SHORTFALLS OF ARBITRATION IN INDIA

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Abstract

The former United States President Mr. Abraham Lincoln once stated "Discourage Litigation. Persuade your neighbors to compromise whenever you can. Point out to them how the nominal winner is often the real loser in fees and expenses and waste of time. As a peacemaker, the lawyer has a superior opportunity of being a good man. There will still be business enough". [1]

Today, almost the entire world has enacted several provisions concerning Alternative Disputes Resolution (hereinafter referred to as ADR) in its legislature. Yet we see a lopsided approach in its development. The growth of Arbitration in India was largely hindered until The Arbitration and Conciliation (Amendment) Act, 2015, and 2019 and it still lacks various elements to become an arbitration hub. Thus, this article would briefly focus on the primary aspects that are responsible for the impeded growth of arbitration in India, discussing it under four heads namely Assistance of the government and courts, irregularities while creating an arbitration agreement, legislative deficiencies, and empirical concerns.

Assistance of the government and the courts

Arbitration is practiced across the world since ancient times. Countries like the United States of America, France, Netherlands, England, and Switzerland had enacted several statutes dealing with arbitration right from the 16th and 17th centuries. This was the time when the governments were skeptical about ADR mechanism as it was considered to be a medium of compromise. It was only in the 20th century that the contemporary arbitration resurfaced, started gaining maximum impetus, and seemed the best fit owing to its flexible nature and reasonable time frame. The developed nations started realizing the importance of Arbitration due to the increasing pendency of cases in the courts and the delayed disposal of justice. England, France, and several other developed nations came up with new statutes that were amended as per the needs from time to time. The Netherlands made several new rules in support of arbitration by rendering the utmost autonomy to the arbitral tribunals. For instance, today there is no compulsory requirement of filing all the domestic arbitral awards in the courts of the Netherlands. The United States introduced the Pan American Union and took up the responsibility of creating awareness amongst people

regarding arbitration. The world leaders realized the need of redressing issues using ADR before knocking on the doors of the courts. Another nation that swiftly excelled in arbitration merely within the past twenty to thirty years in Singapore. According to The Queen Marry University of London International Arbitration Survey of 2018, Singapore is the most preferred seat for Arbitration in Asia and the third most preferred seat worldwide after London and Paris[2]. The factors like proactive government's action to establish and nurture dispute resolution, focusing on the commercial aspects and taking into consideration the commercial needs and having a forward-thinking approach embracing for experiencing further developments were considered to be the most important reasons behind the success of Singapore as the hub of International Arbitration[3].

On careful and detailed analysis, one would notice that one element that remains common for a nation to become a hub of international arbitration is the assistance from the government and the courts. Justice D.A Desai had rightly stated that "The Arbitration and Conciliation Act, 1940 would make the lawyers laugh and the legal philosophers weep". It took a lot of years for the Indian legislature to bring notable changes in the Act, some of which were brought with the 2015 and 2019 amendment. Despite this, we continue to witness the interference of the courts in the merits of the case in several instances. Moreover, the assistance that is received to date from the government and the courts lack consistency, making it one of the primary reasons for the stunted growth of arbitration in India.

Irregularities while creating an arbitration agreement

Before embarking on the legislative complexities it is necessary to rule out the errors that take place while drafting the commercial agreements. The drafting of a commercial agreement should be simple and smooth. It should include all the clauses that are required to make a clean and unambiguous agreement. Poor drafting of the arbitration clause is one of the major reasons for the added delay in arbitral proceedings. Often it has been observed that the law of contract (substantive law), the law of the seat (crucial law), and the laws of the arbitration agreement are not properly laid down. The law of the contract includes the laws based on which the contract is carried out, the same laws are used to determine the merits of the case, the law of the seat consists of the laws that command the proceedings and the law of the arbitration agreement decides the scope of the arbitral

tribunal. A frequent confusion is witnessed between the substantive laws and the crucial laws. In Quippo Construction Equipment Limited versus Janardhan Nariman Pvt. Limited [4] it was reaffirmed that the venue of arbitration is same as the seat of arbitration (at least in domestic arbitration) concerning the precedent judgment BGS SGS Soma JV versus NHPC Ltd[5]. The case was interpreted in the best possible way, as Janardhan Nariman Pvt. Limited did not object the award, which ultimately led to the waiver of its rights. But this does not necessarily aver that the situation would remain the same in every single case as the venue being different from the seat can be construed from Article 20(1) of the UNCITRAL model law that states that parties are free to agree on the place of arbitration failing which the arbitral tribunal considering the circumstances would determine the same. Hence, the argument about venue and seat of arbitration is to be dealt with from case to case basis making it essential to draft the agreement crisp and clear right at the onset to avoid the further hurdles that hamper the growth of arbitration in the country.

Legislative deficiencies

The Arbitration and Conciliation (Amendment) Act, 2019 that came into force did bring several notable changes by amending Section 11, Section 17, Section 45, Section 50 along with amendments in various other sections and also rectified few pitfalls that were encountered with the 2015 amendment, like in Section 23 and Section 29A more realistic time frames were set. The most significant change that was brought in with the 2019 amendment was establishing arbitral institutions. Since the inception of arbitration in India, it has mostly been practicing ad hoc form of arbitration, though both these forms have its own pros and cons, erecting arbitral institutions was the need of time as it would help to dispose of the issue within the set period by following the already established rules, by choosing eminent arbitration professionals from the panel and with its institutional assistance that would aid in administering the arbitral tribunal rather than rushing to the courts for every tiny barrier that arises amid the arbitral proceedings. However, these notable amendments cannot cloak the existing defects in the current framework. Section 11 (3-A) [6] states that the Supreme Court and the High Courts shall have the power to designate, arbitral institutions, which have been graded by the council under Section 43-I provided where the arbitral institution is not available, the Chief Justice of respective High Court would appoint an arbitrator from their maintained panel of arbitrators. Unfortunately, there is no concrete pattern designed or any specifications stated that

would solely act as the basis of grading an arbitral institution. Section 11 that deals with the appointment of the arbitrators is still not notified. Further, the insertion of Eight Schedule that deals with the qualifications and norms applicable to the arbitrator is only applicable to the arbitrators in India and remains silent on the arbitrators that are appointed from outside India. Section 42[7] which states that the arbitrator, arbitral institution and the parties to the arbitration agreement shall maintain confidentiality, except when its disclosure is mandatory while implementing and enforcing the award shows the rigidity of laws, as there cannot be a straitjacket formula when it comes to confidentiality. Several International Institutions are focusing on making the arbitral proceedings more transparent. For instance, the ICSID confidentiality and transparency rules and the UNCITRAL transparency rules do allow publishing the awards, allowing briefs from amicus curiae, and providing public access to the hearings. It is only in exceptional cases that total confidentiality is maintained. Furthermore, in BCCI versus Kochi Cricket Private Limited[8] it was stated that the pending petitions for the enforcement of an award under Section 36 could be applied retrospectively to the applications of setting aside of an award under Section 34. However, this judgment was overruled with Section 87[9] of the 2019 amendment stating that the amendments would only apply to the arbitral proceedings commenced on or after the 2015 amendment and the proceedings arising out of or about such arbitral proceedings meaning it would be prospective from 23rd October 2015. However, Section 87 was reversed in Hindustan Construction Company versus Union of India [10] restoring the judgment of BCCI versus Kochi Cricket Private Limited. Such instances portray the uncertainty and ambiguity existing while enacting laws by the legislature.

Empirical Concerns

To make India arbitration-friendly country it is necessary to pay heed to the empirical obstructions along with the legislative or procedural flaws. As per the law ministry data, India has only 19 Judges per 10 lakh people [11] and around 32.45 Million pending cases[12]. The arbitration in India is nowhere close to the original principles of arbitration and this is reflected from its skyrocketing expenses, an increasing amount of time taken, and delays in facilitating justice. Moreover, the participation of women and young practitioners as arbitration professionals is quite negligent. The majority of the times the arbitrators that are appointed are the retired judges of the High Courts or the Supreme

Court. To deal with matters expeditiously it is equally important to create new opportunities for the younger generations and induce some faith in them. India is rarely been thought of as the preferred seat as the parties are well aware of the sorry state of affairs due to its inordinate delays despite paying heavy costs and interference of the courts in the merits of the case. The principle of competence de la competence i.e. having jurisdiction to the extent of its cause is not as deeply rooted as it should have in our arbitral processes, for which one has to knock on the doors of the court each time to seek recourse.

Conclusion

By exploring the overall structure of the arbitration in India we certainly have to push ourselves hard to understand the true essence of arbitration and implement it accordingly. The current framework of arbitration laws would take too long for India to compete at the International level resulting in several economic losses. Thus, it is necessary to make policies, which are not only positive but also practical. Expedited arbitration should be regularized for the cases having less magnitude. The arbitral practices should not be restricted only to the commercial sector as we see today rather it should be normalized in every possible way. It should be utilized more and more for property matters, along with matters related to injury or compoundable offenses (except matters related to child rights, divorce, or crimes). Awareness should be created not only regarding arbitration but several other alternative dispute resolution mechanisms like mediation, conciliation, fact-finding, med-arb, construction adjudication, consumer adjudication, summary trials, etc. Many Institutes that are a Centre for International Arbitration provide additional facilities of mediation, conciliation, and fact-finding. Singapore has already initiated the Singapore Mediation Convention with a particular aspect of enforcing the decision given in mediation. A watch is to be kept on these changing trends around the world that would impact the field of arbitration. Considering the pandemic situation around the globe, flexibility and adaptability are to be maintained. Only when the change comes from the grassroots in all the relevant spheres, India would be called the hub of arbitration.

[1] The Collected Works of Abraham Lincoln
[2] Alvin Yeo SC, Chou Sean Yus & Lim Wei Lee – Wong Partnership LLP, The Asia-Pacific Arbitration Review 2020 – SINGAPORE, Global Arbitration Review, (May24, 2019), globalarbitrationreview.com
[3] Lewis Johnston, International: Lessons from Singapore, The Resolver: The Quarterly Magazine of The Chartered Institutes of Arbitrators, Volume 2020, Issue 3 (2020) pp. 26-27
[4] Quippo Construction Equipment Limited v. Janardhan Nariman Pvt. Limited, Civil Appeal No. 2378 of 2020, sci.gov.in
[5] SGS BGS Soma JV v. NHPC Ltd, Civil Appeal No. 9308 and 9309 of 2019, sci.gov.in
[6] The Arbitration and Conciliation (Amendment) Act, 2019, Bare Act, pg. (A-ii)/13
[7] The Arbitration and Conciliation (Amendment) Act, 2019, Bare Act, pg. (A-v)/36
[8] Board of Cricket Control in India v. Kochi Cricket Private Limited & Ors, Civil Appeal Nos. 2879-2880 of 2018, sci.gov.in & (2018) 6 SCC 287, scc online
[9] The Arbitration and Conciliation (Amendment) Act, 2019, Bare Act, pg. (A-ix), 51
[10] Hindustan Construction Company Limited & Anr v. Union of India & Ors, Writ Petition (Civil) No. 1074 of 2019, sci.gov.in
[11] India has 19 judges per 10 Lakh people: Data, The Economic Times, June 24, 2018
[12] 32.45 Million cases pending in India; 10% Over 10 years old: Justice Chandrachud shares NJDJ Statistics, livelaw.in, May 24, 2020