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Arbitration as a Means of Resolving Disputes

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***Abstract*: Litigation never makes people get along with each other. In a system where people try to beat each other, someone will always lose. This makes it easy for the two sides to get angry with each other. Alternative Dispute Resolution Mechanisms, on the other hand, are different because they focus on working together to solve problems. But the way to solve a problem depends on what the problem is and how the people involved feel about it (Spier, 2007). Mediation or conciliation can be used as an alternative way to settle a dispute if both sides are willing to work together to find a common goal. Arbitration is the process of resolving a disagreement between two or more parties by sending it to a neutral third party whose decision is considered final and must be followed (Kenny, 2008). The Arbitration and Conciliation Act, 1996, was passed by Parliament to change and bring together India's arbitration laws. The main goal of the Act was to encourage people to settle their disagreements through arbitration and to offer arbitration as a fast and cheap way to settle disagreements (Krishan, 2004). In this paper, the author wants to tackle the problems with how the Arbitration and Conciliation Act is being used. He or she believes that a lot of changes need to be made to both the law and how things are done in order for arbitration to be a good alternative way to settle disputes.**

***Keywords*: Arbitration, Conciliation Act, Mediation, Disputes.**

1. Introduction

"*Justice delayed is justice denied*," as the saying goes. Article 21 of the Indian Constitution guarantees that Indian citizens have the right to a speedy trial. But the fact is that both civil and criminal courts are full of cases that need to be heard. If the rate of getting rid of cases doesn't get better, the backlog will keep getting bigger (Aparna, 2006). People lose faith in the country's legal system when cases take too long to be solved or closed. If the Rule of Law is going to become a reality, these backlogs of cases in different courts need to be stopped.

The goal of the Indian Constitution is to reach social, economic, and political justice. Justice that is fair, cheap, and quick to get is a basic human right. It is important that everyone has the same access to justice (Sharma, 2017). But the courts have so many cases that they have to deal with that the Constitutional goal of getting justice in a reasonable amount of time may not be possible with the current judicial system. Effective alternative ways to settle disagreements should be used so that justice can be done in a way that makes everyone happy. This is an absolute must if you want the legal system to work and be taken seriously.

In their book "ADR Principles and Practice" (1999), Henry Brown and Arthur Marriot define Alternative Dispute Resolution as a range of procedures that serve as an alternative to going to court to settle a dispute, usually with the help of a neutral and impartial third party (BROWN & MARRIOTT, 2005). Abraham Lincoln said it well over 150 years ago, but Alternative Dispute Resolution systems are still based on the same ideas:

"*Discourage litigation, persuade your neighbours to compromise whenever you can point out to them how the normal winner is often a loser in fees, expense, cost and time. Litigation does not always lead to a satisfactory result. It is expensive in terms of time and money. A case won or lost in the Court of Law does not change the mindset of the litigants who continue to be adversaries and go on fighting in appeals after appeals. Alternate Dispute Resolution Systems enabled the change in mental approach of the parties*."

So, what Mahatma Gandhi wrote more than 30 years ago is still true: "*I had learnt the true practice of law. I have learnt to find out the better side of human nature and to enter men's hearts. I realized that the true function of a lawyer was to unite parties riven as under. The lesson was so indelibly burnt into me that a large part of my time during the 20 years of my practice as a lawyer was occupied in bringing about private compromises of hundreds of cases. I lost nothing there by- not even money, certainly not my soul.*"

Alternative ways to settle disagreements, like mediation and conciliation, have been used all over the world since the 11th century. But the roots of ADR as we know it today can be found in the 1800s.

A. Why Alternative Dispute Resolution (ADR)?

Alternative Dispute Resolution (ADR) is one of the most important changes in how people settle disagreements and how the courts work. In the past few years, ADR has become more popular because it is faster, more effective, and less expensive than formal systems of redress (Hodges, 2012). The best thing about alternative dispute resolution mechanisms is that they encourage the parties to work together to solve the problem. When things are worked out right, the parties can agree on a common goal. This depends on what the problem is between them. There would be no way to win or lose the case, and the time it takes can be cut from years to weeks or months. This will probably make the relationship between the parties better overall, since the focus is on the interests of the community or

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the disputants, while litigation is mostly about the positions of the disputants (Relis, 2009).

ADR is a faster way to settle a dispute than going to court because it allows for more flexibility in how things are done. It can be done in any way that both sides agree upon. It could be as unstructured as a conversation around a table or as formal as a private court trial. ADR is a private process that is set up by agreement between the parties. It is confidential, and most of the time, especially in mediation and conciliation, both sides come out ahead. This makes it possible for the two sides to stay friendly even after the dispute is over. In its role as the highest court in India, the Supreme Court of India has backed the ADR process by telling the parties or their lawyers to settle the dispute out of court (Raju, 2007). When couples had problems with their marriage, the court tried to get them to work things out by settling their differences.

Alternative Dispute Resolution has been very successful in some places, like the USA, where almost 90% of cases are settled outside of court. There, the law says that the parties must say what kind of alternative dispute resolution (ADR) they want to use while the court case is going on. In India's legal system, Section 89 and Rules 1-A, 1-B, and 1-C in order X of the Code of Civil Procedure of 1908, which allows for ADR to be used to settle disputes, have been added. Section 89 of the Code of Civil Procedure was added to try to find ways to settle cases outside of court. Not all cases that are brought to court have to be decided by the court. Taking into account the fact that courts take a long time to decide cases for a variety of reasons, it is now essential that the parties use alternative dispute resolution (ADR) tools to end their lawsuits quickly and in a fair way. But this doesn't mean that ADR is the answer to all problems that come up while a court case is going on (Xavier, 2005).

There are many different ways to settle a dispute outside of court in India, such as arbitration, conciliation, mediation, negotiation, med-arb, arb-med, etc. Section 89 of the Code of Civil Procedure, which was changed in 2002, has also made it possible to use conciliation and pre-trial settlements to settle disputes that are already in court. The idea behind this was to cut down on the time it takes for cases to be settled by speeding up the process of resolving them in a way that makes everyone happy. But when ADR is used instead of traditional court litigation, it must be made sure that no one is abusing the system by insisting on arbitration, mediation, or conciliation as the only way to settle a dispute (Motiwal, 1998).

2. Arbitration

Arbitration is often suggested as a good way to settle a disagreement besides going to court. It is a way to settle a disagreement that is written into a contract. Both sides agree to let a neutral third party decide what to do. It's hard to say exactly what it is about arbitration that makes it different from other ways to settle disagreements (Born, 2021). Lord Mustill said this in the House of Lords:

"*The great advantage of arbitration is that it combines strength and flexibility. Strength because it yields enforceable decisions and is hacked 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 proceedings which fit the nature of the dispute and business context in which it occurs. A system of law which comes anywhere close to achieving these aims likely to be intellectually difficult and hard to pin down in practical terms*."

India is not new to the idea of arbitration. It was common in ancient India, and the arbitrators' decisions were carried out not by law but by the social and moral authority of the arbitrators. The Indian Arbitration Act of 1940, which was based on the English Arbitration Act of 1934, is thought to be the most important law governing arbitration in the whole country. The Arbitration Act of 1899 and the relevant parts of the Code of Civil Procedure of 1908, including the Second Schedule, were thrown out by this act. It only covered domestic arbitration and gave different ways for arbitration to happen, with or without the court's help. Even though the Act has been in place for more than 50 years, it has been found to be unsatisfactory in how it handles domestic arbitrations. This has led to several negative comments from the courts (Kachwaha & Rautray, 2009). The Supreme Court made these points:

"*we should make the law of arbitration simple, less technical and more responsible to the actual realities of the situation, responsive to the canons of justice and fair play and make the arbitrator adhere to such process and norms which will create confidence not only by doing justice between the parties, but by creating a sense that justice appears to have been done* (Dhavan, 1977)."

From what was said in Guru Nanak Foundation vs. Rattan Singh, it's clear that the Supreme Court was upset about how the Arbitration Act of 1940 was being used.

Arbitration Act 1940 emerged from the search of jurists for a forum that was less formal, more effective, and quicker in resolving disputes, while avoiding procedural jargon, due to the interminable, time-consuming, costly, and complex nature of court processes. However, the manner in which processes under the Act are performed and without exception challenged in courts has caused attorneys to chuckle and legal philosophers to cry. Experience demonstrates, and law reports provide enough evidence, that the processes under that Act have grown exceedingly complicated and endlessly verbose, presenting a legal trap at every stage for the unwary. By the court's decisions, the informal venue established by the parties for speedy resolution of their issues has been encumbered with legalese of unanticipated complexity (Shab-e, Drog, Ubaran, & Ko mool'uparan, 1970).

But it's important to remember that the Arbitration Act of 1940 has been around for more than 50 years. Based on the UNCITRAL Model Law, the Arbitration and Conciliation Act of 1996 was passed to deal with and fix the problems caused by the 1940 Act. The UNCITRAL Model Law on International Commercial Arbitration applies to international commercial arbitrations. However, in India, the Act of 1996, which was based on the UNCITRAL Model Law, also applied to other arbitrations. According to (Binder, 2019),The UNCITRAL Model Law defines an arbitration as international if:

a) If the places of business of the parties to an arbitration agreement are in different states when the agreement

is made, or

b) One of the places listed below is not in the state where the parties do business:
   i. the place of the arbitration if it is set in the arbitration agreement or based on it,
   ii. any place where most of the obligations of the business relationship are to be carried out or where the dispute is most closely related to what is at stake, or
c) Both sides have agreed in writing that the arbitration agreement is about more than one country.

The Arbitration and Conciliation Act of 1996 was enacted in response to concerns about the law pertaining to arbitration, particularly the shortcomings of the Arbitration Act of 1940. The Act consolidated and modified the laws concerning domestic arbitration, international business arbitration, and the enforcement of foreign awards. Part 1 of the 1996 Act applies the UNCITRAL Model Law to all Indian arbitrations with few exceptions. In crafting the 1996 Act, one of the primary issues was the need to reduce arbitral procedure delays. However, surprisingly, among the goals intended to be fulfilled by the new Act, measures for quick and inexpensive dispute resolution were omitted. Even though the courts play a crucial role in resolving certain issues that occur before, after, and even during arbitration, there is a significant risk of arbitration-related litigation becoming entangled in the courts' enormous backlog of ongoing cases. When an alternative to the conventional court system is proposed through legislation, it should include provisions that divert a substantial number of cases from the country's official court system to the proposed alternatives of arbitration and conciliation (Bookman, 2019).

Despite the fact that the Act does not define the term arbitration beyond the provision in section 2(a), the purpose of arbitration is to secure fair resolution of disputes by an impartial tribunal without undue delay or expense. The parties should be able to resolve their dispute so long as the essential safeguards are in place. Moreover, with the goal of minimizing court interference and promoting conflict resolution through arbitration to the greatest extent practicable, the Act stipulated instances in which the judiciary may intervene in arbitration proceedings. In Konkan Railway Corporation vs. Mehul Construction Company, the Supreme Court of India ruled as follows (Nayak & Mohanty, 2019):

To attract the confidence of International Mercantile Community and the growing volume of India’s trade and commercial relationship with the rest of the world after the new liberalization policy of the Government, Indian Parliament was persuaded to enact the Arbitration and Conciliation Act of 1996 in UNCITRAL Model Law and therefore in interpreting any provisions of the 1996 Act, courts must not ignore the objects and purpose of the enactment of 1996. A bare comparison of different provisions of the Arbitration Act,1940 with the provisions of Arbitration and Conciliation Act, 1996 would unequivocally indicate that 1996 Act limits intervention of Court with an arbitral process to the minimum (Singh & Agarwal, 2020).

However, a detailed review of the 1996 Act's provisions reveals that several of the Act's provisions are self-defeating in terms of offering arbitration as a suitable alternative conflict resolution tool. It neglected to stipulate a deadline within which the entire arbitration process must be concluded. This caused numerous arbitrations to continue for several years without a resolution. There were also no regulations regarding the principles to be applied when the matter of the arbitrators' jurisdiction is brought before a court (Singh & Agarwal, 2020).

3. Law and Practice

Under section 89 of the Act, parties to an arbitration agreement may be referred to arbitration under certain circumstances. This is a remedy accessible to the party who asserts the existence of an arbitration agreement if the opposing party approaches the court without honoring the arbitration agreement they agreed into. In such cases, however, it is observed that the judicial authority takes a great deal of time to determine whether such a reference is possible or not, as it is required to examine the agreement, the validity of the arbitration agreement, any vitiating factors in the formation of the contract, bargaining power of the parties, mandatory arbitration clause, arbitrability of the dispute, etc. These are all preliminary issues that, once presented to the judicial authority, need a significant amount of time to determine whether the parties can be referred to arbitration at all, hence delaying the start of the arbitral process (Dunna, 2020).

Though the Act provided for a challenge procedure for arbitrators appointed10 on the grounds of alleged bias and lack of qualification according to the terms of the parties' agreement, it remained silent to the extent that the only recourse when such a challenge is invoked by one of the parties and is rejected by the arbitrator was to wait until the final award was issued. The time, money, and effort expended by the parties are simply disregarded or not addressed by the statute if the court before which the award was passed ignoring the challenge to the arbitrator's jurisdiction is taken for quashing and upholds the allegations raised by the parties regarding the arbitrators' jurisdiction (Dunna, 2020).

Regarding the execution of the award, the prescribed method is to file the award with the civil court so that it may be executed as a civil court decree. Section 34 of the Arbitration and Conciliation Act specifies the permissible grounds for challenging an arbitral ruling. The grounds for setting aside the award and the time limit within which the challenge against the award must be made were stated so ambiguously in the Act that petitions for execution of award before the civil court would wait alongside other pending civil cases for an additional couple of years, denying the successful claimant the fruits of justice (Tiwari & Dubey, 2019). Previously, the Supreme Court's interpretation of the grounds for challenging a decision was narrowly limited to circumstances where the award was in opposition with India's "public policy." In following cases, however, we may observe a change from this approach, as the court defined the word 'public policy of India' in the broadest conceivable terms, so expanding the area of challenge beyond that of the 1940 Act.

Internationally, the standards of public policy have a distinct

hue and contour. Due to the fact that the 1996 Act is based on the UNCITRAL Model Law, the concept of public policy may need to be viewed from an international perspective. There is room for what can be termed "international public policy" or "order public international" given that each country has its own conception of public policy. Regarding contesting an award on this basis of public policy, it is necessary to distinguish between national and international public policy, as international public policy would not be concerned with simply domestic form and method (Binder, 2019).

The Supreme Court ruled in the case of Renu Sagar Company that Indian courts are justified in refusing to enforce a foreign award on the grounds that it conflicts with India's public policy if such enforcement is contrary to the fundamental policy of Indian Law, Indian interest, morality, and justice. The court stressed further that since the implementation of a foreign judgment is controlled by the rules of private international law, only the doctrine of public policy as applied to international law would apply. Regarding domestic awards, the scope of challenging an award on the basis of public policy has yet to be determined (Rahim, 2022).

In 2001, a committee was established to investigate the deficiencies of the Arbitration and Conciliation Act of 1996 in terms of the implementation challenges it posed. When applied to domestic arbitration, the Act, which adopted the UNICTRAL Model Law as the Model Law, failed to address the difficulties. This resulted in the Supreme Court and the High Court's having divergent interpretations of several provisions of the Act. In its 176th report and modification, the Law Commission attempted to address some of the difficulties and concerns voiced at the time.

In 2010, the Law Commission established a second expert group to examine the need for modifying the Arbitration and Conciliation Act, and the Law Commission's Report recommended a number of revisions. On the basis of the recommendations made by the Law Commission in its 246th Report, revisions to the then-existing Arbitration and Conciliation Act were suggested and went into effect on October 23, 2015. The modifications were praised for meeting India's requirements to become a center for international arbitration (Jose, 2022).

4. Conclusion

The 1996 Arbitration and Conciliation Act was intended to accomplish two objectives. First, to unify the legislative framework governing arbitration in India for both domestic and foreign arbitration. The second objective is to improve arbitral efficiency by eliminating the need for judicial involvement, enforcing judgements as judicial decrees, and allowing arbitral tribunal institutions greater autonomy. Even though the 1996 Act limited the scope of judicial intervention, courts have expanded the scope of judicial review through interpretation, resulting in a greater number of instances of judicial intervention than anticipated under the Act. Parties to the dispute also utilize various provisions of the Act that result in "indispensable delay" at different stages.

The question of whether the Act has been able to achieve the aforementioned goals in practice can only be answered with reference to the key features of arbitration: I the agreement to arbitrate; (ii) the choice of arbitrators and their appointment; (iii) the interim measures in arbitration proceedings; (iv) the decision of the arbitral award and its enforceability; (v) and the enforcement of the award. With the passage of time, however, the fundamental objective for which the Act was passed became irrelevant, resulting in the Arbitral Tribunal functioning like any other subordinate court established for the resolution of disputes, from which an appeal was available to the superior court. The reality is that arbitration in India confronts two significant obstacles in delivering arbitration as an effective alternative dispute resolution option, namely cost-effectiveness and fast resolution of disputes. The cost incurred by the parties in arbitration consists of the arbitration fee, rent for the arbitration venue, travel and lodging for arbitrators, administrative expenses, and professional fees paid to lawyers, in addition to the costs incurred by the professionals working in-house for the parties. These costs are significantly higher for ad hoc arbitration compared to institutional arbitration.

Due to the fact that arbitration is a manifestation of the parties' permission, when two parties agree to resolve a dispute outside of the court system through arbitration, court intervention should be kept to a minimum; processes should be rapid, effective, and free of abusive actions. Moreover, as the majority of arbitration in India is handled by practicing attorneys, it is usually sandwiched between evening or weekend court appearances, resulting in significant delay. Therefore, lawyers and legal practitioners should be trained in the law and practice of arbitration so that their propensity to prolong arbitration by requesting unnecessary adjournments and continuing court procedures in arbitral proceedings can be reduced and arbitration can become a truly effective ADR system.

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