

“Independence and Impartiality of Arbitrators: A Technological

Approach”

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ABSTRACT

Arbitration an Alternative Dispute Resolution mechanism is a novel concept in the legal fraternity. In a developing country like India, arbitration as a concept is still an evolving process. Legislation was drafted for arbitration way past in 1899 and since then it had undergone several amendments to finally take form as the Arbitration and Conciliation Act 1996 and is aiming on becoming a favourable seat for dispute resolution.

The main aim of this article is to bring out the importance of the role of arbitrators in the proceedings of Arbitration. It throws light on the characteristics that must be possessed by an arbitrator and brings out the various discrepancies that affects the procedure in appointing an independent and impartial arbitrator.

The main intention of this article is to bring out the significance of combining the traditional approaches that were used in the past to appoint the arbitrators with technological measures to remove the discrepancies that hinder the process of appointing a competent arbitrator, which in turn reduces the effectiveness and efficiency of arbitration as a dispute resolving mechanism.

Key Words: Arbitration, Dispute Resolution, Mechanism, Arbitrator

I. Introduction

Humans as species have travelled through a vicious circle of evolution, from the stage of early man to an intellectual human being. Evolution not only has developed our standard of living but also mentally has given us the ability to learn, to understand and to comprehend things that take place around us. With this evolution one thing is certain that no human is same as the other with respect to their intellect. With different humans possessing different ideologies and residing in the same earthly plane, it can be discovered that differences between the creatures of the same species are likely to arise. However, possessing different levels of intellect has not only caused us to give rise to conflicts but also to discover ways in resolving the same.

The differences in thought process between two human beings sometimes escalate and take the form of a dispute or a conflict, where both the parties are aiming at a resolution that favours their side. In order to resolve these disputes, the humans have come up with various Dispute Resolution mechanisms. Since the ancient times, India has witnessed several dispute resolving bodies like the Kulas, Srenis and Pugas which were considered the main means of dispute resolution; nonetheless these bodies were subject to changes as the time passed by. As a result of such transformation, the dispute settling mechanisms that we know today range from the informal to the formal, and one such formal dispute resolution mechanism is arbitration.

Arbitration as a dispute settling mechanism has an ancient legacy. Arbitration has evolved from the concept of Panchayats.¹ Panchayats as a system was followed for over decades in India and as the time passed by, the principles of Panchayat were adopted to branch out into different forms of settlement procedures.

¹ Shah, N., & Gandhi, N., 'Arbitration: One size does not fit all: Necessity of developing institutional arbitration in developing countries.' (2011) J. Int'l Com. L. & Tech., 6, 232.

In the year 1899 the British India drafted the first ever legislation for arbitration and i.e. Indian Arbitration Act 1899 and later on this Act was consolidated and amended to enact the Arbitration Act 1940. It was also largely based on the English Arbitration Act of 1934. This Act extended to the whole of India except the State of Jammu and Kashmir.

However, this Act was suffering with drawbacks that were addressed in *Guru Nanak foundation v. M/s Rattan Singh & Sons*² the Supreme Court observed that the way in which the Proceedings under the Act are conducted and without an exception are challenged in Courts, has made lawyers laugh and legal philosophers weep. The proceedings under this Act have become highly technical and at every stage providing a legal trap to the unwary.³

In order to solve these problems, the Government of India enacted the Arbitration and Conciliation Act in 1996, which consolidated 3 statutes: Arbitration Act 1937, Indian Arbitration Act 1940 and Foreign Award 1961. This Act covers arbitration in two parts, one being domestic, where the place of arbitration is India and second being international which involves cross border conflicts.

Under this Act, arbitration is defined as a procedure of dispute resolution in which a neutral third party called an arbitrator pronounces what is called an arbitral award based on the arguments and submissions made by both the parties. In this process of arbitration the role of an Arbitrator is of utmost importance, as the result of arbitration completely depends upon the verdict of an Arbitrator.

II. Arbitrator

An Arbitrator acts as a third and a neutral party in the proceedings. The nature of the arbitrator influences his role and the rights and obligations of the parties in the proceedings. Two schools have brought a jurisprudence with regard to the status of the arbitrators in two ways, one arising out of judicial nature, thereby associating his role with a judge and the other arising from a contractual relationship that exist

² AIR 1981 SC 2075.

³ 'Law of Arbitration: Genesis and Development', https://shodhganga.inflibnet.ac.in/bitstream/10603/40545/12/18_chapter9.pdf accessed on 25th August 2020.

between the parties.⁴ The status of the arbitrator to a great degree influences his role and his conduct in the arbitral proceedings. Thus, the appointment of an arbitrator to preside over an arbitral proceeding is as important as the award pronounced by an arbitrator.

- Appointment of Arbitrators:

Appointment of an Arbitrator⁵ is easier said than done, as parties tend to invest substantial amount of time and resources in selecting their arbitrators. The parties with their respective counsel conduct a research on the arbitrator's background, from arbitration experience to academic writings. The general number of arbitrators is three, two arbitrators are appointed by each party and these two arbitrators collectively appoint a single arbitrator, thereby forming a tribunal of 3 arbitrators. The 3rd arbitrator is considered as the President of the Tribunal.⁶

- Qualification:

An arbitrator appointed by the parties or the two arbitrators, may be persons of high moral character and must have competence in the fields of law, commerce or finance, which is considered as a requisite to deliver an independent judgement.⁷ These pre-requisites ensure that an arbitrator is proficient enough to deliver a judgement with respect to the parties' conflict. Along with this criteria there are two important traits that need to be present in an arbitrator and that is the ability to be Independent and Impartial.

Section 12⁸ of the Act provides for grounds for challenge that can be brought against the arbitrator based on his independence and impartiality. This challenge can be brought either at the beginning, during or at the end of an arbitral proceeding.

⁴ Mullerat, R., & Blanch, J, 'The liability of arbitrators: a survey of current practice.' (2007) *Disp. Resol. Int'l*, 1, 99.

⁵ Section 11(2) of Arbitration and Conciliation Act 1996: The parties are free to agree on a procedure for appointing the arbitrator or arbitrators.

⁶ Section 11(3) of Arbitration and Conciliation Act 1996: Appointment of the third Arbitrator by two Arbitrators.

⁷ Schacherer, S., 'Independence and Impartiality of Arbitrators-A Rule of Law Analysis.' (2018).

⁸ Section 12(a) of Arbitration and Conciliation Act 1996: Existence of any direct or indirect, past or present relationship with interest of any parties which is likely to give rise to justifiable doubts as to his independence and impartiality.

Hence it is important for an arbitrator to possess and have an understanding of these two qualities.

- Notions of Independence and Impartiality:

Independence and Impartiality are important attributes that must be possessed by an arbitrator. There is a conceptual dilemma with respect to these two terms. These two terms are deemed to be synonymous to each other. Independence is usually associated with certain institutional guarantee that allows adjudicators to free themselves from external pressures.⁹

Independence as a trait can be tested by ensuring that an arbitrator doesn't have any conflict of interest. Independence is again of two types: a) Personal and b) Institutional.

Personal Independence refers to the duty of the adjudicator to take decisions free of influence or external interferences and it is an entitlement as the State or any other person shall not interfere or influence the decision making of the adjudicator.¹⁰

In the circumstances where an arbitrator might have been the council of the client in the past, such circumstances are considered as premises where the criterion of Personal Independence is violated. Such kind of dependent relationship has been elaborated in International Bar Association guidelines (hereinafter referred to as IBA).¹¹

Institutional Independence refers to an institution remaining autonomous irrespective of its structure and policies and where an institution refrains from interfering in the functioning of arbitrators. Institutional independence is mainly observed in institutional arbitration.

⁹ Papayannis, D. M., 'Independence, impartiality and neutrality in legal adjudication.' (2016) *Revus. Journal for Constitutional Theory and Philosophy of Law /Revija za ustavno teorijo in filozofijo prava*, (28), 33-52.

¹⁰ Schacherer, S., 'Independence and Impartiality of Arbitrators-A Rule of Law Analysis.' (2018).

¹¹ IBA Rules on Conflicts of Interest in International Arbitration ('IBA Rules') (23rd October 2014) art 2.

An arbitrator appointed by an institution to preside over a dispute, where the seat of arbitration is the same institution. The arbitrator acting in accordance with the policies and rules framed by the institution is said to violate the duty of institutional independence.

The second trait to be possessed by an arbitrator is Impartiality. Unlike Independence, Impartiality as a trait cannot be seen or tested in a definitive manner. Impartiality has lot to do with certain states of mind either conscious or sub-conscious. An arbitrator's conduct in an arbitral session to a great degree is dictated by his mind. Mind is a state, in which humans tend to harness their potential and this state is far beyond reach to confine it within the ambit of a few legislations, as a result it is very difficult to test for impartiality.

An arbitrator making gestures that refers to his biasness and his idolatry towards one party is said to be partial and can be challenged as an arbitrator.

However, there are certain scenarios where it has been observed that independence as a trait compliments impartiality. In other words, independence is an important aspect to be considered while establishing impartiality, however not sufficient in itself to do so.¹²

- Relation between Independence and Impartiality:

Independence and Impartiality have a very imperative relationship with respect to an arbitrator's qualities. While it is true that Independence acts as a pre-requisite for Impartiality, but that's not always the case, in certain scenarios where the role of an arbitrator becomes enigmatic, even though he/she has no relation with the parties, the arbitrator can persist with his inclination towards one party. Independence and Impartiality while being complimentary to one another, can distinctively meddle the fair execution of the proceedings.

¹² Papayannis, D. M., 'Independence, impartiality and neutrality in legal adjudication.' (2016) *Revus. Journal for Constitutional Theory and Philosophy of Law /Revija za ustavno teorijo in filozofijo prava*, (28), 33-52.

In order to ensure that the convoluted relationship between these two imperative traits do not hamper the fair execution of the proceedings, it was very important to find a solution and make certain amendments to the 1996 Act in place. Back then the Act was not elaborate enough upon the challenging of an arbitrator with respect to his Independence and Impartiality.

As a result of this imprecise detail, the courts had to take the initiative and appoint arbitrators. The court going by the agreement drafted by the parties appointed an employee from one of the contracting parties to be the arbitrator. However, this was immediately changed in *Union of India v. Singh Builders Syndicate*¹³ where the court required the government to phase out the arbitration clauses which require an employee of a party to be nominated as the arbitrator.

This decision was crucial and triggered a change where the parties to an agreement decided to settle any conflict through arbitration, must be done in the presence of a specified government official. However, there were scenarios where the single specified arbitrator appointed by the government was either associated to a party or in the past was the arbitrator for a dispute that involved a party to the arbitration. In *Shakti Bhog Foods Ltd. V. Kola Shipping Ltd.*¹⁴ it was addressed that the arbitrator appointed failed to disclose the fact that, he had in the past served as an arbitrator with respect to a dispute that involved the respondent.

Owing to several discrepancies, Arbitration and Conciliation Amendment Bill 2015 was passed that required the arbitrators to disclose any circumstances likely to give rise to justifiable doubts as to their independence and impartiality. The information disclosed by the arbitrator will be useful in deducing the individual's standing as an arbitrator.

In order to help us with this, the Act has been comprised with 5th and 7th Schedule which postulates various criteria for determining independence and impartiality of arbitrators. Any circumstances which perfectly fits within the ambit of the 7th schedule immediately renders a person ineligible to act as an arbitrator, further if falling within the 5th schedule an application can be filed to remove the arbitrator

¹³ (2009) 4 SCC 523.

¹⁴ (2012) 193 DLT 421.

from presiding over the dispute. These Schedules have been inspired from the IBA guidelines¹⁵ which are formed for governing International Commercial Arbitration. The Schedules¹⁶ were designed to ensure that the Independence and Impartiality of arbitrators remain intact from the beginning to the end of an arbitration session. However, the provisions under these schedules are not exhaustive and they do not cover all sorts of relationships, further there could be various discrepancies that can be caused by the arbitrator through his conduct on which the court cannot put any check.

These conventional methods have been in existence for a long period of time and still suffer from the same drawback. It's about time we take advantage of various technological advancements and develop strategies to solve such discrepancies in the mechanism.

III. Arbitrator Intelligence (AI)

The success or failure of arbitration to a great degree depends upon the appointment of arbitrators. The obligation of an arbitrator to disclose his reputation dictates his appointment or relinquishment of his post as an arbitrator.

The neutrality and confidentiality by which arbitrators have conducted the proceedings will build up his reputation.

Reputation also implies the history of service as an arbitrator. If an arbitrator had a very poor history in the past, involving either party, the arbitrator is unlikely to be appointed for a future dispute. In order to avoid this reputation/bias dispute, several institutions have developed methods to recommend arbitrators.

The American Arbitration Association has developed a list and appointment method with respect to appointing arbitrators. According to the rules mentioned under list and appointment method each party ranks the arbitrators in that institution

¹⁵ IBA Rules on Conflicts of Interest in International Arbitration ('IBA Rules') (23rd October 2014).

¹⁶ 5th & 7th Schedule Arbitrator's relationship with the parties or counsel.

in order of preference. The highest ranked candidate is selected and he goes through a conflict check by the institution.¹⁷

For this practice to be executed effectively it is very important for the parties to have all the information about the arbitrators in the list. However, that is not the case as the parties simply lack information to filter out a suitable arbitrator for the dispute.

In order to make things easier technology has developed to such an extent that it is now ruling various professional fields including the legal fraternity. A company that goes by the name DoNotPay.com¹⁸ is the world's first robot lawyer that provides legal services in a chat box, since its inception it has been updated to an extent that the program is able to perform and offer various legal services.

The company uses Artificial Intelligence (herein after referred to as AI) to run the Lawyer Bot. AI is an intelligence that augments the human intelligence or to an extent mimics human's intelligence. AI is also defined as a complex series of layers of algorithms that do something with the information that's coming into it.

Kleros is another organisation that specialises online dispute resolution protocol which uses block chain and crowdsourcing to fairly adjudicate disputes. On Kleros, adjudication is essentially, a task of information discovery and analysis. In the justice system, transparency is a key feature, it is very important for the users to trust that evidence is not tampered with, block chain proved a cryptographic proof that evidence was not tampered with.

Also Kleros using the features of block chain can guarantee that all the processes are fully automated and incorruptible.¹⁹

With technology playing a pivotal role in the legal industry new innovative measures can also be used in the process of appointing an arbitrator. With respect to selecting an arbitrator it is very much important to store all the important

¹⁷ American Arbitration Association, 'AAA Arbitrator Select' https://www.adr.org/sites/default/files/document_repository/AAA_Arbitrator_Select_2pg.pdf accessed on 4th September 2020.

¹⁸ DoNotPay 'The World's First Robot Lawyer' <https://donotpay.com> accessed on 15th September 2020.

¹⁹ Kleros 'An open online dispute resolution platform bringing justice for all' <https://kleros.io> accessed on 15th September 2020.

information about an arbitrator, and in order to meet this requirement Cloud technology can come into play.

Cloud technology is used especially for large data storage (cloud storage) and computing power, without direct active management by the user. Cloud can help us to increase productivity by allowing multiple users to work on the same data simultaneously.

Cloud computing eliminates the capital expense of buying hardware and software and it ensures that computing resources can be provisioned within minutes and takes the pressure off capacity planning. Some common used Cloud storage platforms are Google Cloud Platform, Amazon Web services and Microsoft Azure. The combination of AI and Cloud platforms can be used in the field of arbitration in such a way that it keeps track of the history of an arbitrator, from number of years of service as an arbitrator to his reputational history as an arbitrator and provides the required data of an arbitrator within minutes to multiple users.

In a country like India, this technology can seek to solve the problem of appointing a credible arbitrator for arbitration. To ensure that the system works effectively in India, the Indian Council of Arbitration (herein after referred to as ICA) a body that was established in 1965 as a specialised arbitral body must adopt this technological domain and oversee matters in different States.

By incorporating this technological interface for arbitration it will be able to maintain a database of all the individuals registered as arbitrators which will also include institutional arbitrators on the Cloud platform.

Any arbitrator acting in individual capacity will have to register themselves with the ICA; this is to ensure that either party to the arbitration are not treated unfairly by the arbitrator. After registering themselves with the ICA the system should allot them a unique identification number. This number can be used to view their track record as an arbitrator on the system.

Along with the identification numbers of the arbitrators, the database maintained by the governing body shall comprise of the arbitrator's personal details, history and reputation as an arbitrator along with their expertise in law. The AI system based on the subject matter of the dispute accesses the Cloud and provides a digital

list of arbitrators along with their reputation as arbitrators to the parties, both the parties will rank the arbitrators and based on the rankings given by both the parties a potential candidate is selected by the interface.

The selected candidate will undergo screening through the ICA, where the candidate in an e-form must disclose any circumstances that might raise justifiable doubts with respect to his appointment before the governing body. After the screening if the members of the governing body are not convinced, the AI will select another name based on the rankings.

This AI system will also allow the parties to give a review on the competence of the arbitrators after the session. In order to give a review the parties can mutually decide among themselves whether to give a positive or a negative feedback. It has been observed that the losing party tends to give a poor feedback for the award delivered by the arbitrator.

In order to overcome this drawback the parties are required to discuss among themselves prior to the session about the feedback they wish to give at the end of the session. In case if parties agree to give a feedback, for a poor feedback it should be made mandatory for the parties to provide a valid reason supported by evidence justifying the remark. However, in case the parties do not wish to give any review, they are free to leave a comment about the entire proceeding.²⁰

The parties that give a feedback about the arbitrator, that feedback would get updated into the database, thereby making it more convenient for the parties in future to select a competent arbitrator with respect to their subject matter of dispute. The Cloud system maintains a record of all the input shared by the parties on the competence of the arbitrators which can be later accessed by the governing body. This will help the ICA to review the performance of an arbitrator based on the feedback given by the parties. Therefore, with this structure in place, it can ensure that the Independence and Impartiality of arbitrators appointed are maintained during the proceedings.

²⁰ Kluwer Arbitration Blog, 'Reputation Arbitration: Building a Decentralised Reputation system for Arbitrators?' http://arbitrationblog.kluwerarbitration.com/2018/07/26/reputation-arbitration-building-decentralized-reputation-system-arbitrators/?doing_wp_cron=1597237248.3705399036407470703125 accessed on 14th September 2020.

IV. Conclusion

Arbitration is slowly transforming to take an idealistic place in the legal community. Arbitration as a mechanism is flourishing not only at domestic level but at International level as well. The International Community has found arbitration to be a suitable mechanism for resolving disputes at a much faster pace. However, in a developing country like India that has witnessed growth in the commercial and corporate sectors in the last couple of years, arbitration is yet to be developed and adapt with respect to these sectors to emerge as favourable seat for dispute resolution in India. In order for it function effectively, it is very important to ensure that foundations of arbitration are strong and free from any discrepancies. It's imperative to learn the importance of independence and impartiality of an arbitrator and that it dictates the success of arbitration. It's time we also recognise and adopt various measures of technology that will help arbitration as a practice to attain perfection. We must find a way to combine the new innovative approach to the traditional and conventional methods, and by doing so we can ensure that arbitration as a procedure continues to impact and make a difference in the legal fraternity.

V. References

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