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EFFECT OF COVID-19 ON ARBITRATION PROCEEDINGS IN INDIA

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Arbitration is one of the forms of alternative dispute resolution. It is a process by which parties resolve their disputes amicably. It is presided by an arbitrator, he presides the arbitration proceedings. He resolves the disputes between parties by issuing an arbitral award, which is equivalent to an order of a court. This form of dispute redressal mechanism is on an evolving stage in India, but this has been hindered with the inception of the global pandemic of covid-19 in India. There are umpteen difficulties that arbitration as an alternative form of dispute resolution is facing, ranging from the problem of conducting arbitration proceedings to lack of well-defined legal framework to deal with novel situation such as covid-19. These problems which covid-19 have brought up has resulted into a lot of loss for the people associated with arbitration and also for arbitration itself. There are some reforms which government has initiated to combat this issue, but they are not requisite as far as bringing arbitration proceedings to normalcy is concerned. Some more reforms are needed to mitigate the disastrous effects that covid-19 has caused to arbitration.

What is arbitration?

Arbitration is one of the alternative dispute resolution (ADR) methods, which is majorly used as a method to resolve disputes parties which indulge in commercial transactions. This method is effectuated by one or more persons, which may involve arbitrator, arbitral tribunal, etc.¹ They are supposed to render a decision which should entail the capacity to resolve the disputes of the parties and they do that by issuing an arbitral award, which is equivalent to an order of

¹ Arthur O'Sullivan & Steven M Sheffrin, Economics : principles in action 324 (Needham et al, 2003).

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a court. The arbitral award is binding and enforceable on parties as well as on courts.² It is different from the process of mediation, which is also an alternative form of resolving disputes, in mediation the mediator is only a facilitator and mainly tries to establish a compromise by trying to maintain their relations. The binding arbitration is very different from it in all the aspects, ranging from the very purpose to the intricacies involved in the process of arbitration. The non-binding arbitration is very similar to mediation.

Legal Framework which governs arbitration proceedings in India

The current set of laws which govern the arbitration proceedings has formed as a result of several promulgations, amendments, bills and acts passed by various agencies of the nation, but most importantly the parliament. The current set of laws is loosely based on the English common law, but proper legislations which governed the arbitration proceedings earlier were arbitration act, 1940, arbitration (protocol and convention) act, 1937, foreign awards(recognition and enforcement) act, 1961. All the major provisions were consolidated and some new were formed in order to cater the changes in the developing process of arbitration, which was incorporated in the arbitration and conciliation act, 1996. This act was further amended in 2015 to incorporate certain aspects of domestic arbitration, international arbitration and also added certain laws to strictly enforce arbitral award.³ Therefore, the arbitration and conciliation act, 1996 is the main legislation according to which majority of arbitration proceedings is governed. The Indian council of arbitration is the apex authority which checks the validity of laws prevailing and passed according to the amendments. Ergo, this is the legal framework of India according to which its arbitration proceedings work.

How or in what ways covid-19 has affected the arbitration proceedings in India

Covid-19 has affected umpteen sectors in our country, ranging from agriculture sector to business sector. Arbitration is also one of the sectors of the nation which has faced the extreme brunt of covid-19 in India. Covid-19 has forced the government to resort to many ways which have adversely affected the arbitration proceedings. The government has effectuated a nationwide lockdown in the month of March, thereby preventing the physical arbitration

² *ID* at 325.

³ Jagdeep Singh Bakshi, Arbitration law in India: everything you want to know, *The Statesman* (May 21, 2019, 8:04 p.m), <https://www.thestatesman.com/india/arbitration-law-in-india-everything-you-want-to-know-1502757528.html>.

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proceedings to continue, which in turn have further widened the existing disputes between the parties.

Covid-19 and resultant lockdown has also brought difficulty in approaching court for assistance under section 27 of arbitration and conciliation act, 1996. As under section 27(5), it has been clearly specified that persons failing to attend the court proceedings according to mentioned in the above clauses would bear consequences such as punishments and penalties and because of the lockdown many parties who resorted to arbitration were unable to attend court proceedings and many of them exceeded the statutory limits.⁴ A similar kind of problem cropped up for the parties who wanted to challenge an arbitral award which was passed against them. They could challenge it under section 34(1) of arbitration and conciliation act but according to section 34(3), an application to set aside an arbitral award given by an arbitrator in an arbitral tribunal should be made within three months of passing of an arbitral award.⁵ This condition has become a hindrance for those who wanted to approach court, here court refers to court which has the power to appoint an arbitration under section 11 of the same act,⁶ but due to covid-19 and resultant lockdown, they were unable to reach court and furthermore because of that they had to bear the brunt by following the arbitral award. Therefore, along with the various difficulties like difficulty in conducting arbitration proceedings, difficulty in following arbitral award, difficulty in approaching court to set aside the arbitral award, etc, there is a major problem of limitation period which has been enshrined at various places in arbitration and conciliation act. The supreme court by its orders and also the government by its initiatives have made an effort to crumble down these difficulties stemmed attributable to covid-19.

Steps taken by the Government and the Supreme Court to mitigate these encumbrances

There were various orders which mitigated the affect of covid-19 on arbitration proceedings, passed by the Supreme Court. There were also many initiatives taken by the government to do the same. But there are certain provisions in the arbitration and conciliation act, 1996 itself to deal with these kinds of circumstances. Section 29A, which was inserted through the amending act of 2015 is an illustration for such kind of provisions, in it, it has been mentioned that though

⁴ Sec.27, THE ARBITRATION AND CONCILIATION (AMENDMENT) ACT, 2015, No.3, Acts of Parliament, 2016 (India).

⁵ Sec.34, THE ARBITRATION AND CONCILIATION (AMENDMENT) ACT, 2015, No.3, Acts of Parliament, 2016 (India).

⁶ DDA VS M/S Tara Chand Sumit Construction, OMP (Misc.) (Comm.) 236 of 2019 Delhi.

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the time period has been fixed for passing an arbitral award, with time period starting from the date reference has been made to the arbitration tribunal, still it can be extended to six months with the permission of the parties involved in the arbitration, it can be further extended, but only when the concerned court meddles and extend it.⁷ So this acts as a relief for the parties involved in the arbitration. But these types of provisions were not enough, because of that the SC passed an order in the month of March which reads as follows:

“This Court has taken suo motu cognizance of the situation arising out of the challenge faced by the country on account of Covid-19 Virus and resultant difficulties that may be faced by litigants across the country in filing their petitions/applications/suits/ appeals/all other proceedings within the period of limitation prescribed under the general law of limitation or under Special Laws (both Central and/or State). To obviate such difficulties and to ensure that lawyers/litigants do not have to come physically to file such 2 proceedings in respective Courts/Tribunals across the country including this Court, it is hereby ordered that a period of limitation in all such proceedings, irrespective of the limitation prescribed under the general law or Special Laws whether condonable or not shall stand extended w.e.f. 15th March 2020 till further order/s to be passed by this Court in present proceedings.⁸”

To better the situation of arbitration in the testing times of covid-19, the SC specifically passed an order to better the state of arbitration, this order reads as follows:

“It is hereby ordered that all periods of limitation prescribed under the Arbitration and Conciliation Act, 1996 and under section 138 of the Negotiable Instruments Act 1881 shall be extended with effect from 15.03.2020 till further orders 3 to be passed by this Court in the present proceedings.⁹”

The government has not expressly passed any initiatives to ensure that the arbitration proceedings run smoothly even after the exodus of covid-19, but it encouraged the practise of using video conferencing as a mode to conduct arbitration proceedings, this method is already enshrined in the arbitration and conciliation act. It also promoted the Indian council for arbitration to allow video-conferencing as a medium to conduct arbitration proceedings, as

⁷ Mirza Alam Beg & Chandni Arora, Impact Of Covid-19 On Arbitration Proceedings In India, MONDAQ: Connecting Knowledge & People (April 02, 2020, 10:04 a.m), <https://www.mondaq.com/india/operational-impacts-and-strategy/911554/impact-of-covid-19-on-arbitration-proceedings-in-india>.

⁸ “In Re: cognizance for extension of limitation”, petition no(s).3/2020.

⁹ “In Re: Cognizance for extension of limitation”, writ(civil) no.3 of 2020.

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rules of ICA allows the arbitration tribunal to conduct arbitration proceedings through video conferencing, telephonic conversations or any other such means which they deem fit.¹⁰The government also ensured that the above two orders which were passed by the SC were effectuated properly throughout the country and they did that by making people aware of the contents of these orders.

Suggestive changes to ensure that arbitration proceedings work even in these testing times

The changes that were effectuated by the SC and the government through orders and initiatives respectively were able to ensure that arbitration proceedings work smoothly even in these testing times. But because the lockdown has been extended many times in the past months, these changes have lost its effect which it had at the start of the lockdown, therefore new changes are required in order to maintain the continuity of arbitration proceedings. These suggestive changes are-

The government can promulgate an ordinance specifically pertaining for the purpose of combating the problems bored by the arbitration sector attributable to covid-19. In that ordinance, they can create laws for these novel circumstances and also incorporate certain old ones by moulding them akin to the present scenario, like they can do away with the process of physical documents required during the process of arbitration and instead of that, they can give validity to E-documents with e-signatures being valid, they can also allow the parties to approach the court through the way of video-conferencing, so that they can get away from bearing the brunt of the arbitral award which they did not see reasonable. Along with this ordinance, the government can also develop new portals which only focus on teaching how E-arbitration is conducted so that the parties indulged in arbitration do not face any substantial difficulty, they can also introduce many new devices where e-arbitration can be conducted and they also can also run awareness campaigns in order to educate people about e-arbitration. Therefore, these are some of the suggestive changes that the governing agencies can resort to, in order to run the arbitration proceedings without any encumbrances.

¹⁰ Rules of International Commercial arbitration, cl. 17(4).

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Conclusion

Arbitration as a sector like many has suffered the brunt of the global pandemic of covid-19. But to combat these kinds of circumstances the existing legal framework already has some laws. Like the arbitration and conciliation act, 1996 contains sections section 29A which has the provision for existence of limitation period that can be extended by the concerned court. There are also certain rules framed by the Indian council of arbitration which promotes the concept of video conferencing to conduct arbitration proceedings. These prevailing provisions did mitigate the disastrous effects that covid-19 had on arbitration proceedings. But it did not eliminate the problems completely, to properly attenuate its effects, new laws or new initiatives were needed and the SC and the government exactly did the same. The Supreme Court promulgated various orders and the government though not passing any direct ordinance or act to deal with these effects, still impliedly did mitigate the effects of covid-19 on arbitration proceedings. Not only did the governing agencies, but also the arbitral institutions themselves did their part to combat these effects. For instance, like organisations like JAMS, AAA-ICDR started using commercially available services like facetime, skype, vidyacloud, etc.¹¹ But these ways do not seem enough as lockdown is imposed one after another in order to combat the spread of the corona virus. Therefore, government expressly needs to pass some ordinance and also needs to resort to some strong measures to ensure that arbitration proceedings work smoothly for a long period even in these testing times. Ergo, arbitration, which is one of the very vital alternative dispute resolutions existing, shall continue so that many disputes could be resolved in a short period of times, which in turn would reduce the burden of the courts and even covid-19 should not act as a hindrance in pursuance of that

¹¹ Craig Tevendale, "NECESSITY IS THE MOTHER OF INVENTION": COVID-19 DRAMATICALLY ACCELERATES DIGITALISATION OF ARBITRATION PROCESSES, Herbert smith freehills (June 12, 2020, 11:07 a.m)[http://\"NECESSITY%20IS%20THE%20MOTHER%20OF%20INVENTION\"_%20COVID-19%20DRAMATICALLY%20ACCELERATES%20DIGITALISATION%20OF%20ARBITRATION%20PROCESSES%20_%20Arbitration%20notes.html](http://\).