

ADR In INDIA – 2009

By Prathamesh D Popat

Introduction

Every society, every community, every culture has some or the other form/s of resolving the disputes faced by their constituents. Often, the longer and more prosperous the lineage, the more refined and varied the mechanisms. India is a country of many cultures and hence several dispute resolution mechanisms (DRMs) have evolved and been customized over time. We had the Gulas, the Kulas, and the Shrenis, DRMs tailor-made for different segments of society. We also had – and still have in several regions – the Panchayats, which exercise social influence within geographical boundaries. With the advent of British colonization, these varied DRMs by and large gave way to formal Courts of Law based on Anglo-Saxon jurisprudence.

Old Law

One of the several benefits of the British rule over India was that we got some very robust laws. Several of these exist till date (after over 60 years of Independence) without any major amendments. However, the flip side was that at the altar of 'Uniformity' were sacrificed all the then existing DRMs, which were by and large enabling satisfactory outcomes. What was worse was that the system that replaced them soon started showing its colors - the formal procedures of the Courts of Law not only took their own time but also provided umpteen loop-holes to the ingenious lawyers to stretch that time even further, if that suited their clients' interests. This had a telling effect on the backlogs in court registries across the nation. To give an extreme example, the Bombay High Court is currently taking up Final Hearing of Plaints filed in the '80s and 90's. An Appeal from an Order/Judgment in these cases will take roughly another 5 to 7 years from date of filing and a further Appeal to the Supreme Court could take an additional 2 years.

Arbitration too has seen its name sullied thanks to the Ad Hoc version adopted by the lawyers drafting their clients' contracts. With no institution to keep a check on their schedule, the Arbitrators become masters unto themselves. Arbitral hearings, when held, are often as prolix as the court hearings. One can't blame the Arbitrators for that, as they are usually retired judges and that's the only way they know how to conduct hearings.

By and large, in the initial period, the scheduled hearings are held only to give fresh dates of hearings on some or the other ground ranging from non-completion of records to the ill-health of someone connected to the proceedings or related to that someone. This continues till the parties' patience is found to be wearing thin. Thereafter, substantive work is done at the arbitral hearings, but they go on for only half a day, i.e., 2 to 3 hours, with considerable time going in recaps and agenda settings for future hearings. There are of course exceptions to this trend, especially amongst arbitrators, who are either newly retired judges, practicing lawyers or those coming from a non-legal background.

The parties and their lawyers, due to fear of antagonizing their Arbitrators, refrain from attempting to rein them in. Some lawyers see this as a 'win-win' situation between themselves and the Arbitrators as they get to charge for the whole day (plus for the earlier days' preparation) for the hour or so of arbitral hearing on a given day. And if the hearing is at an out-of-town location, it's a paid holiday.

Going further down the line, when an Award is published, one must expect it to be challenged in Court. It could take years for it to pass through that channel. Introduction of the new Arbitration and Conciliation Act, 1996 has not helped much as the Supreme Court has rolled back the benefit of limited grounds of Appeal by suggesting a broader interpretation of the term 'Public Policy', which is one of the few grounds on which an Award can be sought to be challenged under this new Act.

New Law

Faced with these realities, coupled with the usual issue of inadequate infrastructure, the Parliament drastically amended the Code of Civil Procedure, 1908 (CPC) in the year 1999. One of the amendments was by way of introduction of a new provision, Section 89, which gave the Courts the power to refer matters to one of the ADR tracks listed therein: Arbitration, Conciliation, Judicial Settlement, Lok Adalat and Mediation. A Lok Adalat (literally meaning People's Court) usually comprises of 3 eminent personalities; like retired judges and senior members of the Bar, Administration or society generally, who are appointed for a particular term. They attempt conciliation and Judicial Settlement for dealing with disputes referred to them. Section 89, coupled with Order X Rules 1A, 1B, 1C of the CPC and allied laws, affords the

judiciary the opportunity to offer the parties an array of avenues to resolve their issues in a timely and amicable manner and, in the process, reduce its backlog.

Whereas there already exist some provisions for conduct of Arbitration, Conciliation and Lok Adalat in different Statutes, the need for a framework to regulate the ADR tracks as a whole and Mediation in particular has been sought to be fulfilled by the Supreme Court. It has done so by providing the final version of the Model Rules of ADR and the Model Rules of Mediation, both framed by the Law Commission of India, in its Orders passed in the case of Salem Bar Association versus Union of India with a direction that all High Courts should adopt these with such modifications as they may consider necessary. The links to the said provisions of the CPC, as also to the Rules of ADR and the Rules of Mediation for the Bombay High Court can be found at www.mediate.com/prachi as also at www.prachi.org .

The new law, which came into effect in July 2002, was seen to be adopted with differing enthusiasm across the nation. Some States' High Courts had already put in place a Panel of trained mediators, who were being referred cases for mediation on a regular basis, and had also adopted the earlier version of the aforesaid Model Rules (recommended in an earlier Order of the Supreme Court in the same case) with or without modifications. Whereas other States' High Courts had either only held 'Awareness Campaigns' with little or no follow up action or were in the process of providing mediation training and creating a Panel of trained mediators. These ADR developments in the respective States depended largely on the inclination of their respective High Court's Chief Justice towards ADR. This not only led to uneven introduction of ADR services in the different States but also led to the implementation of the ADR system gaining and losing momentum with the change of guard in each High Court, which on an average one can expect to happen every other year. Now, after the second Order of the Supreme Court in the Salem Bar's case, it is to be presumed that all High Courts shall be implementing the ADR system by adopting the aforesaid Model Rules in such form as they choose. They will be providing mediator's training to the legal fraternity and such others as they choose, and setting up Panels of trained mediators and providing the list to the Judges, lawyers and parties for consideration whilst appointing mediators. On successful completion of the mediation process, they will take the mediated agreements on record and dispose of the cases on the basis thereof.

The Bombay High Court was fortunate to have, at the relevant time, a senior Judge, Justice Ajit Prakash Shah, who was thoroughly convinced about the

benefit of ADR for the litigants as well as the Court's backlog. He is now Chief Justice of the Delhi High Court (see <http://delhihighcourt.nic.in/ajitprakash.htm>). Successive Chief Justices gave him a relatively free hand and all their support to implement his plans for a robust ADR system. We thus saw the creation of the [first Panel of trained Mediators](#) in the year 2003, along with a Panel of Arbitrators comprising of retired Judges with fees stipulated for each Panel. A new post of Registrar (ADR) was created and a Judicial Officer was appointed to man that post. Separate ADR Co-ordinators were appointed for the High Court and the City Civil & Sessions Court (the District Court for Mumbai). An ADR course was introduced for lawyers and Chartered Accountants in aegis with the Mumbai University, which has till date completed four courses. The earlier versions of the Model Rules were also adopted as soon as they became available. Awareness campaigns and training workshops were conducted in several parts of the State (of Maharashtra). Panels of trained Mediators were set up in several lower courts and some tribunals. A sizable piece of land was also earmarked for setting up a judicial academy and a mediation centre. And cases, at least outside the High Court, started being referred to mediation on a regular basis. As for the High Court itself, the system is such that the Chief Justice cannot direct his Brother Judges to refer suitable matters before them to some or the other ADR track, as he could with the lower judiciary. Thus only a few High Court Judges choose to recommend ADR options in cases before them.

The insufficiency of training for judges has left a majority of the judiciary ignorant or unconvinced about the mechanisms and nuances of each ADR track and the benefits of adopting ADR and Case Management systems in general and Mediation in particular. Some even remain unconvinced about the competency of the trained mediators, probably due to their limited initial experiences. It was probably due to one of the two above mentioned reasons that a very Senior Judge, whilst heading a Bench, spent over 50 minutes urging Counsels appearing in a family dispute to sit with each other and help their respective clients resolve their differences. He repeated several times "It is better that the two of you say something rather than the two of us say something." He even went to the extent of quoting dialogues from the celluloid world to buttress his point, but not once did he utter the word 'mediation', even though the High Court's Panel of Mediators was already in place for quite some time.

With the creation of the Maharashtra Judicial Academy & Indian Mediation Centre and Training Institute at Bombay, which was inaugurated recently by

the President of India, the need for judicial training will be effectively met. Already, a batch of over 40 newly appointed Judges for the District Courts in several parts of the State (of Maharashtra) received Judicial Training, which included an ADR component.

The next step is to simultaneously start training the lawyers representing parties in cases referred to mediation so that they can shift from their usual adversarial role and learn to adopt a more collaborative approach. Even more important is the need to empower the litigants by making them aware of the choices now made available to them. For both these tasks, the support of the Bar Councils and Bar Associations is crucial as they can not only exert the required influence on the legal fraternity, but can also assist the Judiciary in programmes to educate the litigating public, who are the end users whose empowerment would play a crucial role in changing the legal mindset.

Conclusion

By having trained panels of mediators and training also being imparted to Judges, Magistrates & other Judicial Officers, concerned court staff and, more importantly, to the litigation lawyers (along with the necessary sets of Rules for their respective conduct), ADR, when used effectively in tandem with a robust Case Management system, holds great promise for the litigants who have virtually been languishing for years in the corridors of Indian courts.

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