

1. INTRODUCTION

Life comprises of several differences between and among people, groups and nations. There are cultural differences, personality differences, differences of opinion, situational differences. Unresolved differences lead to disagreements which can cause problems. Unresolved disputes become conflicts.¹ In a society, it is impossible to eliminate contradictions, conflicts and disputes. Conflicts and disputes are bound to happen no matter how civil or barbaric the society may be. Therefore, to ensure stability and security in the society, it is essential to have a dispute resolution mechanism in place. Every state provides for a formal dispute resolution system through a system of courts. Often these state-provided courts are overburdened and are not able to deliver justice in time.

The proliferation and pendency of litigation in civil courts for a variety of reasons has made it impracticable to dispose of cases within a reasonable time. The overburdened judicial system is not in a position to cope up with the heavy demands on it mostly for reasons beyond its control.² Due to delay and huge pendency of cases in India, it is essential to use Alternative Dispute Resolution processes along with the formal process to ensure that the justice is not denied to the masses. This module provides an introduction to various ADR mechanisms and the philosophy and the basis for ADR in the Indian Legal System.

2. DISPUTES AND THE APPROACHES TO DISPUTE RESOLUTION

Conflicts and disputes are a fact of life. They are not good or bad. However, what is important is how we manage or handle them.³ Disputes are conflicts may arise due to several reasons such as lack of information or misinformation, different interpretations of information, differences in goals and needs, differences in perception, poor communication, misconceptions, stereotypes, distrust, different criteria for evaluating ideas or different ways of life and ideology. Everyone knows the meaning of a dispute and one may presume that one will recognize a dispute when

¹ Mediation and Conciliation Project Committee- Supreme Court of India, Mediation Training Manual of India
<<https://www.sci.gov.in/pdf/mediation/MT%20MANUAL%20OF%20INDIA.pdf>>

² Law Commission of India, Report No. 238 Amendment of Section 89 of the Code of Civil Procedure, 1908 and Allied Provisions (December, 2011)

³ Nishita Medha, Alternative Dispute Resolution in India,
<http://www.fdrindia.org/old/publications/AlternativeDisputeResolution_PR.pdf>

one sees it.⁴ However, it is essential to see a few definitions of disputes before proceeding ahead with the module. The Black's Law Dictionary defines a dispute as follows:

*A dispute is a conflict or controversy, esp. one that has given rise to a particular lawsuit.*⁵

Other definitions for a dispute which capture the essence are as follows:

*A dispute is a disagreement on a point of law or fact, a conflict of legal views or of interests between two persons.*⁶

Or

*A dispute is a situation in which the two sides held clearly opposite views concerning the question of the performance or non-performance of certain treaty obligations.*⁷

Or

A dispute is a present divergence of interests and opposition of legal views.⁸

On a combined reading of these different definitions, the following are the common points:

- A dispute is between two or more parties.
- A dispute is based due to difference in opinion or opposing views.
- A dispute may be due to a legal position, rights or obligations.
- A dispute may lead to a law suit.

A dispute may be resolved either by the use of traditional state-established court system or through the use of Alternative Dispute Resolution Mechanisms. ADR can be defined as encompassing all legally permitted processes of dispute resolution other than litigation. While this definition is widely used, ADR proponents may object to it on the ground that it privileges litigation by giving the impression that litigation is the normal or standard process of dispute

⁴ Christoph Schreuer, What is a Legal Dispute? <<https://www.univie.ac.at/intlaw/wordpress/pdf/95.pdf>>

⁵ Bryan A. Garner, Black's Law Dictionary Thomson West(10th edition, 2015)

⁶ Mavrommatis Palestine Concessions (Greece v. Great Britain), Judgment of 30 August 1924, 1924 PCIJ (Ser. A) No. 2, at 11.

⁷ Interpretation of the Peace Treaties with Bulgaria, Hungary and Romania, Advisory Opinion of 30 March 1950 (first phase), 1950 ICJ Rep. 65, at 74.

⁸ Texaco Overseas Petroleum Company and California Asiatic Oil Company v. Libyan Arab Republic, Preliminary Award of 27 November 1975, 53 ILR 389, at 416 (1979).

resolution, while alternative processes are aberrant or deviant. That impression is false.⁹ Alternative processes, especially negotiation, are used far more frequently.

The Black's Law Dictionary defines ARD as follows:

*Alternative dispute resolution: A procedure for settling a dispute by means other than litigation, such as arbitration or mediation.*¹⁰

ADR covers within its ambit a broad spectrum of structured processes, including mediation and conciliation, which does not include litigation though it may be linked to or integrated with litigation, and which involves the assistance of a neutral third party, and which empowers parties to resolve their own disputes.¹¹ Parties may use arbitration, mediation, and other hybrid forms of dispute resolution to settle their disputes without proceeding through the trial process.¹²

ADR is not a recent phenomenon as the concept of parties settling their disputes themselves or with the help of third party, is very well-known to ancient India. Disputes were peacefully decided by the intervention of Kulas (family assemblies), Srenis (guilds of men of similar occupation), Parishad etc.¹³ In India, disputes were even settled by a council of village elders, known as a Panchayat which was an accepted method of conflict resolution.¹⁴

To summarize, Alternative Dispute Resolution Mechanism are:

- legally permitted processes of dispute resolution other than litigation
- structured or unstructured processes
- processes which help resolve dispute and harmonize the relation of the parties¹⁵
- processes such as mediation, negotiation, arbitration, Lok Adalats etc

⁹ Bryan A. Garner, Black's Law Dictionary Thomson West(10th edition, 2015)

¹⁰ Bryan A. Garner, Black's Law Dictionary Thomson West(10th edition, 2015)

¹¹ Law Reform Commission, Alternative Dispute Resolution: Mediation And Conciliation (LRC 98-2010)

¹² Mr. Adithya Joseph, Alternative Dispute Resolution Mechanisms In The Intellectual Property Regime
<<http://www.manupatrafast.com/articles/PopOpenArticle.aspx?ID=78779378-b7d0-44bd-a04c-b637daee867f&txtsearch=Subject:%20Intellectual%20Property%20Rights>>

¹³ Hon'ble Thiru Justice S.B.Sinha, ADR and Access to Justice: Issues and Perspectives
<<http://www.tnsja.tn.nic.in/article/ADR-%20SBSinha.pdf>>

¹⁴ Law Commission of India, Report No. 222 Need for Justice-dispensation through ADR etc.

¹⁵ Hon'ble Thiru Justice S.B.Sinha, ADR and Access to Justice: Issues and Perspectives
<<http://www.tnsja.tn.nic.in/article/ADR-%20SBSinha.pdf>>

Need for ADR

According to a report Report also suggests that the average pendency of any case in the 21 high courts is about three years and one month (1,128 days). If the case is in any of the subordinate courts in the country, the average time in which a decision is likely to be made is nearly six years (2,184 days). These statistics show that dispute resolution through courts is a long and costly process. Hence, it is necessary to have alternative methods so as to get justice in a faster and less expensive manner.

The presumption that courts are the principal forum for dispute resolution continues to be eroded. Alternative forms of dispute resolution (ADR), including agreement-based ADR (such as mediation and conciliation) and adjudicative ADR (such as arbitration), continue to proliferate and are increasingly institutionalized, leading to their characterization as ‘appropriate’ or ‘proportionate’ dispute resolution.¹⁶ The major objective of ADR is that it is a peaceful method of conflicts resolution. The main philosophy underlying the relevance and growth of Alternative Dispute Resolution (ADR) methods is that it is quicker and cheaper and above all parties have a level of control of the process and the advantage of having a continued harmonious co-existence even after the process. ADR, which includes arbitration and mediation, apart from its primary goal of dispute resolution also have broader goals such as capacity building, skills development and reductions in social friction.

3. STATUS OF ADR

Constitutional Mandate to ADR

The Constitution of India through provides every citizen a Right to Justice through a combined reading of Article 14, Article 21 and Article 39A.

Article 14 of the Constitution of India reads as under:

“14. The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India.”

¹⁶Lorna McGregor, Alternative Dispute Resolution and Human Rights: Developing a Rights-Based Approach through the ECHR European Journal of International Law, Volume 26, Issue 3, August 2015, Pages 607–634, <<https://doi.org/10.1093/ejil/chv039>>

Article 21 of the Constitution reads as under:

“No person shall be deprived of his life or personal liberty except according to procedure established by law.”

In Anita Kushwaha V Pushap Sudan¹⁷, the Hon’ble Supreme Court of India made the following observations:

“If “life” implies not only life in the physical sense but a bundle of rights that makes life worth living, there is no juristic or other basis for holding that denial of “access to justice” will not affect the quality of human life so as to take access to justice out of the purview of right to life guaranteed under Article 21. We have, therefore, no hesitation in holding that access to justice is indeed a facet of right to life guaranteed under Article 21 of the Constitution.

We need only add that access to justice may as well be the facet of the right guaranteed under Article 14 of the Constitution, which guarantees equality before law and equal protection of laws to not only citizens but non-citizens also. We say so because equality before law and equal protection of laws is not limited in its application to the realm of executive action that enforces the law. It is as much available in relation to proceedings before Courts and tribunal and adjudicatory fora where law is applied and justice administered.

The Citizen’s inability to access courts or any other adjudicatory mechanism provided for determination of rights and obligations is bound to result in denial of the guarantee contained in Article 14 both in relation to equality before law as well as equal protection of laws. Absence of any adjudicatory mechanism or the inadequacy of such mechanism, needless to say, is bound to prevent those looking for enforcement of their right to equality before laws and equal protection of the laws from seeking redress and thereby negate the guarantee of equality before laws or equal protection of laws and reduce it to a mere teasing illusion. Article 21 of the Constitution apart, access to justice can be said to be part of the guarantee contained in Article 14 as well.

¹⁷ (2016) 8 SCC 509

Furthermore, Article 39A of the Constitution of India reads as follows:

“Equal justice and free legal aid

39A. The State shall secure that the operation of the legal system promotes justice, on a basis of equal opportunity, and shall, in particular, provide free legal aid, by suitable legislation or schemes or in any other way, to ensure that opportunities for securing justice are not denied to any citizen by reason of economic or other disabilities.”

Article 39-A of the Constitution of India provides for easy access to justice to all sections of people and provision of legal aid for the poor and needy and dispensation of justice by an independent judiciary within a reasonable time. Thus, access to justice, provision of legal aid for poor and needy and dissemination of equal and speedy justice are the cherished goals of our Constitutional Republic.¹⁸

Traditional concept of "access to justice" as understood by common man is access to courts of law. For a common man a court is the place where justice is meted out to him/her. But the courts have become inaccessible due to various barriers such as poverty, social and political backwardness, illiteracy, ignorance, procedural formalities and the like.¹⁹ Delay, unpredictability and cost are considered as three main enemies of efficient administration of justice.²⁰ It is one of the most important duties of a welfare state to provide judicial and non-judicial dispute-resolution mechanisms to which all citizens have equal access for resolution of their legal disputes and enforcement of their fundamental and legal rights.²¹ To give effect to this mandate, Parliament has recognized various alternative dispute resolution mechanisms, such as arbitration, conciliation, mediation, and Lok Adalats to strengthen the judicial system.²² The need for

¹⁸ Mahboob Ali, Judicial Training And Research Institute, U.P.- Alternative Dispute Resolution Mechanism in Modern Indian Society
<<http://www.ijtr.nic.in/Alternative%20Dispute%20Resolution%20Mechanism%20inModern%20Indian%20Society.pdf>>

¹⁹ Law Commission of India, Report No. 222 Need for Justice-dispensation through ADR etc.

²⁰ Arun Mohan, *Justice, Courts and Delays*, Vol. 1, (New Delhi: Universal Law Publishing Co. Pvt. Ltd., 2009) p. 19.

²¹ Law Commission of India, Report No. 222 Need for Justice-dispensation through ADR etc.

²² Bar Council of India, All India Bar Examination Preparatory Materials <<http://www.barcouncilofindia.org/wp-content/uploads/2010/08/AIBEBook1.pdf>>

Alternative Dispute Resolution process is to ensure that justice may be met to masses in a faster, cheaper and simpler way.

Cases suitable for ADR

Section 89 of the Code of Civil Procedure provides for settlement of disputes outside the court.

The section reads as follows:

89 . Settlement of disputes outside the Court

(1) Where it appears to the Court that there exist elements of a settlement which may be acceptable to the parties, the Court shall formulate the terms of settlement and give them to the parties for their observations and after receiving the observations of the parties, the Court may reformulate the terms of a possible settlement and refer the same for -

(a) arbitration;

(b) conciliation;

(c) judicial settlement including settlement through Lok Adalat; or

(d) mediation.

(2) Where a dispute has been referred -

(a) for arbitration or conciliation, the provisions of the Arbitration and Conciliation Act, 1996 (26 of 1996) shall apply as if the proceedings for arbitration or conciliation were referred for settlement under the provisions of that Act;

(b) to Lok Adalat, the Court shall refer the same to the Lok Adalat in accordance with the provisions of sub-section (1) of section 20 of the Legal Services Authority Act, 1987 (39 of 1987) and all other provisions of that Act shall apply in respect of the dispute so referred to the Lok Adalat;

(c) for judicial settlement, the Court shall refer the same to a suitable institution or person and such institution or person shall be deemed to be a Lok Adalat and all the provisions of the Legal Services Authority Act, 1987 (39 of 1987) shall apply as if the

dispute were referred to a Lok Adalat under the provisions of that Act;

(d) for mediation, the Court shall effect a compromise between the parties and shall follow such procedure as may be prescribed.

In ***Afcons Infrastructure Ltd. v. Cherian Varkey Construction Company Pvt. Ltd.***²³, the Hon'ble Supreme Court of India while discussing Section 89 of the Code of Civil Procedure, provided an illustrative list of the categories of cases suitable for ADR and those which are not suitable for ADR. The Apex Court held the following categories of cases considered to be not suitable for ADR process:

- i. Representative suits under Order 1 Rule 8 CPC which involve public interest or interest of numerous persons who are not parties before the court. (In fact, even a compromise in such a suit is a difficult process requiring notice to the persons interested in the suit, before its acceptance).
- ii. Disputes relating to election to public offices (as contrasted from disputes between two groups trying to get control over the management of societies, clubs, association etc.).
- iii. Cases involving grant of authority by the court after enquiry, as for example, suits for grant of probate or letters of administration.
- iv. Cases involving serious and specific allegations of fraud, fabrication of documents, forgery, impersonation, coercion etc.
- v. Cases requiring protection of courts, as for example, claims against minors, deities and mentally challenged and suits for declaration of title against government.
- vi. Cases involving prosecution for criminal offences.

The Court further held that all other suits and cases of civil nature in particular the following categories of cases (whether pending in civil courts or other special Tribunals/Forums) are normally suitable for ADR processes :

- i. All cases relating to trade, commerce and contracts, including - disputes arising out of contracts (including all money claims);

²³ (2010) 8 SCC 24

- a. disputes relating to specific performance;
 - b. disputes between suppliers and customers;
 - c. disputes between bankers and customers;
 - d. disputes between developers/builders and customers;
 - e. disputes between landlords and tenants/licensor and licensees;
 - f. disputes between insurer and insured;
- ii. All cases arising from strained or soured relationships, including
 - a. disputes relating to matrimonial causes, maintenance, custody of children;
 - b. disputes relating to partition/division among family members/co-parceners/co-owners; and
 - c. disputes relating to partnership among partners.
- iii. All cases where there is a need for continuation of the pre-existing relationship in spite of the disputes, including
 - a. disputes between neighbours (relating to easementary rights, encroachments, nuisance etc.);
 - b. disputes between employers and employees;
 - c. disputes among members of societies/associations/Apartment owners Associations;
- iv. All cases relating to tortious liability including
 - a. claims for compensation in motor accidents/other accidents; and
 - b. All consumer disputes including
 - c. disputes where a trader/supplier/manufacturer/service provider is keen to maintain his business/professional reputation and credibility or `product popularity.

The Court further clarified that the enumeration of `suitable' and `unsuitable' categorization of cases was not exhaustive or rigid.

4. OVERVIEW OF ADR METHODS

Negotiation

Negotiation is a process where two parties with differences which they need to resolve are trying to reach agreement through exploring for options and exchanging offers and an agreement.²⁴

Negotiation can be defined as:

‘The process through which two or more parties who are in conflict over outcomes attempt to reach agreement. It is the constructive, positive alternative to haggling or arguing; it is aimed at building an agreement rather than winning a battle.’²⁵

Characteristics of negotiation are²⁶:

- It is a process.
- Multiplicity of parties
- Differences between the parties exist.
- Parties attempt the resolution of differences.
- Parties attempt to reach agreement

Negotiations are not limited to business and commerce. People negotiate constantly in everyday situations even outside the workplace. For example bargaining with a shopkeeper is also a negotiation. Negotiations are very common in business and can include²⁷:

- producing deals with suppliers, partner businesses or customers
- inter-departmental or team discussions to determine aims, processes and resources
- management and staff discussions to discuss job priorities and workload
- discussions between management and trade unions, for example, rates of pay
- Recruiting new people to the business, for example, interviews.

²⁴ Cambridge University Press, Effective Negotiation: From Research to Results
978-0-521-73521-6 -

²⁵ Pillutla, M. and Nicholson, N. (eds). (2004). Negotiation: how to make deals and reach agreement

²⁶ Cambridge University Press, Effective Negotiation: From Research to Results
978-0-521-73521-6 -

²⁷ CIMA, Topic Gateway Series No. 25- Negotiation

<https://www.cimaglobal.com/Documents/ImportedDocuments/cid_tg_negotiation_mar07.pdf.pdf>

The Negotiation process has multiple steps

- Preparation and planning
- Definition of ground rules
- Clarification and justification
- Bargaining and problem solving
- Closure and implementation.

Negotiation is not provided for in any law. It is more of a skill set which is useful in coming to an amicable solution without the inclusion of a third party. If negotiation is successful, the dispute does not escalate.

Mediation

Mediation is a voluntary, party-centered and structured negotiation process where a neutral third party assists the parties in amicably resolving their dispute by using specialized communication and negotiation techniques. In mediation, the parties retain the right to decide for themselves whether to settle a dispute and the terms of any settlement. Even though the mediator facilitates their communications and negotiations, the parties always retain control over the outcome of the dispute.²⁸

During mediation, the mediator communicates with both parties and tries to unearth their actual underlying interests in the dispute. The mediator does not take evidence or hear pleadings because he is not the decision maker. The mediator helps the parties streamline their key disputed issues and encourages them to devise commercially feasible solutions which will meet not just immediate interests of the parties but also provide long lasting solutions. The mediator holds joint meetings with all disputing parties and private meetings with each disputing party to brainstorm possibilities out of the dispute. The outcome of a mediation is a settlement agreement which the disputing parties execute. Some schools of thought also propagate converting the mediation settlement into an arbitration or conciliation award. In such a case, the possibility of appeal is very low since the parties have voluntarily agreed to the terms of the award.

²⁸ Mediation and Conciliation Project Committee- Supreme Court of India, Mediation Training Manual of India <<https://www.sci.gov.in/pdf/mediation/MT%20MANUAL%20OF%20INDIA.pdf>>

In addition to dispute resolution, mediation allows building stronger relationships between the parties and focuses on people cohesion more than the actual problem. The mediator has to use psychological and communication skills in order to understand the parties and influence them to agree on a single solution.²⁹

Characteristics of Mediation are:

- It is a voluntary and non-binding negotiation process
- Occurs outside the courtroom to resolve a dispute.
- A third, impartial and neutral party manages the interaction between the disputing parties.
- The parties decide the terms of settlement.
- Mediator only facilitates the process.

The parties may refer the dispute to mediation at any stage of the dispute:

- Before arbitration
- After arbitration
- Before initiating court proceedings
- During the court proceedings
- At appeal stage of court proceedings right upto the Supreme Court of India

The process of mediation may be initiated by the disputing parties by appointing one or more individual private mediators chosen mutually by the disputants or referring the matter to a mediation service provider. While direct appointment of mediation is generally referred to as private mediation, referring the dispute to a service provider is known as institutional mediation.

Provision for Mediation is incorporated in several statutes in India. The following are an illustrative list of the provisions.

- ***Code of Civil Procedure***

Section 89 of the Code of Civil Procedure provides the courts the power to refer the dispute for settlement or conciliation with a purpose of amicable, peaceful and mutual settlement between parties without intervention of the court. In Afcons Infrastructure

²⁹ Anuroop Omkar and Kritika Krishnamurthy, *The Art of Negotiation and Mediation- Wishbone, Funny Bone and a Backbone*, LexisNexis Publications (2015)

Limited v. Varkey Construction Co. (P) Ltd. (2010) 8 SCC 24, the Hon'ble Supreme Court has provided a list of disputed that can be mediated. (Discussed earlier)

- ***The Company Act, 2013***

Section 442 of the Company Act, 2013 provides that the parties to a dispute may apply to the tribunal for referring the matter to mediation. The section also provides the power to the tribunal to refer the case suo moto for mediation. The Company Act, 2013 r/w Rule 30 of the Companies (Mediation and Conciliation) Rules, 2016 provide that all Company Law dispute may be refereed except:

- the matters relating to proceedings in respect of inspection or investigation or the matters which relate to defaults or offences for which applications for compounding have been made by one or more parties.
- cases involving serious and specific allegations of fraud, fabrication of documents forgery, impersonation, coercion etc.
- cases involving prosecution for criminal and non-compoundable offences.
- cases which involve public interest or interest of numerous persons who are not parties before the Central Government or the Tribunal or the Appellate Tribunal as the case may be.

- ***The Commercial Courts Act, 2015***

Section 12A of the Commercial Courts Act, 2015 provides that a suit shall not be instituted unless the plaintiff exhausts the remedy of preinstitution mediation unless it contemplates urgent interim relief. The Commercial Courts Act, 2015 r/w the Commercial Courts (Preinstitution Mediation and Settlement) Rules, 2018 provide that any commercial dispute can be mediated.

- ***The Consumer Protection Act, 1986***

With a combined reading of section 89 of the CPC and the decision of the Hon'ble Supreme Court in Afcons Infrastructure Limited v. Varkey Construction Co. (P) Ltd. (2010) 8 SCC 24, Consumer protection cases can also be mediated. The Consumer Protection Bill, 2018 even provides for mediation cells attached to the District, State and

National Commissions. The bill provides the Commissions the power to refer a matter for mediation if the parties consent to settle their dispute in this manner.

- ***The Real Estate (Regulation & Development) Act, 2016***

Under section 32(g)(2) of the RERA, the Authority is entitled to make recommendations to the Government on measures to facilitate amicable conciliation of disputes between the promoters and the allottees through dispute settlement forums set up by the consumer or promoter associations.

Conciliation

Conciliation is the process where an independent third party, the conciliator, helps people in a dispute to identify the disputed issues, develop options, consider alternatives and try to reach an agreement. Conciliation can be defined as follows:

“A settlement of a dispute in an agreeable manner.

A process in which a neutral person meets with the parties to a dispute and explores how the dispute might be resolved; esp., a relatively unstructured method of dispute resolution in which a third party facilitates communication between parties in an attempt to help them settle their differences.”³⁰

A conciliator may have professional expertise in the subject matter in dispute and will generally provide advice about the issues and options for resolution. However, a conciliator will not make a judgment or decision about the dispute. Like mediation, conciliation is a voluntary, flexible, confidential, and interest based process. The main difference between conciliation and mediation proceedings is that, at some point during the conciliation, the conciliator will be asked by the parties to provide them with a non-binding settlement proposal. A mediator, by contrast, will in most cases and as a matter of principle, refrain from making such a proposal.

³⁰ Bryan A. Garner, Black's Law Dictionary Thomson West(10th edition, 2015)

The process is flexible, allowing parties to define the time, structure and content of the conciliation proceedings. These proceedings are rarely public. Once the conciliator has made their recommendations, it is up to the parties to decide whether to agree to any proposals. The suggestions or opinions of a conciliator cannot be imposed. If a settlement is achieved, it must be set out in writing in order to be legally binding.

Characteristics of Conciliation are:

- It is a voluntary and non-binding negotiation process
- Occurs outside the courtroom to resolve a dispute.
- A third, impartial and neutral party manages the interaction between the disputing parties.
- The parties decide the terms of settlement.
- Conciliator actively participates in the settlement.

Conciliation is suitable in cases where the parties:

- want to reach an agreement on some technical and legal issues
- want assistance with the process
- want to make the decision with the other participants involved
- want advice on the facts of the dispute.

Conciliation under the Arbitration and Conciliation Act, 1996

The process of conciliation may be initiated by a party to a dispute by sending to the other party a written invitation for conciliation. Such an invitation should contain a brief on the subject matter of the dispute.³¹ Conciliation proceedings begin once the other party accepts in writing the invitation.³² If the other party rejects the invitation, the conciliation proceedings will not begin.³³ The inviting party may specify the number of days within which a reply shall be given or adhere to the 30 days period given in the Arbitration and Conciliation Act, 1996 (the “Act”).³⁴ If a reply is not received in such period, the inviting party may treat such non-receipt as a rejection of the

³¹ Section 62(1), The Arbitration and Conciliation Act, 1996.

³² Section 62(2), The Arbitration and Conciliation Act, 1996.

³³ Section 62(3), The Arbitration and Conciliation Act, 1996.

³⁴ Section 62(4), The Arbitration and Conciliation Act, 1996.

invitation by the other party. In such a case, the inviting party shall inform the other party in writing regarding the rejection of the invitation.³⁵

The Act provides for appointment up to three conciliators, who shall act jointly.³⁶ Parties may choose the conciliators themselves or request another person or institution to either assist the parties in appointing conciliators or appoint conciliators on behalf of the parties.³⁷ In any case, under the Act, the parties are tasked with appointing the conciliator jointly, in case of one conciliator;³⁸ separately (one by each party), in case of two conciliators;³⁹ in case of three conciliators, parties may appoint one conciliator each and the two conciliators shall agree on the third conciliator who shall act as the presiding conciliator.⁴⁰ Institutions may assist the parties by recommending names of conciliators. For this purpose, the institutions shall take into account such considerations as may be required to secure the appointment of an independent and impartial conciliator and with respect to a sole or third conciliator, shall take into account the advisability of appointing a conciliator of a nationality other than the nationalities of the parties.⁴¹

Any conciliator appointed:

- a. shall not act as an arbitrator or as a representative or counsel of a party in any arbitral or judicial proceeding in respect of a dispute that is the subject of the conciliation proceedings; and⁴²
- b. shall not be presented by the parties as a witness in any arbitral or judicial proceedings.⁴³

Upon appointment, the next step in the process involves the conciliator requesting the parties to submit to him a brief written statement describing the general nature of the dispute and the points at issue. Copies of the written statements submitted by the parties shall be shared by the parties

³⁵ *Ibid.*

³⁶ Section 63, The Arbitration and Conciliation Act, 1996.

³⁷ Section 64(2), The Arbitration and Conciliation Act, 1996.

³⁸ Section 64(1)(a), The Arbitration and Conciliation Act, 1996.

³⁹ Section 64(1)(b), The Arbitration and Conciliation Act, 1996.

⁴⁰ Section 64(1)(c), The Arbitration and Conciliation Act, 1996.

⁴¹ Section 64(2), The Arbitration and Conciliation Act, 1996.

⁴² Section 80(a), The Arbitration and Conciliation Act, 1996.

⁴³ Section 80(b), The Arbitration and Conciliation Act, 1996.

with each other.⁴⁴ The conciliator shall reserve the power to request either party, at any time, to submit to him further written statements of their respective positions and the facts and grounds in support thereof, supplemented by any documents and other evidence that such party deems appropriate. The parties shall also share copies of such statements, documents and other evidences with each other.⁴⁵

The conciliator is not bound by the Code of Civil Procedure, 1908 (5 of 1908) or the Indian Evidence Act, 1872 (1 of 1872).⁴⁶

1. The roles and duties of the conciliator include:

- a. to assist the parties in an independent and impartial manner in their attempt to reach an amicable settlement of their dispute;⁴⁷
- b. to be guided by principles of objectivity, fairness and justice, giving consideration to, among other things, the rights and obligations of the parties, the usages of the trade concerned and the circumstances surrounding the dispute, including any previous business practices between the parties.⁴⁸
- c. to conduct the conciliation proceedings in such a manner as he considers appropriate, taking into account the circumstances of the case, the wishes the parties may express, including any request by a party that the conciliator hear oral statements, and the need for a speedy settlement of the dispute.⁴⁹
- d. to make proposals for a settlement of the dispute. Such proposals need not be in writing and need not be accompanied by a statement of the reasons.⁵⁰

2. The parties are enabled to request the assistance of a third person or an institution for the administration of the conciliation proceedings.⁵¹ With respect to place of the proceedings, parties may agree upon a place, or the conciliator, after consulting the parties, may decide

⁴⁴ Section 64(1), The Arbitration and Conciliation Act, 1996.

⁴⁵ Section 65(2), The Arbitration and Conciliation Act, 1996.

⁴⁶ Section 66, The Arbitration and Conciliation Act, 1996.

⁴⁷ Section 67(1), The Arbitration and Conciliation Act, 1996.

⁴⁸ Section 67(2), The Arbitration and Conciliation Act, 1996.

⁴⁹ Section 67(3), The Arbitration and Conciliation Act, 1996.

⁵⁰ Section 67(4), The Arbitration and Conciliation Act, 1996.

⁵¹ Section 68, The Arbitration and Conciliation Act, 1996.

on the place of the proceedings.⁵² Communications with the conciliator can be orally or in writing and the conciliator is permitted to communicate with the parties separately or together.⁵³

3. With respect to disclosure of information, the conciliator may share any factual information relating to the dispute with the other party,⁵⁴ unless the disclosing party deems such information to be confidential. In such a case, the conciliator shall not disclose the information to the other party.⁵⁵ However, the parties and conciliator are prohibited from disclosing any information relating to the proceedings to any third party, except in cases where its disclosure is necessary for purposes of implementation and enforcement.⁵⁶

The parties may also, at any point, suggest ways to settle the dispute to the conciliator.⁵⁷

If the conciliator observes any chance for settlement of the dispute, he may formulate the terms of such settlement and share them with the parties. The parties may then convey their observation with respect to the terms of settlement. After taking into account parties' observations, the conciliator may reformulate terms of the settlement.⁵⁸

If the parties reach a settlement, they may draw up a written settlement agreement either by themselves or with the assistance of the conciliator.⁵⁹ Such a settlement agreement shall be signed by both parties and shall be deemed final and binding on both parties.⁶⁰ The conciliator shall authenticate the settlement agreement and furnish a copy thereof to each of the parties.⁶¹ The settlement agreement shall have the same status and effect as if it is an arbitral award on agreed terms on the substance of the dispute rendered by an arbitral tribunal under section 30.⁶²

⁵² Section 69(2), The Arbitration and Conciliation Act, 1996.

⁵³ Section 69(1), The Arbitration and Conciliation Act, 1996.

⁵⁴ Section 70, The Arbitration and Conciliation Act, 1996.

⁵⁵ *Ibid.*

⁵⁶ Section 75, The Arbitration and Conciliation Act, 1996.

⁵⁷ Section 72, The Arbitration and Conciliation Act, 1996.

⁵⁸ Section 73(1), The Arbitration and Conciliation Act, 1996.

⁵⁹ Section 73(2), The Arbitration and Conciliation Act, 1996.

⁶⁰ Section 73(3), The Arbitration and Conciliation Act, 1996.

⁶¹ Section 73(4), The Arbitration and Conciliation Act, 1996.

⁶² Section 74, The Arbitration and Conciliation Act, 1996.

The parties shall not initiate during the conciliation proceedings, any arbitral or judicial proceedings in respect of a dispute that is the subject-matter of the conciliation proceedings. However, a party may initiate arbitral or judicial proceedings where, in his opinion, such proceedings are necessary for preserving his rights.⁶³ Notwithstanding the preceding statement, conciliation proceeding may be considered terminated:

- a. by the signing of the settlement agreement by the parties, on the date of the agreement;⁶⁴ or
- b. by a written declaration of the conciliator, after consultation with the parties, to the effect that further efforts at conciliation are no longer justified, on the date of the declaration;⁶⁵ or
- c. by a written declaration of the parties addressed to the conciliator to the effect that the conciliation proceedings are terminated, on the date of the declaration;⁶⁶ or
- d. by a written declaration of a party to the other party and the conciliator, if appointed, to the effect that the conciliation proceedings are terminated, on the date of the declaration.⁶⁷

Cost of the conciliation proceedings, including fee of the conciliator, shall be borne by both parties equally.⁶⁸ To this effect, the conciliator may request both parties to deposit an amount as an advance for the costs.⁶⁹ The conciliator is also permitted to request for supplementary amounts to be deposited by both parties.⁷⁰ If the deposits are not paid in full by both parties within thirty days, the conciliator may suspend the proceedings or make a written declaration of termination of the proceedings to the parties, effective on the date of that declaration.⁷¹ Upon

⁶³ Section 77, The Arbitration and Conciliation Act, 1996.

⁶⁴ Section 76(1), The Arbitration and Conciliation Act, 1996.

⁶⁵ Section 76(2), The Arbitration and Conciliation Act, 1996.

⁶⁶ Section 76(3), The Arbitration and Conciliation Act, 1996.

⁶⁷ Section 76(4), The Arbitration and Conciliation Act, 1996.

⁶⁸ Section 78(1), The Arbitration and Conciliation Act, 1996.

⁶⁹ Section 79(1), The Arbitration and Conciliation Act, 1996.

⁷⁰ Section 79(2), The Arbitration and Conciliation Act, 1996.

⁷¹ Section 79(3), The Arbitration and Conciliation Act, 1996.

termination of the conciliation proceedings, the conciliator shall render an accounting to the parties of the deposits received and shall return any unexpended balance to the parties.⁷²

The parties shall not rely on or introduce as evidence in any arbitral or judicial proceedings, irrespective of any relation to the dispute that is the subject of the conciliation proceedings,—

- a. views expressed or suggestions made by the other party in respect of a possible settlement of the dispute;⁷³
- b. admissions made by the other party in the course of the conciliation proceedings;⁷⁴
- c. proposals made by the conciliator;⁷⁵
- d. the fact that the other party had indicated his willingness to accept a proposal for settlement made by the conciliator.⁷⁶

Mediation v Conciliation

Many a times, conciliation and mediation are used interchangeably and they are together referred to as Mediation. A Mediator assists the parties to reach an agreement for resolving the dispute and he does not express his opinion on merits of the dispute, whereas a Conciliator may express an opinion about the merits of the disputes. In both, a third party is appointed to assist the parties to reach a settlement of their dispute. The Mediator is not given any power to impose a settlement. His function is only to try to break any deadlock and encourage the parties to reach an amicable settlement. A Mediator does not determine a dispute between parties.

A Mediator may act as a communicator filtering out the emotional aspects and allowing the parties to focus on the key issues. He encourages the parties to reach an agreement on their own as opposed to having it imposed upon them.⁷⁷

⁷² Section 79(4), The Arbitration and Conciliation Act, 1996.

⁷³ Section 81(a), The Arbitration and Conciliation Act, 1996.

⁷⁴ Section 81(b), The Arbitration and Conciliation Act, 1996.

⁷⁵ Section 81(c), The Arbitration and Conciliation Act, 1996.

⁷⁶ Section 81(d), The Arbitration and Conciliation Act, 1996.

Arbitration

Arbitration can be defined as follows:

*“Arbitration is a reference to the decisions of one or more persons either with or without an umpire, a particular matter in difference between the parties”*⁷⁸

Or

*“A method of dispute resolution involving one or more neutral third parties who are usually agreed to by the disputing parties and whose decision is binding”*⁷⁹

In arbitration, the parties submit a dispute to an appointed decision-maker (arbitrator), or panel of arbitrators (the tribunal). This is typically done by providing for arbitration in the contract (the arbitration agreement). The agreement should also cover the number of arbitrators, the location (also known as the seat) of the arbitration, and the procedural rules that will govern the arbitration.

The tribunal will generally give its decision (the award) following a hearing during which each party will have the opportunity to present its position. If appropriate, arbitrations can be conducted on paper only, for example, where the sums or issues in dispute do not justify a hearing. Generally, the tribunal will decide the dispute in accordance with the law governing the relevant contract.⁸⁰

Arbitration provides a final and binding outcome and being regarded as an alternative to court litigation, the existence of a valid agreement to arbitrate intends that state courts refuse to hear disputes falling within the scope of that agreement.

Characteristics of Arbitration are as follows:

- Arbitration is a voluntary and consensual process.

⁷⁷ Ashwinie Kumar Bansal and Rahul Kaushik, Arbitration and ADR (Universal Law Series)

⁷⁸ *Collins v. Collins* 1858 28 LJ Ch 184: 53 ER 916

⁷⁹ Black's Law dictionary

⁸⁰ <https://www.ashurst.com/en/news-and-insights/legal-updates/introduction-to-international-arbitration/>

- Arbitration offers dispute resolution in a neutral forum.
- The parties to an arbitration have considerable choice in determining how, where, by whom, and in what language their dispute is resolved.
- Arbitration is particularly advantageous for commercial parties because of the privacy and confidentiality that it can offer.
- Most arbitration do not allow for the award to be challenged except in very limited circumstances.
- Arbitration is simpler than litigation because it is less formal than litigation.

Arbitration under Arbitration and Conciliation Act, 1996

Part I of the Act deals with Arbitration and Part II deals with enforcement of certain foreign arbitrations. Part I of the Act applies where the place of arbitration is in India. Also, the provisions of sections 9, 27 and clause (a) of sub-section (1) and sub-section (3) of section 37 are applicable to international commercial arbitration, even if the place of arbitration is outside India, and an arbitral award made or to be made in such place is enforceable and recognised under the provisions of Part II of this Act unless the parties agree otherwise.⁸¹

“Arbitration” under the Act has been defined to mean any arbitration whether or not administered by permanent arbitral institution.⁸² An “international commercial arbitration” has been defined as an arbitration relating to disputes arising out of legal relationships, whether contractual or not, considered as commercial under the law in force in India and where at least one of the parties is—

- i. an individual who is a national of, or habitually resident in, any country other than India; or
- ii. a body corporate which is incorporated in any country other than India; or
- iii. an association or a body of individuals whose central management and control is exercised in any country other than India; or
- iv. the Government of a foreign country;⁸³

⁸¹ Section 2(2), The Arbitration and Conciliation Act, 1996.

⁸² Section 2(1)(a), The Arbitration and Conciliation Act, 1996.

⁸³ Section 2(1) (f), The Arbitration and Conciliation Act, 1996.

The Act defines an Arbitration Agreement as an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not.⁸⁴ An arbitration agreement may be in the form of an arbitration clause in a contract or in the form of a separate agreement.⁸⁵ The Act provides for the manner for receipt of written communications unless agreed to by the parties.⁸⁶ The Act provides that if a party loses his right to object if he had proceeded with an arbitration knowing about a derogation of any provision of the act or any requirement under the Act.⁸⁷

Judicial Intervention and Appeals

The Act provides that no judicial authority shall intervene except where so provided in part I of the Act.⁸⁸ Section 8 and Section 54 provide the power to refer parties to arbitration where there is an arbitration agreement. Section 9 provides for interim reliefs that can be issued by courts. Section 27 provides that the assistance of court can be taken for taking evidence. Section 34 provides for application for setting aside arbitral award. The Section provides that an arbitral award may be set aside by the Court only if—

- (a) the party making the application furnishes proof that—
 - i. a party was under some incapacity, or
 - ii. the arbitration agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law for the time being in force; or
 - iii. the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case; or
 - iv. the arbitral award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration.
 - v. the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless such agreement was in conflict

⁸⁴ Section 6(1), The Arbitration and Conciliation Act, 1996.

⁸⁵ Section 6(2), The Arbitration and Conciliation Act, 1996.

⁸⁶ Section 3, The Arbitration and Conciliation Act, 1996.

⁸⁷ Section 4, The Arbitration and Conciliation Act, 1996.

⁸⁸ Section 5, The Arbitration and Conciliation Act, 1996.

with a provision of this Part from which the parties cannot derogate, or, failing such agreement, was not in accordance with Part I of the Act⁸⁹

(b) the Court finds that—

- i. the subject-matter of the dispute is not capable of settlement by arbitration under the law for the time being in force, or
- ii. the arbitral award is in conflict with the public policy of India.

The Act also provides that an award is in conflict with the public policy of India, only if,—

- i. the making of the award was induced or affected by fraud or corruption or was in violation of Confidentiality provisions or in violation of section 81 related to Admissibility of evidence in other proceedings
- ii. it is in contravention with the fundamental policy of Indian law; or
- iii. it is in conflict with the most basic notions of morality or justice.

An arbitral award arising out of arbitrations other than international commercial arbitrations, may also be set aside by the Court, if the Court finds that the award is vitiated by patent illegality appearing on the face of the award.⁹⁰

Appeals in Part I of the Act are from the order refusing to—

- a. refer the parties to arbitration under section 45;
- b. enforce a foreign award under section 48, to the Court authorised by law to hear appeals from such order.⁹¹

Part II of the act provides that an appeal shall lie from the order refusing—

- a. to refer the parties to arbitration under section 54: and
- b. to enforce a foreign award under section 57, to the Court authorised by law to hear appeals from such order.⁹²

Composition of the tribunal

⁸⁹ Section 34, The Arbitration and Conciliation Act, 1996.

⁹⁰ Section 34(2A), The Arbitration and Conciliation Act, 1996.

⁹¹ Section 50, The Arbitration and Conciliation Act, 1996.

⁹² Section 59, The Arbitration and Conciliation Act, 1996.

The Act provides that the parties are free to determine the number of arbitrators, provided that such number shall not be an even number.⁹³ A person of any nationality may be an arbitrator, unless otherwise agreed by the parties.⁹⁴ The Parties are free to agree on a procedure for appointment of arbitrators.⁹⁵ Section 11 also provides the method of appointment of arbitrator in case the parties do not come to a consensus.

An arbitrator who has been appointed may be challenged on the grounds that

- (a) circumstances exist that give rise to justifiable doubts as to his independence or impartiality, or
- (b) he does not possess the qualifications agreed to by the parties.⁹⁶

The parties are free to agree on a procedure for challenging an arbitrator.⁹⁷ If a challenge under any procedure agreed upon by the parties is not successful, the arbitral tribunal shall continue the arbitral proceedings and make an arbitral award and the party challenging the arbitrator may make an application for setting aside such an arbitral award in accordance with section 34.⁹⁸

The mandate of an arbitrator shall terminate and he shall be substituted by another arbitrator, if

- a. he becomes de jure or de facto unable to perform his functions or for other reasons fails to act without undue delay; and
- b. he withdraws from his office or the parties agree to the termination of his mandate.⁹⁹

In addition to the above, the mandate of an arbitrator shall terminate—

- a. where he withdraws from office for any reason; or
- b. by or pursuant to agreement of the parties.¹⁰⁰

The Act provides for substitution of terminated arbitrator.¹⁰¹

⁹³ Section 10, The Arbitration and Conciliation Act, 1996.

⁹⁴ Section 11(1), The Arbitration and Conciliation Act, 1996.

⁹⁵ Section 11(2), The Arbitration and Conciliation Act, 1996.

⁹⁶ Section 12(3), The Arbitration and Conciliation Act, 1996.

⁹⁷ Section 13(1), The Arbitration and Conciliation Act, 1996.

⁹⁸ Section 13(5), The Arbitration and Conciliation Act, 1996.

⁹⁹ Section 14, The Arbitration and Conciliation Act, 1996.

¹⁰⁰ Section 15, The Arbitration and Conciliation Act, 1996.

Jurisdiction of Arbitral Tribunals

The arbitral tribunal may rule on its own jurisdiction, including ruling on any objections with respect to the existence or validity of the arbitration agreement, and for that purpose,—

- a. an arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract; and
- b. a decision by the arbitral tribunal that the contract is null and void shall not entail ipso jure the invalidity of the arbitration clause¹⁰²

A plea that the arbitral tribunal is exceeding the scope of its authority shall be raised as soon as the matter alleged to be beyond the scope of its authority is raised during the arbitral proceedings. The arbitral tribunal shall decide on a plea and, where the arbitral tribunal takes a decision rejecting the plea, continue with the arbitral proceedings and make an arbitral award.¹⁰³

A party aggrieved by such an arbitral award may make an application for setting aside such an arbitral award in accordance with section 34.¹⁰⁴

An arbitration tribunal has the power¹⁰⁵ to make interim orders

- i. for the appointment of a guardian for a minor or person of unsound mind for the purposes of arbitral proceedings; or
- ii. for an interim measure of protection in respect of any of the following matters, namely:—
 - a) the preservation, interim custody or sale of any goods which are the subject-matter of the arbitration agreement;
 - b) securing the amount in dispute in the arbitration;
 - c) the detention, preservation or inspection of any property or thing which is the subject-matter of the dispute in arbitration, or as to which any question may arise therein and authorising for any of the aforesaid purposes any person to enter upon any land or building in the possession

¹⁰¹ Section 15, The Arbitration and Conciliation Act, 1996.

¹⁰² Section 16, The Arbitration and Conciliation Act, 1996.

¹⁰³ Section 16(5), The Arbitration and Conciliation Act, 1996.

¹⁰⁴ Section 16(6), The Arbitration and Conciliation Act, 1996.

¹⁰⁵ Section 17, The Arbitration and Conciliation Act, 1996.

- of any party, or authorising any samples to be taken, or any observation to be made, or experiment to be tried, which may be necessary or expedient for the purpose of obtaining full information or evidence;
- d) interim injunction or the appointment of a receiver;
 - e) such other interim measure of protection as may appear to the arbitral tribunal to be just and convenient,

The Act mandates that the parties are to be treated with equality and must be given a full opportunity to present their case.¹⁰⁶ The parties are free to agree on the procedure to be followed by the arbitral tribunal in conducting its proceedings.¹⁰⁷ The parties are also free to agree on the place of arbitration¹⁰⁸ and the language of the proceedings.¹⁰⁹ The arbitral proceedings in respect of a particular dispute commence on the date on which a request for that dispute to be referred to arbitration is received by the respondent unless agreed otherwise by the parties.¹¹⁰

The claimant and the respondent shall submit claim and counterclaim along with the relevant documents to the tribunal.¹¹¹ The parties may amend these submissions unless agreed otherwise. The arbitral tribunal has the power to decide whether to hold oral hearing or whether the proceedings are to be conducted on the basis of document unless the parties have agreed otherwise.¹¹² In case of a default by the claimant in submission of the claim, the tribunal may terminate the proceedings and in case the respondent fails to communicate his defence, the proceedings shall continue.¹¹³ In case a party fails to appear at an oral hearing or to produce documentary evidence, the arbitral tribunal may continue the proceedings and make the arbitral award on the evidence before it.¹¹⁴

The arbitral tribunal, unless agreed otherwise by the parties, has the power to

- (a) appoint one or more experts to report to it on specific issues to be determined by the arbitral tribunal, and

¹⁰⁶ Section 18, The Arbitration and Conciliation Act, 1996.

¹⁰⁷ Section 19(2), The Arbitration and Conciliation Act, 1996.

¹⁰⁸ Section 20, The Arbitration and Conciliation Act, 1996.

¹⁰⁹ Section 22, The Arbitration and Conciliation Act, 1996.

¹¹⁰ Section 21, The Arbitration and Conciliation Act, 1996.

¹¹¹ Section 23, The Arbitration and Conciliation Act, 1996.

¹¹² Section 24, The Arbitration and Conciliation Act, 1996.

¹¹³ Section 25, The Arbitration and Conciliation Act, 1996.

¹¹⁴ Section 25, The Arbitration and Conciliation Act, 1996.

(b) require a party to give the expert any relevant information or to produce, or to provide access to, any relevant documents, goods or other property for his inspection.¹¹⁵

Rules applicable to disputes

Where the place of arbitration is situate in India,—

- a) in an arbitration other than an international commercial arbitration, the arbitral tribunal shall decide the dispute submitted to arbitration in accordance with the substantive law for the time being in force in India;
- b) in international commercial arbitration,—
 - a. the arbitral tribunal shall decide the dispute in accordance with the rules of law designated by the parties as applicable to the substance of the dispute;
 - b. any designation by the parties of the law or legal system of a given country shall be construed, unless otherwise expressed, as directly referring to the substantive law of that country and not to its conflict of laws rules;
 - c. failing any designation of the law under clause (a) by the parties, the arbitral tribunal shall apply the rules of law it considers to be appropriate given all the circumstances surrounding the dispute.¹¹⁶

The Act provides that while deciding and making an award, the arbitral tribunal shall, in all cases, take into account the terms of the contract and trade usages applicable to the transaction.¹¹⁷

Unless otherwise agreed by the parties, in arbitral proceedings with more than one arbitrator, any decision of the arbitral tribunal shall be made by a majority of all its members.¹¹⁸ The Act provides time limits for making of arbitral award¹¹⁹ and fasttrack procedure.¹²⁰

The Act provides that during arbitral proceedings, the parties settle the dispute, the arbitral tribunal shall terminate the proceedings and, if requested by the parties and not objected to by the

¹¹⁵ Section 26, The Arbitration and Conciliation Act, 1996.

¹¹⁶ Section 27(1), The Arbitration and Conciliation Act, 1996.

¹¹⁷ Section 27(3), The Arbitration and Conciliation Act, 1996.

¹¹⁸ Section 29, The Arbitration and Conciliation Act, 1996.

¹¹⁹ Section 29A, The Arbitration and Conciliation Act, 1996.

¹²⁰ Section 29B, The Arbitration and Conciliation Act, 1996.

arbitral tribunal, record the settlement in the form of an arbitral award on agreed terms.¹²¹ The Act also provides for the Form and contents of arbitral award¹²² and provisions for costs of arbitration.¹²³

Online dispute resolution (ODR)

ODR encompasses a broad range of approaches and forms (including but not limited to ombudsmen, complaints boards, negotiation, conciliation, mediation, facilitated settlement, arbitration and others), and the potential for hybrid processes comprising both online and offline elements. As such, ODR represents significant opportunities for access to dispute resolution by buyers and sellers concluding cross-border commercial transactions, both in developed and developing countries.¹²⁴ ODR must be simple, fast and efficient, in order to be able to be used in a “real world setting”, including that it should not impose costs, delays and burdens that are disproportionate to the economic value at stake. The principles that underpin any ODR process include fairness, transparency, due process and accountability.

Uses of ODR

- Use of Computers in the dispute resolution process facilitates dissemination of information, creation of data, upkeep of the judicial records and betters judicial delivery system.¹²⁵
- An ODR process may be particularly useful for disputes arising out of cross-border, low-value e-commerce transactions.
- An ODR process may apply to disputes arising out of both a business-to-business as well as business-to-consumer transactions.
- An ODR process may apply to disputes arising out of both sales and service contracts.

.The benefits of ODR¹²⁶

¹²¹ Section 30(2), The Arbitration and Conciliation Act, 1996.

¹²² Section 31, The Arbitration and Conciliation Act, 1996.

¹²³ Section 31A, The Arbitration and Conciliation Act, 1996.

¹²⁴ UNCITRAL, Technical Notes on Online Dispute Resolution

<http://www.uncitral.org/pdf/english/texts/odr/V1700382_English_Technical_Notes_on_ODR.pdf>

¹²⁵ Law Commission of India, Report No. 222 Need for Justice-dispensation through ADR etc.

- One of the most widely discussed benefits of ODR is cost savings. ODR is said to be more cost-effective than traditional forms of dispute resolution, both for parties to a dispute and to the dispute resolver, be that a lawyer, a mediator, or a member of the judiciary.
- Time savings and convenience In addition to cost savings, ODR is said to be more a more efficient form of dispute resolution, able to resolve disputes faster and more conveniently for the parties involved.
- Increased access to justice ODR is also said to improve the accessibility of dispute resolution by removing barriers to access due to financial status, disability, geographical location, shyness in face-to-face contexts, and other such potential hindrances to accessing justice
- Environmentally friendly A less well publicised benefit of ODR is the environmental benefit that ODR services offer compared with traditional dispute resolution services.

Court annexed ADR processes,

The Lok Adalats, Nyaya Panchayats, Legal Services Authorities are part of the campaign to take justice to the people and ensure that all people have equal access to justice in spite of various barriers, like social and economic backwardness.¹²⁷

Lok Adalat is a unique system developed in India. It means people's court. It is a forum where voluntary effort at bringing about settlement of disputes between the parties is made through conciliatory and persuasive means. It encompasses negotiation, mediation and conciliation as tools to settle disputes between the parties. Lok Adalats have been given the powers of civil court under the Code Civil Procedure. The summary procedure employed in Lok Adalats help in the speedy disposal of cases by the team of experts involved in Lok Adalats. One of the advantages of Lok Adalat is that a number of disputes between different parties can be settled at one go without wasting much time.

Revolutionary changes are also happening in the administration of Lok Adalats with the introduction of mobile Lok Adalat systems to bring justice to the doorsteps of needy and poor. Lok Adalats have got statutory recognition under the Legal Services Authorities Act 1987 and

¹²⁶ Charlotte Austin, Online dispute resolution <<https://www.mbie.govt.nz/assets/00ddebf604/online-dispute-resolution-report-2018.pdf>>

¹²⁷ Law Commission of India, Report No. 222 Need for Justice-dispensation through ADR etc.

the award made by the Lok Adalat is deemed to be a decree of civil court. The award is final and binding on the parties. Parties may refer any dispute during pre-litigation stage or during the pendency before the court of law to Lok Adalats for amicable settlement. The reference to Lok Adalats may be made by State Legal Services Authority or District Legal Services Authority upon the receipt of any application. There are also permanent Lok Adalats operating for the settlement of cases relating to Public Utility

Services like transport services, postal services, telegraph services etc. Added to this, national level Lok Adalats are held on every month on a fixed day relating to different subject matters. A huge number of cases are disposed off during national Lok Adalats.¹²⁸

5. ETHICS OF ADR

Legal ethics are the principles of conduct that members of the legal profession are expected to observe in their practice. The need for following ethics is even greater in ADR because of absence of state established courts. Ethics in ADR have been widely discussed by multiple authors across the world. The following are the common issues discussed in this regard.

Confidentiality

Confidentiality is an essential feature of ADR processes. Confidentiality is generally maintaining private and secret: all discussions; the contents of documents disclosed that will not be used as evidence; and information provided during the ADR process. Maintaining confidentiality encourages meaningful participation and can promote good outcomes. Respecting confidentiality encourages a full and frank discussion between the parties about the issues in dispute and this can assist in the resolution or narrowing of the issues.¹²⁹ Confidentiality in ADR is more complicated as party interests along with third-party neutral and process interests have to be kept in mind. What is particularly tricky in the ADR area is ascertaining exactly what is protected.¹³⁰

¹²⁸Prof. (Dr.) Sandeepa Bhat, Alternative Dispute Resolution (ADR) Mechanism and Legal Aid in the Settlement of Disputes: A Case Study of State of West Bengal

<<http://doj.gov.in/sites/default/files/Final%20Report%20West%20bengal%20NUJS.pdf>>

¹²⁹ Confidentiality in Alternative Dispute Resolution Processes;

<<https://www.aat.gov.au/AAT/media/AAT/Files/Directions%20and%20guides/ConfidentialityInADRProcesses.pdf>>

¹³⁰ 1997 Ethics in Alternative Dispute Resolution: New Issues, No Answers from the Adversary Conception of Lawyers' Responsibilities Carrie Menkel-Meadow

The neutral must keep confidential all information arising out of or in connection with the ADR, including the fact that the ADR is to take place or has taken place, unless compelled by law or grounds of public policy to disclose it. Any information disclosed in confidence by one of the parties must not be disclosed to the other parties without permission, unless compelled by law.¹³¹

Conflict of Interest/ Neutrality

Neutrality refers to the Neutral's having no personal or institutional interest in the outcome of a dispute. In other words, the neutral should not have any conflict of interest in the dispute involved. Therefore, questions of role, time, place and vicarious conflicts must all be analyzed to consider whether a particular conflict should be prohibited or can be waived.¹³²

Neutrality requires the following:¹³³

- Freedom from bias and prejudice.
- Ability to evaluate and apply legal, business, or trade principles

Familiarity between the neutral and the involved attorneys can raise ethical concerns. Commonly, neutrals are also practicing attorneys, and may have close ties with many of the fellow lawyers, either from previous professional associations or from past dealings.¹³⁴

If there are any circumstances that may, or may be seen to, affect a neutral's independence or give rise to a conflict of interests, the neutral must disclose those circumstances to the parties before acting or continuing to act. In such cases the mediator may only agree to act or continue to act if he is certain of being able to carry out the mediation in full independence in order to ensure complete impartiality and the parties explicitly consent. The duty to disclose is a continuing obligation throughout the process of mediation.¹³⁵

¹³¹ European Code Of Conduct For Mediators, <http://ec.europa.eu/civiljustice/adr/adr_ec_code_conduct_en.pdf>

¹³² 1997 Ethics in Alternative Dispute Resolution: New Issues, No Answers from the Adversary Conception of Lawyers' Responsibilities Carrie Menkel-Meadow

¹³³ International Centre for Dispute Resolution International Panel of Arbitrators and Mediators, Application Information

<https://www.adr.org/sites/default/files/document_repository/icdr_panel_application_information_and_form.pdf>

¹³⁴ Legal Ethics And ADR: Do You Pass The Test? Nancy Neal Yeend & John Paul Jones

First published in the San Francisco Attorney, June/July 1998

¹³⁵ European Code Of Conduct For Mediators, <http://ec.europa.eu/civiljustice/adr/adr_ec_code_conduct_en.pdf>

Fairness in ADR

The process of litigation contains many safeguards for fairness and justice. Procedural and evidentiary rules followed during litigation ensure that each person has a chance to present their case and to challenge the arguments and evidence of the other person.¹³⁶ Since the rules and procedures of ADR are governed by the parties and neutral, it is essential to maintain fairness at all cost. The neutral must ensure that all parties have adequate opportunities to be involved in the process.¹³⁷ The neutrals must therefore focus on procedural fairness and not the substance of the outcome.¹³⁸

The Neutral must consider the difference in values of the parties must find a balance between the values of the parties. A neutral's personal values or belief system should not interfere with his/her duty to uphold the ethical standards of mediation.¹³⁹

6. ADVANTAGES AND DISADVANTAGES OF ADR

Advantages of ADR:

- It is less expensive and less time-consuming.¹⁴⁰
- It is free from technicalities as in the case of conducting cases in law Courts.
- Parties are free to decide on the procedure and rules of the ADR.
- Parties are free to discuss their differences of opinion without any fear of disclosure of this fact before any law courts.
- Parties have the feeling that there is no losing or winning side between them but at the same time their grievance is redressed and their relationship is restored.¹⁴¹
- ADR provides confidentiality to the dispute.

¹³⁶ National Alternative Dispute Resolution Advisory Council, Issues Of Fairness And Justice In Alternative Dispute Resolution

<<https://www.ag.gov.au/LegalSystem/AlternateDisputeResolution/Documents/NADRAC%20Publications/Issues%20of%20Fairness%20and%20Justice%20in%20Alternative%20Dispute%20Resolution.PDF>>

¹³⁷ European Code Of Conduct For Mediators <http://ec.europa.eu/civiljustice/adr/adr_ec_code_conduct_en.pdf>

¹³⁸ Ethical Challenges for Mediators around the Globe: An Australian Perspective Mary Anne Noone Lola Akin Ojelabi Journal of Law & Policy Vol. 45:145

¹³⁹ Code of Ethical Standards for Mediators Multi-Door Dispute Resolution Division Superior Court of the District of Columbia <<https://www.dccourts.gov/sites/default/files/MultiDoor-PDFs/MD%20Mediators%20Code%20of%20Ethics.pdf>>

¹⁴⁰ Law Reform Commission, Alternative Dispute Resolution: Mediation And Conciliation (LRC 98-2010)

¹⁴¹ Law Commission of India, Report No. 222 Need for Justice-dispensation through ADR etc

Disadvantages of ADR

- Parties cannot be compelled to go in for ADR unless they sign an agreement or mutually agree to resolve their disputes by ADR.
- Success of ADR depends upon the good faith of the parties and their attorneys.
- Prevents elaboration of development of law and precedent.
- Poor mediator / arbitrator (qualifications, style and attitude) can result in unsuccessful resolution, and can defeat the purpose of ADR.¹⁴²
- Lack of public accountability
- Privatization of justice is another issue related with the use of ADR. Some scholars argue that the privatization and informalization of justice could run counter to the claims of rule of law.¹⁴³

7. SELECTION OF A METHOD

It is the nature of the dispute and relation of the parties which decide the choice of ADR method.¹⁴⁴ In simple cases relating to the matters where legal principles are clearly settled and there is no personal animosity between the parties ADR such as Lok Adalat may be used. Complicated cases which may require several rounds of negotiations, may be referred to mediation or arbitration depending on the relationship between the parties.¹⁴⁵ ODR may be considered for small value transactions wherein parties are located at different places. An expert determination may be considered wherein the dispute is based on a techno-legal point and Dispute Resolution boards may be used in case of conflicts in infra related matters. Each method of ADR is suited to different kinds of disputes. It is on the parties' discretion to choose one method on the basis of the nature of dispute and the relations between them.

¹⁴² Dr. Anil Kumar Singh, ADR Mechanism in India: Achievements and Challenges Indian Journal Of Research Volume : 5 | Issue 8

¹⁴³ Jasmine Joseph Alternate To Alternatives Critical Review Of The Claims Of ADR
<<https://nujs.edu/workingpapers/alternate-to-alternatives-critical-review-of-the-claims-of-adr.pdf>>

¹⁴⁴ Dr. Anil Kumar Singh, ADR Mechanism in India: Achievements and Challenges Indian Journal Of Research Volume : 5 | Issue 8

¹⁴⁵ Recasting Section 89 CPC — Afcons Infrastructure Ltd. v. Cherian Varkey Construction Co. (P) Ltd., (2011) 4 SCC J-16