

Emerging Opportunities For CAs in ADR

—Editorial Team

“It is virtually impossible to survive litigation and remain solvent, but it is occasionally possible to endure it and remain sane. As a modern ordeal by torture, litigation excels. It is exorbitantly expensive, agonisingly slow and exquisitely designed to avoid any resemblance to fairness or justice. Yet, in strange and devious ways, it does settle disputes to everyone’s dissatisfaction.”

J.S.AUERBACH in his article “Welcome to Litigation”

Resolution of dispute through arbitration or other alternative methods has been a way of life in our country. Traditionally, panchayat formed the keystone of the village arch. Its decisions were honoured and accepted by village community, and any non-compliance attracted penalty. That system has been vastly overtaken by a complex modern judicial system but the relevance of that tradition remains unaffected even today — especially to those



The area of Alternate Dispute Resolution (ADR) is bound to grow by leaps and bounds in times to come. Arbitration and other methods of ADR offer promising opportunities to CAs. They can be instrumental in resolving complex disputes through their wide range of experience.

who crave for quick resolution of disputes.

Recognising the traditional dispute resolution system, a full Bench of the Bombay High Court [by Martin CJ] in Chanbasappa Vs. Balingayya made the following observation:

“It is indeed a striking feature of ordinary Indian life. And I would go further and say that it prevails in all ranks of life to a much greater extent than is the case in England. To refer matters to a Panch is one of the natural ways of deciding many a dispute in India. It may be that in some cases the Panch more resembles a Judicial Court because the Panch may intervene on the complaint of one party and not necessarily on the agreement of both, for example, in a caste matter. But there are many cases where the decision is given by agreement between the parties.”

In litigation a dispute is referred to a court of Law and the process involved is expensive, time consuming and complex. Alternate Dispute Resolution is a system whereby people resolve their disputes with the minimum outside help.

An ADR procedure comprises four basic methods of dealing with disputes, which are: (1) Negotiations, (2) Mediations (3) Conciliations, and (4) Arbitration.

Negotiations: In negotiation, the disputing parties resolve their differences out of the court by way of negotiation. No lawyers or outsiders are generally involved. There are no hard and fast rules, no technicalities and complicated procedures. However, if a dispute cannot be resolved through negotiations, one can try mediation.

Mediations: In mediation, generally a third party is involved who acts as a facilitator. In a typical mediation, there is always a win-win situation. However, the settlement reached through mediation is non-binding.

So we come to the next best method that is “Conciliation.”

Conciliation: Conciliation is now recognised by the Arbitration and Conciliation Act, 1996. In Conciliation, the disputant parties resolve their disputes with the help of one or more conciliators. The settlement agreement reached by the parties and authenticated by the conciliator is binding upon the parties.

Arbitration: Arbitration is a quasi-judicial method for resolving disputes outside the court. Arbitration is a preferred mode of dispute resolution in domestic as well as international trade. It is preferred over litigation as our overburdened courts generally take a long time to deliver justice.

Role of a CA

A CA is well versed in taxation, accounting, projects, financial services, business planning, mergers and acquisitions, etc. He is in an advantageous position of appreciating the business background of a dispute or difference. When there is a dispute between two parties, they first go to their CAs and not to any advocate. Day in and day out, a CA is engaged in resolving disputes of his clients, though informally. With extensive experience in drafting commercial agreements, negotiating with government authorities, a CA represents his clients in a number of ways.

Arbitration and other methods of ADR offer promising opportunities to CAs. In ADR methods, the counsel need not be a lawyer because the proceedings are dependent primarily on factual merits. A CA must look at ADR as



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a crucial addition to the skills and services he can offer to his client. He can be instrumental in resolving complex disputes by utilising his wide range of experience. The following are few of the areas where he can render his services in an effective manner.

AS AN ARBITRATOR

A CA is required to maintain a high degree of professional competence and technical standard. He is bound by the code of conducts framed by the Institute of Chartered Accounts of India. Section 2(2) of the Chartered Accountants’ Act, 1949 read with Regulation 191 of the Chartered Accountants Regulations, 1988 specifically pro-

vides that a CA in his professional capacity is allowed to act as an ARBITRATOR.

Indian Council of Arbitration (ICA), a specialised arbitral body, sponsored by GOI, and certain apex business organisations, also recognise CAs as arbitrators. The ICA maintains a panel of arbitrators drawn from the various fields. Clause III (b) of the “broad categories of qualification and experience for Empanelment as an arbitrator indicates that CAs are eligible for Empanelment. Clause III (b) reads as follows :-

“Chartered Engineers, Chartered Accountants, Chartered secretaries, Architects, Valuers or other technical consultants in any branch of engineering, accountancy,” etc., with at least 15 years of experience in government, private organisation or in professional practice with adequate knowledge and experience in arbitration matters” can act as arbitrators on ICA panel.

So, a CA having 15 years of professional experience is eligible for empanelment as an arbitrator with ICA.

There are a large number of organisations, national as well as international, which have panel of arbitrators.

The job of an arbitrator is often challenging and satisfying. The assignment is reasonably paid and above all the timing and venue of the meeting is arranged to suit the convenience of the parties as well as arbitrator. However, an arbitrator has to maintain high level of integrity. There is no formal qualification to become an arbitrator at the moment. However, normally the professionals with legal background are preferred.

AS A COMPOSITEUR

The mechanism of ADR is evolving and many new methods of resolving disputes are emerging throughout the world. Many arbitral organisations handle amiable composition as an additional alternative for dispute resolution. Amiable composition is different from conciliation in the sense that in this method the parties delegate the resolution of their dispute on third parties called amiable compositeurs and undertake to accept any decision by them. Many organisations, like Bogota Chamber of



Commerce, provide special training in the field of amiable composition. A professional like a CA, Company Secretary and others can profitably explore this area and add values to the services they render to their clients.

AS A COUNSEL

Of late, there is a move all over the world to encourage professionals and experts like CA, Company Secretaries, Engineers, Advocates, etc., to play an active role in arbitral process. The objective of arbitration is to provide expedient, efficient and economical justice to the aggrieved parties as it is felt that too much lawyering defeats the very

purpose of arbitration. A CA can equip himself to enter into the field with considerable advantage.

A CA normally represents the cases of his clients before various authorities including the ITAT, Company Law Benches, SEBI, RBI, etc. He can definitely specialise in arbitration matters particularly those connected with breach of contracts, insurance claims, loss of profit, securities fraud, commercial disputes, rights of properties, lease transactions, etc and represent his clients in arbitration proceedings.

AS AN EXPERT

Under Section 26(1) of the Act, the Arbitral Tribunal may appoint expert(s) to report on any specific issue to be determined by it. It may also require a party to give the expert any relevant information or to produce or to provide access to, any relevant documents, goods or other property for his inspection. An expert may be examined and cross-examined on request of a party and where the arbitral tribunal considers it necessary. The expert may be required on request of a party to make available to that party for examination, all documents, goods or other property in the possession of the expert on the basis of which he prepares his report [section 26(2) & (3)].

A CA can help the Arbitral Tribunal in the capacity of an expert. It is not uncommon that the arbitrators take the help of CAs in various matters like accounts, commercial transactions, lease transactions etc.

AS A CONCILIATOR

Conciliation is a process by

which the conciliator (a third party) endeavours to bring the disputant parties to an agreement. The conciliator uses his expertise in creating a cordial atmosphere, enhancing communications, suggesting potential solutions, providing technical assistance and reaching an amicable settlement. Conciliation is an independent method of settling disputes arising out of any legal relationship, contractual or otherwise where the parties choose a 'third person' to settle their dispute. Though the terms 'conciliation' and 'mediation' are used

A CA eyeing to excel in ADR can particularly specialise in matters related to breach of contracts, insurance claims, loss of profit, securities fraud, commercial disputes, rights of properties, lease transactions, etc.

interchangeably yet they are different. Mediation is a structured method where the mediator helps the disputant parties reach an amicable settlement of their disputes. A mediator is normally taken to be person of disputants' choice. He may meet each party separately to know their viewpoint and impress upon each party to comprehend the viewpoint of the other disputant. The conciliator, on the other hand, is instrumental in drawing up the terms of the settlement in the shape of an agreement, consequent upon comprehensive discussions with

the parties to the dispute. The primary duty of both is alike — settlement of dispute in an amicable manner.

In our day-to-day practice, we often help our clients in settling their disputes through conciliation. CAs can serve as professional conciliators. This will require CAs to sharpen their skills and acquire latest knowledge of the technology of conciliation.

IN OTHER CAPACITIES

(a) Consultancy: A CA can also advise the client, whether a particular dispute is arbitrable or not. In case of arbitrable disputes, he can provide various services like advising the clients on selection of arbitrator, initiating the arbitral proceedings, preparation of statement of claims or defence, pleadings, etc. He can help in deciding which ADR process the client should choose.

After enough experience in arbitration and other ADR methods, he can also play an



important role in solving the pending disputes of his clients by identifying those cases which are suitable for resolution through ADR.

(b) The Code of Civil Procedure, 1908 has been recently amended and Amendment Act of 1999 has recognised ADR as an effective tool for resolving disputes. The purpose of the amendment is to speed up the judicial process and get over the problem of backlog of civil cases. Now, at the state of inception itself, the court is required to scrutinise and assess whether the matter can be settled or be referred to arbitration and other ADR methods. This amendment will encourage the process of ADR to a greater extent and professionals can see a lot of opportunities in this field. We can quote here Section 89(1) of the code of Civil Procedure (Amendment) Act, 1999 that is quite relevant and self-explanatory.

Settlement of dispute outside the court

Where it appears to the court that there exist elements of a settlement that may be acceptable to the parties, the court shall formulate the terms of settlement and give

them to the parties for their observations and after receiving the observations of the parties, the court may reformulate the terms of a possible settlement and refer the same for (1) Arbitration, (2) Conciliation, (3)

Judicial settlement, including settlement through Lok Adalat, or, (4) Mediation.

Where A Dispute Has Been Referred :-

- 1) For arbitration or conciliation, the provision of the Arbitration and Conciliation Act, 1996 shall apply as if the proceedings for arbitration or conciliation were referred for settlement under the provision of that Act.
- 2) To Lok Adalat, the court shall refer the same to the Lok Adalat in accordance with the provisions of Sub-section (1) of section 20 of the Legal Services Authority Act, 1987 and all other provisions of that Act shall apply in respect of the dispute to be referred to the Lok Adalat.
- 3) For judicial settlement, the court shall refer the same to a suitable institution or person and such institution or person shall be deemed to be a Lok Adalat and all the provisions of the Legal Services Authority Act, 1987 shall apply as if the disputes were referred to a Lok Adalat under provisions of that Act;
- 4) For Mediation, the court shall effect a compromise between the parties and shall follow procedure as may be prescribed.

Section 581 ZO of Companies Act, 1956 now provides that where disputes relating to formation management or business of a producer company arise amongst members or between member and producer company or between producer company and its directors, such disputes shall be settled by conciliation or by arbitration as provided under Arbitration and Conciliation Act, 1996.

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So, the amendment in C.P.C. is going to substantially enhance the activities in arbitrations and we CAs can find a foothold in this ever-growing area.

Specific Areas: There are innumerable areas where CAs can profitably settle the disputes through ADR. The followings are a few of them: -

- 1 Loss of Profit
- 2 Lease or Hire Purchase Transactions
- 3 Insurance Claims
- 4 Company Law
- 5 Commercial Contracts
- 6 Issues Relating to Amalgamation and Takeovers.
- 7 Securities Fraud
- 8 Rights of Properties
- 9 Joint Venture Agreements
- 10 Breach of Contracts
- 11 Buy Back of Shares
- 12 Sale and Purchase of Securities

Multi-State Cooperative Societies Act, 2002

The Multi-State Co-operative Societies Act has been amended w.e.f. 19th August, 2002 and disputes touching the constitution/management or business of such Cooperative will have to be referred to Arbitration. Sec. 84(1) and 84 (2) are reproduced below :-

84. Reference of disputes

- 1) Notwithstanding anything contained in any other law for the time being in force, if any dispute other than a dispute regard-

ing disciplinary action taken by a multi-state co-operative society against its paid employee or an industrial dispute as defined in clause (k) of section 2 of the Industrial Disputes Act, 1947 (14 of 1947), touching the constitution, management or business of a multi-state co-operative society arises -

- a) Among members, past members and persons claiming through members, past members and deceased members, or
- b) Between a member, past members and persons claiming through a member, past member or deceased member and the multi-State co-operative society, its board or any officer, agent or employees of the multi-state co-operative society or liquidator, past or present, or
- c) Between the multi-state co-operative society or its board and any past board, any officer, agent or employee, or any past officer, past agent or past employee, heirs or legal representatives of any deceased office, deceased agent or deceased employee of the multi-state co-operative society or,
- d) Between the multi-state co-operative society and any other multi-state co-operative society, between a multi-state co-operative society and liquidator of another multi-state co-operative society or between the liquidator of one multi-state co-operative society and

the liquidator of another multi-state co-operative society.

Such disputes shall be referred to arbitration.

2) For the purpose of sub-section (1), the following shall be deemed to be disputes touching the constitution, management or business of a multi-state co-operative society, namely :-

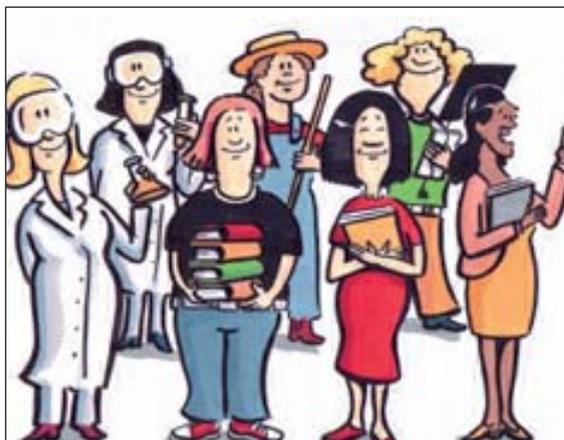
- a) A claim by the multi-state co-operative society for any debt or demand due to it from a member or the nominee, heirs or legal representatives of a deceased member, whether such debt or demand be admitted or not;
- b) A claim by a surety against the principal debtor where the multi-state co-operative society has recovered from the surety any amount in respect of any debt or demand due to it from the principal debtor as a result of the default of the principal debtor, whether such debt or demand is admitted or not.
- c) Any dispute arising in connection with the election of any officer of a multi-state co-operative society.

OPPORTUNITIES UNDER THE COMPANIES ACT, 1956

It is not uncommon that the Articles of Association of a company contains the provision that disputes between the company and its members be referred to arbitration. In such cases, it will be obligatory on the part of the parties to the dispute, to resolve the same

through arbitration or conciliation.

Companies (Second Amendment) Act, 2002 has introduced part IX A consisting of Section 581A to 581 ZT to enable incorporation of producer companies and conversion of existing multi-state cooperatives into producer companies on discretionary basis. In the amended Act a provision for resolution of disputes through arbitration has been introduced. Section 581 ZO of the Companies Act, 1956 now provides that where disputes relating to the formation management or business of a producer company arise amongst members or between member and producer company or between the producer company and its directors, such disputes shall be settled by conciliation or by arbitration as provided under the Arbitration and Conciliation Act, 1996.



- isations maintain independent panels. CAs can empanel themselves with these organisations.
6. He must be alert to the opportunities available, for e.g. while preparing balance sheet he can analyse the debts outstanding over six months and suggest remedial measures to the clients. Thus, he can add value to his services.
 7. Bring professionalism, have a mandate in writing and keep a record.
 8. Value addition to our services

He can assist in drafting arbitration agreements and in case of dispute or differences suggest ways to resolve the same.

CONCLUSION

It will not be out of place to mention that the field of ADR is bound to grow by leaps and bound in times to come. Mahatma Gandhi in his autobiography has said

“I realised that the true function of a lawyer was to unite parties ... A large part of my time during the twenty years of my practice as a lawyer was occupied in bringing about private compromises of hundreds of cases. I lost nothing thereby - not even money, certainly not my soul.”

Indian Council of Arbitration

Dispute resolution is a growing area, which requires highly trained professionals who can manage conflict constructively and ensure a successful outcome. Indian Council of Arbitration, the apex arbitral organisation at national level, provides a major stage for all such professionals.

Established in 1965, ICA is a non-profit service organization. The Council has Government of India, Federation of Indian Chambers of Commerce and Industry and other important Chambers of Commerce and trade associations in India as well as the export promotion councils, public sector undertakings, companies and firms as its members. It can boast of an exhaustive expert panel of arbitrators from more than 20 fields. The panelists include Retired Judges, Advocates, Shipping Experts, **Chartered accountants**, Chartered Engineers, Businessmen, Foreign Nationals and Executives.

The Council has a website called ICANET to provide information on Arbitration and Commercial Laws. The site offers complete information about New Arbitration Law and Rules and the services and activities of ICA. The Council is making efforts to compile information about arbitration law and procedures in different nations through this site.

STEPS FOR BEGINNERS

Those who want to pursue ADR/Arbitration as a career should take some initial steps which are as follows: -

1. Acquire sufficient knowledge of the subject - read a good book
2. Subscribe to at least one journal on Arbitration or ADR
3. It helps to become a member of the arbitral organisation like Indian Council of Arbitration
4. Attend a formal training programme, if possible. ICADR, New Delhi is conducting a postgraduate diploma course in ADR.
5. Since most of the arbitral organ-