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# Contemporary Issues of Arbitration

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*Today's World is experiencing a rapid increase in extraterritorial trade, which is inevitably leading to disputes and conflicts between the parties participating in these trades. A Speedy resolution of these disputes is a need of the hour for the smooth conduct of business, parties always prefer the Alternative Dispute Resolution (ADR) method rather than resolving inside of traditional courtrooms. Millions of cases are awaiting resolution, which further adds to the courts' severe workload. To preserve privacy as well as diplomatic and commercial ties, recourse to the courts is also avoided. Arbitration is the most well-established and widely used form of ADR for resolving conflicts. Keeping in mind all the aspects, the Arbitration and Conciliation Act 1996 has been amended multiple times to bring appropriateness in compliance with International standards.[1] The Arbitration methods in India have also evolved. Despite all the efforts made to bring completeness to the Arbitration process, it is still witnessing multiple issues. This article will discuss the current positions of Arbitration and what are the contemporary issues in India in support of different Legislations and precedents.*

**Keywords:** *arbitration, contemporary issues of arbitration, dispute resolution, arbitral issues.*

[1] Arbitration and Conciliation Act 1996

## INTRODUCTION

Alternative Dispute Resolution (ADR) is the process by which the disputing party may settle up their conflict without involving a hard-core judicial system. Nowadays The ADR process is like a 'Flavor of the Season'. The Malimath committee recommended Alternative Dispute Resolution (ADR) as obligatory for the courts.[2] Hence, almost all commercial disputes, corporate matters, family matters, some cases under Motor Vehicle Act 1988[3], and some patty cases shall go through some ADR process primarily before bringing these matters to the court.[4] Arbitration is the oldest and most used tool among all the ADR mechanisms. Through this process the disputing parties or in some matters, the court appoints one or more than one person as Arbitrator to review the dispute and to decide it. Their decision is legally binding and enforceable in a court of law.

In the arbitration procedure, an impartial third party (known as an arbitrator) interferes to help the parties in resolving their disagreements. According to Halsbury, arbitration is the process of conferring a dispute or difference between two persons or parties or people other than a traditional court of law for resolution post-hearing both parties in court. But both parties must be prepared to submit their dispute to arbitration. There is no appeals process, thus the ruling of the arbitrator is on the parties compulsive in nature. The decision given by the Arbitrator in the Arbitral Tribunal is called an 'Award'.

In the era of this liberalized economy and globalization, the overburdened Indian court would have been a failure to provide a speedy resolution. Although Arbitration plays a quasi-judicial role to provide the fastest resolution. To meet the goal of *Access to Justice for All,* the Legislators have incorporated the provisions for Lok Adalat and also established Legal Service Authorities under the Legal Service Authorities Act 1987.[5] By which a huge number of pending cases were resolved. Since practically the formal concept of Arbitration in India is still evolving, still people

[2] Law Commission, *Need for Justicedispensation through ADR etc.* (Law Com No 222, 2009)
[3] Motor Vehicle Act 1988
[4] *Ibid*
[5] Legal Service Authorities Act 1987

need to know how? When? And where? Arbitration needs more nourishment and gradual changes as per the contemporary phenomena.

The arbitration process has been classified into three available categories and is practiced in India: Institutional Arbitration, Ad-hoc Arbitration, and Fast Track Arbitration.[6] In Institutional arbitration, a professional organization takes on the roles of a dispute resolution institution, including aiding in the processes and administering those processes by those rules. Such type of arbitration is carried out by an arbitral institution. The parties have a choice of referring to any disagreements to be resolved by the institution of their choice as elected. The selection of one or more arbitrators may be made by the governing body of the organization, the disputants, or both from a panel that has already been preselected by the organization. Nevertheless, this selection should be limited to the panel engaged by the governing body.

In an ad hoc arbitral process, the parties will be in charge of the decision-making process rather than a designated institution. The process, the number of arbitrators, and the format for the proceedings will all be determined by them. Ad hoc arbitration refers to a situation in which the arbitrator or party serving as the arbitrator is entirely free to make their own rules. Hence, the arbitrator is not obligated to apply the same rules as in previous arbitrations. Since most disputes will be settled in line with the laws of the countries where the arbitration's seat is located, the geographical jurisdiction of ad hoc arbitration is crucial. This makes it crucial that the parties to the agreement decide where the arbitration will take place.

A clause dealing with the idea of Fast Track Arbitration was incorporated after the Arbitration and Conciliation Amendment Act, of 2015.[7] Fast Track Arbitration is a technique in which the arbitration process must be completed in less than six months.[8] An arbitration proceeding conducted under the fast-track approach is overseen by a single arbiter. Fast-track arbitration does not include the idea of three arbitrators being selected for the same dispute.

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[6] D. Priyanka, 'Contemporary issues in India' (*Legal Service India*) <https://www.legalserviceindia.com/legal/article-8095-contemporary-issues-in-india.html> accessed15 March 2023

[7] Arbitration and Conciliation (Amendment) Act 2015

[8] Arbitration and Conciliation (Amendment) Act 2015, s 29B

## POSITION AFTER THE ENACTMENT OF THE ARBITRATION AND CONCILIATION ACT, 1996

The Arbitration and Conciliation Act of 1996 has repealed the Act of 1940, and since then the principal Act that was enacted in 1996 has been amended five multiple times significantly. The new Act of 1996 has brought some major changes and put an overlapping effect over the earlier provisions. The Act of 1940 allowed the disputing parties to apply to the court under section 20 of the Arbitration and Conciliation Act for the appointment of an arbitrator and interim relief under section 41(b).[9] Post-enactment of the new Act of 1996, no party can move such an application to the court but a court may pass the orders even before the beginning of the Arbitration proceeding.[10]

According to the 1940 Act, there was no requirement to provide the reason for the Arbitral Award. But according to the 1996 Act, there's a need to grant the arbitral award with proper reason unless the parties have agreed that there should be no recording of reasons.[11] That has reduced the court's interpretation on its own. Though post-enactment of the Act of 1996, it has faced numerous challenges regarding the legislative intention and applicability of the provisions. But Hon'ble Supreme Court has clarified these contentions by various cases, like- unless the litigants expressly or implicitly agree to disallow its terms Part-I of the aforementioned Act shall likewise apply to foreign commercial arbitration conducted outside of India.[12] Due to the pro-arbitration stance taken by the Indian judiciary and to meet up the level of International arbitration laws, practically following the 2021 Amendment, all international awards are now enforceable there in India. The Apex Court has stated that except in the rarest of instances, no international arbitral award's enforcement could be refused.[13]

[9] Arbitration and Conciliation Act 1940
[10] Arbitration and Conciliation Act 1996
[11] Arbitration and Conciliation Act 1996, s 31
[12] *Bharat Aluminium Co. v Kaiser Aluminium Technical Services Inc* (2016) 4 SCC 126
[13] *Associate Builders v Delhi Development Authority* (2015) 3 SCC 49

**The Arbitration and Conciliation (Amendment) Act 2021 has brought some important changes:**

- The amendment enables an automatic stay on the execution of every arbitration award if the courts come across any credible evidence that the arbitral award was affected by corruption or fraudulent activity. By referencing Section 2[14] of the Principal Act, this amendment has been made by Section 36 of this Act.[15]
- The main Act's Eighth Schedule, which specified the qualifications, background, and guidelines that the arbitrator must adhere to, was omitted.[16]

## CONTEMPORARY ISSUES OF ARBITRATION

Along with all the advantages the Arbitration procedure has achieved so far there are also some non-neglectable gaps reflected in the Arbitration process and its governing laws. Although in comparison to the then procedures of Arbitration modern procedures are more liberalized and flexible. Here we have discussed some major gaps or issues with the current Arbitration system:

**The intervention of the Judiciary:** Before examining the extent of court participation in arbitration, it is important to remember that the Act of 1996 and 2015 and the 2019 Amendment to it have targeted easing court workloads and facilitating speedier dispute settlement since it is beneficial for a developing economy to have prompt resolutions to commercial disputes and roadblocks.

Section 5 of the Arbitration and Conciliation Act 1996 parallels Article 5 of the UNCITRAL Model Law, which restricts judicial intervention using the term "no judicial authority shall intervene" but has also provided certain exceptions using the term "except where so provided in this part". According to the Honorable Supreme Court, only a limited amount of judicial action is permitted to initiate arbitral proceedings. Just an administrative role, not a judicial one, is played by the judiciary.[17] Hence, legislators intend to have a limited scope of judicial

[14] Arbitration and Conciliation (Amendment) Act 2021, s. 2
[15] Arbitration and Conciliation (Amendment) Act 2021, s. 36
[16] Arbitration and Conciliation Act 1996, sch 8
[17] *Secur Industries Ltd. v Godrej and Boyce Mfg Co Ltd* (2004) 55 AIILR 232

interference by making sure there are few opportunities for any party to a dispute to approach the courts to secure the finality of arbitral rulings, that did not forbid judicial intervention completely. A court can intervene in the arbitration proceeding in any of these ways: Before the initiation of the arbitration, during the arbitration, after the award has been made, or in a decision that is subject to appeal.[18]

Hon'ble Supreme Court also observed that "*If it intervenes in pending proceedings there is bound to be a delay in termination of proceedings. If it does not intervene, the error of the moment may earn immunity from correction. Thus the power is there but the exercise is discretionary which will be governed solely by the dictates of judicial conscience enriched by the judicial experience and practical wisdom of the judge."*[19]

Now there is no doubt that despite the legislative intention to reduce judicial interference and the introduction of the norm of non-interference by the court the judicial intervention is still in its sufficient to damage the core goal of the arbitration. Also, The arbitral proceedings are severely harmed by the presence of appeals from arbitrators' procedural decisions.

**Absence of Specific Limitation Period:** India's statute of limitations is governed by the Limitation Act of 1963. Section 3 of the Act forbids filing lawsuits, applications, and appeals after a specified time frame.[20] As a result, the party cannot take action once the allotted time has passed. Section 43(1) of the Arbitration and Conciliation Act 1996 mandates the applicability of the Limitation Act of 1963.[21] According to Section 43(2) of the Act 1996, the arbitration is considered to have started on the date as provided in Section 21 of the Act.[22] Further, Section 43(3) reads- *"Where an arbitration to submit future disputes to arbitration provides that any claim to*

[18] Niharika Chauhan, 'Judicial Intervention in Arbitration- A Comparative Analysis' (2022) Manupatra <https://articles.manupatra.com/article-details/Judicial-Intervention-In-Arbitration-A-Comparative-Analysis> accessed 21 March 2023
[19] *Surya Dev Rai v Ram Chander Rai* (2003) 6 SCC 675
[20] Indian Limitation Act 1963, s. 3
[21] Arbitration and Conciliation Act 1996, s 43(1)
[22] Arbitration and Conciliation Act 1996, s 21

*which the agreement applies shall be barred unless some step to commence arbitral proceedings is taken within a time fixed by the agreement, and a dispute arises to which the agreement applies…"*[23]

Section 11 of the Act provides for the initiation of the arbitral proceeding, by which the disputing party should appoint an arbitrator within 30 days.[24] But it doesn't provide any specific time frame by which a party should submit an application to the court for the appointment of an arbitrator if the parties fail to appoint an arbitrator within 30 days.[25] It becomes an issue before the court. Later Hon'ble Supreme Court held that "Article 137 of the First Schedule of the Indian Limitation Act 1963 would apply to Section 11 of the Arbitration and Conciliation Act 1996 and any application under section 11 of the Act of 1996 shall be submitted within 3 years from the date when the cause of action arose".[26] Although it is a residual element, it establishes a limitation time for any claim for which the Limitation Act's provisions do not provide a limitation term. According to this Article limitation period begins when the "right to reply" accrues.[27]

The goal of the Arbitration and Conciliation Act 1996, which is the quick and effective resolution of disputes, is defeated if there is no set deadline for submitting any claim under Section 11. Moreover, Section 29-A of the 1996 Act stipulates eighteen months for the conclusion of the arbitration and the issuance of the verdict. The Act of 1996 also stipulates in Section 11 that every effort shall be made to resolve the petition within 30 days of the opponent's notice being served; therefore, the three-year application deadline is contrary to the spirit of the 1996 Arbitration & Conciliation Act. Interestingly, in the Nortel Network case, the Hon'ble Supreme Court has opined that "the period of a three-year time frame is unduly long for applying section 11 of the Arbitration and Conciliation Act 1996".[28]

**Unconditional stay on Arbitral Proceeding:** By including a Proviso under section 36(3) of the Act, the 2021 Amendment made a significant alteration. The arbitral award should

[23] Arbitration and Conciliation Act 1996, s 43(3)
[24] Arbitration and Conciliation Act 1996, s 11
[25] Arbitration and Conciliation Act 1996, s 11
[26] *Grasim Industries v The State of Kerala* (2017) 14 SCC 265
[27] Limitation Act 1963, art 137
[28] *BSNL v Nortel Networks Pvt. Ltd.* (2021) 3 MLJ 131

unconditionally stay if the court is prima facie satisfied that the arbitration agreement, the contract used to make the award, or the process used to make the award is motivated by or affected by fraud or corruption.[29] But when the Bill was introduced in the Lok Sabha, numerous lawmakers questioned the unconditional stay.[30] Additionally, An unconditional stay, according to experts, is comparable to a blanket stay and will hinder India's efforts to put in place a pro-arbitration system.[31] Now, it is quite easy for the losing party to accuse the other of corruption and halt the implementation of the arbitral decision.[32]

**Appointment of Arbitrator**: Throughout the process of arbitration in the dispute settlement system, the qualification of the arbitrator is a contentious issue. However, the original Act of 1996, which established the conditions and qualifications for the official accreditation of an arbitrator, was amended in 2019 by the Arbitration and Conciliation (Amendment) Act, which inserted Section 43J. Subsequently, this section has developed Schedule VIII which provides a thorough list of qualifications that an arbitrator should satisfy.[33] But the new Amendment Act 2021 has substituted the section & also the schedule and stated that the "regulations" may specify the qualification, expertise, and standards for accreditation of arbitrators.[34] Which is defined under section 2(1)(j) added by the Amendment Act of 2019. But the contention is what this regulation stands for and who would make these. But With the availability of enough qualified, educated, and honest arbitrators, together with a well-equipped arbitration institution, the goals and objectives of the Act might be achieved. The necessity for these arbitrators is crucial because, if it were to become widely believed that parties who choose arbitration over litigation significantly reduced their prospects of receiving high-quality justice, it would undoubtedly cast doubt on arbitration's future.

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[29] Arbitration and Conciliation (Amendment) Act 2021, s 36(3)
[30] Subham Prakash Mishra, 'Impact Of The Arbitration And Conciliation (Amendment) Act, 2021 on India's Pro Arbitration Outlook' (*Bar and Bench*, 30 March 2021) <https://www.barandbench.com/apprentice-lawyer/impact-of-the-arbitration-and-conciliation-amendment-act-2021-on-indias-pro-arbitration-outlook> accessed 19 March 2023
[31] *Ibid*
[32] *Ibid*
[33] Arbitration and Conciliation (Amendment) Act 2019, s 43j
[34] Arbitration and Conciliation (Amendment) Act 2021

**Absence of the Statutory Recognition of Emergency Arbitration**: Emergency Arbitration (EA) proceedings have gained more acceptance and use globally over the past decades from a variety of jurisdictions and arbitral organizations. In India, emergency arbitration has lately attracted attention as courts examine the award made in Amazon's favor when litigating against the Future Group in the Emergency Arbitration proceedings.[35] The Arbitration and Conciliation Act of 1996 governs the arbitration process in India. it does not explicitly include any provisions for EA.[36] Whereas in India various Arbitration institutions have specific provisions that were inserted for Emergency Arbitration in their arbitration rules. Such institutions are the Delhi International Arbitration Centre,[37] the Mumbai Centre for International Arbitration,[38] the Indian Council of Arbitration,[39] and the Nani Palkhivala Arbitration Centre.[40]

In the alternative, parties are only left with the choice of seeking temporary or interim relief from Indian courts.[41] The value of emergency arbitration is obvious. Parties may prefer to seek an Indian court, unless confidentially is a problem, because interim relief can be granted in a couple of days, even on an ex-parte basis. This is true even though significant delays plague the Indian court system. According to the 2015 (Amendment) Act, as per changes to the Indian Arbitration Act, interim relief can be sought from Indian courts even in arbitrations with foreign seats.[42] The Indian Arbitration Act 1996 as it exists today doesn't make it clear if the decisions of an emergency arbitrator are enforceable in India (even if the arbitration is sitting there), despite having been Amended in 2015, 2019, and 2021.[43] The main draw for parties to a commercial dispute is the speed of Emergency Arbitration proceedings, which they much prefer to a traditional judicial system that suffers from several flaws like scarcity of trust in the court to

[35] *Future Retail Ltd. v Amazon.com Investment Holdings LLC & Ors* CS (COMM) 493/2020
[36] Arbitration and Conciliation Act 1996
[37] DIAC (Arbitration Proceedings) Rules 2018, r 14
[38] MCIA Rules 2016, r 14
[39] ICA Rules of Domestic Commercial Arbitration and Conciliation 2021, r 57(b)
[40] Rules of Arbitration for Nani Palkhivala Arbitration Centre, r 20(A)
[41] Arbitration and Conciliation Act 1996, s 9(17)
[42] Arbitration and Conciliation (Amendment) Act 2015
[43] Arbitration and Conciliation Act 1996

provide immediate relief, a lack of experience, the disclosure of privacy, exorbitant case expenditure, and so on.[44]

**Biassed Decision of the Arbitrator**: An officer of the government agency or organization or in the contract of such government agency or organization would frequently be designated as the arbitrator, particularly in government or public-sector contracts. This practice appears to violate the maxim- "Nemo Judex in Causa Sua" (No person can be judged based on their purpose), this is a basic principle of natural justice. However, there have been some differences in the court's opinions on the subject. But the Supreme Court held that the practice of naming an arbitrator who works for the company as a named arbitrator in contracts with a government entity does not automatically give rise to a hypothesis of bias, partiality, or lack of liberty on the arbitrator's role.[45] Thus it is evident that there may be concerns about bias when a party's current or former employee who is a designated arbitrator in a contract has signed it.

The Hon'ble Supreme Court in Vinod Bhaiyalal Jain v Wadhwani Parmeshwari Cold Storage Pvt. Ltd challenged arbitrators based on the possibility of discrimination, It was decided that arbitrators should not be subject to bias.[46] In this case, because the arbitrator had previously represented one of the parties in the dispute as a lawyer, the injured party questioned the arbiter's independence. The referee has frequently called this aspect into question. The aggrieved party had a legitimate bias against the arbitrator and his capacity to render an independent and unbiased verdict, according to the Supreme Court. Hence, the award needs to be canceled.

Among other things, the 246th Law Commission Report of India, which was issued in 2014, noted that judges' independence and impartiality are crucial characteristics that cannot be disregarded.[47] It was also acknowledged by the commission that the Act's flaw was the lack of a formula for identifying situations that raise "justifiable doubts." The committee recommended

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[44] Shaneen Parikh et al., 'developing compass of emergency arbitration in India' (*International Bar Association*,3 June 2021) <https://www.ibanet.org/emergency-arb-india#_ednref20> accessed 18 March 2023

[45] *Ace Pipeline Contract v Bharat Petroleum* (2007) 10 SCC 504 SC

[46] *Vinod Bhaiyalal Jain v Wadhwani Parmeshwari Cold Storage Pvt. Ltd.* (2011) 1 SCC 670

[47] Law Commission, (Law Com No 246, 2014)

substantial amendments in Sections 11, 12, and section 14 of the Arbitration and Conciliation Act 1996, to address the problem of impartiality, which would then enable the arbitral process to function properly.[48] These recommendations resulted in the enactment of the 2015 Amendment Act.

In HRD Corporation (Marcus Oil and Chemical Division) v Gail (India) Ltd, The Supreme Court decided that the existence of conditions covered by the 7th Schedule automatically disqualifies a person from serving as an arbitrator and that a challenge to the terms of the aforementioned schedule may be brought directly before the court.[49] The parties may bring up independence and impartiality concerns only before the arbitrator under Section 13 of the Arbitration and Conciliation Act of 1996. However, until the arbitrator issues an arbitration decision, no component of the fifth schedule may be challenged in court.[50]

In Perkins Eastman Architects DPC v HSCC (India) Ltd, the Supreme Court was concerned that the Chief Managing Director's nomination of an arbitrator would be void.[51] Thus it is evident that in numerous cases, the biassed appointment of arbitrators or biassed arbitral decisions was brought about in front of the Supreme Court and was tackled. Hence, If an arbitrator fails to maintain their independence and impartiality at all times, the system for providing justice through arbitration is severely susceptible. The law must recognize and eradicate the inherent bias in the one-sided appointment of arbitrators. India must foster an environment that is friendly to arbitration and enact stricter anti-bias laws. Arbitration is a means of achieving justice, much like the judicial system, so the procedure must be devoid of bias, such as on the part of the arbiter.[52]

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[48] *Ibid*
[49] *HRD Corporation (Marcus Oil and Chemical Division) v Gail (India) Ltd (Formerly Gas Authority of India Ltd* Civ App No 11126/2017
[50] *Ibid*
[51] *Perkins Eastman Architects DPC v HSCC (India) Ltd* (2019) SCC Online SC 1517
[52] Faranaaz Karbhari and Mahafrin Mehta, 'India: Arbitral Bias' (*Mondaq*, 27 November 2020) <https://www.mondaq.com/india/arbitration--dispute-resolution/1010490/arbitral-bias> accessed 23 March 2023

## ANALYSIS AND CONCLUSIVE REMARKS

As every aspect of Law is a matter of gradual development based upon societal needs, the Arbitration procedure is also not apart from this. Although in India Arbitration is not a new process, from earlier times we had similar systems to resolve various disputes. After many ups and downs in India, we have got codified Arbitration procedures i.e- The Arbitration and Conciliation Act. Subsequently, it has achieved its contemporaneous immunity with some amendments and numerous precedents. But it is a general norm that everything is a mixture of black and white, Arbitration is also not an exception to this norm of imperfection. As compared to the International arbitration norms and ease of commercial dispute resolution, Indian Arbitration procedures need to be more immune and nourished because gradually India is getting developed as a World class business destination. World wide different business entities are moving towards Indian Territory, e.g- Foxconn. The Government of India is inviting different companies to invest in India. So, India needs appropriate and reliable legal provisions for ease of doing business.

The business elite doesn't prefer traditional court intervention in their dispute resolution instead they opt for Alternative Dispute Resolution processes for settling their complicated business disputes. Because somewhere unconditional delay is the core reason behind it. But as a whole, if we look at the process, the court intervention is still a matter of concern. The foundation of the system for delivering justice through arbitration is extremely vulnerable if an arbitrator fails to keep their independence and impartiality at all times. The inherent bias in the unilateral selection of arbitrators must be acknowledged by law and eliminated. India needs to create an environment that is supportive of arbitration and stronger anti-bias legislation. Arbitration, like the judiciary, is a way to accomplish justice, so the process must be free from bias on the part of the arbitrator, for example. In the Indian context, the Arbitration procedure is still prone to several issues. Some of the issues are pending with the Apex court and we are looking forward to a positive decision, e.g- the validity of Emergency Arbitration.