

**RISE OF ALTERNATIVE DISPUTE RESOLUTION
STEPPING TOWARDS EFFICIENT
JUSTICE SYSTEM**

ADR
ALTERNATIVE
DISPUTE
RESOLUTION

BY
ALLIANCE CENTRE FOR ALTERNATE DISPUTE RESOLUTION

Rise of Alternative Dispute Resolution: Stepping Towards Efficient Justice System

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MESSAGE FROM PRO-CHANCELLOR

I feel elated to note that Alliance Centre for Alternate Dispute Resolution (ACADR), Alliance School of Law, Alliance University, Bengaluru has come out with glorious and praiseworthy compilation of decisive research work done by the interneers at the Centre along with their faculty supervisors. As a matter of fact ,this edited book titled **“RISE OF ALTERNATE DISPUTE RESOLUTION: STEPPING TOWARDS EFFICIENT JUSTICE SYSTEM”** is a compilation of various emerging and niche issues on a wide range of topics including ADR in Criminal cases in India, Evaluation of Efficiency and effectiveness of Lok Adalat System, Competency of Arbitral Tribunals, Emergence of Alternative Dispute Resolution in International Trades and Business, Judicial Intervention in Arbitration and need for ADR Mechanism in Inter-State Water Disputes in India. I certainly hope that the readers shall have in depth insights into the most complex and vital issues surrounding Alternate Dispute Resolution tools and techniques.

I congratulate once again the editorial board and wish all the readers good health and happiness always!

Sh. Abhay G. Chebbi

Pro-Chancellor,

Alliance University, Bengaluru

MESSAGE FROM VICE-CHANCELLOR

It gives me immense pleasure and deep satisfaction that Alliance Centre for Alternate dispute resolution (ACADR), Alliance School of Law, Alliance University, Bengaluru has come out with compilation of research work in the form of edited book version titled “RISE OF ALTERNATE DISPUTE RESOLUTION: STEPPING TOWARDS EFFICIENT JUSTICE SYSTEM” which is comprised of the research work undertaken by the interneers along with their faculty guides at the Centre. I am sure that the Centre shall attain marvelous heights in terms of research projects and activities thereby enlightening and assisting the policy makers, industry, academicians, students, lawyers to address of newly emerging arenas pertaining to Alternate Dispute Resolution tools and techniques.

I wish the readers intellectual stimulation through this compilation.

Prof (Dr.) Anubha Singh

Vice Chancellor,

Alliance University, Bengaluru

MESSAGE FROM DEAN

I am happy to note that Alliance Centre for Alternate Dispute Resolution (ACADR), Alliance School of Law, Alliance University, Bengaluru has brought out magnificent and exemplary compilation of research work done by the internees at the Centre along with their faculty guides. As a matter of fact ,this edited book titled “RISE OF ALTERNATE DISPUTE RESOLUTION: STEPPING TOWARDS EFFICIENT JUSTICE SYSTEM” is a compilation of various emerging issues on a range of topics including ADR in Criminal cases in India, Evaluation of Efficiency and effectiveness of Lok Adalat System, Competency of Arbitral Tribunals, Emergence of Alternative Dispute Resolution in International Trades and Business, Judicial Intervention in Arbitration and need for ADR Mechanism in Inter-State Water Disputes in India. I certainly hope that the readers shall gain in depth insights into the most complexed issues surrounding Alternate Dispute Resolution tools and techniques.

I congratulate once again the editorial board and wish all the readers good health and happiness.

Prof (Dr.) Kiran Gardner

Professor and Dean,

Alliance School of Law,

Alliance University, Bengaluru

PREFACE

“RISE OF ALTERNATE DISPUTE RESOLUTION: STEPPING TOWARDS EFFICIENT JUSTICE SYSTEM” has been conceived and conceptualized keeping in view the modern-day necessities and requirements and solution-oriented approaches which are going to be blessings in disguise for the people at large. The story goes that Alternative Dispute Resolution methods do take less time to solve disputes and are considered to be more of an informal way unlike litigation which is mostly based on the accepted domains of laws and their cumbersome procedures, more so ADR methods normally do not require the presence of learned counsels for solving their dispute. In other words, the third person necessary to solve the dispute between parties need not necessarily be a learned counsel. They have thus raised great expectations and hopes in the minds of the litigants for a more satisfactory, acceptable, and early resolution of their disputes.

Therefore, 'Rise of Alternative Dispute Resolution: Stepping Towards Efficient Justice System' tries to give a good and detailed overview of the ADR Systems of India in particular and the world over in general. This book zeros in on the important aspects of the ADR methods, like judicial intervention, the usefulness of these methods for the resolution of criminal matters, the efficiency of methods, etc. It also covers a comparative analysis of the ADR mechanism in Indian legal system with foreign laws. I hope, this book shall enlighten the students, ADR practitioners and all other stakeholders concerned in a big way thereby enabling them to unfold new paradigms of ADR methods and resolutions techniques.

Dr. Rahul Mishra

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LIST OF ABBREVIATIONS

AAA	American Arbitration Association
ADR	Alternative Dispute Resolution
Arb.	Arbitration
Arb-Med.	Arbitration-Mediation
Anr	Another
Fet	Fair and equitable treatment
GOI	Government of India
HC	High Court
Hon'ble	Honourable
ICADR	International Centre for Alternative Dispute Resolution
ICC	International Chamber of Commerce
ICJ	International Court of Justice
ISWD	Inter-state Water Dispute
KLRC	Kuala Lumpur Regional Centre for Arbitration
NAFTA	North American Free Trade Agreement
NDIAC	New Delhi International Arbitration Centre
NYC	New York Convention
ODR	Online Dispute Resolution

List of Abbreviations

PCA	Permanent Court of Arbitration
SC	Supreme Court (India)
SIAC	Singapore International Arbitration Centre
SIMC	Singapore International Mediation Centre
TMC ft.	Thousand Million cubic feet
UNCITRAL	The United Nations Commission on International Trade Law
UNO	United Nations Organization
WIPO	World Intellectual Property Organization
WTO	World Trade Organization

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CHAPTER 1

ALTERNATIVE DISPUTE RESOLUTION IN CRIMINAL CASES IN INDIA

Ashwini M.*

Abstract

Speedy trial is one of the necessities of Criminal Justice system and there is no doubt that delay in trial amounts denial of justice. Right to speedy trial is a Fundamental right guaranteed under Part III of the Constitution to every citizen of the State. Inadequacy of courts, tiresome process of litigation and cost of litigation made way for the rise of Alternative dispute resolution. The main objective of introducing the ADR mechanism in criminal cases is to provide a cost-effective and accessible remedy to the criminals who are guilty of petty offences and protect the accused from the inordinate delay caused by the lengthy litigating process. Thus, the ADR mechanism in the Criminal Justice System in India has been emphasized to provide a better understanding of the entire concept of plea bargaining and its analysis. In India, there has been a provision in the Code of Criminal Procedure for an accused to plead 'guilty' instead of claiming the right to a full trial, but it is not the same as plea bargaining. The concept of Plea Bargaining is adopted from the US Constitution, which has been a successful method of avoiding protracted and complicated trials. It primarily involves pre-trial negotiations between the accused and the prosecutor along with bargaining on the charge or in the quantum of sentence. Therefore, this paper focuses on constitutional provisions of speedy trial, ADR mechanism in Criminal Justice System in India, India's stand on

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the concept of Plea Bargaining, pros, and cons of plea-bargaining mechanism in India and a comparison of plea-bargaining mechanism between India and USA.

Keywords: Speedy Trial, Alternative Dispute Resolution, Constitution, Criminal Cases, Plea Bargaining.

1. Introduction

The under structure of any civilized society is Justice. The quest for justice has been an ideal that mankind has been aspiring for generations down the line.¹ Administration of Justice involves the maintenance of rights within a political community by the means of protection of the innocent; punishment of the guilty along with the satisfactory resolution of disputes.² This has been rightly said that: 'An effective judicial system requires not only that just results be reached but that they are reached swiftly'. But in India available infrastructure of courts are not adequate to settle the growing litigation within a reasonable time.³ Despite continuous efforts by the judiciary, the average person may sometimes find himself entrapped in litigation for as long as a lifetime, at times litigation carries on even to the next generation. In this entire process, the person may dry up his resources and fall into the state of penury.

One of the main objectives of the criminal justice system is a speedy trial as the delay in justice might dilute the justice. Therefore, it is rightly said that speedy trial is the essence of a civilized society, and it is always recommended that a case should be decided as early as possible, but it is also said that basic norms which ensure justice cannot be overlooked because as the popular proverb goes like, 'justice hurried, justice buried.'⁴ The main aim of the Right to Speedy trial is to propagate Justice in society.

¹ V. Vijayasai Reddy: *Justice Hurried is Justice Buried*, DECCAN CHRONICLE (2020), <https://www.deccanchronicle.com/opinion/columnists/131220/v-vijayasai-reddy-justice-hurried-is-justice-buried.html>.

² Hon'ble Thiru Justice S.B. Sinha, Judge Supreme Court of India, *ADR and Access to Justice: Issues and Perspectives*, (2021).

³ Legal Correspondent, *Supreme Court Launches Portal to Track Cases Pending at District Courts*, THE HINDU (2015), <https://www.thehindu.com/news/national/supreme-court-launches-portal-to-track-cases-pending-at-district-courts/article7668677.ece>.

⁴ V. Vijayasai Reddy, *supra* note 1.

Speedy justice is a component of social justice since the community is concerned about the criminal being deserved and finally punished within a reasonable time and the innocent being absolved from the inordinate difficulty of criminal proceedings. Inadequacy of courts, tiresome process of litigation and cost of litigation gave rise to Alternative dispute resolution.⁵

Alternative Dispute Resolution refers to settling of dispute outside the courtroom other than the means of litigation, where the settlement of the case is done by the impartial third party through conciliation, mediation, arbitration, Lok Adalat, and negotiations.⁶ ADR techniques are extra-judicial; they can be used to resolve any matter, under law, by the agreement between the parties. They have been employed to settle abundant subject categories of disputes, commercial, civil, industrial, and family disputes. The main objective of ADR is to provide quick and cost-effective relief to clients.⁷ The present system fails to deliver quick and inexpensive relief to the party in a dispute. The procedure is also overly complicated, and this leads to a search for an alternative mechanism that should be a cost-effective, quick, confidential procedure and be an accessory to the process of the traditional court system. Alternative Dispute Resolution promotes cordial settlement and helps in the preservation of the relations. Since the parties are directly involved in the process of settlement. However, the cordial settlement here does not mean compromise at any cost; it is a reasonable compromise factor.⁸ Thereby ADR helps in overcoming many challenges posed by judicial proceedings as a method of resolution. To manage the pending cases in the Indian Courts, a review of the court system was undertaken by the Malimath Committee. In the report, the Committee recommended Plea Bargaining to be introduced in the Indian Criminal Justice System to facilitate higher disposal of cases to reduce the burden of the courts to confirm that justice

⁵ AVTAR SINGH, *LAW OF ARBITRATION AND CONCILIATION*, P. 239 (6th ed. 2002).

⁶ Tala Esmaili and Krystyna Gilkis, *Alternative Dispute Resolution*, LEGAL INFORMATION INSTITUTE, https://www.law.cornell.edu/wex/alternative_dispute_resolution.

⁷ S.C Srivastava and Geeta Obrai, *Dispute Resolution Process in India*, INDIAN LAW INSTITUTE, P. 26, (2002).

⁸ P.C RAO & WILLIAM SHEFFIELD, *ADR IN THE CONSTRUCTION INDUSTRY*, (Universal Law Publishing Co. Pvt. Ltd. 1997).

is made accessible to every citizen at the minimum cost of time and finances. Therefore, ADR mechanisms came in force into the criminal justice system by way of the Criminal Law (Amendment) Act, 2005 under Chapter XXI A in the Code of Criminal Procedure, 1973 while introducing the concept of “plea bargaining” in India.⁹

1.1 Research Problem

There is presence of Alternative Dispute Resolutions with advantages, however it remains unutilized. We should understand the reason behind this while being able to answer the question if ADR can only be used in petty criminal offences and not on serious offences. Furthermore, In Plea bargaining, there is a high probability that though the convicted person is not guilty but pleads guilty on the ground of leniency provided under plea bargaining. Even if a lenient sentence may be considered as a part of circumstances of cases after a regular trial but mere acceptance of guilt should not be based on reduction of crime and there are high chances of corruption and coercion by investigating agencies which may be against the principles of a fair trial. Hence, it is of importance to understand whether the application of Plea Bargaining is successful in India. Thus, the coverage of the study is confined to the ADR mechanism in a criminal case in India. The study also throws light on various landmark decisions to understand the stand of the judiciary towards the concept of plea bargaining in criminal trials in India.

1.2 Objectives of the Study

To study and understand the right to a speedy trial as a fundamental right in India.

To study the evolution of ADR in Criminal Jurisprudence along with the significance of ADR in criminal cases.

To understand the efforts of the judiciary to ensure speedy trial through various landmark judgments.

To analyze the concept of Plea bargaining and its types with the help of landmark judgments.

⁹ Criminal Law Amendment Act, 2005, Chapter III- Section 256A- 256L (India).

1.3 Objectives of the Study

Plea bargaining in the Indian Criminal Justice system is extremely limited and has failed to give desired results.

1.4 Research Methodology

The research methodology opted for this paper is a doctrinal research method involving an analytical as well as a deductible approach where various primary and secondary sources of information have been used to complete the research. Majorly relying upon the articles, journals of both domestic and international origin as well, this research paper is the outcome of thorough research and confining the idea to the scope and objective of the study.

2. Constitutional Obligation of ADR

The Constitution of India is structured on the concept of welfare and well-being of the people, and the state must provide justice to the aggrieved party by judicial or non-judicial forums of dispute resolutions that ensure timely and effective justice and enforcement of fundamental rights for every individual of the state. The primary objective of ADR was to provide a solution for the increasing burden of the courts. It was an initiative taken by the Legislature and judiciary to restraint on the situation and achieve a “Constitutional goal” for achieving justice. The Preamble of the Indian Constitution ensures the State secure social, economic, and political justice to all the citizens of the State.

Article 14: It guarantees equality before the law and equal protection of laws. Equality before law necessarily involves the concept that all the parties to a legal proceeding must have an equal opportunity of access to the court and to present their cases in front of the court. For the indigent, who are not able to meet the economic needs, the justice access to the court would remain a myth because of their inability to pay the court fee and lawyer's fees etc. Thereby speedy trial would help them to cope with the delay in the case and be cost-effective.¹⁰

¹⁰ INDIA CONST. art. 14.

Article 21: By the wider interpretation of Article 21 of the Constitution, Speedy justice is a fundamental right guaranteed under the purview of article 21.¹¹ In the case of *Hussainara Khatoon v. Home Secretary, the State of Bihar* recognized the right to a speedy trial as a fundamental right implicit in the right to life and personal liberty provided under Article 21 of the Indian Constitution.¹² In its decision, the court directed greater access to bail; more humane living standards and a significant reduction in time from arrest to trial. The court also held that no procedure that doesn't guarantee a cost-effective, quick trial can be regarded as reasonable, fair and just as interpreted by the Hon'ble court in the case of *Maneka Gandhi case*.¹³

Article 38(1): The preamble of the Constitution enjoins the state to secure social, economic, and political justice to all its citizens, making the constitutional mandate for speedy justice inescapable.¹⁴

Article 39A: The State shall secure that the operation of the legal system promotes justice., to ensure that opportunities for securing justice are not denied to any citizen because of economic or other disabilities.¹⁵ While interpreting this provision the Supreme Court in the case of *L Babu Ram v. Raghunathji Maharaj and ors* held that, social justice would include 'legal justice' which means that the system of administration of justice must provide an affordable, prompt, and effective instrument for the realization of justice for all sections of the people irrespective of their social or economic position or their finances.¹⁶

3. Plea bargaining

Traditionally, under the Criminal Justice System, the state is bound to prove that the accused is guilty of the criminal charges for which he is accused, beyond a reasonable doubt. But the concept of Plea bargaining refers to pre-trial bargaining between the accused person and the

¹¹ INDIA CONST. art. 21.

¹² *Hussainara Khatoon v. Home Secretary State of Bihar*, AIR 1979 SCR (3) 532.

¹³ *Maneka Gandhi v. Union of India*, AIR 1978 SC 597; (1978) 1 SCC 248.

¹⁴ INDIA CONST. art. 38, § 1.

¹⁵ INDIA CONST. art. 39, § A.

¹⁶ *L Babu Ram v. Raghunathji Maharaj and Ors.*, AIR 1976 SC 1734.

prosecutor where the accused person accepts the commission of the offence by pleading guilty of the offence by negotiating with the prosecution for a lesser punishment than what is provided in law by pleading guilty to a less serious offence. This is commonly used in the United States and has been one of the successful methods in avoiding complicated trials. The concept of Plea bargaining gained its constitutional validity in the US in the case of *Brady v. U. S.*¹⁷ It was also held that plea bargaining is a voluntary process where the accused is free to choose whether to accept the offer of the prosecutor for a plea bargain or reject it.¹⁸

The Plea Bargaining in India is inspired by the Doctrine of *Nolo Contendere*. The doctrine has been under deliberation by India for introduction and employment in the Criminal Justice System. Thereby, Plea bargaining has been incorporated by the legislature after several law commission's recommendations. This doctrine has been considered and implemented in a manner that considers the social and economic conditions prevailing in our country.

3.1 Plea Bargaining, 142nd Law Commission Report

Though the courts of India continuously criticized the introduction of the concept of Plea bargaining in India but 142nd Law Commission report stated that the "Concessional treatment for offenders who on their initiative chose to plead guilty without any bargaining was in favour of the introduction of Plea bargaining in Indian Criminal Justice.

In its report, the commission pointed that in many cases the time spent by the accused in jail before the commencement of trial exceeds the maximum punishment which can have awarded them if found guilty. The main objective of the committee was to reduce the delay in deciding criminal cases and to discuss the concept of plea bargaining and the committee has taken into consideration answer the issues, impacts and criticism raised by the court and discussed the drawbacks of introducing plea bargaining have discussed in the report like the possibility of an

¹⁷ 397 U.S.742.

¹⁸ 434 U.S. 357.

increase in the crime, the socio-economic condition does not favour plea bargaining there is the possibility that plea bargaining to be used as a tool by the criminals to save themselves from being punished from the law, the possibility of an increase in corruption. The committee considered all these limitations of plea bargaining and proposed a system of plea bargaining in India where there will be no contact between the accused and the public prosecutors that there is no possibility to the practice of corruption. Where the accused will be having the liberty to make an application to the court for the procedure of plea bargaining.

3.2 The 154th Report of the Law Commission

This was the first to recommend the concept of plea bargaining in the Indian Criminal Justice System. Under the National Democratic Alliance government, a committee was constituted which was headed by the former Chief Justice of the Karnataka and Kerala High Courts, Justice V.S. Malimath to tackle the issue of a hike in several backlogs in criminal cases. The committee defined Plea Bargaining as an alternative method that should be introduced to deal with a huge backlog of criminal cases in Indian courts. The Committee recommended the plea-bargaining system in India. The committee said that it would facilitate in quick disposal of criminal cases and reduce the burden of the courts. Furthermore, the Malimath Committee pointed out the success of the plea-bargaining system in the USA to emphasize the importance of Plea Bargaining.

The 177th report of Law commission also sought to incorporate the concept of Plea bargaining as suggested in the 154th report of Law Commission.

3.3 Constitutional validity of Plea Bargaining

In India, the Constitutional validity of Plea bargaining into the criminal justice system was put ahead in the year 2003 by the Criminal Law (Amendment) Bill, 2003. However, those provisions failed and were introduced again with minor changes through the Criminal Law (Amendment) Bill, 2005, which was passed by the Rajya Sabha on 13-12-2005 and by the Lok Sabha on 22.12.2005. The acknowledgement of plea bargaining has made a significant impact over the years and has become a

significant part of criminal jurisprudence in India. In the case of *State of Gujarat v. Natwar Harchandji Thakor*, the Court acknowledged the importance of plea bargaining and said that every “plea of guilty” which is interpreted to be a part of the statutory process in the criminal trial, should not ipso facto be understood as a “plea bargaining”.¹⁹ The court also said that plea bargaining must be decided on a case-to-case basis. Further, considering the changing nature of law and society, the court observed and said that the very objective of the law is to provide cheap, easy, and expeditious justice by resolving the dispute in a brief period with no harm. Thus, the provisions were finally incorporated with the introduction of sections 265A-265L to the Code of Criminal Procedure, 1973 as a Chapter XXI-A through the Criminal Law (Amendment) Act, 2005 Act 2 of 2006.²⁰

3.4 Types of Plea bargaining

3.4.1 Sentence Bargaining

Here the defendant agrees to plead guilty to the stated charge and in return, he bargains for a lighter sentence. The person pleading guilty will know the sentence he will be awarded for the offences he had committed, for which the plea bargain agreement would be made to reduce his stated high sentence of punishment. Sentence bargain takes place when an accused is told in advance what will be his reduced sentence if he pleads guilty. The main motive in this type of bargaining is to get a lesser sentence than awarded.

3.4.2 Charge Bargaining

This is the most generic form of Plea bargaining where the defendant agrees to plead guilty to a lesser charge consideration of dismissing higher charges. In other words, this sort of bargaining happens for getting less severe charges.

¹⁹ State of Gujarat v. Natwar Harchandji Thakor, (2005) 1 GLR 709.

²⁰ The Criminal Law (Amendment) Act, 2005, Act 2 of 2000, (India).

3.4.3 Fact Bargaining

This plea bargaining is not used in court as it is alleged to be against Criminal Justice System. This sort of bargaining takes place only when a defendant agrees to agree to certain facts to prevent the introduction of the other facts.

3.5 Judicial pronouncement and Plea Bargaining

Indian Judiciary has been reluctant in applying the concept proper to the 2005 Amendment and on various occasions rejected the concept of Plea bargaining even after several recommendations of the Law Commission of India.

Initially, the Indian court criticized the concept of Plea bargaining in the Indian Scenario. The Hon'ble Supreme Court held that "It is indolent to speculate on the virtue of negotiated settlements of criminal cases, as attained in the United States but our jurisdiction, it may result in dangerous economic crimes and corruption, this practice invades on society's interests by opposing society's decision expressed through predetermined legislative fixation of minimum sentences and by delicately subverting the mandate of the law.²¹ In this case, the court disapproved of the concept of plea bargaining and held that it was against the interest of society. In *Kasambhai v. State of Gujarat*, the Apex court held that the practice of plea bargaining is unconstitutional and illegal, and it tends to increase in corruption, collusion and pollute justice.²² The same was reiterated in *Kachhia Patel Shantilal Koderlal v. State of Gujarat and Anr.*²³ In the case of *Thippaswamy v. the State of Karnataka*, the Court held reducing or letting an accused plead guilty on the agreement would be a violation of Article 21 of the Constitution of India.²⁴ Thereby Court stated that "In such cases, the Court of appeal or revision should set aside the conviction and sentence of the accused and remand the case to the trial court so that the accused can if he so wishes to defend him against the

²¹ Murlidhar Meghraj Loya v. State of Maharashtra, AIR 1976 SC 1929.

²² Kasambhai v. State of Gujarat, (1980) AIR 854.

²³ Kachhia Patel Shantilal Koderlal v. State of Gujarat and Anr, Special Leave Petition (crl), 3774 of 1999.

²⁴ Thippaswamy v. State of Karnataka, (1983) 1 SCC 194.

charge and if he is found guilty, a proper sentence can be passed against him.”

In *State of Uttar Pradesh v. Chandrika*, Hon’ble court held that “it is settled law that on the idea of bargaining Court cannot eliminate the criminal cases. Mere acceptance or admission of the guilt must not be a ground for reduction of sentence.²⁵ Neither can the accused bargain with the Court that as he is pleading guilty sentence to be reduced.” The basic principle of administration of justice says that merit alone should be considered for conviction and sentencing of the accused, even if the accused confesses the guilty.

However, it is the constitutional obligation of the court to provide an appropriate sentence. The Apex Court was against the concept of plea bargaining and thus held this practice as unconstitutional and illegal. However, the Hon’ble Court was of the view that on the plea bargaining that it cannot be the basis of disposing of criminal cases, mere acceptance of the guilt should not be the reason for giving a lesser sentence and it was further held that the accused cannot bargain for reduction of the sentence because he pleaded guilty. The Court acknowledged the importance of plea bargaining in the case of *State of Gujarat v. Natwar Harchandji Thakor* and held that every “plea of guilty” which is construed to be a part of the statutory process in the criminal trial, should not be understood as a “plea bargaining” ipso facto.²⁶ Considering the dynamic nature of law and society it is recommended that fundamental reforms such as to eradicate arrears of criminal cases and the court held that the very object of the law is to provide an easy, cheap, and expeditious justice by resolving disputes.

4. Why Plea bargaining is only used for Petty offences?

The Court must ensure that plea bargaining is not used by the accused who has frequently been convicted of criminal behaviour and as he is someone presumed to be dangerous to society. The key objective of plea bargaining is to reduce the backlog of criminal cases in India to ensure a

²⁵ *State of Uttar Pradesh v. Chandrika*, (2000) (crl) 384(386).

²⁶ *State of Gujarat v. Natwar Harchandji Thakor*, (2005) 1 GLR 709.

speedy criminal justice system in India. According to Section 265-A the major limitation of the procedure of plea bargaining is that an accused is charged for any offence for which the punishment is not more than seven years cannot take the support of Plea bargaining. Thereby, plea bargaining is not available for offences committed against women and children aged below the age of fourteen years and the socio-economic offences. Therefore, due to this exclusion, the support of plea bargaining is not available for the people charged with serious offences. In such a scenario, it is absolute to take into consideration the recommendation of the 142nd Law Commission Report where it has mentioned that the scheme of plea bargaining may be introduced only for those offences in which the maximum punishment is of seven years of imprisonment and once the viability and the success of the scheme is visible there is the probability that scope of plea bargaining will be applied to other areas of criminal justice system. The authorities for the legislature to take consideration to widen the scope of plea bargaining to offences having a punishment of more than seven years to achieve the key objectives of the introduction of the concept in the Indian jurisprudence is to that the burden of cases will be taken from the shoulder of judges and to provide a speedy trial. It has been observed that Plea bargaining has failed to give the desired result the main reasons are lack of awareness about the concept, strict provisions of eligibility and no specific time to decide on the case.

4.1 Disputes that cannot be settled through ADR

In the case of *Afcons Infrastructure Ltd. v. Cherian Varkey Construction Co. (P) Ltd. & Ors.*,²⁷ the Hon'ble Supreme Court has set forth the subsequent classes of cases that are not suitable for ADR they are:

Those suits are mentioned under Order I, Rule 8 CPC which involves the interest of the public or the interest of several persons who are not the parties before the court.²⁸

Accused charged with an offence punishable with life imprisonment or the death penalty or charge less than 7 years.

²⁷ *Afcons Infrastructure Ltd. v. Cherian Varkey Construction Co. (P) Ltd. & Ors.*, (2010) 8 SCC 24.

²⁸ Civil Code of Procedure, 1908, Order 1, Rule 8.

Disputes regarding elections concerning public offices.

Those Cases are related to a serious and heinous crime against women and children below the age of 14 years.

Proceedings that involve prosecution for criminal offences.

A person charged with an offence concerning the socio-economic conditions of the state.

4.2 Whether the concept of Plea bargaining is successful in India?

In a country like India where the process of litigation takes years altogether at times even to the next generation. There might be cases where an innocent person may opt for plea bargaining for the crime which he has not committed but confesses to having committed only to avoid lengthy litigation which would cost him time and financial resources. Thereby the principle of law states that 'let the hundred guilty be acquitted but one innocent should be convicted' may be violated of plea bargaining.²⁹

One of the major drawbacks of plea bargaining has been discussed under 142nd Law Commission Report wherein it was stated that plea bargaining would give space for corrupt practices. There is no time limit within which the entire process of plea bargaining should be completed by the parties to the suit and the Court should ensure the key objective of the plea-bargaining system, that is, to ensure speed of delivery of justice in criminal cases. Moreover, as there is no time within which the Court is supposed to make the report regarding the success or the failure of the meeting between the accused and the prosecutor or the victim to come to a mutual decision for speedy disposal of the case. In such conditions, the Court has the discretion to take its own time for the preparation of the report which may lead to a delay in the criminal justice system which indeed makes the main objective of a speedy criminal justice system to be ineffectual in India. Though the Plea-bargaining mechanism has proved to be feasible and a sustainable instrument of justice and now there is a

²⁹ Jain, Tarun. *'Let Hundred Guilty Be Acquitted but One Innocent Should Not Be Convicted': Tracing the Origin and the Implications of the Maxim*, (2007).

significant need to take the drawbacks of the present system of plea bargaining to make it more effective in India.

4.3 Why despite having various advantages, the ADR mechanism remains underutilized in India?

Despite having numerous advantages, the potential of the Alternative Dispute Resolution (ADR) mechanism remains underutilized in India due to assorted reasons:

The Supreme Court of India has been encouraging parties to take up pre-litigation mediation to settle their dispute before they turn to court proceedings. In *Afcons Infrastructure v. Cherian Varkey Construction*.³⁰ As the ADR is a vital mechanism for the parties who are willing to resolve through negotiation to avoid the tiresome process of litigation. Section 89 of Civil Procedure Code 1908 powers the court to refer the matters that can settle through ADR, but it is seen that judges are referring the cases to the ADR mechanism.³¹

ADR is expected to take the burden of cases from the shoulder of judges but has failed to give desired results and still people are ignorant to trust the process that gives justice outside the courtroom. There is a lack of awareness about the ADR mechanism amongst the people in both rural and urban areas which is one of the hurdles in the realization of the full potential of the ADR mechanism. There is also a lack of awareness amongst judges, advocates and litigants regarding the efficacy and usefulness of the process of mediation among the common masses about the advantages obtained from the ADR mechanism.

The intervention of judiciary in Arbitral proceeding is one of the major drawbacks of ADR mechanism which to be minimized to attained aimed objective.

Lack of trained practitioners as there is no separate course or department who can take the seat in a dedicated manner to keep up the objectives of the ADR mechanism. Furthermore, the

³⁰ *Supra* note 27.

³¹ Rituparna Padhy, *Analysing Section 89 of CPC*, LAW TIMES JOURNAL (2019).

training should be made a part of continuing education on unique features of ADR as far as judicial officers and judges are concerned.

5. Comparative Analysis of ADR mechanism in India and USA

Sr. No.	USA	INDIA
Enforceability	In the USA, Plea bargaining is filed after the completion of negotiation between the accused and the prosecutor.	In India, Plea bargaining is a voluntary choice of the accused person. There is no negotiation process before plea bargaining.
Nature of offences	The accused charged of any offence may take the application of Plea bargaining.	In India, there are certain exceptions provided under Section, 265-A.
Role of the victim in the Proceeding	The victim does not have an active role.	The victim plays a vital role, as he has the power to refuse if unable to reach a mutual conclusion for the disposition.
Discretionary power of the Judge	The judge does not exercise discretionary power while accepting an application for Plea Bargaining.	The judge has discretionary powers to either refuse or accept an application by the accused of Plea Bargaining.
Final Judgment	The punishment awarded by Plea bargaining is the final judgment.	The Court thinks that the punishment awarded in any case of Plea Bargaining is not sufficient or is regarded by unfair circumstances.

Table 1: Comparative Analysis of ADR mechanism in India and USA³²

³² Judge Peter J. Messitte, *Plea Bargaining in Various Criminal Justice Systems*, (2010).

6. Pros of Plea Bargaining

6.1 Reduction in Charges

The most generic form of the plea bargain, a reduction in the severity of the charge, is a great benefit to a defendant. A lesser charge looks better on a permanent record that does not constitute a serious impact on future convictions and may not exclude the defendant from several things.

6.2 Very Few Technicalities

Courts resolve disputes by referring to binding procedural laws which makes the process rigid and technical. On the contrary, ADR procedures are not afflicted with such rigorous rules of procedure within the case of arbitration; however, the principles of arbitration, which are fixed, are typically applied. Otherwise, the parties might meet and fix the procedures for themselves with the assistance of a mediator. It is substantive justice and not procedural justice that gets prominence in ADR. The ADR thereby facilitates access to justice in an efficient and convenient means.

6.3 Confidential Nature

The ADR proceedings and awards are kept private and confidential. Even in the case of conciliation, Section 75 of the Arbitration and Conciliation Act, 1996 states that all the proceedings should be conducted confidentially. This provides the parties ground to resort to such mechanisms.³³

6.4 It helps in dealing with the caseload of the Judiciary

In plea bargaining, the state and the court are assisted in dealing with caseloads and the method decreases the prosecutors' workload by giving them space to focus much on preparing more serious cases by leaving effortless and petty charges thereby to settle through ADR mechanisms.

³³ Section 75. Confidentiality. –Notwithstanding anything contained in any other law for the time being in force, the conciliator and the parties shall keep confidential all matters relating to the conciliation proceedings. Confidentiality shall extend also to the settlement agreement, except where its disclosure is necessary for purposes of implementation and enforcement.

7. Cons of Plea Bargaining

7.1 Judges are not mandatory to follow the agreement of Plea bargaining

Even if the prosecutor and accused may accept for plea bargain agreement. In India, a judge is not bound to follow the plea-bargaining agreement. Thereby the discretionary power is in the hand of a judge whether to reduce the charges or nullify the agreement if they find that a plea bargain is being given in mala-fide intention.

7.2 It provides soft Justice

In many situations where a plea bargain provides a lighter sentence for someone guilty. Thereby, it can be treated as an escape route for a prosecutor. Few arguments concerning this may argue a guilty plea and a guaranteed sentence is not similar to being found guilty and having a definite sentence imposed.

7.3 Plea bargains eliminate the chances of appeal

If a case goes to trial and a defendant loses, there may be several grounds upon which an appeal may be filed but in plea bargain requires a defendant to plead guilty to the charges imposed on him, even though they are reduced. Thereby, it restricts the ability to file an appeal in any circumstance.

7.4 It has the probability to create a criminal record for the innocent

There might be cases where an innocent person may opt for plea bargaining for the crime which he has not committed but confess to having committed to avoid lengthy litigation which would cost him time and financial resources.

7.5 In India, Judges are not required to follow the Plea-bargaining agreement

In India, Judges are not bound to plea bargaining agreements. Thereby, though the parties and prosecutor may agree to the plea bargain still judges can nullify the agreement and impose a longer sentence, or no sentence should be imposed. A judge can also require a case to go to trial if they feel like a plea bargain is being offered in malafide intention.

8. Conclusion and Suggestions

Certainly, the basic definition of law says that law develops with the development of the society. Although the concept of plea bargaining is not new to India as it was already recognized under Article 20(3) of the Constitution. Initially when plea bargaining was implemented it was hard for Indian system to accept the concept on its disadvantages, but the law must grow rapidly according to the changes in the society and over a period Criminal Justice system has reformed its standards both legally and socially. In India the Plea-bargaining process is voluntary process with the objective to reduce the burden of judiciary and to provide fast and expeditious justice. However, the very essence of ADR is lost if it is not implemented in the true ethos. The role of the judiciary and the bar is especially important for the successful implementation and to achieve the objective of plea bargaining. There are certain loopholes of ADR in the criminal justice system in India which must be given utmost care to achieve efficacy. Following are the suggestions:

Lack of awareness about ADR mechanism amongst the people in both rural and urban areas is one of the hurdles in the realization of the full potential of the ADR mechanism. There is also a lack of awareness amongst judges, advocates and litigants regarding the efficacy and usefulness of the process of mediation.

The National and State Legal Services Authorities should circulate more information regarding these, so they become the first option explored by potential litigants.

Trained officers should be appointed to deal with ADR.

Training of the ADR practitioners should be extensive which would also be necessary to be imparted to those who intend to function as a facilitator, mediators, and conciliators. Furthermore, the training should be made a part of continuing education on unique features of ADR as far as judicial officers and judges are concerned.

The major loopholes in ADR are that it is not binding because one could still appeal against the award or delay the implementation of the award.

CHAPTER 2

AN EVALUATION OF EFFICIENCY AND EFFECTIVENESS OF LOK ADALAT SYSTEM IN ANDHRA PRADESH, KARNATAKA, AND TELANAGANA

Charvi Sharma*, Girish Ilagar†

Abstract

The institution of 'Lok Adalat' is one of the Alternative Dispute Resolution Mechanisms which granted legal status by the Indian government long back. Lok Adalat has been introduced to overcome the problem of pending cases. From data can be said that this institution has the potential to resolve lakhs of pending cases in a single day. However, current pending cases statistics show that above 4.4 crore cases are pending before courts include the Supreme Court; the Indian Judicial System needs a helping hand from institutions like Lok Adalat to deal with this issue. Though India has Parliamentary Law, State Legal Services Authorities are working independently and have separate policies, plans for organizing Lok Adalat at different locations within the state. Due to COVID19 since March 2020, the government institutions are not working in their capacity, the Lok Adalat is not an exception to this. Therefore, it is essential to evaluate the pre-covid and post-covid performance of Lok Adalat, how the state legal services authorities overcome the pandemic, and what policies the state legal services authorities are implementing. This research is a comparative study of

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policies, measures adopted by the different state legal services authorities in Andhra Pradesh, Karnataka, and Telangana.

Keywords: Lok Adalat, Alternative Dispute Resolution, Andhra Pradesh, Karnataka, Telangana, Online Dispute Resolution.

1. Introduction

Today in India around 4.4 crore cases are pending before all courts including Supreme Court and High Courts.³⁴ This includes Civil and Criminal matters with a ratio of 1:3. In 2019, former Supreme Court judge Justice (ret'd) Markandey Katju said that the judiciary will need 360 years to clear a backlog of cases pending (3.3 crore cases) before all the courts right from lower courts to the Apex Court if no new case is filed.³⁵ The fewer the judges, absenteeism of judges, frequent transfer of judges, strikes by advocates, procedural delays, etc. are some of the reasons for piling up the cases in all levels right from lower to the higher forums. In such a scenario, Lok Adalat has been a relief for disputing parties and judges who are overburdened.

The idea of Lok Adalat, also known as people's court, is a creative Indian commitment to the world's jurisprudence. Lok Adalat is one of the alternative dispute redressal methods where the cases pending before the court of law or disputes at the pre-suit stage are settled or compromised agreeably based on principles prevailed in the Indian legal system like principles of justice, equity, fair play, etc. If the parties failed to compromise or settle the matter at the Lok Adalat then, in case of pending case the adjudicating forum will again takeover the case, and in case the matter is at the pre-suit stage then the disputing parties are free to approach appropriate forum to resolve their dispute. Through this method, for many

³⁴ Pradeep Thakur, *Pending cases in India cross 4.4 crore, up 19% since last year*, THE TIMES OF INDIA, <https://timesofindia.indiatimes.com/india/pending-cases-in-india-cross-4-4-crore-up-19-since-last-year/articleshow/82088407.cms>.

³⁵ Kenneth Mohanty, *Explained: Here's What Has Been Fuelling Backlog In Indian Courts*, NEWS18, (2021), <https://www.news18.com/news/explainers/explained-cji-ramana-says-4-5-crore-cases-pending-heres-what-has-been-fuelling-backlog-3977411.html>.

years lakhs of cases have been resolved by the legal services authorities.³⁶ However, this system also has some issues like infrastructure, vague policies, technological barriers, lack of administrative support, etc. These issues are hampering effectiveness and efficiency

1.1 Scope and Objectives of the Study

There is presence of Alternative Dispute Resolutions with advantages, however it remains unutilized. The scope of research study is not limited to highlighting the importance of Lok Adalat but to Travel beyond the procedural barriers which are construed to be major impediment to the people friendly justice delivery system called Lok Adalat as the formal court system is sinking under its own weight of backlog, in relation to Constitutional mandate of providing access to justice for all and fundamental duty of citizen to respect the institutions:

- to study the need of organization of the Lok Adalat at various levels i.e., State, District and other courts conducting Lok Adalat.
- to evaluate the advantages and disadvantages of Lok Adalat.
- to collect, analyze and evaluate the statistical information relating to the number of Lok Adalat's conducted, number of cases settled, types of cases settled and pending cases; and
- to explore measures to overcome drawbacks.

1.2 Research Methodology

Researchers has followed the doctrinal research methodology, here researchers did a comparative analysed of the policies dealing with Lok Adalats and the way these are being organized by Andhra Pradesh, Karnataka and Telangana. It includes an analysis of the enactments, government reports, research reports, cases disposed through E-Lok Adalat from January 2019 to June 2021 to understand the pattern of cases disposal, etcetera.

³⁶ Press Trust of India, *Last national Lok Adalat of the year settled over 10 lakh cases: Law Ministry*, THE HINDU.

2. Historical Development of the Lok Adalat

In old period every one of the debates were disputes to town 'Panchayats' which comprised of village elders. The panchayats used to determine the disputes through arbitration.³⁷ The idea of Lok Adalat's had become mixed up in blankness in the previous few centuries before autonomy especially during the British Raj, yet presently it has again reemerged and become well known in recognizable in the legal framework. This is a framework which has extremely profound roots in Indian lawful history. This framework likewise has an extremely close faithfulness with culture just as the impression of equity as for Indian ethos. Ongoing legitimate history has demonstrated that Lok Adalat's is the most significant and productive Alternative Dispute Resolution instrument and is fit to the Indian culture, climate, and cultural interests.

Hon'ble Justice P.N. Bhagwati and Hon'ble Justice Krishna Iyer of the Supreme Court of India, emphasized the need for revival of the informal dispute resolution system in India. They mobilized social action groups, public spirited citizens and a section of lawyers to experiment settlement of disputes outside the courts.³⁸ The Central Government formed the Committee for Implementing Legal Aid Schemes (CILAS) in 1980 headed by Justice P.N. Bhagwati. Later, the Legal Aid movement baton was given to Justice R.N. Mishra.³⁹ Lok Adalat's camps had at first been started in Gujarat in March 1982. The headway of this development was a pre-arranged system, so the significant weight on the courts due to forthcoming cases could be diminished. The first since forever Lok Adalat in post-free India held at Junagarh in Gujarat.⁴⁰ In Maharashtra, the Lok Adalat's had initiated in 1984.⁴¹

³⁷ Shivaraj S. Huchhanavar, *In Search of True 'Alternative' to Existing Justice Dispensing System in India*, NALSAR LAW REVIEW, (2013) Vol. 7, No. 1, pp 01-25.

³⁸ P. Bhargava, *Lok Adalat: Justice at the Door Steps* (1998), pp. 16-17.

³⁹ Tameem Zainulbhai, *Justice for All: Improving the Lok Adalat System in India*, FORDHAM INTERNATIONAL LAW JOURNAL, (2016), Vol. 35, Issue 1, pp. 248-278.

⁴⁰ Akhil Jindal, *Lok Adalat In India: A Comprehensive Study*, White Black Legal Law Journal, Vol. 1, Issue 7, (2019), <http://www.whiteblacklegal.co.in/wp-content/uploads/2020/02/Vol-1-Issue-7-Akhil-Jindal.pdf>.

⁴¹ Madonna Jephi, *Lok Adalat: A new chapter to The Justice Dispensation System*, LAW TIMES JOURNAL, (2018), <https://lawtimesjournal.in/lok-adalat/>.

After the Legal Services Authorities Act, 1987⁴² (the Act) was passed, Lok Adalat's were given a legal status, as indicated by the established directive in Article 39A⁴³ of the Constitution. It contains different arrangements of settlement of debates through Lok Adalat's. This Act coordinates the legal services authority to convey free and segment legitimate administrations to the weaker sections of the general public, it likewise puts an obligation on the legal service authority to guarantee that equity isn't denied to any resident on account of any monetary or different inabilities. It likewise coordinates the association of Lok Adalat's to guarantee that the general set of laws advances equity based on equivalent freedom. Lok Adalat's were given statutory acknowledgment in this demonstration. It was plainly given that the honor that will be chosen by the Lok Adalat's will have a similar impact as a declaration, which can likewise be executed like a common court order.⁴⁴

In the year 2002 the Parliament carried certain significant alterations to the Act, it introduces section VIA for pre-litigation conciliation and settlement.⁴⁵ After the numbers of Amendments, Lok Adalat's were organized accordingly it empowered them to resolve the disputes and made them a perpetual body.

3. Legal Basis

Considering the necessity of legal aid for poor and needy people the Central Government through the Constitution (Forty-second Amendment) Act, 1976 added Article 39A to the Directive Principles of State Policy (DPSP). The language of Article 39A is known in mandatory terms, it mandates free legal aid to weaker sections of the society. It is, therefore, clear that the State has been ordained to secure a system which promotes justice on the idea of

⁴² The Legal Services Authorities Act, 1987, No. 39, Acts of Parliament, 1987 (India)

⁴³ INDIA CONST. art. 39A, amended by The Constitution (Forty-second Amendment) Act, 1976. "39A. The State shall secure that the operation of the legal system promotes justice, on a basis of equal opportunity, and shall, in particular, provide free legal aid, by suitable legislations or schemes or in any other way, to ensure that opportunities for securing justice are not denied to any citizen because of economic or other disabilities."

⁴⁴ Dayawati v. Yogesh Kumar Gosain, CRL.REF.No.1/2016, (2017).

⁴⁵ The Legal Services Authorities (Amendment) Act, 2002, No. 39, Acts of Parliament, 2002 (India).

civil rights. It is emphasized that the system should be ready to deliver justice expeditiously on the idea of civil right and supply free legal aid to make sure that opportunities for getting equity aren't denied to any residents by reasons of financial or different incapacities. Poor people and resourceless people need equity, they need for that, an admittance to equity. Mere recognition of rights does not help them, without providing for necessary infrastructure to secure them justice whenever needed.

For this purpose, the Act constitute and defines functions of the legal services authority and the legal services committee at different level. Chapter VI and VIA deals with the Lok Adalats and the Permanent Lok Adalats respectively. It provides for organising the Lok Adalats from taluk level to national level for the settlement of appropriate matters.⁴⁶ The Act enabled the Lok Adalats with powers vested in a civil court under the Civil Procedure Code, 1908 to achieve the intended outcomes.⁴⁷ The award of the Lok Adalats is deemed as a decree and becomes a final and binding on parties to the dispute.⁴⁸ As it is a result of settlement between disputing parting it cannot be appealed.⁴⁹ The Act also have provisions for the Permanent Lok Adalats and it can be established to deal with matters pertaining to the Public Utility Services (PUS) as defined.⁵⁰

4. Hierarchy of Various Authorities Created under the Act

4.1 National Legal Services Authority

Article 39A of the Constitution of India provides for free legal aid to the poor and weaker sections of the society and ensures justice for all.⁵¹ Articles 14⁵² and 22(1)⁵³ of the Constitution also make it obligatory for the State to ensure equality before law and a legal system which promotes justice on the basis of equal opportunity to all. The National Legal Services Authority (NALSA) has been constituted under the Act to monitor and evaluate

⁴⁶ The Legal Services Authorities Act, 1987, § 20, No. 39, Acts of Parliament, 1987 (India).

⁴⁷ The Legal Services Authorities Act, 1987, § 22, No. 39, Acts of Parliament, 1987 (India).

⁴⁸ The Legal Services Authorities Act, 1987, § 21, No. 39, Acts of Parliament, 1987 (India).

⁴⁹ *Id.*

⁵⁰ The Legal Services Authorities Act, 1987, § 22B, No. 39, Acts of Parliament, 1987 (India).

⁵¹ INDIA CONST. art. 39A, amended by The Constitution (Forty-second Amendment) Act, 1976.

⁵² INDIA CONST. art. 14.

⁵³ INDIA CONST. art. 22, § 1.

implementation of legal aid programmes and to lay down policies and principles for making legal services available under the Act.

In every State, a State Legal Services Authority (SLSA) and in every High Court, a High Court Legal Services Committee (HCLSC) have been constituted. District Legal Services Authorities (DLSA), Taluk Legal Services Committees (TLSC) have been constituted in the districts and most of the Taluks to give effect to the policies and directions of the NALSA and to provide free legal services to the people and conduct Lok Adalats in the State. Further as the Supreme Court of India is concerned, the Supreme Court Legal Services Committee has been established to administer and implement the legal services programme.

4.2 State Legal Service Authorities (SLSA)

The Act was enacted to establish Legal Services Authorities to provide unrestricted and competent legal services to the weaker sections of society, to ensure that opportunities for seeking justice are not denied to any citizen due to economic or other disabilities, and to organise Lok-Adalats to ensure that the legal system operates in a manner that promotes justice on an equal footing. Section 6 of the Act establishes the SLSA.

For the State to execute the powers and perform the functions granted or assigned to a SLSA under this Act, each State Government should establish a body to be known as the Legal Services Authority. The Chief Justice of the High Court, who shall be the Patron-in-Chief; a serving or retired Judge of the High Court, to be nominated by the Governor, in consultation with the Chief Justice of the High Court, who shall be the Executive Chairman; and such number of other Members, possessing such experience and qualifications, as the State Government may prescribe, to be nominated by that Government in consultation with the Chief Justice of the High Court.

The SLSA's functions are as follows:

The State Authority is responsible for carrying out the Central Authority's policies and directives.

Without limiting the generality of the functions mentioned in subsection (1), the State Authority shall conduct all or any of the following functions:

- provide legal services to persons who meet the conditions set forth in this Act.
- hold Lok Adalats, including Lok Adalats for High Court matters; and
- (c) implement proactive and strategic legal aid programmes.⁵⁴

According to the Act, the SLSA shall appropriately act in co-ordination with other governmental agencies, non-governmental voluntary social service institutions, universities, and other bodies engaged in the work of promoting the cause of legal services to the poor and shall also be guided by the Central Authority.⁵⁵

4.2.1 Karnataka State Legal State Authority

The Karnataka State Legal Services Authority (KSLSA) was established with the noble goal of providing free and competent legal services to the weaker sections of society, ensuring that no citizen is denied justice because of economic or other disabilities, organising Lok Adalats, and ensuring that the legal system's operations promote justice on an equal footing. Regardless of caste, creed, or religion, everyone is treated equally. Lok Adalats have shown to be a weapon in the hands of the judiciary, removing from the system any issues that do not require the Court's attention or time. In the aftermath of the Covid-19 outbreak, courts were unable to hear the cases. The KSLSA took a big move in organising E-Mega Lok-Sabha under the excellent leadership of Hon'ble Chief Justice, High Court of Karnataka and Patron-in-Chief, KSLSA and Hon'ble Executive Chairman, KSLSA.

4.2.2 Telangana State Legal Services Authority

The Telangana State Legal Services Authority (TSLSA) organizing the Lok Adalat would constitute benches for the Lok Adalat, each bench comprises the sitting or retired judges of the supreme court or a sitting or retired

⁵⁴ The Legal Services Authorities Act, 1987, § 7, No. 39, Acts of Parliament, 1987 (India).

⁵⁵ The Legal Services Authorities Act, 1987, § 8, No. 39, Acts of Parliament, 1987 (India).

judicial officer and anybody or both of a member from the legal profession and or a caseworker engaged within the upliftment of the weaker sections and curious about the implementation of legal services schemes or programmes.⁵⁶ Lawful Services Clinics were set up in the 36 Jails for delivering legal assistance to the prisoners.⁵⁷ TSLSA took appropriate steps for digitization of jail clinics.⁵⁸

The TSLSA in a joint effort with the District Legal Services Authorities (DLSAs), Non-Governmental Organisations (NGOs) and District Administration organized various programmes like seminars, legal services camp module, camps, etc.⁵⁹ The said programmes were coordinated to spread data about the different socio-lawful issues of the neighborhood the approaches to change them.

4.2.3 Andhra Pradesh State Legal Services Authority

The Andhra Pradesh State Legal Services Authority (APSLSA) guaranteed that expert administrations were delivered in court based lawful administrations and appeals were filed timely under the scheme to protect the rights of convicted prisoners. In such manner, all the DLSAs were told to co-ordinate with the Supreme Court Legal Services Committee (SCLSC) and High Court Legal Services Committee (HCLSC) and to guarantee smooth progression of information and timely submission of documents. The APSLSA through one of the Mandal Legal Services Committee in Krishna District, got arranged various CDs in Telugu language containing data about the NALSA plans, the Legal Services Activities, etc. what's more, sent it to every one of the Legal Services Institutions arranged in the State of Andhra Pradesh.⁶⁰ The CDs were played at different spots and occasions, for example, Legal Literacy Camps, National Lok Adalats, Andhra Pradesh State Road Transport Corporation (APSRTC) transport stands, Doordarshan, Railway stations and at other public spots.

⁵⁶ The National Legal Services Authority (Lok Adalat) Regulations, 2009, Reg. 6.

⁵⁷ The National Legal Service Authority, Compilation Best State Legal Services Authority, (2019). https://nalsa.govsin/uploads/pdf/2019/11/13/13_11_2019_243823498.pdf.

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ *Id.*

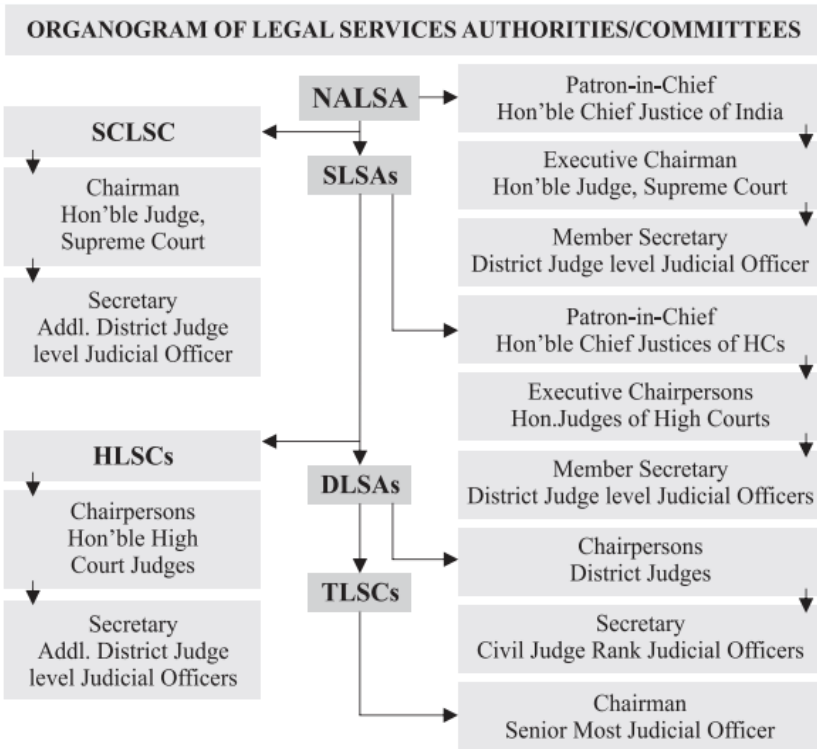


Figure 01: Organogram of Legal Services Authorities/Committees⁶¹

5. Types of Lok Adalat

5.1 National Lok Adalat

The National Lok Adalats are organised throughout the country, in all over the courts right from the taluka level to Apex Court. It has a capacity to disposed of the huge number of cases in single day so, this has to be held compulsorily at certain intervals. The National Lok Adalats are conducted on the bases of the specific matter of every month.⁶²

⁶¹ National Legal Services Authority, Training Module, <https://nalsa.govsin/training-modules/training-module-part-1>.

⁶² Loknath Mohapatra et. al., *An Analysis of the functioning of Lok Adalats in the Eastern Region of India*, Ministry of Law and Justice, Government of India (2019).

5.2 Permanent Lok Adalat

The Permanent Lok Adalat are permanent bodies with the Chairman and two members, and these are organized under Section 22B of the Act. It provides the regular pre-litigative and the mechanism for the conciliation and also the settlement for the cases that deal with the PUS like transport, postal, telegraph etc.⁶³

5.3 Regular Lok Adalat

As name suggest these held on regular basis various parts of the country. Daily Lok Adalat, Continuous Lok Adalat, Mobile Lok Adalat and Mega Lok Adalat are the types of Regular Lok Adalat.⁶⁴

6. Analysis of Policies Related to the Lok Adalat in Southern India

6.1 Frequency and Schedule of Lok Adalat

As the frequency of Lok Adalat's at several levels is not secured, there is as such no organized practice of the preparation of an annual schedule containing the tentative plan of the schedule of activities. The schedule of each Lok Adalat must be confirmed from time to time rather than being in obedience to a pre-arranged schedule.

As far as the National Lok Adalat is concerned it not comes within the scope of SLSAs. National Lok Adalats in 2014 it was organized once in a year, in 2015 and 2016 it was organized monthly basis. However, this was not long lasting, in 2018 and 2019 they organized bimonthly (5 Lok Adalats in each year).⁶⁵

⁶³ The Legal Services Authorities Act, 1987, § 22A, No. 39, Acts of Parliament, 1987 (India).

⁶⁴ Loknath Mohapatra et. al., *supra* note 62.

⁶⁵ *Id.*

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Year	Date	Types of Cases	No. Cases Disposed
2015	14.02.2015	Banking Matters & Section 138 NI Act	420665 (AP- 2047; Karnataka- 30475; Telangana- 616)
	14.03.2015	Revenue, MNREGA and Land Acquisitions	41,92,313 (AP- 8443; Karnataka- 686737; Telangana- 8616)
	11.04.2015	Labour and Family Matters	5,32,436 (AP- 13196; Karnataka- 38974; Telangana- 22868)
	09.05.2015 & 13.06.2015	MACT and Insurance Claims	3,18,724 (held on 13.06.2015 only for: AP- 14063; Karnataka- 5705)
	11.07.2015	Public Utility Disputes	873752 (AP- 24368; 262693; Telangana- 35818)
	08.08.2015	Banking Matters U/Section 138 and Recovery Suits	377507 (AP- 9375; Karnataka- 31638; Telangana- 6462)
	12.09.2015	Criminal Compoundable Matters	579477 (AP- 14450; Karnataka- 320302; Telangana- 18116)
	10.10.2015	Traffic, Petty Matters and Municipal Matters	1637399 (AP- 32834; Karnataka- 568412; Telangana- 33676)

	12.12.2015	All Types of Cases	13569441 (AP- 66210; Karnataka- 1812394; Telangana- 79912)
2016	13.02.2016	Banking Matters U/Section 138 and Recovery Suits	363565 (AP- 28907; Karnataka- 36412; Telangana- 11904)
	12.03.2016	Civil and Revenue Matters	1425819 (AP- 13737; Karnataka- 303636; Telangana- 8465)
	09.04.2016	Labour and Family Matters	801552 (not organized at AP and Telangana ; Karnataka- 124455)
	14.05.2016 & 11.06.2016	MACT and Insurance Claims	222501 (held on 11.06.2016 only: AP- 19751; Karnataka- 51621; Telangana- 2949)
	09.07.2016	Public Utility Disputes	708305 (AP- 16707; Karnataka- 418703; Telangana- 7686)
	13.08.2016	Banking Matters U/Section 138 and Recovery Suits	409487 (AP- 10150; Karnataka- 27923; Telangana- 7644)
	10.09.2016	Criminal Compoundable Matters	324208 (AP- 14863; Karnataka- 51186; Telangana- 8916)

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	08.10.2016	Traffic, Petty Matters and Municipal Matters	1096932 (AP- 11669; Karnataka- 572409; Telangana- 30355)
	12.11.2016	All Types of Cases	5146084 (AP- 23405; Karnataka- 123129; Telangana- 24360)
2017	11.02.2017	All Types of Cases	953312 (AP- 44871; Karnataka- 37804; Telangana- 67572)
	08.04.2017	All Types of Cases	945530 (AP- 30727; Karnataka- 8409; Telangana- 14357)
	08.07.2017	All Types of Cases	1018366 (AP- 27934; Karnataka- 11768; Telangana- 35214)
	09.09.2017	All Types of Cases	1118210 (AP- 16143; Karnataka- 15189; Telangana- 28369)
	09.12.2017	All Types of Cases	1370449 (AP- 27890; Karnataka- 12100; Telangana- 27411)
2018	10.02.2018	All Types of Cases	1263474 (AP- 31612; Karnataka- 15502; Telangana- 22968)
	22.04.2018	All Types of Cases	1263243 (AP- 29901; Karnataka- 18961; Telangana- 16804)

	14.07.2018	All Types of Cases	1104565 (AP- 14357; Karnataka- 22834; Telangana- 16178)
	08.09.2018	All Types of Cases	1054811 (AP- 15430; Karnataka- 20148; Telangana- 15321)
	08.12.2018	All Types of Cases	1193598 (AP- 9280; Karnataka- 26008; Telangana- 17194)
2019	09.03.2019	All Types of Cases	1292395 (AP- 20610; Karnataka- 43721; Telangana- 28913)
	13.07.2019	All Types of Cases	1413974 (AP- 25243; Karnataka- 81987; Telangana- 37291)
	14.09.2019	All Types of Cases	1174644 (AP- 23497; Karnataka- 67930; Telangana- 9748)
	14.12.2019	All Types of Cases	1412440 (AP- 28065; Karnataka- 88211; Telangana- 34886)
2020	08.02.2020	All Types of Cases	1199575 (AP- 22483; Karnataka- 71466; Telangana- 15468)
	12.12.2020	All Types of Cases	1042816 (AP- 15413; Karnataka- 263215; Telangana- 32092)

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2021 (Up to 31 st June 2021)	27.03.2021 & 10.04.2021	All Types of Cases	484489 (AP- not organised; in Karnataka organized on 27.03.2021- 332936; in Telangana organized on 10.04.2021- 35679)
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Table 01: National Lok Adalats organised between 2015-2021⁶⁶

The above given data shows that the NLSA is not consistent on frequency of National Lok Adalat which had an impact on number of cases disposed. Here, when the National Lok Adalat was organized for particular type of matters on monthly basis in 2015-2016 the highest number of cases were resolved compare to 2017-2019. The NLSA should plan National Lok Adalats on monthly basis, that will help in to achieving the intended objectives. Data clearly shows that the NLSA's work was hampered because of COVID pandemic. But the NLSA adopted the technological measures to deal with it and they organized the Online National Lok Adalats. The Act gives power to State Authorities, District Legal Services Authorities and Taluk Legal Services Committee to decide the policy on frequency or interval of Lok Adalats.⁶⁷ So, the policies vary from state to state. Here, researchers have considered policies of state of Andhra Pradesh, Karnataka and Telangana, it was found that they don't have any standard operating procedure for organizing Lok Adalats. Among these states, Karnataka only have a policy to conduct Lok Adalats every month⁶⁸ but the schedule was not available at official website of KLSA⁶⁹. Andhra Pradesh⁷⁰ and Telangana⁷¹ they don't have such express policy on their official website, neither they have schedule of Lok Adalats organized in

⁶⁶ National Legal Services Authority, <https://nalsa.govsin/lok-adalat/national-lok-adalat> & Response to RTI Application number NLSAT/R/E/21/00159.

⁶⁷ The Legal Services Authorities Act, 1987, § 19, No. 39, Acts of Parliament, 1987 (India).

⁶⁸ The District Legal Service Authority Bengaluru Urban, <https://districts.ecourts.govsin/dlsa-2>.

⁶⁹ The Karnataka Legal Services Authority, <https://kslsa.kar.nic.in/index.html>.

⁷⁰ The Andhra Pradesh State Legal Services Authority, <https://apslsa.ap.nic.in/index.html>.

⁷¹ The Telangana State Legal Services Authority, <https://tslsa.telangana.govsin/>.

past. Reports available in public domain shows that the highest number of Lok Adalats were organized in state of Karnataka.⁷² Here, respective state legal services authorities should fix the frequency and publish their Lok Adalat schedule in advance so they will achieve the intended objectives. Organising Lok Adalats on frequently basis will help them in resolving high number of cases at pre-litigation stage.

6.2 Types of Cases Resolved

Generally, cases like civil cases, matrimonial cases, MACT cases, and petty offence cases etc. are referred for resolution before Lok Adalats. It is the organizing authority who will decide the types of cases would be resolved in scheduled Lok Adalat. Sometimes they organize Lok Adalat for particular type of matters (*refer Table 01*). Here, is the list of matters normally referred for resolution:

1. Criminal Compoundable Offences
2. NI Act Cases under Section 138 (Negotiable Instruments)
3. Bank Recovery Suits
4. MACT Cases (Motor Accidents Claims Tribunal)
5. Labour Dispute Cases
6. Electricity and Water Bills (excluding non-compoundable)
7. Matrimonial Disputes
8. Land Acquisition Cases (LAC)
9. Consumer's Grievances
10. Other Civil Cases

All three states have more or less uniform policy on types of cases to be resolved by Lok Adalat. However, TSLSA has comprehensive list of matters which can be referred for Lok Adalat like, railway claims, disaster

⁷² The Karnataka Legal Services Authority, Bengaluru, https://kslsa.kar.nic.in/pdfs/statistics/lok_adalat.jpg.

compensation, cantonment board matters, Forest Act cases, etc. The APSLSA and KLSLSA policies are silent on this.

Lok Adalats are not only disposing cases pending before courts but the parties can approach for pre-litigation disputes. According to the Act, the case will be referred if,

- a) both the parties are agreed for settlement through Lok Adalat, or
- b) if one of the parties makes application to court or
- c) if court is satisfied that the matter is appropriate for Lok Adalat.⁷³

Here, none of the states considered for research have specific guidelines on this. This is the reason the number of referred matters are in considerably high as compared to the settled. It reduces the overall success rate of Lok Adalat. For example, for the National Lok Adalat held on 08 February 2020 total 1,88,699 matters from Karnataka were taken up for settlement but only 71,466 matters resolved through, it means success rate was 37.87%.⁷⁴

6.3 Additional Incentives or Special Duty Allowances for Lok Adalat Work

The work concerning periodic Lok Adalat's organized under Section 19 of the National Legal Services Authorities Act, 1987 is by and generally conducted beyond the common authority working hours of judicial officers. Lok Adalat's are organized on such days when the courts are closed, and the judicial officers don't have official duties to attend. Judicial officers are likewise not excused from their regular official duties for accomplishing preliminary work corresponding to Lok Adalat's. Along these lines, arranging Lok Adalat ordinarily otherwise what in any case would have been off days for legal officials. SLSA, DLSA and TLSC also takes help of social worker, legal professions or academicians for Lok Adalat work. Those who are permanently associated with SLSA they are

⁷³ The Legal Services Authorities Act, 1987, § 20, No. 39, Acts of Parliament, 1987 (India).

⁷⁴ The National Legal Services Authority, Disposal of National Lok Adalat held, (2020), <https://nalsa.govsin/statistics/national-lok-adalat-report/national-lok-adalat-2020/disposal-of-national-lok-adalat-held-on-08-02-2020-for-all-types-of-cases>.

salaried employees but other members are paid remuneration for the day of Lok Adalat.

There is no uniformity on remuneration policy, it varies from state to state. The TSLSA⁷⁵ and APSLSA⁷⁶ have express remuneration policy but KSLSA⁷⁷ regulation didn't have provision. Whereas the TSLSA pays good remuneration as compared to the APSLSA.⁷⁸ Remuneration is something to recognize the efforts taken by officers and members of Lok Adalat. Good amount remuneration can motivate concerned people to contribute for Lok Adalat, so the APSLSA and KSLSA need to revise their respective provisions dealing with allowances or remuneration. Also, if an academicians is working for Lok Adalat, they should get a comp off from their institution.

6.4 Infrastructure

In Another factor which affect the working of Lok Adalat that is a preparedness of SLSA. As since March 2020 due to pandemic the Lok Adalat work has been affected tremendously. But the data indicates that the respective SLSA shown their preparedness by organizing E-Lok Adalats. Among these three states, the KSLSA has introduced online facility first, they organized first E-Lok Adalat on 19th September 2020. Later, TSLSA come up with E-Lok Adalat in November 2020 and APSLSA in December 2020. Considering the data provided by the NLSA in response to the RTI application filed by researcher, the KSLSA has settled highest number of cases i.e., 1,36,274 cases. Surprisingly, among the Southern states, not a single case has settled in Kerala and Tamil Nadu though Lok Adalat from June 2020 to June 2021. So, to achieve the objectives set out by the Act, SLSA should be equipped with good infrastructure and latest technology (*refer Table 02*).

⁷⁵ The Telangana State Legal Service Authority Regulations, 2016, Reg. 25.

⁷⁶ The Andhra Pradesh State Legal Service Authority Regulations, 1996, Ch. IX.

⁷⁷ The Karnataka State Legal Services Authorities Rules, 1996.

⁷⁸ The Telangana State Legal Service Authority Regulations, 2016, Reg. 25.

7. Covid Crisis and Measures Adopted by Legal Services Authorities

Governments and organisations around the world have faced major issues because of the spread of coronavirus and the unprecedented shutdown. In today's world, fundamental necessities such as food, water, clothing, and justice are all available. The active participation of legal service authorities has ensured that the state provides aid to the people. During this period of public health emergency, legal service authorities have taken active leadership and responded to all concerns. In addition to providing legal aid to the underprivileged and weaker parts of society, the NALSA has ensured that essentials are accessible to Indian residents through its competent workforce.

Although lok adalats have been extremely beneficial, it is critical to guarantee that their essence of simple, hassle-free access to justice and a broader reach is preserved. As Justice N V Ramanna, who presided over the first e-mega lok adalat in Karnataka, noted that the primary roadblock to its implementation is to promote it at the grassroots level, where video conferencing is not always available. This is essential as otherwise, it will fail to serve its function if it is unable to meet the requirements of the less fortunate members of society for which it was designed.

E-Lok Adalats organized by APSLSA, KSLSA and TSLSA and Number of cases disposed from June 2020 to June 2021			
Sr. No.	Name of the State Authority	Date	Total Disposal (both pre-litigative and pending cases)
1	Karnataka	19.09.2020	115938
2	Telangana	07.11.2020	9923
3	Andhra Pradesh	12.12.2020	5677
4	Telangana	12.12.2020	31
5	Karnataka	19.12.2020	19090

6	Andhra Pradesh	20.01.2020	1
		23.01.2020	1884
		30.01.2020	463
7	Andhra Pradesh	March, 2021	839
8	Karnataka	27.03.2021	1246
9	Andhra Pradesh	April, 2021	463
10	Andhra Pradesh	May, 2021	499
11	Telangana	June, 2021	8
12	Andhra Pradesh	June, 2021	2636
	Grand Total		158698

Table 02: E-Lok Adalats organized by APSLSA, KSLSA and TSLSA and Number of case disposed⁷⁹

8. Conclusion and Suggestions

Certainly, the purpose of Lok Adalat, according to this article, is to settle pending court cases by concessions, peacetime, and the promotion of a practical, common sense, and realistic approach to the combatants' problems. Lok Adalat is a mechanism that is required for all living court hearings in order to save time and money. It can only take cases that are similar in nature and fit within their disposal capacity. The system has received accolades from all parties involved, as well as the general public and legal officials. It also aids the establishment of a law of peace in the larger interests of justice and a broader range of society.

However, there are few suggestions which the respective state legal services authorities should consider and make changes in their rules or regulations applicable to the Lok Adalats:

The NALSA and all above mentioned SLSA should decide the frequency and schedule Lok Adalats in advance, probably in the

⁷⁹ Response to the RTI Application number NLSAT/R/E/21/00159.

month of December for upcoming year or at the beginning of the year, with specific dates and other necessary details. While making schedule SLSA schedule should revolve around the schedule prepared by NALSA.

Each SLSA should formulate the policy to refer matters for Lok Adalat.

The APSLSA should reconsider their remuneration regulations as considering current inflation rate remuneration offered is very low. It may discourage people to work on holidays. On the same note, the KLSA should expressly mention allowances for members or administrative staffs other than permanently affiliated to the KLSA.

Its procedure is voluntary, and it is based on the assumption that both disputants are eager to settle their differences amicably. Disputes can be resolved in a simpler, faster, and more cost-effective manner at pre-litigation or pending litigation stages. As a result, it can be concluded that the Lok Adalat system of providing platform to disputing parties is a noble one that has aided the judiciary not only in the speedy disposition of cases.

CHAPTER 3

COMPETENCY OF ARBITRAL TRIBUNALS: A COMPARATIVE STUDY BETWEEN THE UNITED KINGDOM & INDIA

Vibhuti VK*

Abstract

Arbitration is a mutually agreed-upon and convenient way of settling conflicts. It encourages disputing parties to settle their differences outside of the court of law. Generally, arbitration is employed if a pre-existing commercial relationship exists between two parties. The principle behind this specialized dispute resolution method stems from the backlogs of cases and intricacies of the court processes. It aims to provide an efficient dispute resolution process while maintaining the disputing party's autonomy. However, arbitration is now emerging in non-commercial settings as well. Arbitration has reduced the burden on courts as well as on the parties in dispute. The disputes are settled with binding force in arbitration by an individual (arbitrator) acting in a judicial manner, rather than by a domestic court of law, which would have jurisdiction if the parties to dispute did not include the arbitration clause in their contract. All such predicaments have been critically analysed.

Keywords: Law, Tribunal, Competence, Legislations, Case law.

1. Introduction

In the modern world, the traditional judicial system fails to deal with the ever-increasing burden of legal proceedings. Arbitration is a popular

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method for settling conflicts and disputes. Alternative Dispute Resolution is a legal system that is distinct from the traditional judicial system. It encompasses a range of standardized methods for resolving dispute issues more effectively when the traditional way of settling conflicts and negotiation fails. It is a non-litigation, inexpensive, and time-saving alternative for resolving disputes.

1.1 Background

The researcher opines that arbitration has not been proven to be a successful method of dispute resolution in India compared to the United Kingdom. This paper will analyse the similarities as well as the differences in an arbitral proceeding, implantation of the competence doctrine, and standpoint of judiciary between these two common-law States. This paper will explore the importance of arbitration, the doctrine of competence-competence with respect to the United Kingdom and India. The paper will also look into the issues and challenges that these States face while enforcing foreign arbitral awards. The approach taken by the research is both legal and sociological.

1.2 Research Problem

Arbitration is a procedure wherein individuals seek adjudication from a neutral, unbiased, and independent third party to resolve a dispute. The decision is binding, and both parties must execute it. In India, arbitration has not been proven to be successful and effective as traditional courts. The issue relating to the competency of arbitral tribunals is debatable in various states including India and the United Kingdom. To solve this issue, one must analyse the doctrine of competence and its practical application in the court of law in each of these states which further gives rise to judicial intervention that defeats the purpose of arbitration. Mostly arbitral awards are adhered to wilfully, the main problem arises when a party disagrees with the award and has to execute the same. Despite receiving a desirable verdict, there are numerous instances where the party fails to have it enforced by a competent authority. The rationale in these failed enforcements differs from one party rejecting to participate in the Arbitral procedures with another party questioning the decision based on the cost awarded or the Arbitration Tribunal's competency.

The issue relating to the competency of arbitral tribunals is debatable in various states like India and the United Kingdom. To solve this issue, one must analyse the doctrine of competence and its practical application in the court of law in each of these states that further gives rise to judicial interference that defeats the purpose of the arbitration. The paper will study the history and evolution of arbitration, the doctrine of competence-competence, and judicial interference in arbitral tribunal proceedings in the United Kingdom and India to compare and analyse the arbitral system.

1.3 Scope of the study

The scope of research is to evaluate present scenario of competency of arbitral tribunal in India. The research will focus on examining the implementation and interpretation of the doctrine of competence-competence and the judicial interference in arbitral matters with the help of case laws.

1.4 Scope of the study

The research is limited to analysing the doctrine of competence-competence, competency of arbitral tribunals and judicial interference in the United Kingdom (England & Wales) & India.

1.5 Objectives of the Study

- To discuss the history and evolution of arbitral tribunals.
- To understand the doctrine of competence-competence.
- To compare the viability and competency of the arbitral tribunals in each state.
- To evaluate judicial interference in arbitral proceedings.
- To discuss the recent amendments.
- To determine which State has a successful functioning of arbitral tribunal.

1.6 Research Methodology

This research will use comparative analysis method to fulfil the objectives of the study using the primary sources like case laws and legislations, statutes and secondary source of books, articles, journals, blogs etc.

2. History and Evolution of Arbitration

The In the history of humankind, the search for peace and justice, arbitration has prevailed. According to the biblical theory, King Solomon was the primary arbitrator⁸⁰ when he settled a dispute between two women claiming to be the mother of a baby boy. Some authors have proclaimed that King Solomon's procedure is the same as the one employed in modern arbitration. Arbitration was also utilized by Philip the Second who was the father of Alexander the Great to settle domestic disputes in Greece in 337 B.C. in a dispute between Athens and Megara over possession of the island of Salamis around 600 B.C.⁸¹ The first law for arbitration is traced back to England to the seventeenth century, when merchants attracted by the lower cost and speed of arbitration considered resolving their disputes before resorting to litigation. In 1698 John Locke, an English philosopher, seemed to have a contempt for the legal field, which prompted his thoughts for arbitration so he with four Board of Trade members⁸² drafted an arbitration legislation, which was passed the following year known as the Locke Act/ Arbitration Act 1698. Historical literature suggests that not along with private parties, the government and even the crown tried to resolve their issues through arbitration.⁸³

Arbitration was also a regular type of dispute resolution in construction and insurance contracts. At the end of the seventeenth century, there were two types, parties agreeing to arbitration and courts referring matters to arbitration. The former type was unenforceable on the other hand, the latter

⁸⁰ Frank D Emerson, *History of arbitration Practice and Law*, 19 CLEVS ST. L. REVS 155 (1970).

⁸¹ Tariq Khan and Muneeb Rashid Malik, *History and Development of Arbitration Law of India*, BAR AND BENCH, <https://www.barandbench.com/amp/story/columns/history-and-development-of-arbitration-law-in-india>.

⁸² Also called Lords Commissioners of Trade and Plantations, English governmental advisory body established by William III in May 1696 to replace the Lords of Trade (1675) in the supervision of colonial affairs. The board was to examine colonial legislation and to recommend disallowance of those laws that conflicted with imperial trade policies, to nominate governors and other high officials for royal colonies and to write the instructions for appointed governors, to recommend laws affecting the colonies to Parliament and the Privy Council, and to hear and to make reports on complaints from the colonies regarding imperial administration.

⁸³ Kateryna Honcharenko, *Has Arbitration Always Been Favor in England*, KLUWER ARBITRAL BLOG, (Jul. 6, 2021, 02:00 PM) <https://arbitrationblog.kluwerarbitration.com/2019.07/11/roebuck-lecture-2019-has-arbitration-always-been-favoured-in-england/>.

negated the time and cost savings of arbitral procedures.⁸⁴ When the Act provided statutory recognition to arbitration, it increased the number of arbitrations in the 18th century. The subsequent Acts contributed to the Act, endorsing arbitration. In the 1845 Act, Statutory powers to refer parties to arbitration where their disputes were covered by an arbitration agreement were first embodied, followed by making all arbitration agreements irrevocable in the 1860 Act. Arbitral awards could no longer be challenged to judicial review for legal issues under the 1979 Act. Finally, the mechanism peaked with the introduction of the Arbitration Act of 1996.⁸⁵ It has not opted to follow the UNCITRAL Model Law⁸⁶, however contains similar provisions.

According to legislative developments and historical circumstances, arbitration evolved in the United Kingdom as an ancillary component of the legal system. Arbitration was a common law affair throughout this period in English history, but it was an entirely private arrangement with no authority or precedent and no binding power on the parties involved. Arbitration is a cornerstone of the legal system in contemporary England which has been supervised and developed by the courts, providing the same binding authority as the judgement of a court of law. Arbitration has evolved as one auxiliary piece of the legal system only after a significant amount of time had passed, due to incremental legislative changes.⁸⁷ India also has a history of arbitration. The concept of non-judicial dispute resolution was widespread in ancient India before the adoption of any codified law. Yajnavalka's writings make references to certain special arbitration courts in ancient India. Yagnavalkya proposed and established the *kula*, *Serni & puha* as tribunals to settle conflicts between individuals, families, groups, and tribes. During Yagnavalkya's time, there was

⁸⁴ *Id.*

⁸⁵ *Id.*

⁸⁶ The UNCITRAL Model Law on International Commercial Arbitration is a model law prepared by UNCITRAL and adopted by the United Nations Commission on International Trade Law on 21 June 1985. In 2006, it was amended and now includes more detailed provisions on interim measures. The model law is not binding, but individual states may adopt the model law by incorporating it into their domestic law. http://www8.austlii.edu.au/cgi-bin/viewdb/au/legis/cth/consol_act/iaa1974276/.

⁸⁷ Kateryna Honcharenko, *supra* note 83.

tremendous growth and improvement in commerce, industry, and trade, with Indian merchants believed to have sailed the seven seas, laying the foundations of international trade.⁸⁸ In India, the panchayat system⁸⁹ is regarded as one of the earliest forms of arbitration.⁹⁰

Chief Justice A. Marten comments while describing the concept of arbitration, "*It is indeed a striking feature of ordinary Indian life. And I would go so far as to say that it is much more prevalent in all walks of life than it is in England. Referring matters to a panchayat is one of the oldest ways of resolving disputes in India. And, in many cases, the decision is reached through mutual agreement between the parties.*"⁹¹ The Arbitration Act of 1899 was India's first arbitration statute, but it was confined to the three presidential towns of Madras, Bombay, and Calcutta. This statute was based on the English Arbitration Act, 1899 and was eventually extended to the rest of British India under Section 89, Schedule II of the Code of Civil Procedure 1908. The Act of 1899 and the Code of Civil Procedure, 1908 were deemed inefficient and too technical, hence, the Arbitration Act of 1940 was adopted, which repealed the Act of 1899 and few specific Sections of the Code of Civil Procedure, 1908.

The Act of 1940 was a comprehensive piece of law that reflected the English Arbitration Act of 1934. However, it did not include provisions for the enforcement of foreign awards and thus dealt only with domestic arbitrations. The Act of 1940 failed to achieve its goal because its implementation was inadequate. The Act of 1940 gave courts the authority to interfere in arbitration proceedings at any step along the way, from the selection of the arbitrator to the passing of the award. This fostered the practice of court monitoring arbitration procedures rather than elevating arbitration to the level of an alternate dispute resolution procedure. As a result, this was exacerbated by the fact that the Courts in India had a

⁸⁸ Mediation Training Manual of India, Supreme Court of India, <http://supremecourtsofindia.nic.in/MEDIATION%20TRAINING%20MANUAL%20OF%20INDIA.pdf>.

⁸⁹ A village council; the oldest system in the Indian subcontinent, and historical mentions date to the 250 CE period. The word raj means "rule" and panchayat means "assembly" (ayat) of five (panch). Traditionally panchayats consisted of wise and respected elders chosen and accepted by the local community who settle disputes between the villagers.

⁹⁰ Vytla Sitanna v. Marivada Viranna, (1934) 36 BOMLR 563.

⁹¹ Chanbasappa Gurushantappa v. Baslingayya Gokurnaya Hiremath, (1927) 29 BOMLR 1254.

significant backlog of cases, delaying the settlement of the matters that had been brought before them. Thus, defeating the entire purpose of the arbitration. The Supreme Court of India regularly criticised the 1940 Act. It can be observed in cases like the *Food Corporation v. Joginderpal*⁹², where it observed that the law of arbitration must be “*simple, less technical and more responsive to the actual reality of the situations, responsive to the canons of justice and fair play.*” And in *Guru Nanak Foundation v. Rattan Singh*⁹³, the Supreme Court Justice observed and stated that “*Interminable, time consuming, complex and expensive Court procedures impelled jurists to search for an alternative Forum, less formal, more effective and speedier for resolution of disputes, avoiding procedural claptrap and this led them 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.*” Even then, the government failed to make the necessary changes to the Act of 1940. However, following privatization, globalization, and liberalisation in India during 1991, legal reforms were made to attract international investors for ease of doing business. One of the reforms was the Arbitration and Conciliation Act of 1996; which is based on the UNCITRAL Model Law on International Commercial Arbitration of 1985 that encompassed domestic and international arbitration effectively repealing the Act of 1940. It was taken into account by Indian legislators while drafting the Act, as stated in the Preamble to the Act. It states that the Act is in accordance with and promote the UNCITRAL Model Law. Many of the provisions of the Act of 1996 are in conformity with the Model Law as a result of this adherence to the Model Law and some provisions were drawn from English arbitration Act. Even then, the 1996 Act had several flaws, notably the arbitrator’s exorbitant fee and excessive judicial interference, authority to Arbitrator to issue a summons, taking evidence, examine witnesses, power to enforce awards, etc., was not provided.

In 2014, a Law Commission Report⁹⁴ suggested several modifications to the Act of 1996 which were accepted by the legislatures, and thus, the Arbitration and Conciliation (Amendment) Act 2015 came into effect in

⁹² *Food Corporation v. Joginderpal*, (1989) AIR 1263.

⁹³ *Guru Nanak Foundation v. Rattan Singh* (1981) 4 SCC 634.

⁹⁴ Law Commission of India, Report No. 246, August 2014.

2015, intending to expedite the arbitration procedure, restrict judicial interference, facilitating quick contract enforcement, easy recovery of monetary claims, decreasing the pendency of cases in courts, to judicial interference, facilitating quick contract enforcement, easy recovery of monetary claims, decreasing the pendency of cases in courts, in order to encourage foreign investment. Even though the Act of 2015 provided new and improved provisions, it failed to promote institutional arbitration⁹⁵ in India. As a result, parties to arbitration preferred a foreign seat instead.⁹⁶

Therefore, in 2017, the government set up a High-Level Committee⁹⁷ to look into the institutionalization of arbitration system in India and study the performance of ICADR to recommend reforms. One of its main recommendations was to establish an Autonomous Body for arbitration, named the Arbitration Promotion Council of India (APCI), comprised of various stakeholders, to regulate and promote arbitration in India.⁹⁸ In 2019, the Arbitration and Conciliation (Amendment) Act 2019 was implemented with the intention of fostering institutional arbitration in India. To encourage institutional arbitration, the Act gave sole authority to arbitral institutions designated by the Supreme Court or the High Court to select arbitrators. It tackles certain shortcomings that occurred due to the Act of 2015. It also provided for the confidentiality of proceedings, easing of time limitations, and time-bound completion of written submissions, etc. The establishment of the Arbitral Council of India to promote alternative dispute resolution systems by framing policies, grading arbitral institutions, and accrediting arbitrators, as well as making policies for the establishment, operation, and maintenance of professional standards for all alternate dispute systems and maintaining a depository of arbitral awards

⁹⁵ A permanent organization with a set of its own arbitration rules regulating the services provided by the organization and other procedural aspects of arbitration.

⁹⁶ The 'Seat' of arbitration is the 'situs' of arbitration, the place where the arbitration is anchored. The seat of arbitration defines the curial law or procedural law governing the arbitration and determines which court will exercise supervisory jurisdiction over such arbitration.

⁹⁷ High Level Committee to review the institutionalization of arbitration mechanism in India (2017), <https://legallaffairs.govsin/sites/default/files/Report-HLC.pdf>.

⁹⁸ Saba, *Justice B.N.Srikrishna Committee Submits Report On Making India An International Hub of Arbitration*, SSC ONLINE (Jun 27, 2021 9:43 AM) <https://www.sconline.com/blog/post/2017/08/05/justice-b-n-srikrishna-committee-submits-report-on-making-india-an-international-hub-of-arbitration/>.

produced in India and abroad. The next Amendment Act was introduced in March 2021 with a retrospective effect from November 2020.⁹⁹ The Amendment Act of 2021 provides that where it is prima facie established that the arbitration agreement or contract on which the award is based or the award was influenced or obtained by fraud or corruption, the court shall stay the order indefinitely with a retrospective effect from October 2015 that may give rise to greater confusions.

The Supreme Court held the same in *McDermott International Inc. v. Burn Standard Co. Ltd*¹⁰⁰, that the "Act makes provision for the supervisory role of courts, for the review of the arbitral award only to ensure fairness. Intervention of the court is envisaged in few circumstances only, like, in case of fraud or bias by the arbitrators, violation of natural justice, etc. The court cannot correct errors of the arbitrators. It can only quash the award leaving the parties free to begin the arbitration again if it is desired. So, the scheme of the provision aims at keeping the supervisory role of the court at minimum level and this can be justified as parties to the agreement make a conscious decision to exclude the court's jurisdiction by opting for arbitration as they prefer the expediency and finality offered by it." This judgment was also taken into consideration recently.

A new provision has been added for the law to specify qualifications, experience, and standards for accrediting arbitrators. These provisions employ vague and unclear terms. Lastly, Act's Schedule VIII¹⁰¹ has been omitted which previously hindered the autonomy of parties in dispute and did not allow foreigners from sitting as arbitrators in India. The New Delhi International Arbitration Centre Act, 2019, passed by the government in 2019¹⁰² establishes the New Delhi International Arbitration Centre (NDIAC) to oversee arbitration, mediation, and conciliation proceedings. The NDIAC will assume full control of the International Centre for

⁹⁹ The Arbitration and Conciliation (Amendment) Act, 2021, No.3, Acts of Parliament, 2021 (India).

¹⁰⁰ *McDermott International Inc. v. Burn Standard Co. Ltd.*, (2006) 11 SCC 181.

¹⁰¹ Schedule VIII of the Act by prescribing qualifications for the arbitrators that are applicable for all the India seated arbitrations, banned various category of persons from sitting as arbitrators in India, including Foreign qualified lawyers and Judge.

¹⁰² Prathma Sharma, *Cabinet approves New Delhi International Arbitration Centre Bill*, LIVEMINT, (Jun. 28, 2021, 5:03 PM) <https://www.livemint.com/news/india/cabinet-approves-new-delhi-international-arbitration-centre-bill-1562167019992.html>.

Alternative Dispute Resolution (ICADR) and transfer its title, rights and interest. The NDIAC will be fully established after the Final Rules are published by the government. Since its establishment, India's arbitration system has undergone numerous revisions and continues to improve. Just in the past 5-6 years, there have been various amendments and judicial decisions that have substantially contributed to the expansion of arbitration as an acceptable alternative to the traditional method of dispute resolution. Several areas like institutional arbitration need attention. Absolute judicial backing and limited court interference will provide a significant boost to institutional arbitration in India.

3. The Doctrine of Competence-Competence

‘Maximum support. Minimum interference’- Lord Thomas sums up the views of courts toward arbitration.¹⁰³ Yet, differentiating between support and interference is not always simple.¹⁰⁴ One of the cornerstones of arbitration is the doctrine of competence-competence (herein referred to as ‘the doctrine’). The Competence-Competence theory states that an arbitral tribunal has jurisdiction to examine and determine any issues involving its jurisdiction, subject to judicial review in particular situations. In other words, the doctrine states that the tribunal has the ‘competence’ to decide its own ‘competence.’¹⁰⁵ If and when the jurisdiction of a tribunal is challenged, it must adjudicate on its jurisdiction. If it were not empowered to settle the matter an unwilling party to an arbitration agreement could very well block proceedings or ultimately cause delay merely by contesting the tribunal's jurisdiction. In the case of *Gas Authority of India Ltd. v. Ketu Construction Ltd.*¹⁰⁶, the court observed that the doctrine ensures a swift resolution of conflicts when jurisdictional pleas can be addressed by the

¹⁰³ Lord Thomas CJ, *Commercial Dispute Resolution: Courts and Arbitration* (2017).

¹⁰⁴ Irina Ţuca, *Separability and Competence-Competence: A Comparative Perspective*, JURDICE, (Jul. 26, 2021, 10:02 AM) <https://rlw.juridice.ro/17150/separability-and-competence-competence-a-comparative-perspective.html>.

¹⁰⁵ Rituparna Padhy, *Doctrine of Competence- Competence*, LAW TIMES JOURNAL, (Jun. 28, 2021, 2:30 PM), <https://lawtimesjournal.in/doctrine-of-competence-competence>.

¹⁰⁶ *Gas Authority of India Ltd. v. Ketu Construction Ltd.*, (2007) 5 SCC 38, 24.

arbitral tribunal at the threshold itself, and countermeasures can be adopted simultaneously.

The doctrine is internationally recognized as it is adopted by the United Nations Commission on International Trade Law.¹⁰⁷ Among several States, the United Kingdom and India have incorporated arbitration as a dispute resolution method and have implemented the doctrine of competence. Yet, the nature and implementation of the doctrine by the judiciary differ from one State to another¹⁰⁸, since each country having revised the Model Law and implemented it to accommodate its legal environment.¹⁰⁹ England & India have adopted a similar doctrine of competence-competence, as its previous arbitration legislations share a common history and their new arbitration acts have a common foundation.¹¹⁰ Providing jurisdiction to Tribunals is important since the validity of arbitration proceedings and the enforceability of arbitral awards are both dependent on it.

3.1 The United Kingdom

English law recognises the doctrine of competence under Section 30 of the Arbitration Act, 1996.¹¹¹ It provides that the arbitral tribunal may decide on its substantive jurisdiction and unless agreed by the parties, it may determine: Arbitral tribunals may rule as follows unless the parties agree otherwise; if a valid arbitration agreement exists if the tribunal has been duly established, and what issues have been referred to arbitration under the terms of the arbitration agreement. Prior to the 1996 Act, the competence of an arbitral tribunal to determine on its jurisdiction was an

¹⁰⁷ Article 16 of the Model Law provides that the arbitral tribunal may rule on its own jurisdiction, either as a preliminary question or in an award on the merits.

¹⁰⁸ Doug Jones, *Competence-Competence*, 75 THE INTERNATIONAL JOURNAL OF ARBITRATION, MEDIATION AND DISPUTE MANAGEMENT, 56, (2009).

¹⁰⁹ Departmental Advisory Committee on Arbitration Law, Departmental Advisory Committee (DAC) Report on Arbitration Bill 1996.

¹¹⁰ Vaishnavi Chillakuru, *The Rule of Competence-Competence: A Comparative Analysis of Indian and English Law*, 6 CONTEMPORARY ASIA ARBITRATION JOURNAL, 133, (2014).

¹¹¹ The Arbitration Act, 1996 Section 30 - Competence of tribunal to rule on its own jurisdiction. (1) Unless otherwise agreed by the parties, the arbitral tribunal may rule on its own substantive jurisdiction, that is, as to (a) whether there is a valid arbitration agreement, (b) whether the tribunal is properly constituted, and (c) what matters have been submitted to arbitration in accordance with the arbitration agreement. (2) Any such ruling may be challenged by any available arbitral process of appeal or review or in accordance with the provisions of this part.

inherent power, as per English law, however, it was limited.¹¹² Any decision made by these tribunals on jurisdiction would only be interim. Therefore, the tribunal's decision on jurisdiction could be challenged in a court because the courts did not recognise the tribunal's authority to render a binding decision on jurisdiction.¹¹³ A party that wants to challenge the tribunal's jurisdiction has limited rights as one must file the objection before the merits stage and as soon as he or she discovers the reasons for such objection. Considering the Model Law provisions, the English laid a great emphasis on the aspect of party autonomy in the 1996 Act.¹¹⁴ In a landmark case of *Dallah Real Estate and Tourism Holding Co v. Ministry of Religious Affairs*¹¹⁵, the Supreme Court elucidates the extent of applicability of the competence doctrine in England. The extent to which an English court can use its discretion under Section 103¹¹⁶ of the Arbitration Act 1996 to reinstate issues of fact and law in order to determine whether the parties to a dispute have entered into a valid arbitration agreement. This decision suggests that a tribunal does not have the final authority, leading to delayed proceedings.¹¹⁷

The negative aspect of competence-competence is not recognised by English law because while the tribunal decides on its competence, as it does not restrict the domestic courts from doing the same thing at the same time, rather, according to Section 32, the court may determine any question as to the substantive jurisdiction of the tribunal during a preliminary hearing,

¹¹² ALAN REDFERN & MARTIN HUNTER, *LAW AND PRACTICE OF INTERNATIONAL COMMERCIAL ARBITRATION* 346 (Sweet & Maxwell 2009).

¹¹³ Christopher Brown LD. v. Genossenschaft Oesterreichischer Waldbesitzer Holzwirt Schaftsbetriebe Registrierte Genossenschaft Mit Beschränkter Haftung, 1 Q.B. 8 (1954)- Judge Delvin stated that although the arbitrator may decide on the matter of one's jurisdiction in response to a challenge by one of the parties, his decision is not binding on the parties and has no effect on the parties' rights in whichever way. The only reason to make such a determination would be to convince the arbitrators themselves, as a preliminary inquiry, as to whether or not they should continue with the arbitral procedures.

¹¹⁴ Vaishnavi Chillakuru, *supra* note 111.

¹¹⁵ [2010] UKSC 46.

¹¹⁶ The Arbitration 1996, Section 103-Refusal of recognition or enforcement.

¹¹⁷ Christopher Bailey, Dominic Roughton, David Gilmore, Gavin Margetson, Peter Godwin and Kallun Willock, *The competence-competence doctrine and the enforcement of arbitral awards*, LEXOLOGY, (Jul. 23, 9:30 AM) <https://www.lexology.com/library/detail.aspx?g=70303764-71b7-4352-babb-6c8c8d399190>.

concurrent with the arbitration tribunal.¹¹⁸ The English courts will not be bound by the tribunal's decisions and will re-examine the dispute.¹¹⁹ Lord Mance used tennis as a metaphor to explain the English law approach at the enforcement stage: “the arbitral tribunal's finding regarding its own jurisdiction is a useful starting point for the court's assessment at the enforcement stage, but it is by no means a decisive conclusion: it is the advantage of service, not a 30-0 lead.”

Therefore, the English courts will give the arbitral tribunal's decision credibility, but not conclusively or even strongly: they will evaluate the dispute from afresh. Parallelism is a significant characteristic of the English framework. The English Courts provide a safeguard without infringing on party autonomy as the parties can appear before the tribunal concurrently with the court's evaluation of the arbitration clause nor do not reserve their decision until the stage of enforcement. Moreover, the Courts do not decide before the arbitral tribunal rather examine the arbitration clause concurrently with the tribunal, and save time and avoiding paternalist infringement of the parties' freedom of choice at the same time. If indeed the ideal situation of the courts concerning arbitration is ‘maximum support, minimal interference¹²⁰, then it is said that the English courts are the closest to Lord Thomas’ dystopia.¹²¹ However, is disputed whether and to what extent a court must be certain that an arbitration agreement exists before assigning the dispute to arbitration.¹²²

3.2 India

In India, arbitration is regulated by the Arbitration and Conciliation Act, 1996, which was formed to strengthen party autonomy while restricting judicial interference. Prior to the current Act, India's dispute resolution was

¹¹⁸ Stavros Brekoulakis, *The Negative Effect of Compétence-Compétence: The Verdict Has to Be Negative*, Austrian Arbitration Yearbook, QUEEN MARY SCHOOL OF LAW LEGAL STUDIES RESEARCH PAPER No. 22/2009, (2009).

¹¹⁹ *Supra* note 116.

¹²⁰ Lord Thomas CJ, *supra* note 104.

¹²¹ Irina Ţuca, *supra* note 105.

¹²² Sandra Synkova, *Courts' Inquiry into Arbitral Jurisdiction at the Pre-Award Stage: A Comparative Analysis of the English, German, and Swiss Legal Order* (Springer 2013).

governed by the Arbitration Act of 1940,¹²³ the Arbitration (Protocol and Convention) Act, 1937, and the Foreign Awards (Recognition and Enforcement) Act, 1961, all of which gave Indian courts the discretionary power to decide whether an Arbitral Tribunal had competent jurisdiction to settle disputes. Pursuant to the Competence doctrine, Section 16 of Arbitration and Conciliation Act, 1996 enables the Arbitral Tribunal the power to decide on its jurisdiction, including any challenges to the existence or validity of the arbitration agreement itself. The Supreme Court in *Koerner Cementation India Ltd. v. Bajranglal Agarwal*¹²⁴ validated the doctrine. Here, the petitioner filed a civil court suit seeking a judgment that there was no arbitration clause between the parties and that the ongoing arbitration proceedings lacked jurisdiction. The three bench Judge held that the arbitral tribunal has the power to decide on the existence and validity of the agreement, hence the Civil Court cannot make decisions on such an issue because of Sections 5 and 6 of the Act. This decision is further recognized by other judgments by the Supreme Court such as the *Hema Khattar & Another v. Shiv Khera*¹²⁵, *A. Ayyasamy v. A. Paramasivam & Others*¹²⁶, and *Reva Electric Car Co. (P) Ltd. v. Green Mobil*¹²⁷. However, this was not the case under the 1940's Arbitration Act since Section 33 conferred the power to determine jurisdiction to the courts. Therefore, the introduction of Section 16 to the 1996 Act was of utmost importance.

The Supreme Court attempted to redefine the power of the Courts in *SBP & Co. v. Patel Engineering Ltd.*¹²⁸ and *National Insurance Co. Ltd v. Boghara Polyfab (P) Ltd.*¹²⁹ by extending the scope of issues that the Courts must consider when referring cases to arbitration or appointing arbitrators. The Courts sought to divest and diminish the ability of the Arbitral Tribunals to

¹²³ Section 31(2)- provided that all questions regarding validity, effect, or existence an arbitration agreement between parties is to be decided by court in which the award under the agreement has been filed (repealed 1945). Article 33- provided that any party to an arbitration agreement desiring to challenge the existence or validity of an arbitration agreement shall apply to the Court and the Court shall decide the question on affidavits).

¹²⁴ 2001(6) Supreme 265.

¹²⁵ *Hema Khattar & Another v. Shiv Khera*, (2017) 7 SCC 716.

¹²⁶ *A Ayyasamy v. A. Paramasivam & Others*, (2016) 10 SCC 386.

¹²⁷ *Reva Electric Car Co. (P) Ltd. v. Green Mobil*, (2012) 2 SCC 93.

¹²⁸ *SBP & Co. v. Patel Engineering Ltd.*, AIR 2006 SC 450.

¹²⁹ *National Insurance Co. Ltd v. Boghara Polyfab (P) Ltd.*, (2009) 1 SCC 267.

rule on their competence by transferring these powers to judicial authorities, undermining the intent of Section 16 of the Act and the accompanying theory of competence.

Section 11(6A) of the Arbitration Act was recently repealed, with the intent of empowering Arbitral Institutions to assign issues to arbitration rather than the judiciary. The Supreme Court held in *M/s Mayavoti Trading Pvt. Ltd. v. Pradyuat Deb Burman*¹³⁰ that the absence of Section 11(6A) does not indicate the resurrection of the legislation that existed before the inclusion of such section, in which courts enlarged the scope of involvement in arbitration procedures. As a result, raising a jurisdictional issue to the Arbitral Tribunal under Section 16 remains the only option. As a result, the SBP Patel Engineering judgment was struck down, and the doctrine of Competence-Competence was re-established in the Act.

The Supreme Court later embraced the doctrine in *Duro Felguera S.A. v. Gangavaram Port Ltd*¹³¹ and a slew of other instances. Section 11(6A) of the Arbitration Act was recently repealed, to support Arbitral Institutions to transfer issues to arbitration rather than the judicial authorities. However, in *Mayavoti*¹³², the Supreme Court held that the removal of Section 11(6A) does not indicate the resurrection of past law, wherein courts enlarged the boundary of involvement in Arbitration procedures. As a result, Section 16 remains the exclusive option for raising a jurisdictional issue against the Arbitral Tribunal.

The doctrine of competence-competence is a presumption that the arbitral tribunal has jurisdiction to decide whether or not the arbitration provision is valid. The lack of jurisdiction by the arbitral tribunal negates the presumption of competence. However, if the tribunal determines that it has jurisdiction, this judgment is not final: the parties can appeal the arbitration tribunal's decisions on its competence before Court under specific situations and criteria.¹³³ In a way, competence-competence is not an absurd, unreasonably powerful tool that grants the arbitration tribunal

¹³⁰ *M/s Mayavoti Trading Pvt. Ltd. v. Pradyuat Deb Burman*, (2019) 8 SCC 714.

¹³¹ *Duro Felguera, S.A. v. Gangavaram Port Limited* (2017) 9 SCC 729.

¹³² *Supra* note 131.

¹³³ *Saba*, *supra* note 98.

unrestricted power.¹³⁴ The competence-competence doctrine saves time and avoids complications while challenging the tribunal's jurisdiction appears. Moreover, delays or interruptions in any legal proceeding appear to waste both public and private resources.

A detailed analysis of the arbitration agreement is required in common law countries to identify the arbitral tribunal's jurisdiction.¹³⁵ Arbitrators always have the power to decide on jurisdictional issues, unless and until there is a specific written agreement granting them the exclusive power to do so. Generally, courts need not interfere with or examine an arbitral decision if it contains an exclusive clause, however, this is not a universally acceptable norm.¹³⁶ This doctrine often faces criticism as it is a violation of the natural justice principle since it is judging its cause.

However, in the both the countries, the judiciary has the right to interfere in certain matters such as appointment of arbitrators where the parties have not appointed one, enforcement of foreign awards, challenge domestic awards, grant interim relief etc.

4. Judicial Interference in Arbitral Proceedings

4.1 The United Kingdom

In England, the 1996 Act allows the courts to intervene in certain matters. At first, under Section 9, the court issue a stay if it is satisfied that the arbitration agreement is null and void, inoperative, or incapable of being performed.¹³⁷ Nevertheless, the broad scope of this provision allows parties to aim to prolong arbitration by inciting litigation. Further, the court may intervene in order to appoint arbitrators under Section 18 of the 1996 Act.¹³⁸

¹³⁴ Saadia Bhatti, *Competence-Competence*, JUS MUNDI, (Jun. 30, 2021, 12:46 PM) <https://jusmundi.com/en/document/wiki/en-competence-competence>.

¹³⁵ Dr. Mukesh Kumar Malviya, *Jurisdictional Issues in International Arbitration with Special Reference to India*, BHARATI LAW REVIEW, 36, (2017).

¹³⁶ Madhusudan Kesharwani, *Jurisdiction of Arbitration Tribunal Inherent Principle and Indian Perspective*, 6 MADRAS LAW JOURNAL 138 (2008).

¹³⁷ The Arbitration 1996, Section 18 - Stay of legal proceedings..... relation to those proceedings.

¹³⁸ The Arbitration 1996, Section 18 - Failure of appointment procedure..... court under this section.

It states that in the absence of an agreement, any party to the arbitration agreement may request the court for the appointment of an arbitrator.

Further, Section 44 authorizes the court to take witness testimony, preserve evidence, make orders pertaining to property that is the subject of the proceedings, sell any goods that are the subject of the proceedings, grant an interim injunction, or appoint a receiver. The section compels the party requesting the court to first demonstrate that the arbitral tribunal lacks the authority to make the necessary decision.¹³⁹ The Courts assists the Arbitral Tribunal by the virtue of this provision, but only if the assistance is constructive and helpful and not if the courts undermine the authority or independence of the arbitral tribunal. The Court's Inherent Authority, i.e., the court has an absolute discretion to interrupt arbitration proceedings where it deems fit.

In the case of *Bremer Vulkan Schiffbau und Maschinenfabrik Respondents v. South India Shipping Corporation Ltd*¹⁴⁰, the court had to determine whether it had jurisdiction to prevent a party from proceeding with the arbitration. The court determined that claimants have a responsibility not to delay the proceedings, and that if they do, the respondents have the right to consider this a breach of the arbitration agreement. The court in this case opined that the arbitrators are incompetent and that only the court can bring the party to justice. Accordingly, the judiciary is seen to have a substantial authority over arbitral proceedings. Furthermore, the courts are empowered to enforce awards given by the tribunals. It must be enforced through the summary proceedings method given in Section 66 or by filing a lawsuit in the court of law. Lastly, a decision of the arbitral tribunal may be appealed against in the court of law if a decision is made by the arbitral tribunal under Section 67 in absence of jurisdiction¹⁴¹, where there is a serious irregularity in the arbitral proceedings as mentioned under Section 68¹⁴² and under Section 69 with respect to substantive breach of law,

¹³⁹ The Arbitration 1996, Section 44 - Court powers exercisable in support of arbitral proceedings..... court under this section.

¹⁴⁰ *Bremer Vulkan Schiffbau and Maschinenfabrik Respondents v. South India Shipping Corporation Ltd.*, 9 [1981] 2 WLR 141.

¹⁴¹ The Arbitration 1996, Section 67 - Challenging the award..... court under this section.

¹⁴² The Arbitration 1996, Section 68 - Challenging the award..... court under this section.

incompetence of the parties and breach of the public policy of the state in which the award is issued.¹⁴³

4.2 India

Arbitration is founded on the principle that the judicial system must not interfere with arbitration processes. Judiciary may interfere when either party may petition the court for interim measures during or before arbitration under Section 9 and issue interim orders.¹⁴⁴ The court may intervene in order to appoint arbitrators. when the parties or arbitrators, fail to agree/act/perform any function entrusted to them or any procedure they are expected to agree on under subclauses (4), (5), or (6) under Section 11. The law permits the Chief Justice, or any person or institution designated by him to take appropriate measure.¹⁴⁵ In one of the landmark cases of *Konkan Railway Corporation v. Rani Construction Pvt Ltd*¹⁴⁶, the Supreme Court states, 'the function of Chief Justice of India and his designates is to ensure the nomination of an arbitrator who is independent, competent and impartial and settles the dispute between the parties to the best of his knowledge.' Further, under Section 12, when a party challenges the appointment of arbitrators in the court of law.¹⁴⁷ The Courts may interference in setting aside an arbitral award under the pretext of public policy. Section 34 provides for the process of bringing an application to set aside the arbitral decision.¹⁴⁸ In the recent case of *M/s. Ssangyong Engineering & Construction Co. Ltd. v. National Highway Authority of India Limited*¹⁴⁹, the Supreme Court discusses the extent of the public policy ground for rejecting an award under the Amendment Act 2015. The Court further stated that 'under no circumstances can any court interfere with an arbitral award on

¹⁴³ The Arbitration 1996, Section 69 - Appeal on point of law..... the Court of Appeal.

¹⁴⁴ The Arbitration and Conciliation Act, 1996, Section 9 - Interim measures, etc. by Court..... any proceedings before it.

¹⁴⁵ The Arbitration and Conciliation Act, 1996, Section 11 - Appointment of arbitrators..... Chief Justice of that High Court.

¹⁴⁶ *Konkan Railway Corporation v. Rani Construction Pvt Ltd.*, (2002) AIR SC 778.

¹⁴⁷ The Arbitration and Conciliation Act, 1996, Section 12 - Grounds for challenge..... appointment has been made.

¹⁴⁸ The Arbitration and Conciliation Act, 1996, Section 34 - Application for setting aside arbitral award..... setting aside the arbitral award.

¹⁴⁹ *M/s. Ssangyong Engineering & Construction Co. Ltd. v. National Highway Authority of India Limited*, (2019) SCC Online SC 677.

the ground that justice has not been done in the opinion of the Court. That would be an entry into the merits of the dispute which, as we have seen, is contrary to the ethos of Section 34 of the Act, 1996 as has been noted earlier in this judgement.’ Section 37 provides for the appeals that may lie in the higher court against awards and decisions.¹⁵⁰ Lastly, a decision of the arbitral tribunal may be appealed against in the court of law if a decision is made by the arbitral tribunal under Section 16(2), 16(3)¹⁵¹ and even Section 17¹⁵². Contrary to popular belief, the courts in both the countries still play a vital role in arbitral proceedings, instead of engaging and empowering arbitral tribunals. It is to be noted that the provisions for the domestic courts to interfere in arbitral matters are far more in England than India. Indian judiciary is now pro-arbitration as observed in recent legal precedents. It minimizes interference and provides support to the arbitral tribunal by acknowledging its competent authority.

5. Conclusion

Arbitration in the United Kingdom has a long record, beginning with merchants and continuing with initiatives by the government to legitimate the arbitration mechanism. Even though the law is in place to control this mechanism, the practice itself remains genuine. Be it ad hoc or institutional, British arbitrators have repeatedly proved that the system has particular importance in British culture and that the government would do nothing to disrupt it. Overall, the United Kingdom arbitration system is better. The government, as well as the Courts, have been promoting and supporting arbitration for a long period. The arbitration mechanism in India has a long way to go due to the lack of proper implementation of the 1996 Act along with the Court’s discrepancy in allowing the Tribunal to rule on its matters. However, with change in time, the government is now promoting arbitration via constant amendments to the legislation. Individuals are now

¹⁵⁰ The Arbitration and Conciliation Act, 1996, Section 37 - Appealable orders..... appeal to the Supreme Court.

¹⁵¹ The Arbitration and Conciliation Act, 1996, Section 16 - (2) A plea that the..... appointment of, an arbitrator. (3) A plea that the..... during the arbitral proceedings.

¹⁵² The Arbitration and Conciliation Act, 1996, Section 17 - Interim measures ordered by..... under sub-section (1).

aware that the litigation process is expensive, lengthy and stressful whereas arbitration focuses on the emotional quotient of the parties and tries to improve relationships, mitigate stress, and settle disputes without much hassle. As observed by the Supreme Court in the case of *Union of India v. Singh Builders Syndicate*¹⁵³, 'It is unfortunate that delays, high costs, and frequent and sometimes unnecessary court interruptions at various stages are seriously hampering the growth of arbitration as an effective dispute resolution process.' The court opined that an immediate solution to the problem is essential to save arbitration as it has come close to offering a proper alternative to the traditional judicial system. Therefore, India now has to focus on improving institutional arbitration as well as strengthen domestic arbitration by promoting and establishing several arbitration centres. Currently, India has established arbitration centres only in few major cities such as Delhi, Chennai, Bangalore & Kolkata.¹⁵⁴

However, at times it is noticed that people are hesitant to put their faith in a non-traditional method of settling legal disputes. At times, arbitration can also be viewed as a private judicial system accompanied by several procedures like the traditional legal system which may unnecessarily complicate the arbitral proceedings. The legislators in India need to observe the problems and make necessary changes to the current legislation. Most importantly, the Judiciary needs to support the arbitration system by minimising its interference and adjudicate arbitral matters only when necessary. India has not yet lost its race to the United Kingdom in the aspect of arbitration hence, it is time to strengthen the domestic arbitration system to increase the confidence amongst the people and lessen the burden of the Courts.

¹⁵³ *Union of India v. Singh Builders Syndicate*, (2009) 4 SCC 523.

¹⁵⁴ Few prominent centres are - Delhi International Arbitration Centre, Indian Council of Arbitration, Construction Industry Arbitration Council, London Court of International Arbitration India, International Centre for Alternative Dispute Resolution, Indian Chamber of Commerce Council of Arbitration.

CHAPTER 4

EMERGENCE OF ALTERNATIVE DISPUTE RESOLUTION IN INTERNATIONAL TRADE AND BUSINESS: A GLOBAL VIEW

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Abstract

Alternative Dispute Resolution emerging as one of the major techniques of solving international trade and business disputes. Countries throughout the world recognized this method to some extent as per as their ADR approach is concerned. This technique is being used as a tool to reduce burden from the litigation in the court system and gradually showing more efficiency over litigation when we look into certain factors of dispute settlement.

This paper focuses on the global emergence of various methods of ADR technique with special concern to arbitration, mediation, and some hybrid form of ADR methods. Being a non-judicial settlement the debate on its jurisdictional status has been discussed in this paper with reference to relevant case laws. Moreover, the question on the legitimacy and adequacy of the ADR outcomes has been examined in detail throughout the paper with the approach and advancement made by certain countries and signatories of New York Convention.

A comparative study between litigation and ADR has been exhibited in this paper to deal with future position of these alternative dispute settlement methods. Each factor while dealing with dispute settlements has been observed in depth to find out the lacunas and advantageous factors of ADR over litigation.

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While need of judicial assistance has also been analysed to understand the extent of jurisdiction of the courts in the matter of ADR.

Keywords: ADR, Global Emergence, Adequacy, Outcomes, Challenge.

1. Introduction

1.1 General Introduction

Alternative Dispute Resolution (ADR) mechanism indicates an alternative measure to settle disputes, but by its very name, a question arises, the mechanism alternative to what? When it comes to ADR process it has been observed that, this method of settling dispute consist of Arbitration, Mediation, Conciliation, etc. which are quite different from formal litigation and thus this mechanism is upholding an alternative way to solve disputes which is having less interpretation of Courts and not so much complicated process as litigation.

Arbitration and Mediation are the most common mode of ADR while dealing with international trade and businesses. Although they constitute different ways to solve disputes. Arbitration helps in recognition of legal rights of the parties while mediation comply beyond legal rights and takes care of the interest of the parties to the settlement. In the current scenario it is very important for the in-house counsel and staffs to be familiar with the ADR mechanism to serve the companies at their best in international level.¹⁵⁵

When it comes to Private International Law, where the major concern is conflicts of law because of the diverse legal system in the world, in that case, ADR plays an important role to avoid the complexities of the litigation and in saving time of the parties. Despite of being time and cost saving option, both Arbitration and Mediation subjected to some questions which remained unanswered, which challenges the effectiveness of the ADR outcomes. The challenge of jurisdiction became the major bar of this mechanism. Although in the developing countries, growth of these type of

¹⁵⁵ Randy J. Aliment & Williams Kastner, *Alternative Dispute Resolution in International Business Transactions*, CCBJ, <https://cbjournal.com/articles/alternative-dispute-resolution-international-business-transactions>.

settlements which takes place outside the court is quite remarkable because complexities of court system and overburden of cases over national and domestic courts.

ADR techniques although provides a better space for negotiation between parties but the awards coming out of it still has to face certain obstacles while enforcement. This is because of non-judicial approach to settle dispute and judiciary cannot totally ignore its roles and responsibilities. But in recent global framework, countries are coming with a unique approach where they can use both court settlement as well as out of court settlement together. With this intent some countries are making mediation between parties mandatory before approaching to court. This technique helps the courts to control the ADR mechanism under its jurisdiction. Moreover, a global emergence of ADR can be observed and sometimes it is preferable than litigation. The whole mechanism of ADR is in developing stage so disadvantageous factors are also there so who knows? Probably it may suffer same issues as litigation in future as soon as it gains more popularity.

1.2 Statement of Research Problem

Alternate Dispute resolution mechanism when viewed in the context of Private International Law, major issue comes into picture while dealing with disagreements relating to international business transactions and international trade where the legal dispute binds upon more than one country. Several questions must be answered to such disputes, which court is having the jurisdiction to decide the matter, what law should be applicable on that dispute and further the Private International Law must address the enforceability clause of the judgements. ADR (Alternate Dispute resolution), being a cheap and quick mode of dispute resolution helps the parties to avoid the complexities of the litigation. As per as the procedure of arbitration and mediation are concerned, they settle disputes out of the court and can be a better option in developing countries throughout the globe because of its growing domain due to principle of concurrent jurisdiction. But exercise of ADR and extent of it differs from country to country and it is highly influenced by local laws and moreover based on intention of the parties.

Although ADR seems to be an easy way for dispute resolution but while dealing with international laws, it develops some loopholes. Both arbitration and mediation subjected to some technical complexities while deciding the jurisdiction. So, the growth of the ADR in different countries may have reduce the burden of cases from the court but it itself is unable to assure complete settlement of conflicts because choice of law is still a grey area which can be a bar for the growth of ADR mechanism in the world in near future. The adequacy of the ADR outcome relating to international trade and transaction is still lies in a debate because it is more of party defining and non-judicial in nature.

1.3 Objectives of the Study

This study is advanced to achieve the following objectives:

To understand the relevance of Arbitration and mediation (methods of ADR) in the view of Private International Law.

To analyze the major challenges to ADR mechanism while exercising peaceful settlements of disagreements relating international trade.

To understand the role of arbitral awards in international trades and international business transactions.

To understand how arbitration, mediation and other non-judicial settlements is taking over litigation in different war prone developing countries in the practice of international trade and bilateral treaties.

To check the legal validity of arbitral decisions in the light of principle of concurrent jurisdiction.

1.4 Scope of the study

The ambit of research includes an analytical study of the growth of Alternative Dispute resolution in the field of international business transaction and international trades. A detailed study has been done in the view of Private International Law to define the extent of arbitral decisions to the disagreements arising out of the mention fields. Rapid growth of this alternate non-judicial dispute settlement process brought so many changes in the society at a large but at the same time some issues to ADR mechanism

has also come into existence in the global level, which will be analyzed throughout the preparation of this paper to find out adequate measures. Also, this research work includes an analytical approach to magnify the legal validities of ADR outcomes as it is a non-judicial approach.

1.5 Limitation

The reach of this paper is limited to the disputes arising out of International Commercial Agreements. And the view has been restricted to the purview of Private International Law. Alternative Dispute Resolution is an alternative measure to the litigation and its growth is too remarkable in the field of international trade and business where parties need high control over negotiation as well as privacy plays a vital role there. This paper only concerned about adequacy of the ADR and not its techniques and any decision given by any international institution of Alternative Dispute Resolution which is declared after completion of this paper is to be considered as a subject beyond the scope of this paper. Any suggestion or recommendation mentioned in this paper is strictly adhered to analysis of related literature and not otherwise. Every source referred in due course of this research is in existence and put out from relevant sources where the author found resemblance with the objectives of the paper.

1.6 Research Methodology

To reach at the decisive conclusion in an approach to obtain the objective of this paper, a doctrinal method of research has been taken up. Opinion from several literature and judicial views on the topic, helped to obtain the detailed answer to the research question. Various primary and secondary sources of data collected in due course of this research work assisted to compare the hypothesis with the actual findings. To structure the answers to the research questions this paper divided into several chapters to obtain a clear view of the concerned objectives.

2. Alternate Dispute Settlements Under Purview of Private International Law

Private International Law mainly deals with the allocation of law-making authority among the States and at the same time it focused on law-

adjudication. While choice of law is the major concern of Private International Law which includes conflicts of law between different jurisdictions. Traditionally, factors such as domicile and nationality of the parties to the disagreement, where the cause of action has been identified, and the jurisdiction or the laws in practice of such places was the law to adjudicate the dispute. But after the Hague Conference on Private International Law, it has been decided that habitual residence of the parties to be considered in choice of laws.

2.1 Scope and Validity

One of the main tools that is used under Private International Law to solve the disputes that arises from contracts that is between the parties from two different countries with different laws is Alternate Dispute Resolution (ADR), the process of ADR is lot more advantages to the parties than going to the Court. Private International Law usually addresses three main questions. First, when a legal problem touches upon more than one country, it must be decided which court has jurisdiction to adjudicate the matter. Second, after the jurisdiction of a particular court is decided, what law should be applied for the said question before the court. Third, after the court renders the judgment, PIL must address the enforcement of the judgment. Private International Law mainly deals with the allocation of law-making authority among the states and at the same time it focused on law-adjudication. While choice of law is the major concern of Private International Law which includes conflicts of law between different jurisdictions. Traditionally, factors such as domicile and nationality of the parties to the disagreement, where the cause of action has been identified, and the jurisdiction or the laws in practice of such places was the law to adjudicate the dispute. But after the Hague Conference on Private International Law, it has been decided that habitual residence of the parties to be considered in choice of laws.

The term Alternate Dispute Resolution in the international context is not very clear, because it raises the question: Alternative to what? The answer to this question is clear in the domestic context where national courts provide a generally acceptable means of resolving disputes whenever the parties cannot agree on some alternative means. In many international

disputes, however, resort to national courts is not possible. Absent consent of the parties, and where it is possible without consent at least one of the parties will usually view it as a most undesirable option. Thus, the only formal means of dispute resolution that find broad acceptance in the international context are those created by agreement of the parties.¹⁵⁶ This practice of including the arbitration or ADR clause that clearly says what is the process to solve any dispute that is raised in the due course helps the parties in resolving the dispute without any complications.

With the ever-widening expansion of international trade and businesses, complex questions on Private International Law, effect of local laws on contract between parties belonging to different nations are certain to come up. ADR has been considered as one of the great ways of resolving disputes hassle-free avoiding court proceedings. This approach manifests faith of the parties in the capacity of the tribunal of their choice to decide even a pure question of law.¹⁵⁷

2.2 Contribution over emergence of ADR on international level

ADR is gaining more and more importance in the international trade contacts because the presence of the Arbitration provisions or the clause removes many questions and gives an opportunity to the parties to keep their matter private, which may not be possible if the matter is taken to court. When a dispute arises between the parties, the arbitration provision suddenly becomes one of the most important terms of the contract. It is on the Part of the drafter to not repeat the mistake of many who simply cut and paste ambiguous or flawed arbitration clauses into their contracts. In this context, the word "contract" is extremely important since arbitration rights and duties arise from the contract itself.

When drafting the arbitration provision, special consideration must be given to the: (i) choice of forum; (ii) choice of law; (iii) selection and number of arbitrators; (iv) language of the proceedings; (v) discovery rights and obligations; (vi) remedies; and (vii) arbitration rules and/or the arbitral

¹⁵⁶ O. Thomas Johnson Jr, *Alternative Dispute Resolution in the International Context: The North American Free Trade Agreement*, (1992), <https://core.ac.uk/download/pdf/147632715.pdf>.

¹⁵⁷ PC, Markanda, *Features of Arbitration and Conciliation Act*, (1996).

institution.¹⁵⁸ Statutory municipal laws usually do not contain provisions for the enforcement of foreign awards and parties are confronted with vulnerability about the law and practice of requirement system in a nation other than their own. International Agreements and treaties facilitate the enforcement of foreign awards to the extent that no further activity is essential in the nation in which the honor was rendered. Further development of International commercial arbitration has been empowered by the UNCITRAL, which targets advancing the harmonization and unification of laws in the field of International commercial arbitration.

The United Nations Commission on International Trade Law route in 1985 received the UNCITRAL Model Law of International Commercial Arbitration and from that point forward various nations has offered acknowledgment to that model in their individual Legislative frameworks.¹⁵⁹ One of the greatest examples of the growth of ADR in developing countries is India. Resolving disputes through means other than going to court has always been in practice in India till date. Arbitration Law in India has always been trending since its inception, in 1940. Commercial arbitration has been well established since the 1990s. It is governed by the Arbitration and Conciliation Act 1996, which is based on the UN Commission on International Trade Law (UNCITRAL) Model Law and rules.¹⁶⁰ United nations being promoter of ADR under Article 33 of Chapter VI of the charter of the United Nations requires the parties to a dispute to resolve their issues through negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice.

The General Assembly Resolution 2625 (XXV) of October 1970 requests the states to seek early and just settlement of their international disputes” of

¹⁵⁸ Randy J Aliment, *Alternative Dispute Resolution in International Business Transactions*, <https://cbjournal.com/articles/alternative-dispute-resolution-international-business-transactions>.

¹⁵⁹ Vani Shrivastava, *International Commercial Arbitration and Treaties Related to It*, <https://viamediationcentre.org/readnews/MzM3/International-Commercial-Arbitration-and-Treaties-related-to-it>.

¹⁶⁰ Riya Dani, *The Role of Alternative Dispute Resolution In Developing Countries*, <https://viamediationcentre.org/readnews/NTcy/The-Role-of-Alternative-Dispute-Resolution-in-Developing-Countries>.

their international disputes by ADR methods. As more countries began to develop their own common law and legislative structures, the ADR advancement led to the establishment of various institutions taking the role of “middle-man” in the world of conflict. UN also provides international institutions dedicated to the cause of ADR, The Permanent Court of Arbitration (PCA) was established by the Convention for Pacific Settlement of International Disputes, which is in Hague. Various other ADR institutions, such as the prestigious American Arbitration Association (AAA) and the International Chamber of Commerce (ICC) have been using ADR in the business setting for well over half a century.¹⁶¹

3. Utility of ADR Mechanism in International Trade and Business

International business community needs an efficient, quick and an easily accessible method of solving commercial disputes. And whatever method, whether Arbitration, mediation or litigation, the parties prefer to settle the disagreement arising in a business transaction, must be included in the contract of such transaction only. And in absence of such clause will affect the parties while claiming relief in case of any breach of that contract due to personal jurisdiction objections.¹⁶²

3.1 Relevance and Ideology

ADR mechanism is getting a remarkable attention to resolving disagreements out of the court but why this method is getting so much recognition in modern day dispute settlements in international trade and business is the major concern. Firstly, ADR allows to resolve controversies of the parties coming from different nations, having different ethnics and belongs to different jurisdiction irrespective of subjectivity of the courts.¹⁶³ Another factor leads the growth of this mechanism in international trade is confidentiality of solving the disputes. ADR takes care of the privacy and

¹⁶¹ Reyburn W. Lominack III, *Examining Alternative Dispute Resolution in The International Business Domain*, <https://scholarcommons.sc.edu/cgi/viewcontent.cgi?article=1127&context=scjilb>.

¹⁶² Louise Ellen Teitz, *Taking Multiple Bites of the Apple: A Proposal to Resolve Conflicts of Jurisdiction and Multiple Proceedings*, *The International Lawyer*, 21-64 (1992).

¹⁶³ Michael F. Hoellering, *Alternative Dispute Resolution and International Trade*, 14 NYC REVIEW OF LAW AND SOCIAL CHANGE, pp. 785-795, (1986).

confidentiality as reported by many parties who have opted for ADR mechanism as a part of their dispute settlements. Also, in an obvious sense party to international business suffers damages in terms of loss in the business or sometimes it may affect the good will of the company while undergoing proceedings of the disputes arising out of the business, but ADR ensures less damages to the parties over litigation in this matter.

Being simple and less formal practice of dispute settlements, ADR is gaining remarkable popularity in the matter of international trade and business. Mediation especially provides a wide scope of negotiation between the parties while arbitration mostly comply with the rights of the parties, but both the methods are faster, cheaper, and sometime exhibits more creative way to resolve dispute than litigation. Despite of having so many advantages, it must be taken in consideration that the whole ADR mechanism is in developing stage.¹⁶⁴ So, as per the relevancy of this mechanism is concerned, we must look after the shortcomings also, for a better point of view to this debate let's analyze each mode separately.

3.1.1 Arbitration

Arbitration is one of the methods of ADR by which conflicts arising out of international business transaction can be settled out of the court and this method has gained the recognition because of its attractive speed of justice delivery over litigation. If we take the example of U.S. federal court, it takes an average time of 23 months to end a trial whereas, by opting arbitration the average time to reach at the decision is approx. 16.7 months.¹⁶⁵ And same thing if we relate it to Korean framework, it can be observed that the Commercial Arbitration board takes on an average 5 months to settle any international dispute by the means of arbitration whereas, the Korean court system can take a time of 2-3 years to reach at the decision.¹⁶⁶ It is not

¹⁶⁴ Nicole Chevrier, *Causes of Global Business Disputes and How to Avoid Them Trade Ready*, (2018), <https://www.tradeready.ca/2018/topics/international-trade-finance/4-causes-of-global-business-disputes-and-how-to-avoid-them/>.

¹⁶⁵ *Federal Judicial Caseload Statistics United States Courts*, <https://www.uscourts.gov/statistics-reports/analysis-reports/federal-judicial-caseload-statistics>.

¹⁶⁶ Randy J. Aliment and Williams Kastner, *Alternative Dispute Resolution in International Business Transactions*, CCBJ, <https://ccbjournal.com/articles/alternative-dispute-resolution-international-business-transactions>.

restricted to these two nations based on the data provided rather this fast-decision-making approach by arbitration can be observed throughout the world. The method of arbitration has been accepted widely in the practice of international trade dispute settlements and almost 90% of the international contracts is being governed by arbitration clause.

In this era of globalization, where the global business environment is subjected to modern technologies, the parties to international trade disputes gives priority to highest level of neutrality during settlements of international trade disputes, while arbitration offers the parties to choose experienced international arbitrators who are aware of cultures of international business. Courts of some of the countries restructured themselves so as to support international arbitration for example Singapore International commercial court established a new business in the month of January, 2015, by virtue of which they have targeted international dispute market while the panel has been set up for the same which consists of international judges and the Singapore court has further assistance with Dubai International Finance center courts which also offers a panel of international judges.

Till now we have discussed the advantageous factors by which a party can give more priority to the arbitration process but the major challenge for the arbitration is its stability of the outcomes as well as the process of enforcement of arbitral awards. When we look the finality of the decision emerge out of an arbitral proceeding, it can be observed that international arbitration offers more finality of the decision than litigation and one of the major reasons behind this can be taken as in court system, one judgement may be subjected to more than one appeal, which can take a few years to get settled while this delay in decision making is avoid by the arbitral process. Usually, courts willingly not interfere in arbitral process, but they cannot completely ignore their rights so there some limited grounds on which arbitral awards has been challenged and in certain jurisdiction which are less arbitration friendly, the scope of challenging the awards becomes wider.

So, when the court found the awards are inadequate, then at highest, they direct to a fresh arbitration process to be held in the light of its jurisdiction.

International Arbitration awards are enforceable through New York Convention and in recent days most of the countries are signatories to this convention allowing enforcement of foreign awards. Although court judgements of a jurisdiction can also be enforced in another jurisdiction, but the process is subjected to complexities and slow enough. Most of the countries adopted UNCITRAL Model laws without or small amendments which helps to meet the standard of New York Convention although countries in the Middle East, are facing some difficulties with the enforcement procedure as the domestic court of those countries having a reviewing authority over the enforcements of the awards. But otherwise, enforcement of international arbitration awards is much easier and acceptable. However Supreme Court in India in the case of *Renusagar Power Plant co ltd. v. General Electric Co.*¹⁶⁷ held that foreign awards can be considered as against public policy if it is contrary to (1) fundamental policies of Indian law, (2) the interest of India and (3) moral values and justice. This decision further analyzed by SC of India in the case of *Associate Builders v. Delhi Development Authority*, where it has been clearly pointed out by the court that, only in rarest of rare cases the foreign awards can be refused enforcement otherwise common rule of law always takes the side of enforcement.¹⁶⁸

Overall, the recent need for the parties to international business dispute is a business-friendly resolution while arbitration meets almost all the required elements, but it is not completely free from court interpretation rather sometime bound by the court rulings. So, its outcome by means of awards are generally accepted because of its binding natures to court and standard statues. The qualifications of the neutrals are in question but then arbitration offers a pool of expertise so choice for the best neutrals is in the hand of parties to the disputes.

3.1.2 Mediation

Unlike arbitration which mostly focuses on legal rights of the parties, process of mediation focuses on a wide scope of negotiation by the parties to the disputes. As discussed, more than 179 countries became signatories

¹⁶⁷ *Renusagar Power Plant co ltd. v. General Electric Co.*, (1994) 1 SCC 644.

¹⁶⁸ *Associate Builders v. Delhi Development Authority*, (2015) 3 SCC 49.

to New York Convention for the enforcement of international arbitral awards the mediation also needs the same approach to function smoothly at global level. Because universal enforcement of agreement coming out of mediation process during international business dispute settlement is the major challenge. So recently situation is such that if a party finds that the opposing party will not respect or act according to the mediation settlement agreement then he must re-litigate the matter in the domestic court of the country where the opposing party resides, so as to enforce the terms and condition of the agreement. United Nation trying from 2002, to establish a universal mechanism for mediation, when they adopted model laws for the countries.¹⁶⁹ But with the changing time, the demand of mediation has increased in recent few years. This mechanism has been developed to achieve a simple, clear, and efficient mediation process universally, which is exactly what an international business wants as a part of their dispute resolution. Apart from that it focused on more flexibility and optionality of the parties rather restricted themselves only to reach at creative solution.

There is a major difficulty in achieving this mechanism which is variation in the level of national implementation of mediation method throughout the globe. So global initiative over implementation of this mechanism is subjected to controversies while some organizations have taken initiative to enforce the mediation outcomes when the decision has been finalized out of the process. Singapore International Arbitration center (SIAC) and Singapore International Mediation Center (SIMC) established a kind of hybrid proceedings which further known as Arb-Med-Arb or Arb-Med clause¹⁷⁰ which ensures, if the mediation successfully achieved the settlement between the parties, the agreement so formed in the process will be referred by arbitral tribunal appointed by SIAC and further the tribunal consider that agreement as an award under the arbitration. New Jersey passed a recent law by virtue of which parties can opt for mediation and then goes for another process where they conduct arbitration with a limited

¹⁶⁹ *A Collaborative Process to Resolve International Business Disputes: Mediation Policy as A Global Business Model*, <https://www.mediate.com/articles/WeissD1.cfm>.

¹⁷⁰ *What Is It and How Can It Help the Parties to Solve Their Disputes Efficiently?* GLOBAL ARBITRATION NEWS, <https://globalarbitrationnews.com/arb-med-arb-what-is-it-and-how-can-it-help-the-parties-to-solve-their-disputes-efficiently>.

scope to enforce the settlement only. So, it depends on parties whether they will retain the mediation settlement or convert the settlement agreement into awards and the major reason for converting the agreement into awards is to be recognized under New York Convention. Although none of the above method can be the efficient universal mechanism for mediation but it is the general methodology that is accepted for the enforcement of international awards. The conversion method is the better option for the time being in international business community as the agreement further got enforced which is settlement decision of an international business dispute.

3.1.3 Global Emergence of Court-Order Mediation

In some countries judges of the courts are having authority to adjudicate mediation and conciliation although practically they have very less approach over that, and this authority has been prescribed in the national procedural codes. These type of approach by the judges are termed as court-order mediation. This approach is a contradictory practice of mediation because in general mediation refers to a process of disputes settlement which is voluntary, confidential, and non-binding in nature.

In Australia, specific legislation is there which requires parties to take a genuine resolution step before stepping to court proceedings and mediation has been recognized there as a genuine step taken by the parties before actual court settlements and further some countries like Italy and Indonesia where it has been made mandatory for the disputing parties to opt for mediation prior to litigation in the court for any civil or commercial matters.¹⁷¹ And this has been further added that if the parties failed to mediate before court proceedings, then according to the procedure of the law, the judgement can be declared as null and void. While in Colombia, it is mandatory to undergo mediation before filling the case in the court.

In China and Hongkong, Courts have the power to order the parties to mediate between themselves in a dispute which may be with or without

¹⁷¹ *Compulsory Mediation the Australian Experience*, KLUWER MEDIATION BLOG, <http://mediationblog.kluwerarbitration.com/2018/10/22/compulsory-mediation-australia-n-experience/>.

consent just like the rule in Australia¹⁷², while in countries like France, Judges of the court having authority to refer parties to mediate but only with the consent of the parties to disputes. In those cases, judges hold back the jurisdiction of the case and if the mediation become successful it would be viewed as a judgement render by the court. In the United Kingdom the case is slightly different, here the court cannot compel a party to mediate but they can issue orders by virtue of which the party has to opt for mediation although party denying such an order, subjected to punishment¹⁷³ according to the violation of law and further if any case brought before the court whereby a party violates agreement to mediate before opting litigation, then the court is having authority to deny the hearing that particular case. But apart from court-order mediation and the above mention countries, mediation is subjected to major challenges because mediation is lagging in no establishment of rule of law to govern the mechanism, there are certain guidelines and regulations to look after the process but they are not strictly adhered during the process as the mediation is mostly facilitating the parties rather to adjudicate them mediation and conciliation which are the process of ADR basically focused on negotiation by the parties are non-judicial settlement and the outcomes of mediation and conciliation are not enforceable like arbitral awards and court's decision. Parties are not legally bound to act according to the outcome of the mediation and conciliation, it is just a recommendation by the neutral. The enforceability of these outcomes depends upon national legal framework of the country. So, if any of the parties is not acting according to the agreement settled by the mediator or conciliator, the other party must approach to court or Arbitral tribunals for the enforcement of the agreement terms.

3.2 ADR Outcomes: A Jurisdictional Debate

Discussions stated in previous two consecutive sections clearly denotes that the methods of ADR whatever may be used by the parties, is not free from

¹⁷² Jiang Heping and Andrew Wei-Min Lee, *From the Traditional to The Modern: Mediation in China*, WEINSTEIN INTERNATIONAL FOUNDATION, <https://weinsteininternational.org/mediati-on-in-china/>.

¹⁷³ *Settling Business Disputes: Arbitration and Alternative Dispute Resolution*, INTERNATIONAL TRADE CENTRE, 2 (2016).

controversies. As it is known that every coin has two sides so despite of advantageous factors governing arbitration and mediation which contributed immensely to the emergence of ADR practices at global level, also facing some major challenges, resulted in disadvantages of practicing ADR in international business disputes.

In International Commercial Arbitration a requirement was observed that it should be governed by *Lex Mercatoria*¹⁷⁴ which is separated from the national laws. But till date this could not have been achieved, although approach has been made several times for the unification and harmonization international commercial arbitration laws. So even today also national courts exhibit a supervisory role in the matter of arbitration in international business disputes because many of the jurisdiction consider the process of arbitration as per the statutory provisions of code of civil procedure. Moreover, it lies with the nation state to define what is meant by 'international' and 'commercial' to sort out the applicable statute accordingly.¹⁷⁵

Also in case, if a party for some emergency, wants to alter the terms of the agreement made in the settlement process through ADR is subjected to some difficulties because he then must wait for formation new arbitral tribunals whereas the courts at that situation are the better options which takes care of matter under emergency irrespective of formation of arbitral tribunals. Also, if the courts can challenge the arbitral awards on certain grounds and if they found the awards are inadequate, they usually direct for a fresh arbitration on that matter. So, participation of the courts in the arbitration process cannot be totally ignored and probably this could one of the reason due to which arbitral awards are sometime binding in nature. As per as the enforcement part is concerned, it is look after by the New York Convention¹⁷⁶, provided the countries must be signatories to the convention. International arbitral awards are generally accepted through the world although countries from the Middle East still faces some issues

¹⁷⁴ *Theory of the Lex Mercatoria*, LAW TEACHER, <https://www.lawteacher.net/free-law-essays/commercial-law/the-theory-of-the-lex-mercatoria-commercial-law-essay.php>.

¹⁷⁵ Julian D. M. Lew, QC, Loukas A. Mistelis et.al., *Comparative International Commercial Arbitration*, 49 (Kluwer Law International, New Delhi, 2003).

¹⁷⁶ New York Convention, 1958, *The Institute of Arbitration*.

while enforcing the foreign awards as domestic courts supervises the adequacy of the awards.

And if we observe the mediation point of view, as discussed before it is a sort of negotiation and sometime combined with arbitration for the enforcement of the agreement, although people around the world is not completely bound by both the mechanism. So, its universality is still not achieved but yes, if it can be achieved in future, will be more fruitful in international business disputes because this method assures more scope for the negotiation. But again, if it is combined with the arbitration process then jurisdictional issues are still revolves around and it cannot be stated completely as out of court settlements, a little contribution and influence of domestic courts and local laws will the process.

4. Rationality Behind the Growth of ADR Over Litigation: A Global View

Alternative dispute resolution mechanism although emerging as a better platform to settle international trade disputes but still it is a secondary to litigation. Despite of so many advantageous factors relating to ADR, litigation is being accepted as a primary form of dispute settlement throughout the world. Being a developing concept, people throughout the globe neither properly aware nor familiar with the methods of ADR mechanism.¹⁷⁷ Also, supervisory role of domestic courts creates a scope of doubt, whether the outcome of ADR is universally acceptable or not? But if we keep aside these debates, we can observe that there is a chance of these alternatives to become a primary method of disputes settlement in future.

4.1 ADR v. Litigation: A contest for efficient justice system

As mentioned in the earlier chapters' ADR is gaining importance in the international community, many countries are adopting UNCITRAL Model to ensure the international ADR process runs smoothly. However, it is important to know how litigation and ADR are different and what are its

¹⁷⁷ *Alternative Dispute Resolution Is Still Secondary to Litigation*, VIA MEDIATION CENTRE, <https://viamediationcentre.org/readnews/MTQ2/Reasons-why-Alternative-Dispute-Resolution-is-still-Secondary-to-Litigation>.

positives and negatives in resolving international disputes. Both Litigation and ADR has its positives and negatives in its own ways depending what aspect were looking from. There are various aspects that decides which process is more efficient.

4.1.1 Time

When the time consumed by both the process is the parameter to see which is more effective. In a typical litigation system, a dispute between parties from different countries could take many to become fully resolved. Many questions rise just on which country has the jurisdiction, if the judgement given is applicable in the other party's country, etc. this prolonged litigation period has a huge effect on the business that is conducted. As the process of ADR is more informal as compared to the litigation process. There are no lengthy procedures as that is present in the court.

4.1.2 Cost

The cost of resolving a conflict is very important factor that decides which system is more benefitting to the parties, the costs are generally relatively low in ADR and can be distributed equally among all the parties. Further, we can see that litigation is time consuming it is also more costly than ADR. The state of the economy at the time a dispute arises and the time it is resolved in a traditional judicial proceeding may vary so significantly that it materially alters the bargaining relationship between the parties. Such instability may even affect a party's willingness to continue the business relationship.¹⁷⁸ Less time spent to resolve a dispute means lower costs of fees. In addition, discovery is much more limited in arbitration, and appeals are very limited, so those costs are all saved.

4.1.3 Proceedings and Decision

ADR provides advantage of allowing the parties to select the arbitrator of the dispute. This is particularly advantageous in an international business dispute because a skillful arbitrator "can acknowledge and reconcile different cultural, legal and social norms in reaching a decision, whereas

¹⁷⁸ Lominack, Reyburn W, *Examining Alternative Dispute Resolution in the International Business Domain*, SOUTH CAROLINA JOURNAL OF INTERNATIONAL LAW AND BUSINESS,1(2003).

courts are generally bound by the procedural rules and substantive law of the country in which they sit.”¹⁷⁹ In ADR, an approach is made to balance the interest of both the parties and tries to end up in a win-win scenario. Whereas, in the litigation, the other party loses the case. Furthermore, having the parties agree upon an arbitrator significantly reduces the risks of perceived bias.

4.1.4 Confidentiality

In a global business setting, the desire for confidentiality is great because of the extensive scope of marketability. Most business entities would prefer to keep their disputes private to avoid publicity that may hurt their image or benefit their competitors.¹⁸⁰ The discussions of the proceedings in ADR are confidential and no public record is to be maintained. The discussions in the court involve knowledge of the public. Brown in his book says that “not only is the hearing in private with strangers excluded, but the parties, by entering into arbitration agreement, accept a mutual obligation not to disclose or use for any other purposes any documents which are prepared for and used in the arbitration.”¹⁸¹

Many of the advantage’s ADR has over traditional litigation are prevalent in both business and non-business-related transactions, as well as on a national and international level. Some advantages are especially applicable to the international business setting and serve as catalysts for increased global market activity and efficiency. When there is a discussion on litigation v. ADR, it is also to be considered that ADR helps a judiciary and reduces the burden on Litigation. Resolving the cases outside court makes courts give their time to matters in hand which needs proper litigation.

Though, the advantages of ADR in an international business setting are generally attractive, there in turn exists a downside to its operation. ADR in the international business setting will only work if the selected arbitrator is committed to making fair and expeditious decisions, keeping in mind the

¹⁷⁹ W. Michael Reisman, *Systems of Control in International Adjudication and Arbitration*, (1992).

¹⁸⁰ Philip Rothman, *Please Keep It Confidential: Arbitration Makes It Possible*, (1994).

¹⁸¹ Alexis C. Brown, *Presumption Meets Reality: An Exploration of The Confidentiality Obligation in International Commercial Arbitration*.

relative social, economic, and political objectives of each culturally diverse party.¹⁸² If the arbitrator exhibits prejudice in any manner, the offended party may consider the resolution process unsuccessful, regardless of the actual outcome. Another major concern for parties is the ability to enforce an award that may be issued. The effectiveness of private international arbitration is dependent “on substantial and predictable governmental and intergovernmental support.”¹⁸³ Government plays a significant role in the ADR process, such that without the assurance of enforcement by a national court in whose territory an award debtor's property is located, international commercial arbitration simply would not work.

Most significant promoter of ADR on the global business scale has been governmental approval and encouragement. The demand for ADR has been supported by governments around the world, enabling businesses to act with the knowledge that their choice to use ADR is recognized, that ADR awards will be respected, and if needed, will likely be enforced by national governments. With governments promoting ADR and international business adopting ADR to resolve disputes we can see a shift from litigation to ADR methods from the sides of the businesses. Though, there is shift and higher demand to ADR. It does not mean ADR can completely take over litigation, as litigation is an important aspect of a judiciary and ADR cannot replace litigation, it can support litigation by reducing the burden on Litigation and allow it to function more efficiently.

4.2 Reason behind Global emergence of ADR

A remarkable rate of growth of Alternative Dispute Resolution has been observed in recent few years in various domain. Although arbitration, mediation and other methods of ADR mechanism is there in the international society for a century at least. Moreover, in labor management relations, techniques of ADR, were used for the first time in 19th Century¹⁸⁴ but commercial arbitrations are in practice for a longer period now. And

¹⁸² Christopher W. Moore, *Will Travel: Reflections on Democratic Decision Making and Conflict Management Practice Abroad*, 1993.

¹⁸³ Reyburn W. Lominack III, *supra* note 162.

¹⁸⁴ David B. Lipsky & Ronald L. Seeber, *In Search of Control: The Corporate Embrace of ADR*, 1 U. PA. JOURNAL OF LABOR AND EMPLOYMENT LAW, 133-157 (1998).

further cost and delay issues with the litigation process is not new as per the case *Jarndyce v. Jarndyce* in bleak House is concerned. So, why ADR mechanism has got a good amount of recognition and a exhibited a dramatical growth in recent past few years?

To understand the answer to this question let's link the factors affecting the growth of ADR techniques. In the period of 1980s, international corporations felt the pressure of global and domestic market whereby they were in constant threat of takeover, merger, and acquisition in the business. At that situation companies were facing difficulties to invest over legal department but at the other hand they had to run their business in a more efficient and effective manner. ADR emerges there to solve out the cost related issues and became an established way to resolve disputes in cost-saving manner.

Another set of factors revolving around the growth of the ADR techniques in international business can be viewed as incapability of Legal system. With the increasing rate of corporates and approach of privatization, the legal issues and disputes has started growing immensely at the global level these resulted into huge number of pending cases before courts and other administrative agencies. The respective authorities were unable to handle this over-burden of cases, which encourages the corporations to opt of alternative dispute resolution techniques to resolve their disputes in a less period. A lesser-known factor affecting growth of the ADR is changes in federal criminal legislation.¹⁸⁵

For past few years terrorist activities was increased throughout the world as a result government is more focused to give priority over criminal legislation to tighten the law to govern this issue. So, a constant and rapid accommodation of criminal and constitutional rights by federal courts, became a bar for judicial review of commercial and civil matters. Since the judiciaries were under statutory obligation to deal with criminal matters, the civil and commercial cases was started suffering delay in justice. This ultimately turned up to a loop whole for litigation and encouraged ADR to

¹⁸⁵ Francesca Altema, *Alternative Dispute Resolution: How the Growth of This Practice Has Led to a Drop in Litigation*, LAW STUDENT CONNECTION, http://nysbar.com/blogs/lawstudentconnection/2012/05/alternative_dispute_resolution.html.

take charge. This incapability of civil litigation, mediation got much priority as it constitutes a mode of nonbinding dispute settlement.¹⁸⁶ But choosing the mode of settling the disputes is completely depends on the parties, and it's not always ADR is advantageous, sometimes it shows drawbacks in its practice. If we take the confidentiality aspect of ADR, it may protect the privacy of the parties in the settlement but at the same time we must consider that by providing confidentiality, they are restricting the society to maintain the precedent.

Another disadvantageous factor can be the approach of ADR, because people at a large are opting ADR techniques to solve their disputes due to its speedy justice delivery system and party centric approach. But this approach is not encouraging the legislation to reform the laws accordingly for the benefit of people. Judiciary plays a vital role to encourage and guide the legislative authority to reframe laws as and when required but settlement through mediation, conciliation and non-binding arbitration will not help legislation to any extent.

Basically, ADR techniques are providing us a temporary relief and not solving the actual problems and although, ADR is showing a rapid growth at global stage but still there are people who are not aware of such techniques and sometimes people do not rely on ADR because it is itself a developing concept. So, it may happen in near future that whatever the issues are facing by the judges and litigants in the court system now a days, arbitrator and mediator may face same problems as soon as they start receiving more and more cases. Even in the present context, formation of arbitral tribunals takes time due to which emergency changes in the agreement cannot be performed by the parties very easily and then the parties are left with only the court system who takes care of such emergencies. So, a permanent approach should be there by legislations and same amount of constitutional protection should be provided to civil and commercial matters just like criminal matters. Equitable treatment from the legislation may heal the wound of justice system contest and will serve the parties with more efficiency.

¹⁸⁶ Riya Dani, *supra* note 161.

5. Judicial Approach on Practice of ADR in International Business Matter

When we deal with the concept of international commercial arbitration, we can observe that most of the time parties to the disputes as well as the arbitrators doesn't want any interference from the court.¹⁸⁷ But there are certain circumstances where the assistance from the court becomes necessary, because court is having the power to make someone to do something whereas, arbitral tribunal is lagging in that perspective. Apart from that Courts are having a supervisory role over alternative dispute settlements. Although the process of arbitration is a type of private justice system, but it is governed by arbitration law at domestic as well as international level. Sometime parties also seek for judicial assistance when they found there is biased and unfair justice delivery from the arbitral tribunal. For this context let's take the example of Belgium, where law states that there will be no judicial review of the arbitral awards for the parties who are opting arbitration in Belgium but having no connection to Belgium. This made people to avoid arbitration in Belgium, because business doesn't want barrier to approach to court if it found the award is improper, as a result, the law suffered a reform in 1998 by means of which parties has been permitted to get assistance from the court unless they decide otherwise.¹⁸⁸

5.1 Judicial assistance to ADR

A party to the dispute can ask for judicial assistance from the court in various circumstances for various purposes, it may be some emergency relief by providing order to the other party, it can be mere enforcement of awards, etc. But the assistance is based on parties' autonomy hence takes care of party's interest. In the case *Textile Workers Union v. Lincoln Mills*¹⁸⁹, it has been stated by the judge that despite of having so much debate over advantages and barriers of arbitration, the mechanism still holds a trend as a dispute settlement process and one of the major reasons for the same is

¹⁸⁷ Margaret L. Moses, *Judicial Assistance to Arbitration*, THE PRINCIPLES AND PRACTICE OF INTERNATIONAL COMMERCIAL ARBITRATION, pp. 84–113 (2010).

¹⁸⁸ William W. Park, *The Specificity of International Arbitration: The Case for FAA Reforms*, 36 VAND. J. TRANSANT'L, (1241-1267) (2003).

¹⁸⁹ *Textile Workers Union v. Lincoln Mills*, 353 U.S. 448 (1957).

judicial review. But a question remains there, whether the court should involve in review of the complete facts and circumstances or just a prima facie review is enough¹⁹⁰. Complete review can be helpful to detect a defective arbitral agreement, but the parties must pay for full litigation process whereas for prima facie review these costs can be cut down to some extent.

Although, courts of different countries grant different amount of review which they found suitable. Further the court can direct the parties to opt for arbitration if certain criteria have to meet, as the approach made by U.S. Fifth Circuit as well as decided in the case of *Ernesto Francisco v. Stolt Achievement Mt*¹⁹¹, according to this, there must be an agreement in written form to arbitrate the dispute, the agreement should ensure the arbitration will be held in a country, which is a signatories to the particular convention, the agreement must arise out of commercial legal relationship and a party to the agreement is not an American citizen, then the court can compel the parties for the arbitration.¹⁹²

Despite of having supervisory role of court over ADR, sharp criticism has been observed on judicial review. There are certain charges over judiciary relating to its interference in the matter of arbitral proceedings like Judicial hostility of the courts, which has been defined in the case *Kulukundis Shipping Co. v. Amtorg Trading Corp*¹⁹³ and unwanted interference. New York Court of appeals established a new reasoning in the case of *General Elec. Co.*¹⁹⁴, where the party sought for an arbitration for a dispute arising during pension credit, the Court of appeal stated that if there is no legal ground for the claim, the court may refuse to compel arbitration¹⁹⁵.

To understand the charge of unwanted interference by the Court let's take the case of *Alpert v. Admiration Knitwear Co*¹⁹⁶. In this case a purchaser

¹⁹⁰ Frederic Bachand, *Does Article 8 of Model Law Call for Full or Prima Facie Review of Arbitral Tribunal's Jurisdiction*, 22 Arb. Int 463 (2006).

¹⁹¹ *Francisco v. Stolt Achievement Mt*, 293, F.3d, 270-273 (5th Cir 2002).

¹⁹² *Supra* note 169.

¹⁹³ *Kulukundis Shipping Co. v. Amtorg Trading Corp*, 126 F.2d, 978-984 (2nd Cir 1942).

¹⁹⁴ *General Elec. Co.* 300 N.Y. 262.

¹⁹⁵ T. Freeman Jalet, *Judicial Review of Arbitration the Judicial Attitude*, 45th CORNELL LAW REVIEW 519-557 (1960).

¹⁹⁶ *Alpert v. Admiration Knitwear Co.*, 304 N.Y. 1, 105 N.E.2d 561 (1952).

sought for enforcement of the arbitration clause contained in the contract, and in this contract empowered the seller to claim advance payment if the financial responsibility of the purchaser becomes unsatisfactory. The purchaser was not ready to accept this demand and called for arbitration, but the court found that the seller is not liable for any breach of delivery and hence there is no need to compel them for arbitration.

Another charge on judicial review is that the Court has narrowed down the jurisdiction arbitrators, which can be observed in those cases where courts take the authority to confirm status of the award given by arbitrator. And a major reform can be observed in Arbitration and Conciliation (Amendment) Act, 2021¹⁹⁷ in India. Insertion of Section 36 in the parent Act increased an extra task for the court, now, the court to check whether there is prima facie evidence of fraud and corruption in the arbitral award. Also, the matter of *Western Union Tel. Co.*¹⁹⁸ where the arbitrator's award has been reviewed by the court on appeal and the decision then given has been considered as interpretation of court in the dispute. Such action from the judiciary put the reputation and efficiency of arbitrator in question and this type of approach from the parties which challenges the awards provided after their consolations only, can be viewed as an attempt to weaken the cause of arbitration and motives of judiciary.

5.2 Enforcement of Awards and Interim Orders

The most important part if an ADR process is to enforce the awards, if the award that is granted is not considered or enforced then the whole purpose of ADR is not fulfilled, and the resources and time that is put into deal with matter goes in vain. So, it is very important to acknowledge the awards that are given in international ADR and enforce it even if the awards or the interim orders are given in in other states. Not very Long ago, it is said that ADR mechanisms did not have the power to pass interim orders in many countries, passing of interim orders is crucial to ensure that once the final award is given it is still possible to enforce the award. As the ADR evolved and more and more people started to give preference to ADR the laws

¹⁹⁷ Arbitration and Conciliation (Amendment) Act, 2019, (INDIA).

¹⁹⁸ *Western Union Tel. Co.*, 299 N.Y. 177, 86 N.E.2d 162 (1949).

governing the process and enforcing the awards became stronger. Today, most ADR laws and rules assume that the courts and the ADR tribunals have concurrent jurisdiction to grant interim relief. There are differences even today, in countries like Argentina and Italy, arbitrators do not have the power to issue interim decisions. But, in Countries like England ADR has comparatively more power.¹⁹⁹

Mostly, the parties may choose to seek provisional methods like interim orders from courts to protect themselves from immediate harm. As, if there is a need for urgent relief it can be obtained by the courts before the tribunal is decided. The parties won't lose the right to go to ADR if they obtain the urgent relief from the local courts. However, this will not be the case if the tribunal is decided, and the tribunal can issue such relief. like cases in the United States suggest, that a court will not grant interim relief if the relief sought is also available through a tribunal. In *Simula, Inc. v. Autoliv, Inc.*²⁰⁰ a district court in US had completely denied Simula's request for a preliminary injunction because provisional relief was available from the Swiss Arbitral Tribunal where the arbitration would take place under the ICC Rules of Arbitration. Once, this seeking of interim order is done and if it is granted then the next step would be to enforce it. If an arbitral tribunal grants an interim measure, and court enforcement is needed, normally the local court at the seat of the arbitration will provide for enforcement. But the complication arises when the Award or the relief granted is to be enforced in different Jurisdiction.

In the matter of Enforcement of Interim orders, Article 17 of the Model laws facilitates the enforcement of interim measures, it says that the measure must be enforced, unless there are reasonable grounds for its nonenforcement, as set forth in Article 36. Those grounds for nonenforcement are essentially the same grounds that are set forth in the New York Convention. The New York Convention was not intended to deal with interim measures, but rather for the enforcement of final awards. Occasionally, an interim measure can be enforced under the Convention

¹⁹⁹ *Supra* note 170.

²⁰⁰ *Inc. v. Autoliv Inc.*, 175 F.3d 716 (1999).

when the relief granted by the tribunal is termed a partial award or the measure is determined by a court to be a final and enforceable award.

When it comes to enforcements of the awards, the difference that lies between the enforceability of a court judgment and that of an arbitral award favors the use of ADR. As there this an international treaty such as the New York Convention, when it comes to the matter of the enforcement of ADR awards, more than half of the United Nations Member States have adopted the New York Convention, and most international arbitration agreements are within its application. If an arbitration award, under the New York Convention is issued in any country that is a party to the Convention every other party to the convention would be legally obligated to enforce the award. The signatory states of New York Convention may refuse interim relief or awards only on one of five grounds outlined in Article 5.²⁰¹ Otherwise, it must recognize and enforce the settlement agreement. Arbitration is now often included in the bilateral investment treaties negotiated at an increasing number to resolve disputes between foreign states and private overseas investors. The smooth enforcement is yet another reason why international ADR continues to grow.²⁰²

6. Conclusion

ADR being a mode of settling dispute outside court gained a remarkable amount of popularity on international business because a person running the business doesn't want to waste both time and money in a legal proceeding of court system. The question of adequacy on the ADR outcome to an extent has been understood by this analysis. We cannot say every person is aware of this mechanism, but enough people and countries are familiar with this mechanism. This analysis shows that even after decision provided by arbitrator or neutrals, courts are always having a supervisory role to look after the legal validity of the awards. Some countries

²⁰¹ Alexander Gay, *A Breakthrough for International Trade*, THE SINGAPORE CONVENTION, <https://nationalmagazine.ca/en-ca/articles/law/opinion/2018/the-singapore-convention-a-breakthrough-for-intern>.

²⁰² Prina Sharma, *International Arbitration Vs. Litigation*, <https://viamediationcentre.org/read/news/Nzg2/INTERNATIONAL-ARBITRATION-VS-LITIGATION>.

approached differently by making mediation compulsory before appearing to court, which shows the approach of judiciary to make function ADR techniques under its jurisdiction.

Moreover, this can be observed that enforcement of awards has been authorized to court unless the parties to the dispute decide otherwise. But judiciary at world level is aware of the rapid emergence of ADR mechanism that's why they are making the use of this emergence but under guidance of court. Court's control over ADR is well displayed by many countries. the countries may be signatories to New York Convention but when the enforcement part comes, recent amendments over arbitration law in the countries has been considered and the court has the power to review the award, which shows that the final decisions has been interpreted by the court and having a legal value making the party legally abide by that award, but any agreement settled non-judicially doesn't make parties completely abide by that agreement.

The jurisdictional issues revolving around the arbitration and other ADR process is one of the major concerns under the Private International Law and there are no measures to come out of this problem because the whole mechanism is still developing, and a series of advantages and disadvantages will be there while practicing this mechanism. But approach till date which can be stated as adequate measures are arbitration and mediation clause which has been upheld by Singapore, then the targeted place of dispute can be viewed as the respective jurisdiction for solving the disputes and certain other contribution of Courts helps to solve the jurisdictional issues to an extent.

But it is obvious that one cannot completely assure ADR method is the most competent way to solve dispute because today where the litigation is, in future the ADR can be at the same position if it developed completely and can face same challenges which the court system is facing today. So as per our opinion it will be better to continue both court system and ADR techniques under jurisdiction of the court so that the burden of cases will be decreased to an extent and the enforcement procedure will be smooth enough.

CHAPTER 5

JUDICIAL INTERVENTION IN ARBITRATION: AN INDIAN OVERVIEW

Ishita Garg*

Abstract

Arbitration is the referral of a dispute or difference between at least two parties to a person or persons other than a judiciary for resolution after both sides have been heard judicially, by a person or persons other than a court of competent jurisdiction, it is believed by a section of people that judicial intervention is antithetical to arbitration, and this viewpoint is shared by a section of the arbitration community in India. On the other hand, the Law Commission of India does not share this viewpoint, as it understands that the judicial system is critical to the arbitral procedure's success. It is based on the principle of eliminating a dispute from the ordinary courts and allowing the parties to choose a private tribunal to resolve it. Furthermore, in respect of its powers of intervention, the Indian judiciary has taken an extensive approach. The Supreme Court's decisions interpreted the Arbitration and Conciliation Act, which was against the spirit of the UNCITRAL Model Law, causing widespread condemnation from the international business sector. However, to avoid judicial intervention, the Indian judiciary construed arbitration agreements to give priority to the seat of arbitration with the help of 'seat theory' which is internationally accepted in the field of arbitration. Nevertheless, in an arbitral procedure, judicial intervention may occur at several points. At the outset, when arbitration procedures are set an arbitrator may need the intervention of a judiciary during a certain time to help the

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arbitrators, judicial intervention may be necessary to determine if it is an interim order or a preliminary injunction. The question of whether there is a need for the judiciary to intervene in arbitral awards has significant importance or an issue of interim measures during the arbitration. This research paper aims to discuss the necessity of Judicial intervention and its significance in arbitral awards.

Keywords: Arbitration, Arbitral Awards, India, Judiciary Intervention

1. Introduction

In recent years, because of the rapid growth of industrialization and globalization, the excessive burden placed on the judiciary because of many pending cases due to lengthy court procedures has resulted in arbitration becoming a time-efficient and reliable means of resolving disputes not only in India but around the world. Furthermore, by allowing for greater flexibility in the procedure for dispute resolution, arbitration creates far larger and more open opportunities for networking between the disputing parties.

The primary objective of introducing arbitration as a dispute resolution mechanism was to create a rapid and convenient dispute resolution process that was also cost-effective when compared to traditional court proceedings. It is currently one of the most popular methods of conflict resolution since it includes a mediation and conciliation procedure that encourages parties to resolve their disagreements outside of court and in a short amount of time.

Section 2 of the Arbitration and Conciliation Act, 1996 defines "Arbitration" as unless the context otherwise requires (a) Arbitration means any arbitration whether administered by permanent Arbitral Institution and (b)'Arbitration Agreement' means and Agreement referred to in Section 7.²⁰³ It is thought in some quarters that judicial intervention is anathema to arbitration, and this view is not alien to a section of the arbitral community even in India. The Commission, however, does not subscribe to this view.

²⁰³ The Arbitration and Conciliation Act 1996, § 2, No.26, Acts of Parliament, 1996 (India).

The Commission recognizes that the judicial machinery provides essential support for the arbitral process.²⁰⁴

In India, the evolution of arbitration law has a lengthy history. The Bengal Regulations were the first to implement modern arbitration in India in 1772. Eventually, the Arbitration and Conciliation Act of 1996 was enacted. When a disagreement over the nomination of an arbitrator develops at the outset, the court must intervene. An 'award' is a decision made by an arbitrator through an arbitration tribunal that is like a decision or judgment made by a court of law.

An Arbitral Award specified under Section 31 of the Arbitration and Conciliation Act, 1996 is merely a statement of an arbitral tribunal's determination of issues, and there is no basis for appeal against the award in the 1996 Act, which is based on the UNCITRAL Model Law. Section 34 of the Arbitration and Conciliation Act of 1996, on the other hand, allows an aggrieved party to request that the arbitral award be set aside.

The competence of the supervising court to set aside an arbitral judgment has been consolidated in Section 34 of the Act's limited grounds. In addition, judicial decisions have been made in this regard. The supervisory courts, on the other hand, do not even have the authority to alter, modify, or remand. The award to the arbitral tribunal for alteration. According to the acknowledged judicial basis, the court must set aside the award if it fails to pass the judicial scrutiny required by section 34 of the Arbitration and Conciliation Act, 1996. Although, before upholding or remanding the Arbitral award to the Arbitral Tribunal, the courts have revised or modified it in certain cases.

The object of the section is to avoid delay and to require the parties to bring the disputes to the decision of the court in the form of a petition. Remedy by way of a regular suit is intended to be excluded.²⁰⁵ About Section 34(4) of the Act, which authorizes the court to adjourn the procedure under

²⁰⁴ Law Commission of India, Amendments to the Arbitration and Conciliation Act 1996, Report No 246 (2014).

²⁰⁵ *Jawahar Lal Burman v. Union of India*, AIR 1962 SC 378.

Section 34(1) of the Act for setting aside the Arbitral Award for a period defined by it, where appropriate and so petitioned by a party.

1.1 Research Problem

The Alternative dispute resolution process has an enormous impact on the Indian economy and international perception of doing business in India, consequently, the Indian judiciary and justice administration system have discovered an alternative to adversarial litigation in the form of ADR which offers parties options for resolving their differences. It is a technique for settling disagreements between parties that covers a wide range of issues. Whereas at times there is judicial interference in an arbitral proceeding needed as the judicial system is critical to the arbitral procedure's success. The researcher has limited their scope of research on judicial intervention in Indian Arbitration and analysis on what the recourse is against Arbitral Awards.

1.2 Objectives of the Study

- To comprehend the function of judicial intervention in Arbitration.
- To study the implication of judicial intervention in arbitral awards.
- To analyses the challenges under Section 34 of The Arbitration and Conciliation Act, 1996.

1.3 Research Methodology

The Research Methodology involves the use of secondary resources for the collection of data. Secondary research contains information found in research papers and other comparable publications. Public libraries, websites, and data gathered from previously completed surveys, among other sources, can make these papers available. Some government and non-government entities also save data that may be downloaded and utilized for the study. Therefore, the information used in this paper is from online journals and online research papers and other sites

2. The Role of Judiciary in Arbitration

In India, the development of arbitration law has a lengthy history. The Bengal Regulations were the first to implement modern arbitration in

British India in 1772. In time, the Arbitration and Conciliation Act of 1996 was enacted. The 1996 legislation was only enacted after two ordinances were approved following the implementation of the New Economic Policy in 1991. The 1996 legislation is structured in such a way that the court's supervisory role in arbitration procedures and arbitral decisions is minimized. The preamble of this Act states that it is based on the UNCITRAL Model Law.

On the other hand, not all the UNCITRAL Model Law's protections were included in this Act. Article 16 of the Model Law specified that Arbitration Tribunals may rule in their jurisdiction, and jurisdictional problems were to be addressed by the arbitral tribunal as preliminary matters before appealing to the court. The Act was amended to remove this provision. According to the Model Law, a court has the authority to give an interim measure of protection if the outcome of the arbitration is dependent on the area of the arbitration and whether it is in the same area as the court.

The Act's objective is to motivate people to travel. This purpose would be defeated if cases persisted in courts for months or years before arbitration even was considered. Arbitration proceedings should be determined based on affidavits and other relevant documents, rather than oral testimony, to expedite the settlement of the case. However, in a few unusual situations, it may be necessary to provide the parties with the chance to lead oral evidence. In both cases, the judicial authorities must resolve the issue promptly and within a reasonable time limit, rather than treating the case as a typical civil action.

The alternative dispute resolution process has risen significantly in recent years, to its considerable advantages over the traditional way of litigation. In a report delivered to Parliament in September 2014, the Ministry of Law and Justice showed that India is short of 6,000 judges. It is important to note that between 2006 and 2018, India saw an 8.6% increase in the number of cases pending in all courts, increasing the time it takes for a court to decide a case. These reasons make it possible to avoid litigation in India. These considerations make it possible to avoid litigation in India, particularly in contractual disputes that can be resolved by alternative methods such as

arbitration, which is governed by the Arbitration and Conciliation Act, 1996. ("Arbitration Act").

However, the judiciary in India can intervene when there is a dispute between the parties over the selection of an arbitrator, or the court intervention is necessary during the proceedings to help the proceedings, similarly, the judiciary can help by granting temporary protection or other measures. Finally, once the arbitral judgment has been announced, court action is necessary for either enforcement or challenge of the award. Judiciary has played a critical role in promoting and transforming India into an international arbitral country. Though in recent years, Indian courts have repeatedly embraced an arbitration-friendly attitude. While a party challenges an arbitration judgment, the Supreme Court of India and various High Courts have taken a hands-off approach to the case.

There have been numerous cases where courts have sustained arbitration agreements despite small flaws, thereby respecting the parties' decision to have their problems resolved through arbitration. The case of *Enercon (India) Ltd. & Ors v. Enercon GMBH & Anr*²⁰⁶ has rendered a landmark decision affirming the pro-arbitration outlook the Indian courts have developed in the past few years. The Supreme Court while taking a pro-arbitration approach has upheld an arbitration agreement despite the error it suffered and concluded that since the intention of the parties to arbitrate was clear, the Court can make the arbitration agreement feasible even if it has some errors in it.²⁰⁷

Where parties have attempted to circumvent the Arbitration Act's requirements, the courts have typically refused to interfere with the awards made under the Act. While having a pro-arbitration stance, this decision is indeed a positive step toward reconciling Indian arbitration law with international jurisprudence, and it will improve the situation India establishes a reputation as an arbitration-friendly country.

²⁰⁶ *Enercon India Limited & Ors. v. Enercon GmbH & Anr*, (2014) 5 SCC 1.

²⁰⁷ Nishank Tyagi, *Role of Judiciary in Making India an Arbitration-Friendly Jurisdiction*, LINK LEGAL (2021), <https://www.linklegal.in/news/details/642>.

The Supreme Court did not interfere with an order since the party had appealed an order made under the Arbitration Act under Section 13 (1) of the Commercial Courts. The Commercial Division and Commercial Appellate Division of the High Court Act, 2015 (“Commercial Courts Act, 2015”) and stated that only the Arbitration Act governs arbitration appeals.²⁰⁸ If the Arbitration Act does not provide for an appeal, a party cannot use the arbitration-friendly of the Commercial Courts Act, 2015 to get across the Arbitration Act's provisions; the pro rulings have also been granted with caution by the courts.

The Bombay High Court has ruled that if a party has an appeal under the Arbitration Act, it cannot obtain an anti-arbitration order from the court by ignoring the Act's provisions.²⁰⁹ In this instance, one of the arbitrators was selected after collaboration with the other party, according to one of the parties. In the case, one of the arbitrators was selected in cooperation with the other party and without following the agreement procedure, prompting the party to seek an injunction from the Court prohibiting the arbitral tribunal from proceeding with the arbitration. The Bombay High Court held that the party making such accusations has a right to dispute the selection of an arbitrator under Section 12 of the Arbitration Act, 1996 and therefore it cannot be permitted to circumvent the Act's provisions.

2.1 Intervention of the Judiciary Before the Arbitral Proceedings

The Arbitration and Conciliation Act, 1996 limits judicial intervention to a bare minimum. Under the Act, judicial intervention is severely limited. Section 5 of Arbitration and Conciliation Act, 1996 provides that '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.'²¹⁰ The term "Part" in this section refers to Part I of the Act, 1996, which applies when the arbitration takes place in India and has no bearing on any other legislation currently in force

²⁰⁸ *Kandla Export Corporation & Anr. v. OCI Corporation & Anr*, (2018) 14 SCC 715.

²⁰⁹ *Ravi Arya & Ors v. Palmview Overseas Limited & Ors*, (2018) SCC Online Bom 19886.

²¹⁰ Arbitration and Conciliation Act, 1996, § 5, No.26, Acts of Parliament, 1996 (India).

that prohibits specific issues from being brought to arbitration. As just a consequence, judicial intervention has been limited and curtailed.

The phrase used in Section 5 is "Judicial Authority," which is a broader term than "Court," and judicial authority includes all such authorities/agencies granted with the Government's judicial powers. The interference of the judicial authority under the Act of 1996 is restricted to the purposes outlined in the Act. The construction of Section 5 of the Act makes it clear that the legislature wanted to limit the role of the Court in arbitration. Parties are given autonomy over the court's intervention to achieve the two-fold objective of expediting justice and economic resolution of disputes.

Disputes can be resolved by either Domestic or International commercial arbitration a non-obstante clause commences Section 5. This precludes the prospect of judicial intervention. The wording "no judicial power" is broad enough, and the Act further guarantees that there is no judicial discretion involved by using the phrase "shall intervene."²¹¹ Only a limited amount of judicial intervention is permitted to restart the arbitral procedure.

The duty of the judiciary is purely administrative, not judicial. The Act includes terms like "unless where so specified in this part" that give exceptions to the non-obstante clause. In the case of *Secure Industries Ltd v. Godrej and Boyce Mfg. Co. Ltd*, the supreme court held that in Section 5 of the 1996 Act no Court could intervene in arbitration proceedings except to the extent prescribed under the 1996 Act. According to the City Civil Court, the reliefs claimed for respondent in its suit did not fall within the ambit of those situations where interference by Court was permissible and consequently, the Court had no authority to stay the proceedings before the Council.²¹²

The Supreme Court in the case of *Surya Dev Rai v. Ram Chander Rai & Ors*²¹³ held that "If it intervenes in pending proceedings there is bound to be a delay in termination of proceedings. If it does not intervene, the error of the

²¹¹ Kailash Khali, *Judicial Intervention in Arbitration - Indian Legal Solution*, SCRIBD (2021), <https://www.scribd.com/document/511258816/Judicial-intervention-in-arbitration-Indian-Legal-Solution>.

²¹² *Secure Industries Ltd v. Godrej and Boyce Mfg. Co. Ltd.*, AIR 2004 SC 1766.

²¹³ *Surya Dev Rai v. Ram Chander Rai & Ors*, AIR 2003 SC 3044.

moment may earn immunity from correction. Thus, the power is there but the exercise is discretionary which will be governed solely by the dictates of judicial conscience enriched by the judicial experience and practical wisdom of the Judge.” There is judicial intervention when an application is made to stay the court proceedings in violation of the arbitration agreement, and a judicial authority steps in to address issues. It is worth noting at this point that the judiciary cannot compel claimants to participate in the arbitration. They have the right to seek redress in the courts, as well as through arbitration. Section 8 of the Arbitration and Conciliation Act, 1996 refers to domestic arbitration whereas Section 45 and 54 refer to International commercial arbitration. Section 8 of the Act, 1996 provides the power to refer parties to arbitration where there is an arbitration agreement and states that 'A judicial authority, before which an action is brought in a matter which is the subject of an arbitration agreement shall, if a party to the arbitration agreement or any person claiming through or under him, so applies not later than the date of submitting his first statement on the substance of the dispute, then, notwithstanding any judgment, decree or order of the Supreme Court or any Court, refer the parties to arbitration unless it finds that prima facie no valid arbitration agreement exists.'²¹⁴ This means that a party gets involved in the court by the virtue of this section, procedures can have their disagreement referred to arbitration only when a valid arbitration agreement exists does the power to refer parties to arbitration arise. Such contracts are a kind of contract between two parties.

Nonetheless, the parties attempt to approach traditional courts. Arbitration aims to solve disputes quickly and cheaply. Judicial intervention should be restricted to supporting arbitration rather than exceeding its jurisdictional power. The judicial authorities are required to refer the parties to arbitration under Section 8 of the Act.

In the case of *P. Anand Gajapathy Raju v. P.V.G. Raju*, the court held that “the language of Section 8 is peremptory and brings about a legal obligation upon Courts to refer parties to the arbitration.”²¹⁵

²¹⁴ Arbitration and Conciliation Act, 1996, § 8, No.26, Acts of Parliament, 1996 (India).

²¹⁵ *P. Anand Gajapathy Raju v. P.V.G. Raju*, (2000) 4 SCC 539.

Furthermore, arbitration may be commenced or continued and concluded by making an arbitral award' while the application is pending. Section 8 of the 1996 Act specifies the requirements for referring parties to the arbitration. There is an arbitration agreement, and one of the parties files a complaint in the judiciary against the other, with the action's subject matter being the same as the arbitration agreement. Before submitting his case to the Court, the other party requests that the parties be referred to arbitration. The Judiciary has extended the meaning of this word as necessary to broaden the extent of interpretation of the rules enacted by this Act.

The Apex Court in the case of *Fair Air Engineers Pvt Ltd., v. NK Modi*²¹⁶ held that the District Forum, the State Commission, and the National Commission under the Consumer Protection Act, 1986 are to be considered as "Judicial Authority". Even a Commission set up under the Monopolies and Restrictive Trade Practices Act 1969 is also judicial authority. The legislators wisely chose the term "Matter" over "Suit," which would have restricted the extent of what might be deemed judicial power.

In the case of *Canara Bank v. Nuclear Power Corporation of India Ltd*, the Supreme Court observed that the Company Law Board is a judicial authority. However, arbitration does not take away the possibility of advancing criminal proceedings against an accused if the prima facie case constitutes a criminal offence.²¹⁷

The role of the judiciary in arbitration is Section 5 of the Act, which itself is derived from Article 5 of the Model Law, which brings reduced judicial involvement in the arbitral process and a consequential increase in the powers of the arbitral tribunal. The position is all the starker in India, given the changed regime from the 1940 Act which envisaged a much larger and more active role for the judiciary.²¹⁸ Nonetheless, notwithstanding the Courts' reduced role and the arbitral tribunal's expanded powers under the Act, the balance between judicial intervention and judicial restraint must be deliberately constructed.

²¹⁶ *Fair Air Engineers Pvt Ltd., v. NK Modi*, (1996) 6 SCC 385.

²¹⁷ *Shri Balaji Traders v. MMTCL Ltd.*, (1999) CLA 261.

²¹⁸ Law Commission of India, Amendments to the Arbitration and Conciliation Act 1996, Report No 246 (2014).

The observations in the book are made by LORD MUSTILL “There is the vital importance of the harmonious relationship between the courts and the arbitral process. This has always involved a delicate balance since the urge of any judge is to see justice done, and to put right injustice wherever he or she finds it; and if it is found in an arbitration, why then the judge feels the need to intervene. Moreover, only where the departure from the agreed method is of a degree that involves real injustice, is the court entitled to intervene, and even then, the intervention must be so crafted as to cause the minimum interference with the forward momentum of the process.”²¹⁹

2.2 Intervention of the Judiciary in the Course of an Arbitration

The 'court,' as defined in Section 2(1)(e) of the Act, can be either a district court or a High Court with 'original jurisdiction,' which would have the authority to resolve the arbitration subject matter as if it were a civil complaint. In the context of international commercial arbitration, i.e., an arbitration concerning a commercial dispute in which at least one of the parties is from another country, only a High Court of a state in India will have jurisdiction over an international commercial arbitration, that is, an arbitration about a business dispute in which at least one of the parties is a non-Indian. The interim measures used by the court in arbitral proceedings are discussed in Section 9 of the Arbitration and Conciliation Act of 1996, in line with Section 36 of the act, the 2015 Amendment permitted the judiciary to provide interim relief to the parties before the final award was implemented. The arbitral tribunal may issue an interim award during the arbitral procedures, according to Section 31(6). Section 9 deals with the act's temporary relief provisions.

Section 9 of India's Arbitration and Conciliation Act, 1996, similarly Article 9 of the UNCITRAL Model Law, allows the parties to obtain interim relief from the courts through arbitration procedures. However, there is a significant difference between the two clauses. Parties can claim an interim remedy from the courts under Article 9 of the Model Law at two stages: before the start of arbitration proceedings and throughout arbitration proceedings. While Section 9 of the Act does not prohibit any party from

²¹⁹ O.P. Malhotra, *Law And Practice of Arbitration* (1st ed, 2002), LEXISNEXIS.

seeking interim relief from the court in any given situation. However, recent court judgments have consistently held that after the arbitral award is made, only the winning party in the arbitration proceedings ("successful party") is entitled to obtain interim reliefs from the courts, whereas the losing party in the arbitration proceedings ("unsuccessful party") is not entitled to seek any remedy under Section 9.

This approach of the courts gives rise to a debatable issue that is currently pending for the consideration of the Supreme Court of India in *Home Cares Retail*.²²⁰ In the case of *Bharat Aluminum Company v. Kaiser Aluminum*, the Supreme Court observed that the court of the seat of arbitration will have jurisdiction under the Act. Fixation of a seat of arbitration is equivalent to assigning exclusive jurisdiction to the courts of the seat for any supervisory functions over including powers to interim reliefs. Such designation of the seat would oust the jurisdiction of all other courts.²²¹ When an application is made to a court under Part I of the Act concerning the arbitration agreement, Section 42 of the Act will apply to prevent all subsequent applications under Part I including those under Section 9 made to any court beside the court to which the last application has been made. Similarly, if an appeal for interim relief is filed with a court, all future Part I petitions must be filed with the same court to which an application for interim relief was filed under Section 9 of the Act.

In the case of *Dirk India Pvt. Ltd. v. Maharashtra State Power Generation Company Ltd*, the Bombay High court held a landmark judgment that after an arbitral award is made, interim relief can only be sought to safeguard the fruits of the proceedings until the enforcement of the award.²²² It further held that the purpose of providing interim relief after the passing but before the enforcement of the arbitral award is to secure its value for the benefit of the party that seeks the enforcement of the award. Thus, after the award is made, the remedy under Section 9 can only be obtained as a step-in aid of enforcement of the arbitral award.

²²⁰ Pallav Mongia, Shaurya Dhoundiyal, *Is the Remedy Under Section 9 of India's Arbitration and Conciliation Act, 1996 Available Post-Award to the Losing Party?*.

²²¹ *Bharat Aluminum Company v. Kaiser Aluminum*, (2012) 9 SCC 552.

²²² *Dirk India Private Limited v. Maharashtra State Electricity Generation Company Limited*, 2013 (7) Bom.C. R 493

On the aforesaid basis, it held that as the unsuccessful party in the arbitration proceeding has no right over the subject matter of the dispute at the stage of enforcement, such party is not entitled to seek any remedy under Section 9 of the Act. Another significant factor to consider is if a party whose claims are partially rejected and partially accepted in the arbitral judgment is entitled to an interim remedy from the Court under Section 9. In *Nussli Switzerland Ltd. v. Organizing Committee Commonwealth Games (2014)*, the Delhi High Court held that a party whose claims are partly rejected and partly accepted in an arbitral award is disqualified to seek interim relief under Section 9 if the amount of its claims is absorbed into a larger amount awarded in balance in favour of the opposing party. Only the parties whose claims are pending for enforcement against the opposing party, i.e., the successful party, would be entitled to seek the remedy provided under Section 9 once the award is issued.²²³

Section 9 of the Act permits 'any party' to seek interim relief from the Court at three points: before the arbitration procedures begin, during the arbitration proceedings; and after the arbitral judgment is issued but before it is enforced. A 'party to an arbitration agreement' is defined as a 'party to an arbitration agreement' under Section 2(1)(h) of the Act. As a result, applying the judicial precedent of statutory construction, all parties, both successful and unsuccessful, are equally entitled to approach the Court at any point to seek the remedy granted under Section 9. Therefore, the interpretation of Section 9 makes no distinction between the rights of the successful and unsuccessful parties to seek interim relief from the arbitrator. Therefore, even after the arbitral award is issued, if the court finds merit in a Section 9 application submitted by an unsuccessful party in the arbitration procedures, the courts may provide an appropriate remedy to the unsuccessful party.

The powers of the court to grant interim measures under Section 9 of the Act vis-à-vis powers of the arbitral tribunal under Section 17 of the Act, the introduction of the following clause to Section 9 of the Act merits discussion: under sub-section (1), unless the Court finds that circumstances

²²³ *Nussli Switzerland Ltd. v. Organizing Committee Commonwealth Games*, (2014).

exist which may not render the remedy provided under Section 17 efficacious. Thus, to avoid prejudice to any party after the constitution of the arbitral tribunal, courts have begun to refrain from making orders under Section 9 of the Act.²²⁴ Nevertheless, After the modifications to Section 9 of the Act, the court has the authority to award interim measures in the following situations that is if a Proceeding to the establishment of the tribunal or subsequently the award is made, but before it is enforced.

In the case *M Ashraf v. Kasim VK*, A Division Bench of the Kerala High Court observed that when an application is made before a court under Section 9(1) of the Act after the award is made but to be enforced, the court shall bear in mind that it is a stage where the arbitral tribunal has ceased to function.²²⁵ It further held that the court must adopt a liberal approach in such circumstances. When an interim measure issued by the tribunal would not be applicable during the arbitral proceedings, following the tribunal's formation. Courts examine the relevant facts and circumstances with accuracy when granting interim reliefs in such matters, including instances such as arbitrators' sluggishness in issuing interim reliefs in respect of assets, rendering the remedy ineffective. Some judges have expressed the view that tribunals would be compelled to take a rigorous approach when considering such applications under Section 9 during arbitral proceedings.

In the case of *Benara Bearings & Pistons Ltd. v. Mahle Engine Components India Pvt. Ltd.*, the Delhi High Court, the question of whether a court that is hearing an application for interim remedies must relegate it to the arbitral tribunal upon its formation was debated.²²⁶ To avoid a situation where a party is left without an interim relief in respect of proceedings for interim measures pending before a court that has not been transferred to the tribunal after its constitution, the Delhi High Court held that the court may continue with the proceedings and grant appropriate reliefs, where necessary.

²²⁴ Interim Reliefs in Arbitral Proceedings Power play between Courts and Tribunals January 2020.

²²⁵ *M Ashraf v. Kasim VK.*, SCC Online, Ker 4913, (2018).

²²⁶ *Benara Bearings & Pistons Ltd. v. Mahle Engine Components India Pvt. Ltd.*, (2017).

In the event of a foreign-seated arbitration, an interim remedy is available. When it is required in the event of a foreign-seated arbitration, an interim remedy is available. Even if the venue or the seat of arbitration is outside India, petitions under Section 9 of the Act may be brought to seek interim measures against dissipation or alienation of assets in India following the passing of an award. A party can attempt to safeguard its financial interests under Section 9(ii)(b) of the Act by securing the amount in dispute, including through guarantees provided by the opposing party, Courts can enable parties to assume symbolic possession of properties under Section 9(ii)(c) of the Act, Courts can also appoint receivers to seize property that isn't the focus of the dispute, Using the broad powers granted by Section 9(ii)(e) of the Act, courts can require parties to reveal their assets, issue attachment orders against third-party respondents, and prohibit parties from disposing of their assets.

2.3 Regulations issued under Section 9 are justiciable

An appeal from a Section 9 ruling granting or rejecting a preliminary injunction can be made under Section 37(1) of the Arbitration and Conciliation Act 1996, which provides that: "(1) An appeal shall lie from the following orders (and from no others) to the Court authorized by law to hear appeals from original decrees of the Court passing the order, namely:

Refusing to refer the parties to arbitration under Section 8;
granting or refusing to grant any measure under Section 9;
setting aside or refusing to set aside an arbitral award under section 34."

The Act's Section 9 Some courts have attempted to apply Order XXXVIII²⁴ and Order XXXIX²⁵ of the Code of Civil Procedure, 1908 ("CPC" or "Code") standards.

Courts have concluded that the CPC's criteria are not relevant to actions under Section 9 of the Act and that if a party can merely explain that it has a good case on the merits, the matter will be dismissed. It would be successful in obtaining interim relief. In many cases, courts have been guided by the notion that denying such interim reliefs would result in unfairness to the petitioner or render the resulting award unenforceable/un-executable if such reliefs were not granted. In

consideration of the different decisions of several High Courts, the extent to which the CPC provisions apply to actions under Section 9 of the Act remains unclear. The Supreme Court in *Arvind Constructions v. Kalinga Mining Corporation and Others*, despite recognizing that there were divergent decisions by various High Courts, left this question open to be considered in an appropriate case.²²⁷

The Amendment Act 2015 does not address this lacuna and remains silent concerning standards that may be applicable in the case of grant of interim reliefs by courts under Section 9 of the Act.²²⁸ In *Delta Construction Systems Ltd., Hyderabad v. M/S Narmada Cement Company Ltd.*²²⁹ Mumbai Bombay High Court held that the court would not be bound by the provisions contained in the Order XXXVIII Rule 5 while granting relief under Section 9 of the Act. In the same way, in the case *Steel Authority of India v. AMCI Pty Ltd*, the Delhi High Court took the view that the principles contained in Order XXXVIII Rule 5 would only serve as guiding principles for the exercise of power by the court. A party seeking relief under Section 9 would have to satisfy the court that the furnishing of security.²³⁰

3. The Significance of Judicial Intervention in Arbitral Awards

An arbitration award is a financial incentive made by an arbitrator based on their judgment. It is that one party must make a financial contribution to the opposing party which could even be a nonmonetary award, such as capitulating to a particular corporate practice or attaching an employment incentive. Section 2 (1)(c) of the Arbitration Act defines an arbitral award as "an interim award".

According to Section 31 of the Act, the rational, comprehensive substance of an award that is the award must be written; oral awards are not legally recognized also the members of the arbitral panel can sign the award and if an arbitral tribunal has more than one member, the award must be signed by the majority of the members similarly the arbitral tribunal shall state the

²²⁷ *Arvind Constructions v. Kalinga Mining Corporation and Others.*, (2007) 6 SCC 798.

²²⁸ *Id.*

²²⁹ *Delta Constructions v. Narmada Cement.*, (2002) 1 Mah LJ 684.

²³⁰ *Steel Authority of India v. AMCI Pty Ltd.*, (2011) 3 Arb LR 502.

date and location of the award and a signed copy of the award shall be supplied to each party once it is made. It could either be a "domestic" or "international" award, at the request of the disputing party, an arbitral tribunal may issue an interim injunction as a protective measure such orders are only in effect during the arbitration procedures, and a party may abstain from doing something that is in the adversary party's best interests. This may be in the form of a restraining order.

In contrast to an interim measure, an interim award becomes part of the final award and is binding on the parties, and it can only be made after a proper hearing. Interim measures are accepted in the form of an interim award. The law regulating "Settlement Award" is codified in Section 30, this provision is meant to encourage settlement during Section 2 of the act. If the parties settle the dispute during the arbitration procedures, the arbitral tribunal, if there are no objections, will proceed with the settlement in the form of an arbitral award following the conditions.

An award shall have the same effect as an award in the dispute; it is final and binding between the parties and is enforceable as if it were a decree of the court. Such an award is final and binding as it determines all the issues of spoken arbitration or determines all the issues which have remained outstanding following earlier awards dealing with only some of the issues. In this way, the word "final" means that as between the parties to the reference the award is conclusive as to the issue with which it deals, unless and until it is set aside by the court.²³¹ In the case of *Gobardhan Das v. Lakshmi Ram*, an arbitrator is bound to pass an award within the time prescribed or within the extended period if any. An award must be read. It should be constructed liberally to give effect to the real intention of the arbitral tribunal.²³²

Section 4(2) of the Arbitration and Conciliation Act 1996, states that "Any foreign award, which would be enforceable under this Act shall be treated as binding for all-purpose on the person as between whom it was made and may accordingly be relied on by any of those persons by way of defence, or

²³¹ Aarushi Dhingra, *Arbitration and Conciliation Act,1996 - An Overview*, SSRN (2021) https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3582896.

²³² *Gobardhan Das v. Lakshmi Ram*, AIR 1954 SC 689.

otherwise in any legal proceeding in India, and any references in this Act to enforcing a foreign award shall be constructed as including references to relying on an award."²³³ In the case of *National Thermal Power Corporation v. The Singer Co*, the supreme court examined the language of Section 2 of the Foreign Awards (Recognition and Enforcement) Act, 1961 clarified that: "An award is 'foreign' not merely because it is made in the territory of a foreign state, but because it is made in such territory on an arbitration agreement not governed by India. An award is an arbitration agreement administered by the law of India, though rendered outside India is affected by the saving clause in Section 9(b) of the Act of 1961 and is, therefore, not a 'foreign award.'"²³⁴

3.1 The Implementation of an Award

When the process of arbitration is completed, the enforcement of the award is essential and is the last stage. The award is enforceable as a judicial order according to the Arbitration and Conciliation Act establishes a framework for resolving disputes, the judiciary must comply with the provisions of the Arbitration Act of 1996 to enforce an arbitral judgment recognizing and enforcing awards given in line with national standards and international law, which includes both local and international awards.

When the arbitration is held in India and both parties are Indians, the award is called a domestic award. A foreign prize is one in which the recipient is from another country. The hearings are held outside of India, the proper appreciation and acknowledgement Award enforcement acts as a way of both guaranteeing the arbitral procedure as well as the choice of arbitration over other means of dispute resolution resolving of conflicts. Section 36 lays down two conditions that must be met before an award may be enforced, which are as the time limit for filing a request to set aside an award must have expired, and such a request must be denied. The stamping or registration of an award is not mentioned in the 1996 Act.

²³³ Arbitration and Conciliation Act, 1996, § 42(2), No.26, Acts of Parliament, 1996 (India).

²³⁴ *National Thermal Power Corporation v. The Singer Co*, AIR (1993) SC 998.

In the case of *M. Anasuya Devi v. Manic Reddy*²³⁵, the Supreme Court while examining the effect of non-stamping and non-registration of an award held that Section 34 of the 1996 Act permits an award to be set aside only on the ground listed therein and non-stamping and non-registration is one of them. Therefore, an award cannot be set aside on the grounds of not stamped or unregistered. Once an arbitral award has become final and binding upon the parties and bound by the award, the said award is impressed with the character of a decree and can be enforced as a court decree. The effect of such awards is the same as that of a court order. The Act establishes provisions for the finality of arbitral awards under Section 35. Only the losing party has the right to file a challenge to the enforcement of an arbitral award.

3.2 Judicial Intervention under Section 34

Section 34 of the Arbitration and Conciliation Act 1996 is governed by Section 34 of the UNCITRAL Model Law, and the jurisdiction of setting aside a judgment is significantly less than under Sections 30 and 33 of the Arbitration Act, 1940. This section establishes the permissible grounds for appealing an arbitral award. Arbitral awards are not appealable to the Court; this section is also a reference to the statute limited extent of judicial intervention. Section 34 contains four significant sub-sections that define the grounds for voiding an arbitral award.

Section 34 of the Act states that “An arbitral award can be set aside only if any of the five grounds as contained in Section 34(2)(a) or any of the two grounds as contained in Section 34(2)(b) of the Act exist. If a party fails to establish its case within the four corners of this section, the award cannot be set aside. The object of the section is to avoid delay and to require the parties to bring the disputes to the decision of the court in the form of a petition. Remedy by way of a regular suit is intended to be excluded. Section 34 has shrunken the grounds and limited the scope for challenging the award to such an extent that the recourse to a court against an award is available only in the following circumstances:

²³⁵ *M. Anasuya Devi v. Manik Reddy.*, (2003) 8 SCC 565.

if the party challenging the award furnishes proof that he was under some incapacity;
that the agreement was not valid under the law;
that he was not given proper notice of the appointment of an arbitrator or the arbitral proceedings or was otherwise unable to present his case;
that the award deals with a dispute not referred to or not falling within the terms of the agreement;
if the award contains decisions on matters beyond the scope of the submission to arbitration only when of the decisions on matters submitted to arbitration can be separated from those not to be submitted and in that case, only the severable part is liable to be set aside;
if the composition of the arbitral tribunal or the procedure was not per the agreement of the parties;
of the subject matter of the dispute is found, in the opinion of the court, not capable of settlement under the law; and
of the award conflicts with the public policy of India.”²³⁶

When a judiciary is called upon to resolve a party's objection to an arbitration decision, the court's authority is expressly restricted by the Act, and it has no competence to sit on an appeal and evaluate the award's validity on the merits. An award can be set aside only in the following three contingencies that is that Composition of the arbitral tribunal was not per the agreement also the arbitral procedure was not under the agreement between the parties as well as in the absence of such an agreement, the composition of the arbitral tribunal or arbitration procedure was not following Part I of the Act.²³⁷

The supervising judiciary does not have the authority to alter, modify, or remand the award of the arbitral tribunal for consideration. According to established legal precedent, the court's responsibility is restricted to setting aside the award if it fails to pass the legal scrutiny required by Section 34 of the 1996 Act. Nevertheless, before approving or remanding the Arbitral

²³⁶ Arbitration and Conciliation Act, 1996, § 34, No.26, Acts of Parliament, 1996 (India).

²³⁷ Sankalp Jain, *Judicial Intervention in Arbitration*, SSRN (2021).

award to the Arbitral Tribunal, the courts have revised or modified it in some situations. As a result, under Section 34(4) of the Act, the court might simply defer the proceedings challenging the arbitral award. In a particular situation, an appropriate court can either set aside the award under Section 34(1) or adjourn the proceedings under Section 34 (4) to eliminate the deficiencies in the arbitral award. The following circumstances must be met for the court to adjourn the proceedings under Section 34(4), an application to set aside the award under Section 34 (1) of the Act and a subsequent determination by the court that the award is appropriate and a request by a party in this regard. Under this provision, the court cannot exercise its powers *Suo moto*.

In the case of *MMTC v. Vicnivass Agency*²³⁸, the Madras High Court adjudicated upon the scope of Section 34(4) of the Act and observed its departure from the provision of remand provided under Section 16 of the 1940 Arbitration Act. The Court gave a wider interpretation to Section 34(4) of the Act even though the said Section does not provide substantive grounds for remand in contrast to Section 16 of the 1940 Act, which provided three grounds for remittal, namely:

where the award has left undetermined any of the matters referred to arbitration or where it determines any matter not referred to arbitration and such matter cannot be separated without affecting the determination of the matters referred to; or

where the award is so indefinite as to be incapable of execution; or

where an objection to the legality of the award is apparent on the face of it.

The Hon'ble Supreme Court observed that on a bare reading of this provision, it is amply clear that the Court can defer the hearing of the application filed under Section 34 for setting aside the award on a written request made by a party to the arbitration proceeding to facilitate the Arbitral Tribunal by resuming the arbitral proceedings or to take such other action as in the opinion of the Arbitral Tribunal will eliminate the grounds

²³⁸ *MMTC v. Vicnivass Agency.*, (2009) 1 MLJ 199.

for setting aside the arbitral award. The quintessence of exercising power under this provision is that the arbitral award has not been set aside.

Further, the challenge to the said award has been set up under Section 34 about the deficiencies in the arbitral award which may be curable by allowing the Arbitral Tribunal to take such measures which can eliminate the grounds for setting aside the arbitral award.²³⁹ No power has been vested by the Parliament in the Court to remand the matter to the Arbitral Tribunal, except to adjourn the proceedings for the limited purpose mentioned in sub-section 4 of Section 34.²⁴⁰ A petition to set aside an arbitral award must be filed with the Court within three months of receiving the award. The three-month deadline might be extended to a maximum of 30 days and no more if the party can show the court that there was sufficient cause for not submitting it on time.

In the case of the *State of Maharashtra & Ors. v. M/s. Ark Builders Pvt. Ltd.*, the supreme court held that the application for setting aside the award must be made within the period of limitation and it must be made if it satisfies the grounds laid down under Section 34 of the 1996 Act.²⁴¹

3.3 An Ambiguity of Public Policy

In The uncertainty in the interpretation of the term "public policy" has contributed significantly to the failure of Arbitral Awards to be carried out. The idea of Public Policy was inserted under Section 34(2)(b)(ii) of the Act of 1996 in Chapter VII- Recourse Against Arbitral Awards. Furthermore, the Indian court was confronted for the first time with the challenge of interpreting the term "public policy" regarding the provision of this Act relating to the setting aside of an arbitral judgment.

In the case of *Renusagar Power Corporation Ltd v. General Electric Company*²⁴² laid down the so-called narrow view of the interpretation of term public policy as an award which is against:

²³⁹ Kinnari Mullick and Another v. Ghanshyam Das Daman., (2018) 11 SCC 328.

²⁴⁰ Simran Brar, Tanya Prasad and Srisatya Mohanty, *India: Scope and Analysis of Section 34(4) Of the Arbitration and Conciliation Act, 1996*, MONDAQ, (2021).

²⁴¹ State of Maharashtra & Ors. v. M/s. Ark Builders Pvt. Ltd., (2011) 4 SCC 616.

²⁴² Renusagar Power Corporation Ltd v. General Electric Company., (1994) SCC Suppl. (1) 644.

fundamental policy of Indian laws,

interest of law,

contrary to justice and morality which covers a wide aspect of both justice and morality as it comprises of more or less everything that comes under the ambit of justice.

When the Act of 1996 came into force, the provisions of the act withdrew Article 5 of the New York Convention and inserted it as Sections 34 and 48 of the 1996 Act in both domestic and international circumstances. Later in 1996, this interpretation of the case was included in the Act as a provision for throwing aside arbitral awards under the heading of public policy.

As a result, the Renuagar era began, in which the word public policy was defined and interpreted by two ambiguous statements: 'Fundamental Policy of Indian Law' and 'Justice and Morality'. Moreover, it was acknowledged that while the Renuagar case established the criteria for distinguishing between legal errors and Indian Law's fundamental Policy, it somehow failed to make a specific distinction between the public interest and other interests, as it is quite possible and obvious that public interest and government interest could indeed differ in some cases.

Under the recommendation made in the 246th Law Commission Report under the chairmanship of Hon'ble Justice A.P. Shah certain amendments were made in context for the interpretation of the term public policy, where a part of it dealing with justice and morality was given a close end and confined to the basic notion of justice and morality i.e. something that has shocked the entire notion of the legal system and also the term fundamental policy of Indian laws was interpreted through explanation as "for the avoidance of any doubt, the test as to whether there is a contravention with the fundamental policy of Indian law shall not entail a review on the merits of the disputes."²⁴³

²⁴³ Arunav Prakash, *Setting Aside of Arbitral Awards under section-34 of Indian Arbitration and Conciliation Act, 1996: An Ambiguity of Legal Interpretation*, XII JOURNAL OF XI'AN UNIVERSITY OF ARCHITECTURE & TECHNOLOGY 1746, 1747-1749 (2020).

3.4 The Doctrine of Optional Public Policy: A Contradiction in Terms

In *Venture Global*, the Supreme Court introduced into jurisprudence a concept which was probably never heard of hitherto- the concept of optional public policy. In common usage, legal parlance and even in *Saw Pipes*, the term "public policy" connoted public good or the public interest. An award contrary to it would fall foul of Section 34. In *Venture Global*, while holding that an award that would contravene the public interest or public good would be set aside, the Court also held that the parties had the option to exclude Part-I and thereby allow the parties to avert invalidation of awards that contravene "public policy". A public policy rule cannot be such if it is optional.²⁴⁴

The ambiguity of the term "patent illegality" has also led to a broadening of the grounds for abolishing arbitral awards. In the case of *ONGC Ltd. v. Saw Pipes Case*²⁴⁵, the Hon'ble Supreme Court while interpreting the term public policy expanded its meaning and held that the word public policy should be interpreted both narrowly and widely depending upon the facts and circumstances of the case and inserted a new head of "Patent Illegality" rather than dealing with the inconsistency of the word fundamental policy of Indian law and justice and morality.

The term patent illegality was inserted as Section 2A of the Arbitration and Conciliation Act 1996, which again induces an additional ground for setting aside an arbitral award. On the other hand, the term patent illegality was a provision that was only applicable to arbitration proceedings taking place in India and not in the context of international commercial arbitration and not in the context of international commercial arbitration, as evidenced by 2A's phrasing, which states: "an arbitration award arising out of arbitration other than international commercial arbitration." Furthermore, an award that violates the terms of the Arbitration and Conciliation Act, 1996 is considered blatantly illegal, and such an award cannot be enforced since it is null and invalid.

²⁴⁴ Badrinath Srinivasan, *Arbitration and The Supreme Court: A Tale of Discordance Between the Text and Judicial Determination*, NUJS L. REVIEW 639, 642-643 (2011).

²⁴⁵ *ONGC Ltd. v. Saw Pipes Case*, AIR 2003 SC 2629.

The Supreme Court in *Associated Builders v. Delhi Development Authority*²⁴⁶ in 2014 explained the dimension of patent illegality and state that patent illegality includes:

- Fraud or corruption,
- Contravention of substantial law,
- Errors of law by arbitrator
- Contravention of Arbitration and Conciliation Act, 1996,
- The Arbitrator fails to consider the terms of contract and usages of trade under Section 28(3) of 1996 Act,
- Arbitrator fails to give reasons for his decision.

The Indian arbitration system and legislation have always gone a meandering approach with different forward and backward thrusts, with the advancing thrust being the Renusagar Case in 1994 and the reverse impetus being the Saw Pipe Case in 2002. Nonetheless, the many amendments to the 1996 Act made under and under the jurisdiction of the 246th Law Commission report have approached arbitration positively.

The amendment to Section 34, where the ambience of justice and morality was construed to core notions of justice and morality, managed to put an end to the ambiguous ambit of public policy as well as offer a close finish to the undefined ambit of public policy. The amendment to Section 34, in which the ambient of justice and morality were construed to basic notions of justice and morality, managed to bring the undefined ambit of public policy to a close as well as make up the difference, but it is still a field that requires various modifications to establish arbitration as an undisputed conflict resolving mechanism.

4. Conclusion

Arbitration has become a time-efficient and reliable means of resolving disputes not only in India but around the world in recent years because of the rapid growth of industrialization and globalization, the excessive burden placed on the judiciary because of a large number of pending cases due to lengthy court procedures. Furthermore, by providing for more

²⁴⁶ Associate Builders v. Delhi Development Authority., (2014) 4 AR BLR 307 SC.

flexibility in the workplace. Arbitration also offers wider and more open chances for networking between disputing parties by providing greater flexibility in the method for dispute settlement.

The main goal of adopting arbitration as a conflict resolution mechanism was to provide a quick and easy dispute settlement procedure that was also less expensive than conventional methods. When there is a dispute between the parties over the appointment of an arbitrator, or when judicial action is required during the procedure to help the proceedings, the judiciary in India can intervene. Similarly, the judiciary can assist by giving temporary protection or other measures. Finally, after the arbitral decision is made public, judicial action is required for either enforcement or appeal.

The judiciary has been instrumental in developing and transforming India into a worldwide arbitral institution. Although Indian courts have consistently embraced an arbitration-friendly stance in recent years, the Supreme Court of India and several High Courts have maintained a hands-off attitude to the matter when a party disputes an arbitration judgement. The interpretation of Section 5 of the Act makes it obvious that the legislators intended for the Judiciary's participation in the arbitration to be limited, to achieve the dual goals of expedited justice and cost-effective conflict settlement, the parties are granted control regarding the court's intervention. Disputes can be addressed by domestic or international business arbitration, which includes a non-obstante provision, Whereas Section 9 of the Act does not exclude any party from obtaining interim relief from the court in any scenario, it does make it more difficult.

However, recent court decisions have consistently held that after the arbitral award is issued, only the successful party in the arbitration proceedings is entitled to seek interim relief from the courts, while the losing party in the arbitration proceedings is not, the successful and failed parties both have the right to seek interim relief from the arbitrator, according to the interpretation of Section 9. An Arbitral Award issued under Section 31 of the Arbitration and Conciliation Act, 1996 is merely a declaration of an arbitral tribunal's judgment on issues, and the 1996 Act provides no grounds for an appeal.

The judiciary must follow the provisions of the 1996 Act to enforce an arbitral award that recognizes and enforces awards made following national norms and international law, which includes both domestic and foreign awards. The grounds for appealing an arbitral award are established under Section 34, although arbitral awards are not subject to judicial review, and this section also refers to the statutorily limited scope of judicial action. When a court is called upon to address a party's objection to an arbitration judgement, the Act limits the court's authority, and it has no jurisdiction to do so.

The judiciary can only intervene under three circumstances that are if the composition of the arbitral tribunal was not as agreed, the arbitral procedure was not as agreed, and in the absence of such an agreement, the composition of the arbitral tribunal or arbitration procedure did not follow Part I of the Act. The concept of Public Policy was added under Section 34 (2) (b) (ii) of the Act of 1996. Furthermore, the Indian court was confronted with the challenges of defining the word "public policy" concerning the provision of this Act about the setting aside of an arbitral award for the first time.

The *Renusagar Power Corporation Ltd v. The General Electric Company* case has established the so-called limited perspective of the meaning of the phrase public policy as an award that is contrary to Indian Laws' fundamental Policy. The ambiguity of the phrase "patent illegality" has led to an expansion of the grounds for voiding arbitral awards, while the definition of "public policy" has been enlarged. The ambiguity of the term "patent illegality" has also led to a broadening of the grounds for annulling arbitral awards, while interpreting the term "public policy" expanded its meaning and held that the term should be interpreted both narrowly and broadly depending on the facts and circumstances of the case, and inserted a new heading of "Patent Illegality" rather than dealing with the inconsistency of the word fundamental policy of Indian law and justice and morality.

The amendment to Section 34, which limited the scope of justice and morality to basic notions of justice and morality, was effective in providing the undefined ambit of public policy to an end and making up the difference, but it remains a field that requires various modifications to

establish arbitration as an undisputed conflict resolving mechanism. However, because the important aim of the Award is to guarantee that a lawful award is delivered in the interest of justice, the law allows for this Intervening court in arbitration proceedings to maintain vigilance over the Arbitrator, as a result, to bring out the best in you, you will need a well-balanced approach. the Act's actual goal.

CHAPTER 6

NEED FOR ADR MECHANISM IN INTER-STATE WATER DISPUTES IN INDIA

Abhishek Charan*, Nayana Bhushan†

Abstract

On 3rd of August 2021, the CJI recused himself from hearing an Interstate water dispute between the States of Andhra Pradesh and Telangana respectively. While stating the reasons for recusing himself, the Hon'ble CJI stated that the states should try to solve such matters through mediation. Interstate water disputes are conflicts arising from the rivers that form a major source of water resources in the states it flows. To resolve the conflicts, the centre has established interstate water tribunals that are empowered to solve any issues relating to the use, distribution, and utilization of water bodies. The main aim of this paper is to examine the impact of the interstate water tribunal system in resolving or settling among the states. As it is being given exclusive jurisdiction over the issues, the working of them becomes prime importance. The centre plays a significant role in enacting laws that enforce rules and regulations to the working of the tribunals. It involves more than one state so the relationship between the centre and states is analysed through the relationship between federalism and the interstate water tribunals to have a better understanding. This research paper will try to bring out a critical analysis on the tribunal acts that were passed till present in relation to the interstate water disputes and how far was that effective to resolve the shortcomings in its arbitrations. This paper

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would try to investigate the ways in which the arbitration could be enhanced better to give resolve its existing faults.

Keywords: Inter-State Water Tribunal, Federalism, Arbitrations, Exclusive Jurisdiction, Tribunal Acts.

1. Introduction

There are about 20 river basins in India that are shared by the States and Union Territories. There are 28 states in India. This simple fact represents how deep India's water security is embedded in the hands of interstate hydrogeography. MP Jain says that the framers of our Constitution had already foreseen the picture that there would be disputes between states regarding river waters. A river passes through two or in some cases more than two states.

Now, since the river water is a natural resource and no state can claim ownership of that river, problems arise when there is a water-sharing conundrum.²⁴⁷ The Constitution specifically states that no State can make laws on the use of waters since no State can claim legislative powers beyond its territory and into other states, only with the reason that the said river originates in its territory.²⁴⁸ Hence, the Constitution of India gives special legislative power under Article 262(1) to the Parliament to create mechanisms to resolve such disputes. This article empowers the Parliament to provide for the adjudication of any dispute with respect to the use, distribution, or control of the river waters of any inter-State River or river valley per se.

The wordings under Article 262(1) are wide and include regulation and development projects of the said water body too. Under this article, the Parliament may also curtail the jurisdiction of the Supreme Court or any other court Parliament may also curtail the jurisdiction of the Supreme Court or any other court in respect of these water disputes. Although the Supreme Court has original jurisdiction, Article 262 provides that the class of disputes mentioned under, may be excluded from the purview of the

²⁴⁷ MP JAIN, CONSTITUTION OF INDIA 1023 (2018).

²⁴⁸ Cauvery Water Disputes Tribunal, SC 522 (1992).

Court. “If the dispute resolution mechanism is weak, then it is most likely that the disputes are bound to translate to a brawl over the need to access, control, manage and/or use these water resources.”²⁴⁹

Thus, the mechanisms to resolve disputes which arise from this need to inspire confidence. However, the present case of water disputes does not inspire such confidence. Inter-state water disputes occur frequently. The adjudication regarding such disputes takes a long time and often involves states, defying the orders of the water dispute tribunal and the direction of the Supreme Court as well.

Presently, there is no proper mechanism. Consider this; the Interstate (River) Water Disputes Act, 1956 was made to solve interstate water disputes. This has been amended more than 12 times and another amendment Bill 2019 is pending in Parliament. In contrast, another Act was passed in 1956 named the River Boards Act, 1956. This too was enacted to resolve interstate water disputes and enable interstate collaboration. The irony is that it has never been touched to date. The River Boards Act had provisions on arbitration to resolve the disputes between states without getting into litigation. This has not been amended since 1956.

In the initial years of single-party dominance, the negligence in definitively carving out the Centre’s role has led to the states assuming unfettered and exclusive powers over water governance. Ramaswamy Iyer has called it the ‘willful abdication of its role’ by the Centre.²⁵⁰

1.1 Research Problem and Methodology

The present institutional set up for interstate water disputes do not inspire confidence. In India where there are 20 major river basins shared between 28 states, inter-state water disputes occur frequently. States often ignore the orders of either the tribunals or sometimes the Supreme Court itself (which most of the time directs the states to obey the awards passed by the tribunal). Therefore, there is no practical reliable mechanism for interstate

²⁴⁹ Bhumika Indulia, *A Perpetual Tussle Over Water Resources: An Inevitable Need for Inter-State Mediation* In *Inter-State Water Disputes*, SCC BLOG, (2021).

²⁵⁰ Srinivas Chokkakula, *Interstate River Water Governance: Shift Focus from Conflict Resolution to Enabling Cooperation*, CENTRE FOR POLICY RESEARCH, (2021).

cooperation over the river water disputes. Alternate Dispute Resolutions can be used to resolve these conflicts without prolonged delays which are often characterized by adverse litigations. Further, little research has been done on the use of ADR mechanisms for Interstate Water disputes. Therefore, this research paper is an attempt to bridge the gap. The researchers in the present research have adopted a mix of doctrinal and empirical method for collecting required data. This research will base its findings, inter alia, on analytical and critical studies. The sources of data used in preparing this paper are books, research articles and other online articles.

2. India's Inter State Water Disputes and Federalism

Federalism is a system of government in which the power is been divided between a central authority and constituent political units. Indian Federalism is different from that of Federalism practiced in countries like the United States of America. The Indian model of federalism is called quasi-federal system as it is a confusion major of the features of both federation and union. It can be higher be phrased as 'federation sui generis' or federation of its own kind. Article 1 of the Constitution of India states that 'India that is Bharat shall be a union of states. Indian federation was not a product of coming together of states to form the federal union of India. It was a conversion of a unitary system into a federal system. Federalism is the most relevant factor in modern constitutionalism. The core objectives of Indian federalism are unity in diversity, devolution in authority, and decentralization in administration. Through federalism, the State pursues the goal of common welfare amid wide diversity in socio-cultural, economic spheres. In recent times the challenges to its core ideas of establishment have been questioned.²⁵¹

Interstate (River) Water Disputes (ISWDs) are those institutions that are proceeding with the challenge to government's water or river administration in the country. These institutions have been established with the backing of constitution. Rivers being the subject of dispute have

²⁵¹ WATTS, R.L, NEW FEDERATIONS: EXPERIMENTS IN THE COMMONWEALTH (Oxford, the Clarendon Press 1996).

been organized into the institutions to solve the issues that had a long historical underpinning.

At the present situation, it has been facing the issues relating to the following three aspects.

Federal-jurisdictional is about the Centre and state relations regarding interstate water dispute.

Historical-topographical that has given rise to disputes.

Institutional framework that is been adopted.

2.1 Federal-Jurisdictional Issue

When it comes to the effect of federal structure with that of the interstate water disputes, the legislators have adopted the scheme where both the Centre and the state would have the powers regarding the same. Schedule 7 of the Constitution²⁵² recognizes the utilization of water inside a state and the reason for directing interstate waters. The Centre's job is to a great extent restricted to settling between state river water disputes. That, as well, a segregated one in setting up tribunals for their arbitration. This approach towards the advancement of the administrative and sacred component with respect to ISWDs has brought about an uncertain appropriation of force between the Centre and the States, making government jurisdictional uncertainty.

The main reason for federal feature in this aspect is because of, water in the Constitution of India is a State subject according to section 17 of State List and in this way, states are enabled to authorize enactment on water. It manages water for example water supply, water system, waterway, seepage, banks, water stockpiling and water power.

Entry 56 of Union List gives the power and capacity to the Union Government for issuing of the guideline and improvement regarding the water disputes between state rivers and river valleys to the degree proclaimed by Parliament to be convenient in the public interest. Within

²⁵² M.P JAIN, INDIAN CONSTITUTIONAL LAW (Lexis Nexis Butterworths Wadhwa 2009).

the India's administrative political construction, the centre's role becomes important for the arrangement in the following levels:

- between the states in question
- between the Centre and the States.

Article 262 in the constitution empowers the President to constitute an Inter-State water Disputes Tribunal being and furthermore states. Under this arrangement an Inter-State Water Dispute Act, 1956 and River Boards Act, 1956 was made.²⁵³ This is the framework that is currently working in India.

2.2 Historic-Topographical Problem

The historical problem is concerned with the emergence of new boundaries and the change in the societal and political structure. After freedom, the states were cut out and combined to shape the Union of India.

The changing boundaries has effects on current jurisdictional and asset sharing arrangements and become wellsprings of interstate political contention prompting historic-topographical vagueness in interstate river water administration. Perhaps perceiving the issues brought about by such redrawing of authoritative limits, the Union government established two other significant demonstrations around the same time to make a system for overseeing and overseeing interstate rivers: the Interstate (River) Water Disputes Act, 1956 (ISRWDA) and the River Boards Act, 1956.²⁵⁴

2.3 Institutional Vagueness

With respect to the goal interaction for ISWDs, the Supreme Court has made restricted mediation to arbitrated disputes, including the authorization of council grants, holding that such disputes can be settled under Article 131. According to Salve, the astuteness behind this choice is clear: the courts, as an established gathering, order a specific level of regard and authority because of its ability to rebuff for scorn.

²⁵³ Richards, Alan, Singh, N, *Water and Federalism: India's Institutions Governing Inter-State River Waters*, Centre on Institutional Reform and the Informal Sector, IRIS, (1996).

²⁵⁴ Jain, S.N., Alice, J., Subash, J, *Inter-State Water Disputes in India: Suggestions for Reform in Law*, INDIAN LAW INSTITUTE, (1971).

The tribunals need such position, in this manner neglecting to productively authorize an honor, particularly in disputes that get intensified because of political hints. However, inside this structure, the Supreme Court's job sabotages that of the tribunals as adjudicators of ISWDs, despite the last being set up for the execution of restricting honors and their choice allowed a similar power as a request for the Supreme Court. While Article 262 prevents the most elevated legal executive from arbitrating ISWDs, Article 136 enables it to hear claims against the tribunals and guarantee the execution of the council. Thus, the pinnacle court stays the adjudicatory body alongside the tribunals, making an institutional ambiguity regarding which body is a definitive adjudicatory force on ISWDs in India.

2.4 Constitutional History, Relevant Provisions and Other Legislation

Traditionally, Until the Government of India Act of 1919, all water system works except for those not surpassing Rs 10 lakhs in cost were heavily influenced by the Central Government, and subject to the authorization of the Secretary of State.²⁵⁵ The Government of India (GOI) Act, 1919 made water systems a commonplace subject, while matters between commonplace concern or influencing the relations of a region with some other domains were dependent upon enactment by the central council. The Government of India Act of 1935 attracted consideration expressly to river disputes between one territory and another or between an area in British India and a unified Indian state.

Section 130 to 134 of the Government of India Act, 1935 set out that territory or a regal state could gripe to the Governor General if its inclinations were preferentially influenced in the water supplies from a characteristic source, because of the activity of another region or royal state. On the off chance that the Governor General was of the assessment that the issues included were of abundant significance, he was needed to delegate a commission to examine the matter and to answer to him. After considering the report he was to give a choice he considered appropriate.

In the draft constitution the first arrangements regarding the matter, viz., Articles 239 to 242 were drafted on similar lines as segments 130 to 134 of

²⁵⁵ Ramana, M.VSV, *Inter-State River Water Disputes in India*, ORIENT LONGMAN, (1992).

the Government of India Act, 1935. Nonetheless, an ensuing correction supplanted these arrangements and Article 262 was added.

The important arrangements in the current Indian Constitution are:

Entry 17 in the State List,
Entry 56 in the Union List, and
Article 262.

Section 17 makes water a state subject, however qualified by Entry 56 in the Union List, which engages Union with respect to the guideline and improvement of between state rivers and river valleys to the degree to which such control of the Union is pronounced by parliament by law to be practical in the public interest. What is more, Article 262 expressly concedes right to administer to parliament over the issue in Entry 56, and furthermore gives it power over the Supreme Court. Different River Authorities have been proposed, however not enacted, or set up as bodies vested with forces of the board. Given the circumstances, river boards with just warning forces have been made.

Article 262 says:

Parliament may by law accommodate the mediation of any dispute or grumbling concerning the utilization, circulation, or control of the waters of, or in, any between state river or river valley.
Notwithstanding anything in this Constitution, Parliament may by law give that neither the Supreme Court nor some other court will practice ward in regard of any such dispute or grumbling as is alluded to in provision (1).²⁵⁶

Parliament has instituted two laws under the above arrangements:

The River Boards Act of 1956: This Act was made for setting up of river boards by the focal government in line with the invested individuals.

The Inter-State Water Disputes Act of 1956: Under this Act, in the event of a dispute, the influenced State is engaged to demand the Central government to allude disputes identifying with the

²⁵⁶ Iyer, R.R., *Federalism and Water Resources*, ECONOMIC AND POLITICAL WEEKLY, (1994).

utilization, dispersion, or control of Inter-State River waters for arbitration by a court comprised under the Act. Likewise, if the Central Government feels that the water dispute alluded to it cannot be settled by exchanges, then, at that point it can allude to the dispute for mediation by a court comprised under the Act. The court will then, at that point explore the grumbling and forward a report to the Central government known as request or grant of the council. Inside 90 days (about 3 months)90 days (about 3 months) of the report, the Central G government or any of the state Government concerned can move toward the court for an explanation. The Central Government should publish the court's choice in the authority newspaper, and afterwards the choice will be conclusive and restricting on the gatherings to the dispute. Neither the Supreme Court nor some other court will practice locale in regard to any water dispute alluded to a council.

Other than this, National Water Policy of 1987 likewise managed circulation of water among the states.²⁵⁷ Water being a state subject, it is fundamental that the drive and obligation regarding improvement of between state rivers and river valleys ought to principally lay on the State government. Experience, has, notwithstanding, shown that the river valley projects have been extensively hampered in the past by the irreconcilable circumstance among various state governments. While it is important to guarantee that the forces of State governments comparable to between state rivers and river valleys stay unaffected, it is additionally important to make reasonable arrangement for settling struggle among the State governments and for accomplishing greatest outcomes in regard of preservation, control, and ideal usage of water assets of between state rivers.

2.5 The Krishna River Dispute

The Krishna River starts in the Western Ghats, a mountain range that runs north-south along the western shore of India. The river channel portions of three states: Maharashtra (where the river starts); Karnataka (the centre riparian) and Andhra Pradesh (the uttermost downstream). The principal

²⁵⁷ *Id.*

water system projects in the bowl were worked in 1855, when India was important for the British Empire. As the bowl populace developed, and the States will be consented to water allotment of arrangements with one another, first in 1892 and again in 1933, 1944 and 1946. In 1951; three of the States marked another water portion arrangement. In any case, the fourth State, Mysore, would not confirm the understanding, and the interstate disputes waited.

The 1953 resolution of the making another State of Andhra Pradesh and the States Reorganization Act, 1956 has been changed the significant limits that in the Krishna River bowl and merged various States. Yet, that must conflict over water proceeded. Then, at that point, in 1969, in the response to a request from three States, that the Central Government conjured the Inter-State Water Disputes Act and made the Krishna Water Disputes Tribunal. After four years, the Krishna Tribunal gave honor. And the extra demands from the States for explanation constrained the Tribunal to rethink of certain suspicions and choices.²⁵⁸ Thus, it was not until the 1976 and that the Tribunal distributed its last honor, which contained the accompanying ends.

The Tribunal assessed two elective arrangements, in which it is called "Plan A" and "Plan B."

Scheme A: The depended on a division dependent on the yearly accessibility of 2,060 thousand million cubic feet (TMC) of water in the bowl. The Tribunal distributed this water to among these three states and those are the States of Andhra Pradesh, Karnataka, and Maharashtra. And the Tribunal assigned the excess to the State of Andhra Pradesh yet it did not procure a perpetual (vested) right to those waters.

Scheme B: The thought about the making of a Krishna Valley Authority, a bowl wide government element, and to assign the water and deal with the river, including excess streams. The State of Andhra Pradesh did not underwrite this other with the option of while Maharashtra and Karnataka did. Since the three States did

²⁵⁸ Waliur Rahman, *Row Over India river Scheme*, BBC NEWS, 496 of 2001, (2003).

not altogether consent to make a Krishna Valley Authority, the Tribunal did not receive the Scheme B. The Tribunal had permitted the States to re-open the water assignments after May 3, 2000.

The ensuing round of mediation started in 2004 with the development of a second Krishna River Tribunal. That the Krishna II Tribunal expanded the measure of yearly allocable water to 2,578 TMC. In any case, the Tribunal had made those extra allotments less reliable than the base distributions in 1976. Like its forerunner, the Tribunal did not clarify what happens when there is not satisfactory water in the river to fulfil requests in the dry season. Then the Tribunal required the production of a Krishna Water Decision Implementation Board to direct its discoveries. Hence the Tribunal said that the States could re-open the Tribunal's organization after May 31, 2050. Meanwhile, two of the States, Karnataka, and Andhra Pradesh, have recorded petitions in the Supreme Court, testing that the honor is pending under the dispute of the Supreme Court.

2.6 The Sarkaria Commission

The Sarkaria Commission in its report at Chapter XVII on Inter-State River Water Disputes has suggested that:

Once an application under Section 3 of the Inter-State River Water Disputes Act is gotten from a State, then it ought to be compulsory on the Union Government and to comprise the Tribunal inside the period not a surpassing one year from the date of receipt of the utilization of any disputant State. The Inter-State River Water Disputes Act had been revised for this reason.

The Inter-State Water Disputes Act ought to be revised to engage the Union Government to select a Tribunal, suo-moto and if important, when it is fulfilled that such a dispute exists indeed.

There ought to be a Data Bank and data framework at the public level and the sufficient hardware ought to be set up for this reason at the soonest.

The Inter-State Water Disputes Act ought to be corrected to guarantee that the honor of a Tribunal becomes the viable inside a long time from the date of constitution of a Tribunal. And assuming, notwithstanding, for certain reasons, the Tribunal feels

that the five years' period of frame must be expanded, and the Union Government may on a reference made by the Tribunal broaden its term.

The Inter-State Water Disputes Act, 1956 ought to be revised with the goal that a Tribunal's honor has to be a similar power and the assent behind it as a request or pronouncement of the Supreme Court had to make a Tribunal's honor truly restricting.

These five proposals were considered by the recent Sub-Committee of the Inter-State Council. And the Sub-Committee acknowledged four out of five suggestions. Then the period determined for establishing the Tribunal by the Union Govt. That was expanded from one year to two years. Then the Inter-State Council Secretariat arranged an agreement paper on the suggestions of Sarkaria Commission, in which the thought was after during fifth gathering of the Standing Committee of Inter-State chamber under the chair of the Union Minister of Home Affairs. And the Standing Committee suggested that the Tribunal should give its honor inside the time of a long time from the date of its constitution. Notwithstanding, if for unavoidable reasons the honor could not be given inside a period of three years, the Union Government may broaden the period not surpassing two years.

Hence the honor must be ought to executed inside a long time from the date of warning of the honor. And then the event that for unavoidable reasons the honor could not be carried out inside a period of two years the Union Government may expand the period appropriately.

3. Problems with Inter-State Water Disputes Act, 1956

There are about 20 river basins in India which are shared by the States and Union Territories. There are 28 states in India. This simple fact represents how deep India's water security is embedded in the hands of interstate hydrogeography. MP Jain says that the framers of our constitution had already foreseen the picture that there would be disputes between states regarding river waters. A river passes through two or in some cases more than two states.

Now since the river water is a natural resource and no state can claim ownership of that river, problems arise when there is water sharing

conundrum.²⁵⁹ The Constitution specifically states that no state can make laws on the use of such waters since no state can claim legislative powers beyond its territory and into other states only with the reason that the said river originates in its territory.²⁶⁰ Hence, the Constitution of India gives special legislative power under Article 262(1) to the Parliament to create mechanisms to resolve such disputes. This article empowers Parliament to provide for adjudication of any dispute with respect to the use, distribution, or control of the river waters of any inter-State River or river valley per se. Ramaswamy Iyer has called it the 'willful abdication of its role' by the Centre.²⁶¹

Water disputes depend upon the ability of the dispute resolution mechanisms to resolve the water conflicts in a particular area or community. If the dispute resolution mechanism is weak, then it is that the disputes are bound to occur and perpetuate. These "disputes" essentially translate to a brawl over the need to access, control, manage and/or use these water resources."²⁶²

Thus, the mechanisms to resolve the disputes which arise from this needs to inspire confidence. The present case of water disputes however does not inspire this confidence. Inter-state water disputes occur frequently. The adjudication too takes a long time and often involves states defying the orders of the water dispute tribunal and the directions of the Supreme Court too. The history of water disputes in India explains this.

The picture of the active River Water Dispute Tribunals in India can be clearly seen from the table in the website of the Central Water Commission. The table shows that the river dispute problems are still pending even though the Water Dispute Tribunal was enacted to improve the existing conditions.

²⁵⁹ MP JAIN, CONSTITUTION OF INDIA 1023 (LexisNexis 2018).

²⁶⁰ Cauvery Water Disputes Tribunal, SC 522, 550, (1992).

²⁶¹ Srinivas Chokkakula, *Interstate River Water Governance: Shift focus from conflict resolution to enabling cooperation*, CENTRE FOR POLICY RESEARCH, (2021).

²⁶² Bhumika Indulia, *A perpetual tussle over Water Resources: An inevitable need for Inter-State mediation in Inter-State Water Disputes*, SCC BLOG (2021).

Let us take a note of the elemental problems first. Of course, there can be no doubt that mutual agreement is superior to adjudication for the means of resolving a dispute, be it on river waters (as is the case here) or about anything else. Whenever negotiations and talks fail, conflicts still need to be resolved and the constitutional provision of Article 262 and the Inter-State Water Disputes Act provide for this. Although it argued that there is no machinery which inspires confidence to resolve disputes, Article 262 and few provisions of the Act are necessary.

It has been argued that in India for inter-state water disputes, we need to jump straight from negotiations to resolving the disputes and the way desirable to proceed through the conciliation and mediation before travelling down the other path of adjudication. No doubt the Act does not rule out the recourse of negotiations or mediation or any other form of alternate dispute resolution but in fact the Act itself requires the Central government to satisfy itself that there is no other way, no form of alternate dispute resolution is possible, complete repugnancy exists between the states which are in dispute- only then after this satisfaction can the central government set up a Tribunal. But the central government tends to overdo this. "As for divisiveness this is not an ineluctable concomitant of adjudication.

Each state will undoubtedly argue its case as strongly as possible before the Tribunal, but this can be done without acrimony. If goodwill and desire to find a solution exist, adjudication need not be adversarial in spirit. On the other hand, if a spirit of accommodation were absent, negotiation, mediation and conciliation are not likely to succeed either."²⁶³ The fact that the water disputes between states is not dealt at its best by judges is because that the issues involved here is not of legal sense but is technical in nature. Consider this example: Without any expert opinion, how should a judge know how many cusecs of water is the capacity of a dam or reservoir? Or how should a judge know how much TMC feet of water should be stored and how much should be released? The judge would not know without the help of an *amicus curiae* or an expert opinion. Now although many types

²⁶³ Ramaswamy R. Iyer. "Inter-State Water Disputes Act 1956: Difficulties and Solutions." *Economic and Political Weekly*, vol. 37, no. 28, pp. 2907-2910, (2002).

of disputes which go to court deal with expert opinions like criminal cases, accident cases etc. But the water disputes nature is always water sharing and water rights.

With reference to the above discussions and the arguments, it is quite clear that the Centre has failed to provide an effective way. The delay in a proper mechanism to settle water disputes over the water sharing and water rights between the states have failed to provide an effective way to deal with the problem of inter-state river water disputes. This has affected investments in dams, irrigation, and agriculture particularly.

4. Need for Inter-State Mediation to Resolve Dispute

A harmonious ground is necessary since the water disputes between the states have resulted in heavy loss of resources and opportunities and to avoid any future damages as well. The mechanism of mediation fits the glove in this sense reconciliation because it lets the states take charge of the proceedings while there will be a mediator present who would only facilitate dialogues between the states. The conundrum arises as there is no adequate mediation mechanism available for the states.

4.1 Definition of Mediation

Mediation is a form of joint decision making where a third party who is neutral controls few aspects of the process or the whole outcome in a conflict or a dispute. However, the ultimate decision-making power remains with the parties in the dispute themselves. Mediation can be viewed as another branch of a bilateral conflict management. Mediation is rational, political, process with benefits. "It operates within a system of exchange and social influence whose parameters are the actors, their communication, expectations, experience, resources, interests, and the situation within which they all find themselves. Mediation is a reciprocal process; it influences, and is in turn influenced by and responsive to, the context, parties, issues, history, and environment of a conflict."²⁶⁴ To resolve this there is a need for a separate institution for inter-State

²⁶⁴ Jacob Berkovitch and Scott Sigmund Gartner, *International Conflict Mediation: New Approaches and Findings*, (2009).

mediation. Germany has an institution called the Working Group of the Federal States)²⁶⁵, and Australia has the Council of Australian Governments)²⁶⁶ that acts as a dialogue between different States.

Indian Constitution has a provision under Article 263 where we can establish a permanent inter-state Council.²⁶⁷ This can facilitate smooth procedures, appointment of mediators, etc. This can also lead to the utilization of the existing framework and save time and money for both the states and the Centre. Also, the Inter-State River Water Disputes (Amendment) Bill, 2019²⁶⁸ calls for the set-up of a Dispute Resolution Committee that shall first attempt to settle the inter-State disputes. If the dispute fails to be settled only then shall it be referred to the Inter-State Dispute tribunals.

Now, although it a positive step, the Bill has only been passed by the Lok Sabha. Thirdly, the Inter-state council can adopt a combination of arbitration and mediation. In arbitration and mediation, a party who is neutral hears both parties an arbitration proceeding and writes an award. However, the third party keeps this award sealed. He then moves to mediate between them. The mediator knows the sensitive and personal information of the parties by virtue of the arbitration proceedings which commenced first. This may not be disclosed in the arbitration. Hence the combination of arbitration and mediation together seems like a good option to resolve the water disputes since the third party will first hear the States, write a suitable award, and then move ahead with mediation between the States. In case there is a failure in mediating them, deliver the earlier written award.

4.2 International Agreements to Note

There are two main conventions to note- one, the Convention on the Protection and Use of Transboundary Watercourses and International Lakes²⁶⁹ (Herein after mentioned as Watercourse convention) and the

²⁶⁵ Bund/Länder-Arbeit gemeinschaft Wasser - LAWA, (2021).

²⁶⁶ Federation, Federation.govsaw (2021).

²⁶⁷ MP JAIN, CONSTITUTION OF INDIA 1016 (LexisNexis 2018).

²⁶⁸ The Inter-State River Disputes (Amendment) Bill, (2019).

²⁶⁹ Introduction, UNECE, Unece.org (2021).

Convention on the Law of the Non-Navigational Uses of International Watercourses (hereinafter “UN Watercourses Convention”)²⁷⁰. The UN Watercourse convention only makes sure that the previous Watercourse Convention is enabled, and it also covers the uses of international watercourses and their waters for purposes other than navigation. This convention also covers the measures for protection, preservation, and management of the related uses of these watercourses and their waters. What is interesting and ironic is that both the above-mentioned conventions cover arbitration and negotiation in a detailed manner which is absent in India.

The problem is that India is not a party to these conventions. Had India been a party to these frameworks, it would have been obligated to ratifying the conventions in its legislative framework and further the mechanisms of resolving the disputes would have complied followed the global international standards. Therefore, India should become a signatory to the above-mentioned conventions.

4.3 New Development: Current Legislative Bills

A Bill named Inter-State River Water Disputes (Amendment) Bill, 2019²⁷¹ was introduced in the Lok Sabha on 25th July 2019, which amends the present Inter-State River Water Disputes Act of 1956. The changes are discussed below:

4.3.1 Dispute Resolution Committee

Under the amendment bill, which is proposed, when a state requests any water dispute, the union government will create a dispute resolution committee to resolve the dispute. It comprises of a chairperson and experts with a minimum of 15 years of experience in the relevant sectors who are nominated by the Central government. Under this Bill, the committee will also comprise of one member from each state, which is a party to the dispute who is at least of the Joint Secretary rank who will be nominated by the concerned state government. This Dispute Resolution Committee will

²⁷⁰ Convention on the Law of the Non-Navigational Uses of International Watercourses New York, (1997).

²⁷¹ The Inter-State River Disputes (Amendment) Bill, 2019, (INDIA).

seek to resolve the water disputes through negotiations within one year which can be extended to 6 months. If the dispute is irreconcilable only then will the central government refer the matter to River Water Dispute Tribunal.

4.3.2 Water Disputes Tribunal

An Inter-State River Water Disputes Tribunal will be setup by the central government. This can have multiple benches across the territory of India. This Bill dissolves all the existing tribunals and all the pending cases will now be transferred to the new Tribunal.

4.3.3 Time limit

The Tribunal must make its decision on the dispute within 2 years which can be extended by 1 year. But, under the Bill such an extension may be up to a maximum of six months.

4.3.4 Decision of the Tribunal

Under the Act, the decision of the Tribunal has the binding force and stature same as that of the Supreme Court of India and its decision will have to be published in the official gazette.

4.3.5 Data bank

The Bill provides that the central government will appoint or authorize an agency to maintain a data bank and information system for each river basin.

5. Conclusion

On 3rd of August 2021, the CJI recused himself from hearing an Interstate water dispute between the States of Andhra Pradesh and Telangana respectively. While stating the reasons for recusing himself, the honorable CJI stated that the states should try to solve such matters through mediation. The delay in a proper mechanism has failed to provide an effective way to deal with the problem of inter-state river water disputes. This has affected investments in dams, irrigation, and agriculture more generally. The practice of arbitration-mediation needs to kick off water disputes between states. The problem currently is that there is no binding

arbitration as such. This can lead to a lack of adequate levels of investments, repugnancy between states, which further leads to an improper investment of resources and inefficient use of the natural resource water too! Of course, this can have a negative impact on economic growth. These problems get further complicated by being knotted with more general Centre-state conflicts.

Over the years, there have been subsequent amendments to the Inter-State Water Disputes Act, 1956. This is also one of the reasons which cause delays in giving the awards. It is a trend. The 2018 Cauvery judgment of the Supreme Court is just another example of this because extending the Supreme Court's jurisdiction opens a new front of judicial litigations. The way in which the tribunals are deciding matters needs to be reviewed with due attention to the courts; limitations in addressing matters related to interstate water disputes.

The Central government must reconsider the methods of improving the adjudication of water disputes with deep integration of a deliberate process and build a more cooperative ecosystem. The Bill raises hopes of a good mechanism to incorporate the cooperation element by proposing a permanent commission and other recent changes as discussed in the previous chapter. However, it would be better if the blend of the arbitration-mediation mixture is adopted. The Bill does put up notable changes which may appear to be promising but whether the implementation would be successful or not, only time will tell.



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