Challenging Arbitration Awards: A Critical Analysis

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"To be, or not to be: that is the question: ...For who would bare the whips and scorns of time, the oppressor's wrong, the proud man's contumely, the pangs of despised love, the law's delay..."

William Shakespeare, Hamlet

INTRODUCTION

The preamble of the Indian constitution, the key to the minds of the framers of the constitution, ensures justice at three levels i.e. Social, Economic, and Political. Simply mentioning and empty possession of the various rights in the constitution in different parts will not please the people unless effective machinery for their enforcement is provided. In the issue of primacy, the right of Access to justice must be placed on the top level. Conceptually, justice is a desirable virtue which surpasses all hurdles. One of the essential features of this justice delivery system is timely delivery of justice.

But in the Indian court there is a huge deadlock of cases. It is well-known that "Justice delayed is justice denied". Hence Hon'ble Supreme Court took the note of this in the case of Hussain Ara Khatoon v. State of Bihar[1]. Observed that "Right to speedy trial" is implicit in article 21 of the Indian Constitution. In order to give effective mandate to this the parliament has recognized various Alternate Dispute Resolution (ADR) mechanisms.

To overcome the delay and to provide effective justice it is high time to resort to ADR mechanism.

Supreme Court in the case of Salem Advocates Bar Association, Tamil Nadu v. UOI[2] observed that: "*In certain countries of the world where ADR has been successful to the extent that over 90 per-cent of the cases are successfully settled out of the court, there is a requirement that the parties to the suit must indicate the form of ADR which they would like to resort to during the pendency of the trial*".

[1] AIR, 1979, SC, 1360

[2] AIR 2003 SC 189.

Advantages of ADR over litigation

- This method is time and money effective.
- Reliable information is an indispensable tool for adjudicator. Judicial proceedings make halting progress because of reluctance of parties to part with inconvenient information. ADR moves this drawback in the judicial system. The truth could be difficulty found out by making a person stand in the witness-box and he pilloried in the public gaze. Information can be gathered more efficiently by an informal exchange across the table. Therefore, ADR is a step towards success where judicial system has failed in eliciting facts efficiently. The method also ensures privacy.
- The proceedings happened in much more simpler and flexible manner. Procedures are not affected with rigors of strict rules and procedures. The efficacy involving in composition oriented justice by holding free and frank deliberation and confabulation across the table would get both the parties satisfied from their own stand point because the parties be-come themselves being the spokesperson can have full-fledged right and liberty to ex-press their own grievance and, upon settlement or composition, both the parties would leave the arena with joyous satisfaction without leaving anything unexplored.
- The presence of lawyer is not necessary. The lawyer can assist the court and help the parties to understand the complicated question of law or issues involved in the process.
- Technicalities of law and procedures, rules of evidence have no place in the ADR mechanism.
- Litigation harms relation and causes mental stress. Participation in a civil suit is cumbersome. On the other hand ADR is a problem solving process, which has creative solution to the parties. In ADR it is a matter of resolution rather than the natter of winning or losing.

Challenging Arbitration Award:

Domestic

Any Arbitration under the Arbitration and Conciliation Act, 1996 (Hereinafter "the act") can be challenged after the post-award stage not before that. Section 34 of the Act provide for the grounds to challenge the arbitration award. Under the UNCITRAL Model Law, 1996 any

arbitration can be challenged at a pre-award period .The following are the grounds of challenge under section 34 of the act:-

1. The parties to the agreement are under some incapacity*;*
2. The arbitration agreement is not valid under the law it falls;
3. No proper notice was given for the appointment of arbitrator or for the arbitral proceedings or was unable to present his case;
4. Award contain decision on matter beyond the scope of the arbitration;
5. The composition of the arbitral authority or the arbitral procedure was not in accordance with the arbitration agreement;
6. The subject matter of dispute cannot be settled by arbitration under Indian law; or
7. The enforcement of the award would be contrary to Indian public policy.

The grounds provided under section 34 are exhaustive as because of the use of the word "only" at the very beginning of the section 34(2). A bare reading to the provision state that the grounds are not exhaustive. The two provisions supporting this proposition are: (1) the section 13 of the act which deals with the challenge procedure and it provides that if the challenge is not successful, then the award may afterwards be challenged on the same grounds for setting aside on which arbitrator was challenged. (2) Rejection of the plea regarding his lack of jurisdiction is a ground for making an application of setting aside of an award.

Public Policy

The term public policy has not been defined anywhere. Though a wide range of topic come under the general head of public policy, some of the matters have been directly mentioned in the Indian Contract Act 1872 section 24-30, as against the public policy of India in the shape of the void agreement. In the earlier decision the concept of public policy is very strict and any violation under it will render the contract void.

Lord Halsburg in Janson v. Dreiefontein Consolidated Mines Limited[3] stated that no court can invent a new head of public policy, but the dictum of Lord Davey in the same case was that " Public policy is always an unsafe and treacherous ground for legal decision".

[3] 1902 A.C. 484.

The same view was taken in the case of Bhagwat Genuji Girme v. Gangabisan Ramgopal[4] that the doctrine of 'Public Policy' is regarded as an illusive concept, Untrustworthy guide, variable quality, uncertain one, unruly horse, etc ., the primary duty of the court is to enforce a promise made between both the parties and to uphold the sanctity of the contract which forms the basics of the society, but in certain cases the court has to rely upon what is called 'Public Policy'.

The doctrine of public policy is basically governed by its precedents, its principle has been crystalized in different ways. In Oil & Natural gas Corporation Ltd. v. SAW pipes Ltd[5], the Supreme Court of India interalia observed that the phrase "Public Policy of India" used in the section 34c of the act is required to be given a wider meaning. It can be stated that the concept of public policy connoted some matter which concern the public good or in public interest has varied from time to time. However the award which is, on the face of it, patently in the violations of the statutory provision cannot be said to be in public interest. In this way court urged to give a wider meaning to the term public policy.

The amendment added one more ground for challenging the arbitration i.e. Patent illegality. As per the court, giving limited jurisdiction to the court for having finality to the award and resolving the dispute by speedier method would be much more frustrated by permitting illegal award to operate. A patently illegal award is required to be set at naught, otherwise it would promote injustice. Hence the award could be set aside if (a) fundamental policy of Indian Law; or (b) the interest of India, or (c) if it is patently illegal.

Foreign Policy

The difference between foreign award and domestic award is that foreign award is regulated by the New York Convention and the later is regulated by the domestic act. Clause (b) of the section 48(2) under part II of the inter alia provides that enforcement of an arbitral award may be refused if the court finds that the enforcement of the award would be contrary to the public policy of India.

[4] I.L.R 1941 Bom. 71.
[5] AIR 2003 SC 2629

There is a difference between public policy governed by a domestic law and public poicy in case of involving foreign element. Although the concept of the public policy is same but it differs in the application.

In the case of Renusagar Power Co. Ltd. v. General Electric Company and Anr[6], the Supreme Court has favored a liberal construction of public policy.
Further also held that any foreign award can be refused on the ground of being contrary to (1) Fundamental policy of Indian Law or (2) the interest of India (3) Justice or morality.

The wider definition was given to the concept of challenging foreign arbitral award on the basis of public in the case of Panchapakes Iyer and Ors. v. K.M Hussain Muhammad Rowther and Anr[7]

Conclusion

ADR is the gift of the evolution in the justice delivery system. It is an expeditious method which is very much cost effective.

ADR law is still evolving as the recent amendment of 2015 to arbitration and conciliation act 1996 makes many provisions to make it more efficient like making arbitrator liable for any unreasonable delay also the provision which makes the law more realistic.

One of those is the section 34 which states about the ground of challenging the arbitral awards. But a better interpretation to this section is needed as words like ‘public policy’ has been discussed at length; still lacks a solid definition.

[6] AIR 1985 SC 1156
[7] AIR 1934 Mad 145