EARLY NEUTRAL EVALUATION: A CASE FOR INCORPORATION AS AN ALTERNATE DISPUTE RESOLUTION MECHANISM IN INDIA

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Grave concerns have been raised regarding the slow litigation mechanism that has resulted in a considerable backlog of cases in India. This situation has significantly worsened due to the COVID-19 pandemic. Various solutions to address this problem, such as the adoption of alternative dispute resolution mechanisms like mediation, have been propagated. This article proposes the incorporation of a lesser-known Early Neutral Evaluation mechanism in the Indian adjudication mechanism. The paper highlights the modalities and nuances of the early neutral evaluation process that can assist in a swifter litigation process, saving both time and money for parties and courts. Further, the early neutral evaluation process is proposed as a compulsory mechanism before the initiation of trial proceedings for civil disputes. In arguing the aforementioned proposals, the paper analyses various legislations and court decisions from India and foreign jurisdictions. Lastly, the paper also proposes a model that entails the core features to be incorporated in an early neutral evaluation mechanism in India.

Keywords: Early Neutral Evaluation, Access to Justice, Preliminary Dispute Assessment, Code of Civil Procedure.

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I. INTRODUCTION

The Early Neutral Evaluation ('ENE') mechanism was designed by a task force set up by Chief Justice Robert F. Peckham of the federal district court of Northern District of California, USA, in 1982.[1] Justice Peckham was concerned about the rising cost and wastage of time that had become an unacceptable burden on an average litigant.[2] He feared that this burden could impair access to justice and compromise the quality of the outcome of the adjudicatory process.[3] The task force set up by him comprising experienced lawyers and judges, was tasked to address this concern regarding unnecessary cost and unnecessary time consumed in the conventional litigation process.[4] It planned to isolate and analyse the problems that generate most of the cost and delay in litigation and then determine a new procedure for attacking these problems.[5] The task force concluded that significant time and money could be saved at the 'formative stage of litigation' through direct and candid communication between the parties and inducing intellectual discipline and common sense.[6]

Consequently, ENE was conceptualised, and an experimental program was launched in the courts in 1985.[7] Upon receiving successful results, ENE was enacted as a permanent program in the Northern District of California in 1988.[8] Today, it is the most popular alternate dispute resolution ('ADR') mechanism in the Northern District, surpassing popular methods of mediation, arbitration and negotiation.[9] ENE is also used as an effective and popular ADR mechanism in countries such as the USA, the UK, Singapore and Australia.[10]

ENE is a non-binding process through which parties and counsels are provided with an opinion on the strengths and weaknesses of each party's position and the likely outcome of the case.[11] It is well known that parties often tend to exaggerate their pleadings and form an unrealistic view of their case.[12] There might also be poor communication between the parties,

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1 O. Russell Murray, *The Mediation Handbook* (Bradford Publications 2010) 156.

2 Wayne D. Brazil, Michael A. Kahn, Jeffrey P. Newman and Judith Z. Gold, 'Early Neutral Evaluation: an experimental effort to expedite dispute resolution' (1986) 69 JUDICATURE 279, 280.

3 ibid.

4 ibid.

5 Wayne D. Brazil, 'A close look at the Three Court-Sponsored ADR Programs: Why they exist, How they operate, What they deliver, and Whether they threaten Important Values' (1990) 1 UNIV. CHIC. LEGAL FOR. 303, 331.

6 Brazil (n 2).

7 Brazil (n 5).

8 ibid, 341.

9 United States District Court: Northern District of California, 'ADR Annual Reports' <https://www.cand.uscourts.gov/about/court-programs/alternative-dispute-resolution-adr/adr-annual-reports/> accessed 10 May 2021.

10 Norman Zakiyy J. T. Chow and Kamal Halili Hassan, 'Integrating Early Neutral Evaluation into Mediation of Complex Civil Cases in Malaysia' (2014) 7 J. POL. & L. 138, 139.

11 Michael Leathes, *Negotiation: Things Corporate Counsel need to know but were not Taught* (Wolters Kluwer 2017) 159 – 160.

12 Robert F. Peckham, Wayne D. Brazil, Michael A. Kahn, Jeffrey P. Newman and Judith Z. Gold in Erika S. Fine, *ADR And The Courts: A Manual for Judges and Lawyers* (Butterworth 1987) 166.

such as in cases concerning marital disputes.[13] These issues arguably lead to frivolous engagements and wastage of resources and time in the litigation process. To curb these menaces, the core idea of ENE is to provide an early, frank and thoughtful assessment that acts as a 'reality check' for the parties on their respective positions in the concerned case.[14] The assessment and the opinion is rendered by a neutral, experienced and independent evaluator appointed by the parties or the court.[15]

In this paper, we focus on examining the ENE process and its essential features and critically analyse the benefits of its mandatory application in India. Part II of the paper delineates the process of ENE in order to familiarise the readers with the less popular mechanism. Thereafter, we delve into the benefits that ENE possesses as an ADR mechanism. Herein, we highlight certain empirical data and other propositions that conclusively establish the benefits of the ENE mechanism. In Part III, we examine the clash and contemporary debate surrounding the consensual nature of ENE. We first delve into the conundrum surrounding the idea of ENE as a court process or as an ADR tool. Subsequently, we discuss the important and crucial differences between the ENE mechanism and mediation. Finally, we analyse the stage at which the ENE mechanism can be deemed compulsory.

In light of the discussion in Part III, Part IV of the paper analyses the consensual nature of the ENE process in light of Article 6 of the European Convention on Human Rights ('ECHR'), which deals with the universal and fundamental right of the parties to access the court.[16] The part proposes that the essence of the right under the aforesaid provision can only be restricted through limitations pursued through legitimate aims and proportionate means. Thereafter, we discuss the important guidelines given in the case of *Rosalba Alassini* v. *Telecom Italia SpA*, to ensure conformity of mandatory ADR mechanisms with Article 6 of the ECHR.

Part V of the paper deals with the ENE mechanism in the Indian jurisdiction. Herein, we first analyse the current practice of the mechanism in India and highlight the lack of comprehensive understanding and awareness about ENE. Thereafter, by accounting for numerous factors such as the large pendency of cases in India, we make a case for incorporating the said mechanism in the country. The last section of the paper focuses on the important advantages ENE possesses over mediation – a rapidly growing ADR mechanism in India. In Part VI, we provide a comprehensive overview of the core features of the ENE mechanism as guidelines that should necessarily be featured in an ENE model for India. These features comprise addressing the question regarding when and where to initiate the process, the procedure for ENE, the maximum permissible duration for the entire process, who can act as an evaluator, who pays for the ENE sessions, amongst various other important considerations. Lastly, Part VII of the paper offers concluding remarks.

II. CONCEPTUALISING THE ENE MECHANISM

In this part we first discuss the procedure of ENE in Part II(A). The procedure is explained in details in order to familiarise the readers with the essential features of ENE and

[13] ibid.

[14] David Levine, 'Northern District Court of California Adopts Early Neutral Evaluation to Expedite Dispute Resolution' (1989) 72 JUDICATURE 235.

[15] Jane Jenkins, *International Commercial Arbitration Law*(2nd edn, Wolters Kluwer 2013) 129.

[16] European Convention on Human Rights (September 3, 1953) ETS 5, art 6.

for a better understanding of the process. Thereafter, in Part II(B), we explore the usage and the benefits of ENE in resolving disputes.

A. THE ENE PROCEDURE

An ENE session should start 'early' in the pre-trial stage of litigation before the parties spend money and time in the utilisation of the conventional methods for the process to be most effective.[17] The creators of ENE envisioned the process to take place within one hundred and fifty days of the filing of the suit or claim.[18] This initiation of the process at an early stage is an essential feature of ENE.

Generally, at least a week before the commencement of the session, a written statement highlighting the facts, legal assertions and positions of the respective party are submitted by both sides.[19] At the beginning of the ENE session, the evaluator gives an opening statement briefly describing the purpose of the session, informing the parties about the rules of confidentiality and other conventions such as respecting each other and not interrupting or interjecting other sides.[20]

The opening statement of the evaluator is followed by a brief, informal and narrative presentation by both sides wherein they highlight their positions, claims and evidence in the case.[21] The presentation is generally done by the counsels, while the parties can also contribute at their discretion.[22] After the parties have concluded their presentations, the evaluator summarises his or her understanding of the issue, highlights the disputed facts or law and identifies common grounds of the parties.[23]

Thereafter, the evaluator enters into a private office, drafts the evaluation, which includes the likely outcome of the case and provides candid opinion on the strengths and weaknesses of the claims and defences, especially their primary arguments.[24] This evaluation is not a 'gut' reaction of the evaluator but is a careful study of all the material provided, independent research into the relevant case laws, and evaluation of the presentation and facts by the neutral evaluator.[25] Further, the evaluation does not necessarily have to be confined to the arguments raised by the parties, but the evaluator can also identify key legal or factual issues missed by the parties.[26] Moreover, no *ex parte* communication is permitted with the neutral evaluator till the evaluation is prepared.[27]

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[17] Wayne D. Brazil, *Early Neutral Evaluation* (American Bar Association 2012) 16.

[18] ibid.

[19] Jerome S. Levy and Robert C. Prather, *Texas Practice Guide: Alternative Dispute Resolution* (Lawyers Cooperative Publishing 2001) 19.

[20] Sophia Bonne and Theophile Margellos, *Mediation: Creating Value in Intellectual Property Disputes* (Wolters Kluwer 2018) 27.

[21] Albert Jan Van Den Berg, *Arbitration Advocacy in Changing Times*(Wolters Kluwer 2011) 37.

[22] David I. Levine, 'Early Neutral Evaluation: a follow-up Report' (1987) 70 JUDICATURE 236, 237.

[23] ibid.

[24] David I. Levine, 'Early Neutral Evaluation: The Second Phase' (1989) 4 J. DISP. RESOL. 1, 2.

[25] Roderick Thompson and Michael Sacksteder, 'Judicial Strategies to resolving Intellectual Property Cases without Trial: Early Neutral Evaluation' (1998) 1 J. WORLD INTELL. PROP 643, 645.

[26] ibid.

[27] Wayne D. Brazil, 'The Merits of Early Neutral Evaluation' (*JAMS ADR Blog*, 1 March 2012) <https://www.jamsadr.com/blog/2012/the-merits-of-early-neutral-evaluation> accessed 11 August 2020.

The evaluator then returns to the session room. However, before sharing his or her opinion, the evaluator gives a choice to the parties to either hear the evaluation immediately or explore settlement prospects by proceeding to mediation or negotiation.[28] If the parties pick the latter choice, the evaluator changes his or her role accordingly and acts as a mediator.[29] Thus, the chosen evaluator must be experienced and possess the required skills of a mediator. In case where the parties pick the former choice, the non-binding evaluation is presented, and the parties may choose to proceed with litigation or go for further evaluation wherein they can try for a settlement at a later stage.[30]

The evaluators are neither allowed to share the contents of the ENE session with the court nor provide any substantial or procedural opinion.[31] However, evaluators are well placed and can suggest and help parties in setting up a schedule for discovery or even recommend what motions a party must make and when to make them.[32] The ENE session generally lasts for two hours and is strictly confidential in nature.[33]

B. BENEFITS OF ENE AS AN ADR MECHANISM

The ENE process expedites the resolution process and, even upon failure of settlement, makes the litigation process cheaper. Numerous empirical studies highlight that ENE saves time and money of the parties and is also favourably viewed by lawyers. Shortly after the introduction of ENE in the 1980s, a study was conducted by David Levine, one of the pioneers of the ENE process.[34] The study was conducted on over one hundred and eighty different types of matters regarding antitrust, banking, intellectual property, civil rights, securities, and torts issues.[35] The study concluded that the process of ENE works and is effective.[36] Both the parties and the lawyers displayed confidence in the procedure of ENE. They also reported the procedure to be fair and without any bias from the evaluator and even consented to be charged for such evaluations.[37]

Joshua Rosenberg and H. Jay Folberg also conducted a four-year study of over 1700 cases that underwent the ENE process.[38] This study also included various types of cases dealing with intellectual property, contracts, fraud, and other civil matters.[39] Over two-third of the parties and lawyers who participated found the ENE session to be helpful and worth

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[28] Elizabeth A. Plapinger and Donna Stienstra, *ADR And Settlement in the Federal Courts: A Sourcebook for Judges and Lawyers* (Federal Judicial Centre 1996) 165.

[29] Wayne D. Brazil, 'Early Neutral Evaluation or Mediation – When Might ENE Delivery More Value' (2007) 14 DISP. RESOL. MAG. 10, 11.

[30] Stephen Kallipetis and Michel Ruttle, 'Better Dispute Resolution – The Development and Practice of Mediation in the United Kingdom between 1995 and 2005'in Jean-Claude Goldsmith and Arnold Ingen-Housz, *ADR In Business: Practice and Issues Across Countries and Cultures*(Wolters Kluwer 2006) 210.

[31] Keith A. Ashmus, 'Early Neutral Evaluation' (1992) 6 OHIO LAW. 16, 17.

[32] Brazil (n 17) 21.

[33] Malcolm Sher, 'Neutral Evaluation – An effective ADR Process' (*Mediate*, January 2016) <https://www.mediate.com/articles/SherM8.cfm> accessed 11 August 2020.

[34] Levine (n 24) 1.

[35] ibid, 4.

[36] ibid, 47.

[37] ibid, 47-48.

[38] Joshua D. Rosenberg and H. Jay Folberg, 'Alternative Dispute Resolution: An Empirical Analysis' (1994) 46 STAN. L. REV. 1487.

[39] ibid, 1493.

their efforts.[40] These parties reported an earlier disposition of their case and an average saving of USD 40,000 per party, including the attorney fees.[41] Half of the cases found their parties cutting costs of over ten times the cost of the ENE session.[42] Similar support and findings about the ENE process were shown in a study James S. Kakalik et. al in over six districts.[43]

Ever the most recent Annual Report, 2019, of the District Court of the Northern District of California shows that over 92% of the participant in the ENE process were satisfied and content with the process and indicated to utilise it again in the future.[44] 94% of the participants found the process to be fair, whereas over 88% viewed that the benefits of the ENE process outweighed the costs of the programme.[45] Therefore, there is a strong empirical backing to the assertion that the ENE process makes litigation cost-effective and saves time of both the parties and the lawyers, resulting in better adjudication of the dispute.

Another benefit of the ENE process is that it makes the parties confront their case systematically while contributing significantly to the understanding of their issues, and it also provides a more efficient communication channel. It provides the litigants with an opportunity to feel included in the resolution process and also to explore various settlement prospects. Further, it provides an opportunity to meet the adversary face-to-face in front of a neutral third party that has experience in the subject matter of the dispute. ENE furnishes a fresh analysis of evidence and law.[46] This is due to the fact that such an analysis is presented from a neutral third party's perspective. Thus, it widens the scope of considerations for the parties and provides a holistic analysis of the case. Further, the evaluator, through their assessment, narrows down the dispute and streamlines the process of identifying the core issues between the parties. Furthermore, ENE also assists the parties to maintain a certain level of privacy about their case and the details involved.[47] By avoiding trial, especially in family-related issues, the parties avoid sensitive information from being displayed in the public forum.

Moreover, ENE also assists the lawyers in situations where they face difficulty in convincing the clients regarding the reality and weakness of their cases.[48] In the same light, the clients also get an opportunity to monitor the decisions of the lawyers. This monitoring can be necessary since often lawyers fail to view the case from both sides and their view are not completely neutral.[49] Thus, it makes the opinion of the evaluator significantly valuable. Such measures are primarily important since frequently, the litigants, as well as the lawyers, face difficulty in realistically viewing their situation in the beginning of a law suit.[50]

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[40] ibid, 1496.

[41] ibid.

[42] ibid, 1497.

[43] James Kakalik et. al, 'Just, Speedy, and Inexpensive? An Evaluation of Judicial Case Management under the Civil Justice Reform Act' (1997) 49 ALA. L. REV. 1, 20.

[44] Northern District of California, 'ADR Program Report: Fiscal Year 2019' (*US Courts*, 30 September 2019) <https://cand.uscourts.gov/wp-content/uploads/2020/02/ADR-Annual-Report-2019.pdf> accessed 10 May 2021.

[45] ibid.

[46] Brazil (n 17) 13 – 14.

[47] Robert F. Cochran, 'Educating Clients on ADR Alternatives' (2002) 25(52) LOS ANGELES LAWYER 52.

[48] Brazil (n 2) 283.

[49] Levine (n 14) 237.

[50] Brazil (n 2).

Sometimes the lawyers can face difficulty in forming a coherent theory and strategy for the concerned case. Lawyers and litigants may be so occupied by other activities such that the only way to bring them to systematically analyse their own case is through external help. Moreover, the written pleadings often exaggerate the magnitude of the disputes. Even for tactical purposes and to preserve options, parties often tend to assert multiple claims and defences, which makes it difficult to locate the crux of the issue. Therefore, ENE can function in such scenarios to find the realistic and core issues and to streamline the claims of the parties. The lawyers are also benefitted since ENE assists them in a better case management and satisfying cost-conscious clients.[51]

However, it is important to remember that the primary purpose, aim and focus of the ENE process is to expedite the dispute resolution process and not to facilitate a settlement between them, though the process can lead to a settlement.[52] Based on the aforementioned goal, a broad distinction can be created between ENE and mediation since the latter focuses on creative solutions and settlement of a dispute while the former focuses on informing the parties about the likely court outcome of the case and the position of the parties.[53] Further, a mediator in a mediation process is not expected to be an expert in the subject matter of the dispute or expected to render legal advice about the likely outcome of the case in a litigation process.[54] These distinctions between mediation and ENE are more substantively discussed in the next part.

Similarly, ENE is different from arbitration, wherein the counsels present their case before an arbitrator who renders an award on the issues. Arbitration is, in fact, opined to be more similar to litigation except for facilitating a more relaxed atmosphere.[55] Thus, unlike the process of ENE, arbitration does not focus on providing parties with a realistic view of their respective cases, but is instead focused on arriving at a binding decision. Negotiation is also altogether substantially different from ENE since it does not involve a neutral third party evaluator and instead consists of a direct discussion between parties and their respective lawyers.[56]

III. ENE AND CONSENT – ANALYSING THE HALSEY-LOMAX CLASH

A contemporary debate which embroils the ENE framework is the aspect of consent involved in the process.[57] Essentially, in order to proceed for an ENE, the question of the necessity to obtain the consent of both parties, versus, the ability of the court to mandate this process, remains contentious.

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[51] Ashmus (n 31) 33.

[52] Brazil (n 2) 284.

[53] Jordan Leigh Santeramo, 'Early Neutral Evaluation in Divorce Cases' (2004) 42 FAM. CT. REV. 321, 326.

[54] John W. Cooley, 'Arbitration vs. Mediation – Explaining the Difference' (1986) 69 JUDICATURE 263.

[55] R. Clayton Allen, 'Arbitration: Advantages and Disadvantages' (*Allen and Allen*) <https://www.allenandallen.com/arbitration-advantages-and-disadvantages/> accessed 28 April 2021.

[56] Harvard Law School, 'What is the Negotiation Process?' (*Harvard Law*) <https://www.pon.harvard.edu/tag/negotiation-process/> accessed 28 April 2021.

[57] Herbert Smith Freehills, 'Post Lomax v Lomax : Two Recent Judgments Relating to ADR and the Courts' (*Herbert Smith Freehills*, 23 March 2020) <https://hsfnotes.com/adr/2020/03/23/post-lomax-v-lomax-two-recent-judgments-relating-to-adr-and-the-courts/> accessed 3 May 2021.

The American Bar Association stipulates that there are two ways by which this process can be triggered. *First*, by virtue of a written agreement or a contract between the parties. *Second*, by way of mutual consent.[58] In a similar vein, the Draft Guidelines for Neutral Evaluation, under the New Vienna Mediation Rules, 2016 ('Draft NE Guidelines'), contemplate that the ENE process may be instituted if it is requested-for by all parties to the dispute, jointly.[59] It further provides that if a party withdraws consent after the institution of the ENE, the process shall terminate with immediate effect.[60] Therefore, adequate support for the entirely consensual nature of ENE is observed — where consent is required to proceed to ENE, must contemporaneously prevail with the proceedings and is also required to hear the evaluation.[61]

The rationale supporting this school of thought may be traced to the decision of the English and Wales Court of Appeal in *Halsey* v. *Milton Keynes* ('*Halsey*').[62] Here, the court ordered the parties to take part in mediation to resolve the dispute. However, this order was refused by one of the parties. Accordingly, the question to be determined was whether costs may be imposed on the reluctant party — linking to the question of the interplay between ADR mechanisms and the requirement of party consent. In addressing this concern, the court drew a distinction between the role of the court in encouraging ADR mechanisms as against mandating such processes. Essentially, it held:

> "*It is one thing to encourage the parties to agree to mediation, even to encourage them in the strongest terms. It is another to order them to do so. It seems to us that to oblige truly unwilling parties to refer their disputes to mediation would be to impose an unacceptable obstruction on their right of access to the court*."[63]

Accordingly, the court believed that compelling parties to enter into mediation would constrain their right to access court, enshrined under Article 6 of the ECHR.[64] The court also stipulated that such a mandate would defeat the purpose behind ADR mechanisms itself, which are rooted in consent — adding to the costs borne by parties and time taken for adjudication.[65] Accordingly, it held that it was not within the court's power to compel mediation and impose costs on the refusing party.

However, the recent decision by the same forum in *Lomax* v. *Lomax* ('*Lomax*') directly contradicts this discourse, specifically in light of the ENE framework.[66] The primary question before the court pertained to the inheritance rights of a widow under the

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[58] American Bar Association, 'Early Neutral Evaluation: Getting an Expert's Assessment' (*American Bar Association*) <https://www.adr.org/sites/default/files/document_repository/Early_Neutral_Evaluation.pdf> accessed 3 May 2021.

[59] Alice Fremuth-Wolf and Anne-Karin Grill, *Austrian Yearbook on International Arbitration 2016* (Christian Klauseggar and Peter Klein, January 2016) 192.

[60] ibid.

[61] Van Den Berg, *International Dispute Resolution: Towards an International Arbitration Culture* (ME Schneider, Kluwer Law International, 1998) 76; Klaus Peter Berger and J. Ole Jensen, 'The Arbitrator's Mandate to Facilitate Settlement' (2017) 2017 International Commercial Arbitration Review 71.

[62] *Halsey v Milton Keynes General NHS Trust* [2004] EWCA Civ. 576.

[63] ibid para 9.

[64] *Deweer v Belgium* [1980] 2 EHRR 439 para 49; ibid para 9.

[65] Halsey (n 62) para 10.

[66] *Lomax v Lomax* [2019] EWCA Civ. 1467.

Inheritance (Provision for Family and Dependants) Act, 1975. The court's suggestion for the parties, under Rule 3.1(2)(m) of the Civil Procedure Rules, 1998 ('CPR'), to first proceed to neutral evaluation, was met with the objection of one side. Therefore, akin to the *Halsey* decision, the ability of the court to mandate such a process, in the absence of agreement by either of the parties, remained contentious. The court answered this question in the affirmative by referring to the bare text of Rule 3.1(2)(m) of the CPR Rules — highlighting that it gives the court the power to take any step to ensure effective case management.[67] Therefore, since it does not expressly provide for the requirement of consent of both parties, such must not be read into the provision.

The court thereafter directly addressed the *Halsey* decision and its applicability to the present instance in three broad prongs. *First*, the requirement of consent may be considered inconsequential since ENE is envisaged as a part of the process of the court, under Rule 3.1(2)(m), rather than a distinct ADR mechanism.[68] Borrowing from this understanding, it held that *second*, the *Halsey* decision would be inapplicable since it related to mediation and not ENE as a part of the court's process, as was the present instance.[69]*Third*, addressing the question of Article 6, ECHR, the court believed that even if there may be coercion to enter the ENE process, there is no mandate to hear or agree to the evaluation. ENE does not prejudice a party's right to approach courts after the termination of the process. Accordingly, a compulsion to take part in an ENE does not vitiate a party's right to access court.[70]

Since these prongs form an essential limb of the ENE-ADR-consent debate, they are elucidated upon hereunder.

A. ENE — AN ADR TOOL OR A PART OF THE COURT'S PROCESS

The *dictum* in the *Lomax* decision stipulated that ENE, in the concerned instance, was a part of the court's process — vitiating the requirement for consent.[71] Accordingly, it may be interpreted that the court did not view ENE as a separate ADR tool, consent to which would then form an essential bedrock. Rather, association with the court's process brought the dispute within the complete purview of the court's powers, eliminating the perquisites essential for instituting ADR.

However, this approach of the court is fallacious. Such a conclusion may be reached by referring to the early stages of the introduction of the ENE process. Essentially, ENE was envisaged by its developers to reduce the burden and costs associated with conventional litigation.[72] Therefore, to subject parties to a reality check, it was meant to be deployed "*in the early stages of the litigation process*".[73] This purported time frame, within which an ENE may be instituted, is further substantiated by the holding in *PGF II SA* v. *OMFS Co. Ltd.* ('PGF decision').[74] Here, it was stipulated that an ENE may be "*provided*

[67] ibid para 30.
[68] ibid para 25.
[69] ibid para 25.
[70] ibid para 26.
[71] ibid para 30.
[72] Sophia Bonne (n 20) 26.
[73] ibid.
[74] *PGF II SA v OMFS Co. Ltd.* [2013] EWCA Civ. 1288.

cheaply by the court".[75] Therefore, traditionally as well as judicially, akin to the *Halsey* decision, ENE has been considered to be a part of the process of the court.

However, such association does not prevent the ENE process from being an ADR mechanism. Accordingly, requirements such as party consent, which are inherently fundamental to ADR, do not stand vitiated on this basis. In the PGF decision itself, the court clarified that that even if an ENE may be instituted at the concerned stage, *i.e.* despite the association of ENE with the court's process, "*it is another form of ADR*".[76] Such was also the opinion of the early ENE developers.[77] In fact, ENE is often considered to be a 'consensual ADR method', where a neutral third party assists the parties of the dispute to comprehend their case better,[78] irrespective of its time of institution.

Therefore, this justification of the *Lomax* decision, for allowing mandatory ENE, is disagreed with in this article, since ENE is merely an ADR process that precedes litigation. Its association with the court must not vitiate fundamental principles such as mutual consent.

However, it is noteworthy that the stage at which the requirements of consent may be fulfilled may differ, which shall be elaborated upon in the succeeding segments of this article.

B. ENE V. MEDIATION – CHALKING OUT THE DIFFERENCES

ENE and mediation may appear to be deceptively similar, since both employ a neutral third-party — termed an evaluator and mediator respectively.[79] However, while the primary function of a mediator is to facilitate the parties in reaching a settlement,[80] that of an evaluator is to merely provide the parties with a realistic view of their case.[81] Therefore, distinctions prevail between the two forms of ADR. Given that the *Halsey* decision related solely to mediation, its applicability to ENE was questioned in the *Lomax* decision.[82] Resultantly, it is pertinent to highlight such differences.

First, the differing roles of a mediator and an evaluator may have an impact on the assessment made by the two individuals. The role of an evaluator is to ease the litigation process by helping the parties determine the focal points of the case at hand.[83] Therefore, it helps to centre the submissions of the parties to ensure an efficient allocation of resources on relevant matters.[84] Additionally, it also gives a preliminary analysis of the submissions

[75] ibid.
[76] ibid.
[77] Brazil (n 2); PGF II SA (n 74).
[78] Lucy V. Katz, 'Compulsory Alternative Dispute Resolution and Voluntarism: Two-Headed Monster or Two Heads of the Same Coin? (1993) 1993 Journal of Dispute Resolution 1.
[79] Brazil (n 29) 11.
[80] Norman Zakiyy (n 10); World Intellectual Property Organisation, 'What is Mediation?' (*World Intellectual Property Organisation*) <https://www.wipo.int/amc/en/mediation/what-mediation.html#> accessed 3 May 2021.
[81] Ashurst, 'Early Neutral Evaluation' (*Ashurst*, 19 June 2019) <https://www.ashurst.com/en/news-and-insights/legal-updates/early-neutral-evaluation/> accessed 3 May 2021.
[82] Lomax (n 66) para 25.
[83] William Hogg, 'Early Neutral Evaluation vs. Mediation: What's the Difference?' (*Laurus UK*, 22 October 2020) <https://lauruslaw.co.uk/insights/early-neutral-evaluation-vs-mediation-whats-the-difference> accessed 3 May 2021.
[84] ibid.

and defences of both parties, highlighting the likely outcome of the case. This helps the parties to draw from the experience of the evaluator and subdue any unrealistic expectations that the parties may have.[85] Accordingly, the aim of an ENE process is to give a 'true assessment' of the case, devoid of prejudice. On the other hand, a mediation is focused towards reaching a settlement.[86] Therefore, the primary focus in this mechanism is towards the dynamics shared between the parties, facilitating the same to reach a middle ground.[87] Therefore, the focus is more on human behaviour — easing out the accommodation of varied interests, instead of evaluating the technical fragments of the law at hand.

Second, the success of an ADR mechanism depends, not only on the capability of the neutral party, but also the accommodative nature of the parties concerned. If there is lack of confidence in the neutral party, the process itself may be rendered infructuous. Accordingly, it is essential to highlight that owing to the afore-mentioned distinction, the parties' faith on the assessment of the neutral third-party may differ in the two mechanisms. Since the ENE process is directed at receiving a true assessment, the fear that the evaluator may overstate or undermine the value of certain information stands considerably reduced.[88] Contrastingly, in a mediation, owing to the primary aim of settlement and the need to facilitate accommodation between the concerned parties, concerns that the mediator may overlook essential facts to placate the situation may persist.[89] Such concerns would resultantly undermine the reliability of the process in the eyes of the parties. This perception may also be influenced by the concept of private caucuses, *i.e.* private, ex-parte sessions with the neutral party. Since such sessions are permitted in mediation but not ENE,[90] Therefore, parties may be concerned that they do not have complete access to the substantive views of the mediator, as opposed to an evaluator.[91]

Fourth, ADR mechanisms are often encouraged due to their ability to preserve long-term business interests. The facilitative and reconciliatory nature of a mediation aids in achieving this end.[92] However, the assessment in an ENE often presents a 'winner' between the two parties, as a likely outcome of the dispute. On the basis of such adjudication, the chances of preserving an amicable relationship may stand considerably reduced, especially in sensitive cases like family disputes.[93]

Therefore, considerable differences persist between ENE and mediation, rightly making the applicability of the *Halseydictum* to the *Lomax* decision, questionable. However, notwithstanding this stipulation, ENE continues to fall within the ADR framework, with party consent, thus, playing a relevant role. Therefore, does court mandated ENE erode such consent?

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[85] *Seals and Anor v Williams* [2015] EWHC 1829 (Ch) para 3; Douglas Houston, 'Is Early Neutral Evaluation the Start of a New Way of Resolving Probate Disputes' (2016) 2016 Elder Law Journal 95.

[86] Norman Zakiyy (n 10).

[87] Brazil (n 29) 12.

[88] Brazil (n 29) 13.

[89] Brazil (n 29) 13.

[90] Malcolm Sher, Nathan Witkin, Joe Hilberman, Michael D. Marcus and James A. Steele, 'Other Forms of Dispute Resolution' (2015) 2015 GP Solo Dispute Resolution 58.

[91] ibid.

[92] Shane Coons, 'Mediation Can Play a Role in Preserving Long-Term Business Relationships' (*Shane E. Coons*, 11 January 2018) <http://shanecoonslaw.com/mediation-can-play-role-preserving-long-term-business-relationships/> accessed 3 May 2021.

[93] Sophia Bonne (n 20) 18; William Hogg (n 83).

C. COMPULSION – PERMISSIBLE AT WHAT STAGE?

The court in *Halsey* believed that compulsion to enter into an ADR process, like mediation, would defeat the purpose of the dispute resolution mechanism itself.[94] However, *Lomax* introduced a two-fold distinction in the stages of the process. It held that there is a difference between the parties entering the ENE process and the parties agreeing to hear the final evaluation. Addressing the consent debate, the court held — while there may be coercion to enter the process, there may not be coercion to hear the evaluation/settle (in the case of mediation).[95] Therefore, as long as the latter condition is satisfied, the requirement of consent is fulfilled.

Support for this view may be sought by referring to 'Court ADR', *i.e.* a system where courts deploy ADR mechanisms for efficient case management, preservation of party relations such as in the case of family disputes, etc.[96] Here, there may be 'voluntary ADR', where the court plays a suggestive role or 'mandatory ADR', where the requirement to proceed to ADR mechanisms is an order upon the parties.[97] Interestingly, the latter form is justified by presenting a stance similar to the *Lomax* decision. Essentially, while the parties must compulsorily enter the proceedings, there is no compulsion to agree with the final outcome. For instance, in cases of 'mandatory mediation', the parties are not bound by the decision of the mediator. Therefore, there is "*coercion into the process of mediation, but not coercion within mediation*".[98]

In the specific context of ENE, scholarship often stipulates that party consent must be obtained before the preliminary views of the evaluator are provided.[99] However, the same is not mentioned for proceeding to the ENE process itself.[100] Therefore, there is wide-scale recognition of the *Lomax* distinction. As long as the outcome is voluntary in nature, compulsion into the process does not vitiate requirements of consent.

In a similar vein, it is noteworthy that the *Halsey* decision stipulated that coercion to enter into mediation, or an ADR mechanism in general, restrains a party's right to access court under Article 6 of the ECHR.[101] Contradicting this concern, the court in *Lomax* held that on the conclusion of the ENE process, parties have a right to refuse the evaluation. Additionally, as is the case with failed mediation, the parties also have the right to proceed to courts.[102] Therefore, the choice to proceed to courts does not stand precluded, safeguarding Article 6, ECHR rights.

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[94] Halsey (n 62) para 10.

[95] Lomax (n 66) para 26.

[96] Brazil, 'Should Court-Sponsored ADR Survive?' (2006) 21 Ohio State Journal of Dispute Resolution 241; Resolution Systems Institute, *How do Courts use ADR?* (*Resolution Systems Institute*) <https://www.aboutrsi.org/resource-center/how-do-courts-use-adr> accessed 3 May 2021.

[97] Resolution Systems Institute (n 97).

[98] Alan Limbury, 'Compulsory Mediation — The Australian Experience' (*Kluwer Mediation Blog*, 22 October 2018) <http://mediationblog.kluwerarbitration.com/2018/10/22/compulsory-mediation-australian-experience/> accessed 3 May 2021; CIArb, 'Mandatory Mediation in India — A Boon or a Bane to the Legal System in the Country?' (*CIArb Features*, 30 April 2019) <https://www.ciarb.org/resources/features/mandatory-mediation-in-india-a-boon-or-a-bane-to-the-legal-system-in-the-country/> accessed 3 May 2021.

[99] Klaus (n 61).

[100] Ibid.

[101] Halsey (n 62) para 9.

[102] Lomax (n 66) para 26.

In this context, it is observed that nuances of the right to access court have been overlooked by both decisions. However, since the provision enshrines a fundamental human right,[103] it affords detailed consideration, undertaken in the next segment.

IV. COURT MANDATED ENE AND ARTICLE 6 OF THE ECHR

Article 6 of the ECHR is an internationally recognised fundamental provision which enshrines the right to a fair trial.[104] It encompasses a civil and criminal limb, of which the former is relevant for the present discussion. Essentially, Article 6 provides that all claims, relating to civil rights and obligations, may be brought before a court, as a matter of right.[105] Resultantly, the 'right to court' encompasses within its ambit, the 'right to access to justice', which preserves one's right to institute proceedings before a court of law. In the case *Golder* v. *United Kingdom*,[106] the Plenary Court of the European Court of Human Rights held that in a civil matter, a rule of law cannot be conceived if the 'right to access court' is divorced from the legal framework.[107] On this understanding, the *Lomax* decision held that since the parties which are directed to an ENE, in any case, have an option to proceed to court thereafter, their right to court does not stand impaired.[108]

It is seen that the *Lomax* decision addressed the question pertaining to Article 6 on a preliminary basis. What must be noted is that the right to access court is not absolute in nature.[109] Instead, this right may be subject to limitations, such as the re-direction to the ENE mechanism in the present instance. However, in order to impose such limitations, certain qualifications must be met — the essence of the right must not be impaired[110] and the limitation must be legitimate and proportional.[111] Therefore, it is only if the court ordered ENE mechanism satisfies such qualifications, can it be termed to be in compliance with Article 6 rights.

A. ESSENCE OF THE RIGHT MUST NOT BE IMPAIRED

The protection of the essence of a right may be understood in different ways. For instance, in *Philis* v. *Greece*,[112] the applicant was owed fees from his or her client and resultantly, sought for payment. However, the applicant was barred from instituting proceedings. Accordingly, the court held that the very essence of the right, i.e. the right to access court, was impaired.[113] Similarly, in *Ashingdane* v. *The United Kingdom*,[114] a suit was

[103] JJ Fawcett, 'Impact of Article 6(1) of the ECHR on International Private Law' (2007) 56 The International and Comparative Law Quarterly 1; UK Human Rights Blog, 'Article 6 | Right to a Fair Trial' (*UK Human Rights Blog*) <https://ukhumanrightsblog.com/incorporated-rights/articles-index/article-6-of-the-echr/> accessed 3 May 2021.

[104] ibid.

[105] European Convention on Human Rights, 1950, art 6(1).

[106] Application no. 4451/70 *Golder v United Kingdom* [1975].

[107] ibid para 34.

[108] Lomax (n 66) para 26.

[109] European Court of Human Rights, *Guide on Article 6 of the Convention — Right to a Fair Trial (Civil Limb)* (2019) 26.

[110] ibid.

[111] ibid.

[112] Application no. 12750/87 *Philis v Greece* [1991].

[113] ibid para 65.

instituted under the Mental Health Act, 1959 ('the 1959 Act'). Section 141 limited a person's liability for actions done in pursuance of the 1959 Act, except in cases of bad faith or lack of reasonable care. This provision was challenged as restricting an individual's right to access court under Article 6 of the ECHR. In addressing this question, the court held that the restriction merely limited the liability of the authorities. Since the entirety of the liability was not obviated, the applicant could still proceed to court on the basis of negligent action or that undertaken in bad faith. Resultantly, the claim of an Article 6 violation cannot be maintained.[115] It can thus be observed that the 'right' whose 'essence' is sought to be protected, has often been interpreted as the right to institute proceedings before the court of law.

However, the 'right' also relates to the substantive right of the party arising from the merits of the dispute. Here, the limitation imposed must not be such that the proper administration of justice is hindered and a party in unable to effectively have their merits adjudicated upon before a competent court of law.[116] Essentially, the very substance of the right, which is sought to be protected, must not stand altered. For instance, if one's property is being illegally demolished, one has the right to proceed to court for the grant of an injunction. Now, if due to procedural obstacles, the interim order is delayed, the building would already stand demolished.[117] Therefore, the 'right' whose 'essence' is impaired, in this instance, is the right to temporarily prevent demolition by way of an injunction and not the right to proceed to court itself.

Notably, the court ordered ENE framework, when viewed from this perspective, varies with respect to the nature of the dispute. In intellectual property disputes, discovery of information such as prior publication, access to data, consumer response, etc. is fundamental for the determination of any case related to patent, trademark, copyright, etc.[118] Prior to the ENE process, a claimant for a copyright may be convinced that the original work and infringing work display points of similarity. However, it is only after the institution of the ENE that s/he may realise that the likelihood of proving access to the work, to prove the infringement claim, may be remote.[119] While in conventional litigation, this factum might be discovered late into the proceedings where it may become difficult for the claimant to alter their submissions, the ENE process helps to provide an early reality check.[120] Therefore, it acts as a stimulant to the effective adjudication of intellectual property disputes by permitting the parties to fully see the elements of the claims and defences and analyse accordingly.

Similarly, court ordered ENE is often considered suitable for evaluating family disputes. Such disputes, especially those relating to child custody and divorce, are exceedingly emotional in nature.[121] In the face of such emotions, it is common for parties to have unrealistic expectations from their case and overlook relevant matters of contention.[122]

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[114] Application no. 8225/78 *Ashingdane v United Kingdom* [1985].

[115] ibid para 57.

[116] Guide to Article 6 (n 109) 23.

[117] *Seema Arshad Zaheer and Ors. v Municipal Corporation of Mumbai and Ors*. (2006) 5 SCC 282 para 30.

[118] Thompson (n 25) 643.

[119] ibid.

[120] Sophia Bonne (n 20).

[121] Christel A. Croxen, 'Early Neutral Evaluation (ENE): What is it? How does it work?' (*GJESDAHL Law*, 17 April 2020) < https://gjesdahllaw.com/blog/early-neutral-evaluation-defined/> accessed 13 May 2021.

[122] Santeramo (n 53) 321.

Since issues of family law often involve compromises, proceeding to ENE may help the parties realistically understand the case better and put forth sharp and relevant submissions.[123] Additionally, family disputes are also personal in nature, where sensitive information is often required to be divulged before courts of law. However, parties may often encompass public interests which they may want to protect, such as clientele, public perception, etc.[124] Therefore, ENE, being a confidential process, aids the parties to put forth information, which they may otherwise be reluctant to share in court and thus, aids a holistic understanding of the dispute.

Therefore, ENE may be seen to not only protect but in fact, facilitate the essence of substantive rights sought, in the instances mentioned above. However, not all disputes suit the ENE framework. Within the realm of family disputes, those relating to family violence are often considered unsuitable for the ENE framework since factors such as intimidation and power imbalances may prevent a party from meaningfully participating in the process.[125]Therefore, ordering an ENE in such instances may only lead to procedural delays without effectively contributing to the litigation process. Similarly, in large and complex disputes, an evaluator may take considerable time and effort to go through the case file and hear the evidence of both parties.[126] A realistic evaluation, which is the primary agenda of the ENE framework, may also not be possible in such cases without hearing factual witnesses, which would come up only in trial.[127] Therefore, the ENE framework proves ineffective in such instances and defeats the essence of the rights of parties.

Accordingly, in order to determine whether ENE would safeguard the essence of the right sought in a particular case, factors such as nature of the dispute, power dynamics between parties, confidentiality requirements, complexity of the case, etc. may be considered. However, it is ultimately a case-to-case determination, which was failed to be considered by the *Lomax* decision.

B. LEGITIMATE AIM SOUGHT THROUGH PROPORTIONAL MEANS

Along with the essence of right consideration, limitations to one's right to access court will be in conformity with Article 6 of the ECHR only if a legitimate aim is pursued by way of the limitations, i.e. the restrictions must not be arbitrarily imposed.[128] Additionally, the relationship between the means employed and the aim sought to be achieved must be proportional,[129] as discussed hereunder.

1. Legitimate Aim

In the case *Naït–Liman* v. *Switzerland* before the Grand Chamber of the European Court of Human Rights, the applicant was barred from accessing the courts of Switzerland,

[123] ibid.

[124]Christel A. Croxen (n 121).

[125] Erin Shaw, *Exploring Early Neutral Evaluation in Family Cases* (Law Foundation of British Columbia) 18.

[126] Van Den Berg (n 61) 75.

[127] Catherine Mathews, 'Alternative Dispute Resolution — What is Early Neutral Evaluation?' (*Stephens Scown*, 22 September 2020) <https://www.stephens-scown.co.uk/family/alternatives-to-court/coronavirus-alternative-dispute-resolution-adr-early-neutral-evaluation/> accessed 13 May 2021.

[128] Guide to Article 6 (n 109) 23.

[129] Guide to Article 6 (n 109) 23.

since the cause of action arose in Tunisia.[130] Accordingly, a contention with respect to the violation of the applicant's right to access court was raised. Negating this, the court held that in order to impose restrictions on an individual's Article 6 rights, a legitimate aim must be sought to be achieved — such as ensuring proper administration of justice, efficiency of proceedings, etc.[131] In the instant case, allowing the Swiss courts to proceed with jurisdiction would have posed problems with respect to collection of evidence, enforcement of the decision and restraining domestic resources. Therefore, since the effectiveness as well as efficiency of such a decision would be rendered nugatory, a legitimate aim was sought to be achieved by excluding the jurisdiction of Swiss courts.[132]

Along the lines of ensuring efficiency and effectiveness, the legitimacy of the purpose of ordering for an ENE, before proceeding to conventional litigation, may be observed. As has been highlighted in the preceding segments of this article, the primary agenda behind the ENE mechanism is to ease the litigation process.[133] Parties, such as in family disputes, due to the sensitivity and emotional nature of the matter or in intellectual property disputes, due to lack of information, may often have unrealistic views of their case.[134] Here, if litigation is directly pursued, a lot of time may be spent on attempting to focus the case on relevant matters and directing the submissions of the parties towards the same, thereby delaying the final adjudicatory process. However, if such litigation is preceded by an ENE, the parties would be better placed to determine the focal points of the case early in the process, and tailor their submissions accordingly. Therefore, it helps subdue unrealistic expectations, opens considerations of settlement and in any case, eases out the litigation process by ensuring focused and relevant submissions.[135]

This factum may be illustrated by referring to a commercial ADR instance in Europe.[136] Here, there was a dispute with respect to the legal interpretation of a contract, entered into between a supplier and a joint venture partner of a construction syndicate. Due to the urgency of the matter, the parties sought for an ENE. Notably, while conventional litigation would have taken a minimum of eighteen months to two years, the ENE framework helped determine the case in merely four months. Recognising the benefits of an ENE process, the parties in fact stated:

> "*Merely getting an answer concerning disputed points in law is not worth five years' time in order to obtain a court ruling which would most probably not have come to completely different rules than the neutral evaluator*."[137]

Therefore, it is well settled that the ENE framework, whether court ordered or completely voluntary, aids in the efficient utilisation of sources, ensures better case management, effectively realises the rights of the parties by presenting relevant submissions, etc. Therefore, by directing parties to an ENE before conventional litigation, a legitimate aim is sought to be achieved.

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[130] Application no. 51357/07 *Naït-Liman v Switzerland.*

[131] ibid para 160.

[132] ibid para 122.

[133] Sophia Bonne (n 20) 26.

[134] Roderick Thompson (n 25); Jordan Leigh (n 122).

[135] Seals and Anor (n 85).

[136] Ewald A. Filler, *Commercial Mediation in Europe: An Empirical Study of the User Experience, Global Trends in Dispute Resolution* (Vol. 5, Wolters Kluwer, 2012) 165.

[137] ibid, 167.

2. Proportional Means

The question of proportionality vis-à-vis Article 6 of the ECHR requires that a balance must be struck between the interests of the one imposing restrictions and the one on whom such restrictions are imposed.[138] The concept was discussed in *Geffre* v. *France* where the Government of France acquired certain parcels of land as places of historical interest, of which one belonged to the applicant.[139] The notice for this acquisition was given by way of general publication and the applicant was not personally informed. Accordingly, he alleged that he was deprived of the opportunity to assert his or her rights in domestic courts, thereby violating Article 6 of the ECHR. Considering the question of proportionality, the court held:

> "*…the machinery of general publication used by the authorities constitutes a coherent system that strikes a fair balance between the interests of the authorities and of the property owners. In particular, it affords the latter a clear, practical, and effective opportunity to challenge administrative acts. In light of the circumstances of the case, the Court finds that the applicant has not suffered disproportionate interference with his right to access court.*"[140]

The factum of proportionality also requires for cases to be heard within a 'reasonable time-frame'.[141] Essentially, if the justice administered is riddled with delays, the effectiveness of the right is jeopardised and the resources of the courts are also strained. Accordingly, restrictions imposed on Article 6 rights should generally be accompanied with formal rules and time limits, ensuring legal certainty and establishing proportionality with the end sought to be achieved.[142] This prescribed time-frame is especially relevant when considering the ENE framework, where early timing of the ENE is central to its function.[143] Accordingly, when a court orders for an ENE, the same must take place within a given number of days, ensuring that the ultimate remedy is not jeopardised. Interestingly, provisions for prescribed time-limits for holding an ENE are observed in a few instances. The Department of Justice, Canada, within its sample ENE framework, allows the parties or court to provide for explicit time stipulations.[144] Additionally, members of Working Group-II, which were instrumental for the introduction of the Draft ENE Guidelines, recognised the dangers of delay due to procedural timetables.[145] Accordingly, they explicitly provide that the process of ENE shall not last beyond two months. Therefore, court mandated ENE, in order to comply with Article 6 requirements, must preferably conform to prescribed time limits to ensure settlement/adjudication in a timely manner.[146]

Cost considerations are also relevant to determine proportionality.[147] The court in the *Lomax* decision stipulated that costs may be imposed on a party, on their refusal to proceed to

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[138] Application no. 51307/99 *Geffre v France* [2003].

[139] ibid.

[140] ibid.

[141] Application no. 55782/00 *Cañete De Goñi v Spain* [2003] para 36, Guide to Article 6 (n 109) 23.

[142] ibid para 36.

[143] Erin Shaw (n 125) 15.

[144] Dispute Resolution Reference Guide, 'Neutral Evaluation' (*Department of Justice, Canada*) <https://www.justice.gc.ca/eng/rp-pr/csj-sjc/dprs-sprd/res/drrg-mrrc/eval.html> accessed 13 May 2021.

[145] Alice Fremuth-Wolf (n 59) 177.

[146] Alice Fremuth-Wolf (n 59) 192.

[147] Guide to Article 6 (n 109) 24.

ENE, despite the court's orders. In light of this, it must be noted that generally, requirement to pay court fees in civil proceedings is not a restriction on Article 6 of the ECHR.[148] However, when an individual's financial capacity is impaired, prohibitive costs of proceedings may defeat the right to access court.[149] Moreover, the time of imposition of costs also plays a relevant role. For instance, when costs in the form of fees are imposed in the beginning of the process, one may be unable to institute proceedings before the court of law.[150] However, when such costs are imposed at the end of proceedings, they may hamper a party from reaping the benefits of the decision.[151] Such cost considerations are especially relevant with respect to the ENE framework, where not only is the process itself expensive,[152] but when ordered by the court, it may be proceeded-with despite the unwillingness of the parties. Therefore, within this framework, there is a need to strike a balance between cost considerations and party interests, in the larger context of proportionality, which has been discussed in detail in the later segments of this article.

Therefore, if the court ordered ENE is prescribed within a specific framework, it is then that the restriction limiting a party from directly proceeding to court is justified, since it establishes proportionality between the means and the end. This way, the interests of the authority, with respect to efficient utilisation of time and compensation for services, as well as those of the parties, with respect to timely adjudication within a reasonable cost structure, are looked after.

C. ARTICLE 6 AND MANDATORY ADR

In a landmark decision, *Rosalba Alassini* v. *Telecom Italia SpA*,[153] before the Fourth Chamber of the European Court of Justice, the inter-relationship between court-mandated ADR mechanisms and the right to access court under Article 6 of the ECHR was analysed. Here, there was an amendment to Italian legislation which mandated mediation as a pre-condition for proceeding to conventional litigation. Essentially, certain disputes had to mandatorily be subjected to out-of-court settlement before being heard in a court of law, which, similar to the *Halsey* and *Lomax* decision, was then challenged as being violative of Article 6 of the ECHR.[154]

In considering this question, the court held that the right to access courts is not absolute in nature, but rather, may be subject to certain preconditions.[155] Since such mandatory ADR mechanisms allow parties to pursue less expensive modes of dispute resolution and lighten the burden of courts, they pursue a legitimate aim and are in the general interest of the legal framework and public at large.[156] Pertinently, the court in this

[148] Application no. 74789/01 *Reuther v Germany* [2003] para 2; Application no. 28249/95 *Kreuz v Poland* [2001] para 59.

[149] Kreuz (n 148) para 66.

[150] Kreuz (n 148) para 51.

[151] Application no. 68490/01 *Stankov v Bulgaria* [2007] para 59.

[152] Penningtons Manches Cooper, 'Early Neutral Evaluations: ENE Takers? (*PenningtonsManches Cooper*, 7 December 2015) < https://www.penningtonslaw.com/news-publications/latest-news/early-neutral-evaluations-ene-takers> accessed 15 May 2021.

[153] Case-318/08 *Rosalba Alassini v Telecom Italia* [2010].

[154] ibid para 62.

[155] ibid para 48.

[156] ibid para 64.

case established certain guidelines to ensure conformity of mandatory ADR mechanisms with Article 6 of the ECHR, which shall be elucidated upon hereunder.

First, the outcome of the ADR process, such as mediation, must not be binding on the parties. Thus, their right to institute legal proceedings must not stand prejudiced.[157] In court ordered ENE, as was also identified in the *Lomax* decision, there is compulsion to enter into the ENE process but no compulsion to agree to or hear the final evaluation. This evaluation is not binding upon the parties, details of which are not shared before courts of law. Further, if the parties do not proceed for settlement after the conclusion of the ENE, they have a right to institute proceedings before courts.

Second, for the purpose of bringing legal proceedings, the settlement process must not result in substantial delay. It is preferable to have a prescribed time limit.[158] From the perspective of the ENE mechanism, it has been seen in this article that certain systems, such as Canada and the Draft NE Guidelines prescribe time limits within which an ENE must be concluded. In any case, it has been suggested that courts must necessarily consider specific time limits, ensuring proportionality between the restriction and the end sought to be achieved.

Third, for the time duration of the ADR mechanism, the limitation period for instituting claims before courts of law must be suspended.[159] Presently, this stipulation has been absent in the court-mandated ENE framework. However, since parties may be referred to this process even in the absence of consent, considering the time period of limitation to coincide with the ENE process would gravely jeopardise the rights of the parties to access courts. Therefore, this calls for consideration.

Fourth, the mandatory ADR mechanisms must not result in the parties incurring substantial costs.[160] This factor is a matter of contention for the ENE process. Undoubtedly, such processes help to effectively resolve disputes, thereby reducing litigation costs. However, the ENE process in itself has often been criticised as being expensive and, thus, limited to only those who can afford it. Therefore, in association with this factor, a cost mechanism has been suggested in the latter half of this article.

Therefore, in light of the guidelines of the Rosalba decision, it is observed that the court-mandated ENE framework is in conformity with Article 6 of the ECHR, subject to the satisfaction of conditions such as balanced cost mechanisms, prescribed time limits, etc. Therefore, in order to ensure that courts keep encouraging parties to engage in the ENE process for an efficient and effective dispute resolution, the afore-stated factors must necessarily be taken into consideration.

V. ENE AND THE INDIAN JURISDICTION

The Indian jurisdiction is no stranger to the problem of enormous pendency of civil cases and a lackadaisical judicial system. As per the National Data Judicial Grid ('NDJG'),

[157] ibid para 54.
[158] ibid para 55.
[159] ibid para 56.
[160] ibid para 57.

over 10.27 million civil cases are pending in the country.[161] Out of these, over 75% are cases pending before the courts of original jurisdiction.[162] Further, around 32% of the civil cases are over 3 to 10 years old, and over 7% are more than 10 years old.[163] Such a high number of old cases put an additional burden on the clearance of cases since extra efforts are required on the part of the parties, lawyers as well as judges to assimilate and analyse old information.[164]

The general pendency of cases across India has been increasing over the years.[165] This abysmal situation has worsened considerably due to the COVID-19 pandemic and the resultant hindrances in the day-to-day functioning of the civil courts in the country.[166] As per a report, the backlog of cases has gone up over 19% from the previous year.[167] The pendency rose by over 10.35% in the Supreme Court, 20.4% in the High Courts, and 18.2% in the District Courts.[168] Further, there has been a considerable increase, over 61%, in the pendency of cases over 30 years old.[169]

Various research studies have analysed the menace of huge backlogs of cases in India and recommended different solutions.[170] They have identified various causes for this problem, such as vacancies in the judiciary,[171] lack of technological integration in the court process, improper case management,[172] amongst others. Therefore, we can assess similar problems and concerns pertaining to huge pendency and delays in the Indian judicial system as raised by Justice Peckham in the USA while creating the process of ENE in the 1980s.

In this part, we first analyse the usage of the ENE mechanism in India in Part V(A). Thereafter, in Part V(B), we highlight the relevance of the ENE mechanism in India and make a case for its incorporation. In Part V(C), we highlight certain aspects in which ENE

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[161] National Judicial Data Grid, 'Pending Dashboard' <https://njdg.ecourts.gov.in/njdgnew/?p=main/pend_dashboard> accessed 10 May 2021.

[162] ibid.

[163] ibid.

[164] Dushyant Mahadik, 'Analysis of Causes for Pendency in High Courts and Subordinate Courts in Maharashtra' (2018) DEPARTMENT OF JUSTICE 1, 97.

[165] PRD Legislative Research, 'Pendency of Cases in the Judiciary'<https://prsindia.org/policy/vital-stats/pendency-cases-judiciary> accessed 10 May 2021.

[166] Sruthisagar Yamunan, 'Covid impact: Cases disposed of by High Courts drop by half, district courts by 70%' (*Scroll*, 4 September 2020) <https://scroll.in/article/971860/covid-impact-cases-disposed-by-high-courts-drop-by-half-district-courts-by-70> accessed 10 May 2021.

[167] Pradeep Thakur, 'Pending cases in India cross 4.4 crore, up 19% since last year' (*Times of India*, 15 April 2021) <https://timesofindia.indiatimes.com/india/pending-cases-in-india-cross-4-4-crore-up-19-since-last-year/articleshow/82088407.cms> accessed 10 May 2021.

[168] The Wire Staff, 'COVID-19 Increased Pendency of Cases at ALL Levels of Judiciary' (*The Wire*,27 March 2021) <https://thewire.in/law/covid-19-increased-pendency-of-cases-at-all-levels-of-judiciary> accessed 10 May 2021.

[169] Pradeep Thakur, 'Backlog of 30-year-old cases up by 612 years' (*Times of India*, 16 February 2021) <https://timesofindia.indiatimes.com/india/backlog-of-30-year-old-cases-up-by-61-in-2-years/articleshow/80956134.cms> accessed 10 May 2021.

[170] Sudhir Krishnaswamy, 'Legal and Judicial Reform in India: A Call for Systemic and Empirical Approaches' (2014) 2(1) JOURNAL OF NATIONAL LAW UNIVERSITY DELHI 1, 3; Dr. B. H. Satyanarayana, 'Pendency of litigation in India' (2018) 12(1) INDIAN JOURNAL 97, 99.

[171] Y. Ghosh, 'Indian Judiciary: An Analysis of the Cyclic Syndrome of Delay, Arrears and Pendency' (2018) 5(1) ASIAN JOURNAL OF LEGAL EDUCATION 21, 25.

[172] K. G. Balakrishnan, 'Judiciary in India: Problems and Prospects' (2008) 50(4) JOURNAL OF INDIAN LAW INSTITUTE 461, 465.

can serve as a better ADR mechanism in India than the rapidly growing mechanism of mediation.

A. PRACTICE OF THE ENE MECHANISM IN INDIA

There is an absence of usage and awareness about the ENE mechanism in India amongst the courts and the litigants. This lack of awareness is best manifested from the fact that there has been only one case in India that implemented or even mentioned the ENE mechanism. This was in the case of *Bawa Masala Co.* v.*Bawa Masala Co.*,[173](‘*Bawa Masala*’) before the Delhi High Court. The case dealt with an intellectual property right (‘IPR’) dispute. In this case, the dispute was first referred to mediation, and the parties had failed to resolve the matter.[174] Thereafter, the parties were suggested to adopt the process of ENE to resolve the said dispute.[175] The court tracing the process of ENE and its advantages[176] referred the parties for evaluation to two neutral evaluators.[177]

Notably, there is a skewed approach taken by the court in *Bawa Masala,* which manifests the lack of understanding about the ENE mechanism in India. The court first highlighted the differences between the process of mediation and ENE on the basis of the differing roles of an evaluator and a mediator.[178] It observed that in mediation, the parties themselves come to the solution, whereas in ENE, the evaluator advises the parties on the likely outcome of the case and the strength of their claims.[179] However, the court thereafter opined that since ENE follows the same process as that of mediation, therefore, the power to refer the parties for a ‘negotiated settlement’ under §89 of the Code of Civil Procedure, 1908, (‘CPC’) can be attracted in this instant case.[180]

§89 read with Order X, Rules 1A-1C of the CPC provide the powers to the court to refer a matter for arbitration, conciliation, judicial settlement or mediation where it appears to the court that there exist elements of settlements that may be acceptable to the parties.[181] Therefore, these provisions are the repository for the court to refer the parties to the four ADR mechanisms enlisted in §89 of the CPC. It is evident that §89 does not mention ENE, which is a distinct ADR mechanism as explained earlier.

The court in *Bawa Masala*, however, managed to incorporate ENE under §89 of the CPC by essentially making two erroneous conclusions. *First*, the court, even after recognising the distinctions between ENE and mediation, equated the process to be ‘same’. This is substantively incorrect since the process of ENE and mediation differ significantly as highlighted earlier. ENE focuses on expediting the process of litigation and saving time and money, while mediation is primarily concerned with reaching an amicable settlement

[173] AIR 2007 Delhi 284.
[174] ibid, para 1.
[175] ibid, para 2.
[176] ibid, paras 3 – 9.
[177] ibid, para 12.
[178] ibid, para 7.
[179] ibid, para 8.
[180] ibid, para 11.
[181] Code of Civil Procedure 1908, s 89.

between the parties. *Second*, the court linked ENE to the object of negotiated settlement as envisaged under §89 of the CPC. This approach is fallacious due to the primary focus of ENE on expediting the litigation process. ENE does not primarily focus on the aspect of reaching a settlement of disputes between the parties; rather, it helps in locating the focal point of the case and streamlining the submissions of the parties.

Such an approach by the court blemishes the view of ENE as an independent and distinct ADR mechanism. It undermines the importance and relevance of the process by equating the same to mediation and misinterpreting some of the core elements and goals of the process. This in fact, affects the evolution of the process as a vibrant and practical ADR tool. Further, vesting the powers to refer to ENE under §89 also takes away the idea of initiation of the ENE process at an 'early' stage of litigation. This is due to the fact that powers vested under §89 of the CPC can be utilised at the discretion of the court during any stage of litigation.[182] Therefore, the court in *Bawa Masala* should have clearly delineated the powers while referring parties to ENE under §89 to be exercised at an early stage of the litigation process. This omission by the court in fact, paves the way to refer parties to the ENE at any stage of litigation. Conclusively, the judgement provides an erroneous and self-contradictory view of the ENE process and misinterprets the past ENE jurisdiction.

It may be argued that the court's interpretation was a mere expansionist reading of the provision under the CPC in order to give effect to the will of the parties and promote ADR mechanisms. Though this may well have been the intention of the court, the same is not manifested from the judgement and could have explicitly been stated by the court itself. Instead, the court equates the processes of ENE and mediation as a common and undisputed understanding of these mechanisms. In fact, as highlighted earlier, there is substantial literature on the differences between the aforesaid mechanisms, and the founders of ENE specifically emphasised these differences in order to popularise and establish the relevance of ENE as a distinct ADR mechanism. Further, an expansionist reading of the provision could have been done by the court without distorting and misinterpreting the basic features of the ENE mechanism itself.

Therefore, we can assess a scarcity of understanding and awareness about the process of ENE in India, both amongst the legislature and the judiciary. However, the process is opined to have the potential to fully grow as a distinct, popular and beneficial ADR mechanism in the country. This possibility is analysed in the next sub-part.

B. INCORPORATION OF ENE IN INDIA

The Chief Justice of India ('CJI') N.V .Ramana recently raised concerns regarding the pendency of cases.[183] He emphasised the role of lawyers in the pre-litigation stage to properly advise their clients without abusing the process and keeping the clients' interests in their

[182] Gaurav Prakash, 'Section 89 of CPC – A Critical Analysis' (*Legal Service India*, 20 January 2017)<http://www.legalserviceindia.com/legal/article-385-section-89-of-cpc-a-critical-analysis.html> accessed 10 May 2021.

[183] Bar and Bench, 'Lawyers can play an important role in reducing pendency by advising clients to settle disputes at pre-litigation stage: Justice NV Ramana' (*Bar and Bench*, 5 April 2021) <https://www-barandbench-com.cdn.ampproject.org/c/s/www.barandbench.com/amp/story/news/lawschools/justice-nv-ramana-dsnlu-convocation-lawyers-pendency-law-schools-sub-standard> accessed 10 May 2021.

minds.[184] This approach, the CJI suggested, can play a pivotal role in the reduction of pendency in litigation in India.[185]

Evidently, such observations reflect the goals of the ENE process to provide frank feedback and advice to the parties through a neutral evaluator in the early stages of litigation. ENE, in other words, provides the ideal mechanism for the concerns and suggestions raised by the CJI. This is due to the fact that the recommendations of the CJI to properly advise the clients, i.e. to make realistic claims, is ensured through the process of ENE. Through ENE, the parties attain a realistic assessment of their claims and can simultaneously keep a check on the advice of their lawyers. Conversely, it also keeps a check on the parties who make unrealistic claims themselves and are unconvinced by their own lawyer's suggestions.

Moreover, ENE is proven to be suitable for certain types of cases that are prevalent in India. For instance, cases dealing with family matters such as marriage and divorce flood the judicial institutions in the country.[186] Marriage petitions alone constitute over 8% of the pending civil cases in India.[187] In family matters, as explained earlier, the parties are often faced with the challenge of dealing with various highly charged emotions and personal feelings.[188]

In such situations, an adversarial litigation system heightens the level of conflict and adversely impacts the psyche of the couples and their children.[189] This makes it difficult for the parties to accept the validity of the other party's position or the weakness of their own, leading to the exaggeration of their claims.[190] ENE is opined to be a viable option in this regard. The rationale and goals of the ENE mechanism itself make it ideal for utilisation in family law matters. In the UK, efforts are already being made to shift family law cases out of the court system and process them through an ENE process for a swifter resolution.[191]

Similarly, in IPR cases, as discussed earlier, ENE has proven to be a helpful fit and a fruitful process. In the Northern District of California, IPR disputes are the single most common type of new civil-case filings under the ENE programme.[192] Moreover, the only case in India that has implemented the ENE process, i.e. *Bawa Masala*, also dealt with an IPR issue, and the ENE session proved to be successful.[193] The process of ENE in IPR cases makes the parties present the relevant evidence and get a reality check on their position, as highlighted earlier. These aspects are important in IPR proceedings, especially in common

[184] ibid.

[185] ibid.

[186] Mahadik (n 164).

[187] National Judicial Data Grid (n 161).

[188] Family Court of Western Australia, 'Emotional Impact of Proceedings' (16 April 2018) <https://www.familycourt.wa.gov.au/E/emotional_impact_of_proceedings.aspx> accessed 10 May 2021.

[189] Andrew I. Schepard, Children, *Courts and Custody: Interdisciplinary Models for Divorcing Families* (Cambridge University Press 2004) 120.

[190] Abhinav Gupta, 'Arbitrability of Divorce Disputes: A Child Rights Perspective' (*CCR Law Review*, 9 June 2021) <https://ccrnusrlblog.wordpress.com/2021/06/09/arbitrability-of-divorce-disputes-a-child-rights-perspective-abhinav-gupta/> accessed 12 June 2021; Levy (n 19) para 2:27.

[191] Simon Bruce, 'We cannot ignore court backlogs' (*The Law Society*, 2 November 2020) <https://www.lawgazette.co.uk/practice-points/we-cannot-ignore-court-backlogs/5106187.article> accessed 10 May 2021.

[192] Northern District of California (n 44).

[193] *BawaJagmohan Singh v Registrar of Trade Marks* M.P. No. 128/2008 in TA/180/2003/TM/Del [CM (M) No. 601/2001].

law jurisdiction, where the process of discovery is often used to obtain the relevant information that is the basis of the support for a trademark, patent, or copyright claim.[194] Further, the ENE process is well adept at handling matters that arise in IPR, such as in patents, where issues often revolve around sophisticated technologies.[195] This is due to the fact that in ENE, the evaluators can be appointed not only on the basis of the knowledge about the area of law but also the specific technology involved in the issue.[196]

Therefore, the aforesaid factors, along with the benefits of the ENE mechanism discussed earlier, make a compelling case for the adoption of the process in the Indian judicial system. The ENE mechanism, in our opinion, shall help in reducing the ever-growing backlog in civil litigation and the tremendous burden on the Indian courts.

At this juncture, it is important to note that mediation as an ADR mechanism has gained tremendous goodwill and prominence in the past few years.[197] Various scholars have opined the process of mediation to be the future of dispute resolution in India.[198] The popularity of mediation has been boosted by the passage of the historic Singapore Convention on Mediation ('the Convention') in 2019.[199] India was amongst the first 53 countries to sign the said Convention.[200] The Convention provides a harmonised legal framework for the right to invoke the settlement agreements in a contract as well as to enforce the same.[201] Shweta Sahu and Nikita Pattajoshi have robustly argued in their work about the significance of this Convention and have made a case for mediation as a frontrunner for dispute resolution in India.[202]

While agreeing with such assertions and suggestions about the significance of mediation as a dispute resolution mechanism in India, we shall highlight certain factors and advantages that the process of ENE manifests over mediation. These advantages are discussed in the next sub-part.

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[194] Anna Carboni et al., 'Mediation as a Resolution Method in IP Disputes'in Sophia Bonne et al., *Mediation: Creating Value in International Intellectual Property Disputes*(Wolters Kluwer 2018) 30.

[195] Fabio E. Marino, 'The road less travelled for dispute resolution – the benefits of ENE in patent litigation' (*Polsinelli*, 10 February 2021) <https://www.iam-media.com/the-road-less-travelled-dispute-resolution-the-benefits-of-ene-in-patent-litigation> accessed 10 May 2021.

[196] ibid.

[197] Manisha T. Karia, 'Effective implementation of Mediation in India: The Way Forward' (*Bar and Bench*, 23 December 2019)<https://www.barandbench.com/columns/effective-implementation-of-mediation-in-india-the-way-forward> accessed 10 May 2021.

[198]Alok Prasanna Kumar et al., 'Strengthening Mediation in India' (*Vidhi Centre for Legal Policy*, December 2016) <https://vidhilegalpolicy.in/wp-content/uploads/2019/05/26122016_StrengtheningMediationinIndia_FinalReport.pdf> accessed 10 May 2021; Ankoosh Mehta et al., 'Mediation: The Future of Dispute Resolution' (*The SCC OnLine Blog*, 25 June 2020) <https://www.scconline.com/blog/post/2020/06/25/mediation-the-future-of-dispute-resolution/> accessed 10 May 2021;

[199] Singapore Convention on Mediation, 'About the Convention' <https://www.singaporeconvention.org/> accessed 10 May 2021.

[200] PTI, 'Singapore Convention on Mediation comes into force' (*The Hindu*, 13 September 2020) <https://www.thehindu.com/business/singapore-convention-on-mediation-comes-into-force/article32589671.ece> accessed 10 May 2021.

[201] United Nations, 'United Nations Commission on International Trade Law' <https://uncitral.un.org/en/texts/mediation/conventions/international_settlement_agreements> accessed 10 May 2021.

[202] Shweta Sahu and Nikita Pattajoshi, 'Mediation: The New Trump Card in Commercial Dispute Resolution?' (2021) 1(1) NUJS JODR 74-95.

C. ADVANTAGES OF ENE OVER MEDIATION

Through the exhaustive discussion on ENE in the preceding parts, we can trace several factors and circumstances that together operate in favour of the ENE process. *First*, the most evident advantage is the evaluative component of ENE. The ENE process, as explained in Part II, focuses on identifying the legal and evidentiary centres of the case and provides a reliable evaluation of the merits. Mediation sessions, on the other hand, can have multiple purposes and sometimes may be too remote from the merits of the case.[203] The mediators concentrate more on the nature and spirit of the dynamics between the parties rather than on the actual evidence or the law.[204] In contrast, the ENE process is structured in a way so as to assure that the evaluative component of the process is systematically developed and the parties have comprehensive knowledge of the same. The evaluator's primary purpose in the process is to provide a reliable opinion on the merits of the case.

Second, unlike mediation, the evaluator in the ENE process should compulsorily have subject-matter expertise of the case. In cases of IPR, the evaluator can also be selected on the basis of the knowledge about the relevant technology. Such practices enable the evaluator to understand the law, issue in advance and identify the relevant evidence. It also improves the likelihood of a sophisticated and reliable evaluation that the parties receive through the process. In mediation, on the other hand, the mediator is often a person who specialises in the process itself and not the substantive law involved in the matter.[205]

Third, the evaluator can be viewed by parties as more credible than the mediator. This is due to the fact that when the parties participate in a mediation process, the basic assumption is that the primary goal for the mediator is to obtain a settlement for the case.[206] Thus, parties assume that the mediator will keep an eye on this goal throughout the process.[207] In order to achieve such settlements, mediators manipulate their behaviour and conversations to build a relationship with the parties.[208] Such a perception of the mediator can compromise the confidence of the parties about the opinion and feedback of the mediator. The parties may fear that the mediator is not being frank or thorough in assessing the merits merely in order to preserve the relationship and goodwill with the parties.[209] Further, the

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[203] Siddhi Gupta, 'A Critical Analysis of Mediation Process' (*VIA Mediation & Arbitration Centre*) <https://viamediationcentre.org/readnews/NjI5/A-CRITICAL-ANALYSIS-OF-MEDIATION-PROCESS> accessed 11 May 2021.

[204] Justice Government, 'Roles and Duties of Mediator' (*Malta Mediation Centre*) <https://justice.gov.mt/en/mmc/Pages/Roles-and-Duties-of-Mediator.aspx> accessed 11 May 2021.

[205] Rakhi, 'Who Can be a Mediator: Qualifications or Disqualifications' (*VIA Mediation & Arbitration Centre*) <https://viamediationcentre.org/readnews/MzY3/Who-Can-be-a-Mediator-Qualifications-or-Disqualifications#:~:text=and%20Sessions%20Judge-Officers%20of%20Delhi%20Higher%20Judicial%20Services,themselves%20expert%20in%20the%20mediation> accessed 11 May 2021.

[206] Constantin-AdiGavrila, 'The roles of the mediator' (*Kluwer Mediation Blog*, 14 July 2019) <http://mediationblog.kluwerarbitration.com/2019/07/14/the-roles-of-the-mediator/> accessed 11 May 2021.

[207] ibid.

[208] Brazil (n 29) 13.

[209] Robert Benjamin, 'A Critique of Mediation, Challenging Misconceptions, Assessing Risks, and Weighing the Advantages' (*Mediate India*, April 1999) <https://www.mediate.com/articles/critiq.cfm> accessed 11 May 2021.

parties may also fear that the mediator is exaggerating the legal or evidentiary disadvantages so as to mitigate the strength of the claims and reach a settlement.[210]

On the other hand, the ENE process structures the role of the evaluator so as to eliminate such considerations and concerns of the parties. The evaluator's job is to provide a frank and candid assessment of the merits of the case. Further, settlement is not the primary object of the ENE session as discussed before and therefore, the evaluator is not focused on reaching the same. Thus, the perception of the evaluator as a person who is willing to modify the realities of the situation merely to reach a settlement does not exist in an ENE process.

Fourth, the feature of private caucuses in a mediation process can further compromise the credibility of the mediator. Such private meeting can instil fear in the parties regarding the manipulation of the merits by the evaluators. This is due to the fact that in cases of *ex parte* communications, no party is assured or in knowledge of all the information and consideration that influence the mediator's opinions.[211] The parties can fear that the opposite party may have shared secretly certain information that may be affecting the opinion of the mediator.

In contrast, the ENE mechanism, as explained earlier, prohibits the usage of *ex parte* communications with the evaluator. Such communications can only take place after the evaluator has made the evaluation in writing. Thus, each party in the ENE session is aware of every communication that the evaluator receives before providing an opinion on the merits of the case. They are aware of every piece of evidence and argument that is put forth before the evaluator. Therefore, there are no hidden considerations or information that affects the decision of the evaluator. This increases the confidence of the parties in the intellectual and moral integrity of the evaluator's feedback.

Fifth, the ENE process takes place early in the pre-trial phase. Such an early assessment helps the parties and the lawyers to identify the centre and the core issues in the case much quickly in the lifespan of litigation. Normally such identification takes time and is processed through the course of litigation.[212] Such an early identification helps the parties and lawyers to focus on the core issues from the beginning and cuts down on the duration of the dispute resolution process.[213] On the other hand, mediation often takes place much later in the litigation process and after the judge has ruled on significant portions of the matter.[214]

Sixth, in a mediation process, there is a possibility that the mediator may lose interest and energy in case there is an indication that no settlement can be reached.[215] This is due to the fact that the primary goal of a mediator in a mediation process is to obtain a settlement, as explained before. On the other hand, there is no such risk in an ENE process since the primary objective is to make the parties aware of the core legal and evidentiary issues and the

[210] ibid.

[211] Janet Rifkin et al., 'Towards a new Discourse for Mediation: A critique of neutrality' (1991) 9(2) MED. QUAT. 151, 159.

[212] *See generally* Code of Civil Procedure 1908, Order XIV.

[213] Chow (n 10)140.

[214] Brazil (n 29) 14.

[215] Charlie Irvine, 'Transformative Mediation: A Critique' (2007) SSRN 1, 20.

likely outcome of their dispute. Therefore, the evaluator does not tend to drift into passivity in an ENE process.

Seventh, ENE can function and operate as a broader, holistic ADR process. This is due to the fact that usage of other mechanisms of mediation or negotiation is very much a part of the ENE process, as shown earlier. The parties can, after the evaluator has made the assessment in writing, choose to proceed and explore settlement through other ADR mechanisms. Herein, the evaluator himself or herself changes the role to a mediator. Therefore, the ENE process operates as an entire package of various ADR mechanisms. This further allows parties to explore different possible ways for dispute resolution under a unified scheme. In other words, ENE can function as a dynamic dispute resolution mechanism.

VI. GUIDELINES FOR THE ENE MECHANISM: A MODEL FOR INDIA

It is important to delineate, like other ADR mechanisms, the core features and the process of ENE that should generally be complied with and followed. In this Part, we attempt to outline and identify such key features that should necessarily be included in an ENE mechanism for the Indian legal system. Such an identification primarily flows from the analysis in the preceding parts of the paper.

A. INCORPORATION OF THE ENE MECHANISM AT THE COURT OF FIRST INSTANCE

The ENE mechanism should be mandatorily adopted at the court of first instance, i.e. the lowest civil court where the jurisdiction is established for filing a civil suit as per §9 and §15 of the CPC.[216] It has been previously seen that such a compulsory mandate to refer the parties to the process of ENE does not violate the idea of consent in ADR mechanisms. Further, it also does not impair the universal rights of the parties to access the courts. The ENE process shall, in fact, serve as a mechanism to reduce the time for litigation and the enormous pendency of civil cases in India. For further reassurance, there can be a trial programme and an empirical study conducted in India to garner evidentiary support for the aforesaid propositions.

The civil cases should ideally be screened by the courts for eligibility to be referred to an ENE process. Generally, as also followed in Northern District of California,[217] civil actions involving civil rights, cases where the primary relief is injunctive in nature, and class actions should be exempted from the process of ENE. This is primarily due to the nature of the relief and the rights involved, i.e. rights *in rem* – rights against the world at large, in such cases.

B. INITIATION OF THE ENE SESSION – HOW EARLY?

An early evaluation is an essential feature of the ENE mechanism. Such an early assessment enables the parties to recognise the core issues and contentions from the initial

[216] Code for Civil Procedure 1908, s 9, s 15.
[217] ADR Local Rules 2018, Rule 5.2.

stages of litigation. Therefore, determining when the ENE session should take place is crucial in order to ensure the success of the process. The founders of the ENE process recommended the session to take place within 150 days from the filing of the complaint.[218] Thus, ENE sessions should be conducted at a pre-trial stage in order to satisfy this criteria. In our assessment, the ideal opportunity to conduct the session shall be after the defendant has filed the written statement as per Order VIII, Rule 1 of the CPC,[219] but before the discovery process under Order XI and, in case no discovery procedure is required, before the framing of issues as per Order XIV, Rule 1 of the CPC.[220]

Such a recommendation is primarily based on four reasons. *First*, after the filing of the written statement, the defendant is assured to be aware of the general controversy surrounding the case. Therefore, this shall ensure better engagement and understanding during the ENE session. *Second*, as per Order VIII, Rule 1 read with Order V, Rule 1, the defendant has to file the written statement within 30 days from the date of the service of summons,[221] which may be extended by 90 days in special circumstance.[222] Further, the summon is issued to the defendant right after the suit has been duly instituted.[223] Therefore, conducting the ENE session after the filing of the written statement shall sufficiently comply with the time period of 150 days as suggested by the ENE founders and satisfy the 'early' criteria of ENE.

Third, the ENE session should be conducted before the discovery process under Order XI and the framing of the issues under Order XIV, Rule 1 of the CPC, since the ENE process is intended to help the parties to view the evidence of the other party and quickly identify the core issues in a case. Therefore, the process itself enables the parties to gather the evidence and bypass the expensive and time-taking discovery procedure. It also assists the parties to find the germane points of contentions and cross out irrelevant concerns or differences. Further, it may also be possible that certain issues are itself settled in the ENE session, and the rest may require adjudication by the courts. Thus, it shall be ideal to proceed first with the ENE session and later approach the court, in case no settlement is reached, to frame the relevant issues on facts or law as per Order XIV, Rule 1 of the CPC. Moreover, if the case goes to the court without any settlement, the requirement of a discovery process shall be redundant since the parties would have already shared their evidence and documents. Therefore, conducting the ENE process first shall be financially and logically conducive for the parties.

Fourth, to buttress the aforesaid argument, one may also rely on Order X, Rule 1A of the CPC, which is a part of the current ADR mechanism as shown earlier. The said provision permits the court to refer the parties to an ADR mechanism under §89 of the CPC before the

[218] Brazil (n 17) 16.
[219] Code for Civil Procedure 1908, Order VIII.
[220] Code for Civil Procedure 1908, Orders XI, XIV.
[221] Code for Civil Procedure 1908, Order VIII, Rule 1 and Order V, Rule 1.
[222] Code for Civil Procedure 1908, Proviso to Order VIII, Rule 1
[223] Code for Civil Procedure 1908, Order V, Rule 1.

discovery process and the framing of the issues.[224] Therefore, the recommendation is also in line with the current ADR framework in the Indian legal system.

C. THE PROCEDURE OF THE ENE SESSION

The precise procedure of the ENE session can be a replication of the procedure discussed in Part II(A). It is our view that there are no such domestic considerations that may necessitate an alteration in the procedure of the session. Moreover, other ADR mechanisms also such as mediation and negotiation, follow fundamentally a similar process in India as in the rest of the world.[225] Further, the parties, through mutual agreement, can always alter the non-controversial aspects of the process, such as an increase or decrease in the time limit for oral presentation.

Moreover, in order to preserve the rights of the parties to access courts, the entire ENE mechanism can be prescribed to be completed in a specific period of time. This period may preferably be 2 months in accordance with the Draft NE Guidelines, during which a non-binding evaluation may be delivered.

D. HALT ON THE LIMITATION PERIOD

As observed in the *Rosalba* guidelines,[226] the ongoing periods of limitation under the Limitation Act, 1963, or any other statutes of limitation must be suspended during the ENE process in order to maintain proportionality between the restrictions and the end sought to be achieved.

In case there is no stoppage of the limitation period and the parties participate in the ENE process, they might face the undue pressure of reaching a settlement during the session. For instance, in case a period of limitation ceases during the ENE session, the concerned party may not have any choice but to proceed for settlement. Such a situation shall lead to an undue restriction on the right of the party to access the court.

E. QUALIFICATION OF AN EVALUATOR – WHO CAN EVALUATE?

The evaluator in an ENE process must have subject matter expertise, as explained earlier. This is a major advantage of ENE over mediation and permits easy and fast comprehension of issues and a reliable evaluation. Further, the evaluator must also be trained in evaluation and mediation techniques and should ideally possess the general qualities of integrity and uprightness.

Preferably, an experienced lawyer or a retired judge can be made an evaluator for an ENE session. Sitting judges should ideally be refrained from acting as evaluators for such sessions. This is primarily based on two reasons. *First*, appointing sitting judges for evaluating sessions will, in fact, end up as an indirect utilisation of the courts time. Judges will have to give time that they could spend on pending litigations in order to conduct such sessions. Therefore, it will ultimately lead to defeating the purpose of the ENE mechanism

[224] Code for Civil Procedure 1908, Order X, Rule 1A.

[225] Nadja Alexander, 'Four Mediation Stories from Across the Globe' (2010) 74(4) RABEL JOURNAL OF COMPARATIVE AND INTERNATIONAL PRIVATE LAW 732-758.

[226] Rosalba (n 153).

itself. *Second*, parties and lawyers may both be more open to discussing their case with a lawyer or a former judge than a present, sitting judge of a court. Comfort and openness of the parties are of primary importance in any ADR mechanism in order to extract the most from the process.[227]

F. STRICT ADHERENCE TO THE RULE OF CONFIDENTIALITY

Confidentiality is a crucial element of the ENE process. The court, lawyers, evaluators as well as the parties have to treat the communications and statements made in the proceedings as confidential. The evaluator is also not permitted to share the evaluation made in the ENE session with the judge assigned to the case. The rule of confidentiality may be breached in certain limited circumstances, such as where a judge makes an inquiry regarding a possible violation of rules of an ENE session, where disclosure is approved by all parties and evaluator for a legitimate purpose, or when required by law.[228]

Here, it is also important to note that the rule of privacy also prevails in an ENE session. Privacy focuses more on the non-participation of third parties in a proceeding, whereas confidentiality refers to the non-divulgence of information to third parties.[229] Therefore, we can observe a very thin line of difference between the aforesaid concepts. However, the rule for privacy can be breached where it appears to the parties and the evaluator that the participation of a third party may enhance the utility of the ENE session.[230]

G. PROHIBITION OF EX-PARTE COMMUNICATION

As analysed before, *ex-parte* communications with the evaluator are strictly prohibited in and ENE process and is an essential factor that enhances the credibility of the evaluator in the eyes of the parties. Such communications can only be done after the evaluator has performed the evaluation in writing.

H. COSTS

The payment of the evaluator's fee and other miscellaneous charges can be made by the parties themselves. Here, it is important to remember that such a measure does not act as an addition to the already expensive litigation fees paid to the lawyers. This is due to the fact that, as shown earlier, the ENE mechanism results in a significant reduction of overall costs, which undeniably outweighs the cost of an ENE session. For further precaution with respect to saving of parties' money, the legislature or the courts can control and regulate the fees of

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[227] Brazil (n 2) 284.

[228] ADR Local Rules 2018, Rule 5.12(b).

[229] Mayank Samuel, 'Confidentiality in International Commercial Arbitration: Bedrock or Widow-Dressing?' (*Kluwer Arbitration Blog*,21 February 2017) <http://arbitrationblog.kluwerarbitration.com/2017/02/21/confidentiality-international-commercial-arbitration-bedrock-window-dressing/#:~:text=While%20'Privacy'%20means%20that%20no,to%20the%20parties%20to%20arbitration.> accessed 11 May 2021; Abhinav Gupta, 'Public Interest in International Commercial Arbitration: Time for English Courts to Align with Esso?' (*RMNLU Arbitration Law Blog*, 5 September 2020) <https://rmlnluseal.home.blog/2020/09/05/public-interest-in-international-commercial-arbitration-time-for-english-courts-to-align-with-esso/> accessed 11 May 2021.

[230] ADR Local Rules 2018, Rule 5.8(c)(1)(B).

the evaluator. For instance, in the Northern District of California, the first hour of the ENE session is free, and thereafter, the evaluator can charge a maximum $150 per hour.[231]

Another step that can be taken to reduce the costs is through a cost-recovery model that is also initiated in the District Courts of California.[232] This model provides funding for the ENE programme through a general surcharge in the court filing fees and thereby spreads the cost of the ENE programme amongst all litigants.[233] Such a surcharge on the court fees is opined as fair since the process of ENE benefits all litigants and not just those who are referred for ENE.[234] This is due to the fact that the ENE mechanism leads to an early adjudication and reduction in the pendency of cases, benefitting the other litigants as well as the general public. Further, since all litigants are paying for the programme anyways through mandatory court fees, it also reduces their reluctance to use the mechanism. Moreover, the cost-recovery model also removes the possibility of bias on the part of the evaluator since a single party will not be paying the complete or proportionately higher fees to the evaluator.[235] Therefore, the cost-recovery model can be utilised as an effective method to fund the ENE programme in India.

VII. CONCLUSION

Several solutions have been proposed in order to reduce and mitigate the enormous pendency of cases in India. The ADR process comprising mediation has been at the forefront of the suggestions proposed to reduce this pendency. With the passage of the historic Singapore Convention, the case for mediation has been further augmented in India.

In this paper, without downplaying the importance of the developments in mediation, we propose the inclusion of an ENE programme for civil cases in the Indian legal system. ENE is a distinct ADR mechanism that focuses on providing a frank and candid opinion to the parties about the merits of their claims. Such an opinion is provided by a neutral evaluator who conducts the ENE session. Backed by empirical data, the ENE programme has proven to be beneficial and has spread across countries such as the USA, the UK, Singapore and Australia. In fact, there are various circumstances in which ENE can function as a better ADR mechanism than mediation. In India, however, there has been only one case, i.e. *Bawa Masala,* before the Delhi High Court, which dealt with ENE. A critical appraisal of the said case shall also reveal the lack of a comprehensive understanding of the ENE process and its core features in the country.

Resultantly, we have proposed a model containing certain core features of the ENE mechanism as guidelines that should be complied with while implementing the process in India. Such guidelines range from addressing when the ENE session should commence to

[231] ADR Local Rules 2018, Rule 5.3(b).

[232] California Judicial Branch, 'Collections Resources' <https://www.courts.ca.gov/partners/455.htm> accessed 11 May 2021.

[233] Sanateramo (n 53) 334.

[234] Ministry of the Attorney General, 'Justice Ontario' (*Ontario*) <http://www.attorneygeneral.jus.gov.on.ca/english/about/pubs/cjr/suppreport/Exesummary.php> accessed 11 May 2021.

[235] *Cole v Burns International Services* 105 F.3d 1465 (D. C. Cir. 1997) 1485.

who should pay for the session. Further, in order to propose the inclusion of ENE as a compulsory ADR process, the guidelines have followed the tests laid down in the landmark *Rosalba* case. Therefore, the proposed model restricts the essence of the right to access the courts only through legitimate aims and proportionate means.

Implementation of dynamic and non-traditional methods of dispute resolution has assisted countries across the globe to reduce and keep a check on the pendency of cases. Through this paper, the authors hope that India will follow a similar path and implement the dynamic and important ENE mechanism for civil litigation in the country.