

ALTERNATE DISPUTE RESOLUTION

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Alternate Dispute Resolution (ADR) means resolving of disputes by parties through methods other than adjudication by Courts. ADR includes arbitration, mediation, conciliation and referral to Panchayats.

2. Resolution of disputes through arbitration has been part of our statute law since before partition. The current law on the subject is the Arbitration Act 1940. In addition, there is a specific law for arbitral resolution of international investment disputes in the form of the Arbitration (International Investment Disputes) Act 2011 which was passed to give effect to Pakistan's ratification of the International Convention on the Settlement of Investment Disputes between States and Nationals of other States. Pakistan has also, belatedly, given effect to the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 through enactment of the Recognition and Enforcement (Arbitration Agreements and Foreign Arbitral Awards) Act 2011.

3. The Arbitration Act 1940 needs to be amended extensively or, better still, substituted by a revised and updated Act. Under the present law even awards made by retired Judges of the Superior Courts can be objected to, and stayed, on the basis of objections filed before a Civil Judge. Decisions on such objections often take years because of the huge pendency of civil court cases especially in Punjab and Sindh as also in the Islamabad Capital Territory. The Civil Court judgments are then subject to appeals to the District Courts and/or the High Courts depending on the valuation of the suits as per awards. Inevitably there is further challenge through

petitions/appeals to the Supreme Court. The minimum required change is that awards made by the Judges of the Superior Courts should not be challengeable except before the High Courts and that also on very limited grounds viz lack of jurisdiction and errors floating on the face of the awards. The decision of High Court should be final subject to the constitutional right of appeal to the Supreme Court. Yet another desirable change is that awards made by arbitrators other than retired Judges of the Superior Courts should be challengeable only in the District Courts, and not the Civil Courts, and that also on the limited grounds referred to above. Further, the procedures followed in international arbitration could with advantage be incorporated into the revised and/or updated Pakistan Arbitration Law.

4. Resolution of disputes through mediation and conciliation became part of statute law through enactment of Ordinance XXXIV of 2002 inserting Section 89-A into the Civil Procedure Code. Section 89-A reads as under:-

“89-A. Alternate dispute resolution. The court may, where it considers necessary having regard to the facts and circumstances of the case, with the object of securing expeditious disposal of a case, in or in relation to a suit, adopt with the consent of the parties alternate dispute resolution method, including mediation and conciliation”.

Section 89-A CPC was a step in the right direction but much more requires to be done. After enforcement of the Eighteenth Amendment arbitration, other than international arbitration, is now a provincial subject. Therefore, the Federal Government will need to act in consultation and coordination with the Provincial Governments to enact an Alternate Dispute Resolution Act for the whole of Pakistan. This can be done by following the procedure prescribed by Article 144 of the Constitution. It would be advisable to first take the matter to the Council of Common Interests.

5. The proposed ADR Act should provide for the setting up of ADR centers all over the country. The Act should empower the concerned Governments, in consultation with the respective High Courts, to appoint a panel of mediators for each ADR center from amongst lawyers, retired Judges of the Superior Courts and subordinate judiciary, retired civil servants, social workers, jurists, technocrats, ulema, experts in various fields and persons of recognized repute and integrity, having such qualifications as may be prescribed, to deal with disputes referred to the ADR centers by the Civil Court or brought directly to the centers on joint application of the disputant parties. The Courts should have power to refer specified civil disputes to the ADR centers where the parties consent to such referral.

6. Civil matter disputes that could be referred for ADR resolution include land and property disputes, small claims, family law disputes, personal injury cases, compensation and damages suits, suits for recovery of immovable property and separate possession of joint property, rendition of accounts, suits to restrain waste and remove nuisance, mesne profits of property and any other matters agreed upon by the disputant parties for referral to the ADR center. In due course and depending on the performance of the ADR system, this list could be expanded to include all commercial and contractual disputes, company and banking matters, insurance cases, patents and trademarks, revenue and canal drainage matters, and negotiable instruments.

7. The mediators should be required to decide all matters referred to them within 30 days. They should hear each matter from day to day and should not be bound to adhere to the provisions of either the Qanun-e-Shahadat Order or the Civil Procedure Code. Their only object should be to achieve an agreed settlement between the disputing parties. An agreed settlement should be got signed by the parties or their duly authorized representatives and submitted to the referral court for pronouncement of judgment and decree accordingly. If the mediator is unable

to achieve an agreed settlement he should, immediately on conclusion of the 30 days period, transmit the matter back to the referral court for further proceedings in accordance with law.

8. The ADR system can also be extended in due course to cover amicable settlement of compoundable offences specified in Section 345 of the Criminal Procedure Code and other laws which allow compounding of specific offences.

9. It would be appropriate for each Province to pass its own law for establishment of a Panchayat system as part of its Local Government Act. The matters included within the remit of Panchayats should be excluded from the purview of the law establishing the ADR system.

10. The costs and fees under the ADR System should be borne by the parties concerned as may be mutually agreed upon by them. In case of failure to reach a settlement the costs should be determined by the Court to whom the matter is referred back for adjudication.

11. As the decisions of the mediators under the ADR System are to be made on the basis of agreed settlements it follows that there can be no appeal or revision from the decrees passed on the basis of such settlements.

12. The proceedings before the mediators should not be admissible in evidence in any court without the consent of the parties, and the mediators themselves should not be required to appear as witnesses in any subsequent proceedings sent back to the referral courts regardless of whether they have succeeded or failed in achieving negotiated settlements. The mediators should be given protection for any act done in good faith in performance of their functions.

13. Each Government should have power to add to and, where necessary, delete subjects within the ambit of the ADR system, as also to make Rules to give effect to the provisions of the ADR Act within its jurisdiction.

14. The Punjab Local Government Act 2013 [sections 96 to 99 refer] provides for amicable settlement of disputes through Panchayats established by the Village Councils in the rural areas and through Musalihat Anjumans constituted by Municipal Committees in the urban areas. Both the Panchayats and Musalihat Anjumans are to consist of 9 members including at least 2 women. The term of office is 5 years. The assumption of jurisdiction is based on consent of the parties or reference by the competent court. Neither the Panchayat nor the Musalihat Anjuman can assume jurisdiction in disputes relating to non-compoundable offences. If the dispute is pending before Court, the settlement effected by the Panchayat or Musalihat Anjuman is subject to the approval of such Court. The Panchayat or Musalihat Anjuman can also assume jurisdiction on a reference made by the Officer Incharge of a Police Station where the offence is compoundable.

15. The Khyber Pakhtunkhwa Local Government Act 2013 [section 29 refers] prescribes that the functions of Village Councils and the Neighbourhood Councils shall include provision of effective forums for out of court amicable settlement of disputes. For this purpose the respective Councils are required to constitute panels of their members as conciliators. The panels are to be chaired by the Nazims.

16. The Sindh Local Government Act 2013 [section 72 read with Schedule-III] provides, amongst the optional functions of District Councils, adoption of measures for the settlement of disputes by conciliation and arbitration.

17. The Balochistan Local Government Act 2010 [sections 81 to 85 refer] provides that Musalihat Anjumans shall be constituted in each local council consisting of 3 of its members including at least one women member. The term of office is to be the same as the term of office of the concerned local council. All members of the local council including the members of the Musalihat Anjumans are enjoined to use their good offices to achieve amicable settlement of

disputes amongst the people in their jurisdiction through mediation, conciliation and arbitration regardless of whether or not any proceedings have been instituted in a Court of law in respect of such disputes. Every settlement brought about by the Musalihat Anjuman in a case pending before a Court shall be subject to the approval of the concerned Court. Any Court may refer a dispute to a Musalihat Anjuman and prescribe the procedure for the Anjuman and the time period within which the dispute is required to be settled. The Musalihat Anjuman may, if the disputant parties so require, appoint a one-person conciliator to resolve the dispute.

18. It would be seen that in all the provincial laws there are varying degrees of ambiguity as to which disputes can be referred for amicable resolution by the Panchayat/ Musalihat Anjuman/ Village Council/Neighbourhood Council. Some of the provincial laws need to be given more ‘substance’. The ground position is that, as of date, none of the provisions in the provincial laws are operative.