ADR Mechanism and Arbitration Law in India

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"I realized that the true function of a lawyer was to unite parties…A large part of my time during the 20 years of my practice as a lawyer was occupied in bringing about private compromises of hundreds of cases. I lost nothing thereby-not even money, certainly not my soul"…

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***Abstract*- The existing justice system is struggling to cope with the ever-increasing load of civil litigations. Many people in India cannot afford litigation, and apart from litigants who benefit from delaying the process of justice, others are reluctant to pursue litigation due to the exorbitant amount of time and expenses involved. This situation has led to widespread cynicism about the judicial process, not only in India but also in many other countries facing similar challenges.**
The United States has taken the lead in refining legal procedures by introducing new methods for the speedy settlement of disputes. These procedures, known as "Alternate Dispute Resolution" or simply "ADR," have been adopted in the USA and several other countries. ADR provides well-structured processes that offer easy access to justice without undue delays and at a lesser cost, allowing parties to actively participate in resolving their disputes. ADR is not intended to replace the court system but rather to supplement it, with a focus on reducing excessive lawyering.
ADR has been in use for the past 30 years or so in countries such as the USA, Australia, Canada, Germany, Holland, Hong Kong, New Zealand, South Africa, Switzerland, and the U.K. ADR encourages disputants to reach negotiated understandings with minimal external intervention.
The primary objective of the ADR movement is to avoid vexation, expense, and delay, while promoting the ideal of "access to justice" for all. The ADR system aims to provide affordable, straightforward, prompt, and accessible justice.

***Key Words*; Arbitration, ADR, ADR Mechanism, Alternative Dispute Resolution, Arbitration and Conciliation Act, 1996**

INTRODUCTION

Arbitration refers to a dispute resolution process where a neutral third party, known as an arbitrator, makes a decision after conducting a hearing where both parties have an opportunity to present their arguments. In India, arbitration is not a new method for settling disputes. It has been practiced since ancient and medieval times. If any party was dissatisfied with the decision, they had the option to appeal to the Court of law and ultimately to the King.
The foundation for arbitration law in India can be traced back to the English Arbitration Act of 1889, which provided inspiration for the first Indian legislation on arbitration in 1899. Subsequently, the Indian Arbitration Act of 1940 was enacted, and later the Arbitration and Conciliation Act of 1996 (referred to as the Arbitration Act) came into effect. The 1996 Act is based on the United Nations Commission on International Trade Law (UNCITRAL Model Law) and serves as the framework for regulating the Alternative Dispute Resolution (ADR) system in India.

Meaning Of 'Alternative Dispute Resolutions'[2]:

The term "Alternative Dispute Resolution" (ADR) refers, in a narrow sense, to those processes where the final decision is reached with the consent of the parties involved. These processes include negotiation, mediation, and conciliation, where the parties retain their freedom to determine the outcome of their disputes.
In negotiation, mediation, and conciliation, the conciliator or mediator does not make the decision for the parties but rather facilitates the resolution of the dispute. Their role is to assist the parties in finding common ground that has previously eluded them. In a broader sense, ADR also encompasses arbitration, as it provides an alternative to litigation.
Arbitration, however, involves an imposed decision. As the arbitration process settles disputes outside the courts, it falls under the category of ADR since it brings the parties to the negotiating table, helps identify problems, establish facts, clarify issues, develop settlement options, and ultimately resolves disputes through a binding award.
In summary, ADR includes negotiation, mediation, and conciliation where parties reach a decision by mutual agreement, while arbitration is considered ADR because it offers an alternative to litigation, albeit through a binding decision.

Alternative Dispute Resolution Techniques or procedures:

ADR, or Alternative Dispute Resolution, encompasses various techniques for resolving disputes outside of traditional court litigation. The two well-known and oldest ADR methods are Arbitration and Conciliation/Mediation. However, other ADR

[1]Retrievedfromhttps://www.mkgandhi.org› autobio›chap39visitedon5-10-13

[2]Dr.S.R.Myneni,'*AlternateDisputeResolution*',AsiaLawHouse,2015,pg.10

techniques, widely practiced in countries like the USA for over 20 years, remain relatively unknown in India.
Let's explore the different procedures or techniques of ADR:

I. **Negotiation**: Negotiation is the most common form of dispute resolution, where parties engage in direct discussions without the involvement of a third party. The objective is to reach a mutually agreed settlement based on an objective assessment of each party's position. Voluntary, non-binding, and non-structured, negotiation allows participants more control and is often preferred over other methods.

II. **Mediation:** Mediation involves an impartial third party, the mediator, who assists disputing parties in reaching a mutually satisfactory settlement. The mediator facilitates communication and helps identify common ground. Parties present their positions to the mediator, who conducts private sessions with each party and works towards reaching an agreement. Mediation is an informal and assisted negotiation process. Co-mediation involves multiple mediators, potentially from different backgrounds, who work together to facilitate the resolution process.

III. **Conciliation**: Conciliation is sometimes used interchangeably with mediation. It is a more structured process than mediation and may be more rights-based than interest-based. A neutral third party, the conciliator, assists the parties in reaching a mutually satisfactory settlement. While interviewing parties individually, any information or allegations disclosed are shared with the other party for comments, without requiring consent from the disclosing party. The conciliator settles the dispute in an informal and friendly manner with the agreement of both parties.

IV. **Arbitration:** Arbitration is a binding procedure where the dispute is submitted to an arbitral tribunal consisting of one or more arbitrators. The tribunal makes a decision, known as an award, which is binding on the parties and finally settles the dispute. Unlike other ADR methods, arbitration involves an imposed decision and is considered an alternative to litigation.

V. **Family Group Conference:** This technique involves a meeting between family members and their extended related group. The focus is on learning skills for interaction and creating a plan to address issues within the family, such as abuse or ill-treatment.

VI. **Ombuds:** An ombuds is a third party appointed by an institution, such as a university or government agency, to handle complaints from employees, clients, or constituents. Ombuds use various techniques like counseling, mediation, conciliation, and fact-finding to resolve disputes. They make recommendations to the parties, but their solutions are not imposed. The power of the ombuds lies in their ability to persuade parties to accept the recommendations. If parties reject the proposed solution, they are free to pursue other avenues for dispute resolution.

VII. **Online Dispute Resolution System (ODR):** ODR refers to conducting ADR processes online. It can be provided by government entities and may be used globally in cases where domestic remedies are unavailable, such as domain name disputes. However, ODR services provided by government entities may not fully satisfy the "alternative" element of ADR.

VIII. **Lok Adalat:** Lok Adalat, meaning "people's court," is a system in India inspired by traditional dispute resolution through village elders. It is a non-adversarial process where mock courts are held by various legal services committees to exercise jurisdiction as they see fit. Lok Adalats focus on compromise, and when an agreement is reached, an award is made and enforced as a civil court decree. The decision of a Lok Adalat is final and cannot be appealed, providing a fast and cost-free resolution for the litigants.

IX. **Permanent Lok Adalat for Public Utility Services:** To address a major drawback in the existing scheme of Lok Adalats under Chapter VI of the Legal Services Authorities Act 1987, where unresolved cases are either returned to the court or parties are advised to seek remedy in a court of law, causing unnecessary delays in justice, Chapter VI A was introduced in the Legal Services Authorities Act 1987 through Act No.37/2002, effective from 11-06-2002. This chapter provides for the establishment of Permanent Lok Adalats to handle pre-litigation, conciliation, and settlement of disputes related to Public Utility Services as defined under section 22 A of the Legal Services Authorities Act 1987. The establishment of Permanent Lok Adalats aims to reduce the workload of regular courts significantly. One such example is the Permanent Lok Adalat for Public Utility Services in Hyderabad, India.

A Permanent Lok Adalat is typically presided over by a sitting or retired judicial officer as the chairman, accompanied by two other members, usually a lawyer and a social worker. There is no court fee involved in the proceedings. If a case is already filed in a regular court and the dispute is settled at the Lok Adalat, the fee paid in the regular court will be refunded. The procedural laws and the Evidence Act are not strictly followed when assessing the merits of the claim in the Lok Adalat.

The main condition for a Lok Adalat is that both parties in dispute should agree to a settlement. The decision made by the Lok Adalat is binding on the parties involved, and its order can be enforced through legal processes. There is no provision for appeal against the order of the Lok Adalat.

X. **Lok Adalats** have proven to be highly effective in settling money claims, as well as disputes like partition suits, damages, and matrimonial cases. The scope for compromise through a give-and-take approach is high in these cases, making Lok Adalats a valuable resource for the litigant public. One of the significant advantages of Lok Adalats is that they provide a fast and cost-free resolution for disputes.

XI. **Plea Bargaining:** Plea bargaining is a process in which the accused and the prosecutor in a criminal case reach a mutually satisfactory disposition of the case, subject to court approval. It typically involves the defendant pleading guilty to a lesser offense, usually for one or some of the counts in a multi-count indictment, in exchange for a lighter sentence compared to what could be imposed for the more severe charge.

In essence, plea bargaining refers to pre-trial negotiations between the defendant, through their counsel, and the prosecution. During these negotiations, the accused agrees to plead guilty in exchange for a reduced punishment. The final agreement reached through plea bargaining requires the court's approval to be binding.

By engaging in plea bargaining, both the defendant and the prosecution aim to reach a resolution that is mutually acceptable

and can expedite the legal process.

Arbitration and Conciliation Act, 1996:
The Arbitration and Conciliation Act, which became effective on January 25, 1996, encompasses the laws pertaining to arbitration. This act serves as a comprehensive and amending legislation, consolidating various provisions related to arbitration. It not only addresses domestic and international commercial arbitration but also covers the enforcement of foreign arbitral awards. Additionally, the act introduces new rules and regulations concerning conciliation.
The Arbitration and Conciliation Act is based on the United Nations Model Law, aiming to align India's arbitration laws with the standards set by the United Nations Commission on International Trade Law (UNCITRAL). By adopting the UN Model Law, the act ensures that the laws governing arbitration in India are in accordance with international norms and practices.

Objective of the Act:
The objective of the Arbitration and Conciliation Act, 1996 was to consolidate and revise the existing laws pertaining to domestic arbitration, international commercial arbitration, and the enforcement of foreign arbitral awards. Additionally, the Act aimed to define the legal framework governing conciliation and address matters related to or incidental to these dispute resolution processes.

Constitutional validity of the Act:
The Supreme Court, in the case of Babar Ali v Union of India, upheld the constitutional validity of the Arbitration and Conciliation Act. The court concluded that the Act is not unconstitutional, as it provides for judicial review to challenge awards in accordance with the prescribed procedure outlined in the Act.

Drawbacks of the Arbitration and Conciliation Act, 1996

1. **Misuse of Section 9**: One of the drawbacks of the Act is that parties may misuse Section 9, which allows them to obtain interim measures. After obtaining these measures, parties may fail to take the necessary initiative to constitute the arbitral tribunal. This can result in unnecessary delays in the arbitration process, defeating the purpose of a timely resolution.
2. **Lack of clarity regarding payment of arbitrator fees**: Section 14 of the Act states that the mandate of the arbitrator shall terminate, but it does not provide clear information on which party will be responsible for paying the arbitrator for the services rendered and the quantum of fees involved. This ambiguity can lead to disputes and further delay the resolution process.
3. **Absence of time frame for appointing substitute arbitrator**: Section 15 of the Act allows for the appointment of a substitute arbitrator after the termination of the previous arbitrator's mandate. However, the Act does not specify a time frame within which the substitute arbitrator should be appointed. This lack of clarity can lead to uncertainties and prolong the arbitration proceedings.
4. **Delay in issuing awards**: Despite the objective of the Act to provide quick and speedy settlement of disputes, there is no provision that explicitly enables the arbitrator to issue the award promptly. As a result, the intended goal of swift resolution remains unfulfilled, and parties may experience undue delays in receiving a final decision.
5. **Requirement to challenge the award in district court**: If the aggrieved party wishes to challenge the arbitration award, they are required to initiate the process again by filing a case in the district court. This additional step can be time-consuming and burdensome for the party seeking redress.

Overall, these drawbacks highlight certain limitations and ambiguities within the Arbitration and Conciliation Act, 1996, which can hinder the efficient and effective resolution of disputes through arbitration.

The Arbitration And Conciliation (Amendment) Act, 2019 –Key Highlights[3]
The Arbitration and Conciliation (Amendment) Act, 2019, which received the President of India's assent on August 9, 2019, brings several significant changes to the existing Arbitration and Conciliation Act of 1996. Here are the key highlights of the Amendment Act:

I. **Introduction of an Arbitral Institution:** Section 1(ca) now defines an "arbitral institution" as an institution designated by the Supreme Court or a High Court under the Act. This provision aims to establish recognized bodies that can oversee and facilitate arbitration proceedings.
II. **Appointment of Arbitrators:** The Amendment Act empowers the Supreme Court (for international commercial arbitration) and the High Court (for other cases) to designate arbitral institutions responsible for appointing arbitrators. These institutions will be graded by the newly established Arbitration Council of India. In situations where a graded institution is unavailable, the Chief Justice of the respective High Court may maintain a panel of arbitrators. The arbitral institution will handle the appointment process in cases where no specific procedure is mentioned in the agreement. The institution must dispose of the appointment application within 30 days and determine the fees of the arbitral tribunal, subject to the rates specified in the Act.
III. **Establishment of the Arbitration Council:** Part 1A introduces the concept of an Arbitration Council of India, to be established by the Central Government. The Council, consisting of a Chairperson and various members, aims to promote and encourage arbitration, mediation, conciliation, and other alternative dispute resolution mechanisms. It will frame policies, guidelines, and professional standards related to arbitration and oversee the grading of arbitral institutions and

[3]Retrieved from https://www.azbpartners.com/bank/the-arbitration-and-conciliation-amendment-act-2019-key-highlights/on3-9-19

arbitrators.

IV. **Grading of Arbitral Institutions and Arbitrators:** The Council will establish grading criteria for arbitral institutions based on factors such as infrastructure, quality of arbitrators, and adherence to time limits for dispute resolution. The qualifications and experience of arbitrators will be determined according to the Eighth Schedule of the Act.

V. **Timelines:** The Amendment Act introduces specific timelines for arbitration proceedings. Pleadings, including the statement of claim and defense, must be completed within six months from the date the arbitrator(s) receive notice of their appointment. The arbitral award should be issued within twelve months from the completion of pleadings, both for domestic and international commercial arbitrations. Extensions of time will be granted if an application for extension is pending.

VI. **Amendments to Section 34:** Section 34, which pertains to the challenge of arbitral awards, clarifies that parties must rely on the record before the arbitral tribunal alone when challenging an award. The amendment replaces the phrase "furnishes proof that" with "establishes on the basis of the record of the arbitral tribunal that."

VII. **Amendments to Section 45:** Section 45 has been amended to replace the words "unless it finds" with "unless it prima facie finds." This change empowers the courts to refer matters to arbitration unless they find the arbitration agreement null and void, inoperative, or incapable of being performed.

The qualifications and experience required for arbitrators are as follows:
(i) **Advocate:** Must be an advocate with at least ten years of practice experience under the Advocates Act, 1961.
(ii) **Chartered Accountant:** Must be a chartered accountant with at least ten years of experience as defined by the Chartered Accountants Act, 1949.
(iii) **Cost Accountant:** Must be a cost accountant with at least ten years of experience as defined by the Cost and Works Accountants Act, 1959.
(iv) **Company Secretary:** Must be a company secretary with at least ten years of experience as defined by the Company Secretaries Act, 1980.
(v) **Officer of Indian Legal Service:** Must be an officer of the Indian Legal Service.
(vi) **Officer with Law Degree:** Must be an officer with a law degree and at least ten years of experience in legal matters in the government, autonomous bodies, public sector undertakings, or at a senior-level managerial position in the private sector.
(vii) **Officer with Engineering Degree:** Must be an officer with an engineering degree and at least ten years of experience as an engineer in the government, autonomous bodies, public sector undertakings, or at a senior-level managerial position in the private sector or self-employed.
(viii) **Officer with Senior Level Administrative Experience:** Must be an officer with senior-level administrative experience in the Central Government or State Government, or have senior-level management experience in a public sector undertaking, government company, or reputable private company.
(ix) **Person with Educational Qualification and Experience:** Must be a person with a degree-level educational qualification and at least ten years of experience in a scientific or technical stream in fields such as telecom, information technology, intellectual property rights, or other specialized areas in the government, autonomous bodies, public sector undertakings, or at a senior-level managerial position in the private sector.
In addition to the qualifications, the arbitrator must adhere to certain general norms, which include:

- **Impartiality and neutrality:** The arbitrator must maintain impartiality and neutrality and avoid any financial, business, or other relationships that could compromise their impartiality or create an appearance of bias.
- **Knowledge and expertise:** The arbitrator must be well-versed in the Constitution of India, principles of natural justice, equity, common and customary laws, commercial laws, labor laws, law of torts, making and enforcing arbitral awards, domestic and international legal systems on arbitration, and international best practices.
- **Ability to issue enforceable awards:** The arbitrator should have the capability to suggest, recommend, or write a reasoned and enforceable arbitral award in any dispute brought before them for adjudication.

Regarding confidentiality, the arbitrator, the arbitral institution, and the parties to the arbitration agreement must maintain the confidentiality of all arbitral proceedings, except for the award itself. Disclosure of the award may be necessary for the purpose of implementing and enforcing it.
The amendments made to the Arbitration and Conciliation Act in 2015 will not apply to arbitral proceedings initiated before October 23, 2015, unless the parties agree otherwise. This clarification overturns the position laid down by the Supreme Court in the case of BCCI vs. Kochi Cricket Private Limited.

The Arbitration and Conciliation (Amendment) Act, 2021[4]
Following intense discussions and debates, the Arbitration and Conciliation Amendment Act 2021 (referred to as the 'Amendment') was ultimately approved by the Parliament on March 10, 2021. This Amendment was intended to supplant the Arbitration and Conciliation (Amendment) Ordinance, 2020, which was enacted on November 20, 2020, during a period when the Parliament was not in session.

Unconditional Stay on Awards;
Section 34(2)(b) of the Act allows for an arbitral award to be challenged and set aside if it goes against the public policy of India.

[4]https://www.mondaq.com/india/arbitration-dispute-resolution/1169106/arbitration-and-conciliation-amendment-act-2021-what-it-holds-for-foreign-investors

The Explanation further explains that such conflict with public policy includes instances where the award was influenced or impacted by fraud or corruption. However, Section 36 states that an application to set aside an award under Section 34 does not automatically halt the enforcement of the award. Instead, the court has the authority to grant a stay on enforcement, subject to appropriate conditions.
With the Amendment, a significant change has been made to Section 36(3) by adding an additional proviso. This proviso states that if the Court finds that a prima facie case has been established that: (i) the arbitration agreement or contract on which the award is based, or (ii) the making of the award was influenced or affected by fraud or corruption, the Court shall unconditionally stay the award until the challenge to the award under Section 34 is resolved.

Qualifications of Arbitrators;
The Arbitration and Conciliation Amendment Act 2019 introduced Part 1A into the Act, which established the Arbitration Council of India (ACI). Within this section, Section 43J introduced the Eighth Schedule, which outlined the qualifications and experience required for appointment as an arbitrator. However, the Eighth Schedule faced significant criticism due to its departure from the principles of party autonomy. It was seen as restrictive and unfairly prohibitive towards the appointment of foreign arbitrators. This approach was considered contrary to the essence of arbitration and detrimental to India's reputation as an international arbitration hub. It is important to note that these amendments have not been enforced as the ACI has yet to be established.
The 2021 Amendment has addressed this concern by completely removing the Eighth Schedule. It has been omitted, and Section 43J now states that the qualifications, experience, and accreditation norms for arbitrators will be specified by regulations. The indication is that these regulations will be formulated by the ACI. The Statement of Object and Reasons accompanying the amendment states that this step is being taken to promote India as a hub for international commercial arbitration and to attract distinguished arbitrators to the country. Therefore, the regulations to be drafted by the ACI are expected to prioritize party autonomy and align with international standards.

Conclusion
The objective of the 1996 Act was to establish a prompt and cost-effective mechanism for resolving disputes. In India, arbitration has gained popularity as a preferred method for resolving business conflicts. However, the arbitration institution in India is still evolving and has not fully met the demands arising from the country's commercial growth. Despite this, India cannot be characterized as a jurisdiction with an inclination against arbitration.
Indian courts, despite their interventionist tendencies and extensive judicial review, generally refrain from interfering with arbitral decisions. A reliable and stable dispute resolution mechanism is crucial for a rapidly expanding economy to attract foreign investment. Given the significant backlog of cases in Indian courts, both domestic and international parties involved in commercial disputes prefer arbitration as a means of resolution.
While Indian arbitration has not always adhered to global best practices, there has been a notable shift in attitude over the past five years. Courts and legislators have taken steps to align Indian arbitration legislation with international standards.
With the pro-arbitration stance of the courts and the implementation of the Amendment Acts in 2015, 2019, and 2021, it is expected that these best practices will soon be integrated into Indian arbitration law. Exciting times lie ahead for Indian arbitration jurisprudence, and our courts are prepared to handle numerous cases involving the interpretation of the Act's various amendments.

Bibliography:
A. Law Commission Reports
    1. Law Commission of India, 176th Report.
B. Legislations & Codes
    1. Arbitration and Conciliation Act, 1996.
C. Websites And Blogs
    1. Justice Indu Malhotra: Ad-hoc Arbitrations keep on lingering as lot of Retd Judges delay them deliberately' (Latest Laws.Com, 21 June, 2020) https://www.latestlaws.com/latest-news/justice-indu-malhotra-ad-hoc-arbitrations-keep-on-lingering-as-lot-of-retd-judges-delay-them-deliberately/
    2. Retrievedfromhttps://www.mkgandhi.org› autobio›chap39visitedon5-10-13
    3. Dr.S.R.Myneni,'*AlternateDisputeResolution*',AsiaLawHouse,2015,pg.10
    4. Retrievedfromhttps://www.eeoc.gov/federal/adr/ombuds.cfmvisitedon19/5/2017
    5. Retrieved from http://www.legalservicesindia.com/article/article/plea-bargaining-present-status-in-india-658-1.htmlvisitedon19/5/2017
    6. Retrieved from https://www.azbpartners.com/bank/the-arbitration-and-conciliation-amendment-act-2019-key-highlights/on3-9-19
    7. P.C. Rao & W. Sheffield, *Alternative Dispute Resolution,* 33 (1st ed., 1997).