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EXPLORING ALTERNATIVE DISPUTE RESOLUTION: THE PRACTICE OF FORUM SHOPPING

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INTRODUCTION

In our country, legal cases face significant delays in judgements due to various factors like judicial vacancies, insufficient sanctioned strength in courts, high costs, lengthy court proceedings leading to pending cases. Because of all these reasons, Alternative Dispute Resolution (ADR) came forward which is a means to settle disputes outside the courtroom thereby providing flexibility, control and maintaining confidentiality. It brings to us a number of methods for solving disputes, namely, arbitration, mediation, negotiation and conciliation. However, beneath the surface of the ADR, there lies a phenomena known as *forum shopping* wherein the parties strategically select the forum most favorable or advantageous to their interests. This article delves into the practice of forum shopping within the context of ADR, exploring its implications and potential ramifications.

UNDERSTANDING ALTERNATIVE DISPUTE RESOLUTION

As discussed above, it is a method for resolving disputes without litigation and there is no interference of the government authorities. Since it is a new and a bit complex system, people are skeptical to put their faith in it as they seek court redressal as a trusted institution. Although it is a new concept, it gives parties the opportunities to present their case and perspective on the matter. It aims to provide a safe and interactive platform to the parties seeking redressal. ADR not only provides flexibility but it is cost effective, gives speedy resolution, involves experts which uses their skills to the best to analyze the case and provides a simpler method to resolve disputes. Since there is no government interference, courts can review the decision of ADR but cannot turn it down unless specified in the contract entered into with the parties.

It includes various methods for solving disputes; arbitration, mediation, negotiation and conciliation. All these methods share common characteristics, i.e. providing a platform to

enable parties to seek redressal. Now, let's discuss these methods:-

1. **Arbitration**

In this method, the two parties present their arguments and evidence to a third party which is neutral known as *arbitrator*. The arbitrator on the basis of the arguments and the evidence, brings to a decision which is binding on both the parties and they cannot further appeal in court. This is known as '**binding arbitration**'. In '**non-binding arbitration**' the decision of the arbitrator is not binding and parties have the option to either accept or disregard the decision of the arbitrator and can further appeal in court if not satisfied.

2. **Mediation**

A person called a *mediator*, who tries to solve the dispute in an amicable manner. He doesn't solve the case, rather try to have a conversation and bring both the parties to a mutual agreement by creating a friendly environment. It is suitable where the cases are related to less formal relationships like, family relations, marriages, business partners and not someone who has a power over the other. It is an informal method of ADR and the decision of the mediator is not binding.

3. **Conciliation**

Unlike arbitration, it is an informal process of dispute resolution where the third party is known as a *conciliator* who settles disputes through the communication and negotiation between the parties. The conciliator is neutral and impartial and provides greater flexibility to the parties in deciding the matter as the decision of the conciliator is not binding.

4. **Negotiation**

It is not an eminent mode of dispute resolution but still parties approach it first before moving onto the other methods. It is less formal in nature as it gives parties the control to handle the process and find a solution but just acts as a *negotiator* thereby providing flexibility in dispute resolution. The decision of the negotiator is not binding and parties can seek redressal through other methods of ADR as well.

ARBITRATION AND CONCILIATION ACT, 1996

In order to increase the validity of Alternative Dispute Resolution in the country, India came up with an act for governing and regulating the system of ADR in the respective country;

Arbitration and Conciliation Act, 1996.

This act was incorporated into the Indian constitution on 25th January, 1996. Before the commencement of this act, there were three more acts governing the ADR; **The Arbitration Act of 1937, The Arbitration Act of 1940, and The Foreign Awards Act of 1961.** This act went through several amendments in the years 2015, 2019 and 2021. The 2021 amendment was made to make India's International Arbitration at par with the global standards. It includes various types of arbitration - (a) International Commercial Arbitration, (b) Domestic Arbitration and (c) The Enforcement of Foreign Arbitral Awards. This act conforms with the legal standards adopted by the United Nations Commission on International Trade Law (UNCITRAL).

In furtherance, this act puts a bar on the jurisdictional boundaries of the redressal mechanism. It provides a fair and efficient procedure to seek the redressal. It minimizes the involvement of courts thereby reducing the burden on the judicial system for handling the matters. It also provides both the International as well as Domestic Commercial Arbitration and Conciliation. This act is regulated under certain sections which are of utmost importance and is divided into four main parts:

- A. **Part 1 (sections 2 - 43):** This part treats the awards as a domestic awards within the boundaries of India
- B. **Part 2 (sections 44 - 60):** This part deals with the enforcement of foreign awards
- C. **Part 3 (sections 61 - 81):** This part deals with the process of conciliation
- D. **Part 4 (sections 82 - 86):** This part contains supplementary provisions

This act is an important legislation in our country that governs the arbitration process, arbitral proceedings and arbitral awards thereby ensuring that the dealing with the individuals will be fair, effective and speedy in resolving disputes through arbitration and conciliation.

THE EMERGENCE OF FORUM SHOPPING

Forum shopping is a substitute word for 'court'. Forum means a public facility for open discussion especially for public issues. It is a place for people to exchange ideas and thoughts. It can also mean a place or a spot where people raise their voice in accordance to resolve an issue of utmost importance.

Forum shopping is similar to ADR. It mentions premeditatedly singling out a specific court in the occurrence of getting a favorable outcome in a legal case. As ADR refers to different ways through which out of court settlement can take place this (forum shopping) refers to choosing judges or courts in the search of whatever judge or court gives them the most benefit plus helps the case to reach a large number of people and to also garner the attention of people towards their case. In many cases, we see when a litigant wants to file a suit for any damages, he files the PIL in the Supreme Court rather than the High Court because this gives the member of the bar political mileage and the practitioner gets a lot of exposure in the case.

A concept known as *Bench Hunting* is similar to that of forum shopping where the petitioners try to get their cases heard by a particular judge or members of the bar in order to assure a favorable outcome for their client. In our country, there are four types of benches, which are:-

1. **Single Bench** (consists of a single judge presides over the cases individually)
2. **Division Bench** (consists of two or more judges who decide the cases together)
3. **Full Bench** (consists of all the judges presented in a court who decide particular case)
4. **Constitutional Bench** (consists of larger number of judges who decides the matter relating to the constitution or constitutional importance)

The individual has the right to choose any one bench as mentioned above to represent their case and gain the most advantage out of it.

Forum shopping not only facilitates the selection of the most favorable or advantageous forum but it also allows plaintiffs to seek justice and compensation in court in a sympathetic manner in the interests of the claimant. As everybody is going to the Supreme Court for their cases, the quantity of cases will increase leading to healthy competition and innovation among courts leading to the increase in efficiency and quality of judges.

Now, we will delve into the Arbitral Forum Shopping where we will see the relation between Arbitration and Forum Shopping.

RELATIONSHIP BETWEEN ARBITRATION AND FORUM SHOPPING

Lis pendens, estoppel and res Judicata; these are the problems that are present in both the litigation and the arbitration and it still arises. Arbitral forum shopping has the same notion as forum shopping. There is no specific definition of arbitral forum shopping but it usually means choosing the best form of arbitration to resolve a dispute be it through mediation, negotiation, arbitration or conciliation. As mentioned above, ADR consists of several methods and they play an important role while selecting the forum.

Now, there are 8 key factors that we should keep in mind while selecting a forum that is most suitable for achieving our goal which consists of **Quantitative** and **Qualitative** considerations.

1. **Quantitative considerations** are of 4 types which further shows the involvement of the ADR methods:-

(A) **PRIVACY**

- In **Mediation**, things usually are pre-trial which means there is a scope of less public disclosure but there is no public record for it. In this an agreement may include confidentiality provision and allows professionals to show their involvement in mediation without the fear of getting exposed.
- **Arbitration** keeps the information confidential thereby maintaining privacy and there is no restriction on third party discovery.
- **Litigation** includes a public forum whereby documents can be publicly accessible and there are no restrictions in third party discovery and it remains robust.

(B) **SPEED**

- **Mediation** requires only one or two days and parties have an upper hand in controlling their timings. Sometimes the issues are not resolved during mediation but parties negotiate independently or can resolve later as per the dates given by the mediator.
- In a recent survey of in-house counsel of both the public and pvt companies, 78.2% indicated that it led to a faster resolution through **arbitration**. On an average, time to trial is 6-12 months and the trial length is generally the same as in courts.

- In **litigation**, a case in a state court can take up to 12-18 months and sometimes longer whereas in a federal court, it takes upto 18-30 months or sometimes longer than that.

(C) COST

- In **mediation**, the cost depends on the duration of the dispute i.e for how long the dispute has been going on. Experienced mediators take up to 300 - 500 dollars an hour and a flat fee of 5000 - 7000 dollars per day.
- In a recent survey of in-house counsel of both private and public companies, 59.7% surveyed indicated **arbitration** as less expensive than litigation. The filing fee depends on the nature of dispute and the amount can be estimated at 250 - 500 dollars per hour. An employer must pay all the arbitration fees according to the contracts.
- In **litigation**, the filing fees are less than arbitration but it is difficult to budget the attorney fees because of the nature of unpredictability to the extent of discovery and discovery related disputes. The cost applied on expert witness and other general costs and fees are on appeal.

(D) FINALITY

- In **mediation**, there is no judgment but a contractual agreement takes place. The agreement can provide for arbitration of dispute over agreement and parties can waive all known and unknown claims.
- In **arbitration**, the arbitrator issues a decision and it is seen in most cases that it is binding and accountable. It can be seen that in very limited circumstances appeal is available.
- In **litigation**, the appeal is generally available for all. The final allows other measures to collect judgment eg:- property lien, debtor's examination etc.

2. Quantitative considerations are of 4 types which further shows the involvement of the ADR methods:-

(A) DAMAGES/ AWARD RISK

- In **mediation**, both the parties and not the third party decides the terms. Both the parties have to come to a common consensus to reach an applicable solution. The mediator has no hold over the agreement and hence can't force it.
- In **arbitration**, the decision issued by the arbitrator is almost always binding

- In **litigation**, 84.7% of in-house counsel surveyed found arbitration and mediation equally or more suitable for insurance/reinsurance purposes and Jury issues unpredictable awards

(B) DECISION MAKER SELECTION

- In **mediation**, parties have a control over selection. The options it provides generally includes practitioners and retired judges and cost is figured into decisions and particularly in disputes.
- In **arbitration**, one should invest in the selection process. There is an agreement to follow the law and cost plays a substantial role in decision.
- In **litigation**, essentially there is no control, depending on the court there may have different challenges of appointment.

(C) NATURE OF THE DISPUTE

- In **mediation**, it essentially requires a meeting of the minds, which ultimately means the parties must be willing to compromise. This is particularly effective in non - IP disputes.
- In **arbitration**, it is particularly effective for non - discovery intensive disputes. It is used in leveraging financial resources that are more limited than in litigation.
- In **litigation**, it is more suitable for disputes that require third party discovery. it provides a better platform for capitalizing financial resources to weaken the other side.

(D) POST - RESOLUTION RELATIONSHIP

- In **mediation**, the parties control the outcome that does not foreclose post- dispute relationships. Mediation in general does not produce a winner or a loser, but a solid mediated resolution.
- In **arbitration**, it enforces post-dispute relationships such as specific performance. Appeals are limited but otherwise there is no ability to limit post dispute legal action.
- In **litigation**, there is no ability to limit post-disputes legal action as court enforces post-dispute relationships, such as through specific performance.

CONTENTIONS FOR FORUM SHOPPING IN ALTERNATIVE DISPUTE RESOLUTION

Many judges have criticized this practice of forum shopping by making contentions like

- It creates an imbalance in the workload of the court system
- It overburdens the courts and also interferes with the judicial proceedings
- It increases the cost and the complexities in the litigation, which ultimately leads to conflict of laws and multiple proceedings as discussed above in the considerations.

As we know that forum shopping is basically a platform where the litigants can choose or select their most favorable or advantageous forum for their respective case. And when the litigator doesn't get desired relief by approaching a case in one court, then he or she can approach another court to obtain the relief on the same matter. Because of this, forum shopping has been criticized and rendered void by the Supreme Court in its judgment dated March 22, 2022.

The practice of forum shopping has not only been discouraged or disregarded in India, but also in countries like the US and UK, where they introduced the principle of '*forum non-conveniens*' which means that if the litigant has already approached one court, then he cannot move or approach the another court on the same matter.

A doctrine known as '**Erie doctrine**' is a legal principle that derives from the US Supreme Court case **Erie Railroad Company. vs. Tompkins, 1938**. According to this principle, the federal courts, exercising diverse jurisdiction, apply the federal procedural law and the state substantive law. This doctrine was established to prevent forum shopping and also to promote fairness and wellness in the judicial system of the state. It prevents forum shopping by discouraging the litigants to seek the federal courts only for the purpose to gain the advantage, by applying the state substantive law to the federal courts.

The practice of forum shopping also affects the justice and the judicial system of the country by compromising the principle of natural justice, which basically means that every person has the right of their hearing. It also hampers the principle of finality which means that the litigation should not last for a prolonged period and it should be ended at some point before so far. There are other multiple cases in India related to forum shopping and in which the court imposed costs and also discouraged this practice hence, highlighting the view of the judiciary.

1. Dr. Khair-Un-Nisa and Ors vs. Union Territory of Jammu and Kashmir and Ors, 2023

In this, the Jammu, Kashmir, and Ladakh High Court addressed the issue of forum shopping by litigants. The petitioners had filed multiple petitions in different courts concerning the same matter, which the court found to be an abuse of the judicial process. In response, the court imposed costs on the petitioners as a penalty for this improper conduct. The court's decision underscored the importance of maintaining the integrity of the legal system and discouraged litigants from attempting to manipulate the judicial process by seeking multiple remedies in different forums for the same issue.

2. Vijay Kumar Ghai vs. State of West Bengal, 2022

In this case, the Supreme Court held that forum shopping is not of utmost important practice of the court and it is not sanctioned by law therefore, its practice should be stopped and if want to continue, then there has to be a clear mention of it in the statutes and should be sanctioned by law.

CONCLUSION

ADR presents as the fairness and efficiency in the judicial system. On the other hand, forum shopping presents challenges to these fairness and efficiency. ADR methods offer advantages such as cost effectiveness and flexibility whereas forum shopping raises concerns about the judicial workload and complexities in the Judicial process. Courts have discouraged the practice of forum shopping not only in India but also in countries like the US and the UK emphasizing the practice of ADR to ensure fairness and equity in the dispute resolution system. Ultimately, it is essential to promote trust and confidence in the ADR and ensure equitable outcomes for all the parties involved.