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Effectiveness of Arbitration in India: Challenges and Enforcement in the Present Era

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ABSTRACT

Arbitration has emerged as a pivotal mechanism for dispute resolution in India, particularly in the context of an increasingly complex commercial landscape. The significance of this study lies in its exploration of the Arbitration and Conciliation Act, 1996, which established a comprehensive legal framework for arbitration in the country. By examining the objectives and scope of this legislation, it becomes evident that the Act not only aims to expedite dispute resolution but also seeks to align with global standards of arbitration practices. Given the challenges posed by conventional judicial processes—characterized by delays and inefficiencies—alternative dispute resolution methods, including arbitration, present considerable advantages. As noted in recent studies, while institutional arbitration has gained favor, concerns regarding the effectiveness of ad-hoc mechanisms and the role of the judiciary persist. Understanding these dynamics is essential, as courts significantly influence arbitration outcomes through their supportive functions and interpretations of relevant laws.

The effectiveness of arbitration in India, particularly in terms of speed, cost, and flexibility, is a critical factor influencing its appeal as a dispute resolution mechanism. Arbitration is often perceived as a quicker alternative to traditional litigation, but the actual speed can vary significantly depending on whether the process is institutional or ad hoc. Institutional arbitration typically offers structured timelines and procedural norms, ostensibly enhancing efficiency; however, it can also lead to higher costs due to administrative fees. Conversely, ad hoc arbitration often provides greater flexibility, allowing parties to tailor

procedures to their needs, albeit at the risk of protracted timelines if not managed effectively. Cost considerations further complicate this dynamic; while ad hoc arbitration can minimize expenses by eliminating institutional fees, it may incur higher costs if disputes escalate due to procedural ambiguities. Ultimately, striking a balance among speed, cost, and flexibility remains pivotal for parties seeking effective arbitration outcomes in India.

KEYWORDS

Arbitration, Legislation, Efficiency, Judiciary, Flexibility

INTRODUCTION

Arbitration has emerged as a pivotal mechanism for resolving disputes in India, particularly in the context of an increasingly complex commercial landscape. As an alternative to traditional litigation, arbitration offers distinct advantages in terms of speed, cost efficiency, and flexibility, making it an attractive option for parties seeking timely resolutions. In recent years, legislative reforms have further enhanced the arbitration framework, fostering an environment conducive to swift and effective adjudications. This essay aims to analyze the effectiveness of arbitration in India, comparing institutional and ad hoc models to assess their respective benefits and drawbacks. Additionally, it will delve into critical dimensions such as party autonomy and confidentiality, which underpin the arbitration process. By examining these aspects, a comprehensive understanding of how arbitration functions within the Indian legal system will be established, highlighting its significance as a preferred mode of dispute resolution in contemporary India.

OVERVIEW OF ARBITRATION IN INDIA AND ITS SIGNIFICANCE IN DISPUTE RESOLUTION¹

Arbitration in India has emerged as a crucial mechanism for resolving disputes, particularly in the context of an increasingly complex and dynamic commercial environment. Established under the Arbitration and Conciliation Act of 1996, the framework aims to facilitate efficient dispute resolution by providing an alternative to traditional litigation, which can often be protracted and costly. The significance of arbitration in India lies in its ability to offer speed, cost-effectiveness, and flexibility to parties involved in disputes. By allowing greater autonomy to the involved parties,

¹ Lauren Graham. 'In Conclusion, Don't Worry About It.' Random House Publishing Group, 4/3/2018.

arbitration empowers them to choose the venue, arbiter, and procedural rules governing their resolution process. Furthermore, the private nature of arbitration proceedings ensures confidentiality, safeguarding sensitive business information from public scrutiny. This blend of advantages makes arbitration not only a practical option for domestic disputes but also an attractive alternative for international transactions, thereby reinforcing India's position as a favorable hub for global commerce and legal arbitration.

ANALYSIS OF SPEED, COST, AND FLEXIBILITY²

The effectiveness of arbitration in India, particularly in terms of speed, cost, and flexibility, is a critical factor influencing its appeal as a dispute resolution mechanism. Arbitration is often perceived as a quicker alternative to traditional litigation, but the actual speed can vary significantly depending on whether the process is institutional or ad hoc. Institutional arbitration typically offers structured timelines and procedural norms, ostensibly enhancing efficiency; however, it can also lead to higher costs due to administrative fees. Conversely, ad hoc arbitration often provides greater flexibility, allowing parties to tailor procedures to their needs, albeit at the risk of protracted timelines if not managed effectively. Cost considerations further complicate this dynamic; while ad hoc arbitration can minimize expenses by eliminating institutional fees, it may incur higher costs if disputes escalate due to procedural ambiguities. Ultimately, striking a balance among speed, cost, and flexibility remains pivotal for parties seeking effective arbitration outcomes in India.

FACTORS INFLUENCING THE SPEED AND COST-EFFECTIVENESS OF ARBITRATION PROCEEDINGS IN INDIA

The efficiency and cost-effectiveness of arbitration proceedings in India are influenced by various interrelated factors that demand careful consideration. One significant aspect is the choice between institutional and ad hoc arbitration; institutional arbitration often provides a structured framework that can mitigate delays through predefined rules and efficient administration. Conversely, ad hoc arbitration may lead to extended timelines and increased costs due to the lack of such structure, ultimately complicating procedural efficiency. Furthermore, the readiness and willingness of the parties to engage cooperatively throughout the process significantly impact timing and expenses; a collaborative approach can expedite resolution, while contentious attitudes may result in prolonged proceedings. Additionally, the qualifications and

² Alistair McCleery. 'An Introduction to Book History.' David Finkelstein, Routledge, 3/13/2006.

experience of arbitrators play a critical role, as competent arbitrators can effectively manage proceedings, reducing delays and minimizing costs. Lastly, the legislative environment surrounding arbitration, including enforcement of awards and judicial intervention, can further shape the overall speed and affordability of proceedings, highlighting the need for ongoing reforms in the Indian arbitration landscape.

COMPARISON BETWEEN INSTITUTIONAL AND AD HOC ARBITRATION³

In the landscape of arbitration, a crucial distinction exists between institutional and ad hoc arbitration, influencing the overall effectiveness of dispute resolution in India. Institutional arbitration is characterized by the involvement of established arbitral institutions that provide a structured framework, rules, and administrative support. This often enhances procedural efficiency and ensures adherence to recognized standards, which can be advantageous in complex cases. In contrast, ad hoc arbitration allows the parties greater flexibility in crafting their own procedures and rules, catering specifically to the unique needs of the dispute at hand. While this flexibility can foster innovative solutions and expedite resolution, it may also lead to inconsistencies and challenges in enforcement if not carefully managed. Ultimately, the choice between these two forms hinges on the parties' priorities regarding speed, cost-effectiveness, and the desire for procedural autonomy, reflecting the diverse approaches to dispute resolution in India's evolving arbitration landscape.

ADVANTAGES AND DISADVANTAGES OF INSTITUTIONAL V. AD HOC ARBITRATION IN THE INDIAN CONTEXT

In the Indian context, the choice between institutional and ad hoc arbitration presents distinct advantages and disadvantages, significantly influenced by factors such as speed, cost, and procedural structure. Institutional arbitration, typically governed by established rules and administered by recognized institutions, offers parties a level of certainty and procedural integrity, which can enhance the efficiency of the arbitration process. This framework often results in faster resolutions due to the institutions' experienced administrators and established timelines. Conversely, the ad hoc approach allows for greater flexibility as parties can tailor the procedures to their specific needs, often resulting in lower costs in simpler disputes. However, this flexibility can also lead to delays and inconsistent practices due to

³ Tushar Kumar Biswas. 'Introduction to Arbitration in India.' The Role of the Judiciary, Kluwer Law International, 1/1/2014.

varying levels of expertise among appointed arbitrators. Moreover, ad hoc arbitration may lack the procedural safeguards and oversight present in institutional settings, potentially compromising the overall effectiveness of the arbitration process in India.

EXAMINATION OF PARTY AUTONOMY AND CONFIDENTIALITY IN ARBITRATION⁴

In the context of arbitration in India, the concepts of party autonomy and confidentiality are paramount, providing a framework that significantly enhances the effectiveness of the process. Party autonomy empowers the participants to tailor their arbitration agreements according to their specific needs, allowing them to select the governing law, choose arbitrators, and determine the procedural rules. This flexibility fosters a more personalized approach to dispute resolution, which is particularly beneficial in the diverse commercial landscape of India. Concurrently, confidentiality serves as a crucial element, ensuring that the proceedings and outcomes of arbitration remain private, thereby protecting sensitive information and preserving the reputations of the parties involved. By maintaining confidentiality, arbitration not only promotes a level of trust between parties but also encourages open communication during the proceedings, which can lead to more amicable settlements. Together, these principles not only affirm the effectiveness of arbitration as a dispute resolution mechanism but also enhance its appeal relative to traditional litigation in India.

- *Arcelor Mittal Nippon Steel India Ltd. v. Essar Bulk Terminal Ltd.*⁵

Once an Arbitral Tribunal is constituted, the court would not take up for consideration and apply its mind to an application for an interim measure, unless the remedy of applying to the arbitral tribunal for interim relief is inefficacious. However, this bar does not operate where already the application has been taken up for consideration and the court has applied its mind.

- *Amazon Nv Investment Holdings Llc v. Future Retail Ltd. & Ors.*⁶

An Emergency Arbitrator's orders, would be covered by the Arbitration Act. The Court emphasized that when there is no provision in the Arbitration Act which interdicts such order

⁴ Kaviraj singh. 'INBA Law Report 2012.' Law Journal 2012, Indian National Bar Association , 3/10/2015.

⁵ Civil Appeal No. 5700 of 2021.

⁶ Civil Appeal Nos. 4492-4493 Of 2021.

from being made, the losing party cannot claim that the award has been made sans jurisdiction.

The Court highlighted the importance of party autonomy enshrined in the Arbitration Act and the freedom to have a dispute decided in accordance with institutional rules which include the provision of Emergency Arbitration.

An “award” delivered by an Emergency Arbitrator under institutional rules, constitutes as an order under Section 17(1) of the Arbitration Act and is enforceable as such.

No appeal lies under Section 37 against an order of enforcement of EA Order made under Section 17(2) of the Arbitration Act.

Amazon.com NV Investment Holdings LLC (Amazon) had infused INR 1,431 crore into Future Coupons Pvt Ltd which was to 'flow down' to Future Retail Ltd (FRL). Based on mutual understanding, Amazon's investment in the retail assets of FRL would continue to vest in FRL, due to which FRL could not transfer its retail assets without Amazon's consent.

Within few months from the date of investment, FRL and 12 other group companies of Future Group entered into a transaction with Mukesh Dhirubhai Ambani Group (Reliance Group). The transaction envisaged amalgamation of FRL with Reliance Group, including transfer of its retail assets to Reliance Group, which led to dispute between FRL and Amazon.

As a result of this transaction, Amazon initiated an arbitration proceeding against Future Group under the Arbitration Rules of the Singapore International Arbitration Centre (SIAC Rules). Amazon filed an application requesting for injunction against the transaction and sought emergency interim relief. On October 25 2020, an Emergency Arbitrator passed an interim award restraining Future Group from taking any steps towards the disputed transaction. However, Future Group went ahead with the transaction, describing the interim award as nullity.

FRL then filed a suit before the Delhi High Court in which it sought to interdict the arbitration proceedings and asked for an interim relief to restrain Amazon from writing to statutory authorities by relying on the Emergency Arbitrator's award. However, the Delhi High Court refused to grant the interim relief, which was not challenged by FRL.

Separately, Amazon filed a Petition before the Delhi High Court under Section 17(2) of the Arbitration and Conciliation Act, 1996 (Act) for enforcement of Emergency Arbitrators' interim award. On

February 2, 2021, and March 18, 2021, the Delhi High Court restrained Future Group from proceeding with the transaction. However, FRL challenged the order before Division Bench of the Delhi High Court, and the Division Bench stayed the judgment of the Single Bench. Against this order, Special Leave Petition was filed, and the Supreme Court stayed all the proceedings before the Delhi High Court.

Whether an "award" delivered by an Emergency Arbitrator under the Arbitration Rules of the Singapore International Arbitration Centre ["SIAC Rules"] can be said to be an order under Section 17(1) of the Arbitration and Conciliation Act, 1996 ["Arbitration Act"]

Whether an order passed under Section 17(2) of the Arbitration Act in the Enforcement of the award of an Emergency Arbitrator by a learned Single Judge of the High Court is appealable

Section 9, Arbitration Act: Section 9 confers powers on the adjudicating authority or the arbitral tribunal, providing interim measures such as sale of goods or interim custody, as a means of protection. It can not only issue orders to help parties secure disputed sums but the Section confers power on the tribunals to issue a temporary restraining order or appoint a receiver or guardian too.

Section 17, Arbitration Act: Section 17 of the Act applies when the arbitral tribunal has been formed, and before an award has been issued. Earlier, the tribunals had power to issue any interim measure but after the 2015 amendment, these powers were restricted.

Section 36, Arbitration Act: Section 36 provides that once the time prescribed for making an application to set aside an award has expired or the application has been refused under Section 34 of this Act, the arbitral award shall be treated as a decree passed by the court.

Section 37 states of the provisions regarding appeals under this Act. This Section provides for appeals against orders and not awards.⁷

The Rule 2A provides for the procedure against a person whenever there is a case of disobedience of any injunction made or any breach of such injunction.⁸

Order XLIII, CPC, states all the orders that are appealable, hence,

⁷ Section 37, Arbitration and Conciliation Act, 1996.

⁸ Order XXXIX, Rule 2A, the Code of Civil Procedure, 1908.

Rule 1(r) states that any order under Rule 1, Rule 2, Rule 2A, Rule 4 or Rule 10 of Order XXXIX are appealable.⁹

The Supreme Court observed that the heart of Section 17(1) is the application by a party for interim reliefs. There is nothing in Section 17(1), when read with other provisions of the Act to interdict the application of rules of arbitral institutions that the parties may have agreed to. This being the position, at least insofar as Section 17(1) is concerned, the arbitral tribunal would, when institutional rules apply, include an Emergency Arbitrator, the context of Section 17 "otherwise requiring" – the context being interim measures that are ordered by arbitrators.

Since Section 9(3) and Section 17 form part of one scheme, an 'arbitral tribunal' as defined under Section 2(1)(d) would not apply and the 'arbitral tribunal' spoken of in Section 9(3) would be like the 'arbitral tribunal' spoken of in Section 17(1) which, would include an Emergency Arbitrator appointed under institutional rules.

The same object and context would apply even to Section 9(3) which makes it clear that the Court shall not entertain an application for interim relief once an arbitral tribunal is constituted, unless the Court finds that circumstances exist which may not render the remedy under Section 17 efficacious.

Based on the 246th Law Commission Report and Sri Krishna Report dated July 30, 2017, the Supreme Court expressed the view that "an Emergency Arbitrator's award, would undoubtedly be an order which furthers these very objectives to decongest the court system and to give the parties urgent interim relief in cases which deserve such relief. Given the fact that party autonomy is respected by the Act and there is no interdict against an Emergency Arbitrator being appointed, it is clear that an Emergency Arbitrator's order, which is exactly like an order of an arbitral tribunal once properly constituted, in that parties have to be heard and reasons are to be given, would fall within the institutional rules to which the parties have agreed, and would consequently be covered by Section 17(1), when read with the other provisions of the Act.

Arbitrator's award by stating that it is a nullity when such party expressly agrees to the binding nature of such award from the date it is made and further undertakes to carry out the said interim order immediately, without delay.

The Supreme Court observed that despite Section 17 being

⁹ Order XLIII, Rule 1(r), the Code of Civil Procedure, 1908.

amended by the same Amendment Act, by making Section 17(1) the mirror image of Section 9(1) as to the interim measures that can be made, and by adding Section 17(2) consequently thereof, significantly, no change was made in Section 37(2) (b) to bring it in line with Order XLIII, Rule 1(r). The said Section continued to provide appeals only from an order granting or refusing to grant any interim measure under Section 17. There can be no doubt that granting or refusing to grant any interim measure under Section 17 would only refer to the grant or non-grant of interim measures under Section 17(1)(i) and 17(1)(ii).

In fact, the opening words of Section 17(2), namely, 'subject to any orders passed in appeal under Section 37' also demonstrate the legislature's understanding that orders that are passed in an appeal under Section 37 are relatable only to Section

17(1). For example, an appeal against an order refusing an injunction may be allowed, in which case sub-Section (2) of Section 17 then kicks in to enforce the order passed in appeal. Also, the legislature made no amendment to the granting or refusing to grant any measure under Section 9 to bring it in line with Order XLIII, Rule 1(r), under Section 37(1)(b). What is clear from this is that enforcement proceedings are not covered by the appeal provision.

The Court finally held that no appeal lies under Section 37 of the Act against an order of enforcement of an Emergency Arbitrator's order made under Section 17(2) of the Act.

The interim orders passed by the Court must stay vacated. The Court opined that the orders made under Section 17 play an important role in aiding the civil courts and providing interim relief to the parties. The Court also added that Section 34 is complete as long as appeals and orders are considered

Party autonomy is a fundamental principle in arbitration that empowers the parties involved to shape their arbitration agreements according to their specific needs and preferences. This autonomy allows the parties to determine essential procedural aspects, such as the choice of applicable laws, the selection of arbitrators, and the venue for arbitration. By exercising this flexibility, parties can tailor their agreements to align with their particular business contexts and dispute resolution objectives, potentially enhancing the effectiveness of arbitration in India. However, the implications for confidentiality are significant. When the parties craft their agreements, the inclusion of confidentiality clauses can create a secure environment for sensitive information, thereby encouraging frank discussions and minimizing the risk of reputational damage. On the other hand, unclear formulations or

an absence of confidentiality protections can lead to disputes regarding the confidentiality of proceedings and outcomes. Thus, the interplay between party autonomy and confidentiality is crucial in fostering trust and efficacy within the arbitration process in India.

The effectiveness of arbitration in India emerges as a multifaceted phenomenon shaped by various critical factors, including speed, cost, and flexibility. This analysis elucidates that while arbitration offers a promising alternative to traditional litigation, its efficacy is significantly influenced by the chosen framework—whether institutional or ad hoc. Institutional arbitration typically provides a more structured environment, contributing to expedited processes and adherence to procedural norms; however, ad hoc arbitration allows for greater flexibility and autonomy, catering to the unique preferences of the parties involved. Furthermore, the examination of party autonomy and confidentiality underscores the advantages of arbitration, as parties can dictate the terms of their engagement while safeguarding sensitive information. Despite challenges such as potential delays and costs, the overall assessment indicates that arbitration remains a viable and effective dispute resolution mechanism in India, aligning well with the contemporary needs of businesses and individuals seeking efficient, private, and adaptable resolutions to conflicts.¹⁰

The findings illustrate that arbitration in India has emerged as a viable mechanism for dispute resolution, notably enhancing speed, cost-efficiency, and flexibility compared to traditional litigation. The analysis reveals that institutional arbitration tends to provide a more structured and consistent framework, promoting greater adherence to established procedures and ensuring higher levels of party autonomy and confidentiality. Conversely, ad hoc arbitration offers greater flexibility, allowing parties to tailor processes to their specific needs; however, this can lead to inconsistencies in execution. Overall, the effectiveness of arbitration in India hinges on a delicate balance between these differing approaches, as both institutional and ad hoc methods present unique advantages and disadvantages. The increased acceptance of arbitration has spurred significant legislative reforms and judicial support, aiming to alleviate previous concerns about delays and enforceability. Consequently, arbitration not only serves as a practicable alternative but also facilitates a more efficient resolution of commercial disputes, aligning with India's broader economic aspirations.

¹⁰ Gary B. Born. 'International Commercial Arbitration.' Kluwer Law International B.V., 10/1/2014.