ARBITRATION, CONCILIATION & MEDIATION IN A NUTSHELL

Background

Since a lot of cases were pending for many years in Indian courts. To solve the issues and make the people belief in Indian Judiciary, Alternate Dispute Resolution (ADR) came into the Indian judiciary. It is a method that provides speedy justice as well as it is less expensive than going to the court. ADR mechanisms help expedite dispute resolution, reducing the strain on courts and facilitating timely outcomes.

The concept of Alternate Dispute Resolution (ADR) in India can be traced back to ancient times when village councils and elders played an important role in resolving disputes.

It has been noted that misunderstanding and conflict commonly arise whenever two people get together for the purpose of transaction or business. Such misunderstanding & conflict needs resolution, which should be quick and effective. Apart from litigation, there are other alternative methods of dispute resolution which are quick and effective in nature.

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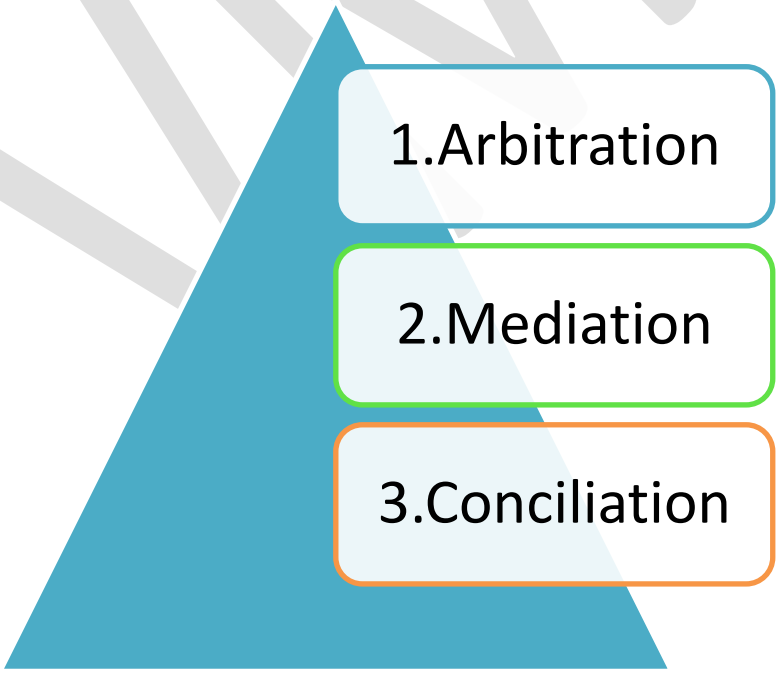
Dispute Resolution – History

Dispute resolution in India has a rich history that dates back centuries. Here's an overview of how mediation and arbitration played a key role, alongside other traditional systems:

1. **Ancient Practices**:
   - **Mahajans** (respected traders) settled business disputes through **mediation** and **arbitration**.
   - The **Panchayat system** was used to resolve social and family disputes, with a council of elders providing decisions.
2. **Formalization of ADR**:
   - In 1908, the **Civil Procedure Code (CPC)** introduced provisions for **Alternative Dispute Resolution (ADR)**, including arbitration.
3. **Modern ADR**:
   - ADR mechanisms like mediation and arbitration were formalized with the **Arbitration and Conciliation Act of 1996**, becoming integral to India's legal system today.

There are three main types of Alternate Dispute Resolution



ARBITRATION

Arbitration: Arbitration is one of the most widely used Alternate Dispute Resolution methods in India. It involves a neutral third party, the arbitrator, who hears the arguments and evidence presented by the parties and makes a binding decision. India has a strong legal framework for arbitration, governed by the Arbitration and Conciliation Act, 1996. The arbitration process is more structured and similar to a court case. The main purpose of the arbitrator is to avoid court proceedings which are very time consuming and costly. Usually in India, An arbitrator is appointed in dispute matters like labour disputes, business disputes, consumer disputes, and family matters.

The decision taken by the arbitrator is accompanied by a written opinion providing reasons supporting the decision.

Further, the procedure is comparatively expeditious than courts and tribunals. However, the process is a bit expensive, and if there is a mistake in selecting an arbitrator, the judgement becomes arbitrary.

Who is an Arbitrator?
In arbitration, an arbitrator is the presiding officer. The Cambridge dictionary defines an arbitrator as a person who has been officially chosen to make a decision between two people or groups who do not agree.

In an arbitration proceeding, he plays an important role in deciding the case. An arbitrator is an independent third-party entity. They hear the pieces of evidence, apply the law and decide the result of the arbitration proceedings.

Who can be an Arbitrator?
A person who is of sound mind can be appointed as an arbitrator. The nationality of an arbitrator is not specifically restricted. Hence, the arbitrator may be of any nationality. This is as per Section 11 of the Arbitration and Conciliation Act, 1996 (“The Act”). Furthermore, the parties are free to choose the arbitrator and determine the arbitrator’s qualifications.

MEDIATION

Mediation is a voluntary and non-binding dispute resolution process where a trained mediator helps the parties reach a mutually acceptable solution. It is a less formal and collaborative approach compared to litigation or arbitration.

The **Mediation and Conciliation Project Committee (MCPC)** plays a key role in promoting mediation in India, emphasizing its value in resolving less serious disputes. If both parties agree to mediation, they can work together to reach a solution that benefits both, preserving their relationship and avoiding the time and cost of formal legal proceedings.

Example: If you owe money but cannot pay immediately, instead of facing a lawsuit, you might offer goods or services in exchange for the debt. If an agreement is reached, it is typically formalized in writing. If mediation fails, you retain the right to pursue other options, such as arbitration or litigation.

When and How Mediation is Used:

Mediation is typically used when parties cannot negotiate a resolution on their own. The mediator facilitates communication and helps identify potential solutions. It can be used in various disputes, including:

- **Consumer and merchant disputes**
- **Landlord and tenant conflicts**
- **Employment issues**
- **Family matters** (e.g., divorce, child custody, visitation rights)
- **Business or personal injury disputes**

Parties can choose to go to mediation with or without legal representation, depending on the nature of the dispute. Mediation is a versatile tool, suitable for a wide range of conflicts, offering a more collaborative and efficient resolution process.

CONCILIATION

Conciliation is a widely used method of dispute resolution that shares similarities with mediation but differs in its level of involvement from the third-party facilitator. While mediation relies on the mediator to help the parties communicate and reach an agreement, **conciliation** is a more active process in which the conciliator takes a proactive role in suggesting solutions and may even draft the settlement agreement. This more interventionist approach provides the conciliator with the ability to guide the parties toward a resolution, making it a suitable choice for many types of disputes.

The **Mediation and Conciliation Act, 1996** governs the process of conciliation in India, setting a legal framework for its use in resolving disputes. The scope of conciliation is vast, extending across a variety of disputes, from **industrial and labour conflicts** to **marital and family matters**. Its adaptability and flexible nature make it a valuable tool in resolving both personal and professional disputes.

Types of Disputes:

- Conciliation is commonly used in **industrial disputes**, where it serves as an alternative to the more adversarial processes of litigation or strikes. It is particularly useful in resolving conflicts between **employers and employees**, or between **labor unions** and management.
- It is also effective in **family disputes**, including matters of **divorce**, **child custody**, **visitation rights**, and **inheritance**. By promoting dialogue and compromise, conciliation can help preserve relationships and avoid the emotional toll of protracted legal battles.

Benefits of Conciliation:

- **Control Over Outcome**: One of the primary advantages of conciliation is that it allows both parties to have a greater degree of control over the outcome. They actively participate in finding a solution and are more likely to reach a mutually agreeable resolution.

- **Cost-Effective and Efficient**: Compared to formal legal proceedings, conciliation is typically faster and more affordable. This makes it an attractive option for parties looking to resolve disputes without incurring the time and financial costs associated with litigation.

Advantages of ADR in India:

Speed: ADR methods are generally faster than traditional litigation, which can take years to reach a final decision. This makes the delivery of justice faster.

Cost-effective: ADR is often more cost-effective than litigation, as it reduces legal fees and court-related costs.

Flexibility: ADR methods allow parties to customize the process to suit their needs, ensuring a more flexible and adaptive approach to dispute resolution.

Confidentiality: Many ADR processes, such as mediation and conciliation, are confidential, protecting sensitive information from public scrutiny.

Reduced Court Backlog: ADR mechanisms help reduce the burden on the overburdened Indian judiciary by resolving disputes out of court.

Challenges of ADR in India:

Awareness and Acceptance: Lack of awareness of ADR practices and resistance to change are significant barriers to their adoption.

Overlapping Jurisdiction: In some cases, disputes may move back and forth between the ADR process and the courts, causing delays and confusion.

Enforceability: Ensuring the enforceability of ADR settlements can be challenging, especially in cases of non-compliance.

Quality of Mediators/Conciliators: The effectiveness of ADR largely depends on the skills and impartiality of the mediators or conciliators involved.

Cultural Factors: In some instances, deep-rooted cultural and social factors can hinder the success of ADR, especially in family and community disputes.

SOME KEY PROVISIONS UNDER ARBITRATION AND CONCILLIATION ACT, 1996

Section 7: Arbitration agreement

1. Arbitration agreement means an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not.
2. An arbitration agreement may be in the form of an arbitration clause in a contract or in the form of a separate agreement.

3. An arbitration agreement shall be in writing.

4. An arbitration agreement is in writing if it is contained in

   a) document signed by the parties;
   b) an exchange of letters, telex, telegrams or other means of telecommunication [including communication through electronic means] [Inserted by Act No. 3 of 2016 dated 31.12.2015.] which provide a record of the agreement; or
   c) an exchange of statements of claim and defence in which the existence of the agreement is alleged by one party and not denied by the other.

5. The reference in a contract to a document containing an arbitration clause constitutes an arbitration agreement if the contract is in writing and the reference is such as to make that arbitration clause part of the contract.

Section 8: Power to refer parties to arbitration where there is an arbitration agreement

1. A judicial authority, before which an action is brought in a matter which is the subject of an arbitration agreement shall, if a party to the arbitration agreement or any person claiming through or under him, so applies not later than the date of submitting his first statement on the substance of the dispute, then, notwithstanding any judgment, decree or order of the Supreme Court or any Court, refer the parties to arbitration unless it finds that prima facie no valid arbitration agreement exists.

2. The application referred to in sub-section (1) shall not be entertained unless it is accompanied by the original arbitration agreement or a duly certified copy thereof.

   Provided that where the original arbitration agreement or a certified copy thereof is not available with the party applying for reference to arbitration under sub-section (1), and the said agreement or certified copy is retained by the other party to that agreement, then, the party so applying shall file such application along with a copy of the arbitration agreement and a petition praying the Court to call upon the other party to produce the original arbitration agreement or its duly certified copy before that Court.

3. Notwithstanding that an application has been made under sub-section (1) and that the issue is pending before the judicial authority, an arbitration may be commenced or continued and an arbitral award made.

Section 9: Interim measures, etc., by Court.

For detail refer the act. https://legalaffairs.gov.in/acts-rules-policies

Composition of Arbitral Tribunal

Section 10 Number of arbitrators

1. The parties are free to determine the number of arbitrators, provided that such number shall not be an even number.
2. Failing the determination referred to in sub-section (1), the arbitral tribunal shall consist of a sole arbitrator.

Section 11 Appointment of arbitrators

1. A person of any nationality may be an arbitrator, unless otherwise agreed by the parties.

2. Subject to sub-section (6), the parties are free to agree on a procedure for appointing the arbitrator or arbitrators.

3. Failing any agreement referred to in sub-section (2), in an arbitration with three arbitrators, each party shall appoint one arbitrator, and the two appointed arbitrators shall appoint the third arbitrator who shall act as the presiding arbitrator.

4. If the appointment procedure in sub-section (3) applies and

   a) a party fails to appoint an arbitrator within thirty days from the receipt of a request to do so from the other party; or

   b) the two appointed arbitrators fail to agree on the third arbitrator within thirty days from the date of their appointment,

   [the appointment shall be made, on an application of the party, by the arbitral institution designated by the Supreme Court, in case of international commercial arbitration, or by the High Court, in case of arbitrations other than international commercial arbitration, as the case may be]

5. Failing any agreement referred to in sub-section (2), in an arbitration with a sole arbitrator, if the parties fail to agree on the arbitrator within thirty days from receipt of a request by one party from the other party to so agree the appointment shall be made, upon request of a party, by 1[the Supreme Court or, as the case may be, the High Court or any person or institution designated by such Court].

6. Where, under an appointment procedure agreed upon by the parties,—
   (a) a party fails to act as required under that procedure; or
   (b) the parties, or the two appointed arbitrators, fail to reach an agreement expected of them under that procedure; or
   (c) a person, including an institution, fails to perform any function entrusted to him or it under that procedure,

   a party may request 1[the Supreme Court or, as the case may be, the High Court or any person or institution designated by such Court] to take the necessary measure, unless the agreement on the appointment procedure provides other means for securing the appointment.

   (6A) The Supreme Court or, as the case may be, the High Court, while considering any application under sub-section (4) or sub-section (5) or sub-section (6), shall, notwithstanding any judgment, decree or order of any Court, confine to the examination of the existence of an arbitration agreement.

(6B) The designation of any person or institution by the Supreme Court or, as the case may be, the High Court, for the purposes of this section shall not be regarded as a delegation of judicial power by the Supreme Court or the High Court.]

7) A decision on a matter entrusted by sub-section (4) or sub-section (5) or sub-section (6) to [the Supreme Court or, as the case may be, the High Court or the person or institution designated by such Court is final and no appeal including Letters Patent Appeal shall lie against such decision].

(8) The Supreme Court or, as the case may be, the High Court or the person or institution designated by such Court, before appointing an arbitrator, shall seek a disclosure in writing from the prospective arbitrator in terms of sub-section (1) of section 12, and have due regard to-

(a) any qualifications required for the arbitrator by the agreement of the parties; and

(b) the contents of the disclosure and other considerations as are likely to secure the appointment of an independent and impartial arbitrator.

(9) In the case of appointment of sole or third arbitrator in an international commercial arbitration, [the Supreme Court or the person or institution designated by that Court] may appoint an arbitrator of a nationality other than the nationalities of the parties where the parties belong to different nationalities.

(10) The Supreme Court or, as the case may be, the High Court, may make such scheme as the said Court may deem appropriate for dealing with matters entrusted by sub-section (4) or sub-section (5) or sub-section (6), to it.]

(11) Where more than one request has been made under sub-section (4) or sub-section (5) or sub-section (6) to the Chief Justices of different High Courts or their designates, [different High Courts or their designates, the High Court or its designate to whom the request has been first made] under the relevant sub-section shall alone be competent to decide on the request.

(12) (a) Where the matters referred to in sub-sections (4), (5), (6), (7), (8) and sub-section (10) arise in an international commercial arbitration, the reference to the "Supreme Court or, as the case may be, the High Court" in those sub-sections shall be construed as a reference to the "Supreme Court"; and

(b) Where the matters referred to in sub-sections (4), (5), (6), (7), (8) and sub-section (10) arise in any other arbitration, the reference to the Supreme Court or, as the case may be, the High Court in those sub-sections shall be construed as a reference to the "High Court" within whose local limits the principal Civil Court referred to in clause (e) of sub-section (1) of section 2 is situate, and where the High Court itself is the Court referred to in that clause, to that High Court.]

(13) An application made under this section for appointment of an arbitrator or arbitrators shall be disposed of by the Supreme Court or the High Court or the person or institution designated by such Court, as the case may be, as expeditiously as possible and an endeavour shall be made to dispose of the matter within a period of sixty days from the date of service of notice on the opposite party.

(14) For the purpose of determination of the fees of the arbitral tribunal and the manner of its payment to the arbitral tribunal, the High Court may frame such rules as may be necessary, after taking into consideration the rates specified in the Fourth Schedule.

Explanation.— For the removal of doubts, it is hereby clarified that this sub-section shall not apply to international commercial arbitration and in arbitrations (other than international commercial arbitration) in case where parties have agreed for determination of fees as per the rules of an arbitral institution.]

For more details: https://legalaffairs.gov.in/acts-rules-policies

Provision of ADR under Companies Act, 2013

Chapter– XXVIII Special Courts

Section 442 of Companies Act, 2013

The Companies Act, 2013 under **section 442** provides for mediation and conciliation as viable options for dispute resolution to which the concerned parties can resort to at any stage of the proceedings between them. It provides for dispute settlement through alternate disputes resolution mechanisms. Such a mechanism provides an alternative to litigation which is a time consuming and exhausting process.

(1) As per Section 442 of the Companies Act, 2013, the Central Government is required to maintain a panel of experts to be called as the Mediation and Conciliation Panel consisting of such number of experts having such qualifications as prescribed for mediation between the parties during the pendency of any proceedings before the Central Government or the Tribunal or the Appellate Tribunal under this Act.

(2) Any of the parties to the proceedings may, at any time during the proceedings before the Central Government or the Tribunal or the Appellate Tribunal, apply to the Central Government or the Tribunal or the Appellate Tribunal, as the case may be, in form MDC-2 along with such fees as may be prescribed, for referring the matter pertaining to such proceedings to the Mediation and Conciliation Panel and the Central Government or Tribunal or the Appellate Tribunal, as the case may be, shall appoint one or more experts from the panel referred to in sub-section (1).

(3) The Central Government or the Tribunal or the Appellate Tribunal before which any proceeding is pending may, suo motu, refer any matter pertaining to such proceeding to such number of experts from the Mediation and Conciliation Panel as the Central Government or the Tribunal or the Appellate Tribunal, as the case may be, deems fit.

(4) The fee and other terms and conditions of experts of the Mediation and Conciliation Panel shall be such as may be prescribed.

Refer for more details: The Companies (Mediation and Conciliation) Rules, 2016

(5) The Mediation and Conciliation Panel shall follow such procedure as may be prescribed and dispose of the matter referred to it within a period of three months from the date of such reference and forward its recommendations to the Central Government or the Tribunal or the Appellate Tribunal, as the case may be.

Time limit for completion of mediation or conciliation:

The process for any mediation or conciliation under these rules shall be completed within a period of three months from the date of appointment of expert or experts from the Panel.

(2) On the expiry of three months from the date of appointment of expert from the Panel, the mediation or conciliation process shall stand terminated.

(3) In case of mediation or conciliation in relation to any proceeding before Tribunal or Appellate Tribunal which could not be completed within three months, the Tribunal or as the case may be, the Appellate Tribunal, may on the application of mediator or conciliator or any of the party to the proceedings, extend the period for mediation or conciliation by such period not exceeding three months.

(6) Any party aggreived by the recommendation of the Mediation and Conciliation Panel may file objections to the Central Government or the Tribunal or the Appellate Tribunal, as the case may be.

Note: Detailed Procedure for appointment, qualification and Disqualification of Conciliator and Mediator will be covered in the separate article.

For details:

https://www.mca.gov.in/content/mca/global/en/actsrules/ebooks/acts.html?act=NTk2MQ

Difference between Arbitration & Conciliation

Arbitration	Conciliation
The arbitrator is the person chosen to oversee the arbitration process	Conciliator refers to the person chosen to facilitate the conciliation procedure.
Section 11 of Arbitration and Conciliation act of 1996 governs the appointment of arbitrators.	Section 64 of the Arbitration and Conciliation act of 1996 specifies the procedure for conciliator appointment.
A prior agreement is necessary to resolve the dispute through the arbitration process.	No prior agreement is necessary to resolve the disagreement through the conciliation process.
Arbitration is available for the current and future disputes	Conciliation can be adopted for existing disputes only.
Arbitration is like a courtroom proceeding, wherein witnesses, evidence, cross-examination, transcripts and legal counsel are used.	Conciliation is an informal way of resolving disputes between the management and labour.
No communication between the parties	Communication is permitted.
Arbitrators are not allowed to have separate discussions with any party or suggest options for terms of settlement or negotiation between the disputing parties.	Conciliators are allowed to have direct discussions with parties or suggest option for terms of settlement or negotiation between the disputing parties.
Arbitration is generally used to resolve civil disputes related to contractual obligations related to employment, construction and other similar commercial matters.	Conciliation is generally used in cases involving some emotional issues, like matters related to family law or workplace conflicts, where there is potential to reach a solution through effective communication.
The decision made by the arbitral tribunal is binding on both parties, which means that they must adhere to it.	It is the step used before going for arbitration or litigation to attempt to reach common ground without having to invest valuable time and money of all parties involved.

Difference between Arbitration, Conciliation and Mediation

ARBITRATION	CONCILIATION	MEDIATION
Arbitration is like litigation which is outside the court and which results in an award like an order.	A conciliation is a form of arbitration but is less formal in nature as compared to arbitration. It is the process of providing a harmonious resolution of disputes between the parties.	Mediation is when a neutral third party aims to assist the parties in arriving at a mutually agreeable solution.
It is binding on parties whether they agree with it or not	There is no right to enforce the decision of the parties.	There is no binding decision without both parties agreeing to one.
An arbitrator has the power to enforce his decision.	A conciliator does not have the power to enforce his decision	The decision made by the mediator is not enforceable like a arbitral award.
Prior agreement is required	Prior agreement is not required	Prior agreement is not required
The result is the award given and it is appleable.	Result is agreement between the parties and not appleable.	The result is settlement agreement and not appleable
Arbitration and conciliator act, 1996	Section 74 of Arbitration and conciliation act, 1996	Order XXII, Rule 3 of CPC for passing decree/order.
An arbitrator plays the role of a neutral person, who makes decision on a dispute based on evidence presented by the parties.	The conciliator is more active than the mediator who also intervenes and act as an evaluator. He propose a solution.	The mediator only facilitates parties themselves find a solution.

Conclusion: Choosing the Right ADR Method

While arbitration, mediation, and conciliation all serve as effective alternatives to litigation, the choice of method depends on the nature of the dispute, the relationship between the parties, and the desired outcome. Arbitration is ideal for cases requiring a final, binding decision, while mediation is well-suited for disputes where the parties wish to retain control and maintain relationships. Conciliation offers a balance between the two, with a conciliator providing active guidance to resolve the dispute.

By understanding these ADR methods and their respective advantages, parties can make informed decisions on how best to resolve their disputes in a way that is efficient, cost-effective, and in line with their specific needs.

In today's fast-paced world, everyone seeks to resolve disputes swiftly and get back to their work. However, with the growing number of cases and the overwhelming backlog in courts, relying solely on traditional litigation can be inefficient. This makes it essential to explore alternative methods that offer timely and favourable resolutions. In this regard, arbitration and conciliation stand out as highly effective alternatives for dispute resolution, offering parties a way to achieve outcomes without the lengthy process of court proceedings. These methods should be considered whenever possible.