONS OF LOW SUCCESS RATE OF ARBITRATION IN INDIA-*BY AYUSH VERMA.* https://blog.ipleaders.in/reasons-low-success-rate-arbitration-india/#Lack_of_awareness

[xiii] In K.K. Modi v. K.N. Modi, (1998) 3 SCC 573, the Supreme Court reiterated that the arbitral tribunal will have to determine the rights of the parties in an impartial and judicious manner, because the tribunal owes an equal obligation of fairness towards both sides.

[xiv] Section 34 of the Act deals with recourse against arbitral awards.

[xv] The arbitrator is required to make an award in accordance with the law. (Thawandas Pherumal v. Union of India, A.I.R. 1955 S.C. 468).

[xvi] R. v. Agricultural Land tribunal exp. Bracy, [1960] 1 All ER 518)

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