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# Alternative Dispute Resolution and Comparative Analysis of its Methods

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## **ABSTRACT**

*Alternative Dispute Resolution resolves disputed controversies to a greater extent than that of the court. This dispute resolution technique is from a long period and was in use before the enlightenment of civilization. The various methods of Alternative Dispute Resolution consisting of negotiation, mediation, conciliation, and arbitration has established an efficient way to reduce the burden imposed by the judicial process with flexibility, fastness, and lower costs. It has an intent of fair resolution of the disagreement of the controversial parties. The parties are free to pick out the preferable method when the dispute arises.*

**Keywords:** Dispute Resolution, Negotiation, Judicial Process, Mediation, Conciliation, Arbitration.

## **I. INTRODUCTION**

The most common way of resolving Alternative Dispute Resolution is with the help of discussion and common agreement of the parties in dispute. It plays a primary function in the international infrastructure of trade, commerce, and finance.<sup>2</sup> If the court feels that the dispute can be settled by the mutual understanding between the parties then they can bring up the matter to the Alternative Dispute Resolution.<sup>3</sup> It is an alternate and not the preferred method of settling the conflict.<sup>4</sup> Criminal law matters cannot be arbitrated because it is a wrong against society at large. In the case of Booz Allen and Hamilton Inc. V. Securities Bank of India Home Finance Limited,<sup>5</sup> the Supreme Court identified the structure of the conflict that are arbitrable or not. Rights in rem are arbitrable and rights are personam is non-arbitrable. In the case of Wellington Associates Limited V. Mr. Kirit Mehta, Supreme Court stated that it is difficult to find out the clear intent of the parties whether they want to enter into the arbitration or resolve

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<sup>2</sup> Hindustan Times. 2021. 'Devise law to make mediation agreements binding': CJI SA Bobde. [online] Available at: <<https://www.hindustantimes.com/india-news/devise-law-to-make-mediation-agreements-binding-cji-sa-bob-de/story-ARqyLBj7t2oZhQGQKqFPPM.html>> [Accessed 6 October 2021].

<sup>3</sup> Districts.ecourts.gov.in. 2021. [online] Available at: <<https://districts.ecourts.gov.in/sites/default/files/Section%2089%20CPC.pdf>> [Accessed 6 October 2021].

<sup>4</sup> Harvard Business Review. 2021. *Alternative Dispute Resolution: Why It Doesn't Work and Why It Does.* <<https://hbr.org/1994/05/alternative-dispute-resolution-why-it-doesnt-work-and-why-it-does>> [Acc. 6 Oct 2021].

<sup>5</sup> CIVIL APPEAL NO.5440 OF 2002, THE SUPREME COURT OF INDIA

the dispute by court proceedings. The entire court proceedings were nullified because of the reason of faulty drafting.<sup>6</sup>

### **Characteristics of Alternative Dispute Resolution**

The characteristics of Alternative Dispute Resolution involves:

- i. It is a faster process.
- ii. Parties have control over the case.
- iii. It is an inexpensive dispute resolution process.
- iv. The matter is resolved in a closed room so that confidentiality and relationship are well maintained between the parties.
- v. The compliances are to be divided in an equal proportion between both the parties.
- vi. It is a flexible process with fewer complications.
- vii. There is a timely settlement of the dispute.
- viii. In arbitration, conciliation, and mediation there is an independent right to choose the arbitrator, conciliator, and mediator of their own choice.
- ix. The matter in dispute is resolved amicably in a friendly manner.

## **II. ALTERNATIVE DISPUTE RESOLUTION OVER LITIGATION**

The majority of the group refer to the Alternative Dispute Resolution method due to the vast resources required in litigation. It is more compatible than going to the open court for publicly resolving the matters. There is flexibility in the due process where the proceeding can be withdrawn by the parties which are not at all possible in the court. With the help of alternative dispute, resolution matters can be resolved in five to ten days or even one day. In a court, it takes long time to resolve the legal proceeding. It is less costly than the courtroom judicial proceeding. In Alternative Dispute Resolution, every perspective of the parties is taken into consideration while in court process either one party wins or loses the case.

## **III. DIFFERENT MODES OF ALTERNATIVE DISPUTE RESOLUTION**

### **(A) Arbitration**

In arbitration, the arbitrator which is also a resolves the difference of opinion. Section 11 of the

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<sup>6</sup> Bhatia, G. (2009). Section 11 of the Arbitration and Conciliation Act of 1996: The Jurisprudence of the Supreme Court and Implications for the Jurisdiction of an Arbitral Tribunal. *National Law School of India Review*, 21(2), 65–75. <http://www.jstor.org/stable/44283804>

act talks about the appointment of arbitrators which excludes impartial or biased arbitrators.<sup>7</sup> The decision taken by the arbitrator is valid and a concluding process. This process is based on the consent of the parties wherein case of disagreement they are moving to the court. In arbitration, the proceedings are confidential. Further, this arbitration agreement is grouped into two classes namely ad hoc and institutional arbitration. Ad hoc arbitration is less expensive, flexible, and a faster process but institutional arbitration is more expensive, relaxed, and a slow-moving procedure. In ad hoc arbitration, the arbitrator is of the choice of the party but there is a specific specialized institution intervening, administering, and governing the whole arbitration process in institutional arbitration.

### **(B) Mediation**

It is a non-binding process where the dispute is resolved by an intervention of the third party known as the mediator. The mediator is an expert which facilitates the matter to get resolved easily. The qualification of the mediator involves former judges of the Supreme Court, High Court, District & Sessions Court, City Civil Courts, or any other forum with 15 years of experience of standing at the bar.<sup>8</sup> They are skilled professionals mutually agreed upon and appointed by the parties themselves. It is completely dependent upon the decisions of the disputed parties whether to settle the dispute or not.

### **(C) Conciliation**

The conciliator resolves the issue of the disputed parties with mutual understanding. It is non-binding unless and until the parties are a signatory to it. The parties can freely move to the court if not satisfied with the conciliation process. A party autonomy exercises an important role in mediation as compared to conciliation.<sup>9</sup> The expert involved is an active spectator for the settlement of the dispute.

### **(D) Negotiation**

The dispute between the parties is to be settled in a friendly manner by a third person known as the negotiator. The parties are engaged in a difference of opinion until they reach a preferred conclusion. But there is a possibility that they may not come to a settlement.

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<sup>7</sup> Sharma, D., 2021. *Appointment of arbitrators under Section 11 by the Supreme Court: A time intensive phenomenon / SCC Blog*. [online] SCC Blog. Available at: <<https://www.scconline.com/blog/post/2020/11/28/appointment-of-arbitrators-under-section-11-by-the-supreme-court-a-time-intensive-phenomenon/>> [Accessed 6 October 2021].

<sup>8</sup> Salem Advocate Bar vs Union of India, <https://indiankanoon.org/doc/342197/>

<sup>9</sup> Eidenmueller, H. and Großerichter, H., 2021. *Alternative Dispute Resolution and Private International Law*. [online] Available at: <[https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2638471](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2638471)> [Accessed 6 October 2021].

#### **IV. COMPARATIVE ANALYSIS**

1. The matters related to arbitration or conciliation are governed by the Arbitration & Conciliation Act of 1996, for mediation, there is not a particular act other than the Code of Civil Procedure, 1908. But in India, negotiations do not have any legal identification.
2. Arbitration is a more formal process whereas mediation, negotiation, and conciliation both are informal processes.
3. Arbitrator and negotiation enforce its decision upon the parties but the conciliator and mediator do not impose its decision without the agreement of the parties.
4. There is no defined structured process for arbitration and negotiation but mediation and conciliation is a structured process.
5. Arbitration is legally binding upon the parties but mediation, negotiation and, conciliation are non-binding.
6. A written prior agreement is required in arbitration and mediation but it is not required in conciliation and negotiation.
7. In arbitration and negotiation party's presence and active participation is not necessary whereas in mediation and conciliation it is mandatory.
8. In arbitration and conciliation parties do not communicate with each other directly but in mediation, there is direct contact. In the case of negotiation, parties may or may not contact directly.
9. Mediation and negotiation does not necessarily involve the consent of the parties but are mandatory in arbitration, and conciliation.
10. Arbitration is exactly like court proceedings in which the arbitrator strictly follows the contractual terms. A mediator is more active than a conciliator as in mediation the role of a facilitator is an interaction between both parties. But in conciliation, the conciliator facilitates and provides a solution to the dispute. There is no prescribed procedure in case of negotiation, the parties are free to pick out the rules.
11. In arbitration one or two parties are involved including the arbitrator but in mediation and conciliation, there is an involvement of the third party which is the mediator and conciliator. In negotiation, there is no interference of the third party.
12. Arbitration is an adjudicative procedure in which the third party is appointed by the tribunal or by the disputed parties themselves whereas mediation, negotiation, and conciliation are non-adjudicative processes where there is direct participation.

13. Arbitration is adversarial in whereas the rest three of the Alternative Dispute Resolution methods are collaborative. The party's mutual agreement is given more importance than the rights and liabilities.

14. In mediation, negotiation and conciliation focus is more on the present and future but it is absent in the case of arbitration.

15. Arbitration and conciliation are adversarial whereas mediation and negotiation are non-adversarial in which both parties have a win-win situation.

16. In arbitration and conciliation, the level of confidentiality is determined by law whereas in negotiation and mediation it is based on trust.

## **V. CONCLUSION & SUGGESTIONS**

To settle any disputes or conflict or variation of opinion Alternative Dispute Resolution offers the best remedial procedure in a shorter time. It is better to go with the shortened method of dispute resolution than to rely on the lengthy court processes in which the parties are not even sure whether they will win or lose the battle. This can be exercised according to the suitability of both the parties and most importantly it maintains confidentiality or privacy. The cases are resolved amicably in a friendly manner keeping in mind the human relationship status. The popularity of the Alternative Dispute Resolution method is increasing because of the long-pending backlog of cases.<sup>10</sup> Mediation is the most uncomplicated way of resolving the arising conflict. Both the parties can benefit through one common consented solution. Mediation by being less formal, and tangled decreases the burden of courts and the people with low financial gain incapable of bearing the court expenses.

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<sup>10</sup> Lawcommissionofindia.nic.in. 2021. *Arrears and Backlog: Creating Additional Judicial (wo)manpower*. [online] Available at: <<https://lawcommissionofindia.nic.in/reports/report245.pdf>> [Accessed 6 October 2021].