



THE EVOLVING ROLE OF ARBITRAL INSTITUTIONS IN SHAPING THE FUTURE OF ARBITRATION

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Abstract: In today's world arbitration is being flaunted as the cheapest and fastest alternative to resolve intricate commercial disputes. The institutional arbitration system is gradually taking over the traditional court-based dispute resolution systems. Earlier, arbitration system meant ad hoc arbitration which was navigated primarily by the retired judges of the top courts, coupled with its high cost, unapproachable styles and lengthy time consumed procedures for the dispute resolution, often intermitted by the unnecessary intervention by the courts. Today, in most of the advanced countries, Institutional arbitration has come to dominate the field of arbitration, due to its cost effective and efficient establishment, technologically advanced high class arbitration institutions with all infrastructure facilities. These institutions are more advantageous over the court-based dispute resolutions. Arbitral institutions can be said as the harbingers of change. For the various challenges that face the arbitration profession today and suggest that arbitral institutions will prove essential to their resolution. Thus will enable more transparency to the proceedings and will ensure the speedy, impartial, cost effective resolution of disputes and strengthen the arbitration, thus enable shaping the future of arbitration.

Index Terms - Institutional arbitration; dispute resolution; arbitration in India; commercial arbitration; international arbitration; domestic arbitration.

I. INTRODUCTION

Two decades ago, few would have said that arbitral institutions had any role of shaping the future of arbitration. And only a few would have said, arbitral institutions had the privilege of initiative. As early as 1970, Ion Nestor, UNCITRAL's Special Rapporteur, was able to write that "the future of arbitration lies in institutionalization".¹ The evolution of arbitral institutions can be traced back to medieval times. However, these were pseudo-courts that functioned in parallel with the State legal system. A more recent ancestor of the modern arbitral institution is probably the trade association of post-industrial Revolution in Britain and

¹ Special Rapporteur Ion Nestor, "Problems concerning the application and interpretation of existing multilateral conventions on international commercial arbitration and related matters", UNCITRAL 5th Sess, UN Doc A/CN.9/64, reprinted in [1972] III YB UNCITRAL at p 220.

perhaps the most famous of this is ‘Liverpool Cotton Brokers.’² As a result of its success, it provided blueprint for the modern arbitral institution, which was followed by the very earliest institutions, such as the LCIA, PCA, the German Institution and the ICC’s International Court of Arbitration.³

Cry for reforms in the legal frame work relating to Arbitration is well laid on by Lauren Benton in ‘Law and Colonial Cultures’.⁴ The author has successfully traced the shift in plural legal orders from the multi-centric law of early empires to the state centered law of the Colonial and Post-Colonial world. She argues that these “fluid multi-jurisdictional” regimes seen to best effect in newly colonized areas, created the conditions for the emergence of a “common institutional framework” based on “an ordered and contested multiculturalism.”⁵

II. WORLD SCENARIO

Few years back, the word ‘arbitration’ meant ‘ad hoc arbitration’ alone. Today, Institutional arbitration has come to dominate the field of arbitration. Perhaps with the exception of India,⁶ the evidence on the whole world is that the vast majority of the users prefer Institutional Arbitration. The use of arbitration has grown up significantly. One of the salient features of this growth is the emergence of cost-effective new arbitration centers that has contributed to the development of Institutional arbitration.

The developed countries of the world like the USA, UK, and other progressive countries, they have realized and we have also realized, the best way to resolve commercial disputes are not court litigation and we should invoke ADR. It should be well noted that ADR has gained primacy as our national scene is also concerned.

III. THE INDIAN SCENARIO

The tradition of Indian system of dispute resolution is one of the most ancient in the world. Courts follow the adversarial system and the common men were not able to think about dispute resolution in the absence of Courts, until the drastic changes brought by Arbitration and Conciliation Act, 1996, by modifying the arbitration system. Arbitration is the procedure, which allows parties to resolve disputes outside the purview of the courts. It is a delocalized mode of dispute resolution. The present system of arbitration in India is based on UNCITRAL Model Law. The Indian system of arbitration meant ad hoc arbitration and arbitrator in the mind of the Indians were engraved with ‘ex-judge syndrome’, since a large number of tribunals were manned by ex-judges. Prior to the 2015 Amendment Act in Arbitration and Conciliation Act, 1996, Indian judicial system saw a rise in pendency and decreased rate in disposal of cases. One of the major obstacles faced by arbitration regime was the copious judicial intervention that stood in contradiction to the whole aim of converting India into an International arbitral hub. The 246th Law Commission Report and the 2019 Amendment on Arbitration and Conciliation Act were a major way forward for the smooth functioning of arbitration system in India and also aimed at creating an arbitration friendly niche in India. Provision for

² Liverpool Cotton Brokers Association was founded in 1841 and still exists today as the international cotton association.

³ Gary Born, *International Commercial Arbitration*, Vol. I: *International Arbitration Agreements*, p.174 (Wolters Kluwer, 2nd Edn, 2014).

⁴ Lauren Benton, *Law and Colonial Cultures: Legal Regimes in World History, 1400-1900*, (Cambridge: Cambridge University Press, 2002).

⁵ *Id.*

⁶ Kluwer Arbitration Blog, *available at*: arbitrationblog.kluwerarbitration.com (last visited on May 02, 2024)

establishing Arbitration Council of India is enacted by the 2019 amendment in the Arbitration Act and Section 43D(h) mandate that for the purpose of performing the duties and discharging the functions under the Act, the Council may promote institutional arbitration by strengthening arbitral institutions.⁷ We should grow into that stage where we are 'no more frog in a well or a cocoon'.

Therefore it is high time for India to leave behind the prejudices of sticking to court litigations for dispute resolutions and take a smart and intelligent shift towards arbitration by reducing courts interference. It is right to say that 'an early bird catches the prey'. It should be kept in mind that we should adjust, but when we adjust, we should not surrender our conceptual sovereignty. The law of Arbitration must be made simple, less technical and more responsible to the actual realities of the situation but must be responsible to the cannon of justice and fair play.⁸ We should grow to that level, that people from other jurisdictions get attracted to have arbitration proceedings in India, with an intend to do business in India. The establishment of Delhi High Court Arbitration Centre at Delhi under the aegis of the Delhi High Court has marked the beginning of a new era of cost effective and expeditious institutional arbitration. Now there are various permanent arbitral institutions flourishing in Delhi, such as ICA, LCIA, CIC, DAC, etc. There are other court attached arbitral institutions at Chandigarh, Bangalore, Chennai and Hyderabad. The India International Arbitration Centre erstwhile known as the 'New Delhi International Arbitration Centre' (NDIAC) is an autonomous institution based in New Delhi, to conduct arbitration, mediation, and conciliation proceedings. It was established in 2019 and declared as an Institute of National Importance by an Act of Parliament.⁹ The IAC has been set up with an overall objective of promoting and developing India as a major arbitration hub by facilitating a quick and efficient dispute resolution mechanism. Therefore, in India we should Trans-create an atmosphere with a friendly judicial approach and maximum government support. Governments and courts should promote Institutional Arbitration. In the case of arbitration, Government is the biggest user of arbitration. If there is a paradigm shift for the reformation in the field of arbitration, Government should take the lead. Therefore, if arbitration is to leave an imprint on Indian jurisprudence as an impartial, expeditious, effective and economical ADR mechanism, institutional arbitration should gradually replace ad hoc arbitration to a large extent.

For all the commercial transactions dispute resolution by arbitration in the international domain, Institutional arbitration is the first choice. In the domestic context institutional arbitration is not the first choice. For instance in China, institutional mode is mandatory, if China is the Seat of arbitration. Taking into consideration the advantages of Institutional arbitration over ad hoc arbitration there should be a smart intelligent paradigm shift towards Institutionalization of Arbitration globally and there is where India has to strive grow its own arbitral system, so that the people from other jurisdictions get attracted to have arbitration proceedings in India, with an intent to do business in India. Thereby India can be transformed into an International Arbitration Hub. Foreign investments are coming to India, the percentage is increasing day by day. There should be a friendly judicial approach and government support. Finally should transcreate it.

⁷ Arbitration and Conciliation Act, 1996 (Act 26 of 1996), s. 43 D (h).

⁸ *Food Corporation of India v. Jogindarlal Mohindarpal*, (1989) 2 SCC 347.

⁹ The New Delhi International Arbitration Centre (NDIAC) Act, 2019.

IV. STRENGTHENING OF INSTITUTIONAL ARBITRATION

In ad-hoc arbitration the parties agree upon a form of arbitration that is specific to a particular contract or dispute, without referring to any arbitral institution. The parties are required to determine all aspects of arbitration like the number of arbitrators, manner of their appointment and procedure for conducting arbitration. It is supposed to be flexible and less expensive. An institutional arbitration is one in which a specialized institution with a permanent character intervenes and assumes the functions of aiding and administering the arbitral process, as provided by the rules of that institution. It is pertinent to note that these institutions do not arbitrate the dispute, it is the arbitrators who arbitrate, and only the rules of the institution apply.

In any judicial forum there are three important issues or elements like the quality of decision, certainty of decisions and the ultimate time required for completing the process. The modern arbitral institutions has been described as the “gate keepers” to the arbitral process, playing a very crucial role at every stage in the life cycle of an arbitration, from the appointment of the arbitrator, to the determination of application for joinder and consolidation in certain circumstances and finally in the scrutiny of awards.¹⁰ Much of the innovations that take place in the field of arbitral procedure today come in the form of rules, codes and guidelines which are promulgated by arbitral institutions and professional associations such as the IBA, CIARB, ICC. These populate the so called soft regulatory space that exists outside the scope of international treaties and national laws.

Arbitral institutions now play a very crucial role in upholding due process and shaping the rights of the parties in potentially far reaching ways. Arbitral institutions play not only a special role, but with a duty to shape the future of arbitration. Arbitral institutions can be said as the harbingers of change. For the various challenges that face the arbitration profession today and suggest that arbitral institutions will prove essential to their resolution.

V. CHEAPEST AND FASTEST ALTERNATIVE

In today’s world arbitration is being flaunted as the cheapest and fastest alternative to resolve intricate commercial disputes.¹¹ In many instances, there is much confusion among parties and much time lost in agreeing to where the actual arbitration will take place. Institutions will sacrifice some degree of party autonomy in favour of more efficiency, and users will ultimately embrace this. An example of this today is the SIAC and ICC rule changes imposing a sole arbitrator in smaller-sized cases. Institutions will seize upon the lack of accessible information about arbitrators, which is a common user complaint and transform it to opportunity. The 2018 Queen Mary / White & Case Survey highlighted, 43% of in-house counsel respondents stated they have insufficient information to make an informed choice about the appointment of arbitrators. This kind of tensions will not last, if Institutional Arbitrations comes into play. Such kind of transparency issues will be sorted out by the Institutions more effectively. Institutions will offer competing avenues to provide users with information about arbitrators.

¹⁰ Janice Lee, “The Evolving Role of Institutional Arbitration in Preserving Parties’ Due Process Rights” (2017) 10 Contemporary Asia Arbitration Journal 235 (“Lee”) at 239–241.

¹¹ Indu Bhan, *Seat versus Venue*, Financial Express, February 27, 2014.

VI. USE OF TECHNOLOGY

Institutions will also explore new forms of cooperation, especially in the sharing of administrative resources and technology. Some of this will be driven by the need for expensive compliance with regulatory frameworks. In today's scenario of worldwide pandemic, we have to be innovative. Online hearing and on-line dispute resolution comes to play. Cyber security should be taken up very seriously by the tribunals. Institutions support such kinds of issues effectively. Therefore the proceedings are not processed or hacked. So the processes are safe. Additional security can be provided by securing link portal for saving the documents. Innovative ideas are always taken up by institutions. They try to coordinate arbitrations in an efficient and fruitful manner. One of the benefits of institutional arbitration is the continuity of disputes, in spite of any problems. In today's world scenario the role played by Institutions comes into play.

VII. ONLINE DISPUTE RESOLUTION

Discussion in arbitration revolves around the efficiency in arbitration which typically focuses on larger- sized disputes, institutions will continue to introduce tools to make it cost-effective to resolve disputes on the lower end. To meet this end Institutions had introduced new market forms of automation, especially versions of automation, especially versions of Online dispute resolution (ODR).¹² At least initially, users will adopt this tool not because they appear better than non-automated procedures, but because they offer a method of resolution where no viable alternative is available.

Leading institutions will begin to market resolution methods that draw on data analytics and tools of predictive justice that purport to help users assess likely outcomes and resolve their disputes earlier. The ability to better predict outcomes will bolster amicable methods of resolution, especially arbitration. Some common and famous institutions include ICC, LCIA, HKIAC, SIAC, AIAC. Approximately 1000 over institutions worldwide that offers arbitration services. The quality control is world class in arbitral institutions. So it is extremely a positive point to go with arbitral institutions rather than ad hoc.

VIII. ETHICS FRIENDLY ARBITRATORS

An *arbitrator* is in a relationship of trust to the parties and should not, at any time, use confidential information acquired during the course of the proceedings to gain personal advantage or advantage for others, or to affect adversely the interest of another. Today, all over the world, arbitrator ethics have become an important topic of public debate, and various trends have led to a proliferation of specialized code of ethics, rules intended to guide and govern arbitrators'.¹³ The arbitral institutions like ICA and CIAC operating in Delhi have come up with self-formulated code of ethics for arbitrators for ensuring impartial and fair arbitral proceedings.

IX. ADVANTAGES OF INSTITUTIONAL ARBITRATION

Institutional arbitration has various advantages like availability of pre-established rules and procedures which assure that arbitration will get off the ground and proceed to conclusion with dispatch; administrative assistance from institutions providing a secretariat or court of arbitration; lists of qualified arbitrators, often

¹² Kluwer Arbitration Blog, available at: arbitrationblog.kluwerarbitration.com (last visited on May 02, 2024)

¹³ Catherine A. Rogers, "The Ethics of International Arbitrators", Bocconi Legal Studies Research Paper No. 2007-01, Leading Arbitrators Guide to International Arbitration, Juris Publishing, 2008, available at: <http://papers.ssrn.com> (last visited on May 02, 2024).

broken out by fields of expertise; appointment of arbitrators by the institution should the parties request it; physical facilities and support services for arbitrations; assistance in encouraging reluctant parties to proceed with arbitration and an established format with a proven record and many more. These arbitral institutions contain experts in different fields in arbitration. When the client submits the dispute, the institution chooses its arbitrator, which gives an ambit that imparts more surety of the awards that has been passed. Resorting to institutional arbitration will help resolve infrastructure related disputes in timely and cost-effective manner.

X. CONCLUSION

Institutional arbitration is emerging as the most popular dispute resolution in the world. Earlier, arbitration system meant ad hoc arbitration which was navigated primarily by the retired judges of the top courts, coupled with its high cost, unapproachable styles and lengthy time consumed procedures for the dispute resolution, often intermitted by the unnecessary intervention by the courts. Today, in most of the advanced countries, Institutional arbitration has come to dominate the field of arbitration, due to its cost effective and efficient establishment, technologically advanced high class arbitration institutions with all infrastructure facilities. China, the most populated country in the world along with the other advanced countries are now preferring institutional arbitration in resolving the disputes, clearly depicts the importance of institutional arbitration. India, the second largest populated country, amended its domestic arbitration law recently to promote the institutional arbitration. These institutions are more advantageous over the court-based dispute resolutions.

The basic purpose of arbitration is to bring about cost effective and speedy resolution of disputes. Delay and high cost are two areas where the arbitrators by self-regulation can bring about a marked improvement.¹⁴ If arbitration is to prosper a change in the mindset of all stake holders and observance of strict discipline are the foremost requirements.¹⁵ Institutional arbitration is one of the plausible solution to the problem and an important step can be that institutional arbitration gradually replaces ad-hoc arbitrations to a considerable extent and the remaining ad-hoc arbitration be properly and effectively regulated so as to maintain the standards of the dispute regulation process. This will enable more transparency to the proceedings and will ensure the speedy, impartial, cost-effective resolution of disputes and strengthen the institutionalized arbitration and thus enable shaping the future of arbitration.

¹⁴ *Union of India v. M/s Singh Builders Syndicate*, (2009) 4 SCC 523.

¹⁵ Ruma Pal, "Arbitrations and Arbitrators", 1(1)Dispute Resolutions (Nani Palkhivala Arbitration Centre Quarterly) 3 (September 2010).

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