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India's Institutionalised ADR Challenges

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ABSTRACT

The Indian Parliament recognised in 1996 the need for alternative dispute resolution (ADR) mechanisms in civil and commercial disputes to reduce the workload of the courts. These mechanisms include arbitration, mediation, and conciliation. To facilitate the fast resolution of economic disputes through private Arbitration, Parliament passed the "Arbitration and Conciliation Act, 1996." Rapid problem solving is seen as crucial to the efficient operation of any business or sector. Although "Alternative Dispute Resolution" (ADR) is the name under which it was originally introduced, it has since been rebranded in several sectors as "Appropriate Dispute Resolution" (ADR) in recognition of the process and results it consistently delivers. Judicial dispute resolution (JDR) is another term for litigation. Since alternative dispute resolution (ADR) is not limited by national borders, it is increasingly being viewed as a truly global system.

In India, the courts use the Indian Arbitration and Conciliation Act of 1996 while deciding on alternative dispute resolution. In 1996, India passed the Arbitration and Conciliation Act based on the work of the United Nations Commission on International Trade Law (UNCITRAL), but the concept of alternative dispute resolution has been part of Indian law since at least 1840. It was not until January 25, 1996 that the Arbitration and Conciliation Act, 1996 went into effect. Prior to that date, disputes were resolved under the Civil Procedure Code, the Indian Contract Act, the Specific Relief Act, and the Indian Arbitration Act, 1899, which was subsequently repealed by the Indian Arbitration Act, 1940.

Keywords: *Alternate Dispute Resolution, UNCITRAL, Human Resources, Arbitration, Judicial System.*

I. INTRODUCTION

Everyone, as a matter of principle, deserves access to justice that is both prompt and economical. Any kind of war is a deadly disease. Time spent working toward a solution is time well spent for everyone involved and for society as a whole. In the absence of prompt action, the problem will rapidly escalate, spawning a plethora of additional complications and conflicts that will be much more difficult to overcome. Conflict begets conflict. This means that the conflict must be settled as soon as possible.[2] Article 21 as the rule of law which gives equal

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[2] Anurag A Agrawal; Strengthening 'Lok Adalat' Movement in India; AIR Journal, vol.1, March 2006, p. 33.

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access to justice for every person of India guarantees timely case disposal as a fundamental right. Someone, somewhere, feels disregarded, undervalued, disenfranchised, or insulted in the background of nearly every human conflict. Difficulty can arise when simmering tensions that have been buried for a while rise to the surface. "The worst insult to law is the delay that prevents it from being served," but in India, this insult destroys the entire justice delivery system, not just the people who have to wait for their cases to be heard. As a result, more and more people are resorting to criminal gangs and mob justice to settle personal scores, which reflects a general decline in confidence in the court system.

The Indian Parliament recognised in 1996 the need for alternative dispute resolution (ADR) mechanisms in civil and commercial disputes to reduce the workload of the courts. These mechanisms include arbitration, mediation, and conciliation. To facilitate the fast resolution of economic disputes through private Arbitration, Parliament passed the "Arbitration and Conciliation Act, 1996." Rapid problem solving is seen as crucial to the efficient operation of any business or sector. Although "Alternative Dispute Resolution" (ADR) is the name under which it was originally introduced, it has since been rebranded in several sectors as "Appropriate Dispute Resolution" (ADR) in recognition of the process and results it consistently delivers. Judicial dispute resolution (JDR) is another term for litigation. Since alternative dispute resolution (ADR) is not limited by national borders, it is increasingly being viewed as a truly global system.[3]

Disputes can be settled outside of court through one of many alternative dispute resolution (ADR) processes in India. The parties' relationship and the nature of the dispute determine whether arbitration, conciliation, mediation, Lok Adalat, etc., will be used. The purpose of arbitration, as stated in the agreement, is to facilitate communication between the disputing parties in the hopes that they might reach an amicable resolution to their dispute. A mediator is a neutral third party who facilitates agreement between conflicting parties in a private, informal dispute resolution procedure.[4]

Lok Adalat was established under the National Legal Services Authority Act, 1987 to facilitate the resolution of disputes in accordance with Article 39-A of the Indian Constitution. Dispute settlement procedures, such as Lok Adalats and others, are also included in this statute. Rather than being a novel phenomena, the concept of Lok Adalat is an ancient one that has recently been given legal standing. One of Lok Adalat's distinguishing traits is that disputes are resolved

[3] Anil Xavier; Mediation is here to stay; AIR Journal vol. 2 March 2010, p.7.
[4] ibid

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quickly and easily, without resorting to the time-consuming and complicated legal proceedings of regular Courts. Establishment of Lok Adalat was made official by the 1987 Legal ServicesAuthorities Act. The authority and components of the Lok Adalat, as well as the consequences of the Lok Adalat's award, are outlined in PartVI of the Act. Anyone can use the provisions of Section 19 of this Act to have his or her dispute submitted to Lok Adalat for mediation and reconciliation. After a compromise or settlement is reached in front of the Lok Adalat, the award based thereon has the same force as a decree of a civil court. It settles the matter conclusively and binds the parties to the conflict. The Act forbids launching an appeal to any court against such an award other than on the basis of fraud. The delivery of justice is expedited and free of charge in LokAdalats. The bulk of the Indian populace is averse to going to conventional court to settle disputes due to illiteracy, poverty, and the lengthy procedures that must be followed. Thus, Lok Adalats could be a blessing as an extra mechanism to the judicial institution, helping to reduce the backlog of cases that goes on growing day by day. In all civil and compoundable criminal proceedings, the Lok Adalats have the authority to reach a final resolution.

II. ADR SYSTEM IN INDIA

In India, the courts use the Indian Arbitration and Conciliation Act of 1996 while deciding on alternative dispute resolution. In 1996, India passed the Arbitration and Conciliation Act based on the work of the United Nations Commission on International Trade Law (UNCITRAL), but the concept of alternative dispute resolution has been part of Indian law since at least 1840.[5] It was not until January 25, 1996 that the Arbitration and Conciliation Act, 1996 went into effect. Prior to that date, disputes were resolved under the Civil Procedure Code, the Indian Contract Act, the Specific Relief Act, and the Indian Arbitration Act, 1899, which was subsequently repealed by the Indian Arbitration Act, 1940.

When discussing the past, it is important to note that ADR in its modern form was the primary method by which disputes were resolved in ancient India. Traditional village conflict resolution involved the entire community coming together for a meeting called the Gram Panchayat to mediate disputes between residents.[6] This approach to resolving legal disputes has been largely abandoned since the rise of the current legal system. This ancient means of settling legal disagreements is now the domain of sophisticated corporations.[7] Disputes are now only

[5] Act IX of 1840.
[6] K Ravi Kumar; Alternative Dispute Resolution in Construction Industry; International Council of Consultants (ICC Jornal).
[7] Report on National Juridicare Equal Justice – Social Justice; Ministry of Law, Justice and Company Affairs,1977.

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discussed in boardrooms, and their resolution is contingent on internal procedures.

Intriguingly, there's a good explanation for why this occurrence occurs in our country.

To begin with, ADR is still a very exclusive and high-end service because there are so few persons who specialise in this sector and are qualified enough to arbitrate on numerous matters.[8] Second, "ADR is just too flexible in nature and there is no assurance in its proceedings," meaning that there is no predetermined path that must be taken when using ADR to resolve disputes.

The Indian legal system views arbitration as the primary form of alternative dispute resolution, which severely limits the scope of this process. One major downside is that the principle of arbitrability of subject matter is built into the arbitration process. The true scope of ADR is strongly weakened because most concerns with a specific enactment to their name are forgotten due to the non-arbitrability of its theme. If alternative dispute resolution is to reach the average person and not just stay a corporate toy, it must be given the freedom to spread its wings. As a result of being sick and tired of the constant cases in courts, business executives wisely relied on arbitration, as do numerous firms throughout the world, only to discover that, on the great majority of occasions, arbitration is surprisingly more unpleasant than litigation.[9]

III. PROBLEMS WITH THE LEGISLATIONS

The first law, the 1940 Act, was repealed and replaced with the 1996 Act because it failed to meet the expectations of the Indian people and the Indian business community. In order to appease the international business community and meet the requirements of the UNCITRAL Model Law, the 1996 Act was enacted. Unfortunately, the Model Law was never subjected to a thorough evaluation at the time. India, unlike the United Kingdom and a number of other countries (the United States included), fully embraced the Model Law.[10] The provisions of UNCITRAL Model Law were essentially rewritten by India. During the legislative process, little regard was given to the unique requirements of the Indian business sector, the country's legal and social situations, the shortage of judges and courtroom facilities, etc.

There have been other instances where implementing the new law has been a frustrating administrative failure. This legislation is a fairly typical example of poorly drafted legislation due to its numerous loophole provisions. Court's meaning in the 1996 Arbitration and

[8]Justice K G Balakrishnan, 'International Conference on Institutional Arbitration in Infrastructure andConstruction, New Delhi' on October 16, 2008.
[9] Hernando de Soto; The Other Path';, Harper & Row Journal 1st ed., 1989.
[10] Paul Whitley; ARBITRATION IN INDIA; 'Talk to the European Branch of the C.I.Arb; at Salice d'Ulcio,Italy; on April 2005

Conciliation Legislation is, generously speaking, not nearly the same as in the 1940 act. This new definition places an enormous burden on the District Judge that was formerly distributed among the judges of the Civil Court. The past decade's worth of cases prove beyond a shadow of a doubt that the District Judge just doesn't have the time to devote to arbitration proceedings. It causes further waiting and makes matters worse for the people involved in the lawsuit.

All matters relating to arbitration must be submitted in the major Civil Court of original jurisdiction in a district, with the exception of "a few places where the High Court's wield regular original civil jurisdiction." This is the District Judge's Court, by definition. The law has expressly barred the establishment of any subordinate Civil Courts or Courts of Small Causes. Consequently, only the District Judge's Court has authority to hear arbitration cases.

Therefore, litigants select other legal procedures to settle down the disagreement, which is not helpful for the legal sector or the economy, because arbitration matters take a long time to resolve. " It tarnishes the reputation of the law and causes people to lose faith in the judicial system. Because of this, international partners and investors view India with suspicion because of its notoriously sluggish judicial system. This has a negative impact on the company and the economy as a whole.[11]

IV. THE ROLE OF THE COURTS

Mediation, the most well-known form of Alternative Dispute Resolution (ADR), serves primarily as a means to avoid litigation whenever possible. However, judicial involvement is inevitable. Interference can be tempting when it serves the purpose of preventing the arbitration process from being transferred to another location. It is clear that judicial intervention is essential and that this is the case everywhere throughout the world. Most governments allow lower courts to conduct investigations into arbitration cases, with the Supreme Court eventually hearing a wide range of appeals. A large number of mediated proceedings are recorded in India's lower courts, following a structure not dissimilar to that used in the United States.

Given that arbitration follows the actions of the parties during the contracting process. Accordingly, it is essential in every arbitration to safeguard the parties' substantial interests. This independence, however, is not unrestrained. This party autonomy is bounded by arbitration rules that are consistent with applicable law and are transparent in their operation. Additionally, the principles of arbitral institutions limit the autonomy of the parties involved. Furthermore, it appears that in cases of arbitrator bias, improper procedures, and so on, judicial action is

[11] Indu Malhotra; Arbitration as a fast tract solution; ICA's Arbitration Quarterly, ICA, 2006, vol. XLI/No.1pg. 8.

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required. Courts can also intervene to either nullify or enforce an award. Giving the parties carte blanche to do whatever they want during the arbitration process isn't good enough, and the result is usually something nobody wants. In the Hooters case,[12] the court ruled against the arbitration clause and noted, "The parties agreed to submit their claims to arbitration — a mechanism whereby disputes are fairly addressed by an unbiased third party." Hooters agreed to build such a system as part of a contract, therefore it was responsible for doing so. Hooters breached the terms of its contract by instituting a fraudulent arbitration process. Therefore, despite the vehement objections of some, judicial oversight of arbitrations is highly desired and necessary.

The new Arbitration and Conciliation Act of 1996 was enacted with the primary goal and administrative purpose of reducing unnecessary legal mediation, an issue that plagued the older Arbitration Act of 1940. Accordingly, Section 8(1) of the New Act makes it obligatory for the judicial authority, i.e. court, to suspend legal procedures if they have already begun if the subject matter has referenced an arbitral tribunal. The provisions are similar to those in New York law and Geneva law.

It is not in accordance with the legislative intent to implement Section 13 of the 1996 Act for courts to adopt rules that would functionally delay arbitral proceedings (either by raising erroneous objections to main issues or by halting the appointmentprocess). This brings us to what is known as the conflict between "high principles" in modern adjudication (which emphasise the need of justice even if it means the end of the world) and "low principles," which demand an end to litigation just as firmly. Serious complications have arisen as a result of the Court's increasing intrusion into the judicial process; the definition of "public policy" was initially discussed in the ONGC case, and has since been discussed in a number of other cases, all of which restate the judiciary's right to review the arbitral award. According to the Supreme Court's decision in the Hindustan Zinc case, "ONGC gave licence for interference in suchgrounds," meaning that awards might be voided if they violated the terms of a contract. Since the promotion of ADR was founded on the necessity to avoid the drawn-out court process, this does definitely set a dangerous precedent.

EVANS J.'s well-reasoned opinion in the Indian Oil Case[13], in which he reaffirmed that "these two considerations are not conflicting with each other," is perhaps the best deciding factor in the issue between decisiveness and justice. The need for fairness must win out if either of them is to succeed. However, justice is not an abstract idea. Specifically, it must be applied here since

[12] Hooters of America v. Phillips, Court of Appeals, US, CA-96-3360-4-22,1999.
[13] Indian Oil Corporation Ltd. v. Coastal Bermuda Ltd., [1990] 2 Lloyd‘s Rep., 407.

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the dispute is between two parties who previously agreed to have their disagreement heard by an arbitral tribunal. They reached an agreement that the tribunal's decision should be definitive. The parties reached this agreement, however, on the condition that the arbitration process be governed by law. When arbitrators act improperly or fail to follow the references, the Court may vacate the award under the applicable statute. On the other hand, it has complete authority to send back the award to the selected court. To my mind, there is neither an uncovenanted nor an undesirable restriction on the accepted finality of the tribunal's verdict if the power is exercised but only in circumstances where it would be wrong not to do so.

V. ADEQUATE HUMAN RESOURCES

An organization's values are only as high as its employees. A number of major factors have prevented this process from being as effective as it could have been. The main among them is the vested interest of various parties involved in the conflict settlement process.[14] There is a lack of ethics in conducting arbitration in India because lawyers are often not well-versed in the specific law and practise of arbitration and have a tendency to delay arbitrations, pursue unnecessary postponements, compromise arbitrations cases due to their regular court appearances, etc. This is the fundamental reason why parties opt for arbitration in places like Singapore or London instead of domestic courts, or why some still choose litigation in Indian courts as a "lesser evil."

For arbitration in India to grow, it is crucial that both well-resourced arbitralinstitutions and knowledgeable, skilled, and honest arbitrators be readily available. The future of arbitration is doomed if there is a growing consensus that parties' access to justice is diminished when they choose arbitration over litigation. To prevent the "canalization" of arbitration, it is essential to create a positive environment and many chances for arbitration among the industry's key players. These include the Bench, the bar, arbitral institutions, arbitrators, and arbitration users.[15]

Furthermore, no fees or compensation have been set for the arbitrators, and providing them a possibility to profit after retirement raises questions about whether or not they will be biassed, as well as whether or not they will have a vested interest in prolonging the process for their own benefit. It's also worth noting that few arbitrators, regardless of financial motives, are able to strike a good balance between a heavy caseload and a prompt resolution of disputes.[16]

[14] S.B.Sinha; Altenative Dispute Resolution and Access to Justice: Issues and Perspectives; SCR,vol.1 2008.
[15] Nancy J. Manring; ADR and Administrative Responsiveness: Challenges for Public Administrators; Public Administration Review, vol. 54, No. 2 1994.
[16] D. M. Popat; ADR and India: an overview; SCR Journal vol. 3 Dec.2004, pg.756.

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VI. Institutional Constraits on Existing ADR

Formerly viewed as a substitute for litigation, arbitration now shares that process's high price tag, lengthy timeline, complicated nature, and need for lawyers. The extent to which they have improved efficiency and made justice more accessible to more people remains an open subject. While ADR is well-liked due to its ability to promote reconciliation and provide transparent guidance, few productivity benefits have resulted from its adoption. Cases that were appealed from an arbitral tribunal to the Supreme Court of India were studied, and it was determined that neither the total cost to the courts nor the average time to dispose of cases had decreased. The second difficulty involves the aftereffects of alternative dispute resolution on the judicial system. Restoring traditional dispute resolution processes, like in India, for example, is argued by critics to expose women to the application of discriminatory societal norms rather than the relatively fair justice of a rights-based legal system. To further emphasise the efficacy of ADR, it is important to note that a mediator or arbitrator, in contrast to a judge, has no authority to compel a party to attend and defend a claim. The losing party cannot be forced to follow the decision of a mediator or arbitrator. The motivation to participate in and comply with the outcome of an ADR procedure can originate from a desire to maintain positive relations with the other party or to protect one's reputation.

(A) Financial Resources

An important consideration here is the high cost of arbitrations. When a case goes to court, the judge is paid by the state, but when it goes to arbitration, the situation is different. Payment to the arbitrators is handled independently by the Parties. The current situation involves arbitrators who demand exorbitant fees only to hold an arbitration. We consulted with legal counsel and neutral arbitrators. On the other hand, we must keep the parties' interests in mind. What will happen if arbitrators are chosen involuntarily and the appointing body under Section 11 takes nothing else into account?[17]

(B) Outreach and trust of society

People continue to have faith in the superior judiciary even though, as a result of growing globalisation, more and more cases are being transferred to regulatory bodies. This may be shown by looking at the number of challenges filed against arbitrator and appellate tribunal awards in India's highest courts including the Supreme Court. The question of whether or not ADR is trusted. Despite this, as globalisation progresses, more and more cases are being

[17] Christine Cervenak,David Fairman and Elizabeth McClintock; Leaping the Bar: Overcoming Legal Opposition To ADR in the Developing World; Dispute Resolution Magazine, Spring 1998.

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transferred from traditional courts to regulatory bodies. The inhabitants of Y still have faith in the judicial system. As evidence, consider the numerous challenges filed against decisions made by arbitrators and appellate tribunals in India's high courts and the Supreme Court.

(C) Other Problems

When two or more parties mutually agree to use arbitration or another form of alternative dispute resolution (ADR), it is necessary for them to execute an agreement formalising their decision to do so. Arbitrators were repeatedly and forcefully criticised for being biassed and inexperienced when deciding cases. The Alternative technique of dispensing even justice through the Arbitral process is likely unknown to many in the legal world. Therefore, the arbitral justice system has largely persisted alongside the legal system, albeit having far less success than was anticipated. Believe in the ADR system is crucial to its success. There is no precidentiary value attached to the ADRs' decisions. In alternative dispute resolution proceedings, precedents are typically disregarded as irrelevant. Successful alternative dispute resolution is contingent on the use of trained arbitrators and mediators. The benefit of alternative dispute resolution is diminished when it is conducted by incompetent mediators who produce disastrous results.[18]

VII. The Arbritration & Conciliation (Amendment) Act, 2019: A Way Forward

- **The Designation and Grading of Arbitral Institutions**

The Act's Part 1A, "Arbitration Council of India" (Sections 43A to 43M), was included in the 2019 Amendment, and it grants the Central Government the authority to establish the ACI through a notification published in the Official Gazette (Section 43B). The ACI's members will include I a retired Supreme Court or High Court judge appointed by the Central Government in consultation with the Chief Justice of India as its Chairperson, (ii) an eminent arbitration practitioner nominated as the Central Government Member, and (iii) an eminent academician with research and teaching experience in the field of arbitration appointed by the Central Government in consultation with the Chairperson. Ex officio members include the (iv) Secretary to the Central Government in the Department of Legal Affairs, Ministry of Law and Justice, and (v) Secretary to the Central Government in the Department of Expenditure, Ministry of Finance, as well as (vi) one representative of a recognised body of commerce and industry, chosen on a rotational basis by the Central Government, and (vii) the Chief Executive Officer-

[18] Justice B.K. Somashekara; The Process of Justice by way of Arbitration; SCC Journal vol. 3 April 2009 pg.6.

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Member-Secretary (Section 43C). The ACI is responsible for evaluating arbitration centres on a variety of factors, including their physical facilities, the expertise of their arbitrators, the speed with which they resolve cases, and whether or not they adhere to strict deadlines for resolving disputes (Section 43I).

- **Timely conduct of proceedings**

The new Section 23(4) requires that all pleadings, including the statement of claim and the statement of defence, be finalised within six months of the arbitrator(s) being appointed, and the new Proviso to Section 29(1) states that the award in an international commercial arbitration may be made as quickly as possible, with an effort to have it delivered within 12 months (4).

- **Qualifications of Arbitrators**

For its part, the ACI is responsible for examining arbitrator evaluations (Section43D(2)(c)). According to the Eighth Schedule, established by the 2019 Amendment, arbitrators must meet the standards for qualifications, experience, and accreditation as outlined therein (Section43J). Only one of the nine types of people listed in the Eighth Schedule (such as an Indian advocateor cost accountant or company secretary with a specific level of expertise or a governmentofficer in certain instances) is allowed to serve as an arbitrator.

This means that under the 2019 Amendment, a foreign academic, foreign-registered lawyer, or retired foreign officer is expressly banned from serving as an arbitrator. For obvious reasons, foreign parties will be dissuaded from opting for Indian institutional arbitration where their choice of candidates as their potential arbitrators is limited due to nationality, the likelihood of lack of experience, and the potential absence of academic and professional specialisation in handling international arbitrations.

VIII. CONCLUSION

Many issues related to law, society, and the economy plague India's alternative dispute resolution (ADR) system. The culturally rich and diverse population of India, along with a lack of governmental will, causes these issues.

The government must take firm action in order to overcome these obstacles, and the first step should be to implement the report of the 176th Law Commission. The government at all levels—local, state, and federal—must also devise education initiatives, targeting both the general public and the individuals who will be serving as arbitrators. Because ADR is so novel, widespread adoption of the practise faces challenges related not only to bureaucratic red tape but also to resistance from established norms and customs. Since this is the case, it is essential

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that India implement a robust programme to educate its citizens on the law, particularly in the area of alternative dispute resolution. This would not only make ADR more accessible to the average person, but it will also allow an informed citizen to aid in the development of ADR statutes in India.

The general public also bears some responsibility for this flaw in the ADR system. People can save time and money by choosing alternative dispute resolution (ADR) over traditional litigation. The goal of alternative dispute resolution. There is an urgent need for the Indian legal system to incorporate the ADR mechanism into their curriculum. The only context in which these instruments are discussed and taught is in the context of a corporate merger or acquisition. As a means of relieving pressure on the judicial system, these procedures should also be applied to the resolution of private disputes.

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