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

Evolution of Arbitration act and Enforceability of an Arbitration agreement along with Analysis of Judicial intervention in Arbitration

Krishna Brahmbhatt[a]

[a]Jitendra chauhan college of law, Mumbai, India

Received 22 September 2022; *Accepted* 01 October 2022; *Published* 10 October 2022

We all have seen and heard that litigation takes very long periods for passing a relevant judgment on a case, it is a very slow procedure and people's justice does get affected by the unnecessary time being involved in getting judgments from the courts. So, for public righteousness and justice, there had been an urgent need to bring a mechanism that helps in getting judgments in a short period and also does not have lengthy procedural work to go through and supports the cost-cutting measure. Hence for this purpose, Arbitration Act came into force, fitting perfectly with the need of getting quick justice.

Keywords: *arbitration, enforceability, judicial intervention.*

INTRODUCTION

Arbitration comes under the dispute resolution method which is also known as ADR (Alternate Dispute Resolution). It includes mediation and negotiation which are different ways of getting the dispute resolved through non-litigation methods. However, ADR cannot be used for cases involving criminal acts, family matters that are related to custody, succession, matrimonial

disputes, insolvency matters, or any such severe case, as it can only be dealt with by the Indian courts. Arbitration is a non-litigation method i.e, resolving a dispute outside the court by involving a mutually agreed third party, that looks upon the matter and gives a valid decision. The arbitration clause needs to be identified in an agreement by the parties to a dispute, as it is to be primarily agreed upon by both parties agreeing, to mutually consider the arbitration clause. The agreement of arbitration is considered separated and different, from the entire agreement. The arbitration clause itself is an agreement entered between the parties. Arbitration serves as a lifesaver for various companies and businesses. It can solve a dispute in an efficient time and also gives effective decisions for the dispute which has arisen. Usually, a property case would take years to get a judgment from the court, this takes a toll on the cost factor and the advantage of the accruals that keeps on rising over years due to inflation. The property cannot be used and keeps on losing its value in many productive ways, whereas a dispute is solved through arbitration, such a resolution method saves all the important time to put that property to use and make a valuable income out of it, this is how arbitration is also proved to be cost-effective. Arbitration involves an arbitrator to which both parties have agreed, it can be in any odd number, one arbitrator for both parties or three arbitrators wherein both parties will choose their arbitrator, and the chosen arbitrators, select one mutual arbitrator who listens to both sides, and gives relevant judgment. The decision made under Arbitration by the Arbitrator is called an 'Award' that has a binding effect on both parties. Usually, contract documents are used to prove a point, as a witness hearing is not allowed in the case of Arbitration. The whole proceeding is governed under the Arbitration and Conciliation Act, 1996, and parties get the judgments on their issue or dispute. A dispute commenced out of a matter not under the ambit of the arbitration agreement accepted by the parties and, some of the parties to the dispute are not covered under the same agreement, in this case, the dispute can be filed under a Civil Court as a civil matter. The Arbitration Act, of 1940 was repealed by the execution of the Arbitration and Conciliation Act, of 1996.

HISTORY AND EVOLUTION OF LAWS RELATING TO ARBITRATION IN INDIA

Traces of dispute being settled through arbitration methods were seen back during the King Solomon era, when they used to settle both territorial and commercial matters, by parties being related to dispute fighting for their right, and then a viable conclusion or decision was formed. Its existence could also be seen in Vedic times. If there was any issue related to the borders of a particular property, it was used to get settled by the elders of the village. The earliest treaty to consider the concept of arbitration was seen in 'Brihadaranyaka Upanishad'. It mentioned three well-known courts, 'Puga' was known as the local court, 'Srenis' had people from similar working areas and 'Kulas', was considered to be associated with social issues arising in the society. These three courts had a common name called 'Panchayats' and their members were known as 'Panchas'.

Modern Arbitration law showed its existence back in **1772 by Bengal Regulation** and was recognized as dispute resolution, The parties chose the tribunal, and became well-known and successful in the dispute resolution area. It was promulgated to the presidency towns of **Bombay and Madras by the intimation of such regulations as the Bombay Regulations Act of 1799 and the Madras Regulation Act of 1802.**

There was the foundation of India's very first Legislative Council, in the year 1834, and on 1st July 1899, the First Indian Arbitration Act came into force had taken various needed fundamentals and functioning from the British Arbitration Act, 1899 however the applicability of the Act was limited to Bombay, Madras, and Calcutta. The Act had a provision of mentioning the name of the Arbitrator in the agreement and was also allowed to be a sitting judge. In Gajendra Singh v Durga Kunwar[1], it was stated that Award is nothing but a compromise between the parties. The High Court had rightly formed a view that the Arbitration Act was filled up with complexity and was very lengthy, it urgently needed a lot of clarifications and reforms.

[1] *Gajendra Singh v Durga Kunwar* [1925] ILR 637

ARBITRATION ACT, 1940

This Arbitration Act 1940 was brought by repealing the Arbitration Act of 1899 and some provisions of the Civil Procedure Code, 1908. The new act was enacted and framed by referring to the legislation of English law popularly known as the Arbitration Act, 1934. This Act came into force on 1st July 1940. The Act helped in empowering the courts of India for modifying or altering the award, remit awards so that they could be reconsidered by the arbitrators, and also had set certain grounds on which awards could be set aside. The Act helped in laying down domestic arbitration as a framework for India.

The Act tried to bring huge changes in its working and its structure, however, it started being less effective and needed more provisions and framing due to the liberalization scheme taken up by the government. The intervention of courts at every stage was also a big issue as it could not help in giving importance to its status as an alternate redressal mechanism. The delay in getting justice would be the same as normal courts already had a lot of backlogs and would overlook the matter again and then give a decision. It was also unsuccessful in prohibiting the parties from doubting the validity of an arbitration award and hence most of them would likely resort to getting a judgment from the normal courts that led to the ineffective arbitration proceeding and questioned the entire validity of the Act. It disregarded foreign investors investing in businesses as there was no importance given to the Arbitration Act and somehow questioned the validity of the rule of law.

In Guru Nanak Foundation v Rattan Singh[2]

Supreme Court had its view and observations regarding the Act and said that "how proceeding under the Act are conducted and without an exception challenged, has made lawyers laugh and legal philosophers weep" regarding the working and enforcement of the Act. By all these setbacks, it became necessary to have more stringent and effective laws that could be given the needed importance.

[2] *Guru Nanak Foundation v Rattan Singh* [1981] AIR 2075 (SC)

So to complete the Act as a whole to make it effective. **The Arbitration and Conciliation Act, of 1996 was brought into force.**

During P.V Narsimha Rao's ruling as the Prime Minister of India, they took into consideration various international treaties like the Geneva Protocol of Arbitration Clauses and the United Nations Commission on International Trade Law (UNCITRAL) Model on Commercial International Arbitration and reframed and discussed all the necessary changes that needed to be brought into effect in the Arbitration and Conciliation Act of 1996. The Act is codified and has 86 sections and has objects of consolidating and amending existing laws related to domestic arbitration, defining conciliation, enforcing UNCITRAL, creating a uniform system of regulation relating to arbitration and conciliation, and the establishing fair and effective settlement of arbitration disputes. In 2005, 2015, and 2019 there were needed amendments to improve the entire process of arbitration. This Act had a lot of changes and advances which were needed in the previous acts. The process relating to the settlement of the dispute was easy and speedy to reduce the cost associated with it and saved time by the expeditious process of dispute solving under the Act. The Act makes an arbitrator responsible for the delay so that there is self-discipline and punctuality in the entire proceedings of the dispute settlement as well as solidifies the impartiality and independence of an arbitrator in giving the decision.

The Act of 1940 had a provision of an agreement, to move to arbitration by one party taking action to proceed with the case, however, the later Act has the provision of passing an order even before the arbitration proceedings were initiated, if the council thinks it is fit for justice. The former Act had no requirement of giving reasons and explanations for the effectivity of an award, but the act of 1996 has the effectivity of arbitration by giving valid reasons to an award that would result in minimization of interpretation by the Courts. The 2019 amendment defined arbitral as institutions, which are institutions designated by Supreme Court or High Court. It also has a Schedule that directs the parties regarding fees of the arbitrators in an Adhoc arbitration procedure for helping the parties to decide fee-related issues. It also establishes the Arbitration Council of India, an independent body that is for conciliation, mediation, and also other dispute redressal mechanism. The council has the power to make different regulations

under the Act and appoints members eligible for the same. After looking at the evolution it is important to know how an arbitration agreement could be enforced.

ENFORCEABILITY OF AN ARBITRATION AGREEMENT

Section 36 of the Arbitration Act provides for the enforceability of an arbitral award, having the same effect as a decree passed by the court and the time has expired for making the award set aside under Sec 34 of the Act. This simply means that an award passed by an arbitrator has the validity of a decree that is passed by an authorized court and the award shall be enforced if it is not challenged under the application of Sec.34 of the Act, which deals with setting aside of an award if it has been passed on specific grounds which are mentioned under the said section. However, If a dispute arises under certain cases, then it cannot be referred under Arbitration Act. The law in itself does not exclude any dispute to be non-arbitrable but the courts have the authority of setting aside an award if the dispute cannot be referred for arbitration due to the laws that are enforced or they have an issue that is related to the public policy of India.

Most of the civil cases that have rights in personam are eligible to be resolved under the arbitration mechanism. The matters which are not allowed to be referred to arbitration are- matrimonial cases, succession and guardianship cases, testamentary cases, insolvency, any act being criminal, a company's winding up or its dissolution if it is related to the Trust's Act if the matter is governed under special statue or matters under the law of secularisations, if an agreement has any case related to the above-mentioned issues or matters, then it shall not be referred to arbitration as it cannot be effected and enforced through the arbitration process.

In Booz Allen and Hamilton Inc v SBI Home Finance Ltd & Others[3], the Supreme Court held that if a case is related to the enforcement of a mortgage deed that is in replacement of a sale by the mortgaged asset, then such a case lies under the right in rem and is non-arbitrable.

[3] *Booz Allen & Hamilton Inc v SBI Home Finance Ltd & Ors* [2011] SC 5440

In the case of N Radhakrishnan v Maestro Engineers & others[4], it was held that a case that involves any criminal aspect or has serious fraud and financial embezzlements or issues then such cases shall only be resolved by a court and should not be referred to arbitration.

The recent judgment of the Supreme Court in Avitel Post Studioz Ltd v HSBC PI Holdings[5] has considered tests to determine allegations of fraud that are serious and hence non-arbitrable. The test relied on the Ayyasamy decision which upheld the two tests given below

- Is allegation permeating the whole contract and even the agreement of arbitration is considered void;
- If the allegations regarding serious fraud are related to the party's internal affairs and they do not have any implication against the public policy or domain or are they inter-related to each other

Serious allegations of fraud are only to be determined under the above-mentioned test and if it satisfies and clears both tests, the case becomes non-arbitrable in nature.

Other requirements needed to enforce an Arbitration Agreement

The Arbitration Act mention of the arbitration agreement to be in writing.

Section 7 mentions that to form and enforce arbitration, it needs to be in form of a clause in a contract or can be a separate agreement set out for arbitration.

- It should compulsorily be in writing,
- as a document that is signed by both parties
- transfer and exchange of letters, emails, or any other form of telecommunication providing as evidence of the existing agreement
- transfer of claim and defense statements, which mentions the enforceability and agreements existence that alleges one party under the said arbitration term or clause and the other party does not deny it.

[4] *N Radhakrishnan v Maestro Engineers & Ors* [2009] SCALE 403
[5] *Avitel Post Studioz Ltd v HSBC PI Holdings* [2020] SCC Online 656 (SC)

- It can be as a reference or a clause to a contract that makes the arbitration clause an effective part of the contract or an agreement.

The Amendment made in 2015 adds section 7(4)(b) that allows electronic communication as a medium to draft and enforce an arbitration agreement.

These circumstances have the effect of putting an end to the arbitration agreement

- If there was incapacity to perform by any of the parties
- The non-capability of subject matter to be settled by arbitration under the law
- If the agreement becomes void or is considered invalid due to incapacity or disqualification of the parties involved
- If any of the parties become insolvent then the matter cannot be sent to arbitration as it first needs the permission of the judicial authority to pass an order that directs the matter or dispute to be submitted to arbitration.

Courts have recently ensured that even poorly drafted arbitration clauses will be given validity and shall be referred to arbitration. An arbitration agreement is subject to the **doctrine of separability** and hence an arbitration agreement can be separated from the main agreement under sec 16 of the Act that explains, if a contract stands to be null and void, it cannot invalidate the arbitration clause. It was seen in **National Agricultural Co-op Marketing Federation India Ltd v Gains Trading Ltd**[6] where the Supreme Court held that "even if performance of the contract comes to an end on account of repudiation, frustration or breach of contract, the arbitration agreement would survive for resolution of disputes arising under or in connection with the contract".

JUDICIAL INTERVENTION IN ARBITRATION

As earlier seen, The earlier arbitration acts had a lot of judicial intervention which made the Arbitration mechanism lose its essence and it neither could work as an independent authority. After referring to the UNCITRAL Model, major changes were made, which included limiting

[6] *National Agricultural Cooperative Marketing v Gains Trading Ltd* [2007] SCC 692

the scope of judicial intervention in the arbitration procedure. Its scope in the present environment is only to ensure that the dispute is handled with fairness and that the parties' rights are protected. The courts have also widened the scope of judicial authority so that the application of law becomes easy and smooth. In Fair Engineers Pvt Ltd v NK Modi,[7] the Supreme Court held that all the commissions under Consumer Protection Act shall be treated as judicial authorities. Also in Canara Bank v Nuclear Power Corporation Ltd[8], The Apex Court stated Company Law Board to be considered as judicial authority.

Section 8 mentions that if an arbitration agreement is existing between the parties, then in such case, if any dispute arises, it shall be referred to be resolved under Arbitration. However, courts have the authority to resolve a dispute if there is prima facie, no evidence of the existence of a valid arbitration agreement wherein any of the parties to an agreement make an application to the Court along with the Original Arbitration Agreement or a certified copy to that effect.

Moreover as mentioned above an arbitration award can be set aside by a court if any of the circumstances match with the provision of Sec 34 of the Act which states as follows

- If any party was suffering from some incapacity during the arbitration proceedings.
- If the award fails to indicate any relevant provision or test under the relevant law which is the subject matter of the agreement, it can be set aside under Sec 34.
- If the arbitration proceedings were subjected to the partial judgment of unfair practices, proved by one of the parties or proper notice had not been given regarding the appointment of the Arbitrator, then it can be set aside under the said section.
- If the parties have not been duly notified about the arbitration proceedings.
- If the parties had not been given a fair opportunity to represent their respective cases before the arbitrator and hence, stands the injustice done to one of the parties.
- If an arbitration award was set outside the scope and ambit of the entire agreement set forth by the parties.

[7] *Fair Engineers Pvt Ltd v NK Modi* [1997] AIR 533 (SC)
[8] *Canara Bank v Nuclear Power Corporation Ltd* [1995] SCC Supl. (3) 81

- If terms of reference have been overlooked, misinterpreted, or misheard during the delivery of the award by an arbitrator
- If the procedure agreed by the parties stays unmatched with the procedure done by the arbitrator
- The courts also intervene if it is found that the case or issue referred to under the arbitration agreement is outside its scope.
- An award that is delivered through fraud, corruption, or violation of provisions of any law.
- If it is in contravention to any fundamental policy of the Indian law.

In McDermott International Inc v Burn Standards Co.Ltd[9], it was held that the courts only have supervisory power of setting aside an arbitral award if they match the situations mentioned under Section 34 of the Act. The Court is not allowed to correct any errors and can only set aside the award.

In Mohan Steels Ltd v Steel Authority of India,[10] the award was set aside by the Court due to the illegality of the patent, the Arbitrator passed the award based on factors beyond the ambit of the agreement, and the parties were not given a chance to change their statements, however, the conclusions set by the arbitrator have relied on the Regulators notification after both the parties had been heard in the matter. Hence in this case it had been set aside as the circumstances fell under the provisions of Sec.34

CONCLUSION

It is seen how arbitration acts as a successful model to resolve disputes in various methods and can be done in less time and cost without any actual interference from the judiciary. The evolution of arbitration has proved to be a boon for getting justice in a reasonable time and manner and ultimately helps to reduce the workload of the courts present in our country. Arbitration is actively used in most cases and turns out to be the best mechanism for solving a

[9] *McDermott International Inc v Burn Standards Co Ltd* [2006] App 4492
[10] *Mohan Steels Ltd v Steel Authority of India* [2020] Del 268

dispute under an agreement. Its applicability should always be in an effective manner and the government should try to amend every possible loophole if it arises soon.