



# Tourism and Technology Mediated Dispute Resolution: A Legal Case Study of India

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**Abstract.** International tourism is economically important for developing countries, but contractual disputes arising between the tourists and international tour operators or domestic providers of goods and services, can affect perceptions of tourist destinations and impact tourism. This necessitates that any disputes between the tourists and the other parties be resolved expeditiously, and Alternate Dispute Resolution has the potential to be an appropriate forum for the same. This article will demonstrate that Information and Communication Technology based Alternative Dispute Resolution can act as an apposite forum for resolution of disputes in the tourism sector, while also highlighting issues that preclude effective technology-based dispute resolution, based on actual cases in India. This research uses legal analysis of statutes in India to analyse the structural, policy and legal impediments, which affect the potential of technology mediated dispute resolution to contribute to sustainable tourism. The conclusion drawn in this article is that while India has the structural legal and jurisprudential frameworks to resolve tourism disputes with the aid of technology there exist gaps in executive public policy which need to be addressed.

**Keywords:** Tourism and Law, Contractual Dispute Resolution, Information and Communication Technology, India

## 1 Introduction

The International Tourism Industry recovering after the Covid 19 Pandemic, has the potential of ushering in much needed domestic economic development in developing countries like India through transborder inflow of foreign exchange. The economic and developmental advantages of international tourism for the local communities of developing countries is pivoted upon the experiences of the visiting international tourists [1]. A pleasant and seamless experience of visit can substantially boost tourism, while negative experiences of tourists can seriously erode tourism, especially since online reviews of tourist experiences are readily accessible on the internet and play an important role in the decision making of potential tourists [2].

India, Common Law Country, is a developing economy of Asia and an important destination of international tourists in South Asia. Tourism plays an important part in the national and local economy of India, and both the Federal and provincial govern-

ments of India, actively promote International Tourism as a source of revenue [3]. An essential element for the promotion of tourism is to have a mechanism for just fair and expeditious resolution of disputes, if they arise between transborder disputants international tourists (tourists) in case of contractual disputes with local providers of goods and services (Other Party). While India has several statutes to address these disputes through the judiciary, and alternate dispute resolution (ADR), there are practical difficulties in practise even with the use of Information and Communication Technologies (ICT).

### **1.1 Legal Issue**

This article will assess the legal framework for ICT based dispute resolution between tourists and other parties in India, based on the statutory law and emerging jurisprudence. Other perspectives, and issues encountered in actual practise, will also be used to assess efficacy of the existing legal frameworks. The issues identified are drawn from the authors experience as dispute resolution professionals. The identities of the parties to the dispute will not be divulged on account of professional fiduciary obligations, however the brief facts and lessons pertinent to analysing the issues will be discussed.

## **2 Research Methodology and Structure**

### **2.1 Research Methodology**

This article aims to evaluate the contemporary statutory legal frameworks and the practical issues in implementation of ICT mediated dispute resolution in the tourism sector as emergent in India. It aims at identifying areas for reform, which will better facilitate confidence and participation in ADR in the tourism sector. This article is based on analytical legal research. In order to identify gaps in legal issues which arise, this article provides an analytical analysis between dispute resolution laws of India in letter and in practise and evaluates the socio-economic and legal frameworks in the country.

It will discuss the legal and statutory framework and issues for ICT based dispute resolution in India, and compare it with the legal problems and issues faced in practice, using the Constitutional Law, statutory laws and Jurisprudence related to ICT, Contractual dispute resolution through ADR in the tourism sector. The overarching analysis focuses on promotion of tourism and protection of the rights of both, the tourists and of business in the tourism industry.

### **2.2 Structure of the Article**

In order to achieve its objectives, this article is structured as follow. Section 2 will provide a descriptive analysis of the legal framework for protection of tourists' rights, both Constitutional and statutory, and ICT based alternative dispute resolution in

India. In this regard, the analysis will first explicate the Constitutional provisions, and thereafter critically analyse the applicable case laws and statutes related to Contracts, applicability of ICT for ADR in India. Similarly, Section 3 will analyse the practical and legal impediments encountered in implementing ICT based alternative dispute resolution in the tourism sector. Subsequently, Section 4 based on a legal analysis of the statutes and practical issues encountered in India will outline recommendations for effective resolution of disputes through ICT based ADR in India. Finally, conclusion will be given in Section 5.

### **3 India and Tourist Rights**

India has a rich cultural and natural heritage stretching back millennia, and is a major tourist destination of South Asia with more than 10.93 million Foreign Tourist Arrivals (FTA) in 2019. This number impacted by the pandemic and post pandemic air fare inflation, shrunk to 6.19 million FTA in 2022 but still contributed 4.6% of national income of the GDP [4]. Tourism is of crucial economic significance to the local economies of the major tourist destinations. As a signatory of the UNWTO, India is obligated to take all possible measures for the elimination of all forms of exploitation of tourists [5], Eliminate inequalities in travel and tourism experiences of domestic and international tourists [6], ensure tourists freedom of mobility within permitted areas [7] and to ensure that the tourists' safety, security and privacy are protected [8]. Despite this international obligation is no law has been statutorily enacted either at the Federal Parliament or the provincial legislatures to regulate and protect tourists or their interests in India.

Legally tourism can therefore be delineated as a limited permit for entry, stay, travel, and exit of a foreigner. The term "foreigner" is legally defined as "a person who is not a citizen of India" in Section 2 (a) of the Foreigners Act, 1946 [9]. While the entry, stay and exit of foreigners is regulated under Section 3 of the Foreigners Act, 1946, the statute does not distinguish between the various categories of foreigners, such as tourists, investors, employees, refugees etc. in the territory of India. There is no separate legal status other than that of a foreigner, nor any special protection available in India, to an international tourist, which for the purposes of this article means a foreigner in the territory of India for the express and sole purpose of travel and sightseeing. Tourists in India therefore are subject to the same restrictions as other categories of foreigners.

#### **3.1 Constitutional Rights of Tourists**

The Constitution of India [10], however, bestows all persons, whether citizens or foreigners with certain inalienable fundamental rights which recognises the civil status, freedoms, and economic rights as well as right to safety, liberty, and access of justice which are therefore available foreigners and tourists in India as well. The most important of these rights are enshrined in Articles 14, 21 and 32 of the Constitution of India. Article 14 specifies all persons (irrespective of nationality) are entitled to equal

protection of law, and equality before law. Article 21 mandates that no person shall be deprived of life (which has been interpreted by the Supreme Court of India to include all civil, economic, and human rights as are essential for a dignified life, not mere animal existence) or liberty, and Article 32 guarantees all persons the right to judicial remedy for any violation of their rights.

The Supreme Court of India as the interpreter and arbiter of laws in India has held that the right of a person to travel, including the right to leave and enter India, is a fundamental right under the rubric of liberty as envisaged in Article 21[11]. But even before this in 1974, the Courts of India have recognised the civil and economic rights of foreigners to be at par with those of Indian Citizens [12] and held that “A foreign national...is entitled to equality before the law and equal protection of laws guaranteed under article 14 of the Constitution” and that these laws must be “just, fair and reasonable”. Similarly, interpreting Article 32 the Indian Judiciary has held that all persons, including foreigners have a right to justice and to approach courts for violation of their rights [13]. The Supreme Court of India has imposed exemplary damages on the State and initiated criminal proceedings against State Officers in cases of the violation of right to equality, life and liberty or access to justice of foreigner’s rights guaranteed by the Constitution of India [14].

Since all foreigners have inalienable Constitutional Rights while they are in India, an international tourist also can be said to have the status of a person protected by the law and a vested right in rem against unlawful loss caused by the action of others, along with the right to approach adjudicatory forums and courts for the protection of all his rights as guaranteed to all persons within India. These rights, civil, economic, and penal are enforceable against other foreigners in India, Indian citizens, Indian juristic persons, and also against any public authority under the control of the Government of India or its provincial governments. The tourist can not only seek remedy and damages against private individuals or entities, but also Government Authorities for the action of its officials which may be construed to be deficiency in service, deterioration in quality or quantity of goods, harassment, causing pecuniary loss, mental distress, or restriction of freedom of movement within and out of India without appropriate authority.

#### **4 Statutory Framework for ICT Based ADR in India**

While, it is clear from the foregoing discussion that Constitutional law, statutory provisions and common law rights, all permit tourists to seek legal recourse for enforcement of their contractual rights in case of a dispute, it is usually practically very difficult for an international tourist to enforce his right against a domestic party in the courts of India in case a contractual dispute arises. There are various reasons for it. Firstly, since a significant proportion of international tourists visiting India, avail services of international tour operators and through legal contracts for provision of goods and services during their travels sometimes even before entering the country visited.

The number and complexity of the multifarious transborder and domestic contracts between the tourists paying for the travels on one hand, and the international tour operators and their sub-contractors or direct contractors with the tourists represent a source of disputes. Disputes can be resolved either by conventionally approaching the Courts of competent jurisdiction and obtaining decrees, referred to here as litigation, or through ADR. The necessity of unbiased and expeditious access to justice is afforded to the disputants, even after the tourist returns to his home country and the advantages of Alternative Dispute Resolution, based on Information and Communication Technology, emerges as a forum with the potential for amicable, cost effective and just dispute resolution [15]. Rapid developments in ICT, and the engagement of judicial authorities with online justice delivery especially during the Covid-19 pandemic lockdown has attested to the feasibility for use in ADR in small value transborder commercial disputes [16].

Conventional litigation in India, despite increasing use of ICT in the courts is still largely in person, requiring the attendance of the litigants at the court on many occasions and their legal representatives more often for the legal process of adjudication. Moreover, all commercial litigation proceedings in court are strictly governed by procedural law of the Code of Civil Procedure, 1908 which in itself is quite elaborate to navigate. Conversely ADR refers to legally backed mechanisms for the resolution of disputes without recourse to litigation. While there are many existing social mechanisms for resolution of commercial disputes in society, what differentiates ADR from others is that it is authorised and based on statutory law, bound by principles of natural justice and Common Law, not the Code of Civil Procedure, 1908. Since 2020, Niti Aayog, (Planning Commission) of India has been promoting ADR by use of ICT for small value commercial disputes resolution in India.

The main statutory legislation in the field of ADR in India is the Arbitration and Conciliation Act, 1996 which has been amended a number of times the most recent being the 2021 amendment [17]. A proposed law on mediation and negotiation, the Mediation Bill, 2021 is pending in the Indian Parliament. Both the Arbitration and Conciliation Act, 1996 and the Mediation Bill, 2021 are based on the UNCITRAL Model Law on Arbitration, 1985 to which India is a signatory and follows the international principles of commercial arbitration and can therefore be presumed to be universally familiar across jurisdictions. The ADR process is expected to reduce burden on courts and provide a simple and expeditious means to settle small value commercial disputes, especially transborder disputes affordably and expeditiously.

The Arbitration and Conciliation Act, 1996 has many provisions that facilitate these objectives. A dispute can be referred to ADR by an ADR clause in the agreement, by decision of the parties or by order of a court. Firstly, the (one or any odd number) ADR neutrals (conciliators, mediators, and arbitrators) are to be chosen and appointed by the disputant parties themselves. Alternatively, or in case of disagreement among the parties the appointment of neutrals to adjudicate the award the parties can delegate by agreement the appointment of neutral adjudicators to unbiased professional ADR institutions. In both cases a properly constituted and authorised ADR neutral is legally deemed to be a tribunal with the powers of a civil court to compel collection of evidence and attendance of parties and witnesses. Unilaterally appointed sole ADR

adjudicator is illegal in India. The parties, if they so choose, can represent themselves pro se, and there is no compulsion for representation by an advocate, as in conventional court proceedings. The decision of the ADR tribunal in respect of a dispute is called an “award”, is binding on the disputants, and is legally enforceable as if it were a decree of a Court of competent jurisdiction of the Republic of India. Code of Civil Procedure is not applicable to ADR proceedings. However, all tribunals must adhere mandatorily to the principles of natural justice and non-adherence vitiates the award. The award of the ADR tribunal is usually non justiciable, and can only be set aside by High Courts or the Supreme Court of India only on grounds of gross miscarriage of Justice, such as improperly constituted authority, corruption, or biased award by authority discernible at the face of it, illegal award, or non-adherence to the principles of natural justice by the dispute resolution authority. The process of appealing an award in the Superior Courts is cumbersome and expensive. The fees payable to adjudicating ADR neutrals is prescribed in the Arbitration and Conciliation Act, 1996. A number of qualified ADR professionals and ADR institutions with excellent resources and ICT enabled ADR are present in all major cities of India.

Since there is no separate law governing and regulating tourism, tourists travelling in India usually do so by entering into multiple private legal contracts for service and goods with multiple actors such as private independent contractors, or tour operators or even the Government of India or a province (for example when they board a State-owned public transport). These contracts are commercial in nature and fall under the ambit of the Indian Contracts Act, 1872 [18]. The Indian Contract Act, 1872 does not distinguish on the basis of the nationality of the parties, and therefore a tourist entering into a contract with the other party is on equal footing before the law provided that the essentials of legal contract of offer & its communication, acceptance of offer and its communication, ad idem, consideration, capacity of the contracting parties and legality of the contract are met. Once an agreement, express or implied, has been reached between the two parties, the agreement is enforceable in law. In the case of any dispute arising from the contract, or in case of breach of contract by a party to the contract, the affected party is at liberty to seek legal recourse in India.

With the rapid development of Information and Communication technology, a vast majority of contracts are contracted online and referred to as electronic contracts. Electronic contracts are recognised as legally valid under section 10A of the Information Technology Act, 2000 which specifies that contracts entered into in electronic form or electronic means are enforceable in India. Section 2 (r) of the same defines electronic form as “any information sent, generated, received/ stored in media, computer memory, magnetic, microfilm, optical, computer generated micro fiche, or similar device.” These electronic contracts are therefore legally similar in all aspects to traditional contracts with the only difference being that they have been offered and accepted through the use of Information and Communication Technology. A point to note is that the Indian Contract Act, 1872 allows contracts to be entered into across distances including international boundaries and it anticipates and presages contracts entered electronically or online between parties in different countries, which is equally applicable in the age of electronic agreements which the tourist usually contracts with other parties. Further electronic contracts are valid and admissible under section

65B of the Indian Evidence Act, 1872, which specifies that “any information in an electronic record printed on a paper or stored or recorded or copied in optical or magnetic media produced by a computer shall be deemed a document. Section 65B also states that such a document can be admissible as evidence in any proceedings without additional proof of the original.” Indian common law jurisprudence has also upheld the validity and enforceability of transborder contracts entered electronically between juristic persons of India and a foreign country [19]. Thus India has the legal, statutory and institutional framework for the resolution of disputes by the deployment of ICT.

#### **4.1 Assessment of ICT Enabled ADR in India**

Since the parties to the tourism related disputes are usually nationals of different countries, and cost of litigation, unfamiliarity of visiting tourist with domestic legal system and visa period restrictions, pecuniary jurisdictions and language may make access to justice through courts and judicial institutions difficult. Litigation in India is adversarial and even minor matters take a long time for adjudication. Further, as a Common law country, court decisions in India are based on precedent case laws which may be murky and difficult for foreigners to comprehend and navigate. The cost of litigation, through advocates, is therefore considered to be high in India. Under these circumstances ICT mediated (online) ADR in India has emerged as an appropriate forum for tourists.

The entire ICT mediated ADR is an online proceeding in digital space, with no necessity of physical presence in India of the disputants, eliminating the necessity for travel back to India by the tourist to contend his claims against the other party. In ICT enabled ADR a legally approved ADR institution or arbitral tribunal (presided by sole or multiple neutrals) in India, offers a comprehensive website interface or digital platform for the complete ADR proceedings. In the All documents are filed and stored online securely making access easy saving time and effort. While the ICT enabled ADR does reduce burden of the court, its primary purpose is to serve as a technology platform to assist disputants resolve their disputes. It not a mere platform for interaction but a legally valid forum for submission of claims and notices by complainant and disputation of claims and notices by respondent, electronic filing of all relevant documents in evidence supported by affidavits, video conferencing for oral hearings and submission of defences if necessary, expert determination of complex claims if necessary, for expeditious, efficient, cost-effective, transparent, and fair legal adjudication, and binding award which is legally enforceable in India. Advancements in digital technologies have made it increasingly possible to resolve disputes through ICT enabled ADR. Any dispute between the disputants, irrespective of nationality can be submitted for online ADR at very cost effective and efficient manner.

#### **4.2 Certain Issues with ICT Mediated ADR**

It has been noticed that awareness of tourists’ rights and ADR as a valid legal forum for adjudication for resolution of commercial disputes is almost non-existent among most tourists. Many tourists and their service providers have disputes but these dis-

putes are unresolved, leading to bitterness and bad reviews affecting tourism. Even where there is awareness of Tourists rights and ICT enabled ADR, there is a general reluctance to enter into any dispute resolution in India which in popular perception is a corrupt country. The experience of a large number of tourists has been that of attempts to scam them in India. This is a criminal offence which would fall outside the pale of ICT enabled ADR but for which recourse to criminal law must be made. However, instances of fleecing by overcharging, misrepresenting quantity, quality or nature of services or goods, deliberate misleading by natural and juristic persons of India may be amenable to ADR if a commercial contractual connection can be shown. At times disputes between the disputants are based more on ego clashes or on misunderstanding than on a point of law. A tourist seeking to sue a service provider for serving an allergen despite previous notice of allergy will succeed, but a case of a tourist filing a claim for gastro-intestinal distress from consumption of Indian cuisine may not succeed especially if no one else experienced similar effects.

India being a Common Law country emphasises legal precedent, and Indian legal professionals as neutral adjudicators are consciously and sub-consciously guided by legal precedents even though *stare decisis* is not strictly applicable in ADR proceedings. This is a fact which many tourists from civil law/ Islamic law countries may not appreciate, since in India the law as it is written in the codes may be interpreted by the courts in such a manner that its meaning is completely different from that which may be expected by a layman reading of the law without the study of its attendant and subsequent legal precedents. Language is often a barrier for tourists from countries which are not predominantly English speaking since most ADR tribunal proceedings in India as are court proceedings are conducted in English. The cost of hiring a qualified interpreter and translation costs often exceed the cost of ADR fees and sometimes even the amount in dispute. There is a lack of uniform formats of multi lingual ICT enabled ADR. The ICT mediated ADR is exclusionary towards those who are not educated or not technology savvy. Often in proceedings the erudite speaker is able to present claims much more effectively than an introvert affecting the outcome of the award.

ICT enabled ADR despite its advantages, is based on technological platforms which, no matter how secure, are susceptible to hacking and thus present confidentiality risks as well as violation of right to privacy, especially in complex and sensitive ADR being conducted online. Similarly, video conferencing does not afford the same level of engagement and fluidity in communication, and impedes the building of trust and assessment of motives of disputants by the neutrals. This lack of direct human-interaction and empathy makes the process of ICT enabled ADR quite mechanical.

## **5 Recommendation**

The use of ICT for dispute resolution represents a new paradigm of legal adjudication in India and holds promise of revolutionising access to justice beyond borders, especially of disputes involving tourists. However, there is tremendous scope for improvement. Due to the large number of tourists visiting India, the possibility of dis-



putes is quite high. International tourists may be hapless victims of unscrupulous vested interests or have unrealistic expectations or make impractical demands from tour operators/ service providers. The lack of a national or provincial legislation clearly delineating the rights of the tourists and protections available to them is a major setback as the law related to tourism dispute resolution is derived secondarily from other statutes and based on common law. Firstly, there is a need for the enactment of a legislation in accordance with India's international commitment at the UNWTO. This along with clear and unambiguous guidelines, procedures, and timelines for different stages of the dispute would go a long way in eliminating frivolous disputes. In this legislation, the rights of tourists as well as the procedure of accessing ICT enabled ADR must be included. All tour and travel operators, as well as licensed providers of goods and services to tourists on agreements must be mandated to compulsorily include a clause for ICT based ADR in all electronic and physical agreement forms. This can be further reinforced by making ICT enabled online ADR mandatory in case a tourist files a request online against any Other Party in India. Compulsory Mediation followed by Arbitration is an effective model for all ICT based ADR related to tourists.

Special training for institutional neutrals, with an emphasis on the special nature of ADR, and employment or empanelment of trained translators/ notaries public in institutional arbitration centres would facilitate access to justice for foreign tourists. Multi lingual digital interface with options for translation along with firewalls for data security for ensuring safety of confidentiality and privacy are essential.

## **6 Conclusion**

India is a major tourist destination and needs a robust institutional and legal framework for protecting the rights of tourists. The issue of disputes resolution involving tourists can be effectively addressed through ICT mediated ADR which has the potential to allow access to justice across borders while also boosting the image of India as a tourist friendly destination. While the existing framework of common law principles, and statutory laws can be deployed for ICT mediated ADR where tourists are disputants, a national legislation for recognizing and protecting rights of tourists is desirable. ICT based ADR can change the paradigm of access to justice and dispute resolution and improve India's standing as global tourist destination.

## **7 Authors' Contributors**

Authors contributions are equal in the article.

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