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A CRITICAL APPRAISAL OF ARBITRATION IN INDIA

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ABSTRACT

India is a nation which has always had an apt criminal justice system to suit its needs. However, with the changing times, the prevalent methods of providing justice are seeming to be redundant and necessitates the introduction of more modern methods of resolving disputes, and one of them is arbitration. This paper traces the origins of arbitration in India, followed by the legal backing that this mode of dispute redressal has received over a long period of time. It throws light on the drawbacks and the future opportunities that it brings with itself for easing the processes of providing speedy justice to the people. The author concludes on an optimistic note with the hope that one day the old mechanisms will be replaced by newer and easier dispute redressal mechanisms like arbitration.

I. INTRODUCTION

The criminal justice system of India, which is commonly referred to as the world's largest democracy, has its reputation reaching far and wide. It is clearly written in the 222nd Report by the Law Commission of India[2] that the Indian Constitution guarantees all the citizens of the country equal access to justice, fundamentally through Article 39A.[3]

Arbitration, as a medium of dispute resolution, has gained momentum in the contemporary times, since it is cost effective and consumes relatively lesser time. There has been marked growth in the popularity of arbitration when we look back a decade or two, beginning with the introduction of The Arbitration and Conciliation Act, 1996 to The Arbitration and Conciliation Act, 2021. Arbitration laws in India were given a boost with the introduction of UNCITRAL Model Law, which has been instrumental in keeping the various countries updated with the new

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[2] Dr. Justice AR Lakshmanan, *Need for Justice Dispensation through ADR*, LAW COMMISSION OF INDIA (Dec. 16, 2021, 3:13 PM), https://lawcommissionofindia.nic.in/reports/report222.pdf.
[3] INDIA CONST. art. 39A.

developments that are taking place in the field of arbitration.[4] Until recently, the law courts held the view that it was not imperative to interpret the arbitration laws of India by keeping in mind the Model Law (to which it traced its roots), through means like scrutinizing the judgements and decisions pronounced by the various national courts and the international commentaries.[5] This consequently had resulted in several decisions which had put India's position with respect to arbitration laws contrary to that of the other nations.

Essentially, the term *Arbitration* refers to a legal method of dispute resolution, which takes place between two parties, who appoint a third party, known as the arbitrator, to provide a solution to the dispute that may have arisen out of domestic, commercial or international agreements between the parties, which will have a binding effect on both of them. This is a type of out-of-court settlement, which gives space to the parties involved, who come from diverse cultural and legal backgrounds to solve the issues.[6]

A survey had been conducted in which it was found that 86% of the companies had faced cross border or domestic issues for which they had gone for dispute resolution. 95% of those who had gone for dispute resolution had opted for arbitration, either by combining with other techniques or solely with arbitration. Moreover, 48% of them had opted for mediation, while 68% had chosen litigation. A pertinent question that arises at this junction is – why did the companies not take recourse to the litigation procedures? [7]

It has been seen that most companies are used to litigation, instead of opting for arbitration. But in the developing countries, litigation is long drawn legal battle and most of the companies prefer to stay away from litigation process, if there are huge sums of money involved in the dispute. While the companies that used arbitration to resolve disputes are of the view that from the start to the culmination of the process, it takes less than 3 years.[8]

Arbitration is not new to India. It traces its roots back to the Vedic era, and it has been growing

[4]Abhilasha, *Future of Arbitration in India*, VIA-MEDIATION CENTRE (Jan. 15, 2022, 10:11 AM), https://viamediationcentre.org/readnews/MzIy/Future-of-arbitration-in-India.

[5]Konkan Railway Corporation Ltd &Anor. v. Rani Construction Pvt. (2002) 2 SCC 388.

[6]Abhilasha*supra* note 3.

[7]HiroNaraindasAragaki, *Arbitration Reform in India: Challenges and Opportunities*, Ssrn Papers (Jan. 15, 2022, 2:12 AM), https://deliverypdf.ssrn.com/delivery.php?ID=765078021102095113110030101064115096056012093049062087109127095007119071065094109088011062005012058022097120086065091127074087009058062048011003064067096109065073034018004068027025004025117007110002002090067106096072000109124112072083069121075086097&EXT=pdf&INDEX=TRUE.

[8]Pwc, *Corporate Attitudes & Practices towards Arbitration in India*, PWC (Jan. 1, 2022, 1:17 PM), https://www.pwc.in/assets/pdfs/publications/2013/corporate-attributes-and-practices-towards-arbitration-in-india.pdf.

exponentially since the later part of the 19th century. Back in the vedic times, Sage Yajnavalkya, in his works, has talked about bodies such as "*sreni*", "*kula*" and "*puga*", which are akin to modern times arbitral bodies. It is a commonly recognized fact that in earlier times as well, disputes and issues did arise between the commoners. In such situations, they used to approach the "Panchayat" which consisted of a group of wise and learned men, called as the "*Panchas*". The decisions that they took were final and binding on both the parties. Ergo, the "Panchayati Raj System" was a way of solving disputes in ancient India. [9]

The Law Commission, in 2009, had found that "*Union of India and its instrumentalities were the biggest litigant in the country*"[10], thus providing a rationale for the introduction of arbitration. In arguendo, in 2016, NITI Aayog, in one of its reports, had stated that in the construction sector, it took nearly 5 years for adjudging a case that had been filed under arbitration and another 2.5 years in the courts for deciding on any challenges which may have been filed with respect to the arbitral award. [11]

The Government of India, in 2014, had issued an Office Memorandum, in which it was stated that "*Adhoc arbitration proceedings often suffer from innumerable legal and practical problems which cause inordinate delays and costs in actual practice. This is because adhoc arbitrations do not have the advantage of any institutional machinery set up under the comprehensive rules of an arbitral institution*." The Trade Policy Division had therefore given the suggestion that the organizations under the Union Government can *"opt for use of arbitration conducted by institutions". [12]*

II. THE 1996 ACT AND AFTERWARDS

In 1996, Indian government brought forth a new regulation that was based on 'Model Law' as Arbitration & Conciliation Act. This was done with the aim to address the need for arbitration as an effective mechanism for redressal of commercial disputes in domestic and international

[9] SukhleenSaluja, *History and Development of Arbitration Law in India,* LAWLEX (Dec. 13, 2021, 3:40 PM), https://lawlex.org/lex-pedia/history-and-development-of-arbitration-law-in-india/20489.

[10] NITI Aayog, *Initiatives to revive the Construction Sector,*NITIAAYOG (Dec. 17, 2021, 8:16 AM), http://niti.gov.in/writereaddata/files/press_releases/Initiatives%20to%20revive%20the%20 Construction%20Sector.pdf.

[11] Dr. Justice AR Lakshmanan, *Reforms in the Judiciary – Some Suggestions,* LAW COMMISSION OF INDIA (Dec. 16, 2021, 9:13 PM), https://lawcommissionofindia.nic.in/reports/report230.pdf.

[12] Cyril AmarchandMangaldas, *Arbitration in India – A Story of Growth and Opportunity,*CYRIL AMARCHANDMANGALDAS (Jan. 4, 2022, 3:41 PM),https://www.cyrilshroff.com/wp-content/uploads/2019/06/Arbitration-in-India-%E2%80%93-A-Story-of-Growth-and-Opportunity.pdf (Last visited on August 14, 2021).

levels. To remove the delays and increasing backlog of cases in the current judiciary, the Act was needed to dispel effective resolution of disputes.[13]

Under the tutelage and Chairmanship of Justice AP Shah, the Law Commission of India gave consent to the constituted expert committee to out forward the 246th report on the "Amendment to the Arbitration and Conciliation Act 1996".14 As per the report, one of the members of the expert committee, Ashutosh Ray, discussed the amendments as suggested by the Law Commission that covered the larger international diaspora. [15]

It was due to the 1991 New Economic Policy and the radical changes it brought into the Indian economy, the 1996 Arbitration and Conciliation Act was adopted. This gave enforcement to the UNICITRAL Model Law on Arbitration. Thus, this Act became the yardstick for effective resolution of disputes in industrial and commercial arena that were outside the procedures of the courtroom. It consolidated various legal norms and bypassed the old laws. In the past 20 years, the experiences after the implementation of the Act suggests that amendments are needed as there are legal drawbacks. This included poor legal techniques that led to massive interventions by the judiciary and dissatisfaction among those that were trying to resolve disputes, using arbitration, under this Act.[16]

The governments that took over the regimes thereon made several unsuccessful efforts to make amendments in the Act of 1996. It is was under the current Prime Minister of India, Mr. NarendraModi, that there was substantial progress made in this direction and some modifications were brought about in the arbitration laws of India. [17]

These modifications were made following the firm decision of the Government to do business through an Ordinance in India, along with the aid of the legislative mechanisms. These culminated into the amendments that were enforced on January 1, 2016. [18]

One of the most crucial judgements given by the Supreme Court in this respect was in ***Bharat Aluminium Co v. Kaiser Aluminium Technical Services***[19], which coupled with two

[13]Nishith Desai Associates, *Law and Recent Developments in India,* NISHITH DESAI ASSOCIATES (Dec. 16, 2021 5:13 PM), https://www.nishithdesai.com/fileadmin/user_upload/pdfs/Research_Papers/2021_04_International_Commercial_Arbitration.pdf.

[14] Justice AP Shah, *Amendments to the Arbitration And Conciliation Act 1996,* LAW COMMISSION OF INDIA (Dec. 18, 2021, 3:39 PM), https://lawcommissionofindia.nic.in/reports/report246.pdf.

[15]Ashutosh Ray, Law Commissions Report to Revamp the Indian Arbitration Experience, KLUWER ARBITRATION BLOG (Jan. 14, 2022, 4:32 PM), http://arbitrationblog.kluwerarbitration.com/2014/08/23/law-commissions-report-to-revamp-the-indian-arbitration-experience/.

[16] Stephen York, *India as an arbitration Destination,* 21NLSIR77 (2009).

[17]RohitMoonka& Silky Mukherjee, *Impact of the Recent Reforms on Indian Arbitration Law,* 4 BRICS LAW J. 2-7 (2017).

[18]*Id.* at 16.

[19] Bharat Aluminium Co. v. Kaiser Aluminium Technical Services Inc., (2012) 9 SCC 552.

suggestions, or proposals for amending the Act, led to the drafting of the 20th Law Commission Report No. 246[20]. This came out in August 2014[21], following which a Supplementary Report was published in February 2015[22]. This Report sheds light with a fresh perspective on the loopholes in the Act and taking into consideration the various judgements given by the courts through these years, came up with constructive suggestions for making some analytical and pending amendments to the Act. [23]

III. THE 2021 AMENDMENT

The most recent amendment to the Arbitration and Conciliation Act came in 2021[24]. The Arbitration and Conciliation (Amendment Act), 2021 was enforced as a law on March 10, 2021, after the Arbitration and Conciliation (Amendment) Ordinance, 2020 had been passed in November 2020 by the President of India. [25]

This amendment brings changes to Section 36 of the Arbitration and Conciliation Act, 1996 [26], with respect to the "*enforcement of an arbitral award*". Many lawyers are of the view that the Amendment slows down the progress and scope of arbitration in India. The foremost obstacle created by the Amendment of 2021 dealt with changes with regards to the implementation of the arbitral awards. Furthermore, the amendment act has weakened the "*enforcement-friendly*" modifications that had been made in the Act in 1996 by putting restrictions on the discretionary power of the courts to render justice in the situation before them. Last, but not the least, this act has not stated the grounds for the enforcement of arbitral awards. This has not only led to the introduction of hurdles in the enforcement of awards, but also has created grounds which can be used to defer the enforcement and which are not in consonance with the present grounds for challenging arbitral awards. [27]

[20] *supra* note 13.
[21] *Id.* at 19.
[22] *supra* note 11.
[23] *Id.* at 21.
[24] The Arbitration and Conciliation (Amendment Act), 2021, No. 3, Acts of Parliament, 2021 (India).
[25] AshishDholakia et al., *India's Arbitration and Conciliation (Amendment) Act, 2021: A Wolf In A Sheep's Clothing?*, KLUWER ARBITRATION BLOG (Dec. 15, 2021, 11:34 AM), http://arbitrationblog.kluwerarbitration.com/2021/05/23/indias-arbitration-and-conciliation-amendment-act-2021-a-wolf-in-sheeps-clothing/.
[26] The Arbitration and Conciliation Act, 1996, No. 26, Acts of Parliament, 1996 (India).
[27] *supra* note 24.

The Supreme Court, in ***Swiss Timing Ltd. v. Commonwealth Games***[28], had adjudged those frauds committed in the contracts, would not weaken the arbitration agreement. On reading Section 15 and Section 16 of the Arbitration and Conciliation Act, 1996, it can be seen that it has been that "*all matters including the issue as to whether the main contract was void/voidable can be referred to arbitration*". Furthermore, the Apex Court had explicitly set out the differentiation between "*serious allegations of fraud*" and "*fraud simpliciter*" in cases such as ***Avitel Post Studioz Ltd. v. HSBC PI Holdings (Mauritius) Ltd***.[29] and ***A. Ayyasamy v. A. Paramasivam***[30]. These cause a lot of damage to the entire public. The Court had also stated that it was in the case of "*fraud simpliciter*" that the issues which arise will be *ultra vires* the Arbitration Tribunals. [31]

The Amendment made in 2021, however, could not successfully distinguish between those claims which fell under the category of *fraud* which will overstep the threshold, and allow a stay without any conditions on a particular arbitral award. Moreover, the amendment did not take into cognizance the aforementioned intricacies, thus leading to the formation of questions in corruption cases as well. [32]

In ***Prakash Industries Limited v. Bengal Energy Limited and Ors***.[33], the issue before the court was whether a change could be made in an arbitration application which had been filed under Section 34 of the Arbitration Act[34]. In its judgement, the court had categorically stated that there is a need to ascertain as to whether the grounds which are to be included with the modification are independent and new ones, which do not have any origins in the original application. In other words, every case will be decided on the basis of the nature of the modifications. In arguendo, in ***Board of Control For Cricket in India v. Kochi Cricket Pvt. Ltd. And Etc***.[35], the court had held that the alterations that had been made to Section 34, which deals with the grounds so as to challenge an arbitral award, were related to the "substantive rights" and were inapplicable to the applications that had been filed before the cut-off date under the said section. On the other hand, when taking into cognizance Section 36, the court

[28] Swiss Timing Ltd. v. Commonwealth Games, Arbitration Petition No. 34 Of 2013.
[29]Avitel Post Studioz Ltd. v. HSBC PI Holdings (Mauritius) Ltd., Civil Appeal No. 5145 OF 2016.
[30] A. Ayyasamy v. A. Paramasivam, Civil Appeal Nos. 8245-8246 OF 2016.
[31]NilavaBandyopadhyay, *India: Future of Litigation And ADR In India – Post COVID-19*, MONDAQ(Jan. 2, 2022, 4:17 PM), https://www.mondaq.com/india/arbitration-dispute-resolution/1046078/future-of-litigation-and-adr-in-india-post-covid-19-.
[32]*Id.* at 30.
[33]Prakash Industries Limited v. Bengal Energy Limited and Ors., AIR 2020 Cal 279.
[34]*supra* note 25.
[35]Board of Control For Cricket in India v. Kochi Cricket Pvt. Ltd. And Etc., Civil Appeal Nos.2879-2880 OF 2018.

had adjudged that "*execution of a decree pertains to the realm of procedure*" and that no right that had been given in order "*to resist enforcement*" under Section 36, which had not undergone any modifications, would be material to applications filed under Section 34 before the cut-off date.[36]

The Amendment made in 2021, on the other hand, makes changes in the "enforceability of the award". The 2021 Amendment Act had impacted the rights of the award-holder, as opposed to the 2015 Amendment Act which had removed the Automatic Stay and, thus had offset the rights of the award-debtor. This had several negative connotations, since now, the arbitral award could be enforced only with the requirement of security. Additionally, the 2021 Amendment, in this respect, not only negatively impacts the substantive rights of the award-holders, but brings back the obstruction in the rights of the award-holders. [37]

IV. COVID-19 AND AFTERMATH

Before the advent of COVID-19 pandemic, there were widespread discussions on the use of ADR with the aid of the digital media. Considering the case of arbitration, there were several arbitrators, who readily agreed to file the documents and the pleadings in a PDF form through an email. It is a widely acknowledged fact that the pandemic has changed the medium of hearings in the courts from physical to virtual. The circumstances created by COVID-19 resulted in the courts or the Arbitration Tribunals only hearing urgent and highly pertinent matters, leading to a delay in the delivery of justice. This necessitated the requirement for alternate means of providing justice to the people whose cases had not been taken up by the court. An extremely viable and popular answer to this impending problem came with the Online Dispute Resolution (ODR). In the contemporary times, it is believed to be the successor of ADR as well as Dispute Resolution. Courts and Arbitral Tribunals, thus took to video conferencing for hearings. [38]

Online Dispute Resolution is commonly used in International Commercial Arbitrations in which, the two parties are living in two different nations. ODR is not novel in nature. It is

[36] Amal K. Ganguli, *New Trend in the Law of Arbitration in India*, 60 JILI249-270 (2018).
[37] *supra* note 30.
[38] *Id* at 36.

COVID-19 which has boosted its usage and implementation across nations. Moreover, there are several international arbitration cases in which the statements of the experts or the witnesses have been recorded via video conferencing. In the Indian context, the usage of technology for purposes of collecting evidence, as well as for holding virtual courts has found its legal base in several judgements given by the Supreme Court. There are cases such as ***State of Maharashtra vs. Praful Desai***[39]**,** in which the Supreme Court highlighted the fact that 'evidence' as a term is inclusive of evidence in the electronic form and that video conferencing can be used as a method of collecting and recording evidence. In arguendo, the progress made in the field of technology has opened several avenues for going ahead with virtual courts, which stimulate the physical ones.[40]A step in this direction was taken by the National Green Tribunal, even before the pandemic had occurred, by hearing cases which had been filed in the Zonal Benches over digital platforms.[41]

In *Re: Guidelines for Court Functioning Through Video Conferencing During COVID-19 Pandemic*[42], the Hon'ble Supreme Court took *suomotu* cognizance and passed an order for all the courts to take the requisite steps so as to make sure that the smooth functioning of the courts is not hindered. Ergo, the courts took recourse to video conferencing.There are several High Courts which have come up with explicit rules and regulations regarding the filing of cases online, as well as scheduling the hearing of cases through the digital platforms.[43]

With the assumption that viruses and such diseases will continue to come year after year, video conferencing seems to be a method which will continue way into the near future.

V. FUTURE OPPORTUNITIES AND CHALLENGES

According to the surveys which have been conducted so far, it has been found that most of the companies agree that India hosts a great arbitration potential. Out of those companies who have undergone arbitration, 82% have stated that they will opt for arbitration in case any more disputes arise in the forthcoming times. In fact, 43% of the companies reported that the arbitration scenario of India looks either "optimistic" or "very optimistic". Additionally, 46%

[39]State of Maharashtra v. Praful Desai, **(**2003)4 SCC 601.
[40]*supra* note 24.
[41]*Id.*
[42] S. A. Bobde et al**.,** *Re: Guidelines For Court Functioning Through Video Conferencing During COVID-19 Pandemic,* SUPREME COURT OF INDIA (Jan. 13, 2022, 4:09 PM), https://main.sci.gov.in/supremecourt/2020/10853/10853_2020_0_1_21588_Judgement_06-Apr-2020.pdf.
[43]*supra* note 30.

out of those companies who had not yet chosen arbitration were ready to try arbitration in the future. [44]

It is a well-established fact that most of the MNC's currently operating in India are filing for arbitration, while litigation is the next option. This cannot, however, hide the discontent which has for long been there with respect to the settlement of altercations when the seat of the arbitration is in India. The Law Ministry of India has proposed several changes to the existing law. Thus, the active and constructive steps taken by the Government along with the industry will surely result in the companies in India to opt for international or domestic arbitration. [45]

On carefully scrutinizing the obstacles that the companies face, as well as the benefits and the quality information that they receive from arbitration contribute towards the active involvement of India in becoming a major hub of arbitration. This can be summarized in the following two points:

(A) The recognition of the immense advantages that the seat of arbitration offers

(B) The requirement of a sturdy arbitration infrastructure, so as to solve the issue relating to the selection of the arbitrators along with the cost and the duration of the proceedings of the case.

The interference of the courts of law in arbitration should be reduced substantially. Such intrusions consequently result in a greater preference for law courts and litigation, even for those who choose arbitration over the court. Sometimes, the people opt for getting the dispute resolved through the courts initially. It is pertinent to regulate the interference of the courts during the course of proceedings, as well as post the culmination of the proceedings. In ***White Industries v. Republic of India***[46], two cardinal issues were highlighted: firstly, the delay in the arbitration and secondly, the interference of the judiciary. It was thus decided that the interventions by the judiciary should be decreased to a considerable degree. It is noteworthy that two of the most censured cases related to laws regarding arbitration in India, i.e., ***Satyam Computer***[47] and ***Bhatia International v. Bulk Trading S.A. and Anr.***[48], were the primary reasons behind the inability and the delay in the enforcement of the award by the White Industries.

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[44] AyushVerma, *Challenges for Arbitration in India*, IPLEADERS (Dec. 12, 2021, 5:42 PM), https://blog.ipleaders.in/challenges-arbitration-india/.

[45] JahanviSindhu, *Public Policy And Indian Arbitration: Can The Judiciary And The Legislature Rein In The 'Unruly Horse'?*, 58 JILI 421 (2016).

[46] White Industries v. Republic of India, IIC 529 (2011).

[47] M/S Satyam Computer Services Limited v. Directorate of Enforcement, Civil appeal number 3678 of 2007.

[48] Bhatia International v. Bulk Trading S.A. and Anr., (2002) 2 SCR 411.

However, considering the changes in the provisions brought about by the Arbitration and Conciliation (Amendment Act), 2021, it can be clearly inferred that the "*Statement of Objects*" and "*Reasons*" do not seem viable. The Parliament may not have taken into account the various complications arising out of it. [49]

VI. SUGGESTIONS AND CONCLUSION

India is certainly heading towards a brighter future with respect to arbitration, with the inclusion of new cases, amendments to the existing laws, coupled with the crystal-clear inclination towards arbitration for dispute resolution and the boost given by the government. The modifications of the laws have been planned for a long period of time now, and now they are being given a fresh push to make India an "*arbitration friendly jurisdiction*". [50]

India's chances of becoming the hub of arbitration and the ability of the latest provisos to work efficaciously are dependent on the coordination between the courts and the parties, along with the feasibility of the provisos. Furthermore, the modifications and amendments which are made aim to reinforce the relationship between the various tribunals and the courts, keeping in mind that the interaction between them is extremely pivotal.

With the passing of time, technologies such as block chain, document collation tools and artificial intelligence, which may be used in the selection of arbitrators, will become more developed and sophisticated. This will aid in catering to the surge in the use of arbitration in businesses and bring about marked improvements in its efficiency. With the speedy progress made by India in the field of arbitration laws, there is a ray of optimism that one day India will emerge as a hub of arbitration all over the world.

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[49] Mukherjee *supra* note 16.
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