FUTURE OF ARBITRATION IN INDIA

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Arbitration is an Alternate dispute Resolution method for an out of Court settlement of a matter. Arbitration laws are governed under the Arbitration and Conciliation Act, 1996. Among the piling cases in the Courts of India, Arbitration is breather, which helps settle disputes in a faster way and the Arbitral Award is the final order, which means unlike court cases, arbitration cannot be endlessly extended and the arbitrator's decision is conclusive and final. In India, Arbitration is a widely used dispute resolution method. After relying for years on the court, many people are now dependent on Arbitration, for at least contractual matters, which can be resolved in a much faster way. So, what is the future of Arbitration in India? This article attempts to shed light on the prospective changes and additions in the status of Arbitration in India.

Brief history of Arbitration

Arbitration has been a part of the Greek and Roman history since a long time. Nevertheless, this concept became a part of the Indian Judicial System in the year 1889. The first ever enactment which was solely concerned with Arbitration was the Indian Arbitration Act, 1889. The application of this act was restricted to only the Presidency towns i.e., Bombay, Calcutta, Madras, etc. However, a new consolidated Law on Arbitration was enacted in 1940. This Act compiled all the domestic Arbitration laws which were based on the English Arbitration Laws. Further, this act did not include any foreign award provisions. The Foreign laws are enforced through two distinguished legislations which are the Arbitration (Protocol and Convention) Act, for New York Convention awards and the Foreign Awards (Recognition and Enforcement) Act, for Geneva Convention awards. After the 1940 regime, to fill in the loopholes of the 1940 Act, a new regime was required. Hence, the Arbitration and conciliation Act, 1996 was enacted, wherein, the UNICTRAL Model law on International Commercial Arbitration were basis for this act. Various amendments have been made to this act as well.

The Arbitration and Conciliation Act, 1996, was then amended for the first time in 2015. The changes brought about through this amendment can be distinguished under three categories. First being the reduction in the interference from the Courts. The amendment aims at reducing judicial interventions in arbitration matters. The main objective was to curtail the powers of the court in arbitral proceedings. The second objective of this amendment was to minimize the delays and resolve disputes in a quicker way by setting a time frame of 12 months for completion of an arbitration proceedings, which can be extended up to 6 months.

The third objective was to improve the overall functioning of arbitration, intending to make the process smoother and more efficient, by making arbitration a more convincing option to the public at large. It included creating a model fee schedule for arbitrators & limiting costs, developing mechanisms for ensuring an impartial and unbiased award delivered by arbitrators.

Future of Arbitration in India

India has been actively working towards accommodating amendments to the existing laws so that we are at par with legal regimes of other leading commercial law jurisdiction. Therefore, many recent changes have been made that would change the future of Arbitration in our country.

Reliance on Online Arbitration

Due to the Coronavirus Pandemic, the initiation of arbitral proceedings has changed from a physical mode to a virtual venue. Many types of disputes can be resolved through online Arbitration. Business-to-business disputes, business-to-commercial disputes as well as international trade disputes such as property, intellectual, employment, etc, Online Dispute Resolution (ODR) has been used as tool during these times. What became a necessity can now become the new normal. Online Dispute Resolution can become the future of Arbitration in India.

Another branch of the use of technology in Arbitration is Blockchain Arbitration technology. The blockchains are decentralized and sometimes doesn't have one central data storage or administrator. they're fully transparent in terms of transactions, but true identity of the user is often anonymized behind a username. Essentially, you'll hide fully daylight. Blockchain Arbitration is a digital ledger of transactions which stores and traces anything form financial accounts to e-documents. It uses coding to store and process such information. The smart-contract is fabricated and a contract that auto-enforces with the help of blockchain under certain pre- conditions. Although, it is still unclear whether the arbitration clause is a pre-requisite in Blockchain Arbitration as this is a relatively new technology and is not widely recognized in India as of now, however, India is privy to the concept of Blockchain Arbitration and in the near future will be used as a means of resolving disputes.

The question is of whether online Arbitration in accordance with the current laws of India is legally valid. Section 31(1) of the Arbitration and Conciliation Act,1996, clearly states that an arbitration agreement should be in a written form. If read with Section 4 of the Information Technology Act, 2000, which states that if any law provides that any matter shall be in writing or in the typewritten or printed form, then, notwithstanding anything contained in such law, such requirement shall be deemed to have been satisfied if such information or matter is:(a) rendered or made available in an electronic form; and (b) accessible so as to be usable for a subsequent reference. Thus, there seems not contention on the validity of Online Arbitration as such.

Embracing the of Technology will only be advantageous to Arbitration in India and putting it to proper use can make India a more suitable and global hub of Arbitration. There seems to be a future of ODR in India even after the Pandemic comes to an end. It seems to be a great mode for conducting Arbitration proceedings, especially for foreign parties and venues.

Third Party Funding

Third Party funding has become a new addition in the Arbitration Landscape. We all know that Arbitration has become a very costly recourse, that's where third party comes into play. There has been an increase in the funding of Arbitration in recent years. It started off, mainly focusing on only investor – state arbitrations, however, funding in commercial international arbitration has now gained popularity in India. In Bar Council of India vs A.K.Balaji[1], the Hon'ble Supreme Court affirmed the admissibility of third- party funding, but such funding cannot be made by the advocates. Although this case was in 2018, there was not much spoken on the funding for arbitration by third-parties. Again, due to the coronavirus pandemic, many of the parties could not afford the cost of arbitration and thus, the topic of Third-Party Funding gained momentum. Third Party funding can be done either in exchange of remuneration or wholly or partially reimbursing the same, totally depending on the party funding the proceedings or by the result of the dispute.

Two main problems in particular, can be identified, with Third Party Funding. Firstly, the possibility of the funder knowing the Arbitrator can be a hinderance in the fair delivery of an Arbitration Award. It becomes difficult to establish whether or not a funder has any pre-existing relation with the Arbitral Tribunal or any particular member of it. In such a situation, the arbitration proceeding might not remain an unbiased and impartial one. Such a case may become disadvantageous for the opposite party. It can be said that the such an indirect interest or influence on the arbitrator's can be anticipated in the future.

Secondly, according to the new 2019 amendment of the Arbitration & Conciliation Act, the identity of the parties needs to be kept confidential. However, with the emergence of Third-Party Funding, the confidentiality provision would be violated, and such can be used as a contention by the opposite party. Breach of Confidentiality can be alleged in this case and that would contradict the existing provisions regarding Third Party Funding.

Nevertheless, it is for sure that Third Party Funding has already become a feasible option for many. It can be said that Third Party Funding is here to stay for Arbitration in India. It can also open doors for many changes and new provisions in Arbitration.

Emergency Arbitrations

[1] CIVIL APPEAL NOS.7875-7879 OF 2015

On 6th August 2021, the Supreme Court gave a historic judgement on emergency arbitrations. In Amazon. Com NV Investment Holdings vs Future Retail Ltd. & ors[2], the Supreme Court held that emergency arbitral awards are enforceable.

Emergency Arbitration are inclusive of brief and quick hearings by arbitral institutions for urgent hearings for interim reliefs. Although, it doesn't clearly specify, the urgent hearings mainly revolve around invoking interim reliefs. The judgement specifies that the parties who have been in such a proceeding cannot say that it is not bound by the award. To quote the judgement, "A party cannot be heard to say, after it participates in an Emergency Award proceeding, having agreed to institutional rules made in that regard, that thereafter it will not be bound by an Emergency Arbitrator's ruling." Further, the judgement states that, "As we have seen hereinabove, having agreed to paragraph 12 of Schedule 1 to the SIAC Rules, it cannot lie in the mouth of a party to ignore an Emergency Arbitrator's award by stating that it is a nullity when such party expressly agrees to the binding nature of such award from the date it is made and further undertakes to carry out the said interim order immediately and without delay."

The 246th Law Commission report recommended the addition of rules an institution for appointment of emergency arbitrators. Now that such a judgement is passed, this recommendation would be considered with more interest, and might be accepted in the coming years. The new emergency arbitration judgement requires the parties to choose appropriately which papers they want to file. There needs to be a careful consideration of all the documents, submissions and witness testimony that the parties want to file in the stipulated time period given. Since this is an emergency arbitration, the parties should prepare their submissions accordingly and the submissions should be short and precise, because, if there is insufficient evidence and submissions presented, there will be a risk of not identifying the case properly and basically hamper the judgement. Thus, the validity of emergency arbitration is now valid and the future o arbitration would change drastically with this judgement. It will surely affect the arbitration procedures in India. However, the only problem which can become a risk with regards to emergency provisions is that the cases would start to pile up, burdening the arbitral tribunals. There are sufficient reasons to think that emergency provisions can be misused and the time constraint for the arbitrators may result in some faulty arbitration awards.

Arbitration Amendment Act, 2021

The Arbitration Amendment Act, 2021, seeks to bring new reforms to the Arbitration and Conciliation Act, 1996, to intensify the pro-arbitration outlook. There are two amendments which had been proposed. The first is the automatic stay on awards. Section 34 of the principle act has been amended, wherein, there is an automatic stay on the awards which was not the case after the 2015 amendment. The new amendment introduced material changes, which is to make sure that if courts are clear satisfied by the case made out of either (i) the arbitration agreement or contract, which is that the basis of the award; or (ii) the making of the award, was induced or suffering from fraud or corruption. It shall stay the award unconditionally pending disposal of the challenge. This is done by the addition of

[2] CIVIL APPEAL NOs. 4492-4493 OF 2021

proviso under Section 36(3). The pending applications, filed under Section 36(2), will now have to refresh the applications in accordance with the new grounds laid down in this amendment, resulting in an increase in the cost for the parties as well as delay the procedure, which is contrary to the pro-arbitration regime that the legislature wanted to create. Therefore, this new amendment was not supported by many.

The second change which was made was to extend the scope of qualifications of the arbitrators. Section 43J of the act has been replaced and the Eighth schedule has also been deleted. Which means that the parties to a dispute are now free to appoint an arbitrator irrespective of the qualifications of such appointed arbitrator. The Law Ministry justified this amendment by claiming that this amendment was created to make the Arbitration Council of India more flexible and promote institutional arbitration. The arbitrator's qualifications will be determined by the regulations specified under Section 2(1)(j) of the Arbitration Council of India. The proposition for the Arbitration Council of India was in the Arbitration Amendment Act, 2019.

A critical analysis of the 2021 amendment tells us that the new amendments are not quite helpful in the promotion of pro-arbitration regime.

Arbitration Council of India

The creation of Arbitration Council of India had been proposed and mandated in the Arbitration amendment Act, 2019. The Arbitration Council of India is to be created with the motive of encouraging and promoting Arbitration, Conciliation and Mediation. It also introduces a tier system. The tier system includes grading system for all arbitral institutions. The grading shall be done taking into consideration the infrastructure, quality and performance of the arbitrators, compliance with the time specified for disposing of the international and domestic matters, and other such parameters which will be clarified in the regulations specified by the Arbitration Council of India. It also seeks to reduce the intervention of the courts in the arbitration disputes. This amendment hopes to resolve the inhibitions regarding Arbitration in India and make arbitration a more preferable mode for dispute resolution and make India a preferred destination for conducting arbitration and make India an arbitration hub for International Arbitration. The Arbitration Council of India is yet to be created, even though the act has been assented to. The Arbitration Council of India will surely be established in the future, which will be an extreme change to Arbitration in India. There are chances that this amendment will help in making arbitration in India more credible and improve the quality of the proceedings, which everyone would look forward to.

Conclusion

Over the years, the Arbitration landscape in India has been amended a lot of times with the sole aim of encouraging out of court dispute resolution. The Arbitration Act has been repealed twice just to make the Arbitration in India more in compliance with the international standards, which has surely worked to a great extent. Arbitration is widely recognised and trusted than before. There has been an evident increase in the number of

cases referred to arbitration. The recent changes made to the Arbitration laws in India will greatly impact the future of arbitration. Technologically advanced modes of arbitration are going to stay for the rest of the future. It will greatly impact the efficiency and quality of the arbitral procedure and awards in India. Further, India will have an Arbitration Council which will monitor the integrity and efficiency of the arbitration institutions in India. There are going to be significant changes in the way the arbitration will be conducted in India. These changes will positively enhance the functioning of arbitration and hopefully, India would be the most preferred destination and become an arbitration hub.