*Page 3024 - 3028* **DOI:** *https://doij.org/10.10000/IJLMH.116464*

# INTERNATIONAL JOURNAL OF LAW MANAGEMENT & HUMANITIES

[ISSN 2581-5369]

**Volume 6 | Issue 6**

**2023**

# Legal Impact of Arbitration in India: Bolstering the Alternative Dispute Resolution System

CEANIX T. PALAKUZHI[1], ARYA K. ASHOK[2] AND KIRTHI MANOJ[3]

**ABSTRACT**

*The Supreme Court has drastically changed the civil justice system over the last thirty years, which is terrible news for both workers and customers. The Court has granted large corporations the authority to compel consumers and workers to arbitrate disputes pertaining to nearly every kind of alleged violation of numerous state and federal laws that safeguard citizens from fraudulent and unsafe products, employment discrimination, unpaid wages, and other forms of corporate misconduct. The Court has allowed companies to draught the rules that will govern their relationships with their customers and employees as well as the processes that will be utilised to interpret and apply those rules in the event of a disagreement by assigning arbitration to handle conflict resolution. Also, the Court allows businesses to combine a prohibition on arbitration with forced arbitration.*

***Keywords:*** *ICC - International Court of Arbitration ; AAA - American Arbitration Association.*

## I. INTRODUCTION

India is a worldwide economic powerhouse, and as such, its laws have undergone several amendments to bring them up to date with those of other top commercial law jurisdictions in order to facilitate integration with the global business community. Alternative conflict resolution procedures like arbitration have been around for a while. The Arbitration and Conciliation Act of 1996 was designed to modernise Indian arbitration law, bring it into compliance with best practises worldwide, and establish India as a global hub for arbitration. It was modelled after the UNCITRAL (United Nations Commission on International Trade Law) framework of laws. Even if legal reforms have made arbitration a more popular option than litigation, it's important to remember that institutional arbitration still makes up a very small percentage of all arbitrations performed in India, with ad hoc arbitration accounting for the majority of cases. India currently lacks institutions that are comparable to internationally

[1] Author is a LL.M. student at CSI College For Legal Studies, Kottayam, India.
[2] Author is a LL.M. student at CSI College For Legal Studies, Kottayam, India.
[3] Author is a LL.M. student at CSI College For Legal Studies, Kottayam, India.

 [ISSN 2581-5369]

renowned establishments such as the International Court of Arbitration (ICC), LCIA, SIAC, HKIAC, etc. Because of this, it is frequently seen that international businesses choose a foreign arbitration centre when they sign into commercial agreements with Indian businesses. Generally speaking, arbitration procedures entail a private tribunal making a decision on the disputed matter. Generally speaking, arbitration proceedings are a more relaxed version of court procedures, with formal standards of evidence being one example of how they are easier. However, there is a lot of variances in arbitration procedures beneath these generalisations. The degree of formality, resemblance to court proceedings, and quantity of due process afforded to participants varies greatly throughout arbitration methods. The main source of the regulations guiding the arbitration procedure is the arbitration agreement itself. Generally speaking, the parties to this private agreement are free to include any rules they like for the resolution of disputes in the arbitration provision. In actuality, this implies that the company that decides to mandate arbitration for its employees or customers will draught the procedure's rules, and the employee or customer will be forced to consent in order to engage in either of these transactions. While organisations are allowed to create their own arbitration rules, many choose to base their decisions on those of a reputable arbitration service provider. These arbitration service providers, such JAMS or the American Arbitration Association (AAA), will handle the arbitration administration and supply the parties with lists of potential arbitrators, hearing rooms for the arbitration, and standard operating protocols to be followed. The AAA and JAMS are two significant players in the arbitration system. Despite being founded as privately funded nonprofits, they are nevertheless well-known institutions that are vulnerable to public criticism and lend credibility to the arbitration procedure.

## II. Legal issues in arbitration today: Arbitration and class-action waivers

The most controversial issue in arbitration law today grows out of the interaction between arbitration and class actions. Composite arbitration–class-action waivers have become common in contracts offered by credit card companies, banks, cell phone providers, and providers of other common services.[4] Furthermore, employment contracts are using them more and more frequently. Composite arbitration–class-action waivers have been contested by customers and workers on two grounds: either they are unconscionable or they make it difficult to defend statutory rights. On both reasons, several state courts and lower federal courts have declined to

[4] See Katherine V.W. Stone, "Procedure, Substance, and Power: Collective Litigation and Arbitration of Employment Rights," *UCLA Law Review Discourse*: 61, 164 (2013).

 [ISSN 2581-5369]

enforce these composite provisions; but, recent rulings by the Supreme Court are raising doubts about these rulings.

### (A) Arbitration Council of India

The 2019 amendment aims to address the aforementioned issue by offering the foundation for formalised arbitration in India. It requires the establishment of the Arbitration Council of India, whose mandate is to frame policy and guidelines for the establishment, operation, and maintenance of uniform professional standards in respect of all matters relating to arbitration, as well as to "take all such measures as may be necessary to promote and encourage arbitration, mediation, conciliation, or other alternative dispute resolution mechanism." Additionally, a tiered structure for referring issues to arbitral institutions has been implemented by the 2019 Amendment. The Arbitration Council of India will now provide grades to arbitral institutes in accordance with the 2019 revision. In accordance with any guidelines that may be provided, arbitral institutions are to be graded "on the basis of factors pertaining to infrastructure, quality and calibre of arbitrators, performance and compliance with time constraints for disposition of local or international commercial arbitrations." The grading system would offer an indication of the standard and reliability of a certain arbitral institution and give legal standing to the decisions it makes. Additionally, the 2019 Amendment gives the High Courts of India the authority to name such graded arbitral institutions for the appointment of arbitrators in cases other than international commercial arbitration, and the Supreme Court of India the authority to do so in cases involving international commercial arbitration. In order to improve the procedure's timeliness, this modification basically aims to decrease the involvement of courts in arbitration cases. This recently enacted, quick, and progressive legal framework is a significant step toward expediting the settlement of business disputes and elevating India to the forefront of international arbitrations. It will also strongly encourage more parties to use arbitration as their preferred method of dispute resolution. The current arbitration epidemic is a result of judicial developments that began in the 1980s, when the U.S. Supreme Court reinterpreted a little-known federal law enacted in 1925 called the Federal Arbitration Act (FAA). The FAA provides that when a dispute involves a contract that has a written arbitration clause, a court *must*, upon motion, stay litigation so that the dispute can go to arbitration.[5]

### (B) Arbitration Fairness Act

[5] 9 U.S.C. § 3. In order to come under the FAA, an agreement must involve commerce and include a written arbitration clause. 9 U.S.C. § 2.

 [ISSN 2581-5369]

The most direct way to address mandatory arbitration would be for Congress to amend the Federal Arbitration Act to exempt consumer and employment arbitration, or to provide more protection for consumer and employee rights in arbitration. Whereas state-level legislative action to this effect would almost certainly be pre-empted by the FAA, legislation passed by Congress would encounter no such problem.

The most prominent effort to deal with mandatory arbitration at the federal level has been the proposed Arbitration Fairness Act (AFA). Although there have been various versions of the statute, the most recent version would amend the FAA to specify that "…no pre-dispute arbitration agreement shall be valid or enforceable if it requires arbitration of an employment dispute, consumer dispute, antitrust dispute, or civil rights dispute."[6] If enacted, the AFA would effectively eliminate all mandatory arbitration in the employment or consumer realms, as well as in antitrust and civil rights cases. In its statement of congressional findings, the proposed AFA specifically refers to the problems of employees and consumers having little effective choice about entering mandatory arbitration agreements, the deleterious effect on the development of public law, and the lack of judicial review.[7] The Arbitration Fairness Act has been repeatedly introduced in Congress, with versions proposed in 2009, 2011, and 2013. Most recently, the AFA was again proposed in 2015 by Sen. Al Franken (D-Minn.) and Rep. Hank Johnson (D-Ga.). However, it has not received a vote, and passage in the current Congress appears unlikely.

### (C) Third-party funding of arbitration

A company's costs associated with funding litigation are high since it adversely affects its cash flow, EBITDA, and market value. Rather of tying up cash to finance costly litigation, litigation funding enables businesses to use their limited resources for worthwhile endeavours like capacity growth, product development, etc. Because there are no capital costs associated with third-party financing, the company's market value and operating profit both rises. In a win-win scenario for all sides, the future probability adjusted payoffs from litigation are often discounted at an IRR that investors are prepared to underwrite. Selling the potential for a claim for a fixed amount of money, together with the money saved on likely lawsuits, is very advantageous for a business in India because neither contingent liabilities nor contingent assets are recorded in financial statements. Singapore has recently passed amendments to its Civil Law Act legalising third party funding for arbitration and associated proceedings. Similarly, Hong Kong recently

[6] Section 3(a), Proposed "Arbitration Fairness Act of 2015," H.R. 2087.
[7] Section 2, Arbitration Fairness Act of 2015.

 [ISSN 2581-5369]

legalised third-party funding for arbitrations and mediations. The Paris Bar Council has also indicated its support for third party funding. Third-party litigation is not currently covered by any laws in India; however, the Supreme Court has ruled that TPF is permissible in court and noted that "there appears to be no restriction on third parties (non-lawyers) funding the litigation and getting repaid after the outcome of the litigation." Third-party funding for arbitration in India was also suggested in the 2017 Report of the High-Level Committee to Review the Institutionalization of Arbitration Mechanism in India, also referred to as the Sai Krishna Committee Report.[8]

## III. CONCLUSION

The best chance to halt these trends and give regular people their justice back is the Arbitration Fairness Act, which is presently being considered by Congress. Everyone who thinks that employee and consumer rights are significant and should be protected must support this measure. Although the NLRB and the Consumer Financial Protection Bureau have made commendable attempts to shield employees and consumers from arbitrations, the legal trends indicate that agency action on this front will almost certainly be overturned. Therefore, changing the legislation itself is the only option to stop these tendencies. Due to the private nature of arbitration and the lack of public publication of arbitration rulings, it is challenging to assess the actual effects of the courts' extensive delegating of dispute settlement to arbitration. Research, however, indicates that the odds of consumers and workers winning in arbitration are lower, and in the rare event that they do, the damages awarded are far less than they would be in a court of law.

*****

[8] Manoj K Singh, The future of arbitration in India: Strengthening the process of alternative dispute resolution, The Economic Times, https://economictimes.indiatimes.com/small-biz/legal/the-future-of-arbitration-in-india-strengthening-the-process-of-alternative-dispute-resolution/articleshow/82114707.cms (last accessed on DEC. 6, 2023, 10.33 PM)

 [ISSN 2581-5369]