ADR: Conceptual Issues

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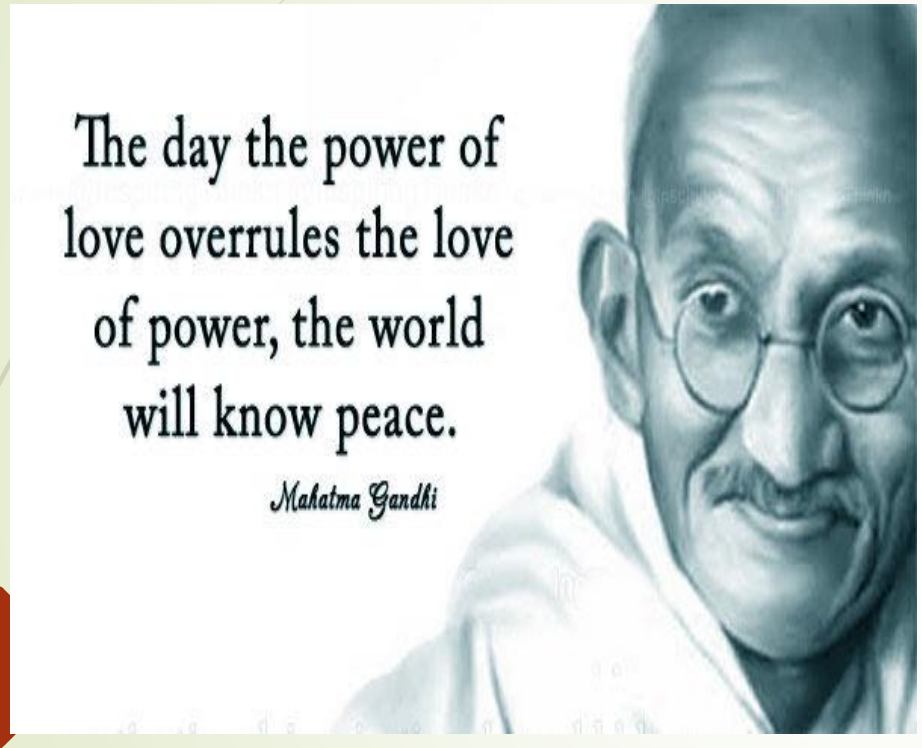

"I realized that the true fiction of a lawyer was to unite parties… A large part of my time during the 20 years of my practice as a lawyer was occupied in bringing out private compromise of hundreds of cases. I lost nothing thereby- not even money, certainly not my soul."

– Mahatma Gandhi

What is ADR (Alternative Dispute Resolutions)

Alternative Dispute Resolution (ADR) is a collection of processes used for the purpose of resolving conflict or disputes informally and confidentially.

►According to Glossary Law Dictionary– "The term 'ADR' describes, a number of methods used to resolve disputes out of court, including negotiation, concilia.ion, mediation and the many types of arbitration. The common denominator of all ADR methods is that they are faster, less formalistic, cheaper and often less adversarial than a court trial."

►According to the case referred to Hilmond Investments v CIBC 1996 135 DLR 4th 471 ONT Court of Appeal) 887574- 'ADR' is the method by which legal conflicts and disputes are resolved privately and other than through litigation in the public courts, usually through one of two forms: mediation or arbitration.

Definition (Continued)

►According to Barrister Maudud Ahmed (Former Minister for Law, Justice and Parliamentary Affairs) said that- "To me, the generic term Alternative Dispute Resolution (ADR) is a real, practical and traditional approach of outside court justice system, saves time and mone), uses simple common sense of the common people of the society with the guidance of the experts, respects community beliefs & values, acts to preserve peace and harmony among the parties, resolves disputes with assistance of neutral persons, involves with a range of processes like negotiation, mediation, arbitration, conciliation, ombudsman or even malpractice screening panel as appropriate; and creates an innovative dimension in legal profession for better effectiveness of the over-all justice delivery system"(An exclusive television interview with Channel I on 24th March 2006).

ADR in Types or Modes in General

The most common types of ADR for civil cases are mediation, settlement conferences, neutral evaluation, Conciliation, negotiation, and arbitration.

Mediation: In mediation, an impartial person called a "mediator" helps the parties try to reach a mutually acceptable resolution of the dispute. The mediator does not decide the dispute but helps the parties communicate so they can try to settle the dispute themselves. Mediation leaves control of the outcome with the parties.

Types… continued

Cases for Which Mediation May Be Appropriate

Mediation may be particularly useful when parties have a relationship they want to preserve. So when family members, neighbors, or business partners have a dispute, mediation may be the ADR process to use. Mediation is also effective when emotions are getting in the way of resolution. An effective mediator can hear the parties out and help them communicate with each other in an effective and nondestructive manner

Cases for Which Mediation May Not Be Appropriate

Mediation may not be effective if one of the parties is unwilling to cooperate or compromise. Mediation also may not be effective if one of the parties has a significant advantage in power over the other. Therefore, it may not be a good choice if the parties have a history of abuse or victimization.

Types… continued

Arbitration: **In arbitration, a neutral person called an "arbitrator" hears arguments and evidence from each side and then decides the outcome of the dispute. Arbitration is less formal than a trial, and the rules of evidence are often relaxed. Arbitration may be either "binding" or "nonbinding."**

►*Binding arbitration* means that the parties waive their right to a trial and agree to accept the arbitrator's decision as final. Generally, there is no right to appeal an arbitrator's decision.

►*Nonbinding* arbitration means that the parties are free to request a trial if they do not accept the arbitrator's decision.

Types… continued

Cases for Which Arbitration May Be Appropriate

Arbitration is best for cases where the parties want another person to decide the outcome of their dispute for them but would like to avoid the formality, time, and expense of a trial. It may also be appropriate for complex matters where the parties want a decision-maker who has training or experience in the subject matter of the dispute.

Cases for Which Arbitration May Not Be Appropriate

If parties want to retain control over how their dispute is resolved, arbitration, particularly binding arbitration, is not appropriate. In binding arbitration, the parties generally cannot appeal the arbitrator's award, even if it is not supported by the evidence or the law. Even in nonbinding arbitration, if a party requests a trial and does not receive a more favorable result at trial than in arbitration, there may be penalties

Types… continued

Neutral Evaluation: **In neutral evaluation, each party gets a chance to present the case to a neutral person called an "evaluator." The evaluator then gives an opinion on the strengths and weaknesses of each party's evidence and arguments and about how the dispute could be resolved. The evaluator is often an expert in the subject matter of the dispute. Although the evaluator's opinion is not binding, the parties typically use it as a basis for trying to negotiate a resolution of the dispute. Click on the video to the left to see a demonstration of the neutral evaluation process.**

Types… continued

Cases for Which Neutral Evaluation May Be Appropriate

Neutral evaluation may be most appropriate in cases in which there are technical issues that require special expertise to resolve or the only significant issue in the case is the amount of damages.

Cases for Which Neutral Evaluation May Not Be Appropriate

Neutral evaluation may not be appropriate when there are significant personal or emotional barriers to resolving the dispute.

Types… continued

Settlement Conference: Settlement conferences may be either mandatory or voluntary. In both types of settlement conferences, the parties and their attorneys meet with a judge or a neutral person called a "settlement officer" to discuss possible settlement of their dispute. The judge or settlement officer does not make a decision in the case but assists the parties in evaluating the strengths and weaknesses of the case and in negotiating a settlement. Settlement conferences are appropriate in any case where settlement is an option. Mandatory settlement conferences are often held close to the date a case is set for trial.

Types… continued

Conciliation: Conciliation is a less formal form of arbitration. This process does not require the existence of any prior agreement. Any party can request the other party to appoint a conciliator. One conciliator is preferred but two or three are also allowed. In the case of multiple conciliators, all must act jointly. If a party rejects an offer to conciliate, there can be no conciliation. It is relatively unstructured method of dispute resolution in which a third party facilitates communication between parties in an attempt to help them settle their differences.

This consists in an attempt by a third party, designated by the litigants, to reconcile them either before they resort to litigation (whether to court or arbitration), or after. The attempt to conciliate is generally based on showing each side the contrary aspects of the dispute, in order to bring each side together and to reach a solution.

Types… continued

Negotiation: Negotiation-communication for the purpose of persuasion-is the pre-eminent mode of dispute resolution. Compared to processes using mutual third parties, it has the advantage of allowing the parties themselves to control the process and the solution.

Essentials of Negotiation are:

It is a communication process;

It resolves conflicts;

It is a voluntary exercise;

It is a non-binding process;

Parties retain control over outcome and procedure;

There is a possibility of achieving wide ranging solutions, and of maximizing joint gains.

Negotiation is self counseling between the parties to resolve their dispute. Negotiation is a process that has no fixed rules but follows a predictable pattern.

Types… continued

Med-Arb: This form of ADR in one in which the arbiter starts as a mediator, but, should the mediation fail, the arbiter will impose a binding decision. Med-arb is a mixture of mediation and arbitration that pulls from the benefits of the two;

Mini Trial: A mini trial is not so much a trial as it is a settlement process. Each party presents their highly summarized case. At the end of the mini trial, the representatives attempt to settle the issue. If they cannot, an impartial advisor can act as a mediator, or declare a non-binding opinion regarding the likely outcome of the issue going to trial. Mini trial is a unique ADR method, as it often comes after formal litigation, as opposed to before;

Summary Jury Trial (SJT): An SJT is similar to a mini trial. However, the case is presented to a mock jury. The mock jury produces an advisory verdict. Additionally, it is order by the court rather than the parties. After the hearing the verdict, the court usually requires the parties to at least attempt to settle before litigation; etc.

ADR in Types or Modes in Bangladesh

Professor Dr. Sumaiya Khair suggests that there are three streams of ADR in Bangladesh:

Extra- judicial or community based ADR (informal);

ADR in Quasi-formal systems; and

ADR in formal legal system.

Formal ADR in Bangladesh:

In Civil Suits:

Code of Civil Procedure

Mediation u/s 89A

Arbitration u/s 89B.

Modes of ADR in Bangladesh

Muslim Family Laws Ordinance,1961

Polygamy u/s 6

Divorce u/s 7

Maintenance u/s 9

Family Court Ordinance,1985

Pre-trial Proceeding u/s 10

Post-trial Proceeding u/s 13

Modes of ADR in Bangladesh

Artha Rin Adalat Ain, 2003

Settlement Conference u/s 21

Mediation u/s 22

Gram Adalat Ain, 2006 [all sections]

The Conciliation of Disputes (Municipal) Board Act, 2004 [all sections]

The Arbitration Act, 2001 [all sections]

The Labor Code, 2006

Negotiation u/s 210(1,2,4)

Conciliation u/s 210(6)

Arbitration u/s 210(16)

In Criminal Cases:

The Criminal Procedure Code,1898

Compounding offences u/s 345

Modes of ADR in Bangladesh

ADR in the Quasi-Formal System

There are mechanisms at the local level for settlement of disputes through arbitration/conciliation. Legally mandated, these apparatuses are headed by local government personnel who dispense justice with the aid of nominees of the parties to the dispute.

1. The Village Courts Act, 2006

2. The Conciliation (Municipal Areas) Board Act 2004

Modes of ADR in Bangladesh

Informal ADR in Bangladesh

Informal ADR in Bangladesh includes traditional shalish and NGO modified Shalish. Quasi-formal ADR includes village court and Board of Conciliation have originated from the informal shalish system and this is why they all have been shown in the following single diagram.

Advantages of Alternative Dispute Resolution (ADR)

There are some potential advantages of using ADR. Such as:

Save Time: A dispute often can be settled or decided much sooner with ADR; often in a matter of months, even weeks, while bringing a lawsuit to trial can take a year or more.

Save Money: When cases are resolved earlier through ADR, the parties may save some of the money they would have spent on attorney fees, court costs, and experts' fees.'

Advantages of ADR

Increase Control over the Process and the Outcome: In ADR, parties typically play a greater role in shaping both the process and its outcome. In most ADR processes, parties have more opportunity to tell their side of the story than they do at trial. Some ADR processes, such as mediation, allow the parties to fashion creative resolutions that are not available in a trial. Other ADR processes, such as arbitration, allow the parties to choose an expert in a particular field to decide the dispute.

Preserve Relationships: ADR can be a less adversarial and hostile way to resolve a dispute. For example, an experienced mediator can help the parties effectively communicate their needs and point of view to the other side. This can be an important advantage where the parties have a relationship to preserve.

Advantages of ADR

Increase Satisfaction: In a trial, there is typically a winner and a loser. The loser is not likely to be happy, and even the winner may not be completely satisfied with the outcome. ADR can help the parties find win-win solutions and achieve their real goals. This, along with all of ADR's other potential advantages, may increase the parties' overall satisfaction with both the dispute resolution process and the outcome.

Improve Attorney-Client Relationships: Attorneys may also benefit from ADR by being seen as problem-solvers rather than combatants. Quick, cost-effective, and satisfying resolutions are likely to produce happier clients and thus generate repeat business from clients and referrals of their friends and associates.

Because of these potential advantages, it is worth considering using ADR early in a lawsuit or even before you file a lawsuit.

Advantages of ADR

In a nutshell:

Suitability for multi-party disputes;

The flexibility of procedure – the process is determined and controlled by the parties the dispute;

Lower costs and less complexity;

Parties choice of neutral third party (and therefore expertise in area of dispute) to direct negotiations/adjudicate;

Likelihood and speed of settlements;

Practical solutions tailored to parties' needs;

The durability of agreements;

Confidentiality;

The preservation of relationships.

Disadvantages of ADR

Generally ADR are usually faster, and cheaper than litigation they are also private and informal when also compared to litigation and it gets both parties involved in the settlement process and the decisions are not necessarily final. However ADR does not alway guarantee an agreed upon decision and with arbitration the decision is final. The problems of ADR are given below:

In certain situations one side is able to dominate the other, for example, employ

Unequal Bargaining Power– Agreement and divorce cases, making the courts a better option for a weak party.

Lack of Legal Expertise: Where a .dispute involves"-difficult legal points a mediator or arbitrator is unlikely to have the same legal expertise and knowledge as a judge.

Disadvantages of ADR

No System of Precedent: It isn't easy to predict the outcome of a dispute decided through ADR as there is no system of precedent.

Enforceability: Most forms of ADR are not legally binding, making any award difficult to enforce.

A Court action may still be required: If using ADR fails to resolve the parties' dispute, court action may Still be needed. This adds to the costs and delays compared to taking a dispute direct to the courts in the first place.

No guaranteed resolution: There is no guaranteed resolution. With the exception of arbitration, alternative dispute resolution processes do not always lead to a resolution. That means it is possible that you could invest the time and money in trying to resolve the dispute out-of-court and still end up having to go to court.

Questions Session