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A Comparative Analysis of Litigation and Arbitration in India

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Abstract- *Litigation is currently the prevalent method of resolving dispute through court processes. It is a non-voluntary process where a named party to a lawsuit must appear before the court. A primary benefit of litigation is the ability of an aggrieved or injured party to force another party to assume financial responsibility for injuries or damages the other party may have caused. But in the resent days this existing litigation method has proved to be disastrous for certain kind of disputes and consuming more time, money, and also showed ineffectiveness and non-flexibility. The enormous litigation has result anted into chaos. At present we are living in a highly litigious society. The most remarkable aspect is that many lawyers, businessman and other professionals are increasingly turning to non-court methods to settle virtually any type of disagreement. It is called Alternative Dispute Resolution (ADR) and it is guaranteed to save your company both time and money, may be even a crucial client. Alternative Dispute Resolution is a powerful and revolutionary tool for controlling litigation costs. Numerous ADR methods are available, and several are likely suitable for any given purpose or situation. Arbitration is the most frequently used method of Alternative Dispute Resolution. So far in the past several years, the arbitration has undergone numerous changes. The computer technology and information science is one of the major factors that have impacted the methodology of arbitration. The conventional type of arbitration system is getting replaced or transformed by the use of internet technology or online mechanism.*

Key Words- Litigation, Arbitration, Institutional, Prevalence

Types of Arbitration in India[1] — (Institutional Arbitration and Ad Hoc Arbitration):

Arbitrations conducted in India are mostly ad hoc. The concept of institutional arbitration, though gradually creeping in the arbitration system in India, has yet to make an impact. The advantages of institutional arbitration over ad hoc arbitration in India need no emphasis and the wide prevalence of ad hoc arbitration has its ramifications in affecting speedy and cost effectiveness of the arbitration process.

There are a number of advantages of institutional arbitration over ad hoc arbitration in India.

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- In ad hoc arbitration, infrastructure facilities for conducting arbitration pose a problem and parties are often compelled to resort to hiring facilities of expensive hotels, the cost of arbitration.
- In institutional arbitration, the arbitral institutions maintain a panel of arbitrators. The parties can choose the arbitrators from the panel. These advantages are not available to the parties in ad hoc arbitration.
- In institutional arbitration, many arbitral institutions such as the International Chamber of Commerce (ICC) have an experienced committee to scrutinize the arbitral awards. Before the award is finalized and given to the parties, the experienced panel scrutinizes it. As a result, the possibilities of the court setting aside the award is minimal, because the scrutiny removes possible legal/technical flaws and defects in the award. This facility is not available in ad hoc arbitration, where the likelihood of court interference is higher.
- In institutional arbitration, the arbitrators may be removed from the panel for not conducting the arbitration properly. In ad hoc arbitration, the arbitrators are not subject to such institutional removal sanctions.
- In the event the arbitrator becomes incapable of continuing as arbitrator in an institutional arbitration, substitutes can be easily located and the procedure for arbitration remains the same. This advantage is not available in an ad hoc arbitration.
- In institutional arbitration it is easy to maintain confidentiality of the proceedings. In ad hoc arbitration, it is difficult to expect professionalism from the staff.

Some of the arbitral institutions in India are the Chambers of Commerce (organized by either region or trade), the Indian Council of Arbitration (ICA), the Federation of Indian Chamber of Commerce and Industry (FICCI), and the International Centre for Alternate Dispute Resolution (ICADR).

A Critical Analysis of the Success of Arbitration under the 1996 Act:

The 1996 Act was brought on the statute book as the earlier law, the 1940 Act, did not live up to the aspirations of the people of India in general, and the business community in particular. Even though the 1996-Act was enacted to plug the loopholes of 1940 Act, the arbitral system that evolved under it led to its failure. The main purpose of the Act was to provide a speedy and efficacious dispute resolution mechanism to the existing judicial system, marred with inordinate delays and backlog of cases. But an analysis of the arbitration system, as practiced under the 1996 Act, reveals that it failed to achieve its desired objectives.

a) Speedy Justice:

Arbitration in India is rampant with delays that hamper the efficient dispensation of dispute resolution. Though the 1996 Act confers greater autonomy on arbitrators and insulates them from judicial interference, it does not fix any time period for completion of proceedings. This is a departure

from the 1940 Act, which fixed the time period for completion of arbitration proceedings. The time frame for completion of the arbitration proceedings was done away with, on the presumption that the root cause of delays in arbitration is judicial interference, and that granting greater autonomy to the arbitrators would solve the problem. However, the reality is quite different. Arbitrators, who are mostly retired judges, usually treat the arbitration proceedings in the same manner as traditional litigations, and are willing to give long and frequent adjournments, as and when sought by the parties. Although the scope of judicial intervention under the 1996 Act has been curtailed to a great extent, courts through judicial interpretation have widened the scope of judicial review, resulting in the admission of large number of cases that ought to be dismissed at the first instance. Moreover, the parties usually approach arbitration with a similar mindset as for litigation, with the result that awards invariably end up in courts, increasing the timeframe for resolution of the disputes. Parties also abuse the existing provision that allows 'automatic stay' of the execution of the awards on mere filing of an application for challenge of the awards. So, the objective of arbitration as a mechanism for speedy resolution of disputes gets obstructed due to obtrusive delays.

b) Cost-Effectiveness:

Arbitration is generally considered cheaper over traditional litigation; the ground realities show that arbitration in India, particularly ad hoc arbitration, is becoming quite expensive vis-à-vis traditional litigation. A cost analysis on arbitration vis-à-vis litigation will throw light on the higher cost of arbitration over litigation. This is a crucial factor which weighs against developing a cost-effective quality arbitration practice in India.

Extent of Judicial Intervention under the 1996 Act:

One of the main objectives of the 1996 Act was to give more powers to the arbitrators and reduce the supervisory role of the court in the arbitral process. In effect, judicial intervention is common under the 1996 Act. Such-intervention takes the form of determination in case of challenge of awards. Such a propensity to exercise their authority to intervene may be attributable to their skepticism that arbitration is not effective at resolving disputes or the judges' vested concern that their jurisdiction will be adversely eroded. The decision of the Supreme Court in the Saw Pipes case[2] exemplifies this inclination, and threatens to hamper arbitration's progress toward speed and efficiency. In this case, the Supreme Court expanded the scope of 'public policy' from the earlier ratio laid down by a three bench judgment in the Renusagar case and that one of the grounds for challenge of an award under the 1996 Act is violation of 'public policy'. The Renusagar case, while respecting the opinion that the definition of 'public policy' ought not to be widened in the greater interest of society, has laid down three conditions for setting aside an award which are a violation of

- The fundamental policy of Indian law;

- The interest of India; and
- Justice of morality.

Similarity in the trend of Arbitration Practice under the 1996 Act with that of the 1940 Act

The 1940 and the 1996 Acts differ in some important ways in terms of the Arbitration system they establish and the processes that they require. First, the role of judges is more limited in the 1996 Act. Under the 1940 Act, courts played a substantial role in the arbitration process. Perhaps more importantly, the 1940 Act required that an arbitral award be filed in a court before it could become binding upon the parties. Furthermore, the grounds for challenging an award before the courts were broad and quite liberal. In the 1996 Act, however, there is limited scope for interference by courts. The award is no longer required to be filed before the court to make it a rule of law, and the grounds on which an award can be challenged are very limited.

Summary and Conclusion:

From the above analysis, it is clear that globalization of the Indian economy in the early nineties and the consequent economic reforms necessitated the existence of effective dispute resolution mechanisms to quickly settle commercial disputes. The 1996 Act was enacted to achieve this purpose of quick and cost-effective dispute resolution. Arbitration occupies a prime position in commercial dispute resolution in India. An examination of the working of arbitration in India reveals that arbitration as an institution is still evolving, and has not yet reached the stage to effectively fulfill the needs accentuated with commercial growth. Viewed in its totality, India does not come across as a jurisdiction which carries an anti- arbitration bias. Notwithstanding the interventionist instincts and expanded judicial review, Indian courts do restrain themselves from interfering with arbitral awards. However, there are still inherent problems that hindered in the working of successful arbitration in India which are multifold — starting from requirement for amendment of certain provision of law to changing the mindset of the stakeholders who are judges, arbitrators, lawyers and parties involved. Based on the identified problems, the following recommendations can be made:

- Universities in India could create a separate faculty or department for arbitration law to encourage specialized study and incisive research.
- All stakeholders - arbitrators, judges and lawyers- should make efforts to change general attitude towards arbitration. It is necessary for arbitrators, judges and lawyers to know and to understand the direction of the new law, respect the will of the parties set out in arbitration clauses, and observe the dichotomy between arbitration and litigation. This change in the mindset must focus on the need to make the system more effective, attractive and functional[3].
- There is requirement for legislative amendment to remove the anomaly which enables a defeated party to avoid execution of arbitral awards by

merely filing an application for setting aside under Section 34 of the 1996 Act, without being required to deposit a part of the award amount. In NALCO Ltd. vs. Pressteel Fabrications (P) Ltd[4], the Supreme Court of India has expressed a hope that suitable legislative action would undo this situation. The Court refused to impose any condition on the applicant pending disposal of its application for setting aside the award under Section 34, reasoning being that any such order would run counter to the letter and spirit of the Act. Nevertheless, the court did take judicial notice of the injustice that could be caused to the beneficiary of an arbitral award due to the 'automatic' stay by mere challenging of awards.

- The government should disseminate knowledge of the benefits of alternate dispute resolution mechanisms to foster growth of an international arbitration culture amongst lawyers, judges and national courts.
- Provisions in the arbitration laws in India that require entire arbitral tribunals to impart effective interim measures at par with the authority of a national court should be amended, and an effective mechanism for carrying out these provisions should be put in place.
- There is an emerging trend to go for settlement of business disputes by institutional arbitration, provided such institutions maintain quality standards in conducting proceedings. The standards are evaluated in terms of professional arbitrators, infrastructure facilities, time and cost saving procedures and uniformity of laws - standards that will make the ADR system more sound and acceptable among the business community. Independent institutions should impart training for nurturing competent professionals who are trained to delve into the crux of the dispute for its resolution.

References :

1. P. Anand Raju v. P.V.G (2000) 4 SCC 539.
2. Under Section 31 of the Arbitration Act, 1940, an award has to be filed before any court having jurisdiction, to make an award the rule of the court.
3. Excerpt from the article 'Arbitrating Commercial and Construction Contracts published in ICA's Arbitration Quarterly and webcasted in ICA's official website
4. (2004) 1 SCC 540