

Efficacy of Arbitration Under the Arbitration Act 1996 (As Amended 2015): An Overview of the Arbitration Process

Dayanand B. Shetty*

School of Business Management, NMIMS University, Maharashtra, India

ABSTRACT

Arbitration is alternative method for solving disputes outside the ambit of courts but within the purview of the Act. This process was necessitated due to huge burden on courts in respect of civil matters. It provides for cost effective and expeditious method of solving commercial disputes in a time bound manner. The process of arbitration has been simplified and expedited by the Arbitration Act 1996 (As Amended 2015). The holding of arbitration proceedings, process of appeals, challenge to arbitral awards and other aspect of arbitration has been amended to make to more effective. The efficacy of this Act shall be tested in the years to come but surely will pave the way for faster adjudication of commercial disputes.

Keywords: arbitration, appeals, award, dispute, litigation

Corresponding Author

E-mail: Dayanand.Shetty@nmims.edu

INTRODUCTION

Arbitration is an alternative dispute resolution (ADR) method where the disputing parties involved present their disagreement to one arbitrator or a panel of private, independent and qualified third party “arbitrators”. The process of arbitration was introduced as an alternative method of dispute resolution to ease the burden of courts which has backlog of huge commercial disputes. The main purpose of Arbitration law in India is to give speedy remedy to the parties to the dispute. The Arbitration and Conciliation Act was introduced to consolidate and amend the law relating to domestic arbitration, international commercial arbitration and enforcement of foreign arbitral awards as also to define the law relating to conciliation. The award of the Arbitrator is regarded as the decree of the court which is binding in nature.

The importance of arbitration has also been enshrined in our constitution under Article 51 (d), the state has to endeavor to encourage settlement of international disputes by arbitration. The Act is based

on the 1985 UNCITRAL Model Law on International Commercial Arbitration and the UNCITRAL Arbitration Rules 1976. The Statement of Objects and Reasons of the Act recognizes that India’s economic reforms will become effective only if the nation’s dispute resolution provisions are in tune with international regime. India responded the recommendations of United Nations keeping in mind the role of foreign investors. Accordingly, India enacted the Arbitration and Conciliation Act 1996 in line with the UNCITRAL Model Law of Arbitration.

The Statement of Objects and Reasons set forth the main objectives of the Act as follows: “(i) to comprehensively cover international and commercial arbitration and conciliation as also domestic arbitration and conciliation; (ii) to make provision for an arbitral procedure which is fair, efficient and capable of meeting the needs of the specific arbitration; (iii) to provide that the arbitral tribunal gives reasons for its arbitral award; (iv) to ensure that the arbitral tribunal remains within the limits of its jurisdiction; (v) to minimize

the supervisory role of courts in the arbitral process; (vi) to permit an arbitral tribunal to use mediation, conciliation or other procedures during the arbitral proceedings to encourage settlement of disputes; (vii) to provide that every final arbitral award is enforced in the same manner as if it were a decree of the court, (viii) to provide that a settlement agreement reached by the parties as a result of conciliation proceedings will have the same status and effect as an arbitral award on agreed terms on the substance of the dispute rendered by an arbitral tribunal; and (ix) to provide that, for purposes of enforcement of foreign awards, every arbitral award made in a country to which one of the two International Conventions relating to foreign arbitral awards to which India is a party applies, will be treated as a foreign award.”

SUBJECT MATTER OF ARBITRATION

The Act provides for domestic arbitration; international commercial arbitration; enforcement of foreign award and conciliation. Any commercial matter including an action in tort if it arises out of or relates to a contract can be referred to arbitration. However, public policy would not permit matrimonial matters, criminal proceedings, insolvency matters anti-competition matters or commercial court matters to be referred to arbitration. Employment contracts also cannot be referred to arbitration but director – company disputes are arbitrable (as there is no master servant relationship here). Generally, matters covered by statutory reliefs through statutory tribunals would be non-arbitrable. The decision so pronounced after adjudication of arbitration dispute is a judicial decision. In the case of *SBP & Co. v. Patel Eng Ltd.*, the Supreme Court of India (in a decision rendered by a Bench of Seven Judges) held that the nature of power conferred on the

Court under Section 11 of the Act is judicial (and not administrative) in nature.

ARBITRATION AND MEDIATION ANALYZED

Arbitration and Mediation is both Alternative Dispute Mechanism to ensure faster resolution of disputes to ease the burden of the courts.

Mediation is a form of alternative dispute resolution in which a neutral third person helps the parties reaches a voluntary resolution of a dispute. In mediation, the mediator helps parties to settle their disputes by a process of discussion and closing down on differences.

ADR Principles and Practice’ by Henry J. Brown and Arthur L. Mariot, the authors say that ‘mediation’ is a facilitative process in which “disputing parties engage the assistance of an impartial third party, the mediator, who helps them to try to arrive at an agreed resolution of their dispute. The mediator has no authority to make any decisions that are binding on them, but uses certain procedures, techniques and skills to help them to negotiate an agreed resolution of their dispute without adjudication.

The mediator aids the parties to arrive at a solution. He does not decide the dispute. This is the fundamental difference between mediation and arbitration. As against mediation, an arbitrator adjudicates upon a dispute when called upon by the contesting parties. In case of Arbitration, the appointed arbitrator adjudicates the dispute in a less formal as compared to court proceedings and pronounces a decision which is called the award.

In contrast, Arbitration is less formal than litigation, while mediation is even less formal than arbitration.

A successful mediation culminates in an agreement signed by the parties, whereas contested arbitration results in decision of the arbitrator himself without agreement of the parties.

EFFICACY OF ARBITRATION

Arbitration is considered as the most effective method of solving commercial disputes. It gives the parties' flexibility to use any method of resolving dispute through equitable mechanism. It is cost effective and expeditious in nature. The main object of Arbitration was to reduce the burden of courts as the parties can seek legal remedy under the aegis of an Arbitrator. Accordingly, it is provided that any matter before a judicial authority containing an arbitration agreement shall be referred to arbitration. A party cannot approach the courts for setting aside an arbitral award except under limited grounds. This limits the aggrieved parties of seeking remedies through frivolous appeals. The constitutional propriety of the Act received an impetus in the case of *Babar Ali v Union of India* where the constitutional validity of this Act was upheld by the Supreme Court which stated that in view of the judicial review being available for challenging the award in accordance with the procedure laid down in the Act, the Court said that there is no question of the Act being unconstitutional. Further in the case of *Kalpana Kothari v. SudhaYadav and OR's.*, the Hon'ble Supreme Court held that as long as the Arbitration clause exists, having recourse to Civil Court for adjudication of disputes envisaged to be resolved through arbitral process or getting any orders of the nature from Civil Court for appointment of Receiver or prohibitory orders without evincing any intention to have recourse to arbitration in terms of the agreement, may not arise. This judgment gives an impetus to the Arbitration procedure whereby when Arbitration is provided under the

agreement the parties have to resolve their disputes as per Arbitration Act which underscores the efficacy of Arbitration method of solving disputes.

ROLE OF ARBITRATOR

The Arbitrator should play an impartial role while adjudicating disputes. He should have good knowledge about judicial procedure though he is not compelled to follow rules of Civil Procedure Code. He should operate within the ambit of arbitration agreement following the procedure of the Arbitration Act. In a commercial dispute involving technicalities apart from legalities a person with sound knowledge of commercial transaction can be a good arbitrator. The fact that an Arbitrator has to adjudicate within the purview of Agreement and the Act was validated in the case of *New India Civil Erectors (P) Ltd. Vs. Oil & Natural Gas Corporation [1997]*, where the Supreme Court again considered the contention wherein the arbitrator has passed award contrary to the specific stipulation/condition contained in the agreement between the parties. The Court observed "It is axiomatic that the arbitrator being a creature of the agreement must operate within the four corners of the agreement and cannot travel beyond it. More particularly, he cannot award any amount which is ruled out or prohibited by the terms of the agreement". Here, the court set up the boundaries for Arbitrator within which he has to operate. It is noted that Arbitrator being a neutral person should apply mind judiciously and act impartially, this was emphasized in the case of *Rajasthan State Mines Mineral Ltd v Eastern Engineering Enterprise*, where the Supreme Court held that the arbitrator could not act arbitrarily, irrationally, capriciously or independently of the contract. A deliberate departure or conscious disregard of the contract not only manifests the disregard of his

authority or misconduct on his part, but it may tantamount to malafide action. (j) The arbitrator is not a conciliator and cannot ignore the law or misapply it in order to do what he thinks just and reasonable; the arbitrator is a tribunal selected by the parties to decide the disputes according to law.

CHALLENGE TO ARBITRATION AWARD

Basically, Arbitration is aimed at finality of dispute in an expeditious way but in many cases the award of the arbitration is challenged on various grounds. This due to the award being not favorable to a party against whom the award has been pronounced wants to delay its execution. The grounds to challenge the arbitral awards under Section 34 of the Arbitration and Conciliation Act 1996 is provided whereby it is stated that an award can be set aside if: (a) a party was under some incapacity; or (b) the arbitration agreement was not valid under the governing law; or (c) a party was not given proper notice of the appointment of the arbitrator or on the arbitral proceedings; or (d) the award deals with a dispute not contemplated by or not falling within the terms of submissions to arbitration or it contains decisions beyond the scope of the submissions; or (e) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties; or (f) the subject matter of the dispute is not capable of settlement by arbitration; or (g) the arbitral award is in conflict with the public policy of India. Many times, the losing party in Arbitration files for appeal only with the intention of delaying the enforcement of arbitral award. This defeats the very purpose of Arbitration as any further delay in enforcement of award leads to further delay in dispute resolution. The courts through various judgements entertained appeals of Arbitration awards on the grounds of opposing public policy. The term public policy has also been given

a wider connotation. Since public policy has not been defined in the Act, the courts while adjudicating disputes have determined the scope of public policy through various judicial pronouncements. The doctrine of Public Policy was well expounded by in the case of *Parke, B.*, in *Egerton v. Brownlow* (1), which is a leading judgment on the subject, describes the doctrine of public policy thus as: "I Public policy' is a vague and unsatisfactory term, and calculated to lead to uncertainty and error, when applied to the decision of legal rights; it is capable of being understood in different senses; it may, and does, in its ordinary sense, mean 'political expedience', or that which is best for the common good of the community; and in that sense there may be every variety of opinion, according to education, habits, talents, and dispositions of each person, who is to decide whether an act is against public policy or not. To allow this to be a ground of judicial decision, would lead to the greatest uncertainty and confusion. It is the province of the statesman, and not the lawyer, to discuss, and of the Legislature to determine, what is best for the public good, and to provide for it by proper enactments. In this case, the lack of clarity of the term public policy has been illustrated as a ground for courts not to consider the same as a ground. The fact that term public policy is flexible in nature was highlighted in the case of *Murlidhar Agarwal and another v. State of U.P.* and others, where the court while dealing with the concept of 'public policy' observed that, Public policy does not remain static in any given community. It may vary from generation to generation and even in the same generation. Public policy would be almost useless if it were to remain in fixed molds for all time. This judgment gave credence to the changing dimensions of public policy.

The earlier view, as expounded by the Supreme Court in *RenuSagar Power Co.*

Ltd. v. General Electric Co. was that an award could be set aside if it is contrary to the public policy of India or the interests of India or to justice or morality – but not on the grounds that it is based on an error of law or fact. The Supreme Court in that case was faced with the issue to determine the scope of public policy in relation to proceedings for enforcement of a foreign award under the Foreign Awards (Recognition and Enforcement) Act, 1961. The Court also held that in proceedings for enforcement of a foreign award the scope of enquiry before the court in which the award is sought to be enforced would not entitle a party to the said proceedings to impeach the award on merits. However, in Oil & Natural Gas Corporation Ltd vs Saw Pipes Ltd, the court gave wider amplitude to the theory of public policy by stating that an award would be contrary to public policy if it is “patently illegal”.

Even when the issue of bias is raised in Arbitration proceedings, the Indian courts in the case of International Airports Authority of India v. K.D. Bali & Anr have held that “the apprehension of bias must be judged from a healthy, reasonable and average point of view and not on mere apprehension of any whimsical person. Vague suspicions of whimsical, capricious and unreasonable people are not our standard to regulate our vision.” This has limited the scope of challenging arbitral awards on the basis of bias. The fact that arbitral award cannot be challenged on the ground of error of law or fact was highlighted, in the case of Rajasthan State Mines Mineral Ltd v Eastern Engineering Enterprise, the Supreme Court had held that the court cannot interfere in the decision of the arbitrator on the ground that his decision is based on the error of law or fact.

In respect of foreign awards, in the case of Eitzen Bulk A/S and Others Versus Ashapura Minechem Ltd and Others

[LNIND 2016 SC 237; [2016] 4 MLJ 546], the Supreme Court has reiterated that where parties choose juridical seat of Arbitration outside India and provide that law which governs Arbitration will be law other than Indian law, part I of Arbitration Act 1996 would not have any application. Award debtor would not be entitled to challenge award by raising objections under Section 34 before Court in India and Court in India could not have jurisdiction to entertain objections under Section 34 in such case.

ANALYSING THE NOTEWORTHY PROVISIONS OF THE AMENDED ACT

The Arbitration Act 1996 (As Amended 2015) was passed by both the houses and received the assent of the President on 31st December 2015. The Act was notified in Gazette of India and came into force on 1st January 2016. One of the most common grounds of challenging an Arbitral award was on the grounds of “public policy”. The scope of “public policy” as enshrined in Section 34 has been narrowed and substituted by Section 34(2)(b) which states that an arbitral award shall be treated as an award in conflict with public policy of India only if the arbitral award (i) was induced or effected by fraud or corruption; or (ii) is in contravention with the fundamental policy of India; or (iii) conflicts with the most basic notions of morality or justice. Hence, the large amplitude given through various judicial pronouncements has been curtailed.

The present amendment has introduced an additional ground of “patently illegality” to challenge an award. However, this has been restricted for domestic arbitrations and not international arbitrations. Further, the amendment provides that the domestic awards can be challenged on the ground of patent illegality on the face of the award but the award shall not be set aside merely

on the ground of an erroneous application of law or by re-appreciation of evidence.

The purpose of Arbitration was faster resolution of disputes but under the old Act the Arbitration process would be protracted one. The new provisions under the amended Act address this issue and provides for fast track procedures for conducting arbitral proceedings if the parties agree to such proceedings. In such cases, the award must be made within six months from the date of reference. This shall ensure faster resolution of disputes.

Under the old Act, a party who loses in Arbitration proceedings immediately moves High Court for a stay. The present amendment Act seeks riders on obtaining a stay on arbitral award. It states that there shall not be any automatic stay of the arbitral award and a separate application will have to be filed seeking stay of the arbitral award. As section 36 states that mere filing of application for setting aside an arbitral award would not render that award unenforceable unless the court grants an order of stay on the operation of the said award on a separate application made for that purpose.

In case of stay the court has to record the reasons for grant of stay and the provisions of CPC for grant of stay of a money decree have been made applicable, implying thereby the losing party will necessarily be required to either deposit some part or the entire sum awarded in the arbitral award, or furnish security, as the court deems fit. Also, a period of one year has been prescribed for disposal of an application for setting aside an arbitral award.

As section 36 states that mere filing of application for setting aside an arbitral award would not render that award unenforceable unless the court grants an order of stay on the operation of the said award on a separate application made for that purpose. Hence any attempt to frustrate an arbitration award is thereby

restricted as strong grounds for stay as to be adduced.

CONCLUSION

The Arbitration Act 1996 (As Amended 2015) is aimed to address the inadequacies of the Arbitration Act 1996 and targets to expedite the arbitration process and to make it cost effective. In case of commercial disputes, if the disputes are resolved in a time bound manner it augurs well for investments and foreign tie ups. For a nation aiming to attract foreign investment, it is necessary that the Arbitration mechanism is swift, reliable and judicious. The new Amended Act aims at providing cost effective, trustworthy and impartial mechanism to solve disputes. This will encourage foreign business institution forging commercial transactions to incorporate arbitration clause in business deals which they can invoke in case of disputes, thereby reducing the burden of courts. In nutshell, it is concluded that the amended Act shall expedite the arbitration process, bring more accountability to the Arbitrators and ensure time bound awards are delivered thereby paving way for smooth dispensation of justice.

REFERENCES

- [1] M.P. Jain. *Indian Constitutional Law, Wadhwa and Company-Nagpur*. 5th Edn., 2003, Reprint 2008, 1394p.
- [2] S. Kachwaha, D. Rautray. Arbitration in India: An Overview. <https://ipba.org/media/fck/files/Arbitration%20in%20India.pdf> (Accessed on 10th July 17).
- [3] <https://ipba.org/media/fck/files/Arbitration%20in%20India.pdf>.
- [4] *Comed Chemicals Ltd. v. C.N. Ramchand* 2008 (13) SCALE 17).
- [5] *M/s S.B.P & Co. v. M/s Patel Engineering Ltd and Another*:2005 SCC L Com 706.

-
- [6] http://lawcommissionofindia.nic.in/dr_conf/concepts%20med%20rao%201.pdf.
- [7] Sweet, Maxwell, Lord on Chapter 7, p 127, 1997, 2nd Ed.
- [8] Babar Ali v Union of India (2000) 2 SCC 178.
- [9] Kalpana Kothari v. Sudha Yadav and Ors (2002) 1 SCC 203.
- [10] M. Agarwal, and another v. State of U.P. and others [1974 (2) SCC 472]
- [11] Renu Sagar Power Co. Ltd. v. General Electric Co. AIR 1994 SC 860.
- [12] Oil & Natural Gas Corporation Ltd vs Saw Pipes Ltd AIR 2003 SC 2629.
- [13] International Airports Authority of India v. K.D. Bali & Anr; (1988) 2 SCC 360.
- [14] Rajasthan State Mines Mineral Ltd v Eastern Engineering Enterprise:1999(8) Supreme 295:1999 (4) CCC 227 (SC).
- [15] B. Parke, E.V. Brownlow. 4 H.L. Cas U,196,10 Eng.Rep.359,437 (1853).
- [16] S A Bobde. Eitzen Bulk A/S and Others Versus Ashapura Minechem Ltd and Others [LNIND 2016 SC 237; [2016] 4 MLJ 546].
- [17] V. Goel, R.V. Prabhat. Highlights to the Arbitration and Conciliation Act 1996 via Arbitration Ordinance 2015, <http://www.manupatrafast.in/NewsletterArchives/listing/ILU%20RSP/2015/Dec/Highlights%20of%20Amendment%20to%20the%20Arbitration%20and%20Conciliation%20Act%201996%20via%20Arbitration%20Ordinance%202015.pdf> (Accessed on 14th July 17).
- [18] L.K. Nidumuri. India: Critical Analysis of the Arbitration and Conciliation(Amendment)Act,2011 <http://www.mondaq.com/india/x/494184/Arbitration+Dispute+Resolution/Critical+Analysis+Of+The+Arbitration+And+Conciliation+Amendment+Act+20159> (Accessed on 12th August 17)