ALTERNATIVES TO LITIGATION IN INDIA

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It is now widely acknowledged that our litigation system requires drastic spring cleaning. This is not to minimize the role our courts, especially the superior courts, play in the promotion of the rule of law. Generally speaking, except litigants who stand to gain by delaying the process of justice, others do not perhaps enjoy taking amounts by way of expenses. This is true of all types of cases. There is always a great rush for interim orders of courts. Not many in India can afford litigation. This state of affairs makes people cynical about the judicial process, often subjecting it to ridicule. Where do we go from here?

In recent years, several conferences have been held in India, including a conference of Chief Ministers of the various States and Chief Justices of the High Courts, to devise appropriate strategies for dealing with the exploding docket problem. These exercises have no doubt created a greater awareness of the problem today than before at all levels concerned with the justice dispensing system and some progress has been achieved, at least at the level of the Supreme Court. Be that as it may, it is unlikely that the problem will get resolved in the near future. The Supreme Court does not appear to view with favour tribunalisation of justice. What then are our choices?

We have no other choice but to vigorously and quickly devise effective alternative options to litigation to ease the present weight of judicial business. Of course, India is not the only country which is buffeted by arrears of courts cases. Even the developed countries such as United States of America and the United Kingdom suffer from this problem, albeit on a lesser scale. The USA and, following its inspiration, several countries, including Australia, Canada, Germany, Holland, Hong Kong, New Zealand, South Africa, Switzerland and the United Kingdom have been using over the last 20 years or so what is popularly known as 'Alternative Dispute Resolution' (ADR) that encouraged the disputants to arrive at a negotiated understanding with a minimum of outside help. The primary object of ADR movement is avoidance of vexation, expense and delay and promotion of the ideal of "access to justice" for all. In other words, the ADR system seeks to provide cheap, simple, quick and accessible justice. The desirability and necessary of encouraging ADR on a large scale is hardly in dispute.

The ADR procedures consist of negotiation, conciliation, mediation, arbitration and an array of hybrid procedures, including mediation and last-offer arbitration(MEDOLA), mini-trial, med-arb and neutral evaluation. In countries like the USA, several federal and state judges have incorporated ADR techniques in their court room practice and are calling upon litigants to utilize them; legislation was also enacted to promote the use of ADR by Legislature and the Judiciary - are thus committed to the encouragement of ADR movement.

ADR techniques are extra judicial in character. They can be used in almost all contentious matters which are capable of being resolved, under law, by agreement between the

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parties. They have been employed with very encouraging results in several categories of disputes, especially civil, commercial, industrial and family disputes. In particular, these techniques have been shown to work across the full range of business disputes; banking; contract performance and interpretation; construction contracts; Intellectual Property Rights; insurance coverage; joint ventures; partnership differences; personal injury; product liability; professional liability; real estate; and securities. ADR offers the best solution in respect of commercial dispute of an international character.

Alternative dispute resolution is not intended to supplant altogether the traditional means of resolving disputes by means of litigation. It offers only a alternative options to litigation. There are still a large number of important areas, including constitutional law and criminal law, in respect of which there is no substitute for court decisions. ADR may not be appropriate for every dispute even in other areas; even if appropriate, it cannot be invoked unless both parties to a dispute are genuinely interested in a settlement.

The advantages of ADR are several. First, it can be used at any time, even when a case is pending before a court a law, though recourse to ADR as soon as the dispute arises may confer maximum advantages on the parties; it can be used to reduce the number of contentious issues between the parties; and, it (except in the case of binding arbitration) can be terminated at any stage by any one of the disputing parties. Second, it can provide a better solution to dispute more expeditiously and at less cost than litigation. It helps on keeping the dispute a private matter and promotes creative and realistic business solutions, since the parties are in control of the ADR proceedings. ADR procedures take only a day or a few days to arrive at a settlement. Third, ADR programmes are flexible and not afflicted with rigours of rules of proceedings. Even a failed ADR proceeding is never a waste either in terms of money or time spent on it, since it helps the parties to appreciate each other's case better. Fifth, ADR can be used with or without a lawyer. A lawyer, however, plays a very useful role in identification of the contentious issues, exposition of the strong and weak points in a case, rendering during negotiations and over-all presentation of his client's case. Sixth, ADR procedures help in the reduction of the work-load of the courts and thereby help them to focus attention on the cases which ought to be decided by courts. Seventh, ADR procedures permit parties to choose neutrals who are specialists in the subject-matter of the dispute. This does not mean that there will be a diminished role for lawyers. They will continue to play a central role in ADR processes; however, they will have to adapt their role to ADR requirements.

A number of ADR procedures are hybrids that combine two or more well established ADR procedures. ADR procedures can be broadly divided into two categories, namely, adjudicatory and non-adjudicatory. The adjudicatory procedures such as arbitration and binding expert determination lead to a binding ruling that decides the case. The non-adjudicatory procedures contribute to resolution of disputes by agreement of the parties without adjudication.
Of the several ADR techniques, "mediation" seems to be the most widely-used one; it is the same dispute resolution process as conciliation, except that in the case of the former the neutral third party plays a more active role in putting forward his own suggestions for the settlement of the dispute. Sometimes, the terms "conciliation" and "mediation" are used interchangeably. Other ADR techniques can be used where appropriate and what form is appropriate depend upon the facts and circumstances of each case.

A brief description of ADR procedures widely used is as follows:

Negotiation: A non-binding procedure in which discussions between the parties are initiated without the intervention of any third party with the object of arriving at a negotiated settlement of the dispute.

Conciliation/Mediation: A non-binding procedure in which an impartial third party, the Conciliator/mediator assists the parties to a dispute in reaching a mutually satisfactory and agreed settlement of the dispute.

Med-Arb: A procedure which combines, sequential, conciliation/mediation and, where the dispute is not settled through conciliation/mediation within a period of time agreed in advance by the parties, arbitration.

MEDOLA: A procedure in which, if the parties fail to reach agreement through mediation, a neutral person, who may be the original mediator or an arbitrator, will select between the final negotiated offers of parties, such selection being binding on the parties.

Mini-trial: A non-binding procedure in which the disputing parties are presented with summaries of their case and then an opportunity to negotiate a settlement with the assistance of a neutral adviser.

Arbitration: A procedure in which the dispute is submitted to an arbitral tribunal which makes a decision (an "award") on the dispute that is binding on the parties.

Fast-track Arbitration: A form of arbitration in which the arbitration procedure is rendered in a particularly short time and at reduced cost.

ADR is by no means a recent phenomenon, through it has been organised on more scientific lines, expressed in more clear terms and employed more widely in dispute resolution in recent years than before. The concept of parties settling their disputes by reference to a person or persons of their choice or private tribunals was well-known to ancient India. Long before the king came to adjudicate on disputes between persons such disputes were quite peacefully decided by the intervention of the *Kulas* (family or clan assemblies), *Srenis* (guilds of men following the same occupation), *Parishads* (assemblies of learned men who knew law) and such other autonomous bodies. There were *Nyaya Panchayat* at grass-roots level before the advent of the British system of justice.

Even in day-to-day affairs, in respect of some categories of disputes, ADR procedures are invoked sometimes without conscious thought, *e.g.,* disputes within the family, between friends, between neighbours, dispute involving employers and employees, etc.

The Constitution of India calls upon the State to provide free legal aid to ensure that opportunities for securing justice are not denied to any citizen by reason of economic or other disabilities. It was in discharge of this obligation that the Committee for Implementing Legal Aid Schemes (CILAS) was established in 1980. The CILAS had initiated non-formal fora known as *Lok Adalats.* A *Lok Adalat,* which means a 'people's court', is not, however, a court in its accepted connation; it is a forum where voluntary effort aimed at bringing about settlement of disputes

between the parties are made through conciliatory and persuasive efforts. *Lok Adalats* provides speedy and inexpensive justice in both rural and urban areas. They specially cater to the needs of weaker sections of the society.

The Members of *a Lok Adalat,* usually three, act as conciliators and are drawn generally from amongst serving or retired judicial officers, social workers and advocates. *Lok Adalats* are organised with the financial assistance rendered by both the Central and State Governments and are monitored by the judiciary. As on 31 March 1996, more than 13,000 *Lok Adalats* were organized and over five million cases were settled. These cases related primarily to motor accidents, land acquisition, family disputes, mutation of land, encroachments on forest land, bank loans, workmen's compensation and compoundable criminal offences. While the achievements of *Lok Adalats* are significant, they have not been able to attract cases involving heavy financial stakes or important civil litigation. Private litigation remained totally outside the ambit of *Lok Adalats.* Even Government departments or public sector undertaking do not seem to think of *a Lok Adalat as* a major forum for alternative dispute resolution. However, in the socio-economic conditions that prevail in India there is a clear and urgent need to make greater use of the conciliatory process, already set in motion through this medium of *Lok Adalats,* at least in respect of certain categories of disputes. The Legal Services Authorities Act, 1987 has been enacted by Parliament to confer statutory status on *Lok Adalat* and also to regulate their functions. It has brought into existence the National Legal Services Authority in place of CILAS. In the context of growing number of cases in the courts as also the need to provide for expeditious disposal of commercial disputes in the context of economic reforms undertaken in India in recent years, it was widely recognised that the law on arbitration need reform. Accordingly, the Arbitration and Conciliation Act, 1996, was promulgated which came into force on 25th January, 1996. It is modelled largely on the UNCITRAL Model Law on International Commercial Arbitration and the UNICTRAL Conciliation Rules. However, the Ordinance seeks to go beyond the aforesaid Model Law and Conciliation Rules inasmuch as it makes provisions for arbitration and conciliation of domestic disputes as well. Any domestic dispute, not merely a commercial one, which is capable of being resolved by agreement between the parties, may become the subject-matter of arbitration, conciliation or any other ADR programme.

The Act consolidates and amends the law relating to domestic arbitration, international commercial arbitration and enforcement of foreign arbitral awards as also defines the law relating to conciliation arbitration and enforcement of foreign arbitral awards as also defines the law relating to conciliations. There are also provisions regarding arbitration in other Central and State enactments in force in India.

Procedures also exist which combine, sequentially, direct negotiations and, where the differences are not settled through direct negotiations, compulsory arbitration. An example of this procedure is contained in the Government of India Scheme for Joint Consultation and Compulsory Arbitration for Central Government Employees. Under the Scheme, if the Government and the employee fails to reach agreement in direct negotiations on matters relating to conditions of service and work, etc., the disagreement is required to be referred to a Board of Arbitration, if so desired by either side. And, subject to the over-riding authority of Parliament, the recommendations of the said Board will be binding on both sides.

Government contracts generally provide for compulsory arbitration in respect of disputes arising there under and usually the arbitrators appointed to decide such disputes are senior government officers. The large numbers of public sector undertaking also follow a similar procedure. There is also Government of India's Scheme, evolved on the Directors of the Supreme Court, with regard to settlement of disputes between one Government Department and another and one Government Department and a Public Enterprise and between Public Enterprises themselves. This Scheme provides for the constitution of a standing Committee of senior officers to ensure that no litigation involving such disputes is taken up in a court or a tribunal without the matter having been first examined by the said Committee and the Committee's clearance for litigation obtained.

The Ministries concerned in specific cases are also represented in the said Committee. The Committee assesses the reasonableness of the rival stands before it makes up its mind. This procedure has helped in an amicable settlement of a large number of disputes which would have otherwise ended in litigation.

There is also a permanent machinery of arbitrators constituted by the Government of India to settle all current and future commercial disputes between public sector undertaking inter-se as well as between a public sector undertakings inter-se as well as between a public sector undertaking and a Government Department. The award of the arbitration in such a dispute is binding on the parties to the dispute. Any party aggrieved by the award may make a reference for setting aside or revision of the award to the Union Law Secretary whose decision binds the parties finally and conclusively.

Courts in India also appoint arbitrators of their choice in certain eventualities. There are also a number of commercial organizations which provide a formal and institutional base to commercial arbitration and conciliation.

There are several merchant associations which provide for in-house arbitration facilities between the members of such associations and their customers. In all such cases, the purchase bills generally require the purchasers and sellers to refer their disputes in respect of the purchase or the mode of payment or the recovery thereof to the sole arbitration of the association concerned, whose decision is final and binding on the parties. Stock exchanges in India also provide for in-house arbitration for resolution of disputes between the members and others. The Board of Directories of each stock exchange constitutes the appellate authority for hearing appeals from the ward of the arbitral tribunal. It appears that these in-house facilities have proved quite effective.

India has recently entered into bilateral investment protection agreements with the United Kingdom, Germany, Russian Federation, The Netherlands, Malaysia and Denmark. Each agreement makes provision for settlement of disputes between an investor of one Contracting Party and the other Contracting Party in relation to an investment of the former through the following ADR procedures: negotiation, conciliation and arbitration. India is also a party to the Convention Establishing the Multilateral Investment Guarantee Agency which provides for settlement of disputes between States parties to the Convention and the Multilateral Investment Guarantee Agency through negotiation, conciliation and arbitration. There are a number of agreements in other sectors to which India is a party containing provisions for dispute-resolution through ADR procedures.

Of the enactments having a bearing on the subjects of conciliation, special reference may also be made to the Code of Civil Procedure, 1908 which contains provisions enjoining a duty on courts to make efforts and to assist the parties in arriving at a settlement in certain categories of suits/proceedings such as litigation by or against the Government or public officers in their capacity, litigation relating to matters concerning the family such as suits/proceedings for matrimonial relief, guardian and custody, maintenance, adoption, succession, etc. Similar provisions are also contained in the Hindu Marriage Act, 1955 and the Family Courts Act, 1984. The Industrial Disputes Act, 1947, also makes provisions for settlement of disputes through conciliation.

Consistent with the legislative policy on conciliation and with a view to providing a solution to the problem of congestion of cases in courts, the Himachal Pradesh High Court had evolved Pre-trial, In-trial and Post-trial Conciliation Project in the subordinate courts in Himachal Pradesh with effort from 1st September 1984. This scheme has been widely welcomed by the litigants. The Conference of Chief Ministers and Chief Justices, in their Resolution of 1993, as also the Law Commission of India in its 77th and 131' Reports, had recommended the operation of the conciliation courts as existing in Himachal Pradesh. The Calcutta Resolution adopted in 1994 by Law Ministers had also recommended that such conciliation courts should be constituted in other States also.

Barring arbitration and conciliation, other ADR procedures are virtually unknown in India. For a successful pursuit of ADR movements in India, three things are absolutely necessary; good law; infrastructural facilities for holding ADR proceedings; and, professionally trained ADR practitioners. Of these three, the aforesaid Act is in accord with internationally shared thinking on the subject. There are, however, no trained ADR practitioners in India at present and those who are doing ADR work are largely self-taught. Nor are the infrastructural facilities for holding ADR proceedings very attractive. There are also no institutions which have teaching or research programmes on ADR.

The ADR movement received a major fillip in India in 1993. A resolution adopted by the Chief Ministers and the Chief Justices on 4th December 1993 declared that courts were not in a position to bear the entire burden of justice system and that a number of disputes lent themselves to resolution by alternative modes such as arbitration, mediation and negotiation. It further emphasized the desirability of disputants taking advantage of ADR which provided procedural flexibility, saved valuable time and money and avoided the stress of a conventional trial. The Prime Ministers of India has on a number of occasions emphasized the need to turn to ADR for resolving disputes.

It is in this context that certain eminent people in the legal, administrative and commercial fields have come together and established an institution known as "The International Center for Alternative Dispute Resolution" (ICADR). The International Center is registered as a society under the Societies Registration Act, 1860 on 31" May 1995. It is an independent non-profit making organization. The International Center is intended to spread ADR culture in this part of the world.

Through it is seated in Delhi at present; it has plans to function through offices set up in other parts of the country. The main objectives of the Center are:

(1) to propagate, promote and popularize the settlement of domestic and international disputes by different modes of ADR;
(2) to provide facilities and administrative and other support services for holding conciliation, mediation, mini-trials and arbitration proceedings;
(3) to promote reform in this system of settlement of disputes and its healthy development suitable to the social, economic and other needs of the community;
(4) to appoint conciliators, mediators, arbitrators, etc. when so requested by the parties;
(5) to undertake teaching in ADR and related matters and to award diploma, certificates and other academic or professional distinction;
(6) to develop infrastructure for education, research and training in the field of ADR;
(7) to impart training in ADR and related matters and to arrange for fellowships, scholarships, stipends and prizes.

On 6th October, 1995, the ICADR was inaugurated by Shri P.V. Narasimha Rao, the Prime Minister of India. A new chapter in the history of the administration of justice has thus commenced. It is now a time of hope and change and of rising expectations for the ICADR.

While inaugurating the ICADR, the Prime Minister of India, observed:

While reforms in the judicial sector should be undertaken with necessary steps, it does not appear that courts and tribunals will be in a position to bear the entire burden of the justice system. It is incumbent on government to provide at reasonable cost as many modes of settlement of disputes as are necessary to cover the variety of disputes that arise. Litigants should be encouraged to resort to alternative dispute resolution so that the court system proper would be left with a smaller number of important disputes that demand judicial attention.

In addition to effort of private institutions such as the International Center for ADR, there is an urgent need for the judiciary to evolve court-annexed ADR schemes and make ADR a part of the judicial repertoire of dispute management. Experience gained so far does not lend support to the view expressed by some legal theorists that judicial sponsorship of ADR can compromise judicial authority in the context of adjudication. Government and public sector undertakings too should encourage recourse to ADR by incorporating mandatory ADR provisions in their contractual undertakings. Where appropriate, legislative changes should be introduced. ICADR has plans to seek corporate pledges and law firm pledges to use ADR.

ADR in India is in its infancy. Attitudes towards it of the professional, industrial and commercial groups are yet to be developed. The beginnings of a professional attitude and approach to the subject are, however, discernible. It is hoped that the coming years will be characterized by a search for alternative means of resolving disputes. The Indian experience in this regard may prove to be great relevance to other developing countries, for many of the problem faced in these countries are similar to those faced in India. The Indian initiative should not be seen, therefore as having only a local significance.