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A Bird's Eye View Of Arbitration - The Preferred Mode Of Dispute Resolution In The Future

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Introduction

At this juncture, the question of whether it is "alternate" or "alternative" dispute resolution is significant to be addressed. Where there is no arbitration agreement between two or more parties with respect to their legal relationships, the only common resort that could be availed is litigation. On the other hand, if an agreement to arbitration exists, the common resort of litigation is navigated to this. Therefore, an alternative to litigation shall be in the form of Alternate Dispute Resolution.

Difference between Dispute and Conflict

Before taking shelter under any form of dispute resolution, it is imperative to know what leads to conflicts and disputes, for both these terms differ subtly. Conflict usually precedes dispute which may be due

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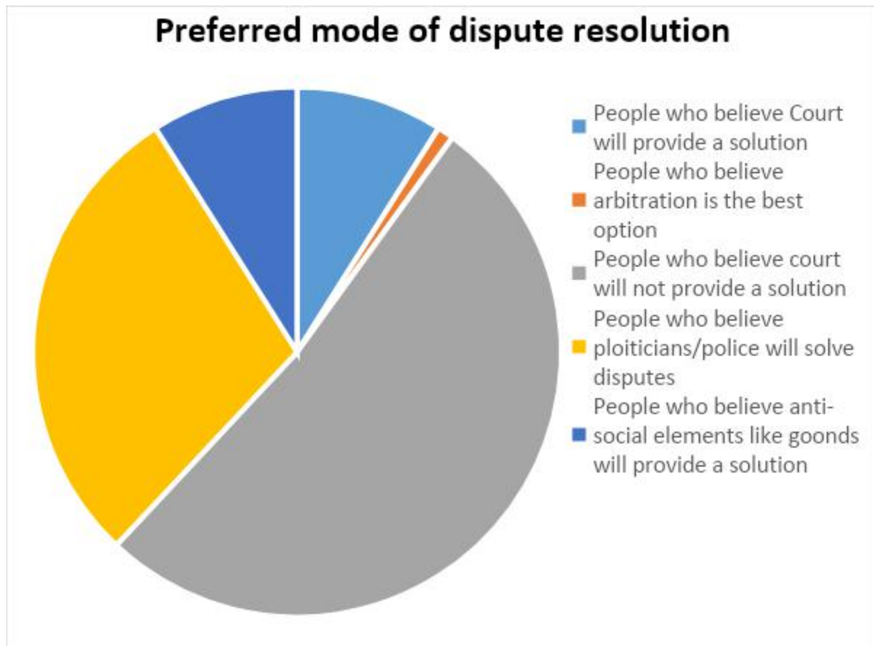
to poor communication, misinformation, lack of information or data, having expectations beyond standards that are unmet, interpersonal behavior, variant interest, value-based conflicts and other constraints. When a conflict is resolved, the dispute can be avoided. But if left unresolved and aggravated, it gives rise to the dispute. Usually, litigation addresses dispute by determining the rights of the parties. ADR methods that focus on conflict are as follows -

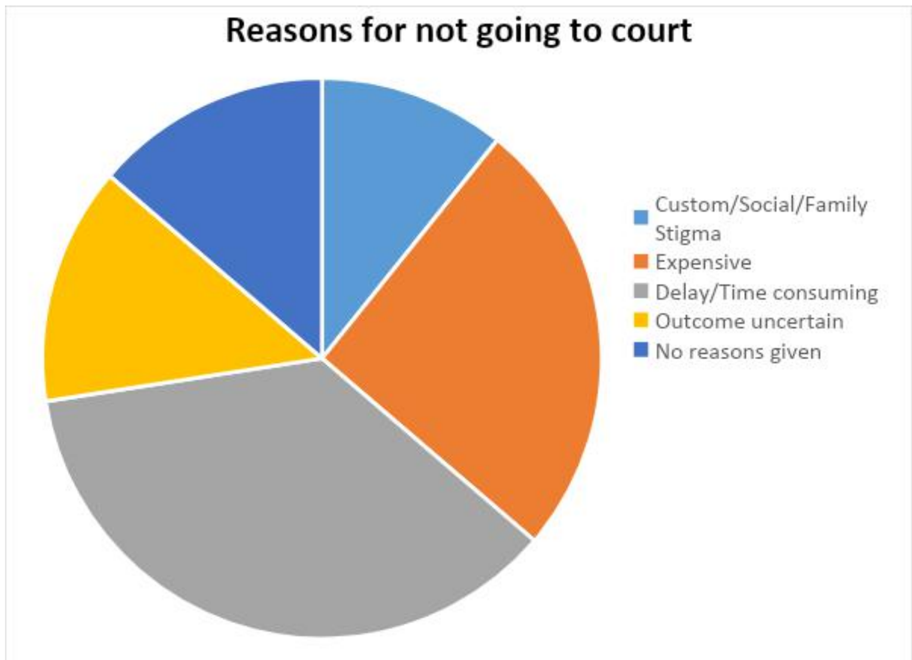
1. Mediation
2. Neutral evaluation
3. Collaborative settlement
4. Mentoring.

These methods help litigants come to their own consensus. The third party facilitating them would explore interests underlying their position.

What is the preferred mode of Dispute Resolution?



What are the reasons for NOT going to court?



History of arbitration

Arbitration proceedings can be traced back to the thirteenth century AD, under the Court of Pie Powder of England, which essentially means dust from the Court. It stated that "no foreign merchant shall be delayed by a

long series of pleadings, the King doth commands that the wardens and sheriffs shall hear daily pleas of such foreigners giving a speedy redressal". With this, began the mode of the speedy recovery process.

In the fourteenth century, England introduced a "statute of the staple" providing additional courts for merchants for speedy disposal of cases. Mayors and sheriffs had complete jurisdiction over the merchant's case on an hour to an hour and day to day basis. Regular courts were precluded from hearing merchants and were decided that all merchants shall not be ruled by the common law.

The emergence of admiralty courts involving the jurisdiction relating to shipping and contracts was recognized in England. It involved foreign elements in the mid-sixteenth century.

The seventeenth and eighteenth centuries began with traders disliking civil court since it was too legal and time-consuming. It was controlled by lawyers and judges who did not understand commercial problems. This gave birth to modern arbitration.

The birth of the first Legislative Council in India in 1834 and the first

Indian Arbitration Act was enforced on 1st July 1899. It was enforced on the basis of British Arbitration Act and applied to Presidency towns in India. In those times, it was mandatory for the parties to mention the names of the arbitrators in the agreement and the arbitrator was said to be the sitting judge as observed in the case of *Nusserwanjee Pestonjee and Ors. v. Meer Mynoodeen Khan Wullud Meer Sudroodeen Khan Bahadoor.*[1]

In the nineteenth-century in England, the first codified law for arbitration was Common Law Procedure Act, 1854. The arbitration agreement was introduced and mandated on the parties to refer the dispute to arbitration so that Courts do not interfere. However, there was a provision for appeal to civil courts mentioned in the Act.

A more specific Arbitration Act was enacted on 11th March 1940 under the British reign. Although many disputes were referred to under this Act, there were many shortcomings with respect to private contracts, filing of awards in various high courts, appointment of new arbitrators in case of an arbitrator, resignation of arbitrator, etc,. For better implementation of the Act, the Arbitration and Conciliation Act, 1996

[1] India [1855] UKPC 15

came into force on 22nd August 1996 covering domestic and international arbitration rules and minimizing judicial intervention.

Two main Conventions governing ADR Mechanism

1. **New York Convention –** It was adopted by the United Nations in June 1958. The convention was for the Recognition and Enforcement of Foreign arbitral awards. Courts of contracting states were directed to give effect to private agreements to arbitrate, recognize and enforce awards made in the other contracting states.
2. **Geneva Convention** – Geneva Convention governs the Execution of Foreign Arbitral Awards. Article 2 of the Convention states that the contracting parties can, at any point, refuse the enforcement of foreign awards despite the impositions under the Article were satisfied. Some common grounds of refusal will be such that the party against whom the award is given may not have been given ample opportunity and time to present their case or the dispute would be such that it may have not been as contemplated in the agreement.

The Arbitration and Conciliation Act, 1996

This Act is based on the United Nations Commission on International Trade Law Conciliation Model Rules in 1980. It recognizes conciliation, mediation and distinguishes domestic and international arbitration. However, the Act was amended in 2015 and further in 2019.

What does the Arbitration and Conciliation Act of 1996 contain?

The Act comprises four parts. The first part contains the dispute relating to Domestic Arbitration. The second part deals with the enforcement of foreign awards. The third part contains conciliation proceedings followed by supplementary provisions forming the fourth part.

With regard to references made to the Arbitral Tribunal, the parties may agree, in writing, to resolve the disputes including implied admissions. The parties may, with consent, arrange for administrative assistance by a suitable institution or person. The parties are free to determine the number of arbitrators, provided that such shall not be an even number. Otherwise, the arbitral tribunal shall consist of a sole arbitrator. [2]

[2] Mondaq.com. 2021. *Critical Analysis of the Arbitration and Conciliation (Amendment) Act, 2015 - Litigation, Mediation & Arbitration - India*. [online] Available at: <https://www.mondaq.com/india/arbitration-dispute-

The jurisdiction is decided by the arbitral tribunal for all disputes concerning signing, execution, and performance of the contract. The tribunal is also empowered to pass interim relief.

Arbitral Award

The Arbitral Award is the conclusive determination as to the questions put forward before the arbitral tribunal governed under Section 34 and 35 of the Act. It is similar to a judgment given by the arbitral tribunal as a decision on various issues. The award must be in writing and be signed by all members of the tribunal or signed by the majority with reasons for any omitted signatures. The Arbitration and Conciliation Act requires the award to set out the reasons on which it is based, unless the parties have agreed that no reasons are to be given. The award should state the date and place of the arbitration, and a signed copy must be delivered to each party.

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resolution/494184/critical-analysis-of-the-arbitration-and-conciliation-amendment-act-2015> [Accessed 18 December 2021]

Advocates and parties expect an arbitral tribunal to function like tribunals and courts. There is constant allegation about the expense and misconduct against arbitrators giving an award. The global perception about Indian arbitration is that it is not friendly, difficult to appoint arbitrators in international disputes, enforcement of foreign awards is not easy, inordinate delay in courts, steep hierarchy of appeals and such other things. Hence, there is always some amount of resistance towards arbitral awards.

Arbitration and Conciliation (Amendment) Act, 2015

Here are a few changes to take note of post amendment:

1. Interim relief by the Court under section 9 of the Arbitration and Conciliation Act, 1996. Post the case Bharat Aluminium & Co. v Kaiser Aluminium & Co., interim orders made by arbitral tribunals outside India could not be enforced in India. Such orders are application only to an 'international commercial arbitration" with a seat outside India and Indian parties who choose to arbitrate outside India cannot get the benefit.
2. Under Section 17, the Act empowers the arbitral tribunals to grant interim relief. Tribunals enjoy the same power of Civil Court under

Section 9 and shall pass interim relief even after declaring final award.

3. The Amended Act provides for faster timelines to make the arbitration process more effective. Proviso to Section 24 has been added providing for the arbitral tribunal to hold oral hearings for evidence and oral argument on a day-to-day basis and not grant any adjournments unless sufficient cause is made out. The arbitral tribunal has been vested with the power to impose heavy costs for adjournments without sufficient cause. Every arbitral award must be made within 12 (twelve) months from the date the arbitrator(s) receives a written notice of appointment.
4. Prior to the Amendment Act, the mere filing of a challenge petition to the arbitral award would result in an automatic stay of the arbitral award. The court would take several years to decide the petition, making the process of arbitration time-consuming and ineffective. In a welcome move, the Amendment Act provides that there would be no automatic stay of the arbitral award and a separate application will have to be filed seeking a stay of the arbitral award.
5. Fast Track Procedure - Section 29 (B) has been introduced which gives an option to the parties to agree on a fast track mechanism under which the award will have to be made within a period of 6 (six)

months from the date the arbitrator(s) receives written notice of appointment. The dispute would be decided based on written pleadings, documents and submissions filed by the parties without any oral hearing. Oral hearing can be held only if all the parties request or the arbitral tribunal considers it necessary for clarifying certain issues. There may not be too many occasions where the parties to an on-going dispute agree on anything, let alone agree on a fast track procedure.

6. The Amendment Act has borrowed the disclosure requirements from the IBA Guidelines on Conflict of Interest in International Arbitration. The Fifth and Seventh Schedule has been inserted which provides a guide in determining circumstances for ineligibility of the arbitrator.
7. There were amendments made to Section 34 of the Act. The scope of "public policy" was narrowed to the following if the award is:
    - Influenced by fraud or corruption; or
    - In contravention with the fundamental policy of India; or
    - In conflict with most basic notions of morality or justice.

8. Section 87 – Application of the Arbitration and Conciliation (Amendment) Act, 2015, in the case of BCCI v Kochi Cricket Private

Limited[3], it was held that the effect of 2015 amendment will be retrospective. Section 87 was introduced in the 2019 Act clarifying that Arbitration and Conciliation (Amendment Act), 2015 will not apply retrospectively. Section 26 of the Amendment Act 2015 was also deleted. This overruled the decision in the case of BCCI v Kochi Cricket Private Limited. The Supreme Court in Hindustan Construction Company limited v Union of India, [4]struck down the insertion of Section 87 of the Arbitration Act.

J. Srikrishna Committee Report

The Committee stated that a high-level committee shall review the institutionalizing of arbitration mechanisms in India. This report was issued on 30th July 2017 under the chairmanship of retired justice B.N Srikrishna. The committee also decided to make India a hub of institutional arbitration for both domestic and international arbitration. The Committee also made suggestions related to the appointment of Arbitrators under Section 11.

[3] (2018) 6 SCC 287
[4] (Civil) W.P No. 1074 of 2019 (SC)

1. In the case of the international commercial arbitrator, the Supreme Court shall appoint the arbitrators.
2. High Courts shall appoint in cases other than international commercial arbitration.
3. Arbitral institutions shall be graded by the Arbitration Council of India.
4. In the absence of an institution, the High Court Chief Justice may appoint from a panel of arbitrators.

Arbitration Council

The Arbitration Council engages in framing policies for grading arbitral institutions and accrediting arbitrators. The object of forming such a council is to promote and encourage arbitration, mediation, conciliation or other alternative dispute mechanisms. Framing policies for the establishment, operation and maintenance of uniform professional standards for all the alternate dispute redressal matters and maintaining a depository of arbitral awards made in India and abroad are also some of its functions.

The Chairperson of the Arbitration Council shall be a serving Judge of

the Supreme Court or High Court or Chief Justice of High Court. The members of the council will include an eminent arbitration practitioner, an eminent academician, secretaries of Central Government and a representative of the body commerce or industry.

Notable case laws under the Act

Brahmani River Pellets Limited v. Kamachi Industries Limited [5]

The instant case decided whether the Madras High Court could exercise jurisdiction under Section 11(6) of the Act although the arbitration agreement says that the venue shall be Bhubaneswar. The Apex court ruled that the High Court of Madras did not take note of the difference in meaning between 'seat' and 'arbitration.' The jurisdiction was wrongly assumed by the High Court of Madras under Section 11(6) of the Act.

National Highways Authority of India v. Sayedabad Tea Estate[6]

In the above case, the question was whether the application under Section 11(6) for appointment of arbitrator is allowed while the said appointment is to be made by the Central Government under the National Highway

[5] AIR 2019 SC 3658

[6] 27 August 2019 in Civil Appeal No. 6958-5959 of 2009

Act. The Supreme Court held that the provisions laid down in 3G (5) of the NH Act clearly states that it will prevail over the Arbitration Act in relation to all the compensation matters under the National Highway Act. Hence, the application was not maintainable.

Mahanagar Telephone Nigam Limited v. Canara Bank & Ors[7]

The Supreme Court in the instant case held that even a non-signatory to an arbitration agreement to participate in the arbitration proceedings under the doctrine of "Group Companies."

Vinod Bhaiyalal Jain v Wadhwani Parmeshwari Cold Storage Pvt. Ltd [8]

The aggrieved party raised the face that the arbitrator in the above case was reported to be the counsel of the other party. The Apex Court held that there shall be no room for even a perception of bias against the arbitrator and in that case the award shall be set aside on the ground of lack of impartiality and independent award.

[7] Judgment dated 08 August 2019 in Civil Appeal No. 6202-6205 of 2019
[8] Judgment dated 24 July 2019 in Civil Appeal No. 6960 of 2011

Conclusion

The Arbitration and Conciliation Act, 1996 applies to both international and domestic arbitrations unlike the Model Law which was designed to apply only to International Commercial Arbitration. Present Indian law of arbitration is an achievement realized in a relatively shorter period of time. The process of the development of the Indian law of arbitration actually indicates a move towards strengthening the contractual features of arbitration. When it was identified as an ideal time to reform arbitration law in India, the amendment Act of 2015 and 2019 gave a significant deletion and addition of sections in the Act. It has removed the serious lacuna and difficulties and improved its arbitration landscape on a domestic as well as international level.