Evolution of Arbitration Law in India

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ABSTRACT

The construction industry is considered to be one of the most dispute-prone industries in the world. Disputes of any kind need to be solved through alternate dispute resolution methods to avoid delay in the completion of the projects and thereby reduce financial losses. Arbitration is an alternative dispute resolution mechanism that has been in use since ancient times worldwide. In India, various laws related to arbitration were formulated prior to British rule and also post-independence. In this paper, an attempt has been made to compare the different Arbitration Acts existing in India to study their effectiveness in dispute resolution.

Keywords: Alternative Dispute Resolution (ADR), Arbitration, Arbitration Acts

1 Introduction

Chances of misinterpretation and conflicts are quite common, whenever two people get into the purpose of business transaction. Conflicts, if not solved, lead to claims and disputes. The construction industry is in fact the second largest employer, next to agriculture, in India. It is considered one of the most conflict and dispute-ridden industries, and hence is one of the most claim-oriented sectors. This may be due to the differences in perceptions existing among the various project participants. Therefore, conflicts are inevitable in the construction industry, which can quickly materialize into disputes. If the disputes are not attended to on time, it leads to the escalation of time and financial loss which ultimately inhibits the successful accomplishment of the projects. Therefore, there should be a quick and effective method to resolve construction disputes. Considering the time delay associated with the litigation process, it is necessary to look towards alternate mechanisms for effective dispute resolution.

2 Alternate Dispute Resolution Mechanism - Arbitration

Arbitration is a type of alternate dispute resolution mechanism, in which the disputes between the parties are resolved through a third person called the arbitrator. The decision taken by the arbitrator is considered final and the parties are bound to follow the same. This method is less expensive and there is no waste of time since the settlement is done outside the courts. Hence, in modern era this method is being recognized as the main tool for the settlement of disputes.

Need For Arbitration

An alternative dispute resolution method like arbitration is very essential in modern society as the litigation process is very complicated and time-consuming. It is needed for the minimization of court intervention. The following are the advantages of arbitration:

- **Harmonious settlement of disputes–**This method provides amicable settlement of disputes without keeping an element of rivalry between the parties in the future also.
- **Expeditious and time-saving** –It is a very efficient & quicker process, as there is no scope of adjournment as in the case of litigation.

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- **Inexpensive settlement of disputes**–This delivers a cheap or inexpensive solution for the settlement of the matter compared to litigation.
- **Reduce the burden of the courts of law**- In our country, there are crores of cases pending in many subordinate courts, High Courts and in the Supreme Court. So, alternative dispute resolution methods are necessary to reduce the workload of the regular Courts of law.

3 Historical Evolution of Arbitration Law in India

Arbitration was in practice during ancient times in Greek and Roman city states, for resolving disputes on ownership of properties, assessment of damages etc. Prior to the formulation of the code of law, the concept of arbitration was prevalent in Indian society also. The growth of arbitration regime in India can be broadly classified under 3 periods based on formulation of the Arbitration Act, which are as follows:
(i). The Pre-1940 Period; (ii). The 1940-1996 Period; and (iii). The Post-1996 Period.

(i). The Pre-1940 Period

This phase can be subdivided into two:

(a). Ancient India

Arbitration has a long history, and it has been popular in India since the Vedic era. In the Brihadranayaka Upanishad, there were references to some arbitral bodies like Puga, Sreni and Kula which were known as 'Panchayat'. To settle disputes on mundane matters, parties to the disputes approached the Panchayat. Parties should agree to the final decision taken by the arbitral bodies and thus the disputes were solved through the "Panchayati Raj system" [1].

(b). During British Rule

Bengal regulation of 1772 was considered as the precursor of the modern law of Arbitration in India. Since then, Arbitration has been recognized as a dispute resolution mechanism in India. As per Bengal regulation 1781, a judge could recommend to the parties (without compulsion) to submit to arbitration of one person by the mutual agreement between the parties. The Bengal Regulation of 1787, 1793 and 1795, introduced provisions allowing the court to refer the suit to arbitration with the mutual consent of the parties. Similar procedural changes were also in the Bengal Regulations of 1802, 1814 and 1833 [1].
The Legislative Council of India was established in 1834. For systemizing the procedures in civil courts, the council formulated Code of Civil Procedure Act 1859. This was later replaced by passing the Civil Procedural Code 1877, 1879 and the third civil procedure code were enacted in 1882, which replaced the previous code.

Indian Arbitration Act 1899

The Legislative Council enacted the Indian Arbitration Act in the year 1899. This act was based on the British Arbitration Act of 1899 and was considered as the first major law of arbitration in India. The application of this act was limited to the Presidency towns viz, Calcutta, Bombay and Madras. New code of Civil Procedure 1908 was enacted after repealing the Code of Civil Procedure 1882. First schedule of this code consists of provisions relating to the law of arbitration which extended to the other parts of India. Arbitration outside the operation and scope of the 1899 Act was specified in second schedule. The enforcement of foreign awards was based on Arbitration (Protocol and Convention) Act 1937. Thus, the law related to arbitration was scattered in multiple acts and a consolidated law governing arbitration was lacking during this period. To address these concerns, several committees were constituted to revise the existing law and thus to formulate a new structured framework for arbitration [1].

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(ii). The 1940-1996 Period

In the year 1940, the then-existing laws related to arbitration were repealed and an act to consolidate and amend the law of arbitration was enacted, called the Arbitration Act 1940.

Arbitration Act 1940

The Arbitration Act 1940 came into force on 1st July 1940 [2]. This act, which was based on the English Arbitration Act 1934, was a complete framework for domestic arbitrations. But it did not contain any provisions related to the enforcement of foreign awards. Foreign awards were enforced in India through two separate legislations viz. (i) the Arbitration (Protocol and Convention) Act, 1937 (for Geneva Convention Awards) and (ii) the Foreign Awards (Recognition and Enforcement) Act, 1961 (for New York Convention Awards).

The scheme of the Arbitration Act 1940 is as follows:

- Arbitration without the intervention of a court (Chapter II)
- Arbitration with the intervention of a court where there is no suit pending (Chapter III)
- Arbitration in suits (Chapter IV)
- Provisions common to all three kinds of arbitration (Chapters V to VII)
- Schedules

(iii). The Post-1996 Period

The Arbitration Act 1940 failed to achieve its desired objectives and it attracted severe criticism since the entire arbitration process became litigation-oriented. The act allowed the courts to interfere at every stage of the arbitration proceeding, starting from the appointment of the arbitrator till the passing of the award. This intervention of courts questioned the status of arbitration as an alternative resolution mechanism. Enormous backlog of cases in the Indian court further increases the delay in the process. Due to these reasons, Indian law was never preferred by foreign parties. They obtained awards from foreign states and sought their enforcement in India. India recognized those awards based on the Arbitration (Protocol and Convention) Act, 1937 and the Foreign Awards (Recognition and Enforcement) Act. Enforcement of awards under these acts was not much time-consuming due to limited grounds of challenge. Though the 1940 Act was criticized severely, amendments to improve the effectiveness of the 1940 Act were not done. The report submitted by Law Commission in India on 9-11-1978, suggested extensive amendments to the Arbitration act of 1940 [1]. With the introduction of the economic liberalization policy in the year 1991, foreign investment started to pour into India. So, to attract the same, steps to create a comfortable business environment were the need of the hour. However, the shortcomings in the act lead to the legal barrier in resorting to foreign arbitrations. This resulted in the demand of foreign and Indian investor communities on the Indian Government to modernize the arbitration law in order to make it more expeditious, effective and thus simplifying the arbitrational proceedings.

Arbitration and Conciliation Act, 1996

Due to several limitations, Arbitration act of 1940 was repealed. The Arbitration and Conciliation Act, 1996 came into force on 25th January 1996 [3]. This Act was based on the UNCITRAL Model Law on International Commercial Arbitration, 1985 and the UNCITRAL Conciliation Rules, 1980. The Act was enacted with the following purposes:

- Creating a consolidated legal framework dealing with both domestic and international arbitrations and provisions for conciliation
- Minimizing judicial interference and supervision

The 1996 Act consists of four parts. Provisions for domestic and international commercial arbitration are dealt in part I. Part II provides provisions for enforcement of foreign awards, Conciliation has been dealt under Part III and Part IV provides the supplementary provisions [3].

Amendment in 2015

The 1996 Act was heavily criticized in India since it had several interpretive loopholes which allowed the court to interfere at various stages of arbitration proceedings, leaving the 'expeditious' mechanism of dispute resolution as time-consuming as litigation. Also, Part I of the Act did not clearly specify whether it is applicable for arbitrations seated outside India. For resolving all the issues, 246th Law Commission submitted a report with various recommendations to amend the 1996 Act, to reaffirm its objectives. Thus, by incorporating the recommendations, the **Arbitration and Conciliation (Amendment) Act 2015** came into force on 23rd October 2015 [4].

Amendment in 2019

The **Arbitration and Conciliation (Amendment) Act 2019** came into force on 9th August 2019 [5]. This amendment specially focused on promoting institutional arbitration in India, by giving power to arbitral institutions to appoint the arbitrators designated by the Supreme Court or the High Court.

Amendment in 2020

The **Arbitration and Conciliation (Amendment) ordinance 2020** came into force on 4th November 2020.

Amendment in 2021

The arbitration and Conciliation (amendment) Act 2021 was passed by the central government on 11th March 2021, to replace an Ordinance with same provisions promulgated on November 4, 2020. Hence, the Arbitration and Conciliation (Amendment) ordinance 2020 was repealed and Arbitration and Conciliation (Amendment) Act 2020 came into force on 4th November 2020 [6].

4 Comparison of the Acts

A brief comparison of the important sections of the Arbitration Acts of 1940, 1996 and Amendments in 2015 [2]–[4] are shown in Table 1. Amendments corresponding to the 2019 and 2020 Acts are mentioned separately thereafter.

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Table 1: *Comparison of important sections of Arbitration Acts*

Sections	**Arbitration Act 1940**	**Arbitration and Conciliation Act 1996**	**Arbitration and Conciliation (Amendment) Act 2015**
Referring parties to arbitration	Sec.8 gives provisions regarding the Power of court to appoint arbitrator or umpire in various cases	As per Section 8(1), it was mandatory for a judicial authority to refer the parties to arbitration and the scope of any review was extremely limited.	Section 8 (1)) has been amended in such a way that courts can take a *prima facie* view as to existence of a valid arbitration agreement. Also, a provision was inserted not to prevent a party from making an application merely because the original arbitration agreement or a duly certified copy thereof is not available and is retained by the other party
Interim measures		Sec.9 gives provisions for a party to apply to court based on various conditions during any stage of arbitral proceedings or at any time after the making of the arbitral award but before it is enforced in accordance with section 36.	As per amendment, if the Court passes an interim measure, then within a period of 90 days from the date of such order the arbitral proceedings has to be commenced. Also, the Court shall not consider any application under section 9 unless it finds that circumstances exist which may not render the remedy under Section 17 effective.
Appointment of arbitrators	Gives provisions to parties to appoint three or more arbitrators (Sec.10)	Sec.11 specifies that Chief justice can appoint the arbitrator as and when requested by the party, in case if the parties fail to appoint an arbitrator or the appointed arbitrators fail to appoint the third arbitrator.	The Amendment has replaced the words “Chief Justice” with either “Supreme Court” or “High Court”, as applicable (Sec.11)
Grounds for challenge		Sec.12 provides the declaration from the part of arbitrator and the circumstances for challenging his appointment	Fifth Schedule has been inserted which lists the grounds that would give rise to justifiable doubts as to the independence and impartiality of arbitrator. Also, Seventh schedule is added which gives provisions that makes arbitrator ineligible for appointment

Failure or impossibility to act	Sec.11 provides authority to court to remove arbitrators or umpire in certain situations like failure to make award or misconduct	Sec.14 provides the conditions for termination of mandate of the arbitrator	Amended as the conditions for termination of mandate of arbitrator and substitution by another one (Sec.14)
Interim measures ordered by arbitral		Not enforceable as per Sec.17	Enforceable, if it is an order of a court (Sec.17)
Statements of claim and defense		The claimant shall state the facts supporting his claim and the respondent shall state his defense in respect of the particulars within the time period determined by the arbitral tribunal or that agreed by the parties. (Sec.23(1))	As per amendment, in the same arbitration itself the Respondent can file its counterclaim against the Claimant without initiating another arbitral proceeding (Sec.2(A))
Hearings and written proceedings		Unless otherwise agreed by the parties, the arbitral tribunal shall decide whether to hold oral hearings for the presentation of evidence or for oral argument, or whether the proceedings shall be conducted on the basis of documents and other materials (Sec.24(1))	The arbitral tribunal shall hold day to day hearings for presentation of evidence or oral arguments and mandates the tribunal not to grant any adjournments unless sufficient causes are shown. Tribunal may impose costs for seeking adjournments without sufficient cause (provision added in Sec.24(1))
Default of a party		Sec.25 gives provisions for arbitral tribunal to terminate or continue the proceeding based on the submission of statement of claims by claimant or statement of defense by the respondent within stipulated time	Amendment empowers the tribunal to treat Respondent's failure to communicate his statement of defense as forfeiture of his right to file such statement of defense (Sec.25(b))

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Rules applicable to substance of dispute		The arbitral tribunal shall decide in accordance with the terms of the contract and shall take into account the usages of the trade applicable to the transaction, in all the cases (Sec.28(3))	Shall take into account the terms of the contract and trade usages applicable to the transaction, while deciding making the award in all the cases (newly amended Sec.28(3))
Decision making by panel of arbitrators	As per Sec.10(2), if there are three arbitrators, then the award taken by the majority prevails.	Sec.29 (*1*) specifies that decision of the arbitral tribunal shall be the made by majority of its members, if the proceedings have more than one arbitrator. Sec.29 (*2*) specifies that Notwithstanding sub-section (*1*), if authorized by the parties or all the members of the arbitral tribunal, questions of procedure may be decided by the presiding arbitrator.	A new section 29A has been added which provides a time limit for rendering an award for all arbitration seated in India. A new section 29B has been added providing for fast track procedure for arbitration.
Form and contents of arbitral award	As per Sec.14, the award has to be signed by the arbitrators or umpire and a notice in writing has to be given to the parties specifying the fees and charges	Sec.31 gives provisions such as form in which award has to be given, signatures required in the award, reasoning of the award, interest to be paid in the case of award involving payment of money etc.	Sec.31 (7b) specifies about 2% interest rate higher than the current rate of interest to be paid from the date of award to the date of payment. A new section 31A has been added which stipulates a common regime for costs under the Act – both for arbitration proceedings and litigations arising out of arbitration.
Correction and interpretation of award; additional award	Sec.15 gives provision to court to modify award, if (a) its part is upon a matter not referred to arbitration, (b) it is imperfect in form or (c) it contains a clerical mistake or an error	Sec.33 (1a) gives provision for party to request the arbitral tribunal for correcting the award for type of errors specified within 30 days from the receipt of the arbitral award. Sec.33 (4) gives provision for party to request to make an additional arbitral award with respect to the claims presented in the arbitral proceedings.	

Setting aside arbitral award	Sec.30 gives the grounds for setting aside award in case of misconduct from arbitrator, invalid award etc.	Sec.34 gives various provisions for setting aside arbitral award	Section 34(2)(b) has been substituted to make clear that an award is in conflict with the public policy of India only if the award is made under certain specified conditions in the clauses. A new sub-section 34(A) gives provisions to set aside award by the Court, if it finds that the award is corrupted by patent illegality (domestic arbitration only)
Enforcement of award		This act gives provision that enforcement of the award can be stayed by mere filing of an application under section 34 (Sec.36)	The Amendment (Sec.36) specifies that mere filing of an application to set aside the arbitral award will not render the award unenforceable, except in the case when the Court grants a stay of the operation of the award on a separate application requesting a stay
Appealable orders	Sec.39 gives provisions to hear appeals from original decrees of the Court passing the order	Sec.37 make provisions to give appeal against the orders given with respect the provisions in Sec.9, 34, 16 and 17	In addition to the orders from which appeals were earlier allowed before the Court, an order refusing to refer parties to arbitration under section 8 has also been added
Evidence when seeking enforcement of foreign award.		Sec.46 & 57 gives various provisions required for the party to produce before the court while applying for the enforcement of a foreign award	Amendment ensures that jurisdiction will be exercised by the High Court in the case of enforcement of a foreign award
Conditions for enforcement of foreign awards	No Provision in the Act	Section 48 and 57 provides the various conditions for which enforcement of foreign awards may be refused and conditions for which the foreign awards may be enforceable	Amendment added explanations to Sections 48 and 57 to make it clear as to when an award shall be considered to be in conflict within public policy of India
Conciliation	No Provision in the Act	Sec.61 to 81 gives the various provisions related to Conciliation	

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Arbitration & Conciliation (Amendment) Act, 2019

Following amendments were made in the Act [5]:

1. **Insertion of Part 1A to the Act-** This part states about the establishment of Arbitration Council of India (ACI). The composition of ACI is provided in section 43C.The duties and functions of the council are provided under section 43D.
2. **Section 11-** Section 11(3A) has been added which specifies the power of Supreme Court of India and the High Courts for authorizing arbitral institutions graded by the ACI.
3. **Section 23 & 29A –**Section 23(4) has been added, which specifies about the mandatory time period of six months for the parties to complete their pleadings. The amended Section 29A states that the arbitral tribunal must pass an award within a period of twelve months after the completion of pleadings in matters other than international commercial arbitrations.
4. **Section 42-** This section has been added which states about the confidentiality of all the arbitral proceedings except its award that has to been maintained by the arbitrator, the arbitral institution and parties to the arbitration.
5. **Applicability of the 2015 Amendment Act –**Section 87 had been inserted which specifies that this amendment will be applicable for cases where arbitrations which have commenced on and after 23rd October 2015.

Arbitration & Conciliation (Amendment) Act, 2020

Following amendments were made in the Act [6]:

1. **Section 36(3)** – This section has been added which gives the provision for the court to grant unconditional stay when a prima-facie case of fraud or corruption has been found out. The amendment is deemed to be effective from 23 October 2015.
2. **Section 43J** – This section was substituted as "the qualifications, experience and norms for accreditation of arbitrators shall be such as may be specified by the regulations".
3. Eighth Schedule of the principal Act has been omitted.

5 Conclusion

Arbitration is an age-old concept. Since its origin, it has been continuously subjected to several changes. In India, the introduction of the 1996 Act and its amendments in 2015 and 2019 have contributed significantly to the development of arbitration as an effective alternative dispute resolution method. Moreover, the establishment of ACI will surely make India's arbitration system more effective by promoting institutional arbitration which speeds up the arbitral proceedings. Institutional arbitration will surely foster the future of alternate dispute resolution methods and hence make India an arbitration-friendly jurisdiction.

6 Publisher's Note

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