Dispute Resolution in Water Management and Environmental Goals

Ayushi Mittal *, Ashish Kumar Singhal **
Research Scholar, The ICFAI University, Dehradun, India *; Associate Professor, The ICFAI University, Dehradun **

Abstract: This privatization of dispute resolution must be considered in the context of our fundamental public commitment to provide substantive justice on an equal basis to all people. We must not close the courthouse door to those who need the courts' protections. More justice, better administrated, is what both proponents of new and old forms should seek. Absorption of Alternative Dispute Resolution into public and private institutions is pervasive.' ADR has been incorporated into court procedures (and more inclusion is urged),[1] government contracts,[2] contracts between individuals and businesses, contracts between businesses and businesses, and statutorily mandated relationships. One senior partner at a major New York law firm estimates that he spends almost half his time mediating disputes-as a special master to the courts or by request from attorneys involved in litigation. Much of the other half is spent using ADR techniques to develop settlements for his own clients. Law firms interested in exploring settlement are increasingly resorting to ADR on their own initiative-for example, by arranging privately choreographed "mini-trials" at which both sides present arguments and evidence to the CEOs of the disputing companies in environment, even as litigation is pending in a traditional forum.

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1.Introduction: Widespread privatization of dispute resolution has the potential to stunt the common law's development as entire areas of law are removed from the courts; deprive the public of important information, such as news of a product's harmful effects; deny plaintiffs the therapeutic benefit of having their "day in court;" degrade constitutional guarantees of the right to a jury trial; and prevent public debate and consensus-building in cases with national public policy implications.

The term "alternative dispute resolution" has been used to refer both to procedures and to institutional structures for dispute resolution. In its forum sense, it invokes the panoply of dispute resolution institutions that do not involve the courts, including intra-industry treaties to arbitrate disputes, administrative agency ombudsperson services, contractual agreements to arbitrate disputes, and others. In its procedural sense, it invokes dispute resolution tactics that depart from the litigation norm-mediation, summary jury trials, mini-trials, judicial referral of cases to magistrate judges and settlement masters-whether employed by the courts or by extrajudicial dispute resolution bodies. ADR refers to a variety of techniques, each implicating different levels of privatization. First, there is the panoply of private ADR methods. By pre-agreement, as through contract provisions or through industry-wide treaties and regulations, the parties agree to resolve future disputes according to arbitration or some other ADR method. The court may only become involved if asked to enforce the agreement or arbitrator's decision. Second, there is court-annexed ADR, which typically consists of mediation, arbitration, or early neutral evaluation. In some districts, it may also include the use of "summary jury trials" and "mini-trials." Third, there are a variety of techniques that judges use in handling cases without full dress litigations. Our goal in developing adjuncts to our courts and new procedures in courts is to improve the functioning of society's entire complex peaceful dispute resolution system.

The movement to privatize justice must be put in the context of a variety of recent procedural and substantive modifications designed to limit plaintiffs' access to the courts.[3] These modifications include reducing venue over defendant corporations in diversity suits; increasing minimum amounts in diversity cases; increasing the complexity of pleading requirements; increasing the availability of summary judgment; limiting the availability of

[1] See Civil Justice Reform Act of 1990, 28 U.S.C. § 473(a)(6) (1990) (directing courts to consider authorizing referral of "appropriate cases to alternative dispute resolution programs');

[2] the Administrative Dispute Resolution Act of 1990, Pub. L. No. 101-552, 104 Stat. 2736 (codified as amended in scattered sections of 5 U.S.C., 9 U.S.C. § 10, 28 U.S.C. § 2672, 29 U.S.C. § 173, 31 U.S.C. § 3711, and 41 U.S.C. §§ 605, 607)

[3] Jack B. Weinstein, After Fifty Years of the Federal Rules of Civil Procedure: Are the Barriers to Justice Being Raised?, 137 U. PA. L. REv. 1901, 1922 (1989); Jack B.

habeas corpus relief; instituting "loser pays" rules in civil tort litigation; shortened statutes of limitation such as those in proposed tort reform measures; and increasing the availability of sanctions under Rule 11.[4]

2.Materials and Methods

Creation of Two-Tiered System of Justice

ADR is "viewed by many as the most promising bridge over the gap between legal needs and affordable services." There is the risk, however, that as the rich move out of the courts to private dispute resolution forums, only criminals and the poor will be left in the courts, thus, reducing the effective power of these institutions over all society.[5] A recent news report confirms the immediacy of the threat that increased resort to ADR will result in creation of "a two tier system of justice." According to the report, California's "three strikes law" is forcing diversion of civil judges to criminal trials to handle the increased caseload. With the public resources to handle civil cases shrinking, some are predicting that one day only the rich will have recourse to civil litigation-by hiring private judges as provided for under California law. We can imagine without much difficulty a future "in which wealthy litigants will use private ADR while the poor and powerless will be consigned to public courts which government will have little incentive to fund because their constituents lack political clout." This would create a situation analogous to what has happened to public education in some of our central cities because of the middle class exodus to private schools and the suburbs.

TYPES OF ALTERNATIVE DISPUTE MECHANISHM

Negotiations

An agreement to negotiate in good faith is in general not enforceable but may be enforceable in the context of a dispute resolution clause. The parties may agree one or more rounds of negotiations: between the managers, authorised representatives an/or at the executive level. Most importantly, the clause must include time limits for the negotiations to avoid protracted or unproductive negotiations. The time limits enable the parties to move to the next stage if an amicable settlement cannot be reached. The parties can always agree to extend the time limits if a settlement is imminent.

Mediation

A mediation clause that is sufficiently certain and does not require further agreement by the parties for the mediation to proceed is enforceable. At a minimum, it should specify:

- the process for appointing a mediator, either by agreement and/or an appointing authority;
- the process for termination of the mediation, including time limits if, for example, a settlement is not reached within say 30 days of referring the dispute to mediation.

Parties may adopt mediation rules, such as the ACICA Mediation Rules. A vague mediation clause that simply provides that the parties will mediate or will seek to resolve the dispute by mediation may be uncertain and unenforceable.

Expert determination

The parties may agree to refer certain issues to expert determination. The clause should stipulate:

- the specific issues to be determined by the expert;
- the process for the appointment of the expert, either by agreement and/or an appointing authority;
- the process for the expert determination, such as how submissions and information are to be provided to the expert;
- how the expert is to issue a decision - time limits? reasons?
- whether the decision is binding or non-binding; and
- how the costs are to be divided between the parties.

An expert determination clause that leaves the process open or requires the parties to agree on further matters before they can proceed may be found to be uncertain and unenforceable.

Arbitration

The key advantage of arbitration is enforcement. An arbitral award can be enforced in one of nearly 150 States that are party to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, provided that it has been made in one of those States.

An arbitration clause or agreement may also be enforceable. The clause should be kept simple stating:

- the arbitral rules to be applied - e.g. ACICA, ICC, SIAC, HKIAC, LCIA, UNCITRAL Arbitration Rules
- the number of arbitrators to be appointed - one or three
- the seat of the arbitration - e.g. Sydney, Singapore, London

[4] Celotex Corp. v. Catrett, 477 U.S. 317 (1986).

[5] James Podgers, Chasing the Ideal: As More Americans FInd Themselves Priced Out of the System, the Struggle Goes on to Fulfill the Promise of Equal Justice for All, A.B.A. J., Aug. 1994, at 56, 60; see also Silbey & Sarat, supra note 20, at 450-52

- the language of the arbitration - e.g. English

The parties may, for example, consider providing for confidentiality, interim measures, and/or the joinder of parties and consolidation if there are more than two parties to the agreement or more than one agreement in the transaction. Such clauses are optional and often already provided for in the applicable arbitral rules or arbitration law. Arbitration precludes the parties from referring the dispute to the courts. A jurisdiction clause in the agreement providing that the parties have submitted to the jurisdiction of the courts, may render the arbitration clause uncertain and ineffective and thus, unenforceable. Parties may include an "option clause" if they want to reserve the right to refer the dispute to the courts. The clause needs to be carefully drafted and must include a time limit in which the option may be exercised - that time limit must be early in the proceedings, such as before a response to the notice for arbitration is filed. Option clauses are not enforceable in all jurisdictions so careful consideration must be given if this is the path the parties want to take.

Litigation

If the parties choose to refer disputes to the courts, then they need to consider:

- Which court is the most convenient forum?
- Should the court have exclusive or non-exclusive jurisdiction?
- Should the parties waive any rights to raise forum non conveniens arguments?

If a dispute resolution clause is ineffective and unenforceable then the parties are likely to end up in the courts. That court is often chosen by the party commencing the claim. If the other party commences proceedings in a different court then there is a risk of parallel proceedings and conflicting judgments unless an anti-suit injunction can be obtained to stay one of the proceedings.

Benefits of alternative dispute resolution

Alternative dispute resolution (ADR) gives parties in dispute the opportunity to work through disputed issues with the help of a neutral third party. It is generally faster and less expensive than going to court.

When used appropriately, ADR can:

- **save a lot of time** by allowing resolution in weeks or months, compared to court, which can take years.
- **save a lot of money**, including fees for lawyers and experts, and work time lost.
- **put the parties in control** (instead of their lawyers or the court) by giving them an opportunity to tell their side of the story and have a say in the final decision.
- **focus on the issues** that are important to the people in dispute instead of just their legal rights and obligations
- help the people involved come up with **flexible and creative** options by exploring what each of them wants to achieve and why.
- **preserve relationships** by helping people co-operate instead of creating one winner and one loser.
- **produce good results**, for example **settlement rates of up to 85 per cent.**
- **reduce stress** from court appearances, time and cost.
- **keep private disputes private** - only people who are invited can attend an ADR session, unlike court, where the proceedings are usually on the public record and others, including the media, can attend.
- lead to **more flexible remedies than court,** for example by making agreements that a court could not enforce or order (for example a change in the policy or practice of a business).
- **be satisfying** to the participants, who often report a high degree of satisfaction with ADR processes.
- give more people **access to justice,** because people who cannot afford court or legal fees can still access a dispute resolution mechanism.

Other points to consider about ADR

It is important that ADR is used in a way that is appropriate and likely to lead to the best results for all parties.

These are some things to take into account when considering whether to use ADR and which type is most appropriate for you.

- ADR may not be suitable for every dispute, for example if the dispute involves a matter of public interest, it may be more appropriate to have a court judgment to set a precedent.
- Where a binding agreement is made (for example through negotiations or use of ADR), parties normally give up the right to go back to court about the same matter. Similarly, an award made at arbitration is generally binding and cannot appealed except in limited circumstances.
- Some agreements made at ADR may not be as easy to enforce as a court or tribunal order. In some cases this can be addressed by having the terms of an agreement made into orders by consent by a court or tribunal. You can also get legal advice or further information about other ways of making ADR agreements and decisions binding.
- If ADR is not successful and you have to go to court in the end, trying ADR first might add to your legal costs. However, in general, ADR has very high rates of success.

Risk of Alternative Dispute Mechanism

Wholeheartedly. Consider the following sad but true story of two large electronics manufacturers—both, ironically, subscribers to the Centre for Public Resources policy statement. Winning is the only thing that matters. Few senior corporate managers are willing to forgo a chance to win a courtroom triumph. Here's the way a top lawyer at a major company puts it: "CEOs want to be able to take the other guy to the cleaners if they believe they're in the right, and they're going to bet the ranch if they have to." Often the case itself becomes less important than the principle involved. In the struggle between the electronics giants, for instance, the chief legal counsel for Company A declared, "If the other side continues its strategy of copying, I'm going to continue this strategy of suing."

It's one thing for the corporate general counsel to argue for arbitration when his or her company is the respondent or, as is often the case, when both parties are culpable to some degree. Under these circumstances, common sense urges negotiation to limit the extent of the claims. But when the company appears to be in the right, when millions in revenues are at stake, and when decision makers ache to go to the mat to prove their point, arguing for arbitration may strike some as foolish, if not downright disloyal.

3.Discussions:

ADR is only one alternative, not the method of choice. Most lawyers—and hence the companies they serve—still view ADR as the alternative rather than the primary or preferred method of settling disputes. Such companies see the procedure as a way of settling peripheral, less important disputes, or, as in the electronics case, they simply abandon it when they fail to get the result they want. In any event, they have not decided to make dispute avoidance and early resolution the prime mission of the legal department.

Even in companies where ADR has taken hold, there may be ways around the system. At Motorola, for example, at least ten circumstances can cause a dispute to be classified as an unsuitable candidate for early ADR, including "critical principle," "deterrent strategy," "the only issue is money," and "extremely complex factual issues."[1]

ADR isn't really all that different from litigation. Because few companies have made a serious commitment to ADR as a distinct system, and because there are very few rules governing it, the procedure is often allowed to become a litigation look-alike. Whenever that happens, the cost of ADR begins to approach the cost of the litigation that it's supposed to replace.

4. Results:

To cut down on attorney time, arbitration permits the parties to stipulate, or agree on, certain facts and virtually eliminate briefs, discovery, and the endless reliance on expert testimony and countertestimony. But the contending parties often waste prodigious quantities of time, money, and energy by reverting almost automatically to the habits of litigation. As happened in the electronics battle, lawyers make repetitious presentations of facts and legal arguments as if they were appearing before a judge rather than an arbitrator. They pursue discovery, file motions, and rely excessively on expert witnesses—exactly the way they would in a lawsuit. Outside the courtroom, lawyers grind out publicity favoring their cause. Moreover, arbitrators themselves contribute to the problem by handing down damage awards that are beyond reason and contractual limits. Sometimes, they even award punitive damages.

Without the commitment of top management, ADR quickly turns into litigation-in-disguise.

Adding to ADR's reputation as nothing more than litigation-in-disguise is the popularity of court-annexed ADR, which judges in federal jurisdictions often mandate after contestants have already begun to litigate. Not surprisingly, the parties tend to pursue the case as they began it—with a lot of hostility and all the expensive paraphernalia of a lawsuit—despite the judge's admonition to arbitrate. What's more, if either party objects to the arbitration decision, it can take the case back to the judge. Despite the drawbacks—high legal costs, lost time, lack of finality—some 65% of cases facilitated by the American Arbitration Association are court-annexed ADR.

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