Page 312 - 317 **DOI:** *https://doij.org/10.10000/IJLSI.112123*

INTERNATIONAL JOURNAL OF LEGAL SCIENCE AND INNOVATION

[ISSN 2581-9453]

Volume 6 | Issue 4

2024

The Future of Arbitration in India: A Paradigm Shift

AAKASH SHANKAR[1]

ABSTRACT

The article discusses the evolving landscape of Alternative Dispute Resolution (ADR), emphasizing the transition from arbitration to mediation. It underscores the challenges that government entities encounter when utilizing arbitration as a tool for resolving disputes.

Well-structured, the article thoroughly examines each issue that disputing parties, particularly the government, face in arbitration proceedings. Beyond merely outlining these difficulties, it delves into the judicial obstacles related to the interpretation of the Arbitration Act of 1996.

In conclusion, the article provides a brief analysis of the Mediation Act, highlighting its potential benefits and implications for future dispute resolution.

***Keywords**: Mediation, Arbitration.*

I. INTRODUCTION

On June 3rd, the Ministry of Finance released a memorandum providing guidelines for the conduct of mediation and arbitration in domestic procurement contracts by the government and its agencies. This memorandum is significant, particularly in light of the amendments made to the Arbitration and Conciliation Act, 1996, over three cycles (2015, 2019, and 2022). Additionally, in 2023, a new Mediation Act[2] came into force, marking a pivotal shift in the landscape of alternative dispute resolution (ADR) by elevating mediation to the same level as arbitration and removing conciliation as a mode of ADR.

II. ARBITRATION AS A MEANS OF ADR

Arbitration has emerged as a popular means of ADR due to its contractual nature, independence from judicial processes, speedy resolution of disputes, inclusion of technical expertise, and finality of judgments. However, despite its advantages, the arbitration system reveals several loopholes and challenges, especially for the government and its entities.

(A) Challenges Faced by the Government in Arbitration

1. Accountability and Acceptance of Adverse Orders: The Union Government, being accoun-

[1] Author is an Advocate in India.
[2] THE MEDIATION ACT, 2023, NO. 32 OF 2023

 [ISSN 2581-9453]

2. table to the legislature, finds it controversial to accept adverse arbitration awards. This often leads to the government challenging these awards in the judiciary to overturn them.

3. Fairness and Non-Arbitrariness: The necessity for fairness and non-arbitrariness makes it difficult for the government to accept arbitration awards that deviate from established practices for other similarly-placed contractors not involved in arbitration.

4. Frequent Transfers of Government Officials: Frequent transfers of government officials result in a lack of deep understanding of the subject under arbitration, weakening the government's position.

(B) General Limitations of the Arbitration Process

1. Prolonged and Costly: Arbitration can be a lengthy and expensive process. The time period prescribed for arbitration is often not adhered to, and the reduced formality combined with the binding nature of decisions can lead to incorrect factual findings and improper application of the law.
2. Perceptions of Wrongdoing: The arbitral process, being contractual and intended to be final, is susceptible to perceptions of wrongdoing, including collusion, especially in high-value cases. Arbitrators are not necessarily subject to the high standards of selection and conduct applied to the judiciary.
3. Lack of Transparency: Arbitration proceedings are conducted behind closed doors, unlike open court proceedings, leading to concerns about accountability.
4. Judicial Intervention: A large number of arbitration cases end up in courts, increasing the burden on the judiciary. The presence of an arbitration agreement often leads officers to refer matters to arbitration, making the process adversarial and inflating claims and counterclaims.

III. KEY ISSUES IN ARBITRATION

(A) The Seat of Arbitration

The Arbitration and Conciliation Act, 1996, uses the term "place of arbitration" rather than "seat" or "venue." This term carries two distinct meanings:

Section 20(1) and 20(2): Refers to the seat of arbitration.

Section 20(3): Refers to the geographical location where hearings may be conducted.

In Union of India v. Hardy Exploration and Production[3], the Supreme Court held that the choice of a venue did not imply the seat of arbitration unless additional factors were present. However, in Brahmani River Pellets Limited v. Kamachi Industries Limited[4], the Supreme Court held that the parties' choice of the venue is the seat of arbitration, illustrating ongoing ambiguity in defining the difference between venue and seat.

(B) The Issue of Arbitrability

The landmark judgment Booz Allen and Hamilton Inc. v. SBI Home Finance Ltd[5]. broadly categorized disputes affecting rights in rem as non-arbitrable, while those affecting rights in personam are arbitrable. Subsequent judgments, such as Himangni Enterprises v. Kamaljeet Singh Ahluwalia[6] and Vidya Drolia, have further explored this issue, leading to ongoing debates about the arbitrability of disputes, particularly those involving tenancy and property rights.

a. Arbitrator's Fees and Costs

The Supreme Court in Oil & Natural Gas Corporation Ltd. vs. Afcons Gunanusa JV[7] addressed issues related to arbitrators' fees:

1. Unilateral Determination of Fees: Arbitrators cannot unilaterally determine their own fees; party autonomy is crucial.

2. Definition of "Sum in Dispute": Differentiates between costs (expenses related to arbitration) and fees (remuneration to arbitrators).

3. Ceiling on Fees: Each arbitrator can claim up to INR 30 lakhs as individual fees, but costs can escalate due to additional expenses.

IV. JUDICIAL INTERVENTION

While the Arbitration and Conciliation Act, 1996, aims to minimize judicial intervention, various judgments have expanded the scope for court involvement. For instance, in ABL International Limited v. Export Credit Guarantee Corporation of India[8], the Supreme Court upheld the jurisdiction of High Courts under Article 226, even in contractual disputes. Similarly, in Unitech Limited v. Telangana State Industrial Infrastructure Corporation[9], the

[3] AIR 2018 SUPREME COURT 4871
[4] AIR 2019 SUPREME COURT 3658
[5] Booz Allen and Hamilton Inc. Vs. SBI Home Finance Ltd. & Ors
[6] AIR 2017 SUPREME COURT 5137
[7] Oil and Natural Gas Corporation Ltd. V. Afcons Gunanusa JV
[8] Noble Resources Ltd. V. State of Orissa & Anr
[9] UNITECH Limited & Ors. v. Telangana State Industrial Infrastructure Corporation (TSIIC) & Ors.

presence of an arbitration clause did not bar jurisdiction under Article 226, opening avenues for judicial intervention.

(A) International Arbitration and Sovereignty

International arbitration can conflict with national sovereignty, as seen in cases like Vodafone International Holdings v. Union of India and Cairn Energy v. Government of India. These cases illustrate how arbitration can challenge the government's sovereign functions, such as taxation, leading to significant financial implications for the state.

1. Vodafone International Holdings v. Union of India[10]

Vodafone's journey in India has been entrenched in heavy litigation due to the infamous retrospective tax amendment act and its contentious revenue-sharing model. The dispute began when Vodafone International Holdings BV acquired CGP Investment from Hutchison Telecommunication International Ltd., which controlled 67% of HEL based in India. The acquisition enabled Vodafone to indirectly control HEL, a prominent Indian telecom company.

The Indian tax authorities demanded tax on capital gains, but the Supreme Court initially ruled in favor of Vodafone, stating that the gains were indirect. However, in 2012, the government amended Section 9(1)(i) of the Income Tax Act retrospectively, imposing tax on earlier transactions. Vodafone challenged this under the India-Netherlands Bilateral Investment Treaty (BIT), claiming a breach of fair and equitable treatment. The arbitration tribunal ruled in favor of Vodafone, highlighting that domestic taxation disputes could be arbitrated if they violated international obligations under a BIT.

2. Cairn Energy v. Government of India[11]

The Cairn Energy dispute arose from a reorganization of its shares in Indian subsidiaries, which led to a tax demand of USD 1.6 billion from the Indian tax authorities for failure to deduct withholding tax. Cairn Energy initiated arbitration under the UK-India BIT, arguing that the tax demand violated the fair and equitable treatment standard under the BIT.

The arbitration tribunal distinguished between tax-related investment disputes and pure tax disputes, ruling in favor of Cairn Energy. The tribunal held that the Indian government's actions violated its international obligations under the BIT, leading to significant compensation for

[10] Vodafone International Holdings BV v. Union of India : case analysis, https://blog.ipleaders.in/vodafone-international-holdings-bv-v-union-of-india-case-analysis

[11] The Cairn Energy v. India Saga: A Case of Retrospective Tax and Sovereign Resistance against Investor State Awards, https://arbitrationblog.kluwerarbitration.com/2021/07/02/the-cairn-energy-v-india-saga-a-case-of-retrospective-tax-and-sovereign-resistance-against-investor-state-awards/.

Cairn Energy.

V. THE MEDIATION ACT AND ITS SIGNIFICANCE

The introduction of the Mediation Act in 2023 signifies a crucial shift in the ADR landscape in India. Mediation, now on the same footing as arbitration, provides an effective, less adversarial method for dispute resolution. Mediation offers several benefits:

1. Cost-Effective and Time-Efficient: Mediation is generally faster and less expensive than arbitration or litigation. It avoids the prolonged processes and high costs associated with arbitration.

2. Confidential and Non-Adversarial: Mediation is conducted in a confidential setting, fostering open communication and collaboration between parties. This non-adversarial approach helps in preserving business relationships.

3. Flexibility and Control: Parties in mediation have more control over the process and the outcome. They can tailor the process to their needs and reach mutually acceptable solutions.

4. High Success Rate: Mediation has a high success rate in resolving disputes amicably, reducing the burden on the judicial system.

VI. CONCLUSION

While arbitration offers a valuable alternative to traditional litigation, it presents several challenges, particularly for the government. The recent memorandum by the Ministry of Finance and the new Mediation Act aim to address these issues by providing clear guidelines and elevating mediation as a viable ADR method alongside arbitration. However, ongoing debates about arbitrability, arbitrators' fees, and judicial intervention indicate that further reforms and clarifications are needed to ensure a fair, efficient, and transparent arbitration process.

The government's experience with arbitration, both domestic and international, highlights the need for a balanced approach. Ensuring accountability, fairness, and transparency in the arbitration process is crucial. Additionally, the promotion of mediation as an effective ADR method can alleviate some of the challenges faced in arbitration, providing a more collaborative and cost-effective way to resolve disputes.

In summary, while arbitration has its benefits, the evolution of ADR in India, including the introduction of the Mediation Act, presents an opportunity to address existing challenges and improve the overall dispute resolution framework. The government's proactive steps in this direction reflect a commitment to fostering a more efficient and just ADR system, ultimately

 [ISSN 2581-9453]

benefiting all stakeholders involved.

*****

 [ISSN 2581-9453]