

## THE NOTIONAL PROCESS OF ADR AND INCULCATE EMERGENCE OF ODR

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### ABSTRACT

*Human conflicts and disputes are equally inevitable. It is difficult to imagine a human society without conflicts of interests and justice. Invariably human population is increasing in an exorbitant way with an equal proposition of conflicts within them. Current scenario of e-biological pattern not only reflects the abnormal growth of human population in society but it also includes population in jails, courts and litigations, which results delay in general disposal. In large number of cases, a delayed remedy services virtually no purpose. To prevent denial of justice due to delay, a tentative quicker and final remedy is required. Hence, there was an emergence of ADR with new concepts. Today the ADR is greatly acknowledged for its speculative process and it avoids rigidity and inflexibility, which is inevitable in the litigation process. The institution of arbitration was emerged as a powerful and proper weapon for resolution of disputes that arises in the society as well as in the new atmosphere of the commercial world. In order to compete the e-commerce the ADR need to be kick-started with the updated procedure of Online Disputes Resolution. The process of Online Dispute Resolution eliminates the discrepancies that exists in Alternate Dispute Resolution and will make it easier.*

**Key words:** ADR, ODR, Arbitration.

### AN OVERVIEW ON ADR

From all the attention that it has recently, particularly from the time of formation of the International Centre for Alternative Dispute Resolution one may get an impression that it is a recent concept. But Arbitration, Mediation and conciliation have its own traditions in several parts of the world especially in India. There is a very old tradition in India regarding the encouragement of dispute resolution outside the formal legal system. Invariably disputes

were quite often decided by the intervention of elders or the group of learned men and other such bodies. Nyaya panchayats at the grass root level were there even before the advent of British legal system. It is a matter of common knowledge that even today many disputes in villages are settled by such methods by the intervention and order of the elders of that village. The credibility of such forums by Panchayats arose from the knowledge of the parties and of its uses. However, with the harassment of the British rule these traditional and customary institutions of dispute settlement somehow started withering and the formal legal system introduced by British began to rule with a basis concept of omissions of rule of law and the supremacy of law. It was only after independence and after realization that the formal British legal system will not be in a position to bear the entire burden, it was felt that the system requires drastic changes. The mounting arrears in the courts, inordinate delays in administration of justice, and expenses of litigation have gradually undermined the people's faith in the formal legal system. Today, therefore the issue is to examine and choose a right formal legal system, such as ADR procedures and to organize the same on more scientific lines. Perpetually alternate dispute resolution has a long tradition in many part of the world specifically in India.

Due to globalization, trade and commerce nowadays the business world has rightly recognized the advantages of ADR and it will be the right solution. The use of Alternative Dispute Resolution has grown tremendously in the International business field in the recent years. This growth has been permitted by several factors including tremendous expansion of international commerce and recognition of global economy. Many governments around the world have supported the demand for ADR as an efficacious way of handling international commercial disputes and this system got expanded<sup>1</sup>. In order to compete the current scenario of trade and commerce in a worldwide way the ADR must equipped with some additional organs such as Online Dispute resolution. Many experts in this field are of strong opinion that the impact of ODR on international commerce is great and will continue to expand. No doubt the developing countries have been rather slow in responding to this concept. About ADR and need of ODR mostly in the way of arbitration are follows.

## **ALTERNATIVE DISPUTE RESOLUTION AND ITS CONSTITUTIONAL BACKGROUND**

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<sup>1</sup> Honble Justice.K.Jayachandra Reddy, Former Judge of Supreme Court of India in his article regarding Alternative Dispute Resolution.

ADR processes are decision making processes are decision making processes to resolve disputes that do not involve litigation or violence. ADR includes a variety of processes through which litigants or potential litigants may resolve their disputes. Unlike the courts, which use adversarial processes, ADR focuses on effective communication and negotiation. ADR is not an alternative to the judiciary but it is only as the suffix to the same aiming on quicker remedy for the disputes. ADR mechanism is intended to cover negotiation, mediation, conciliation and arbitration.

This process is of two types namely binding methods and non-binding methods. Binding methods includes the processes which involve a third neutral party investigating the dispute. These processes may include a formal hearing and making a determination that is potentially enforceable. It includes adjudication and Arbitration. Non-binding methods includes the processes which involve a third neutral party, which does not have determinative role. It provides assistance in managing the process of dispute resolution. These processes include facilitative and advisory processes like mediation, conciliation, facilitation, Mini-Trial, Dispute Resolution Board, Case Appraisal and Evaluation and Dispute Counseling.

“It is settled law that free legal aid to the indigent persons who cannot defend themselves in a court of law is a Constitutional mandate under Articles 39A and 21 of the Indian Constitution. The right to life is guaranteed by Article 21”<sup>2</sup>. Indian civilization put at about 6000 years back, at the dawn of civilization<sup>3</sup>, when habitation was growing at river banks, was devoid of urbanization, where the creator was presumed to be the head of humanity.

The Constitutional mandate rescue operation began with V.R.Krishna Iyer.J and P.N.Bhagwathi J’s Committees’ report. The CILAS (Committee for the Implementation of Legal Aid Services) also came to the scene and initiated methods of solving civil disputes in non-legal fora and non-formal fora. Based on this Legal Aid and Advice board etc were established.

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<sup>2</sup> K. Ramasamy J, while delivering his key note address at Law Ministers’ conference, at Hyderabad, on Saturday,25.11.1975.

<sup>3</sup> Meeting of Commonwealth Law Ministers, held at Christ Church, New Zealand in the month of April, 1990.

The soul of good government is justice to people.. This requires the creation of an ultra-modern disseminating infrastructure and manpower; sympathetic and planned; need for new judiciary technology and models; and remedy – oriented jurisprudence.<sup>4</sup>

## **MAIN OBJECTIVES OF INTERNATIONAL CENTRE FOR ALTERNATIVE DISPUTE RESOLUTION**

The International Centre plays a vital role in the processes of ADR and it is intended to spread ADR concept effectively throughout the country. The main objectives are;

- i) To propagate, promote and popularize the settlement of domestic and international disputes by different methods of ADR.
- ii) To provide facilities and administrative and other support services for holding conciliation, mediation, mini- trials and arbitration proceedings.
- iii) To promote reform in the system of settlement of disputes and its healthy development suitable to the social, economic and other needs of the community.
- iv) To appoint conciliators, mediators, Arbitrators, etc., when so requested by the parties.
- v) To undertake teaching in ADR and related matters and to award diplomas, certificates and other academic or professional distinction.
- vi) To develop infrastructure for education, research and training in the field of ADR.
- vii) To impart training in ADR and related matters and to arrange for fellowships, scholarships, stipends and prizes.<sup>5</sup>

## **AN EMERGENCE OF E-DISCOVERY**

The cost constraints and the need for speedy resolution of disputes continue to be bottlenecks in a scenario of increasingly global and complex disputes involving multiparty proceedings and mass claims. Dispute resolution is one of the most rapidly developing fields

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<sup>4</sup> See, P.N. Bhagwathi on the need to create adequate and effective delivery system of justice in Chap vi of Social Justice- Equal Justice.

<sup>5</sup> Concepts of International Centre for Alternative Dispute Resolution.

in which there is significant usage of Information Technology. One method of reducing the excessive duration and cost of dispute resolution is to use IT tools to facilitate the proceedings. Use of these tools can reduce costs and time significantly and thereby, aid timely administration of justice.

Technology is a very powerful tool for international arbitration and is rapidly penetrating the legal profession. It has the potential to facilitate handling of increasingly voluminous records that are part and parcel of present-day dispute resolution in our country.

The new concept of E- discovery is a growing trend in commercial arbitration proceedings, especially when parties seek significant discovery. It is growing as a means to reach fair results in complex commercial matters. Companies whose commercial disputes are likely to involve exchange of significant electronically stored information (ESI) need to understand the pros and cons of clauses in an agreement they negotiate due to e-discovery becoming more accepted as a part of ODR. So the neutrals need to be familiarizing themselves with technological issues that arise in connection with electronic data to be able to appropriately address issues pertaining to it.<sup>6</sup>

### **AN EMERGENCE OF ODR**

In order to complete the current globalized world and trade and commerce the ADR should be equipped with the formulation of an Online Dispute Resolution. While considering the circumstances of an emergence of science and technology the process of ADR can be made in a better way to provide a remedy to the parties those cannot be present in the certain place or spot to participate the process of ADR can opt the updated version of ADR, probably the ODR. ODR processes are consensual, voluntary and quick process, which are chosen by the parties to the dispute. These processes are expeditious because it avoids those components of traditional litigation that prolong and delay resolution of dispute. This process is flexible which is handled and resolved through an agreement. The parties choose a particular process, outline the specific steps of the process, and establish time limits. It is a non-judicial process in which decision is made by the parties themselves. In ODR, the parties control the process and the outcome.

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<sup>6</sup> Discussions in National Conference on Arbitration Law: On Chapter Importance of Technology in Arbitration.

ODR is an option for those parties who are willing to communicate with each other and make genuine attempt to resolve the dispute with the help of a neutral party. It can be used in almost every dispute, which can be filed in the court as a civil suit. It can be recommended when i) Parties want to control the outcome of the dispute, ii) parties want to resolve the dispute at the earliest, iii) Parties want to preserve their relationship, iv) Parties want confidentiality or privacy, v) Parties want to end their relationship without undue stress, vi) Parties have multiple issues in dispute, vii) Parties want to save money.

And ODR is not be successful generally when, i) A party does not have a significant decision maker, ii) Dispute involves important issues of law or public policy, iii) One party is weak and other party is very strong i.e there is an imbalance of power between the parties, iv) One party wants to delay resolution of dispute for one or the other reason, v) A definitive or authoritative decision is needed for precedential value, vi) The dispute involves significant questions of government policy, vii)The matter affects parties that are not parties to the ODR.

The parties agree on an ODR process considered best suitable for them and they appoint a neutral to assist them in reaching an agreement. They fix a time schedule for completion of the process. The parties may stipulate special provision like confidentiality, privacy, sharing of cost of ADR process etc. The parties proceed using this process until the dispute is resolved; it is usually recorded in a written agreement. The Neutral is an unbiased, impartial and third party not connected with the dispute, which includes an Arbitrator, Mediator, Conciliator, Facilitator, Evaluator or any other person who helps the parties to settle their conflicts by this process.

## **PRINCIPLES SETTING THE PATH OF THE FUTURE**

The development in the part of Alternate Dispute Resolution hugely influences the process of arbitration in order to considering the trade and commerce agreements between the corporate all over the globalized world. According to e-business, custom demonstrates the obligation of professional parties to use the security in technology as a means of protecting the importance and confidentiality in the process. Lex Informatica principles have assured a promising mechanism for providing proper adjudication of disputes at international level.<sup>7</sup> There are certain principles and rules which have been accepted as fundamental principles in

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<sup>7</sup> Joel R.Reidenberg, Lex Informatica:The Formulation of Information Policy Rules through Technology.

the international arena, like functional equivalence of written and electronic documents.<sup>8</sup> Regarding any issues on ODR there should be certain set of principles and laws to provide a proper resolution to the disputes. The principles of Lex Mercatoria, laying down general principles of law, are identical to Lex Informatica, which again help in developing definite code for the adjudication of matters<sup>9</sup> by ODR and the most important uniform law for this issue is The United Nations Commission on International Trade Law (UNCITRAL) and UNIDROIT by providing sufficient tools for this dispute resolution system in the international arena. The codes of conduct and guidelines should be used for the resolving e-commerce disputes.

Role of Tribunals and their case laws plays a vital role in the enumeration of enactment of the uniform code to this process of ODR. The tribunal will carefully consider the intent of the parties, as expressed in the choice of law clause and in particular should examine whether the parties themselves have given any methodological instructions.<sup>10</sup> But the greater draw back in this ODR is the chaos and confusion in following the specific rules for settling the disputes, the parties might opt their own principles of their country or state and other might not able to know personally, which results in lack in confidence and the neutrals might unable to conclude the decision regarding the rules to be followed to resolving the disputes for the parties who were all from different areas or country.

### **THE NEED FOR JUDICIAL BACKING FOR ADR**

In what direction then should dispute resolution in commercial matters proceed? Based on the ethos of the people who live in the Asian region and of the experience of those well versed in the arts of dispute resolution in the areas, I would suggest the following:

i) Conciliation with third party assistance should be the primary method of dispute settlement. It is an invaluable technique helping to resolve disputes whilst preserving amicable relationships, thus fostering further international trade.

ii) Since we in India appear to have lost the art of conciliation and have not yet acquired the necessary modern expertise, we must learn from other countries, and then evolve our own

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<sup>8</sup> U.N.Doc.A/RES/60/21

<sup>9</sup> V.J.J.M.Bekkers, Emerging Electronic Highways:New challenges.

<sup>10</sup> Comparative International Commercial Arbitration by Julian D.M.Lew.

standards for strengthening the mechanisms of conciliation – ICADR in New Delhi, provides this and hopefully will help develop the requisite technique.

iii) In the event of a failure to resolve a particular commercial dispute by negotiation and conciliation, resort to arbitration under the aegis of our new law based on the UNCITRAL Model law and rules.

iv) The development of arbitration along non-litigious, non-adversarial lines: In other words, less lawyer techniques, less “court-craft”, lawyers are certainly useful but not in their confrontational capacity, but in their more meaningful role as negotiators and mediators.<sup>11</sup>

## CONCLUSION

The third world did not always discriminate between foreign and international arbitration. Our history and customs enumerates the procedures of ADR in past itself. But it was hidden by British regime by the means of formal legal system and caused backlogging of cases and after recognition the need of ADR it was introduced back with new enactments. In order to compete the trade and commerce and e-business ADR requires to equipped with ODR with uniform Code and conduct. With the new law in place, ADR acquired a new prospectus in our country and all over the world, but we must develop the will to work it in the right spirit and with good faith, always conscious of the danger to which Lord Mustill drew attention: Just as the slow tide of opinion had once carried international commercial disputes away from the courts towards voluntary arbitration, so may another tide lead to another movement in some jurisdiction back towards the courts.

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<sup>11</sup> See Arbitration and ADR in India by Mr.F.S.NARIMAN, President - ICCA, Vice chairman- ICA of ICC Paris