ARBITRATION AND CONCILIATION: AS METHOD OFALTERNATE DISPUTE RESOLUTION

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INTRODUCTION

The significant increase in the role of international trade in the economic development of nations over the last few decades has been accompanied by a considerable increase in the number of commercial disputes as well. In India too, rapid globalization of the economy and the resulting increase in competition has led to an increase in commercial disputes. At the same time, however, the rate of industrial growth, modernization, and improvement of socio-economic circumstances has, in many instances, outpaced the rate of growth of dispute resolution mechanisms. In many parts of India, rapid development has meant increased caseloads for already overburdened courts, further leading to notoriously slow adjudication of commercial disputes. As a result, alternative dispute resolution mechanisms, including arbitration, have become more crucial for businesses operating in India as well as those doing businesses with Indian firms. Keeping in mind the broader goal of exploring links between the quality of legal performance and economic growth, this paper is an attempt to critically evaluate arbitration in India as a legal institution

The Indian Parliament passed the Arbitration and Conciliation Act of 1996 mainly to implement the UNCITRAL Model Law on International Commercial Arbitration of 1985 and UNCITRAL Rules on Conciliation of 1980 and to improve upon the Arbitration Act of 1940 to make the arbitration law more in conformity with the changed global investment and commercial climate. While the 1996 Act was not intended to supplant the tried and tested judicial system with the non-formal private arbitration or the purely consensual conciliation mechanisms, the new law certainly ushered in an era of privatization of the hitherto State monopoly over dispute settlement procedures and institutions in conformity with the global rend of liberalization of economic policies, privatization of industry and globalization of markets. This shift offers both an opportunity and a challenge to the judiciary ---an opportunity to utilize the ADR methods to lessen the stress of docket explosion and a challenge to improve its age-old dilatory procedures and sustain the people's faith in itself as

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an institution. Fortunately, the emergence of the ADR mechanisms were not viewed by the judiciary at the highest level in India as leading to any institutional conflict between the Courts and the ADR. On the other hand, the successive Chief Justices and the judges have commended and welcomed the new development as necessary and desirable. As was observed in Mediterranean and Eastern Export Co. Ltd. v. Fortress Fabrics Ltd. (1948) 2 All E R 186, "the day has long gone by when the Courts looked with jealousy on the jurisdiction of arbitrators." In fact the recent amendments to the Indian Civil Procedure Code clearly signal a readiness to integrate the ADR methods into the existing court system by authorizing the Courts to have recourse to arbitration and conciliation in appropriate cases. This amalgamation of judicial system with arbitration and conciliation processes is indeed a historic and momentous development.

Rationale and Definition of Conciliation

It may be remembered that the UNCITRAL Model Law on arbitration and Rules on Conciliation were both made in the context of growing international trade and commercial relations against the back-drop of liberalization, privatization and globalization. UNCITRAL Rules on Conciliation of 1980 adopted by the General Assembly of the United Nations stated at the very outset that the General Assembly.

The Act dealt with the enforcement of foreign awards in Part III only in relation to States which were parties to the New York Convention on the Recognition and Enforcement of Foreign Awards of 1958 (Part III, Chapter I and Schedule I), and the Geneva Protocol on Arbitration Clauses of 1923 and the Geneva Convention on the Execution of Foreign Awards of 1927 (Part III, Chapter II and Schedules II and III). India made reservations to those instruments on the grounds of reciprocity and for confining the disputes to matters of commercial nature. Consequently, the Act did not deal with international arbitration or with international conciliation in general in relation to States that were not parties to the Geneva or New York Conventions. Arbitral awards given in the States that are not parties to those Conventions are treated as non-Convention awards, but even the awards made in States that are parties to the Conventions but are not covered by the reciprocity reservation might fall outside the purview of Part II. In fact the Act defines only "international commercial arbitration" in S. 2(1) (f) and applies the same definition mutatis mutandis to international commercial conciliation under S1 (2), 'Explanation' and the Act does not define or deal with international arbitration or international conciliation, as such. As the provisions of Part I of

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the Act apply "where the place of arbitration in India" (S. 2(2), it cannot obviously be taken to mean that the part would apply to conciliation, domestic or international, even if the venue of conciliation is in India. As Part I contains some important definitions of the terms like "court" etc, some ambiguity is created because of its non-application to conciliation. UNCITRAL dealt with arbitration and conciliation five years apart and in two separate documents, and the integration of these two into the 1996 Act might create problems of interpretation.

Arbitration has a long history in India

In ancient times, people often voluntarily submitted their disputes to a group of wise men of a community—called the panchayat—for a binding resolution[3]

Modern arbitration law in India was created by the Bengal Regulations in 1772, during the British rule. The Bengal Regulations provided for reference by a court to arbitration, with the consent of the parties, in lawsuits for accounts, partnership deeds, and breach of contract, amongst others[4]

Until 1996, the law governing arbitration in India consisted mainly of three statutes: (i) the 1937 Arbitration (Protocol and Convention) Act, (ii) the 1940 Indian Arbitration Act, and (iii) the 1961 Foreign Awards (Recognition and Enforcement) Act. The 1940 Act was the general law governing arbitration in India along the lines of the English Arbitration Act of 1934, and both the 1937 and the 1961 Acts were designed to enforce foreign arbitral awards (the 1961 Act implemented the New York Convention of 1958).[5]

The government enacted the Arbitration and Conciliation Act, 1996 (the 1996 Act) in an effort to modernize the out-dated 1940 Act. The 1996 Act is a comprehensive piece of legislation modelled on the lines of the UNCITRAL Model Law. This Act repealed all the

[3]K Ravi Kumar, 'Alternative Dispute Resolution in Construction Industry', International Council of Consultants (ICC) papers, www.iccindia.org.at p 2. K Ravi Kumar is assistant executive engineer, Salarjung Museum, Hyderabad.

[4] ibid

[5]The New York Convention of 1958, i.e. the 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards, is one of the most widely used conventions for recognition and enforcement of foreign awards. It sets forth the procedures to be used by all signatories to the Convention. This Convention was first in the series of major steps taken by the United Nation since its inception, to aid the development of international commercial arbitration. The Convention became effective on June 7, 1959.

5The 1996 Act, Section 85.

6Justice Ashok Bhan in his inaugural speech delivered at the conference on 'Dispute Prevention and Dispute Resolution' held at Ludhiana, India, October 8, 2005.

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three previous statutes (the 1937 Act, the 1961 Act and the 1940 Act).[6] Its primary purpose was to encourage arbitration as a cost-effective and quick mechanism for the settlement of commercial disputes.[7] The 1996 Act covers both domestic arbitration and international commercial arbitration.

The Arbitration Act, 1940

The Arbitration Act, 1940, dealt with only domestic arbitration. Under the 1940 Act, intervention of the court was required in all the three stages of arbitration, i.e. prior to the reference of the dispute to the arbitral tribunal, in the duration of the proceedings before the arbitral tribunal, and after the award was passed by the arbitral tribunal. Before an arbitral tribunal took cognizance of a dispute, court intervention was required to set the arbitration proceedings in motion. The existence of an agreement and of a dispute was required to be proved. During the course of the proceedings, the intervention of the court was necessary for the extension of time for making an award. Finally, before the award could be enforced, it was required to be made the rule of the court.

While the 1940 Act was perceived to be a good piece of legislation in its actual operation and implementation by all concerned - the parties, arbitrators, lawyers and the courts, it proved to be ineffective and was widely felt to have become out-dated.[8]

The Arbitration and Conciliation Act, 1996

The 1996 Act, which repealed the 1940 Act, was enacted to provide an effective and expeditious dispute resolution framework, which would inspire confidence in the Indian dispute resolution system, attract foreign investments and reassure international investors in the reliability of the Indian legal system to provide an expeditious dispute resolution mechanism.

The 1996 Act has two significant parts – Part I provides for any arbitration conducted in India and enforcement of awards thereunder. Part II provides for enforcement of foreign awards. Any arbitration conducted in India or enforcement of award thereunder (whether domestic or international) is governed by Part I, while enforcement of any foreign award to which the

[8]Arbitration and Conciliation Act, 1996, Statement of Objects and Reasons

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New York Convention or the Geneva Convention applies, is governed by Part II of the 1996 Act.

The 1996 Act contains two unusual features that differed from the UNCITRAL Model Law. First, while the UNICITRAL Model Law was designed to apply only to international commercial arbitrations,[9] the 1996 Act applies both to international and domestic arbitrations. Second, the 1996 Act goes beyond the UNICITRAL Model Law in the area of minimizing judicial intervention.[10]

The changes brought about by the 1996 Act were so drastic that the entire case law built up over the previous fifty-six years on arbitration was rendered superfluous.[11] Unfortunately, there was no widespread debate and understanding of the changes before such an important legislative change was enacted. The Government of India enacted the 1996 Act by an ordinance, and then extended its life by another ordinance, before Parliament eventually passed it without reference to a Parliamentary Committee—a standard practice for important enactments.[12] In the absence of case laws and general understanding of the Act in the context of international commercial arbitration, several provisions of the 1996 Act were brought before the courts, which interpreted the provisions in the usual manner.

The Law Commission of India prepared a report on the experience of the 1996 Act and suggested a number of amendments. Based on the recommendations of the Commission, the Government of India introduced the Arbitration and Conciliation (Amendment) Bill, 2003, in Parliament for amending the 1996 Act. It has not been taken up for consideration. In the meantime, Government of India, the Ministry of Law and Justice, constituted a Committee popularly known as the 'Justice Saraf Committee on Arbitration', to study in depth the implications of the recommendations of the Law Commission of India contained in its 176th Report and the Arbitration and Conciliation (Amendment) Bill, 2003. The Committee submitted its report in January 2005.

8 See Article 1 of the UNICITRAL Model Law.
9S K Dholakia, 'Analytical Appraisal of the Arbitration and Conciliation (Amendment) Bill, 2003', *ICA's Arbitration Quarterly*, ICA, New Delhi, 2005 vol. XXXIX/No.4 at page 3. S K Dholakia is a Member of ICC International Court of Arbitration and Senior Advocate, Supreme Court of India.
10(1999) 2 SCC 479 (Sundaram Finance vs. NEPC Ltd.). The Supreme Court held at p 484 thus: 'The provisions of this Act (the 1996 Act) have, therefore, to be interpreted and construed independently and in fact reference to the 1940 Act may actually lead to misconstruction

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WORKING OF ARBITRATION IN INDIA

Arbitration in India is still evolving. One of the objectives of the 1996 Act was to achieve the twin goals of cheap and quick resolution of disputes, but current ground realities indicate that these goals are yet to be achieved. The ground realities can be ascertained from the study and analysis of the various aspects in conducting arbitration, which are discussed in the following paragraphs.

Types of Arbitration Practice- *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 costeffectiveness of the arbitration process.

• In ad hoc arbitration, the procedures have to be agreed upon by the parties and the arbitrator. This requires co-operation between the parties and involves a lot of time. When a dispute is in existence, it is difficult to expect cooperation among the parties. In institutional arbitration, on the other hand, the procedural rules are already established by the institution. Formulating rules is therefore no cause for concern. The fees are also fixed and regulated under rules of the institution.

• 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, which increase the cost of arbitration. Other problems include getting trained staff and library facilities for ready reference. In contrast, in institutional arbitration, the institution will have ready facilities to conduct arbitration, trained secretarial/administrative staff, as well as library facilities. There will be professionalism in conducting arbitration.

• In institutional arbitration, the arbitral institutions maintain a panel of arbitrators along with their profile. The parties can choose the arbitrators from the panel. Such arbitral institutions also provide for specialized arbitrators. 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

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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 are governed by the rules of the institution, and they 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, where one party (whose nominee arbitrator is incapacitated) has to re-appoint the new arbitrator. This requires co-operation of the parties and can be time consuming.

• In institutional arbitration, as the secretarial and administrative staffs are subject to the discipline of the institution, it is easy to maintain confidentiality of the proceedings. In ad hoc arbitration, it is difficult to expect professionalism from the secretarial staff.

In spite of the numerous advantages of institutional arbitration over ad hoc arbitration, there is currently an overwhelming tendency in India to resort to ad hoc arbitration mechanisms. This tendency is counterproductive, since there is considerable scope for parties to be aggrieved by the functioning of ad hoc tribunals. An empirical survey will reveal that a considerable extent of litigation in the lower courts deals with challenges to awards given by ad hoc arbitration tribunals.

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).

CONCLUSION:

The Arbitration and Conciliation Act, 1996 governs arbitration, whether domestic or international commercial arbitrations, and is in compliance with Model Arbitration Law framed by the UNCITRAL. In all the cases of domestic arbitration and also where the seat of arbitral tribunal is in India in case of the international commercial arbitration, the doctrine of

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res judicata, which is a codified principle under Section 11 of the Code of Civil Procedure 1908, would apply. Its application to arbitration bars the further reference to arbitration on the same dispute. Where all the disputes referred to arbitration are decided, then no second award can be made again on the ground that an arbitration agreement to refer the dispute to arbitration still exists between the parties. The same is not permissible where all the disputes have been decided as the arbitration agreement merges with the final award. However, where some of the matters were not raised earlier, the doctrine of constructive res judicata would have no application, as the law governing arbitration is based upon a mutual contract between the parties to refer the dispute to arbitration, the same cannot be barred by the doctrine of constructive res judicata. The doctrine of res judicata also has no application to the interim awards made by the arbitral tribunal, but have application only to the final award.

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