Alternate Dispute Resolution

-Deb Zyoti Das[1]

Conflict is an inevitable facet of international relations. As much as the nations of the world work harmoniously in order to achieve their mutual interest, they also disagree as they strive to protect and preserve their individual national interests. Where conflict is inevitable and is part of the daily, where disagreement among the member states of the international system is bound to happen, some mechanisms have been put in place to resolve these conflicts and disagreements among nations.

We must acknowledge that Dispute Settlement and Conflict Resolution are not the same thing. Conflict resolution in its true essence requires a more analytical, problem-solving approach than dispute settlement. Where resolution requires identifying the regular and casual factors lying underneath it, settlement is as primary as settling the dispute as amicably and as fast as possible. Thus, a dispute that is in context to a larger conflict can be settled without actually resolving the conflict itself. For example the Nigerian Civil war ended in 1970, but causes like nepotism and political intolerance that were the underlying cause of the unrest are yet to be effectively curtailed by successful regimes.

In the 21st century, many conflicts nowadays are being solved through ADR. Alternate Dispute Resolution (ADR) is a form of agreement.In the international context, Alternative Dispute Resolution is something of a misnomer as leads to the question ' alternative to what?' In domestic context, national courts provide a generally acceptable means of resolving disputes upon the parties agreeing on some alternative means. But, in many international disputes, resort to national courts is not possible due to the absence of consent of parties. At least one party will always view it as the most undesirable option where it is possible without consent as each party here is inclined towards serving their national interests first. Thus, the only formal medium of dispute resolution that finds broad acceptance in the international context without any resurgence is created by agreement of the parties.

Alternate Dispute Resolution, as the name itself suggests, is the resolution of a dispute through means other than courts and the orthodox legal systems like litigation. As discussed earlier, Alternate Dispute Resolution merely aims to solve a dispute that is very small in context to a conflict. It aims to solve the dispute through ways that are agreeable to both parties mostly through compromise so that the

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feeling of winner-loser does not apprise them. In sharp contrast to conventional court rules where one party wins and one loses, thus in the way of justice, in turn, it starts a new grudge from the loser to the winner, which in the long run is harmful to the international community of member nations of the world.

The word 'dispute' means 'disagreement,' and the word 'resolution' means "the action of solving something." Alternate dispute resolution is a form of agreement Alternative Dispute Resolution includes substitute methods of helping people/nations in this context to resolve legal problems before going to court or as directed by the court. In ADR, "neutral" is an independent third person who tries to help resolve the areas of conflict or at least narrow it down.

Alternate Dispute Resolution customarily includes mediation, arbitration, negotiation, early neutral evaluation, and conciliation. Some most commonly used international alternative dispute resolution techniques and methods are dispute board review, expert's assessment, mini-trials, arbitration, conciliation, etc. National have begun experimenting with ADR programs as rising costs of litigation, time delays, and burgeoning court queues continue to plague litigants. Some of these ADR programs initiated by the states are voluntary; others are mandatory.

Domestic:-

Types of alternative dispute resolution that are mostly prevalent at domestic levels are:-

Negotiation

This is the simplest form of Alternative Dispute Resolution. The parties involved in a dispute negotiate and strike a solution themselves. There is no third party or a neutral middle man who facilitates or imposes a resolution.

Arbitration

Arbitration is a prominent method of alternative dispute resolution. The process of arbitration includes the appointment of an arbitrator, a neutral and independent third person who hears and decides upon the dispute as well as renders a final and binding decision referred to as an award on a private basis, the expenses are mostly paid by both the parties. The parties select their arbitrator as well as the manner in which the arbitration will proceed, as the process of arbitration includes passing of a binding judgment, it is said to be equal to litigation process but with advantages over the latter.

Mediation

The most popular form of Alternate Dispute Resolution is mediation. Mediation is a dispute settlement mechanism that focuses on effectively communicating and negotiating. The role of mediator is to help the parties communicate and negotiate more effectively, thus improving their decision-making capacity. Adjudicating the issues in dispute is not the job of the mediator. Although compromise is an element of the process of mediation, it is not a process to force compromise. The limits of each party are respected, and only if it is convinced that it is fair to do so will a party be expected to change its approach to the problem. Mediation today is ADR's fastest-growing method. It is used in practically every possible type of dispute resolution and comes in various forms. The system has also been successfully tailored with tremendous success to multi-party dispute resolution. On average the success rates of mediation processes range from 80% to 85%. In an attempt to capitalize on success rates, the law is being slowly amended to include conflict resolution clauses.

Conciliation

Conciliation is a very similar process to mediation. In the process of mediation, a neutral third person helps the parties resolve their dispute. The conciliator just plays a more active role in the process of dispute resolution. However, it is not legally binding on the parties.

On a domestic level, it is straightforward to adopt the methods of alternate dispute settlement as parties are under common and accepted law. They are of the same state and are in accordance with the law of their country. But, when a dispute arises between two persons belonging to two different countries, the difficulty arises. If they approach the domestic courts of one country, then jurisdiction related problem emanates due the dispute being transnational in nature. The other problem is dissimilarity of the legal system of two countries, which could affect one of the parties that doesn’t belong to the country.Thus the need for developing a full-fledged structure and legal system for transnational disputes arises.

Authoritative bodies like the United Nations have tried to develop such a system, but at the end of the day, it is the mindset of the parties that ultimately comes into place while choosing between orthodox litigation process and alternative dispute resolution processes.

International:-

Arbitration

On an international level, arbitration has four international documents that deal and describe the guidelines, process, and enforcement of foreign arbitral awards.

The documents are:-

1) Protocol on Arbitration clauses signed at Geneva on 24th September 1923 (commonly known as Geneva Protocal, 1923). It is ratified by 30 nations of the world and has 8 articles.

2) Convention on the Execution of Foreign Arbitral Awards signed at Geneva in 1927 (commonly known as Geneva Convention 1927). Ths convention amended the Geneva Protocol 1923.

3) The Convention on the Recognition & Enforcement of Foreign Arbitral Awards signed at New York on 10th June 1958 (commonly known as New York Convention). This convention gave the parties greater freedom in the choice of arbitral authority & of the arbitration procedures. It reduced & simplified the requirements with which the party seeking recognition or enforcement of an award had to comply.

4) The ICSID Convention signed at Washington in 1965 on the settlement of investment disputes between states and nationals of other states.

Internationally, the UNCITRAL or United Nations Commission on International Trade Law has prepared Model Law on International Commercial arbitration. In addition, the UNCITRAL also prepared & published "UNCITRAL Arbitration Rules."

The most important & oldest institution in the field of arbitration is the International Chamber of Commerce (ICC) Paris. The International Court of Arbitration of the Internal Chamber of Commerce (ICC) is the arbitration body of the ICC. It provides necessary facilities for the settlement of business disputes by arbitration that are of an international character and in accordance with the Rules of Arbitration of the ICC if so empowered by an arbitration agreement between the parties.

Presently, every country has one or more bodies or institution which provides facilities for arbitration or other ADR methods for resolving commercial disputes. Some of these are – American Arbitration Association (AAA) , London court of international arbitration (LCIA), Permanent Court of International Arbitration, Hong Kong International Centre (HKIAC), International Centre for ADR, New Delhi, World Arbitration and Mediators Council, New Delhi, etc.

CONCILIATION:

Conciliation is an effective means of alternative dispute resolution and can be usefully deployed for International disputes. UNCITRAL has prepared "conciliation rules." Many other international organization & institution has issued conciliation rules, like the ICC.

MINI TRIAL:

Mini-Trial is an extremely new device for resolution of disputes. In this process, no adjudication process takes place, and the parties can select and adopt any institution and its rules for resolution of their disputes, time-bound process. As per American Arbitration Association's Mini trial procedures, " the mini-trial is a structured dispute resolution method in which scenario executives of the parties involved in legal disputes meet in the presence of a neutral advisor and after hearing presentations of the merits of each side of the disputes, attempt to formulate a voluntary settlement."The dispute, if not resolved within 90 days of the initiation of the process, or if either of the parties is not willing to participate, shall be referred to arbitration.

EXPERT ASSESSMENT

Certain contracts, those involving convoluted and long term construction projects, adopt the system of appointing "EXPERTS" to resolve any dispute that might arise thereunder. The experts are expected to be impartial. They undertake to interpret the provision of the contract. They do not give awards or judgments, only express to give his opinion within the time prescribed by the parties the relevant clauses. ICC has founded an organization called the International Centre for Technical Expertise.

DISPUTE REVIEW BOARD

Dispute Resolution Boards also known as Dispute review boards is another method of alternative dispute resolution. It is common in long term contracts involving construction works and similar contracts. There is no law, rules or regulation of any

country. It is purely a contractual institution. The clauses provide that the dispute resolution board is an agreement and should cover all aspects of its constitution and working. The best illustration of the clause regarding Dispute Resolution Board can be found in standard bidding documents for procurement of works prepared and issued by the World Bank.

Alternative dispute resolution incorporates a variety of methods for the resolution of disputes between the parties, the availability of deployment of any particular method of alternative dispute resolution in any specific case depends on a number of facts. The clause related to alternative dispute resolution in the agreement between the parties, the availability of persons well versed in the process of alternative dispute resolution, the support provided by the legal system of a country to the ADR method, the national and international framework for ADR, the availability of necessary infrastructure facilities etc., play a significant role in the selection of any particular method of the resolution of dispute.

On the international platform, based on the agreement of parties, three basic types of dispute resolution methods exist:

i) Mediation, in which no report of decision is issued

ii) Non-binding Arbitration, in which there is a decision, but the parties are not bound to comply with it

iii) Binding Arbitration

International Arbitral bodies are fundamentally of two types:

- Ad-hoc Panels
- Permanent Tribunals

Two significant advantages that permanent tribunals have over ad-hoc panels are that the former is better adept at establishing a consistent jurisprudence over time than the latter. With time, this jurisprudence increases the clarity of agreement and hence, at least in argument, makes disputes less likely.

Sometimes, domestic methods of alternate dispute resolutions are also applied in the international context; methods like mediation and arbitration are gaining popularity. For example US mediation to facilitate bilateral talks between India and

Pakistan on the issue of Bifurcation of Kashmir or the dispute of territorial rights of South China Sea, to arbitrate the matter, the arbitral tribunal formed under the United Nations Convention on the Law of the Sea(UNCLOS) has been recommended by the Flipino Government; are proof that the alternate methods of settlement are indeed a right way towards the future of dispute settlement.

SHORTCOMINGS OF INTERNATIONAL ALTERNATIVE DISPUTE RESOLUTION

Although there are many instances of nations of the world taking the help of alternate ways of settlement, the road for this new concept is long, and it still needs to drive a long way to be equal or to serve as a replacement to the court system. As it stands today, the methods of alternative dispute resolution are not well defined in the international level as there are different conglomerates of different countries providing different services rather than a unified body consisting representatives of all member states of the world that could function like the UN overseeing and performing all the tasks involved in this field.

Nations are reluctant to submit to international adjudication often citing the reason of unfair tribunals and no binding or non-enforceable, weak international laws and treaties. A great many reasons have been suggested and concluded from the present situations to why nations are reluctant, for example, when a matter important or vital national interests arise, nations simply don't want to lose and thus avoid going through the process of any kind of alternative dispute resolution. Speaking in layman's terms, submitting to any form of adjudication means letting go and giving up control over the outcomes, which foreign office officials are evidently hesitant to abdicate

Alternative dispute resolution has many advantages, but there, in turn, exists a downside to its operation. Amongst various reason for the shortcoming of the International alternative dispute resolution, some of the reasons worth mentioning are:

- Alternative dispute resolution in the international business setting will only work if the selective arbitrator is committed to making fair and expeditions decisions, keeping in mind the relative social, economic, and political objectives of each party.

- Arbitration rulings are not always clear, and in subsequent proceedings they are seldom binding, leaving parties only to contemplate the possibility of a similar matter being dealt with in the future.

- Another shortcoming of international alternative dispute resolution is the ability to endorse an award that may be issued. The effectiveness of private international arbitration is dependent " on substantial and predictable governmental and inter governmental support". Government paly a significant role in the alternative dispute resolution process. Cross-cultural business operations in the uncertainty of many regulatory structures are one of the most disturbing aspects in the battle to globalize alternative conflict resolution.

- These countries will be more likely to take a leading role in the internationalization of alternate dispute settlement as their economic, cultural and political structures grow stronger.

Undoubtedly, the desire of less developed countries to attract foreign investment can only be insisted if they promote international arbitration — the starting point is to promote legislation which recognize arbitration as an integral part of the legal system. Perhaps the most widely discussed advantage of alternative dispute resolution in the international setting is the expediency in provides. Alternative dispute resolution provides a valuable solution to the costs of litigation. A typical arbitration has a much more limited docket than does a typical judge with ADR in the international business setting, the parties can mutually engage in the arbitrator selection process, making decisions that correspondent to their own political, social and economic agenda.

"The administration of international justice broadly conceived is becoming fully integrated with and supplemented by a system of alternative methods, which is, in fact, the only viable alternative that does justice to the growing demands of the international community" -Francisco Orego Vicuna. However, the time has come when we shake off our traditional approach to the existing legal justice system and look forward to alternative modes other than litigation and take recourse to ADR principles and practice.