A QUEST - THE NEED FOR REGULATOR IN ARBITRATION

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ABSTRACT

India is on track of establishing confidence in its legal system which is the fundamental condition to become an international arbitration venue. Unneeded to say, a steady amendment in the Arbitration laws to keep abreast of economic variations might be desirable. However, India has already done the needful in this regard, the present need of the regulatory body in arbitration must be considered. This article endeavours to explain that the regulatory body in the arbitration field is essential to promote it. This work fishes out the need for the regulator by picturizing the growth of arbitration oversees and centralizes the need to improve the best dispute resolution technique in near future. Hence, the authors argue that regulator in arbitration is a boon

Keyword: Regulator, Arbitration

INTRODUCTION

Arbitration is an alternative and oldest system of alternative dispute resolution (ADR) to the traditional state-administered court litigation. It is a well-established form of ADR, to resolve disputes outside the courts.

The basic Indian law of arbitration is contained in the Arbitration and Conciliation Act 1996 (Act). The Act is principally based on the 1985 UNCITRAL Model Law on International Commercial Arbitration and the UNCITRAL Arbitration Rules 1976. Ultimately the scope of this very section was resolute in ***TDM Infrastructure Pvt. Ltd. v. UE Development India Pvt. Ltd***[1]**,** wherein the Supreme Court enumerated that even though the fact that a company holds foreign control if it is established that a company is incorporated in India, it can only have Indian nationality for the said Act. Thus, it cannot be said that a company incorporated in India does not have Indian nationality.

Though arbitration shares some of the traits of litigation and mediation but has features that are distinct from both. Non-binding arbitration is similar to mediation, in which a decision cannot be imposed on the parties similar to litigation, the award made by the tribunal in the arbitration is binding on the parties. However, as opposed to going to court, the arbitration process is generally less formal and confidential.

Thus, the arbitrators are rulers of their procedure and subject to parties' agreement, may conduct the proceedings in the manner they consider appropriate. The only confine on them is that they should treat the parties with equality and each party shall be given a full opportunity to present his or her case,[2] which includes ample advance notice of any hearing or meeting[3]. Also, neither the Code of Civil Procedure[4] nor the Indian Evidence Act applies to arbitrations[5].

ARBITRATION AND CONCILIATION (AMENDMENT BILL 2018)

This particular bill was introduced in Rajya Sabha on July 15, 2019. The 2019 bill varies from its previous one by mentioning ample key features including:

[1](2008) 14 SCC 271.
[2] Section 18 of the Arbitration and Conciliation Act, 1996.
[3] Section 24 (2) of the Arbitration and Conciliation Act, 1996.
[4] Section 19 of the Arbitration and Conciliation Act, 1996.

- Constitution of an independent body called the Indian Council of Arbitration.
- Under the Bill, the Apex Court and High Courts may now elect arbitral institutions, which parties can approach for the appointment of arbitrators.
- The Bill pursues to eliminate time restrictions for international commercial arbitrations.
- The Bill provides that all details of arbitration proceedings will be kept confidential except for the particulars of the arbitral award in certain circumstances.

In addition to the above facts, the Arbitration and Conciliation (Amendment Bill 2018), states the functions[6] undertaken by the ICA which includes "*framing policies for governing the arbitral institutions, hold training, workshops, set up, review and update norms etcetera".*

INDIAN COUNCIL FOR ARBITRATION AND IT'S ROLE

Indian Council for Arbitration is a non-profit service organisation for the elevation of the use of commercial arbitration and was set up, under a sanction of the Indian Ministry of Commerce, in 1965, following the Societies Registration Act, 1860.

The Indian Council for Arbitration which is now considered to be an apex arbitral institution in the nation has started the process of identifying and training specialized arbitrators for disputes connected with the IT industry. Concerning this aspect, the Indian Council for Arbitration had conducted a comprehensive session on Alternate Dispute Redressal methods for the IT sector in India's major cyber cities like Bangalore and Hyderabad to create a proficient pool of arbitrators specialized in cyber laws. The ICA has also pioneered the notion of fast-track arbitration in India. Also, the ICA has no jurisdictional limitations and arbitrate on any proceedings in any part of the country[7].

Furthermore, its role is to define rules for arbitration which are to be strictly adhered to by all persons indulging in areas of arbitration in India. The ICA also has a Code of Conduct which has been framed in the wake of a fundamental principle that only an arbitration institution can guarantee

[5] Section 1 of the Evidence Act,1872.
[6]Section 43(D)(2), Arbitration, and Conciliation (Amendment Bill 2019).
[7] 103. KRISHNA SARMA, MOMOTA OINAM& ANGSHUMAN KAUSHIK, DEVELOPMENT, AND PRACTICE OF ARBITRATION IN INDIA –HAS IT EVOLVED AS AN EFFECTIVE LEGAL INSTITUTION, (2009).

the enforcement of such ethical norms. The Code is established into 4 parts, namely, Code of Conduct for:

1. the Arbitration Committee.
2. the Arbitrators.
3. the parties.
4. the Counsel.

Thus, it is one of the most important arbitration centers in the Asia Pacific, which handles more than 400 domestic and international arbitration cases each year.

COMPARATIVE STUDY OF THE ALTERNATIVE DISPUTE REDRESSAL INSTITUTIONS FUNCTIONING IN INDIA AND OTHER COUNTRIES

Accordingly, so far, we have comprehended the Arbitration and laws governing it in India. Now let's apprehend the ADR methods of different Countries.

UNITED STATES OF AMERICA

The development and use of alternate dispute redressal mechanisms in the United States of America pre-dates both the announcement of Independence as well as the Constitution. Arbitral tribunals were established as early as 1768 in New York and shortly thereafter in other cities predominantly to resolve disputes in the clothing, printing, and merchant seaman industries[8]. An emergent number of Courts have promulgated rules that mandate Judges to recommend litigants to participate in, ADR procedures such as summary jury trials, early mediator evaluation, mini-trials, mediation, and arbitration. The ADR method is so successful in the USA that, it is practiced in every Court at the State level since the 1970s, more than 90% of all pending cases are settled through advocate and judicial mediation and hardly a few percent of all cases proceed to trial.

[8]Dana H. Freyer, The American Experience in the field of ADR. pg,108, P.C. Rao and William Sheffield, The Arbitration and Conciliation Act,1996 (1997).

UNITED KINGDOM

With the expansion of the British Empire and growth of trade, disputes with merchants and traders increased and marketable matters were habitually referred to arbitration. This resulted in a significant reduction of the trial of commercial business in Courts. The Common Law Procedure Act of 1854 and the England Arbitration Act of 1889 had together organised the general law concerning to arbitration.

AUSTRALIA

In Australia, arbitration is a matter generally covered under the State rather than Commonwealth, legislation. The Australian law on arbitration is grounded on international conventions, legislations consisting of both federal and state, and common law which is the obvious judge-made law. Australia being party to three international conventions on arbitration has given effect to it within Australia by the federal International Arbitration Act 1974 (IAA).). Part II of the IAA comprehends the provisions for the enactment of the Convention on the Recognition and Enforcement of Foreign Arbitral Award of 1958(New York Convention). Part III of IAA states the UNCITRAL Model Law on International Commercial Arbitration of 1885 a force of law in Australia. Part IV gives influence to the Convention on the Settlement of Investment Disputes between States and Nationals of other States of 1975 (Washington Convention). The State and Territories of Australia have their standard law on arbitration, known as the Commercial Arbitration Act (CAA)[9].

SOUTH KOREA

The Korean Arbitration Act is the principal governing law that constituted an official body (the Korean Commercial Arbitration Board) that regulates arbitration in the Republic of Korea. Legal professionals and corporations, in Korea, are greatly choosing arbitration for litigation.

NORTH KOREA

North Korea owns an advanced arbitration system as the cases are concluded in a minimum of six months. According to Hay, a lawyer specialized in arbitration law, North Korea holds an advanced dispute resolution system to facilitate foreign investment.

[9]Pryles Michale, Dispute Resolution in Asia, (2002), Kluwer Law International (Australia-p62).

ADVANTAGES OF A REGULATOR IN ARBITRATION

The Cabinet had sanctioned the Arbitration and Conciliation (Amendment) Bill, 2018 which brought a lot of amendments to the arbitration laws. The aim behind the amendments was to strengthen the institutional base of the arbitration. Regulation is usually adversative to development. Principally, it is the goal of the regulators to resolve the dispute promptly and in a way that avoids service disruptions and minimizes welfare loss among stakeholders. The ability for regulators to handle disputes effectively and equitably lies in their ability to maintain reliability among parties involved.

The analysis of the SC's judgment in ***Gujarat Urja Vikas Nigam v. Essar Power Ltd***[10]***,*** *interprets that the* discretion of the regulator cannot be exercised arbitrarily, unreasonably, or perversely. Also, arbitral decision-makers and institutions will be allocated the most immediate regulatory tasks.

In national legal systems, the ethical regulation is to guide, punish, and deter attorney conduct to protect clients and third parties, and to ensure the proper functioning of the state adjudicatory apparatus[11]. While these are the straight objects of attorney regulation, the regulation also obliges numerous ancillary functions. Regulation contributes to public debate about the proper role and conduct of attorneys and enhances the image of regulators, the legal profession, and the legal system[12].

CASE STUDY OF BOTSWANA TELECOMMUNICATIONS CORPORATION[13]

This was one of the first countries in Africa to establish an independent regulatory agency which in 1999, resolved its first interconnection dispute, between Botswana Telecommunications Corporation (BTA) and the two majors. The regulator took action to resolve the dispute between

[10] (2008), 4 SCC 755.

[11] JOINT COMM. ON PROF'L DISCIPLINE, App. JUDGES' CONE. & STANDING COMM. ON PROF'L DISCIPLINE, AM. B. ASS'N, STANDARDS FOR LAWYER DISCIPLINE AND DISABILITY PROCEEDINGS 1 (1978).

[12] FRED C. ZACHARIAS, WHO CAN BEST REGULATE THE ETHICS OF FEDERAL PROSECUTORS, OR WHO SHOULD REGULATE THE REGULATORS.

[13] Key Findings from ITU Interconnection Dispute Settlement Mini Case Studies, https://www.itu.int/ITU-D/treg/Case_Studies/Disp-Resolution/Key-Findings.pdf..

the BTA and the cellular operators Mascom Wireless and, Vista Cellular only after the parties were unable to agree on modifications to the earlier interconnection agreement.

ADDRESSING AND OVERCOMING ARBITRATION CHALLENGES

Additionally, there are a few issues that need to be addressed at the policy level. The first and foremost amongst these are guaranteeing the disposal of proceedings in time and making sure that the project which is under dispute should not stall as a consequence of the alteration. Secondly, the scope of challenging the arbitration award before courts. Under the Indian Arbitration and Conciliation Act, 1996 (the Act) an award[14] would be considered to conflict with the public policy in India only if

(i) the finality of the award was influenced by fraud or corruption or if it was in violation of section 75 or section 81 or
(ii) it is in infringement with the fundamental policy of law of India or
(iii) it conflicts with the elementary notions of morality and justice. Also challenging the arbitral awards on the grounds of public policy has become an Achilles heel for arbitration in India that is a means by which the losing parties may attack the arbitral awards, on much wider grounds than that which are permitted in other countries.

In ***ONGC v. Western Geco***[15] , the Supreme Court had upheld the above method and directed that a court should evaluate whether a particular tribunal:

(i) has applied a judicial approach that has not acted arbitrarily manner;
(ii) has acted per the principles of natural justice, including applying its mind to the relevant facts; and
(iii) has sidestepped reaching a decision that is so perverse or illogical that no sensible person would have arrived at the same.

JUDICIAL INTERVENTION

In the Indian context, interference by courts was identified as one of the major reasons for the delay in arbitrations. An award in ***White Industries v. The Republic of India*** [16]in 2011, is a case in

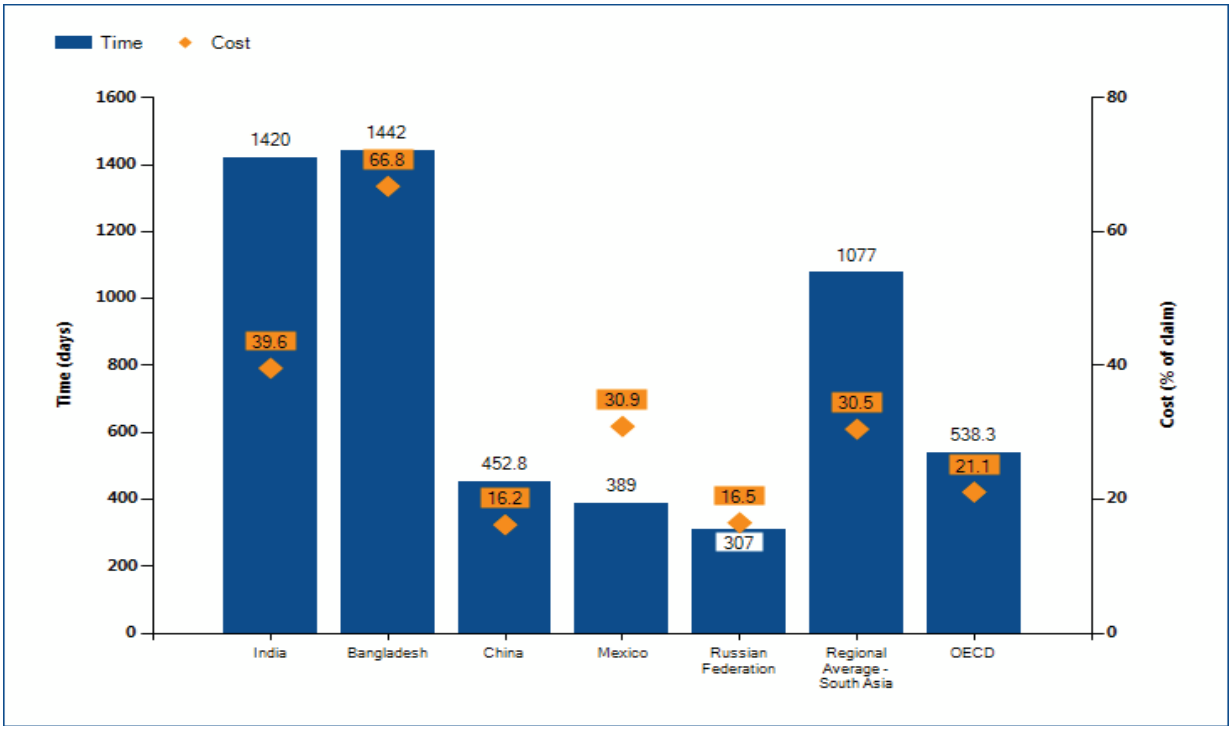
[14]Section 34 of the Indian Arbitration and Conciliation Act, 1996.

which an Australian company appealed compensation, equal to the amount of award, from the Indian government on the excuse of judicial deferment. Two issues had emerged from the above award. One is interference by courts and two delays in arbitration. Concerning interference by courts, it is well debated and agreed that the judiciary should minimize its intervention into the arbitration, as is being done in various other jurisdictions. In China, only the Supreme Court can be barricaded in arbitration matters. This aids in depressing and containing the obstacles in arbitral awards. Another issue that has been recognised as a cause of concern is the lack of consistency in decisions by the Indian judiciary on arbitration and decisions taken by arbitral authorities. It is very well noticed that judicial supervision absences uniformity in so far as due to the federal structure of States and Central relations in India. This calls for action on the part of the government to set up a regulator to keep away judicial intervention in arbitration as it the way to exclude court proceedings in dispute resolution. Therefore, an effort is to be made to identify those steps which would make a good balance between judiciary and arbitration, at pre, during, and post arbitral proceedings.

STATISTICAL ANALYSIS

The dispute resolution process has an enormous influence on the Indian economy as well as the global perception of doing business in India. This is specified by the World Bank rating on Ease of Doing Business 2016 which has ranked India 131 out of 189 countries on how tranquil it is for private companies to monitor and follow regulations. The table thus shows the comparative data on both the time and the cost of settling disputes.[17]

[15]2014 (9) SCC 263.
[16] IIC 529 (2011).
[17]https://niti.gov.in/writereaddata/files/document_publication/Arbitration.pdf



CONCLUSION

International arbitration is undoubtedly the finest alternate for resolving cross-border disputes. One of the pros of international arbitration is that the final award given by the arbitrator is willingly enforceable in many countries. The impartiality, tractability, confidentiality, and sovereignty enjoyed by the parties involved make it the most popular method of ADR among businessmen.

The road for International Commercial Arbitration (ICA) in India is not as smooth as it is still in the neophyte stage. Therefore, to conclude an enforceable arbitration contract, various validity conditions are mandatory. The list of issues doesn't end here. Therefore, it is claimed that the regulatory body in the field of arbitration in India whose need is mapped out here is not a mere regulator but a promoter of arbitration.