



**A CRITICAL STUDY OF
ARBITRATION LAWS THROUGH
YEARS: 1940-2019**

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Abstract

Our legal framework primarily provides for lawsuits and trials as the legal method for resolving disputes. Although, India had uncodified ADR mechanism prevailing where people voluntarily submitted their disputes to a group of wise man having knowledge to resolve yet the necessity of a modified legislation constantly kept touch. Arbitration – although being new way of dispute resolution now, has a long history in the Indian Justice System. From first enacted legislation in 1940 to 2019 amendment, arbitration law is changed in accordance to the need of the hour. Arbitration Act has through passage of period inculcated and accepted implementation of foreign awards, which was earlier only for domestic awards. The article tries to analyse the difference between 1940 act and 1996 act, with inclusion of conciliation in the new act. It further deals with the need for 2019 amendment. The article in core tries to highlight the changes in arbitration law from beginning to the present scenario.

Key Words: Arbitration law, Amendment, Dispute Resolution, Conciliation, Foreign Awards

CHAPTER 1: INTRODUCTION

“Discourage litigation, persuade your neighbours to compromise whenever you can point out to them how the normal winner is often a loser in fees, expenses, cost and time. As a peace maker, the lawyer has a superior opportunity of being a good man. There will be business enough.”

- Abraham Lincoln

Human being- a social animal has an inherent characteristic of conflict of opinion. This conflict of opinion often leads to rise of disputes in it in relation to personal life, family life, economic or political life which may disrupt their peaceful conduct of existence. This requires the resolution of disputes with least utilization of assets as far as time and cash is concerned.

Since long, Indian is prone to utilisation of traditional court system for dispute resolution however, its effectiveness in terms of money and time spent often defeats the purpose of justice. The courts have grown unavailable because of different obstructions, for instance, poor availability of infrastructure, social and political backwardness, procedural formalities and the like so as to get equity through courts one needs to experience the unpredictable and exorbitant techniques associated with the complex and costly procedures involved in litigation.¹

In order to cope up with the era of liberalization, privatisation, globalization, phenomenal growth of international trade in terms of: commerce, investment, transfer of

¹ 222nd Report of, *Law Commission of India*, on the Need for Justice dispensation through Alternative Dispute Resolution (2009) (published in April, 2009)



technology, developmental and construction works, banking activities and the like, there stood a need to adapt the Alternative Dispute Resolution [ADR] mechanism which not only resolves family or property disputes but a mechanism that targets these complexities in a codified legislative way.

Moreover, in a country like India with a population of 1.40 billion people² having 59,867 pending cases in Supreme Court and 44.75 lakh pending cases in various High Courts³, a proper alternative mechanism to combat piling of cases and to serve justice in its true sense became crucial.

With a free and proficient judicial system being one of the essential structures of the Indian Constitution, it turns into our constitutional commitment to guarantee that the overabundance of cases is diminished and endeavours are made to build the removal of cases.⁴ Hence, arbitration as one of the alternative mechanisms has developed for clearing this enormous backlog and to contest increasing number of cases with a speedy legislated framework having a binding decision as that of an order or decree of court.⁵

Historical Transition from the British ruled India to an Independent India

In today's scenario, arbitration stands as a default setting for commercial dispute resolution in India.⁶ Although it had its prevalence in some forms since the Vedic times that can be followed back from the Pradvivaca Upanishad.⁷

Having said so this mechanism in India found its true application since the creation of Modern Arbitration Law by the Bengal Regulations in the year 1772 during the British rule.⁸ This Bengal Regulation legislated the reference by a court to arbitration proceedings, with the assent of the gatherings of other parties to the lawsuit in matter of: accounts, partnership deeds and breach of agreement amongst the disputing individuals.⁹ Subsequent to this came the Madras Regulation of 1816 and the Bombay Regulation of 1827 recognizing the process of Arbitration in British ruled India.¹⁰

However, with the establishment of the Legislative Council in Pre-Independent India in the year 1834, came the enactment of the Code of Civil Procedure [CPC] 1859. Of this, sections 312 to 325 dealt with arbitration in

² India's Population figure's <<https://countrymeters.info/en/India>> (as on 27th October, 2020)

³ Over 3.5 Crore cases pending across courts in India, little change in numbers since, 2014' <<https://thewire.in/law/pending-court-cases%3E> > accessed 24th October, 2020

⁴ Sumit Kumar, Historical Growth of Arbitration in India (Vol 10, No. 2, Jan-June 2017) pp. 118-135 assessed 24th October, 2020

⁵ Arbitration and Conciliation Act, 1996 sec 36.

⁶ Cyril Amarchand Mangaldas, *Arbitration in India- A Story of Growth and Opportunity* (2019) <www.cyrilamarchandblogs.com> accessed on 24th October, 2020

⁷ *Development of Arbitration Law in India* <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1502812> assessed on 24th October, 2020

⁸ Vashista and Associates Advocates and Solicitors, *Arbitration in India* <http://vassociates.in/images/pdf/Arbitration_in_India.pdf> accessed on 24th October, 2020

⁹ *Ibid*

¹⁰ Bibek Debroy and Suparna Jain, *Strengthening Arbitration and its Enforcement on India- Resolve in India*

<https://niti.gov.in/writereaddata/files/document_publication/Arbitration.pdf> assessed on 24th October, 2020



suits while sections 326 and 327 provided for arbitration proceedings being undertaken without court's intervention¹¹ which was to facilitate the proceedings being conducted autonomously without courts intervention. This came as a progressive shift in Indian Arbitration framework from- "referring the lawsuits to arbitration" (as per the Bengal Regulation, 1772) to- "recognising the autonomy of the arbitrators" (as per Civil Procedure Code, 1859).

It was then in the year 1859 that the Civil Code of Procedure was codified with provisions of arbitration which were *mutatis mutandis* reproduced in 506 to 526 of the new Act effectuated in the year 1877 and consecutively repealed in the year 1882.¹² Again, with the happening of recommendation by the Civil Justice Committee in the year 1925, several changes in the then arbitration framework¹³ took place and no sooner in the year 1938, the government appointed Shri Ratan Mohan Chatterjee, an Attorney-at-Law, for facilitating modifications in the arbitration concerned laws with which the revised Act was so approved. On the basis of such recommendations the Act came to be recognised by the Indian Legislature as Arbitration Act of 1940.

However post-independence the law on subject of arbitration in India was contained in two separate enactments which are: (i) The Indian Arbitration Act, 1899 and (ii) The Code on Civil Procedure, 1908.¹⁴ Both of

these were then consolidated into the 1940 act.¹⁵

Other than, 1940 act there were other legislation pertaining to arbitration - Arbitration (Protocol and Convention) Act, 1937 and Foreign Awards (Recognition and Enforcement) Act, 1961. The 1937 act was enacted for enforcement of foreign arbitral awards to which the Geneva Convention of 1927 while 1961 act was enacted pursuant to the New York Convention of 1958 and it prescribed the law and procedure for the enforcement of foreign awards in India to which the said Convention applied.

It was on 25th day of January, 1996 where the Arbitration and Conciliation Act, 1996 was consolidated into being and did not had an exhaustive nature. As its preamble indicates, it stood to repeal three statutory provisions of Arbitration which were then in existence in India. The three enactments were namely: (a) The Arbitration Act 1940, (b) The Arbitration (Protocol and Convention) Act, 1937 and (c) The Foreign Awards (Recognition and Enforcement) Act, 1961.¹⁶

The Act of 1996 further stood to be amended by the Arbitration and Conciliation (Amendment) Act, 2015 to the present day consequently been amended by the Arbitration and Conciliation (Amendment) Act, 2019. In spite of the fact that the legislation isn't judicial in the strictest sense, yet arbitration is directed by a separate legal framework wherein the arbitrators by law are

¹¹ *Supra* Note 7

¹² *Supra* Note 4

¹³ Dr Sandeepa Bhatt, *ADR Mechanism and Legal Aid in the settlement of Disputes: A Case Study of State of West Bengal* (2017) File No. N-9/6/2014-NM assessed on 24th April, 2020

<<https://doj.gov.in/sites/default/files/Final%20Report%20West%20bengal%20NUJS.pdf>>

¹⁴ Law Commission of India, 76 Report on Arbitration Act, 1940, 1978 (November, 1978).

¹⁵ The Arbitration Act, 1940.

¹⁶ Arbitration and Conciliation Act, 1996, Preamble.



governed not to act arbitrarily, capriciously or a manner of misconduct upon their actions and behaviour.¹⁷

Why Arbitration?

Arbitration is a process of dispute resolution in which a neutral third party (which is an arbitrator) renders a decision after a hearing at which both parties have an opportunity to be heard whereby the disputing parties select the arbitrator who has the power to render a binding decision¹⁸, which can also be understood as an arbitral award.

The word “Arbiter” was originally used as a non-technical duty of a person to whom controversy was referred for decision irrespective of any law.¹⁹ In this manner the word has been associated to a specialized term of an individual chosen regarding a set up framework for neighbourly assurance of disagreements which although not being a judicial practice is directed by legal stature.²⁰

As also in case of *Booz Allen and Hamilton Inc v. SBI Home Finance Ltd.*²¹ the Supreme Court of India has held that not all the disputes arising between parties are arbitrable in nature of which a few are; criminal cases, guardianship matters, matters pertaining to patents, trademarks, copyright and likewise. Arbitration is thus a framework applicable to a set of individuals to abide by the award passed by an arbitrator in a legally

implacable manner similar to the set of arrangements done by the courts.

In *Guru Nanak Foundation v. Rattan Singh and Sons*²² D.A. Desai, J. observed that:

“Interminable, time consuming, complex and expensive Court procedures impelled jurists to search for an alternative... However, the way in which the proceedings under the Act are conducted and without exception challenged in Courts, has made Lawyers laugh and legal philosophers weep. Experience shows and law reports bear ample testimony that the proceedings under that Act have become highly technical accompanied by unending prolixity, at every stage providing a legal trap to the unwary.

CHAPTER 2: TIMELINE OF OBJECTIVE & PURPOSE OF ARBITRATION LAWS

The Arbitration Act, 1940

The framers of the 1940 Act while re-enacting the provisions of the Act of 1899, or of the Code of Civil Procedure, 1908, relevant to arbitration took the opportunity of drawing upon the (English) Arbitration Act, 1934. The Act of 1940 is an Act to consolidate and amend the law relating to arbitration. It is, therefore intended to be a complete code of the law.²³

The new Act was drafted taking the UNCITRAL Model Law on International

¹⁷ Youth Forum, *Need for Arbitration in India* (5th July 2014) <<http://youthforum.co.in/need-of-arbitration-in-india/>> assessed on 25th October, 2020

¹⁸ Black’s Law Dictionary (6th ed)

¹⁹ Russell on Arbitration (22nd ed., 2003) (page- 362)

²⁰ Visheshdahiya, *Alternative Dispute Redressal Methods*

<<https://www.coursehero.com/file/52749367/ADR-1pdf/>> assessed on 25th October, 2020

²¹ (2002) Civil-Appeal No. 5440

²² 1982 SCR (1) 842.

²³ The Arbitration Act, 1940, Statement of Object and Purpose



Commercial Arbitration and Conciliation Rules, as the basis. The emphasis under the Act has been to accord primacy to resolution of disputes through arbitration and to reduce the intervention of the courts in such proceedings.²⁴

Arbitration and Conciliation Act, 1996

Preliminarily, The Arbitration and Conciliation Act of 1996 was carved out with an objective of consolidating and amending the law relating to domestic arbitration, international commercial arbitration, enforcement of foreign arbitral awards and to define the law relating to conciliation.²⁵ The said goals were proposed to be given impact by comprehensively covering international commercial arbitration and conciliation as likewise domestic arbitration and conciliation by making arrangements for an arbitral strategy, which is impartial, responsive, productive and fit for addressing the requirements of the particular arbitration. The Act came into force on 25th January 1996 and its notable features are that of minimalizing judicial intervention and reducing the grounds of challenge to the award so passed. The object of the Act is to ensure speedy decision of the disputes between the parties.²⁶ As such it is to abridge administrative role of the courts by

obliterating different stages and procedures through which the courts require to go through with the goal that the object of expedient resolution of dispute is along these lines effectively accomplished.²⁷

However, because of several reasons, the 1996 Act failed to achieve its objectives in the first 15 years of its operation.²⁸ As in case of *Bhatia International v Union of India*²⁹, Supreme Court in its judgement observed, “the said act does not appear to be a well drafted legislation.”³⁰

This ushered in an era of uncertainty in India’s arbitration jurisprudence as the answer largely depends on- (i) the seat of arbitration and curial law, (ii) the law applicable to the arbitration agreement and (iii) the law applicable to the substantive contract.³¹

Subsequently in case of *Videocon Industries Ltd. v. Union of India & Anr.*³² the Supreme Court upheld the judgement of *Bhatia International v Bulk Trading S.A.*³³. However, with the judgement pronounced by the Apex Court in case of *Bharat Aluminium Co. v Kaiser Aluminium Technical Services, Inc.*³⁴ (ref. as BALCO) re-established the decision of *Bhatia’s Case* and clarified the

²⁴ A. Ramakrishna v. Union of India 2004 (3) Raj 554 (AP).

²⁵ Arbitration and Conciliation Act, 1996, Statement of Object and Purpose

²⁶ Kohinoor Creations v. Syndicate Bank, 2005 (2) Arb LR 324: 2005 (2) Raj 622 (DB) (Del.)

²⁷ Western Shipbreaking Corps. v. Clare Haven Ltd., 1998 (Supp) Arb LR 53.

²⁸ Badrinath Srinivasan, *Failures in Law-Making: The Case of Arbitration Law in India* (20th December, 2016)

< https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2887417> assessed on 25th October, 2020

²⁹ [2002] 4 SCC 105

³⁰ *Ibid*

³¹ Olga Boltenko and Kartikey Mahajan, *How the Reliance Saga brought clarity to the applicability of Bhatia International* (30th November, 2015) <<http://arbitrationblog.kluwerarbitration.com/2015/11/30/how-the-reliance-saga-brought-clarity-to-the-applicability-of-bhatia-international/>> assessed on 25th October, 2020

³² [2011] 6 SCC 161

³³ [1992] 3 SCC 551

³⁴ [2012] 9 SCC 552



loopholes which were upheld in case of *Videocon Industries*.

The 1996 Act, thus did not operate in a way it was expected and its objective of minimizing supervisory role of courts largely remained unfilled³⁵ with constant uncertainty induced by the Supreme Courts by rendering conflicting decisions.

The Arbitration and Conciliation (Amendment) Act, 2015

With the advent of Law Commission of India's 246th report in 2014³⁶, several changes were promulgated and the amendments to the original legislation were notified in the year 2015. The 2015 Act had brought structural changes to the arbitration law.³⁷

The 2015 Act has brought structural changes to the arbitration law, with the objective of; amending definition of 'court' in case of international commercial arbitration, to provide for neutrality of arbitrators, to provide application of challenging awards shall be disposed by courts within one year.³⁸ This thus evidently shows how the objectives of the Arbitration and Conciliation (Amendment) Act, 2015 does not seem to address the "defects" in the statute; rather it

mainly corrects the misinterpretations and improves upon the 1996 Act.³⁹

The Arbitration and Conciliation (Amendment) Act, 2019

The Arbitration and Conciliation (Amendment) Act, 2019 which amended the 1996 Act, came into force on 9th August 2019 with the assent of the President.⁴⁰ The objective of this amendment act can broadly be stated to make India a hub of arbitration both in terms of domestic and international commercial arbitrations. The supplementary objectives of the same act are; establishing of an independent body called the Arbitration Council of India, power of judicial authorities to refer parties to arbitration in International Commercial Arbitration and time limit of arbitral awards.⁴¹

Contradictory to the objective of incorporation of the legislation

When at one end, the amendment act regulates and eases the process of commercial arbitration, by providing extensive scope of appeal, on the other hand the act clearly widens the scope of courts interference in matters of commercial arbitration. Although with the advent of Arbitration Institutions the act structuralizes the process and is a step forward for the nation, the act forces India to take two steps back as an arbitration friendly jurisdiction.⁴²

³⁵ Dr Venkata Gogiseti, *Chaning Trends of International Commercial Arbitration in India* (20th May, 2019) <<https://www.ciarb.org/resources/features/changing-trends-of-international-commercial-arbitration-in-india/>> assessed on 25th October, 2020

³⁶ Law Commission of India 246th report (2014)

³⁷ A. K. Ganguli, *The Proposed Amendments to the Arbitration and Conciliation Act, 1996- A Critical Analysis* (Vol. 45, No. 1, January-March 2003) (Indian Law Institute)

<<https://www.jstor.org/stable/43952405>> assessed on 25th October, 2020

³⁸ Arbitration and Conciliation Act 2015, Statement of Object and Purpose

³⁹ Arbitration and Conciliation Act, 1996

⁴⁰ Arbitration and Conciliation Act 2019, Preamble

⁴¹ Arbitration and Conciliation Act 2019, Statement of Object and Purpose

⁴² *Emperor's New Clothes? Arbitration and Conciliation (Amendment) Bill, 2019* (18 July 2019)

<<http://www.nishithdesai.com/information/news-storage/news-details/article/emperors-new-clothes->



Not only this, but also the primary purpose of incorporation of the legislation which was to give speedy recourse to settlement of disputes amongst parties, to keep minimal intervention of judicial courts and to combat the piling of cases gets defeated with the application of 2019, amendment act.

CHAPTER 3: COMPARATIVE ANALYSIS OF 1940 AND 1996 ARBITRATION FRAMEWORK

Arbitration Agreement

The definition under 1940 act was “arbitration agreement” means a written agreement to submit present future differences to arbitration, whether an arbitrator is named therein or not”. However, the developments needed a definition, which is descriptive in nature. It did not mention the essentials of the valid arbitration agreement. A contract may not explicitly talk about arbitration however; the intention behind the contract needs to be seen. The definition must be of nature that the minimum interference of court in interpretation is there and can be done with the help of definition.

The act of 1996 came up with new section, which is considered as entry gate of the arbitration. An arbitration agreement is clearly an agreement whereby the individuals to the pact agree to submit to arbitration all or certain arguments, which have emerged or which may emerge in a dispute. The arbitration agreement may be in the form of a separate agreement or may be incorporated in

the form of an arbitration clause in the primary contract.⁴³

Arbitrator’s power to decide jurisdictional questions

Under the pre-1996 Act regime, the court only has the power to decide questions relating to the extent of jurisdiction of the arbitrator.⁴⁴ Even if the arbitrator finds that the arbitration agreement is valid, such a finding cannot bind the parties, if later the court finds that the arbitration agreement is invalid.⁴⁵

Under the new act, the arbitral tribunal can rule on its own jurisdiction, including ruling on any objections with respect to the existence or validity of the arbitration and for that purpose an arbitration clause which forms part of a contract is treated as an agreement independent of the other terms of the contract⁴⁶

Appointment of Arbitrator(s)

Under the act of 1940, the arbitrator can be appointed by the way of: (1) Agreement, (2) As per procedure in the agreement, (3) Failure to comply with the terms of the agreement, the aggrieved party had to approach the Jurisdictional Civil Courts under either Sec.8 or under Sec.20⁴⁷ to get an Arbitrator, Arbitrators or Umpire, appointed.

The act of 1996 allows parties determine the number of arbitrators, however there cannot exist an arbitral tribunal with an even

arbitration-and-conciliation-amendment-bill-2019.html> assessed on 25th October, 2020

⁴³ K.K. Modi v. K.N. Modi, 1998 (3) SCC 573; Bihar State Mineral Development Corporation v. Encon Builders (India) Pvt. Ltd. (2003) 7 SCC 118.

⁴⁴ Renuagar Power Co Ltd. v. General electric Co AIR 1985 SC 1156

⁴⁵ Clive Mills Ltd v. Swalal Jain AIR 1957 Cal 692.

⁴⁶ Arbitration and Conciliation Act 1996 sec 16(1)(a).

⁴⁷ Arbitration Act, 1940 sec 20.



number⁴⁸ of arbitrators⁴⁹. The arbitrator(s) may be named in the agreement or the parties may nominate them themselves or through any other person or institution as and when the dispute arises. Where the parties fail to agree on the name of the arbitrator the appointment can be made, upon request of a party, by the Chief Justice of the High Court or his designate.⁵⁰

Power of Arbitrator

The act of 1940 gave arbitrator power: administer oath to the parties and witnesses appearing; state a special case for the opinion of the Court on any question of law involved, or state the award, wholly or in part, in the form of a special case of such question for the opinion of the Court; make the award conditional or in the alternative; correct in an award any clerical mistake or error arising from any accidental slip or omission; administer to any party to the arbitration such interrogatories as may, in the opinion of the arbitrators or umpire, be necessary.⁵¹

The 1996 gave wide powers to arbitrator or arbitral Tribunal, while reducing the intervention of court. They have power take an interim measure,⁵² power to proceed to *ex-parte* i.e. in the favour of one party if another party contravenes any provision of this act,⁵³ power to appoint one or more experts to report to him on a specific issue, if he finds it necessary in any case.⁵⁴

Time limit

The 1940 Act there was a time limit of four months within which the arbitrator has to make the awards. However, this time limit used to be extended by the arbitration tribunal with the agreement of the parties and failing such agreement, by the court. This resulted in delay. The time limit for making awards has been deleted under the 1996 act.

Reasoned award

Under the act of 1940, requirement of reasons in the award, unless so required by the arbitration agreement in any other statutory provision, was not essential for the validity of an award. The court in *Raipur Development Authority v. Chokhamal Contractor*⁵⁵ rejecting the demand held that “Having given our careful and anxious consideration to the contentions urged by the parties we feel that law should be allowed to remain as it is until the competent legislature amends the law. In the result we hold that an award passed under the Arbitration Act is not liable to be remitted or set aside merely on the ground that no reasons have been given in its support except where the arbitration agreement or the deed of submission or an order made by the Court such as the one under section 20⁵⁶ or section 21⁵⁷ or section 34⁵⁸ of the Act or the statute governing the arbitration requires that the arbitration or the umpire should give reasons for the award.”

However, the present situation is changed. The Supreme Court recently held that “The

⁴⁸ M.M.T.C. Ltd. v. Sterlite Industries (I) Pvt. Ltd., AIR 1997 SC 605.

⁴⁹ Arbitration and Conciliation Act 1996 sec 10.

⁵⁰ Arbitration and Conciliation Act 1996 sec 11.

⁵¹ Arbitration Act 1940, sec 13.

⁵² Arbitration and Conciliation Act 1996, sec 17.

⁵³ Arbitration and Conciliation Act 1996, sec 25.

⁵⁴ *Ibid.*

⁵⁵ 1989 SCR (3) 144.

⁵⁶ Arbitration Act, 1940 sec 20.

⁵⁷ Arbitration Act, 1940 sec 21.

⁵⁸ Arbitration Act, 1940 sec 34.



mandate under Section 31(3)⁵⁹ of the Arbitration Act is to have reasoning which is intelligible and adequate, that, when we consider the requirement of a reasoned order three characteristics of a reasoned order can be fathomed and are: proper, intelligible and adequate”.⁶⁰

Enforcement of Award

Under the 1940 Act, courts played a substantial role in the arbitration process. Perhaps more importantly, the 1940 Act required that an arbitral award be filed in a court before it could become binding upon the parties.⁶¹

However, under the act of 1996, an arbitral award shall be final and binding on the parties and persons claiming under them respectively⁶², such award shall be enforced in accordance with the provisions of the Code of Civil Procedure, 1908 (5 of 1908), in the same manner as if it were a decree of the court.⁶³

Setting aside Arbitral Award

The only ground is setting aside an award were those in section 30 of the Indian Arbitration Act, 1940, namely; Misconduct of the arbitrator or proceedings (ii) Award being made after superseding of the arbitration or the proceedings having become invalid and (iii) the award being improperly procured or otherwise invalid. A non-speaking award was, therefore difficult to assail.

The act of 1996, provides a detailed list when the arbitral award can be set aside: The party is under some incapacity; Arbitration agreement between the parties is not valid; Lack of notice of appointment of arbitrator or of holding of arbitral proceeding; Arbitral award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration or it contains decisions on matters beyond the scope of submission of arbitration; Composition of arbitral tribunal or arbitral procedure was not in accordance with the agreement of the parties; The Court finds that the subject matter of the dispute is not capable of settlement by arbitration under the Law; The Award is in conflict with the Public Policy.⁶⁴

Appeal

Under the act of 1940, an order is appealable: superseding an arbitration; on an award stated in the form of a special case; modifying or correcting an award; filing or refusing to file an arbitration agreement; staying or refusing to stay legal proceedings where there is an arbitration agreement; setting aside or refusing to set aside an award.

The act, with modifying the language provides an appeal can be filled against an order of court: refusing to refer the parties to arbitration under section 8;⁶⁵ granting or refusing to grant any measure under section 9;⁶⁶ setting aside or refusing to set aside an arbitral award under section 34⁶⁷. Appeal against an order of the arbitral tribunal: accepting the plea referred to in sub-section

⁵⁹ Arbitration and Conciliation Act 1996, sec 31(3).

⁶⁰ M/S Dyna Technologies Pvt. Ltd. v. M/S Crompton Greaves Ltd, Civil Appeal No. 2153 Of 2010.

⁶¹ Arbitration Act, 1940 sec 31

⁶² Arbitration and Conciliation Act, 1996 sec 35.

⁶³ *Supra* Note 5.

⁶⁴ Arbitration and Conciliation Act, 1996 sec 34.

⁶⁵ Arbitration and Conciliation Act, 1996 sec 8.

⁶⁶ Arbitration and Conciliation Act, 1996 sec 9.

⁶⁷ Arbitration and Conciliation Act, 1996 sec 34.



(2) or sub-section (3) of section 16;⁶⁸ or granting or refusing to grant an interim measure under section 17.⁶⁹

CHAPTER 4: CONCILIATION AND FOREIGN AWARDS

Conciliation

Arbitration act, 1940 was an only dealing with domestic arbitration. Conciliation was afforded an elaborate codified statutory recognition in India with the enactment of the Arbitration and Conciliation Act, 1996 and Part III of the Act comprehensively deals with conciliation process in general. The chapter on conciliation under the Arbitration and Conciliation Act, 1996 is however, essentially based on the UNCITRAL Conciliation Rules, 1980.⁷⁰

Sections 61 to 81 of the said Act of 1996 provide the procedure for the settlement of the disputes by conciliation. The said Act of 1996 does not define 'conciliation'. However, section 67 (1) of the said Act of 1996 impliedly defines it as the assistance given to the parties in an impartial manner in their attempt to reach an amicable settlement of their dispute.⁷¹

Section 62 of the said Act of 1996 provides that the party desiring to initiate conciliation may send written invitation to the other party to conciliate briefly identifying the subject of dispute. The conciliation proceeding starts when the other party accepts the invitation. If the other party refuses the invitation, there will be no conciliation proceedings. If the

other party does not wish to accept invitation, he may refuse it or if party giving invitation does not receive reply within 30 days from the date, he sent invitation or within such time as stipulated in the invitation, he may elect to treat this as rejection of an invitation to conciliate.⁷²

The conciliator is supposed to assist the parties in an independent and impartial manner in their attempt to reach an amicable settlement of their dispute.⁷³ The conciliator may conduct conciliation proceedings in such a manner as he considers appropriate, taking into account the circumstances of the case and the wishes of the parties. The conciliator has wide procedural discretion in shaping the dynamic process towards a settlement.⁷⁴ The conciliator is not bound by the Code of Civil Procedure, 1908 or the Indian Evidence Act, 1872.⁷⁵ He is to be guided by principles of objectivity, fairness and justice giving due consideration to the rights and obligations of the parties, the usages of the trade concerned and the circumstances surrounding the dispute, including any previous business practices between the parties.⁷⁶

A successful conciliation proceeding concludes with the drawing and signing of a conciliation settlement agreement. The signing of the settlement agreement by the parties, on the date of the settlement agreement terminates conciliation proceedings.

⁶⁸ Arbitration and Conciliation Act, 1996 sec 16.

⁶⁹ Arbitration and Conciliation Act, 1996 sec 17.

⁷⁰ P.C. Rao, "Arbitration and Conciliation Act, 1996: The Context" in P.C. Rao and William Sheffield (Eds.), *Alternative Dispute Resolution 82* (Universal Law Publishing Company Pvt. Ltd., Delhi, 1997).

⁷¹ Arbitration and Conciliation Act, 1996 sec 67(1).

⁷² Arbitration and Conciliation Act, 1996 sec 62.

⁷³ Arbitration and Conciliation Act, 1996 sec 65.

⁷⁴ P.M. Bakshi, "Conciliation for Resolving Commercial Disputes", 19(1) *Comp. L. J.* (1990); See also *Haresh Dayaram Thakur v. State of Maharashtra*, AIR 2000 SC 2281.

⁷⁵ Arbitration and Conciliation Act, 1996 sec 66.

⁷⁶ Arbitration and Conciliation Act, 1996 sec 67.



Foreign Awards

The new act incorporated implementation of foreign award. As already discussed the arbitration act, 1940 was only for enforcement of domestic award, the new act have provisions to give effect to be given to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, done at New York, on the tenth day of June, 1958, to which India is a party and for purposes connected therewith.⁷⁷ It also incorporated provisions with respect to Geneva Convention Awards as India was a State signatory to the Protocol on Arbitration Clauses and to the Convention on the Execution of Foreign Arbitral Awards.⁷⁸

New York convention incorporated under Part- II, Chapter 1 is comprehensively inspired from The Foreign Awards (Recognition and Enforcement) Act, 1961. Sections 44 to 52 of the Arbitration and Conciliation Act, 1996 deals with foreign awards passed under the New York Convention. There are two pre-requisites for enforcement of foreign awards under the New York Convention. These are:⁷⁹

1. The country must be a signatory to the New York Convention.
2. The award shall be made in the territory of another contracting state which is a reciprocating territory and notified as such by the Central Government.

If Court is satisfied that the foreign award is enforceable under this Chapter, the award shall be deemed a decree of that Court.⁸⁰

Geneva Convention incorporated under Part-II, Chapter 2 is comprehensively inspired from The Arbitration (Protocol and Convention) Act, 1937. Sections 53 to 60⁸¹ of the Arbitration and Conciliation Act, 1996 deals with foreign awards passed under the Geneva Convention.

Equally, enforcement of foreign awards should take place as soon as possible if India is to remain as an equal partner, commercially speaking, in the international community.⁸² However, enforcement of foreign award would be refused under Section 48(2)(b)⁸³ only if such enforcement would be contrary to (1) fundamental policy of Indian law; or (2) the interests of India; or (3) justice or morality.⁸⁴

CHAPTER 5: NECESSITY TO AMEND- THE ARBITRATION AND CONCILIATION (AMENDMENT) ACT, 2019

Section 11: Appointment of Arbitrators

Section 11⁸⁵ has necessarily widened the scope concerning intervention of courts in appointing of arbitrators which was earlier only limited to the court's introspection in the matters of existence of arbitration agreements⁸⁶ by virtue of Section 11(6-A)⁸⁷. The Amendment now extends the scope of court to appointing arbitrators by creating

⁷⁷ Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958.

⁷⁸ Geneva Convention, 1927.

⁷⁹ Arbitration and Conciliation Act, 1996 sec 44.

⁸⁰ Arbitration and Conciliation Act, 1996 sec 49.

⁸¹ Arbitration and Conciliation Act, 1996 sec 53-60.

⁸² *Kandla Export Corporation v. M/S. Oil Corporation*, Civil Appeal No. 1661-1163 of 2018.

⁸³ Arbitration and Conciliation Act, 1996 sec 48(2) (b).

⁸⁴ *Shri Lal Mahal Ltd. v. Progetto Grano Spa*, 2013 (3) ARBLR 1 (SC).

⁸⁵ Arbitration and Conciliation (Amendment) Act 2019, sec 11

⁸⁶ *Duro Felguera SA v Gangavaram Port Limited* (2017) 9 SCC 729

⁸⁷ Arbitration and Conciliation (Amendment) Act 2019, sec 11(6-A)



vacuum in way of omitting the said clause and leaving it on the interpretation of courts to decide when and in what matters should the arbitrators be appointed.

Not only this but also the amendment act introduced section 11(3A)⁸⁸ by virtue of which the Supreme Court of India and the High Courts shall have the power vested in them to designate the Arbitral Institutions, to appoint arbitrators in cases where parties to the agreement fail to do so. Although inspired from Singapore's International Arbitration Act⁸⁹ and Hong Kong's Arbitration Ordinance⁹⁰, this provision misses an important aspect which is present in both of these legislations i.e. only one Arbitral Institution is designated the authority of appointing authority.⁹¹ Also, the provision extends to elaborating the fact that these institutions shall be so graded by the Arbitration Promotion Council of India however, no clarity in terms of grading has been further promulgated by the act leaving it to the discretion and understanding of the courts ultimately broadening the periphery of judicial intervention.

Section 42-A: Confidentiality of Information

The newly inserted section, explains how confidentiality needs to be observed in terms of disclosure of arbitral awards as the same shall be disclosed only when needed for the intent of its implementation and

enforcement.⁹² This section however repeals the ICC (India International Chambers of Commerce) recent release on updates to Parties and Arbitral Tribunals on the conduct of Arbitration under the ICC Rules of Arbitration⁹³ with effect from 1 January 2019,⁹⁴ When the section on one hand preserves the confidentiality of awards, on the other, it obstructs by not comprehensively interpreting as to how and on what grounds shall the arbitral institutions disclose such awards.

Section 45: Power of Judicial Authority to refer parties to arbitration

The section 45⁹⁵ provides for when can parties to arbitration; by request of one of the party or any person claiming through under him can the judiciary refer parties to arbitration. However, the recent amendment announced the phrase 'unless it *prima facie finds*' in addition to the already existing phrase 'the said agreement is null and void, inoperative or incapable of being performed' As in case of *Shin-Estu Chemical Co. Ltd v Aksh Optifibre Lts & Anr.*⁹⁶ the Supreme Court observed that, to take final and determinative approach, it would result in proceedings being prolonged at an early stage, increasing costs and uncertainty for parties. Nevertheless, the observation of courts appears to be undermined with introduction to section 45 in the legislation as it creates a lacuna in giving a proper

⁸⁸ Arbitration and Conciliation (Amendment) Act 2019, sec 11(3A)

⁸⁹ Singapore's International Arbitration Act, 2019

⁹⁰ Hong Kong's Arbitration Ordinance, 2011

⁹¹ Shubhiksh Vasudev, *The 2019 Amendment to the Indian Arbitration Act: A Classic case of one step forward two steps backwards?* (25th August, 2019) <[http://arbitrationblog.kluwerarbitration.com/2019/08/25/the-2019-amendment-to-the-indian-arbitration-](http://arbitrationblog.kluwerarbitration.com/2019/08/25/the-2019-amendment-to-the-indian-arbitration-act-a-classic-case-of-one-step-forward-two-steps-backward/)

<http://arbitrationblog.kluwerarbitration.com/2019/08/25/the-2019-amendment-to-the-indian-arbitration-act-a-classic-case-of-one-step-forward-two-steps-backward/> assessed on 26th October, 2020

⁹² Arbitration and Conciliation (Amendment) Act 2019, sec 42-A

⁹³ ICC Rules of Arbitration, 2019, Article 34

⁹⁴ *Supra* Note 91

⁹⁵ Arbitration and Conciliation (Amendment) Act 2019, sec 45

⁹⁶ [2005] 7 SCC 734



reasoning for such references made by the parties to the judiciary.⁹⁷

Schedule 8: Qualifications and Experience of Arbitrators

The schedule 8 deals with the qualifications and experience of arbitrators which has been recently added to the legislation⁹⁸. Prior to the insertion of the schedule, any person could be appointed as an arbitrator even with or without his expertise in the profession of law or any limb thereto as the case may suggest.

With the advent of this, the scope of foreign arbitrators being appointed by the parties in case of either domestic or international commercial arbitration gets curtailed as the qualification suggests him to be of Indian nationality by virtue of schedule 8. Not only this but also, this addition contradicts with section 11(9)⁹⁹ which states how in case of international arbitration, the appointment of a sole arbitrator or a third arbitrator maybe from any nationality other than the nationality of the parties to the agreement. This becomes difficulty when the intended arbitrator to be appointed has to qualify the give list of criteria as mentioned in Schedule 8.

CHAPTER 6: CONCLUSION

Concludingly, the 1996 Act appeared to conquer the insufficiencies and pitfalls of the 1940 Act which prevailed during pre-independence era. The subsequent enactment intended to unite development with coherence and custom of the then prevailing dispute mechanism. In any case, in genuine practice the experience exhibited that the

expectations about the arbitration law were misrepresented and the trust about its adequacy stood penetrated because of the delayed court procedures.

The 1940 Act neglected to accomplish the ideal destinations and the whole cycle there under became litigation adaptive. Court's interference stood excessively regular and was looked for nearly at each phase of the arbitral procedures.

However, the road to framing and legislating of the Arbitration Mechanism in India continually stood to be a challenge for it to stay true to its purpose of enactment. The introduction of 2015 Act noteworthy not only amended some portions of the 1996 Act, but also it stood to emerge as providing a clarity on the precedent legislation. This strengthened the evident loopholes of the 1996 Acts failure of execution and simplified its application in complex circumstances. This step proved to be a progressive foot forward but sooner the need of further amendment for more multifaceted circumstances felt.

With the advent of the Arbitration and Conciliation (Amendment) Act, 2019 and major lacuna pertaining in application of the laws laid down in the legislation, the amendment can be said to raise 'glaring concerns which require corrections' as in words of Justice Rohinton Fali Nariman and with the observation made in this article, there is an urgent need of amending the 2019 Act so as to make it eligible of delivering the purpose it intends to be adopted.

⁹⁷ *Supra* Note 91

⁹⁸ Arbitration and Conciliation (Amendment) Act 2019, schedule 8

⁹⁹ Arbitration and Conciliation (Amendment) Act 2019, sec 11(9)



Thus, to conclude the viability and accomplishment of these changes will at last rely upon how these corrections are actualized by the Central Government and deciphered by legal executive and judiciary in the long run to prove to be beneficial to a larger public interest.

