



A STUDY ON ARBITRATION COST VS LITIGATION COST IN INDIA

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Abstract

Arbitration is one of the forms of Alternative Dispute Resolution (ADR) mechanisms. ADR is a method where disputes are resolved outside the court. Section 2 (1(a)) The Arbitration and Conciliation Act defines “arbitration” as any arbitration, whether administered by a permanent arbitral institution. In Arbitration, where the parties agree to resolve their dispute through a neutral third party called an arbitrator, there should be a clause in the contract stating that any dispute shall be resolved by ADR, or an arbitration agreement must be executed by the parties. The arbitrator's decision, known as an award, has the effect of a judgment given by a judge of a court. On the other hand, there is the traditional litigation, where it starts when the contract is breached by one party and the other party institutes a suit by sending a legal notice to the other party, then the defendant will file a written statement and then follows in the context of the Indian Civil Procedure Code (CPC), "costs" refer to expenses incurred during litigation, primarily governed by Sections 35. The cost for arbitration is given in Schedule 4 in the Arbitration and Conciliation Act. Litigation fees are determined by jurisdiction and are given under the Court Fees Act 1870. The objective of this study is to examine the comparative cost structures of arbitration and litigation in India, analysing statutory provisions, fee slabs, and empirical data from recent cases.

Keywords – Arbitration, Cost, Litigation, ADR, Court.

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1. Review of Literature

“Analysis: Mediation vs. Arbitration vs. Litigation” by Ayushi Singh (Hein Online)

In this research paper, the author Ayushi Singh highlights how litigation is growing in India and explains the differences between the 2 main forms of ADR Mechanisms – Arbitration, mediation, and litigation. The Author Also says that Indian courts are overburdened and people are choosing ADR Mechanisms Nowadays. In conclusion, the author says that mediation is the most flexible, friendly, and effective way of solving disputes, where both parties can win, while litigation and arbitration often have one who wins and the other party loses. It helps reduce the burden of courts and saves money and time of parties and the court, and promotes harmony in society.¹

Arbitration: A Streamlined Alternative to Court Litigation, by author Sumith Kumar (LawFoyer International Journal of Doctrinal Legal Research, 2024), explains how arbitration has become an effective substitute for litigation. The author also spoke about amendments in the Arbitration and Conciliation Act 1996, and spoke about the future trends like online dispute Resolution, use of AI.

He concludes the paper saying that there are some challenges in arbitration, such as high cost and limited judicial review. Ultimately, he says that arbitration represents the future of ADR, which is a faster, fairer, and more adaptable system that meets the needs of a globalised world better than conventional court litigation²

2. Introduction

ADR is a mechanism through which the parties can solve their disputes outside court. Alternative dispute resolution has been around since ancient times, long before the advent of law courts. In the days of yore, justice was rendered by village heads of a particular community. Our panchayat was an example of ADR. There are 5 different forms of ADR mechanisms, one of which is Arbitration.

Section 2(1(a)) of the Arbitration and Conciliation Act defines “arbitration” as any arbitration, whether

¹ Analysis :Mediation vs Arbitration vs Litigation by Ayushi singh

² Arbitration: A Streamlined Alternative to Court Litigation, by author Sumith Kumar (LawFoyer International Journal of Doctrinal Legal Research, 2024)

administered by a permanent arbitral institution. Arbitration is a process where parties solve their dispute through a neutral third party called an arbitrator. Arbitration only looks at commercial disputes ³

For parties to resolve disputes between themselves according to section 7 of the act, they should have an arbitration agreement, or there should be an arbitration clause mentioned in the agreement, and such an agreement should be signed by both parties; only then can arbitration take place. ⁴ In India, Arbitration has 2 systems –

a) Ad hoc Process

The parties themselves can appoint an arbitrator of their choice, or each party can choose one arbitrator each, too, if they are still not happy, they can appoint the 3rd arbitrator. The cost of the Ad hoc process is given in Schedule 4 of the Arbitration and Conciliation Act, 1996.

b) Institutional Arbitration

Institutional arbitration is a type of arbitration where a permanent arbitral institution takes care of organizing and managing the entire dispute resolution process. Instead of the parties having to handle everything themselves, the institution provides a clear set of rules, timelines, and support to make the process smoother and more efficient. In India, institutions like the Delhi International Arbitration Centre (DIAC), Mumbai Centre for International Arbitration (MCIA), and Indian Council of Arbitration (ICA) play this role. They have experienced arbitrators on their panels, help appoint neutral arbitrators, and manage the procedural and administrative aspects, so the parties can focus on presenting their case.

The entire process in arbitration should be completed within 1 year. The fee is collected for 1 year if the process is completed within 1 year; still, the parties are liable to pay the entire fee.

Litigation

Litigation is a traditional way of solving a dispute in India, which involves a formal judicial process where parties are present before the court of law. The Civil Procedure Code 1908 and other acts provide a framework work for civil litigation, and sometimes, when parties cannot reach an amicable settlement

³ Arbitration and conciliation act 1996

⁴ Arbitration and conciliation act 1996

through arbitration, mediation or negotiation, they can also settle through litigation. It ensures that justice is delivered according to statutory provisions, principles of natural justice, and judicial precedent.

3. Methodology

This research adopts a comparative analytical approach, using -

Statutory Analysis- Reviewing the Arbitration and Conciliation Act, 1996 (Schedules II, III, IV) and the Court Fees Act, 1870.

Case Analysis- Examining recent arbitration awards and litigation outcomes to estimate average costs.

4. Cost in Arbitration Proceedings

Arbitration is widely regarded as a flexible and efficient mechanism for dispute resolution outside the courts, but it is not free of cost. According to 31 A of the Arbitration and Conciliation Act 1996, the arbitrator or tribunal shall have discretion to determine whether cost is payable by one party or another, and when such cost shall be paid. Here, cost means the fees and expenses for arbitrator, courts, and witnesses, legal fees and expenses, any administration fees of the institution supervising the arbitration, and any expenses incurred in connection with arbitral or court proceedings and the arbitral award.⁵

In determining the costs, the Court or arbitral tribunal shall have regard to all the circumstances, including the conduct of all the parties, whether a party has succeeded partly in the case, whether the party had made a frivolous counterclaim leading to delay in the disposal of the arbitral proceeding, and whether any reasonable offer to settle the dispute is made by a party and refused by the other party, costs from or until a certain date only, costs incurred before proceedings have begun, costs relating to particular steps taken in the proceedings, costs relating only to a distinct part of the proceedings, interest on costs from or until a certain date.

An agreement which has the effect that a party is to pay the whole or part of the costs of the arbitration in any event shall be only valid if such agreement is made after the dispute in question has arisen. The Court or arbitral tribunal may make any order under this section, including the order that a party shall pay a

⁵ Arbitration and conciliation act 1996

proportion of another party’s costs, or a stated amount in respect of another party’s costs. Section 11 (3A) The supreme court and high court shall have the power to designate, from time to time, those who have been graded by the council under section 43-I.⁶

In the High Court where no graded arbitral institutions are available, the chief justice of the concerned high court may maintain a panel of arbitrators for discharging the functions and duties of an arbitral institution, and any reference to the arbitral institution shall be deemed to be an arbitral institution. Arbitrators appointed by the parties are entitled to the fees specified under the 4th schedule of the Arbitration and Conciliation Act. Till 2019, there was no fixed amount for arbitration. After the 2019 amendment to the Arbitration & Conciliation Act 1996, they set a fee. This is specified in the 4th Schedule of the Arbitration and Conciliation Act.

SL .No	SUM IN DISPUTE	MODEL FEE
1.	Up to Rs 50,00,000	Rs 45,000
2.	Above Rs 5,00,000 up to Rs 20,00,000	Rs 45,000+ 3.5 per cent of the claim amount over and Rs 5,00,000
3.	Above RS 20,00,000 Up to 1,00,00,000	Rs 97,500 +3 per cent of the claim amount over and above Rs 20,00,00
4.	Above Rs 1,00,00,000 up to Rs 10,00,00,000	Rs 3,37,500 + per cent of the claim amount over and above Rs 1,00,00.000
5.	Above Rs 10,00,00,000 and up to Rs 20,00,000	Rs 12,37,500 +0.75 per cent of the claim amount over and above Rs 20,00,00,000 with a ceiling of Rs 30,00,00
6.	Above Rs 2,00,00,000	Rs 19,87,500 + 0.5 per cent of the claim amount over and above Rs 20,00,00,000 with a ceiling of Rs 30,00,000

⁶ Arbitration and conciliation act 1996

In case a sole arbitrator, he shall be entitled to an additional amount of 25% on the fee payable on the above.

The cost of the arbitration proceedings is not limited here only to arbitrator fees; some additional costs can be incurred by the parties, such as lawyers' fees, as the parties may appoint a counsel for their side, the counsel may charge a fee depending on case complexity of the case complexity and their experience, as the fees for lawyers are not fixed.

Certain arbitration agreements and arbitral awards attract stamp duty under the Indian Stamp Act 1899 or state laws. Stamp duty on the arbitration agreement will cost approximately Rs 100- 500, depending on the state. There may be a cost incurred, such as hiring a venue for arbitration proceedings, travelling costs, Accommodation for arbitration if out of station, etc, Refreshments costs, and some miscellaneous items, such as paperwork, documents, experts' fees if they appoint any experts or witnesses.

In institutional arbitration, fees are fixed by the respective institution, Like Delhi International Arbitration Centre (DIAC) – Schedule of Fees under DIAC Arbitration Rules, 2020, and Mumbai Centre for International Arbitration (MCIA) – Fee Schedule based on claim amount and hourly rates, where arbitrators can be chosen by parties from the empanel list.

5. Litigation Cost

Litigation cost is governed by the Court Fees Act 1870, and each state has a separate court fee act too. The Court Fees Act 1870 is central, but certain states, such as Karnataka, have their own legislation, the Karnataka Court Fees and Suits Valuation Act 1958, to govern the court fees. Section 35 deals with 'COST', meaning such expenses as court, processing fees, who has to pay them, etc.

The court will have the discretion to decide who should pay the costs of a case, etc, but this power is not absolute. The Court's power to award costs is not unlimited; it must follow rules made under the CPC (for example, High Court or State amendments) and any other law in force⁷. Example: Court Fee Acts.

⁷ Code of civil procedure code 1908

The normal rule is that the cost should be paid by the losing party, but the court can deviate from this rule if both the party is in fault or a genuine legal issue is raised. However, if the court does this, it must give written reasons to ensure transparency. This was added by the 2002 Amendment Act (Act 22 of 2002)

Section 35 of the CPC says that for any commercial dispute, the courts have the discretion to determine whether the cost is paid by one party or another, and the quantum of those costs to explain 'cost' to include some legal expenses. The parties will appoint an advocate for them; they should also pay advocate fees, which may depend on the complexity of the case and the advocate's experience. Some senior advocates charge a high witness expense incurred, as well as other expenses required for court proceedings. The court will have the discretion to decide who should pay the costs of a case, but this power is not absolute.

Illustration: If A sues B for ₹10 lakh, claiming breach of contract. The Court finds B guilty and decrees in favour of A.

Then, applying Section 35: "Costs to follow the event — Defendant shall pay the costs of the suit to the Plaintiff." If the Court decides otherwise, it must write: "Each party to bear its own costs because both contributed to the delay in proceedings."

Conclusion

In conclusion, I would like to conclude my paper by saying that Arbitration Ad hoc process is expensive as it involves arbitrator charges even if the charges are fixed in the 4th schedule arbitrator doesn't need to only charge according to that as schedule only acts as the guidelines for the fee structure additional charges such as lawyer fees, venue fees, arbitrator travel and refreshments charges, paper charges etc, but institutional arbitrator is comparatively cheaper as it is similar to court charges as fees are already fixed and there no venue expenses or arbitrator travel expenses etc. On the other hand, litigation is comparatively cheaper to arbitration Ad hoc process, as it involves a minimal court fee as prescribed in the Court Fees Act 1870 or other state court fees statutes, and there no fees to be paid to the judge unlike the arbitrator or any accommodation or travel cost or refreshments to be paid to judge, as he is a public servant and most of the advocates in lower court charges a reasonable amount as their fees, but only drawback is if the litigation prolongs for many years it may be expensive. In the case of *ONGC v. Afcons Gunanusa JV* (2022) 7 SCC 497, the Court held that the fee structure under the Fourth Schedule of the Arbitration and

Conciliation Act serves as a guiding framework to maintain reasonableness in cost, but the arbitrator can charge more than the fees mentioned in the schedule, too.⁸

In the case *Union of India v. Singh Builders Syndicate (2009) 4 SCC 523*, the Supreme Court highlighted the rising concern of high arbitrator fees and observed that arbitration should not become a “luxury available only to the rich,” underscoring the need to regulate costs.⁹

⁸ *ONGC v. Afcons Gunanusa JV (2022) 7 SCC 497*

⁹ *Union of India v. Singh Builders Syndicate (2009) 4 SCC 523*