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TYPES OF ADR

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TYPES OF ADR MECHANISM

01

NEGOTIATION



Traditionally occurs directly between the parties and their counsel and does not involve a Neutral 3rd Party

02

MEDIATION



A very flexible process that can be effectively used at any time during the course of the dispute

03

CONCILIATION



Neutral 3rd Party to communicate with the parties in the exchange of information and settlement options

04

ARBITRATION



A Neutral Arbitrator renders a decision, called an Award, after there has been a presentation of evidence

NEGOTIATION








01

NEGOTIATION

Gimny Pearson Barnes: “Negotiation is a resolution of a disagreement using give and take within the context of a particular relationship”

Pepperdine university of USA :

It is a communication process used to put deals together or resolve conflicts. It is a voluntary, non-binding process in which the parties control the outcome as well as the procedures by which they will make an agreement. Because most parties place very few limitations on the negotiation process, it allows for a wide range of possible solutions maximizing the possibility of joint gains.

-  Most common form of dispute resolution
-  Non Binding Procedure
-  Without Intervention of 3rd Party
-  Parties Voluntarily Participate
-  No Statutory Provisions
-  Parties determine what they want with reasons
-  Parties identify all other party’s interests, motivations

ESSENTIAL INGREDIENTS OF NEGOTIATION

01

NEGOTIATION

- ✓ Communication based technique
- ✓ Voluntary Exercise
- ✓ Non-binding process
- ✓ Outcome and procedure controlled by the parties
- ✓ Mutual outcome
- ✓ Respective interest of the parties not subjected to drastic modification
- ✓ Swift, economical, private and uncomplicated

STAGES OF NEGOTIATION

01

NEGOTIATION

4 Characteristics of good negotiated settlement: by PM Bakshi

- ✓ Efficiency
- ✓ Fairness
- ✓ Stability
- ✓ Wisdom



Preparation : This stage involves information and data collection



Opening: This stage involves presentation of initial position of both sides.



Bargaining: It is phase by which the parties are suggested to narrow down their position









Closing: It reflects the outcome of solution.

Power Sources for the purpose of Negotiation

01


NEGOTIATION


-  Knowledge, preparation and skill
-  Progressive acceptable alternatives
-  Acceptable solutions
-  Credibility and legitimacy
-  Steadfast commitment
-  Cordial relationship


KINDS OF APPROACHES TO NEGOTIATION


01


NEGOTIATION

 **Concessional:** It is a soft approach adopted by a negotiator who is not a rigid person in nature and have the belief that by following concessional method the solution of problem would come and via very next step.

 **Problem Solving:** In this approach the negotiator focused on tools capable of solving the problem at the threshold.

 **Distributive:** It is a method in which the negotiator makes sure that deadlock is distributed according to the respective position of the parties. More or less it ensures involvement of the parties.

 **Avoidance:** It is regarded as a negative approach or the part of the negotiator and this approach is adopted by the negotiator / parties who is not prepared to undertake risk. As a result in this approach issues are not at all addressed.

 **Position:** This approach is also called 'positional bargaining'. In this process, the parties make extreme claim rather coerce another so that he gets more benefits than his opponent at the outcome of negotiation.

OBSTRUCTIONS TO NEGOTIATION

01

NEGOTIATION



Failure of Communication: There may be failure of communication and a negotiator needed to restore the broken communication.



Lack of Negotiating Skills: Sometimes a negotiator himself may be lacking negotiating skills as a gesture, knowledge and temperament etc.



Lack of Legal awareness: The parties may not differ on outcome but lack of knowledge may cause failure of negotiation if it violates law of the land.



Improper Information : Sometimes a negotiator is not well equipped with the relevant information on the point.



Improper representation: If there is a personality conflict that results into failure and without situation the proper remedy is to seek a new team of representatives.



Non-Cooperation of the parties : Non cooperative attitude of the parties is a great impediment to negotiation. It is the paramount duty of a negotiation to develop and seek cooperativeness of the parties.



Negative attitude: It is regarded as an impediment/obstruction in the process of negotiation. The negative attitude causes total breakdown of negotiation. It is an obligation on the part of the negotiator to wipe the negative approach replaced by positive trend.

LB Cuszon: Mediation is the act of a 3rd party relating to the settling of a dispute between two contending parties. Obviously a mediator is not required to follow the procedural law but he is expected to act adhering to the fundamental principle of natural justice.

MEDIATION



Non-Binding Procedure



Mediator : Neutral 3rd Party assists the in reaching mutually agreed settlement



Parties submit their positions beforehand and make oral briefs



Mediator holds private sessions with each party separately & goes back and forth, also holds joint sessions



The mediator process is informal and an assisted negotiation of a dispute settlement.



Outside the system of formal legal system : Avoids procedural trap



Guru Nanak Foundation vs. Rattan Singh and Sons – Avoid Interminable, time consuming, complex and expensive court procedures held by SC

STAGES OF MEDIATION

02

MEDIATION



Selection of Mediator



Execution of Contract



Furnishing of Information and correspondence



Meeting of parties



Familiarizing mediator with facts about the dispute



Gathering information



Facilitating negotiations



A stage of impasse



Termination of mediation or achieving agreement



Post-termination stage



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QUALITIES OF A MEDIATOR

02

MEDIATION



Understanding: The ability of understand with sensitivity the issues, often complex and the concerns and aspirations of the parties, explicit and implicit.



Judgement: A sound judgement, a judicious and rational approach and shortcut common sense.



Intuition: An ability to sense information without any rationalization, obtained through a perceptiveness to a verbal and other signals received.



Creativity: A creative and inventive response to the problem of the case, generating options and encouraging the parties to explore ideas.



Trust worthiness: Integrity coupled with a sense that trust can be reposed in the mediator.



Authority: A firmness of tough in managing the process effectively and constructively



Constructiveness: A practical turn of mind that sees positive possibilities and can motivate the parties to deal constructively with settlement options.



Flexibility: An ability to cope with change, with unusual situations, ideas and solutions and with rapidly varying circumstances.



Independence : It includes ability to work autonomously without support or feedback and to maintain a neutral and independent stands.

TYPES OF DISPUTE RESOLVED BY MEDIATION

02

MEDIATION



Aviation, Banking and Finance



Boundary disputes, Broker Liability



Business Disputes, charities



Clinical and Medical negligence,
compensation



Commercial agencies: Commercial contracts



Construction and development – corporate
finance



Distribution agreement – employment



Energy engineering and manufacturing dispute



Environmental issues, financial services



Information Technology, Insolvency and Banking



Maritime and Shipping, Multiparty actions



Land Lord and tenant, leasing and supply contracts



Oil and gas contracts – partnership disputes



Railway Industry : Transport regulatory disputes




Securities and Shares: Shareholder’s dispute


ADVANTAGES OF MEDIATION

02


MEDIATION

 Mediation deals with the root causes of the problems and conflicts. Settlement through mediation is lasting because the parties are encouraged to think about the basic reasons of dispute.


 Mediation improves the communicative capacity of the disputants


 Mediators are not strangers like courts but are friends and the disputes are settled in a friendly manner and the disputants part as friends


 Mediation is neither coercive nor threatening.

 Mediator is voluntarists as it allow the disputants to solve their problems themselves

 Mediation is means of reducing tension in the community

 Mediators are not professionalized and do not require long training as is the case of judges, lawyers, court officials and police.











 Mediation is speedier, less costly and fairer than adjudication

 Unlike Judges Mediators represent the society and share its values

LIMITATIONS OF MEDIATOR

02

MEDIATION

-  He can't compel attendance of any person or production of any document
-  He can only act upon the disputed points raised by the parties and induce them to resolve dispute by exchanging views
-  He remains as a mediator till the consent of the parties exists
-  No ex-parte mediation is permissible
-  Mediation is a non-statutory function thus it lacks enforceability
-  He has no power to penalize the non-cooperating party
-  He Can't modify the subject matter of dispute
-  He Can't seek expert assistance without the prior consent of the parties
-  He has not power to seek the courts intervention on his own.
-  A mediator can be removed at any time by the party

03

CONCILIATION

It is more structured than mediation

It is rights based than, interest based.

Defined as a non-adjudicatory and non adversarial ADR mechanism involving a settlement procedure wherein an impartial third party (conciliator) enables and steers the disputant parties to arrive at a satisfactory and acceptable settlement of a dispute.

CONCILIATION



Non-Binding procedure



Impartial 3rd Party : Conciliator



Interviews both the parties, asks for comment without consent



Conciliator is a more pro-active



Results in mutually agreed settlement



A voluntary process and the conciliator has no authority to impose on the parties a solution to the dispute.

Example: Accounts Reconciliation process in corporates and customers
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CONCILIATION VS. MEDIATION

CONCILIATION



The power of conciliator is larger under the A & C Act, 1996

01



The conciliator can make proposal for settlement, formulate or reformulate the terms of a possible settlement

02



The conciliator would settle the dispute himself in an informal and friendly manner with agreement of both the parties

03

MEDIATION



The power of the mediator is too limited as a he can only suggest proposals for settlement.

01



A mediator would merely facilitate a settlement between the parties.

02



The mediator would endeavour to help the disputing parties to reach a mutually agreed solution

03

CONCILIATION : BULLET POINTS

03

CONCILIATION



Section 61 to 81: Of the A & C Act, 1996 deals with the conciliation mechanism.



Section 61: deals with the Application and Scope of Conciliation machinery.

This part shall apply to conciliation of disputes arising out of legal relationship, whether contractual or not and to all proceedings thereto.

This part shall not apply where by virtue of any law for the time being in force, certain disputes may not be submitted to



Sec-62: Commencement of Conciliation Proceedings: Send letter to the other party



Sec-64 : The conciliator shall be appointed by agreement of parties



Sec - 65: Submission of statements to the conciliator



Sec - 67: Conciliator assisting the parties to reach an amicable settlement



Sec-69 : Regarding the communication between the conciliator and parties



Sec - 70: Regarding the disclosure of Information



Sec - 72: Party may initiate suggestions for settlement



Sec - 75: Confidentiality clause



Sec - 77: Parties shall initiate judicial or arbitral proceedings

ARBITRATION

04

ARBITRATION

Arbitration is the means by which the parties to a dispute get the matter settled through the intervention of an agreed third person.

Halsbury: Arbitration means the reference if dispute or difference between not less than two parties, for determination, after hearing both sides in a judicial manner, by a person or persons other than a Court

Arbitration in India is governed by Indian Arbitration and Conciliation Act 1996.

It was created on the lines of the Model Law of the UNCITAL (United Nations Commission on International Trade Law). Art – 2 (a)

The A & C Act, 1996, states that "Arbitration" means any arbitration whether or not administered by permanent arbitral institution [Sec 2 (1) (a)]



Can be voluntary or by operation of Law



It is binding



May Adjudicated before Arbitral Tribunal



Arbitrator



Results in mutually understood settlement



It can be written into a business contract : Scott & Avery Clause

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INGREDIENTS NECESSARY FOR ARBITRATION

04

ARBITRATION



There is an arbitration clause in the agreement to resolve the dispute by means of arbitration



There is dispute between two or more parties



There is arbitrable dispute in terms of agreement between the parties



Dispute referred to third person other than the Court



Persons constituting arbitration are under obligation to resolve the dispute in a judicial manner - that is by hearing of both the parties

ARBITRATION

ADVANTAGES



It is used to resolve disputes, it is more flexible than adjudication

01



The disputants usually choose their own arbitrator, an Expert

02



It is usually more quicker than litigation

03



The result is binding and not open to appeal as litigations.

04



Arbitration is private. This avoids the disclosure of trade secrets and potential

05

DISADVANTAGES



Arbitration is adversarial, so does not help in improving relationship

01



Both the parties have to give their consent

02



It takes decision making power away from the parties.

03



It is too informal and potentially unjust.

04



The rights of appeals are limited

05

FEW TERMS RELATED TO ARBITRATION

04

ARBITRATION



Arbitrator:

An Arbitrator may be defined as a person to whom the matter in dispute are submitted by the parties and whose functions are more or less judicial.

Arbitrator may be in the form of Arbitral Tribunal.

Section 2 (1) (d) of the A&C Act, 1996 states that arbitration tribunal means a sole arbitrator or a panel of arbitrators.



Arbitration Agreement :

- Section 2(1)(b) of the A&C Act, 1996 provides to refer Sec-7 of the Act.
- Section 7(1) of the Act, "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."

TERMS : ARBITRAL AWARD

04

ARBITRATION



Arbitral Award:

It is a judgement pronounced by an arbitral tribunal on dispute or difference referred to it for arbitration.

Under Sec -2 (1)(c) the word Arbitral Award is not defined but it states that the Arbitral Award includes an "Interim Award"



IT would also include "Additional arbitral Award" made under Section 33(4) and an award recorded on the basis of "Settlement agreement" reached under Section 30(2) during "Arbitral Proceedings" but not a "Settlement Award" reached under Section 73 in Conciliation proceedings under Part III of the Act.










Section 35: An arbitral award shall be final and binding on the parties claiming under them.

Case: Satish Kumar v. Surendra Kumar: An award stands at the same footing as a decree of a court, and therefore it is binding upon the parties.

KINDS OF ARBITRATION

04

ARBITRATION

-  Ad-hoc Arbitration
-  Institutional Arbitration
-  Contractual Arbitration
-  Statutory Arbitration
-  Domestic Arbitration
-  International Arbitration
-  Foreign Arbitration

KINDS OF ARBITRATION : Ad-Hoc Arbitration

04

ARBITRATION



Ad-hoc Arbitration:

It may be sought as and when a dispute arises between the parties to a business transaction which could not be settled by negotiations in the shape of mediation or conciliation.



Arbitration which is not conducted under the auspices of any arbitral institution.



The present arbitration law discourages the use of ad-hoc arbitration which causes potential delay in disposal of arbitration cases.



It requires parties to rush to law court repeatedly for seeking orders even on ordinary procedural matters.



it is not self-enforcing. Claimant has to move the court for the enforcement.



He has not power to seek the courts intervention on his own.



A mediator can be removed at any time by the

KINDS OF ARBITRATION : INSTITUTIONAL ARBITRATION

04

ARBITRATION



Institutional Arbitration:

This kind of arbitration is when there is a prior agreement between the parties that in case of future differences or disputes arising between the parties during their commercial transactions, such differences or disputes will be settled by arbitration and it will be referred to the named institution of which one or more of them are members.



Such named institutions have their own published rules and with the consent of the parties can appoint arbitrators from among the panel of experts.



Few institutes are :

1. Indian Council of Arbitration
2. The federation of Indian chambers of commerce and Industry
3. The Bengal chamber of commerce and industry



It requires parties to rush to law court repeatedly for seeking orders even on ordinary procedural matters.



it is not self-enforcing. Claimant has to move the court for the enforcement.

KINDS OF ARBITRATION : CONTRACTUAL ARBITRATION

04

ARBITRATION



Contractual Arbitration:

Due to growth of commercial activities and commercial transactions in modern time there are frequent occasions for differences and disputes between the parties which is required to be settled amicably.

Thus, parties seek early settlement of differences and disputes without taking recourse to the court of law.



The parties involved in commercial transactions choose to incorporate an arbitration clause as a part of the agreement to refer their future or existing differences or disputes to a named arbitrator/arbitrators to be appointed by a designated authority.



- International Centre For the Settlement of Investment Disputes (ICSID) : for arbitration between States and Individuals
- WTO Disputes Settlement uses Arbitrations
- The International Chamber of Commerce Court of Arbitration
- The American Arbitration Association is a popular arbitral body in the USA
- Court of Arbitration for Sport

KINDS OF ARBITRATION : STATUTORY ARBITRATION

04

ARBITRATION



Statutory Arbitration:

It is mandatory arbitration which is imposed on the parties by operation of law.

In such a case the parties have no option as such but to abide by the law of land.



It differs from the above three kinds of arbitration because :—

- (i) the consent of parties is not necessary,
- (ii) it is a compulsory arbitration,
- (iii) it is binding on the parties as the law of land.



Examples of Statutory Provisions:

1. Section 31 of the North Eastern Hill University Act, 1973
2. Sections 24, 31 and 32 of the Defence of India Act, 1971
3. Section 43(c) of the (Indian) Trusts Act, 1882

KINDS OF ARBITRATION : DOMESTIC ARBITRATION

04

ARBITRATION



Domestic Arbitration:

The term "Domestic Arbitration" denotes arbitration which occurs in India. This is when the subject-matter rather scope of the agreement, the merits of the dispute and the procedure for arbitration are all governed by Indian law or when the cause of action for the dispute has arisen wholly in India or where the parties of commercial transaction are otherwise subject to Indian jurisdiction.



The Arbitration and Conciliation Act, 1996 mentions the term "domestic arbitration" in its preamble and the term "domestic award" in Section 2(7) read with section 2(2) of the said Act.



Article 51(d) of the Constitution of India, 1950 makes provision that the State should encourage settlement of international disputes by arbitration, it includes domestic arbitration.

KINDS OF ARBITRATION : INTERNATIONAL ARBITRATION

04

ARBITRATION



International Arbitration:

A foreign ingredient is found in "international arbitration".

When at least one of the parties involved is domiciled or resident outside India or subject-matter of the difference or dispute is related to a place outside India, such arbitration is treated as an international arbitration.



Section 2(1) (f) of the A & C Act, 1996 defines the term "International Commercial Arbitration" as arbitration relating to disputes arising out of legal relationship, whether contractual or not, considered as commercial under the law in force in India where atleast one of the parties is—



- an individual who is a national of, or habitually resident in, any country other than India; or
- a body corporate which is incorporated in any country other than India; or
- a company or an association or a body of individuals whose central management and control is exercised in any country other than India; or
- the Government of a foreign country.






Section 28 of the Act deals with the rules applicable to place India & Sec-28 (1) (b) for International


KINDS OF ARBITRATION : Others


04


ARBITRATION

-  **Foreign Arbitration:** When the arbitration proceeding is conducted in a place outside India, it is called "foreign arbitration". In such arbitration, a "**Foreign Award**" is sought to be enforced.
-  **Specialized Arbitration:** It is conducted under the auspices of arbitral institutions, which might have framed special rules to meet the specific requirements for areas of Technology, commodities or construction.

-  **Judicial Arbitration:** Some State Court systems have proposed Court-ordered arbitration.
Example: Family Law (Child Custody)
Often advisory, serving as the first step toward resolution.

-  **Court –Annexed Arbitration:** It requires statutory introduction into the court system and depending upon the model adopted, may be binding or initially non-binding.

-  **Fast Track Arbitration:** A binding procedure where parties agree to accelerated arbitral proceedings with short time and reduced cost..

-  **Labour Arbitration:** For employers whose employees are not represented by a labour union.
Establishes a Org. Problem Solving process for labour disputes, employee complaints, misconduct etc.

CONCILIATION VS. ARBITRATION

CONCILIATION



Conciliation may be resorted to without the existence of such prior agreement

01



The role of conciliator is to help and assist the parties to reach an amicable settlement of their dispute

02



A party may require the conciliator to keep the 'factual information' confidential

03

ARBITRATION



In case of arbitration, a prior 'agreement in writing' is necessary.

01



The arbitrator also actively arbitrates and resolves the dispute by making an arbitral award

02



The information given by a party is subjected to scrutiny by the other party

03

CONCILIATION VS. ARBITRATION

CONCILIATION



A settlement agreement may be made by the parties themselves and the conciliator shall authenticate the same.

04



The conciliation proceedings may be unilaterally terminated by a written declaration by a party to the other party

05



Conciliator is subjected to certain disabilities under Section 80 of the Act and he cannot act as arbitrator or as a council or witness in any arbitral or

06

ARBITRATION



An arbitration award on the other hand, is a judgment duly signed by the arbitrator.

04



Arbitration proceedings cannot be so terminated.

05



No such disabilities imposed on an arbitrator or parties to arbitral proceedings.

06

CONCILIATION VS. ARBITRATION

CONCILIATION



The conciliation proceedings cannot be used as evidence in any arbitral or judicial proceedings.

07



A conciliator can conciliate irrespective of law.

08

ARBITRATION



The arbitration proceedings or awards may be used as evidence in any judicial proceedings

07



An arbitrator has to decide according to law

08

THANK YOU
