

FOREWORD

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Alternate Dispute Resolution ('ADR') mechanisms have been evolving at a staggering rate over the past few decades. In a country whose judiciary is notoriously burdened with a heavy backlog of cases, ADR mechanisms act as catalysts to accelerate the delivery of justice. The shortcomings of the judiciary are no secret. Courts are overburdened with a colossal backlog of pending cases, some of which are nearing a century in age. Even otherwise, the average time taken for the pronouncement of a judgment in a civil matter is at least 5 years. More, if the same is appealed. However, that is not the only criticism that the judicial system faces. The overly adversarial system creates an unwelcoming and overwhelming environment, especially for non-habitual litigants. To them, the process seems extremely unfamiliar and difficult, with the amount of time it consumes, the costs incurred, and the inconsistency and unpredictability of the decisions given. To a person who is not very closely linked to the system, a lack of clarity tends to weaken the faith in it as a whole. That apart, the technicalities of an adversarial system do not bring about just and fair resolution of the disputes on many occasions.

It would only be appropriate to mention here that the two said systems, namely court litigation and ADR mechanisms, cannot exist in a vacuum and therefore, are complementary to each other, at least at present. Ideally, in the near future there could exist a possibility that ADR and Litigation become completely independent of each other and have distinct identities of their own.

ADR, as it stands today, has many facets including Arbitration, Mediation and Lok Adalats. The emergence of ADR is not rooted in recent history, but dates back to a time when humanity itself was coming into being. This is primarily because of the fact that conflict is an inseparable part of existence, human and/or otherwise. Instances of conflict resolution outside litigation have been pointed out in almost all the religious scriptures. While resultant settlements and awards (as we would call them now) were not statutorily recognized back then, they were followed

unwaveringly, owing more to social and moral obligations than anything else. One of the primary reasons for its success was of course, that these settlements were specific to the region, culture and oftentimes religion of the parties as well as that of the neutral. In other words, the indigeneity of the process was a key factor that contributed to the success of the ADR mechanisms of the time.

Presently, of course, ADR reigns more supreme than ever before, especially because of the fact that even Courts are actively promoting its use over litigation. By virtue of their power under Section 89 of the Code of Civil Procedure, the Courts themselves refer the disputes to be settled outside litigation, thereby marking a shift of this power from Courts of Law to other bodies such as arbitral tribunals, mediators/conciliators (or panel thereof, as the case may be) or in the unique instance of India, Lok Adalats.

Closely akin to litigation is the theory and practice of adverting to arbitration as a form of ADR, wherein an independent third party, also referred to as a ‘neutral’, adjudicates disputes between parties. However, unlike traditional litigation, in arbitration and other forms of dispute resolution, the principle of party autonomy prevails. It is as a result of this principle that the parties get the right to choose not only the person(s) who will adjudicate their disputes, but are also free to choose the laws governing the contract and/or the dispute (the two may be chosen separately if the parties wish to do so) and even the procedure that the tribunal ought to follow for the adjudication of that particular set of disputes. For instance, in an International Commercial Arbitration (‘ICA’) wherein one of the parties is from India and the other is from France, they are free to mutually create a system where the law governing the contract is Indian Law, that governing the Arbitration Agreement is the Singaporean Law and the procedure to be followed throughout the entirety of the arbitral proceedings is the Arbitration Rules of the Singapore International Arbitration Centre (‘SIAC Rules’). Such is the flexibility of arbitration as a form of dispute resolution, which cannot be even remotely dreamt to govern litigation.

All being said and done, inevitably there are certain shortcomings of arbitration as a form of ADR. While one of the major benefits of arbitration over traditional litigation was intended to be cost saving, it has not lived up to that expectation. Per contra, arbitrations have become increasingly expensive on account of several cost components such as exorbitantly high fees charged by arbitrators and counsels especially in high-stakes matters, technical and administrative expenses, venue-

related expenses, high penalties in cases of default, high quantum of damages etc. Following suit is the aspect of time. While arbitration mechanisms were designed to be expeditious, delays have been observed in many stages, not only during the pendency of the proceedings, but also after as the award/settlement agreement invariably undergoes a separate challenge and/or enforcement procedure, and oftentimes both at the same time. The enjoyment of the fruits of such hard labour is delayed and therefore tends to cause a drop of the mechanism's image in people's eyes. Again, arbitration is also adversarial in nature and therefore, has the same limitations about the just and fair outcomes which prevail in court litigation.

That said, it may be noted that the pros outweigh the cons of arbitration in many ways. While there is incurrence of costs, the parties benefit tremendously by not only saving their relationships, but also retain their reputation, commercial and otherwise, on account of the characteristic feature of confidentiality. It is, in fact, a necessary evolution in the approach to conflict resolution as it reshapes the understanding of justice in a world as dynamic as it exists today.

While arbitration is a rights-based approach where one party benefits more than the other, mediation provides for an interests-based approach. In this context, I would like to talk about the most celebrated form of ADR, namely, mediation. In mediation, the primary objective is to reach an amicable and mutually acceptable solution, thereby creating a win-win situation for both or all the parties to the dispute, as the case may be. In my long-spanning experience, I have found these results to be unique and amazing in their own way. Since the settlements are tailored to suit the needs and best interests of the parties, they tend to be much superior in utility than the standard reliefs given by Courts.

Many a times, a cohesive and less formal environment, coupled with a calming approach of the mediator, prompts parties to keep their egos at bay and put on their collaborative hats. Unlike litigation and arbitration, mediation is more facilitative in nature, meaning that the power to resolve the dispute, in essence lies with the parties themselves rather than the Mediator. The Mediator plays a facilitative role by empowering the parties to reach the best possible solution in any situation, while simultaneously ensuring that the results are mutually advantageous. A common practice that mediators employ is the use of caucuses, wherein the actual needs and interests of the parties are assessed through open dialogue. Doing so ensures that the

mediation proceeds in a fruitful fashion and that underlying interests are surfaced and resolved. It is in instances like these, that it becomes safe to acronymize ADR as ‘Appropriate Dispute Resolution’.

While the enforceability of Mediation Settlement Agreements was in question up until some time ago, the Mediation Act, 2023 put a halt to said questions. The agreements so arrived at now have the force of law and are at par with a decree of the Court. With this development, the faith of the public in ADR has been reinforced and all qualms regarding the lack of its legal backing have been put to bay. Ultimately, the end goal of the process is not only to resolve disputes that have been tabled, but also to preserve and maintain relationships, if not enhance them.

A major advantage parties have while choosing a neutral to adjudicate their disputes is the option of choosing someone who has an in-depth understanding of the subject matter and would be able to effectively navigate through its nuances as and when required, essentially an expert. In matters involving high technical expertise, it becomes difficult for general practitioners to latch onto underlying problems. These could include *inter alia* construction and engineering disputes, or those relating to shipments and cargoes transported via air or water etc. A nuanced understanding of the subject matter and the intricacies it contains aids the neutral to reach better and more desirable outcomes, especially with respect to the estimation of losses and damages.

Interestingly, there can be instances wherein two or more methods of traditional dispute resolution are employed in a sequential manner for the adjudication of a dispute. These are more common and often more effective than the employment of a single form of traditional dispute resolution. In common parlance, this is called a Multi-Tier Dispute Resolution System (‘MTDRS’). It can be a case that during the pendency of an arbitration, there are certain disputes that are less complex in nature and require less technical expertise. In instances like these, the major issues may be resolved through arbitration and the issues requiring less intense consideration may be resolved through negotiation or mediation. In essence, all disputes need not be adjudicated with the same amount of vigour. The dispute resolution process can be tailored to suit the specifics of the dispute’s nature or its gravity and even urgency of the relief sought. In recent times, and especially in the arena of commercial disputes, MTDRS has become quite popular.

With the advent of advanced technology as it exists in the present day and age, Online Dispute Resolution (**‘ODR’**) has come into play. This is nothing but the provision of a platform to host one or all of the aforementioned dispute resolution processes .

The shift from a physical to a virtual set-up has brought about tremendous convenience in the lives of parties as well as that of the neutrals. Its advantages include but are not limited to reduction in time, costs, labour etc. It becomes extremely convenient for people to remain in the comfort of their homes or office spaces and continue to work effectively, irrespective of the weather conditions and other allied parameters. This mode of dispute resolution can have increased environmental benefits as well, especially if the neutral decides to proceed in a paperless fashion.

Especially after the global Covid-19 pandemic and the corresponding lockdown, the modern world has realised the significance of the internet more than ever before. This is true for populations across various age groups and even economic strata, as the world wide web has deeply penetrated into the homes of even the remotest of villages in the country. Of course, the lack thereof cannot be completely neglected, but in a general sense, a vast majority of the Indian and the global population has been exposed to the benefits of the internet, including ODR. I am happy to witness the emergence of fully digitalised platforms that use and promote ADR by providing end-to-end support with respect to conflict resolution on a virtual mode. Everything from first listening to the grievance, followed by suggesting the appropriate method of conflict resolution, offering a choice of neutrals from their panels, receipt of claims along with corresponding arguments, documents and supporting evidence, hearings, rendering of interim, partial and final awards and even the delivery of orders takes place completely virtually. In this manner, the actual costs incurred for the proceedings are drastically lower than that what would be incurred in a physical set up.

ADR has come a long way already but there is still a long way to go. We are all equal stakeholders in ensuring that the existing pressure on the judiciary is alleviated. This could be made possible only by promoting adequate, effective, timely and amicable resolutions to arrive at harmonious outcomes through cooperative problem-solving.

It gives me immense joy to inaugurate this series of publications for RGNUL’s Centre for Alternate Dispute Resolution (**‘RGNUL-CADR’**). It is initiatives like these that go a long way in propagating and promoting the ADR movement. Having gone

through the essays myself, I am certain that this is a huge leap forward in the field. I hope it reaches many more people, as it would help masses see how there exist much better and more peaceful forms of dispute resolution in comparison to the adversarial ones. This particular edition has meaningful submissions on ADR vis-à-vis various subjects such as IP Law, Family Law, Insolvency Law, Anti-Trust Law, Media Law, Company Law, Commercial Law, Medical Law. Which I believe will prove beneficial to the masses, academicians and practitioners alike, and will help them gain diversified perspectives on the various subject matters dealt with herein.

Kudos to the efforts of the entire team of RGNUL-CADR, who are increasing the appreciation and significance of the field of ADR through the dissemination of this literature. All the best!