



INBA VIEWPOINT

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Why this attempt! • *How to Promote Arbitration & Mediation in India?* • A Way Forward Towards Making India an International Arbitration Hub • *Why and How of Arbitration and Mediation in India* • A New Era of Arbitration for India. Will It Rise to the Challenge? • *Are the Changes to the Arbitration & Conciliation Act 1996 an Eyewash?* • How to Make India an International Arbitration Hub • *Need for Arbitration to be Recognized as an Effective and Long-Lasting Dispute Resolution Process* • Will the Amended Arbitration and Conciliation Act Improve and Influence Foreign-Seated Arbitrations? • *Dispute Resolution Through Arbitration and Mediation for Intellectual Property Disputes*

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Why this attempt!

Kaviraj Singh

As per available data on the National Judicial Data Grid, about two crore, eleven lakh fifty one thousand five hundred and one (21151501) cases are pending in the Supreme Court, 24 High Courts and 600 District Courts of India (as on March 1, 2016). In an answer to Parliamentary Question, Union law Minister informed Lok Sabha that the 24 high courts disposed of 17,34,542 cases in 2014.

The Supreme Court disposed of 44,090 cases last year till 1 December, while the pendency there has been estimated at 58,906 till the beginning of December 2015. ¹

Another aspect

A research team of lawyers analysed 884 judgments, delivered by the Supreme Court in the year 2014 and found that only 64, or 7 per cent, involved any substantive constitutional issues, and the apex court instead was mostly handling routine appeals from high courts.

It was reported that only in these 64 judgments a dispute regarding the interpretation of any constitutional provisions was involved, or a challenge of any law on the basis of its inconsistency with the constitution, with several exceptions and notwithstanding a degree of unavoidable subjectivity Out of the 64 judgements dealing with constitutional issues, exactly half (32) were written by a two-judge bench, 18 were penned by a three-judge bench, and 14 were handed down by a five-judge bench.²

STATUS REPORT OF PENDING COURT CASE IN INDIA AS ON 1ST MARCH, 2016

Pending Cases				
	Civil	Criminal	Total	
Cases Pending over 10 years	657069	1584737	2241806	-10.60%
Cases Pending (5 to 10 years)	1131696	2655844	3787540	-17.91%
Cases Pending (2 to 5 years)	2101070	4190417	6291487	-29.74%
Cases Pending less than 2 years	3121714	5704948	8826663	-41.73%
Total Pending Cases	7012271	14139229	21151501	-100%
Category Wise Pending Cases				
Senior Citizen	537805	110484	648286	-3.06%
Filed By Women	1218181	1360236	2578417	-12.19%

Under, these distressing scenario, Government of India based on 246th Report of the Law Commission amended the Arbitration & Conciliation Act in 2015 and made a sincere attempt to make alternate dispute resolution mechanism a robust, reliable and respected dispute resolution mechanism so that the overburdened courts be relieved of unnecessary burden.

Keeping in view the importance of Arbitration as an effective & portent tool to change the litigation landscape of the Country, Indian National Bar Association (INBA) organized a Round Table Conference at Committee Room-A, Parliament House Annexe, New Delhi on How to promote Arbitration & Mediation in India? Encompassing a related theme “What Indian Arbitration need to do to make Institutional Arbitration a success in India” with a point of discussion A New Era of Arbitration for India – Will it Rise to the Challenge?

The Round table was organized on 11th February, 2016 and was attended by over 85 delegates ranging from Member of Parliament, Litigation Lawyers, Corporate General Counsel and Mayor of city to a British Parliamentarian.

The crux of the round table discussion can be summed up in five Ms:

1. Mindset
2. Men
3. Material
4. Management, and
5. Magnitude.

All the participants were unanimous that mindset of all of us must be changed and Arbitration come out of the appendages of “alternate” and be considered as “full fledged dispute resolution system”, which is aimed at solution & resolution and not adjudication. We must understand that adjudication carries a portent seed of further litigation whereas solution & resolution minimize further litigation.

During the brainstorming session various suggestions were made and our endeavourer in the present volume is to enlist best of them and send these suggestions to policy framers and ensure that these suggestions may find expression in the steps taken to make Arbitration and its orphan brother Mediation as mainstream dispute resolution process in times to come as Robust dispute resolution process.

You will find the suggestion emerged during the Round Table in the coming pages. The suggestions were having a world class tech savvy infrastructure serving needs of all the stakeholders, a collaborative cohesion with other jurisdictions, an umbrella nodal agency to oversee the functioning of different institutional Arbitration processes, a uniform rule regime with strict discipline vis-à-vis time and quality.

With the pious hope that policy makers and others would give a serious thought on this pressing issue, this inaugural volume is being presented.

¹ National Data Grid

² Post dated 6th February, 2015 in Legally India

How to promote Arbitration & Mediation in India?

“What Indian Arbitration needs to do to make Institutional Arbitration a success in India”

A New Era of Arbitration for India - Will it Rise to the Challenge?

Committee Room - A, Parliament House Annexe, New Delhi
February 11th 2016 • 3:00pm - 5:00pm



India is on the cusp of huge change in its Alternative Dispute Resolution mechanism.

Series of major initiatives by both, the Law Makers (Government of India) and the Judiciary (Supreme Court) recognise the imperative need for promoting Institutional Arbitration as the form of Alternative Dispute Resolution & encourage Individuals, companies, Corporates, PSUs & other litigants to embrace it so as to promote, propagate and foster less costly method of litigation.

The Law Commission of India through its various reports including its 246th report has suggested to the Government of India various measures to promote institutional arbitration in the form of Key Recommendations to the Arbitration and Conciliation Act, 1996.

All these argue well for India which is encouraging foreign companies to come & invest here under the leadership of Hon'ble Prime Minister's Campaign of "Make in India".

FDI and Make in India can only be a success if there is a robust arbitration mechanism available in India especially Institutional Arbitration coupled with other forms of ADR mechanisms.

With this thought process in mind and mindful of its social obligation as a responsible body, Indian National Bar Association (INBA), thought it prudent to start its series of think-tank interaction. The first such interaction was planned on February 11th, 2016 at the Committee Room A, Parliament House Annexe in New Delhi.

Indian National Bar Association (INBA) invited contributors for their thoughts on "What Indian Arbitration need to do to make Institutional Arbitration a success in India" so that India is able to compete as an International Arbitration hub like those of Singapore, Germany, Hongkong, London, US etc.

Leading questions placed before the participants at the round table on 11th February, 2016

1. What is holding India from becoming hub for Arbitration in Asia?
2. Is time ripe for India to have its own Arbitration nodal agency?
3. What Steps should India take to create an environment for Arbitration to get institutionalized over adhoc Arbitration.
4. How can the Government, Bar Council of India & the Courts help in the objective of a National Level Nodal agency with Regional chapters to Promote Arbitration.
5. Why Tax disputes not be encouraged to be settled through Arbitration.
6. Do we actually require Courts to supervise Arbitration.
7. Should Arbitration not be delinked from litigation and recognized as Separate Area of Practice in order to encourage a New Breed or Set of Specialist to promote Arbitration.
8. Do we need to shift our focus to Expert Arbitrators from retired Judges.
9. Does the new introduced amendments to the Arbitration & Conciliation Act, 1996, pave the way for International Arbitration to flourish in India.
10. Are the 2015 amendments is a way forward way in the right direction?
11. What further suggestions made by the Law Commission in its 246th Report needs to be introduced.
12. Will the newly enacted act, the Commercial Courts Act, 2015 aid in the progress of Arbitration.



A Way Forward Towards Making India an International Arbitration Hub

“The law of arbitration simple, less technical and more responsible to the actual realities of the situation, but must be responsive to the canons of justice and fair play and make the arbitrator adhere to such process and norms which will create confidence, not only by doing justice between the parties, but by creating a sense that justice appears to have been done”. (F.C.I. v. Joginderpal Mohinderpal, (1989) 2 SCC 347’)

Our Prime Minister’s vision, ‘Make in India’, targets worldwide business investments to enter the Indian market. It is a prerogative to have a working arbitration institution in place.

The major steps that can be taken to promote institutional arbitration in India are hereunder mentioned:

1. Nodal Agency: Forming an Arbitral Commission in India which would encourage spreading of institutional arbitration in India as well as protect the interest of the parties to a dispute opting for arbitration to solve the dispute between them. Amending the existing governing laws to favor institutional arbitration in India.
2. Active role of Supreme Court and High Courts to promote institutional arbitration in India in all types of civil disputes.
3. Support of Government in terms of providing financial aid and arrangement of lands for building of such institutions.
4. Create Awareness: There is lack of awareness in the public of the advantages of institutional arbitration. The Government, Bar Associations and media can help create awareness of the advantages of institutional arbitration. Promote the cause of institutional arbitration and their own services. Foreign arbitration institutions such as LCIA, SIAC and ICC continuously hold conferences, seminars, sponsor and organize workshops with technical and legal experts, which not only promote the cause but also draw potential end users who avail of such services. Popularize institutional arbitration in India by chalking out and promoting its advantages to the public opting for the arbitration process to solve the dispute between them and establishing an institution towards that effect which will conform to international standards.
5. Establish more arbitration institutions: There is such a dearth of strong credible Indian international arbitration institutions. Hence, setting up more arbitration institutions in India can help regulate and streamline the arbitration process and thereby allow more people to use institutional arbitration. The more

established arbitration institutions there are, the more likely India will become a preferred international arbitration destination.

6. **Role of Trade Houses and Business Communities:** Trade and business community may take a lead and come forward to set up arbitration centres all across India. A good example is to be found in the stock exchange arbitration mechanism. In the event each industry sector has its own specialized arbitration centre with experts from the field appointed as arbitrators, members of such trade associations could resolve their disputes with utmost speed and at reasonable costs.
7. **Costs and fees:** Prevalent high cost of ad hoc arbitration in India is a factor that prevents arbitration from being effective. Insertion of fourth schedule with respect to fees of arbitral tribunal in the amended Arbitration and Conciliation Act, 1996 is a right step towards rationalization of fees which will make ad-hoc arbitration less expensive. Fees of institutional arbitrators may be based on the value of the claim or on hourly basis so that parties know the costs upfront which will enable them to make an informed choice. Additionally it may help in empowering parties to stipulate a specific arbitration institution to be named in their contracts.
8. **Panel of arbitrators:** A professional body of experts is the foremost requirement prior to any other. A sound body which is motivated to achieve a satisfactory and smooth end is what any entity or individual looks forward to. This is evident from the success of London Court of International Arbitration. Factors such as credibility and integrity (read non-corruptibility), linguistic skills, knowledge and expertise in technical and legal field, dedication of sufficient time to read case papers, attend all hearings and meetings, remain neutral and independent from parties and decide a case with impartiality are critical, essential and significantly impact the arbitration process and its outcome.
9. **Providing a Legislative Sanction from the Arbitration Institutes to institutions such as ICC and SIAC which provide for Emergency Arbitrator by broadening the definition of Arbitral Tribunal.**
10. **Apart from the basic facilities viz., efficient mode of transportation, excellent telecommunication, legal and commercial expertise, banking and finance institutions, etc., a corruption-free, service-oriented manpower is required to execute the mandatory functions.**
11. **Mandatory shifting of pending cases from courts to the Arbitration Centres.**
12. **Form more Arbitration societies and counsels to preside over Arbitration matters.**
13. **Set a limit (dispute matters, money involved, parties, urgency) for cases to particular kind to be solved in Arbitration only.**
14. **Urgent cases should be immediately reported to the Arbitration Centre for faster solution.**

15. **Creating an Arbitration Centre in all states and more in States with a large pendency of court cases.**
16. **Building people's faith in Arbitration as an alternative to courts as means to solve disputes.**
17. **Mass awareness and Advertisement of Arbitration .**
18. **Client Counseling to guide them and equip them with knowledge of the Arbitration procedure and its benefits.**

Institutional Arbitration as a way forward

India needs to establish flawless institutions, which maintain high quality standards and include professional arbitrators, infrastructure facilities, time, cost saving and uniformity of law. These standards will make the Indian Alternative Dispute Resolution system more desirable to the business community and stand out with par with other players like Singapore, London or Hong Kong etc. Institutional arbitration in a nation flourishes only when its arbitral institutions fulfill the basic requirements to successfully and effectively carry out an arbitration process. These requirements include:

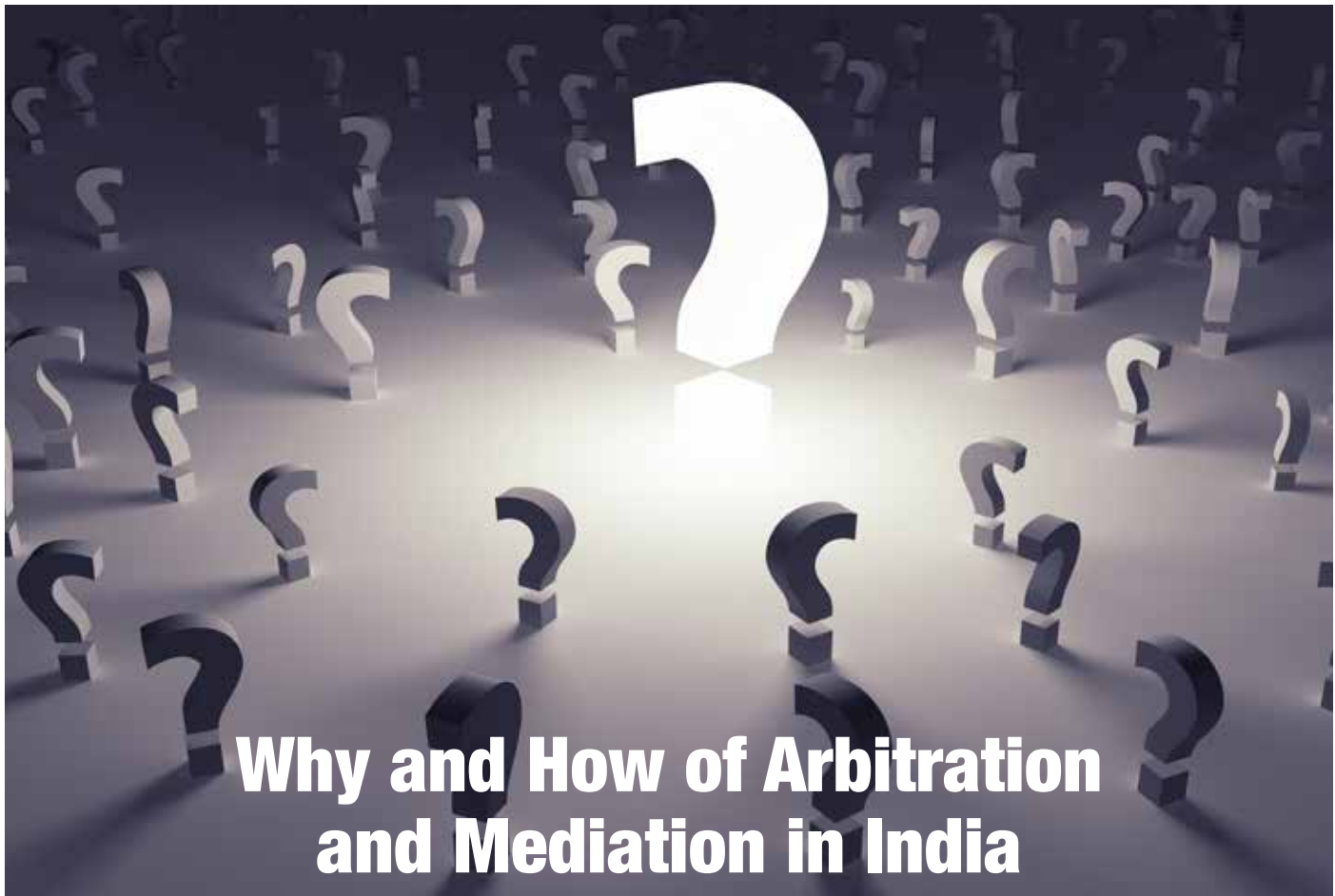
- a) Degree of permanency
- b) Modern rules of arbitration
- c) Qualified staff
- d) Reasonable charges

Conclusion

Institutional arbitration comes along with great advantages – Reputation of the institution which is a prerogative that an arbitral award will be enforced, for instance – ICC. Strictly construing to the rules of the institution is another added advantage. Administration, a panel of quality arbitrators, remuneration of the award only prompt us to use Institutional Arbitration as a mediation and negotiation mechanism. Where the no. of cases is myriad and judiciary is involved with high profile cases, commercial disputes should therefore be disposed by arbitration laws and for that matter Institutional Arbitration.

Contributors:

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Why and How of Arbitration and Mediation in India

Zahra Mousavi

Introduction

In order to provide the reader with a broad view of the subject of the present enquiry, this article will first define the two terms of “arbitration” and “mediation” and then briefly examine their current status in India. Next, it will refer to and outline certain elements that are of some relevance to these topics, including the target group of promotion policy. Finally, it will venture to make a few specific recommendations.

Institution	2012	2013	2014
ICC (International Chamber of Commerce)	759	767	791
DIS (German Institution of Arbitration)	125	121	132
SCC (Stockholm Chamber of Commerce)	177	203	183
VIAC (Vienna International Arbitration Centre)	70	56	56
SCAI (Swiss Chamber's Arbitration Institution)	92	68	105
LCIA (London Court of International Arbitration)	277	301	~300
ICDR (International Centre for Dispute Resolution)	996	1165	1052
SIAC (Singapore International Arbitration Centre)	235	259	222
CIETAC (China International Economic and Trade Arbitration Commission)	1060	1256	1610
HKIAC (Hong Kong International Arbitration Centre)	456	463	~500
ICSID (International Centre for Settlement of Investment Disputes)	50	40	38
In total	4297	4699	~4989

Arbitration and mediation, both in domestic and international terms, are well recognized in the legal system of India. For example, the Act of 1999, which was added to the Code of Civil Procedure (1908) as

Section 89, introduced Alternative Dispute Resolution (ADR) as a mechanism of dispute settlement. Section 89 became effective as from July 2002. Arbitration and Conciliation Ordinance (the Ordinance) was amended in 2015, however Mediation rules was not updated. In the landmark case of *Tamil Nadu v. Union of India*¹, the Supreme Court of India expressly stated that reference to mediation, conciliation, and arbitration was mandatory for court matters. That means that not only the parties may choose to resort to ADR, but also the Court may decide to refer the parties to mediation, conciliation, arbitration, Lok Adalat, or litigation. The focus of this article, for the purpose of round table discussion, is exclusively on mediation and arbitration.

Concept and challenges

Mediation is, in principle, a non-binding process in which a third party (mediator) assists the parties to reach a mutually acceptable solution in their dispute. Arbitration is, in principle, a binding process in which a third party (arbitrator) is appointed, typically by the parties, to resolve their dispute through an enforceable decision.

Court-Referred Mediation or Court-Annexed Mediation is a well-known practice, especially in family law issues, but Court Referred Arbitration is a new phenomenon in India. It should be noted that the Ordinance permission to refer to arbitration extends to *non-signatories* to an arbitration agreement.²

However, for the success of arbitration or mediation, it is essential not only that the method chosen be appropriate to the needs of the parties, but also that the related rules be consistent with other relevant rules and regulations.

Mediation and Arbitration are cost and time efficient

One of the main reasons commonly offered in support of mediation or arbitration is that the alternative - the resolution of dispute through litigation - is both expensive and time-consuming. This is generally true and borne by evidence. According to the *Doing Business Report 2009 (World Bank)* and *The Cost of Non ADR - Survey Data Report 2010 (ADR Center)*, for example, the comparative costs for resolving an identical dispute through the two methods of litigation and mediation in Italy and Belgium are shown. As will be seen, in Italy, the cost of mediation in a given dispute amounts to €4,369.50, while the cost of litigation for the same dispute amounts to €15,370.50. The costs for a combination of the two would amount to €19,740.00. These figures may vary from country to country, but the ratio and difference in fees generally remain the same for all, including India.

In the context of present debate, it is important that all those concerned, and particularly the prospective litigants and lawyers, be made aware of the clear advantages of mediation/arbitration over court litigation. Such advantages extend, not only to the financial aspects of the process, such as its more modest expenses, but also to its many other, and equally important, features, such as the voluntary nature of the process, and the parties' direct involvement in the proceedings, including the appointment of arbitrators. These are of course very relevant and significant factors in the assessment of any dispute resolution method, even though they cannot, for reasons of space and time, be adequately addressed here.

Target groups

Before venturing to make any recommendations, it may be useful to identify the addressees - or the stake-holders - of the promotion policy. This is because each of the stakeholders and parties concerned may have a different interest, for whom an appropriate strategy should be considered. For a lawyer, for instance, cost-efficiency may not be a prime motivation for resorting to arbitration or mediation, though the time-efficiency, his own role in the selection of the panel, or the satisfaction of his client may well be. Once the target group is identified, specific policies focusing on their special needs, and highlighting the shortcomings of court litigation can be determined and introduced. Target groups are basically those who are involved in litigation as parties, as well as those who have a role to play in the process, including organizations, lawyers, judges, authorities, business sectors, and the like.

Recommendations

Raising public awareness of the availability of mediation and arbitration for resolution of disputes, publicizing the advantages of these methods over other available methods, holding university courses and conferences with a view to motivating the interested students, training lawyers and prospective mediators and arbitrators, and organizing moots for the purpose of demonstrating how the process works in practice are all effective means of promoting mediation and arbitration, though awareness and training are not sufficient at launching stage, which is the current phase of ADR in India.

Win-lose v. win-win

Litigation is often a win-lose process, which mainly reflects the hot temperament of the old generations. A more progressive approach calls for the replacement of this attitude by a win-win approach; a replacement that can be achieved through cultural makeovers. These, in turn,

can be accomplished partly by projects and courses at school level, and by inclusion of mediation and arbitration courses in programs other than law, such as business, management, governance, and psychology.

Mediator/arbitrator's statuses should be enhanced

While judges and lawyers are normally held in high esteem by the public, and their professions are keenly sought after, mediators and arbitrators do not in some countries enjoy such statuses. This may have some merits, making the positions more widely accessible to the prospective candidates. But for the purposes of promoting the process, mediators/arbitrators should be accorded greater recognition, especially by the judiciary and bar associations, as an essential part of the administration of justice.

Other incentives

Judges should be trained to encourage lawyers to refer their cases, wherever possible, to mediation and arbitration. Financial supports by the government can also be very helpful. For example, tax incentives to those parties who resort to mediation can boost the practice⁴, as can the reimbursement of court expenses and fees upon the completion of mediation or arbitration⁵.

Lawyers

As happened in Italy, lawyers may take the view that a mandatory mediation or arbitration system is an inappropriate means of dispute solution, and one that works against their interests. This can be tackled simply by making them aware of the fact that mediators and arbitrators are not their competitors, and that there is a high chance for them to be involved in the process.

"The time is always right to do what is right."

Martin Luther King, Jr.

1. Judgment [With Writ Petition (Civil) No. 570 of 2002] Y.K. Sabharwal, J.
2. Vikas Mahendra, "Arbitration in India: A New Beginning", Kluwer Arbitration Blog, 6 November 2015, (see <http://kluwerarbitrationblog.com/2015/11/06/arbitration-in-india-a-new-beginning/>).
3. See, European Parliament, "Quantifying the cost of not using mediation – a data analysis", PE 453.180, 2011.
4. Italy applied Tax Incentive to improve mediation, *ibid*.
5. See Bulgaria, Poland, Romania, and Hungary's policies and incentives, e.g. Bulgaria has a Court-Annexed Mediation Program (established in 2010), through which it gives the opportunity to its citizens to explore ADR without any additional fee.



A New Era of Arbitration for India. Will It Rise to the Challenge?

Recommendations of the Round Table Conference

Institutional arbitration in India is fledgling, evolving and yet to reach a stage to successfully address industry concerns. A cultural shift is inevitable for institutional arbitration to be successful in India. In order to keep pace with the rest of the developed and developing world, there is an urgent need to popularize institutional arbitration in India to achieve the foremost objective of arbitration law, viz. to provide a quick and cost effective dispute resolution mechanism.

By creating a system of uniformity in procedures and process, it will increase confidence in the arbitration process. Parties and attorneys will be more willing to arbitrate in India if they know that there is an established system that results in predictability and efficiency.

To further the said objective following recommendations are made:

1. Establish One independent arbitration institution: There is such a dearth of strong credible Indian international arbitration institution. Certain trade associations like FICCI and ASSOCHAM have set up reputed centres such as ICA and ICADR. Then there are centres such as IIAM, Nani Palkhiwala Arbitration Centre at Chennai and IMC in Mumbai, which are but a few centres having made some inroads. However, India is still not a preferred international arbitration destination. If one of the party to the dispute is a foreign national then foreign international arbitration institutions such as SIAC or LCIA or ICC are preferred since arbitration in India is seen as mired with undue delay, exorbitant costs and needless court intervention. Hence, setting up one independent arbitration institutions in India

can help regulate and streamline the arbitration process and thereby encourage more people to use institutional arbitration. This institute should have a legislative recognition in the Act itself and work as a transparent independent body. This independent institution is to only provide procedural rules to be applicable to all the contracts that chose such an institution. The substantive law will be followed as applicable under the arbitration Act and the courts or as chosen by the parties.

2. Rules of arbitration institution: This independent Institution should give great emphasis to formulating its rules. Well established uniform rules can deal quickly and efficiently with many delaying tactics and/or assist the arbitral tribunal to discourage frequent and baseless adjournments, ensure continuous sittings for arguments and evidence which in turn enables the arbitrator to publish an award within stipulated time making the arbitration process strictly time bound. Uniform rules can efficiently deal with many procedural issues that might otherwise have to be resolved by a domestic court. There must be provision in the rules to remove any arbitrator who lacks independence or is otherwise not performing his or her functions properly and appoint a substitute in his or her place. Rules should also provide a pre-award scrutiny, which limits appeals and time consuming procedures. We can adapt/learn/adopt from LCIA/SIAC/DIFC.

3. Panel of arbitrators: It is often said that arbitration is only as good as the arbitrators. Factors such as credibility and integrity (read non-corruptibility), linguistic skills, knowledge and expertise in technical and legal field, dedication of sufficient time to read case papers,

attend all hearings and meetings, remain neutral and independent from parties and decide a case with impartiality are critical, essential and significantly impact the arbitration process and its outcome. Confidence in the arbitrators and the arbitration process results in credible arbitration practice and allows issues to be resolved fairly and efficiently. Institution ought to uphold minimum quality standards whilst empanelling arbitrators. This Independent arbitration institution may go further and even impart training for nurturing competent professionals who are trained to delve into the crux of the dispute for its resolution. There is need to move away from the practice of appointing only retired judges as arbitrators but have a diverse panel which is possible only with institutional arbitration.

4. Costs and fees: Prevalent high cost of ad-hoc arbitration in India is a factor that prevents arbitration from being effective. Insertion of fourth schedule with respect to fees of arbitral tribunal in the Arbitration and Conciliation Act, 1996 is a right step towards rationalisation of fees which will make ad-hoc arbitration less expensive (although there is much debate on its applicability in reality). Fees of institutional arbitrators may be based on the value of the claim or on hourly basis so that parties know the costs upfront which will enable them to make an informed choice. Additionally it may help in empowering parties to stipulate the arbitration institution to be named in their contracts.

5. Enforcement of award: Special dedicated judges/bench hearing arbitration matters will ensure disposal in a time bound manner in accordance with the time stipulated in the amended Act. No automatic stay ought to be given. Conditional stay may be granted on compliance of strict terms, including depositing the award amount in court diminishing the incentive to challenge award / litigate to a great deal. Courts ought to award punitive costs in the event the arbitrator finding on evidence the existence of perjury and/or fraud.

6. Resources: Further, the Institution prescribing rules for Arbitrations in India should be provided ample resources and opportunities to participate in important international arbitration conferences and to host one to two major international arbitration conferences at least in a year so that it would invite worldwide participation/attention and exposure that can enhance the international image of Institutional Arbitrations in India and attract foreign parties to arbitrate in India. It is likewise also important to have enriching bilateral relationships with numerous other international arbitration institutions and to ensure constant update of the Rules governing Institutional Arbitrations so as to cater to the specific needs of the respective industries. A mandatory review by the Institutions conducting Arbitration of their services should also be encouraged with a view to improve the range and quality of its services.

7. Arbitration Training: At present, most advocates are trained to draft agreements and represent their parties during disputes and thus, their knowledge is limited to litigation. Further, arbitration mostly deals with technical matters that demand specialized knowledge on the

subject. As the world grows in complexity, parties seek arbitrators with specialized knowledge. Therefore, training arbitrators to handle such disputes is an important aspect which must be taken into consideration while promoting arbitration.

8. Promote Med-Arb: A hybrid of Mediation and Arbitration is to allow a softer mediation process to occur first, thus taking every opportunity of achieving a resolution to a dispute which is not imposed and to which each party to the dispute subscribes voluntarily. In this initial phase, the presiding neutral third-party acts as a mediator and coaches or encourages the parties towards a settlement taking into account the information received from both at a mediation hearing. If mediation fails, of the process to arbitration. At that point, the presiding officer, now sitting as an arbitrator and no longer as a mediator, is enabled to proceed as if the hearing was one of arbitration and to impose a resolution, a final and binding award, generally relying on the information presented during the mediation hearing.

9. Create awareness:

(a) There is lack of awareness in the public of the advantages of institutional arbitration. The Government, Bar Associations and media can help create awareness of the advantages of institutional arbitration.

(b) Indian arbitration institutions do not vigorously promote the cause of institutional arbitration and their own services. Foreign arbitration institutions such as LCIA, SIAC and ICC continuously hold conferences, seminars, sponsor and organise workshops with technical and legal experts, which not only promote the cause but also draw potential end users who avail of such services. It is imperative that Indian domestic arbitration institutions should take regular, consistent and pro-active steps to promote themselves and create more awareness of its existence, the calibre of arbitrators on its panel, inform public about its rules, fees charged and the nature of procedural and administrative support it offers.

10. Cultural shift: The real problem in enforcing arbitration award is not a legal one. Judges and courts can play an important role in encouraging parties to refer disputes to institutional arbitration and lean towards giving an adequate thrust to the arbitration process and uphold awards showing least tolerance towards parties committing breach of contractual obligations or challenging the award. It is necessary for law firms, counsels and lawyers to know and uphold the objective of the latest amendments to the Arbitration and Conciliation Act, 1996, respect the will of the parties and adopt practises conducive to making arbitration speedy, cost effective and binding. The Indian Arbitration forum was set up by a few law firms with an objective to liaise with the Government to introduce reforms which is a step in the right direction.



Are the Changes to the Arbitration & Conciliation Act 1996 an Eyewash?

Saloni Gupta

With the proposed changes to the Arbitration & Conciliation Act, 1996 we are at the cusp of new era. A long awaited change that is a step towards “make in India” and giving India that added boost and encourage the growing business interest the world is showing towards the country.

Right from detailed proposals suggested under the 246th Law commission report on amendments to the Arbitration & Conciliation Act 1996, to the ordinance being passed by the President, we have been hopeful of changes that the country has been in dire need of.

Ever since liberalization of the economy the flood gates not only opened for business, but they also opened up for disputes that are inevitable.

While the economy may have developed by leaps and bounds in terms of becoming more investor friendly, the same cannot be said for the laws of the country in general and the dispute resolution mechanisms available, in particular.

There is much left to be desired not only by investors, but also by the legal fraternity that finds itself at the mercy of decadent laws requiring urgent revision to meet the speed of growing business needs and changing dynamics. While the current ordinance/bill is a great improvement on the Arbitration & Conciliation act of 1996, there is much left to be desired.

Arbitration needs to be convenient, cost efficient and progressive.

We will briefly analyze some of the salient features of the ordinance that even though are amendments over the existing law, whether they truly are an improvement or in practical reality are just an eye wash and only lead to more litigation and hence, need to be considered more closely.

1) Section 9 (2)

“.....the arbitral proceedings shall be commenced within a period of ninety days from the date of such order or within such further time as the court may determine”

Issues:

- In case the arbitration does not commence within 90 days or the time prescribed by the court, do the parties then have the liberty to come back to court under a fresh application?
- Does that not delay the process further and increase litigation?
- Would the party, in whose favour the interim order is passed, seek and use all these excuses to keep delaying commencement as they would want to enjoy the interim orders?
- Will justice be compromised in order to meet timelines?
- Is the 90 day time frame practical, especially when there are disclosures to be sought from arbitrators under section 12 (1)?

2) Section 11 (8) & (13)

“.....shall seek a disclosure in writing from the prospective arbitrator in terms of subsection (1) of section 12 ...”

“....endeavour shall be made to dispose of the matter within a period of 60 days...”

Issues:

- No timeline given for the prospective arbitrator to get back?
- How does this tie in with a party having taken an interim injunction, needs to commence arbitration within 90 days?
- Who ensures that the arbitrator will be appointed and arbitration will commence within 90 days?
- If the parties keep resorting to the proviso available, where court can extend time, then how is this concept of assigning timeline useful?
- 60 days timeline too impractical?
- Pressure on courts unfair?

3) Section 12

“...when a person is approached in connection with his possible appointment as an arbitrator....”

Issues:

- Too wide an ambit?
- Inevitably someone or the other knows the arbitrator as the arbitrator is either from that industry as he understands the subject or is known to one party or the other.
- Can be used as a delay tactic?
- Also, can be used by parties as an excuse to stall awards passed by such arbitrators.

4) Section 29A(1)

‘...award shall be made within a period of twelve months...’

Issues:

- In what circumstances might the courts refuse to extend the time limit for an arbitration?
- Will arbitrators sacrifice quality for expedition, in order to meet the time limit?
- How long will the court take to deal with the application to extend time?
- Will the time taken by court add or be included in the timeline?
- Who will the delay be pinned on?
- Will such applications lead to further delay and confusion between parties and arbitrators as to who should be penalised for the delay?

If these amendments are not considered thoroughly and the practical applicability of the same is not tested from all possible situations, it may just turn out to be yet another rushed endeavor to please the investors.



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September 23, 2016

*Venue- Le-Meridien, Sankey Road, Opposite Golf Club,
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PARTICIPANTS

More than 300 legal, InfoSec and Other professionals in attendance.

Speakers, include GCs, CIPs, CISOs

Knowledge Partner



A close-up photograph of a target with three darts. The target has a red outer ring and a white inner circle. The darts have wooden shafts and silver ferrules. One dart is in the bullseye, another is in the white ring, and the third is in the red ring.

How to Make India an International Arbitration Hub

Thomas P. Valenti

The steps that India should take in developing a top quality International Arbitration Centre:

Foundational requirements are a legal system that is stable, and universally recognized as such. Modern arbitration legislation is also essential, which has been initiated in the 2015 Amendments.

Next India needs a panel of arbitrators, who are competent, and knowledgeable. Arbitrators would benefit from training by internationally recognized training organizations. The panel should encompass arbitrators with international experience across multiple nationalities and multiple professions.

India should retain leading practitioners as “Advisors,” who will lend both knowledge and credibility to its Centre.

There also needs to be strong support from the Judiciary. Therefore, judges must be knowledgeable in all facets of modern arbitral practice, and who can distinguish between domestic and international, interim measures, and emergency arbitral orders.

To be a true International “Centre,” it must have to have a modern, accessible, place, close to high level accommodations. The “Centre” must offer the full range of services, as must the nearby accommodations.

It must have clear, established and flexible rules, because the law gives us conceptual concepts for the process and procedure, but we need to detail it: what about the hearing? How long will each party have? etc. Thus, you need rules, model clauses and provisions for expedited cases, to serve as a framework.

In developing the ADR Centre, both private and public stakeholders need to become involved in addressing the above, ensuring that India also garners the attention of specialist sectors, who become the ultimate beneficiaries.

Clear and concise websites, training opportunities, funding and alternative services (such as mediation, conciliation, expert evaluation, and dispute boards) should also be considered.

The actual Centre, with administrative offices, hearing and conference rooms, full modern facilities, audio and visual recording, video conferencing, translation services, catering, all must be present.

At an early stage, there needs to be the hiring of key administrators, case managers, economic advisors to structure fees, and budgets, trainers for arbitrators, advocates and judges. Later marketing and branding needs to highlight these key elements that enhance the credibility and reputation of the Centre.







Need for Arbitration to be Recognized as an Effective and Long-Lasting Dispute Resolution Process

Suman Doval & S. Ramaswamy

INTRODUCTION

Arbitration is that process of dispute resolution, which two parties adopted by their own volition rather than the constituted by law. This freedom of choice of forum while on one hand provides a choice to parties and free them from labyrinth of procedures on the other hand gives relaxation to the Court which are already overburdened and overworked.

HISTORICAL PERSPECTIVE

This process of dispute resolution is in vogue in India since time immemorial. The Village Council or the Panchayats were the Arbitration Courts which remain in existence till today . The British understood the importance of the Arbitration and did not abolish

the system of panchayats. The British Regulations of 1772,1780 & 1781 were designed to encourage arbitration. The Subsequent Bengal Regulations, 1787 & 1793, Madras Regulation of 1816 and Bombay Regulation of 1827 recognized the process of Arbitration. The significant step was taken by promulgating the Indian Arbitration Act,1899. However, while enacting Code of Civil Procedure, 1908 , Arbitration was included as Second Schedule to Code of Civil Procedure.

On the recommendation of the Ratan Mohan Chatterjee Committee, which was appointed in 1938, for revision of the Law of Arbitration, the Arbitration Act,1940 was promulgated.

LATEST AMENDMENT

The Arbitration Act, 1940 was repealed and replaced by the Arbitration & Conciliation Act, 1996 and vide Arbitration and Conciliation (Amendment 2015) Act, (3 of 2016), the Act of 1996 was further amended.

The attempt of the authors is to pin point and list out potential solutions/ recommendations to give effect for a strong Arbitration and mechanism in India to attract Foreign Investment and make India a place where Arbitration is cost effective, within fixed timelines and at par with other developed economies including institution like SIAC, LCIA, DFA, DSI, ICC etc. However, with a caveat that in dispute resolution expediency cannot override quality of resolution process and solution provided. Also, the solution provided and accepted by the parties should not contain seeds of further discontentment.

CHANGE IN MINDSET

There should be marked change in mindset of all the stakeholders. It must be borne in mind that the arbitration is not an alternate to any dispute resolution process. It is a full-fledged dispute redressal mechanism and capable of resolving the disputes in a manner to satisfy all the parties concerned and minimize any further litigation. Arbitration is a separate science in itself and should not be clubbed with the routine litigation. Litigation is essentially adversarial in nature while arbitration is a process comprising of mediation and conciliation which would be win-win for all the parties.

TO CREATE AN NATIONAL LEVEL AUTONOMOUS BODY

Say National Council for Arbitration Law, Research & Training.

India should set up its own Statutory Nodal Agency at par with International bodies like ICC etc. which would frame overall uniform rules and regulations for regulating and conducting institutional Arbitration in India for both Domestic and Foreign parties. It would serve as a premier agency and can be an instrument in promoting & strengthening Arbitration movement in India and provide an effective solution to problem of arrears in Courts. This nodal agency can in turn set up regional centres which the help of all fellow stakeholders like Bar Council of India, FICCI, CII, Lawyers, Academicians, Corporates etc to popularize Institutional arbitration viz-a-viz adhoc arbitration. This nodal agency in turn could have an accredited list of trained arbitrators specialized in respective fields to deal with all kind of commercial disputes with the proper infrastructure and other amenities which goes in the functioning of any

accredited institution.

TRAINING

For institutional arbitration to have a foot hold and gain prominence in the Country, Nodal agency, its affiliates, Bar Council of India, Academicians, Lawyers, Corporates, etc. need to relentlessly pursue creation of awareness by way of holding conferences, seminars, workshops, symposiums, interactive talks, etc. between various people, institutions, experts in their fields. By creating this awareness, training will be encouraged and later on should be made mandatory for any arbitrator to be enlisted into the Nodal agency.

CREATION OF A WORLD CLASS INFRASTRUCTURE

On the lines of other International accredited agencies, India must also set up world class infrastructure with all possible communication/ Technological tools & amenities. The infrastructure may be developed of PPP mode with assistance of corporate/ Industry. This world class infrastructure will go a long way in establishing the credibility of the Government in popularizing institutional arbitration in the country which can attract better FDIs in the country.

SKILL SET IN LINE WITH “MAKE IN INDIA AND DIGITAL INDIA”

The pool of arbitrators who would be enrolled as part of the Nodal agency and its accredited units shall be trained in all respects to enable them to handle disputes of diverse nature which requires a combination of Law, Technology, Administrative Experience, Negotiation and Conciliation skills. This way the nodal agency will create a diverse pool of arbitrators, experts, paralegal staff, etc., which will not only bolster up self-employment opportunities but also allow parties to have a diverse choice of arbitrators at reasonable cost to handle their commercial disputes.

MANDATORY TIME BOUND PRE-LITIGATION EXERCISE AT HIGH COURT LEVEL PRIOR TO INVOKING PROVISIONS OF COMMERCIAL COURT ACT, 2015

The new Act is aimed at speedier, effective, and long lasting solutions to corporate disputes. It is suggested that any corporate dispute prior to its filing before the competent court must be subjected through mandatory pre litigation arbitration process. It is suggested that the proposed arbitration council of India would establish pre litigation arbitration clinic in each High- Court and an expert panel of arbitrators would spend pre-determined time on each dispute and try to resolve the dispute before

its filling. It is also suggested that the panel of the arbitrators, which is chosen by the parties from the prepared list would also send its recommendations and the finding to the concerned High Courts so that High Court is assisted by expert panel in arriving its decision. This suggestion is a conformity with the recommendation of the Law Commission of India which had recommended the setting up of the Commercial Act and Commercial Courts..

ENCOURAGE ADHOC ARBITRATION TO MOVE TOWARDS INSTITUTIONAL ARBITRATION

India is a diverse country and recognizes the role ad hoc arbitration has played over centuries. With the world moving into a fast pace and with a dispute compassing complex nature need is also felt for the ad hoc arbitration to redefine itself and move towards institutional arbitration. The Government of India, the Bar councils and other agencies should encourage and facilitate ad hoc arbitration to look at the larger picture and virtues of institutional arbitration.

TO OPEN UP FDI IN LEGAL SERVICES FOR FORMATION OF JOINT VENTURES BETWEEN INDIAN AND FOREIGN LAW FIRMS FOR ARBITRATION PRACTICE

India is mindful of the fact that it needs to open up FDI in legal services areas also to encourage many foreign law firms and individual practitioners who would like to practice arbitration in India. This will open up the doors for Indian Law firms to enter into strategic JV tie ups with potential foreign parties/ individuals and in this way both the Government and the Law firms can be benefited with foreign funding as well as global practices available to Indian consumers at Indian prices. Recent press releases have also indicated that the Narendra Modi led Government is willing to look at the possibility of opening of the Indian Legal services to foreign entity as a first step in the area of arbitration. Of course, as a Nation we should also be provided the reciprocity by the countries which are willing to participate in our ventures.

POPULARIZE CERTAIN MODEL CLAUSES FOR CONTRACTS/ AGREEMENTS

It is a given thing that disputes arises out of interpretation of contracts/agreements. To avoid such interpretation, it is suggested that certain model clauses for contracts/ agreements be created, popularized and published which can be adopted by the parties. This will go a long way in reining in litigation on privileged issues due to interpretation of clauses. The model clause could also recommend that the Governing Law would be Laws of India and seat of the arbitration would be

India. However, parties can then choose venue of convenience depending upon their convenience of holding arbitration.

WHAT MAY WORK WONDERS WITH ARBITRATION

In order to popularize arbitration as a long lasting dispute resolution mechanism we need to be straight forward, clear, concise and honest in our time lines in above process, procedures and the end result, i.e., the award.

It is suggested that in person hearing in arbitration matter be restricted only to three and each hearing session should not be ideally more than 8 hours. It is further suggested that no personal hearing should be done prior to completion of the pleadings and framing of the main issues on which parties wish to lead evidence and furnish documents.

One day hearing should be ideally reserved for cross examination of the witnesses of each of the parties and parties be encouraged to complete their cross examination within the specified period. Parties should be encouraged to file and disclose list of witnesses and documents and ordinarily no parties should be allow to add an additional list of witnesses unless this goes to the root of the matter.

The hearing for the final arguments should also be regulated in terms of time and should not be more than one day maximum for each of the parties. The award as far as possible be announced in person and must contain the following in a systematic and concise manner:

- (a) dispute involved in the matter which requires arbitration by the tribunal
- (b) case set up the claimant
- (c) defense establish by the respondent
- (d) documents and evidence lead by the parties
- (e) issues for consideration, and,
- (f) finding on the issues with reasoning and lastly outcome of the arbitration.

A separate note should be appended at the foot of the award indicating time consumed in the process and expenses incurred in the process. We assume that these set of recommendations could as a start be considered by the Law Makers.



A roundtable discussion on Legislative Gaps in the Cyber Era - Harmonising Indian Law with the International Legal Regime

April 29, 2016 • Parliament House-Annexe, New Delhi

India is leading the global e-economy and the technological revolution but unfortunately its legal regime has often fallen short of catering to and regulating the fast evolving technological landscape and the information revolution.

Series of major initiatives by both, the Law Makers (Govt. of India) and the Judiciary (Supreme Court) recognize the imperative need for developing a culture for appreciation of the issues involved with cybercrimes and the law in India.

India as a country, was the twelfth nation in the world to legislate on cyber law, adopting an Information Technology Act, and has also brought about certain amendments to the Indian Penal Code and the Indian Evidence Act to aid in cyber-crime investigation and prosecution. The government has made efforts towards putting in place a National Cyber Security Policy that addresses several areas related to cyber security, particularly incident response, vulnerability management and infrastructure security.

Cyberspace being the fifth common space, it is imperative that there be coordination, cooperation and uniformity of legal measures among all nations with respect to Cyberspace. The peculiar nature of cyberspace implies that existing laws are largely ineffective in curbing cyber-crime and terrorism, thus creating an urgent need to either modify existing legislation or to enact laws that are effective in checking the growing menace online. Internet security is a global problem and cyber-crime and terrorism are increasingly becoming a worldwide nuisance. Only international cooperation will enable the nations of the world to better crackdown on cybercrime and ensure healthy development of the internet.

Since the internet is not limited by national geographical boundaries, it requires that any regime that is set up with regard to the internet

be one that is applicable not only to a given state, but should have global application, anywhere on the internet. To meet this end, it is now the need of the hour that nations of the world cooperate and make constructive efforts to reduce vulnerabilities, threats and risks to manageable levels. Attempts that have been made so far, including the EU Convention on Cybercrime or the OECD Guidelines and even the probable extension of the Law of Armed Conflict to Cyberspace are not without their respective glaring loopholes and deficiencies.

The Govt. on its part enacted the Information Technology Act in 2000 which was subsequently amended in 2008 and additional Rules were framed thereunder in 2011 to deal with issues relating to cybercrimes and data protection but still the law fails to catch up with the fast changing technological developments and nature of digital crime in the cyberspace. In 2015 the Supreme Court of India passed the landmark judgment striking down the legality of section 66A of the Amended IT.

While the Supreme Court decision and the recent directives issued under the IT Act all steps in the right direction and argue well for India as a technological destination and outsourcing hub, which under the leadership of Hon'ble Prime Minister is encouraging foreign companies to come and invest here as part of the "Make in India Campaign".

The Make in India Campaign can only be successful if there is a proper legislative and effective prosecution mechanism in place to deter cybercrimes and punish any offenders, we need to develop not only attractive campaigns but also effective culture of Cyber literacy to prevent cybercrimes. With this thought process in mind and mindful of its social obligation as a responsible body, Indian National Bar Association (INBA), thought it prudent to start its series of think-tank interaction.

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Will the Amended Arbitration and Conciliation Act Improve and Influence Foreign-Seated Arbitrations?

Suman Doval

The twin prime concern of the foreign-seated arbitrations are (a) scope of judicial interference and (b) enforcement of award. These two complex concerns were sought to be addressed by the new amendments on the Act, which were brought in pursuance of 246th Report of Law Commission of India.

Historically, arbitration in India, is an ad hoc process characterised by the tag of lengthy and complex and lack of formal rules. A handful of arbitrations are conducted under the aegis of the Arbitration Institution. Arbitrations were also plagued with uncertainty because of various judicial decisions which expanded the scope of challenges to awards and judicial interference in the arbitral process. This uncertainty led to lengthy court proceedings arising from arbitrations and further ambiguity regarding the means by which final awards could be executed. These shortcomings and drawbacks hindered arbitration as an effective means of dispute resolution.

In order address these pressing these issues, Parliament passed the Arbitration and Conciliation (Amendment) Act on December 17, 2015, which received the president's assent on December 31, 2015. With this, substantial changes to the Arbitration and Conciliation Act 1996 came into force on October 23, 2015.

The amendment aims at:

- make arbitration in India a speedier, inexpensive and more streamlined process;
- minimize interference by the courts;
- make India an attractive& affordable destination for

- foreign investors; and
- improve the ease of doing business in India.

While these intentions are really good but many pertinent issues have still not resolved. This article attempts to analyses the effect that the amendment may have on international commercial arbitration seated outside India, from the perspective of a foreign party.

International commercial arbitration

Section 2(1)(f) of the act, defines ICA as 'international commercial arbitration' is an arbitration which relates to disputes arising out of legal relationships, whether contractual or not, considered to be commercial under Indian law and where at least one of the parties is:

- an individual who is a national of, or habitually resident in, any country other than India;
- a body corporate which is incorporated in any country other than India;
- an association or body of individuals whose central management and control is exercised in any country other than India; or
- the government of a foreign country.

Prior to the amendment, if a company which had its central management and exercised its control in a country other than India was party to an arbitration, that arbitration was treated as an international commercial arbitration. However, in order to align the act with the Supreme Court judgment¹, wherein the Supreme Court held that the legislature intended to determine the residence of a company based on its place of incorporation and not its place of central

management or control, the amendment has deleted the words “a company or” from the beginning of Section (2)(1)(f)(iii). That said, foreign companies incorporated outside India are still covered under Section (2)(1)(f)(ii) (ie, body corporates incorporated outside India).

Notable amendments

Clarity on applicability of Part I and seeking of interim reliefs.

The un-amended act, specified that Part I applied where the place of arbitration was India. However, the Supreme Court² held that, in the context of a foreign party seeking interim relief against an Indian party under Section 9 of the act (which falls under Part 1 of the act), Part I applies to international commercial arbitrations held outside India, unless the parties have by express or implied agreement excluded all or any of the provisions of Part I of the act.

The Bhatia International³ scope was further expanded in several other subsequent cases particularly in Venture Global Engineering⁴ In this case, a party to an international commercial arbitration filed a petition under Section 34 of the act, challenging a foreign award. In view of its judgment in Bhatia International, the Supreme Court held that since Part I of the act applied to foreign seated arbitrations and a party could challenge a foreign award under Part I of the act under Section 34.

However, this ambiguity was set to rest in Bharat Aluminium Company v Kaiser Aluminium Technical Service, Inc (BALCO case)⁵, a constitutional bench of the Supreme Court overruled the Bhatia’s judgment⁶, holding that Part I would not apply to foreign-seated international commercial arbitrations. However, this judgment applied only to agreements executed after September 6 2012. Agreements executed before this date would continue under the Bhatia regime. This led to two parallel periods : arbitration agreements executed during the Bhatia regime on the one hand and agreements signed after September 6 2012 (ie, the BALCO regime) on the other. These parallel regimes created a substantial confusion in the act, as parties to foreign-seated arbitration under the BALCO regime had no means by which to obtain interim relief from the Indian courts under the act.

In order to resolve this issue, the amendment has introduced a provision to Section 2(2) which stipulates that in the case of international commercial arbitration – unless the parties have otherwise agreed – Sections 9, 27, 37(1)(a) and 37(3) (all of which fall under Part 1 of act) will apply to foreign-seated arbitrations. However, foreign arbitral awards will be enforced and recognised under Part II of the act. In a sense, the amendment has brought back the Bhatia judgment insofar as it makes Section 9 applicable to foreign-seated arbitrations, while at the same time ensuring that a foreign award cannot be challenged under Section 34.

As a result of this proviso, unless the parties have agreed otherwise, a foreign party can seek interim relief against a party in India, and thus preserve its goods/assets located in India, during the pendency of the arbitration. This relief can be sought either (a) before arbitration commences or (b) during arbitration or (c) after an award has been passed, until the execution of the award.

This provision facilitate parties to petition the High Court directly for interim protection measures to preserve their goods or assets located in India which are the subject matter of arbitration or to secure disputed amounts.

In accordance with the newly introduced Section 9(2), if interim relief is sought before commencement of arbitration, and if such relief is granted, the arbitral proceedings must commence within 90 days from the date of the order or from the date set out by the court. However, the consequence of failing to commence arbitration within the 90-day period has not yet been set out.

Assistance from courts and appeal provisions

As a result of the new proviso to Section 2(2), unless there is an agreement excluding the applicability of this section, a party to a foreign-seated international commercial arbitration can apply to a court under Section 27, seeking its assistance in taking evidence. This should be particularly useful for foreign parties that want to summon witnesses or have documents produced that are located in India. This section also sets out the consequence for not complying with an order made thereunder.

Further, unless there is an agreement excluding the applicability of Section 9 or Section 2(2), a party that is dissatisfied with an order passed under Section 9 can appeal under Section 37(1)(a). However, there appears to be a typographical error in the amendment in this respect. As per the unamended act, Section 37(1)(a) provided for the right to appeal orders passed under Section 9 of the act. However, under the amendment, this appeal provision has been renumbered as Section 37(1)(b), with the introduction of a new Section 37(1)(a) providing for appeals from orders passed under Section 8, which does not apply to foreign-seated international commercial arbitrations. The proviso to Section 2(2) should therefore have made Section 37(1)(b) applicable instead of Section 37(1)(a). One may expect that this error will soon be addressed by law makers. Further, since Section 37(3) also applies to international commercial arbitrations, no second appeal can be sought under Section 37(1)(b). However, Section 37(1)(b)(3) specifically provides that no right to appeal to the Supreme Court will be affected or removed.

That the parties can seek to execute foreign awards passed in countries that are signatories to the New York Convention or the Geneva Convention under Sections 48 or 57 of the Act. Section 48 applies where an award has been passed in a country which is a signatory to the New York Convention and has a reciprocal agreement with India. Section 57 applies to cases where an award has been passed in a country which is a signatory to the Geneva Convention. One of the grounds for refusal is that the foreign award was passed in contravention of the public policy of India, which was previously not defined. The amendment has introduced two identical explanations to Section 48(2) and Section 57(1) in an attempt to explain the meaning of ‘public policy of India’. The explanations seek to narrow the scope of the definition of ‘public policy’ which, to date, has been interpreted so broadly by the judiciary that almost all awards are challenged based on a violation of the public policy of India. Explanation 1 clarifies that an award conflicts with the public policy of India only in the following circumstances: “i. the making of the award was induced or affected by fraud

or corruption or was in violation of Section 75 or Section 81; or
ii it is in contravention with the fundamental policy of Indian law; or
iii it is in conflict with the most basic notions of morality or justice.”

Explanation 2 tries to clarify that when determining whether there has been a contravention of public policy, the courts will not review the case on the merits of the dispute. While some attempt has been made to explain what public policy is, the explanations may not really help, as they are loosely worded and open to interpretation.

Prospective applicability of amendment

According to Section 26 of the Act, the amendment will apply prospectively to arbitral proceedings invoked after October 23 2015. However, the issue of whether the amendment applies to pending court proceedings filed after the passing of an award is a matter of debate and is currently being considered by various courts across the country.

Despite Section 26, courts differed on the applicability of the amendments to arbitration and arbitration-related court proceedings. Some of these decisions are discussed below in order to understand and highlight the divergent viewpoints surrounding the question:

The short question involved was whether upon filing an application for challenge the award was automatically stayed. Under the unamended Section 36, there was an automatic stay on enforcement of arbitral award on filing of an application to set aside the award (“Where the time for making an application to set aside the arbitral award under section 34 has expired, or such application having been made, it has been refused, the award shall be enforced...”). However, under the amended Section 36 there is no automatic stay [Section 36(2) of the amended Act provides: “Where an application to set aside the arbitral award has been filed in the Court under section 34, the filing of such an application shall not by itself render that award unenforceable...”]⁷

On facts, the award was passed in July 2015 and the petition for setting aside was filed in November 2015. The Single Judge of the Calcutta High Court held that since Section 26 did not make applicable the Amendment Act to arbitration which commenced prior to 23 October 2015, nothing in the Act applied to the arbitration, which was the subject matter of challenge

A Division Bench of the Calcutta High Court decided⁸ an appeal on the question as to whether a court could entertain an application for interim relief under Section 9 of the 1996 Act post 23 October 2015 even if it was filed before the said date. The Division Bench of the Calcutta High Court held in the negative. Among other things, the court’s rationale was based on the use of the phrase “arbitral proceedings” in Section 26. The Court held that arbitral proceedings commenced with notice invoking arbitration (or as provided under Section 21 and terminated as per Section 32 by the final arbitral award or by an order of the arbitral tribunal under Section 32(2). Hence, Section 26 did not apply to proceedings initiated under Section 9..The Court held.

A careful reading of the provisions of the 1996 Act, and in particular Sections 21 and 32 thereof, makes it amply clear that the expression ‘arbitral proceedings’ in Section 26 of the Amendment Act of 2015 cannot be construed to include proceedings in a Court under the provisions of the 1996 Act, and definitely not any proceedings under Section 9 of the 1996 Act, instituted in a Court before a request for reference of disputes to arbitration is made

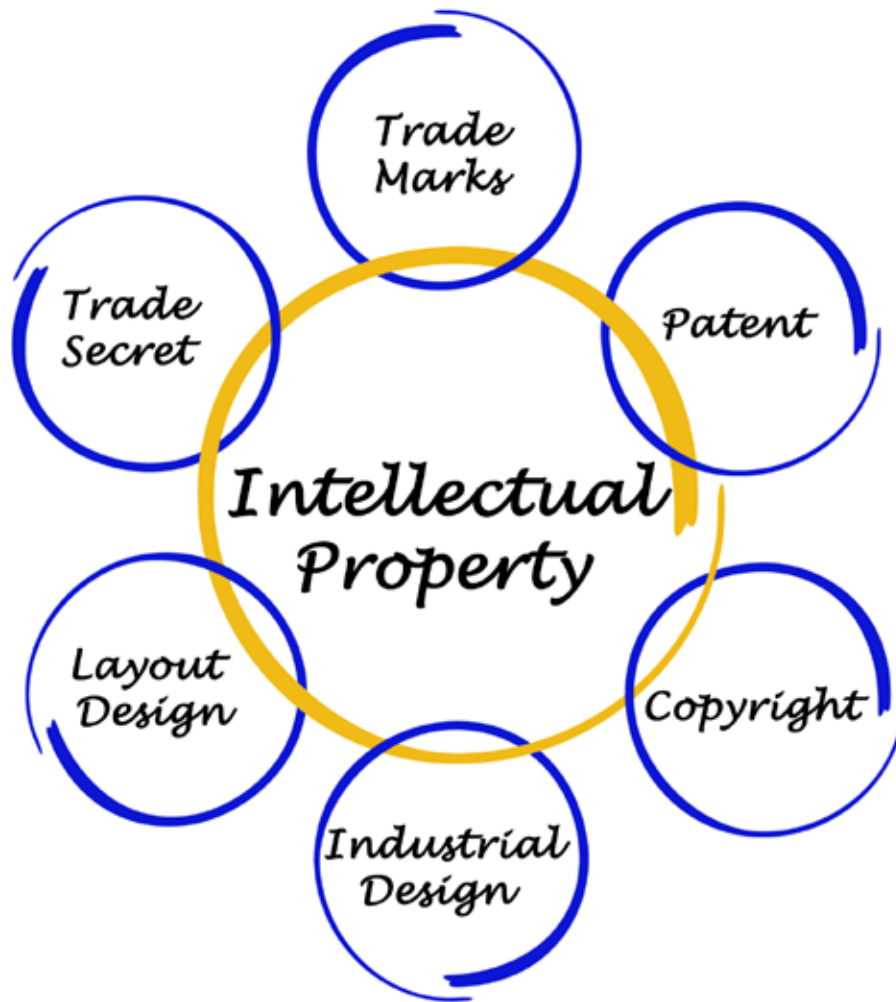
That a Division Bench of Madras High Court⁹ directed the Union of India to examine the provision related to pending arbitration proceedings as per the recently promulgated Arbitration and Conciliation (Amendment) Ordinance, 2015, the Division Bench stated that the Government must clarify that whether Section 29-A would be applicable to pending arbitrations or not, and if it is applicable to the pending arbitrations, then whether the time period specified therein would commence from the date of the Ordinance. The Court further directed the Government to clarify that whether the Law Commission’s opinion was sought prior to the promulgation of the Ordinance with regard to introduction of Section 29-A. The Court further sought clarification on the point of non-introduction of the proposed Section 85-A as recommended by the Law Commission, which dealt with the aspect as to prospective and retrospective operation of the various provisions.

The provision in question, Section 29-A was inserted to specify that an award shall be made by the arbitral tribunal within the period of twelve months from the date the arbitral tribunal enters upon the reference. This period may be extended for a period not exceeding six months with the consent of the parties. It is also provided that if the award is not made within the period of 12 months or the extended period, the mandate of the tribunal shall terminate unless the Court has, either prior to or after the expiry of the period so specified, extended the period.

In fact, the high courts have already taken opposing views on this matter. However, this controversy will not affect new foreign-seated arbitration, but will affect matters relating to earlier domestic arbitrations and international arbitrations awards that have already been challenged under Section 34 of the act.

The amendment should come as a welcome relief to most international entities/individuals that are parties to foreign-seated international commercial arbitration. The confusion of whether Part I of the act applied to foreign-seated arbitrations has largely been laid to rest. In addition, foreign parties now have the advantage of approaching courts in India for interim relief against Indian parties, as regards their assets located in India. Further, the parties to international commercial arbitration can directly approach the High Courts under Section 9 for interim protection, which will no doubt provide foreign parties with some relief.

1. TDM Infrastructure Private Limited v UE Development India Private Limited (2008)14 SCC 271
2. Bhatia International v Bulk Trading SA (2002) 4 SCC 105
3. Ibid
4. Venture Global Engineering v Satyam Computer Services Limited. 2008 (4) SCC 190
5. 2012 (9) SCC 552
6. (2002) 4 SCC 105
7. Electosteel Castings Limited vs Reacon Engineers (India) Private Limited (14th January, 2016) (Single Judge Calcutta High Court)
8. Tufan Chatterjee vs Rangan Dhar (Division Bench, Calcutta High Court-02-03-2016)
9. Delphi TVS Diesel Systems Ltd v. Union of India, decided on 24-11-2015



Dispute Resolution Through Arbitration and Mediation For Intellectual Property Disputes

Archana Doval

Intellectual property rights (IPR) are defined as the rights claimed by the creator over the creation of their minds. They usually give the creator an exclusive right over the use of his/her creations for a certain period. Intellectual property (IP) refers to creations of the mind: inventions, literary and artistic works, and symbols, names, images, and designs used in commerce.

Intellectual property plays an important role in all the business and commercial activities. In India IPR-related matters like patents, trademarks, copyrights, designs and geographical indications are governed by the Patents Act 1970 and Patent Rules 2003, Trademarks Act 1999 and the Trademarks Rules 2002, Indian Copyrights Act, 1957, Design Act 2000 and Rules 2001, and The Geographical Indications of Goods (Registration & Protection) Act, 1999 and The GI of Rules 2002, respectively

India is now a signatory to various IP treaties and conventions. India has also recognized the value of Intellectual property and is emerging as significant contributor and potential IP creation Centre. Indian law regime is at par with developed countries for effective protection and enforcement of IPRs.

In today's business market, the Intellectual Property is at the core of the commercial transactions, success and valuation of the companies. Intangible assets are important part of the company portfolio. Mostly, the disputes between parties/companies are with their competitors in the same field. To avoid indefinite conflict and find the amicable solution, which suits both, the contracting parties are looking forward to the dispute resolution through mediation and arbitration procedures. Mediation does not require strict regulations of the court; the parties resolve their dispute and decide their own terms and conditions. Fast track resolution helps them to save their time.

As the IP rights are territorial in nature. In this era of globalization of business and trade of international transactions, where parties in dispute are from more than one country, the legislations and understanding of laws of various jurisdictions with respect to the IP has become difficult. Intellectual property disputes demands specialized knowledge within the areas of patents, trademarks, copyright, designs or other form of intellectual property. The expertise and understanding

in the subject matter of technical field is essential for case-to-case basis. The arbitration and mediation would provide the opportunity to the contacting parties to select and appoint the experts for specific domain. Considering the number of cases resolved through mediation since the last decade, it seems that a combination of Arbitration and mediation is evolving as a successful tool for resolving IP disputes.

Time period is crucial as exclusive rights are given to the owner of the IP for limited period of time as in case of patents it is 20 years and other technological innovations and software become outdated and quickly superseded by new technology. The time taken by court in legal proceedings and settlements of disputes is detrimental to IP owner as it limits the useful life of a product and is unable to exploit his rights for commercial success of his venture. The time saved by opting for the quick and expedited arbitration and mediation is helpful in protecting the rights of the IP owner. The cost of IP litigation in foreign countries i.e. US, is exorbitant. The cost on dispute resolution substantially reduced if contracting parties decide to go through arbitration.

As confidentiality is a key feature in the IP Industry, Arbitration provides more protection for confidential information, which is the sole importance to parties in Intellectual Property Disputes with a help of well-drafted Arbitration agreement.

WIPO Arbitration and Mediation Centre established in 1994 situated in Geneva, Switzerland. The Centre provides the services for the resolution of international commercial disputes through arbitration and mediation involving intellectual property. The arbitration and mediation Centre has Expert determination facility to choose technical expert if both the party agree in the involved technology for better understanding and expert opinion.

Advantages of Arbitration for IPR Disputes

There are many advantages to arbitrating IPR disputes, including:

1. Party Autonomy.
2. Certainty as to Forum. Disputes are submitted to a single forum, not several different forums in several different jurisdictions simultaneously.
3. Relative Speed of Arbitration-Arbitration is designed to allow for set decision-making time periods.
4. Availability of Expert Arbitrators-The greatest advantage of arbitration may be that parties are allowed to pick arbitrators who are specialists in the area of dispute.
5. Confidentiality. Parties are not forced to wash their dirty linen in public. This is a significant reason parties elect to arbitrate.
6. Neutrality Regarding National Interests.
7. Avoidance of U.S.-Style Discovery-In an arbitration agreement, parties may agree not to have any discovery at all. Alternatively, they can specify what each side will do. This option is unavailable in court.
8. Minimal Damage to the Party/Commercial Relationship.
9. Flexibility of Remedy.
10. Enforceability of Awards-The New York Convention

has 120 countries as signatories: there is only one result, with one place to go to have the result enforced.

11. Single Procedure.

12. Binding Effect (if the parties so choose).

The importance of IPR and their protection is acknowledged the world over as essential to business. In tune with the world scenario, India too has recognized the value of IP, which recognition has been consistently upheld by legislators, courts and the industry. India is now a signatory to various IP treaties and conventions. This has helped India become more attuned to the world's approaches and attitudes towards IP protection. India has already taken steps to comply with its obligations under TRIPS, and the Indian IP law regime is almost at par with the regimes of many developed nations. Historically, the enforcement of IPRs in India was not particularly effective.

However, recent judicial rulings and steps taken by various enforcement agencies demonstrate that India is gearing up for effective protection and enforcement of IPRs.

The Police in various states have established special IP cells where specially trained police officers have been appointed to monitor IP infringement and cyber crimes.

Various Indian industries have also become more proactive in protecting their IPRs. For example, in the area of music in India, Indian Music Industry, an association of music companies, which headed by a retired senior police official, has taken similar proactive steps to combat music piracy.

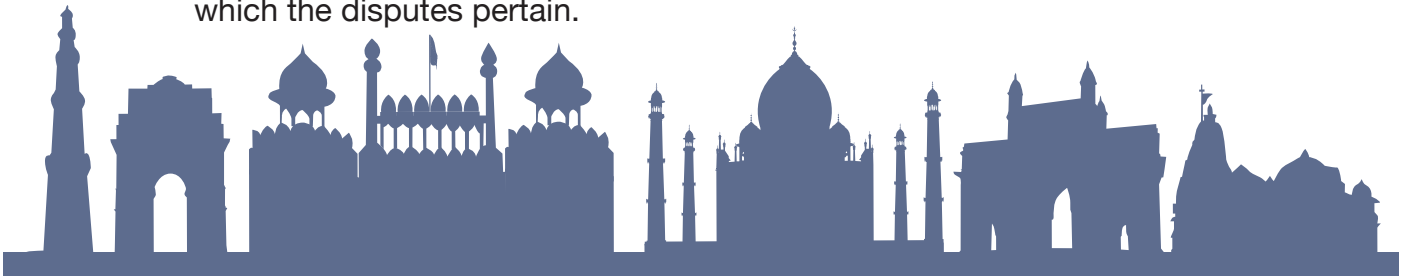
In nutshell, India has taken many positive steps toward improving its IPR regime and is expected to do much more in the coming years to streamline itself with the best practices in the field of intellectual property rights.

There are, of course, circumstances in which court litigation is preferable to ADR. For example, ADR's consensual nature makes it less appropriate if one of the two parties is extremely uncooperative, which may occur in the context of an extra-contractual infringement dispute. In addition, a court judgment will be preferable if, in order to clarify its rights, a party seeks to establish a public legal precedent rather than an award that is limited to the relationship between the parties. In any event, it is important that potential parties, and their advisors are aware of their dispute resolution options in order to be able to choose the procedure that best fits their needs.

What are the changes necessary to make India the go-to destination for international commercial arbitration?

Pravin Anand

1. Court must stringently implement the new amendments to the Arbitration Act which drastically narrow the scope of challenge to arbitral awards.
2. Unless necessary, courts should exercise minimal discretion in interfering with the ongoing arbitration. Thus, interlocutory appeals should be dissuaded to ensure speedy disposal without any interruptions.
3. Infrastructure must be improved
 - a. Necessary to have dedicated pool of stenographers, enough computers and the software like OPUS.
 - b. Necessary to routinely review (and where necessary) increase the number of arbitrators from which parties can mutually agree and appoint a person for their matter.
4. For International Commercial Arbitration of Trade Secrets and Patent disputes (where data is confidential), strict rules of confidentiality must be formulated and stringently implemented.
5. For International Commercial Arbitration of Copyright, Patents, Designs, Plant Varieties, speedy disposal of the arbitration must be encouraged given the limited period of protection.
6. A database of specialist arbitrators should be developed as the science and technology areas can get very highly specialized cases. The case proceeds smoothly if the arbitrators belong to the field of technology to which the disputes pertain.



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