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Access Benefit Sharing to the Insolvency

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Abstract: *The Biological Diversity Act, 2002 seeks, amongst other objectives, to ensure equitable allocation of the benefits of commercial utilisation of the biological resources and traditional knowledge through Access Benefit Sharing. However, the Access Benefit Sharing system has been subject to a rising number of disputes. The present paper analyses the use of alternate dispute resolution mechanisms for dealing with disputes occurring in relation to Access Benefit Sharing. Confidentiality, flexibility and the relative rapid nature of alternate dispute resolution mechanisms, make such processes an attractive proposition. On the other hand, the use of alternate private dispute resolution mechanisms may be subject to abuse, particularly when indigenous communities must deal with large commercial entities who have greater financial bargaining power. The present paper seeks to provide suggestions for incorporating alternate dispute resolution mechanisms in dealing with disputes arising out of Access Benefit Sharing while preventing abuse of the same. Furthermore, the present paper examines the impact of declaration of insolvency of the applicant which is utilising the biological resources, on the resolution of disputes and the claims of right holders in the context of the Insolvency and Bankruptcy Code, 2016. The present paper also provides suggestions to ensure that the rights of stakeholders under the access benefit sharing mechanism are protected even in the event of the declaration of insolvency.*

Keywords: Bio-Diversity, Bankruptcy, Conciliation, Mediation, India

I. INTRODUCTION

One of the major goals of the Biological Diversity Act, 2002, is to make certain that the benefits of commercial utilisation of the biological resources and traditional knowledge of India is equitably distributed amongst all the stakeholders through Access Benefit Sharing. Due to the large stakes involved, a large amount of disputes have been generated with regard to the Access Benefit Sharing mechanism. In this context, the present paper seeks to analyse how alternative dispute resolution mechanisms (hereinafter referred to as '**ADR**') can be efficiently utilised to resolve disputes with regard to the allocation and sharing of benefits from commercial utilisation of biological resources and traditional knowledge. Furthermore, the present paper examines the effect on the rights of the stakeholders in the event of the insolvency of the utiliser of the biological resources or traditional knowledge and its potential impact on the alternative dispute resolution mechanism and also provide suggestions as to how the rights of the stakeholders can be best protected in such a scenario.

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II. Access Benefit Sharing

Under section 3 of the Biological Diversity Act, 2002, any person who does not have Indian citizenship or is a non-resident as well as any corporation, association or organisation which is not incorporated or registered in India or where such registration for incorporation has taken place in India but which has foreign participation in its share capital or management, need to take the permission of the National Biodiversity Authority before taking any biological resources occurring within India or any knowledge associated with the same for the purpose of the research, commercial utilisation, bio-survey or bio-utilisation. Similarly, under section 4 of the Biological Diversity Act, 2002, no person may without the permission of the National Biodiversity Authority, provide the results of research with regard to biological resources occurring in or obtained from India to any of the persons who need permission under Section 3 prior to utilisation of biological resources. Furthermore, under section 6 of the Biological Diversity Act, 2002, even if any person wishes to apply for any intellectual property rights with regard to any invention which is derived from research or information relating to a biological resource which has been obtained from India, the permission of the National Biodiversity Authority needs to be taken first. Prior to granting permission for making of such application for grant of intellectual property right, the National Biodiversity Authority may require the applicant, to provide benefit sharing fee or royalty or both or stipulate conditions including with regard to financial benefit sharing with regard to benefits earned from such commercial use of rights.

Section 21 of the Biological Diversity Act, 2002, specifies how the National Biodiversity Authority while granting approvals for transfer or utilisation of biological resources or knowledge may ensure equitable distribution of benefits. The National Biodiversity Authority while granting any approval for transfer or utilisation of biological resources or knowledge must make sure that appropriate conditions are imposed whereby there is equitable allocation of the benefits which result from the use of the access to biological resources and their by-products as well as innovations and practices associated with their use and related applications and knowledge in harmony with mutually agreed stipulations between the person who has applied for approval, the local bodies concerned and the benefit claimers. Benefit claimers have been defined under section 2(a) of the Biological Diversity Act, 2002 as the persons who conserve biological resources, their by-products, those who are the creators and holders of knowledge and information with regard to the utilisation of such biological resources and innovations and practices which are associated with such utilisation of biological resources. The benefit sharing may be done by several modes including by directing combined ownership of the intellectual property rights to be granted to the National Biodiversity Authority and the benefit claimers if such benefit claimers are identified, by directing the transfer of technology, by directing that the production, development of research facilities be placed at such locations which will enhance the living standards of the benefit claimers, by directing the applicant to coordinate and cooperate with Indian scientists, benefit claimers as well as local people in researching and developing biological resources as well as conducting bio-survey and bio-utilisation, by directing the formation of a venture capital fund for the purpose of helping the benefit claimers and by directing disbursement of monetary compensation and non-monetary benefits, as the National Biodiversity Authority may deem fit, to the benefit claimers. With regard

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to the procedure for benefit sharing, the Biological Diversity ABS Regulations, 2014, have also been introduced detailing the procedure involved. For Indian citizens and entities not covered under section 3 of the Biological Diversity Act, 2002, the distribution of benefits under the Access Benefit Sharing mechanism is determined by the state biological boards in consultation with the Biodiversity Management Committees. Under section 52A of the Biological Diversity Act, 2002, on being aggrieved by the benefit sharing which has been determined by the National Biodiversity Authority or the State Biodiversity Authority, such an aggrieved person may file an appeal to the National Green Tribunal.It is difficult for a common agreement to be reached between the benefit claimers, who may be numerous in number and the applicant. In this context, utilisation of ADR mechanisms may be of use in helping parties arrive at a consensus and generating agreement.

III. Use of ADR Mechanisms

There is a growing trend to shift from the use of traditional legal systems to resolve disputes to utilising ADR mechanisms to resolve disputes. Confidentiality, flexibility and the relative rapid nature of ADR mechanisms, make such processes an attractive proposition. On the other hand, the use of alternate private dispute resolution mechanisms may be subject to abuse particularly when indigenous communities must deal with large commercial entities who have greater financial bargaining power.

There are largely three ADR mechanisms which can be adopted in resolving disputes. Firstly, mediation is a process through which the parties may take the aid of a neutral third party who will assist them as a mediator to help settle their dispute. This is a purely voluntary process and the parties must reach an agreement by consensus and even the decision to participate in the mediation process is voluntary. The mediator must be a neutral person who assists the parties in the arriving at a consensus. The second option available is through conciliation. Conciliation is a process by which a neutral third party known as the conciliator aids the parties who have disputes to enter into and conduct negotiations with the goal of assisting them in reaching a consensual agreement. Conciliation shares many similarities with the mediation process with a few key differences. Although both the conciliator and the mediator assist parties in arriving at a consensus, the process followed by both are slightly different. In mediation, the parties may choose the mediator but in conciliation, the conciliator may be chosen for them in terms of the institute governing the conciliation proceedings. Furthermore, the conciliator may individually or jointly meet with the parties and also discuss the strengths and weaknesses of each party's case with the parties even prior to the dispute. Thirdly, parties can opt for arbitration to resolve their disputes. Arbitration is a procedure by which the parties to a dispute consent for one or more individuals known as arbitrators to decide their dispute after receiving evidence. The decision given by the arbitrators is binding on the parties although the same may be challenged in accordance with the law of the land. In India, arbitration and conciliation procedures are governed by the Arbitration and Conciliation Act, 1996. Arbitration may be ad-hoc, statutory or institutional. Institutional arbitration is one which is administered and supervised by an arbitral institution and the rules of such arbitral institution are applicable on the arbitral process. Ad hoc arbitration refers to arbitration where the parties themselves choose the arbitrators and may fix the rules of procedure as per their consent,

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prior to institution of arbitral proceedings. Statutory arbitrations are those arbitrations wherein reference to arbitration is mandatory for disputes relating to specific subject matter in terms of a specific legislation. For e.g., in India, the Micro, Small and Medium Enterprises Act, 2006 provides for mandatory arbitration, in case, of failure to make payment to Micro and Small enterprises and subsequent failure of conciliation. Apart from the aforesaid ADR mechanisms, hybrid ADR mechanism can also be utilised which involves a mixture of the aforesaid ADR mechanisms. For e.g., Med-arb procedure entails for parties to attempt to mediate and settle their disputes first, and in case of failure of the meditation process, the arbitration process is initiated.

There are several benefits to using ADR mechanisms to resolve disputes arising out of Access Benefit Sharing. The ADR mechanisms are known to be faster, more flexible and more confidential than ordinary legal remedies. Furthermore, by utilising processes such as mediation and conciliation, common ground can be found between the parties. Particularly with regard to Access Benefit Sharing, the traditional communities, entitled to their share of the benefits, may not have the financial backing or legal knowledge to effectively assert their rights before the traditional courts of law. Furthermore, due to the large number of benefit claimers that may exist, using traditional legal mechanisms may overburden the judicial system and lead to further delays. Both mediation and conciliation, in this regard, would enable parties to sit together and attempt to reach common ground. Mediation and conciliation procedures would enable the participants to save time and cost, keep negotiations confidential which gains importance when the discussions are with regard to confidential knowledge, and also allow the parties the flexibility to choose their own procedure as per their convenience. The informal nature of the proceedings will also allow the benefit claimers to put forth their opinions in an unrestricted manner. Furthermore, since mediation and conciliation seek for achievement of a consensus and are non-adversarial in nature, they are less likely to lead to acrimony between the parties. In the case of failure of mediation and conciliation, arbitration can also be utilised which also has the benefit of being confidential and being relatively fast.

However, use of ADR mechanisms, may also contain certain deleterious consequences for the benefit claimers if such mechanisms are not implemented with caution. The benefit claimers in comparison to the potential user of the biological resource or traditional knowledge may be handicapped with regard to financial leverage, legal knowledge etc. Thereby, if such mediation and conciliation is done through unscrupulous private parties, they may take advantage of the benefit claimers. Even though, the advice of the mediator or the conciliator is not binding, such advice may influence the benefit claimers who may not have access to the latest legal knowledge unlike the potential user of the biological resource or traditional knowledge. Similarly, in the case of arbitration also, the proposed user is likely to have such advantages. Furthermore, in the case of arbitration, the benefit claimers may not be able to pay the fees for arbitration which is paid by the parties normally and the benefit claimers may not be able to afford legal representatives to present their case before the arbitrator as well as to take appropriate remedies against the arbitral award if passed against them. Thereby, the Government should ensure that sufficient safeguards are in place, to protect the rights of benefit claimers particularly when the benefit claimers are in a comparatively disadvantaged position financially.

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IV. Consequences Of Insolvency

Another important issue that arises is even if an agreement is reached between the benefit claimers and the proposed users or where the benefit claimers are in the process of challenging the sharing of benefits which has been determined by the relevant Authority, what would be the consequence of the insolvency of the commercial user of the biological resource or traditional knowledge. Under the Insolvency and Bankruptcy Code, 2016, in the case of the insolvency of the company incorporated in India, creditors are to make their claims to the insolvency professional and their claims are paid in terms of the priority accorded to various creditors depending on the assets available with the company. However, there are no clear provisions as to what would happen to the right of utilisation of biological resource or traditional knowledge. For such companies which are incorporated in India, it may be argued that such right would continue to exist as long as the insolvent company or the purchaser of such insolvent company's right for commercial utilisation, adheres to the terms on which the right for commercial utilisation was granted and the buyer would step into the shoes of the insolvent company. However, if the company is liquidated and dissolved or where there is no buyer for the insolvent company or the right for commercial utilisation, then the benefit claimers would find it difficult to recover the amounts owed to them such as future payments for the utilisation which has already been done even if the right to commercial utilisation becomes void. In such cases, the benefit claimers would only have the right to file a claim and their claim would rank at a lower priority than that of banks and other financial creditors resulting in them facing the possibility of a severe haircut. Furthermore, in the case of companies which are incorporated outside of India, section 234 of the Insolvency and Bankruptcy Code, 2016, provides that the government has to enter into agreements with each foreign country in the case of cross-border insolvency. Thereby, in the case of international companies who have managed to commercially utilise biological resources or traditional knowledge, becoming insolvent, unless an agreement is entered into by the government, the benefit claimers will be totally at the mercy of the laws of the country wherein the insolvency proceedings have been initiated. The benefit claimers may not only find it difficult to recover future payments owed to them but depending on the particular law governing insolvency, it may be difficult to nullify the rights granted to the insolvent company or the purchaser of the insolvent company despite breach of the terms on which approval had been granted. While further access to the biological or traditional knowledge can be stopped, recovering compensation for the commercial utilisation already done would depend on the applicable foreign insolvency law.

Conclusions and Suggestions

To effectively implement ADR mechanisms by protecting the rights of all the stakeholders, the conduct of such ADR should not be left completely in the hands of the private parties as there is likely to be a severe gap in bargaining power between the benefit claimers and the proposed user of the biological resource or traditional knowledge. Thereby, to ensure that the rights of benefit claimers and traditional knowledge holders are protected, mediation and conciliation should be done through institutions which are either set up by the government or are vetted for the empanelment after ensuring that they fulfil the requisite criteria. The mediators and conciliators

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should be trained and capable of explaining the legal and factual position to the benefit claimers in simple language and should ensure that the proposed user does not overpower the opinions of the other stakeholders through use of financial power. Even in the case of arbitration, the arbitration process should be mandated through a statue and a statutory tribunal can be established for conducting arbitrations with regard to Access Benefit Sharing to ensure impartiality and fairness. Further, legal aid should be provided to those benefit claimers who are unable to afford legal representatives. Sufficient amendments should be introduced in the Insolvency and Bankruptcy Code, 2016, so that the rights of benefit claimers are treated at the higher priority than that of arbitrators. Furthermore, the government should also introduce a framework for cross-border insolvency where the company is incorporated outside of India so that the right of the claimants, including benefit claimers, in India, are protected.

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