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## ALTERNATIVE DISPUTE RESOLUTION- A SETBACK

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### ABSTRACT

*With technological advances in contemporary world, the communication among the people is also increasing leading to arising disputes. In 1868, it was quoted by William Gladstone (former England PM) and is a prominent saying that "Justice delayed is Justice denied"<sup>62</sup>, and due to overcrowding of cases with the courts adding to burden on the judiciary; there was an introduction of the Alternative Dispute Redressal Mechanism (ADR). It brought in the cost-effective, speedy trial system which reduced the burden of the courts. Recently, the government of India had also declared to make India into an Arbitration hub to improve the Dispute Resolution process of the country. Justice is highlighted through Indian Constitution in its Article 14<sup>63</sup>, Article 21<sup>64</sup>, Article 39A<sup>65</sup>, Article 39A[2]<sup>66</sup>. Such concepts of justice is also mentioned in the 222nd Law Commission Report<sup>67</sup>. There was also the introduction of The Arbitration Act 1899<sup>68</sup>, The Arbitration Act 1940<sup>69</sup>, The Arbitration and Conciliation Act 1996<sup>70</sup>. Even after several amendments and the latest one in 2021 called The Arbitration and Conciliation (amendment) Act 2021<sup>71</sup>. Thus adding up the loops of these amendments, there are still practical challenges. It makes it difficult to implement the arbitral awards granted in the arbitration proceedings. It poses challenges within the justice delivery process as it limits the intervention of the courts as allowed by the Arbitration and Conciliation Act 1996<sup>72</sup>. It even brings in the ambiguity and absurdity in the implementation of the meanings of some terms. Though ADR involves several processes but provides more gains from the proceedings in Arbitration. This article reviews the ADR and its acts in India. It aims to put forward the flaws and contemporary issues raised in the evolution of the arbitration laws in India. This article recommends solutions to overcome these setbacks.*

**Key Words**– Justice, Alternative Dispute Resolution (ADR), Speedy Trial, Cost-effective, The Arbitration Act, Amendment, dispute settlement.

GRASP - EDUCATE - EVOLVE

<sup>62</sup> Parliamentary Debates (Hansard). HC Deb, 3rd ser., vol. 190, col. 68 (March 16, 1868).

<sup>63</sup> INDIA CONST. art. 14

<sup>64</sup> INDIA CONST. art. 21

<sup>65</sup> INDIA CONST. art. 39, cl. A

<sup>66</sup> INDIA CONST. art. 39[A], cl. 2.

<sup>67</sup> **Law Commission of India, Need for Justice-Dispensation Through Alternative Dispute Resolution Mechanisms, 222nd Report** (Government of India, 2009), 1.

<sup>68</sup> *Sukhleen Kaur Saluja, History and development of arbitration law in India Lex pedia* (MAY 23, 2020), History and development of arbitration law in India - LawLex.Org

<sup>69</sup> The Arbitration Act 1940, No.10 Acts of Parliament,1940(India)

<sup>70</sup> The Arbitration and Conciliation Act 1996, No. 26 Acts of Parliament,1996(India)

<sup>71</sup> The Arbitration and Conciliation (amendment) Act 2021, No. 3 Acts of Parliament,2021(India)

<sup>72</sup> Supra note 10

## INTRODUCTION

### I. The Alternative Dispute Resolution Mechanism

ADR is an off- court, cost-less, and speedy dispute settlement system. It brought a great reform to the Dispute Resolution system in the world. It is a system where the parties reach the point of settlement without approaching the courts. The same is done with the help of a third party. Here, when the case first goes to the court, if the court finds an element of settlement, it puts forward in front of both parties the option to opt for ADR. If both parties consent, the case goes to a third party for the settlement process. It aims to give an alternative to the litigation process to the courts in India. Thus, the settlement further continues with any of the ADR processes like conciliation, mediation, arbitration, Lok adalat etc. The Alternative Dispute Resolution Mechanism involves different methods. These include Negotiation, Conciliation, Mediation, Arbitration and Lok Adalat.

**A. Negotiation-** Negotiation is the first and foremost method of ADR. It takes when parties voluntarily come together without appointing any third party to solve dispute. It is the ground level interaction on the matter of dispute. This done to protect the relationship between both the parties. It is the most informal and flexible method among all in the whole ADR mechanism. The method is on a rise in practice.

**B. Conciliation-** It is the process where the conciliator who is the third neutral party appointed by the two parties in conflict. The conciliator meets both parties in separate rooms to know of their views of the matter. The process of conciliation is mentioned from sections 61 to 81 Arbitration and Conciliation Act 1996<sup>73</sup>. The process takes place only if the opposite party agrees to the same in writing. The conciliator gives opinions on the matter to the parties as per his views after looking into all aspects of the case. The suggestion of a conciliator is of a non- binding nature.

**C. Mediation-** In mediation, the disputed parties voluntarily appoint the neutral third party called the mediator. The mediator gives advice to solve the matter, which is non-binding. Here, the parties reach a point of settlement by negotiating the matter. It is considered as the best form of ADR as it is a flexible mechanism and helps establish a fiduciary relation with the parties of conflict. The process goes on as the opinions of both the parties are heard by the mediator jointly as well as separately and then gives a suggestion on the same.

**D. Arbitration -** A neutral third party called an arbitrator is appointed to resolve the matter among the disputed parties. If one person is appointed as a neutral third party, he is called an arbitrator, and if more than one person are appointed as arbitrators, they are collectively referred to as Arbitration Tribunal. The decision of the arbitrator is binding. It limits the right to appeal and review the decision of arbitrator. The acts for arbitration in India from the past include The Arbitration Act 1940<sup>74</sup> which was overtaken by The Arbitration and Conciliation Act 1996 and witnessed many amendments including The Arbitration and Conciliation (amendment) Act 2015<sup>75</sup>; The Arbitration and Conciliation (amendment) Act 2019. Arbitration in India is currently governed under The Arbitration and Conciliation Act 1996<sup>76</sup> with its latest amendment in 2021 known as The Arbitration and Conciliation (amendment) Act 2021<sup>77</sup>.

**E. Lok Adalat-** Lok Adalat is the people's court set up by the government of India under the Legal Service Authority Act 1987<sup>78</sup> with the aim of negotiation between the disputed parties. The decision of the Lok Adalat is binding on the parties. It has the binding effect as that of a civil court. The parties can't go for appeal against it. But they have an option to file the case from the

<sup>74</sup> Supra note 9

<sup>75</sup> The arbitration and conciliation (amendment) act 2015, No. 3, Act of Parliament, 2016 (India)

<sup>76</sup> Supra note 12

<sup>77</sup> Supra note 11

<sup>78</sup> The legal services authorities act, 1987, NO. 39 Acts of Parliament, 1987, (India)

<sup>73</sup> Supra note 10 § 61 to 81

start in the courts of law of the specific jurisdiction if they disagree to the decision of the Lok Adalat.

**F. Judicial settlement** – it is mentioned under section 89 of the Civil Procedure Code 1908, which provides the option of going for the ADR mechanism if the court finds an area of settlement in the dispute between both the parties.

## II. History of Indian Dispute Redressal System<sup>79</sup>

ADR process such as Arbitration in India has a long drawn history. Before the advent of the British, it was seen practiced since the Vedic Era in India. The ADR is also traced in the Hindu mythologies. The Ramayana puts forward the concept of Divine Mediation and Arbitration as the disputes in Lord Rama's family was solved by reciting divine poems. In early ancient India, which was mostly rural, the panchayats and jigras were set up by the honorable village elders to deliver justice to the people. These provided a form of informal arbitration methods. People even had the option of selecting the person of their choice who would resolve Dispute among the parties. The appeal could then go to higher authority in order of hierarchy and then to the king or appeal directly to the ruling king. This was the Ancient Indian Dispute Redressal System. Then came into the picture were the British who fundamentally modified the Indian social, economic, political, structural, and even the legal system as per their own Whims and fancies. It shook the existing structure of the legal framework. It revolutionized reformed the legal system of India. It all took place when the British interest shifted from imperialism to Colonialism in India. There was an invention of new laws and judicial setups of courts. The modifications brought by the British were all based on the legal framework and laws practiced in England.

Though ADR was implicitly seen practiced in the ancient Indian setup but was explicitly (via laws and statutes) mentioned post the advent of the

British into India. The judicial system reformed by the British was seen not matching to the level of British aspirations to manage affairs. Thus, it introduced the Alternative Dispute Redressal Mechanism in India, which was a cost-effective and speedy trial system. It was introduced via The Arbitration Act 1899<sup>80</sup>. This act was only limited to the three presidencies of Bombay, Madras and Calcutta. Before this, the arbitration was implicitly practiced through The Indian Contract Act, 1872<sup>81</sup> and the Specific Relief Act, 1878<sup>82</sup>. The Arbitration Act of 1940<sup>83</sup> was not able to fulfill the demands of globalization. The Arbitration Act 1940<sup>84</sup> which was overtaken by The Arbitration and Conciliation Act 1996<sup>85</sup>. The first part of The Arbitration and Conciliation Act 1996<sup>86</sup> consists of law and practice of arbitration in India. The second part of the act mentions among two chapters– the arbitral awards and conditions as per the New York Convention<sup>87</sup> and Geneva Convention<sup>88</sup>. Later there were many amendments to the act as per the needs of evolving society. These are The Arbitration and Conciliation (amendment) Act 2015; The Arbitration and Conciliation (amendment) Act 2019; The Arbitration and Conciliation (amendment) Act 2021

International Commercial Arbitration<sup>89</sup>– India works to provide foreign arbitration awards based on UNCITRAL Model under the Foreign Awards (Recognition and Enforcement) Act 1961<sup>90</sup>, the Arbitration (Protocol and Convention) Act 1937<sup>91</sup>, and the The Arbitration Act 1940<sup>92</sup>.

## III. ADR – A helping hand

**A. Speedy process**– It is a swift process of easy quick dispute settlement system. It is a fast

<sup>80</sup> Ibid

<sup>81</sup> The Indian contract act, 1872, NO. 9 of 1872 (India)

<sup>82</sup> Specific Relief Act, 1963, No. 47 of 1963 (India)

<sup>83</sup> Supra note 9

<sup>84</sup> Ibid

<sup>85</sup> Supra note 10

<sup>86</sup> Ibid

<sup>87</sup> supra note 10 part II, chap 1, § 44-52.

<sup>88</sup> Ibid, chap 2, §53-60.

<sup>89</sup> [uncitral.un.org](https://uncitral.un.org/), UNCITRAL Arbitration Rules | United Nations Commission On International Trade Law (last visited 17 June, 2023)

<sup>90</sup> The foreign awards (recognition and enforcement) act, 1961, NO. 45, Acts of Parliament, 1961, (India)

<sup>91</sup> Arbitration (Protocol and Convention) Act 1937, No. 6, Acts of Parliament, 1937 (India)

<sup>92</sup> Supra note 9

<sup>79</sup> Supra note 8

mechanism then the litigation in courts. In *Emkay Global Financial Service Limited v. Girdhar Sondhi*<sup>93</sup>- it was held that ADR provides speedy dispute resolution mechanism under the Arbitration Act.

**B. Burden of Judiciary-** The system was seen as a great helping hand to the judicial system of India as it saves the time of the courts. It reduces the burden of the listed up cases in the judiciary by reducing litigation.

**C. Cost effective-** ADR provides a cost-effective and pocket-friendly mechanism to common people who can't claim for justice if they are not from a financially well background or family.

**D. Confidentiality** - the processes of ADR maintains the privacy of the matter of the case and the information of the parties remains within the ADR cells only. It appeals to those parties who don't want their cases to be revealed and discussed in public courts.

**E. AI invention-** with the introduction of Artificial Intelligence in ADR process, the reports generated after the dispute resolution process are accurately based on the questionnaires and evidences produced. The process becomes efficient, accountable, transparent and unbiased.

**F. Relations between the parties-** It saves the relationship and prevents the major points of conflicts that may occur in a formal court setup.

**G. Other benefits-** these include that the ADR is a fair process. The third party is chosen to solve dispute with the consent of the parties. It dispute resolution procedure is much more simple than that of litigation in courts.

#### IV. ADR- A setback

There are observed flaws in ADR in India that pop up during implementation. The common challenges in practice of all the methods of ADR include lack of infrastructure, lack of knowledge and awareness, lack of skilled and experienced

and neutral third party, lack of statutes, lack of investment, lack of implementation of the existing statutes, Lack of participation, chances of matter becoming worse on confrontation of the parties, lack of formalities in the proceedings etc. The following mentions the issues emerging from the processes of ADR.

#### A. Negotiation

It is the primary method of ADR. Thus, it is the most informal method. It lacks the neutral third party appointment. Though the matter is on a rise but when compared to other methods of ADR in practice, negotiation is the least seen process of ADR in India. It faces almost all major challenges as faced by the other methods of ADR. These include all the common challenges as mentioned above. There is no skilled and experienced and neutral third party to solve the dispute between the conflicting parties which can even further worsen the dispute. This can even lead to divergence from the topic of the matter as the parties can take up in between the negotiation their previous matters of disputes. This wastes a lot of time, costs involve and energy of both the parties. Here, the dominant party can even have his monopoly over the matter.

#### B. Conciliation

There is no proper cell or center to perform conciliation procedures for dispute resolution. Mostly attached to the courts are mediation cells. Thus, conciliation is seen less in practice in India. Conciliation is an informal process. So, the parties in conflict do not take the matter seriously. Conciliation is a process for negotiation between both the parties. But when one gets dominant and monopolize the matter, then the route of the matter diverges and disrupts. It has no separate statute. It is governed under The Arbitration and Conciliation Act 1996<sup>94</sup>.

#### C. Mediation

1. The Referrals problem - There is seen a mention of lack of reference to mediation by the courts in the cases despite section 89 of CPC .

<sup>93</sup>*Emkay Global Financial Services Ltd. vs. Girdhar Sondhi* (20.08.2018 - SC) : MANU/SC/0875/2018

<sup>94</sup> Supra note 10



2. Infrastructure problem - India lacks infrastructure to set up mediation cells, which require proper space, room, informal setup, and comfortable surroundings for both parties.

3. Easy Withdrawal - The matter under can be easily withdrawn by any of the parties during the proceedings, which can cause damages to the other parties, especially to the injured party.

4. Statute - Though mediation in practice dominates in India, there is no substantive or procedural legislation for the same.

5. The mismanagement - the mediation process in all over India is governed by a collective committee for mediation and conciliation, which is the Mediation and Conciliation Project Committee under the Supreme Court of India<sup>95</sup>. The primary aim of the judges is to look into the matters of the courts. Thus, less focus on mediation. Therefore, there lays a huge administrative mismanagement in the practical process of mediation as it lacks legislation and is added to it it even lacks the judicial focus.

6. Malafied transfer of information - as mediation is an informal process, the information of one party can possibly be transferred to another.

7. Uncertainty - the mediation gives no certainty that the dispute would fully be resolved. The matter may even become worse on the confrontation of the parties in mediation.

8. Mediation dominates- Among the four methods of Alternative Dispute Resolution ie. Negotiation, Conciliation, Mediation, and Arbitration; Mediation dominates. The Indian Dispute Settlement system is tilted towards mediation which is also called the Indian approach to the ADR. Thus, in practice it falls apart from the other ADR methods of Arbitration and Conciliation as specifically mentioned in the Arbitration and Conciliation Act 1996.

**D. Arbitration-** the arbitration follows the substantive law for dispute resolution. It even follows some procedural laws to govern the process.

1. The Arbitration and Conciliation Act of 1996 - In the case of Hamilton vs SBI Home Finance Ltd.<sup>96</sup>, there were held different connotations for the meaning of the term Arbitrability which makes it perplexing in implementation.

2. The Arbitration and Conciliation (Amendment) Ordinance 2020<sup>97</sup>, which was passed with President assent in 2021, came to be known as The Arbitration and Conciliation (Amendment) Act 2021<sup>98</sup>. It was another Amendment to the Arbitration and Conciliation Act 1996. It brought in modifications to the Act yet had some loopholes. These included the difficulties in implementing the arbitral awards. The wrongly defined standards in the provisions of this Amendment Act create hindrances in practical implementation of the awards. In fact, the provisions and practices pose a great challenge in giving the arbitral awards.

**E. Lok Adalat -** Though Lok Adalat was set up as a mechanism under Alternative Dispute Resolution to fasten the process of solving matters. Due to such fast processes, sometimes it led to inadequate compensation to the injured party. The process of dispute resolution in Lok Adalats also lacks confidentiality. Also, some civil matters of conflicts require punishments as a remedy rather than compensation. This makes it difficult and even out of jurisdiction of the Lok Adalat to give punishments. The judges of Lok Adalats change from time to time, which breaks the flow of the process of granting justice. Even the process of enforcement of awards has loops that the execution of enforcement of awards needs to be applied in the civil court as the Lok Adalat only has the power to grant awards and not to execute.

**F. Issues in Arbitration and Conciliation (amendment) Act 2021<sup>99</sup>**

It gives problems of implementing arbitral awards as mentioned under the problems in

<sup>95</sup>Manisha T Karia Effective implementation of Mediation in India: The way forward , barandbench (15 June, 2023, 3:59 pm), Effective implementation of Mediation in India: The way forward (barandbench.com)

<sup>96</sup> Booz Allen and Hamilton Inc. vs. SBI Home Finance Ltd. and Ors. (15.04.2011 - SC) : MANU/SC/0533/2011

<sup>97</sup> The arbitration and conciliation (amendment) ordinance, 2020 NO. 14 OF Ministry of law and justice, Legislative Department, 2020 (India)

<sup>98</sup> Supra note 11

<sup>99</sup> Supra note 11



practice of Arbitration in India. It even challenges the intervention of the courts as allowed by the Arbitration and Conciliation Act 1996<sup>100</sup>. This new Amendment Act nullifies the provisions of the previous Arbitration and Conciliation (amendment) Act 2015. It even omits the schedule 8 of the previous Act where the qualifications and regulations for the arbitrator were mentioned. This can be a magnet for international arbitrators in India. It brings an amendment to section 36(3) of the Arbitration and Conciliation Act 1996<sup>101</sup> that there is an automatic stay on the arbitral award in case of fraud and corruption. But this was even a flaw in setting arbitral awards as the definition of fraud and corruption is not only properly defined. It involves ambiguities in interpretation.

#### RECOMMENDATIONS

To resolve the above mentioned issues of ADR, the given suggestions should be adhered and followed. ADR Cells- These include proper setup of Mediation, Arbitration and Conciliation cells with each court at each level in India. The proper space and comfortable environment should be created for confrontation and negotiation between both parties.

- Implementation - There would be proper working of the Lok Adalat under the Legal Services Authorities Act, 1987<sup>102</sup>. The government should invest more in such Alternative Dispute Settlement system to promote peaceful, cost-friendly and quick means of justice to its citizens. The jurisdiction of Lok Adalats should increase and should not only stick to the civil cases.
- Challenge the Arbitrator- the decision of arbitrator in the process of Arbitration cannot be challenged even if any of the party is not satisfied with the decision. There is no provision for appeal. Only a new case from square one can be filed in the court of required jurisdiction.
- Need of Statues- as there are no proper explicit statutes for mediation, negotiation and such processes. Additionally, both the process

of arbitration and conciliation are also governed under one statute only that is The Arbitration and Conciliation Act 1996<sup>103</sup>. Thus, there should be proper statutes both substantive and procedural for each method with proper implementation.

- Role of Judiciary - The judiciary should work towards promoting the adr by recognizing the element of settlement and recommending more and more cases for redressal through adr. The judiciary should set up committees to combine and work to improve and enhance the adr mechanism. In *Konkan Railway Corporation v. Rani Construction Pvt. Ltd*<sup>104</sup>- duty of the court to appoint arbitrator was held.
- Arbitral awards- There should be proper mechanism for the execution of enforcement of awards after the ADR proceedings. The arbitral awards the parties now have to first approach the civil courts of the required jurisdiction which takes a lot of time and thus invalidates the effect of such speedy justice. Thus, it should be eased out.
- Infrastructure- There is a huge lack of infrastructure in the legal field in India. The proper and comfortable space and cell. There should be proper and clean area for the same. The documentation and recording of the matter should never lack infrastructure.
- Investments- the government and judiciary should spend more in ADR to promote quick dispute resolution. There should a percentage spending on the same in the annual budget of government of India.
- AI- the artificial intelligence should be used effectively and efficiently. It can be used for producing or recording evidences and documentation of cases. But an AI mediator or arbitrator or conciliator or any such third party based on AI is not a good option as it is an emotionless device that cannot relate to the human parties' problems of dispute.
- Awareness - There should be awareness programs to spread knowledge, essence and benefits of ADR. It should be added to the

<sup>100</sup> Supra note 10

<sup>101</sup> Ibid, §36, cl.3

<sup>102</sup> Supra note 18

<sup>103</sup> Supra note 39

<sup>104</sup> *Konkan Railway Corporation Ltd. and Ors. vs. Rani Construction Pvt. Ltd.* (30.01.2002 - SC) : MANU/SC/0053/2002





syllabus in legal field and legal education for law students to know of such Alternative method of dispute resolution than the traditional litigation.

### CONCLUSION

In a nutshell, it can be concluded that from the ancient Era to the British Regime to the post-colonial civilization, India has been a pro-Arbitration country. The ADR mechanism has emerged as an effective alternative to traditional litigation, providing expeditious and cost-effective resolution of disputes. The cases including the commercial cases for ADR specifically Arbitration has increased at a rampant rate in India. However, as a coin has two sides, so do these amendments. Despite the enactment of legislative acts such as The Arbitration and Conciliation Act of 1996<sup>105</sup> and its subsequent amendments, there remain practical implementation challenges that impede the enforcement of arbitral awards. These challenges restrict the courts' intervention, create ambiguity in interpreting key terms, and undermine the efficiency of the justice delivery process. Thus, these changes are often appreciated and are even sometimes criticized. The mal-implementation of the modifications in the laws shows India's improper and vague functioning and lack of adherence to its laws and precedents. This spotlights the loops in Indian executive processes. It even shows our mismanaged administration and lack of commitment to our constitutional provisions.

But these pulsing issues of such magnetic dispute resolution mechanism in India can be solved by following the mentioned recommendations and adhering to the laws, statutes and precedents in the country. The proper implementation should be taken into account with the needed statutes being into existence with a good level of implementation.

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