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INSTITUTIONALIZED ARBITRATION: THE NEED OF THE HOUR

Authored by - Nihshank Upadhyay

ABSTRACT

Over the past ten years, India has made efforts to become the centre for arbitration. In order to establish New Delhi International Arbitration Centre (NDIAC) as a reliable institution for both domestic and international arbitrations, the Central Government first took control of ICADR through an ordinance and then through an enactment, namely the New Delhi International Arbitration Centre Act, 2019. (NDIAC Act). The Madras High Court recognised the Nani Palkhivala Arbitration Centre (NPAC) as an institution under Section 11(b) of the Act in 2005. The Delhi International Arbitration Centre (DIAC), which was annexed to the Delhi High Court in 2009, and the Society for Affordable Redressal of Disputes (SAROD), a joint initiative of the National Highways Authority of India and National Highway. The Gujarat High Court very recently opened its institute for arbitrators.

Despite the above-mentioned advancements, it is a well-known truth that ad hoc arbitration still predominates in India. Since the parties can select the dispute settlement process, ad hoc arbitrations are viewed as flexible. To establish the arbitration rules in this situation, the parties would need to put in more work, cooperate more, and have more knowledge. Ad hoc arbitration is supposed to be cost-effective because only the parties are responsible for covering the costs of the arbitrators, attorneys' fees, and arbitral expenses. Contrary to popular opinion, in this paper, I argue that India needs to transition from an ad hoc to an institutionalized form of arbitration as institutionalized arbitration stands as the need of the hour.

KEYWORDS : Institutionalized, Ad hoc, BN Srikrishna committee report, arbitration

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METHODOLOGY

It is a fact that India is highly reliant on ad hoc arbitration today and as an inquisitor one has to rely on the practices prevalent in other countries to demonstrate the benefits of institutionalized arbitration in actual practice. Provisions of the arbitration and conciliation act have been used to substantiate the arguments made concerning judicial intervention in Indian arbitration. The BN Srikrishna committee report[1] is heavily used in the study while analysing the suggestions made in light of institutionalised arbitration. The paper also relies on articles from jstor for facts and comprehension of key concepts. The associational approach has made full use of the different categories of arbitration, especially while making comparisons between the Adhoc and institutionalized arbitration. The analytical method is based on a probabilistic approach. It suggests that one occurrence may occur more frequently than the other event. To get as close to the truth as feasible, the principle of parsimony has been used.

INTRODUCTION

Institutionalized arbitration[2] is understood as a process wherein an institution is chosen to oversee the arbitration process completely. In case a dispute arises, the arbitration agreement provides for the selection of an arbitral institution. The parties are required to make a written submission to the institution. The institution then appoints a panel of arbitrators, and the regulations of the institution are upheld and obeyed throughout the proceedings. Most institutions have their own set of guidelines, but when they don't, UNICTRAL standards are observed. The selection of arbitrators is typically dependent on the dispute's subject matter.

WHY INSTITUTIONAL ARBITRATION?

Institutional arbitration offers certainty concerning procedure and administration. The parties get the benefit of relying on a tried and tested method. Article 21 (2) of the ICC rules states that if one of the parties fails to appear for the proceeding and cannot give a reasonable explanation for the same, then the tribunal shall go ahead with the proceedings. Even section 14 of the New Delhi International Arbitration Centre mentions the significance of laying down

[1] Ganguli, Amal K. "NEW TREND IN THE LAW OF ARBITRATION IN INDIA." *Journal of the Indian Law Institute* 60, no. 3 (2018): 249–81. https://www.jstor.org/stable/26826641.

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the parameters for the panels of accredited arbitrators, conciliators, and mediators. For example, in the case of MCIA, they are alone empowered to appoint arbitrators. The party-appointed arbitrators are also subject to the discretion of the institution and its council. Institutionalized arbitration also offers the benefit of active professional administration service. To ensure the smooth running of the proceedings they offer supervision and monitoring of the arbitration proceedings.

ADHOC VS INSTITUTIONAL ARBITRATION

There are two sorts of arbitration: institutionalised and ad hoc[3]. An organisation like the ICC, LCIA, or DIFC does not oversee ad hoc arbitration. The parties must agree on every detail of the arbitration. This covers the selection and method of appointing the arbitral tribunal, the law that will apply, how the arbitration will be conducted, and administrative assistance provided without the need for an arbitral institution. The fact that the additional expenses do not have to be paid to the arbitral institution gives the impression that it is a well-liked option. Arbitration in India is incontrovertibly linked to ad hoc arbitration.

The perception is a far cry from the reality[4]. Ad hoc arbitration may be less expensive for the parties at the outset and go more quickly. Ad hoc arbitration, though, has been complicated by drawn-out legal processes in India. In consequence, arbitration fees go up as a result. The primary goal of the establishment of arbitration in the first place was to promote a less expensive and more expeditious alternative to going to court to resolve disputes. The partner of Nitish Desai and associates[5], Vyaspak Deshai, noted that arbitration proceedings can bring finality to a significant degree. Interference with arbitral awards is only permitted in certain circumstances and must follow the rules outlined in Section 34 of the Arbitration Act. The entire argument is that if arbitration starts to resemble the courts, its very foundation would start to crumble. That is precisely what is happening with the additional time and cost.

It is important to remember that, in the event that a dispute arises and the parties decide to use ad hoc arbitration, collaboration between the two parties becomes essential. There is no one-size-fits-all solution in this situation, therefore it follows that cooperation between the

[3] Goekjian, Samuel V. "The Conduct of International Arbitration." *Lawyer of the Americas* 11, no. 2/3 (1979): 409–74. http://www.jstor.org/stable/40175851.
[4] Sondhi, Aditya. "Arbitration in India — Some Myths Dispelled." *Student Bar Review* 19, no. 2 (2007): 48–54. http://www.jstor.org/stable/44306675.
[5] Desai, Nishith. "Law and Recent Developments in India", Aug (2022).

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parties may be challenging if the relationship in each of their individual roles has soured. The arbitration then becomes vulnerable to obstructive tactics by the parties. Parties still have the option to resort to applicable procedural laws but it is just going to add to the time-consuming process. At the end of the day let's not forget that commercial arbitration does not operate in a vacuum and we need to look at practical connotations like these while undertaking a comparative study of the Adhoc and institutionalized arbitration.

INDIA: GLOBAL HUB FOR ARBITRATION?

Policymakers have prioritised promoting India as a centre for arbitration, particularly over the past two decades[6]. The comparison between ad hoc and institutional arbitration has made it quite evident that parties prefer institutional arbitration globally. Institutions like the London Court of International Arbitration and the Singapore International Arbitration Centre have become significantly more well-known over time. It must be noted that India started early back in the 1960s with the acceptance of the New York Convention. However, let's not forget that the country reeks of the duality syndrome. The duality syndrome provides for institutionalized arbitration but there is always an evident scope for adopting ad hoc arbitration.

The current status of institutionalized arbitration in India indicates that the call for India to be a global hub for arbitration is implausible in the near future. Around 35 arbitral institutions are functioning in India. The Center for Alternative Dispute Resolution, which is housed under the Indian Ministry of Law and Justice, was established back in 1995. A private organisation registered as a company is the Nani Palkhiwala Arbitration Centre in Chennai. The Mumbai Centre for International Arbitration was established by the Maharashtra government. While there may be micro-level institutions functioning in the country to promote arbitration there is not even a single arbitration seat that can claim to have an international or global reputation.

JUSTICE B.N KRISHAN COMMITTEE[7]

On December 29, 2016, the Indian government established a high-level committee, which was presided over by retired supreme court justice B.N. Srikrishna. It was in line with the promotion of India as a preferred seat of arbitration. The committee conducted 7 sittings

[6] York, Stephen. "India as an Arbitration Destination: The Road Ahead." *National Law School of India Review* 21, no. 2 (2009): 77–103. http://www.jstor.org/stable/44283805.
[7] Report of the High-Level Committee to review the institutionalization of the arbitration, 30 July 2017.

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and submitted its report to the Indian Law minister. The establishment of the Arbitration Promotion Council of India was the key suggestion made by the Srikrishna committee for institutionalised arbitration to flourish and to improve the general quality of arbitration in India. It was divided into three components.

To categorise and rate all the arbitral institutions in India, the Arbitration Promotion Council of India would be established as an autonomous body with representatives from all parties. The council could recognize professional institutes that shall provide accreditation of arbitrators. They may further conduct workshops and engage in deliberation with law firms and schools to train people interested in arbitration. The idea was also to maximize awareness and allow greater access to practitioners, students, etc for institutionalized arbitration. The main goal here could be to create a specialist arbitration bar comprising advocates that will be dedicated to the field. The committee also recommended the adoption of international practices to make arbitration speedier alongside proposing changes to the 2015 amendment in the Arbitration and Conciliation Act.

The recommendation to the 2015 Amendment Act is extremely important to us because it aims to expedite the arbitration process and decrease the number of cases that are left open for an extended period of time. Section 29B was amended by the committee to include a six-month period for arbitrators to be referred. As a result, the parties could choose a fast-track arbitration process in which the awards would be given out within the predetermined time frame. Additionally, it was meant to set a timetable for the arbitral awards. As per the provision, 12 months were to be applicable for domestic awards. An extension of 6 months was only to be added after permission of the court and that too shall be done before the expiration of 12 months. The involvement of the Indian courts should be limited.

2019 AMENDMENT ACT AND ITS CRITICAL ANALYSIS

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The 2019 act[8] came into force on 30th August 2019 which was based on the recommendations of the Srikrishna committee. The Arbitration Council of India is to be established as an independent body. It has been provided a wide range of powers for grading the arbitral institutions. It has to act as the centrifugal point of an eco-system of arbitrators thus regulating, training, and recognizing arbitral institutions. The members within these institutions were to be appointed by the central government. It was supposed to include practitioners, representatives, judges, and industry representatives.

While setting up the arbitration council of India is a progressive step it has two major concerns about the act. First, if we were to read the 2019 amendment it allows for the government to remove a member on the grounds of abusing the position. However, the term abuse of position has not been defined in the statute. It opens room for executive despotism or arbitrary exercise of powers to remove a member. Whether the council will be able to work independently from the control of the government is a serious question. It might lead to a conflict of interest between the council and the government. In case the government finds direct representation in the council then a particular party might be favoured over the other depending upon its relations with the government.

The fundamental issue with establishing the Arbitration Council of India in accordance with the amendment's instructions is that it ignores the issue of multiple institutions. The number of institutions that were to be established and the criteria used to select them is rarely clear. Whether one should consider the regions, the practices, or both? A better explanation of the problem would have been in keeping with Niti Aayog's advice. In its conference on arbitration, the body unanimously recommended that India needs to have regional offices of arbitration that all converge to one central arbitration institution.

The amendment fails to recognise that a nation like India does not benefit from a one-size-fits-all strategy when discussing the courts and the selection of arbitrators. When the parties desire it, the Supreme Court or the high court, in circumstances of domestic or international commercial arbitration, might designate the arbitral institutions. The application has to be disposed of off in 30 days and the high court can maintain a panel of arbitrators for discharging the duties of the arbitral institution. The problem here is that the idea of separating

[8] Yadav, Vikrant, "The Arbitration and Conciliation (Amendment) Act, 2019: A Critical Analysis (2019)", *International Journal of Multidisciplinary Educational Research*, Volume 8, Issue 9(5), September 2019.

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the judiciary from the arbitration is not being upheld and whether that can even happen is a question for another day. A problematic Indian judicial system is already burdened by including the judiciary. It appears to be an additional load on the judiciary to assign them the task of overseeing the panel of arbitrators. Therefore, including the judiciary in managerial tasks may not be the wisest course of action.

Section 43J of the eighth schedule lists the requirements for arbitrators but does not address the nomination of foreign practitioners as arbitrators. An advocate, a chartered accountant, a cost accountant, a company secretary, a member of the Indian Legal Service, administrative officers, engineers, and other technical experts were all included in the amendment. If foreign specialists are excluded, other countries may be less likely to view India as a neutral party. It might also lead to the disputes being reduced to where one party is always Indian. This will then become the biggest obstacle in India's dream of becoming the global hub of arbitration.

The author believes that an express provision for the arbitration bench should have been included. India has constantly fared poorly in being appointed as an international arbitrator. Indian arbitrators are mostly seated in Singapore despite as per the 2015 reports only 3 percent were Indians. The data from the London Court of International Arbitration states that around 450 arbitrators were appointed as of 2015 and none of the arbitrators were Indians. These are practical examples of how Indians have been excluded from being appointed as arbitrators. Therefore, the legislation should have paid a little more attention to addressing the issue when the high-level committee stressed the creation of a bar or bench. The statute may have directed the same, as opposed to leaving it up to the Arbitration Council of India.

NEW DELHI INTERNATIONAL ARBITRATION CENTRE

Based on the committee's suggestion to revamp the International Centre of Alternate Dispute Resolution, which was founded in 1995, the New Delhi International Arbitration Centre was approved by the president on July 26, 2019. On March 2, 2019, the New Delhi International Arbitration Center Act was deemed to take effect. The NDIAC is an institution of utmost national significance that regulates both domestic and international arbitration in India. It provides for a chief executive officer that shall be responsible to oversee the daily

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administrational affairs. Section 23 of the act refers to a counsel who will deal with matters relating to domestic and international arbitration.

The NDIAC's goals and objectives may serve as the cornerstones for India's institutionalisation of arbitration. The center's objectives are to support research and promote the dissemination of information about alternative dispute resolution methods. The idea of providing training to the professionals and upcoming practitioners on arbitration as recommended by the committee has been taken seriously by the centre. It aims to even extend beyond that and cooperate with societies, institutions, and related matters to awarding of certificates and professional distinctions. Through the establishment of an arbitration academy and chamber, the institute may serve as a model and guiding force in India for the promotion and facilitation of institutionalised arbitration. From maintaining a panel of arbitrators to laying down the rules and parameters for arbitration, the centre could open the rusty doors to making India a global hub of arbitration.

PUBLIC POLICY OF INDIA

Public policy is discussed under Section 34 (2) (b) (ii) of the Indian Arbitration and Conciliation Act[9]. However, no precise explanation of the phrase has been given. Due to the broad definition of "public policy," the union is always given the authority to apply public policy in a way that is contrary to arbitral rulings. In this situation, the concept of minimal government intrusion has importance. Like in Singapore or London, there is little to no government interference. The fact that these organisations receive so little intervention from the government is one of the main factors contributing to their widespread acceptability and repute.

The Supreme Court's rulings have established standards for how public policy should be analysed, particularly in the context of arbitration. The Supreme Court of India declared in the landmark case of Renusagar Power Co Ltd vs. General Electric that the idea of public policy in India should be interpreted in a narrow sense. Even the standards for rejecting foreign arbitral awards were established by the court. Justice and morality, the interest of the nation, and the

[9] Sindhu, Jahnavi. "PUBLIC POLICY AND INDIAN ARBITRATION: CAN THE JUDICIARY AND THE LEGISLATURE REIN IN THE 'UNRULY HORSE'?" *Journal of the Indian Law Institute* 58, no. 4 (2016): 421–46. http://www.jstor.org/stable/45163080.

fundamental policy of India were the three conditions provided by the court. In the judgement of Oil and Natural Gas Corporation Ltd vs SAW Pipes Ltd held that in case of section 34 is applied when the award is set aside the role of the court is that of an appellate or revision court. However, the judgement has widened the scope of public policy.

Section 5 of the arbitration and conciliation act of 1996 demonstrates an attempt by the legislature to limit judicial intervention. Aside from situations specified by the section, the provision does not call for judicial action. The judiciary's function in starting arbitral proceedings is that of an administrator. However, there are multiple provisions like sections 9 and 17 of the acts wherein the judiciary steps in. It gives the arbitral tribunal the power to take the orders as interim measures. While the purpose of both sections is different the judiciary needs to realize the difference between administering a proceeding and taking control of it.

CONCLUSION

Institutionalized arbitration is the need of the hour. Additionally, the 2019 amendment added some power to arbitration. The broad secrecy clause complements the idea of arbitration in the nation in both law and spirit. In light of this, section 42 B of the amendment stated that the arbitrator was immune from legal action for whatever he had done or planned to do in good faith. Even if the act is a step in the right direction, it merely scratches the surface. Engagement with industry experts and dialogue with non-partisan experts may help the government better frame the provisions.

The New Delhi International arbitration centre is another commendable initiative but still needs a lot more autonomy to become a flagship institution. While the institution cannot be totally free from governmental influence, it must feel immune in order to avoid becoming a tool in the hands of the state. The institution's leadership requires highly qualified trained experts. Technology integration will become essential in this area as well for the properoperation of online proceedings. It could also be helpful during the training sessions and workshops that the Indian Arbitration Council may provide. The best course of action is to institutionalise arbitration in order to create a thriving ecology. The basic component of arbitration is party autonomy. Private right, according to Hugo Grotius[10] (who coined the term

[10] Haakonssen, Knud. “Hugo Grotius and the History of Political Thought.” *Political Theory* 13, no. 2 (1985): 239–65. http://www.jstor.org/stable/191530.

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in his book "De Jure Belli ac Pacis"), is the control we have over ourselves. The essence of institutionalised arbitration and the reason it has become necessary at this point can be found in this private right within the framework of a fair set of rules.