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## Alternative Dispute Resolution vs Litigation - A Comparative Analysis

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*With an increasing number of disputes and disagreements amongst individuals, nations, organizations, etc., there arise numerous complexities in various ways and different forms. Dispute resolution thus becomes very important for harmony and peace amongst different individuals, nations or organizations, etc., and maintaining law and order in the society at large. Without the knowledge of the ways or methods available for use for the resolution of disputes, it becomes very difficult to choose the correct process for resolving or settling a dispute or disagreement. This article focuses on litigation and alternative dispute resolution as a means of dispute resolution process in brief. Merits and Demerits of both are also discussed. Furthermore, general information about different dispute resolution processes is discussed.*

**Keywords:** *disputes, disagreements, alternative dispute resolution, litigation, parties.*

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### INTRODUCTION

Conflict is often used as an umbrella term for all kinds of disagreements between two or more people, but to understand it in a better way, a differentiation between conflict and dispute needs to be done. According to John W Burton, a dispute is a short-term disagreement between two or more that can result in the disputants reaching some sort of resolution; it

involves issues that are negotiable. Conflict, in contrast, is long-term with deeply rooted issues between two or more people that are seen as “non-negotiable”. Disagreements are normal and sometimes healthy as every individual is free to express his/ her thoughts, opinions, beliefs, etc. Disputes are an integral part of our lives. After all no two human beings or organizations or nations at large can be expected to have similar likes and dislikes or similar agreements and disagreements. Dissent in fact, when healthy and positive, improves the relationship between two people or organizations. The reaction is the key! It is okay to have disagreements but the more important part comes post having a disagreement. Every society, every organization, and every nation is comprised of people. And in order to address the dispute resolution mechanism, an analysis of the behavioral aspects of people is required.

### **HOW DO PEOPLE REACT TO DISAGREEMENTS, DISPUTES & CONFLICTS?**

**Unhealthy ways:** Unhealthy ways include angry, disrespectful, and hurtful reactions to a problem. For example, two nations indulging in the war over a land dispute. It becomes traumatic to people, leaves its footprints on the lives of people and the society at large. After all human is a social animal and a peaceful life cannot be led if we continue to respond getting hijacked by emotions or hormones.

**Healthy ways:** Healthy ways include calm and respectful reactions. For instance, consulting experts when a dispute arises. There are a lot of ways in which a dispute can be resolved causing no harm to the lives of people and creating a positive and healthy environment for the society at large.

Where there is a will, there is a way. And one such way is the civil law and justice system. There exists a civil law and justice system so that disputes are resolved and no person is left unheard and unsatisfied. Dispute resolution is a term used for various processes in which a dispute is resolved between two or more people, organizations or nations, etc. (hereinafter referred to as Parties). Dispute resolution lies in the hands of law and authorities (if approached). Let us better understand this.

## **TYPES OF DISPUTE RESOLUTION PROCESSES**

There are two major types of dispute resolution process:

### **1. Litigation -**

Litigation means 'dispute' in Latin (originating from *litigation*). It is a process of resolving a dispute by knocking on the doors of courts. It is a process in which two people take legal actions and argue their respective sides in front of a judge or jury. The Judge, or the jury, after having heard both sides, gives a judgement or an order within the four corners of law that is final and legally binding on both the parties. The order or judgement of the court needs to be followed by both the parties indulged in the dispute.

### **Process of Civil Litigation:**

A brief description of the litigation process is as follows:

- a) The process of litigation starts with identifying the type of legal rights which have been violated by the other party. Types of civil disputes include tort claims, contract claims, land claims, etc. It is at first identified which right has been violated and what are the remedies available for it.
- b) Once the type is identified, a complaint or a plea is drafted and filed as a lawsuit in the court.
- c) A lawsuit comprises name, age, and occupational details of the parties, the claims of the parties, and what are their demands. A lawsuit can only be filed through an advocate. An advocate is a person eligible and qualified to represent a party before the court of law.
- d) After a lawsuit is filed, the judge or the jury takes all the necessary actions for conducting the trial.

- e) Upon hearing both the sides, and completion of trials processes, the judge or the jury passes an order or a decree, or a decision or a judgement depending upon the nature of the suit filed.
- f) The Judgement or the order so passed by the court becomes legally binding and both the parties are required to obey, respect, and act according to the decision taken by the court.

The judgement marks the end of the civil litigation process and it now becomes the duty of the parties to follow the instructions given by the court in form of a judgment. The instructions, if not followed result in contempt of the court which is an offence and you can be punished for it.

### **What if a party is not satisfied with the judgement?**

The process of litigation starts in the courts lower in the hierarchy. If any party is not satisfied with the judgement of the lower courts, the party can knock the doors of courts higher in the hierarchy. The suit now becomes an appeal, an appeal to the higher court to reexamine the judgement passed by the lower court.

Higher courts have the authority and power to review, repeal or revoke the judgement passed by the court lower in the hierarchy. In India, the Supreme Court of India is the highest authority of the nation followed by the High Court followed by district and sessions courts and tribunals. The decision of the apex courts is final and binding and is non-appealable.

### **Merits of Litigation:**

- i. **Conformity of Getting a Result:** Due to the nature of the litigation mechanism, an end result is confirmed. No party is left with no decision or result.
- ii. **No Grey Areas:** When two parties get indulged in a legal battle, it is crystal clear that one party amongst the two is going to win. There exists no such thing as both winning or both losing parties.

- iii. **Precedent Setting:** When litigation goes through the courts, it provides a lasting advantage in form of precedents. This means that if a court observes a set of similar facts which has happened previously and has been decided upon, then that court can rely upon the decision taken in such similar previous cases. This saves the time of court.
- iv. **Importance of Evidences:** No process of litigation can be concluded without evidences. Evidence is an important part of the litigation process. Every claim is required to be proved before the court. Courts always rely upon the evidences brought by the parties to support their claim. Hence, it is the most trusted way of dispute resolution.

#### **Demerits of Litigation:**

- i. **Costly:** Litigation cannot be constituted without a legal representative and hence can become costly with the fees of legal representative and other costs associated with the process of trials.
- ii. **Time Consuming:** There are several procedures involved in litigation from the filing of the lawsuit to the passing of the judgement. Depending upon the complexity of the dispute, sometimes it takes several years for courts to decide upon an issue. Both the parties have to wait and may or may not take certain actions pertaining to the ongoing trial.
- iii. **Public Forum:** Most documents of the courts are also available for the public at large for awareness or to refer. This means there will be no privacy regarding disclosure of name, age, or occupational details of the parties, facts of the case, ongoing issues, etc. Parties are generally concerned about their image in public and are hence uncomfortable with it.

Discussed above were some merits and demerits of Litigation. However, when it comes to the dispute resolution method, it depends upon the personal choices of the people.

## 2. Alternative Dispute Resolution -

Alternative Dispute Resolution or ADR refers to the methods and types of dispute resolutions processes available other than the Litigation process or other than having to go through the courts. It is a way of settling disputes outside the court. With the increasing number of cases, the burden on the shoulders of courts is also increasing and hence efficiency is getting affected. In India, there are about 1,047,107 civil cases pending before District and Taluka courts<sup>1</sup>, 4,170,762 civil cases pending before all the High Courts of the country<sup>2</sup>, and 69,212 cases pending before the Supreme Court of India.<sup>3</sup>

With such a heavy population and a number of disputes arising on a daily basis, it has become really important for the justice system to set up a mechanism where disputes can be resolved within the four corners of the law. Hence, the adoption of Alternative Dispute Resolution processes took place. It is a step for people to get justice without disturbing the courts and it becomes our duty to lessen the burden of the courts and adopt alternative solutions for dispute resolution.

### DIFFERENT TYPES OF ALTERNATIVE DISPUTE RESOLUTIONS

The most common types of ADR processes for individuals, organizations, national or international disputes are Arbitration, Mediation, Conciliation, and Negotiation.

- **Arbitration**

‘Arbitration’ is the process of solving a disagreement between the parties by helping them reach a common ground. Arbitration is a legal mechanism encouraging settlement of disputes between two or more parties mutually by appointment of a third party called the Arbitrator.

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<sup>1</sup> 'National Judicial Data Grid' (*Njdg.ecourts.gov.in*, 2021) <[https://njdg.ecourts.gov.in/njdgnew/?p=main/pend\\_dashboard](https://njdg.ecourts.gov.in/njdgnew/?p=main/pend_dashboard)> accessed 26 July 2021

<sup>2</sup> *Ibid*

<sup>3</sup> 'Statistics | SUPREME COURT OF INDIA' (*Main.sci.gov.in*, 2021) <<https://main.sci.gov.in/statistics>> accessed 26 July 2021

An Arbitrator is an independent and experienced third party who acts as a judge in the arbitration process. The arbitrator conducts the arbitration process in presence of both parties, hears the contentions of both parties, and comes to a decision. The order given or the decision taken by the arbitrator is called an 'award' which is legally enforceable and binding on both parties. There are no qualifications specified for the appointment of an arbitrator and the decision of appointment of an arbitrator lies at the discretion of the parties. Both the parties are free to select their own arbitrators and the selected arbitrator selects a third arbitrator who acts as a chair during the arbitral proceedings. In case any party wants to appoint more than one arbitrator, it is required to be mentioned in the agreement.

Arbitration is the most popular alternative to dispute resolution when it comes to international commercial disputes. The UNCITRAL Model Law on International Commercial Arbitration<sup>4</sup> is the code that applies to international commercial arbitration. Every Member State has adopted and formulated its Arbitration laws according to the guidelines and instructions set by the UNCITRAL Model Law. India has the Arbitration and Conciliation Act, 1996 as the statute regulating arbitration.

### **Mediation and Conciliation**

According to Black Law's Dictionary, Mediation is defined as, "*A method of non-binding dispute resolution involving a neutral third party who tries to help the disputing parties to reach a mutually agreeable solution.*" Mediation is a process wherein two parties discuss the try to resolve their dispute with the assistance of a third person. The third person is called a Mediator. The mediator is an impartial trained person who assists the parties to settle their disagreement or dispute. Mediation is a voluntary process and it is not legally binding on anyone.

Mediation is an informal procedure scheduled or agreed upon by the parties themselves. A mediator may be any professional person or a counsellor, whose job is to help resolve the problems between two parties. Mediation is a voluntary, flexible and confidential process.

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<sup>4</sup> UNCITRAL Model Law on International Commercial Arbitration (United Nations 1994)

Mediation conferences or meetings are held at a mutually agreeable place by the parties and the mediator. It is not necessary for the parties to have a legal representative. There is no general set of rules or regulations on mediation procedure. It completely depends upon the parties as to how, when, and where the mediation meeting is to be held and who should be the mediator. Mediation is informal and not legally binding in nature acts as a discussion with professional help and is a healthy way of dispute resolution. Cases that do not involve complex procedures or evidential issues are generally well suited for mediation such as, business transaction issues, domestic matters, pre-divorce counselling, private injury issues, etc.

Similar to mediation, conciliation is also a voluntary and flexible process where a third person acts as a middle person between two parties and helps them come to a settlement. The third person in Conciliation is called a Conciliator. The only differentiating factor between mediation and conciliation is that the commencement of conciliation takes place with a proposal of invitation to conciliate to any of the parties. The role of a conciliator is to convey and communicate the statements or demands or wishes of one party to the other party. Both the parties may orally or in a written form express their statements to the conciliator and the exchange of statements happens through the conciliator.

Similar to arbitration and mediation, the selection of the conciliator is at the discretion of the parties. The conciliation process commences with a conciliation invitation by either of the parties to the other and it is up to the other party as to whether or not to accept the invitation to conciliate or settle. Although being entirely voluntary, Conciliation is codified in India and is regulated under Arbitration and Conciliation Act, 1996. It is sometimes a compulsory process when the parties do not agree to voluntary conciliation and do not want to meet to resolve their dispute. Compulsory conciliation is common in cases involving labour disputes or domestic issues.

- **Negotiation**



Unlike arbitration, conciliation, and mediation, Negotiation does not involve a third party for the settlement of disagreements. Negotiation is a procedure where two or more parties engage in direct or indirect communication making their respective points before coming to a conclusion or a closure. No party is forced to participate in the negotiation and is absolutely free to accept or reject the points of other party or parties. For example, a buyer and a seller negotiating for the price of the goods. Negotiation is also utterly informal in nature where parties express their wishes or demands and it is left up to the other party or parties to accept or reject those wishes or demands.

### **Merits of Alternative Dispute Resolution**

**i) Time Saving** - Alternative dispute resolution process takes lesser time unlike litigation as it does not involve a lot of procedural steps to be taken. It saves the time of the parties as well as the courts.

**ii) Cost Effective** - Alternative dispute resolution is cost-effective as the parties need not hire a legal representative or expert witnesses which saves the fee costs. Various additional procedural costs are also saved such as court fees etc.

**iii) 'The Choice is Yours'** - The parties are free to choose their own arbitrator, mediator or conciliator, etc. unlike litigation where choosing the judge is not in the parties' hands. The procedure, place, conduct of the resolution meeting is also at the discretion of the parties.

**iv) Freedom** - Only arbitration is legally binding, other alternative dispute resolution such as mediation, conciliation or negotiation, etc. is not legally binding on anyone. The parties may or may not reach a conclusion, the parties may or may not adhere to the instructions of the third person. Basically, the parties have the power to make their own decisions.

**v) Confidentiality** - ADR processes and their outcome or results can be kept utterly confidential if the parties choose so.

## **Demerits of Alternative Dispute Resolution**

- i) No guaranteed resolution** - the alternative dispute resolution does not guarantee a resolution, arbitration being an exception. The parties may not always lead to a solution to their problems
- ii) Not suited for all kinds of disputes** - ADR processes resolve only money related or civil matters. It does not resolve criminal or complex legal matters.
- iii) No Safeguards** - The arbitrators, mediators or conciliators, etc. cannot issue orders instructing a party to do or to refrain a party from doing something i.e., injunctions. The parties also do not have any legal protection of their rights or safeguards that courts provide.

## **CONCLUSION**

There exists no single formula which may help us choose from the alternatives available in case of a dispute. It however depends upon the kind of dispute, the parties involved in the dispute, the complexity of issues, etc. Everything is weighed and kept in mind before choosing the best possible alternative. In addition to traditional litigation mechanisms, however, advancements in alternative dispute resolution have provided a new way for people to settle their disputes. These advancements in ADR have also helped improve the traditional legal fraternity in making dispute resolution easier for society. A healthy balance should be maintained in order to maintain peace and harmony in society.