ARBITRATION – A NEW ERA OF JUSTICE

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ABSTRACT

'Arbitration' as a mechanism of justice is as old as civilization. Arbitration literally means a mechanism in law which encourages parties to settle their differences privately either by mutual consensus or by mediation of a third person. It was prevalent under the Roman law and the Greek civilization in the sixth century. Earlier in England, the attitude towards arbitration was generally hostile but business exigencies changed the scene, in course of time as a yielding place for commercial arbitration. Ancient India had many traditions of arbitration/ mediation up to the medieval period. "ADR is rapidly developing its own national institutions, experience, and theoretical and practical development, and at the same time offering a simpler cross border dispute resolution approach."

INTRODUCTION

For resolution of disputes, there is a legal system in every human society. Every injured person is supposed to go to the courts for his redressal. All the legal systems are trying to attain the legal ideal that wherever there is a wrong there must be a remedy so that nobody shall take law into his own hands. Courts have become overcrowded with litigants. According to an official report of the year 2014, there is a pendency of over 92 crore cases in our nationwide high courts. Naturally, litigants have to face so much loss of time and money that at long last when a relief is obtained, it may not be worth the cost. Hence, began the search for alternatives to the conventional court system. A large number of quasi-judicial and administrative tribunals have been created for quicker reliefs. All these tribunals and forums are in a way an alternative method of dispute redressal. But even such tribunals and forums have become overcrowded with the result that they are not able to provide relief within good time. Many tribunals in service matters have been able to provide relief only when the aggrieved employee has already retired from his position.

Relief in terms of money which he may ultimately get may not be worth the service period lost. Consumer forums came into being to provide quick, effective and costless relief to buyers of goods and hirers of services. In a large number of cases, delayed consumer remedies have also lost their swiftness. Furthermore, they are not able to provide any remedy for non-consumer matters. Thus, there remains the need of an alternative remedy which will not be bogged down by costs and delays. As and when such a method of dispute resolution is discovered or devised, or if it has already been discovered or devised, it will be entitled to be given the name of ADR, Alternative Dispute Resolution. Arbitration is a method of settlement of disputes as an alternative to the normal judicial method. It is one of the methods of alternative dispute resolution (ADR). Among all the forms of ADR like conciliation, mediation, negotiations, etc., arbitration has become the dominant form. It is more firmly established in its utility. The reason for this phenomenal popularity and value is that it is the only real alternative to judicial adjudication. The role and interference of courts in the process of arbitration has been minimized.

SCOPE AND DEVELOPMENT OF ADR

Alternative Dispute Resolution is an alternative to the traditional process of dispute resolution through courts. It refers to set of practices and techniques to resolve disputes outside the courts. It is mostly a nonjudicial means or procedures for the settlement of disputes. ADR has been a spoke in the wheel of the larger formal legal system in India since time immemorial. The search for a simple, quick, flexible and accessible dispute resolution system has resulted in the adoption of Alternative Dispute Resolution' mechanisms. The primary object of ADR system is avoidance of vexation, expense, and delay and the promotion of the ideal of ―access to justice. The ADR techniques mainly consist of negotiation, conciliation, mediation, arbitration and a series of hybrid procedures.

LEGISLATIVE RECOGNITION OF ADR

Alternative Dispute Redressal or Alternative Dispute Resolution has been an integral part of our historical past. Like the zero, the concept of 'Lok Adalat' is an innovative Indian contribution to the world of Jurisprudence. The institution of Lok Adalat in India, as the very name suggests means, Peoples' Court. 'Lok' stands for 'people' and the vernacular meaning of the term 'Adalat' is the Court. India has a long tradition and history of such methods being practiced in the society at grass root level. These are called panchayat, and in legal terminology these are called arbitration. These are widely used in India for resolution of disputes both commercially and non- commercially.

The concept of Lok Adalat was pushed back into oblivion in last few centuries before independence and particularly during the British regime. Now this concept has once again been rejuvenated. It has once again become familiar and popular amongst litigants.

The movement towards Alternative Dispute Redressal (ADR) has received Parliamentary recognition and support. The advent of Legal Services Authorities Act, 1987 gave a statutory status to Lok Adalats, pursuant to the constitutional mandate in Article 39A of the Constitution of India, which contains various provisions for settlement of disputes through Lok Adalat. It is an Act to constitute legal service authorities to provide free and competent legal services to the weaker sections of the society to ensure that opportunities for securing justice are not denied

to any citizen by reason of economic and other disabilities, and to organise Lok Adalats to secure that the operation of the legal system promotes justice on a basis of equal opportunity

In India, laws relating to resolution of disputes have been amended from time to time to facilitate speedy dispute resolution. The Judiciary has also encouraged out of court settlements to alleviate the increasing backlog of cases pending in the courts. To effectively implement the ADR mechanism, organizations like ICA, ICADR were established, Consumer Redressal forums and Lok Adalats revived. The Arbitration Act, 1940 was repealed and a new and effective arbitration system was introduced by the enactment of the Arbitration and Conciliation Act, 1996. This law is based on the United Nations Commission on International Trade Law (UNCITRAL) model law on International Commercial Arbitration.

The first one is the Arbitration and Conciliation Act, 1996 and the second one is the incorporation of section 89 in the traditional Civil Procedure Code (CPC). The adoption of the liberalized economic policy by India in 1991 has paved way for integration of Indian economy with global economy. This resulted in the enactment of the Arbitration and Conciliation Act, 1996 (hereinafter referred as 'new Act') by the legislature as India had to comply with well accepted International norms. It superseded the obsolete and cumbersome Arbitration Act, 1940. The new Act has made radical and uplifting changes in the law of arbitration and has introduced new concepts like conciliation to curb delays and bring about speedier settlement of commercial disputes.

The new Act has been codified on the lines of the Model Law on International Commercial Arbitration as adopted by the United Nations Commission on International Trade Law (UNCITRAL). One of the most commendable objects of the new Act is to minimize the role of the courts in the arbitration process. The Arbitration and Conciliation Act, 1996 laid down the minimum standards, which are required for an effective Alternative Dispute Resolution Mechanism. Further, the recent amendments of the Civil Procedure Code will give a boost to ADR. Section 89 (1) . Further, the recent amendments of the Civil Procedure Code will give a boost to ADR. Section 89 (1) of CPC deals with the settlement of disputes outside the court. It provides that where it appears to the court that there exist elements, which may be acceptable to the parties, the court may formulate the terms of a possible settlement and refer the same for arbitration, conciliation, mediation or judicial settlement.

ADR was at one point of time considered to be a voluntary act on the apart of the parties which has obtained statutory recognition in terms of Civil Procedure Code (Amendment) Act, 1999; Arbitration and Conciliation Act, 1996; Legal Services Authorities Act, 1997 and Legal Services Authorities (Amendment) Act, 2002. The access to justice is a human right and fair trial is also a human right. In India, it is a Constitutional obligation in terms of Art.14 and 21. Recourse to ADR as a means to have access to justice may, therefore, have to be considered as a human right problem. Considered in that context the judiciary will have an important role to play. The Supreme Court of India has also suggested making ADR as 'a part of a package system designed to meet the needs of the consumers of justice'. The pressure on the judiciary due to large number of pending cases has always been a matter of concern as that being an obvious cause of delay. The culture of establishment of special courts and tribunals has been pointed out by the Hon'ble Supreme Court of India in number of cases. For the purpose of reconciliation, the Court may adjourn the proceeding for a reasonable period and refer the matter to person nominated by court or parties with the direction to report to the court as to the result of the reconciliation [Section 23(3) of the Act].

INTERNATIONAL INITIATIVES TOWARDS THE DEVELOPMENT OF ALTERNATIVE DISPUTE RESOLUTION

When the entire world was moving in favour of a speedy resolution of commercial disputes, the United Nations Commission on International Trade Law way back in 1985 adopted the UNCITRAL Model Law of International Commercial Arbitration and since then a number of countries has given recognition to that model in their respective Legislative systems. An important feature of the said model is that it has harmonized the concept of arbitration and conciliation in order to designate it for universal application

TREATIES AND CONVENTIONS

1. 1923 GENEVA PROTOCOL ON ARBITRATION CLAUSES:

In this Geneva Protocol each of the Contracting States recognizes the validity of an agreement whether relating to existing or future differences between parties subject respectively to the

jurisdiction of different Contracting States by which the parties to a contract agree to submit to arbitration all or any differences that may arise in connection with such contract relating to commercial matters or to any other matter capable of settlement by arbitration, whether or not the arbitration is to take place in a country to whose jurisdiction none of the parties is subject. Thereby in this present Protocol, each Contracting State reserves the right to limit the obligation mentioned above to contracts which are considered as commercial under its national law.

2. 1927 GENEVA CONVENTION ON THE EXECUTION OF FOREIGN ARBITRAL AWARDS:

In the territories of any High Contracting Party to which the present Convention applies, an arbitral award made in pursuance of an agreement whether relating to existing or future differences (hereinafter called "a submission to arbitration") covered by the Protocol on Arbitration Clauses, opened at Geneva on September 24, 1923 shall be recognised as binding and shall be enforced in accordance with the rules of the procedure of the territory where the award is relied upon, provided that the said award has been made in a territory of one of the High Contracting Parties to which the present Convention applies and between persons who are subject to the jurisdiction of one of the High Contracting Parties. Besides this some necessary conditions are to be fulfilled to obtain such recognition or enforcement. The present Convention applies only to arbitral awards made after the coming into force of the Protocol on Arbitration Clauses, opened at Geneva on September 24, 1923. It does not apply to the Colonies, Protectorates or territories under suzerainty or mandate of any High Contracting Party unless they are specially mentioned.

3. 1958 CONVENTION ON THE RECOGNITION AND ENFORCEMENT OF FOREIGN ARBITRAL AWARDS (NEW YORK CONVENTION):

Recognising the growing importance of international arbitration as a means of settling disputes, the Convention on the Recognition and Enforcement of Foreign Arbitral Awards or rather can also be recognised as New York Convention seeks to provide common legislative standards for the recognition of arbitration agreements and court recognition, are treated as “foreign” under its laws because of some foreign element in the proceedings. The Convention’s principle aim is that foreign and nondomestic arbitral awards will not be

discriminated against and it obliges parties to ensure such awards are recognised and generally capable of enforcement in their jurisdiction in the same way as domestic awards. An ancillary aim of the Convention is to require courts of parties to give full effect to arbitration agreements by requiring courts to deny the parties access to court in contravention of their agreement to refer the matter to an arbitral tribunal. The Convention deals with the field of application, i.e. the recognition and enforcement of foreign arbitral awards (arbitral awards made in the territory of another State).

4. 2006 RECOMMENDATION REGARDING INTERPRETATION OF ARTICLE II (2) AND ARTICLE VII (1) OF THE NEW YORK CONVENTION:

The Recommendation was adopted by UNCITRAL on 7th July, 2006. It was drafted in recognition of the widening use of electronic commerce and enactments of domestic legislation as well as case law, which are more favourable than the New York Convention is respect is respect of the form requirement governing arbitration agreements, arbitration proceedings, and the enforcement of arbitral awards.

5. 1961 EUROPEAN CONVENTION ON INTERNATIONAL COMMERCIAL ARBITRATION (GENEVA CONVENTION):

Arbitration agreements concluded for the purpose of settling disputes arising from international trade between physical or legal persons having, when concluding the agreement, their habitual place of residence or their seat in different Contracting States.

6. 1962 AGREEMENT RELATING ON APPLICATION OF THE EUROPEAN CONVENTION ON INTERNATIONAL COMMERCIAL ARBITRATION (PARIS AGREEMENT):

This Agreement shall be open for signature by the member States of the Council of Europe. It shall be ratified or accepted. Instruments of ratification or acceptance shall be deposited with the Secretary General of the Council of Europe.

7. 1965 CONVENTION ON THE SETTLEMENT OF INVESTMENT DISPUTES BETWEEN STATES AND NATIONALS OF OTHER STATES (WASHINGTON OR ICSID CONVENTION):

The Convention on the Settlement of Investment Disputes between States and Nationals of other States signed in Washington on 18 March 1965, established the International Centre for Settlement of Investment Disputes (ICSID) within the World Bank Group. The purpose of the Centre is to resolve, through conciliation and arbitration, disputes arising between Contracting States and foreign investors. ICSID arbitration and conciliation allows States and foreign investors to settle their disputes on an equal footing within an international institutional framework.

8. 1966 CONVENTION PROVIDING A UNIFORM LAW ON ARBITRATION (STRASBOURG CONVENTION):

Each Contracting Party undertakes to incorporate in its law, within six months of the date of entry into force of this Convention in respect of that Party, the provisions of the uniform law contained in Annex I to this Convention. Each Contracting Party has the right, in its law to supplement the uniform law by provisions designed to regulate questions for which no solutions are provided, on condition that such provisions are not incompatible with the uniform law.

9. 1972 CONVENTION ON THE SETTLEMENT BY ARBITRATION OF CIVIL LAW DISPUTES RESULTING FROM RELATIONS OF ECONOMIC AND SCIENTIFIC TECHNICAL COOPERATION (MOSCOW CONVENTION):

In this Moscow Convention, all disputes between economic organizations resulting from contractual and other civil law cases arising between them in the course of economic and scientific technical cooperation of the countries parties to the present Convention shall be subject to arbitration proceedings with the exclusion of the above disputes from jurisdiction of the courts of law.

10. INTER AMERICAN CONVENTION ON INTERNATIONAL COMMERCIAL ARBITRATION (PANAMA CONVENTION):

The InterAmerican Convention on International Commercial Arbitration, signed in Panama on 30 January 1975, is one of the main arbitral conventions for the American continent. As for the others, these are the New York Convention of 12 June 1958 on the Recognition and Enforcement of Foreign Arbitral Awards and the InterAmerican Convention on Extraterritorial Validity of Foreign Judgements and Arbitral Awards, signed in Montevideo on 8 May 1979.

11. 1976 UNCITRAL ARBITRATION RULES:

Adopted by UNCITRAL on 28 April 1976, the UNCITRAL Arbitration Rules provide a comprehensive set of procedural rules upon which parties may agree for the conduct of arbitral proceedings arising out of their commercial relationship and are widely used in ad hoc arbitrations as well as administered arbitrations. The Rules cover all aspects of the arbitral process, providing a model arbitration clause, setting out procedural rules regarding the appointment of arbitrators and the conduct of arbitral proceedings and establishing rules in relation to the form, effect and interpretation of the award.

12. 2002 UNCITRAL MODEL LAW ON INTERNATIONAL COMMERCIAL CONCILIATION WITH GUIDE TO ENACTMENT AND USE:

Adopted by UNCITRAL on 24 June 2002, the Model Law provides uniform rules in respect of the conciliation process to encourage the use of conciliation and ensure greater predictability and certainty in its use. To avoid uncertainty resulting from an absence of statutory provisions, the Model Law addresses procedural aspects of conciliation, including appointment of conciliators, commencement and termination of conciliation, conduct of the conciliation, communication between the conciliator and other parties, confidentiality and admissibility of evidence in other proceedings as well as post conciliation issues, such as the conciliator acting as arbitrator and enforceability of settlement agreements.

CONCLUSION

The importance of ADR mechanism can be aptly put in the above words of Abraham Lincoln. Alternative Dispute Resolution mechanisms are in addition to courts and complement them. The traditional system of dispute resolution is afflicted with inordinate delays. However, the backlog and delay appear to be more accentuated than in modern day India. ADR mechanisms play an important role in doing away with delays and congestion in courts. The Indian civil justice system serves the interests of a diverse and exploding population, the largest democracy and the seventh largest national market in the world. The effective utilization of ADR systems would go a long way in plugging the loophole which is obstructing the path of justice. The concepts of alternative modes of dispute resolution should be deeply ingrained in the minds of the litigants, lawyers and the judges so as to ensure that ADR methods in dispensation of justice are frequently adopted.

Awareness needs to be created amongst the people about the utility of ADR and simultaneous steps need to be taken for developing personnel who would be able to use ADR methods effectively with integrity.

With the advent of the alternate dispute resolution, there is new avenue for the people to settle their disputes. The settlement of disputes in Lok Adalat quickly has acquired good popularity among the public and this has really given rise to a new force to alternate dispute resolution and this will no doubt reduce the pendency in law Courts. The scope of alternate dispute resolution system (ADR) has been highlighted by the Hon'ble Chief Justice of India in his speech in the joint conference of the Chief Ministers of the State and Chief Justice of High Courts, held at Vigyan Bhavan, New Delhi on 11/11 Chief Ministers of the State and Chief Justice of High Courts, held at Vigyan Bhavan, New Delhi on September 18, 2004 and insisted the Courts to try settlement of cases more effectively by using alternate dispute resolution system so as to bring down the large pendency of cases in law Courts. Alternate Dispute Resolution is rapidly developing at national and international level, offering simpler methods of resolving disputes. Increasing trend of ADR services can easily be inferred from the growth of "Arbitration clause" in majority of contracts. There has been a significant growth in number of law school courses, diplomas, seminars, etc. focusing on alternate dispute resolution and rationalizing its effectualness in processing wide range of dispute in society.