Jus Corpus Law Journal

Open Access Law Journal – Copyright © 2022 – ISSN 2582-7820
Editor-in-Chief – Prof. (Dr.) Rhishikesh Dave; Publisher – Ayush Pandey

Challenges to Arbitration in India

Anjali Singh[a]

[a]Vivekananda Institute of Professional Studies, New Delhi, India

Received 18 May 2022; *Accepted* 04 June 2022; *Published* 11 June 2022

ADR includes various methods of dispute resolution including mediation, arbitration, conciliation, negotiation, and Lok Adalats. Various countries use these instruments to settle disputes in an effective manner. However, in India, these instruments are still in their infancy. Especially in light of the constantly evolving world economy and globalization, it is challenging to meet the demands of the current era. Since it was becoming increasingly difficult for the traditional judicial process to manage a large number of pending cases, ADR practices were increasingly favoured. Additionally, Malimath Committee recommended to the court that disputes be referred to conciliation, mediation, arbitration, and negotiation through Lok Adalats, but arbitration is by far the most popular form of ADR worldwide due to its confidentiality, speed, and flexibility.This article examines the challenges resulting from arbitration procedures in India and explores ways in which it can become a hub for arbitration.

Keywords: *arbitration, dispute, challenges.*

INTRODUCTION

In the dictionary, arbitration means to assist two people in reaching an agreement through reaching an agreement upon an issue on which they have a disagreement over. Arbitration is a core element of the Alternative Dispute Resolution process that allows parties who wish to skip the usual long resort to local courts for settling disputes. It is a technique for resolving disputes outside of a court system in which parties submit disputes to one or more arbitrators

whose decision (the "award") the parties agree to be bound by as it involves the resolution of disputes by individuals or groups acting with binding effect. Arbitration can only be initiated if there is an Arbitration Agreement between the parties prior to the arsing of the conflict. An agreement of this type must be in writing as per Section 7[1]. An arbitration process is designed to resolve disputes efficiently, conveniently, inexpensively, and in private, so the issues won't be subject to litigation in the future. In 1996, the Arbitration and Conciliation Act recognized conciliation as an ADR (alternative dispute resolution) mechanism. In contrast to arbitration, it is neither predicated on nor controlled by the existence of an agreement between the parties. Nevertheless, not all disputes can be arbitrated, and some disputes fall outside of the scope of arbitrability based on the unanimous decision of the Hon'ble Apex Court in ***BoozAllen and Hamilton Inc. v SBI Home Finance Ltd*[2].** These include criminal offences; parental issues; bankruptcy and winding-up processes, Probate, letters of administration, succession certificates, and so, forth, the eviction process patents, trademarks, and copyright, Antitrust/competition legislation Anti-bribery and anti-corruption legislation. In India, the most often practiced kinds of Alternate Dispute Resolution processes include arbitration and conciliation. Under Lok Adalat can also be used for mediation, negotiation, and judicial resolution. Except for arbitration, mediation and negotiation are not binding on the parties, and the conclusions of these procedures are not legally binding. Furthermore, the negotiators retain control over the outcome and method.

NEED FOR ARBITRATION IN INDIA

The Arbitration and Conciliation Act of 1996 was modeled after the UNCITRAL (United Nations Commission on International Trade Law) legal framework, with the goal of modernising Indian arbitration law and incorporating it in accordance with predetermined foreign operations, as well as making India a worldwide arbitral proceedings hub. Though modifications in the legislation have enabled arbitration more preferred solution to the lawsuit, it is essential to mention that almost all arbitration in India is ad hoc, with institutional arbitration representing just a small part of all arbitration performed. Currently, India lacks

[1] Arbitration and Conciliation Act, 1996, s 7

[2] *Booz Allen and Hamilton Inc. v SBI Home Finance Ltd.* (2011) Civil Appeal No. 5440/2002

organizations that are on par with international organisations such as the ICC (International Court of Arbitration), LCIA, SIAC, HKIAC, and others. As a result, international corporations negotiating commercial relationships with Indian companies frequently select an international arbitral center. The growth, trade liberalisation, and global economic integration of regional and global business ties have driven the development of a dynamic, legitimate, advantageous, and time-saving means of resolving disputes which not need the parties to go through the intensive, time-consuming, and resource-draining methodology of the conventional dispensation of justice. A landmark Supreme Court decision in the matter of ***Amazon v Future Retail***[3]Limited, 2021 drew attention to the parties' decision to resolve the issue through arbitration. Financing litigation is costly for a firm since it reduces cash inflows, EBITDA, and market value. In contrast to locking funds to pay costly litigation, funding sources allow organisations to utilise their precious resources for constructive purposes such as product development, capacity growth, and so on. Third-party financing has no cost of capital and hence boosts both the earnings and the company's valuation. Future possibility compensated payoffs from litigation is often reduced at an IRR that investors are prepared to guarantee, resulting in a win-win outcome for all sides. Because neither contingent liabilities nor contingent assets are reflected in financial statements in India, selling the prospect of a claim for a fixed sum of money, along with the savings on potential litigation, is tremendously beneficial to a corporation. There is currently no law in India that addresses third-party litigation; nevertheless, the Apex Court has clearly stated the legal applicability of TPF in litigation, observing that "there would seem to be no restriction on third parties (non-lawyers) financing the civil suits and being reimbursed after the outcome of the litigation."

The urgent arbitrator provision can be used when immediate relief is necessary, and the parties used this clause during the epidemic. However, there is substantial confusion in Indian law about the enforcement of emergency awards and orders in Indian-seated arbitrations. The LCI proposed in its 246th Report[4] that the notion of an emergency arbitrator be recognised by

[3] *Amazon v Future Retail* (2021) Civil Appeal No. 4493/2021

[4] Law Commission of India, *Amendments to the Arbitration and Conciliation Act 1996* (Law Comm. No. 246 August 2014) <https://lawcommissionofindia.nic.in/reports/report246.pdf> last accessed 17 May 2022

expanding the definition of the arbitral tribunal under section 2(d)[5] of the ACA to also include emergency arbitrators. Technology reliance is another significant factor and since we all have witnessed the epidemic COVID-19 has already altered the way arbitration sessions are conducted throughout the world. Parties and tribunals in India have likewise overcome their early reservations and embraced technology. It is reasonable to infer that even when the world returns to normalcy, technology will play a considerably larger role.

CONCERNS AND CHALLENGES OF ALTERNATE DISPUTE RESOLUTION IN INDIA

The limited workforce of arbitration lawyers: One of the primary issues is a few full-time arbitration lawyers. Arbitration cases are frequently given second priority by lawyers, who schedule arbitrations after trial hours. They are drained after having a long day in court, so the hearings do not last long. In addition, if they are in court, they may request adjournments and schedule dates for arbitration if they do not have court hearings. Likewise, a few arbitrators who are also lawyers are unable to devote enough expertise to the arbitration processes. As a result, there is a demand for full-fledged Arbitration Lawyers and Arbitrators who can spend ample time and expertise in arbitration.

Inadequate legal protection: The Arbitration and Conciliation (Amendment) Bill of 2021 proposes to alter Section 36[6] of the 1996 Act and raises various issues, including the provision for an absolute stay of the award's implementation in the event of fraudulent activity. This will return us to the period of compulsory stays of arbitral decisions, making it easier for judgement lenders to dodge their duties under the ruling. The 1996 Act does not specify what comprises fraud or corruption, therefore there is some uncertainty. As a result, in most cases, a judgment-debtor may plead fraud and corruption in order to obtain an unqualified stay of execution on the award. As a result, award compliance will become more difficult, and the convenience of doing business making companies suffer. The government has lately introduced amendments following amendments, demonstrating that concerns were not fully resolved and amendments were not properly constructed. Despite a series of reforms, none of

[5] Arbitration and Conciliation Act, 1996, s 2(d)
[6] Arbitration and Conciliation (Amendment) Act, 2001, s 36

the Amendment Acts solve the seat vs venue dilemma. Another instance is Section 29-A[7], which runs counter to the principle of minimal judicial intervention entrenched in Section 5[8] of the Act, and an appeal under Section 29-A could require more than a year just to decide whether a six-month extension should be granted.

Loopholes in the drafting of the law: Prior to the 2015 amendment, Section 34[9] of the Arbitration and Conciliation Act, 1996 (hereafter "the 1996 Act") was an invitation to challenge since it immediately stayed the implementation of the arbitral decision once the petition was filed under Section 34. This was a significant stumbling block in carrying out the arbitral rulings. This problem was remedied in 2015 with modifications to the 1996 Act. However, the Amendment Act's text was so intricate that it took three years to figure out whether the Amendment Act applied to pending Section 34 petitions or not. Even after the BCCI[10] decision, the parliament enacted additional Section 87[11], which was eventually overturned in ***Hindustan Construction Co. Ltd. v Union of India***[12]. A lot of court time was lost in order to clarify these modifications.

Inadequate institutional arbitration hubs: Though the having few solid institutes such as the Delhi International Arbitration Centre (DIAC), Nani Palkhivala Arbitration Centre (NPAC), Mumbai Centre for International Arbitration (MCIA), and others, India lacks institutions such as the Singapore International Arbitration Centre (SIAC), International Criminal Court (ICC), London Court of International Arbitration (LCIA), and others. Most arbitrations in India are ad hoc and are one of the main reasons why the Indian arbitration mechanism is not robust. perhaps there is still not a vibrant arbitration culture that can be seen when compared to the litigation culture. A global arbitral hub requires a recognised arbitration specialist, such as Gary Born, who directed SIAC. Due to the hectic schedules of litigation attorneys in India, it is improbable that any major lawyer would devote sufficient time to an arbitration centre.

---

[7] Arbitration and Conciliation Act, 1996, s 29A
[8] Arbitration and Conciliation Act, 1996, s 5
[9] Arbitration and Conciliation Act, 1996, s 34
[10] *Board of Control for Cricket in India v Kochi Cricket (P) Ltd.* (2018) Civil Appeal No. 2880/2018
[11] Arbitration and Conciliation Act, 1996, s 87
[12] *Hindustan Construction Co. Ltd. v Union of India* (2019) Writ Petition (Civil) No. 1074/2019

Appointment of Retired Judges as Arbitrators is a Standard Procedure: It is astonishing to find that the greatest arbitrators are swamped with arbitrations due to a lack of choices. The reason for this is that we do not allow fresh arbitration attorneys to be appointed as arbitrators, hence retired judges are typically selected. This practise must be stopped, and new attorneys should be appointed as arbitrators in conflicts. As a result, making the arbitration procedure is more resilient overall, and the level of awards will not suffer consequences. It is usually difficult to sustain the quality of awards when there are a large number of arbitration proceedings. No other government, like ours, prefers to select solely former judges as arbitrators.

Lack of sufficient court backing: We have observed procedural delays as a result of the courts' overburdening. When an arbitration action becomes embroiled in the Court, it is delayed and it is impossible to predict how long the matter will take. For example, a Section 34 petition, which deals with a challenge to an arbitral ruling, may take an eternity to resolve. Despite unambiguous orders from the Supreme Court that the Court under Section 34 does not seat over as an application and cannot delve into the validity, the petition is being heard as an appeal by several courts. On several occasions, the courts have re-appreciated the evidence and allowed lawyers to debate the merits of the case over a longer length of time. Another issue is that several of the High Court judgements have turned out to be faulty interpretations. This is because it is impossible for all of India's courts to be on the same page. In reality, the Supreme Court has issued several regressive decisions, such as ***ONGC vSaw Pipes Ltd***[13]**.** This creates an image of India as a state that is unfriendly to arbitration and where capital ventures are risky.

Improper Application of amendment act: Dealing with ***New Tripur Area Development Corporation Limited v M/s. Hindustan Construction Co. Ltd. & Ors***[14] .Section 26[15] of the Amendment Act has been interpreted and applied by the Madras High Court. The Madras High Court determined that Section 26 of the Amendment Act does not apply to post-arbitral

[13] *Oil & Natural Gas Corporation Ltd v Saw Pipes Ltd.* (2003) Appeal (Civil) No. 7419/2001
[14] *New Tirupur Area Development v M/S Hindustan Construction Co.* (2017) O.S.A No. 22/2016
[15] Arbitration and Conciliation Act, 1996, s 26

proceedings and that a new application under Section 36(2)[16] is necessary under the updated regulations, and enforcement actions must have been delayed while an arbitral judgement is being contested. Because the word "in respect to" was missing, the court reasoned that the terminology employed in Section 26 of the Amendment Act only applies to arbitral processes, not judicial procedures. Section 26 of the Amendment Act does not apply to the post-arbitral processes stage.

Problems Caused by Public Sector Entities (PSUs): We must concentrate on PSUs because they file the majority of cases. PSUs have a history of not compromising and fighting till the last end. The government must instruct the relevant ministries to choose which cases should be fought and which should not. For example, if the reward is justified, it should not be disputed.

Poor Recognition of Arbitration Issues: Requirement of an Arbitration Bar The heads of the Bar Associations do not discuss arbitration concerns because they are too preoccupied with managing Court matters. It's one of the primary sources as to why concerns about the arbitration procedure are not raised or resolved. As a result, there is an urgent need for a Bar to meet current challenges and the problems of arbitration practitioners.

HOW CAN INDIA SERVE AS AN ARBITRATION CENTRE?

While the perception of arbitration has shifted, we still need a robust and encouraging approach to arbitration. Courts, in particular, must adopt a rational approach to "minimal interference and maximal execution," in order to uphold the arbitration proceedings and honour arbitral rulings. In 2015, the legislature modified the Arbitration Act and established timeframes to speed up arbitration and makeit even more time-restricted, result driven, and professional. However, for India to become a "hub," massive actions are required. In Singapore, for example, the legislature has been fast to reverse any contradicting or anti-arbitration rulings within months, conveying a strong pro-arbitration message. This provides assurance, reliability, and security, which is needed for a 'hub.' The government has mirrored

[16] Arbitration and Conciliation Act, 1996, s 36(2)

this stance, elevating the importance of making India an 'arbitration centre' and boosting the business climate to the level of a major priority. As a result, it is critical that the triumvirate (judiciary, legislature, and administration) establish the ideal area and on-field environment, similar to cricket, in order to realise its aim to become an 'arbitration centre.' This will convey to the investment community that there is a robust, effective, and time-bound dispute resolution mechanism. Honouring contract integrity and upholding awards are critical for emerging as an "arbitration hub."

The approach must be one of adherence to and honour the contract rather than finding methods to circumvent or a way to defy it. This will also help India climb the ease of doing business standards so it's a definite plus. However, a competent conflict resolution method is inadequate. It is also essential to limit the frequency of bogus conflicts. Frequently, unnecessary conflicts, typically by PSUs, are sent to arbitration, where the arbiter merely instructs the parties to follow the provisions of the contract. As a result, an attitude aimed toward protecting the validity of contractual and the arbitral procedure and putting a stop to it is critical for India to realise its arbitration dream. For arbitration to genuinely thrive, unbiased, impartial, and domain/sectoral specialists who are qualified and capable to rule on the subject matter are required. This would provide much-needed commercial stability, protect the award/contract, and improve decision-making quality. Courts are reluctant of implementing verdicts against the government because they are misled by irrational nationalism and emotion. An impartial attitude and a mentality geared toward conformance, adherence, and regulation are essential. The solution is to promote a sense of certainty in arbitral rulings so that a winner may experience the rewards of triumph firsthand. The prize must be as excellent as an ATM, delivering fast cash and compliance, or the else winner would lose. This will instill trust and foster a thriving arbitration culture for settling business conflicts.

SUGGESTION

The system has improved, and several arbitration institutes have emerged. With their functions, these systems play an important role in improving arbitration in the nation, as well

as transmitting information to the general public at large through a lot of workshops. Nevertheless, centres are not created just by acquiring a five-star rating or by constructing infrastructure. Making a structure is not the sole requirement, as largely depends on truthful execution, and introducing amendments is insufficient. Arbitration culture is also essential in other cities like Kanpur, Ludhiana, Kolkata, Lucknow, and others that are business hubs. The concentration must not be limited to Delhi and Mumbai.Ease of doing business, describing the requirements, and implementation of arbitral rulings are all important considerations in making any country appealing to investors. In India, there is a need of having a solid framework in place to deal with business conflicts. It is critical for India to take a counter stance in order to boost international market confidence. In circumstances when the Panel makes well-reasoned awards, the stakeholders need not contest them. Lawyers, as agents of the court, should not oppose arbitration or submit bogus objections to the judgement in order to prevent execution. The public at large is unaware of the benefits of selecting arbitration versus litigation. The reason for this is because Indian institutions do not effectively organise workshops such as SIAC and ICC. As a result, additional public awareness initiatives must be launched to create awareness among the people. Furthermore, students, professionals, and other representatives of the legal community should be trained and encouraged in full-fledged arbitration roles. Aside from that, minimal court intervention is necessary.

CONCLUSION

Without a question, the tone has been established correctly, and a move on the right path has been taken. Nevertheless, much more effort is required before India can claim the 'arbitration trophy' and become a Singapore- or London-style centre. It should be remembered that becoming a "hub" of arbitration does not happen immediately. The impetus must be government effort, judicial and legislative backing, and, most importantly, a corporate attitude and atmosphere that is favourable. We require a well-planned road map to develop a trustable organizational architecture. When such an efficient system is in place, a strong institutional structure will automatically activate/launch. To function effectively and successfully within a certain time frame, the arbitration system needs genuine and meaningful concept

plans involving entities, the government, clients, professionals, and investors. A strong foundation is required to achieve the goal of making India an "arbitration centre" and promoting ease of doing business. This would assure resilience and endurance, which will benefit India's best interest and may even unlock the gate for India as an 'arbitration destination image.'