



COMMENTS AND SUGGESTIONS

ON

BUSINESS ENABLING ENVIRONMENT (BEE)

PRE-CONCEPT NOTE

(08 FEBRUARY 2022)

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RESOLUTION (CADR)**

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ACKNOWLEDGEMENT

The Centre for ADR is thankful to the World Bank Group for reaching out to us and seeking our comments on their new benchmarking exercise Business Enabling Environment (BEE). We are happy to be part of the public consultation process on the pre-concept note.

The Centre for ADR would like to acknowledge the research assistance of few of the student members of the Centre [Mr. Hardik Baid, IV Year, B.A. LL.B. (Hons.), Mr. Ishaan Bhatnagar, IV Year, B. A. LL.B. (Hons.) and Ms. Labdhi Golechha, III Year, B.A. LL.B. (Hons.)] in preparing the comments/ suggestions.

GENERAL COMMENTS

1. In commercial disputes, resolution of disputes is important but prevention of escalation of disagreements into legal dispute is often more important¹. So, instead of ‘Dispute Resolution’, the name of the topic can be ‘Dispute Management & Resolution’.
2. In the choice of topics, dispute resolution is placed in the part “operating a business”. However, often times there may be issues at the time of starting of business and even at the time of closing of business. Practice of Preventive Law² by counsels can play a very important role in clearly ascertaining the rights and liabilities of the parties and prevent some of the future disputes from occurring.
3. Understanding litigation culture of any country is also very important³ as simply making changes in substantive law and creating institutions will not be sufficient.
4. The pre-concept note gives too much importance to litigation and court processes in respect of commercial dispute, whereas worldwide most of the commercial disputes are resolved by using various ADR mechanisms. So, the study may also include working and Governing Rules of the ADR institutions in any country where the research is conducted.
5. In recent times, International Mediation Convention 2018 has come into force which highlight the recent trend in favour of mediation in case of international commercial disputes. So, the study may, apart from focusing on Arbitration as ADR mechanism, also focus on mediation of commercial disputes.

¹ Bjarne Vestergaard, Erik Helvard and Aase Rieck Sørensen, ‘Conflict Resolution – Working with conflicts’ - A Report by Danish Centre for Conflict Resolution (February 2011) ISBN 978-87-992429-4-9

² Andrea Kupfer Schnieder, ‘Building a Pedagogy of Problem - Solving: Learning to Choose Among the ADR Processes’ (2000) 5 Harvard Negotiation Law Review 113

³ 253rd Report of the Law Commission of India – ‘Commercial Division and Commercial Appellate Division of High Courts and Commercial Courts Bill, 2015 (January 2015)

SPECIFIC COMMENTS

Indicators in the Area of Dispute Resolution:

a) **Quality of regulation for commercial dispute resolution**

Comment No. 1: The expert consultation should not be limited to local practitioners but may include other important stakeholders like law makers, judges, members of business community, academicians, etc. as the purpose of consultation is not just to analyze the application in practice but the quality of law also. In this way, the study may not just present the current picture but can also be something which can bring to light the shortcomings in the systems so that steps may be taken by governments to improve it.

Comment No. 2: An important indicator can be the simplicity in the language of law and the procedures of law.

Comment No. 3: The quality of regulation can also be seen in the kind of remedies provided by it. The remedies can be specifically designed to suit the nature of the commercial disputes.

Comment No. 4: The law should be able to incentivize all the parties to dispute so that people will be motivated to use law and the legal systems.

1. **In-court litigation processes**

Comment No. 5: Some other indicators can be, whether the commercial procedural law provides for specialized and fast track procedures, special rules of evidence, effective procedures for disclosure, discovery and inspection, provisions for summary judgments, effective rules for imposition of costs, etc.

Comment No. 6: An important indicator can be if the legislation provide for pre-litigation ADR mechanisms for disputes which doesn't require some urgent interim relief and effective implementation of such a mechanism.

Comment No. 7: An important indicator can be regarding finality of decision of courts i.e., the grounds of appeal, forum of appeal and number of appeals available.

Comment No. 8: Enforcement mechanism of orders, decrees and awards passed by the courts and tribunals – We would like to emphasize on this parameter of enforcement mechanism and time-line of the enforcement machinery. This indicator is intended to analyze the effectiveness and efficiency of enforcement mechanisms so that the business are not engaged in separate long-drawn proceedings of enforcing the judgements/ awards thereby reflecting the quality of the regulations for commercial disputes.

This specific indicator is also intended to cover the legislative (through regulations) and judicial (general trend in the court judgements) steps to ensure enforcement of foreign/ international judgements/ awards. A robust mechanism, statutory provided and judicially implemented, of enforcement boosts investor confidence in the economy.

Comment No. 9: Provisions for appropriate forums/ tribunals and summary procedures for specific kinds of disputes – These provisions form part of *de jure* set of indicators to assess the quality and efficiency of regulations. Having separate legislations along with creating specialized tribunals, with appropriate mechanism, expert members and specified jurisdiction, to match the scope and nature of dispute for different kinds of disputes. This ensures that the businesses can resolve their disputes in an effective and efficient manner, at the instance of special legislation and competent tribunals.

Provisions of summary procedures i.e. specified time-lines of resolving the disputes is to be looked at to analyze the quality and effectiveness of regulations for commercial disputes.

Comment No. 10: Prevalence and presence of soft law in the legal framework – Under the head of ‘quality of regulations’, we believe another parameter for analysis can be the inclusion of *soft law* prevalent in the commercial industry as well as that prevalent in the adjudication of the commercial disputes ought to be included in the legal framework as well.

The presence of soft in the formal legal framework is more significant for the alternative dispute resolution mechanisms. Additional parameter to analyze the existence of legal framework regulating arbitration, mediation, negotiation, conciliation and other forms of ADR ought to be included to indicate the quality of regulations.

b) Adequacy of public services in commercial litigation

1. Court automation and e-service

Comment No. 11: With the advent of technological advancements and shifting of the legal proceedings to the virtual space, additional enabling and protective mechanisms are required for court automation and e-services. Under the relevant head of public services in commercial litigation, additional parameter to analyze the **provisions ensuring safeguard of e-proceedings and digital files and their resilience from malwares/cyberattacks** becomes necessary to be looked into to grade the public services.

In virtual space, the e-proceedings and the digital files are at the risk of being corrupted, attacked and tampered with through cyberattacks. The proceedings are also vulnerable to third-party intrusions, adversely impacting the confidentiality of the proceedings. Therefore, the public services provided during the commercial litigations as well as during ADR proceedings, must ensure protection against such e-threats.

c) Ease of resolving a commercial dispute**1. Obstacles to justice**

Comment No. 12: Institutional pervasive incentive/ malpractices – Under the heading of ‘obstacles of justice’, it is paramount to account for institutional deterrence to access to litigation and consequently justice. This includes analyzing the delays in dates and prolonging of the cases, adversely impacting the businesses and confidence of the business community in the legal system.

Comment No. 13: Another indicator can be the user-friendliness of the judicial process.

Submitted by the Centre for ADR



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ABOUT THE CENTRE FOR ADR

The Centre for ADR is a research centre at National Law University Delhi specializing in alternative dispute resolution mechanisms. The Centre has a vision to promote the use of ADR methods among the legal and non-legal professionals, students and general public at large. The Centre envisions a society which values harmony, peaceful co-existence and diversity. The skills involved in ADR methods are not only for amicably resolving the disputes and disagreements but these are life skills which are needed for all of us. The Centre strive to contribute to the vision and mission of the National Law University Delhi of developing human beings who are technically sound, socially relevant and emotionally strong by imbibing the skills of ADR methods like active listening, understanding other's point of view, discussions, empathy, rational thinking and community interest. The Centre wishes to bring a positive change in the view of the society regarding disputes/disagreements not as something negative but as an opportunity.

Since its inception in 2018, CADR has undertaken a number of activities including conducting legal awareness programs, national consultations on government policies, webinars, diploma and short courses on arbitration, publication of its flagship Journal, CJDR, and release of quarterly digest on arbitration judgements delivered by Hon'ble Indian Courts. More details about the activities and events undertaken by the centre can be accessed [here](#).

The Centre for ADR and its members are committed to raising awareness about the Alternative Dispute Resolution Mechanisms that are well-accepted mode of settling commercial disputes both national and international. We at CADR take pride in collaborating with a wide range of institutions and independent researchers on various projects in furtherance of our objectives.



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