



“India to be made the next Arbitration Hub” – Are You Ready?

Frequently we hear this statement of making India the hub of arbitration from leading personalities. Normally it happens when there is a conference or when a new commercial law is enacted. The situation was no different this time! The occasion was yet another conference on “National Initiative towards strengthening Arbitration and Enforcement in India” held at New Delhi on 21|22 October 2016.

On this occasion none other than the President, Prime Minister and Chief Justice of India declared that India will be made the next arbitration hub!

The President Mr. Pranab Mukherjee said that while India has the basic legal and physical infrastructure to support international arbitrations, we need basic institutional reforms to strengthen our arbitration framework. The Prime Minister Mr. Narendra Modi said that enabling alternate dispute resolution ecosystem is a national priority for India and we need to promote India globally as an arbitration hub. The Chief Justice Mr. T S Thakur said that the Government and Judiciary will help to improve the institutional capacity necessary to create a vibrant ecosystem to make India the next big hub for international commercial arbitration.

The headlines were really exciting!

The purpose for promoting arbitration is different from different perspectives.

Encouraging arbitration in India, the Prime Minister said, "A vibrant ecosystem of alternate dispute resolution needs to be in place as India has become the biggest centre of FDI".

Supporting arbitration, the Chief Justice said, "Arbitration is good. But real trouble starts after the award. If challenged, the case remains pending in a court for decades. Then what is the point? In this country, 18,000 judges are handling 50 million cases. The avalanche of cases is putting the judicial system to tremendous stress".

We need to promote arbitration as an effective and independent dispute resolution mechanism not for the sole purpose of bringing more FDI to India or to appoint more judges to make judiciary more effective so as to support arbitration. We need to improve arbitration, so as to make it credible, reliable and efficient for the disputants to confidently opt for it. We need to garner acceptability for India as a safe venue for arbitration among the global business community. A robust legal framework backed by a vibrant arbitration culture is the need of the hour. As the President of India said, "There is a huge untapped potential for growth of institutional arbitration in India. Both domestic and international arbitral institutions have to play a proactive role in shaping this. A vibrant arbitration ecosystem would need a vibrant arbitration bar as well as a respected pool of seasoned arbitrators". I think the mission of IIADRA is closely connected with this and we have a huge responsibility to achieve this.

Unfortunately, unlike advanced jurisdictions, institutional arbitration is still not widespread in India. Ad hoc arbitration is the norm. I am not saying that all retired judges are considered bad arbitrators, as they carry the court system along with them in arbitration also. But we need a pool

of arbitrators, which could include lawyers, retired judges, chartered accountants, other professionals, subject-matter experts etc. who are trained in the process of arbitration and who conform to a proper code of conduct. The lack of specialised arbitrators has been a crucial reason behind why companies have been unable to embrace arbitration in India. We need ADR lawyers who are experts in the process of arbitration and who does not prolong the process like litigation. We need arbitration professionals, experienced secretarial services and effective arbitral institutions which could provide a reliable and responsive Alternative Dispute Resolution system. This will help build confidence in the arbitration ecosystem in India.

The point raised by the Chief Justice that the avalanche of cases is putting the judicial system to tremendous stress may be valid. It is also true that a major concern of any foreign investor regarding safety of his investment is the efficacy of the judicial system of the country where he is going to invest. But can the delay in justice delivery be solely attributed to the fact of exploding dockets and shortage of judges?

It is a dismay to see how untrained most of the judges are with respect to handling arbitration or commercial matters. The Indian courts need to devise an administrative mechanism to ensure that arbitration matters are handled separately and efficiently so as to avoid any delay arising out of judicial intervention. Even if the Commercial Courts, Commercial Division and Commercial Appellate Division of High Courts are created to fast track commercial dispute resolution, unless proper training is imparted to the judges who handle these matters, the situation may not improve.

I am giving a small example to show how simple and clear positions are complicated by judicial interventions. The Arbitration & Conciliation (Amendment) Act, 2015 came into force w.e.f. 23/10/2015. Section 26 clearly and unambiguously

mentions the applicability of the amended Act, which says, "Nothing contained in the Amendment Act shall apply to the arbitral proceedings commenced, in accordance with the provisions of section 21 of the principal Act, before the commencement of this Act unless the parties otherwise agree, but this Act shall apply in relation to arbitral proceedings commenced on or after the date of commencement of this Act".

In spite of this a division bench of Kolkata High Court in "*Sri Tufan Chatterjee vs. Sri Rangan Dhar*", held that pending court proceedings relating to arbitration which was pending as on date when the amendment was notified, must be governed by the Amended Act. The Bombay High Court also in "*Mahanagar Telephone Nigam v SRV Telecom*" held similarly. The Madras High Court on the other hand in "*New Tirupur Area Development Corporation Ltd. vs. M/s Hindustan Construction Co. Ltd*" decided that the amended provisions will not apply to court proceedings, for such arbitrations which commenced prior to amendments being notified. Similarly the Bombay High Court in two connected matters, "*BCCI vs RSW, Kochi Cricket Private Ltd.*" and "*BCCI vs Global Asia Venture Co. & Arup Deb*" added to the already existing confusion. Even though the petitions challenging the awards under Section 34 of the Act were filed prior to the promulgation of Amendment, the High Court held that amendments brought to Section 36 of the Act has a prospective effect and the amended Act would be operational as it is merely procedural in nature and is removing shadow over the rights of the award holder. Now this matter is challenged and is pending before the Supreme Court of India. Thus within no time after the amendment of the Arbitration Act, made with an intention to make arbitration more fast and effective, confusions have been created by the court with respect to the arbitration process.

So, if we need to make India the next arbitration hub, we need to work on lot of aspects. We need to develop professionalism on all spheres. I think it is time that we discuss on areas

and things that we need to improve to actually make India arbitration-friendly.

Shall we? Are you ready?