VOLUME 4 | ISSUE 4

INTERNATIONAL JOURNAL OF ADVANCED LEGAL RESEARCH

CHALLENGES IN INDIAN ARBITRATION: EXAMINING THE INFLUENCE OF PROCEDURAL LAWS ON DISPUTE RESOLUTION

- Kashish Mathur[1]

ABSTRACT

Arbitration in India has emerged as a preferred alternative for dispute resolution, offering parties flexibility, confidentiality, and efficiency. However, the efficacy of the arbitration process is significantly influenced by procedural laws governing it. This abstract delves into the challenges posed by procedural laws in Indian arbitration and their impact on the efficiency and effectiveness of dispute resolution mechanisms.

One of the primary challenges lies in the complex and often ambiguous procedural framework governing arbitration in India. The Arbitration and Conciliation Act, 1996, while laying down the basic framework, leaves several procedural aspects open to interpretation, leading to delays and uncertainties in the arbitration process. Additionally, conflicting judgments by various Indian courts on procedural matters further exacerbate this challenge, creating confusion and inconsistency.

- **INTRODUCTION:**

Some ADR commentators do not regard arbitration as a form of ADR because of its similarity to the litigation. However, due to the fact that arbitration was originally regarded as part of ADR, and because of its role in the other hybrid processes whichhave since developed, it is treated as a mode under ADR system in India. Arbitration, to some extent, has been proved as an additional option, particularly for the commercial disputes for amicable settlement of disputes. Arbitration appears to have greater effectiveness due to the number of International

[1] Law Student, Amity Law School Noida

©2024 International Journal of Advanced Legal Research

Conventions and laws which have been widely adopted such as the Convention on Recognition and Enforcement of Foreign Arbitral Awards[2], which has been adopted by a number of countries including India. An arbitrator always gives due importance to the evidences produced by both the disputants, though he is not bound to follow the technical procedural aspect as prescribedby the Evidence Act or other procedural Acts.

- **Understanding Arbitration through Roman Laws**

Arbitration, called ―compromise‖ (compromissum) was a mode of terminating controversies much favoured in the civil law. International Arbitration was fully recognised practice amongst the Greeks[3]. In Greece right from the fifth century B.C., disputes were settled by Arbitration and that too of various categories like: dispute related to boundary delimitation, ownership, assessment of damages caused due to invasion, recovery of money and religious matters. There is no denying the fact that Arbitration existed in the western world, may be in different forms[4].

- **Common Law and Arbitration**

Common Law developed a distinct taste towards Roman Law. In Common Law, there was said to be a policy against agreements ousting the Court‗s jurisdiction. In the beginning, it was necessary to establish the jurisdiction of the Courts of politicallyorganised society to replace the institutions of kin-organised society, self-help and the help of one‗s kinsmen, self-redress and private war[5].

In the middle ages, there was a contest for the jurisprudence between the Courtsof the King and the Courts of the Church. In England, after the takeover, the King‗s Courts got hold of the jurisdiction at the cost of the old customary and feudal local tribunals. The Common Law grew up in the King‗s Courts particularly in 13th Century. No doubt, Common Law Courts looked resentfully towards agreements to submit privatedisputes to extra-judicial authorities instead of politically organised society.

[2] See,InternationalEncyclopediaofSocialSciences,Vol.1,p.50,asquotedinLawCommissionofIndia,76th Report on Arbitration Act, 1940 (1978).
[3] Known as New York Convention.
[4] Wehringer,Arbitration:PreceptsandPrinciples(1969),p.5.
[5] Pound,Jurisprudence (1959),Vol.5,pp.357-58

©2024 International Journal of Advanced Legal Research

- **Ad hoc Arbitration**

Ad hoc Arbitration is an arbitration agreed to and arranged by the parties to the disputes themselves without recourse to any special institution. The proceedings are conducted by the arbitrators as per the agreement between the parties or with concurrence of the parties. It can be domestic as well as foreign arbitration.

- **Institutional Arbitration**

When arbitration is conducted by an arbitral Institution, it is called Institutional Arbitration. The parties may specify, in the arbitration agreement, to refer the dispute ordifferences to be determined in conformity with the rules of a particular arbitral Institution[6]. One or more arbitrators are appointed in such arbitration from a pre-selectedpanel by the governing body of the institution or even by selection by the disputants themselves but restricted to the limited panel. ―Institutional Arbitration is arbitration conducted under the rules laid down by an established arbitral organization. Section 2(6) of the Arbitration and Conciliation Act 1996 provides that where Part I except section 28, leaves the parties free to determine a certain issue, that freedom shall include the right of the parties to authorize any person including an institution, to determine that issue. Section 2(8) of the Act expressly provides that where Part I refers to the fact that the parties have agreed or that they may agree, or in any other way refers to an agreement of the parties, that agreement shall include any arbitration rules referred to in that agreement.

Some of the leading Indian institutions are The Indian Council of Arbitration (ICA), New Delhi, Federation of Indian Chambers of Commerce and Industry (FICCI), New Delhi, International Centre for Alternative Dispute Resolution (ICADR), NewDelhi, Bengal Chamber of Commerce and Industry, Indian Chamber of Commerce, the East India Cotton Association Ltd., and the Cotton Textiles Export Promotion Council. There are a large number of such institutions in the other metropolitan cities.

Some of the leading international institutions are, International Chamber of Commerce (ICC), Paris, London Court of International Arbitration (LCIA), London, London Maritime Arbitration Association (LMAA), International Centre for Settlement of Investments Disputes (ICSID), London, Grain and Feed Trade Association (GAFTA), London, and American Arbitration

[6] ArbitrationandConciliationAct,1996,Sec.53.

©2024 International Journal of Advanced Legal Research

Association (AAA), New York. World Intellectual Property Organization (WIPO), an agency of the United Nations, offering services for intellectual property disputes.

By and large, basically the rules of these institutions follow a similar pattern, although they are expressly formulated for arbitrations that are to be administered by the institution concerned; the clause recommended by the ICC, for instance, states:

―All disputes arising in connection with the present contract shall be finally settled under the Rules of Conciliation and Arbitration of the International Chamber of Commerce by one or more arbitrators appointed in accordance with the said Rules[7].

Such a clause is evidently advantageous, because even if at some future stage, one party starts dragging its feet to proceed further with arbitration proceedings, it will nevertheless be possible to arbitrate effectively, because a set of rules exists to regulate the way in which the arbitral tribunal is to be appointed and the arbitration is to beadministered and conducted.

Parties will be well advised to verify in advance whether the arbitral institution to which they wish to refer their disputes has some experience in the particular commercial sector concerned. An institution with the relevant experience will typically have a list, or panel of potential arbitrators with expertise in the field, from which it may appoint one ormore in a case where the parties themselves will not appoint the arbitrators. Some arbitral institutions do not grant to the parties the liberty of designating an arbitrator or a co-arbitrator. They may, in accordance with their rules, recognize parties to choose an arbitrator from a list, which the institution provides. Some arbitral institutions mayrestrict the arbitrators appearing on this list to nations of their own country, or to persons,with a specialist background. Other arbitral institutions may not use a list system at all and give the parties complete freedom to select the arbitrator or arbitration at theirchoice.

• ARBITRATION IN INDIA: EVOLUTIONARY PROCESS

The term Arbitration in India is not of new origin rather, history has witnessedthe adoption of Arbitration from the time immemorial, although with a different nomenclature. In pre-colonial era, the laws in India were not codified. The ancient system prevalent in India was of making oral agreement to submit to arbitration and of making oral awards. The Hindu

[7] RedfernandHunter,LawandPracticeofInternationalCommercialArbitration,fourthedn.2004,P.p47, 1-99

©2024 International Journal of Advanced Legal Research

Civilization encouraged settlement of differences by tribunals, chosen by the parties to the disputes themselves. The decisions of these tribunals were always accepted as final and conclusive between the parties. Apart from the Courts established by the King, there are evidences of other recognized tribunals in ancient texts and digest of Hindu Law. Particularly, the *Smritis* did talk about these kinds of popular courts used to fall under the category of *Puga or Gana, Sreni and Kula.* More importantly, *Smriti* talked about the authority of these agencies to decide law suits. These Courts as mentioned by *Yagnavalkya and Naradawere* practically the Arbitration Tribunals[8].

- ## Arbitration during Medieval Period

In the medieval India, the concept of *Panchayat* was of paramount importance and a reliable agency of justice delivery. *Panchayats* used to be comprised of *Panchas* who were chosen from the elders particularly by virtue of their personal qualities of being fair-minded, unbiased and knowledgeable. The *Panchayats* were best medium to resolve the disputes (irrespective of the nature of the dispute) and used to be held in great veneration. *Panchas* were treated like the messengers of God as depicted by Indian writer Munshi Prem Chand in ‗*Panch Parmeshwar*‖ They proceeded in a very informal way, untrammeled by technicalities of procedure and laws of evidence. According to Sir Henry Maine, a jurist of Historical School of Jurisprudence:

> In those parts of India, in which village community was most perfect, the authority exercised elsewhere by the headman was lodged with what was called the village council or the *panchayat*. It was always considered a representative body and whatever was its real number, it always recalled its constitution of five persons or ‗*Panchayat*. Traces of this method of settling disputes can still be found in certaincommunities in the country.

Arbitration was governed by social sanctions. But, the simple and informal system of arbitration through the *Panchayats,* though useful, was ineffective in order to cater the needs arising out of advancement in social and economic spheres. With the emergence of East India Company in India particularly when the Britishers started taking over administrative control, the

[8] MinistryofLawandJustice,GovernmentofIndia,–ProposedAmendmentstotheArbitration&ConciliationAct, 1996-A Consultation Paper‖ (2011).

©2024 International Journal of Advanced Legal Research

Presidency Governments started making Regulations for providing a suitable platform for flourishing the business of Company in India. Through a series of what were known as Regulations framed by the British Government, beginning with the Bengal Regulation of 1772, the courts in different parts of British India were empowered to refer, either with the consent of the parties or at the instance of the court, certain suits to the Arbitration[294]. Further, the Bengal Regulation XVI of 1793 authorized the Courts to recommend to parties to a suit to submit the decision on matters in disputes which had already arisen to arbitration. Later, the Madras Regulation V of 1816 and the Bombay Regulation IV of 1827 were also made. They introduced substantial changes in the *Panchayat* system in the Presidency towns by making special provisions about the concept of Arbitration keeping in mind the nature of business activities undertaken by the East India Company.

- **Arbitration during Colonial Period:**

It was after the coming into existence of the Legislative Council of India in 1834 that the procedure of the courts of Civil Judicature was codified by Act VIII of 1859. Sections 312 to 325 of the Act dealt with arbitration between parties to a suit while sections 326 and 327 dealt with arbitration without the intervention of the Court. Section 312 of that Act enabled the parties to a suit to apply to the court, if they so desired, that an order be passed that the matters in dispute be referred to arbitration. The procedure for arbitration, making and filing of awards was also laid down in subsequent sections. Not only this, the statute like Indian Contract Act, 1872 inserted the special protection to the Arbitral Agreement[9].

To simplify, as no man can exclude himself from the protection of the courts by contract as it is very much a void agreement, but at the same time there is an exception to it i.e. attached to section 28 of the Indian Contract Act, 1872 which says that said section shall not render illegal a contract by which two or more persons agree that any dispute which may arise between them in respect of any subject or class of subjects shall be referred to Arbitration, and that only the amount awarded in such Arbitration shall be recoverable in respect of the dispute so referred. Exception 2 of the section 28 further provides that this section shall not render illegal any contract in writing, by which two or more persons agree to Arbitration any question between

[9] P.C. Rao & William Sheffield,(eds.)op.cit.

©2024 International Journal of Advanced Legal Research

them which has already arisen, or affect any provision of law in force for the time being as to references to Arbitration.

The successive Civil Procedure Codes enacted in 1877 and 1882 dealt with both Arbitration between parties to the suit and Arbitration without the intervention of the Civil Courts. In this context, the provision for filing and enforcement of awards on such Arbitrations were made in 1882. In the Indian Arbitration Act, 1899 provision was made for arbitration of disputes that might arise in future. Special protections were given to the Indian Arbitration Act, 1899 by the Specific Relief Act of 1877 whereby under section 21, if any party which had made an Arbitral Agreement and had refused to perform it and rather sued in respect of any subject which it had contracted to refer to Arbitration, the existence of such contract would bar the suit.

The Code of Civil Procedure enacted in 1908 carried the provisions related to the Arbitration as earlier, though now it gave them a special place in the form of a Schedule- second schedule, attached to the Act. Perhaps, it was thought that sooner or later it would be given a special statutory status. The second schedule dealt with Arbitration outside the procedure and reach of the Arbitration Act, 1899.

- **Civil Justice Committee:**

In 1925, the Civil Justice Committee recommended several changes in the Arbitration law of India. The report of the Committee contains, inter alia, suggestions for modification of the law of arbitration. Fair amount of time passed before action could be taken on the recommendations of the Civil Justice Committee. This was primarily due to the fact that the Government proposed to wait till the expected new English Act was placed on the Statute book after consideration of the Mackinnon Committee (1927) on the law of arbitration, which was followed by the English Act of 1934. The Government of India appointed Shri Ratan Mohan Chatterjee, as a special officer for revising the earlier Act of Arbitration. Indian legislature passed the Arbitration Act, 1940 which consolidated and amended the law relating to the Arbitration as contained in the Indian Arbitration Act, 1899 and the Second Schedule to the Code of Civil Procedure 1908. The 1940 Act was largely based on the English Arbitration Act, 1934. The 1940-Act included mainly three broad areas including:

- Arbitration proceedings without interference of the Civil Courts,
- Arbitration with intervention of the Court when no suit pending before the Courts,

©2024 International Journal of Advanced Legal Research

- Arbitration in pending suits.

The Arbitration Act, 1940 was limited to Arbitration only and that was only limited to the domestic Arbitration without any provisions related to the Foreign Awards. At that point of time there were certain international conventions which dealt with the enforcement of the Foreign Awards like the Geneva Protocol on Arbitration Clauses, 1923 and Geneva Convention on the Execution of Foreign Arbitral Awards. In order to comply with these International Instruments, India had to enact Arbitration (Protocol and Convention) Act, 1937.

- **Arbitration in post –Colonial Period:**

In the post-colonial beginning also the New York Convention on the Recognition and Enforcement of Foreign Arbitral Award, 1958 came into force. India being the party to the New York Convention was duty-bound to implement the obligation of the Convention and therefore enacted the Foreign Awards (Recognition and Enforcement) Act, 1961. A number of enactments have been amended or repealed in recent years in India with a view to reforming the economy. Indian Constitution also put a mandate for the government for encouraging the settlement of the international disputes by arbitration. It was felt that the economic reforms initiated in early 1990s, would remain incomplete if corresponding changes were not made in the law dealing with resolution of disputes. In the world of LPG (Liberalization, Privatization & Globalization) of which the seeds were shown in the early 1990's when India opened its economy and undertook several measures of economic reforms and after the development in the international trade and commerce, with the increasing role of GATT and later WTO, there was emergence of a gap by newly inserted problems including intellectual property which required the bridging. Disputes arose between the trading parties, which were diverse in nature and complex, involving huge amount of bucks. Such disputes seem to be required quick and amicable settlement since the parties could not tolerate the tardy legal process in adversarial Courts, in appeal, in review and in revisions.

Under the 1940 Act, the parties had to go to the Court to make the awards final. Interference by the courts at the instance of a party to the dispute and delay in disposal of matters gave rise to demands to repeal the 1940-Act.

©2024 International Journal of Advanced Legal Research

- **Law Commission of India – views on Arbitration:**

Law Commission of India has also taken up the subject of Arbitration for consideration at the instance of the Government and came up with its 76th Report on the Arbitration Act, 1940 wherein a lot of amendments were sought in the existing Act. Commission was of the view that practical experience of the working of the 1940 Act has shown that though, by and large, the scheme of the Act is sound, some provisions have in actual working caused difficulties and have resulted in delay and needless expense.

- **Relook into Arbitration Act, 1940**

India (in the good company of several other nations) enacted its new Arbitration Act based on the United Nations Commission on International Trade Law Model Law on International Commercial Arbitration and the Arbitration Rules of the United Nations Commission on International Trade Law 1976. This was in January 1996. The Statement of Objects and Reasons to the Act made no bones of the inefficiency of the old legislation. It said that the same had become outdated ‘and there was need to have an Act more responsive to contemporary requirements. It added: Our economic reforms may not become fully effective if the law dealing with settlement of both domestic and international commercial disputes remains out of tune.
Amongst the main objectives of the new Act (set out in the Statement of Objects and Reasons) are to minimize the supervisory role of courts in the arbitral process and to provide that every final arbitral award is enforced in the same manner as if it were a decree of the court.
It is in this background that Government of India had decided to relook the entire Act as it became vital for India to devise a new legal system relating to both domestic and international commercial arbitration. To draw the confidence of the international trade community in the context of growing trade and our commercial relationship with the rest of the world after the new liberalization policy of the Government, the Arbitration and Conciliation Act, 1996 was passed. This Act was in tune with UNCITRAL Model Law on International Commercial Arbitration, 1985.The Arbitration and Conciliation Act, 1996 repealed the Arbitration Act, 1940 as well as the other two Acts for enforcement of foreign awards. Part II of the Act consolidates the enforcement of foreign awards. Part III of the Act provides for conciliation as a mode of settlement of disputes.

©2024 International Journal of Advanced Legal Research

- **Concluding Remarks**

The traditional adversarial system is run in an arbitration proceedings; proceedings are delayed as both parties take lot of time presenting their submissions; the cost of arbitration is much more than the ADR process, thereby, it does not attract the poor litigants; and participatory role of the parties are neglected as the submissions are made by the party counsels. In the arbitration proceedings it combines strength with flexibility. Strength because, it yields enforceable decisions and is backed by judicial framework which, in the last resort, can call upon the coercive powers of the state. Flexible because it allows the contestants to choose the procedure which fits into the nature of the dispute and the business context in which it occurs. Arbitration acknowledged the essential role of the parties in resolving their disputes. But this Act did not fulfill the essential functions of ADR. The extent of judicial interference under the Act defeated the very purpose of speedy justice. The Act 1996 came into effect to remove few of its difficulties and judicial intervention was limited to some extent.

REFERENCES

- Andrew M. Pardieck. Virtous Ways and Beautiful Customs: Role of Alternative Dispute Resolution
- Anil Xavier,―Mediation: Its Origin & Growth In India, HJPLP Vol.27.
- Boulle, L.(2005). Mediation: Principles Processes Practices. Lexis Nexis Butterworths
- Brazil. W, Effective Approaches to Settlement: A handbook for Lawyers and judges
- Brown, Henry, J., and Marriot Arthur, L., ADR principles and practice.
- Bunni, The FIDIC Forms of Contract (2008)
- Dana H. Freyer, The American Experience in the field of ADR.
- David Prazeracki,WorkingItOut:AJapaneseAlternativeTo FightitOut
- Dice and Morris , TheConflict ofLaws
- Frank.e.DisputeresolutionwithinandoutsidetheCourts-AnoverviewofUS Experiencep123

©2024 International Journal of Advanced Legal Research

- Goldberg,S, Sander,F and Rogers,N, Dispute Resolution: Negotiation Mediation and Other Process,(1992)
- JohnB.SoudersquotedinA PremieronAlternativeDisputeResolution
- Joseph W.SDavis,Dispute Resolutionin Japan.Andrew M.Pardieck.Virtous Ways and Beautiful Customs: Role of Alternative Dispute Resolution in Japan‖.

©2024 International Journal of Advanced Legal Research