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Dispute Insights

Perspectives on Arbitration & Disputes

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Editor's desk



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Welcome to the next edition of Dispute Insights, a periodic newsletter which captures recent developments and commentary on disputes and arbitration.

In this edition, we look at the fundamentals of Alternative Dispute Resolution (ADR) and its key mechanisms. In recent years, the growth and prevalence of Alternative Dispute Resolution has been on the rise. The diverse methods available in ADR allow parties to reach a resolution without heading for litigation. We explore the most widely used mechanisms available in resolving disputes, their typical characteristics, advantages and fallout.

While it is our endeavour to support you in fulfilling your business objective, we always look forward to engage with you more closely. Do let us know what you think and in case you want us to address any specific subject, feel free to write to us.

We hope the information is useful. As always, we welcome your feedback.

Best,
Vidya Rajarao



Viewing ADR through the corporate lens

Judicial backlog in India is enormous. While one can consider ways to tackle this issue, it may be worthwhile to seek recourse 'out of court'. In the corporate context, litigation drains businesses' resources in terms of money, manpower and time and may also put in jeopardy, its reputation. It is therefore prudent to recognise courts as a place where the dispute concludes after alternative methods have been deliberated and tried, and not where resolution of a dispute commences.

Given the current delay in judgements and backlog of pending cases, justice resolution through the ADR scheme is therefore a viable, efficient and progressive.

Understanding Alternative Dispute Resolution (ADR)

ADR is a method to initiate and settle party disputes outside the courtroom. A facilitated settlement, it is an alternate to vicious litigation as the spectrum of techniques within ADR encourage direct negotiations which expedite settling a dispute.

This substitute is so effective that for settling disputes, Courts often mandate parties to pursue these options before getting into litigation..

Key Features

Generally, ADR procedures are not only less formal, but more cost and time efficient, as compared to litigation. These also offer, parties involved, an opportunity to determine when and how a dispute will be resolved. In addition, these procedures have the benefit of providing parties with the prospect to lessen enmity, regain sense of control, resolve and conclude the conflict in a peaceful manner, gain acceptance of the outcome and achieve a greater sense of justice in each case.

The resolution of dispute usually takes place in private and is more viable, economic and efficient. ADR methods are gaining acceptance in legal and commercial domain, both within the country and at a global level and it is sometimes referred to as "Appropriate Dispute Resolution", primarily, it being more interactive and accessible for the parties involved.

Advantages

The process of ADR has been introduced to assist in resolving disputes without going to court/trial for the following reasons:

- No filing of lawsuit with the judicial courts
- No delayed and prolonged trials since the dispute can be settled sooner
- Cost effective to respondents and claimants due to early resolution of disputes
- Problem-solving approach as it provides opportunities for claimants and respondents to fully put forward their views for contention
- Some ADR processes allow parties for creative resolutions that are not available in a trial. Example: Arbitration which allows parties to choose an expert in a particular field to decide the dispute
- Prevents business relationships from going sour
- Allows the concerned parties to find satisfying solutions
- Confidentiality of proceedings and decision

This makes ADR a viable substitute over other methods of dispute resolution such as litigation as it is found on the premise of adopting a positive outlook to resolve dispute.

Downside and concerns

Critics argue that ADR lacks in offering choices of legal recourse to a client who may not be willing to take the settlement negotiated upon. Generally speaking, there is also absence of a standard structure as far as compensation is concerned. In many instances, there is no way to enforce the continuity of an ADR process where one of the parties ceases to cooperate. It may also not be a preferred choice for clientele who prefer a relatively formal proceeding, akin to a court.

Modes commonly practised

ADR in CIVIL cases is generally classified into at least 4 types as given below:

Negotiation

Mediation

Arbitration

Conciliation

1. Negotiation

A primary mode of ADR, negotiation is a discussion aimed at resolving disputes or arriving at an agreement for individual and collective advantage to satisfy financial and commercial interests. It can be used to resolve an existing dispute or lay standards for a future relationship between the involved organisations or parties.

Features

One of the most commonly used techniques, negotiation is voluntary with no compulsion for participation. It allows parties to not only accept or reject the negotiation outcome, but also withdraw at any point, during the process. It is an informal method of resolving dispute, a process, where there are no prescribed rules.

Moreover, the parties involved are free to adopt rules by mutual agreement such as matter, timings and location of negotiation. They also have the liberty to make the negotiation public or private, making the process flexible. Like any other method of dispute resolution, negotiation does not guarantee a solution. However, this process has a greater possibility of arriving at a solution in cases where parties to the dispute adopt an approach which is in commercial and financial interest for both.

Advantages

Unlike mediation and conciliation, there is no need for a neutral third party in a negotiation. This is especially advantageous in resolving issues which are highly sensitive in nature. Negotiation not only helps preserve the existing commercial relationship between parties, but also proves to be less expensive and time consuming.

Despite many advantages, negotiation is not always fair. A particular negotiation may have a successful outcome. For example, absence of the right intermediaries in one party can become an advantage for the other. This makes the outcome of negotiation subject to future challenge, as an impeding manoeuvre to prevent another party to the dispute from using its rights of litigation or arbitration.

However, a successful negotiation can also enhance the existing relationship between parties. Since majority of disputes are around commercials / financials, the professional well-versed in the field of finance and can guide the parties to just and equitable solutions.

2. Mediation

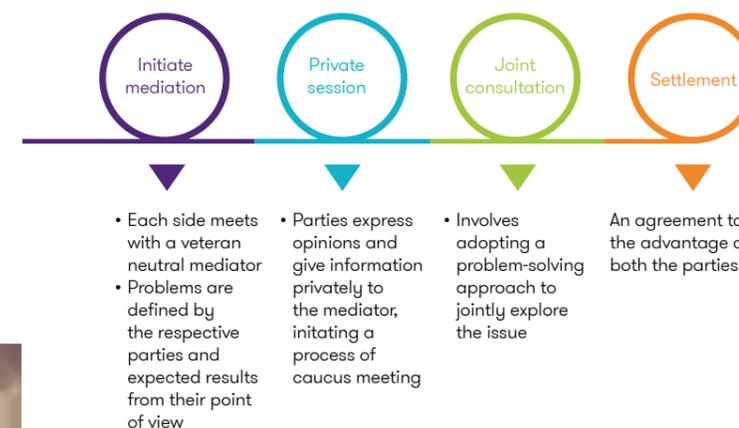
Mediation is a process controlled by parties themselves. In mediation, a “mediator” helps the parties reach a mutually acceptable resolution of the dispute, acting as a facilitator in helping the parties reach a negotiated settlement. The mediator makes no judgements and does not enforce his/her interpretation of what an impartial settlement should be.

The mediator makes no decisions and does not impose her view. As part of the process, the outcome is controlled by the two parties.

Features

Mediation is a simple, voluntary, informal, party focused, and organised conciliation process, where an impartial third party assists the warring parties in amicably resolving their disputes by using specified communiqué and negotiation techniques.

Process of mediation



The mediator has no power to dictate his/her decision over the party. In corporate domain, cases that can be mediated are contractual disputes, employment disputes and the ones based on agreements between the parties.

Advantages

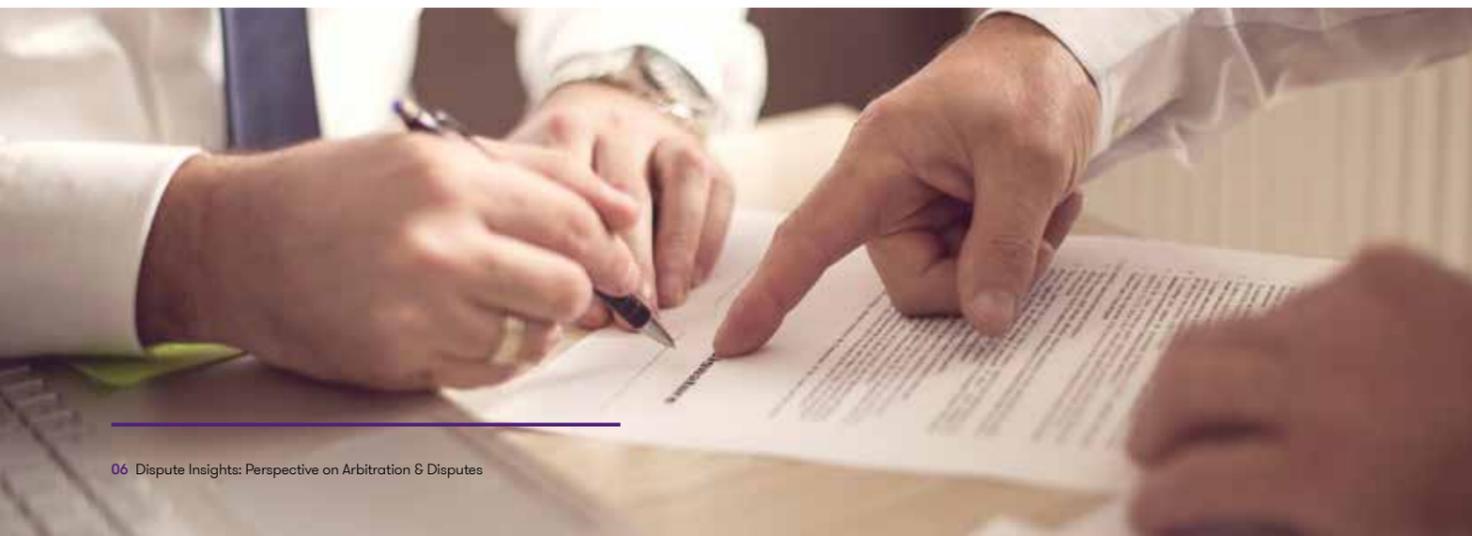
- Mediation is economically more viable than litigation or Court trial, reason being, in litigation, gathering evidences and information about the case is required which needs time and money.
- In mediation, the outcome of the case is in the hands of the disputing parties rather than a judge or jury.
- Since, it is a private process, the parties are not required to disclose information to public. Court trials, as a rule, must transcribe everything said onto the public record.
- Mediation usually lasts a shorter time and costs less than a trial or an arbitration and can be completed anywhere in half a day or over several weeks. Hence, it is expeditious and cost effective.
- Since it is a confidential process, nothing said can be used in Court if the process is not concluded. It is extremely useful in dealing with sensitive cases where any public leakage of the information or the case will cause loss to the companies.

Disadvantages

- Since mediation is a private consultation without the ceremonial rules of an arbitration or litigation, parties are often able to hide information or proof they might not have concealed in a usual Court situation.
- Mediation assumes that the parties in dispute are equal in power, which is not the case in all scenarios.
- Finally, if the mediation fails, the parties would have wasted time and money.

In conclusion, Mediation may be predominantly beneficial when parties have an association they want to preserve and may not be effective if one of the parties is reluctant to cooperate or compromise.

In most instances, since the end line of the case is financial loss, mediations are conducted by professionals experienced in the area of Finance. Professionals in mediation process sometimes may allow a witness for the individual parties if the case involves expert opinions. It might also be wise to consult with a professional prior to engaging in mediation so one can understand the issues in their case.





3. Conciliation

Conciliation as a form of dispute resolution is reconciliation between parties through an intermediary referred to as the “conciliator” who intervenes and attempts to resolve the issues between the parties independently with one another. This is done by cultivating communication, understanding and explaining issues, providing technical support, exploring and suggesting potential solutions and eventually bring about a negotiated solution.

Features

Conciliation is a voluntary proceeding, where the parties involved are free to agree or disagree with the end objective of resolving their dispute through conciliation. The process is flexible, allowing parties to outline the time, structure and content of the conciliation and how it will proceed. A conciliator proposes a solution which considers the parties’ legal positions and their commercial and financial interests. Conciliation includes deliberations among the parties and the conciliator with an intention to explore justifiable and impartial resolutions by aiming the existing issues involved in the dispute and creating alternatives for a settlement that are suitable to all parties.

Advantages

- In addition to being flexible, the process is not obligatory as the conciliator does not decide for the parties, but attempts to support them in making decisions in order to find a mutual resolution
- The process is risk-free and not mandatory for the parties till they conclude and sign the arrangement/agreement
- Once a solution is attained among the disputing parties before a conciliator, the agreement /arrangement has the effect of an arbitration award and is legally acceptable in any Court in the country

Conciliation may be particularly suited where parties in a dispute desire to safeguard and preserve their commercial relationships. Categories of disputes generally conducive for conciliation include:

Commercial

Financial

Employment

Partnerships

Intellectual Property

Insurance

Insolvency

Service

Environmental and product liability

Any party to the dispute can initiate the conciliation procedure. Proceedings for Conciliation commence when an invitation from one party to another for resolution through Conciliation is accepted. The conciliator does not give any award or order.

S/he attempts to get an acceptable arrangement as to the dispute among parties by common accord. The agreement so reached at is signed by the parties and authenticated by the conciliator. If no compromise could be reached between the parties and the conciliation proceedings fail, the parties can recourse to arbitration.

The conciliation proceedings are private in nature. Conciliation has attained statutory recognition as it has been demonstrated useful that before referring the dispute to the civil Court or industrial court etc., efforts to reconciliation between the parties should be made.

4. Arbitration

Arbitration as a form of dispute resolution, refers to a process where the two parties to the dispute refer their problem to one or more persons commonly referred to as arbitrators. The two parties are bound by the decision of the arbitrator.

Features

The arbitrators are neutral to the parties in dispute. Arbitration can be either voluntary or mandatory. Arbitration will be mandatory based on a clause of contract entered between the parties which states arbitration to be entered on the occurrence of a certain event stated in the contract.

Advantages

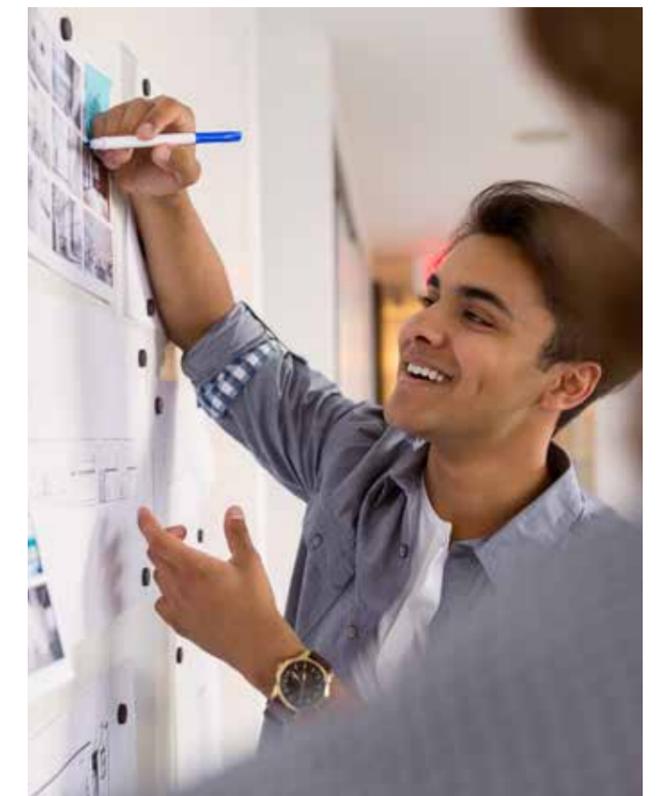
- The process of resolution is faster
- The costs saved on account of reduced time are higher
- A neutral person is onboarded to decide the outcome of the dispute; and
- Works well in cases which require an expert on the subject to assist the decision-maker.

However, arbitration will not benefit when:

- The aggrieved party seeks court intervention or recourse via appeal. The traditional mindset to challenge a court decision when replicated in an arbitration, defeats the entire purpose to arbitrate in the first place. It may also happen that the case of a party is weak or counsel is incompetent. In such circumstances, the likelihood of being content with the arbitration award may be bleak.
- Damages awarded in arbitration cannot be enforced directly. Enforcement of arbitration award further requires access to other judicial remedies.

Conclusion

In conclusion, Alternative Dispute Resolution (ADR) is increasingly preferred to overcome the challenges associated with prolonged court procedures. ADR, as a form of availing justice provides a faster form of resolution, reduced costs and maintains the privilege of confidentiality for the parties in dispute. Each mechanism has its distinct features, strengths and weaknesses, however, it should be noted that ADR methods do not in any way put an end to litigation.



News Snippets

High Level Committee on Making India Hub of Arbitration Submits Report

Aug 2017

In its endeavour to make India an international hub of Arbitration and robust ADR, the Department of Legal Affairs, Ministry of Law and Justice, in January, 2017 constituted a ten Member, High Level Committee under the Chairmanship of Justice B.N.Srikrishna, Retired Judge, Supreme Court of India. The committee submitted its report on August 3, 2017 which suggested measures to improve the overall quality and performance of arbitral institutions in India, promote the standing of the country as preferred seat of arbitration.

Source: Press information Bureau

Delhi High Court halts second arbitration by Vodafone

Aug 2017

The Delhi High Court restrained Vodafone Group's arbitration proceeding against India, under the India-UK Bilateral Investment Protection Agreement (BIPA) as the telecom major had initiated similar proceedings on the same issue under the India-Netherlands BIPA. The proceedings are in connection with a ₹11,000-crore tax demand raised against the company in relation to its \$11 billion deal acquiring stake of Hutchinson Telecom. A notice was also issued to Vodafone to respond by October 26 on the Central government's plea seeking a permanent injunction against the telecom major from proceeding with the arbitration under the India-UK BIPA

Source: The Hindu Business Line

Singapore International Arbitration Centres opens office in GIFT IFSC

Aug 2017

The Singapore International Arbitration Centre (SIAC) opened a second representative office in India at the Gujarat

International Finance Tec-City (GIFT) International Financial Services Centre Zone (IFSC). SIAC and GIFT will collaborate to promote to all companies and investors in GIFT, the use of arbitration and related dispute resolution services such as the Arb-Med-Arb service jointly provided by SIAC and the Singapore International Mediation Centre.

Source: Business Standard

India's New Tax May Unleash a Flood of Litigation

Jun 2017

India's new goods and services tax will spark a flood of litigation on everything from which tax brackets companies fall into to the revenue they generate, some of the country's top lawyers predict. One of Prime Minister Narendra Modi's most ambitious reforms, the tax will combine more than a dozen levies, creating a uniform market across India for the first time. Most goods and services will fall into four main "slabs" or brackets: 5, 12, 18 and 28 percent. Many staples, such as fresh vegetables, are exempt.

Source: Bloomberg

New rules to cut transfer pricing disputes

Jun 2017

India has unveiled a new set of rules that aim to further provide certainty to multinationals and reducing transfer pricing disputes and litigation. The Central Board of Direct Taxes (CBDT) has revamped the norms called the safe harbour rules, unveiled in 2013, under which income tax authorities do not question pricing of dealing between multinational companies and a related party such as their subsidiaries. The new norms will benefit a host of sectors such as IT and ITeS, pharma and automobile.

Source: Economic Times

References

- Department of Justice, Government of Canada
- California Courts, Judicial Council of California
- ShodhGanga, INFLIBNET

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