Research Proposal

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on

"A CRITICAL ANALYSIS OF INTRICACIES AFFECTING THE ARBITRATION MECHANISM IN INDIA"

Submitted To

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Under the Supervision

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1. Background to the research:

Arbitration is a form of Alternative Dispute Resolution. Alternative Dispute Resolution methods enjoy significant advantages such as lower costs, greater flexibility of process, higher confidentiality, greater likelihood of settlement, choice of forum, choice of solutions etc. Having said that one of the most popular widely recognised and practised forms of ADR is Arbitration. Arbitration is a mode of dispute settlement for the resolution of all types disputes outside the courts of a country, where the parties between whom the dispute has arisen refers it to a neutral party or parties, for its resolution.

The legal system of India is characterized by detailed technical procedures and overwhelming use of the adversarial system. In the light of this critical background, it is highly essential that various claims of the arbitration be examined and scrutinized in detail to measure its effectiveness in the legal system. To attract foreign investment, a fast-growing economy requires a trustworthy, stable dispute resolution procedure. Due to the massive backlog of cases pending in Indian courts, commercial players both in India and abroad have established a strong preference for resolving conflicts through arbitration. The present research, in such background, is motivated to make an overall assessment of arbitration and to generate key understanding and findings related to the role of arbitration in the justice delivery system of India. With the courts of India struggling to meet its extraordinary pending caseload (an approximate of 3.3 crore) arbitration has emerged as an efficacious alternative to traditional dispute resolution.

A country’s legal system plays an important role in achieving over all development of the society. With the evolution of corporate world in every sphere of life, it has been evidenced, that the legal system of this country has apparently failed in standing up to the expectations of the people and to meet out the resolving disputes quickly. Court congestions and consequent delayed justice, is often complained about by the public in most countries.

An increase in international trade and investment is accompanied by growth in cross border commercial disputes. Given the need for an efficient dispute resolution programme, international arbitration has emerged as the preferred option for resolving such disputes. In the

context of settlement of legal disputes by way of arbitration, parties often wish to avoid protracted litigation in civil courts and, therefore, attempt to agree in advance that the arbitral award rendered in an arbitration would be final, binding and not subject to further challenge by either party.

India is seen as one of the most attractive manufacturing hub over the world. As more and more international businesses attempt entering vast potential of Indian market, to avoid cumbersome legal proceedings, inclusion of arbitration clauses are adopted in the contracts. This growth in arbitration should've resulted in increased arbitration practice in India. However, seat for arbitration is likely to be preferred outside India over Indian seat due to inferior standards compared to arbitration seats at international institutes such as Singapore, Hong Kong, Geneva, etc. Law in Singapore specifically provides that there are certain disputes which are not arbitrable. Disputes which are against the public policy of Singapore are also considered to be non-arbitrable. The law, to a great extent, is flexible as to which disputes are arbitrable and has greatly increased the scope of arbitration in Singapore.

In the light of this critical background, it is highly essential that various claims of the arbitration be examined and scrutinized in detail to measure its effectiveness in the legal system. The present research, in such background, is motivated to make an overall assessment of arbitration and to generate key understanding and findings related to the role of arbitration in the justice delivery system of India.

With Courts and legislators taking a pro-arbitration approach, the adoption of best practices is vital in the near future. The Arbitration law of India has seen great progress, right from the Arbitration Act of 1940 to the current Arbitration Act of 1996 which has seen amendments from time to time, the most recent one being in 2019. These Amendments have played a major role in keeping the Arbitration Scheme of India up to date with the rest of the world and have been highly topical. The Arbitration Council of India is an important step in that direction, as it will work to promote institutional as well as ad-hoc arbitration, and, at the same time, ensure that the quality of arbitrators and arbitral institutions does not fall. With the increase in preference for arbitration and the general decreasing preference towards litigation, India is all set to become a global arbitration hub in the near future. The Arbitration and Conciliation (Amendment) Act, 2019 is one of the steps taken by the Indian Administration to make India more Arbitration friendly.

A high-level Committee headed by Justice BN Krishna was constituted for the study in this regard. This committee bought out the concept of an Arbitration Council of India in the 2019 Amendment to compete with the international arbitration institutions

Another amendment which bought positive change with it was 2021 amendment. 2021 amendment omitted eighth schedule, which was bought by the 2019 act. Eighth Schedule provided the qualification, experience and norms for accreditation of arbitrators and provided list of individual to be appointed as arbitrator. By eighth Schedule a foreign scholar or foreign-registered lawyer or a retired foreign officer was out rightly disqualified to be an arbitrator under the 2019 Amendment. Choice of candidates as their potential arbitrators was limited by nationality, and not by their qualification to act as international arbitrator. Thus, by omitting the eighth schedule government has cleared their intention to the international arbitrators. Apart from this, India was constantly working on the path of implementing the technology as a norm within arbitrary proceedings. This has gained momentum especially with the onset of the Covid 19 pandemic. Section 19 of the Arbitration & Conciliation Act states: The parties are free to agree on the procedure to be followed by the arbitral tribunal in conducting its proceedings.

The present arbitration system needs to undergo further amendments so that it can be made more effective in the days to come, both in the matters of domestic and international commercial arbitration. Arbitration is correctly called one of the types of ADR which means it is a settlement of disputes out of court, yet we have a lot of intervention by the court in the arbitration process defeating the very meaning of ADR. The amendments to the Act are praiseworthy but it is still a few steps away from making arbitration the preferred mode of dispute resolution in India. Efficiency and professionalism in arbitration are unlikely to come merely from the imposition of legislative change. There should be more legal practitioners who specialize in arbitration and arbitration should also be viewed as the priority rather than playing only second fiddle to the Indian court litigation work.

In a case dealing with bunch of execution petitions of arbitrations, Hon’ble Apex Court of India on 11.10.2022 observed that “A lot is required to be done to dispose of the commercial disputes at the earliest. Pending proceedings out of the commercial disputes may ultimately affect the growth of the economy in the State.”

2. Proposed Research Method:

Proposed research method will be doctrinal and analysis will be made of the existing statutory provisions of The Arbitration and Conciliation Act. 1996 . The new methods revolving around facilitating arbitration will be identified and analysed. Various laws propounded by appeal courts will be focussed. Case study of various arbitration will also be considered . Research will be conducted on the basis of the feedback and hardships faced by various stakeholders regarding arbitration.

Reference will be made to various sources, both national and international, such as the Indian Arbitration and Conciliation Act, 1996, UNCITRAL Model Law on International Commercial Arbitration and the UNCITRAL Arbitration Rules. Emphasis will be given to the legal dimension of various arbitration regimes around the globe and what steps can be taken to help facilitate arbitration in India on a wider scale. However, with a view to complement and substantiate the research topic, various case studies and possible remedies to be done to curb the various problems parties face while undergoing Arbitration.

Research will done having detaliled analysis of primary sources. Pertinent literature will be analysed from published and documented sources for getting insights on the topic of research, by which various intrecacies coming in the way of arbitration will be dealt for postive conclusion on the hypothesis. The study will focus the National as well as International perspective. The Universe of the study will be all the stakeholders such as litigant, Arbitrator, judges, State etc. of our legal system.

3. Hypothesis

The research study will be focussed on following intricacies :-

I. Insurance companies take undue advantage of poor customer's knowledge regarding arbitration. In result award passed by company's arbitrator proves detrimental to customers. Claim settlement on the basis of award are not very affective.

II. Appintment of arbitrator between the parties is always not fair . In many cases arbitrators are appointed unilaterally without the real knowledge of another party.

III. Procedure for conducting Arbitration is neither prescribed nor codified, thereby procedure adopted by Arbitrator is always discretionary. There is high chances of arbitratiness. As the arbitrator

is not bound to conduct arbitration on settled principles of law or specific rules as the courts do.

IV. Indian arbitral institutions are not functional in India hence has also to be encouraged and promoted for dispute resolution through arbitration.

V. The statutory provisons for enforcement of foreign awards in India are not affective.

4. Purpose of Research:

To verify the hypothesis and for the purpose of this submission, the objectives of this study are-

- To evaluate the various intrecacies involved in the law of arbitration.
- To analyse the process, practices and procedure of arbitration in India.
- To study the various scopes to make India more arbitration friendly.
- Radical changes to Indian Arbitration rules, in making arbitration in India attractive, speedy, litigants friendly and cost effective.
- To find out the solutions for making arbitration procedure successful in India.

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