DISPUTE RESOLUTIONS

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Message to the Readers

COVID 19 Implication for future of Dispute Resolution

COVID 19 has sent the smooth functions that sustain everyday life into a staggering tailspin. Its impact in the world of commerce and industry is bound to be huge, daunting and recurring. It is likely to have a significant impact not only in the short term, but also in the medium and long terms.

In the short term, cases of parties who are unable to meet their contractual obligations on account of COVID 19 are likely to flood the courts. Principles relating to force majeure, frustration of contract and impossibility of performance are likely to be decided from completely different perspectives. A large number of disputes are also likely to arise on account of disruption of the supply chain. Also, businesses will have to revisit compliance and investigation measures put in place by them in their companies as physical examinations and supervision become more and more difficult. Central to this is the question of how the conduct of employees and other third parties (who may incur liability for the company) can be monitored adequately from a compliance angle with a less in-person perspective. As with all crises, there is likely to be a spate of fraudsters trying to capitalize on the crisis and exploit innocent businessmen which is also likely to result in a large chunk of litigation. Then again, a large proportion of disputes would revolve around insurance claims between the insurer and the insured relating to COVID 19 related losses. The manner in which these disputes will be filed and heard would be very different with a considerable chunk of these disputes being heard and disposed through the virtual platform. Online dispute resolution platform is likely to become the most favored medium of resolution of disputes at least in the short term.

In the medium term, as more and more business enterprises find it difficult to meet obligations to customers and financial institutions, there is likely to be a surge in insolvency litigation. Another area which is likely to see an upsurge is consumer claims and cases filed under consumer protection laws. In a related development, increasing use of technology may see a rise in the number of disputes around the use of that technology.

In the longer-term, conventional courts would be required to completely realign their procedures and functions to meet the demands of the COVID 19 era. Fresh rules of evidence, procedure relating to e-court hearings and filing will all emerge to alter unrecognizably the manner in which justice dispensation is likely to happen.

Some of these challenges may vanish as the threat of COVID19 recedes, others may leave a lasting impact and may even remain intact and develop further. One thing is certain, dispute resolution is not going to be same ever again.

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A REPORT ON THE 36th NANI PALKHIVALA MEMORIAL LECTURE BY DR. AJIT RANADE

Delivering the 36th Nani Palkhivala Memorial Lecture on 16thMay, 2020 organized by the Palkhivala Foundation, Dr Ajit Ranade, President and Chief Economist, Aditya Birla Group, spoke on the economic prospects in the post-COVID world. Reflecting on the legacy of the late Nani Palkhivala, he said that Palkhivala's towering presence was missed in a situation like the COVID crisis.

Describing the pandemic as unusual and observing that it threw 'contradictory' results, he dealt with the fluctuating fortunes of the WTI Crude Oil, which has plunged below the zero level. He also observed that there was no definitive prognosis as to the economic dimensions of COVID-19, and that both demand and supply shocks were concomitants of the COVID induced lockdown. Laying down the context of the Indian economy in the light of the pandemic situation, he traced the dynamics of the global oil price war between the oil producing economies and its geopolitical implications. Commenting that India's GDP growth has come down to 5% and that this decline was already half a decade old, he theorised the relationship between growth of exports and its impact on overall economic growth.

Sketching out the trade dispute between the United States and China, he said that protectionist tendencies marked the chequered story of exports. Proceeding on a forensic examination of India's growth, he emphasised the need for the InvestmentGDP Ratio to rise and that the long standing 28% growth in its metrics required a fillip. Spelling out the issues faced by banks in terms of recovery, he observed that whilst the Insolvency and Bankruptcy Code stood suspended, the debilitating effect of non-performing assets (NPAs) would hurt banking capital in the long run and the capacity to lend would be generally reduced. Enlisting the crucial items of import, he said the WTI Crude Oil price crash did not affect the prices of diesel and petrol in India, because of the upward trend in the duties imposed. However, this accumulated financial bonanzadid not translate into any growth impetus.

Recognising the need for doubling the GDP to reach the 5 trillion dollar target, he said that India had a traditionally positive growth of 6%, but required a considerable stimulus in terms of consumption and investment spending, especially from the private sector. Hinting at the critical requirement of doubling export trade on the part of Indian industries, he said that interconnected global trade cannot be wished away by protectionist rhetoric. Developing the understanding on agriculture income, he observed that robust industrial growth alone cannot cure the issues confronting Indian agriculture and that sector centric reforms were the need of the hour. Recounting that the slow progress of the GDP-Manufacturing ratio was a concern, he said that automation could be a major disruption in the manufacturing sector, and that a gradual movement of industries back to the West could be a possibility.

Terming India as a continental economy with structural strength, he said that domestic demand was the key to a potential market with demographic advantage. Adding that the savings orientation was a structural feature, he said that the infrastructure deficit would help spurring domestic demand with the aid of demographic human capital.

Concluding his lecture, he said that the post COVID-19 economic scenario was a mixture of fiscal concerns, growth opportunities and an increased accent on innovation in respect of skill development in domestically oriented economies like India.

REGULATORY BODY IN THE FIELD OF ARBITRATION: BOON OR BANE

There has been a constant effort in India to promote and regularize institutional arbitration and to turn it into an arbitration friendly jurisdiction. The Indian arbitration law lacks a streamlined approach and requires a regulatory body to streamline arbitration law and bring it *on par* with international best practices using cues from our neighbouring jurisdictions.

The present article proposes to succinctly examine the need for a regulatory body in light of the increased preference for arbitration in India, while presenting a critique of the Arbitration and Conciliation (Amendment) Act, 2019. Additionally, it seeks to highlight recommendations and efforts required to refine the present law and to provide a platform towards fostering the growth of arbitration in India.

A. PROLOGUE

The Arbitration and Conciliation Act, 1996 (hereinafter **"The 1996 Act"**) has strived to lay down the best principles for arbitrations in India, however, it has failed to reach its potential till date. While neighbouring jurisdictions *viz.,* Singapore, Hong Kong, and China witness a thriving practice for both domestic and international arbitrations, constant troubles such as increased government interference and extension of the judicial mind-set into arbitral proceedings act as an impediment to arbitration practice in India. Apropos the practice and procedure governing arbitration, a more dynamic and party-centric approach is *sine qua non*, however, this is not the case in India.

In an attempt to rectify its own errors, limit its intervention and revamp the approach towards arbitration in India, the Central Government set up a 'High-Level Committee to review the institutionalisation of arbitration mechanisms in India' (hereinafter **"The Committee"**)[1] under the Chairmanship of Justice (Retd.) B.N. Srikrishna, and one of the key recommendations of The Committee pertained to the establishment of an 'Arbitration Promotion Council of India' (hereinafter **"APCI"**).[2]

The Committee was cognizant of the basic principles of arbitration and had emphasized that the APCI was to be 'merely a facilitator and not a regulator'. On the contrary, the lawmakers conceptualized the ' Arbitration Council of India' (hereinafter **"ACI"**) (which is yet to be notified) as a more controlling body.

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[1]High Level Committee to review the institutionalisation of arbitration mechanisms in India, (May 15, 2020, 10:04 AM), http://legalaffairs.gov.in/sites/default/files/Report-HLC.pdf.

[2]*Ibid*, Key Recommendations, page 4.

B. NEED FOR A REGULATORY BODY

More than 35 arbitral institutions are presently functioning in India.[3] However, the quality of these arbitral institutions varies in terms of efficiency, speed, infrastructure, panel of arbitrators and quality of the arbitral award made. Considering these drawbacks, an independent regulatory body at the national front is highly appreciable and necessary to streamline the law governing arbitral institutions across India and to undertake the function of grading arbitral institutions in terms of, but not limited to, infrastructure, personnel and performance. Such a body would:

(i) set a benchmark for assessing various arbitral institutions,
(ii) set the minimum functioning standards for arbitral institutions, and
(iii) incentivize arbitral institutions that find themselves weighed down by a competitive market of arbitral institutions, to perform well.[4]

Essentially, this regulatory body and its tasks should solely be construed and developed as facilitatory and should in no way be enacted and deemed to be a regulatory set up by the government a deviation from which shall make the regulatory body counterproductive .

Discerning the spirit of the aforesaid, The Committee proposed the establishment of the APCI. However, in complete contrast and burying the substance of such recommendation, the legislature introduced the ACI under the aegis of the Arbitration and Conciliation (Amendment) Act, 2019 (hereinafter **"2019 Amendment Act"**).[5]

C. CRITIQUE OF THE ACI

The 2019 Amendment Act introduced the ACI by inserting Part IA under The 1996 Act.[6] Unfortunately, vide the amendment, the lawmakers perhaps failed to take into account the substance and spirit of The Committee's recommendations towards the establishment of an autonomous body as is done in Singapore, Hong Kong, and Paris.

Prima facie, a few flaws in the proposed enactment that are likely to plague the development of a successful model overseeing the process of arbitration are:[7]

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[3] *Supra* note 1, page 13.

[4] *Supra* note 1, page 49.

[5] The Arbitration and Conciliation (Amendment) Act, 2019 (May 17, 2020, 03:40 PM), http://egazette.nic.in/WriteReadData/2019/210414.pdf.

[6] *Ibid.*

[7] AjarRab, Arbitration Council of India: The 'Arbitration Regulator'? *THE CORPORATE AND COMMMERCIAL LAW REVIEW BLOG* (May 18, 2020, 05:15 PM), https://theboardroomlawyer.com/2018/07/16/arbitration-council-of-india-the-arbitration-regulator/.

(I) ***Increased Government entrenchment:*** The conventional legislative practice of mandating government Interference, yet again, has defeated The Committee's recommendations. The creation and composition of the ACI in a country like India with its high levels of bureaucratic delay presents a layer of administrative difficulty in the conduct of arbitration(s).[8]

In-complete opposition to the recommendations of The Committee, all the appointments viz (i) the Chairperson, (ii) eminent academician, (iii) eminent arbitration practitioners and (iv) the law secretaries, are proposed to be made with government interference, while allowing minimum autonomy.

To sum up, all appointments will be either the nominees of government or would be the ex-officio members of the government. Thus, the spirit of autonomy and independence is defeated.

(ii)Conundrum surrounding the recognition of professional accreditation: One of the core functions of the ACI happens to be recognizing professional institutes and providing accreditation to arbitrators. This transpires into two-fold problems as; *(i)* the extent of such recognition is uncertain and *(ii)* such a function of the ACI will be redundant in the background of the 8th Schedule[9] introduced and inserted by the 2019 Amendment Act, as it does not lay any emphasis on individuals being graded as Fellow(s) of globally recognized institutions in the field of arbitration law. Therefore, irrespective of the ACI recognition, professionals / arbitrator(s) may be ineligible due to the conditions under the 8th Schedule.

(iii) Recognition of Arbitral Institutions: The level of government entrenchment into the ACI can be *prima facie* deciphered by its composition. Due to such influence, certain arbitral institutions may not qualify under the ACI, irrespective of them providing state-of-art facilities towards the conduct of arbitral proceedings. Such an influence could possibly hamper the growth of arbitration in India.

(iv) Confidentiality Concerns: The ACI is permitted to maintain an electronic depository of arbitral awards. However, owing to the fact that the Government of India is the largest litigant and a frontal stakeholder in arbitrations, an indispensable conundrum surrounds the extent of confidentiality that will be maintained by the ACI.

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[8] George Burn, The Arbitration and Conciliation (Amendment) Act 2019: Improving institutional arbitration in India (May 18, 2020, 11:25 AM), https://www.bclplaw.com/en-GB/insights/the-arbitration-and-conciliation-amendment-act-2019-improving-institutional-arbitration-in-india.html.

[9] *Supra* note 5.

(v)Extension of a judicial mind-set into arbitration: A glaring feature of ACI would be the role of the judiciary. Normally, retired judges, either of the Supreme Court or of any High Court, are appointed as arbitrators in both ad-hoc and institutional arbitration(s).

However, as per the criteria laid down in the 2019 Amendment Act, once the ACI is enforced and effected into, these retired judges and senior advocates will be empanelled as arbitrators by virtue of their respective experiences, acting as a mere extension of the judicial mind-set into arbitration and not offering any further value addition to the dispute resolution mechanism.

D. RECOMMENDATIONS & CONCLUSION

The introduction of the ACI has been a step in the right direction. However, it presents itself as a bane to the arbitration regime as a result of being subject to governmental control.

Presented below are a few recommendations that may be effective in refining the implementation and functioning of the ACI:

(a) Establishment of an Independent and Autonomous Body: Due to the unwarranted interference of courts and other stakeholders, there arises a demand towards the establishment of an 'independent and autonomous' body, which is aimed at undertaking the functions of:

(i) making arbitration more party-autonomous,

(ii) laying down standards towards the recognition of arbitral institutions,

(iii) regularizing & promoting institutional arbitration,

(iv) making the process more cost-effective, and

(v) ensuring timely disposal of arbitration cases.

To summarize, the establishment of such a body would accelerate the independence and autonomy of institutional arbitrations, allow for better management of arbitrations, and create a body or institution of national importance for the matters incidental and connected thereto.

(b) Reducing Government intervention: The appointments to the ACI are political in nature, as the appointees are either nominated by the Government or *are ex-officio* members of the Government. Interestingly, the lawmakers have yet again disregarded the recommendations of The Committee. This can be seen from the fact that the Chairperson, who earlier was to be appointed by the Governing Board, is now being appointed by the Central Government in consultation with the Chief Justice of India (CJI), thus, symbolizing and perpetuating government control, political influence and red-tapism.

Thus, it is suggested that the Government, being both a litigant and a state functionary, acts as a stakeholder as opposed to playing an intruding role. This would ensure its representation on the body and the government could provide infrastructure and funding for effective functioning of the body, similar to the model adopted in Singapore.[10]

(c) Strengthening Legal Infrastructure: Two primary concerns upsetting the arbitration are lack of *(i)* refined policies and *(ii)* adoption of international best practices. The enactment of policies and laws by the legislature, its revision by the judiciary, or vice-versa, muddles the efforts and process, and leaves them obsolete for implementation.

The tiered screening process for revision of policies acts as a barricade against streamlining legal infrastructure for arbitrations. In such a quandary, and as has been pointed out in the 2015 QMUL Arbitration survey, first and fore-most, a strong local legal system along with a national arbitration law is requisite.[11]

Achieving the said threshold of legal infrastructure would facilitate the flow and growth of arbitration in India. Enabling such an infrastructure, as implemented by Singapore, should assist in *(i)* streamlining the policies at the national front, and *(ii)* fostering institutional arbitration.

(d) Working in tandem with the government: The underlying reason for the success of the neighbouring jurisdictions with respect to arbitration lies in the government support to institutions by providing financial aid and setting up the infrastructure without any interference in its decision making by allowing them to function autonomously. Likewise, in India too, if a regulatory body is being set up under the aegis of The 1996 Act, it should be autonomous and should work in tandem with the government. However, presently, the ACI happens to be nothing more than a watchdog for arbitration in India. It would be wise to permit the regulatory bodies such as the ACI to function independently and not on levels of hierarchy overseeing one another.

To conclude on the analysis of the proposed law on the ACI, an old ditty is appropriate *"I'm the parliamentary draftsman, I compose the country's laws, and of half the litigation, I'm undoubtedly the cause".*[12]

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[10] *Supra* note 1, page 50.

[11] White & Case, 2015 International Arbitration Survey: Improvements and Innovations in International Arbitration (May 18, 2020, 12:40 PM), http://www.arbitration.qmul.ac.uk/media/arbitration/docs/2015_International_Arbitration_Survey.pdf.

[12] The Parliamentary Draftsman: A Poem, NATIONAL CONFERENCE OF STATE LEGISLATURES (May 21, 2020, 02:40 PM), https://www.ncsl.org/legislators-staff/legislative-staff/research-editorial-legal-and-committee-staff/the-relacs-report/2018/04/10/the-parliamentary-draftsman-a-poem.aspx.

In furtherance to The Committee's suggestions, such a body must be self-sustaining in the future with only financial support from the government. Thus, while the intent of The Committee is laudable, the implementation of its recommendations have been erroneous.

Initiating actions in terms of the letter and spirit of The Committee's recommendations would allow the regulatory body a considerable degree of functional independence, foster growth of arbitration, and would provide a conducive environment for arbitration in developing jurisdictions like India.

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Views of the author(s) are personal.