

INSTITUTIONAL ARBITRATION: AN OVERVIEW TO INDIA'S RISING ARBITRAL PROCESS

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ABSTRACT

The topic “Institutional Arbitration: An overview to India’s Rising Arbitral Process” is a topic where, I have discussed the development of Institutional Arbitration due to the staggering economic growth and international trade. The paper contributes in investigating the distinction between institutional and ad hoc arbitration, giving an insight view to the factors and reasons for opting institutional arbitration over ad hoc arbitration. It further has a detail discussion related to the development of institutional arbitration over the years. The paper evaluates the loopholes and drawbacks towards the progress of Institutional Arbitration. The article is an effort to analyse the various laws and amendments made by the legislature for the growth of Institutional Arbitration.

Keywords- Arbitration, Institutional Arbitration, Ad-hoc Arbitration, UNCITRAL, The B.N.Srikrishna Committee.

INTRODUCTION

Arbitration can be determined as a method where two or more parties with mutual consent refer their disputes and differences to an arbitrator who solve their mutual rights and liabilities by way of Arbitration. **Halsbury** says:” An arbitration is the reference of a dispute or difference between not less than two parties for determination, after hearing both sides in a judicial manner by a person or persons other than a court of competent jurisdiction”.¹ Administrative resolution mechanism is a process by which a dispute is settled between two parties with the help of a third person on the basis of amiable solution without any judicial intervention. The Alternative dispute resolution is an optional method to resolve a dispute without judicial intervention, with an object to provide speedy justice for the dispute, to avoid high expenses, legal complexities of the situation, to end the disputes without any further challenges, and many more. “The essence of arbitration is that some disputes are referred by the parties for settlement to a tribunal of their own choosing instead of to a court”.²

INSTITUTIONAL ARBITRATION

Institutional arbitration can be termed to be an organization or institution that administers the process of arbitration. In institutional arbitration, the party submits their disputes and conflicts to

¹ Halsbury’s Laws of England, 4th Ed., vol.2, page 255, para 501

² Russell on Arbitration, 19th Ed., page 1

an institution established to carry out the arbitral process. The institution settles the dispute in accordance to the issue's laid before them. This institution doesn't arbitrate the dispute but it is the arbitrator who arbitrates it, the institutions only apply the process³.

The arbitration agreement⁴ between the parties contains an arbitral clause which ensures that the resolution of disputes is to be done through arbitration and thus the party designates the arbitral institution to administer the arbitral process. It was in the case of **Nandan Bio Matrix Ltd. V. D 1 Oils Ltd**, it was agreed between the parties to resolve the disputes through institutional arbitration. The institution which has been tabbed to solve the dispute, applies its own rules and procedure to determine the issues between the parties.

In institutional arbitration, the main issue for a party to the dispute is to choose an institution that can solve their disputes. There are various factors and circumstances that the parties needs to consider before referring its disputes and differences before an institutional tribunal. The party needs to have a mutual co-operation and understanding for choosing an institutional tribunal over Ad-Hoc tribunal⁵, the parties needs to analyse the commercial value of the dispute, they need to check the rules of the institution that they are going to refer their disputes along with the institutions reputation. They need to ensure that the institution has latest amendments, rules and enactments with context to International Commercial Arbitration practices.

Some common established institutions are The Dubai International Arbitration Centre, The International Chamber of Commerce , London Court of Arbitration .There are around 1100 institutions across the world that provides arbitration assistance, where only few institution deals with disputes related to trade and industries. The parties while selecting an institution should take necessary care and precaution, and opt for those institutions that are prestigious and adequate for providing awards. The problem with less prestigious institutions are that they might not have sufficient means to solve the disputes of the parties like lack of proper acts, rules, infrastructure and qualified arbitrators.

FEATURES OF INSTITUTIONAL ARBITRATION:

There are several features that make a disputed party to opt for institutional arbitration; these institutions provide support for the conduct of the arbitration in the form of appointment of arbitrators, case management services including oversight of the arbitral process, venues for holding hearings, etc⁶.

Merits of Institutional Arbitration:

- **Composition of arbitral institution:** - The party to the disputes after assessing the agreement approaches the institution that can solve or put an end to their dispute. The institution after reviewing the agreement appoints a sole arbitrator or a multi-arbitrator but such number shall not be an even number.⁷ Generally the amount involved in the

³ Alan Redfern and Martin Hunter, Law and Practice of International Commercial Arbitration,47(4th ed., 2004)

⁴ Ronald Bernstine: Handbook of Arbitration Practice, p.no.9

⁵ Sundra Rajoo Institutional and Ad hoc Arbitrations: Advantages and Disadvantages, The Law Review (2010)

⁶ Report of the HighLevel Committee to review the Institutionalization of Arbitration Mechanism in India, p. 13.

⁷ Section 10 of The Arbitration and Conciliation Act, 1996.

dispute decides the required number of arbitrator for resolving the issue. Each party to the dispute, selects an arbitrator of their choice, the preceding arbitrator is nominated by the institution or the arbitrators selected by the parties to the dispute. It must be noted that the arbitrator appointed by the party has to be the member or a part of the panel of the institution before which they have come to resolve their dispute.

- **Arbitral procedure:-**The administration lay down the rules and procedures for the institution to follow, which helps in smooth conduct of the arbitral procedure. The institutions more often administer the service of drafting an arbitration clause. The institution ensures that trained and expert staffs are provided to the parties for administering the arbitral proceedings.
- **Rules: -** The institution has a fixed set of rules and regulations that is considered and referred while solving a dispute. The arbitrators and the institution follow the guidelines while conducting arbitration. The institution provides for an updated rules and amendments which helps them in avoiding ambiguity while resolving a dispute between the parties. The consistency and well-established laws are hardly seen in the ad-hoc arbitration.
- **Arbitral Panel: -** The parties to the dispute are independent to select an arbitrator who is able to represent him/her. The arbitrator is generally selected from the institutional board or panel of arbitrators. The panel of arbitrators is full of expert and experienced arbiter with specialization in different field. In institutional adjudication the parties to a dispute look for an expert and experienced arbitrator.⁸ Where, in ad-hoc arbitration the party selects an arbitrator based on the faith and relation with the arbitrators instead of the experience, qualification and knowledge.
- **Infrastructure Facilities: -** The institutional arbitration itself provides the facility to conduct the arbitration process. The institution has its own infrastructure where they have all the necessary assistance required for smooth conduct of arbitral proceeding. The institution comprises of a several rooms where arbitration process can be conducted; it also has the availability of trained and competent staffs along with library facilities, whereas in ad-hoc arbitration these facilities are not provided. In ad-hoc arbitration, the parties to the dispute take all the responsibilities related to the arbitration, including the venue, snacks and travelling expenses of the arbitrators.
- **Arbitrators Fee: -** The cost of arbitration includes the fee payable to the arbitrator for hearing the suit, sitting charges and award writing fee along with other expenses. The fee of the arbitrator is fixed by the institution under which those arbitrators are appointed. The party pays the fee at the time of selection of the arbitrator. No arbitrator can charge a party more than its fixed price of hearing a dispute.
- **Arbitral Award: -** The relief or the award that is given by the institutional arbitration is final and ultimately binding upon the parties. Therefore, there lies no appeal and review against the arbitral award given by the institutional arbitrators. Since there cannot be an appeal or review against an award that has been made by the arbitrator, the arbiter ensures that all the precautionary measures are taken and no mistakes or fraud is committed while giving an award as it will be impartial on their part and justice won't be served to the parties.

⁸ Ad-Hoc-and-Institutional-Arbitration –By-Jyotsana-Uplavdiya

- **Ground to appeal an award:** - The Arbitration and Conciliation Act allow challenging of arbitral award. There are certain grounds to challenge domestic awards under Indian Law. According to Article 34 of the UNCITRAL Model Law, a challenge under this section can be permitted only after a prior notice is served to the opposite party. A party can raise the following grounds for challenging an arbitral award such as, lack of neutrality of the arbitrator, lack of proper rules and laws, use of malpractices, improper inspection of evidences. The award can also be challenged if it is against the interest of justice.
- **Timeline for delivering Arbitral Award:** - The arbitral tribunal shall render the award as soon as possible. According to Arbitration and Conciliation Act, the tribunal must render the award with 12months from the date it has entered the reference. There can be an extension period up to 6months if the parties agree for the same. But if the award is not given with 12months or within the extended period as agreed by the party, the authorization of the institution to hear the particular dispute will be terminated.
- **Supervision:** - The administration of arbitration provides for assistance and advice to the parties related to the arbitral proceedings. The administration examines the award and penalty given by the arbitrator. Whereas in ad-hoc arbitration, the party moves before the court in case of any dissatisfaction with the award provided.

Demerits of institutional Arbitration

- **Perception regarding credible arbitrators and expertise:** Arbitrators play an important role in arbitration process. One of the biggest concerns for an institution is to have a credible and qualified arbitrator who can solve the issues of the parties. Whereas the expertise deals with issues relating to resources available for the institution, poor and inadequate infrastructure, lack of trained staffs.
- **Latest Arbitral Rules:** - The second biggest issue with institutional arbitration is maintenance of rules and regulations. There have been problems related to rules and practices which have become inadequate in nature. Therefore it is necessary for the institution to keep on changing the rules, and adding the amendments that is being made from time to time by UNICTRAL.
- **Cost:** - Cost is considered to be one of the most affecting issues in institutional arbitration. The parties to a dispute consider institutional arbitration to be more expensive than ad-hoc arbitration, because of the administrative fee that is paid to arbitral institutions.

Challenges for Institutional Arbitration –

It has been clearly and vastly accepted that ad-hoc arbitration is more preferable than institutional arbitration. Despite the fact that various new institution have been set up in the past few years, people still chose for ad-hoc arbitration. The institutional arbitration have put all its effort in examining the reason behind its unsuccessful run in India, the institution have found these following challenges that have been affecting the institutional arbitration:-

- **Absence of Government Support:** The support of government in any form of work or institution is the most important and integral part. In case of institutional arbitration the government has failed to extend its support to promote and give a stand to institutional

tribunal in the society. Though every agreement between the parties contains the arbitral clause for solving the disputes through arbitration, but it doesn't specifically mention which form of arbitration needs to be approached by the parties. Further, the government needs to ensure whether there should be a government policy for making institutional arbitration mandatory for solving disputes specially with respect to amount that are largely valued.

- **Issues related to administration and management:** -The judicial intervention in the arbitration has been one of the biggest issues that have been there. Therefore the 1996 act replaced the 1940 act and promised for a limited interference of the court in the arbitration proceedings. The parties often involve the court into the arbitral proceeding at the initial stage itself or at the time of implementation of the arbitral award. Due to the high pendency of cases in the courts, it becomes very difficult for the courts to dispose of the arbitration matters within a short period of time.
- 1. **Lack of governing Body:** - The Act needs a statutory body that can support institutional arbitration. The governing body is necessary for monitoring the arbitral proceeding, fixation of arbitral award along with the arbitrator's fee. The governing body should also have laws related to the implementation of arbitrary awards.

Set-up of High level Committee to review the institutionalisation of Arbitration System in India:-

The Union Government on 29th December 2016, constituted a High level Committee to analyse the process and condition related to the working of the arbitral institution. The committee reviewed the following challenges and shortcoming of the Institutional Arbitration:-

- Formation of proper governing Authority
- Constitution of specialized arbitral bench
- Review of Effective and Efficient way of conducting arbitral proceeding
- Promote arbitration through setting up of various workshops and interaction sessions
- Review of Infrastructure and expertise
- Evaluation of legal framework for arbitration
- Review to draw a roadmap for strengthening ADR

Recommendation & Amendments suggested by The B.N.Srikrishna Committee:

The committee formed under the chairmanship of Justice B.N. SriKrishna submitted its report on August 3rd, 2017 suggesting the necessary reformation to arbitration in India. The recommendations given by the committee after reviewing the mechanism of institutionalization of arbitration in India are:

- **Arbitration Promotion Council of India (APCI):** The committee gave a proposal for the formulation of APCI with a view to make a responsible body for upgrading the arbitral institutions. The main motive behind the creation of APCI is to train the arbitrators and provide them with the license to practice arbitration in India. It can also work on setting up of various workshops and sessions with legal firms and institutions for the advocates who have interest in arbitration.

- **Arbitration Bench and Bar:** The committee recommended, creation of specialist bar and benches. The bar would comprise with specialist arbitrators and the bench would consist of specialist judges, who would be trained by the APCI. This formation of bar and bench would enhance the arbitration condition in India as it would consist of well-informed and expert lawyers and judges who could promote the international arbitration practices in India.

- **Role of Government:** The committee suggested that Central Government and other state governments should insert a clause that the arbitration proceedings in government contract should be done only by accredited arbitrators who is recognized by professional institute.

Recommendation to changes to the 2015 Amendment Act-

The Committee stated that the 2015 amendments to the Arbitration and conciliation Act, 1996 created unjust fatigue for its users with respect to delay in conclusion of an arbitral proceeding and also with respect to cost. The amendment led to some important change such as power of the court in appointing arbitrators, time limitation etc. The amendment of 2015 to the arbitration and conciliation act, 1996, was inserted with two new sections i.e. 29A and 29B. Some of the more important suggestions are as follows:-

- The committee added section. 29A which provides a deadline for arbitral award. The provision states that a time limit of 12months should be applicable to domestic arbitration for giving arbitral award, an extension period of 6months to be added only with the permission of the court after the expiration of 12month, i.e. a total of 18months is provided for giving an arbitral award.

- One of the most important recommendations to changes to 2015 amendment act was with reference to the time. The committee recommended that if a court seeks to reduce the fee of an arbitrator for delay, the court should give an opportunity to the arbitrator for keeping its part for causing such delay.

- The committee also recommended that the period of outer limit u/s 34(6) should not be made mandatory.

- **Fast tract procedure for arbitration:** - The committee added section.29B, which provides that a parties to the arbitration can choose for a fast-track procedure for arbitral proceeding and the award shall be made within 6months of the reference of the arbitrators.

- **Involvement of Indian Courts:** The committee recommended that there shall be limited involvement of Indian courts for the appointment of arbitrators. Thus making it clear that the

arbitrators should be appointed by the arbitral institution nominated by the High Court or the Supreme Court.

- **Power of court to refer the party for arbitration:** The committee recommended that if any matter is brought before a court and is related to arbitration agreement then such parties should be referred to arbitration.

- **Grounds to challenge the Arbitral award:** If an arbitral award given to a party is against the rule of law or natural justice, then in such cases the act permits the court to set aside such award. An award which is affected by violation of confidentiality, fraud or corruption can be challenged by the parties and the same can be set aside if the court thinks fit.

- **The National Litigation Policy (NLP):** The committee was of the opinion that NLP must be promoted in the Government Contracts as it will avoid the expenses and time consumption of litigation before the courts. The committee suggested that Central Government and other state governments should insert a clause that the arbitration proceedings in government contract should be done only by accredited arbitrators who is recognized by professional institute.

- **Permission to foreign arbitrators to represent clients in International arbitration with seating in India:** The committee gave a suggestion that foreign lawyers should be allowed to participate and represent clients that are seated in India. The committee was of the opinion that the foreign arbitrators shall be relieved to taxation and immigration. Providing easing of restriction to taxation and immigration would encourage the foreign counselor to conduct institutional arbitration in India.

2. **Declaration of the International Centre for Alternative Dispute Resolution (ICADR):** The International Centre for Alternative Dispute Resolution was well-established in 1995, with a view that ICADR could become a global competitive institution for the promotion and development of alternative dispute resolution mechanism. The government has taken various measures to promote the ICADR by providing it with substantial funds and various facilities for the development of the institution and its infrastructure.

- **Bilateral Investment Treaty Arbitrations (BIT):** BITs are legal instruments between two parties for encouragement, preservation and enhancement of investment based in either country. BITs help in providing a mechanism for the settlement of issues, such as ICC, ICSID, and UNCITRAL. The recommendations of the committee on the Bilateral Investment Treaty Arbitrations are:

a) To hire foreign lawyers who are expert in BIT

b) Create an Inter-Ministerial Committee- A committee which would consist of officials from Ministries of finance, external affairs and law.

c) To appoint counsel who is expert in BIT

To create a panel of International Counselor- who can take the responsibility for the management of BIT arbitration.

CONCLUSION

The arbitration in India has failed to prove its importance and significance from time to time amongst the people for solving the disputes between the parties. As we all know that for having a successful arbitral proceeding it is very important for the arbitral institution to have arbitrators who possess greater skill and qualities of arbitration, the arbitrator should be an expert in the subject matter in dispute.

The condition of arbitration process and institutional arbitration globally can be changed by bringing necessary changes and developments in its functioning. The changes can be made by following the recommendation and amendments suggested by the committee of Justice B.N. SriKrishna. The committee has made an attempt to bring a change in the arbitration process through The Arbitration Conciliation (Amendment) Act, 2015. The government should make a governing body that will regulate the arbitration institution in India; every institution shall follow the rules and regulations formed by such body. The committee also gave its suggestion regarding fixing of fees and timeline for arbitration, delay of arbitral proceedings, selection of arbitrators, interim orders, and suggestion for fast track procedure. It also suggested appointing of foreign arbitrators. Therefore, the implementation of the given suggestions and recommendations by the committee along with the support of government shall play a very crucial role for the development and growth of arbitration at domestic and as well as at global level.

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