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Arbitration: Alternative or Appropriate Dispute Resolution

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ABSTRACT

Litigation never creates harmony among the litigants. In an adversarial system, it is inevitable that one party will come out as a loser. This naturally breeds bitterness in the relationship between the parties. In contrast, a collaborative approach to solve the problems is the characteristic feature of Alternative Dispute Resolution Mechanisms. However the method to be chosen for resolution depends on the nature of the dispute and the mindset of the parties.

If the parties are willing to come together to agree on a common goal, then mediation or conciliation can be opted as the alternative mechanism for dispute resolution. By virtue of the introduction of Section 89 into the Code of Civil Procedure, the court before which a matter is pending is empowered to refer the parties to any of the ADR methods after seeking their willingness. But if the parties want to settle the dispute judicially through a neutral third party of their choice which has the status of a decree of the court, then arbitration offers the better alternative. Arbitration is the process of resolving disputes between two or more parties by referring the same to an impartial third party whose decision is considered to be final and binding on them.

Parliament enacted The Arbitration and Conciliation Act, 1996 to consolidate and amend the law relating to arbitration in India. The main objective of the Act was to promote dispute resolution through arbitration, and offer arbitration as a cost effective and speedy mechanism for dispute resolution. In this paper the author intends to convey the drawbacks in the implementation of the Arbitration and Conciliation Act and holds the view that radical changes are needed both in law and in practice in order to offer arbitration as an effective Alternative Dispute Resolution Mechanism.

I. INTRODUCTION

It is well said that "justice delayed is justice denied". Right to Speedy Trial is an assurance given to the citizens of the country by virtue of Article 21 of the Indian Constitution. However the fact remains that courts, both civil as well as criminal are flooded with pending cases. Unless the rate of disposal improves, the back log of cases will keep on mounting. When there

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is a delay in solving the cases or disposal of the cases, it shakes the confidence of people in the legal system of the country. If the Rule of Law has to become a reality, these arrears of cases pending before the various courts should be effectively curbed.

The Indian Constitution aims to achieve justice- social, economic and political. Access to fair, inexpensive and expeditious justice is a basic human right. Equal access to justice to all segments of the society is imperative. But the courts' burden to dispose the pending cases have come to such an extent that, the Constitutional goal of access to justice within a reasonable time perhaps cannot be achieved only with the existing judicial system. Effective alternative methods of dispute resolution, by which justice can be delivered to the satisfaction of all concerned, should be implemented. This is absolutely imperative for maintaining efficacy and credibility of the legal system.

Henry Brown and Arthur Marriot in their book 'ADR Principles and Practice (1999)', define Alternative Dispute Resolution as a *"range of procedures that serve as alternative to litigation through the courts for the resolution of the disputes, generally involving the intercession and assistance of neutral and impartial third party."* The philosophy of Alternative Dispute Resolution systems well stated by Abraham Lincoln over hundred and fifty years ago is relevant even today:

> *"Discourage litigation, persuade your neighbours to compromise whenever you can point out to them how the normal winner is often a loser in fees, expense, cost and time. Litigation does not always lead to a satisfactory result. It is expensive in terms of time and money. A case won or lost in the Court of Law does not change the mindset of the litigants who continue to be adversaries and go on fighting in appeals after appeals. Alternate Dispute Resolution Systems enabled the change in mental approach of the parties."*

So also what Mahatma Gandhi wrote several decades ago is still relevant: *"I had learnt the true practice of law. I have learnt to find out the better side of human nature and to enter men's hearts. I realized that the true function of a lawyer was to unite parties riven as under. The lesson was so indelibly burnt into me that a large part of my time during the 20 years of my practice as a lawyer was occupied in bringing about private compromises of hundreds of cases. I lost nothing there by- not even money, certainly not my soul."*

The alternative methods of dispute resolution like mediation and conciliation was in existence across the globe long back since 11th century. However the seeds of ADR as we see today can be traced back to the 19th century.

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II. WHY ALTERNATIVE DISPUTE RESOLUTION (ADR)?

The emergence of Alternative Dispute Resolution has been one of the most significant movements in the dispute resolution systems and the judicial reform. ADR has become popular in recent years because they are timely, more efficient and cost effective than the traditional, formal systems of redress. Collaborative approach to solve the dispute among the parties is the advantage or the key feature of alternative dispute resolution mechanisms. The parties can agree on a common goal, when worked out properly, depending on the nature of the problem in between them. There would not be any question of winning or losing the case and the time taken for the same can be reduced to weeks or months when compared with the years that are taken for litigation. This will tend to improve the overall relationship between the parties because the focus is largely on the community's or disputant's interests, while litigation focuses on positions of the disputants.

The procedural flexibility that ADR offers is the main reason for making it a speedier method of dispute resolution than the conventional court system. It can be conducted in any manner in which the parties agree. It may be casual as a discussion around a table or as structured as a private court trial. ADR being a private process arranged between the parties on consensus, offers confidentiality and more often it results in a win-win situation for the disputants, especially in mediation and conciliation. This results in maintaining a cordial relation between the parties even after the dispute is decided. The Supreme Court of India in its apex capacity has encouraged the ADR process by directing the parties in the litigation or lawyers representing the parties to settle the dispute amicably out of court. The court specifically in matrimonial disputes had tried to encourage the spouses to resolve the matter by settling the differences.

In some countries like USA, Alternative Dispute Resolution has been very successful to the extent that almost 90 percent of the cases are settled out of the court. There, it is the legal requirement that the parties must indicate the form of ADR which they would like to resort to during the pendency of the court proceedings. A similar provision has been introduced in our legal system by incorporating Section 89 and Rules 1-A, 1-B, 1-C in order X in the Code of Civil Procedure, 1908 which provides for settlement of disputes by ADR. Section 89 Code of Civil Procedure was inserted to try and see the possibility of settlement outside the court and all the cases which are filed in court need not necessarily be decided by the court itself. Keeping in mind the delay in the disposal of cases by the court due to the several reasons, it has now become imperative that resort should be made to ADR mechanisms to logically culminate the

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litigation between the parties at an early date. But this does not mean that ADR is a panacea for all issues relating to the pendency of court cases.

In India, we have various methods of alternative dispute resolution like arbitration, conciliation mediation, negotiation, med-arb, arb-med etc… Further Section 89 of the Code of Civil Procedure as amended in 2002 has opened the scope for introduction of conciliation and pre-trial settlements as methods for dispute resolution in matters pending before the courts. The intention behind this was to bring down the pendency of cases by accelerating disposal of such cases through procedures which will result in settling the dispute amicably. However when ADR is resorted to as an alternative to conventional court litigation, it must be ensured that there is no abuse of procedure by anyone by simply insisting on arbitration, mediation or conciliation as a method for dispute settlement.

III. ARBITRATION

Arbitration is often offered as an effective method of alternative dispute resolution. It is a contractual form of dispute resolution wherein the parties to the dispute submit themselves to the impartial decision by a neutral third person. It is difficult to identify the exact combination of features which distinguishes arbitration from other methods of dispute resolution. Lord Mustill of the House of Lords observed:

> *"The great advantage of arbitration is that it combines strength and flexibility. Strength because it yields enforceable decisions and is hacked by judicial framework which in the last resort can call upon the coercive powers of the state. Flexible, because it allows the contestants to choose proceedings which fit the nature of the dispute and business context in which it occurs. A system of law which comes anywhere close to achieving these aims likely to be intellectually difficult and hard to pin down in practical terms."*

Arbitration is not a new concept in India. It was prevalent in Indian society even in ancient times and the arbitral awards were then implemented not statutorily but by the social and moral authority of the arbitrators. The Indian Arbitration Act, 1940 is considered to be the major consolidated legislation governing arbitration across the country which was enacted based on the English Arbitration Act, 1934.This Act repealed the Arbitration Act, 1899 and the relevant provisions of the Code of Civil procedure, 1908, including the Second Schedule. It was confined to domestic arbitration and provided for different forms of arbitration with or without the intervention of the court. Though the Act catered the arbitration regime for more than half a century, the working of the Act, which dealt with domestic arbitrations, was found to be

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unsatisfactory and the same has invited several adverse comments by the courts. The Supreme Court observed: [2]

> *"we should make the law of arbitration simple, less technical and more responsible to the actual realities of the situation, responsive to the canons of justice and fair play and make the arbitrator adhere to such process and norms which will create confidence not only by doing justice between the parties, but by creating a sense that justice appears to have been done."*

The anguish of the Supreme Court with regard to the implementation of Arbitration Act, 1940 is evident from the following observations made in Guru Nanak Foundation vs. Rattan Singh[3],

> *"Interminable, time consuming, complex and expensive court proceedings impelled jurists to search an alternative forum, less formal, more effective and speedy for resolution of disputes, avoiding procedural claptrap and this lead to Arbitration Act 1940. 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 show 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. Informal forum chosen by the parties for expeditious disposal of their disputes has by the decisions of the court been clothed with legalese of unforeseeable complexity."*

However, it is pertinent to note that the Arbitration Act, 1940 was in existence for more than half a century. To address and redress the problems created by the 1940 Act, the Arbitration and Conciliation Act, 1996 was enacted based on the UNCITRAL Model Law. The UNCITRAL Model Law on international commercial arbitration applies to international commercial arbitrations, though, in India, the Act, 1996 modeled on the basis of UNCITRAL Model Law, applied to other arbitrations also. For the purpose of the UNCITRAL Model Law, an arbitration is international:

> *"(a) if the parties to an arbitration agreement have, at the time of the conclusion of the agreement, their places of business, in different states, or*
>
> *(b) one of the following places is outside the State in which the parties have*

[2] FCI vs. Joginderpal Mohinderpal(1989)2 SCC 347
[3] (1981)4 SCC 634

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their places of business:

(i) the place of the arbitration if determined in, or pursuant to the arbitration agreement,

(ii) any place where the substantial part of the obligations of the commercial relationship is to be performed or the place with which the subject matter of the dispute is most closely connected, or

(c) the parties have expressly agreed that the subject matter of the arbitration agreement relates to more than one country."[4]

The Arbitration and Conciliation Act, 1996 was enacted against a background of concern about the law relating to arbitration especially with reference to the drawbacks of the Arbitration Act, 1940. The Act consolidated and amended the law relating to domestic arbitration, international commercial arbitration and enforcement of foreign awards. Part 1 of the 1996 Act applies the UNCITRAL Model Law almost without qualification to all arbitrations in India. While drafting the 1996 Act; one of the major considerations was the need to curtail delays in the arbitral process. However strangely enough, among the objectives sort to be achieved by the new Act, provisions for settlement of dispute through swift and cheap process were absent. Even though the courts play a pivotal role in giving finality to certain issues which arises before, after and even during arbitration, there exists a serious threat of arbitration related litigation getting caught up in the huge list of pending cases before the courts. When an alternative for the conventional court system is suggested through an enactment it should propose some provisions which would result in diverting large volumes of cases from the formal court system of the country to the suggested alternatives of arbitration and conciliation.

Though the Act does not define the word arbitration other than the definition under section 2(a),[5] the object of arbitration is to obtain fair resolution of disputes by an impartial tribunal without unnecessary delay or expense. The parties should be free to resolve their dispute subject to the safeguards necessary in the interests of justice.[6] Moreover with an intent to

[4] UNCITRAL Model Law, article 1

[5] "Arbitration" means any arbitration whether or not administered by permanent arbitral institution.

[6] Arbitration agreement- (1)In this Part, "arbitration agreement means an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of defined legal relationship, whether contractual or not.

(2) An arbitration agreement may be in the form of arbitration clause in a contract or in the form of separate agreement.

(3) An arbitration agreement shall be in writing.

(4) An arbitration agreement is in writing if it is contained in-

(a) a document signed by the parties;

(b) an exchange of letters, telex, telegrams or other means of telecommunication which provide a record of

minimise the judicial intervention and to promote the dispute resolution through arbitration to the extent possible, The Act specifically provided for instances under which the judiciary can intervene in arbitration proceedings.[7] The Supreme Court of India in Konkan Railway Corporation vs. Mehul Construction Company[8] observed as under;

> *"To attract the confidence of International Mercantile Community and the growing volume of India's trade and commercial relationship with the rest of the world after the new liberalization policy of the Government, Indian Parliament was persuaded to enact the Arbitration and Conciliation Act of 1996 in UNCITRAL Model Law and therefore in interpreting any provisions of the 1996 Act, courts must not ignore the objects and purpose of the enactment of 1996.A bare comparison of different provisions of the Arbitration Act,1940 with the provisions of Arbitration and Conciliation Act, 1996 would unequivocally indicate that 1996 Act limits intervention of Court with an arbitral process to the minimum."*

However, a careful examination of the provisions of the 1996 Act reveals that some of the provisions in the Act are self-defeating to offer arbitration as an appropriate alternative dispute resolution mechanism. It failed to provide for a mandatory time limit within which the entire arbitration process should be completed. This resulted in many arbitrations going on for several years without any award being made. There were also no provisions with regard to the principles to be followed when the question as to the jurisdiction of the arbitrators come before the court.

IV. LAW AND PRACTICE

The Act under section 8[9] made provision for reference of the parties to the arbitration

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the agreement; or

(c) an exchange of statements of claim and defence in which the existence of the agreement is alleged by one party and not denied by the other.

(5)The reference in a contract to a document containing an arbitration clause constitutes an arbitration agreement if the contract is in writing and the reference is such as to make that arbitration clause part of the contract.

[7] Section 5. Extent of judicial intervention; Notwithstanding anything contained in any other law for the time being in force, in matters governed by this part, no judicial authority shall intervene except where so provided in this part.

[8] 2007 (7) SCC 201

[9] Section 8 (1) Power to refer the parties to arbitration where there is an arbitration agreement-(1) A judicial authority before which an action is brought in a matter which is the subject of an arbitration agreement shall, if party so applies not later than when submitting his first statement on the substance of the dispute, refer the parties to arbitration.

(2) The application referred to in sub-section (1) shall not be entertained unless it is accompanied by the original arbitration agreement or duly certified copy thereof.

(3) Notwithstanding that an application has been made under sub-section (1) and that the issue is pending before the judicial authority, an arbitration may be commenced or continued and an arbitral award made.

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agreement to go for arbitration under certain conditions. This is provided as a remedy available to the party who alleges the existence of an arbitration agreement and when the other party approaches the court without honouring the arbitration agreement entered between them. But in such cases what is observed is that a lot of time is taken by the judicial authority in deciding whether such a reference is possible or not as it is compelled to dwell into the agreement, the validity of the arbitration agreement, vitiating factors if any, in the formation of the contract, bargaining power of the parties, compulsory arbitration clause, the arbitrability of the dispute, etc.. These are all preliminary issues which once referred before the judicial authority, takes a lot of time to decide whether the parties can be referred to arbitration at all thereby delaying the very initiation of arbitral process.

Though the Act provided for challenge procedure for arbitrators appointed[10], on the grounds of alleged bias, and lack of qualification as per the terms of agreement between the parties, it simply remained silent to the extent that the only remedy when such challenge is invoked by one of the parties and is negatived by the arbitrator was to wait until the final award is delivered. The time, money and efforts spent by the parties are simply ignored or not addressed by the statute, if the court before which the award, so passed ignoring the challenge as to the jurisdiction of the arbitrator, is taken for quashing and it upholds the allegations raised by the parties as to the jurisdiction of the arbitrators.

With regard to the execution of the award, the prescribed procedure is to file the award before the civil court by which it can be executed as a decree of the civil court. The grounds available for challenging an arbitral award are mentioned under Section 34 of the Arbitration and Conciliation Act. The grounds for setting aside the award and the time limit within which the challenge against the award is to be made was so vaguely stated under the Act that, petitions for execution of award before the civil court would wait along with other pending civil cases for another couple of years denying the fruits of justice to the successful claimant. The earlier view taken by the Supreme Court while interpreting grounds for challenge of an award was limited strictly into cases where the award was in conflict with the 'public policy' of India.[11] However in the later judgments, we may see a departure from this approach and the court interpreted the term public policy of India in the widest possible manner and it has made the scope of challenge even wider than what was there in the 1940 Act.

[10] Section12 Grounds for challenge (3) An arbitrator may be challenged only if –
(a) Circumstances exist that give rise to justifiable doubts as to his independence or impartiality, or
(b) He does not possess the qualifications agreed to by the parties.

[11] Sundaram Finance Limited vs. NEPC India Limited, 1999 (2) SCC 479

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The standards of public policy have different colour and contour when taken internationally. As the 1996 Act is based on UNCITRAL Model Law, the concept of public policy may have to be perceived in the international realm. As each country has its own concept for public policy, there is scope for what can be called "international public policy" or "ordre public international". Hence so far as challenging an award on this ground of public policy, there is a need for differentiating between national and international public policy, as the international public policy would not concern itself with form and procedure which are purely domestic in nature.

The Supreme Court in Renu Sagar Company's[12] case held that Indian Courts would be justified in refusing enforcement of a foreign award on the ground that the award is in conflict with the public policy of India, if such enforcement is contrary to the fundamental policy of the Indian Law, Indian interest and morality and justice. It was further clarified by the court that enforcement of foreign award being governed by the principles of private international law, the doctrine of public policy, as applied in the field of international law alone would be attracted. In so far as domestic awards are concerned the scope of challenge of an award on the ground of public policy is yet to be settled.

In the year 2001, a committee was setup to study the shortcomings of the Arbitration and Conciliation Act, 1996, with regard to the difficulties it raised at the implementation level. The Act which took the UNICTRAL Model Law as the Model Law, failed to address the issues when applied to domestic arbitration. This had led the Apex Court and the High Courts to hold conflicting views while interpreting various provisions of the Act. The issues and concerns then raised were addressed to an extent by the Law Commission in the 176th report and the amendment therin.

In the year 2010, Law commission setup another expert committee to study the need for amending the provisions of the Arbitration and Conciliation Act and the Report of the Law Commission proposed certain amendments. Based on the suggestions put forth by the Law Commission in its 246th Report, amendments were proposed to the then existing Arbitration and Conciliation Act, and the same came into effect on 23rd October, 2015. The amendments so made were hailed for catering to the needs to make India, an International Arbitration hub.

V. CONCLUSION

The Arbitration and Conciliation Act of 1996 was aimed to achieve two goals. Firstly, to unify

[12] Renu Sagar Power Company Ltd. Vs. General Electric Company, (1994) Supp. 1 SCC 644

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the legal regime surrounding arbitration for both domestic and international arbitration conducted in India. Secondly, to improve arbitral efficiency by reducing the need for judicial intervention, enforcing awards as judicial decrees, and granting greater autonomy to arbitral tribunal institutions. The scope for judicial intervention, though curtailed by the 1996 Act, courts through interpretation have widened the scope of judicial review, resulting in large number of instances of judicial intervention than envisaged under the Act. Parties to the dispute also make use of various provisions of the Act that result in 'indispensable delay' at various stages.

The question whether the Act has been able to achieve the aforesaid objectives in reality can be answered only with reference to the key features of arbitration; (i) the agreement to arbitrate; (ii) the choice of the arbitrators and their appointment; (iii) the interim measures in arbitration proceeding; (iv) the decision of the arbitral award and its enforceability;(v) and the enforcement of the award. However with the passage of time the very purpose for which the Act was enacted lost its relevance and it lead to a situation where the Arbitral Tribunal functioned like any other subordinate court constituted for the dispute resolution from which an appellate remedy was there to the superior court. The fact remains that arbitration in India faces two major hurdles in offering arbitration as an effective alternative method for dispute resolution, i.e. cost-effectiveness and timely final resolution of disputes. The cost incurred by the parties in arbitration include arbitration fee, rent for arbitration venue, travel and boarding for arbitrators, administrative expenses, and professional fee paid to lawyers besides the expenses on the professionals working in-house of the parties. These expenses are much more in case of ad-hoc arbitration when compared with institutional arbitration.

As arbitration is a manifestation of consensual agreement between the parties, when two parties by agreement decide to resolve the dispute outside the court system through arbitration, then in such cases, the court intervention should be minimum; the proceedings should be speedy and effective as well as restrictive of abusive of proceedings. Moreover, arbitration in India is mostly done by practicing lawyers and therefore it becomes sandwiched between court appearances, scheduled for evenings, or weekends with long intervals between hearings, leading to inordinate delay. Therefore, the lawyers and the legal practitioners should be trained in law and practice of arbitration so that their tendency to prolong arbitration by seeking unnecessary adjournments and continuing the same procedures of court in arbitral proceedings can be curtailed and make arbitration really an effective Alternative Dispute Resolution System.

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