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The Reality behind the Arbitration Process in India

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The dispute resolution system in India is widely recognized as a well-developed mechanism, particularly in the context of arbitration. This system has been promoted as a means to alleviate the heavy burden on the judiciary, and to provide an alternative pathway for resolving disputes outside the traditional court system. The concept has gained significant popularity and support, even receiving recommendations from the judiciary itself as a viable solution to the challenges faced by the court system. However, it is crucial to critically examine this system's true effectiveness. Like any other system, arbitration in India is not without its flaws and inherent drawbacks, which raise important questions about its overall efficacy. This research paper takes a deep dive into the realities of the arbitration system in India, offering a candid assessment of whether it truly meets its intended objectives. The paper explores whether arbitration can genuinely provide resolutions without judicial intervention, as it claims, and whether the decisions made within this framework can stand independently without requiring judicial oversight. Furthermore, it investigates the effectiveness of the arbitration process over time, questioning whether it has lived up to its promises or has fallen short in delivering the justice and efficiency it was designed to achieve. By examining these issues, the paper aims to provide a comprehensive understanding of the arbitration system's role and effectiveness within India's broader dispute-resolution landscape.

Keywords: *arbitration, mediation, dispute, resolution.*

INTRODUCTION

ADR, or Alternative Dispute Resolution, encompasses various techniques for resolving disputes outside the complexities of the court system. It involves parties attempting to settle their issues privately with the help of an expert third party. The outcome is binding on the parties, similar to a court ruling. There are four main ADR processes: arbitration, mediation, negotiation, and conciliation. These methods serve as alternatives to litigation and can offer significant advantages to the disputing parties.[1]

Arbitration is a legal process that allows parties to settle disputes without going to court and using formal legal proceedings. The parties involved in the dispute agree to have a neutral third party, called an arbitrator, hear their case and make a binding decision. Arbitrators are often retired judges or attorneys empowered to consider evidence, rule on the dispute, and award damages. The arbitrator's decision is final and binding, with limited court review. The language used in such proceedings is usually not the typical legal language but simple daily language so that the parties can understand the court's sayings. Most arbitration arises from a pre-dispute agreement between the parties, in which they consent to resolving future conflicts outside the court system. By opting for arbitration, the parties are effectively waiving their constitutional right to a jury trial. Once arbitration is completed, they typically cannot seek a new trial. Unless stated otherwise, the arbitration decision is legally binding and non-appealable, except in rare cases such as fraud or collusion by the arbitrator.[2]

Arbitration has been an increasingly popular method for resolving international commercial disputes, with growing support from courts in various states. This method has been favoured since ancient times for both state-to-state and commercial disputes, due to its enduring appeal. Currently, over 135 states are parties to the New York Convention, which, despite being almost 50 years old, remains a cornerstone of international arbitration. Following the New York Convention, the Model Law is another crucial instrument in shaping the supportive legal framework for international commercial arbitration today.

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[1] Avtar Singh, *Law of Arbitration and Conciliation with Alternative Dispute Resolution Systems* (11th edn, Eastern Book Company 2015)
[2] *Ibid*

ARBITRATION IN INDIA

Arbitration has become the standard approach for resolving commercial disputes in India. While it first gained popularity with foreign parties who were hesitant to rely on the Indian courts due to systemic delays and perceived interference, Indian parties soon recognized the advantages of this faster and simpler dispute resolution method. The Indian government also acknowledged the need to enhance the efficiency of arbitration and the enforcement process.

The new amended Act, The Arbitration and Conciliation Act 1961[3], amended in 2019, is heavily based on the 1985 UNCITRAL Model Law[4] and reinforces India's pro-arbitration stance. The UNCITRAL Model Law allowed participating countries to incorporate its principles into their domestic arbitration legislation, promoting global uniformity in arbitration laws. Nearly two decades later, criticism peaked, and India's reputation hit an all-time low. Indian courts became notorious for excessive intervention, even asserting jurisdiction over arbitration proceedings based outside of India.[5] Severe delays in the judicial system led to India, despite its ambitions to become a global leader, being avoided as a preferred seat of arbitration at all costs. It became clear to observers that the Act needed further amendments, clarification, and reform. The landmark Supreme Court ruling in 'BALCO,'[6] along with two amendment proposals of the Act[7], eventually led to the 20th Law Commission's Report No. 246.[8] The Report re-examined the Act's various shortcomings, along with court rulings over the years, and proposed crucial and long-overdue amendments.

The proposed 2019 amendments introduced the idea of establishing a new independent statutory body, the Arbitration Council of India (ACI). This body would be responsible for grading and accrediting arbitral institutions and arbitrators, as well as developing policies for such grading and accreditation, along with ensuring uniform professional standards.

[3] The Arbitration and Conciliation Act 1961
[4] UNCITRAL Model Law on International Commercial Arbitration (1985)
[5] *Bhatia International v Bulk Trading S.A & Anr* (2002) 4 SCC 105
[6] *Bharat Aluminum & Company & Ors v Kaiser Aluminum Technical Service Inc. & Ors* (2012) 9 SCC 552
[7] The Arbitration & Conciliation (Amendment) Bill 2003
[8] Law Commission, *Arbitration* (Law Com No 246, 2014)

The gap between ad hoc domestic arbitration and international arbitration practices in India has grown, despite the 1996 Act and the 2015 Amendments aiming to align with international standards for a fair and efficient process. The 24th Law Commission Report, which preceded the 2015 Amendments, highlighted that "*The Act has now been in force for almost two decades, and in this period, although arbitration has fast emerged as a frequently chosen alternative to litigation, it has come to be afflicted with various problems including those of high costs and delays, making it no better than either the earlier regime which it was intended to replace; or to litigation, to which it intends to provide an alternative. Delays are inherent in the arbitration process, and the costs of arbitration can be tremendous. Even though courts play a pivotal role in giving finality to certain issues that arise before, after, and even during an arbitration, there exists a serious threat of arbitration-related litigation getting caught up in the huge list of pending cases before the courts. After the award, a challenge under section 34 makes the award inexecutable and such petitions remain pending for several years. The object of quick alternative dispute resolution frequently stands frustrated.*" According to a NITI Aayog study, resolving challenges to an award takes an average of 2,508 days, with 24 months in lower courts, 12 months in High Courts, and 48 months in the Supreme Court.[9]

VIEW OF ARBITRATION IN INDIA AS A DISPUTE SETTLEMENT ALTERNATIVE (ARBITRATION V JUDICIARY)

Recently, the Supreme Court overturned the arbitral award in the case of DMRC Ltd. v Delhi Airport Metro Express (P) Ltd. The arbitral award is the arbitrator's final decision which holds equal value to a final judgment given by the judge. Overturning such shows the influence of the judiciary in arbitration undermining the effectiveness of arbitration as a process. The Supreme Court proceeded to annul the award on the ground of a 'grave miscarriage of justice', overlooking its guardrails formulated in Rupa Ashok Hurra v Ashok Hurra and Anr,[10] to exercise this exceptional power.

In May 2024, the government celebrated the launch of the Arbitration Bar of India (ABI), signalling its commitment to improving the country's arbitration framework. Following this, the

[9] *Ibid*
[10] *Rupa Ashok Hurra v Ashok Hurra* (2002) 4 SCC 388

government issued a notification to create High-Level Committees (HLCs) for dispute resolution, composed of retired judges and senior officers or experts. While well-intentioned, these committees are not a substitute for arbitration. The effectiveness of these initiatives will depend on the willingness of all parties, especially government entities, to engage in good faith and honour the outcomes. However, the notification reflects a fundamental lack of confidence in the very arbitration system the government has nurtured over the years. The decision to limit arbitration to disputes involving less than Rs. 10 crores seems arbitrary and shortsighted. If the government has concerns with arbitration, it should halt its use for all disputes, regardless of the number of parties involved. Instead, the government appears to be leaning towards litigation or mediation, which is likely to add to the already overburdened court system and contradict the original goal of promoting arbitration. This shift runs counter to global trends and reinforces the perception that India is not arbitration-friendly. Such an approach risks damaging the credibility of India's arbitration system and could deter both domestic and international parties from opting for arbitration, undermining India's ambition to become a global hub for commercial dispute resolution.[11]

Courts in India interfere in the arbitration process primarily to uphold fairness, legality, and adherence to procedural standards. Despite arbitration being designed to minimize judicial involvement, courts intervene when issues such as arbitrator bias, procedural irregularities, or violations of public policy arise. This often happens when arbitral proceedings suffer from procedural lapses, bias, or awards that violate public policy. For instance, in Oil & Natural Gas Corporation Ltd. v Saw Pipes Ltd. (2003)[12], the Supreme Court set aside an arbitral award which was directing ONGC to refund $3,04,970.20 and Rs 15.76 Lakhs towards liquidated damages, because it conflicted with the public policy of India. The Court held that if an award was patently illegal, courts could intervene, which widened the scope of judicial scrutiny. Another notable case is Hindustan Zinc Ltd. v Friends Coal Carbonisation (2006)[13], where the award was

[11] Dinesh Pardasani et. al., 'Bibin Kurian, Raghav Mudgal, One Step Back, Then Three Steps Back: The Unfavourable Pitch of Indian Arbitration' (*SCC Online*, 02 July 2024) <https://www.scconline.com/blog/post/2024/07/02/one-step-back-then-three-steps-back-the-unfavourable-pitch-of-indian-arbitration/> accessed 20 November 2024

[12] *Oil & Natural Gas Corporation Ltd v Saw Pipes Ltd* (2003) 5 SCC 705

[13] *Hindustan Zinc Ltd v Friends Coal Carbonisation* (2006) 4 SCC 445

challenged due to an arbitrator's failure to disclose personal relationships with one of the parties, leading to concerns over impartiality. These cases illustrate that arbitration failures, particularly around bias, legality, and procedural irregularities, often compel courts to step in to ensure justice and maintain the integrity of the arbitration process. This judicial oversight, though necessary to maintain justice, often reflects shortcomings within the arbitration system, such as inefficiency or a lack of professionalism, prompting courts to ensure the process remains fair and legally sound.

THE SETBACKS OF THE INDIAN ARBITRATION SYSTEM

The government's and judiciary's efforts to position India as a leading hub for arbitration are commendable, yet there appears to have been a loss of direction. In India, most arbitrations remain ad hoc, though there is a gradual shift towards institutional arbitration. The government has introduced measures to support this transition, including the Arbitration and Conciliation (Amendment) Act, 2019, which was inspired by the B.N. Srikrishna Committee Report and aimed at institutionalizing arbitration in the country. This legislation also provides for the creation of the Arbitration Council of India under Sections 43-A to 43-M. However, these initiatives alone are insufficient, and greater attention must be given to addressing the challenges and shortcomings that persist within the arbitration system.[14]

Lack of Proper Law: The inadequate drafting of the 1996 Act was often cited as a key factor in its shortcomings. One notable criticism was that the Act failed to provide remedies for parties involved in foreign-seated arbitrations who sought interim relief in India. However, this criticism appears misguided, as the statute did not authorize Indian courts to grant interim measures in foreign-seated arbitration proceedings.

The Arbitration and Conciliation (Amendment) Bill of 2021 aims to modify Section 36 of the 1996 Act[15], raising concerns as it introduces an unconditional stay on arbitral awards if fraud or corruption is involved. This could revert the system to the days of automatic stays, making it

[14] Tariq Khan, 'Making India a Hub of Arbitration: Bridging the Gap Between Myth and Reality' (*SCC Online*, 17 February 2021) <https://www.scconline.com/blog/post/2021/02/17/making-india-a-hub-of-arbitration-bridging-the-gap-between-myth-and-reality/> accessed 20 November 2024

[15] Arbitration and Conciliation Act 1996, s 36

easier for judgment debtors to evade their obligations under the award. The lack of a clear definition of fraud or corruption in the 1996 Act adds to the ambiguity, allowing judgment debtors to claim fraud or corruption in nearly every case to secure an unconditional stay. Consequently, enforcing arbitral awards could become more challenging, negatively impacting the ease of doing business in India.

The government has introduced multiple amendments, reflecting that key issues were not adequately addressed, and the drafting of these amendments was flawed. Despite numerous revisions, the persistent seat versus venue dilemma remains unresolved in any of the Amendment Acts. Additionally, Section 29-A contradicts the principle of minimal judicial interference outlined in Section 5 of the Act. An application under Section 29-A could take over a year to determine whether a six-month extension should be granted, further complicating the arbitration process.[16]

Incompetent Arbitration Lawyers: The issue of incompetent arbitration lawyers in India presents a significant challenge to the effectiveness of the arbitration process. Many arbitration practitioners lack the specialized skills, knowledge, and experience necessary to handle complex arbitration matters, which often leads to delays, procedural missteps, and unsatisfactory outcomes. This lack of expertise undermines the credibility of arbitration as a viable alternative to litigation, causing parties to lose faith in the process and, in some cases, resort to the courts for relief. The lack of training and awareness among arbitration lawyers also hinders the growth of institutional arbitration in India, perpetuating the reliance on ad hoc arbitration, which is prone to inefficiencies and inconsistencies. There is a pressing need for better training, certification, and professional development for lawyers in the field to elevate the standards of arbitration.

In the case of ONGC v Western Geco International Ltd. 2014[17], the Supreme Court of India set aside an arbitral award due to a fundamental flaw in the arbitral process, partly attributed to the inefficiency and lack of diligence of the legal representatives involved. The arbitral tribunal

[16] Khan (n 14)
[17] *ONGC Ltd. v Western Geco International Ltd.* (2014) 9 SCC 263

failed to properly apply legal principles, and the lawyers did not ensure the process adhered to basic judicial standards. This resulted in significant delays and a prolonged legal battle, highlighting the critical role of competent arbitration lawyers in ensuring that arbitration remains an effective and fair method of dispute resolution. Such instances underscore the need for improved training and professionalism among arbitration practitioners in India.

Lack of Institutional Arbitration: Despite having some reputable centres such as the Delhi International Arbitration Centre (DIAC), Nani Palkhivala Arbitration Centre (NPAC), and Mumbai Centre for International Arbitration (MCIA), India still lacks an institution that can match the stature of international counterparts like the Singapore International Arbitration Centre (SIAC), International Chamber of Commerce (ICC), or London Court of International Arbitration (LCIA). The predominance of ad hoc arbitrations in India is a key factor hindering the development of a robust and effective arbitration framework in the country.

Many arbitration users in India fail to fully recognize the benefits of institutional arbitration compared to ad-hoc arbitration. Additionally, the administrative fees charged by arbitral institutions often create the perception that institutional arbitration is costly, which discourages users from choosing this option. However, in reality, these administration fees are relatively affordable.[18]

The primary reason for the low adoption of institutional arbitration in India is the failure of domestic arbitral institutions to consistently deliver a satisfactory level of service to users. Anecdotal evidence suggests that those who choose institutional arbitration through domestic institutions often see no clear benefit over ad-hoc arbitration. Common criticisms include the lack of expertise among case managers, insufficient administrative support, inadequate physical infrastructure, weak oversight of the arbitration process, poor quality arbitrator appointments, and a generally lax approach to serving the needs of arbitration users.[19]

[18] Ashutosh Kumar and Abhinav Hansaraman, 'Institutional arbitration: The right choice for arbitration users in India' (*Bar and Bench*, 29 September 2022) <https://www.barandbench.com/columns/institutional-arbitration-the-right-choice-for-arbitration-users-in-india> accessed 20 November 2024

[19] Khan (n 14)

LACK OF IMPORTANCE TO ARBITRATION

Although India is progressing towards modernization, it remains a developing country. As a result, many people are still unaware of arbitration and tend to place greater trust in the courts over alternative dispute resolution methods. While having confidence in the judicial system is not inherently negative, when citizens are resistant to change and remain unaware of arbitration's potential benefits, this traditional mindset can be more harmful than helpful in the long run.

Arbitration in India is usually used as a settlement mechanism for conflicts arising between industries and the corporate world, making this known to a fairly minor section of society. It is only businessmen, advocates, and legal advisors are generally familiar with arbitration proceedings. There is a lack of awareness in the general public about choosing arbitration over litigation. The reason is that institutions in India do not proactively hold conferences like SIAC and ICC and this leaves many small-scale entrepreneurs and newcomers uninformed about such remedies, preventing them from benefiting from arbitration.[20]

Policy Issues: To ensure timely resolution of proceedings and prevent project delays due to disputes, especially in government infrastructure projects, it is crucial to address the common issue of stalled work. This often happens because officials lack decision-making authority in arbitration proceedings and fear facing vigilance actions. Therefore, disputes should be swiftly addressed to account for the time value of money, and proceedings must not be allowed to drag on. One proposed solution for expediting disputes in government contracts is the establishment of an independent settlement committee. This committee, comprising a retired High Court Judge, the Secretary of the relevant ministry, and an additional member, could be approached by stakeholders at any stage of the proceedings to help resolve disputes quickly.[21]

Under Section 34 of the Indian Arbitration and Conciliation Act, 1996[22], an arbitral award can only be considered in conflict with India's public policy if: (i) the award was influenced by fraud,

[20] Aryan Chaudhary, 'Challenges for Arbitration in India' (*iPleaders,* 15 May 2020) <https://blog.ipleaders.in/challenges-arbitration-india/> accessed 20 November 2024
[21] *Ibid*
[22] Indian Arbitration and Conciliation Act 1996, s 34

corruption, or violated sections 75 or 81; (ii) it contravenes the fundamental policy of Indian law; or (iii) it conflicts with the most basic principles of morality or justice. However, determining whether the award violates the fundamental policy of Indian law should not involve a review of the merits of the dispute. In India, challenging arbitral awards on the grounds of 'public policy' has become a significant hurdle, allowing losing parties to contest awards on broader grounds than those permitted in other countries. The Law Commission and the Supreme Court have disagreed on the interpretation of 'public policy' in arbitration. While courts have taken a narrower view when enforcing foreign awards, they have applied a broader interpretation for domestic awards. In 2003, the Supreme Court in ONGC v Saw Pipes[23] allowed reviewing arbitral awards for errors in applying Indian law. This was reaffirmed in ONGC v Western Geco, 2014[24], where the Court ruled that tribunals must follow a 'judicial approach,' act according to natural justice, and avoid irrational decisions. However, in Associate Builders v DDA[25], the Court restored an arbitral award, stating section 34 generally doesn't allow a review of arbitrators' factual findings. The Court clarified that awards can be set aside if they violate fundamental policies of Indian law, justice, or morality.

RESTRUCTURING INDIAN ARBITRATION

Institutional Setup and Infrastructure: One of the major challenges in expanding India's jurisdiction is establishing arbitration institutions that meet international standards, along with hearing centres. It has been widely suggested that India requires a central arbitration institution with regional branches in key commercial cities such as Mumbai, Delhi, Bangalore, and Hyderabad. This institution should be a for-profit entity independent of any government. Currently, several arbitration institutions are operating in India.

Among the key institutions in India for alternative dispute resolution is the International Centre for Alternative Dispute Resolution (ICADR), established as a society in 1995. It operates autonomously under the Ministry of Law & Justice, Government of India, with its main office in Delhi and regional offices in Hyderabad and Bangalore. In Southern India, the Nani

[23] *Oil & Natural Gas Corporation Ltd v Saw Pipes Ltd* (2003) 5 SCC 705
[24] *ONGC Ltd. v Western Geco International Ltd* (2014) 9 SCC 263
[25] *Associate Builders v Delhi Development Authority* (2015) 3 SCC 49

Palkhivala Arbitration Centre, a private entity registered as a company, is based in Chennai. Additionally, the Indian Council for Arbitration (ICA) was founded in 1965 at the national level through the efforts of the Indian government and major business organizations such as FICCI.

The Government of Maharashtra, along with the domestic and international business and legal communities, has established a non-profit organization known as the Mumbai Centre for International Arbitration (MCIA). International Institutions, SIAC, LCIA, ICC, and KLRCA also have set-ups in India. However, there is no single arbitral seat or institution in the country that is a centre with global repute.

The institutions themselves must be credible, independent, efficient, and transparent, a challenge given India's diversity. Additionally, the leadership must be dynamic, supported by well-trained staff, and equipped with high-quality arbitration resources and infrastructure. Effective use of technology, such as e-filing, case databases, big data analytics, Online Dispute Resolution, and video conferencing, needs to be significantly expanded and integrated into the arbitration process.[26]

Institutionalizing Arbitration: In its 246th Report, the Law Commission of India[27] observed that ad hoc arbitrations often resemble court hearings, leading to frequent adjournments as lawyers prioritize court appearances over completing arbitration. To address this, the Commission recommends that India should focus on promoting institutional arbitration, where a dedicated institution with a permanent structure supports and manages the arbitration process. These institutions could also offer qualified arbitrators from their panels, establish fee structures, and define the process for document submission. A key consideration in institutionalizing arbitration is whether to create a single institution or multiple ones, and with what focus, whether domestic arbitration, international arbitration, or both.[28] Given India's size, domestic arbitration alone would be substantial. Additionally, efforts should be made to attract international arbitration currently taking place outside India to be conducted within the country.

[26] Chaudhary (n 20)
[27] Law Commission (n 8)
[28] Kumar (n 18)

With the growing popularity of institutional arbitration in India, several domestic arbitral institutions have emerged. For instance, the Mumbai Centre for International Arbitration (MCIA), established in 2016, experienced a notable 20% increase in caseload in 2022 compared to the previous year. The total value of disputes overseen by the MCIA has surpassed a billion USD, marking a significant achievement for a domestic arbitration institution. Similarly, the Delhi International Arbitration Centre (DIAC), set up in 2009 and affiliated with the Delhi High Court, serves as an Institutional Arbitration Centre. The rising success of these institutions reflects India's gradual embrace of arbitrations being administered by dedicated arbitral bodies.[29]

For arbitration to be effectively institutionalized, it must be supported by a dedicated bar of professionals skilled in conducting arbitration according to institutional rules while offering competent and reliable services. Establishing rules for this specialized arbitration bar would ensure adherence to timelines and prevent arbitration from resembling court proceedings. A pool of qualified arbitrators would further reinforce arbitral institutions and contribute to the broader effort of institutionalizing arbitration.

Spreading Awareness: Strengthening arbitration in the country must be paired with efforts to promote it as a primary method for dispute resolution. This includes discouraging private parties from bypassing arbitration provisions in contracts and rushing to courts, which often leads to delays in work. Raising awareness, fostering a deeper understanding of commercial matters, and developing a system where impartial arbitrators deliver awards can help ensure all stakeholders benefit. This would also minimize the chances of awards being challenged under Section 34 of the Arbitration Act, 1996.

CONCLUSION

The core purpose of arbitration is to alleviate the burden on courts by resolving disputes without judicial intervention. However, due to shortcomings such as a lack of professionalism from

[29] Priyanka Desai, 'Strengthening Institutional Arbitration for Domestic and International Commercial Disputes in India' (*Indian Review of Corporate and Commercial Laws*, 01 February 2024) <https://www.irccl.in/post/strengthening-institutional-arbitration-for-domestic-and-international-commercial-disputes-in-india> accessed 20 November 2024

arbitrators or systemic loopholes, courts are often compelled to intervene to ensure fairness, legality, and proper adherence to the arbitration process. Although judicial involvement may be necessary to safeguard justice, it ultimately consumes significant time and resources, which contradicts the very purpose of arbitration.

For arbitration to truly be effective, it must operate efficiently and independently, minimizing the need for judicial oversight. This requires skilled arbitrators, streamlined procedures, and public trust in the arbitration process. When parties lack confidence in arbitrators and frequently turn to the courts for recourse, the essence of arbitration as a swift and alternative dispute resolution method is undermined. Therefore, arbitration must foster both professionalism and trust to prevent the need for judicial intervention and to fulfil its role as a genuine alternative to litigation.