
**DEVELOPMENT OF INTERNATIONAL COMMERCIAL
ARBITRATION IN THE WORLD'S LARGEST
DEMOCRACY: ARE WE HEADING TOWARDS MAKING
INDIA AN ARBITRATION HUB OR IS THERE STILL A LONG
WAY TO GO?**

Divyansh, BBA LLB & Ozasvi Amol, BA LLB, Amity University, Patna

ABSTRACT

International Commercial Arbitration helps to safeguard oneself from the aggravate of legal maze. In India, the legal system is not robust due to various irregularities in laws which has resulted in bad perception about Indian legal system in the other countries. The paper takes the best shot to address the issues which are acting as impediment in the process of making India a full-fledged hub of arbitration. The present paper addresses recent arbitration trends along with the judicial approaches which indicates that there is still long way to go. It has been 26 years ago the government of India enforced the Arbitration and Conciliation Act for the purpose to make India a hub of arbitration and the amendments were meant to highlight the prevailing issues and helped in restructuring the laws on arbitration in India. In the past few years, several government representatives have expressed their desire to ameliorate India's position in the ease of doing business but such steps are not sufficient if the irregularities in laws are not discussed.

Introduction

“A vigorous legal system with a dynamic arbitration culture is important for businesses to emerge¹”- Prime Minister Narendra Modi

“International Commercial Arbitration” defined under Section 2 (1)(f) of the Arbitration and Conciliation Act is procuring immense popularity across the globe because it provides an advantage to armament oneself from the bother of legal maze. International commercial arbitration helps in resolving disputes amicably arising out of the commercial transactions. The International business community around the world has accepted International Commercial arbitration as an effective tool to resolve their disputes².

The development of commercial trades has resulted in the rapid growth of international arbitration. The government of India enforced Arbitration and Conciliation Act 26 years before in order to make India a full-fledged hub of arbitration and the amendments were primarily meant to address the issues faced in the 1996 act³. The dream of every country is to become a global arbitration hub and wants to get more and more investments but the international corporations considers different parameters, for example the country must possess vigorous arbitration mechanism, stable environment, whether the courts of the country are arbitration friendly? and how easily their disputes can be resolved. In order to dodge ponderous legal proceedings, many international businesses enters the Indian market but are befuddled whether to invest in India or not. Many regional arbitration centers in Asia have become a preferred destination for arbitration but India still lags behind because of various irregularities in law like difficulty in enforcing international and domestic awards, low perception of legal environment and excessive judicial intervention. Thus, India has not been able to become a global arbitration hub to facilitate international disputes in arbitration. India's rank was 63rd in 2019 in the ease of doing business which indicates that there is still long way to go. According to the Singapore International Arbitration Centre's 2020 annual report, SIAC made the highest record of filing of 1080 new cases while India hit only 690 cases which clearly shows why foreign institutes are preferred more over India. The prevalent global hubs as of now are New

¹ PTI, *Working to make India an arbitration hub: PM Narendra Modi*, ET, Available at: https://www.google.com/amp/s/m.economictimes.com/news/politics-and-nation/working-to-make-india-an-arbitration-hub-pm-narendra-modi/amp_articleshow/55015283.cms, Accessed: July 31, 2022

² The terms 'International Arbitration' and 'International Commercial Arbitration' are used as 'ICA' interchangeably

³ The Arbitration and Conciliation (Amendment) Act, 2015, The Arbitration and Conciliation (Amendment) Act 2019 and the Arbitration and Conciliation (Amendment) Act 2021.

York, Hong Kong and Geneva because of the availability of top skilled and experienced arbitrators. India adopted New York Convention in 1960 while Singapore adopted New York Convention in 1986, even then Singapore has been regarded as the preeminent arbitration center because of the concerted efforts of the Supreme court of Singapore that interpreted public policy and enforced foreign arbitral awards along with great infrastructure popularly known for its proficiency.

Most of the arbitrations in India are ad hoc which has resulted in the lack of predictability with regard to efficiency and cost effectiveness and has eroded the trust in the Indian legal system. The crucial steps adopted by the judiciary and government to make India a hub of international commercial arbitration are commendable but such steps are not sufficient. The Arbitration and Conciliation Act 1996 was enacted by the Indian legislation whose aim was to boost arbitration which would be time saving and inexpensive. However, the act has been smashed into two parts which includes (i) foreign arbitration and (ii) foreign arbitration performed outside India. Also, in order to improve arbitration mechanism in India, Srikrishna Committee was set up in 2016 whose aim was to encourage the matters related to international arbitration and after a year, the committee submitted a report stating that “*there is a need for framing proper laws and concerted efforts that could encourage the practice of international commercial arbitration in India*”. In the past few years, several government representatives have expressed their desire to ameliorate India’s position in the ease of doing business. The Arbitration and Conciliation Act 2019 aimed at formulation of arbitration council of India but such steps are not satisfactory if the following issues are not discussed which includes deficit of full-time arbitration lawyers, unavoidable judicial intervention, corruption and lack of institutional arbitrations. The paper attempts to address the issues which acts as a barrier in the path of India in becoming a global arbitration hub.

Issues acting as impediment in the process of making India a hub of international commercial arbitration

1. Lack of full-time arbitration lawyers in India

India has still not been able to achieve its full potential as a full-fledged hub of arbitration despite multifarious developments. One of the major problem in making India a hub of arbitration is that India don’t have full time arbitration lawyers. The arbitrators practicing in courts are not able to devote sufficient time in the arbitral proceedings. Lawyers mostly give second preference to arbitral matters and after spending whole day in the courts, they are tired

which ultimately delays the proceedings. Therefore, there is an urgent requirement for full time arbitrators who can dedicate ample of time in the arbitration procedure.

2. Unavoidable judicial intervention in the arbitration matters

Another problem is the deficient support from the Indian courts and unavoidable judicial intervention. There are a lot of judicial delays due to overburdening of judiciary and once the arbitration matter gets embroiled in the court, it is difficult to determine how much time the matter will take. for example, Section 34 petition which is unpredictable to determine. Despite clear directions by the Hon'ble Supreme Court that Section 34 does not sit as an appeal, Section 34 petition is heard by various courts as an appeal. Also, the judgements delivered by the High courts proved to build a perception that in India investments are perilous and non-arbitration friendly like in the case of *ONGC v. Saw Pipes Ltd*⁴ Moreover, it takes years to undo the damage of reputation caused due to the regressive judgements . In many cases, it has been observed that the repeated interference by the courts in the matter of arbitration had led to dissuade the parties in choosing India as a destination for international arbitration.

One of the major change brought by the Arbitration and Conciliation Act 2019 is the interpolation of section 87 in the arbitration act which provides that 2015 amendment would be applicable retrospectively. However, in the case of *Hindustan Construction Company Ltd. v. Union of India*⁵, the Hon'ble Supreme Court struck down the interpolation of section 87 by stating that the provision seems to be arbitrary. The court was of view that insertion of section 87 to the act would increase judicial interference in the arbitration matters which would delay the proceedings. This will ultimately affect the objective of arbitration act. Hence, such needless amendment in the act causes inevitable judicial hindrance.

3. Rigid approach adopted by arbitrators

Another difficulty which is strongly associated for the failure of the arbitration procedure in India is the “rigid or inflexible approach adopted by the arbitrators”. If an arbitrator is rigorously going by Civil Procedure Code, 1908 as opposed to section 19 which clearly states that Code of civil procedure code and strict rules of evidence will not be applicable to arbitration thus, the entire purpose would be dejected. Therefore, in such cases it is observed that the arbitration proceedings becomes a civil suit. In addition to this, arbitrators ask repeated

⁴ (2003) 5 SCC 705

⁵ 2019 SCC OnLine SC 1520

and irrelevant questions during cross-examinations which ultimately delays the process of arbitration. Thus, arbitrators need to control cross examination and must not permit questions based on the interpretation of documents.

4. Appointment of retired judges as arbitrators

The fourth issue is that the best arbitrators are mostly overburdened with arbitrations due to which the common lawyers or the retired judges are appointed as arbitrators who do not have enough exposure in the field and young arbitration lawyers are not being given the opportunity. This system must be eradicated and young lawyers should be appointed as arbitrators which is in line with the disclosure prescribed by schedule 6 which will ultimately elevate the arbitral mechanism. Schedule 6 states that arbitrators must divulge the number of continuing arbitrations that will be dealt by him and whether the arbitration process will be concluded within a year or not.

5. Corruption

Corruption is considered as the major problem in Indian arbitration which leads to bad perception about the Indian legal system in other countries. In the past few years, corruption charges have emerged rapidly and it is unpredictable to determine when the corruption pattern will slow down. Corruption eventually leads to not selecting a particular arbitral seat in India. Corruption can take different forms like administrative corruption, political corruption, petty corruption and corporate corruptions. Corruption has been carried out in a variety of forms thus, there is no unified definition of corruption. The outcome of corruption in the arbitral procedure is significant and causes disruptive effect on the arbitral process. As per the reports, there are high rates of corruption in the judiciary especially in the lower judiciary. Thus, it is very difficult to get rid of corruption in India. It can be argued that corruption gives bad signal about the Indian legal system and is considered one of the major impediment in the path of India in becoming a global arbitration hub.

Final words and suggestions

Arbitration has witnessed significant growth in the past few years which has drastically led to the establishment of various arbitration centres which plays a pivotal role in strengthening the arbitration regime in India. In order to make India a preferred global arbitration hub, the entire structure of arbitration institutions should be improved.

Moreover, business hubs are required in Kolkata, Kanpur and Ludhiana which should be considered as target for encouraging arbitration and the focus should not be given to metropolitan cities only. Indian arbitration has continuously been a subject to certain criticism thus, proper law must be legislated to strengthen arbitration in India. There is a need for vigorous legal system to deal with international commercial arbitration as stated by Hon'ble Chief Justice Ranjan Gogoi. In order to increase and build confidence of foreign investors, it is mandatory to adopt a pro-enforcement approach. The well-reasoned awards should not be challenged by the parties to resist enforcement because efficacious enforcement of awards would make arbitration regime more powerful in India. In India, the arbitration sectors only include goods and service trades and construction disputes which are not sufficient. Thus, India should focus on developing more diversified sectors in strengthening the arbitration regime in India. This will ultimately enhance India's potential in becoming the first choice for investment. Most of the arbitrations in India are ad hoc as compared with institutional arbitration. Studies proved that institutional arbitrations are more efficacious than ad hoc arbitrations.

India can be a full-fledged global arbitration hub if institutional framework is preferred over ad hoc mechanism”- Vyapak Desai

Therefore, more arbitration institutions will be developed if the government invests in the amelioration of institutional arbitrations. More the number of arbitration institutions, more it will enhance the potential of India to be preferred as an arbitration destination. Moreover, there is lack of confusion in the minds of people whether to choose ADR or litigation. The main reason for this lack of knowledge is that India does not organize workshops and seminars repeatedly like ICC and SIAC. India should proactively introduce campaigns in order to educate the society at large. Lastly, I would like to conclude that practitioners, and other members of the legal fraternity should be emboldened to move forward as full-time arbitration lawyers. The concerted efforts of the legal fraternity and government will assuredly make India a hub of international commercial arbitration because foreign investors will choose India for investment if the environment is business friendly.