SECTION 89 OF THE CPC: ADR AND BUSINESS DISPUTES.

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INTRODUCTION

While litigation being the preferred mode of dispute settlement, over time there has been a clear increase in the level of case pendency across various courts in India. As per the data on NJDG, it is clear that over 83,66,474 civil cases are still pending before various Courts as of October 2018.[1] With this number only rising, keeping in mind the changing nature of businesses and technology, realisation of rights of individuals, and trans-national expansions — there is a pressing need to consider alternate avenues of dispute resolution. Further, added to this, there are certainly considerations regarding the workload, corruption, malpractice, political pressure, and even threats directed at judges.[2]

Mediation and conciliation are the non-adjudicative approaches to ADR, which primarily envision a client-centric process with the view to air grievances with a neutral third party to facilitate communications. Arbitration, however, "emphasises rights and applications of law," and an ultimate finality with the decision of the appointed arbitrator.[3] While there are certain key differences with regard to these processes, it seems to be the primary focus of these to — increase communication between the parties, offer a degree of privacy and further reduce the burden on the courts.[4] Keeping this in mind, and the fast-paced climate with which many businesses operate, the imperative of having an effective, speedy and private mechanism of dispute settlement is crucial. ADR provides the most viable alternative, keeping in mind the status of civil litigation as it is today.

With specific regard to the terminology, though the case of *Afcons Infrastructure vs. Cherian Varkey Construction*,[5] regarded 'mediation' and 'conciliation' to be synonymous — given the non-binding nature of both, and the fact that it involves negotiation with the help of a neutral third party.[6] However, more importantly, the Court did distinguish between the two with specific regard to Section 89 of the Civil Procedure Code ("**CPC"**). It saw then fundamentally different as the process of conciliation requires the consent of the parties, before a matter can be referred to it by the Court. On the contrary, before a case is referred for mediation by the courts, no such consent is needed. These two are further distinguished with regard to arbitration, where the maxim "*arbitrium est judicium*" is often used (the award of an Arbitrator is the same thing as a judgment).[7] Which thus makes it much more a question about the rights of the parties and the law, and less about just ensuring communication.

STATUTES AND THE COURT'S PERSPECTIVE

In India, Section 89 of the CPC itself provides that the Court "may" reformulate the terms of settlement and refer the case for either — arbitration, conciliation, judicial settlement, or mediation.[8] This has been a

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[1] National Judicial Data Grid (NJDG), Summary Report of India (Oct. 19, 2018) http://njdg.ecourts.gov.in/njdg_public/main.php

[2] Anurag K. Agarwal, *Resolving Business Disputes Speedily*, 41 ECONOMIC AND POLITICAL WEEKLY 2417, 2417-2418 (2006)

[3] Id.

[4] Kristine Forbes, *Similarities Between Mediation and Arbitration: Two Major Alternative Dispute Resolution Methods*, CONSUMER LAW MAGAZINE (Nov. 5, 2012), http://consumerlawmagazine.com/alternative-dispute-resolution-methods/.

[5] (2010) 8 SCC 24

[6] Id., at Para 8.

[7] K.D. Raju, Alternate Dispute Resolution System: A Prudent Mechanism of Speedy Redress in India (Dec. 15, 2007), http://dx.doi.org/10.2139/ssrn.1080602

[8] For the purposes of this paper, the primary focus is going to be restricted to arbitration, conciliation and mediation alone.

consequence owing to certain amendments made to the CPC.[9] It was been held that "depending on the nature of dispute and the relationship between the parties etc., the Court may suggest a particular form of ADR."[10] This referral by the Court has also been clarified in *Salem Advocate Bar Association vs. Union of India,*[11] that though mediation is a mandatory process, nothing prohibits the Courts form referring the parties to mediation upon the first instance (they may subsequently however, choose to walk out). All that needs to exist are certain 'elements' of a settlement.

Further, Order X, Rules 1A, 1B and 1C of the CPC provides for examination of the parties to ascertain the primary issues of controversy for specific referral to ADR mechanisms. Though Rules 1A to 1C seem to give parties the option to pick a mode of settlement outside the Court; while Section 89 has been interpreted to state that the Court refers such matter, there has been held to be no inconsistency.[12] It was been stated that a harmonious construction of Order X and Section 89 leads to the conclusion that Rules 1A to 1C (Order X) provide the manner in which jurisdiction is to be exercised, and in case of no consensus, the Court proceeds to choose the process.[13]

Under Part X of the CPC, the High Courts have powers to formulate their own rules. As a consequence of this, the Civil Procedure Alternative Dispute Resolution (CPADR) and Civil Procedure Mediation Rules have been adopted by numerous High Courts in India.[14] This has been pursuant to Section 89 and provide that arbitration and conciliation to be covered by the Arbitration Act, 1996; while mediation under the Mediation Rules [such as in Part II, Bombay HC Mediation Rules].[15]

However, with regard to arbitration, it has also been stated that the parties must specifically agree to choose arbitration before a pending suit. Unlike the situation under Section 89 of the CPC where the Courts provide the parties the option, and they decide to settle for arbitration.[16] Thus referral to arbitration is by means of agreement between the parties. Further, it is clear by the provisions of Section 89 itself that the Arbitration and Conciliation Act, 1996 would apply to cases referred to.

With regard to the specific history — it was the committee and report of Justice M. Jagannadha Rao that was presented in *Salem Advocate Bar Association vs. Union of India*[17] which became the turning point for ADR mechanisms. Similarly, even the Arbitration and Conciliation Act, 1940 was deemed unsatisfactory and was later amended as per the United Nations Commission on International Trade Law (UNCITRAL) model law. This gave rise to the 1996 Act where the Preamble gave credit to the UNCITRAL model law with regard to it's contribution to creating a single framework for 'fair and efficient' dispute settlement mechanisms in International Commercial Arbitration.[18]

COMMERCIAL DISPUTES AND ADR.

Arbitration is said to be the 'child of commerce,'[19] which makes it a good mechanism for ironing out disputes that arise with respect to trade and commerce. In the current day and age, numerous business transactions today have complex sub-transactions where "multiple parties enter into several distinct, yet

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[9] The Code of Civil Procedure (Amendment) Act, 2002.

[10] Shailesh Dhairyawan vs. Mohan Balkrishna Lulla, (2016) 3 SCC 619.

[11] (2005) 6 SCC 344.

[12] Id., at 5.

[13] Salem Advocate Bar Association vs. Union of India, AIR 2005 SC 3353 [Para 24.2].

[14] States that have these in place include Himachal Pradesh, Delhi, Karnataka, and Kerala.

[15] Vandana Shroff & Shaneen Parikh, *India: A Conciliatory Approach,* INTERNATIONAL FINANCIAL LAW REVIEW (Sep. 1, 2012), www.iflr.com/Article/3083688/India-A-conciliatory-approach.html.

[16] P. Anand Gajapati Raju vs. P.V.G. Raju (2000) 4 SCC 539.

[17] Id., at 13.

[18] The Arbitration and Conciliation Act, 1996 [Preamble].

[19] Id., at 7.

interconnected and interdependent agreements towards achieving a common commercial goal."[20] In the case of *Ameet Lalchand Shah v. Rishabh Enterprises*[21] where out of four contemporaneous business agreements, three had arbitration clauses, the Supreme Court observed that all of the agreements could be covered by the arbitration clause — thus giving a purposive outlook towards commercial transactions in the arbitration landscape.

Commercial disputes are best said to be resolved using either negotiation, mediation or a mix of different ADR processes. Particularly for business disputes where there is the necessity to 'safe face', there may also be instances where parties want to clear the air, before emotion can be distinguished from the law. In cases of mediation and negotiation, there is the added benefit that due to the central role of the client, the counsels are able to understand the questions of fact, and assess the strengths and weaknesses of their own side, and the opposition.[22] In event that such a case is to reach the Court, the would already have saved effort in the determination of the same.

Further, it is certain that mediation/conciliation is a much better suited for business endeavours that have been structured for the long term.[23] Given that it is more hinged on communication, and is significantly less destructive than litigation. In fact, instead of even ending just the dispute, the benefits of mediation in the business model may lead to even more future-based profitable outcomes with regard to the betterment of ties between the parties.

In India, as of 2018, the Commercial Courts, Commercial Division and Commercial Appellate Division of High Courts (Amendment) Ordinance, 2018 was passed. As per Section 12A, a suit (except one claiming urgent interim relief) cannot be instituted unless the remedy of pre-institution mediation occurs. While the purpose of this itself could be to enhance mediation as a viable alternative in cases of commercial disputes — the potential of this could also increase the ease of doing business in the Indian context.[24] Numerous scholars have however debated about whether this step is coercive and not viable for dispute resolution, yet there has been a distinction drawn between "coercion into" and "coercion within" the mediation process.[25] While the latter is problematic as it may jeopardise interests and may vitiate outcomes, the former provides for parties to later even consult the litigation system if their interests have not been met. However, there is the issue of infrastructure in the handling of these cases; and further the question of whether mediation will finally get credence as a viable alternative in the ADR space.

NEW PATHWAYS

While the emergence of ADR as a viable platform for dispute resolution was primarily in light of the high levels of case pendency in the Courts system — it is certain that the provisions envisioned under Section 89 of the CPC provide many more benefits to the parties opting for the mechanisms envisioned. In the case of International Commercial Contracts, the often preferred method of dealing with disputes involves an escalation system — the first level being mediation or negotiation, which is often backed up by arbitration or litigation.[26] However, given the business landscape as it exists today, it is often the case that mediation and other mechanisms of ADR may also fall short, primarily due to the requirement of physical presence of the contesting parties. Keeping this in mind, the business community had increasingly started incorporating Online Dispute Resolution (ODR) clauses in their agreements.

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[20] Ritvik Kulkarni, *India's Treatment of Interconnected Agreements to Arbitrate*, KLUWER ARBITRATION BLOG (Aug. 9, 2018), http://arbitrationblog.kluwerarbitration.com/2018/08/09/indias-treatment-interconnected-agreements-arbitrate/.

[21] AIR 2018 SC 3041

[22] Id., at 7.

[23] Linda C. Reif, *The Use of Conciliation or Mediation for the Resolution of International Commercial Disputes* 45 Can. Bus. L.J. 20 (2007).

[24] Juhi Gupta, Mandatory Pre-Institution Commercial Mediation In India: Premature Step In The Right Direction?, KLUWER MEDIATION BLOG (Sep. 1, 2018), http://mediationblog.kluwerarbitration.com/2018/09/01/mandatory-pre-institution-commercial-mediation-india-premature-step-right-direction/

[25] Dorcas Quek, *Mandatory Mediation: An Oxymoron - Examining the Feasibility of Implementing a Court-Mandated Mediation Program*, 11 Cardozo J. Conflict Resol. 479 (2010)

[26] Id., at 23.

As of today, companies like eBay and PayPal have ODR systems which are geared to increase the number of profitable transactions.[27] The opting of such clauses and subsequently appointing a third party negotiator or neutral facilitator increase the speed and efficiency of transactions and dispute resolutions. ODR mechanisms adopt various forms of information technology services to iron out disputes, where they primarily tap into the cyber-space.[28] With more businesses like Amazon and Flipkart taking to the online space, it is clear that the ODR, involving mediation, negotiation and even arbitration may be a key consideration to be integrated into the CPC and the Arbitration and Conciliation Act. While there has been recognition of, by the Department of Justice in India, regarding the feasibility of ADR and ODR ways. They have provided an indicative list of organisations and practices engaged in private mediation — online or otherwise.[29] However, there needs to me more techno-legal developments for the real impact of ODR to be felt.

Further, considering the heavy emphasis on family-businesses in India, and the element of continuity, there is the further dimension and emphasis on preserving relations. With a higher degree of privacy, confidentiality, and carry over benefits, particularly by restructuring relationship ties for mutual gain[30] — there are clear cultural reasons as to why mediation and negotiation fit into the context of India. That apart, there is a need to adapt to the dynamic legal field, where ADR methods have been gaining prominence. There is the further need to strengthen these avenues as possible dispute resolution forums, as they often leave self-determination to the parties. Mediation has been gaining judicial recognition, as in the case of *K. Srinivas Rao vs. D.A. Deepa,*[31] where it was even stated that mediation centres have a good rate of case disposal — particularly useful for marital claims. Before being introduced via the 2018 Commercial Courts Ordinance, the idea of pre-litigation mediation was brought up in this case.

Overtime, the Supreme Court of India has also upheld various instances where mediation and other ADR processes have been used.[32] The lack of clarity with regard to Section 89 of the CPC has often been mentioned, and the *Afcons*[33] case gave some coherence to it's reading, by changing "mediation" [Section 89(2)(d)] with "judicial settlement" [Section 89(2)(c)].[34] The Court believed this was necessary due to a drafting error on part of the Legislature. However, it is still crucial in the current business set-up to further amalgamate these ADR processes with the CPC, considering most of the back-log certainly occurs in the civil courts system.[35]

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[27] Esther van Den Heuvel, *Online Dispute Resolution as a Solution to Cross-Border E-Disputes,* AN INTRODUCTION TO ODR (Dec. 12, 2000), http://www.oecd.org/internet/consumer/1878940.pdf.

[28] Id., at 2.

[29] Department of Justice, ONLINE DISPUTE RESOLUTION THROUGH MEDIATION, ARBITRATION, CONCILIATION, ETC., http://doj.gov.in/sites/default/files/List%20of%20firm%20with%20profile-17_1.pdf (last visit Oct. 17, 2018).

[30] Id., at 23.

[31] AIR 2013 SC 2176.

[32] ONGC vs. Saw Pipes Limited., AIR 2003 SC 2629

[33] Id., at 5.

[34] Id., at 5 [Paras 13 and 25].

[35] Id., at 1.