TIME TO INSTITUTIONALISE ARBITRATION PROFESSION

Abstract

This article makes a strong case for appointing a statutory body as a regulator for the arbitration profession. This will ensure a major boost to the development and growth of arbitration profession. With each day marching towards USD 5 trillion economy, continued efforts to attract of FDI investments and a push to infrastructure, a two-way regulatory framework is important for catapulting India to reach the dream destination and emerge as a favourite hub of international arbitration.

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INTRODUCTION

In any business transaction, there is a possibility of dispute arising due to expectations of parties not materialising or due to acts of omission or commission by either party or due to the misunderstanding of the terms and conditions of the contract. These disputes need to be resolved, in the first stage, in a spirit of give and take. However, when the parties take an unrelenting stand and wish to drag the other party to the court, there starts the beginning of travails - plethora of appeals, stay petitions, affidavits, counter-petitions, dates of hearing, adjournments, additional grounds, etc. etc. It is a long unwinding journey to seek resolution of a dispute. In the process, no one wins. Even the winner of a court battle is a big loser, in terms of money, time and energy.

Instead of resorting to court route, an easy way is carved out as an alternate dispute resolution. It is better to appoint an independent arbitrator with mutual consent of the parties and seek resolution of the dispute. Arbitration process is largely free from delays. It is cost effective and result-oriented. This is truly a great relief.

Arbitration is ingrained in the history of India. Right from olden days, dispute resolution involved the process of arbitration. Successive Governments at the Centre have tried to frame legislations with the objective of raising the bar and make India an enviable destination for international commercial disputes, confirming to the best practices of other hubs of arbitrations, like Singapore, London, Paris, Stockholm and New York. This is certainly a laudable dream. All efforts should be made to make India a hub for International Arbitration.

INDIA AS INTERNATIONAL ARBITRATION HUB: A DISTANT DREAM?

The dream of India being a hub of international arbitration seems to have remained a distant dream. With each passing year, we seem to be nowhere near it. Some of our own leading businessmen, industrialists, business houses, find comfort in knocking at the door of Singapore or London for resolving their commercial disputes. This shows the extent of trust deficit in the arbitral mechanism in India.

WHAT ARE THE REASONS?

There have been changes, amendments and clarification from time to time. Each piece of legislation or amendment has brought in its terrain further complications and confusion. Compared to the 1940 law (Arbitration Act, 1940), certainly the 1996 law (Arbitration and Conciliation Act,1996) was an improvement. However, what is intended and what is actually implemented are totally contrary. Therefore amendments were made to the 1996 Act in 2015. As these amendments were found inadequate,

further amendments were brought in 2019 with an intention to establish the Arbitration Council of India and insertion of Eighth Schedule to the Arbitration and Conciliation Act, 1996. In the same year, the New Delhi International Arbitration Centre Act, 2019 was passed. Behind the creation of these two bodies i.e. Arbitration Council of India and the New Delhi International Arbitration Centre Act (proposed to be renamed as India International Arbitration Centre), there is a noble objective of inspiring confidence and credibility amongst the litigants of commercial disputes. However, there are still certain flaws in the system. The main reasons are:

i. Presently, there is an overload of retired judges acting as arbitrators.

ii. There is no statutory body acting as a regulator for systematic development and growth of arbitration profession. The two institutions, Arbitration Council of India and the New Delhi International Arbitration Centre, cannot be considered as regulators.

iii. There is random growth of arbitral institutions having their own set of rules and regulations without any over-sight by a statutory authority or regulator.

iv. There is no requirement for continuing education programme (CEP) for updating of knowledge and skill of arbitrators.

v. The responsibility for appointment for arbitrator is given to the Courts rather than to a statutory regulator. Courts are saddled with administrative work for appointment of arbitrator.

vi. There is no monitoring mechanism for the performance of arbitrators, nor is there any mechanism for disciplinary proceedings against the erring arbitrators.

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vii. There is no system of peer review for reviewing the performance of arbitrators for further improvement of the arbitrator's competence and skill.

viii. There is no provision for suspension, surrender, revival, termination or expulsion of an arbitrator.

ix. There is no provision for submission of information regarding arbitration assignments – date of commencement, date of completion, fee charged, etc., on quarterly basis or annual basis to the arbitral institution or regulator.

x. There is no provision for recognition of arbitral institutions with certain laid down criteria. Any institution, on its own, acts as an arbitral institution without any recognition from any statutory body.

xi. There is no syllabus prescribed for appearing in examinations before entering the arbitration profession. Arbitration is a specialised field of law.

xii. Arbitrators are not registered with any statutory regulator, although they may be a member of an arbitral institution.

xiii. There is no mechanism to address grievances and conduct disciplinary proceedings against arbitrators.

xiv. There are no provisions for taking action against an arbitral institution for failing in its duties.

xv. There are no penal provisions for misconduct, misrepresentation and gross negligence on the part of arbitrator or against the functionaries of an arbitral institution.

xvi. There is no Model Code of Conduct for arbitrators to follow. The Fifth Schedule and Seventh Schedule to the Arbitration and Conciliation Act, 1996, do not measure up to a Model Code of Conduct. No importance is shown on certain parameters, like integrity, fairness, independence, professional competence, upholding confidentiality, attraction to being fleeced with gifts, travel, hotel accommodation, etc.

xvii. Presently, there is no provision regarding qualification and experience of arbitrators. With the deletion of the Eighth Schedule to the Act, full freedom is available to the parties to appoint anyone as an arbitrator, so long as both the parties agree on one person.

xviii. There are no Model Bye-laws for arbitral institutions. Presently, they are free to prepare their own bye-laws without any oversight by any statutory authority.

xix. Arbitrators do not enjoy the same respect as members of other professions like doctors, architects, Chartered Accountants. The parties to dispute do not have full faith

in the system of arbitration. Arbitral awards are frequently challenged in the courts of law, leading to further litigation.

xx. Frequent changes in the arbitration law has weakened party autonomy and weakened enforceability of arbitral awards.

WAY FORWARD

The flaws mentioned above provide a ground for bringing changes and carrying out improvements in the system. Following are some suggestions.

1. Presently, any lawyer or a judge can be appointed as an arbitrator without having specialised exposure to subtle nuances of arbitration. Although arbitration law is a subset of general law, it is by itself a distinct field of study and expertise. It requires distinct skill sets. An arbitral tribunal should consist of domain expert, law expert and finance expert, giving a balanced view for resolution of commercial disputes.
2. A two-tier statutory body for regulation, development and growth of the arbitration profession is very much required. Firstly, one body should be appointed as a statutory authority to regulate and develop arbitration profession with clear aims, objectives, role and responsibilities. Secondly, there should be second-tier organisations with due recognition as "Arbitral Institutions". These arbitral institutions should serve the role of frontline regulators for registering, monitoring, disciplining its members who act as arbitrators. These arbitral institutions should remain under overall oversight of principal regulator.
3. A mechanism needs to be put in place so that arbitrators have a responsibility to update their competence, knowledge or skill and update themselves on latest case laws on arbitration matters. There has to be a monitoring body and disciplinary body to monitor their conduct, performance and compliance with the rules and regulations. There has to be peer review of the arbitral awards passed by them so that they realise their mistakes and take steps to improve their performance in future. Arbitrators should attend seminars, webinars or workshops to earn a minimum number of CEP hours under Continuing Education Programme. It is essential for maintenance, growth and development of arbitration as a profession.
4. A person having the requisite experience and having passed an arbitration examination conducted by the regulator, should seek registration with the statutory regulator through the arbitral institution of which he is a member. Upon grant of registration, that person would be a fit person to act as an arbitrator in any commercial dispute. Each arbitrator should be registered with one arbitral institution.
5. A person should be eligible to be a member of an arbitral institution if he has passed an arbitration examination within 3 years preceding the date of making the application. The syllabus of the arbitration examination should be laid down by the statutory authority and it should be compulsory for all the applicants. Besides passing the exam, the person should possess experience of working in any corporate, court, Government department or engaged private practice for at least 3 years after qualifying a post-graduation degree or equivalent as defined by the regulator. This post-graduation degree could be in law, engineering, finance, medicine or any other field. This is to ensure that domain expertise is available to the arbitral panel.

CONCLUSION

With an aspiration to make India a 5 trillion USD economy in the next 2-3 years, it is high time that a well-functioning institutional framework is established with arbitral institutions confirming to the best international practices. Out of the two bodies incorporated during 2019, one needs to be granted the status of a statutory regulator with complete responsibility for development and growth of the profession, recognising and regulating the working of arbitral institutions. This will ultimately enhance the competence and efficiency of our arbitrators to international levels. Ultimately the success of our arbitrators may become envy of other hubs of arbitrations. It is certainly a long journey, but the first step needs to be taken. MA

REFERENCES

1. *The Arbitration and Conciliation Act, 1996*
2. *The Arbitration and Conciliation (Amendment) Act 2019*
3. *The New Delhi International Arbitration Centre Act, 2019*
4. *Arbitration Conciliation Act (Amendment) of 2021*