Alternative Dispute Resolution: Is It Always An Alternative?

Mansi Agarwal[1] and Dakshita Bajpai[2]

Abstract

"Discourage litigation. Persuade your neighbors to compromise whenever you can. Point out to them how the nominal winner is often the real loser - in fees, and expenses, and waste of time. As a peace-maker the lawyer has a superior opportunity of being a good man. There will still be business enough."

– Abraham Lincoln

The Arbitration and Conciliation Act of 1961 marked an era in the struggle to find an alternative to the conventional adversarial system of litigation in India. It indicated the dawn of a new reign of negotiated settlement and archaic civil justice system. The progeny of the Act, section 89 of the Civil Procedure consistent dispute resolution, as a means of fighting the invincible hindrances posed by the dilapidated Code, 2 which pervaded the Court with the duty of referring certain disputes for alternative remedies, was a stepping-stone towards achieving the inexpressible ideal of judicial efficiency.

The role of the judiciary goes beyond the mere setting of examples. Normal litigants do not concern themselves with the excellent thinking of the law, preferring rather, a speedy settlement of their own debate. The judicial institution therefore, must facilitate and encourage economic development.

This paper further includes Travails of the litigative system, Alternate Dispute Resolution, the role of mediators and councilors, ADR's shortcomings and some measures to be taken. The objective of this paper is to highlight the viability of alternative dispute resolution in achieving the aforementioned ideals of institutional efficiency. The utility of ADR in resolving the problems of the traditional limitative system has been emphasized and the focus has also been placed on the successes of mediation and conciliation Vis Vis arbitration.

[1] Student, Banasthali Vidyapith
[2] Student, Banasthali Vidyapith

INTRODUCTION

The Arbitration and Conciliation Act of 1996[3] marked an era in the struggle to find a choice to the traditional argumentative system of litigation in India. It indicates the dawn of a new rule of negotiated agreement and consensual dispute declaration, as a means of hostility the impossible impediments posed by the decrepit and antiquated civil justice system. The progeny of the Act, section 89 of the Civil Procedure Code, [4]which pervades the Court with the duty of referring definite disputes for different remedies, was a stepping-stone towards achieving the inexpressible ideal of trial efficiency.

The progression of time has led to a steady comprehension of the fact that the judicial organization must enable economic growth and financial constancy. The role of the judiciary goes ahead of the mere situation of precedents. Ordinary litigants do not worry themselves with the advanced deliberations of the law, preferring rather, a speedy resolution of their own disputes. Market reforms, globalization and liberalization, the encouragement of foreign direct investment, and several other organizational reforms in the Indian market have led to the surfacing of global partnerships and business welfare which transcend national boundaries. These concerns have a particular concentration in the efficient, effective and expeditious administration of justice. The legal institution therefore, must facilitate and encourage economic development.

The objective of this essay is to highlight the viability of alternative dispute resolution in achieving the aforementioned ideals of institutional efficiency. The utility of ADR in resolving the problems of the traditional limitative system has been emphasized and the focus has also been placed on the successes of mediation and conciliation vis a vis arbitration.

Alternative Dispute Resolution

In devising a scheme of alternative dispute resolution, two principles must be adhered to. Firstly, such a structure must remedy the self-reinforcing troubles which plagued the traditional limitative system. However, it is of epigramic importance that at the same time, the authoritative norms of law, such as those of judicial accountability and integrity, are not lost in our impassioned search for an alternative. Therefore, it is imperative that the system of ADR

[3] Act no. 26 of 1996 [hereinafter the Act].
[4] As amended by Code of Civil Procedure (Amendment) Act, 1999 (46 of 1999). The earlier section was repealed by Act 10 of 1940.

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overcomes the limitative impediments during the allowable means, ensuring that the pillars of justice do not deteriorate in the name of an efficient alternative system.

ADR is an alternative for those parties who are willing to be in touch with each other and make authentic attempt to resolve the dispute with the help of a neutral party. Many disputes like consumers' complaints, family disputes, construction disputes, business disputes can be effectively resolved by ADR. It can be used in almost every dispute, which can be filed in a court as a civil suit.

ADR process is elastic which is handled and determined through an ADR agreement. The parties choose a picky ADR process, outline the specific steps of the process, and establish time limits. It is a non-judicial process in which result is made by the parties themselves. In ADR, the parties manage the process and the result.

Salem Advocates' Bar Association v. Union of India, AIR 2005 SC 3353

Ensuring through immediate trial the alternative dispute resolution and cash flow management the high courts should adopt model ADR rules and cash flow management rules or frame rules, so that a step further is taken to present to litigating public a fair, immediate and inexpensible justice.

The Comparative Failure of Arbitration

Arbitration was the first method of ADR recognized by statutory law in India.[5] Realizing the need for the speedy arrangement of disputes to promote business scenario, contracting parties determined to enter into arbitration agreements, to settle disputes between themselves in the presentation of the contract. Arbitration recognized the crucial role of the parties in resolving their own disputes, and for the first time, the participatory function of parties was improved by enabling them to decide an arbitrator who would preeminent suit their requirements.

While arbitration did evade some of the problems of the limitative system, it did not accomplish the inherent function of ADR, failing to become an end in itself. The degree of judicial intervention which was permitted under the Act of 1940 defeated the very purpose of speedy

[5] The Arbitration Act of 1940 (10 of 1940) [hereinafter the 1940 Act].

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justice, making "lawyers laugh and legal philosophers weep."[6] This breakdown of arbitration was further emphasized by the High Court at Calcutta which stated: "the law of arbitration is a cause, which walks enduringly on the crutches of legal precedents. It is no overstatement to say that almost every divisive arbitration of any importance always waits for a subsequent attack of legal fight in the public courts proving the truth of the older cynical statement that only fools go to arbitration because they pay two sets of costs: one before the arbitrators, and the other before the courts where they came home to settle."[7]

Mediation and Conciliation: A Better Alternative

Mediation is structured easy negotiation. It is an informal, confidential, consensual and irrevocable process aimed at enabling the parties to an argument, to discuss their differences in total isolation with the assistance of a neutral third party (mediator). The process is scrutiny based, future looking, and aimed at a long lasting win-win situation. It must be noted that there is no great difference between the terms 'mediation' and 'conciliation',[8] the latter of which is given statutory recognition in the 1996 Act.[9]

Mediation is absolutely consistent. The proceedings are instituted at the written command of both parties, and any party can opt out of the proceedings at any time. Any information which is submitted to the mediator may be kept top secret, if the party providing such information requests the same. Further, the proceedings of mediation cannot be used as evidence in a court of law, nor can the mediator be asked to give proof in judicial proceedings. This enables the parties to engage in risk-free communication, fostering a healthy and friendly environment for facilitated negotiation.

It is often seen that two parties which have a healthy business correlation, wish to pursue their relationship in spite of a prevailing dispute between themselves. The adversarial system in traditional courts ruptures relationships as it sets one party against the other. Further, in a court of law, a decision tends to result in one party 'winning' the dispute and the other 'losing' it. The remarkable feature of mediation is that both parties 'win' the dispute as they find solutions that

[6] Guru Nanak Foundation v. Rattan Singh, AIR 1981 SC 2075.
[7] Saha & Co. v. Ishar Singh, AIR 1956 Cal 321 at 341.
[8] Bryan A. Garner, a Dictionary on Modern Legal Usage, p. 5554, 2nd Edition, 1995.
[9] Part III, sections 61-81, the Arbitration and Conciliation Act, 1996. [U]

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contain the fundamental wants of each party. The mediator does not make a compulsory decision, and such a decision is not to push upon the parties. He may present the parties with a solution, redevelop the same etc., and such a solution can either be agreed upon or rejected by both parties. This inevitably engenders and encourages a continuing business relationship.

Role of the Mediator

The mediator is not an adjudicator. The facilitative role of the mediator signifies the epitome of mediation. The mediator is neither a trier of fact nor an authority of disputes. The role of the mediator is to generate an environment in which parties prior to him are facilitated towards resolving the dispute in a simply voluntary settlement or agreement. The mediator may invite the parties to meet him together, or may ask each of them to meet him disjointedly in order to open the channels of communication. The mediator must evaluate the dispute from an overall business, professional or private perspective.

A mediator is provided with certain tools of negotiation which do not exist to a judge in a court of law:

(a) Position Based Bargaining

The mediator may slender the differences between the parties and their contradictory positions in law. This may be done by revealing them to the uncertainties of the legal process, and the prudence of settling their disputes in a consensual manner.

(b) Interest Based Bargaining

Interest based negotiation can be exemplified by means of the fictional story of the two girls, each of whom wanted an orange. The judge will consider the questions: who had it first? (Property), who purchased it? (Contract), who needs it more? (Equity). The arbitrator will tear the difference awarding half to each girl. However, the mediator will ask the girls why they each need the orange. If one wants juice and the other wants the peel from the skin, the girls themselves will quickly agree to a distribution that meets the interests of both.

(c) Integrative Bargaining

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The mediator may integrate the interests and needs of both parties to reach a friendly solution. An example is seen in our everyday lives, where two law students required the similar book for an essay competition. After much dispute, a senior student finally tells them to write the essay jointly, thus increasing both their chances, and enabling both of them to participate in the competition.

Equipped with these tools of negotiation, the mediator must have personal qualities which enable him to relate comfortably with the parties. He must have the humility to be non judgmental in relation to each party's mind-set and the willingness to sympathize with their respective points of view. In essence, he is an information gatherer, a reality-tester and a problem solver.

Why does mediation work?

Thus, mediation can be construed as an effective and real alternative because it:

(1) Facilitates communication and separates the people from the problem.

(2) Helps overcome the deadlock and emotional blockages.

(3) Restores the negotiation process.

(4) Identifies and focuses on the real issues and needs of the parties.

(5) Gets the right people and the right information to the table.

(6) Helps parties to re-asses their case.

(7) Increases the options for resolution.

(8) Keeps ownership of the problem and the settlement with the parties.

(9) Restores and safeguards relationships.

In this Article, ADR includes "ways in which a society with an official, state-sponsored adjudicative process prevents, manages, and resolves disputes without using that process." Generally, the term encompasses any conflict-handling procedure that has as its goal avoiding

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the cost and delay of litigation, relieving court obstruction, providing a more "effective" or encouraging resolution between disputants, upgrading community involvement in the process of resolving disputes, and facilitating access to justice. In order to persuade these goals, ADR procedures usually are characterized as voluntary, informal, private, fast, and inexpensive. They tend to exaggerate the adversarial method by disappointing lawyer participation, judicial involvement, and the application of significant law, and by cheering party participation. Of course, the best accepted examples of ADR mechanisms or processes are negotiation, mediation, and arbitration. The latter two occupy third-party intervention. Important distinction between processes in which third parties interfere is whether the process is "conciliatory" or "adjudicative." A critical factor in making such a classification is whether or not the third party has the power to inflict a solution. If so, the process is adjudicative; if not, the process is soothing. Mediation is an appeasing process. Its aim is to achieve the settlement of disputes by adjustment or compromise among the claims, interests, and demands of the parties. Compromise" implies participation and preference in the declaration, which by implication will supply something for both disputants - an "all-win" solution.

Shortcomings of Alternative Dispute Resolution

In spite of the better position of ADR in India, one finds that the system is still lacking in certain respects. There is a dire need to modify section 89 of the Civil Procedure Code. The problem exists in as much as the section mandates that where it appears to the Court that there exists an constituent of settlement which may be acceptable to the parties, the Court shall formulate the terms of settlement and after getting comments of the parties, may reformulate the terms of probable settlement after which parties may be referred to arbitration, mediation etc. This compulsory function places on Courts an important burden. The Court has to determine the terms of possible settlement whereas the objective of mediation is to place the parties under the facilitative function of a mediator who will then allow them to learn their options for negotiated settlement.

Further, the development of mediation as an applicable alternative is in the developing stages in India. ADR has met with a considerable amount of hostility from the legal fraternity. Strategies

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for successful implementation must be carefully evaluated and a conscious effort must be made towards enhancing the evolution of a process that will be acceptable to society at large.

The exercise of arbitration as a means of resolving commercial disputes without appealing to the courts continues to be on the rise. The consignment on the courts caused by increasing caseloads and more and more complex issues in the commercial marketplace has lengthened the procedure of judicial dispute resolution in the courts. The delay inherent in judicial proceedings is often intolerable to those involved in modern commercial transactions and a simpler, faster method of dispute resolution is required. Commercial arbitration is becoming the most extensively utilized alternative.

Conclusion

Law derives its authority from the compliance of the people. However[10], the overweight backlog and sluggish delay of our limitative system defeats the very objective of a fair and just system of law. The procedural rigidity and extravagant expenses involved in the limitative system make path into our legal structure, as the faith of the people in our judicial system slowly wanes away.

Alternative Dispute Resolution, therefore, mainly in the form of mediation, does yeoman's service in restoring public confidence in our system. Mediation affords to the people, a system of resolution of disputes which is free from the delay, costs and firmness concerned in our limitative system. It focuses on their interests conferring upon them the right to self determination.

Mediation, however, has not yet attained the position it is worthy of. An enormous many strides have to be taken in order to ensure a system which is liberated from the manacles of opposition and confrontation.

In this respect, it would be suitable to note an incident that Justice Oliver Wendell Holmes had encountered on a train. [11]A young conductor got on the train and asked the man for his ticket.

[10] Aristotle's Politics 1269a

[11] See The Arbitration and Conciliation Act, 1996, V.A. Mohta: Prefatory Comments by F.S. Nariman.

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Justice Holmes searched a great deal, but was not competent to discover it. Recognizing the illustrious judge, the young conductor said:

> "That's all right Justice Holmes, we are very pleased to have you riding on our train. If you find where your ticket is, please send it to the railroad office."

To which Justice Holmes replied:

> "Young man, the question is not where my ticket is. The question is where it is I am going!"

To the Holmesian question, 'Where it is that Alternative Dispute Resolution in India is going?' the answer must always be:

> "Hopefully, in the right direction."

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