



The Indian Journal for Research in Law and Management

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Editor-in-Chief – Dr. Muktai Deb Chavan; Publisher – Alden Vas; ISSN: 2583-9896

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BEYOND THE COURTROOM:

THE ADVANTAGES AND CHALLENGES OF ARBITRATION

INTRODUCTION

Arbitration is a form of alternate dispute resolution {ADR}. Arbitration is a process used instead of litigation. Arbitration is used to settle a dispute between the different parties without investing time and money to go to the court. In layman's language one can understand arbitration as a process where a dispute is brought between a third disinterested party for the resolution. Hence, that third party is the "arbitrator." In the end of the arbitration process, the arbitrator made the decision, which is binding on both the parties. This arbitrator is an impartial outsider to whom the dispute mostly related to businesses is submitted.

According to Halsbury: arbitration means the reference of dispute or difference between not less than two parties, for determination, after hearing both sides in a judicial manner, by a person or persons other than a court.

The main legislation with regards to domestic arbitration, is "the arbitration and conciliation act, 1996. throughout the years the mechanism of arbitration has gained widespread recognition.

Arbitration is a significant out of court processes adopted to solve disputes. When the courts are overburdened with cases, this ADR mechanism serves as the means of providing faster and simpler resolution of dispute.

Securing an award on a conflict made with reference to a third party is what arbitration is all about. A dispute is presented to an unbiased third party through the arbitration procedure, and the third party renders a ruling that is typically binding on both parties. In the arbitration

procedure, a person or people nominated by the parties or by statute hear arguments between the disputing parties and determine the cause of action.

Since arbitration is meant to be an adjudication process, there is no room for award compromise. Kurt Brenn once said that although parties are free to compromise, the goal of arbitration is adjudication rather than compromise. Although a prudent arbitrator will undoubtedly encourage such an arrangement, awards typically do not allow for concession. When rendering a decision, the arbitrator ought to take into account that the ruling must be grounded in a "Split the difference" strategy, be feasible, and adhere to certain solid natural justice principles.

One component of the Alternative Dispute Resolution (ADR) process that helps parties who wish to forego the customary drawn-out process of resolving disputes in local courts is arbitration. The parties to a disagreement refer it to one or more arbitrators, whose decision (the "award") they agree to be bound by. This is a legal procedure for resolving disputes outside of the courts.

The development of a flexible, reasonable, advantageous, and time-saving method of resolving disputes without requiring the parties to go through the rigorous, time-consuming, and resource-exhausting procedure of the traditional justice delivery system was required due to the advancement, liberalization, and globalization of international business relations.

Understanding the distinctions between arbitration and conciliation as well as mediation can help us to better understand the concept of arbitration.

The binding nature of the arbitrator's ruling and the distinct nature of its methodology set arbitration apart from conciliation. Despite the length of the parties, there is no room for compromise in awards because the primary goal of arbitration is adjudication.

It results in an agreement between the disputing parties, the arbitrator imposes his own viewpoint on the parties, and the disputants' viewpoints are not given any weight. Additionally, arbitration results in a just and equitable resolution of a dispute. Therefore, it has a more judicial nature than conciliation.

The distinction between mediation and arbitration is that the former is a legislative process, while the latter is a judicial one. The arbitrator's decision is based on fairness and equity. In

mediation, compromise is crucial, but in arbitration, there is no possibility of it. In the event of arbitration, the award is required; but, in mediation, it is not. A dispute may occasionally be resolved by arbitration, which does not occur with mediation. The greatest method for settling contractual rights is arbitration; nonetheless, mediation works well for resolving conflicts.

The Arbitration and Conciliation Act, 1996 is the primary law governing arbitration in India. Commencing on August 22, 1996, this legislation unifies and modifies the legal framework concerning internal arbitration, international business arbitration, and the implementation of foreign arbitral rulings. It is based on the 1985 UNCITRAL Model Law on International Commercial Arbitration, which has undergone a number of revisions to improve arbitration procedures and bring it into compliance with global norms.

ARBITRAL AWARD

An arbitral tribunal's or a single arbitrator's final and legally binding ruling that settles all or part of the issue brought under its purview is known as an arbitral award.

It is comparable to a court ruling and is distinguished by being binding, final, and enforceable abroad under international agreements like the New York Convention.

Arbitral awards have the power to make pronouncements, direct the payment of a certain amount of money, mandate the precise performance of a contract, and correct, set aside, or annul a deed or other instrument. Since the New York Convention permits the unrestricted enforcement of awards in contracting states, subject to specific limited defences, the enforcement of arbitration awards is typically easier in international trade than the execution of court verdicts.

The arbitrator's decision, which is legally enforceable, provides a resolution to the concerns raised during the arbitration. In addition to addressing the main points of contention, this formal ruling may also specify any financial awards or required performances.

It is a decision made by an arbitral tribunal about a disagreement or dispute that was referred to it for arbitration.

The term "arbitral award" is not defined in Section -2 (1)(c), although it is stated that an "interim award" is included in the arbitral award.

It would additionally comprise a "Settlement agreement" obtained under Section 33(4) and a "Additional arbitral award" made under Section 33(4).

A "Settlement Award" made pursuant to Section 73 in conciliation processes under Part III of the Act, but not Section 30(2) during "Arbitral Proceedings"

TYPES OF ARBITRATION

There are various forms of arbitration, each with unique characteristics and benefits.

1. Ad-hoc Arbitration

In India, this is the most popular type of arbitration when parties agree to settle their differences amicably without going through formal channels. It allows for the choice of rules and procedures to be followed by the parties, with fair prices and suitable infrastructure provided.

Both domestic and international business conflicts may be arbitrated using this type of procedure. Since most of the disputes are addressed in accordance with the applicable law with regard to the arbitral seat, jurisdiction is crucial.

2. Institutional Arbitration

The arbitration agreement itself gives the parties the freedom to select the specific arbitral institution in institutional arbitration. One or more arbitrators may be chosen from a pre-agreed panel of arbitrators by the institution's governing body or the parties. Parties are free to select an arbitrator to handle a particular matter under Part I of the Act.

3. Contractual Arbitration

When parties to a contract agree to have binding, arbitration handle future disputes instead of going to court, that agreement is known as contractual arbitration. In contemporary corporate agreements, arbitration clauses are becoming more prevalent. For instance, you might have agreed to arbitration when you first started working at your current employment, when you had a credit card, or when you had a cell phone.

4. Statutory Arbitration

Statutory arbitration is a type of arbitration in which the parties are required by law to participate in arbitration and have no other option than to do so. It is distinct from conventional arbitration procedures in that the parties have not given their assent. Approximately twenty-four Central Acts commence statutory arbitration proceedings and submit specific categories of disputes to arbitration.

5. Domestic Arbitration

In domestic arbitration, the hearings are held in India and both parties must be citizens of India. Domestic arbitration is not defined in any particular way in the Arbitration and Conciliation Act of 1996. The parties agreed to resolve any disputes that arose in India through local arbitration, as can be inferred from a simple reading of Section 2(2). The procedures must take place within Indian territory and be conducted in lieu of Indian procedural and substantive law.

6. International Arbitration

Due to a clause added to the parties' agreement or a cause of action resulting from a foreign element connected to the dispute or the parties, international arbitration takes place outside of the country. In accordance with the circumstances surrounding the filing of a case, either Indian or foreign law would be relevant.

7. Fast-track Arbitration

potential answer to the issues arising from the protracted and laborious procedures in other types of arbitration is fast track arbitration. It maintains arbitration's primary goal of quickly resolving disputes and does not entail any drawn-out processes. Fast-track arbitration is allowed a six-month time frame under the Act's provision. Unlike other forms of arbitration, one arbitrator is sufficient to determine the issue; the arbitrator just uses the written submission.

In this article, we will further explore the advantages and the challenges of the process of arbitration beyond the setting of courtroom.

ADVANTAGES OF THE PROCESS OF ARBITRATION:

1. SPEEDY AND EFFICIENT METHOD

The quickness and effectiveness of arbitration is one of its key benefits. Parties can settle their differences more quickly through alternative dispute resolution than through litigation, which frequently takes years to conclude. Decisions are usually made more quickly since the procedure is usually more efficient and less formal.

The process of arbitration is usually quicker than litigation. It is one of the primary advantages of the ADR mechanism. When we compare the process of arbitration to that of process of litigation which can drag for months or even years, arbitration is preferable.

2. A FAIR PRACTICE

In the process of arbitration, the arbitrator is appointed usually by both the parties. which ensures impartial resolution of the dispute

3. CONFIDENTIALITY AND PRIVACY

During the process of arbitration, both the parties can maintain the secrecy and confidentiality of the whole process. During this process the trade secrets can be kept hidden unlike the court proceedings where proceedings are usually open to public.

arbitration provides more secrecy than court hearings, which are typically accessible to the public. Parties have the option to keep their disagreements secret, preventing the disclosure of sensitive material to third parties.

Information raised during the dispute and its resolution can remain secret because arbitration, as opposed to a trial, results in a private resolution. Well-known public personalities or clients in commercial conflicts may find this alluring because all statements, arguments, and supporting documentation will be kept strictly confidential. However, there is still a chance that some records will be made public during a court proceeding, even if they are not to be exposed to the public and contain potentially sensitive business information.

4. AFFORDABLE PROCESS

A more affordable option to lawsuit is arbitration. It requires money to hold the arbitration procedure and hire an arbiter. However, these are usually less expensive than the costs associated with litigation. charges associated with litigation, such as legal fees, court charges, and discovery expenditures, typically exceed the cash outlay for this form of alternative

dispute resolution. Parties involved in dispute resolution may save a substantial amount of money by choosing this alternative conflict settlement process.

Mostly during arbitration, the parties can bear the cost of arbitrators. And it saves money for both the parties.

5. FLEXIBILITY

The process of arbitration comes with greater flexibility in comparison to court proceedings. The arbitrator, the seat of arbitration is usually decided by the parties which provides greater autonomy.

Arbitration offers parties the flexibility to choose their own arbitrator and decide on the procedural rules that will govern this Alternative dispute resolution process. This allows the parties to select an arbitrator with expertise in the relevant area of law and tailor the process to suit their specific needs.

6. LESS BURDEN UPON THE COURTS

In a country like India with loads of overburdened and unsolved cases, these ADR methods like that of arbitration reduces the burden of courts.

7. THE EXPERTISE OF THE ARBITRATOR

Parties to an arbitration can choose an arbiter who specializes in the topic of the disagreement. This guarantees the decision-maker has a thorough comprehension of the pertinent topics, resulting in more specialized and informed conclusions.

The arbitrators are the expert of their field with specialized knowledge in their fields. This ensures well-informed and efficient decision making.

8. FINALITY OF THE PROCESS

Appeals for binding arbitration are not always available. This provides the arbitration with a degree of finality that is not usually possible with trial decisions that may be susceptible to appeals, retrials, and more appeals.

The process of arbitration is a final process in itself. it works for the end of dispute.

9. FULL CONTROL OF THE PROCESS

In the process of arbitration both the parties have the right to check the assure the conduct of the proceedings.

10. ENFORCEMENT OF AWARD

The arbitration award is generally easier to enforce on an international level.

Now let us look at some of the challenges in the process of arbitration

CHALLENGES OF THE PROCESS OF ARBITRATION:

Even though the process of arbitration is a favourable and accepted worldwide, there are certain setbacks and several challenges to the said process.

Let us know dwell into the different challenges that arbitration faces:

1. IMPARTIALITY AND INDEPENDENCE OF ARBITRATORS

Maintaining the independence and impartiality of arbitrators, which are essential components of the process, is a challenge for arbitration. The integrity of the arbitrators is crucial because it protects the parties' fundamental rights. The fairness and openness of the arbitration process may be impacted by issues relating to arbitrator bias, which may also give rise to post-award claims.

2. APPEAL AGAINST ARBITRATION AWARD

The possibility of appeals against arbitration awards poses a severe obstacle as well. These appeals might raise concerns about security for the award and associated expenses, challenges to enforcement, grave anomalies, and procedural flaws. Such appeals may result in drawn-out court cases and extra expenses.

3. BASIC CONTRACT FORMATION ISSUES

Arbitration procedures get more complicated when there are challenges to fundamental or elementary contract construction, such as forgery, fraud in execution, and allegations of non-

signature of the container contract. Arbitration rulings' legality and enforceability may be severely impacted by these problems.

4. LACK OF TRANSPARENCY

One typical issue with the arbitration procedure is its lack of openness. This feature may make it more difficult to obtain important information and affect how fair the processes are seen to be.

5. DIFFICULTY IN ENFORCING AWARDS INTERNATIONALLY

The difficulty of enforcing arbitration rulings globally presents another obstacle for the arbitration procedure. Arbitration verdicts, in contrast to court rulings, may encounter difficulties in being enforced in several jurisdictions. This may make it more difficult to reap the rewards of a successful arbitration ruling, especially when the other party resides in a different country.

6. JUDICIAL INTERVENTION

Judicial intervention in the proceedings is one of the major challenges in the growth of arbitration in India.

7. APPOINTMENTS OF ARBITRATORS

Parties usually approach the court for the appointment of arbitrators, when they themselves fail to appoint the respective arbitrator. This sometimes can be an issue in the proceeding.

8. LACK OF AWARENESS

Another challenge of arbitral proceeding in India is the lack of awareness of the procedure and remedies of the arbitral process.

9. ABSENCE OF CROSS-EXAMINATION

Another lack of the process of the arbitration is lack of examination of documents etc.

10. INSUFFICIENT LAWS

The last amendment that was made in the prime legislation relating to arbitration i.e. The Arbitration and Conciliation Act, 1996 was made in 2015

The laws need to be amended and moulded as per the needs of the society and its changing trends.

11. The rights of appeal are limited

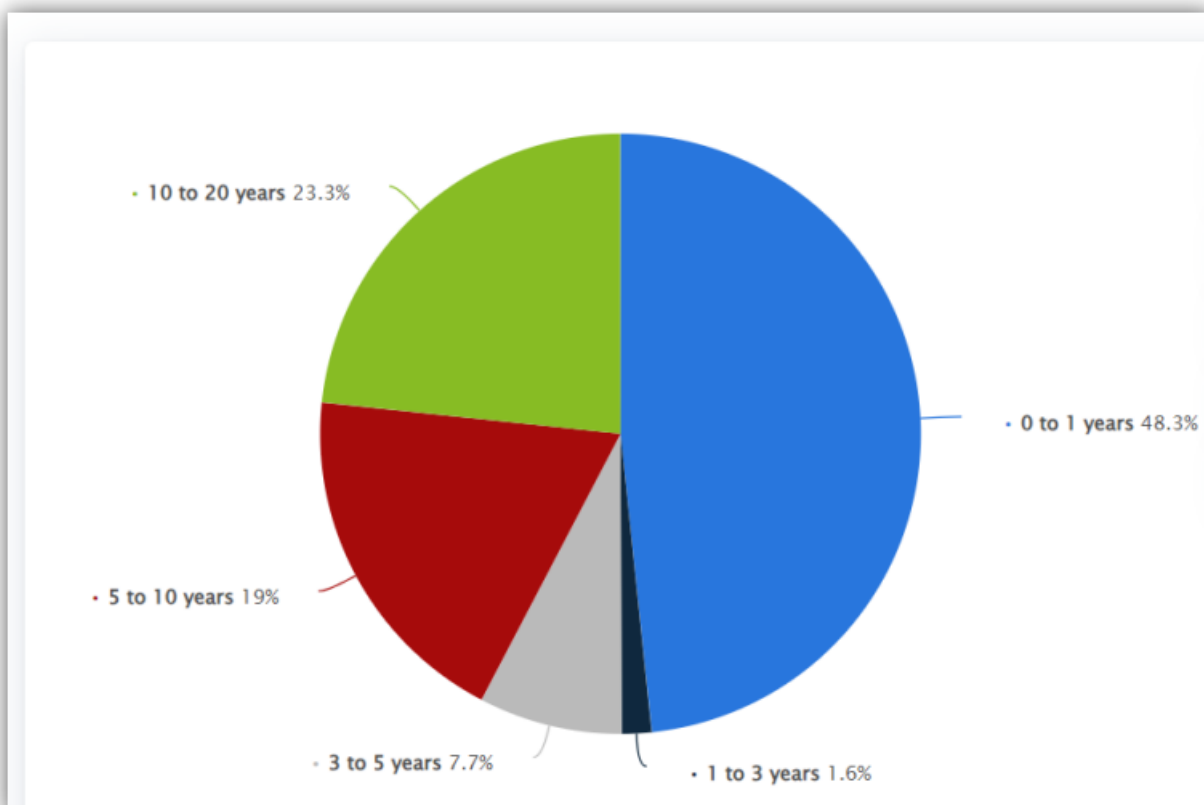
12. The process of arbitration is somehow too informal

13. The process of arbitration is kind of adversarial, and really does not help in improving relations between the parties.

14. The appointment of a third parties, takes the decision-making power away from the parties

15. In the process of arbitration both the parties must give their consent, which sometimes is regrated later.

Age wise pendency of arbitration cases in India in 2022 ¹



¹ <https://www.statista.com/statistics/1356526/india-age-wise-pendency-of-arbitration-cases/>

RELATED CASE LAWS

1. **Hindustan Construction Company Limited & Anr. Vs. Union of India & Ors.** ²

in this case a bench of 3 judges of the hon'ble Supreme Court struck down section 87(5) of the arbitration and conciliation act, 1996.

2. **The Oriental Insurance Co. Ltd. and Ors. Vs. Dicitex Furnishing Ltd** ³

The supreme court in this case ruled that an arbitration clause can be invoked by an aggrieved party in pursuance to execution of no objection certificates.

3. **Rashid Raza Vs. Sadaf Akhtar** ⁴

In this case, supreme court held that mere simple allegations of fraud will not vitiate the effect of arbitration.

4. **Tulsi Narayan Garg Vs. The M.P. Road Development Authority, Bhopal and Ors** ⁵

it was held that a party to an agreement cannot be an arbitrator in his own case

5. **Town Essentials Pvt Ltd v. Daily Ninja Delivery Services Pvt Ltd** ⁶

² <https://indiankanoon.org/doc/102230863/>

³ <https://indiankanoon.org/doc/179903493/>

⁴ <https://indiankanoon.org/doc/12212510/>

⁵ <https://indiankanoon.org/doc/88403840/>

⁶ https://drive.google.com/file/d/1PKaaNjbUyc0qtb4lwBRy5APxp4q_x58v/view

The Karnataka High Court ruled that Section 8 of the A&C Act does not permit non-signatory defendants to be forced to take part in arbitration.

6. Municipal Corporation of Delhi v. Natraj Construction Company⁷

The Delhi High Court ruled that the statute of limitations for bringing an arbitration claim cannot be shortened from the amount stipulated in the Limitation Act.

7. Tata Sons Pvt. Ltd. (Formerly Tata Sons ... vs Siva Industries and Holdings Ltd⁸

The Supreme Court culled out Section 29A of the Arbitration Act as it stood before and after the introduction of the 2019 amendment

8. Larsen Air Conditioning & Refrigeration Co. v. Union of India⁹

The Arbitration Act's Section 31(7)(b) was scrutinized by the Supreme Court. The amendment took effect on October 23, 2015. It was noted that this clause gave the arbitrator the authority to grant pre- and post-award interests, with the specific stipulation that the awarded amount would bear interest at the rate of 18% annually until the payment date, unless otherwise specified.

CONCLUSION:

Despite its difficulties, arbitration is nevertheless a well-liked and valuable dispute resolution method in comparison to going to court. Parties can decide wisely and take the necessary safeguards to guarantee a fair and efficient arbitration procedure by being aware of the potential negatives of arbitration. When the obstacles are properly managed and reduced, arbitration can still be a potent tool for effective and private dispute settlement.

⁷ https://drive.google.com/file/d/1vQtIUH_LZG_SvbyFa1eY-mSFS0Uzc6uy/view

⁸ <https://indiankanoon.org/doc/153994157/>

⁹ https://main.sci.gov.in/supremecourt/2019/35835/35835_2019_8_1501_46026_Judgement_11-Aug-2023.pdf