VOLUME 1 | ISSUE 4

INTERNATIONAL JOURNAL OF ADVANCED LEGAL RESEARCH

UNJUSTIFIED UNCERTAINITIES IN ARBITRATION: ROOTS AND POTENTIAL SOLUTIONS

- Shivangi Mishra[1]

ABSTRACT

Dispute resolution is a central aspect of every judicial system, perhaps one of the most important requirements of a peaceful community or association is the settlement of conflict cases by peaceful mechanisms, among which arbitration is also one. Arbitration is by far the most systematic and constructive method of settling conflicts resulting from domestic and foreign contractual relationships, in which the participants parties agreed to resolve the conflict by signing a contract.

Even though the alternative dispute resolution method were introduced with aim of reducing the time consumed in providing justice, the process of achieving justice through these mechanism has become very tedious and long, and requires a lot of patience in today's scenario.

The Act's reforms, while commendable, are only the first step to make arbitration India's chosen mechanism of conflict resolution. It should be accepted that enhanced arbitration effectiveness is impossible to achieve exclusively by top-down legislative reform, particularly one as problematic as the one above.

Changes such as reducing judicial intervention, establishing arbitral institutes, training arbitrators and creating strong legislative infrastructure can take arbitration a long way in India and can become a quick method for providing justice.

1. 4th-Year, B.B.A.LL.B., JagranLakecity University, Bhopal

For general queries or to submit your research for publication, kindly email us at editorial@ijalr.in

https://www.ijalr.in/

This paper aims to highlight the big and small problems within the arbitration and its procedure in India, and also provide some solutions to overcome such issues.

INTRODUCTION

The economic reforms of 1991 changed the state of trade in the country by opening the doors to foreign investment and facilitating international trade relations. With growing trade relations, the potential for conflict grew.

Indian courts have since been under heavy pressure due to time constraints and backlogs and any further additions will burden the system. Foreign investors who wish to resolve their disputes either through litigation or by means of a mechanism under India-based court system could not be expected to wait indefinitely long time period for a lawsuit to be resolved.

To overcome such an alliance, India needed another way of resolving disputes that could prove to be faster, less expensive, more efficient, and operated independently of conventional litigation. An important step taken to achieve this goal was the adoption of the Arbitration and Conciliation Act, 1996 (hereinafter 'the Act') which replaces obsolete laws, the Arbitration Act, 1940 and The Foreign Awards Act, 1961.

The purpose of this action was to speed up the process of mediation and to reduce the risk of legal intervention. This act is a landmark piece of legislation modelled after the UNCITRAL Model Law on International Commercial Arbitration. The purpose of this law enforcement is to introduce an inexpensive and fast-tool to resolve trade disputes is plagued by needless 'Justice Interventions' which make it unnecessarily sluggish, slow and difficult.

Arbitration in our country is very far from being non-litigious, and it struggles from the very same issues of deferred redress and pendency as courts. A further concern to acknowledge is the enforceability of arbitral awards. 'Public policy', being a soft concept, will always be open to a variety of judging interpretations. The concept, as it relates to arbitration, needs to be balanced with the corresponding principles of limited judicial intervention and court surveillance. As a consequence of the court's inability, a detrimental pattern has emerged, potentially preventing individuals from using resolution of disputes through alternative procedures. A further justification to choose arbitration against litigation is cost efficiency; however arbitration itself has proven to have become a fancily costly process. It is significant

to mention that all these flaws also have potential to stymie international trade and commercial arbitration, and even with the constant increase in industries and businesses, this could damage our economy.

TYPES OF ADR IN INDIA

Arbitration, Conciliation, Mediation, Negotiation, and LokAdalats are among the mechanisms of conflict resolution included within the concept Alternate Dispute Resolution. Numerous nations are using these procedures to resolve disputes efficiently. The functioning of legal system through conventional processes has now become incredibly hard attributed to the increasing workload of cases pending, necessitating the adoption of all such approaches.

Furthermore, the Malimath Committee suggested that the court are required to move the conflict to Conciliation, mediation, arbitration, judicial resolution by LokAdalats, and negotiations. The different types of ADR are:

1. ***Arbitration*:** Arbitration has been the most frequently used approach of alternative dispute resolution. This is a type of alternative conflict settlement in which the disputing parties address the matter to one or maybe more arbitrators. A clear procedure is executed to nominate the arbitral tribunal (that comprises of several arbitrators). In arbitration, a neutral third party examines the facts and documents in the matter and renders a legally final and binding settlement for both sides. Arbitral awards have restricted powers of examination and challenge.
2. ***Conciliation:***Conciliation is yet another frequently used approach of alternative conflict resolution wherein the disputing parties hire a conciliator who interacts with both individually and assist them settle mutual disagreements by strengthening interaction and finding workable scenarios. The parties have extensive flexibility in terms, arrangement, and substance of the conciliation proceedings. Conciliation is used to resolve a variety of conflicts, covering labor disputes, service issues, taxes, and excise. Commercial, environmental, personal, real estate, and insolvency issues are often resolved by conciliation proceedings.
3. ***LokAdalat***: LokAdalat is a platform wherein pre-litigation conflicts are resolved in amicable terms. LokAdalats are organized by NALSA as well as other legal aid organizations. Underneath the Legal Service Authority Act of 1987, LokAdalats were

assigned legal status[2]. The grant (decision) issued by the LokAdalats is considered to become a civil litigation decree and therefore is legally binding on all sides, and therefore no challenge for such an award stands before any court of law, as per the aforementioned Act.[3]

4. ***Negotiation***: A negotiation is often a constructive conversation that aims to settle a problem in a way which is agreeable to both sides. Each side in such a negotiation attempts to convince the other to consent with their perspective. By compromising, the affected parties attempt to stop debating and instead seek to find a consensus. Negotiations entail a certain amount of compromise on both sides, which implies that one side would always come out ahead.
5. ***Mediation***: Mediation is basically a third-party facilitation of a negotiation. Mediation is a form of alternative dispute resolution where the parties negotiate their disagreements with the help of a qualified neutral third party who helps them come to an arrangement. It could be a casual gathering of the claimants or a formal settlement session.

PROCESS OF ARBITRATION

The condensed stages in an arbitration process are as follows:

1. To commence, the participants to an agreement or a contract include an arbitration clause within the contract/agreement, which states that if and when a disagreement emerges amongst both, either party shall notify the other by providing an arbitration notice[4].
2. This would be followed by other side's responses as well as the eventual appointment of an arbitrator[5], and also decisions on rules and regulations[6], arbitration location[7], and language[8].
3. Official hearing with official texts mark the beginning of the arbitration proceedings.
4. When the position involved needs it, the arbitrator will grant temporary reliefs before issu ing a final award that is binding on all parties.[9]

2. Section 19, Organization of LokAdalats, Legal Services Authority Act,1987
3. National Legal Services Authority website(http://nalsa.gov.in/lok-adalat)
4. Section 7, Arbitration Agreement, Arbitration and Conciliation Act,1996
5. Section 11, Appointment of Arbitrator, Arbitration and Conciliation Act,1996
6 Section 19, Determination of rules and procedure, Arbitration and Conciliation Act,1996
7. Section 20, Place of arbitration, Arbitration and Conciliation Act,1996
8. Section 22, Language, Arbitration and Conciliation Act,1996
9. Section 17, Interim measures ordered by arbitral tribunal, Arbitration and Conciliation Act,1996

5. The difficult part emerges whenever one of the sides, dissatisfied with the award, and app eals it in court.[10]Obviously it depends on the circumstance, whether the parties would app roach the appealate court or the Supreme Court.

LANDSCAPE OF ARBITRATION IN INDIA

The Arbitration and Conciliation Act of 1964 regulates the arbitration framework in India. The Arbitration Act is divided into two sections:

- Part I, which extends towards conflicts having an arbitration seat in India as well as the courts of our country, have considerable powers to designate or substitute arbitrators, entertain procedural appeal, issue temporary steps, and dismiss arbitral awards. These are often referred to as "onshore arbitration".
- The New York Convention and also the Geneva Convention was incorporated within Indian Arbitration law in Part II, which refers to conflicts with the seat of arbitration from outside India. These are often referred to as "offshore arbitration".

DELAY IN ARBIRATION IN INDIA

The Indian Constitution brings numerous advantages to its citizens and promises to offer justice to anyone who has been treated unfairly. The Arbitration and Conciliation Act of 1996, for example, provides for arbitration proceedings.

Arbitration and other alternative dispute resolution mechanism try to settle the dispute outside the courtroom with the aim of providing quick justice. But the questions which arise here are IS ARBITRATION REALLY OFFERING QUICK JUSTICE? IS THE TIME CONSUMED IN ARBITRATION REALLY JUSTIFIED? ARE PEOPLEWHO OPTING FOR ARBITRATION WITH THE AIM OF QUICKJUSTICE REALLY EVEN RECIEVEING IT? The answer is NO.

Even though the alternative dispute resolution method were introduced with aim of reducing the time consumed in providing justice, the process of achieving justice through these mechanism has become very tedious and long, and requires a lot of patience in today's scenario.

Despite claims to the contrary, an arbitral claim doesn't really conclude when the grant is declared; rather, the actual action begins is when award is ought to be implemented after it has been confirmed. Lawmakers may have chosen to make arbitral awards open to appeal in

10. Section 37, Appealable orders, Arbitration and Conciliation Act,1996

trial courts for reasons best believed by them. A Trial Judge will review the awards made by a jury of three former Supreme Court Chief Justices. The arbitration encounter, especially for victorious claimant, could become frustrating, drawn-out, and skewed, easily undermining the notion of swift and efficient justice. One could only envision the dilemma of a qualified claimant who is unable to take advantage of the arbitral award before those procedural hurdles are resolved.

1. ***EXCESSIVE JUDICIAL INTERVENTION IN FORM OF JUDICIAL REVIEW:*** Excessive judicial interference mostly observed in the form of judicial interpretation had hindered the dispute settlement process thereby defeating the act's objective. The act, within section 34[11], sets out a number of grounds for filing an appeal in court to overturn an arbitration award. The act's 34 is centred on UNCITRAL Model Law 1985, and also its application in the 1996 act seems to be much expanded than that of the abolished act of 1940. 34(2)(A)[12] identifies five conditions in which a party must provide concrete supporting evidence of its appeal to the court to get the arbitral award put down.

   The section 34(2)(B)[13], that applies to two reasons for reviewing the arbitration award, seems to be of great concern. Firstly, if the dispute is not capable of being arbitrated in India, and secondly, if the award granted in arbitration proceedings is inconsistent with India's "Public Policy." The Supreme Court recognized "public policy" in O.N.G.C v. Saw Pipes ltd[14] in terms of the concepts guiding the 1996 act, the Indian Contract Act of 1872, and constitutional provisions.The above mentioned case widened the spectrum of public policy by allowing for near-unlimited legal challenge, weakening the Act's goal of limiting court intervention. As a result, the Saw Pipes verdict is a major stain on India's arbitration law.

   Since the term "public policy" isn't really described throughout the 1996 act or some other legislation, the context of the phrase has expanded with time as a result of judicial craftsmanship, empowering judges to perceive it however they see fit. It has recently created a series of trouble for litigants in international commercial arbitration and investment arbitration, because court often selectively dismissed and approved claims on this basis.

11. Section 34, Application for setting aside arbitral order, Arbitration and Conciliation Act,1996
12.Section 34, Application for setting aside arbitral order, Arbitration and Conciliation Act, 1996
13.Section 34, Application for setting aside arbitral order, Arbitration and Conciliation Act, 1996
14. [2003] 3 SCR 691

2. ***LONG PROCEDURES UNDER THE ACT:*** The time limit for making an appeal to set aside the award of arbitration proceeding has been fixed at three months within section 34(3)[15]. The start of the time frame is the day that the applicant obtained the award. The claimant could be granted a further thirty-day period if he could provide extensive proof that he had been hindered from submission of application during three months due to some valid reason. The protocol outlined should indeed be re-evaluated.The act was intended to provide swift and efficient remedies to litigants, but it is important to not lose track of the obstacles that might hinder a genuine litigant from exercising his opportunity to be represented. The 34(3)[16] clause prevents certain people from finding justice. Procedural law should at no cost encroach on substantive law's privileges. Without a doubt, the act's goal must take priority, however the intention of ensuring justice should also not be overlooked. As a result, the act's provisions must be interpreted in a way that preserves our legal system's vision and objectives.
3. ***LACK OF PROPER ARBITRATION BODIES AND ARBITRATORS:***Former court judges have long been and continue to be among the most common choice of arbitrator for onshore arbitration. As a consequence, onshore arbitration has taken over the impression of 'after-hours' litigation, with lawyers holding brief proceedings only after courts have closed before the retired judges who carry much of their previous trial procedures (including the pleadings and standards of procedure) into arbitration environment.

   Notably, the lack of a direct supervision authority implies that conflicts amongst parties over issues like arbitrator challenges and default appointment of arbitrators must be brought before the judge in the court. Due to the time it takes to receive such rulings, a commercial conflict frequently lasts far longer than the 1-2 years it would take within arbitration proceedings.

   Only with advent of a community of full-time arbitration practitioners who would not spend most of the time in court and are there to decide appeals and award damages during business hours by extensive proceedings instead of just stretching out during brief meetings, this trend is steadily evolving. As a result, the array of arbitrators is therefore

15.Section 34, Application for setting aside arbitral order, Arbitration and Conciliation Act, 1996
16.Section 34, Application for setting aside arbitral order, Arbitration and Conciliation Act, 1996

no longer restricted to former High Court or Supreme Court justices, and famous practitioners have started to hear disputes as arbitrators.

But the problem does not end here;still the number of arbitrators in our country is very low. Appointment of arbitrators needs to increase. This sometimes makes the parties in the dispute to choose an arbitrator who is competent and professional from the limited choices they have. And sometimes due to limited number of good arbitrators, they are very busy and overburdened.

Also the retired judges who serve as arbitrators still tend to serve as arbitrators in many cases. The documentation that are being used in arbitration proceeding are not as official and formal compared to the documents used in court, however they are professional and respectful. But since large percentage of Arbitrator/s seem to be either former judges from either the Supreme Court of India or the High Court of a specific jurisdiction, and they may sometimes lead to Arbitration following traditional Court structure for document which are to be submitted, protocol to be implemented throughout the hearings, and so forth, which again will impede the Arbitration's performance.

4. ***LACK OF PROPER LAW:*** The Arbitration and Conciliation Act, 1996 is still the only source act that governs arbitral proceedings. The amount of an arbitration award granted is the almost the same as the sum of a court ruling, however due to a complete lack of statutory structure, many citizens are still reluctant to take chances or leaps of confidence when dealing with significant amounts of money. Instead of just relying on recommendations from different organizations such as the Indian Arbitration Forum as well as the Indian Council of Arbitration, such instructions should be legally enforced.

   Multiple guidelines applicable arbitration proceedings were added in 2015, and it was the most significant reform of the act. The Act's implementation was based solely on one day, October 23, 2015. The text of Section 26[17] of that same 2015 Act, that dealt with the potential application of the act, was perhaps the most difficult to understand since arbitral and court procedures are distinct but related. The concern was whether such a provision of the law still applied to court hearings.

17. Section 26, Act not to apply to pending arbitral proceedings, The Arbitration and Conciliation (Amendment) Act, 2015

As in instance of BCCI v. Kochi Cricket[18], the Supreme Court held that perhaps the concept that arbitral and court procedures are distinct is indisputable. Any Arbitral dispute that ends up in Court has something to do with the Arbitration proceeding. Because the act's text in section 26[19] clearly states that it applies ".....in regards to Arbitration proceeding begun from and then after the date of enactment of this act," As a result, if it falls within the scope for validity of the legislation, which is the 23rd of October 2015, the act relates to Court proceedings relating to Arbitral proceedings.

But, Court trials are analogous to arbitration proceeding (main proceedings), according to the legislative branch, while basic proceedings remain prohibited from gaining advantages of new act, and should thus be followed by Court (secondary proceedings). If Section 26[20] is applicable to court cases, it has the power to retroactively extend the 2015 Act to arbitration proceedings.(For example, one of the participants to such an arbitration settlement lodged a lawsuit in the Court Of appeal with authority over the conflict to name the Arbitrator/s.) The Court impedes the appeal and nominates an arbitrator or arbitrators.Then, without any of the participants renewing their mutual agreement, it is stated that arbitration Award should be issued within 12 months (this time limitation is a part of 2015 Act).

To clear up the question, Section 87[21] of its 2019 Amendment Act became enforced, which overturned the BCCI v. Kochi Cricket (2018) 6 SCC 287 decision, however the Supreme Court later quashed Section 87 [22]of the 2019 Amendment Act. People are fearful on using Arbitration to settle their disputes as a result of this chaos. There are still way too many procedures and regulations to obey, which can often make basic Arbitration hearings more difficult.

SOLUTION TO ABOVE STATED PROBLEMS

Arbitration has proven to be a boost for the Indian judicial system, which requires a method of dealing with disputes which are waiting in the court all around the country. Arbitration is

18.(2018) 6 SCC 287
19.Section 26, Act not to apply to pending arbitral proceedings, The Arbitration and Conciliation (Amendment) Act, 2015
20.Section 26, Act not to apply to pending arbitral proceedings, The Arbitration and Conciliation (Amendment) Act, 2015
21. Section 87, automatic stay on all arbitral awards, The Arbitration and Conciliation (Amendment) Act, 2019
22. Section 87, automatic stay on all arbitral awards, The Arbitration and Conciliation (Amendment) Act, 2019

advantageous not just in eliminating the excessive pressure placed on the judicial system, but also in a variety of other respects, such as quicker decision-making, lower costs, and the ability for individuals to present their respective terms and conditions, and so on. If the aforementioned obstacles are resolved, as well as both the government and the courts keep a keen watch on laws for arbitration, the future of arbitration in India is secured.

The Act's reforms, while commendable, were the very first step towards creating arbitration India's chosen system of resolving disputes. It should be accepted that enhanced arbitration productivity is impossible to achieve entirely by top-down new legislation, particularly one as misguided as this.

Some of the steps needed to be taken are:

REDUCE JUDICIAL INTERVENTION: The judicial system needs to reconsider its level of interference as well as recognize that arbitration must be handled as a separate dispute settlement process. It must also make a positive difference by playing supporting role in the arbitration. The judiciary can have a serious influence on arbitration only with proper help, but undue interference undermines the entire intent of the process.

Where there is even the minimal uncertainty in arbitration law, as observed in ONGC v Saw Pipes[23], judicial intervention in the arbitral proceedings could take hold, and the intervention could be so significant that legislative action is required to resolve it. Sad to say, as seen above, even the most recent revisions to the Act are loaded with inconsistencies and confusion, allowing for more judicial intervention.

SETTING UP MORE ARBITAL INSTITUTES: Throughout the nation, ad hoc as well as institutional arbitration exist simultaneously, however institutional arbitration can enhance the efficacy. As a result, institutional arbitration changes need to be implemented. There aren't enough arbitral bodies in India. Despite the fact that organizations such as the Delhi High Court International Arbitration Centre, NaniPalkhiwala Arbitration Centre, International Centre for Alternate Dispute Resolution, and Indian Council for Arbitration are now doing brilliant job, but there is a need for more arbitration organisations to emerge in order to boost performance.

23. ONGC v. Saw Pipes, [2003] 3 SCR 691

Furthermore, there must be a mutual association amongst arbitration institutes and the courts, which must be formed by judges transferring certain disputes to arbitration and even the institutes guaranteeing that perhaps the disputes need not return to the judiciary.

TRAINING IN THE LAW SCHOOLS: With the rising interest in alternative dispute resolution throughout the nation, it is now essential to include procedural arbitration in legal education. Educational institutions should provide Alternative Dispute Resolution Centres to educate students about the process and raise public awareness. Universities should also be willing to consider arbitration as a means of resolving disputes, and students must be taught the necessary skills. Lawyers must be trained and qualified in the protocols that govern the arbitral proceedings. These amendments are aimed at making institutional arbitration a standard procedure in domestic disputes.

CREATING ARBITRATOR'S POOL: Arbitration must be prioritized over Indian court trial proceedings, and the pool of Indian legal professionals who specialize in the field of arbitration must develop. In addition, the pool of arbitrators must expand. Sadly, the practice of appointing former Indian judge as arbitrators is suppressing the advancement of arbitration as a means of dispute resolution in India. What is really required is the creation of a group of arbitrators free of the constraints imposed by Indian court practices and dedicated to the development of arbitration in its own way.

PROPER LEGISLATIVE INFREASTRUCTURE: It is false to think that India lacks several compulsory ADR provisions. Under the Companies Act, corporations are obligated to use mediation to settle a conflict between them. Even though the creation of a Facilitation Council for MSME can become a stumbling block to a pre-existing Arbitral clause/agreement, the conflict is still resolved only using ADR as a procedure. As a result, the authority of overriding impact should be considered. A monetary clause must be used as a criterion over all commercial disputes. For example, "in the lack of an arbitration provision with in agreement, any contractual conflict between both the parties to the contract concerning a monetary sum less than Rs.10,00,000 should be resolved by arbitration." A lot of the workload from the judiciary would be transferred to ADR in this manner.

TAKING HELP OF LAW FIRMS: They could host workshop cum competitions wherein participants can receive instruction on the rules and procedures and roles available to them,

which could also vary from acting as an advocate for a participant in arbitration or mediator, expert judgment, personal evaluation, and summary trails, among other things. As a result, both law students and the firm will develop their own network of potential Arbitration or Alternative Dispute Resolution lawyers. Competitors will be aware of other ADR mechanisms used outside of India in this regard.

CONCLUSION

In India, the idea of mediation and arbitration is still developing. With the constant evolution of the global economies and the increasing globalization, keeping up with the advancement and meeting the ever-changing requirements of today's modern world is becoming exceptionally hard. Arbitration, negotiation, as well as other dispute settlement mechanisms has helped lift the monotony of conventional adversarial dispute settlement, but they also have fallen short of their ultimate goal. Despite many of the other misconceptions, arbitration has consistently demonstrated its power through meeting people's desires and reinforcing their willingness to participate in the some type of transaction.

Alternative dispute resolution, specifically arbitration, has the potential to become the centre of international conflict resolution. Owing to its autonomous and privately owned arbitral tribunals, several nations, such as the United States and Singapore, already had established themselves as perhaps the most desirable arbitration locations. India seems to have the right mix of resources and ability to be among the world's increasingly desirable arbitration hubs. Regrettably, there are several flaws in the new framework that have yet to be addressed.

The Act's reforms, while commendable, are only the first step to make arbitration India's chosen mechanism of conflict resolution. It should be accepted that enhanced arbitration effectiveness is impossible to achieve exclusively by top-down legislative reform, particularly one as problematic as the one above.

It is necessary to reform the ideology of Indian arbitration.

Arbitration may become the predominant form of resolving disputes in India once the Indian arbitration community has modified and all these lingering issues have been resolved.