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ARBITRATION- AN OLD MAN'S CLUB?

AUTHORED BY - SEJAL CHAUDHARY

INTRODUCTION

The ever-developing globalized world with its increasing international trade and commerce has led to inevitable disputes and the urgent need to shift from traditional and conventional court systems to alternative methods of dispute resolution. Arbitration is one such majorly popular alternative dispute resolution mechanism.

The United Nations Commission on International Trade Law (UNICTRAL) in 1985, introduced the "Model Law" on International Commercial Arbitration. Inspired by the model, India adopted the Arbitration and Conciliation Act, of 1996, to check the overburdening of courts and establish arbitration as a cost-effective and time-efficient mechanism for the settlement of commercial disputes in the national and international spheres.

It is a process where two parties to a dispute resolve their conflict through the arbitrator, in an outside court process. It is a procedure in which the dispute is submitted by an agreement of parties to one or more arbitrators whose decision, rather "arbitration award" on the matter is binding.

APPOINTMENT OF ARBITRATOR

The process of arbitration gives the concerned parties the privilege to choose an arbitrator by mutual agreement. However, in case of failure by the parties to decide, Sec.11 of the Arbitration and Conciliation Act, 1996 empowers the Chief Justice of India and the Chief Justice of the State High Court, in case of international and domestic disputes, respectively, or such delegate as he may assign, to appoint an arbitrator.

While the legislation does not provide any specific qualification or mechanism to appoint the arbitrator, in reality, at most times, a specific group of people are preferred as arbitrators at the exclusion of others. A perusal of the appointments and the decisions of the courts regarding the

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same shows that it has practically been made a mandate by the courts to appoint retired judges and their former colleagues as arbitrators.

The Chief Justice of India, D.Y. Chandrachud, in February 2023, at an inaugural session in Delhi, addressed the growing concern of homogeneity in arbitration space and remarked it to resemble an "Old Boy's Club". According to the official roster of the Delhi International Arbitration Centre on 27th December 2023, the institute empanels around 397 retired judges as arbitrators, as opposed to around 250 advocates, 33 retired bureaucrats, 23 Chartered Accountants, 2 architects, and 2 professors.

INEFFICIENT MECHANISM AND ITS EFFECTS

This article attempts to shed light on the lack of transparency in the process of appointment of arbitrators under Section 11 of the 1996 Act. Badrinath Srinivasan in his article[1] studies and analyses the information received through filing RTI applications to the Supreme Court and High Courts. He addressed questions related to the methodology and qualifications considered by the courts to appoint an arbitrator. The Supreme Court and 10 High Courts responded to his applications, out of which only the High Court of Kerela and Calcutta maintained a list of relevant candidates for the job. He further lists down the problems associated with the appointment of retired judges as arbitrators:

1. *A huge fee is paid to a retired judge who functions as arbitrator.*
2. *The proceedings are generally held in star hotels which increases the overall cost of arbitration.*
3. *Inflexible arbitral proceedings which more or less mimics court proceedings.*
4. *Lack of technical knowledge leads to increased time in making them understand the technical aspects. Lack of technical knowledge at times may lead to faulty appreciation of a situation.*
5. *Long gaps between hearings, especially in cases of three-member arbitral tribunals where hearings are held once in three or more months.* (Srinivasan, 2014)

[1] Appointment of Arbitrators by the Designate under the Arbitration and Conciliation Act: A Critique

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Bibek Debroy[2] and Suparna Jain[3] have also, in their article, identified the heavy reliance on retired judges as arbitrators and how it affects the proceedings in two ways. Firstly, when judicial members act as arbitrators, the case acquires a rather languid pace, with traditional hierarchy taking precedence over the matter. Additionally, the exorbitant fees charged by the judges leave the parties to the dispute dissatisfied, giving a severe blow to the growth of arbitration in the country. They suggest fixing a lump sum fee for the arbitrators instead of per-hearing remunerations to be a solution to the problem.

Since the enactment of the 1996 act, the chief justices and their designates have consistently appointed retired judges alone as arbitrators. The practice of appointing retired judges has become so entrenched into the system that it has become extremely difficult for the parties to choose efficient, impartial arbitrators who are not retired judges or lawyers for that matter.

In its judgment in Union of India v. Singh Builders Syndicate (2009)4 SCC 523, the Supreme Court itself highlighted the high arbitrator fee acting as an impediment to the growth of arbitration in the country. The relevant paragraph of the judgment has been reproduced herein under:

> **20.** Another aspect referred to by the appellant, however requires serious consideration. When the arbitration is by a tribunal consisting of serving officers, the cost of arbitration is very low. On the other hand, the cost of arbitration can be high if the Arbitral Tribunal consists of retired Judge(s).
>
> **21.** When a retired Judge is appointed as arbitrator in place of serving officers, the Government is forced to bear the high cost of arbitration by way of private arbitrator's fee even though it had not consented for the appointment of such non-technical non-serving persons as arbitrator(s). There is no doubt a prevalent opinion that the cost of arbitration becomes very high in many cases where retired Judge(s) are arbitrators. The large number of sittings and charging of very high fees per sitting, with several add-ons, without any ceiling, have many a time resulted in the cost of arbitration approaching or even exceeding the amount involved in the dispute or the amount of the award.

[2] Member, Niti Aayog
[3] OSD, Niti Aayog

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It has been stated that arbitration has recently been particularly influenced by litigation procedures thus affecting the very nature of the arbitral system. (Nariman, 2000) emphasizes that 'international commercial arbitration has almost become indistinguishable from litigation, which it was at one time intended to supplant'. (Kerr, 1997) claims that international arbitration seems to have acquired 'the pejorative sobriquet of *Arbitrigation*' which signals large-scale judicialization of arbitration. In an anecdotal survey, an expert confirms that such a tendency prevails in India which emanates from the fact that most arbitrators are from the legal field- such as eminent lawyers and retired judges from the High Court and the Supreme Court.

NEED FOR DIVERSITY AND REFORM

The myth that only judges can be good and efficient arbitrators creates impediments and leads to the exclusion of the wider community of well-versed professionals and technicians of the industry including legitimate researchers, young practitioners, engineers, company secretaries, academicians, etc. The classical court procedure mindset of the judges has led to snail-paced work in arbitration which is defeating the main purpose of the enactment, thereby limiting the exposure and growth of the institution of arbitration.

Moreover, the dominance of judges has pushed the key element of the process, i.e. the technical nature of disputes to the sidelines. Individuals from diverse backgrounds may bring unique problem-solving methodologies and thinking patterns producing innovative solutions that a traditional legal perspective might not cover. The changing regulatory landscapes and technological and business advancement have underlined the need for a crucial understanding of the commerce industry and its shifts for expeditious and effective disposal of disputes. Professionals from non-legal backgrounds who understand the business context may be more adept at emphasizing the core issues at stake in complex commercial disputes, thereby enhancing the arbitration process by making it more attuned to the modern business world.

Diversity of views is a concept fundamental to a conflict resolution process for an unbiased outcome. The over or under-representation of a particular demographic of arbitrators is an issue of constant concern. A dense and homogenous community of arbitrators leads to a narrowly informed body with significant underrepresentation of women, as the gender imbalance in the judiciary naturally extends to arbitration.

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PriceWaterhouse Coopers (2006)[4] surveyed the main stakeholders in the arbitration practice which revealed the serious need for a wider pool of arbitrators with specialization or expertise in the subject matter of the dispute. The study proved that arbitrators with specific skills and experience in a particular area of practice were more likely to conduct proceedings expeditiously rendering satisfactory outcomes and resolutions.

A majority of the arbitrators today do not identify with the aggrieved parties on account of inadequate experience in the same work field as the workers who've come before them seeking justice. A diverse panel of arbitrators will create room for a wider range of perspectives thereby enhancing the credibility of the process in the eyes of the aggrieved.

CONCLUSION

Arbitration is a concept instituted to reduce the burden of traditional courts and dispose of commercial and technical disputes expeditiously with the aid of trained professionals. From senior legal experts to young practitioners, academicians, engineers, chartered accountants, and company secretaries, there is a wide array of choices now available to grace the arbitrator panel. To negate them at one stroke and refer cases to former judicial colleagues is violative of the fundamental principle of fairness. The over-reliance on retired judges as arbitrators is not just empirically questionable but also sets false normative expectations. As the country strives for the efficient and structured establishment of alternative modes of dispute resolution, it is about time to undergo a transformative journey and facilitate the creation of a more reliable and credible system.

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[4] Pricewaterhouse Coopers is a multinational consultancy firm which published a survey- Corporate Attitudes and Practices towards Arbitration in India in 2006.

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