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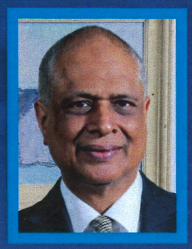
Dedicated to Arbitration for Over Five Decades

ARTICLE



SOME STEPS THE GOVERNMENT CAN TAKE TO ADVANCE ARBITRATIONS IN INDIA

By: Mr. Sumeet Kachwaha

In 1996, India replaced its 1940 arbitration enactment with a modern regime. The new Act was a blend of two United Nations documents - the UNCITRAL Model Law, 1985 and the UNCITRAL Arbitration Rules, 1976. These were tried and tested templates, the world over.

In India, however, the working of the Act has constantly run into trouble; riddled with too much court intervention and too little court support. Three decades of effort have not borne fruit as hoped for.

Here are some suggestions on what the government can do to promote a better arbitration regime:

Help build the ecosystem: Arbitration is sui generis. It is not court litigation. It needs a certain ecosystem. This has many parts and players and even with the best intentions, takes some doing. The government in particular can do its bit. Within about two decades, Singapore has risen from a marginal player to a top arbitration hub. To some measure, the credit goes to its government promoting 'Maxwell Chambers'. This is basically an integrated infrastructure complex, where any ADR can be conducted (physically or virtually). It offers the full bouquet of support services from hearing rooms, business centres, transcription and translation services, virtual hearing management; catering etc. The Centre has not only facilitated arbitrations, it has become a gravitational point for the arbitration community, with major ADR institutions, law firms, arbitration chambers and ancillary service vendors setting up offices within the complex.

In India, we depend on arbitral institutes to provide hearing rooms and ancillary

support. This diverts precious resources and sucks institutes into the 'brick and mortar' side of the business. No major arbitral institute in the world burdens itself with infrastructure. Their focus is on administering arbitrations; facilitating thought leadership, (through seminars, conferences, training programs, publications) and building an arbitration bar - the necessary building blocks for an effective arbitration regime. The government should consider setting up a world class integrated dispute resolution complex for any ADR use on payment basis.

Set an example: A peculiar feature of arbitrations in India is that a vast majority are ad hoc i.e. self-administered by the arbitrators and not institution governed. The government has the highest number of arbitrations but strangely allows most of its arbitrations to be ad hoc. Institutions follow an established set of rules, provide oversight and set fees in a transparent manner. A governmental shift towards institute administered arbitrations would lend greater credibility and transparency to its arbitrations and also boost Indian arbitral institutes.

Bring a change in the government's attitude: The government has created an environment where it has only one solution when faced with a dispute i.e. to leave matters to the courts. Alternatives are not explored due to fear of 'watch dog' bodies. The government needs to create new paths enabling it to take bold and necessary commercial decisions as required.

The government, like any other litigant, it is entitled to every relief or remedy, it can legitimately avail of. There is however a clear line between 'fair' and 'foul' and the government at least should not be seen as treating them alike. As a prime procurer of infrastructure projects, much rides on the government being a fair player and, at a minimum, not an unfair litigant.

Compulsive challenges to every award and every possible appeal therefrom, coupled with various stalling tactics ill behoves the State. Filtering out and not pursuing meritless challenges is only doing the right thing and as much a State responsibility, as pursuing a just cause. A fair approach will lend credibility to the government's genuine challenges, present it as a responsible litigant and have multiple spin-off benefits for the economy.

Legislative interventions: The government has not been an idle bystander. At the same time, three rapid rounds of amendments to the Act (in 2015, 2019 and 2021) betrays a

hastiness, which becomes all too evident when it is seen that a large number of amendments introduced in 2015 have not yet been brought in force (some 9 years later), while some even withdrawn by the subsequent amendment. An ill-advised tinkering with the law, (and later second thoughts) brings uncertainty and confusion.

The government is currently contemplating a fresh round of amendments. Here are two suggestions:

(i) **Delay in enforcement / execution:** While a great deal of strictness is imposed in concluding arbitrations expeditiously, the sense of urgency goes once the award is rendered. Every award is mercilessly challenged, and every stratagem merrily deployed to delay matters. The award challenge stage can take a decade or so, making a farce of the 12 – 18 months period prescribed by law within which the arbitrators need to deliver their award or run the risk of being penalized / replaced. There is no deterrence on the losing party for burdening the system with hopeless challenges and sharp practice. This is peculiar only to India. There is no reason why full compensatory costs are not visited on the losing party in commercial disputes. This should be legislatively mandated.

(ii) **Reducing multiple appeals:** Moreover, it is extravagant to afford three stages of judicial scrutiny post rendering of the award (making it a four stage dispute resolution process in all). Eminent jurist, Mr. Fali S. Nariman was a strong proponent of the award challenge commencing before the Division Bench of the High Court, with a single final appeal to the Supreme Court. This is an excellent idea and deserves serious consideration.

Concluding thoughts:

There is a clear relationship between effective dispute resolution and commercial growth. While the challenges may be many, a few simple steps can go a long way.

The author is an advocate in arbitration practice.