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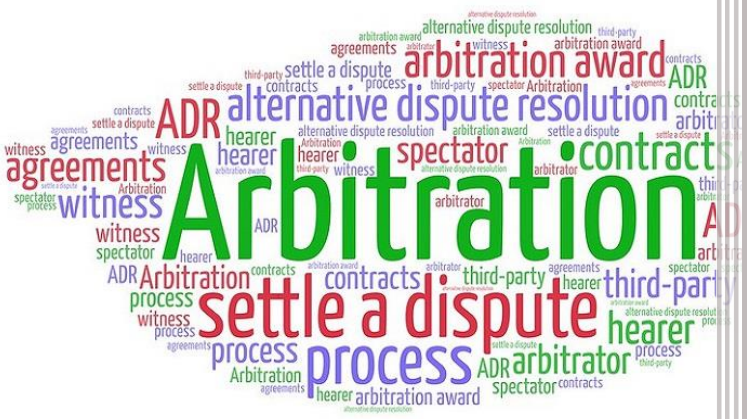

TRANSITION FROM LITIGATION TO ADR

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TRANSITION FROM LITIGATION TO ADR

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INTRODUCTION

A variety of dispute resolution processes exist so as to settle disputes stemming from the course of business. As a dating back tradition, some of the processes, such as litigation, are more familiar to considerable amount of businesspersons, while alternative dispute resolution ("ADR") methods may be less well understood. However, the survey with regard to the corporate attitudes and practices to international arbitration conducted by the School of International Arbitration, Queen Mary College, University of London, and PricewaterhouseCoopers in 2006 has been revealed that, of the 73% of respondents who preferred international arbitration as their dispute resolution mechanism; either alone (29%) or in combination with ADR mechanisms in a multi-tiered, or escalating, dispute resolution process (44%). On the other hand, only one out of ten (10%) corporations prefer transnational litigation whilst resolving their disputes at stake.

THE FOUR VERSIONS OF "ADR

1. ADR - "Alternative" Dispute Resolution is now considered to be politically and sociologically incorrect in some cultures. 'Alternative' reflects egocentric description of the world by a few trial lawyers.

2. ADR - "Additional" Dispute Resolution was an early transition to placate defensive lawyers who were concerned that litigation was being linguistically downgraded. Everyone acknowledges that there are statistically few conflicts which definitely need a judicial decision (like brain surgery).

3. ADR - "Appropriate" Dispute Resolution is a helpful reworking of the letter "A" to bring to the forefront the vital diagnostic question "which intervention is appropriate for which conflicts at what time?"

4. ADR - "Assisted" Dispute Resolution as a description elevates the area of study and practice to embrace a wide range of professions and working groups. Potentially, this label may reduce some of the competitive turf grabbing that has occurred between traditional and newer work groups such as therapists, lawyers, mediators, financial consultants, and change-managers.

ADR vs LITIGATION

Simply stated, **litigation** is a formal, generally public process which resolves disputes through a court with a judge or jury. It is subject to strict rules imposed by law governing the conduct of the proceeding, such as the formal rules of evidence. **Arbitration** is private process whereby parties work with a neutral third party to hear both sides and make a final and binding decision, using agreed-upon rules governing how the process will work. **Mediation** is a negotiation facilitated by a neutral third party. The mediator does not impose a decision, but helps the parties come to an amicable resolution. Mediation is useful to help the parties can find common ground, while arbitration is used as an alternative to litigation when the parties cannot resolve their dispute and need a third-party to impose a decision.

BENEFITS OF ARBITRATION

For many types of disputes, arbitration offers a better alternative to litigation. Its advantages include:

1. **Flexibility and control**. Parties can set terms in their arbitration contract governing how the process will work. This includes establishing rules regarding discovery, hearings, time limitations and other matters. In addition, parties can schedule hearings and deadlines to accommodate their needs.

2. **Speed**. According to statistics of the American Arbitration Association, on average, U.S. District Court cases took 12-16 months longer to get to trial than cases using arbitration.

3. **Low cost**. Less time spent to resolve a dispute means lower costs for attorneys' fees. In addition, discovery is much more limited in arbitration, and appeals are very *limited*, so those costs are all saved.

4. **Simplified rules of evidence and discovery.** Typically, there are limits on the nature and scope of discovery and time limits on how long the process can take. Issues are handled through phone calls rather than multiple hearings, subpoenas, depositions, interrogatories and the like. And, the strict rules of evidence don't apply.

5. **Privacy and confidentiality**. Arbitrations are private with only designated parties in attendance and the proceedings are strictly confidential. In contrast, litigation is open to be public.

6. **Arbitrator selection**. Parties can choose an arbitrator with subject matter expertise as opposed to being assigned a judge randomly. This is particularly important in complex cases requiring specialized knowledge.

7. **Finality**. Appeal rights are *very* limited in arbitration, so disputes are finally resolved more quickly.

The world is witnessing a situation of pandemic and the conditions are far from being normal even in the near future. The state of affairs is dreadful as social distancing and lockdown are the only measures to contain the spread of Covid-19 so far. The administration of justice in India has a history of being delayed and the coronavirus has made the situation even worse. Although the Supreme Court has allowed the online filling and hearing of cases, one cannot neglect the fact that the judiciary is already overburdened and heavily clogged with tons of cases. An improvised and efficient solution is required to ease pressure on courts and the answer to this can be **Online Dispute Resolution or ODR.**

Online Dispute Resolution or ODR is a process to settle disputes outside courts, combining technology and alternative dispute resolution ("**ADR**") mechanisms. ODR covers disputes that are settled over the internet having been initiated in cyberspace but with a source outside it i.e., offline. Originally, arbitration was intended as an alternative to going to court for various kinds of disputes but with time the method itself has become complex and expensive. ODR offers a faster, transparent and accessible option for many companies to resolve disputes online particularly those who have high volume and low-value cases. In the past half-decade, India has seen significant growth in the volume of online transactions, no other position would be more convenient to accept ODR as an efficient mechanism to resolve disputes and hence implement a fast and fair dispute resolution system.

ODR METHODS

Online Dispute Resolution can be seen as an online equivalent of ADR as it primarily involves the use of negotiation, mediation or arbitration for dispute resolution.

- Synchronous ODR is a method of dispute resolution where the parties communicate with each other in real-time by using various video-conferencing applications.
- Asynchronous form is where communication is not conducted in real-time but via email or other such communication applications.
- Online Mediation is coming out to be the most favourable form of dispute resolution with nearly 70% of ODR platforms using the same to reach a conclusion. Typically, online mediation starts with sending an email to parties that contain basic information about the

proceedings followed by virtual meetings to be conducted in the chat rooms.

- Electronic Arbitration is a less popular method of online dispute resolution but its cover-up the process up to a certain extent.

Every practicable method of ODR is unique and efficient to itself and the beauty is that it can be tailored as per the needs of the parties.

ODR PLATFORMS

In recent times, a shift in the pattern of resolving disputes can be established as more and more ODR platforms have become operable in the country facilitating particular kinds of dispute resolution for many national and international companies. These ODR platforms have made easy the process of dispute resolution by combining the already existing process of ADR with cutting edge technology, making the process feasible and time convenient altogether.

- **CADRE** or **Centre for Alternate Dispute Resolution Excellence** is a website-based platform for ODR. First, one party approaches the platform which then contacts the other party. If both the parties agree then an arbitrator is appointed and time-stamped intimations are sent through e-mails or WhatsApp. Usually, the parties do not meet face to face but they make contact electronically via video calls. The decisions that are legally binding come within 20-25 days of time. CADRE has been resolving tenant and rental contract disputes for NestAway an online home rental start-up.
- **SAMA** is another ODR platform that facilitates easy access to high-quality ADR service providers and helps people to resolve disputes online. SAMA is being used as an ODR platform by ICICI Bank to resolve nearly 10,000 disputes with values going up as high as INR 20 lakh.
- **CODR** or **Centre for Online Dispute Resolution** positions itself as an institution that will administer cases online end to end.
- **AGAMI** is yet another non-profit ODR platform that aspires to create a better system of law and justice by providing time-efficient and feasible dispute resolution methods.

The top challenges that businesses face with B2B e-commerce adoption include:

STRATEGIC CHALLENGES

- **Lack of appreciation of B2B e-commerce as a strategic issue for Business**
  - B2B e-commerce adoption is a strategic issue which impacts multiple

stakeholders in an organization and has far reaching impact on the entire business. Despite this, it is often observed that businesses fail to associate B2B e-commerce adoption and its results with their organizational goal; which then adversely impacts the investments and priorities.

- It is also observed that B2B e-commerce adoption is often considered as an IT enabled cost cutting mechanism rather than a central strategic issue.
- Often businesses even fail to communicate the objectives of B2B e-commerce adoption at the beginning of the project; which is a shaky foundation to start on.

- **Lack of support from top management and other stake holders**
  - While most senior managers understood the importance of B2B e-commerce and supported its adoption, the same was often not available from top management and other stakeholders.
  - Moreover, even support from the senior managers tapered off as the project progressed.

OPERATIONAL CHALLENGES

- **Lack of effective change management processes**
  - Adopting B2B e-commerce is a big step for an organization as it completely affects the way business and day-to-day operations are carried out. People have to learn new technology, follow new processes and changes like these are never welcomed.
  - Lack of effective communication is the most cited reason for business process and change management failures. Hence, it is important to have an effective communication strategy in place to deal with questions and uncertainty. Other reasons include user resistance, lack of proper employee consultation process, employee transition process, lack of proper training, systems usability issues, and business operational issues.
  - Having an effective change manage process, which can very easily address these concerns, is critical for successful adoption of B2B e-commerce.

Although the charge is practically impossible to document, some observers feel that any form of non-court-supervised ADR is likely to be unfair when one party has a great resource advantage over the other. They argue that voluntary ADR rests on agreement rather than decree, and in reaching agreement the smaller, weaker party always suffers some sense of intimidation, however subtle, regardless of the merits of its case. A large corporation

proposing ADR to a smaller adversary should be prepared to counter this argument.

Principle. In some cases, the desire to clear a reputation or defend a principal can be powerful. A corporation is charged with fraud or some other offense tinged with immorality. A manager with a strong sense of innocence is charged with sexual harassment. An individual's insurance claim is denied on suspicion of arson. Private, informal means of resolution, like mediation or even minitrial, may not meet the need for personal vindication. Short of a full-blown trial, the only acceptable procedures are likely to be SJT or arbitration because they let both sides tell their stories to an impartial referee, who then delivers a clear-cut pronouncement of guilt or exoneration.

A well-drafted provision for determination will reflect the expert's function. The value of experts lies, above all, in their valuation and industry expertise. For this reason, parties should define the mandate or authority of any expert – or experts, where there is a panel – precisely and narrowly. They should not push an expert into making complex legal findings. In particular, they must specify whether the end result should be limited to a simple figure or extend to a fully reasoned analysis in a report. It is desirable to specify minimal procedural rules, such as the number of experts, whether members of a panel of experts may reach majority decisions, a possible time line, or how costs will be allocated. Even where the main contract contains detailed provisions on the expert's role, parties do well to draw up detailed terms of appointment, identifying procedures for gathering evidence, interviewing witnesses and ensuring confidentiality. As a matter of good sense and indeed law in some jurisdictions, the agreement should be in writing.

By contrast, typical arbitration agreements provide that any arbitral tribunal will have jurisdiction to resolve all disputes arising out of or in relation to a given contract. Parties to an arbitration agreement can easily adopt a substantial package of procedural law, rules and practices by specifying a seat of arbitration and the applicable institutional rules. This makes detailed terms of appointment unnecessary. The difference between the narrow remit of an expert and the broad remit of an arbitrator may be reflected in different approaches to the interpretation of expert determination and arbitration clauses. The English Court of Appeal has held that, since, in a particular contract, the parties did not intend expert determination to serve as a single forum for resolving disputes but only a narrow range of issues, there could be no presumption in favor of a broad

interpretation of an expert determination provision.

Historically, English agreements specified that a valuer would decide as an expert and not an arbitrator. Although the label 'expert' or 'arbitrator' may of itself not be conclusive, this is helpful where certain types of valuation, such as rent reviews, are in practice sometimes settled by an arbitrator. There is less likely to be confusion where an M&A contract also includes an arbitration agreement, which is clearly different in specifying a seat of arbitration and probably institutional rules. Still, it is worth making the distinction.

CASE LAW

SUPREME COURT OPINIONS

In view of the recent amendments to the Arbitration and Conciliation Act 1996, the Supreme Court held that it would confine its examination only to the existence of an arbitration agreement in an application seeking the appointment of an arbitrator under Section 11. It is therefore likely that the courts may leave the arbitral tribunal to answer the question of compliance with pre-arbitral steps.

Indian courts, including the Supreme Court, have dealt with the question of enforceability of pre-arbitral steps before the 2015 amendment. In particular, the Supreme Court has emphasized the importance of the parties' conduct before initiating arbitration. For example, if based on the parties' conduct, the court believes that relegating them to pre-arbitral mechanism would be an empty formality, it will be reluctant to interpret pre-arbitration requirements to be mandatory in nature.

In *Visa International Limited v Continental Resources (USA) Limited* – a case where the clause provided amicable settlement before reference to arbitration – the Supreme Court referred to letters exchanged between parties and inferred that attempts were made for amicable settlement with no result, leaving no option but to invoke arbitration. A similar view was taken by the Supreme Court in *Swiss Timing Limited v Commonwealth Games 2010 Organizing Committee.*

In *Demerara Distilleries Private Limited v Demerara Distillers Limited* the Supreme Court had, while dealing with an application seeking appointment of an arbitrator, rejected the plea that invocation of arbitration was premature. Under the agreed mechanism, the parties had decided that the differences would be resolved first by mutual discussions, followed by mediation, and only if mediation failed would they arbitrate. The court inferred from the correspondence between the

parties that any attempt at that stage to resolve disputes by mutual discussions and mediation would be an empty formality and proceeded to appoint an arbitrator.

DELHI HIGH COURT OPINIONS

The Delhi High Court has held the clause providing for conciliation or mutual discussion before invocation of arbitration to be directory and not mandatory in view of Section 77 of the act. The court held that there should be no bar on filing proceedings to refer a matter to arbitration if this is necessary to preserve the parties' rights (e.g., limitation). However, in certain cases, there may be an effective need for conciliation. In such cases, the parties should be directed to take up the agreed procedure for conciliation and mutual discussion in a time-bound and reasonable period before proceeding with arbitration.

In another case before the Delhi High Court, a party had challenged an award on the grounds that the pre-condition of conciliation provided under the contract was not resorted to before invoking arbitration. The court dismissed the contention while relying on *Ravindra Kumar Verma*, holding the said pre-arbitral step to be directory. The Delhi High Court has followed this decision by holding similar clauses to be directory and has proceeded with the appointment of an arbitrator. Both the Allahabad and Rajasthan High Courts have taken a view similar to that of the Delhi High Court.

BOMBAY HIGH COURT OPINIONS

On the other hand, in *Tulip Hotels Private Limited v Trade Wings Limited* the Bombay High Court dismissed a petition for the appointment of an arbitrator where the parties had failed to follow the prescribed pre-arbitral step of conciliation. The court held that where the parties agree to a specific procedure and mode for settling their dispute by way of arbitration and prescribe certain preconditions for referring the matter to arbitration, they must comply with those pre-conditions and only then can they refer the matter to arbitration. It is noteworthy that the specified pre-arbitration step in this case was conciliation under the act. However, in *Rajiv Vyas v Johnwin* the Bombay High Court refused to dismiss the application seeking the appointment of arbitrator and chose to refer the disputes to a conciliator while simultaneously constituting an arbitral tribunal to which the disputes would be referred in the event that the conciliation failed.

REFERENCES

(1) Section 11(6A) inserted by the Arbitration and Conciliation (Amendment) Act 2015.

(2) *Duro Felguera, SA v Gangavaram Port Limited* (2017) 9 SCC 729.

(3) This issue has yet to come up for consideration before the Supreme Court.

(4) (2009) 2 SCC 55.

(5) (2014) 6 SCC 677.

(6) (2015) 13 SCC 610.

(7) *Ravindra Kumar Verma v BPTP Limited* (2015) 147 DRJ 175.

(8) *Union of India v M/s Baga Brothers* 2017 SCC OnLine Del 8989.

(9) *JK Technosoft v Ramesh Sambamoorthy* 2017 SCC OnLine Del 10813.

(10) *Sun Security Services v Babasaheb Bhimrao Ambedkar University* MANU/UP/2994/2014: Arbitration Case 4/2013, decided on December 19 2014.

(11) *M/s JIL-Aquafil (JV) v Rajasthan Urban Infrastructure Development Project*, 2016 SCC OnLine Raj 3814: AIR 2016 (NOC 671) 313.

(12) 2010(1) Mh LJ 73.

(13) 2010 (6) Mh LJ 483