"ADR :AN IDEA THE TIME FOR WHICH HAS COME"

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"I am pained to observe that the judicial system in the country is almost on the verge of collapse. These are strong words I am using but it is with considerable anguish that I say so. Our judicial system is creaking under the weight of arrears."

- Former Chief Justice P.N. Bhagwati (1997 SCC page 10)

⇨ **INTRODUCTION:-**

It is an admitted fact that our country is suffering from acute problem of population explosion. This in turn has given rise to diverse problems including those of disputes, differences and conflicts. Even our judiciary is suffering from population problem i.e. docket explosion of pending cases. It is estimated that more than 25 Million cases are pending in over 8000 Indian courts. Besides, millions of fresh cases are filed every year. As a result court cases can take up to ten to fifteen years for the original trial hearing and thereafter another three to five years in appeals and there can be appeal against appeal. As a result, Counsels in India specialize in trying to obtain preliminary orders favorable to client which can virtually settle the issue at stake. Needless to say, these delays have caused widespread concern about legal systems. Frustrated litigants may resort to extra-legal methods for resolution of their disputes. This would be a dangerous trend and may ultimately erode the very

rule of law and the entire fabric of democracy to which our country is solemnly committed.

A further bane of the legal system is the lack of consistency, as earlier decisions are often overruled and distinguished on facts. Even the Supreme Court has been overruling its own decisions in many cases leading to uncertainty in the law.

It is under these circumstances that from time to time attempts have been made to persuade the disputing parties to resort to Alternative Dispute Resolution methods (popularly known as ADR methods) to resolve their disputes. In commercial world where time is money, there is a general feeling that litigation be best avoided by providing for Arbitration in all commercial contracts, thus ousting the jurisdiction of the courts.

⇨ REQUISITES OF A SUCCESSFUL ADR SYSTEM.:-

The success of ADR depends on willingness of the parties to get their disputes resolved by a commonsense method, using the services of experts who understand the subject matter of the dispute. The court practitioners, arbitral bodies and arbitrators must note that a sound and successful ADR system will require the followings:-

1. Sound substantial law to meet the requirements of business world.

2. Trained arbitrators. Arbitral and professional bodies should take initiative in designing training programs.

3. An ADR culture. The courts as well as adjudicators must change their mind sets.

4. Secretarial and administrative assistance to conduct arbitral proceedings.

⇨ **Litigation Vs ADR:-**

An English judge said, ***"Litigation is an activity that has not markedly contributed to the happiness and welfare of mankind."***

In the three tier system of our courts, parties will try their luck first in the District Civil Court, then in the High Court on an appeal and finally in the Supreme Court with the leave of that court. In proceedings from the lowest court to the highest there is no fast track. They turn to the usual procedures and suits, interlocutory applications, injunctions and the like. The ADR system has normally one tier and is of binding nature provided the parties have entered into privities of contract.

It is not that there is something wrong with our judiciary. Our judiciary is independent and it has taken number decisions even against the government in many sensitive matters. Only problem is that it is over crowded and like a over burdened horse it cannot run fast.

One more problem with the litigation is that the cost is mounting day by day. It is said that 'Litigation is a fruitful tree planted in the garden of a lawyer.' Therefore nowadays ADR is the most preferred mode of resolving commercial disputes. Under ADR we have four basic method of dealing with disputes i.e. Negotiation, Mediation, Conciliation and Arbitration. Though the first two methods are non binding in nature the third method of Conciliation has been

recognized by the statute of our country i.e. Arbitration and Conciliation Act of 1996 (in short the Act). Compromise and Settlements are the necessary elements of all these three methods. However, the Arbitration is a process of adjudication wherein a third neutral person after hearing both the parties gives its decision. Arbitration has the following advantages over litigation:-

1. Arbitration promises PRIVACY. In a civil court, the proceedings are held in public, which embarrasses the parties, especially during cross - examination.

2. Arbitration provides liberty to choose an arbitrator, who can be a specialist in the subject matter of the dispute. The arbitrators may be experts and can resolve the dispute fairly and expeditiously as they are well versed with the usages and practices prevailing in the trade or industry.

3. The venue of arbitration can be a place convenient to both the parties. It need not be a formal platform. A simple office cabin is enough. Likewise the parties can choose a language of their choice.

4. Even the rules governing arbitration proceedings can be defined mutually by both the parties. For example, the parties may decide that there should not be any oral hearing.

5. A court case is a costly affair. The claimant has to pay for the advocates, court fees, process fees and other incidental expenses. In arbitration, the expenses are lesser and many times the parties themselves argue their cases. The arbitration involves few procedural steps and no court fees.

6. Arbitration is faster and can be expedited. The court has to follow its own system and takes abnormally longer time to dispense off the cases. It is a known fact that millions of unresolved cases are pending before the courts.

7. A judicial settlement is a complicated procedure. A court has to follow the procedure laid down in the Code of Civil Procedure, 1908 and the Rules of the Indian Evidence Act. In arbitration, the procedure is simple and informal. An arbitrator has to follow the principles of natural justice.

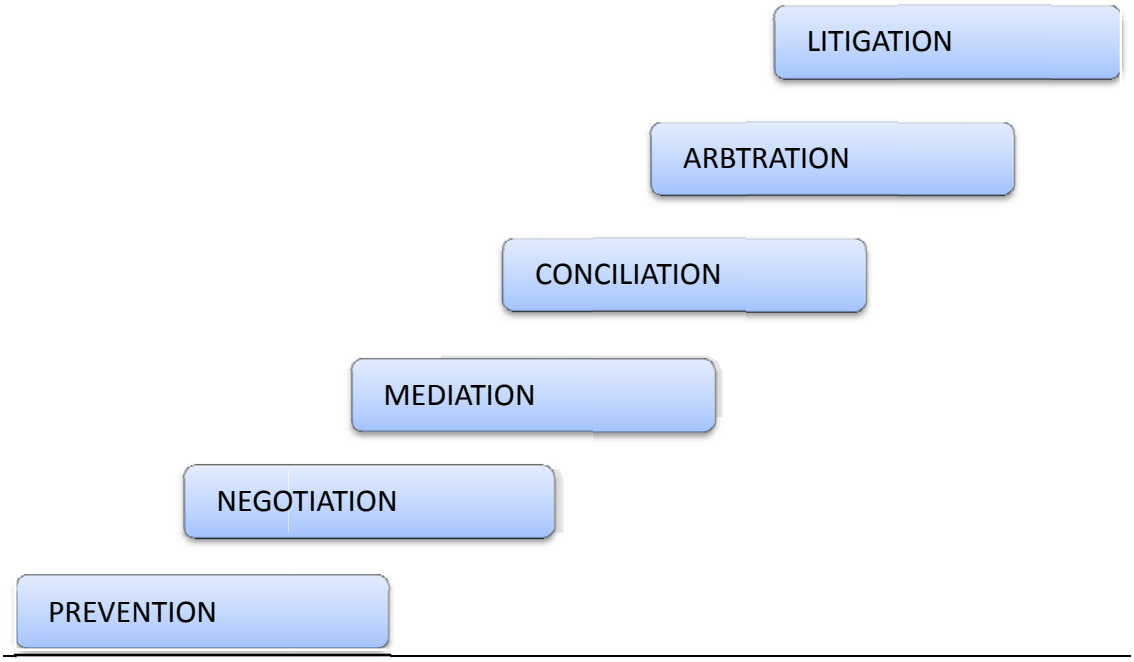
8. Section 34 of the Act provides very limited grounds upon which a court may set aside an award. The Act has also given the status of a decree for the award by arbitrators. The award of the arbitrators is final and generally no appeal lies from the award. While in a regular civil suit there may an appeal and appeal against Appeal.

9. In arbitration, the dispute can be resolved without inflicting stress and emotional burdens on the parties, which is a common feature in court proceeding

10. In a large number of cases, 'Arbitration' facilitates the maintenance of continued relationship between the parties even after the settlement.

11. One of the motivations for ADR is commonly said to be the empowerment of the individual. It gives responsibility for the resolution of their own disputes.

⇨ **LADDER OF LITIGATION:-**



⇨ **PREVENTION :-**

Prevention is better than cure. Definitely in the areas of disputes it is always better to prevent a dispute from arising than find ways of resolving them. The obvious course is to have a legal appraisal before the transaction is finalized. Documents should be vetted carefully so that there are no loopholes which can give rise to disputes.

⇨ **NEGOTIATION:-**

"John F. Kennedy said Let us not negotiate with fear but let us not fear to negotiate."

In Negotiation the disputant parties resolve their differences out of the court by way of negotiation. No lawyers or outsiders are generally involved. There are no hard and fast rules, no technicalities and complicated procedure.

However, if a dispute cannot be resolved through negotiations, one can try mediation.

- **MEDIATION :-**

In mediation generally a third party is involved who acts as a facilitator. In a typical mediation, there is always a win-win situation. However, the settlement reached through mediation is non-binding. So we come to the next best method, which is "Conciliation".

- **CONCILIATION:-**

Conciliation is now recognized by the Arbitration and Conciliation Act, 1996. In Conciliation, the disputant parties resolve their disputes with the help of one or more conciliators. The settlement agreement reached by the parties and authenticated by the conciliator is binding upon the parties.

- **ARBITRATION:-**

Arbitration is a quasi judicial method for resolving disputes outside the court. Arbitration is a preferred mode of dispute resolution in domestic as well as international trade. It is preferred over litigation as our overburdened courts are not in a position to provide timely justice.

⇨ **ADR PROCESS :-**

STRAUS Institute of Dispute Resolution of Pepperdine University has summarized the process of ADR as mentioned below :-

NEGOTIATION	MEDIATION	CONCILIATION	ARBITRATION
Voluntary	Usually Voluntary	Usually Voluntary	Either
If there is an agreement it is enforceable as a contract	If there is an agreement it is enforceable as a contract	If there is an agreement it is enforceable as a contract	If there is an agreement it is enforceable as a contract
No third party involvement	Neutral selected by parties	Neutral selected by parties	Neutral selected by parties
Formalities established by parties	Formalities established by parties and Neutral	Formalities established by parties and Neutral	Formalities established by parties and Neutral
Usually unrestricted party presentations	Presentations limited by agreed rules	Presentations limited by agreed rules with a power to Neutral to give his/her opinion on the rules	Presentation limited by agreed rules However Arbitrator is empowered to give a decision on rules if warranted
Parties control process & outcome	Parties control process & outcome	Parties control process & outcome	Neutral controls process & outcome
Private	Private	Private	Usually Private

(Source:- law.pepperdine.edu)

⇨ **OTHER METHODS:-**

It may not be out of place to mention that in practice a number of combinations of ADR methods are used. The mechanism of ADR is evolving and new experiments are constantly carried out by various arbitral organizations all over the world.

The following ADR methods have gained ground recently:-

⇨ **MINI – TRIAL:-**

It is a truncated form of litigation in which counsels for the parties present their client's best case to mutually acceptable adjudicator. Mini-trial is really not a trial at all and parties are not allowed to produce oral evidences. The senior executives of both the parties attend the proceedings which helps them in reaching a settlement after the hearing is over. The adjudicator will reach his own opinion if the parties fail to reach a negotiable settlement. This method is very quick as the whole proceedings can be complete within couple of days.

⇨ **Mediation – Arbitration (Med – Arb)**

The disputing parties may agree to resolve the difference through Mediation failing which the matter would be referred to Arbitration. The advantage of the combined procedure of Med-Arb is the incentive that it offers for a good faith commitment by the parties.

⇨ **Rent – a – Judge**

In this method the parties retain a neutral third party (usually a retired judge) to decide a dispute (whether or not a case has been filed in court). Private judging is quite different from other ADR processes. In many states of U.S.A., decisions reached by the neutral third party are binding, filed with the court as a judgment, and include the right of appeal. The chief benefit to

private judging is speed; disputes can be resolved without waiting for the courts backlog to clear. In addition, the parties can modify the litigation in process. Lastly, the parties agree in advance on a judge, which in complex commercial cases can be important.

- ⇨ **Early Neutral Evaluation**

Early Neutral Evaluation (ENE) is a non-binding ADR process designed to improve case planning and settlement prospects by providing litigants with an early advisory evaluation of the likely court outcome. ENE is a forum in which attorneys present the core of the dispute to a neutral evaluator in the presence of the parties. This occurs after the case is filed but before the evidence is led. The evaluators help the parties clarify arguments and evidence, identifies strengths and weaknesses of the parties' positions, and gives the parties a non-binding assessment of the case's merits. If a settlement does not result, the neutral helps narrow the dispute and suggests guidelines for managing the case.

- ⇨ **Ombudsman Strategy**

It investigates and expedites complaints, helping either of the parties settle a dispute or proposing change to make the system (of employer, government agency, business, etc.) more responsive to the needs of the complainant.

- ⇨ **Administrative or statutory tribunals**

In these tribunals, adjudication follows certain specific statutory requirements, such as establishing rent levels, compensation awards, social security benefits or a range of other matters through tribunals and appeal tribunals.

- ⇨ **Court-annexed arbitration**

This method requires statutory introduction into the court system, and which, depending upon the model adopted, may be binding or initially non-binding, and may or may not provide for a re-hearing by a judge under certain circumstances.

In its various forms ADR is becoming popular and considered as a Co-operative problem solving system.

The President of American Arbitration Association MR. ROBERT COULSON has observed that:-

"Litigation has not kept up with modern, fast moving society ..... there have been revolutionary changes in the business practices since the basic court structure was adopted from English common law ..... Compared to modern business, civil courts have changed very little ... Alternative dispute resolution gives the lawyers an opportunity to use new processes, encourages problem-solving attitude and an openness to compromise"

- ⇨ **WHAT IS ARBITRATION**

Section 2(1) of the Act, defines Arbitration to mean any Arbitration whether or not administered by a permanent arbitral institution. The above definition has been given to clarify that the Arbitration contemplated by the Act-embraces all arbitrations whether or not administered by permanent arbitral institutions like Indian council of Arbitration, Indian Merchants chamber, international chamber of commerce etc. etc.

Arbitration is the settlement of a dispute by the decision not of a court of law but of one or more persons called arbitrators. Halsbury has defined Arbitration as follows:-

"Arbitration is the reference of dispute between not less than two parties, for determination, after hearing both sides in a judicial manner, by a person or persons other than a court of competent jurisdiction. (Halsbury Laws of England, Fourth edition vol. II)

From the above it will appear that Arbitration is a mode of resolving disputes without the intervention of the court. However, in practice, a court may have to intervene at various stages of arbitration. The Act ensures that the court's interference is minimum. Section 5 of the Act provides that no judicial authority shall intervene except where so provided in part I of the Act. Part- I deal with the law relating to domestic arbitration.

These arbitration proceedings which are conducted without resource to an institution, is also commonly known as "Ad Hoc Arbitration". Thus Ad Hoc Arbitration is an arbitration agreement to and arranged by the parties themselves. The proceedings in Ad Hoc Arbitration are conducted by the arbitrators as per the agreement between the parties or with concurrence of the parties.

An Ad Hoc Arbitration may be:-

1. DOMESTIC ARBITRATION
2. INTERNATIONAL ARBITRATION
3. FOREIGN ARBITRATION

1. **DOMESTIC ARBITRATION:-**

Domestic Arbitration is that arbitration which takes place in India.

2. **INTERNATIONAL ARBITRATION:-**

International Arbitration is where at least one of the party is from any country other than India.

3. **FOREIGN ARBITRATION:-**

Foreign Arbitration is an arbitration conducted in a place outside India.
Thus, it may be noted that the Act broadly classifies arbitration according to the place of Arbitration. An International Commercial Arbitration if conducted in India will be known as Domestic Arbitration.

⇨ **INSTITUTIONAL ARBITRATION**

There are number of national and international organizations set up with the main objects of settling commercial disputes by way of Arbitration and other Alternative Dispute Resolution mechanism. Indian Council of Arbitration, the International Center for A. D. R., various chambers of commerce etc. have framed rules of Arbitration and Conciliation for the benefit of their members as well as non-members.

These organizations lay down rules for the conduct of an Arbitration. These rules, however, cannot override the Act. These organizations handle the arbitration cases of the parties and provide valuable services like administrative assistance, consultancy and recommending names of arbitrators from the panel maintained by them. Since these organizations have experience and proper infrastructure to conduct the arbitral proceedings, it is quite often beneficial to the parties to avail of their services.

Arbitral Institutions claim that ad hoc arbitrations suffer from a number of problems which causes inordinate delays and cost in actual practice. Since, the arbitral institutions have advantage of well developed arbitration machinery, organizational setup and comprehensive rules of procedure; it saves the parties from avoidable delay, expenses and uncertainty.

However, it is quite common in our country that members of a particular organization take help of the arbitration machinery of that very organization.

Needless to say that in Adhoc arbitration, the disputant parties themselves, has to arrange for venue of meetings, secretarial services and other administrative measures.

- **FAST TRACK ARBITRATION:-**

Establishment of fast track arbitrations is a recent trend aimed at achieving timely results, thereby lowering the costs and difficulties associated with traditional arbitration. Fast track arbitration is a time-bound arbitration, with stricter rules of procedure, which do not allow any laxity or scope for extensions of time and the resultant delays, and the reduced span of time makes it more cost-effective.

Fast track arbitration is required in a number of disputes such as infringement of patents/trademarks, destruction of evidence, marketing of products in violation of patent/trademark laws, construction disputes in time-bound projects, licensing contracts, and franchises where urgent decisions are required.

The 1996 Act has built-in provisions for fast track arbitration. Section 11(2) of the 1996 Act provides that the parties are free to agree on a procedure for appointing an arbitrator. Theoretically, under Section 11(6) of the 1996 Act, a party does not have to approach a court for appointment of an arbitrator, if the agreement provides for a mechanism to deal with the failure of the other party to appoint the arbitrator. Thus, the parties are given complete autonomy in choosing the fastest possible method of appointing an arbitrator, and constituting a valid arbitral tribunal. Section 13(1) confers the freedom on parties to choose the fastest way to challenge an arbitral award. Section 13(4) expedites arbitral proceedings by providing that if a challenge to an arbitral proceeding is not successful, the arbitral tribunal shall continue proceedings

and pass an award. Section 23(3) of the 1996 Act enables parties to fix time limits for filing of claims, replies and counter claims. Section 24(1) also permits the parties to do away with the requirement of an oral hearing, if they so desire. More importantly, Section 25 authorizes an arbitral tribunal to proceed ex parte in the event of default of a party. Section 29 even empowers the presiding arbitrator to decide questions of procedure.

As a premier Indian organization for institutionalized arbitration, the Indian Council of Arbitration (ICA) has pioneered the concept of fast track arbitration in India. Under the rules of the ICA, before commencement of the arbitration proceedings, parties may request the arbitral tribunal to settle disputes within a fixed timeframe of three to six months or any other time agreed upon by the parties.

- ⇨ **CPC, Section 89:-**

The importance of arbitration has increased after the CPC Amendment Act 1999, which came into effect from July 1, 2002. This Amendment has inserted Section 89, which empowers a court to refer a dispute in litigation to arbitration or conciliation or judicial settlement, or Mediation, where it appears to the court that elements of settlement exist. This provision empowers the court to refer disputes to arbitration even in cases where there is no arbitration agreement between the parties, to reduce the pressure on courts. This provision is likely to give a grater role to arbitration and conciliation. However, many practical aspects, such as appointment of competent arbitrators / conciliators, the question of fees and time limits, would have to be resolved for this provision to be effective.

- ⇨ **Conclusion:-**

It will not be out of place to say that the field of ADR is bound to grow by leaps and bounds in time to come. Nani Palkiwala has once said "If I were appointed

a dictator of this country, in the short period between my appointment and my assassination, I would promulgate a law making all commercial disputes compulsorily referable to Arbitration.