**EMERGENCE OF ADR AS THE ULTIMATE RESORT**

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**SUBMITTED BY**

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**Abstract:**

Any method of resolving disputes in the absence of the process of litigation can be read as Alternative Dispute Resolution. ADR brings forth a new mechanism to resolve various litigation issues where the disputed parties are unable to take a rational decision. The main governing Acts of ADR in India are Arbitration and Conciliation Act, 1996, Legal Services Authorities Act, 1987 and Section 89 of the Civil Procedure Code. ADR typically includes methods like negotiation, conciliation, mediation, and arbitration. With the changing needs and demands of the society, the judiciary and lawyers must incorporate these methods for resolving matters. The main motive of ADR is to create a fair and just alternative to our conventional method of litigation. And with the plethora of pending cases in India, these methods will definitely aid in speedy disposal and efficient justice delivery system. This article basically, talks about the various modes of ADR and how they are helpful.

**Introduction:**

Alternative Dispute Resolution or External Dispute Resolution refers to any means of resolving disputes outside the courtroom. Section 89 of CPC explicitly describes various modes of ADR. The constitutional viability of Section 89 of CPC was challenged before the Supreme Court of India in *Salem Advocate Bar Association v. Union of India* which is popularly known as Salem Advocate Bar Association and the Court has upheld the constitutional validity of this section 89 of CPC.[[1]](#footnote-1)

In *Afcons Infrastructure Ltd. vs. Cherian Varkey Construction Co. (P) LTD*[[2]](#footnote-2) the apex court in the case has further laid down some guidelines on the referral of the dispute to each ADR mechanisms and which kind of civil dispute can be referred under this section. The court held that both the parties must give their consent if the dispute is going to be referred to arbitration or conciliation but if the dispute is going to be referred to mediation or Lok Adalat then, there is no requirement of the parties’ consent. The court categorized the disputes on capability and non-capability of ADR mechanism.

Justice R.V. Raveendran and K.L. Manjunath both elucidated the importance of ADR methods in the following expression- “*With the gradual growth in the number of laws and number of litigations, without a proportionate increase in the number of Courts, a stage has reached where the Courts are choked with cases. Delay has now virtually become a part of the judicial process. It has become quite common for civil disputes, in particular litigations involving partitions, evictions, and specific performance to be fought for several decades, through a hierarchy of Courts. In commercial litigation, the delay can destroy businesses. In family disputes, the delay can destroy physical and mental health turning litigants into nervous wrecks. Long pendency leads to frustration and desperation. The delay, uncertainty about the final outcome, changes in-laws during the pendency of the cases, and the expenditure of time, energy and money during the period of litigation, take their toll on the patience of litigants and erode the confidence in the rule of law and the justice delivery system. When memories of litigation tend to be unpleasant and harsh, there is a tendency on the part of the litigant to avoid approaching the Courts, for relief, but seek remedy outside the legal framework. A landlord who wants possession from a tenant, knowing that litigation may take years, thinks of engaging the services of musclemen to evict the tenant. It is not uncommon for moneylenders, and even Banks, to entrust debt collection to dubious agencies, to coerce and persuade debtors, not always by lawful means, to recover the amount so due. Though well-aware that such methods are illegal, costly and risky, more and more persons are tempted to have recourse to illegal methods, thinking that results are likely to be swift, decisive and effective, without realizing their pitfalls and the effect on orderly society. In this background, it became necessary to seriously consider the need to encourage alternative dispute resolution methods.*”[[3]](#footnote-3)

**Cases which can be referred to ADRs:**

**1. All cases relating to trade, commerce, and contracts, including - disputes arising out of contracts (including all money claims)**

a. Disputes relating to specific performance

b. Disputes between suppliers and customers

c. Disputes between bankers and customers

d. Disputes between developers/builders and customers; - disputes between landlords and tenants/licensor and licensees

e. Disputes between the insurer and insured

**2. All cases arising from strained or soured relationships, including**

a. Disputes relating to matrimonial causes, maintenance, custody of children;

b. Disputes relating to partition/division among family members/coparceners/co-owners

c. Disputes relating to a partnership among partners.

**3. All cases where there is a need for continuation of the pre-existing relationship in spite of the disputes, including**

a. Disputes between neighbours (relating to elementary rights, encroachments, nuisance, etc.

b. disputes between employers and employees

c. disputes among members of societies/associations/Apartment owners Associations;

**4. All cases relating to tortious liability including - claims for compensation in motor accidents/other accidents**

**5. All consumer disputes including disputes where a trader/supplier/manufacturer/service provider is very keen on maintaining his business/professional reputation and credibility or 'product popularity**

**6. Disputes, the judge must careful which ADR he is suggesting or the parties are preferring and the nature of the dispute which he is referring.**

**Advantages of ADR:**

ADR mechanism has various advantages that are aiding in its growth wantonly. It is affordable and easily available to individuals belonging to every strata of society, especially to the people who cannot afford the litigation expenses. It is also less time taking process unlike the traditional system which takes years to deliver justice. It is unbound from all the technicalities of the normal court and doesn’t require any expert knowledge. Moreover the both the parties are at a win-win situation.

**ADR mechanisms are broadly classified into two major types:**

They are:

1. Adjudicatory ADR mechanisms

2. Non-Adjudicatory ADR mechanisms

In adjudicatory ADR mechanism, the settlement of the dispute shall be decided on merits whereas, in non-adjudicatory ADR mechanism, the dispute shall be resolved through cooperative resolution. Arbitration, is considered as adjudicatory ADR mechanisms whereas, Negotiation, Mediation, Lok Adalat excluding permanent Lok Adalat are considered as non-adjudicatory ADR mechanisms. The courts must be very cautious in deciding the resolution method for the parties in dispute because, once the dispute has been referred to any adjudicatory ADR mechanism then, it cannot be heard by court again.

**Various modes of ADR:**

**Negotiation:**

The first stage is always the process of Negotiation which allows the parties to meet in order to settle a dispute. Parties themselves have the power to control the process and the solution. Here, negotiation means self-counselling between the parties to resolve their dispute but it doesn’t have any statutory recognition in India.

**Mediation:**

Mediation is an informal alternative to litigation. Mediators are persons trained in negotiation, who attempts to work out a settlement or agreement between both the parties. The mediator conducts the joint sessions and also the private sessions in which the mediator discusses the issues and solutions for resolving such issues. Mediation is of most use especially in the matrimonial and property disputes. However, Mediation is not binding and if a party is unsatisfied they can opt for other methods like Arbitration and further Litigation.

**THE PROCESS OF MEDIATION WORKS IN VARIOUS STAGES. THESE ARE:**

* Opening statement
* Joint session
* Separate session and,
* Closing

At the commencement of mediation process, the mediator shall ensure the parties and their counsels should be present.

* Initially in the opening statement he furnishes all the information about his appointment and declares he does not have any connection with either of parties and has no interest in the dispute.
* In the joint session, he gathers all the information, understand the fact and issues about the dispute by inviting both the parties to present their case and put forward their perspective without any interruption. In this session, mediator tries to encourage and promote communication and manage interruption and outbursts by the parties.
* Next is separate session, where he tries to understand the dispute at a deeper level, gathers specific information by taking both the parties in confidence separately.
* Mediator asks frequent questions on facts and discusses strengths and weaknesses to the parties of their respective cases.
* After hearing both the sides, mediator starts formulating issues for resolution and creating options for settlement.
* In the case of failure to reach any agreement through negotiation in mediation, mediator uses different Reality check technique  like:

***Best Alternative to Negotiated Agreement (BATNA)***

It is the best possible outcome both the party come up with or has in mind. Its suitable situation as each party thinks about their most favourable scenario looks like.

***Most Likely Alternative to Negotiated Agreement (MLATNA)***

For a successful negotiation the result always lays in the middle, mediator after considering both the parties comes up with most likely outcome. Here result is not always in the middle but little left or right of the centre depending on negotiation situation.

***Worst Alternative to Negotiated Agreement (WATNA)***

It the worst possible outcome a party has in their mind for what could happen during negotiation.

It may be helpful to the parties and mediator to examine the alternative outside the mediation (specifically litigation) and discusses the consequences of failing to reach agreement like: effect on the relationship of the parties or effect on the business of the parties. It is always important to consider and discuss the worst and most probable outcomes, it’s not always people get the best outcome.

Mediator discusses the perspective of the parties about the possible outcome at litigation. It is also helpful for the mediator to work with parties and their advocates to come to a proper understanding of the best, worst and most probable outcome to the dispute through litigation as that would help the parties to acknowledge the reality and prepare realistic, logical and workable proposals.

**Arbitration:**

Arbitration is little more complex than Mediation. It resembles a simplified version of trial proceedings in front of an Arbitrator. The process of Arbitration was introduced in India through Arbitration and Conciliation Act, 1996. An Arbitrator can be appointed through the parties themselves or the Chief Justice. A panel of such Arbitrators constitute an Arbitration Tribunal. Decision of arbitrator is bound on parties and their decision is called ‘Award’.

Any party to a contract where arbitration clause is there, can invoke arbitration clause either himself or through their authorized agent which refer the dispute directly to the arbitration as per the Arbitration clause. Here, arbitration clause means a clause that mention the course of actions, language, number of arbitrators, seat or legal place of the arbitration to be taken place in the event of dispute arising out between the parties.

**What is the procedure to be followed once the arbitration clause is invoked?**

* Initially, applicant initiates arbitration by filing a statement of claim that specifies the relevant facts and remedies. The application must include the certified copy of arbitration agreement.
* Statement of claim is a written document filed in the court or tribunal for judicial determination and a copy also send to the defendant in which claimant described the facts in support of his case and the relief he seeks from the defendant.
* The respondent reply to the arbitration by filing an answer against the arbitration claim of claimant that specifies the relevant facts and available defences to the statement of claim.
* Arbitrator’s selection is the process in which the parties receive lists of potential arbitrators and select the panel to hear their case.
* Then there is the exchange of documents and information in preparation for the hearing called ‘Discovery’.
* The parties meet in persons to conduct the hearing in which the parties present the arguments and evidences in support of their respective cases.
* After the witnesses examined and evidences are presented, then there in conclusion arbitrator gives an ‘Award’ which is binding on the parties.

Now the intricacies of the proceedings vary with the arbitration agreement. For example, there could be a timeline which must be followed. This timeline would be stipulated in the agreement.

Section 8 of*Arbitration and Conciliation Act, 1996* provides if any party disrespects the arbitral agreement and instead of moving to arbitration, moves that suit to civil court, other party can apply the court for referring the matter to arbitration tribunal as per the agreement but not later the submission of the first statement. The application must include a certified copy of arbitration agreement and if courts satisfy with it, the matter will be referred to arbitration.

**Conciliation**

Conciliation is a form of arbitration but it is less formal in nature. It is the process of facilitating an amicable resolution between the parties, whereby the parties to the dispute use conciliator who meets with the parties separately to settle their dispute. Conciliator meets separately to lower the tension between parties, improving communication, interpreting issue to bring about a negotiated settlement. There is no need of prior agreement and cannot be forced on party who is not intending for conciliation. It is different from arbitration in that way.

**Actually, it is not possible for the parties to enter into conciliation agreement before the dispute has arisen. It is clear in Section 62 of The Arbitration and Conciliation Act, 1996 which provides,**

* The party initiating conciliation shall send to the other party a written invitation to conciliate under this part, briefly identifying the subject of the dispute.
* Conciliation proceedings shall commence when the other party accepts in writing the invitation to conciliate.
* If the other rejects the invitation, there will be no conciliation proceedings.

Above provision clearly states conciliation agreement should be an extemporary agreement entered into after the dispute has but not before. Parties are also permitted to engage in conciliation process even while the arbitral proceedings are on (section 30).

There is some Acts mandate the courts to conciliate/mediate their disputes before it precedes further hearing of the disputes. Hindu marriage Act mandates the trial court must try for the reconciliation of the disputants to resolve their dispute amicably before preceding its hearings. It can adjourn the proceedings about 15 days for the parties to conciliate the dispute.[[4]](#footnote-4) However, the court shall not refer to the following matrimonial disputes for conciliation. a. Either of the spouses ceased to be a Hindu b. Either of the spouses has been incurable of unsound mind c. Either of the spouses has been suffering from a virulent and incurable form of leprosy d. Either of the spouses has been suffering from the general disease in a communicable form; e. Either of the spouses has renounced the world by entering any religious order; f. Either of the spouses has not been heard of as being alive for a period of seven years.[[5]](#footnote-5) Similarly, The Family Courts Act also encourages the resolution of the matrimonial dispute through conciliation and mediation.[[6]](#footnote-6) The family courts have entrusted the obligation to look at the possibilities of settlement of disputes by the parties through conciliation and mediation. The family court shall adjourn the court hearings if there is any possibility of settlement of the dispute.[[7]](#footnote-7) The family court can pass the decree on the basis of such settlement of the parties. The decree passed by the family court upon settlement of the parties shall be final and binding and it cannot be challenged through an appeal.[[8]](#footnote-8) The recently amended Commercial Courts Act contains a chapter on Pre-Institution Mediation and Settlement which make it mandatory to the disputants before initiation.

## Lok Adalat

Lok Adalat is called ‘People’s Court’ presided over by a sitting or retired judicial officer, social activists or members of Legal profession as the chairman. National Legal Service Authority (NALSA) along with other Legal Services Institutions conducts Lok Adalats on regular intervals for exercising such jurisdiction. Any case pending in regular court or any dispute which has not been brought before any court of law can be referred to Lok Adalat. There are no court fees and rigid procedure followed, which makes the process fast. If any matter pending in court of referred to the Lok Adalat and is settled subsequently, the court fee originally paid in the court when the petition filed is also refunded back to the parties.

Parties are in direct interaction with the judge, which is not possible in regular courts. It depends on the parties if both the parties agree on case long pending in regular court can be transferred to Lok Adalat. The persons deciding the cases have the role of statutory conciliators only, they can only persuade the parties to come to a conclusion for settling the dispute outside the regular court in the Lok Adalat. Legal Services Authorities (State or District) as the case may be on receipt of an application from one of the parties at a pre-litigation stage may refer such matter to the Lok Adalat for which notice would then be issued to the other party. Lok Adalats do not have any jurisdiction to deal with cases of non-compoundable offenses.

In *Kamal Mehta v. General Manager*[[9]](#footnote-9) Rajasthan Roadways Transport Corporation, Punjab and Haryana High Court observed that Lok Adalat can pass an award in a dispute upon the basis of the compromise between the parties; it cannot transgression the powers of the court and pass an award on merits. As per the Legal Services Authorities Act, Lok Adalat award become final and binding; however, if the award is not passed on the compromise then, it does not attain finality. The High Court further held that the Legal Services Authorities Act does not specify the remedy against the Lok Adalat award especially if there is any objection against such award.

**ODR: ODR means Online Dispute Resolution:**

There are some special dispute resolution mechanisms are available in an online platform. Automated negotiation is one such mechanism in which the disputing parties simply settle their claims through the bidding process. Apart from this, these days traditional ADR mechanisms such as arbitration, mediation, conciliation are conducted through virtual hearing

**Obstacles in implementation of section 89 of CPC**:

a) Lack of knowledge about ADR mechanism among litigants because of lack of creating awareness among litigants through judges and advocates. Advocates are still not promotion this mechanism effectively to the clients further creates lack of willingness among the litigants or clients to pursue the case through this mechanism.

b) Most of the advocates are not well trained about this area of mechanism and because of lack of expertise they are not able to take ADR mechanism route. Therefore, there is a need to provide training about this system among the advocates.

Former Allahabad Judge, Justice S.U. Khan urged the review of the implementation of section 89 of CPC across the country. He devised a method in which the review should be conducted. He stated that respective High Courts in state-level or Supreme Court in the national level collect the information and segregate in the following manner,- i. The review period should be one particular year. ii. Each court shall furnish the information about the number of suits filed in that particular year and number of suits which referred to ADR mechanisms under section 89 of CPC. iii. The courts should furnish how many suits got settled after the ADR referral and how many suits are not settled after the referral and come back to the court. iv. All the suits are classified into 4 or 5 broad categories and the suits which got settled through ADR referral and which are not settled through ADR referral must be identified through the subject classification.[[10]](#footnote-10)

**History of ADR mechanisms in ancient India:**

Resolution of disputes through ADR has built inherently in Indian culture. From Vedik period onwards, Indian people have used non adversarial methods for resolving their disputes. Yajnavalkya and Narada highlighted that Kula, SRENI and Puga tribunals were resolving the disputes in ancient India. Kula was a tribunal had resolved the disputes between the members of family, community, caste or races and tribes. SRENI was a tribunal consist of trade experts and it helped the traders to resolve their traderelated disputes internally. Puga was a tribunal consist of people belong to various communities but from the same locality. These tribunals are considered as Panchayats and they followed a simple procedure for their decision making. The decision of Kula may be challenged before SRENI and the decision of the SRENI can be challenged before Pradvivaca and the final appeal was permissible before the king. These tribunals had taken decisions on the interest of the party and community.

**Cases which can’t be referred to ADRs:**

1. Representative suits under Order 1 Rule 8 CPC which involves public interest or interest of numerous persons who are not parties before the court. (In fact, even a compromise in such a suit is a difficult process requiring notice to the persons interested in the suit, before its acceptance).

2. Disputes relating to election to public offices (as contrasted from disputes between two groups trying to get control over the management of societies, clubs, association, etc.).

3. Cases involving the grant of authority by the court after inquiry, as for example, suits for grant of probate or letters of administration.

4. Cases involving serious and specific allegations of fraud, fabrication of documents, forgery, impersonation, coercion, etc.

5. Cases requiring protection of courts, as for example, claims against minors, deities and mentally challenged and suits for declaration of title against the government.

6. Cases involving prosecution for criminal offence

**Conclusion:**

The ADR methods have a huge scope in the Indian context. Many fields in which these methods can be used have not been yet fully discovered. There is also some kind of reluctance shown for undergoing these processes. In this regards, awareness must be made. One such step incorporated is “Mediation and Conciliation” has been added as a compulsory subject in the degree of law. After describing and analyzing the scope of ADR methods, it is believed that in the near future ADR can take up a lot of cases and hence pendency of the cases may decrease.

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2. Afcons Infrastructure Ltd. v Cherian Varkey Construction Co. (P) LTD [2010] 8 SCC 24 [↑](#footnote-ref-2)
3. 'H V Venkatesh Vs Oriental Insurance Company Limited And Ors - Citation 374947 - Court Judgment | Legalcrystal' (Legalcrystal.com) [↑](#footnote-ref-3)
4. The Hindu Marriage Act 1955, s 23(2) [↑](#footnote-ref-4)
5. The Hindu Marriage Act 1955, s 23(2) proviso [↑](#footnote-ref-5)
6. The preamble of Family Courts Act, 1984 states that the purpose of establishing family courts for promoting conciliation in matrimonial disputes and ensuring the speedy disposal of the matrimonial disputes. [↑](#footnote-ref-6)
7. The Family Courts Act 1984, s 9 [↑](#footnote-ref-7)
8. The Family Courts Act, 1984 s 19 [↑](#footnote-ref-8)
9. Kamal Mehta v General Manager, Rajasthan Roadways Transport Corporation and Anr., FAO No. 798 of 1999 [↑](#footnote-ref-9)
10. Justice S.U. Khan, 'Judicial Settlement under Section 89 C.P.C. A Neglected Aspect' (Ijtr.nic.in) accessed 23 August 2019 [↑](#footnote-ref-10)