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Loopholes of ADR in India.

Introduction

You may be surprised to hear that courts in many nations only resolve only 5-6% of cases. That is a really startling statistic, and most disagreements are valid, even while it is true that some are dropped because they are not important enough to require court attention. Why could the parties to a disagreement decide against going through the conventional legal process when there are often significant interests and money at stake in these cases? What's possibly more crucial is to know where they go and what they do in their place.

They decide to employ Alternative Dispute Resolution (ADR) as a response to this. ADR essentially provides a means of resolving conflicts without going through the legal system and usually entails the involvement of an unbiased third party. Recently, there has been a noticeable increase in the use of ADR. The US Congress passed the Negotiated Rulemaking Act in 1990, which instructed regulatory agencies to utilize negotiation to produce administrative rules, and the Administrative Dispute Resolution Act in 1990, which "gave federal agencies additional authority to use ADR in most administrative disputes."

Loopholes in ADR

Absence of Knowledge

India is still a developing nation even if it is modernizing. It indicates that the majority of people still have a low opinion of arbitration and prefer to trust the courts over other forms of conflict resolution. Because Indians have a very hard time trusting anyone but judges, the courts are overflowing with cases that are likewise arbitral in character, even though alternative dispute resolution (ADR) can deliver justice instantly.

Arbitrators

The 2015 Amendment Act addressed and settled the majority of issues pertaining to arbitrators; nevertheless, one issue remains unresolved. One of the characteristics of arbitration, as seen from its DNA, is its ability to resolve disputes quickly. The documents being submitted are courteous but less rigidly formal. Due to the fact that most arbitrators are retired judges from the Supreme Court of India or the High Court of a particular state, the arbitration process occasionally follows traditional court procedures for document submission, proceeding protocol, etc., which can be detrimental to the arbitration's effectiveness.

Conflicting effects of several laws

Section 18 of the MSMED Act provides us with a detailed mechanism to be followed: first, there must be a due between the supplier and the buyer and one of the parties must refer the dispute of non-payment due to the Facilitation Council. Secondly, the Council has two levels at which the supplier can seek assistance. The Micro, Small & Medium Enterprise Development Act, 2006 was introduced to protect the supplier from hardship like non-payment of goods or services. The act imposes the obligation on large and government undertakings to pay for the goods within 45 days of the purchase; otherwise, a compound interest or three times bank rate as specified by the RBI will be levied on the defaulter.

Absence of laws

The Arbitration and Conciliation Act, 1996 is the sole primary act that governs arbitration in India. The amount of an arbitral award is the same as a court decision, but most individuals are still reluctant to take a chance or a leap of faith when it comes to significant financial issues that they may encounter in business since there is a lack of legislative framework. There needs to be legislation to enforce these rules, not merely guidelines from different bodies like the Indian Council of Arbitration, Indian Arbitration Forum, etc.

The parent statute had its most significant revision in 2015 when numerous time-related thresholds were added to arbitration proceedings. The Act's applicability was contingent only on one date, October 23, 2015. The most challenging part of the 2015 Act to understand was the material on Section 26, which addresses the act's applicability. This is because court and arbitration proceedings are connected but distinct from one another. Is this clause applicable to court procedures as well? was the inquiry.

The Apex Court held in the BCCI v. Kochi cricket case that there is no question about the distinction between arbitral and court processes. Every arbitral dispute that is brought up in court has something to do with the arbitral proceedings. Section 26 of the act clearly states in its wording that it will apply to arbitral procedures that are started on or after the date this act is enacted. Thus, if the case meets the requirements for the act's applicability by October 23, 2015, it will be considered for application to Court proceedings concerning Arbitral proceedings.

The legislative branch held a different opinion, arguing that since primary procedures are not allowed to benefit from the new statute, courts must also follow arbitral processes (primary proceedings) (secondary proceedings). Section 26 may apply retroactively to the 2015 Act over Arbitral proceedings if it is applied to the Court proceedings. (For example: To appoint an arbitrator or arbitrators, one of the parties to an arbitration filed a suit before the High Court with jurisdiction over that issue.

In order to clear up any doubt, Section 87 of the 2019 Amendment Act was established. This provision overturned the decision made in BCCI v. Kochi Cricket (2018) 6 SCC 287, but it was later invalidated by the Supreme Court. Many are afraid to use arbitration to settle conflicts as a result of this chaos. Too many rules and norms exist, which can occasionally make straightforward arbitration procedures more difficult.

Problems in Implementation of ADR in India

Some of the issues that arise when the ADR is being implemented are as follows. They are listed in the following order:

Attitude

It is evident that India favors arbitration legislation the most. Nonetheless, animosity toward Indians has always had an impact on the ultimate determination of the arbitral rulings. The parties have testified that they underwent protracted and challenging battles to be released from the arbitral decision's binding nature. Every disputing party wants to prevail, and if they are unable to do so, they work to prevent the opposing side from enforcing the award for as long as possible.

Even if this approach is being employed more frequently, it might be argued that this worldview is incorrect when it comes to dispute resolution. The problem in this case is that arbitration has not yet been introduced into India's public or private sectors. If the award is allowed, it should only be revoked in cases where it seems that the arbitrator lacked authority or if there was fraud or corruption on the part of the other party. The Indian Arbitration Act of 1940 introduced the concept of jurisdiction to cure evident errors, which originated in English law and were originally created as a form of award. Under The Arbitration Act, 1940[28], there is ambiguity in the law governing arbitration as well as in the methods of those who have impacted domestic arbitration.

This accurately captures the essence of arbitration as a mechanism in India; hence, a significant transition from the conventional to the contemporary and scientific approaches to arbitration is required. It is necessary to reinterpret the term "win" and instill in the ADR process the notion of a win-win scenario.

Lawyer and Clients

The parties involved in the dispute and the lawyers may have quite different goals and perspectives for settlements. This may be the result of financial gain or unique personalities. For example, when the client wishes to establish a legally enforceable precedent or to demonstrate to other prospective

plaintiffs its hardness and the resulting expenses associated with bringing claims against it. Another scenario is that there might not be any legitimate worries about the settlement; instead, the sole issue might be whether or not the money should be paid out and whether or not the cost of the settlement has been disputed and is less than the interest on the money. In certain situations, the client's best interests might not be served by the settlement.

Legal Education

Lawyers spend most of their career negotiating conflicts; they spend less time learning the art of conciliation by reading, researching, and analyzing the problems. It is well known that law students are trained more for the conflicts that resolve such conflicts, and that very reason has led to the poor performance of the lawyers before the court. It is anticipated that the next generation will be more focused on cooperation and compromise than on rivalry and competition. Leaders who do not work together and create a system for success will not be at the center of the most innovative social experiments of our time.

Poor Communication

Good communication is essential, particularly between the parties and the attorney. A barrier to successful negotiation processes could arise from a lack of good communication. Due to their disparate social and cultural upbringings, the parties may find it difficult to communicate with one another and express their worries.

When ADR might not work

Abuse and power disparities.

Some cases bring up issues of abuse and power imbalance, such as divorce and sexual harassment. ADR might not be possible, for instance, if there are claims of domestic abuse in a family law case. ADR functions best when all sides are essentially in agreement. When they are not, litigation is typically more desired.

Issues of substantial public interest are involved.

There are significant public interest issues at stake. Let us consider a civil lawsuit where an investment advisor is charged with significant financial fraud amounting to tens of millions of dollars. Let's further assume that the story garnered national attention and that the victims were elderly or financially weak people. Situations such as this entail a level of moral indignation that invariably impacts on the public's desire to hold particular parties responsible. A successful lawsuit has the advantage of sending a statement that these kinds of behaviors are unacceptable. As a result, ADR might not be a wise choice.

I**ncompetence and inexperience**.

ADR is only as good as the third-party neutral (arbitrator or mediator, for example) selected to assist in resolving the issue. For instance, an inexperienced family law mediator may not be the

best person to handle a breach of contract lawsuit, nor an arbitrator with insufficient experience in a particular industry to handle a deal in a divorce involving complex assets.

Limitations of ADR

There are several drawbacks that obstruct the path to successful dispute settlement and frequently upset both parties' willingness to make amends and reach a mutually agreeable conclusion. Some of these drawbacks include:

(A) Unequal Command Negotiation

One side is capable of dominating the other in cases where conviction is present. There is a notable disparity in power as a result. For instance, employment and annulment situations, where the courts provide a stronger option for a party in a weak position.

(B) Lacking Legal Proficiency

A mediator or arbitrator is unlikely to have the same level of legal expertise and understanding as a judge when there are complex legal issues at stake in the dispute. There are many different types of disputes that call for skilled mediators, including professional conflicts, social conflicts, legal conflicts, and many more. In the majority of cases, the mediator does not gain insight from the court.

(C) Lack of a Specific Mock-up Organization

Since there is no precedent-setting process, it is difficult to predict how an alternative dispute resolution process would end. As a result, in a litigation, it is simpler to obtain evidence from the other side. Unless there is systemic repercussions in the limited outcome forecast.

(D) Enforceability

Generally speaking, ADR is not legally required, which makes implementing any award difficult. Legal arbitration offers a mechanism for internal appeals that makes the evaluation process mandatory and the exclusive basis for the court's assessment.

(E) Necessary Legal Action

ADR sometimes raises the issue of whether the arbitrator's decision was biased and creates a very flawed framework for judicial review of the arbitrator's decision. This is because the arbitrator's decision may require a court action if one of the parties refuses to accept the arbitrator's conclusion. This would not only cause chaos but also require a mandatory court review.

Conclusion

India is beginning to experience the benefits of judicial equality. The ADR system functions as a subordinate mechanism to advance everyone's access to justice. The ADR association must be approved as soon as possible. In addition to delivering prompt justice at the door, this will greatly reduce the workload on the courts without coming at a substantial expense. The objective of interpreting social justice to the disputing parties will be achieved if they are given constructive consequences. An estimated 3.53 crore lawsuits are waiting in India overall, including 58,669 cases at the Supreme Court, 43,63,260 cases pending in all high courts, and an astounding 3.11 crore cases pending in all District and Subordinate courts alone. In spite of these figures, an increasing number of people are inclined to turn to the legal system to settle their conflicts. The use of alternative dispute resolution techniques is essential and highly beneficial to any business. It assists people in resolving conflicts faster and internally than the legal system could ever hope to.

According to the 2016 World Bank report, India came in at number 131 out of 189 nations for ease of doing business. India is now ranked 63rd out of 190 countries in the 2019 rankings. On the other hand, India ranks 163rd in the world for contract enforcement, which is far lower than it was previously. However, the legislative and judicial branches are working to improve arbitration in India.

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