**Alternate Dispute Resolution**

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**Abstract**

*“While Justice is inspirational, judicial reforms are only aspiration”*

 *CHIEF JUSTICE JAGDISH KHEHAR

The well performing court system is regarded as institutional stipulations for economic growth and socio- economic development. Litigants move towards courts for remedy of their grievances and to protect their rights which are assured by the law. The judiciary is expected to redress the grievances and provide remedy as soon as possible in a speedy and affordable manner though they are expected to deliver justice in a speedy manner but the judiciary cannot ignore the quality of justice the quality and quantity is needed to be balanced as the core standard of justice cannot be abandoned. The major issues that has paralysed the Indian Judicial system is well-known and had been studied by various theorist for several year which includes increase in number of state and central legislation, continuation of ordinarily civil jurisdiction in some high court , numbers of appeals , revisions , indiscriminate use of writ jurisdiction , lack of mechanism to monitor , track cases for hearing etc. But from above all the issue which is eclipsed is the process and the number of disposal which is being done annually.*

*The Supreme Court is disposing pending cases at a more rapidly. In spite of pendency of cases before the apex court, the court’s hard work to set out these cases is showing results. In particular, the figures for the period 2013-16 disclose that pendency in the Supreme Court has come down from 66,603 cases to 59,468 cases.[[1]](#endnote-1) A rather comparable inclination, although not entirely dependable, is seen in the total number of cases pending with the 24 high courts – pendency of 45, 89, 920 cases as of September 2013 contracted with 40, 05,704**cases as of July 2015.*

# *Though fast track courts have in warded criticism for their performance, out of 36 lakh cases transferred to the fast track courts since their beginning, close to 30.7 lakh have been disposed. In effect, fast track courts have succeeded in disposing of more than 80 per cent of cases transferred to them. [[2]](#endnote-2)*

# *Despite the above figures of performance of judiciary the faith on judiciary still continues and therefore a rational solution to all the problems is in progress. Some of the problems which cause a major obstruction on the way of judiciary to resolve overburdened court are still not highlighted properly. “The trial and judgment in India almost takes about 1095 days and enforcement of the judgment takes 305 days. A high cost of engaging lawyers and other court costs increase the burden on businesses,”[[3]](#endnote-3) It takes 1,420 days to enforce a contract in India and costs nearly 39.6 per cent of the claim value because of the long gestation period from filing of the suit to final judgment.[[4]](#endnote-4) In India, the parliament should take material steps to cut back redundant judiciary legislation by derailment of arbitration proceedings and promoting arbitration.*

# *To quote by former Chief Justice of India Justice Ahmedi*

# *“Of the total number of cases which go to the court, hardly 50 per cent require adjudication by a court on the issues of law. Most of the cases, almost 50 per cent or more, essentially involve issues of fact, and they can certainly be resolved, outside the court”*

# Introduction

# The practice of friendly resolution of disputes is as ancient as the Vedic civilization when disputes among members of a particular profession or village were determined by elders

# Through an assembly of village known as panchayats.

# The panchayats dealt with a variety of disputes – contractual, matrimonial, and even criminal in nature.[[5]](#endnote-5)

# To quote Martin CJ, “Arbitration was indeed a striking feature of ordinary Indian life and it prevailed in all ranks of life to a much greater extent than was the case of England. To refer matters to a panch was one of the natural ways of deciding many disputes in India.”[[6]](#endnote-6)

# A “progressive portion of legislation” was brought in the figure of the Arbitration and Conciliation Act, 1996 to modernise the 1940 Act. Based on the UNCITRAL (United Nations Commission on International Trade Law) Model Law on International Commercial Arbitration of 1985 and the ICC (International Chamber of Commerce) Arbitration Rules, the 1996 Act was intended at creating arbitration less technical and more helpful and successful by removing several defects of the previous arbitration law and incorporating contemporary concepts of arbitration. But preceding to 2012 and two unsuccessful attempts were made to amend, the arbitration practice in the country was distant from encouraging and many sections were misinterpretated which lead to confusion and after Balco Judgement of Supreme Court of India an ordinance was propagated in October 2015 with the object of tackling problems in the previous act so that the arbitration court can function according to changing needs of the society.The Arbitration and Conciliation (Amendment) Act, 2015, was finally notified and brought into force with retrospective effect from October 23, 2015.

# Hypothesis

# The hypothesis of present research work is that

# Whether the arbitration and conciliation act 1996 was a failure?

# Whether the amendment 2015 successful in solving the pre amendment issues?

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**Nature Of Amendment**

**General Provisions**

**Section 2 (1)(e) – “Court”**

(e) “Court” means the principal Civil Court of original jurisdiction in a district, and includes the High Court in exercise of its ordinary original civil jurisdiction, having, jurisdiction to decide the questions forming the subject-matter of the arbitration if the same had been the subject-matter of a suit, but does not include any civil court of a grade inferior to such principal Civil Court, or any Court of Small Causes;[[7]](#endnote-7)

**Amendment 2015**

‘(e) “Court” means— in the case of an arbitration other than international commercial arbitration, the principal Civil Court of original jurisdiction in a district, and includes the High Court in exercise of its ordinary original civil jurisdiction, having jurisdiction to decide the questions forming the subject-matter of the arbitration if the same had been the subject-matter of a suit, but does not include any Civil Court of a grade inferior to such principal Civil Court, or any Court of Small Causes.[[8]](#endnote-8)

**Nature of Amendment**

For international commercial arbitration, the word “court” has been amended. The definition is same in case of domestic arbitration. Earlier district court also has the jurisdiction in the matters of the international commercial arbitration. Now it has amended and the jurisdiction has been given to high court exercising its ordinary original civil jurisdiction in the international commercial arbitration. Foreign parties can directly walk off to the high court and they don’t have to take legal action in the remote areas.

**Section - 2(1)(f) - "International Commercial Arbitration"**

Section 2 (1)(f) "international commercial arbitration" means an arbitration relating to disputes arising out of legal relationships, whether contractual or not, considered as commercial under the law in force in India and where at least one of the parties is- (i) an individual who is a national of, or habitually resident in, any country other than India; or (ii) a body corporate which is incorporated in any country other than India; or (iii) a company or an association or a body of individuals whose central management and control is exercised in any country other than India; or (iv) the Government of a foreign country.[[9]](#endnote-9)

**Amendment 2015**

In clause (f), in sub-clause (iii), the words “a company or” shall be omitted[[10]](#endnote-10)

**Nature of Amendment**

This section has been amended by the way omission of the words ‘a company or’ in order to clarify that, it will be irrelevant in determining whether a company is a domestic or an international commercial arbitration that the company is incorporated in India having central management and control .In principle act the criteria that a company having central management and control in India plays an important role in determining domestic or international commercial arbitration.

**Section - 2(2) – “Place Of Arbitration”**

This Part shall apply where the place of arbitration is in India.[[11]](#endnote-11)

**Amendment 2015**

in sub-section (2), the following proviso shall be inserted, namely:— “Provided that subject to an agreement to the contrary, the provisions of sections 9, 27 and clause (a) of sub-section (1) and sub-section (3) of section 37 shall also apply to international commercial arbitration, even if the place of arbitration is outside India, and an arbitral award made or to be made in such place is enforceable and recognised under the provisions of Part II of this Act.”.[[12]](#endnote-12)

**Nature of Amendment**

After the Balco Judgment[[13]](#endnote-13) of the Supreme Court, Indian court was barred regarding exercising jurisdiction with respect to an arbitration not seated in India. But now after this amendment parties can approach Indian courts for interim measures unless it has been specially excluded in the arbitration agreement.

**Arbitration Agreement**

**Section 7 - “Arbitration Agreement”**

Section 7 (4) (b)

(4) An arbitration agreement is in writing if it is contained in- (b) An exchange of letters, telex, telegrams or other means of telecommunication which provide a record of the agreement; or[[14]](#endnote-14)

**Amendment 2015**

In Section 7 of the principal Act, in sub-section (4), in clause (b), after the words “or other means of telecommunication”, the words “including communication through electronic means” shall be inserted.[[15]](#endnote-15)

**Nature of Amendment**

The principle act was enacted in the year 1996 when the electronic communication were not in used and thus it was not mentioned in the definition of arbitration agreement but with the passage of time electronic communication became common almost like letters so with the view to cope up the changing scenario the word “including communication through electronic means” is inserted.

**Section 8 – “Power To Refer Parties To Arbitration Where There Is An Arbitration Agreement.”**

Power to refer parties to arbitration where there is an arbitration agreement. –

1. A judicial authority before which an action is brought in a matter, which is the subject of an arbitration agreement, shall, if a party so applies not later than when submitting his first statement on the substance of the dispute, refer the parties to arbitration.
2. The application referred to in sub-section (1) shall not be entertained unless it is accompanied by the original arbitration agreement or a duly certified copy thereof.
3. Notwithstanding that an application has been made under sub-section (1) and that the issue is pending before the judicial authority, an arbitration may be commenced or continued and an arbitrate award made.[[16]](#endnote-16)

**Amendment 2015**

In section 8 of the principal Act,—

(i)for sub-section (1), the following sub-section shall be substituted, namely:—

“(1) 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.”;

(ii) in sub-section (2), the following proviso shall be inserted, namely:— “Provided that where the original arbitration agreement or a certified copy thereof is not available with the party applying for reference to arbitration under sub-section (1), and the said agreement or certified copy is retained by the other party to that agreement, then, the party so applying shall file such application along with a copy of the arbitration agreement and a petition praying the Court to call upon the other party to produce the original arbitration agreement or its duly certified copy before that Court.”.[[17]](#endnote-17)

**Nature of Amendment**

Now any person claiming through any party can seek orientation of dispute to arbitration and now the person is not prevented in making an application.

**Interim Measures**

**Amendment 2015**

Section 9 of the principal Act shall be renumbered as sub-section (1) thereof, and after sub-section (1) as so renumbered, the following sub-sections shall be inserted, namely:— “

(2) Where, before the commencement of the arbitral proceedings, a Court passes an order for any interim measure of protection under sub-section (1), the arbitral proceedings shall be commenced within a period of ninety days from the date of such order or within such further time as the Court may determine. (3) Once the arbitral tribunal has been constituted, the Court shall not entertain an application under sub-section (1), unless the Court finds that circumstances exist which may not render the remedy provided under section 17 efficacious.”[[18]](#endnote-18)

“17. (1) A party may, during the arbitral proceedings or at any time after the making of the arbitral award but before it is enforced in accordance with section 36, apply to the arbitral tribunal—

1. for the appointment of a guardian for a minor or person of unsound mind for the purposes of arbitral proceedings; or
2. (ii) for an interim measure of protection in respect of any of the following matters, namely:— (a) the preservation, interim custody or sale of any goods which are the subject-matter of the arbitration agreement; (b) securing the amount in dispute in the arbitration; (c) the detention, preservation or inspection of any property or thing which is the subject-matter of the dispute in arbitration, or as to which any question may arise therein and authorising for any of the aforesaid purposes any person to enter upon any land or building in the possession of any party, or authorising any samples to be taken, or any observation to be made, or experiment to be tried, which may be necessary or expedient for the purpose of obtaining full information or evidence; (d) interim injunction or the appointment of a receiver; (e) such other interim measure of protection as may appear to the arbitral tribunal to be just and convenient, and the arbitral tribunal shall have the same power for making orders, as the court has for the purpose of, and in relation to, any proceedings before it.

(2) Subject to any orders passed in an appeal under section 37, any order issued by the arbitral tribunal under this section shall be deemed to be an order of the Court for all purposes and shall be enforceable under the Code of Civil Procedure, 1908, in the same manner as if it were an order of the Court.”[[19]](#endnote-19)

**Nature of Amendment**

Newly added proviso u/s 9 gives a condition that proceedings shall commence within a period of 90days from the date of interim order.The courts will be reserved from compelling an application for interim relief once arbitration has starts.An order of the arbitral tribunal approved u/s 17 giving interim measures will be imposed as if it was an order of the court. After the arbitral tribunal has been constituted No application for interim measure under Section 9 shall be entertained , unless the remedies under Section 17 have been rendered unproductive.

**Composition Of Arbitral Tribunal**

**Nature Of Amendment**

**Section -11**

The Ordinance of 2015 has replaced the terms “Chief Justice” with either “Supreme Court” or “High Court”[[20]](#endnote-20) The matter regarding the question of arbitration agreement only be considered by the court.Sub section 7 has been amended and no appeal with regard to appointment of arbitrator, will lie against the decision of the Supreme Court or High Court , including a Letters Patent Appeal and the high court is given power regarding the determination of fee payable to arbitrators and any application regarding appointment shall be disposed off within 60 days from the date of notice.

**Section -12**

12(1) – The amendment in this section clarify all the doubts on the independence and impartiality of the arbitrators which was not present in the earlier act. The arbitrator can easily approach in writing to the parties, why he should be appointed as an arbitrator and his ability to complete the work of arbitration within a period of 12 months.

12(5) – The amendment in this section provides the automatic disqualification for the appointment of arbitrator if any of the grounds of the seventh schedule exist.

**Making Of Arbitral Award And Termination Of Proceedings**

**Nature Of Amendment**

**Section 29 (A)**

As per the amendment act, the award should be given within the time limit of 12 months for every arbitration seated in India and court can also grant the extension of award up to 6 months with the consent of the parties.

The arbitrators shall be terminated if the award is not made within the time limit and unless there shall be no sufficient ground for the delay. The court shall dispose of such application whose period has been extended, with in a period of 60 days from the date of the service of notice.

If courts find that there is unnecessary delay than the court can deduct 5% of the arbitrator’s fee of each month delay.

**Section 29 (B)**

The amendment in this section provides speedy resolution of dispute. In principle act there was no provision for speedy trail. In this amended section the dispute can be resolved without any oral hearing only when the parties have given consent in the writing and the dispute can be resolved by the written document and submissions.

**Section 31**

Section 31(7)(b) – The default rate of interest which was earlier 18% is changed to a rate of 2% higher than current rate of interest prevalent at date of award. Current rate of interest will be taken same as in interest Act 1978.[[21]](#footnote-1)

Section 31 (8) – Replacement of subsection (8) gives the cost of arbitration will be fixed by tribunal in accordance with Section 31-A. This was not described in the principle actr.

**Recourse Against Arbitral Award**

**Nature Of Amendment**

Section 34(2)(b) – The amendment was needed to narrow the scope of review of award by court as the amendment clarifies the denotation of the term public policy and it also adds that an award in breach to fundamental policy of India will be treated as an award in conflict with the public policy.

The principle act did not define the term public policy and the absence created a wider scope for courts to interpret the word Public policy as there was no guiding principal. However the definition of public policy is inserted as “fundamental policy of Indian law” has also opened doors for interpretation by court and accordingly it may also not accomplish the required goal.

**Enforcement Of Arbitral Award**

**Nature Of Amendment**

**Section 36** – This section has been amended to endow with a relief that except the court grants stay order on operation of award the award will not be rendered unenforceable additional the court has been given power to impose conditions as it may deems fit.

**Conclusion**

The arbitration and conciliation amendment act 2015 was aimed to reform the arbitration act and with the objective in resolving dispute with of minimum court interference. The amendment act has introduced fast track procedure to complete the arbitration proceeding expeditiously. It has also given flexibility to the Indian court for the relief in foreign arbitrations. It has also reduced the cost of the arbitration proceeding and also became very effective. The principle act didn't give Independence to the arbitrator bit after amendment there is a positive result in the Independence and control in the hands of the arbitrators. The amendment has very positive approach towards business growth in the International market and now the arbitration has finally become the best way to solve the dispute in India though some of the provisions which have been amended or added are still not efficient and not able to remove the previous problems but most of them have and this amendment had brought a positive change in the field of arbitration which is highly appreciated and encouraged as arbitration can become a way to resolve the problem of overburdened judiciary by resolving the dispute outside the court .

1. Press Information Bureau Government of India Ministry of Law & Justice , Pending Court Cases , 03-March-2016 17:22 IST, http://pib.nic.in/newsite/PrintRelease.aspx?relid=137291 [↑](#endnote-ref-1)
2. #   RAKESH DUBBUDU, *Fast Track Courts might help reduce Pendency in Courts – But are the Governments Interested?* ON OCTOBER 12, 2015, https://factly.in/fast-track-courts-in-india-might-help-reduce-pendency-in-courts-but-are-the-governments-interested/

 [↑](#endnote-ref-2)
3. YATISH YADAV , Express News Service, Published: 24th January 2017 09:16 PM ,  *Judicial reform PM Modi's priority in 2017, ideas sought to reduce case pendency,* *http://www.newindianexpress.com/nation/2017/jan/24/judicial-reform-pm-modis-priority-in-2017-ideas-sought-to-reduce-case-pendency-1563098--1.html* [↑](#endnote-ref-3)
4. *id* [↑](#endnote-ref-4)
5. The Law and Practice of Arbitration and Conciliation, OP Malhotra, second edition, 2006 [↑](#endnote-ref-5)
6. The Arbitration & Conciliation Act with Alternative Dispute Resolution, OP Tewari, 4th Edition (Reprint 2007) [↑](#endnote-ref-6)
7. Arbitration and Conciliation Act 1996, S 2(2)(e) [↑](#endnote-ref-7)
8. Amendment 2015, S 2(e) [↑](#endnote-ref-8)
9. Amendment 2015, S 2(1)(f) [↑](#endnote-ref-9)
10. Amendment 2015 – S- 2(1)(f) [↑](#endnote-ref-10)
11. Arbitration and conciliation Act 1996 ,S- 2(2) [↑](#endnote-ref-11)
12. Amendment 2015,S- 2(2) [↑](#endnote-ref-12)
13. Bharat Aluminium Company & Ors. V Kaiser Aluminium Technical Service, Inc*;* 2012 (9) SCC 552 [↑](#endnote-ref-13)
14. Arbitration and Conciliation Act 1996, S -7 [↑](#endnote-ref-14)
15. Amendment 2015 , S-7 [↑](#endnote-ref-15)
16. Arbitration and Conciliation Act 1996 – S-8 [↑](#endnote-ref-16)
17. Amendment 2015 – S- 8 [↑](#endnote-ref-17)
18. Amendment 2015 – s- 9 [↑](#endnote-ref-18)
19. Amendment 2015 – S-17 [↑](#endnote-ref-19)
20. SBP & Co v Patel Engineering Ltd (2005) 8 SCC 618 [↑](#endnote-ref-20)
21. Section 2(b) of the Interest Act, 1978 [↑](#footnote-ref-1)