UNIT 2

Alternative Dispute Resolution in India (ADR)

Learning Outcomes

Students will be able to:

- Analyze and compare the adversarial and inquisitorial systems of justice dispensation
- Explain the meaning and scope of ADR
- Evaluate the benefits of ADR
- Identify and explain the various types of ADR- Arbitration, Mediation, Conciliation, Lok Adalat and Tribunals
- Evaluate and explain the role of various Ombudsman- CVC, Lokpal and Lokayukta, Banking Ombudsman and Insurance Ombudsman

I. Adversarial and Inquisitorial Systems

Every legal system in this world can be broadly classified into two models: Adversarial and Inquisitorial. Both the systems aim at dispensing justice, but they differ in their techniques of adjudication and justice delivery mechanisms. Therefore, this classification becomes important.

Let us understand the meaning of each of the systems and the main differences between them.

In an adversarial system

- The parties in a legal proceeding develop their own theory of the case and gather evidence to support their claims.
- The parties are assisted by their lawyers who take a proactive role in delivering justice to the litigants.
- The lawyers gather evidence and even participate in cross-examination and scrutiny of evidence presented by the other disputing party.
- The role of the judge/ decision maker is rather passive as the judge decides the claims based solely on the evidence and arguments presented by the parties and their lawyers.

In an inquisitorial system

- The judge/ decision maker takes a centre-stage in dispensing justice.
- The role of the judge/ decision maker is active as he/ she determines the facts and issues in dispute.

- The judge/ decision maker also decides the manner in which the evidence must be presented before the court. For example, the judge may decide for presentation of a specific form of evidence, i.e. oral (witness statement) or documentary (correspondence between the parties through letters/emails) or a combination of both.
- The judge then evaluates the evidence presented before him/her and decides upon the legal claims. Therefore, this model of adjudication is also known as the interventionist/investigative model.
- Furthermore, in such a system, less reliance is placed on cross-examination and other techniques often used by lawyers to evaluate evidence of their opposing counsel.

The adversarial system is generally adopted in common law countries. Major common law jurisdictions include the UK, U.S, Australia and India. On the other hand, continental Europe which follows the civil law system (i.e., those deriving from Roman law or the Napoleonic Code) has adopted the inquisitorial system.

Having understood the basic framework of functioning of the two models of legal systems, let us analyse their advantages and disadvantages.

II. Advantages and Disadvantages of Adversarial and Inquisitorial System

The main advantages of an adversarial system include:

i. The use of cross-examination can be an effective way to test the credibility of witnesses presented;

ii. The parties may be more willing to accept the results when they are given effective control over the process.

The disadvantages of an adversarial system are the following:

i. The cost of the justice system falls upon the parties. This creates an in-built discrimination amongst the litigants. Parties with better resources are able to access justice by hiring competent lawyers and presenting sophisticated evidence which may not be immediately available for parties that lack these resources. Accessibility and affordability to justice are important challenges for the adversarial system of dispute resolution.

ii. The role of lawyers and the procedural formalities, e. g. cross examination may prolong the trial and lead to delays in several matters.

iii. Judges play a less active role; a judge is not duty bound to ascertain the truth but only to evaluate the matter based on the evidence presented before him/her.

> Peter Murphy in his book, Practical Guide to Evidence recounts an instructive example. A frustrated judge in an English (adversarial) court finally asked a barrister after witnesses had produced conflicting accounts, 'Am I never to hear the truth? 'No, my lord, merely the evidence', replied counsel.

The main advantages of an inquisitorial system include:

i. The system offers procedural efficiency as the active role of judges prevents delays and prolonged trials.

ii. The system preserves equality between the parties as even the stronger party with more resources and expert lawyers may not be able to influence the judges.

The disadvantages of this model include:

i. In an inquisitorial system, since the judge steps into the shoes of an investigator he/ she can no longer remain neutral to evaluate the case with an open mind.

ii. There may be a lack of an incentive structure for judges to involve themselves in proper fact finding.

Activity

Evaluate the features of the Indian legal system- Is it adversarial or inquisitorial? Take four case studies and see if the model would/should change with the change in nature of the case such as civil, criminal. public interest litigation etc.

III. Introduction to Alternative Dispute Resolution

Meaning and Scope:

Alternative Dispute Resolution (ADR) is an attempt to devise a machinery which should be capable of providing an alternative to the conventional methods of resolving disputes in the court system. ADR refers to the use of non-adversarial techniques of adjudication of legal disputes.

The history of ADR in India pre-dates the modern adversarial model of Indian judiciary. The modern Indian judiciary was introduced with the advent of the British colonial era, as the English courts and the English legal system influenced the practice of Indian courts, advocates and judges. Courts in India were established to have in place a uniform legal system on the lines of the English Courts. However, even before the advent of such formalistic models of courts and judiciary, the Indian legal system was characterised by several native ADR techniques.

The Vedic age in India, witnessed the flourishing of specialised tribunals such as

- Kula (for disputes of family, community, tribe, castes, races)
- Shreni (for internal disputes in business, corporation of artisans) and
- Puga (for association of traders/commerce branches).

In these institutions, interest-based negotiations dominated with a neutral third party seeking to identify the underlying needs and concerns of the parties in dispute. Similarly,

'People's courts' or 'Panchayat' continued to be at the centre of dispute resolution in villages.

Did you know?

The ancient position of ADR outside India was akin to the submission of disputes to the decision of private persons - recognised under the Roman Law by the name of Compromysm (compromise). Arbitration was a mode of settling controversies much favoured in the civil law of the continent. The Greeks attached particular importance to arbitration. The attitude of English law towards arbitration fluctuated from stiff opposition to moderate welcome. The Common Law Courts looked jealously at agreements to submit disputes to extra-judicial determination.

Source: Russell on Arbitration, 22ndEdn, 2003, p. 362, para 8-O02

Alternative Dispute Resolution (ADR) which at one point of time was considered a voluntary action on the part of the parties has now obtained statutory recognition with the enactment of Arbitration and Conciliation Act, 1996 and The Legal Services Authority Act, 1987. The incorporation of ADR mechanisms under Section 89 of Code of Civil Procedure,1908 is one more radical step taken by legislature for promoting ADR in India.

Section 89 CPC - Settlement of disputes outside the Court

(1) Where it appears to the Court that there exist elements of a settlement which may be acceptable to the parties, the Court shall formulate the terms of settlement and give them to the parties for their observations and after receiving the observations of the parties, the Court may reformulate the terms of a possible settlement and refer the same for: --

(a) arbitration;

(b) conciliation;

(c) judicial settlement including settlement through Lok Adalat: or

(d) mediation.

The purpose of this section is to enable the Courts to legally refer the matters to ADR to dispose of the cases expediently and to reduce the backlog.

In the modern era, several new and sophisticated forms of ADR techniques have developed. The different forms of ADR models/techniques are discussed in the subsequent parts of the chapter.

IV. Problems faced by Courts

The law courts are confronted with following problems, such as:

1. The lack of number of courts and judges which creates an inadequacy within the justice delivery system;
2. The increasing litigation in India due to increasing population, complexity of laws and obsolete continuation of some pre-existing legal statutes;
3. The increasing cost of litigation in prosecuting or defending a case, increasing court fees, lawyer's fees and incidental expenses;
4. Delay in disposal of cases resulting in huge pendency in all the courts.

V. Benefits of ADR

The ADR techniques are a speedier, informal and cheaper mode of dispensing justice when compared to the conventional judicial procedure. Following are the benefits of ADR:

- It is less time consuming as people resolve their disputes expeditiously in a short period as compared to courts.
- It is less costly than litigation.
- It is free from technicalities of courts as informal ways are applied in resolving disputes.
- It can be used at any time, even when a case is pending before a court of law, though recourse to ADR as soon as the dispute arises may confer maximum advantages on the parties.
- It provides a more convenient forum to the parties who can choose the time, place and procedure for conducting the preferred dispute redressal process.
- If the dispute is technical in nature, parties have an opportunity to select the expert who possesses the relevant legal and technical expertise.
- It is interesting to note that ADR provides the flexibility to even refer disputes to non-lawyers. For example, several disputes of technical character e.g. disputes pertaining to the regulation of the construction industry are usually referred to engineers rather than lawyers. ADR is based on more direct participation by the disputants rather than being run by lawyers and Judges. This type of involvement is believed to increase people's satisfaction with the outcome as well as their compliance with the settlement reached.

In the light of the apparent need and benefits provided by ADR, it has emerged as a successful alternative to court trials. Further, the rise of the ADR movement in India indicates that it is contributing tremendously towards reviving the litigant's faith in justice delivery mechanisms.

VI. Types of ADR

A. ARBITRATION

A.1 Introduction

The law relating to arbitration is contained in the Arbitration and Conciliation Act, 1996. It came into force on the 25th day of January, 1996. But it goes much beyond the scope of its predecessor, the Arbitration Act of 1940. It provides for domestic arbitration, international commercial arbitration and also enforcement of foreign arbitral awards. It also contains the new feature on conciliation.Recently, the Arbitration and Conciliation Amendment Act, 2015 has come into force to meet the requirements of alternative resolutions.

The Arbitration and Conciliation Act of 1996 is the relevant legislation that governs the process of arbitration in India. The statute provides for an elaborate codified recognition of the concept of arbitration, which has largely been influenced by significant movements of judicial reforms and conflict management across the world. In this regard, a special reference must be made to an international convention entitled, United Nations Commission on International Trade Law (UNCITRAL) Model Law on International Commercial Arbitration, 1985. After the birth of this international treaty, the United Nations General Assembly,

recommended that all countries must give due consideration to the said Model law, in order to bring uniformity in the law and practice of international arbitration. The Indian Arbitration and the Conciliation Act of 1996 is similarly modelled on the UNCITRAL model law.

A.2 Meaning

Arbitration is a term derived from the nomenclature of Roman law. Arbitration is a private arrangement of taking disputes to a less adversarial, less formal and more flexible forum and abiding by judgment of a selected person instead of carrying it to the established courts of justice.

A.3 Process of Arbitration

STEP 1 : **NOTICE - the party aggrieved will send a notice to the defaulting party initiating arbitration.**

STEP 2 : **Choose an Arbitrator -** The parties in an arbitration have the freedom to select a qualified expert known as an arbitrator.

- **Arbitration agreement** - An agreement whereby parties agree to submit their present or future disputes/ differences to arbitration. This may be in writing or via other means of communication.
- **Court referral to arbitration** - If a party to the dispute approaches the Court despite the presence of an arbitration agreement, the other party may raise a claim before the Court. The Court then must refer the dispute back to arbitration, if it has been previously agreed by the parties. This method of initiating arbitration is known as court referral to arbitration.

STEP 3 : **Statement of CLAIM -** The initial documents filed by the claimants enlisting the issues raised to be resolved in an arbitration.

STEP 4 : **Statement of COUNTER-CLAIM -** Respondent's reply to the claim presented by the claimant.

STEP 5 : **Proceedings start (decide the place and time to meet)**

- The process of dispute resolution through arbitration is confidential, unlike the court proceedings which are open to the public. This feature of arbitration makes it popular especially for commercial disputes where business secrets revealed during the process of dispute resolution are protected and preserved. Similarly, companies can maintain their commercial reputation, as they can prevent the general public or their customers from discovering the details of their on-going legal disputes.

STEP 6 : **AWARD**

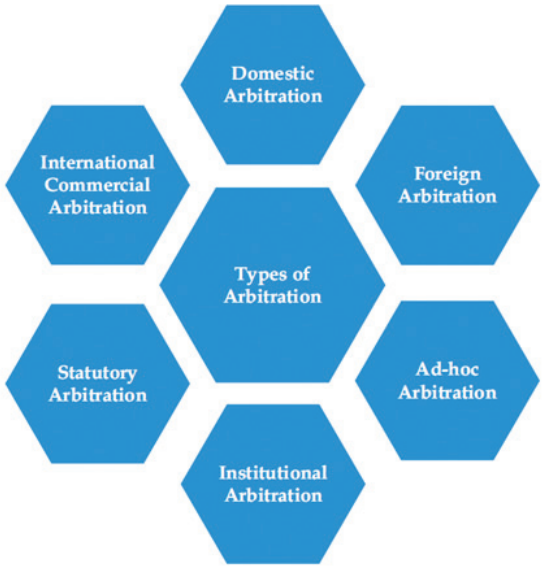
- The decision rendered by an arbitrator is known as an arbitral award.
- Similar to a judgment given by a judge, the arbitral award is binding on the disputing parties. Once an arbitral award is rendered, it is recognised and enforced (given effect to) akin to a court pronounced judgment or order.
- In addition to an arbitral award, the arbitrator also holds power and authority to grant interim measures, like a judge in the court. These interim measures

are in the nature of a temporary relief and may be granted while the legal proceedings are on-going in order to preserve and protect certain rights of the parties, till the final award is rendered. Therefore, an arbitral award holds several similarities with a court order or judgment.

- However, unlike a judgment rendered by a judge in the court, the award does not hold precedential value (see the doctrine of stare decisis which means "stand by the decision") for future arbitrations. Arbitrators are free to base their decisions on their own conception of what is fair and just. Thus, unlike judges, they are not strictly required to follow the law or the reasoning of earlier case decisions.

A.3.1 Setting aside of an arbitral award - An arbitral award rendered in an arbitration may be struck down or invalidated by the courts. The grounds of such invalidation are limited to: - incapacity of a party to enter into arbitration agreement in the first place, improper appointment of arbitrator, dispute falling outside the terms of the arbitration agreement, bias on the part of arbitrator, award violating public policy at large.

A.4 Types of Arbitration



- **Domestic Arbitration** - The arbitration in which the arbitral proceedings are held in India and both the parties to the dispute also belong to India and the dispute is decided in accordance with the substantive and procedural laws of India.
- **Foreign Arbitration** - An arbitration where arbitral proceedings are conducted in a place outside India but the arbitral award is required to be enforced in India.
- **Ad-hoc Arbitration** - An arbitration which is governed by parties themselves,without recourse to a formal arbitral institution. It may be domestic or international in character. Ad Hoc Arbitration means that the arbitration should not be conducted according to the rules of an arbitral institution. Since, parties do not have an obligation to submit their arbitration to the rules of an arbitral institution; they are free to state their own rules of procedure.
- **Institutional Arbitration** - An arbitration where parties select a particular institution, which in turn takes the arbitration forward by selecting an arbitrator and laying out the rules applicable

within an arbitration, e.g., mode of obtaining evidence, etc. There are several institutions to govern arbitration. Examples of prominent institutions of arbitration include, The London Chamber of International Arbitration (LCIA) which has its offices across the world, including New-Delhi, India.

- **Statutory Arbitration** - This type of arbitration emanates from an enactment of the Parliament or State Legislature. In such a case parties have no option as such but to abide by the law of the land. The consent of parties is not necessary and is a compulsory form of arbitration. For example, the Defence of India Act, 1971 is one such legislation that mandates a recourse to arbitration in case of any dispute arising within the Act.
- **International Commercial Arbitration** - An arbitration in which at-least one of the disputing parties is a resident/body corporate of a country other than India. Arbitration with the government of a foreign country is also considered to be an international commercial arbitration. This form of arbitration has been defined specifically under section 2(1) (f) of the Arbitration and Conciliation Act, 1996.

Bharat Aluminum Company Limited ("BALCO") V/s. Kaiser Aluminum Technical Service, Inc. ("Kaiser") (2012 SC)

In Bhatia International v Bulk Trading S.A & Anr. ("Bhatia International") (2002), the Supreme Court had held that Part I of the Arbitration and Conciliation Act, 1996 ("Act") setting out the procedures, award, interim relief and appeal provisions with respect to an arbitration award, would apply to all arbitrations held out of India, unless the parties by agreement, express or implied, exclude all or any of its provisions. The Supreme Court set aside the doctrine in Balco V. Kaiser.

Brief Facts

1. An agreement dated 22 April, 1993 ("Agreement") was executed between BALCO and Kaiser, under which Kaiser was to supply and install a computer based system at BALCO's premises.
2. As per the arbitration clause in the Agreement, any dispute under the Agreement would be settled in accordance with the English Arbitration Law and the venue of the proceedings would be London. The Agreement further stated that the governing law with respect to the Agreement was Indian law; however, arbitration proceedings were to be governed and conducted in accordance with English Law.
3. Disputes arose and were duly referred to arbitration in England. The arbitral tribunal passed two awards in England which were sought to be challenged in India u/s. 34 of the Act in the district court at Bilaspur. Successive orders of the district court and the High Court of Chhattisgarh rejected the appeals. Therefore, BALCO appealed to the Supreme Court ("Court").
4. Another significant issue to be adjudged was applicability of section 9 (interim measures) of the Act.
5. During the pendency of arbitration proceedings in London, an injunction application was made by appellants, Bharti Shipyard Ltd., before the District Judge at Mangalore, against the encashment of refund bank guarantees issued under the contract (u/s 9 of the Act). The applications were allowed and were consequently challenged in the High Court of Bangalore. The Bangalore High Court set aside the application so allowed on the

grounds that the appellants had an alternative remedy (u/s 44 of the Act, being interim reliefs for international arbitration) in the courts of London and further since the substantive law governing the contract, as well as the arbitration agreement, is English law, the English courts should be approached. This was also challenged in this petition to the Supreme Court.

Held:

The judgment in detail analyses the provisions of various sections in the Act and applicability of Part I of the Act to international commercial arbitrations. Some significant issues dealt with in the judgment are as follows:

1. It was observed that the object of section 2(7) of the Act is to distinguish the domestic award (Part I of the Act) from the 'foreign award' (Part II of the Act)

2. It was held that there is a clear distinction between Part I and Part II as being applicable in completely different fields and with no overlapping provisions.

3. The Court has also drawn a distinction between a 'seat' and 'venue' which would be quite crucial in the event, the arbitration agreement designates a foreign country as the 'seat'/ 'place' of the arbitration and also select the Act as the curial law/ law governing the arbitration proceedings. The Court further clarified that the choice of another country as the seat of arbitration inevitably imports an acceptance that the law of that country relating to the conduct and supervision of arbitrations will apply to the proceedings. It would, therefore, follow that if the arbitration agreement is found or held to provide for a seat / place of arbitration outside India, then even if the contract specifies that the Act shall govern the arbitration proceedings, Part I of the Act would not be applicable or shall not enable Indian courts to exercise supervisory jurisdiction over the arbitration or the award. Therefore, it can be inferred that Part I applies only to arbitrations having their seat / place in India.

4. The Court dissented with the observations made in Bhatia International case and further observed on a logical construction of the Act, that the Indian Courts do not have the power to grant interim measures when the seat of arbitration is outside India.

5. The Court further held that in foreign related international commercial arbitration, no application for interim relief will be maintainable in India, either by arbitration or by filing a suit.

Conclusion of the Balco case:

The Court in this case also drew a distinction between a 'seat' and 'venue'. The arbitration agreement designates a foreign country as the seat/place of the arbitration and also selects the Act as the law governing the arbitration proceedings. The Court also clarified that the choice of another country as the seat of arbitration inevitably imports an acceptance that the law of that country relating to the conduct and supervision of arbitrations will apply to the proceedings. Therefore, it can be understood that Part I applies only to arbitrations having their seat / place in India.

However ,the 2015 Amendment Act has compensated for some of the shortcomings in BALCO by adding a provision to S.2(2) of the Act which laid down that the provision for interim relief by the court (S.9) shall be applicable to even foreign seated arbitrations.

The Arbitration and Conciliation Act, 1996 has ushered a new era of dispute resolution for domestic and commercial legal issues. On these lines, the Supreme Court of India has also affirmed that the Arbitration and Conciliation Act, 1996 was introduced in order to attract the 'international mercantile community'.

In *Konkan Railways Corp. Ltd. v. M/s Mehul Construction Co. (2000) 7 SCC 201*), the Hon'ble Supreme Court has emphasised that the increasing growth of global trade and the delay in disposal of cases in Courts under the normal system in several countries made it imperative to have the perception of an Alternative Dispute Resolution System, more particularly, in the matter of commercial disputes. When the entire world was moving in favour of a speedy resolution of commercial disputes, the United Nations Commission on International Trade Law way back in 1985 adopted the UNCITRAL Model Law of International Commercial Arbitration and since then, a number of countries have given recognition to that Model in their respective legislative system. With the said UNCITRAL Model Law in view the present Arbitration and Conciliation Act of 1996 has been enacted in India. The Arbitration Act of 1996 provides not only for domestic arbitration but spreads its sweep to International Commercial Arbitration too. All these aim at achieving the sole object to resolve the dispute as expeditiously as possible with the minimum intervention of a Court of Law so that the trade and commerce is not affected on account of litigations before a court. With that objective when the UNCITRAL Model has been prepared and the Parliament in our country enacted the Arbitration and Conciliation Act of 1996 adopting UNCITRAL, it would be appropriate to bear the said objective in mind while interpreting any provision of the Act.

In **Fuerst Day Lawson Ltd v Jindal exports Ltd, (AIR 2001 SC)** the Supreme Court observed that the object of the Arbitration and Conciliation Act of 1996 is to provide speedy and alternative solution to the dispute and avoid protraction of litigation. The provisions of the Act have to be interpreted accordingly.

B. MEDIATION

B.1 Meaning and Types

Mediation is a method of ADR in which parties appoint a neutral third party who facilitates the mediation process in-order to assist the parties in achieving an acceptable, voluntary agreement. Mediation is premised on the voluntary will of the parties and is a flexible and informal technique of dispute resolution.

Mediation is more formal than negotiation but less formal than arbitration or litigation. Unlike litigation and similar to arbitration, mediation is relatively inexpensive, fast, and confidential. Further, mediation and arbitration differ on the grounds of the nature of an award rendered. The outcome of mediation does not have similar binding like an arbitral award. However, though non-binding, these resolution agreements may be incorporated into a legally binding contract, which is binding on the parties who execute the contract.

Mediation can be classified into the following categories:

Evaluative mediation - Evaluative mediation is focused on providing the parties with an evaluation of their case and directing them toward settlement. During an evaluative mediation process, when the parties agree that the mediator should do so, the mediator will express a view on what might be a fair or reasonable settlement. The Evaluative mediator has somewhat of an advisory role in that s/he evaluates the strengths and weaknesses of each side's argument and makes some predictions about what would happen should they go to court.

Facilitative mediation - Facilitative mediators typically do not evaluate a case or direct the parties to a particular settlement. Instead, the Facilitative mediator facilitates the conversation. These mediators act as guardian of the process, not the content or the outcome. During a facilitative mediation session,

the parties in dispute control both what will be discussed and how their issues will be resolved. Unlike the transformative mediator, the facilitative mediator is focused on helping the parties find a resolution to their dispute. The facilitative mediator further provides a structure and agenda for the discussion.

Transformative mediation - Transformative mediation practice is focused on supporting empowerment and recognition shifts, by allowing and encouraging deliberation, decision-making, and perspective-taking. A competent transformative mediator practices with a micro-focus on communication, identifying opportunities for empowerment and recognition as those opportunities appear in the parties' own conversations, and responding in ways that provide an opening for parties to choose what, if anything, to do with them.

Mediation with arbitration - Mediation has sometimes been utilized to good effect when coupled with arbitration, particularly binding arbitration, in a process called 'mediation/arbitration'. The process begins as a standard mediation, but if mediation fails, the mediator becomes an arbiter.

This process is more appropriate in civil matters where rules of evidence or jurisdiction are not in dispute. It resembles, in some respects, criminal plea bargaining and Confucian judicial procedure, wherein the judge also plays the role of prosecutor.

Despite their benefits, mediation/arbitration hybrids can pose significant ethical and process problems for mediators. Many of the options and successes of mediation relate to the mediator's unique role as someone who wields no coercive power over the parties or the outcome. The parties' awareness that the mediator might later act in the role of judge could distort the process. Using a different individual as the arbiter addresses this concern.

Online Mediation - Online mediation employs online technology to provide disputants access to mediators and each other despite geographic distance, disability or other barriers to direct meeting.

B.2 Process of Mediation

The neutral third party facilitating the process of mediation is known as a mediator. Mediation does not follow a uniform set of rules, though mediators typically set forth rules that the mediation will observe at the outset of the process. Successful mediation often reflects not only the parties' willingness to participate but also the mediator's skill. There is no uniform set of rules for mediators to become licensed, and rules vary by state regarding requirements for mediator certification.

Broadly speaking, mediation may be triggered in three ways:

(i) Parties may agree to resolve their claims through a pre-agreed mediation agreement without initiating formal judicial proceedings (pre-litigation mediation). Pre Litigation mediation is not yet governed by any law in India.

(ii) Parties may agree to mediate, at the beginning of formal court proceedings (popularly known as court referrals). This is governed by Section 89 of the Code of Civil Procedure.

(iii) Mediation may be taken recourse of, after formal court proceedings have started, or even post trial, i.e. at the appellate stage.

Under the Indian law, contractual dispute (including money claims), similar disputes arising from strained relationships (from matrimonial to partnership), disputes which need a continuity of relationship (neighbour's easement rights) and consumer disputes have been held to be most suited for mediation.

For example, a suburban homeowner might find that the formal legal system offers no realistic way to deal with his neighbour's overly bright driveway lights that shine in his bedroom window. Such disputes however can be mediated. Mediation gives the participants an opportunity to raise and discuss any issues they might wish to settle.

For example, it might turn out that the neighbour lit his driveway because the home owner 's dog went on his lawn, or because the homeowner 's tree was encroaching upon his property. Because mediation can handle any number of outstanding gripes or issues, it offers a way to discuss (and solve) the problems underlying a dispute and creating a truly lasting peace.

The Supreme Court of India in its judicial decision has expressly clarified the ambit of mediation. According to ***Afcons Infrastructure Ltd. v. Cherian Varkey Construction Co. (P) Ltd., [(2010) 8 SCC 24]*** representative suits, election disputes, criminal offenses, case against specific classes of persons (minors, mentally challenged) have been excluded from the scope of mediation.

Activity

Identify a situation in which you would choose mediation as your preferred method of dispute resolution. Why is mediation the best method in this situation? What are the potential benefits and drawbacks of mediation in this situation?

C. CONCILIATION

C.1 Concept

- Part III of the Arbitration and Conciliation Act, 1996 deals with conciliation. Conciliation means "the settling of disputes without litigation".
- Conciliation is a process by which discussion between parties is kept going through the participation of a conciliator.
- Conciliation is a process similar to mediation as parties out of their own free will appoint a neutral third party to resolve their disputes.
- The key difference between mediation and conciliation lies in the role of the neutral third party. A mediator merely performs a facilitative role and provides a platform for the parties to reach a mutually agreeable solution. The role of a conciliator goes beyond that of a mediator. A conciliator may be interventionist in the sense that he/ she may suggest potential solutions to the parties, in-order to resolve their claims and disputes.
- If the parties reach agreement on the settlement of a dispute, a written settlement agreement will be drawn up and signed by the parties. If the parties request, the conciliator may draw up or assist the parties in drawing up the settlement agreement. [Section 73(2) of the Arbitration and Conciliation Act, 1996].
- When the parties have signed the settlement agreement, it becomes final and binding on the parties and persons claiming under them respectively. [Section 73(3) of the Act].
- The settlement agreement shall have the same status and effect as an arbitral award. This means it shall be treated as a decree of the court and shall be enforceable as such. *[Haresh Dayaram Thakur v. State of Maharashtra (AIR 2000 SC 2281]*

- Conciliation is also governed by Section 89, a provision inserted by the 2002 amendment of the Civil Procedure Code, 1908 (for short," CPC"). The Code is the primary legislation governing the method, procedure and legal practice of civil disputes. Similarly, conciliation only finds a reference in Section 89, Civil Procedure Code, 1908. The process and methods within conciliation have been described in the Arbitration & Conciliation Act, 1996. Further, the Industrial Disputes Act, 1947 also provides for conciliation as a viable means of resolving disputes in the labour sector.

D. LOK ADALAT

The concept of Lok Adalat (People's Court) is an innovative Indian contribution to the global legal jurisprudence. The institution of Lok Adalat in India, as the very name suggests, means, People's Court. "Lok" stands for "people" and the term "Adalat" means court. India has a long tradition and history of such methods being practiced in the society at grass roots level.

In ancient times the disputes were referred to" panchayats" which were established at village level. Panchayats used to resolve the dispute through arbitration. It has proved to be a very effective alternative to litigation. This very concept of settlement of dispute through mediation, negotiation or through arbitral process known as decision of "Nyaya-Panchayat" is conceptualized and institutionalized in the philosophy of Lok Adalat. It involves people who are directly or indirectly affected by dispute resolution. The evolution of movement called Lok Adalat was a part of the strategy to relieve heavy burden on the Courts with pending cases and to give relief to the litigants who were in a queue to get justice.

The modern institution of Lok Adalat is presided over by a sitting or retired judicial officer such as the chairman, with usually two other members- a lawyer and a social worker. A Lok Adalat has jurisdiction to settle any matter pending before any court, as well as matters at pre-litigative stage, i.e., disputes which have not yet been formally instituted in any Court of Law. Such matters may be in the nature of civil or compoundable criminal disputes. The salient features of Lok Adalat are participation, accommodation, fairness, voluntariness, neighbourliness, transparency, efficiency and lack of animosity.

D.1 The benefits of Lok Adalat include:

- There is no court fee and even if the case is already filed in the regular court, the fee paid will be refunded if the dispute is settled at the Lok Adalat.
- There is no strict application of the procedural laws and the disputing parties can directly interact with the judges.
- The decision of Lok Adalat is binding on the parties and its order is capable of execution through legal process.

Did you know?

The first Lok Adalat was held on March 14, 1982 at Junagarh in Gujarat. Lok Adalat's have been very successful in settlement of claims including- motor accident claims, matrimonial/family disputes, labour disputes, disputes relating to public service such as telephone, electricity, bank recovery cases etc.

Activity

'I had learnt the true practice of law. I had learnt to find out the better side of human nature, and to enter men's hearts. I realised that the true function of a lawyer was to unite parties riven asunder. The lesson was so indelibly burnt into me that the large part of my time during the twenty 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' (Gandhi) In the light of the aforesaid quote, evaluate the role of lawyers as social engineers. What role do ADR techniques and institutions such as Lok Adalat play in this respect?

F. OMBUDSMAN

An indigenous Swedish, Danish and Norwegian term, Ombudsman is etymologically rooted in the word "umboosrnaor", essentially meaning "representative".

Whether appointed by a legislature, the executive, or an organization, the typical duties of an ombudsman are to investigate complaints and attempt to resolve them, usually through recommendations (binding or not) or mediation. Ombudsmen sometimes also aim to identify systemic issues leading to poor service or breaches of people's rights. At the national level, most ombudsmen have a wide mandate to deal with the entire public sector, and sometimes also elements of the private sector (for example, contracted service providers). Further redress depends on the laws of the country concerned, but this typically involves financial compensation.

The Government of India has designated several ombudsmen (sometimes called Chief Vigilance Officer (CVO)) for the redress of grievances and complaints from individuals in the banking, insurance and other sectors being serviced by both private and public bodies and corporations. For example, the CVC (Central Vigilance Commission) was set up on the recommendation of the Santhanam Committee (1962-64). CVC has been conceived to be the apex vigilance institution, free of control from any executive authority, monitoring all vigilance activity under the Central Government and advising various authorities in Central Government organizations in planning, executing, reviewing and reforming their vigilance work.

About Banking and Insurance Ombudsman

- What is the Banking Ombudsman Scheme?

  The Banking Ombudsman Scheme is an expeditious and inexpensive forum for bank customers for resolution of complaints relating to certain services rendered by banks. Presently the Banking Ombudsman Scheme 2006 (As amended up to July 1, 2017) is in operation.

- Who is a Banking Ombudsman?

  The Banking Ombudsman is a senior official appointed by the Reserve Bank of India to redress customer complaints against deficiency in certain banking services covered under the grounds of complaint specified under the Banking Ombudsman Scheme 2006 (As amended up to July 1, 2017).

- Who is an Insurance Ombudsman?

  The Insurance Ombudsman are appointed by the Council for Insurance Ombudsman in terms of Insurance Ombudsman Rules, 2017 (as amended from time to time) and

empowered to receive and consider complaints alleging deficiency in performance required of an insurer (including its agents and intermediaries) or an insurance broker,

The major advantage of an ombudsman is that he or she examines complaints from outside the offending state institution, thus avoiding the conflicts of interest inherent in self-policing.

G. LOKPAL AND LOKAYUKTA

A Lokpal (caretaker of people) is an ombudsman in India. The Lokayukta (appointed by the people) is a similar anti-corruption ombudsman organization in the Indian states.

The institutions of Lokpal and Lokayukta were given formal recognition by the passing of The Lokpal and Lokayukta Act, 2013. The legislation aims to combat acts of bribery and corruption of public-servants — a term that has been given a fairly wide interpretation in the Act. The Act applies to the public servants in and outside India. It is important to note that the Act includes in its purview even the current and ex-prime ministers of India except in matters pertaining to international relations, external and internal security, public order, atomic energy and space. At least two-thirds of the members of Lokpal must approve of such an inquiry. It further provides that any such inquiry shall be held in camera and if the Lokpal comes to the conclusion that the complaint deserves to be dismissed, the records of the inquiry shall not be published or made available to anyone.

Besides the Prime Minister, it brings within its purview any person who is or has been a Minister of the Union and any person who is or has been a Member of either House of Parliament. The Lokpal shall not inquire into any matter involved in, or arising from, or connected with, any such allegation of corruption against any Member of either House of Parliament in respect of anything said or a vote given by him/her in Parliament or any committee thereof covered under the provisions contained in clause (2) of Article 105 of the Constitution.

With respect to bureaucracy, it includes any Group 'A', 'B', 'C' or 'D' official or equivalent from amongst the public servants defined in the Prevention of Corruption Act, 1988 when serving or who has served in connection with the affairs of the Union.

The Act also provides for the manner in which the public-servants must declare their assets.

According to the Act, the Lokpal shall consist of:

- A chairperson who has been a Chief Justice of India or is or has been a Judge of the Supreme Court or is an eminent judicial member of impeccable integrity and outstanding ability having special knowledge and expertise of not less than 25 years in matters relating to anti-corruption policy, public administration, vigilance or finance.
- Further, the total members of Lokpal shall not exceed 8, out of whom 50 % shall be Iudicial Members.

Furthermore, the powers of the Lokpal are extensive, and equivalent to the superintendence, inquiry and investigative powers of the police and the Central Vigilance Commission. The Lokpal shall consist of an inquiry and prosecution wing to take necessary steps in prosecution of public servants in relation to offences committed under the Prevention of Corruption Act, 1988. Further, Lokpal can even recommend the government to create special courts to decide cases arising from the Prevention

of Corruption Act, 1988.

Likewise, the Lokpal and Lokayuktas Act, 2013 provides for the establishment of Lokayukta in every state in-order to deal with complaints of corruption against public functionaries. The Act provides that all states must institute Lokayuktas within one year from the date of the commencement of The Lokpal and Lokayuktas Act, 2013.

It is important to note that even before the enactment of this Act, some states in India, for example, Delhi, Karnataka, Kerala, etc had the institutions of Lokayuktas in place.

Did you know?

Maharashtra was the first State to introduce the institution of Lokayukta in 1971.

Conclusion : The ADR or "Alternative Dispute Resolution" is an attempt to devise a machinery which should be capable of providing an alternative to the conventional methods of resolving disputes. Courts have become overcrowded with litigants. Due to the large pendency of cases in the Courts, litigants have to face so much loss of time and money that at long last when a relief is obtained, it may not be worth the cost. A large number of quasi-judicial and administrative tribunals have been created for quicker relief.All these tribunals and forums are in a way an alternative method of dispute redressal. But even such tribunals and forums have become overcrowded with the result that they are not able to provide relief within good time. Many tribunals in service matters have been able to provide relief only when the aggrieved employee has already retired from his position. Relief in terms of money which he may ultimately get may not be worth the service period lost. Consumer Forums came into being to provide quick, effective and costless relief to buyers of goods and hirers of services. Persons suffering from poor quality of merchandise and services in the market turned out to be so great in number that Consumer Redressal Forums and Commissions have proved to be inadequate to the volume of complaints. Heavy pendency causes long delays. In a large number of cases a delayed consumer remedy serves no purpose. Thus official consumer remedies have also lost their swiftness. Furthermore, they are not able to provide any remedy for non-consumer matters.

There thus remains the need for an alternative remedy which will not be bogged down by costs and delays. The institutional framework for providing the area services is not yet fully developed. All that can be said is that "Now the ADR is rapidly developing its own national institutions, experience, and theoretical and practical development, and at the same time offering a simpler cross border dispute resolution approach"

Exercises

Based on your understanding, answer the following questions:

1. Ram and Sikander agreed in writing to resolve the disputes arising out of their contract by way of arbitration. A dispute arose between Ram and Sikander. Ram filed a case in the court. Will the court stay the legal proceedings filed by Ram? Discuss.
2. Mr Hari and his friend, Mr Suresh entered into a partnership deed to carry on the business of creative designing. After a year of starting a successful partnership firm, creative differences arose between Mr Hari and Mr Suresh, which created a rift between them.

To help resolve the dispute, Mr Sharma, the secretary of a reputed firm, is facilitating them to help them achieve an acceptable agreement. Which dispute resolution method is Mr Sharma resorting to? Explain.

3. Sita and Reena are business partners. After sometime a dispute arose between them. Both of them agreed to submit the dispute between them to Mr Bajaj, a senior member of a law firm. Sita subsequently came to know that Reena and Mr Bajaj are related to each other. Can Sita challenge the authority of Mr Bajaj as an arbitrator? Discuss.

4. What is the meaning of Ombudsman? Identify equivalent institutions within India. Discuss their roles and limitations.

5. A dispute arose between Rakesh and his employer regarding some incident of injustice to Rakesh by some senior members of the management during the course of his employment. They appointed Mr Kumar to resolve the dispute. Mr Kumar not only facilitated the conversation but also suggested potential solutions. Identify and explain the role played by Mr Kumar.

6. A Lokpal is an ombudsman in India while a Lokayukta is a similar anti-corruption ombudsman organization in the Indian States.

   (a) Elaborate on the scope of The Lokpal and Lokayukta Act, 2013.

   (b) Explain the composition of Lokpal under the Act.

7. The concept of Lok Adalat is an innovative Indian contribution to the global legal jurisprudence. Analyse the features of Lok Adalat that make it a suitable forum for alternative dispute resolution.

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