



COMMERCIAL DISPUTE RESOLUTION

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INTERPRETATION, CONSTRUCTION AND ENFORCEMENT OF CONTRACTS

A contract is an agreement between parties which is enforceable by law and that which governs the rights and obligations of the parties. Parties' intent is the essence of every contract. The law is highly volatile, which might lead to different interpretations of the drafted agreement in accordance with the party's intent. Contractual obligations are nothing more than the chosen obligations of the parties, giving effect to one's own choice which was earlier drafted by the parties themselves. Initially, the party's intent is ambiguous. One has to clearly understand whether it refers to the parties' intended exchange or their legal obligations. To get a clear picture of the party's intent, the party's attention has to be drawn towards the order of application where interpretation supersedes construction.

What does relationship between parties in a contractual term mean? It is the promise made by one party to another to fulfill the legal obligation that they have assigned to them. The parties to a contract should create a legal relationship evidenced by offer, acceptance and a valid consideration. The terms that the parties have agreed to in the contract can be used to deduce the way in which the parties have interpreted the terms

of their agreement. Consensus ad idem is the basic element of interpretation.

The words 'interpretation' and 'construction' are used interchangeably, but there exists a fine line of difference between them. A linguistic and simple meaning of the legal text is called interpretation, while its legal effect is called construction. Moreover, interpretation almost defines the intention of the statute. Both formulation and enforcement of a contract must be effective, in substantial and procedural manners to ensure that parties in a contract are ultimately satisfied.

Construction is the most conflict-ridden part and therefore it is important for employers and contractors to include appropriate dispute resolution clauses in their contracts as various methods of Alternative Dispute Resolution (hereinafter ADR) have emerged to provide greater access to individualized justice. Our paper will throw light on the various methods of ADR in India, strengthening and simplifying legal provisions for the enforcement of contracts by reassessing the quality and efficiency of dispute resolution in India and why the ADR system should not just be an alternative in today's world, but rather a mandatory settlement process for disputes of certain nature.

ALTERNATIVE DISPUTE RESOLUTION IN INDIA

Alternative dispute resolution refers to a "procedure for settling a dispute by means other than litigation, such as arbitration or mediation."¹ ADR is a solution of choice for legal disputes through which parties in dispute obtain remedy without involving the

¹ Black's Law Dictionary 91 (9th ed. 2009).



process of litigation, with the help of a third party. In India, the ADR system created a supportive platform for conflict resolution. It helped disputing parties achieve a greater sense of justice in a peaceful manner. ADR was introduced as an alternative to the adversarial litigation in India to resolve legal disputes in a timely and cost-efficient manner.

Alternate modes of resolving disputes are gaining prominence in recent years, especially in the resolution of commercial disputes. In India, laws related to ADR are dynamic in nature. The judiciary also encouraged such out-of-court settlement procedures and has set up premium institutions such as the Indian Council of Arbitration (ICA), International Centre for Alternative Dispute Resolution (ICADR) and many other regional ADR forums. The Indian law also recognizes arbitration and conciliation governed by the Arbitration and Conciliation Act of 1996, judicial settlement including settlement through Lok Adalats governed by the Legal Services Authorities Act, 1987 and mediation as the mechanism of settlement of disputes, apart from litigation. The reasons for the visible shift to alternative modes of dispute resolution include: time efficiency, cost efficiency and specialized adjudicator for resolving disputes. In particular cases, alternative dispute resolution is statutorily prescribed as a means of seeking remedy. For instance, in Section 7B of the Indian Telegraph Act, 1885, the determination of a dispute is mandated only through arbitration and cannot be questioned in any Court.

LOK ADALATS

The Lok Adalat system is an alternative dispute resolution which is effective in settlement of money claims and they are

given statutory status under the National Legal Services Authorities Act, 1987. It is a forum where cases in court at a pre-litigation stage are settled. It is the duty of the State to ensure justice to the citizens by maintaining all those rights which are fundamental to the existence of common man. But in today's judicial system, there exists a dearth of effective administration and access to justice, which necessitated the establishment of ADR forums.

Lok Adalats were firstly established at the village level and popularly called as 'Panchayats' which enabled it to settle disputes between two parties amicably without much hassle. Unlike courts, Lok Adalats always ensure a win-win situation where all the parties to the dispute have something to gain. There are no requirements for a lawyer and there is no requirement of a court fee. The parties are allowed to talk to the presiding officer directly. Lok Adalats are deemed to be civil courts under certain circumstances. The disputes can be brought into the Lok Adalat directly, instead of approaching the courts and then referring it to the Lok Adalats. Lok Adalats provide fast and inexpensive remedies with judicial status. Not all cases are suitable for Lok Adalats and further, the judicial system faces a gamut of pending cases which requires the reinforcement of existing ADR system.

LAWS REGARDING ADR IN INDIA

The Arbitration and Conciliation Act, 1996 as amended by the Arbitration and Conciliation (Amendment) Act, 2015 ensures fair and efficient settlement of commercial disputes by arbitration and conciliation. The Amendment aimed at improving institutional arbitration by establishing the ACI to set down standards, make the arbitration process more effective and efficient, and ensure



disposal of cases in a timely manner. The ACI has the authority to frame rules on the evaluation of institutions, the norms to be followed, checking the quality and monitoring performance, and also encourages the training of arbitrators. **In spite of many reinforcements in the composition of the Arbitration Council of India (ACI), the confidentiality of proceeding and many aspects of the same, there are still loopholes which should be looked into by the concerned officials.**

The Commercial Courts, Commercial Division and Commercial Appellate Division Of High Courts (Amendment) Act, 2018, which amended the Commercial Courts, Commercial Division and Commercial Appellate Division of High Courts Act, 2015 aimed at increasing India's rank in the *Ease of doing Business Index* and covers a wide ambit of cases relating to disputes involving 'commercial transactions'. However, the Act still has certain defects which will be dealt with in the later part of the paper.

WHY ALTERNATIVE DISPUTE RESOLUTION SYSTEM?

Why is it better to approach ADR forums than courts for enforcing contracts in the way that the parties interpreted it rather than just enforcing their rights and obligations? ADR provides a room for parties to understand each other's situation and encourage them for coming up with innovative solutions. It strives to promote effective and affordable access of justice to everyone. It provides an opportunity to work faster and in a less expensive manner than approaching the court through the neutral help of third party. An ADR system does not escalate the conflict, rather it preserves the goodwill which might

help them to have a good relationship even after an amicable settlement.

The major drawback of the traditional court system is the pendency of cases and lack of transparency. Most importantly, there is a lack of interaction between the judiciary and the public to a large extent. The formal system of court often results in marginalization of litigants whose participation in judicial proceedings is distinguished. Since litigants are deprived of legal advice, they are often seen giving vent to their emotions, opinions, perceptions, and interests when they appear in a court of law. The ADR system ensures freedom for a party to choose the method of resolution that they desire. The parties also have the freedom to choose their own arbitrators and mediators. ADR is inclined towards simple justice which demands a system of redressal of disputes. Arbitration ensures confidentiality as the proceeding takes place only with the designated party. Online arbitration has benefits of allowing parties to reduce costs and increase efficiency. Modern arbitration enables the arbitrator to provide positive outcomes.

There is a huge lack of awareness about the ADR system in India and courts should make it a point to make mandatory referrals to the available ADR methods as advocated by the Law Commission in its 129th report and by the Malimath Committee. There are various methods of ADR available which helps parties solve their disputes amicably and economically. ***"The courts of this country should not be the places where the resolution of disputes begins. They should be the places where the disputes end after alternative methods of resolving disputes"***



*have been considered and tried.*² Over time, Alternate Dispute Resolution has come to have a new meaning- ‘appropriate dispute resolution’ which suits the ADR realm in the current scenario. In light of the rapid growth of mediation, arbitration, conciliation and negotiation, there is, in fact, nothing alternative at all about ADR today.

ANOMOLIES IN THE ADR SYSTEM- IS THERE SCOPE FOR IMPROVEMENT?

Despite the existence of Lok Adalats, commercial courts and commercial appellate courts, the efficiency of the ADR system in India can yet be transformed into something better by empowering the existing ADR forums with more strength and stability and ensuring that people are aware of the same.

The Judicial Reform Index, which is an instrument to evaluate judicial independence, judicial reform and the mechanisms present or lacking in a country’s judicial system through factors like quality, education, financial resources, structural safeguards, transparency and judicial efficiency should be utilised in India. Since the JRI assessment facilitates strategic planning by categorizing problems and their solutions, the performance of our judicial bodies can be analysed so that the government can determine the changes needed in the existing system as well as the need to introduce dedicated mediation bodies and arbitration centres that cater to commercial issues.

Presently, the number of ADR bodies in India is extremely less when compared to the number of cases that courts are flooded with on a daily basis. Only when there is an increase in the number of centres catering

specifically to commercial issues there can be a constructive change in the ADR realm. In many instances, settlements are not facilitated in the best interest of the aggrieved parties due to the delaying tactics of legal practitioners for financial gains, which results in unfair outcomes for the disputants. This defeats the motive of the entire litigation process itself, thus rendering the judicial system as inutile and paralyzed.

Although substantive laws are comparatively important, the efficacy of substantive laws is contingent upon the qualitative deliverance of procedural laws. Our paper will deal with the procedural and infrastructural aspects of ADR mainly and will shed light on certain substantive provisions, and how both these areas can be improved and work hand in hand.

Indian courts are faced with a plethora of pending cases due to limited infrastructural facilities and less number of judges. Article 39A of the Constitution of India (enacted in 1976) enjoins that the State shall secure that the operation of the legal system promotes justice, on a basis of equal opportunity, and shall, in particular, provide free legal aid, by suitable legislation or schemes, to ensure that opportunities for securing justice are not denied to any citizen by reason of economic or other disabilities. Thus, easy access to justice to all sections of people and provision of legal aid for the poor and needy and dispensation of justice by an independent Judiciary within a reasonable time are the cherished goals of our Constitutional Republic and for that matter, of any progressive democracy.³

² Sandra Day O’Connor, Associate Supreme Court judge of the U.S.

³ The 238th Law Commission Report



The very purpose of alternate dispute forums is to reduce the burden on courts, but various efforts to achieve the same has been futile. The number of courts dealing with commercial matters should be increased, along with an increase in the number of judges who decide cases within a stipulated time. This not only increases the efficiency of the system but also increases the trust that people have on these dispute resolution bodies to provide speedy remedy.

The Lok Adalat system has become adversarial, leaving people more dissatisfied with it. Lines are usually long and the presence of lawyers is inconsistent. Currently, resources are scarce in the Lok Adalat system, which has reduced the number of cases heard, insufficient personnel and extensive clutter in the dispensation of cases. The forum no longer provides the swift and fair justice upon which people had come to rely, which has led to people viewing it as another arm of the formal justice system. An influx of staff, funding and facilities would allow Lok Adalats to run more effectively, making them structurally sound and increase public confidence in them. The sessions should be held on a consistent basis, participation by the parties be made compulsory and they should make greater use of technology to accelerate the entire spectrum of the process.

India is a diverse country where people speak various languages and follow different culture and traditions which varies from place to place. A legal system that does not take into consideration the particularities of each region will definitely be ineffective. Therefore, Lok Adalats should work towards incorporating the commonly used processes and characteristics of every locality in order to have a permanent effect and compel parties

to switch to Lok Adalats. At present, Lok Adalats rarely consider aboriginal customs and practices. A remedy that does not suit the needs of the party is incompetent in all respects. To ensure that the resolution does not turn out to be inappropriate, Lok Adalats should be more inclusive of the conventions prevalent in each region.

Arbitration is a private process but it is ultimately linked to the courts. An award passed by an arbitral tribunal takes plenteous time to be enforced by the courts. What is the point of having separate bodies for arbitration if their decisions are reverted to courts for sanction? However, recently with the reduction of court intervention in foreign seated arbitrations, it is anticipated that awards will be enforced in a dynamic manner and at a faster pace.

Introduction of technology in the dispute resolution field will improve the prevailing conditions and provide a better platform for the disputing parties to resolve their issues. With the aid of technology, substantial documentation can be separated and indexed properly with the appropriate parameters, thereby saving valuable time and effort. It is necessary that ADR forums utilize internet and cellular technology so that parties can be updated on the status of their case, with absolutely no requirement of their physical presence.

The implementation of the Commercial Courts Act which focused on raising India's rankings in the World Bank's *Ease of Doing Business Index* was volatile as the reforms for commercial litigation were affected. However, the Ordinance promulgated on May 3, 2018 amending the Act expanded the scope of commercial courts in India and has made positive changes, but it led to an



overlapping of jurisdiction of commercial divisions of the High Court and Commercial courts. It has not achieved the desired effect of increased efficiency in the resolution of commercial disputes. The language of the Ordinance should be modified in such a way that the pecuniary jurisdiction of the commercial divisions commences from the value which is the maximum pecuniary jurisdiction of commercial courts. Also, the State government can appoint judges of the Commercial courts without the concurrence of the Chief Justice of the High Courts. This reduces the independence of the judiciary and might suggest a biased role on the part of the selected judges while deciding matters.

Section 89 of the Civil Procedure Code, which gives the Court the power to refer the dispute for settlement to ADR bodies, was introduced with the purpose of enforcing an amicable settlement between the parties without the intervention of the court. However, even after a decade of its implementation, the provision provided for ADR under Section 89 suffers from many anomalies. The frequency with which ADR is utilized for resolution of disputes remains minute, which arises due to lack of awareness about the same or on account of the disinclination of the parties.

There is a dire need to modify Section 89 of the Civil Procedure Code which mandates that the Court shall formulate the terms of settlement and later refer it to ADR bodies. This places a significant burden on courts and defeats the purpose for which ADR forums exist as parties cannot explore their options for negotiated settlement. The Supreme Court in *Salem Advocate Bar Association, TN v. Union of India*⁴ was of the view that there

were some creases in Section 89 which could be ironed out by formulating appropriate rules and regulations for implementation.

The 238th Law Commission Report advocated for a few changes as specified in the case of *Afcons Infrastructure Ltd. v. Cherian Varkey Construction Co. Ltd.*⁵ and called for a revamp of the Section. The Commission stated that it would be unsuitable to deem a Lok Adalat as a mediator and treating the Lok Adalat Award as a mere agreement, and suggested that an appropriate course would be for the mediator to submit the terms of the settlement to the court, and after due scrutiny, can pass a decree in accordance with the compromise arrived between the parties.

In conclusion, the ADR system in India requires a few impactful changes which will go a long way in improving the existing conditions of alternate dispute resolution, especially in commercial matters. Easing the burden on formal courts is the need of the hour which the ADR system aims to achieve in a cost efficient manner, thus making it one of the most viable options for dispute resolution.

⁴ AIR 2003 SC 189

⁵ 2010 (5) AWC 5409 (SC)