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Role of Arbitration in Real Estate Disputes

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The Indian real estate sector stands as a critical arena marked by substantial demand and supply dynamics, yet fraught with the inevitability of disputes that significantly impact its institutional framework. However, arbitration serves as a valuable tool for expeditiously resolving disputes, contributing to the overall stability and growth of the real estate industry in India. This study examines the roles of parties engaged in various facets of real estate transactions which recognize the burdensome nature of prolonged litigation and the attendant costs where the disputes often arise due to issues such as illegal land possession, unclear land titles, and administrative inefficiencies and how arbitration promotes itself as a superior option to litigation, giving several benefits, whereas litigation is all about congested courts, burdened with land dispute cases, reflecting systemic issues caused by conflicting laws and administrative non-compliance congested courts, burdened with land dispute cases, reflecting the systemic challenges arising from conflicting laws and administrative non-compliance. Furthermore, the research delves into the factors attributing to the substantial influence of arbitration and its prevalence in resolving disputes within the real estate sector which also includes the ability to maintain ongoing business relationships, select arbitrators with expertise in real estate matters, and tailor the process to address specific issues efficiently. Focusing on the realm of dispute resolution vis-à-vis the real estate industry, this paper explores emerging trends and relevant issues while shedding light on crucial aspects that enhance comprehension of the current dispute resolution landscape in the legal domain. It examines the advantageous facets of arbitration, including parties' autonomy, arbitrators' impartiality, choice of applicable law and arbitration venue, procedural flexibility, confidentiality, and the international enforceability of awards. Given these merits, it is advisable to promote the widespread adoption of traditional dispute resolution methods, alongside advocating for governmental enactment of laws that bolster the arbitration process at every administrative process.

Keywords: *arbitration, real estate transactions, dispute resolution.*

INTRODUCTION

The Real Estate (Regulation and Development) Act 2016¹, also called **REA**, has been recognized with great eagerness by Indian consumers who have long been scuffling with ultimatums in the real estate sector. Even before REA could be implemented², the Indian real estate industry suffered from a lack of regulation, allowing builders to engage in unfair practices such as prolonged venture delays and instances of fraud. The absence of robust regulations enabled builders and contractors to exploit consumers, resulting in significant frustration and financial burdens for homebuyers. Before REA³, consumers had sought recourse through redressal forums for the consumers established under the Consumer Protection Act 1986 (COPRA)⁴, but legal proceedings were often delayed by builders. The RERA was outlined with three main objectives: to regulate and promote the escalation of the real estate sector, to safeguard the dividends of consumers, and to initiate a medium for fast-track resolution of disputes. In shadowing these goals, the REA⁵ established two important forums, the Real Estate Regulation Authority (RERA) and the Adjudicating Officer (AO), to ensure the safeguarding of buyers' rights and to provide an efficient policy for resolving disputes on time.⁶

To overcome this, builders began including arbitration clauses in contracts, clearing out buyers with few options to look for remedies due to the arbitration cost or shortfall in the understanding of the process. However, a conflict arises regarding the suitable method of dispute resolution.⁷ This disagreement arises between the process under the Real Estate Agreement and the one

¹ The Real Estate (Regulation and Development) Act 2016

² *Ibid*

³ *Ibid*

⁴ Consumer Protection Act 1986

⁵ The Real Estate (Regulation and Development) Act 2016

⁶ Harish Narasappa, 'The long, expensive road to justice' *India Today* (2 May 2016)

<<https://www.indiatoday.in/magazine/cover-story/story/20160509-judicial-system-judiciary-cji-law-cases-the-long-expensive-road-to-justice-828810-2016-04-27>> accessed 5 April 2024

⁷ Sanjeev Sinha, 'Top 6 Real Estate Scams and How Home Buyers Can Avoid Them' *The Economic Times* (5 April 2010) <<http://economictimes.indiatimes.com/wealth/personal-finance-news/top6-real-estate-scams-and-how-home-buyers-can-avoid-them/articleshow/46930255.cms>> accessed 5 April 2024

approved in the Arbitration and Conciliation Act, 1996⁸ ('Arbitration Act'). Section 71 of the REA⁹ provides for recompense due to the buyer, to be decided by an Adjudicating Officer (AO). This raises the question of what happens if there is an arbitration clause in the agreement where specific provisions are present for providing a legitimate remedy.

HOW LONG ARE YOU WILLING TO WAIT? CONSIDERING THE TIME FRAMES INVOLVED IN LITIGATION v ARBITRATION IN REAL ESTATE DISPUTES

Professionals in different fields are constantly looking for alternative and innovative ways to resolve disputes that arise during business transactions and professional activities, due to uncertainty surrounding dispute resolution through litigation.

Litigation, as an essential part of commercial and social development, serves as the primary means of dispute resolution within the conventional justice system. However, it is plagued by challenges such as court congestion, excessive delays, rigid formalities, prioritizing technicalities over justice, harm to social and business relationships, high costs, and undue interference. A retired jurist once highlighted that the administration of justice in courts is constrained by delays and high expenses. When a case takes 7 to 10 years to be resolved, potential litigants may choose to avoid court altogether due to the fear of extensive costs. This results in a large portion of the population being unable to afford legal recourse. Despite the passage of time, the issue of delays in the courts remains a significant concern.¹⁰

The other relevant theory is that asymmetric theory is a crucial framework applied across various disciplines, including finance, economics, risk management, real estate, and law. It provides valuable insights into the disparities in information between parties involved in litigation cases, shedding light on the complexities of the legal process. In legal disputes, the plaintiff and defendant often hold differing levels of information regarding the potential case

⁸ The Arbitration and Conciliation Act 1996

⁹ The Real Estate (Regulation and Development) Act 2016, s 71

¹⁰ Swati Deshpande, 'Mindset change needed to reduce frivolous petitions entry to court, encourage mediation, says Justice SK Shinde' *The Times of India* (19 August 2021)

<https://timesofindia.indiatimes.com/city/mumbai/mindset-change-needed-to-reduce-frivolous-petitions-entry-to-court-encourage-mediation-says-justice-sk-shinde/articleshow/85465424.cms>, accessed 5 April 2024

outcome, creating challenges in reaching a fair settlement.¹¹ This information asymmetry, where each party possesses private knowledge that can significantly impact the litigation process, can lead to prolonged and costly legal battles. To address these challenges, the integration of alternative dispute resolution (ADR) techniques, such as arbitration and mediation, has become increasingly prevalent. By incorporating ADR into the litigation process, parties can navigate information disparities more effectively, leading to more efficient and satisfactory resolution of legal disputes.¹²

Arbitration is an unusual form of dispute resolution where the parties that are involved agree to put forward their disagreement to an unbiased third party, known as an arbitrator. The arbitrator, often a retired judge, lawyer, or expert in the relevant field, presides over an evidentiary hearing where both parties have the opportunity to present their arguments. Following this hearing, the arbitrator issues a conclusive and binding decision, known as an arbitral award. Unlike formal court proceedings, arbitration allows for more flexibility in the rules of procedure and evidence, as long as both parties agree to these terms in advance.

THE FACTORS DETERMINING WHETHER LITIGATION OR ARBITRATION IS THE BETTER OPTION ARE¹³:

Certainty: Litigation often receives criticism for judges' perceived lack of understanding of complex business disputes, which leads to unpredictable and unsatisfactory outcomes. On the other hand, arbitration involves a neutral third party who has substantial learning and command over the subject like real estate. It is important to note that arbitrators do not necessarily have to be lawyers but most of the arbitrators are from legal backgrounds. This characteristic of arbitration usually eliminates the significant conflicts and price of educating a judge in the nuances of a specific business field, such as real estate. Properly selected arbitrators

¹¹ Manash Pratim Goahin, 'Homebuyers Can Now Move NCDRC Directly Against a Builder' *The Economic Times* (13 October 2013) <<http://realty.economictimes.indiatimes.com/news/regulatory/homebuyerscan-now-move-ncdrc-directly-against-a-builder/54823235>> accessed 05 April 2024

¹² 'Passage of Real Estate Bill: Blessing for both, home buyers & developers' (*Free Press Journal*, 31 May 2019) <<https://www.freepressjournal.in/mumbai/passage-of-real-estate-bill-blessing-for-both-home-buyers-developers>> accessed 05 April 2024

¹³ 'Compensation Clause in Builder-Buyer Agreement is Unfair' *Hindustan Times* (18 July 2015) <<https://zeus.firm.in/wp-content/uploads/Compensation-clause-in-builder-buyer-agreement-is-unfair-one-sided.pdf>> accessed 05 April 2024

can emphasize the most pertinent issues in the dispute, and the arbitration process is generally less formal. Instead, it relies on facts and evidence rather than strict adherence to conventional rules of allegation and procedure.

Time: Arbitrations offer the advantage of avoiding crowded court schedules, allowing cases involving large sums of money to be heard within months rather than years. Additionally, it is extremely difficult to appeal an arbitration award, making finality the norm rather than the exception. The ability to promptly schedule a hearing and resolve disputes quickly provides significant benefits to all parties involved.

Costs: Talking about the costs and expenses, we are well aware that litigation is costlier as compared to arbitration because as we have seen litigation is mostly criticized for the abuse of pre-trial discovery which is not the case of arbitration, it is paramount that, with a few exceptions, such instructions are not permitted in arbitration unless specifically stated otherwise. In most arbitrations, the boundary on recognition, as well as the conclusions in the decision, primarily reduces the counsel's fees and costs. The standard principle is that one day of arbitration equals two to three days in court, which saves money for both parties because the parties have the arbitrator's complete focus, as opposed to a judge who has to hustle between many issues during the day. Finally, arbitration diminishes the delayed personal involvement of crucial company officers and employees in depositions and to learn on planning conferences, which reduces their time away from chasing other vocations. Coming to privacy, unlike litigation, arbitration is more exclusive and backstage¹⁴. The legal proceedings are not subject to the civil litigation prerequisite for transparency and easily accessible proceedings.

PROCEDURE FOR DISPUTES RESOLUTION BY RERA

Consumers who find themselves aggrieved hold the right to initiate a complaint against the builder or real estate agents per section 31 of the Real Estate (Regulation and Development) Act (RERA)¹⁵. It is essential to note that the lodging of complaints can be executed through both

¹⁴ Raheja Vedanta, 'Invite All Flat Buyers to Join the Case Through Public Notices – Consumer Forum' (*The Logical Buyer*, 1 October 2015) <<http://www.thelogicalbuyer.com/blog/invite-all-flat-buyers-to-join-the-case-through-public-notice-consumer-forum/>> accessed 28 March 2024

¹⁵ Real Estate (Regulation and Development) Act 2016, s 31

digital and physical channels, namely the RERA portals, or using personal visitation to the respective RERA authority of the applicable state. RERA, distinguished as the preeminent platform for expeditious redressal of real estate-related matters, promptly triggers a response after the filing of a complaint, typically within a period not exceeding one month or 45 days. Ordinarily, the resolution of cases entails a maximum of five to six hearings before reaching a determination and achieving closure.¹⁶

When a complaint is filed under the Real Estate (Regulation and Development) Act (RERA)¹⁷, the authority issues a unique 'complaint number' for reference until the complaint is resolved. Typically, RERA notifies the builder within a week of the complaint being filed. During the initial hearing, the complainant is required to submit two sets of documents, including the complaint copy, builder-buyer agreement, payment receipts, tripartite agreement copy, and other relevant documentation to substantiate their claim.

The developer is entitled to submit a response to the complaint. This response must be bestowed before the authorization in the presence of the complainant, and subsequently, it will undergo inquiry and a war of words on a scheduled date. Subsequent arguments will be entertained to reach final orders. The issuance of the order may have a duration of 15-30 days. Furthermore, this order must be publicly posted on the RERA gateway. Under the Act, once an order is decreed, it must be implemented within a specific duration. In the event of RERA issuing an order for compensation or refund, the complainant retains the right to pursue execution if the developer fails to comply with the directive. An execution complaint can be filed online 45 days after the issuance of the order by RERA, and appropriate measures can be pursued subsequently. In the event of non-compliance by the builder, provisions for penalties and imprisonment for a duration of up to three years are in place.

¹⁶ Susanna Myrtle Lazarus, 'An alternative to legal woes' *The Hindu* (28 February 2015) <<https://www.thehindu.com/features/metroplus/society/legal-mediation-in-india/article6941111.ece>> accessed 28 March 2024

¹⁷ The Real Estate (Regulation and Development) Act 2016

JURISDICTION OF RERA

PROVISIONS OF THE REAL ESTATE (REGULATION AND DEVELOPMENT) ACT, 2016 (RERA)¹⁸

Section 88: Application of other laws not barred¹⁹ – This provision of the Act is meant to supplement and not override any other existing laws in effect at the time. Section 89 should be interpreted in light of this principle.

Section 89: Act to have overriding effect²⁰ – The provisions outlined in this Act will remain valid and enforceable, even if they conflict with any other existing laws.

WHAT IS THE PROVISIO OF THE ARBITRATION ACT AND WHAT IS AN ARBITRATION PROCEEDING?

Section 8 - Power to refer parties to arbitration where there is an arbitration agreement²¹ –

- When a legal dispute is subject to an arbitration agreement and a party is involved in arbitration proceedings, they are required to seek the intervention of a judicial authority. This request should be made promptly, specifically at the time when the party needs to present its initial statement regarding the dispute's content.
- For an application mentioned in subsection (1) to be valid, the original arbitration agreement or a property-certified copy must be submitted. It's crucial to highlight that even if an application has been made under subsection (1) and the issue is still under consideration by the court, arbitration procedures can still be started or continued, and an arbitral award can be granted.

ANALYSIS OF RERA ACT: DISPUTE RESOLUTION CLAUSES

The Act aimed to begin a specialized business for expedited dispute resolution due to the backlog of Indian court cases affecting consumer forums. Many builders exploited this situation

¹⁸ *Ibid*

¹⁹ Real Estate (Regulation and Development) Act 2016, s 88

²⁰ Real Estate (Regulation and Development) Act 2016, s 89

²¹ Arbitration and Conciliation Act 1996, s 8

by wearing down consumers or offering minimal settlements. The process was arduous for buyers, involving multiple levels of forums - district, state, and national. The parties can include arbitration clauses in contracts, such as lease agreements or purchase agreements. The clauses that set forth any kind of difference of opinion that occurs from the contract will have to go through arbitration.²² The involvement of an arbitration clause allows both parties with a pre-planned process for ironing out the disagreements and can be helpful in the smooth running of the resolution process.

Large builders often hire specialized legal counsels to create unfair contracts with arbitration clauses that discourage buyers from filing lawsuits. This practice exacerbates the problem. The Act sets strict deadlines (60 days) for the Appellate Tribunal to consider appeals, ensuring fast-track remedies and minimizing consumer forum wait times. The procedure for lodging a complaint with the RERA is detailed in Section 34²³, while the procedure for filing a complaint with the Adjudicating Officer (AO) is detailed in Section 35²⁴. It's perplexing that the legislature would establish two separate mediums for seeking redress, especially considering that Section 72 of the Act²⁵ specifies the factors for determining compensation. Establishing numerous judiciatures for effectuating these rights would superfluously raise jurisdictional concerns and could wear away at the fundamental objective of the law, which is to ensure fast-track justice.²⁶

BUYERS CAN CLAIM COMPENSATION UNDER THE FOLLOWING CLAUSES

1. In the context of real estate development, if a promoter also includes fake or incorrect information in an advertisement or project brochure, and a homebuyer suffers loss or damage as a result, the promoter may be held liable for such damages.²⁷

²² 'Do Not Fall Prey to One-Sided Builder Agreements' (*The Chambers of Law*, 13 May 2013) <<https://www.tclindia.in/do-not-fall-prey-to-one-sided-builder-agreements-indianlaws/>> accessed 26 March 2024

²³ Real Estate (Regulation and Development) Act 2016, s 34

²⁴ Real Estate (Regulation and Development) Act 2016, s 35

²⁵ Real Estate (Regulation and Development) Act 2016, s 72

²⁶ Bhavya Shah and Charvi Devprakash, 'Dispute Resolution: An Analysis Pre and Post RERA' (*The Indian Journal of Projects, Infrastructure and Energy Law*, 31 August 2022) <<https://ijpiel.com/index.php/2022/08/31/dispute-resolution-an-analysis-pre-and-post-rera/>> accessed 29 March 2024

²⁷ Real Estate (Regulation and Development) Act 2016, s 12

2. If the Promoter fails to correct any structural or other defects within five years of delivering the possession, they must rectify the issue within thirty days of being notified.²⁸
3. If the allottee has an intention to stop being involved in the venture project due to the promoter's incapability to complete the project or provide ownership within the prescribed terms of the agreement for sale, or if the promoter discontinues their business, they may do so.²⁹
4. Compensation for damages incurred by the buyer due to flaws in the land title on which the venture is being constructed or has already been constructed.³⁰
5. In the event that the Promoter is unable to fulfill any additional obligations that have been mandated on it by the Real Estate (Regulation and Development) Act (RERA)³¹ or as per the terms and conditions mentioned in the Agreement for Sale, then such non-compliance shall be deemed as a breach of contract.³²

CAN THE ARBITRATION AWARD BE CHALLENGED?

It is common for the party that loses in arbitration to challenge the award before the High Court and then the Apex Court. However, recent pro-arbitration amendments to the Arbitration and Conciliation Act³³ have scattered down to the extent of challenging the arbitral award, which brought about a decline in the occurrence of court interference. For example, Sections 34³⁴ and 48³⁵ have been amended to limit the grounds for challenge, and Section 36³⁶ has been amended to eliminate the automatic stay on filing a court proceeding challenging the arbitral award. In real estate disputes, parties, again and again, turn to arbitration as a technique of skillfully reconciling conflicts without calling on extensive and expensive legal proceedings³⁷. When both

²⁸ Real Estate (Regulation and Development) Act 2016, s 14 (3)

²⁹ Real Estate (Regulation and Development) Act 2016, s 18 (1)

³⁰ Real Estate (Regulation and Development) Act 2016, s 18 (2)

³¹ Real Estate (Regulation and Development) Act 2016

³² Real Estate (Regulation and Development) Act 2016, s 18 (3)

³³ Arbitration and Conciliation Act 1996

³⁴ Arbitration and Conciliation Act 1996, s 34

³⁵ Arbitration and Conciliation Act 1996, s 48

³⁶ Arbitration and Conciliation Act 1996, s 36

³⁷ Ben Giarretta and Akshay Kishore, 'Changing the Arbitration Law in India' (*Conventus Law*, 14 February 2017)

<<https://conventuslaw.com/report/changing-the-arbitration-law-in-india/>> accessed 29 March 2024

parties see eye to eye to arbitrate their issue, they are confined by the arbitrator's judgement, and the award is usually executable in court. This final decision of the arbitrator allows parties to move further and carry out the purpose without any kind of risks involved in extended appeals.

In a recent case, *PASL Wind Solutions v GE Power*,³⁸ the Apex Court of India sorted out that the two Indian parties may plump for a foreign seat of arbitration, plausibly superior to more instances of domestic parties agreeing to foreign-seated arbitration. When drafting dispute resolution clauses in agreements between lenders and borrowers, it is important to consider cost and timing as crucial factors.

It is advisable to include provisions for appointing sole arbitrators rather than multiple arbitrators to promote economic efficiency in the future. The outcome of an arbitration process hinges on the presentation of the case and the nature of the demands raised. This can lead to either the original transaction being upheld or disputes being settled through an award or liquidated damages. In cross-border scenarios, payments in the form of arbitration awards are not explicitly addressed in tax treaties, resulting in a 40% tax liability for the payer.³⁹ Additionally, there may be an 18% GST exposure on such settlements. However, opting for a settlement in line with the original transaction rather than liquidated damages can help mitigate tax leakage, potentially limiting the tax outflow to 10% for capital gains on the sale of securities. The arbitration award pertains to shares, and according to Indian Exchange Control regulations, the transfer of shares must be based on fair market value. If the value of the asset or security does not align with the arbitration award, there may be challenges in implementing the award from an Indian Exchange Control perspective. In such instances, a consensus on valuation needs to be reached, often by appointing multiple valuers and determining an average value, to prevent disagreements on valuation among the parties involved.

³⁸ *PASL Wind Solutions v GE Power* (2021) AIR 2021 SUPREME COURT 2517

³⁹ Thomas A. Musil and John I. Halloran, 'Arbitrating Real Estate Agency Disputes: The Complex Landscape Of Real Estate Agency Relationships And Duties' (2013) 67(4) *Dispute Resolution Journal* <<https://realestateexpertwitness.us/wp-content/uploads/2016/02/Arbitrating-Real-Estate-Agency-Disputes.pdf>> accessed 29 March 2024

THE DRAWBACKS THAT CREATED THE DEMAND FOR ARBITRATION

Calling Litigation a night terror of the real estate industry. It affects the broker, the seller, the buyer, the lessor, the lessee, and their respective counsels as well involved in real estate disputes.

1. Challenges of a broker dealing with real estate disputes: There exists a multitude of appellate cases involving claims against real estate brokers, pointing to a discernible predisposition in the law favouring the principal over the broker in the event of a conflict. This perceived bias stems from various factors, including:

The disparity between the legally mandated trustful duties of real estate brokers and the prevailing industry customs and perceptions regarding the role of a broker is a critical consideration. While the brokerage community may assume that a broker's actions are evaluated based on marketplace customs and practices in the event of a claim, this is not accurate. Real estate brokers are bound by fiduciary obligations that closely resemble those owed by attorneys to their clients, and their actions, or inaction, are measured against these fiduciary duties. Fiduciary duty represents the prominent form of obligation in our legal system.

Furthermore, the inclination of the courts to automatically classify real estate brokers as 'agents' introduces the concept of the broker's fiduciary responsibility into legal proceedings. This includes the notion that a broker's errors may be construed as 'constructive fraud'⁴⁰. In certain countries, this places the burden of proof on the real estate broker to demonstrate that they have not violated their obligations, rather than the principal being obligated to prove that the broker has breached their duty.

2. Challenges of a Seller dealing with real estate disputes: Selling real property poses similar concerns for sellers as it does for real estate brokers. However, sellers also face the additional worry of potential legal action for specific performance from a buyer, who may also file a *lis pendens*. This filing can effectively prevent the property from being sold, financed, or leased

⁴⁰ Bibek Debroy and Suparna Jain, 'Strengthening Arbitration and its Enforcement in India—resolve in India' (2016) NITI Aayog <https://csja.gov.in/images/p1198/session_1_challenges_in_implementation_of_adr.pdf> accessed 05 April 2024

during the pending litigation. To mitigate this risk, sellers often aim to avoid signing anything other than a comprehensive final document.

3. Challenges of a buyer dealing with real estate disputes: A buyer shares the typical concerns about litigation but also needs to consider the potential duration of the legal process and the likelihood that, even if they win the case, the seller could file an appeal, further prolonging the time until a final judgment is reached.

4. Challenges of a lessor dealing with real estate disputes: The lessor of the commercial property faces litigation concerns similar to other real estate owners. However, they have a unique advantage in the form of a summary procedure. This summary process prioritizes cases involving real estate possession. Nonetheless, lessors may wish to avoid litigating certain issues, such as disputes over common area maintenance charges, as these proceedings are public and can impact other tenants.⁴¹

5. Challenges of a lessee dealing with real estate disputes: The lessee in a lease faces challenges in litigation and is at a disbenefit in an unlawful detainer action compared to the lessor. The obligation of the tenant to pay rent is considered distinct from the lessor's agreement. This implies that even if the lessor breaches the agreement, the lessee is still required to fulfil their rent payment obligations. This principle is not typically applicable in residential leases or most other types of contracts. These unique concerns affect real estate lawyers representing the parties, including the difficulty in determining legal malpractice in real estate matters.

THE EFFECTIVENESS OF ARBITRATION CLAUSES IN REAL ESTATE CONTRACTS WITH RESPECT TO ARBITRATION AND CONCILIATION (AMENDMENT) ACT, 2015

ADR (Alternative Dispute Resolution) is a contractual matter giving parties the freedom to decide which disputes are eligible for arbitration and establish the arbitration procedures. Clarity is crucial when drafting ADR clauses to avoid potential litigation over the statute itself

⁴¹ Bridget A. Logstrom, 'Arbitration in Estate and Trust Disputes: Friend or Foe?' (2005) 30 ACTEC Journal <https://www.dorsey.com/~media/files/newsresources/publications/2005/05/arbitration-in-estate-and-trust-disputes-friend-_/files/tbls13newspdf952916actecjournalspring05arbitrati_/fileattachment/actecjournalspring05arbitrationfrie ndorfoe.pdf> accessed 05 April 2024

or the scope of other matters intended for arbitration. Many real estate contracts contain arbitration provisions that are impractical and hinder the fast-track and efficient closing of disputes. When assessing the validity of arbitration clauses in relation to the REA⁴², obtaining that both parties should consent to submit their dispute to the tribunal is essential as arbitration relies on mutual agreement. Builder-buyer agreements often include one-sided standard terms that heavily favour the builder, creating an unfair advantage for them. These agreements are typically pre-drafted with little room for negotiation, leaving buyers with limited opportunity to review the terms or seek legal advice before signing.

When analyzing a given scenario, it is imperative to determine whether both the parties involved had an intention and also eye to eye that their disputes would be determined to be solved only using arbitration. It should be noted that the decisions related to arbitrability were made prior to the amendment to the Arbitration Act. The updated language of §8(1)⁴³ clearly indicates that judicial authority is responsible for referring the parties to arbitration unless and until it is found that no justifiable arbitration agreement exists. This updated language makes it necessary for the court to refer the parties to arbitration in case the matter is arbitrable. The *A. Ayyasamy v A. Paramasivam*⁴⁴ decision in 2016 highlighted that the existence of an arbitration clause in the agreement brings about the instruction of section 8 of the Arbitration and Conciliation Act⁴⁵, requiring the parties to approach the Tribunal. However, the ambiguity regarding what is arbitrable persists, and it is essential to have laws that define what matters are not arbitrable. This necessitates utilizing the rules of statutory interpretation to critically analyze the arbitrability of disputes under the REA.⁴⁶

The inclusion of an arbitration clause in a contract enables parties to agree to resolve all or specific disputes through arbitration rather than through the court system. In the context of a real estate transaction, a commercial landlord may elect to resolve disputes through arbitration for certain matters such as common area maintenance and option agreements, as well as future

⁴² The Real Estate (Regulation and Development) Act 2016

⁴³ Arbitration and Conciliation Act 1996, s 8

⁴⁴ *A. Ayyasamy v A. Paramasivam* (2016) 10 SCC 386

⁴⁵ Arbitration and Conciliation Act 1996, s 8

⁴⁶ The Real Estate (Regulation and Development) Act 2016

rent. However, the landlord may choose not to resort to arbitration for other matters such as tenant eviction due to non-payment of rent or lease expiration. Similarly, banks may seek the ability to quickly foreclose in the event of a default and may thus limit arbitration to certain types of disputes or those exceeding a certain dollar amount.

The parties need to be specific when defining the scope of disputes subject to arbitration to avoid ambiguity. Any uncertainty will generally be resolved in favour of arbitration. Additionally, in situations where multiple parties are involved in a dispute, not all the parties that are related may be subject to an alternative dispute resolution (ADR) clause. For example, in situations where an owner believes that a construction failure is the responsibility of both the contractor and the architect, but the contract with one party does not require arbitration, the owner may need to initiate both arbitration and litigation processes to resolve the issue.

JUDICIAL PRONOUNCEMENTS

In the case of *Ganesh Lonkar v DS Kulkarni Developers Ltd*⁴⁷, the Maharashtra Real Estate Authority (MahaRERA) asserted its authority to decide disputes in spite of the existence of an arbitration agreement between the parties. The justification for this decision is twofold. First, MahaRERA argued that it takes precedence or outweighs the Arbitration and Conciliation Act of 1996 (ACA)⁴⁸ because it was sanctioned in due course, and therefore, the legislature is presumed to be well informed of all the legislation it has passed. Secondly, MahaRERA pointed to section 89 of the REA⁴⁹, which includes notwithstanding language unambiguously comprehended by the legislature, affirming that the RERA shall be in power despite any inconvenience with other currently in effect laws⁵⁰. This first and foremost means that section 8 of the ACA⁵¹, which is necessarily a judicial administration to call attention to arbitration matters which is enclosed by an arbitration agreement, is substituted by the provisions of RERA. It's

⁴⁷ *Ganesh Lonkar v D.S. Kulkarni Developers Ltd* (2017) MANU/HC/34/2017

⁴⁸ Arbitration and Conciliation Act 1996

⁴⁹ Real Estate (Regulation and Development) Act 2016, s 89

⁵⁰ 'Can The Decision Reached In Arbitration Be Appealed?' (*Real Estate Law Corporation*)

<<https://www.realestatelawcorp.com/can-the-decision-reached-in-arbitration-be-appealed/>> accessed 05 April 2024

⁵¹ Arbitration and Conciliation Act 1996, s 8

paramount to note that the judiciary's viewpoint on this matter is still on the horns of a dilemma, and there is no conclusive precedent that convincingly responds to this question.

The amendment to Section 8 of the Arbitration and Conciliation Act⁵² does not remove the jurisdiction of the Consumer Court, especially in cases where conflicts have been declared non-arbitrable by special legislation. This was confirmed by the Supreme Court in the case of *Aftab Singh v Emaar MGF Land Limited & Anr*⁵³. The phrase 'notwithstanding any judgment, decree or order of the Supreme Court or any Court' was considered to refer to precedents that sanctioned the judicial authority's right to think about the various aspects of arbitration agreements, which also includes their validity, enforceability, and subject matter, as outlined in Section 8.⁵⁴

The Supreme Court has clearly elucidated that disputes can proceed to arbitration even if a party is qualified to seek an additional special remedy under the provisions but still determines not to do so and is a party to the arbitration agreement. Judicial authorities can only turn down to send the parties to arbitration when error-free/special redressal methods are offered and chosen by the dishonoured party. Therefore, the Review Petitions were refused by the Apex Court, upholding The National Consumer Disputes Redressal Commission's (NCDRC)⁵⁵ decision.

As per the RERA Act⁵⁶, properties with a land area of less than 500 square meters or with fewer than eight apartments put forward for the development are not called for to be recorded with RERA. This pronouncement was reaffirmed in the case of *Geetanjali Aman Construction v Hrishikesh Ramesh Paranjpe*⁵⁷, where the builder did not register an ongoing venture with RERA. The construction company pleaded to the MahaRERA Appellate Tribunal, contesting RERA's decision. Under state RERA regulations, Under state RERA regulations, there is a fine that is equal to 3% of the venture's cost that is against the builder. Subsequently, the builder sought a review of the order, pointing out loopholes with the venture's location and the number

⁵² *Ibid*

⁵³ *Emaar MGF Land Limited v Aftab Singh* (2018) 2018 SCC OnLine SC 2378

⁵⁴ Arbitration and Conciliation Act 1996, s 8

⁵⁵ Consumer Protection Act 1986

⁵⁶ The Real Estate (Regulation and Development) Act 2016

⁵⁷ *Geetanjali Aman Constructions and Ors. v Hrishikesh Ramesh Paranjpe and Ors* (2021) 3 Bom CR 567

of apartments. As the venture had more than eight apartments, RERA pressed an additional penalty until this existing project was registered. The Tribunal ultimately nullified both of the orders, stating that the housing project did not need to be registered with RERA if either of the two criteria was met.

Booz-Allen & Hamilton Inc. v SBI Home Finance Ltd. & Ors:⁵⁸ Arbitral tribunals are confidential forums that are selected by the parties to resolve civil or commercial disputes instead of public courts and tribunals. These tribunals can handle almost any civil or commercial dispute, whether contractual or non-contractual and within the jurisdiction of a court unless the authority of arbitral tribunals is explicitly or implicitly eliminated. However, some types of cases are exclusively restrained by the Legislature for public fora as a matter of public policy, while undeniable types of cases may be impliedly prohibited from the perspective of private fora. In case the issue is arbitrable, the court in which a case is pending will deny referring the parties to arbitration under section 8 of the Act⁵⁹, even if the parties have at one time settled to arbitration as the medium for dispute resolution. It is important to note that disputes relating to criminal offenses, matrimonial disputes such as divorce and responsibility of the child, guardianship of the child, bankruptcy and closing of businesses, evidential matters, and eviction or matters related to possession administered by unique provisions where the tenant appreciates statutory safeguarding against eviction and only a few courts are vested with the authorization to grant eviction or decide disputes are non-arbitrable.

The cases mentioned above pertain to actions in rem. A right in rem is a right that can be utilized against the entire world, as opposed to a right in personam, which is a right that is only safeguarding against specific individuals. Actions that are in personam are conclusive of the interests and rights of the parties that are involved like the case, while actions of rem ascertaining the title to the property and rights of the parties involved, that are not only among themselves but also anyone who will claim an interest in that property at any given time.

⁵⁸ *Booz Allen and Hamilton, Inc. v SBI Home Finance Ltd* (2011) 5 SCC 532

⁵⁹ Arbitration and Conciliation Act 1996, s 8

Before the Maharashtra Real Estate Regulatory Authority, Mumbai, in the case of *Mr. Ganesh Lonkar v D.S. Kulkarni Developers Ltd.*⁶⁰

The Arbitration and Conciliation Act, 1996,⁶¹ and the Real Estate (Regulation and Development) Act, 2016⁶² are two important laws enacted by the Indian Parliament. While enacting the Real Estate (Regulation and Development) Act, 2016, the Parliament made it clear that its provisions will have a dominant effect over any other law for the time being in force. This means that despite the subsistence of an arbitration agreement between parties, the Maharashtra Real Estate Regulatory Authority (MahaRERA) will have the authorization to adjudicate disputes related to the subject of the agreement. This legal position has been arrived at after considering the provisions of Section 89 of The Real Estate (Regulation and Development) Act, 2016, and Section 8 of the Arbitration and Conciliation Act, 1996.⁶³

Before the Maharashtra Real Estate Regulatory Authority, Mumbai virtual hearing was held through video conference as per MahaRERA

*Ayyaz Khan and Saba Khan v Era Realtors Pvt Ltd and Ors.*⁶⁴ The Parties are obligated to obey the terms of the Agreement for Sale dated 20.11.2014. it is imperative to note that the parties are precluded from seeking recourse to the Real Estate (Regulation and Development) Act, 2016 (RERA)⁶⁵ for any disputed issue for which the available recourse was stipulated in the original agreement.

The Arbitration and Conciliation Act, of 1996⁶⁶ and the RERA Act⁶⁷ are two distinct legal provisions serving different purposes. The former tackles both domestic and international arbitration, implementation of foreign arbitral awards, conciliation, and related matters. The latter, on the other hand, is engrossed in synchronizing and assisting the real estate sector. It aims to ensure openness and efficiency in real estate transactions, safeguarding consumer

⁶⁰ *Ganesh Lonkar v D.S. Kulkarni Developers Ltd* (2017) MANU/HC/34/2017

⁶¹ Arbitration and Conciliation Act 1996

⁶² The Real Estate (Regulation and Development) Act 2016

⁶³ Arbitration and Conciliation Act 1996, s 8

⁶⁴ *Ayyaz Khan and Saba Khan v Era Realtors Pvt. Ltd. and Ors.* (2022) 3 AD 567

⁶⁵ The Real Estate (Regulation and Development) Act 2016

⁶⁶ Arbitration and Conciliation Act 1996

⁶⁷ The Real Estate (Regulation and Development) Act 2016

interests, providing an expeditious dispute resolution mechanism, establishing an Appellate Tribunal for appeals related to decisions of the Real Estate Regulatory Authority and the adjudicating officer of Patna High Court, and other related matters.

*M/S Bihar Home Developers v Shri Narendra Prasad Gupta*⁶⁸, the Court, in this case, held that Section 88 of the Arbitration and Conciliation Act⁶⁹ makes it a point that its statutes are meant to work in conjunction with the provisions of any other law. The only exception to this principle is outlined in section 89⁷⁰, which stipulates that the Arbitration and Conciliation Act, of 1996⁷¹ will take precedence over any other law that is consistent with it. Upon a thorough review of both statutes, it is apparent that the Arbitration and Conciliation Act,1996⁷² does not conflict with the provisions of the RERA Act⁷³, particularly as respondent no.1 is contesting its applicability based on a jurisdictional issue.

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Section 88 of the RERA Act⁷⁴ establishes that the Act is supplementary to and not in conflict with any other law currently in effect.

The same legal principle that was discussed above was reinforced by the Hon'ble Apex Court in the case of *National Seeds Corporation v M. Madhusudhan Reddy & Anr. (2012)*⁷⁵. The Court examined the provisions of Section 8 of the Arbitration and Conciliation Act⁷⁶ and the Consumer Protection Act, 1986⁷⁷. It determined that since the remedy is available under the Consumer Protection Act, 1986⁷⁸ which was supplementary to and not in exclusion of any other law

⁶⁸ *Bihar Home Developers and Builders v Narendra Prasad Gupta* (2021) AIRONLINE 2021 PAT 677

⁶⁹ Arbitration and Conciliation Act,1996, s 88

⁷⁰ Arbitration and Conciliation Act 1996, s 89

⁷¹ Arbitration and Conciliation Act 1996

⁷² *Ibid*

⁷³ The Real Estate (Regulation and Development) Act 2016

⁷⁴ Real Estate (Regulation and Development) Act 2016, s 88

⁷⁵ *National Seeds Corporation v M. Madhusudhan Reddy & Anr.* (2012) 2 SCC 506

⁷⁶ Arbitration and Conciliation Act 1996, s 8

⁷⁷ Consumer Protection Act 1986

⁷⁸ *Ibid*

currently in effect, a complaint filed in the Consumer Forum would be justifiable even if an arbitration clause was present in the agreement to resolve the dispute through an arbitrator. The Supreme Court has made an authoritative pronouncement regarding the jurisdiction of the RERA Act⁷⁹ in disputes between real estate promoters and allottees.

The above pronouncement was dwelled by a three-member bench of the *National Consumer Disputes Redressal Commission in DLF Ltd. v Mridul Estate Pvt. Ltd.*⁸⁰,

The same situation was repeated in the case of the National Consumer Disputes Redressal Commission in *Sunil Kumar Sengar & Anr. V M/s Unitech Ltd.*⁸¹ 2014 on June 8, 2015.

Furthermore, Section 89 of the Act⁸² states that the RERA Act⁸³ has a pre-eminent effect till the time it is in power over any other law that is prevalent in subjects related to conflicts between real estate promoters and allottees. Based on the aforementioned case law and legal maxims, it can be deduced that in the present dispute, the RERA Act⁸⁴ will apply as compared to the Arbitration and Conciliation (Amendment) Act, 2015⁸⁵. This means that the administration has proper authorization and the complaint is maintainable, whereas the Arbitration and Conciliation Act, 1996⁸⁶ does not apply to the existing case.

*M/s Imperia Structures Ltd v Anil Patni & Another (Civil Appeal No. 3581-3590 of 2020)*⁸⁷, the Apex Court mentioned that the statutes of the Real Estate (Regulation and Development) Act 2016 (RERA)⁸⁸ do not prevent consumers from lodging a complaint under the Consumer Protection Act 1986 (CP Act)⁸⁹. In other words, the redressal mechanism provided by RERA does not act as a hindrance in seeking remedies under the Consumer Protection Act 1986 Act⁹⁰.

⁷⁹ The Real Estate (Regulation and Development) Act 2016

⁸⁰ *DLF Limited and Ors. v Mridul Estate (Pvt.) Ltd. and Ors.* (2013) 2 CPR 756 (NC)

⁸¹ *Sunil Kumar Sengar & Anr. v M/s Unitech Ltd.* (2014) SCC OnLine NCDRC 14

⁸² The Real Estate (Regulation and Development) Act 2016, s 89

⁸³ The Real Estate (Regulation and Development) Act 2016

⁸⁴ *Ibid*

⁸⁵ Arbitration & Conciliation (Amendment) Act 2015

⁸⁶ Arbitration and Conciliation Act 1996

⁸⁷ *M/s. Imperia Structures Ltd. v Anil Patni and Anr* AIR 2020 SC 822

⁸⁸ The Real Estate (Regulation and Development) Act 2016

⁸⁹ Consumer Protection Act 1986

⁹⁰ *Ibid*

Combination of IBC and RERA- *Pioneer Urban Land v Union of India*⁹¹

It is supreme to apprehend that the RERA is to be looked through in consonance with the Insolvency and Bankruptcy Code, of 2016⁹² (Code), as amended by the Insolvency and Bankruptcy Code (Amendment) Act, 2019⁹³. In case of any disagreement between the RERA and the Insolvency and Bankruptcy Code (Amendment) Act, 2019 (Code)⁹⁴, the Code will carry all before one over the RERA. However, remedies that are given to allottees of flats/apartments are coinciding, which means that such receivers are authorized to avail of remedies under the Consumer Protection Act, 1986⁹⁵, RERA, as well as the cause of the Code. This ensures that homebuyers have multiple options to seek redressal in case of a dispute or grievance related to their property. They can approach the consumer forum, or the RERA authority, or initiate insolvency proceedings under the Code, counting on the persona and graveness of the issue. This provides a strong and comprehensive legal framework to safeguard the rights of homebuyers and endorses translucency and responsibility in the real estate sector.

CONCLUSION

Arbitration is one of the more readily available recourse for recurrent use of maximizing the use of alternative dispute resolution methods in real estate law. This is provided that parties have a practical, profitable, and meticulous approach to resolving disputes. Although Arbitration awards are commonly considered concluding and unalterable, there are still always restricted factors for stimulating or annulling an award. The choice to plead an arbitration award is more often restricted to only the cases that involve significant, procedural, non-uniformity, favoritism or fraudulence, lack of authority, or an infringement of public policy. Given their often intricate legal and factual complexities, real estate disputes lend themselves well to arbitration. It is imperative for the creators of real estate documents to meticulously incorporate arbitration provisions. Consulting an experienced real estate attorney can offer valuable insights into the

⁹¹ *Pioneer Urban Land and Infrastructure Limited and Ors. v Union of India and Ors* (2019) 8 SCC 416

⁹² Insolvency and Bankruptcy Code 2016

⁹³ Insolvency and Bankruptcy Code (Amendment) Act 2019

⁹⁴ *Ibid*

⁹⁵ Consumer Protection Act 1986

potential impact of including an arbitration clause in contracts and proficiently overseeing the arbitration process.

This approach serves to expedite the adjudicative process, provide specialized domain knowledge, and guarantee the equitable and just resolution of real estate disputes. As the Indian real estate and construction industry continues to expand, the accompanying surge in challenges and disputes necessitates effective dispute resolution mechanisms. While the courts have historically been the primary avenue for dispute resolution in India, there is a gradual shift occurring. Arbitration is gaining traction due to its expediency, cost-effectiveness, and confidentiality, supported by the country's initiatives to train and equip technically proficient arbitrators. This, in conjunction with the evolution of dispute resolution services for industry and infrastructure sectors, augurs well for their prospective growth and development. When considering the use of arbitration to unravel real estate disputes, parties must analyze the strong point of effectiveness and finality, while being aware of the limited grounds for appeal.