

ISSUES SURROUNDING ADR AND THE ROLE OF
INDIAN COURTS

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I. Abstract

Arbitration, which was previously seen as a viable alternative to litigation, is today plagued by the same issues of expense, delay, complexity, and reliance on legal counsel. There are still many unanswered questions about their significant success in boosting efficiency and expanding access to justice. Even if ADR's conciliatory, understandable, and flexible methods are well-liked by participants, the efficiency improvements are minor. The examination of those cases that were challenged from the arbitration panel to the Supreme Court of India came to found out that the total expenditures of the courts and the average amount of time it takes for cases to be resolved had not decreased. The second issue is the impact of alternative dispute resolution on access to justice. In this article, I have tried to put forth some light on the issues with ADR faces, the role of the courts, and some solutions to improve the ADR mechanism in India.

II. What is Alternative Dispute Resolution

Mahatma Gandhi defined the true purpose of the law, "I realized that the true function of a lawyer was to unite parties given as under. The lesson was so indelibly burnt unto me that the 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."¹⁹ While doing this, Gandhi recognised a less harmful way to resolve a dispute which is not through a long carried battle in the proximity of our courts, rather through a resolution in which every party maximises their profits and minimise their losses, and that too in the current legal landscape, Alternative Dispute Resolution is the maximum suited way to get that result. As a result, Alternative Conflict Resolution (hence referred as "ADR") is an endeavour to develop equipment which is capable enough of offering an alternative to traditional dispute resolution techniques. ADR is a method of resolving disputes between adversaries who are unable to begin a negotiating process or achieve a settlement, whether for commercial or other reasons.²⁰

III. History of ADR in India

After the arrival of the East India Company, ADR gained traction in the nation. By proposing laws in these three presidential towns namely, Bombay, Madras, and Calcutta, the British government tried to give a legislative shape to arbitration law. The Bengal Resolution Act of 1772 along with the Bengal Regulation Act of 1781 allowed the parties to present their disagreements to an arbitrator who was chosen with the mutual consent and whose decision was binding on all the parties.²¹ They were in effect until the Civil Procedure Code of 1859, and they were then extended to the Presidency towns in the year 1862.

The initial step for the development of ADR procedures in India was done in the year 1940, when the very first Arbitration Act was established, but this was not completely implemented because of its insufficiency and loopholes. Many years later, in 1996, the Arbitration Act was passed, it was based on the UNCITRAL model, with Section 30 encouraging arbitrators for using mediation, conciliation, and other methods during the time of an arbitral

¹⁹ Bhatt, J., 2021. *Eastern Book Company - Practical Lawyer*. [online] Ebc-india.com. Available at: <<http://www.ebc-india.com/lawyer/articles/2002v1a3.htm>> [Accessed 12 October 2021].

²⁰ Singh, A., 2021. *Judiciary Role in Promoting Alternative Dispute Resolution*. [online] Law Times Journal. Available at:

<<https://lawtimesjournal.in/judiciary-promoting-adr/>> [Accessed 13 October 2021].

²¹ Walia, I., 2021. *Alternate Dispute Resolution And The Common Man*. [online] Legalserviceindia.com. Available at: <<https://www.legalserviceindia.com/article/I312-Alternate-Dispute-Resolution-And-The-Common-Man.html>> [Accessed 13 October 2021].

proceeding so that they can empower the settlement process, with the mutuality and consent of the parties.²²

The Legal Assistance Authorities Act of 1987 established this Lok Adalat Mechanism to resolve disputes inexpensively and quickly, as well as with the spirit of consensus through a give-and-take formula. Furthermore, Section 89 of the Civil Procedure Code, 1908, following the recommendations of the Malimath Committee and the Law Commission of India, which made it mandatory for such Court to submit the dispute to any Alternative dispute resolution mechanism when the problems are formulated for resolution with the party's mutual consent. If the parties are unable to resolve their disagreements through any of the ADR options, the case will be returned to the court where it was originally initiated.²³

IV. Need of ADR in India

ADR plays a key role in India by using a variety of strategies for dealing with a lot of issues including the issue of cases pending in the Indian courts. The Alternative Dispute Resolution system offers the Indian judiciary with scientifically established procedures that serve to reduce the strain on the courts. Arbitration, conciliation, mediation, negotiation, and Lok Adalat are all forms of alternative dispute resolution mechanisms.

Negotiation can be defined as a kind of self - counselling between parties who are trying to settle a conflict, however, it is not recognized by the law in India. ADR is best for designing a comprehensive framework for granting proper redressal of disputes through arbitration, mediation, conciliation, and negotiation in a developing country like India with structural adjustment policies underway with the framework of the legal system, tactics for quicker settlement

of conflicts to lighten the burden on the justice system and to start giving ways for speedy settlement of disputes. As a result, ADR is in high demand in India.²⁴

V. Issues in ADR Mechanisms in India

In India, there are several difficulties concerning the ADR system. Arbitrators are usually limited to finding the solutions for financial disputes only. They cannot make instructions that are binding to one party to be doing something or to not do something. Also, they are not even able to alter the title of the property, either. Moreover, many safeguards were designed so that they can protect the parties in the court, which may not be present in ADR. Along with that, many different issues in the ADR mechanism in India include the limited opportunity for judicial review of the arbitrator's decision.

The giant arbitration service providers usually have a different mechanism for the internal appeals, if it is desired, but the decision should be final as well as binding on both the parties, and it can only be appealed to the court in very limited circumstances. This usually occurs when the lawyers determine that the initial arbitration contract is unenforceable. Because both participants should willingly agree to the arbitration, if the lawyers get one party's approval by deception or any other illegal means, they cannot enforce it.²⁵

VI. What Role are the Courts Playing in India

The court system has played an important part in promoting and developing India into an arbitration-friendly economy, and the day will not be far away when India will be a major contender for having international arbitration proceedings. The Supreme Court of India, as well as the other High

²² Shashank, S., 2021. *ADR in India: Legislations and Practices - Academike*. [online] Academike. Available at: <<https://www.lawctopus.com/academike/arbitration-adr-in-india/>> [Accessed 13 October 2021].

²³ Tiwari, K., 2021. *Judiciary Role in Promoting Alternative Dispute Resolution*. [online] Law Times Journal. Available at: <<https://lawtimesjournal.in/judiciary-promoting-adr/>> [Accessed 13 October 2021].

²⁴ Halder, P., 2021. *Role of Judiciary in promoting ADR in India*. [online] Legodesk. Available at:

<<https://legodesk.com/legopedia/role-of-judiciary-in-promoting-adr-in-india/>> [Accessed 13 October 2021].

²⁵ Tyagi, N., 2021. *Role Of Judiciary In Making India An Arbitration Friendly Jurisdiction - Litigation, Mediation & Arbitration - India*. [online] Mondaq.com. Available at: <<https://www.mondaq.com/india/trials-appeals-compensation/1013892/role-of-judiciary-in-making-india-an-arbitration-friendly-jurisdiction>> [Accessed 13 October 2021].

Courts, have embraced a realistic learning approach when a party disputes an arbitration verdict. In recent years, the Indian Supreme Court has taken an increasingly pro-arbitration stance. Countless cases were reported in which courts had upheld arbitration agreements regardless of minor defects, acknowledging the parties' determination to address their legal disputes through arbitration. The Supreme Court allowed an arbitral proceeding despite an error by taking a pro-arbitration posture, reasoning that just because the participants' intent to arbitrate was clear, the Court could render an arbitration agreement legitimate even though it had flaws.²⁶

When parties have endeavored to get around the Arbitration Act's provisions, courts have traditionally been reluctant to interfere with the Act's findings. The Supreme Court did not interfere with a judgment because the party had contested an agreement to be made under the Arbitration And conciliation Act, while taking a pro-arbitration posture. Courts have likewise been cautious in granting anti-arbitration orders. The Bombay High Court ruled that if a side has remedy under the Arbitration Act, then the court must not issue an anti-arbitration order by disregarding the Act's stipulations.²⁷ In other instance, one of the arbitrators was nominated in partnership with some other party but did not follow the consented procedure while compelling the other party to request an order from the Court to prevent the arbitration tribunal from proceeding with the hearings. The Bombay High Court held that the party making false statements now has the right to object to the appointment of an arbitrator under Section 12 of the Arbitration Act, and this cannot be used to get around the Act's provisions.

Even though the law enforcement agencies have managed to remove barriers both during and after the arbitral proceedings by typically refraining from interfering with arbitral tribunal verdicts or passing other arbitration-friendly decisions, this was not enough to incentivize foreign

corporations to use India as an arbitration facility. It could go a long way towards encouraging parties that the arbitration process in India will no longer be permitted to go on perpetually, in my opinion.²⁸

VII. Suggestions to Improve the ADR Mechanisms in India

The advancement of ADR mechanisms has not been particularly fruitful. As a result, the trend is to impose duty and responsibility on the Court.

- A. Courts have the authority to issue instructions for the adoption of ADR methods by the respondents, and the court must play an essential role in this regard by providing guidance. The courts are also given authority to intervene at various phases of the process. However, these objectives will not be met until the necessary infrastructure and legal mechanisms are in place.
- B. The institutional framework should be brought at 3 stages –
 1. **Awareness** - It can be accomplished through holding various seminars, workshops, and other events. The goal of the ADR literacy program and awareness program would be to transform the thinking of all involved lawyers, disputants, and judges.
 2. **Acceptance** - In this context, the ADR practitioners need to be very well trained by the universities in collaboration with various other institutes. Those who would like to function as facilitators, mediators, or conciliators will need extensive training. In the case of judicial officers and magistrates, training should be made a component of continued learning on various aspects of ADR.

²⁶ *Enercon India Limited & Ors. V. Enercon GmbH & Anr* [2014] 5 SCC 1.

²⁷ *Ravi Arya & Ors V. Palmview Overseas Limited & Ors.* [2018] SCC OnLine Bom 19886.

²⁸ Kirmani, S., 2021. *Role Of Judiciary In Making India An Arbitration Friendly Jurisdiction - Litigation, Mediation &*

Arbitration - India. [online] Mondaq.com. Available at: <<https://www.mondaq.com/india/trials-appeals-compensation/1013892/role-of-judiciary-in-making-india-an-arbitration-friendly-jurisdiction>> [Accessed 13 October 2021].

3. **Implementation** - To accomplish this, judicial personnel must be taught to recognize instances that would benefit from a particular type of ADR.
- C. The flood of lawsuits cannot be prevented since the doors of justice cannot be barred. ADR Mechanisms must be made more functional. However, there is a pressing need to expand the outflow, either by bolstering the current systems capacity or by seeking new terminals.
- D. The establishment of Mediation Centres in every district of each state to mediate all conflicts will result in a significant shift in the Indian legal system. These arbitration centers would be run by a highly effective team of mediators drawn from the surrounding community.²⁹
- E. Many Indians are unable to afford legal representation. This kind of situation makes ordinary people, particularly those in rural areas, skeptical of the legal system. We need to expand the ADR mechanism outside urban areas. Gram Nyayalayas should handle the majority of the rural arbitration cases, which will allow the normal courts to focus on more complicated civil and criminal cases.
- F. Additional ADR centers should be established to settle conflicts outside of the courtroom. ADR approaches will help individuals accomplish the aim of social justice, which would be the purpose of a successful court system.³⁰
- G. The fact that ADR isn't binding is a huge flaw. It is still possible to file an appeal or postpone the award's execution. "Delayed justice is justice denied." If ADR is not practiced in its real spirit, it loses its fundamental core. The judgment must be made enforceable on the parties, and no review should be authorized unless it was obtained unlawfully or in violation of public policy.³¹

VIII. Conclusion

People now have a new way to settle their disagreements thanks to the emergence of alternative dispute resolution. The rapid resolution of conflicts in Lok Adalat has gained widespread public support, giving ADR a fresh impetus that will undoubtedly lower the huge amount of cases pending in the tribunals. There is a pressing need for ADR mechanisms to provide access to the courts.

The ADR initiative must be pushed ahead at a faster pace. This will significantly lessen the burden on the court system, in addition to offering immediate justice at the doorstep at a low cost. If they will be successfully implemented, they will truly achieve the purpose of providing social justice to the conflicting parties.

²⁹ Rao, P., 2017. *Alternative Dispute Resolution: What is it and how it works*. Universal Law Publishing Co. Pvt. Ltd.

³⁰ Government of India, Law Commission of India, 222nd report, 'Need for Justice-dispensation through ADR etc., at 1.6., 2021.

³¹ Medha, N., 2018. *Alternative Dispute Resolution in India-A study on concepts, techniques, provisions, problems in Implementation and solutions*.