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"Process of Arbitration in India: A beginner's guide"

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Abstract

The Indian judiciary is plagued with a plethora of cases on a day-to-day basis, and this institution is forced to deal with these avalanches of lawsuits. The judicial wing is oftentimes said to be inefficient and slow in its approach. Since the inception of trade practices, it could be observed that when two people decided to trade or enter into a transaction with each other, there would always be a possibility that some form of misunderstanding would creep in. With evolved times and with an evolved legal system, the legal mechanisms were viewed as a medium through which conflicts could be resolved. However, litigation was seen as one of the only means of settling out disputes, arising out of complex backgrounds. Nonetheless, other resolution mechanisms have been arising to effectively resolve disputes. Arbitration is even viewed as the most common forms of alternatives to litigation. It has time and again been hailed as more effective and less time consuming than the formal litigation. Arbitration has seemed to have opened the doors for other forms of justice systems. Arbitration is also less rigid as opposed to the traditional litigation system. The aim of this paper, hence, would be to analyse the procedures involved during the process of arbitration.

***Keywords*- Arbitration, Alternate Dispute Resolution, Statement of claims, Arbitral awards, Statement of defences**

Introduction

A layman may be tormented and ambushed at the thought of experiencing the convoluted and cumbersome rules and procedures of the customary and old fashioned mechanism of litigation. The judiciary in India since time immemorial is been accused of excessive red-tapism. India since Independence has witnessed various reforms in the judicial sector but it is still plagued with several problems. Owing to these endless grievances, new and better forms of dispute resolution are coming to the rescue. All the civil disputes can be settled at any of the following two forums i.e. Courts and Tribunals, or Alternate Dispute Resolution (ADR), it is inclusive of all the mechanisms which assist outside court settlement these include includes Mediation, Conciliation, and Arbitration. Looking at the condition of the formal mode of settlement, it will be alluring to choose ADR for its various benefits such as Cost effectiveness, No appeals and Timely results. The concept of Alternative Dispute Resolution (ADR) emerged in the Indian context in the late 1990s to deal with the avalanche and the barrage of cases that were cropping up. India now has a dedicated law on ADR for Example the Arbitration and Conciliation Act, 1996 which is on similar lines with the model law on International Commercial Arbitration in 1985 by the United Nations Commission on International Trade Law [1](UNCITRAL). These model rules are committed to effective and

[1] Available at: http://www.uncitral.org/ (last viewed on Dec. 15, 2019).

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productive resolution of International disputes. The Indian law on Arbitration i.e. The Arbitration and Conciliation Act 1996 is focussed on mediation, creation of grants, creation of courts, technique for intervention , response against arbitral awards, conclusion of arbitral honours and their implementation, requirement of outside honours and so forth. The aim of this paper, hence, would be to analyse the procedures involved during the process of arbitration.

Arbitration in India is opted when conflict arises between two parties, who are bound by a legally valid contract. The precondition of Arbitration is that the parties have an Arbitration Agreement, which highlights and signifies the assent of the parties to undergo arbitration proceedings to resolve any conflict that might arise. The mechanism of arbitration, in India, is governed by the Arbitration and Conciliation Act of 1996[2].The aforementioned Act is said to have found its base predominantly on the UNCITRAL Model Law. The Arbitration process starts with the drafting of the arbitration agreement specifying that if a dispute arises the parties would opt for arbitration for dispute resolution. Alternatively, a special contract can signed between the parties. That is, this declaration could be made even in the form of a clause, instead of drafting a new contract altogether. When a dispute arises, the Non - defaulting party can send a notice to the defaulter and this marks the beginning of the arbitration proceedings. Once the invocation of the arbitration has been completed, the two parties to the arbitration proceedings would undertake in the activity of appointing arbitrators according to the procedure established by the arbitration agreement. It means that the parties to the dispute have a free will to decide on the number of arbitrators they would want. But the number should not be an odd one. In case they fail to appoint arbitrators, only a single arbitrator would be appointed to conclude the proceedings. The section 11 of the Arbitration and Conciliation Act of 1996[3] empowers the parties to appoint arbitrators with court's assistance. The court's assistance is provided so as to expedite the whole process of appointing arbitrators and to avoid any inadvertent delays that are commonplace in the conventional forms of litigation. After the invocation of the arbitration is complete, the party who is resorting to the said proceedings is mandated to file a statement of claims, which contains a statement of facts, which briefly explain the contention at hand. Moreover, the statement of claims also contains the relief that the party would like to receive due to the breach or the non-performance of the contractual obligations of the defaulter. It is interesting to note that the statement of claims could be amended at any time during the proceedings, unless agreed otherwise by the parties of the arbitration. The statement of claims, so filed, must be sent to the defaulter. In response to the statement of claims, the defaulter files a statement of defence, wherein, he/she refutes the claims made by the applicant or the invoker of the arbitral proceedings. This is done with sufficient evidence to prove the refutations. The arbitral tribunal then hears out each party and scrutinises evidence provided in their favour closely. After sufficient deliberation, the arbitral tribunal passes an Award, which is

[2] The Arbitration and Conciliation Act, 1996.
[3] The Arbitration and Conciliation Act, 1996, s.11.

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essentially the decision arrived at by the tribunal. This 'Award' is often seen as analogous to a judgement passed by the courts of law. Once the Award has been passed, the party, in whose favour the award has been passed, has to ensure that he/she files an enforcement order so as to make certain that the Award pronounced is being implemented sufficiently. This is done with the help of a good arbitration lawyer.

The Section 34 of the Arbitration and Conciliation Act of 1996[4] lays out various grounds on which an Award that was pronounced could be set aside. The sub section 3 of the section 34 of the Arbitration and Conciliation Act of 1996[5] lays down these grounds. For instance, an Award could be set aside in case the party that is making an application for invalidating an Award if the said party could prove that either party, who was subjected to the arbitral proceedings was incapable of being a party to the said proceedings. That is the person who was subjected to the proceedings was mentally incapable of being a party to such arbitral proceedings. Another ground for the invalidation of an arbitral Award could be on the ground that the arbitration agreement, in itself is invalid. That is, the DE legitimization of the arbitration agreement, in itself, renders the Award pronounced to be void. Furthermore, another ground for the setting aside of an arbitral Award, could be on the ground that the party making the said application for the rejection of Award, was not given a proper notice about the commencement of arbitral proceedings. Additionally, the party making such application could also prove that he/she had not received a proper intimation about the appointment of an arbitrator. Furthermore, the party making the said application could also prove that he/she was not able to make his/her case, owing to the miscommunication, thereby, going against the principles of natural justice. Moreover, an Award, so pronounced, could be set aside if it could be proved that the dispute that was resolved, through the means of arbitration was beyond the scope of the arbitration agreement. That is, the dispute does not fall within the terms laid out in the terms of the arbitration agreement. In case there is a part of the decision that does not fall within the ambit of the arbitration agreement, only that part of the decision would be struck down; the remaining decision would be implemented with full effect. Another major factor that could invalidate an Award pronounced could be that the composition of the arbitral tribunal was not according to the one stipulated by the arbitral contract. Additionally, the arbitral proceedings not being in accordance with the procedure established in the arbitration agreement. In such instances, the Award, so pronounced would be set aside. On top of that, the arbitral Award pronounced could also be struck down by the Courts on various grounds. For instance, an arbitral Award could be abrogated in case the subject matter of the contention of the arbitral proceedings at that point of time was incapable of being settled by the law. Moreover, the courts of law could declare an Award, so pronounced as null and void if the decision is in the contravention of public policy of India. To elaborate, the decision or the Award pronounced was in contravention with the principle of equity. That is, the decision was brought forth on the grounds of corruption or any other

[4]The Arbitration and Conciliation Act, 1996, s.34
[5] *Supra* note 1 at 4.

means of misfeasance. The courts may also adjourn proceedings in case the party challenges the arbitral proceedings. The term 'public policy' had been interpreted along similar lines in the case of Renusagar Power Co. Ltd v. General Electric Co[6] , it was held that public policy in cases of Arbitration was anything that was not against the fundamental policy of India, and something that is not against the principles of morality. It is interesting to note that the constitutional validity of the Section 34 was challenged in the case of TPI vs Union of India wherein, the petitioner of the case had asserted and maintained that an arbitral award, must be subjected to challenge and if this provision for challenging were not provided, the Section 34 would be constitutionally invalid. However, the Court held that the subject matter was not within their scope for judicial review.

The subsection 3 of the section 34 of the Arbitration and Conciliation Act of 1996[7] lays down a limitation period, beyond with a party cannot challenge the arbitral Award, laid down, according to the Section 31 of the Arbitration and Conciliation Act of 1996[8]. That is, the application for the setting aside of the arbitral Award cannot be made after three months of the actual pronouncement of the award. However, if the court is convinced that the party could not have made the application for challenging the award within the three months limitation period due to legitimate reasons, it may take into consideration an application of challenge even after the lapse of the 3-month limitation period. That is the court could extend the limitation period by 30 days if it is convinced that the party had a valid, legitimate reason for not being able to make an application within the 3-month limitation period. Moreover, in case the limitation period, under the Section 34(3)[9] has expired, the party could enforce the same through the Code of Civil Procedure of 1908[10]. Moreover, the Section 43 of the Arbitration and Conciliation Act of 1996[11] mentions that the Limitations Act of 1963[12] would be applicable for the instances of arbitration also, in the same way as it would be applicable for ordinary cases in a court of law. A superficial reading of the Arbitration and Conciliation Act of 1996[13] would enable us to reach a conclusion that the limitation period would commence on the mere delivery of the Award, which would be called a receipt, upon the said delivery. However, the Supreme Court held that the delivery has to be effective in order for it to be known as a receipt. As mentioned in the Act, the limitation period starts upon the receiving of the receipt. It has been made exceedingly clear that the civil proceedings that would arise out of the Limitations Act of 1963[14], would also commence in the presence of an arbitrator. It has been repeatedly iterated by many that the limitations, as available for the ordinary courts of law, must also be applicable for arbitral proceedings, for the sake of the

[6] Renusagar Power Co. Ltd v. General Electric Co, 1994 SCC Supl. (1) 644.
[7] The Arbitration and Conciliation Act, 1996, ss. 3, 34
[8] The Arbitration and Conciliation Act, 1996, s. 31
[9] *Ibid.*
[10] The Code of Civil Procedure, 1908.
[11] The Arbitration and Conciliation Act, 1996, s.43.
[12] The Limitation Act, 1963 (36 of 1963).
[13] *Supra Note* 1 at 4.
[14] *Ibid* at 8.

principles of equity and for the furtherance of the principles of justice and fairness.[15] Moreover, it has been iterated that since the Limitation Act of 1963 has laid out the limitation period for claiming actions under disputes that arise out of contract to be three years, anything in the arbitration agreement that is in contravention must be implied to be void to that extent. However, since the Arbitration and Conciliation Act of 1996[16], is a special Act, certain limitation clauses within the Act could have the overriding effect on the original limitation periods, as stipulated by the Limitation Act of 1963[17].

The lack of partiality and any forms of predispositions among the arbitrators is very essential to the process of arbitration to be carried. In fact, this standard against bias is essential in all judicial and quasi-judicial proceedings. However, this is most pertinent in arbitral proceedings because the arbitrators are appointed according to the contract written by the parties to the proceedings. That is, the arbitrators are appointed as per the discretion of the parties to the arbitration themselves. This could point to the fact that some form of predilections could inadvertently creep in. Hence, it must be ensured that the arbitrators, so appointed do not look into the individual interests of the parties and instead take into consideration the case at hand with no external influences whatsoever. That is, the arbitrators are to raise above the pre-existing relations that they might have with the parties involved. However, it should be pointed out that the Arbitration and Conciliation Act of 1966, does not lay down any said guidelines to ensure that there are no such biases. To tackle these issues, there was an amendment to the aforementioned act in the year 2015, which attempted to introduce a few guidelines to ensure that the arbitration proceedings were not commenced on the basis of malfeasance. This amendment further attempted to facilitate the principles of natural justice and upholding the fairness in the arbitral proceedings. For instance, the amendment to the Act had now added a provision to the Section 12(1) of the Arbitration and Conciliation Act[18] of 1996, which mandates the arbitrator, so appointed to disclose the relationship that he shares with the party of the arbitral proceedings. The past relationship held, will then be subject to a lot of scrutiny, to ensure that the relationship, so held shared by the arbitrator and the party would not influence and deviate the due course of the arbitral proceedings. The new amendment to the said Act also saw the inception of a new provision. This new provision was inserted within a new section, the Section 12(5) of the Amendment Act[19]. This section goes into depths and specifies the various grounds and conditions, which would render an arbitrator to be ineligible and incompetent to be an arbitrator of the arbitral proceedings. Additionally, it is pressing to note that the Section 15 of the Amended Act[20]empowers the parties of the arbitration to appoint a new arbitrator, in case the previous

[15] Dr. Anupam Kurlwal, Applicability of limitation act to arbitration proceedings: A critical study, 4 IJL 185 (2018).
[16] *Supra* note 1 at 4.
[17] I*d*. At 8.
[18] The Arbitration and Conciliation Act, 2015, ss.1, 12.
[19] The Arbitration and Conciliation Act, 2015, ss.5, 12.
[20] The Arbitration and Conciliation Act, 2015, s. 15.

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arbitrator was disqualified on the grounds of unfairness. The Arbitration and Conciliation Act, 2015, s. 15.

To conclude, arbitration, a mechanism under the umbrella of Alternative Dispute Resolution (ADR) has proved to be very effective in its approach. It has time and again proved to be a very effective means to the resolution of any conflicts or disputes that arise among two or more parties. Arbitration has also proved to be very flexible and fluid in nature. This is owing to the nature of the procedures. That is, the procedures involved are very simplified and easy to understand even by a layperson. Arbitration is also said to be a very convenient means of resolving conflicts because the proceedings arranged are done so according to the comfort of the parties. Even though Arbitration has proved to be very efficient and cost-effective in resolving conflicts, there are certain demerits and challenges that one might face when he/she might choose arbitration as a means to conflict resolution. For instance, arbitration does not follow fixed standards during the arbitral proceedings. These inconsistencies could arrive when the arbitrator, so appointed is biased. Another major drawback of this mechanism is that the process involves only an exchange of documents. That is, the mechanism has no room for witnesses. This in turn gives rise to a lack of scope for cross-examination, which might prove to be fruitful in settling these proceedings in a more efficient manner. Yet another considerable concern with regard to the arbitral proceedings is that there is a strict clause in the Arbitration and Conciliation Act of 1996[21], which seeks to maintain a sense of confidentiality of the proceedings that take place. This lack of transparency and closeness, might prove to be disadvantageous to a party of the proceedings henceforth, it could be contended that the system of Arbitration has a long way to go.

[21] *Supra* note 1 at 4.