Page 454 - 461 **DOI:** *https://doij.org/10.10000/IJLMH.113807*

INTERNATIONAL JOURNAL OF LAW MANAGEMENT & HUMANITIES

[ISSN 2581-5369]

Volume 5 | Issue 6

2022

Is Arbitration really Accomplishing its Objectives?

SHUBHRANSHI GHOSH[1] AND RISHABH PATIL[2]

ABSTRACT

The populace's use of ADR is hindered by a lack of knowledge of its character, existence and difficulties accessing it, the desire of disputants for engaging in adversarial conduct, and the familiarity and preference of lawyers for court procedures. The term "Alternative Dispute Resolution" (ADR) refers to a number of strategies for resolving conflicts outside of court. The legislative directive for the court to refer civil disputes to the different ADR mechanisms is listed in Section 89 of the Code of Civil Procedure, 1908, which was introduced by the Act of 1999 which took effect on January 7, 2002. The majority of ADR criticism has been directed at mediation, with concerns that it favours the powerful party, undercuts legal rights, and often results in second-class justice for people who cannot afford litigation. The creation of resolutions that are better suited to the parties' underlying interests and needs, improved ex post compliance with the resolution's terms, and a decrease in transaction costs of dispute resolution are among the purported advantages of ADR processes. These processes may also be less expensive and faster than traditional judicial proceedings.

The use of alternative dispute resolution (ADR) systems assists in providing parties with economical, transparent, quick, and accessible justice. Since the overarching goal of all disputes is resolution, why not choose a course of action that may be amicably resolved by compromise?

These techniques will foster a culture of compromise among the parties, which is essential in today's society. This paper attempts to evaluate the efficacy of Section 89 of the Code of Civil Procedure ("CPC") and to explore Alternative Dispute Resolution (ADR) and why it is chosen to resolve disputes. It also discusses the advantages of ADR to both parties over the litigation process.

I. INTRODUCTION

Arbitration is a road constructed as a legal option to the parties to resolve their disputes in a simplified yet dignified manner without approaching the hectic Court proceedings. Arbitration as a way also eases the burden of the Courts to deal with innumerable pending cases. It is the

[1] Author is a Student at Jagran Lakecity University, India.
[2] Author is a Student at Karnavati University, India.

 [ISSN 2581-5369]

form of alternate dispute resolution, an alternative to the standard Court procedures.

Basically, Arbitration is a procedure in which a dispute is submitted by the parties with an agreement made in between them, making sure that the decision would be binding on them. Arbitration is one of few more alternative choices being offered to the parties in order to settle their disputes. The other modes include, Conciliation, Mediation, Lok Adalat's, Negotiations. The Alternate dispute resolution refers to the different ways parties can opt to resolve disputes without a trial. Therefore, alternate dispute resolution (ADR) is summed up into various modes of dispute settlement like, arbitration, conciliation, negotiation, mediation and lok Adalat's. In this, we will get into depth of the arbitration as an alternate dispute resolution along with studying the alternate dispute resolution as mentioned in Section 89 of CPC. And understand how relevant and important it holds its stand in India in settling dispute.

II. BACKGROUND OF ARBITRATION

King Solomon is believed to have served as the first arbitrator when he resolved a dispute between two women who both claimed to be the mother of a boy. Some people thought King Solomon's arbitration process was the same as how it is today[3]. As early as 337 B.C., Alexander the Great's father Philip the Second utilised arbitration to settle a territory dispute in Greece. Interestingly, five Spartan judges decided to award Athens's possession of the island of Salamis after hearing a dispute between that city-state and Megara in the vicinity of 600 B.C[4]. As a result, the history of international arbitration may be easily traced back to antiquity.

HOW THE ARBITRATION, THE ALTERNATE DISPUTE RESOLUTION CAME IN INDIA: A TIMELINE

In modern times, arbitration has become very common when it comes to dispute resolution. But it was not the same scenario before. The course of arbitration flourished in India in the past nineteenth century. Arbitration is used in dealing with commercial matters and it has now become so common that the idea of approaching court to such matters has now become a past thought thing. Arbitration in India was first recognised when Arbitration Act 1899 was enacted. Later The Code of Civil Procedure, 1908 has made sure to mention about the technique of Alternate dispute resolution and arbitration of course in its provision. Section 89 of Code of Civil Procedure refers the parties to choose the alternate ways to resolve their disputes by giving

[3] Mathew, A. (2015) "THE PHILSOPHY OF ARBITRATION," *International Journal of Business, Economics and Law*, 8(4), pp. 104–112. https://www.ijbel.com/wp-content/uploads/2016/01/law-33.pdf

[4] World History: Cultures, States, and Societies to 1500, https://web.ung.edu/media/university-press/World%20History%20Textbook-082817.pdf

them options like Arbitration, conciliation, mediation, lok Adalat's[5]. Synchronously The Indian Arbitration Act, 1899 and Section 89 Of Code of Civil Procedure were followed to deal with arbitration. With passing time, in 1937, The Arbitration (Protocol and Convention) Act for enforcement of foreign awards, along with, in 1940, The Arbitration Act were being followed after The Indian Arbitration Act, 1899 got repealed[6]. Subsequently, India became signatory to the New York Convention and The Foreign Award (Recognition and Convention) Act, 1961 got enacted[7].

In 1985, India adopted UNCITRAL model on International commercial arbitration. Finally, in 1996, after repealing The Arbitration Act,1940, The Foreign Award (Recognition and Convention) Act, 1961, and summing up the arbitration process into a single legislation, being called as, the Arbitration and Conciliation Act,1996. In 2002, CPC again introduced the provision of 89, which got earlier repealed, following the Alternate dispute resolution mechanism.

NEED FOR HAVING ARBITRATION

Arbitration as a legal way has come a long way in gaining its importance, for all the right reasons. Arbitration, as Alternate dispute resolution has felt its need when people realise the burden of the Court, when the parties got tired of seeking the hectic Court procedures. The time taken in Court is usually a lot! People fear to give this amount of time for settling their cases. This problem was also felt by the Courts itself and so it resolved to create more legal ways to settle the disputes while giving some comfort to the parties and to the Court itself while juggling with innumerable pending cases. Alternate dispute resolution is also a cost-effective way to settle the disputes. The procedure of Arbitration and the lok Adalat's are binding in nature, which is not the same in Mediation, negotiation techniques (the other alternate dispute resolution methods).

The binding nature of Arbitration procedure, like of Court procedure starring its effectiveness, the simplicity of arbitration, its flexibility of procedure, which the party decides, to finish up the case with limited least time possible (maximum within 12 months), having providing another option to parties to complete the case in the fastest way possible, Arbitration and Conciliation Act, 1996 provides

"Fast-track procedure", which confers to deal with the case within 6 months. Along with these,

[5] Section 89 CPC - Settlement of Dispute Outside of Court, https://districts.ecourts.gov.in/sites/default/files/Section%2089%20CPC.pdf
[6] The Arbitration (Protocol and Convention) Act, 1937, No. 6 of 1937.Acts of Parliament (India.
[7] https://main.sci.gov.in/supremecourt/2021/2818/2818_2021_33_1501_27661_Judgement_20-Apr-2021.pdf

 [ISSN 2581-5369]

being a relatively cheap way for parties, the parties have sought to approach the method of arbitration, in the cases that apply to it[8]. All of it add to the reasons of why the arbitration has gained its popularity and is ever evolving for good with time.

One of the key reasons of arbitration being a convenient way, is that, the parties are the real kings! Arbitration has been designed as a way by keeping the parties at the centre and all other things are revolving around them. It is a key feature of arbitration. Straight from choosing the arbitrator, to deciding the procedure, with the right to choose the place of arbitration, almost everything has been designed in respect to the convenience of the parties. The only condition the arbitration method mentions is, to form an agreement. Whatever in the agreement, the party mentions, that would be then the responsibility of the arbitrator or the institution to follow all along the way, right from being appointed till passing of the award[9].

KINDS OF ARBITRATION

1. **Domestic Arbitration**: When both the parties having dispute, belong to India, then, that would be known as the domestic kind of arbitration. The Arbitration and Conciliation Act, 1996 covers both the aspects, domestic, as well as, the international arbitration.

2. **International Commercial Arbitration**: When the dispute has arisen between the parties, in which one of them is from the foreign land or outside the territory of India, then it would be subject to be under International Commercial Arbitration. Basically, these are the two types of arbitration which have its provisions available in the Arbitration and Conciliation Act, 1996. But there is still the classification on the basis of procedures and rules governing the method, like, Ad-hoc Arbitration: In this type of arbitration, the parties refuse to approach an institution to go ahead with the proceedings. And so, the parties do not have to comply with the rules established by the institutions, making the procedures to be simpler and freer to the parties. It costs reasonable to the parties[10]. The parties are all on themselves to go move ahead in this kind of procedure applied to arbitration[11].

3. **Institutional Arbitration**: Here, the parties are free to choose the institution to move ahead with arbitration proceedings. The parties are just expected to comply with the rules and procedures of the institution. In this also, there is the freeness of party with just being expected to be in the ambit of the rules of the institution that they have chosen for themselves. Some

[8] *2021 arbitration rules - ICC - international chamber of commerce* (2022) *ICC*. Available at: https://iccwbo.org/dispute-resolution-services/arbitration/rules-of-arbitration/ (Accessed: November 27, 2022).
[9] *Indian Law Applibable to Proceedings - Consequences* (no date) *ICA*. Available at: https://icaindia.co.in/icanet/rules/commercialarbitration/arbitration&conciliation/chapter1d.htm (Accessed: November 27, 2022).
[10] https://www.indiacode.nic.in/bitstream/123456789/1978/1/AAA1996__26.pdf
[11] https://dea.gov.in/sites/default/files/ModelTextIndia_BIT_0.pdf

 [ISSN 2581-5369]

examples are: The London Court of International Arbitration, Singapore International Arbitration Centre etc.

4. **Fast-track**: In order to solve problem of delays, unnecessary time consumption and for dealing the case as soon as possible, in the reasonable fastest way possible, then, this type of arbitration is best for the parties. When time is a huge problem for parties, it is then a go to legal road for commercial related cases. Time is the differentiating element of Fast-track procedure. Six months is the time limit given to resolve the dispute. All these indeed are further classified on the basis of the uniqueness of the procedures followed while dealing with the case but the binding nature would in any way remain the same.

III. SECTION 89 OF CODE OF CIVIL PROCEDURE, 1908

Section 89 of Code of Civil Procedure, 1908, identifies the need to settle potential disputes outside the court. And so, rightly, it directs the parties and the court, the method of Alternate dispute resolution. The problems being faced by the Court while dealing with innumerable pending cases and also the stress taken up by the parties to approach the hectic court procedure is being identified and is noted. Also, not just that, but the effort has been made to try to resolve it through this provision. And so, this provision, Section 89 of CPC stands undisputedly important as an attempt to lessen the burden of the Courts as well as the parties the same time[12]. **Section 89(1)** mentions about the Alternate dispute resolution, which includes, Arbitration, Conciliation, Lok-Adalat's, Mediation. This Section stresses on the fact that the dispute between the parties shall go to trial only when it fails to reach a resolution applying any of these methods.

Section 89(2) states that where a dispute to be referred for the following methods, like for arbitration or conciliation, the provisions of the Arbitration and Conciliation Act, 1996 is said to be applied. Provision of Section 89(1)(b) mentions, that "to Lok Adalat's, the court shall refer the same to the lok Adalat in accordance with the provisions of sub-section (1) of section 20 of the Legal Services Authority Act, 1987 and all other provisions of that Act shall apply in respect of the dispute so referred to the Lok Adalat"[13].

This, along with, Section 89(1)(c) reads, "for judicial settlement, the court shall refer the same to a suitable institution or person and such institution or person shall be deemed to be a Lok Adalat and all the provisions of the Legal Services Authority Act,1987 shall apply as if the dispute were referred to a Lok Adalat under the provisions of that Act". Finally, 89(d) mentions

[12] https://www.indiacode.nic.in/show-data?actid=AC_CEN_3_20_00051_190805_1523340333624&orderno=95
[13] Ojasav chitranshi and Daksha Bairwa, *Effectiveness of Section 89 of Code of Civil Procedure*, 4 (2) IJLMH Page 2370 - 2380 (2021), DOI: http://doi.one/10.1732/IJLMH.26520

of the mediation, that for it, the Court shall affect a compromise between the parties and shall follow such procedure as may be prescribed. Earlier, Section 89 of CPC only mentioned of the arbitration. Later this Section came in with expanding its ambit to alternate dispute resolution and identifying arbitration as one of the methods and not the only one[14].

CASE: SALEM ADVOCATES BAR ASSOCIATION VS. UNION OF INDIA, (2005) 6 SCC 344

FACTS: This present case is the follow-up case of 'Salem Advocates Bar Association, Tamil Nadu vs. Union of India. In that case, certain amendments were made in Code of Civil Procedure,1908 by the Amendment Acts of 1999 and 2002.

ISSUE: It was questioned if these amendments made in Code of Civil Procedure,1908 were even constitutionally valid or not[15]? The amendments made in the last case were doubtful and has arisen question on its constitutional validity in the present case.

JUDGMENT: The report was in three parts. The main focus here would be on the report-2 because it dealt with the settlement of dispute outside the court and the main contention of this report was Section 89 of Code of Civil Procedure,1908, which is the main point of discussion herein.

It talks about Section 89 of CPC. The mentioned Section is said to provide discretion to the courts to send parties to settle dispute outside the court. It gives the Court the power to refer parties to try different ways of settling the dispute. The court after seeing the potential of the case can suggest the parties to try out alternate dispute methods like of arbitration, conciliation, mediation or lok Adalat's[16]. But it is on the parties to decide to move to the other way or to continue with the court proceedings. It was submitted that when parties try out for any of these methods and fails then Court would not be barred to try the suit later.

IV. PRESENT SCENARIO OF ARBITRATION IN INDIA

Needless to mention, Arbitration has gained its popularity in recent times. It has been successful in evolving with time, with ever evolving jurisprudence. It holds firm stand in the eyes of the parties because of its numerous efficient advantages. Also, it is in the mind of the judicial authority which is not failing to make attempts to keep it to be simply more effective and

[14] https://legalaffairs.gov.in/sites/default/files/Report-HLC.pdf
[15] https://districts.ecourts.gov.in/sites/default/files/bSalem_Advocate_Bar_vs_Union_Of_India.pdf
[16] Sharma, D., Bhardwaj, P. and Indulia, B. (2021) *Madras HC: Dictum in Salem advocate bar assn. continues to guide courts all over the country; Court finds no reason to formulate new rules to regulate case flow management in the State*, *SCC Blog*. Available at: https://www.scconline.com/blog/post/2021/08/09/madras-hc-dictum-in-salem-advocate-bar-assn-continues-to-guide-courts-all-over-the-country-court-finds-no-reason-to-formulate-new-rules-to-regulate-case-flow-management-in-the-state/ (Accessed: November 27, 2022).

efficient in the best way possible. The legal system is leaving no stone unturned to make it the most approachable way.

This fact cannot be denied that clearly the efforts are not going in vain to upkeep it. As from companies to IRCTC, everyone is making sure to try this means and settle it within amicably without disturbing the court. All the day-to-day arising disputes are being resolved within their own areas. Having mentioned its growing popularity, still, it would be doubtful to say that Alternate dispute resolution or arbitration as a way is full grown. In fact, it is yet to get mature[17].

There are loopholes while considering arbitration. Like, as mentioned initially that here the parties are the real kings and that they are provided the most powers. Though it is an important factor for it to be approachable and simple but giving so much power to the parties through most provisions of Arbitration and Conciliation Act,1996, it seems to weaken the authority of the arbitrator which makes the proceeding to get directed in least authoritative manner, which means losing of the conduct of the procedure[18].

Next is, time! Time is one of the most differentiating elements of ADR, of arbitration from court. But sometimes, it cannot get fulfilled because of unclear provisions. Another problem stands are, with the appointment of the arbitrator. The Arbitration and Conciliation Act,1996, specifies no requirements to choose the arbitrator. It can literally be anyone! Parties are just expected to depend upon their conscience to appoint the arbitrator (in cases of ad-hoc arbitration, as, in institutional arbitration, the parties the given a list of selected arbitrators from which they are required to choose). This questions the efficiency and the transparency of the arbitrator's position to carry out the duties.

The main aim of having alternate dispute resolutions or arbitration per se, is to cut down the intervention and stress of the court. And clearly, arbitration has not yet reached its position when it can function independently really, without having the intervention of the court. It still has a lot of its dependency on court through one way or the other. It seems like though arbitration has got its identity but it is yet to get into the stage of maturity. And it would not to be wrong to say that, alternate dispute resolution and the arbitration is still at the evolving stage[19].

V. EXPECTATIONS

Alternate dispute resolution, arbitration is something which has a lot of expectations. The

[17] https://www.niti.gov.in/sites/default/files/2021-11/odr-report-29-11-2021.pdf
[18] https://dpe.gov.in/about-us/management-division/pma-cell
[19] https://legislative.gov.in/sites/default/files/A1996-26.pdf

potential of it has been realized and to reach its fullest is one of the main aims of the legal system of the country. All eyes of the parties and the legal system are glued upon it. Seeing the history, the present, through the timeline showcasing the evolution of ADR and the arbitration, it can be easily made out that no stone is being left unturned to make it the most effective, efficient, simple, approachable way.

VI. CONCLUSION

It is a clear aim to strengthen the ADR system, to strengthen arbitration. Many provisions existed, amended, repealed, replaced confirming and backing not just its mere existence but as an attempt of strengthening it. Of course, it is possible that the existing provisions would again be amended or can even be repealed just to welcome a better way that would guide the ADR system, the arbitration to become the most suitable to people, society and to the law. ADR and arbitration as its way, has come a long way and the journey is yet to be destined and covered. Nevertheless, to mention, Arbitration is indeed one of the finest ways to resolve dispute amicably and it definitely deserves the attention.

*****

 [ISSN 2581-5369]