

# GENTIUM

Vol. 3 (6), July 2008



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Public International Law Students United

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*"In regulated markets, disputes are handled by lawyers. In the black market, disputes are handled by guns. I have no love for lawyers, but I'd rather get hit by a stray brief than a stray bullet..."*

- Pete Guither

### **Disputes Settlement Through Method of Arbitration**

Arbitration is a method of settlement of disputes by way of an alternative to the normal judicial method which is activated by instituting legal proceedings. Hence, arbitration is a method of alternative dispute resolution (ADR). Of all forms of other alternative dispute resolution mechanisms, like conciliation, mediation, negotiations, etc, arbitration has become the most dominant form of ADR. It is more firmly established in its utility and importance. The reason for its phenomenal popularity is that it is the only real alternative to judicial adjudication. The Act of 1996 has converted arbitration into an adjudication by a quasi-judicial tribunal. The role and interference of the courts in the process of arbitration has been minimised.

The new Act confers a complete power on the arbitral tribunal for full and final disposal of the matter presented before it by the parties to the dispute. The Act has tried to make arbitration as a complete and self-contained alternative. It is for this purpose that judicial interference has been kept to the minimum. Yet the flow of cases before the courts emerging from arbitrations is more than it used to be before. This might show that the role of the courts has not become really minimised. The growing number of cases is an affirmation of the fact that the courts cannot be simply excluded. After all, the arbitral tribunal has to function within the framework of the Act and the parties' agreement which itself has to be within the framework of the contract. The functioning of the arbitral tribunal is a statutory functioning and such functioning does require judicial supervision. Another reason for the increasing number of court cases seems to be that the new Act requires interpretation of its innovative special provisions. Under the preceding enactments, the power of appointing an arbitrator was vested in the courts. Under the new Act, it is vested in the Chief Justice. How the Chief Justice is to function whether judicially, quasi-judicially or simply in an administrative capacity required explanation. A puisne judge of the same High Court sits to examine the decision of the Chief Justice. Because of this un-naturality, the courts started saying that the Chief Justice was functioning only in an administrative capacity in the performance of that role. But the matter did not seem to end there. A number of judicial pronouncements were attracted by this aspect. And now a seven-Judge Bench of the Supreme

Court has expressed the majority opinion (6 against 1) that it is a power of judicial nature. Another area of the Act which has generated a crop of litigation is the power of the court to provide interim reliefs. Because of some gap in the statutory provisions the power has become exercisable even before there is any arbitration proceeding in existence.

The growing number of cases is not due to anything wrong with the Act. It seems to be wholly due to the fact that arbitration as an institution has started attracting, by virtue of the new Act, a much greater number of references than it did before. The approach to judicial authorities is, therefore, proportionally more. It has become almost an accepted practice to include an arbitration clause in all commercial and contractual relations. The greatest number of cases are to be found in the remedy of last resort, that is, setting aside. The emphasis of the new Act is that during the course of proceedings there should be no intervention. All points of agreement should better be exercised at the stage of the ender of last resort, which is setting aside. How damages are to be assessed for breach of contract has attracted a number of judicial pronouncements.

### **International Alternative Dispute Resolution**

It is against this global background that we need to view conflict and Alternative Dispute Resolution or ADR, as the movement is more commonly known. As a social movement, ADR is beginning to gain greater momentum today, than at any other time in the history of human conflict. This is largely due to the inability of the civil justice system, worldwide, to deal with the increasing load of cases coming through it. Coupled with this, is the issue of scarce resources. The civil justice system is coming under increasing strain everywhere, while simultaneously, more and more people are turning to alternative forms of dispute resolution. Conflict resolution experts, in many instances non-lawyers, have entered the scene. This is reinforced by greater proactivity on the part of lawyers themselves, to enter the ADR field. Added to this is a more pronounced judicial activism, buttressed by statutory provisions, which, in many situations, makes resort to ADR a prerequisite to resort to the Courts. Clearly, ADR, as a social movement, seems to have greater potential today than ever before, to be accepted as a practical and cost effective conflict resolution system. Further, the Civil Justice System, being largely adversarial and thus alienating, creates in people an aversion to it, in search of an alternative system which engenders greater harmony between disputants and a much better possibility of some form of a long term relationship between them. However, not everyone seems to be convinced of this and human society, whatever we may say, still continues to be egregiously litigious.

In this context, I would like to refer you to a front page story in the Hindustan Times of India of April 2nd, 2001. The headline reads "102 and still going strong". When I saw the headline, I thought this was a tribute to a patriarch or a matriarch of an Indian family, with a large brood of children and grandchildren and great grandchildren. But alas, it referred to such people only tangentially. The story is based in Chandigarh, in India. It reads, and I quote:

*This land is my land. This country song from Yankee land could as well be the theme song of four generations of a family from Punjab. Through a century and more, the family has fought over a piece of land, various sections claiming it as theirs. And the battle is hardly over." It all began in 1899 over a piece of land in what is now Pakistan.*

*When partition came, the family came to India. So did the litigation. The fight was now over land allocated to it in India, as compensation for land left behind in Pakistan.*

After going through various lower courts, in 1976, the case went to the Punjab and Haryana High Court when Surdarshan Lab Datta, grandson of Jasuwant Rai, moved against the Union of India and others, demanding his share of the land. He won the case in 1983, but soon thereafter, other members of the extended family, now in its fourth generation since the case was first filed, challenged the judgment. The case has been listed but not heard since.

The case has seen over 140 claimants to the land, gone to the Privy Council in London, twice, the Lahore High Court, twice, the Court of Financial Commission (Punjab) twice and to the Supreme Court of India, once. Most of the litigants are dead, but the case goes on - the only difference is that one generation of litigants has been replaced by the next.

Put very simply, ADR says that when there is a conflict between two people or among people or between institutions, they, themselves, should be able to negotiate their differences with a view to achieving an equitable settlement and they, themselves, should ensure its enforcement through mutual agreement. This may be an over-simplification, because the ADR toolkit has a number of tools and while some, e.g. mediation, allow a greater autonomy to the litigants, others, e.g. arbitration, may grant less control to them. To quote Lon Fuller of Harvard University:

The central quality of mediation lies in ‘its capacity to reorientate the parties toward each other, not by imposing rules on them, but by helping them to achieve a new and shared perception of their relationship, a perception that will redirect their attitudes towards one another.’ (Fuller, 1971, “Mediation: Its Forms and Functions”. Southern California Law Review). The primary quality of the mediator according to Fuller, “is not to propose rules to the parties and to secure their acceptance of them, but to induce the mutual trust and understanding that will enable the parties themselves to work out their own rules.”

ADR, in one form or another, has been known to human society since the beginning of conflict. A case in Africa, very succinctly attests to this. In 1893, two Gujarati Muslim businessmen in South Africa had a major commercial dispute. One of them wrote to their head office in Porbander in India and asked them to send a Vakil, knowledgeable in English, so that he could be a go-between themselves and their European lawyers in South Africa. The Porbander office

looked around and found a young, recently trained, Gujarati barrister by the name of Mohandas Karamchand Gandhi, who agreed to go to South Africa on contract for one year, but actually stayed for 21 years. He managed to settle the case out of court. No doubt, he drew from a tradition that goes back thousands of years - the Lok Adalat system in India, from which he, himself, hailed as did his two clients. His clients found resonance in their culture but also in the teachings of their faith, in the Holy Qur'an, which extols the virtues of forgiveness and negotiated settlement.

A hundred years later, the people of South Africa called upon their then respective leaders, to find an alternative to settle South Africa's problems outside the context of war and civil insurrection - something that was threatening to tear the beloved country apart and draw it into one of the most dangerous bloodbaths in the history of human conflict. No doubt, Nelson Mandela was drawing on a central feature of the African worldview - a concept known as ubuntu.

In fact, secular courts in Canada are today referring cases to religious tribunals. According to the Globe and Mail of Canada (February 7, 2000):

*Faith groups seeking justice from their communities are less concerned with such temporal concepts as damages or pride, than with the restoration of right relationships between God and people, and between people: Lawyers - note well.*

Well, almost 25 years since Frank Sander of Harvard Law School first coined the phrase ADR at a conference in the USA, leading theorists and practitioners in various parts of the world are questioning the basic principles on which ADR is predicated. In an increasingly globalised world, they are asking, should ADR be predicated mainly on a dominant ideology of individualism, as it is today? This is the concern of ADR writers such as Joseph Folger and David Bush. They are questioning whether ADR should not address the issue of transformation and rehabilitation. How do parties, who have had a conflict rehabilitate themselves? Then there is J.P. Lederach, who emphasises the need for cross-cultural conflict understanding. Howard Gadlin of the National Institute of Health and Albie Davis emphasise the concept of Trust and how agents of healing need to enhance trust in themselves, and in the process and how the protagonists of conflict, themselves, need to enhance trust in each other before the threshold of mediation can be reached. Trudy Govier of Canada has written on the concept of Trust and how its enlargement can lead to greater potential for settlement of land claims between Canadian Indians and the Federal

Government and Michelle Le Baron speaks of the role of community and the need for enhancing cohesiveness when dealing with disputes. A leading trainer in the Ismaili National Conciliation and Arbitration Boards worldwide, Tony Whatling, himself, has been asking some very searching questions of ADR since having had exposure to some of the international training programmes run by the Ismaili communities in India, Pakistan, East Africa, Syria, North America and Europe. Clearly, ADR is questioning itself and is presently in search for new directions.

In light of where we find ourselves today, I would like to quote some thoughts for further reflection. If ADR is searching for new directions in an increasingly globalised world where the role of ethics is given more primacy.

If leading jurists in the world are calling for the teaching of comparative law and legal pluralism as an acknowledgement of the fact that human societies are not discrete objects of their own, like flotsams and jetsams in the rivers of time, but are closely interconnected, and Each person is like the knots in a large fishing net with its intricate intertwining of innumerable knots. Each person is tied to many others. When all of the knots are firmly tied, the net is in full working condition. If any of the knots is too close or too tight, the whole net is skewed. Each knot, each relationship, has an effect on the whole. If there is a tear, or a gap in the net, the net is not a working one ... Nets are to be checked frequently, knots cared for tenderly, and if tears do appear, they must be repaired.

As we traverse the 21st century, we may be able to lay more solid foundations so that we can move towards repairing the tears. While tears will need to be repaired, tears will need to be wiped and this we can only do by drawing on the collective wisdom of all our cultures, traditions and heritages and make these speak to us with renewed vigour for the needs of the 21st century.