

ROLE OF ADR IN COMMERCIAL DISPUTES

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ABSTRACT

This Article focuses on making the reader aware of the definition of ADR, and how commercial disputes are dealt under the Alternative Dispute Resolution mechanism. The aim of the project is to make the person aware of the methods that he is available with if he or she gets into a commercial dispute.

In a rapidly developing society, human needs are bound to multiply, creating a conflict of interest. People become more aware of their individual rights and litigation becomes an unavoidable part of their lives due to the surge in disputes between them. The problem is further complicated when there is a lack of discipline in the litigation process and the judicial mechanism has difficulties in dealing with the enormous number of cases. Particularly in a technologically and economically well-advanced modern society, litigation is a primary means of resolving disputes. When it fails to meet people's needs, the need to seek new alternative dispute resolution methods is evident. It is in this context that alternative dispute resolution modes have gained primacy in the present times.

Keywords: ADR, Mediation, Conciliation, Commercial Dispute, Negotiation, Code of Civil Procedure

WHAT IS ADR?

Alternative Dispute Resolution refers to any method of resolving disputes without litigation. ADR encompasses any conflict resolution processes and techniques that occur outside of the purview of any governmental entity. Mediation, arbitration, conciliation, negotiation, and transaction are the most well-known ADR processes.

All ADR procedures have similar qualities in that they allow parties to find admissible resolutions to their disputes outside of traditional legal / court proceedings, but they are governed by various rules.ⁱ As long court lines, rising litigation costs, and time delays continue to plague litigants, more states are experimenting with alternative dispute resolution (ADR) programs. Some of these programs are optional, while others are mandatory.

It seeks to maintain peace and cooperation among the parties involved in the transaction and to prevent hostility among them. The goal of resolving disputes through ADR is to reduce the burden on the courts and provide early access and speedy trial to more serious cases. ADR is established in India under Articles 14 and 21 of the Indian Constitution.

The Supreme Court ruled in *Salem Advocate Bar Association v. Union of India*ⁱⁱ that where it appears to the court that there is an element of a settlement that may be acceptable to the parties, they shall be made to apply their minds so as to opt for one or more of the ADR methods mentioned in the section 89 of Code of Civil Procedure, 1908.

WHAT ARE COMMERCIAL DISPUTES?

Commercial dispute can be defined as 'disputes arising out of transactions of trade or commerce and, in particular, disputes arising out of ordinary transactions of merchants, bankers and traders such as those relating to enforcement and interpretation of mercantile documents, export or import of merchandise, affreightment, carriage of goods, franchising, distribution and licensing agreements, mercantile agency and mercantile usage, partnership, technology development, maintenance and consultancy agreements, software, hardware, networks,

internet, website and intellectual-property such as trademark, copyright, patent, design, domain names and brands, and such other commercial disputes which the High Court may notify.ⁱⁱⁱ

Furthermore, the Act states that a commercial dispute does not cease to be a dispute simply because the state or its instrumentalities are one of the contracting parties.

The following are the most common commercial disputes:

- Contractual disputes, including breaches and lack of delivery.
- Disputes between the shareholders, directors, and other ranking business entities.
- Professional and commercial negligence.
- Construction disputes, including contractual, building, and regulatory issues.
- Partnership disputes.
- Reputation management, including countersuits, defamation, Non-Disclosure Agreement breach.
- Patent and Intellectual Property disputes.

ADR IN COMMERCIAL DISPUTE RESOLUTION

Conciliation - Conciliation has been incorporated into Part III of the Act and has been adopted as one of the most effective means of resolving disputes. The Act is modelled after the UNCITRAL Model Arbitration Law and the UNCITRAL Conciliation Rules, and it is the first time that the conciliation process has been given statutory recognition by establishing detailed rules of engagement. It is a non-binding procedure in which a neutral conciliator assists disputing parties in reaching a mutually agreed-upon resolution. According to Section 61 of the Act, conciliation shall apply in disputes arising from a legal relationship, whether contractual or not, and in all proceedings relating thereto. The choice of a dispute resolution mechanism is largely determined by the parties' cultural and legal traditions. Conciliation is generally preferred because it is faster, less expensive, and more informal. Furthermore, the win-win situation created by conciliation for both parties encourages the continuation of a harmonious business relationship, which could have been harmed if complex legal dispute resolution mechanisms had been used.^{iv}

Part III of the Arbitration and Conciliation Act of 1996 (the Act) establishes the legal framework for conciliation. According to Section 66 of the act, the conciliator is not bound by the Code of Civil Procedure of 1908 or the Indian Evidence Act of 1872. According to Section 67 of the act, the role of the conciliator is to assist the parties impartially in reaching an amicable settlement of the dispute. The conciliator must be aware of the principles of fairness and justice, trade usages, consideration of the party's rights and obligations, surrounding circumstances to the dispute, and so on. Conciliation is simple in and of itself, and because of this, it is commonly used by businesses to resolve commercial disputes.^v

Mediation - When compared to traditional court proceedings resolving the same dispute between parties, mediation usually provides an instant and effective dispute resolution setup that saves time. Mediation is usually agreed upon by business people because it allows for a faster resolution and disposal of commercial disputes between them. For the same reason, it encourages international investors to use the Indian legal system to rely on the Indian legal system to provide them with a simple, cost-effective, and quick dispute resolution mechanism. The Commercial Courts Amendment Act of 2018 has given a significant boost to mediation. The amendment to the Act added a new Chapter IIIA. It means that if a suit does not seek urgent interim relief, the plaintiff must go through pre-institution mediation.

The "Commercial Courts (Pre-Institution Mediation and Settlement) Rules, 2018" are introduced by the Commercial Courts Amendment Act 2018. These rules outline the mediation procedure that must be followed. According to the rules and the Act, the Central Government may authorise the Authorities established under the Legal Services Authorities Act of 1987. This authority would oversee the mediation process by initiating proceedings once a party filed an application. It also appoints a mediator and determines the venue of the proceedings.

The mediation process must be completed within three months of the date the application for pre-institution mediation is received. With the parties' agreement, this period can be extended for another two months. Furthermore, the rules state that the parties must act in good faith and that they, along with the mediator, must keep the proceedings confidential. It also specifies the mediator's ethical obligations. It also implies that the settlement reached through such mediation has the status and effect of an arbitral award under Section 30(4) of the Arbitration

and Conciliation Act, 1996 ("Act"). The experience of such pre-institution mediation provisions has been positive all over the world. As a result, the establishment of this provision is commendable.^{vi}

Negotiation - ADR techniques are widely used in commerce, because where there is trade, there is negotiation. Negotiation is the most basic form of ADR in which both parties, with or without the assistance of attorneys, negotiate the terms of any deal, contract, settlement, or dispute in order to gain an advantage for their side. Negotiations are a common technique in the commercial world, as many deals or contracts involving large sums of money must be negotiated between two parties. These days, this is a must-have skill.

ADR FOR RESOLVING E-COM AND IPR DISPUTES

With globalisation and international competition in commerce and industries on the rise, the Indian judicial system must adapt to meet the new challenges through alternative non-judicial methods of adjudication. The Indian Council of Arbitration (ICA) is investigating the various ways in which mediation and other forms of ADR could be used to provide a just, timely, and less expensive means of resolving commercial transactions disputes.

In terms of using ADR mechanisms to resolve disputes involving intellectual property rights, there is currently no specialised institution in India that solely provides conciliation in this highly specialised area. However, at the international level, the World Intellectual Property Organization provides specialised services to member countries in the form of intellectual property arbitration and mediation. In most international contracts involving intellectual property rights, the parties include a WIPO clause. One notable feature of WIPO, which conducts ADR activities through its Centre for Arbitration and Mediation, is that it has developed a system for on-line resolution of internet "domain names," which are used in relation to a business or commercial enterprise to maintain its identity and provide domain exclusivity to the enterprise.

The Supreme Court addressed the issue of 'domain name' as a protectable intellectual property right in the case of *Satyam Infoway v. Siffynet Solutions*^{vii} According to the Court, a domain

name is a word or name that not only serves as an address for internet communication but also identifies the specific internet site. It assigns an address to computers connected to the Internet. As a result, the term "domain name" has all of the characteristics of a trademark, and its use may cause a lot of confusion for users who may access one domain name instead of another. In the event of infringement, the dispute may be resolved through an ADR mechanism.

CONCLUSION

The goals of commerce today are not the same as they were when the legal and justice systems were introduced. The flaws in the Indian judicial system call for a better system, one that is faster and more transparent. As a result of these flaws, the goal of commercial performance is hampered. When we look at commercial disputes and the mechanisms in place to resolve them, it becomes difficult practically because the ordinary and usual course of conflict resolution does not help promote or ease commerce.

The legislative had also identified the issues surrounding the Judicial System and through legislation, the legislative efforts to make litigation faster and quicker are also failing, as we have seen above. They are also left with only one option: promote the use of ADR in dispute resolution.

In contractual relationships involving trade-mark licence agreements, name licence agreements, or technology transfer cases, parties usually include an ADR clause as part of the main agreement so that when a dispute arises, it is referred to ADR. However, in cases where the parties do not have a contractual relationship, dispute resolution through ADR mechanisms is not possible because the alleged infringer generally denies his involvement in the infringement of trade mark or copy right and prefers to contest the suit in court.

It is also important to recognise that the protracted legal process benefits no one. In the end, it is a burden on all parties involved in the process. ADR mechanisms are much easier to approach and understand, particularly for the parties in dispute, whose participation in court proceedings is through their lawyer, and the complex court mechanism makes it difficult to reach prompt

solutions, whereas in ADR, where the parties are involved in resolving the disputes, prompt solutions are more warranted.

ENDNOTES

ⁱ Available at https://blog.ipleaders.in/suitability-adrs-particular-typesdisputes/#Applicability_of_ADRs_in_different_types_of_disputes

ⁱⁱ AIR 2005 SC 3353

ⁱⁱⁱ See, Law Commission of India, 188th Report On Proposals For Constitution Of Hi-Tech Fast Track Commercial Divisions In High Courts, December, 2003 pg. 167 Section 2 (1) (c) of Commercial Courts, Act 2015

^{iv} Available at <https://www.legalserviceindia.com/legal/article-2899-commercial-dispute-resolution-commercial-courts-and-adr.html>

^v Available at <https://www.grin.com/document/317295>

^{vi} Available at <https://lexlife.in/2021/02/18/alternative-dispute-resolution-its-need-and-importance/>

^{vii} (2004) 6 SCC 145