INSTITUTIONALISATION OF ARBITRATION: A NEED OF ADR IN INDIA

*Akshay Verma**

The legal system of India is the typical Anglo-Saxon method of dispute settlement, wherein issues are settled between the parties, against each other in a versus mode. Inspired by the Colonial direction, this system is better known as the adversarial system of law wherein both parties fight it out in front of a neutral judge who sits as the adjudicator, ensuring that the rules are strictly followed, and the successful contestant is declared victorious. Though the belief behind such a system is that the truth shall emerge by the earnest contestations of such adverse opinions and contentions, yet, it is not a secret today that such adversarial system is plagued with lack of efficiency and want of expeditious settlement of disputes.

It is estimated that a total of 27 million cases are still pending in various courts of India. Of them, 61,344 cases are pending before the Supreme Court of India [1] (as of 30.04.2018); 38,91,076 cases are pending in the High Courts as reported in The Hindustan Times dated 15.11.2016; and a whopping 2,30,79,723 cases are pending before the lower courts[2]. No wonder then that Justice VV Rao of the High Court of Andhra Pradesh in 2010 said that the Indian Judiciary would need another 320 years to clear millions of these unresolved cases. Furthermore, India has been ranked 130 of 189 countries by the World Bank in its prestigious Ease of Doing Business 2018 ratings which clearly indicates the huge impact which the dispute resolution process has on its economy and its global image specially in terms of the ease of doing business by private companies in India[3].

The statistics stated above clearly indicate the need to usher reforms to expedite the dispute resolution process and devise strong mechanisms promoting out of court dispute settlements. Popular practices in India in this regard include, arbitration, negotiations, mediation and conciliation. In this present paper, the researcher focusses on arbitration, which is the first and internationally, the largest mode of resolving disputes.

Traditionally, arbitration has been regarded as an alternative to litigation for disputes regarding commercial matters. The disputing parties under this mechanism mutually choose a neutral third party or agency which renders a binding decision, thereby facilitating the resolution of disputes. Arbitration, like judicial proceedings too follows an adversarial design, wherein parties have no right to participate in the dispute resolution and the decision of the third party stands final. Yet, it is comparatively less formal in nature as compared to the traditional judicial mechanism. Arbitration is of generally two types namely ad-hoc or institutional.

---

* The author is Visiting Faculty, Law Centre II, Faculty of Law, University if Delhi. He can be contacted at akshaylaw1@gmail.com.

[1] "Summary: Types of Matters in Supreme Court of India", *available at:* http://supremecourtofindia.nic.in/p_stat/pm01042017.pdf (last visited on Sept. 5,2018)

[2] "Hindustan Times, Report: 27 million cases pending in Courts, 4500 benches empty", *available at*: http://www.hindustantimes.com/india-news/waiting-for-justice-27-million-cases-pending-in-courts-4500-benches-empty/story-H0EsAx4gW2EHPRtl1ddzIN.html (last visited on Sept. 5, 2018).

[3] "Hindustan Times, Report: 27 million cases pending in Courts, 4500 benches empty", *available at*: http://www.hindustantimes.com/india-news/waiting-for-justice-27-million-cases-pending-in-courts-4500-benches-empty/story-H0EsAx4gW2EHPRtl1ddzIN.html (last visited on Sept. 5, 2018).

Given the increasing use of arbitration world-wide, various new institutions of arbitration have emerged for resolving commercial disputes in both international and domestic realms. Institutional arbitration finds contractual mention in the form of arbitration clauses which determine the arbitral organization. The very fact that arbitration clauses have become a regular feature of standard contracts shows the popularity of arbitration as an alternative dispute resolution mechanism promoted by these institutions.

The Law Commission of India in its 246th Report,[4] chaired by Justice AP Shah constituted an expert committee to work on the "Amendment to the Arbitration and Conciliation Act (in short ACA), 1996,"thereby suggesting major changes to the ACA of 1996. The aim of the report was to find an appropriate balance between judicial intervention and judicial restraint and talked about various issues such as tackling delay in courts and arbitral tribunals along with enforcement of foreign awards, betterment in conduct of arbitral proceedings and encouraging the growth of arbitral institutions.

In its landmark decision in *F.C.I.* v. *Joginderpal Mohinderpal*[5], the Supreme Court at para. 7 observed that the law of arbitration should be simple and devoid of too many technicalities, yet it should be sensitive towards the reality of the situation. It should imbibe the ideals of fair play and justice and compel the obedience of the arbitrator to such norms and processes which shall boost the confidence by not only doing justice, but also by making the parties believe that justice appears to have been done.

However, a review of the rules of arbitral institutions reveal that weighty procedures from traditional litigation are still generally encouraged and prescribed by arbitrators who mostly include former judges who have an obvious familiarity with these procedures. This comes at the cost of efficient low-cost procedures, examples of which include, e-filing, e-discovery, hearings by teleconference/ video conference, etc.[6]Collaboration with leading international arbitral institutions can be an effective solution to this problem yet, it is the very absence of such collaborations which has prevented arbitration from gaining international recognition. It is sad to note that till date no such collaborations exist apart from those associated with Indian Council of Arbitration and The Nani Palkhivala Arbitration Centre.

Certain common grounds come to light when the reasons behind the success of leading arbitral institutions are examined. These include strong support from the government or the business community, location of these arbitration centers and other generic perks attached with arbitration procedure such as party-friendly rules, skilled panel of arbitrators, etc.

On September 17, 2017 at Karnawati University's United World School of Law, Justice Chamaleshwar echoed that ADR can never succeed until different and improved methods of implementation of ADR in legal services are not adopted. Moreover, it is no point to challenge the adjudication once again on similar rules on which regular appeals are treated.

India still needs to do a lot more to fulfill its ambitions in the field of Arbitration. One way to do this is to bring about a shift from ad-hoc arbitration to institutional arbitration. The ACA of 1996 was enacted for the very purpose of bringing quick and cost-effective

---

[4] Government of India, Report No. 246 Published in August 2014, *available at:* http://lawcommissionofindia.nic.in/reports/Report246.pdf, (last visited on Aug. 25, 2018).

[5](1989) 2 SCC 347.

[6]See for instance, the Delhi International Arbitration Centre (DAC) (Arbitration Proceedings) Rules.

commercial dispute resolution mechanism in India. Even though arbitration enjoys primacy in resolution of commercial disputes in India, yet it is still evolving and has not yet reached the required stage to match the needs associated with commercial growth. Even though Indian courts do observe restraint in interfering with arbitral awards despite the power of judicial review,[7] however there are still certain inherent problems which hamper the working of successful arbitration in India. These include the need to amend the provisions of existing law to changing the mindset of the stakeholders involved such as parties, judges and lawyers.

The quality of Arbitration institutions varies greatly, having a direct impact on the efficiency and pace of the arbitration process, along with having an impact on the quality of the resulting award. Therefore, the formulation of a regulatory body at the national level shall involve the formulation of certain minimum standards for arbitration institutions in India. These may include, governance structure, rules of arbitration, data management, infrastructural requirements etc., for arbitral institutions in India.

The quality of the existing arbitral institutions can also be greatly improved by creating a specialist Arbitration Bar which would ensure that member lawyers are able to dedicate more time and resources singularly to arbitration alone. This would further promote its use as an alternative dispute resolution mechanism. Interaction with existing international arbitration institutions may open the doors for better understanding and adoption of the best methods of training to create a pool of lawyers especially dedicated to arbitration. Further measures would include strengthening of teaching of arbitration law in law school curriculums and involving professional institutions to impart training and education to lawyers.

The Arbitration and Conciliation Act, 1996 saw substantive changes under the 2015 Amendments with a view to expedite the arbitration process and make it more efficacious along with improving India's reputation as a seat of arbitration. However, more needs to be done in this regard such as:

(i) "Clarification of the ambiguities brought by the 2015 Amendments which have led to conflicting judicial interpretations, for instance- the prospective applicability of the 2015 Amendments;
(ii) addressing the concerns thrown up by the 2015 Amendments, particularly relating to the provision of imposing strict timelines for the conduct of arbitration proceedings;[8] and
(iii) bringing Indian legislation in line with international practices, including legal provisions concerning the following:
    1. Funding by third party
    2. Immunity to arbitrators
    3. Confidentiality of arbitration proceedings and related court proceedings
    4. Indian parties having a foreign seat of arbitration
    5. Indemnity costs for court proceedings intended to frustrate arbitration proceedings
    6. Tightening grounds for challenge to enforcement of foreign arbitral awards."[9]

[7] *McDermott International Inc*. v. *Burn Standard Co. Ltd*, 2006 11 SCC 181.
[8] S. 29A, Arbitration and Conciliation Act (Amendments), 2015.
[9] Legalaffairs.gov.in

The cabinet has recently approved the Arbitration and Conciliation (Amendment) Bill, 2018 which aims to make several changes to laws of arbitration. The amendments are inspired by the report formulated by the Justice B.N. Srikrishna led Committee which recommended the formations of council to set benchmarks and grade arbitral institutions of India. However, several important recommendations for development of arbitration process in India have been dropped such as those regarding appointment of eminent oversees practitioner nominated by Attorney General of India, on the governing body of the council to facilitate the adoption of internationally sound practices. Moreover, contrary to the recommendations of the committee, the governing body of the Arbitration Council of India would only include those who are nominated by the government and members of ministries.

The above-mentioned Arbitration and Conciliation (Amendment) Bill 2018, further introduces the concept of an autonomous body called Arbitration Council of India (hereinafter referred to as ACI). The main aim of this body is to frame policies to grade institutions; accrediting arbitrators; look after the establishment, operation and maintenance of uniform professional standards; maintaining depository of arbitral awards made in India and abroad. The bill further provides that on accounting of failure by parties to choose an arbitrator, the Supreme court would direct the parties to Institutional Arbitrations who shall chose the arbitrator(s). Furthermore, in case of International Commercial Arbitration, Institution will be designated by Supreme Court. For the Domestic Institutional Arbitration, the High Court would designate the Institution. If there is no designated Institutional Arbitration, then Chief Justice of High Court will provide for the panel of Arbitrators to perform functions of an Arbitral Tribunal. The proposed ACI shall include as its members, a chairperson, who can be a judge of the Supreme Court or High Court or Chief Justice of High Court or an eminent person; and other members who can include eminent arbitrator practitioners, academicians with expert knowledge or government appointees.

The presence of judges or government appointees in the panel as mentioned above starkly reveal not only judicial interference but also interference by the executive which might again hamper the credibility of the arbitration proceedings.

The examples of Singapore and Hong Kong prove how legislative and governmental support play a crucial role in flourishing of the arbitral institutions. The case of Singapore clearly demonstrates the way in which legislative interventions have ensured Singapore's phenomenal rise as the seat for arbitration, leading to growth in the SIAC caseload. In the Indian context this example could indicate that instead placing excessive reliance on the courts to remove via case-laws, the ambiguities in the legislation, the legislature can be pro-active to ensure that ACA stays up-to-date with developments in international arbitration law and practice. The government can also give incentives for developing physical infrastructure to promote the growth of institutional arbitration. Moreover, the government may further boost the use of institutional arbitration by ensuring that all commercial contracts being entered by the government provide for institutional arbitration in an Indian institution, above a certain value.

The creation of an international arbitration culture requires efforts from the government to disseminate information regarding benefits of alternative dispute resolution mechanism which would generate respect for arbitration amongst the lawyers, judges and national courts. A major impediment in enforcing foreign awards around the globe, despite favorable provisions in the New York Convention and Geneva Convention, is thus not of a legal nature but is due to the lack of awareness regarding the benefits of arbitration and of its true consensual nature amongst the lawyers and judges who are amongst its major stakeholders. The confidentiality requirements of ADR too pose their own sets of problems.

The 2015 Amendment though provides for confidentiality of proceedings yet in certain situations they do allow for the publication of the arbitral award which may be disliked by the parties involved.

The reputation and prestige attached to institutional arbitration is one of its biggest strengths. Arbitral awards by well-known institutions such as the ICC is widely perceived to have favorable chances of enforcement. This is so because, the courts so tasked with enforcement of these awards tend to be more accommodating, keeping in mind the reputation of the institution for running a well administered and supervised arbitration.

The rules of Institutional Arbitration are set out in a booklet which is incorporated by the disputing parties into their arbitration agreement when they agree to submit a dispute to arbitration as per the rules of named institutions. One of the principle advantages of the institutional arbitration is this automatic incorporation of the book of rules, which is generally mentioned in the institutional arbitration clause in the agreement between the parties. For instance, the bare-bones clause recommended by KCLRA, states that arbitration would be used to resolve any dispute, controversy or claim with respect to the contract or its breach, invalidity or termination thereof, in accordance with the Rules for Arbitration of the Regional Centre for Arbitration Kuala Lumpur. Clauses like these provide for the minimal yet essential elements required in all most all jurisdictions, for an enforceable arbitration clause and is further useful for those parties who are unable to get specialist advice. Moreover, another major advantage of such clause which states the rules and regulations regarding the appointment, conduct and administration of the arbitral tribunal and award, is that it would make arbitrating effective even in those cases when a party tries to drag its feet in the proceedings. These rules further provide for various factual situations which are possible to arise in arbitration and the contesting parties thus have the advantage of having with them, a set of tried and tested rules of arbitration.

The provision of trained staff further adds to the merits of institutional arbitration. This staff is generally tasked with ensuring the smoothness of the arbitral process and takes care of various aspects such as, appointment of the arbitration tribunal, advancement of payments with respect to expenses of arbitrator, keep track of time constraints, etc. If such staff is not present then the task of looking after these aspects falls on arbitral tribunal itself, which might create difficulties in administration of arbitral proceedings specially in case of international arbitration when sometimes the arbitrator is not a resident of the country of arbitration. Moreover, handing such administration work will run the risk of distracting the tribunal from its primary task of resolving disputes between parties.

Apart from administration, arbitration institutions like International chamber of Commerce (ICC) and International Court of Arbitration located in Paris (ICC Court), carefully scrutinize an award before its publication. This is done to ensure that the reasoning and content of the award takes notice of all claims and counterclaims made by parties. Moreover, they also check the adherence of the procedure to principles of due process. Furthermore, The ICC Court reviews the award on only procedural grounds and is not mandated to review the award on merits. This is done to ensure that there is non- interference with the tribunal's exclusive power in deciding the dispute in final instance. No such quality control measures exist in ad-hoc arbitration.

Speed is of the essence in all arbitrations, irrespective of them being institutional or ad-hoc in nature. Tight time periods are set in the arbitration procedure for the exchange of pleadings of the parties, the main hearing and the publication of the final award. These time limits generally aim to guide the tribunal and the parties to ensure the swift resolution of

disputes even though parties do get some freedom to adopt a more flexible time table and missing a deadline is not fatal.

Another important advantage of institutional arbitration is regarding the remuneration process. Most arbitral institutions have adopted mechanisms which determine the scale of remuneration and the money collected from the parties is paid to the tribunal without involving the arbitrators. This ensures material detachment of the arbitral tribunals up to some extent and further avoids discomfort to the parties and the tribunals in dealing with aspects relating to discussing and fixing the remuneration charges. This allows the tribunal to focus only on the substance of the case and not discuss matters personal to the parties.

Certain rules of institutional arbitration further provide for continuation of the proceedings ensuring that they do not stop short even where one party defaults during the arbitral procedure. For instance, article 21(2) of the ICC Rules gives the power to the tribunal to proceed with the hearing even if any of the party when summoned, fails to appear without providing valid excuse for the absence.

Further strengthening of institutional arbitration in India would require a change in the way arbitration is viewed in the country. Steps must be necessarily taken to transform existing mindsets favorably towards ADR mechanisms, including mediation. Measures to promote the popular use of these mechanisms in institutional mode must be considered.

Sincere efforts should be made by all stakeholders including arbitrators, judges, lawyers to bring about an attitudinal change towards arbitration. This necessarily involves the players in the proceedings to grasp the direction of the law in tandem with the will of the parties as set out in the arbitration clauses, and critically observe the dichotomy between litigation and arbitration. The need of the hour is to change the mindset with the aim of making the system more effective, attractive and functional.[10]

[10] Inaugural address by Justice Santosh N Hedge, Judge, Supreme Court of India, on Indian Council of Arbitration's National Conference on 'Arbitrating Commercial and Construction Contracts' held at Hotel Inter-Continental, New Delhi, December 6, 2003.

NOTES, COMMENTS AND OPINIONS

GLOBALIZED ECONOMIC WORLD: STRUCTURAL REFORMS OF INDIAN LEGAL PROFESSION AND EDUCATION

TSN Sastry[*]

The current phase of globalisation calls for sustainable economic standing of a nation to tinsel in the comity of nations. To build such a robust system, mere economic reforms without legal reforms cannot yield the desired results. India, as a major developing economy, urgently needs to undertake reforms in legal education and profession which interlinks with each other.

In spite of tinkering efforts of legal education by Bar Council of India (BCI), a number of inadequacies still hamper the quality of legal education which in turn has its own impact on the profession. To match with the global standards, curriculum, teaching, research patterns, profession and legal system need a refurbish with a multivalent thought. This calls for inquisitive diversity in legal curricula, profession, which in turn will strengthen justice delivery system with more accountability to society at large and could develop sustainable supporting systems to diversify economic aspirations of state and people to realise the objectives of right to development as a part of legal fabric.

To address the pitfalls of legal education, it needs to be free from BCI. A National Legal Academic and Research Authority with academicians, researchers, lawyers and judges with different wings needs to be established to regulate legal education and research, profession and to support legislature to strengthen legal system and judiciary to match with contemporary realities. The primary wing needs to redraft legal curriculum by involving professors across disciplines with multidisciplinary approach to focus on theoretical proposition with practical applicability than merely inculcating memorisation of codes and sections. At the same time, comparative perceptions of law, practical and theoretical disposition between legal systems, inter play between contemporary realities, public law, public policy; conflict of laws, techniques of court management with practical orientation coupled with research skills has to be imparted. A second wing needs to coordinate with BCI and judicial authorities to impart judicial discourse education and training at regular intervals. A third wing has to look after policy formulations with research orientation to assist the Legislature to draft laws in a simple and understandable perspective and to review the existing laws to weed out inadequacies and also assist the Executive in its legal business. Above all, an administrative liaison wing is necessary for smooth functioning of the body with an inclusive outlook to address any legal crisis.

In addition to the aforesaid, a restructure of judicial system is required. In short, the Supreme Court of India has to be the prime court to address only constitutional and nationally important matters. Two independent Supreme Courts of civil and criminal judicature should be established outside the national capital for clearing backlog and quick access to justice. A

[*] The Author is Vice Chancellor of Tamilnadu Ambedkar Law University, Chennai. He may be contacted at tsnsastry@gmail.com.