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INTERNATIONAL JOURNAL OF LAW MANAGEMENT & HUMANITIES

[ISSN 2581-5369]

Volume 3 | Issue 3

2020

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Emerging Issues pertaining to Alternative Dispute Resolution

JAGRIT CHAWLA [1] AND MANHARMAN SINGH MALHOTRA[2]

ABSTRACT

As it is being said that justice delayed is justice denied and justice hurried is justice buried with keeping this view in mind, the concept of alternative dispute resolution emerges in India. Alternative dispute resolution is the most effective and efficient process in resolving disputes between the parties by providing cost less and speedy trial. But with the expansion of alternative dispute resolution the issues pertaining to it are also emerging. Despite the amendment of arbitration and conciliation act in 2019, there is still no such provision of a forum where parties can go and challenge it. The same arbitrator gets appointed when challenged. The party has to wait to challenge in court till the delivery of the award by the arbitrator. The other challenge is when the arbitral award appealed to the supreme court of India, the efficacy of time and cost still not declined. At various levels the arbitration gets stuck up in court due to court drafting and ambiguous language. To promote the settlement of disputes between the parties there are various alternatives such as mediation, conciliation, negotiation and lok adalat, these resolutions have been proven effective but efficient gains from these proceedings are very low as compared to arbitration and is rarely being practiced in the Indian market. This paper will discuss the proliferation of emerging issues arising in alternative dispute resolution. It will also focus on various ways on how these issues can be resolved.

I. INTRODUCTION

The The alternative dispute resolution has been seen as a traditional practice in most of the countries and India too has been the part of dispute settlement practice through mediation and conciliation since old age. In ancient India, the practice of dispute settlement was conducted by the Panchayats as a forum of dispute settlement in rural India. The disputes were not to be taken to the litigation courts in rural India, but instead to resolve the dispute, it gets transferred to the 'Panchayat' who are often seen as the village elders with very high respect[3].

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[3] Dr. Laju P. Thomas, *Dispute Resolution In Rural India*: *An Overview*, http://thelawbrigade.com/wp-content/uploads/2019/05/Laju.pdf.

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The Village Panchayat consisted of five elders who used to resolve criminal, civil and family disputes. The settlement dispute system in the village was independent of any state authority and control. They were regarded as the 'Panch Parameshwar' because they see themselves as an eminent personality who has the power of voice of god to deliver justice for the smooth functioning of the society. Apart from village panchayat, the people also settle their dispute by a person or persons of their own choice or through well known tribunals in ancient and medieval times. These parties were also able to file appeals against the decision given by eminent persons to the higher hierarchy or to the king himself. The law of arbitration was also there in ancient times, who owe its explanation to the British rule system in India[4]. With the establishment of East India Company in India, the rules of British legal system were also introduced in India. They govern the justice delivery system through establishment of various courts and tribunals. Therefore, subsequently the justice delivery system through courts and tribunals were proven to be ineffective and inefficient which led to the development of Alternative Dispute Resolution.

The ADR system has not always been proven to be effective and efficient in every case. Some people have seen this as just a waste of time while others have regarded this system as a way to check the minimum offer that other parties would accept. Practically, the common man does not get any benefit by this mechanism unless a person who understands his mind-set interacts with him in a similar environment to resolve disputes at very less cost. But it has also been noticed that the dispute concerning matrimonial issues, family disputes and some kind of civil or criminal cases, where the dispute can be addressed through litigation, in these scenarios the mediation and conciliation are seen as more satisfactorily resolvement of dispute between the parties.

Further in this paper we will discuss the various modes of alternative dispute resolution and what are the emerging issues proliferating in the mechanism of alternative dispute resolution.

II. ALTERNATIVE DISPUTE RESOLUTION: AN OVERVIEW

The term "ADR" has been defined as the "alternative dispute resolution" which provides alternatives in settlement of dispute between the parties. The alternative dispute resolution is a mechanism which encompasses a broad spectrum of resolving disputes between the parties. It aims at proliferating the dispute administration process having unique qualities of being cost less and speedy trial mechanism[5]. It is an alternative method of tackling the dispute

[4] Konoorayar, Vishnu; Pillai, K. N. C. Chandrasekharan; V. S., Jaya, *Alternative Dispute Resolution in India- ADR: status/effectiveness study 34-35(2014).*

[5] Vivek Vashi, Shreya Ramesh, Bharucha & Partners*, Emergence of Arbitration in India as a robust mechanism of dispute*

between the parties without involving a court process. Under this system the litigants are not bound to follow the court procedure or any other statutes of litigation statutes[6]. The first and the foremost obligation of the parties is to resolve disputes by themselves before approaching any third party which also includes society, the corporate world, or any other chaos prevailing parties as a whole, because in a civilized society the rule of law prevail the principles of natural justice for better function of society. The process of alternative dispute resolution aims to stipulate settlement between the parties without approaching any court of law. Thus, for the settlement of disputes there are various modes of alternative dispute resolution such as, mediation, arbitration. Lok adalat, and many more.

But however despite the solution oriented dispute alternatives, not every alternative is binding between the parties. As the mediation, negotiation and conciliation are considered as non binding settlement between the parties unless there is any voluntary signed agreement of obligation to be bound under the sphere of the agreement[7]. Mediation and conciliation are similar in nature, in both the situation, a third person is to be appointed either as a mediator or conciliator to facilitate the communication, and structure the settlement between the disputed parties. But they do not have the rule and authority to give binding decisions. While on the other hand, the arbitration is a different concept, the decision given by the arbitrator is binding between the parties through arbitral award. The ADR is today being increasingly acknowledged in the field of law as well as in the commercial sector. The Main reason why people prefer ADR is because of the tiresome process of litigation, costs and inadequacy of the Court system. The alternative dispute resolution emerged as a powerful weapon for resolution of disputes at domestic level as well as at international level.

III. MODES OF ALTERNATIVE DISPUTE RESOLUTION

- Arbitration
- Mediation
- Conciliation
- Judicial Settlement
- Lok Adalat

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resolution (Sept. 1, 2009), https://uk.practicallaw.thomsonreuters.com/1-618-5252?source=relatedcontent&__lrTS=20171207111059485&transitionType=Default&contextData=(sc.Default)&firstPage=true&bhcp=1.

[6] Dr. Marisport A, Dr. Ambawati Nageshwara Rao, Ms Heena Goswami, *Resolving Pending Cases through Alternative Dispute Resolution under Section 89 of Civil Procedure Code*, 134913/2019/NM. 494, (2019).

[7] Bryan A Garner, *A Dictionary of Modern Legal Usage* (2nd Edn. 1995).

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1) Arbitration

Arbitration is a binding form of alternative dispute resolution to the disputed parties. It is a process of resolving disputes between the parties outside the boundaries of court of law. The parties in arbitration choose arbitrator by choosing a neutral person who has agreed upon to give adjudication over the dispute between conflicting parties. Arbitration is an only alternative to litigation and it does not replace the judicial machinery in all aspects rather it co-exists with it. The third party, who has been chosen as an arbitrator, after listening to both the parties and scrutinizing the evidence presented, gives an arbitral award which is a binding norm of an adjudicating authority to the parties. The right to review and appeal in arbitration is limited.

In India, the arbitration is governed by the Arbitration and Conciliation Act, 1996 which is based upon the UNCITRAL Model Law on Arbitration of the year 1985. According to section 2(1) (a) "arbitration means any arbitration whether or not administered by a permanent arbitral institution"[8]. The concept of arbitration is only to provide a speedy justice system by reducing the burden of disputes in pending litigation courts which took so many years to get the issue resolved, with keeping this point of view, the concept of arbitration in India emerges[9].

2) Mediation

Mediation is a voluntary non-binding process of settlement of disputes between the parties. It is a structured informal process of resolving disputes between the parties where a neutral third person is chosen as a mediator to converse and explore the options for the settlement of disputes[10]. The process of mediation controlled mainly by the parties themselves. The mediator only act as a neutral person to enunciate the negotiation for reaching the settlement between the parties. The mediator does not have any power to impose any rule or any orders unlike arbitration but can only give suggestions which can help to finish the disputes.

The mediation is considered as one of the most flexible forms of ADR. The parties feel free to disclose the facts to the mediators which enhance trust and establish a fiduciary relation with the parties. There is no rigid structured framework of rules in the process of mediation. Both the parties accept the person who would be served as a mediator. The session of the

[8] The Arbitration and Conciliation Act, 1996 s. 2(1), No. 26, Acts of Parliament, 1996 (India).
[9] Dhir & Dhir Associates, *India: Evolution of Arbitration in India*, (Oct. 21, 2016), https://www.mondaq.com/india/arbitration-dispute-resolution/537190/evolution-of-arbitration-in-india.
[10] Paresh R. Jani, *Mediation as an Alternative Dispute Resolution System- An Analytical Study*, Chapter-3: Opting for Mediation, pg.71, https://shodhganga.inflibnet.ac.in/bitstream/10603/28048/8/08_chapter3.pdf.

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mediation process begins with the disclosure of facts and the result they desire. Once each party perspective is aired, the mediator then separates the disputed parties into two separate rooms to listen each perspective individually and thereafter, conduct joint meetings of the parties. The mediator only provides a solution which enhances a win-win situation to both the parties. But no such power to impose the decision, as the mediator does not have any imposition rule power to end the dispute.

3) Conciliation

Conciliation is another unique form of an alternative dispute resolution. The parties settle their disputes by the neutral third person, who is to be known as conciliator. The conciliator meets the parties separately in order to lower the tension and resolve the dispute[11]. The function of the conciliator is to explore multiple potential solutions and formulate various alternative strategies which would bring a settlement through a collective collaborative negotiation.

The proceedings related to conciliation are prescribed under section 61 to section 81 of Arbitration and Conciliation Act, 1996. The provisions of conciliation under this act strive to provide a settlement of dispute by the conciliation proceedings which would have the same effect as an arbitral award. The proceeding of conciliation shall commence when the other party accepts the invitation in writing, no such proceeding shall commence if the party rejects the invitation[12]. The parties are bound to follow the agreement as it is an acceptance of legal settlement agreement by both the parties. Unlike an arbitrator, the conciliator does not give any decision but it enhances the enunciation of settlement through providing various alternative strategies to resolve the conflict. If the settlement of dispute is the result of conciliation then all the formalities of it would get reduced into writing and thus a decree regarding the same would be executed. Non compliance of it would amount to filing of an execution petition straightaway.

4) Judicial Settlement

The term "Judicial Settlement" has been defined under section 89 of the code of civil procedure 1908[13]. Judicial settlement is an alternative dispute resolution which aims at settlement of dispute outside the court. When it appears acceptable to the court that there exists a dispute which can be resolved outside the court then the court upon its own terms

[11] Sujay_ilnu, *A critical study of Principals and Procedure of conciliation under Arbitraiton and Conciliation Act,1996.,* http://www.legalservicesindia.com/article/725/Principles-&-Procedure-of-conciliation-under-Arbitration-&-Conciliation-Act-1996.html.

[12] The Arbitration and Conciliation Act, 1996, S. 62, No. 26, Acts of Parliament, 1996 (India).

[13] The Code of Civil Procedure, 1908, S. 89, No.5, Acts of Parlament, 1908 (India).

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formulate the settlement and transfer the case to whomsoever it appears to be fit. Thus the court refers the settlement of dispute to:-

- Arbitration
- Conciliation
- Lok Adalat
- Mediation

5) Lok Adalat

The Lok Adalat which is also regarded as a people's court is one of the mechanisms in alternative dispute resolution in India. This forum has been established by the government to settle the dispute through compromise and negotiation between the disputed parties. In this forum many pending matters or at the pre-litigation stage are settled by not approaching any court of law[14]. The Lok Adalat mechanism is governed by the Legal Services Authorities Act 1987 with the aim of promoting justice in the society by giving equal opportunity in the operation within the operation of law. This act gives statutory recognition to the settlement of disputes through compromise and negotiation by the Lok Adalats[15]. The decision given the lok adalats are considered to be the decree of a civil court which is final and binding on all the parties and no such appeal lies before any court of law. However, if the disputed parties are not satisfied with the decision of Lok Adalat they can approach litigation and file a fresh suit in an appropriate jurisdiction before any court of law.

IV. Emerging Issues In Various Alternative Modes Of Dispute Resolution

There are various challenges and issues related to different modes of dispute resolution which have been discussed under as follows:-

a) Emerging issues pertaining to Arbitration as a dispute resolution

The Arbitration is proven as the most successful and effective dispute resolution. The government of India is trying to reduce compactness and making governance of arbitration more flexible by bringing various changes and amendments in Arbitration and Conciliation Act, 1996. But, despite the various amendments in 2015 and 2019, there are still various issues and challenges which have not been answered.

[14] Lok Adalat, nalsa.gov.in/lok-adalat.
[15] Lok Adalats in India, *Legislation pertaining to Lok Adalats*, http://www.legalserviceindia.com/articles/lok_a.htm.

The arbitration act provides a mechanism where if any party finds out that the arbitrator has not fulfilled the grounds prescribed in schedule 5 and schedule 7 of Arbitration and Conciliation Act, 2019, then he can challenge the arbitrator under section 12 and 13 of the act. The person to whom the application is filled is the same person who is sitting in an arbitral tribunal to resolve the matter between the same concerned parties .Thus, if the arbitrator declines the application filed by the party then the party have no option left but only to wait till the passing of arbitral award by the arbitrator and participate in proceedings.. The only ground for challenge will be when the award will be passed by him, under arbitration there is no such remedy for this mechanism.

The other issue is that the arbitration is based upon the doctrine of competence where the arbitrator has the authority to decide the jurisdiction of the concerned dispute[16]. It means arbitral tribunal is competent to rule its own competency, when any party files an application of section 16 which prescribes the jurisdiction of the competent arbitration authority then the same thing goes back to the same arbitrator who has the authority to decide whether to rule its competency of jurisdiction or not, which creates a bias arbitrary power under the part of arbitrator adjudication authority. The only remedy claimant party has to wait till the delivery of arbitral award. The other speed breaker is that at various levels arbitration proceedings get stuck up in court due to difficult court drafting and using ambiguous language used are one of the important reasons behind the lack of effectiveness of arbitral award. Even after the amendment in arbitration and conciliation act, 2019 there are still many issues left. The arbitration in oppression and mismanagement cases and the Indian parties having the foreign seats are still having several issues left unanswered which are prevailing different turmoil opinions under various courts in India.[17]

b) Emerging issues pertaining to Mediation as a dispute resolution

The mediation is one of the most intrinsic form of settlement mechanism, but, however various issues are still under prevalence of dispute resolution which needs to be addressed and are classified as follows:-

1) Lack of Professional mediators

[16] Dr. Mukesh Kumar Malviya, *Jurisdictional Issues in International Arbitration and Special Reference to India*, BHARATI LAW REVIEW, Jan.-Mar, (2017), http://docs.manupatra.in/newsline/articles/Upload/03D471A1-CEC8-46DC-8E27-A42DC5D09E7C.pdf.

[17] Mahip Singh Sikarwar, Emerging *Issues in the Arbitration Regime - India& Singapore* (Jan. 22, 2017), https://www.mondaq.com/india/arbitration-dispute-resolution/559578/emerging-issues-in-the-arbitration-regime-india-singapore.

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2) Lack of referrals
3) Lack of infrastructure
4) Absence of suitable legislation
5) Lack of mediation management
6) Lack of Awareness

- **Lack of professional mediators**

The process of mediation takes place by the mediator as a facilitator. The role of the mediator is to act as a neutral person between the disputed parties and understand the issue prevailing between both the parties. In order to do so, the mediator has to open up the channel of communication between the disputed parties[18]. As the proliferation of taking mediation as a dispute resolution process by the parties concerning family and civil matters, India is however experiencing the shortage of trained professional mediators. On 8th July, 2012, Hon'ble Mr. Justice Siri Jagan Judge, at High Court of Kerala has expressed his concern regarding the lack of the trained professional mediators.[19]

- **Lack of referrals**

Under section 89 of the Code of Civil Procedure, the judge has the power to refer the cases to various modes of alternative dispute resolution. But, however many instances have shown that judges are not referring cases to the alternative dispute resolution. The Gujarat service legal authority have published a newspaper which indicates that there very less number of case references to the mediation. [20]

- **Lack of Infrastructure**

The mediation is a process where it requires special attention for the settlement of dispute between the parties. For this, it requires proper mediation centers for the facilitation of governance. This includes requirement of sufficient space for proper conduct of mediation having separate rooms, proper environment, computers, and other infrastructural facilities. The atmosphere of mediation has to be an informal situation either within the premises of the court or near the court. Hon'ble Justice Sunil Ambawani and Dr. Sudhirkumar Jain in a

[18] Dr. Justice Dhananjaya Y. Chandrachud, Mediation – *Realizing the potential and designing implementation strategies, page 6-7, sourced from the website of the Law Commission of India.*
[19] Report on the Third National Conference on Mediation held at New Delhi on 8th July, 2012, page 26.
[20] Mediation News Letter published by the Gujarat State Legal Services Authority, Volume 1, Issue 5, Page 8.

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national conference have highlighted the need for the requirement of proper a mediation centre[21].

- **Absence of Suitable Legislation**

The process of proceedings in mediation is informal which has no binding authority which concerns a lack of trust on the process of mediation. The ineffectiveness of the judicial justice system in India is result of the fact that the dispute concerning to litigation in Indian courts has proven to be a time consuming, laborious, and expensive process.[22] As per section 89 of Code of Civil Procedure the case referred to mediation which stipulates the conducting of mediation process but there is no such statutory or legal sanctity to follow the settlement governed by mediator. Thus, for the proper enforcement of mediation process, it is required to put some legislation on mediation.

- **Lack of mediation management**

The entire activities of mediation are being controlled by the Mediation and Conciliation Project Committee, Supreme Court of India. But, however keeping the judicial work first, the judges are unable to stipulate requisite attention to the mediation process which is constituting one of the scenarios why the activity of mediation are not growing rapidly.

- **Lack of Awareness**

Although the practice of mediation is considered to be the most unique and innovative form of alternative dispute resolution, still it is not very much popularly practiced in India. The rural India is still unaware of this dispute resolution, they believe it to be the part of the litigation process. The judges, lawyers and the litigants are also not very much familiar regarding the effectiveness of this mediation process[23].

c) Emerging issues pertaining to conciliation as a dispute resolution

The conciliation proceeding is considered to be a useful binding agreement to both the parties for settlement of disputes, but however there are still many issues pertaining to conciliation which creates hindrance for smooth functioning of the proceeding.

- In many Countries like Australia and the United States the consent of the parties to choose a conciliator is not the main priority. It is not always mandatory for both the parties to choose a third person who will act as a neutral person to resolve disputes between the parties,

[21] Report on the Third National Conference on Mediation held at New Delhi on 8th July, 2012, page 13.
[22] Marc Galanter & Jayanth K. Krishnan, *Bread for the Poor: Access to Justice and the Rights of the Needy in India*, 53 HASTINGS LAW JOURNAL 789.
[23] MH Upadhyay, Chapter-5: *Challenges and Obstacles in Mediation Implementation and Need for Enhancement of Standard of Mediation Practices*, https://shodhganga.inflibnet.ac.in/bitstream/10603/44117/11/11_chapter%205.pdf.

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they prefer early neutral evaluation for settlement. But in India there is a lack of obligatory mediation which can also be called as early neutral evaluation.

- There are generally no suitable places of conciliation centre for conducting proceedings of conciliation as well as improper structure and management leads to a barrier for smooth and effective functioning of conciliation proceedings.

- The parties to the dispute often misunderstand and assume the incorrect knowledge of information of other side which consequently create more serious repercussions for the relation between disputed parties[24].

- The process of conciliation is considered to be an informal process of settlement, thus without proper process of conciliation the parties to the dispute often may not take the case seriously

- The main essence of conciliation is to enhance the negotiation between the parties to reach settlement. When any party appears to be in a dominant position or having economic power, high goodwill, then in these cases the proceeding might get disrupted between the parties and eventually leads to failure in the conciliation mechanism.

d) Emerging Issues pertaining to Lok Adalat as a dispute resolution

As justice delayed is justice denied but justice hurried is also justice buried, with the conception of this view, the concept of Lok Adalat emerges. It gives justice to the parties faster than the courts but it is also discovered that due to its fast conducting of proceedings the parties get less compensation and the parties does not have any chance to file any appeal as there is no such provision of filing of appeal in Lok Adalat.

Lok Adalat is not suitable for all kinds of cases and only includes civil cases. It is all about settlement and compromise which is not the requirement of every case. Some cases in India require punishment and correctional methods which are not dealt by Lok Adalat. These types of cases usually fail here and many a times the disputed matter will get recommended to courts. This only creates superfluous deferral in the proceedings of a case, by not getting the dispute settlement through this alternative dispute resolution.

[24] Shubhangi Sharma, *Facts to know about Arbitration, Mediation and Conciliation*, https://blog.ipleaders.in/arbitration-conciliation-and-mediation/.

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V. SUGGESTION

The aim of this alternative dispute resolution is settlement between the parties. But, for more powerful impact for smooth functioning of alternative dispute resolution the suggestions for better functioning are as follows:-

- There must be a forum where the party can directly go and challenge the arbitrator if he has not fulfilled the grounds mentioned in schedule 5 and schedule 7 of arbitration and conciliation act, 1996. Instead of waiting for the award to be delivered. This suggestion is to remove the barrier of arbitrariness of the arbitrator where he himself decides the competency of his role as an arbitrator in a concerned disputed case in which for the filing of an application under section 12 and section 13 is the same person who is sitting in the same disputed case.

- As for the arbitration, conciliation and lok adalat there are specific acts such as Arbitration and Conciliation act, 1996 and Legal Service Authority Act, 1897. But there is no such kind of statutory act for mediation. Mediation is already flourishing in various parts of India as an ADR mechanism, but due to lack of statutory recognized status, it is causing a barrier for its further development. Thus, for better functioning of mediation, there is a need to afford mediation law as a statutory recognition.

- Enhancement of various ways and procedures for increasing the collaboration of judicial system and alternative dispute resolution for better functioning of resolving dispute mechanism.

- Expansion of lok adalat system in India, as of now the lok adalat only address issues pertaining to civil disputes and providing public service. There is a need for amendment to bring more matter of dispute cases pertaining to all kinds of less grievous dispute within the jurisdiction of lok adalat.

- Bringing various awareness programmes for the use of alternative dispute resolution in rural areas and proliferating the expansion of mediation and conciliation centers all across India.

VI. CONCLUSION

The proliferating emergence of alternative dispute resolution is a result of various recent amendments and implications of various new strategic models adopted by the government of India. The various modes of ADR are stipulated for effective and efficient governance of conflict system prevailing between the parties. With the emergence of dispute resolution, the

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issues pertaining to it are also causing hindrance for smooth functioning and further development in it. Due to which the parties in a dispute sometimes prefer litigation over other alternative mechanisms. Therefore, there is need to reflect the issues pertaining to dispute resolution and removing those issues through formulization of new solutions for better functioning of the dispute resolution mechanism.

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