

Pros vs cons of alternative dispute resolution

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While alternative dispute resolution helps to achieve a speedier outcome for commercial disputes than a court process, it presents challenges in developing legal jurisprudence.



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The Constitution allows disputes to be resolved either in a fair public hearing before a court or by an independent and impartial tribunal or forum. This allows for alternative dispute resolutions (ADRs), which are an alternative to using the courts for resolving disputes in a legally recognised manner. But ADRs have certain shortcomings.

Alternative dispute resolution

ADR takes different forms, including negotiation, mediation, conciliation, and arbitration. During ADR, parties enjoy more flexibility and less formal procedures than in the courts, with the primary objective of settling a dispute on mutually agreeable terms. It also gives the disputing parties more control in the settlement process and with minimal limitation in the way they present their evidence and subsequently negotiate a settlement.

While the courts apply strictly legal procedures, the parties to ADR agree on terms and principles they deem appropriate throughout the dispute resolution process. The court process is also relatively more time-consuming and expensive, which hampers access to justice, and the backlog in finalising cases was exacerbated by the Covid-19 pandemic.

The Judge President of the Gauteng Local and Provincial Division of the High Court revived the commercial court with the objective of resolving commercial disputes faster and at less cost. The commercial court has assisted greatly in adjudicating commercial matters. However, this court has only addressed the tip of the iceberg. Many non-commercial cases continue to flood the court rolls. More interventions and alternatives are needed, and ADR is probably the most important. A recent notable development on this score is that the Minister of Justice and Correctional Services has given retired Dikgang Mosenke DCJ the task of making justice more accessible.

Problems arising in ADR

Legal experts have argued that the publication of arbitral awards in private arbitrations and ADR processes have the unintended effect of hindering the development of legal jurisprudence. This is because ADR matters bypass the courts and subsequently deprive legal jurisprudence of much-needed development. Under South African law, only judges have the legal authority to develop the common law. Arbitrators may only apply the law, not develop it, through arbitral awards.

The crux of the problem is that complex matters, that could potentially develop fundamental areas of the law, miss the opportunity to do so as a result of the rules relating to private commercial arbitrations. The potential consequence is that South African law could be stagnate in commercial law and other critical areas. Although this argument is aimed at arbitrators' awards specifically, it applies equally to the full scope of ADR.

The issue of private commercial arbitrations was raised during the recent Judicial Services Commission interviews for the next Chief Justice, when Madlanga J cautioned that the rise of private commercial arbitrations poses a significant risk to the development of our country's legal jurisprudence and our courts are deprived of an opportunity to adjudicate these matters which would also add more value to the wisdom of the bench. Although this argument has merit, the problem of the long delay in finalising matters cannot be understated.

ADR has made great strides in having matters adjudicated and resolved expeditiously. However, there is an urgent need to strike a fine balance between the two competing interests. The entire legal profession, including the judiciary, needs to find common ground on this predicament.

Conclusion

In order to ensure that ADR contributes effectively to the development of our law, it is proposed that the inherent confidentiality in arbitral awards be amended and objections to the publication of arbitral awards be disallowed, subject to the parties' consent. Arbitral awards could still be published while protecting the privacy of the parties involved. Some experts believe that arbitral awards should have persuasive authority in developing the law, as this will provide for legal development even when matters bypass ordinary court processes. However, this raises practical concerns and the potential unintended creation of a dual legal system. It will also create uncertainty in our law and undermine the doctrine of *stare decisis*.

The balanced approach should weigh the constitutional principle of access to justice and the need to resolve matters in an expedited and cost-effective manner against the necessity for privacy in some ADRs. In other jurisdictions, such as the American Arbitration Association of New York, arbitration awards are published with the identities of the parties removed. It is increasingly common to circulate versions of international awards among academic scholars and legal jurists that are active in the field. This would help to ensure that ADR matters contribute to academic work and other aspects of our law, even if they cannot assist in precedent setting.

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