RNI NO.:- MAHENG 27250

THE BOMBAY CHARTERED ACCOUNTANT JOURNAL

VOLUME 55 | ISSUE 4 | ENGLISH - MONTHLY | MUMBAI JULY 2023 | PAGES 132 | PRICE: ₹100

Economic Development in India

IMPACT OF THE ALTERNATIVE DISPUTE RESOLUTION MECHANISM ON THE ECONOMIC GROWTH OF INDIA

KARISHMA VORA
Barrister, England

KUNAL KATARIYA
Advocate, Mumbai

INTRODUCTION

On a recent trip back to Copenhagen, I was keen to revisit Christiania, a social experiment where hippies squatted and rejected state control. Originally set up in 1971 in a former military complex in Denmark's capital, it had continued in its existence and the population had grown, but this hippie utopia was not thriving. Accommodation was in disrepair and members of the community could not afford its repair costs. Rising rents meant many were forced to leave the community and return to the main state, one with law and order, whose economic prosperity could feed them and their families.

This is the impact that a state and its legal system can have on economic growth.

TYPES OF LEGAL SYSTEMS

I am called to the bar in India, England & Wales and the DIFC in Dubai. All three are common law jurisdictions where court judgments become precedents binding on future judges of lower courts or hold persuasive value for judges of courts having an equal ranking. The common law system permits incremental advancement in law where every judgment slowly builds on and adds to a nation's body of law.

Dubai, however, is a bit of a mixed bag. The DIFC Court is a common law oasis in what is otherwise a civil law system. The 'on shore' Dubai courts outside the DIFC follow a civil law system and apply Sharia law, as legislated by the UAE. Most of Europe and many countries around the world that are not part of the commonwealth (previous British colonies) also follow a civil law system.

In civil law jurisdictions, there is not much scope for advocacy and historic judgments do not hold precedent value. In these countries, the letter of the law is closely followed. This works too, but rather differently from common law systems as there is less opportunity for a judge to tailor his / her ruling to the specific facts and circumstances of a case.

There are also alternate dispute resolution systems such as arbitration and mediation. I dare say arbitration has become rather mainstream and an integral part of the legal system in India and other countries such as Singapore, England, Nigeria, Kenya etc. Arbitration allows tremendous flexibility. An arbitrator / arbitral tribunal derives its power from the consent of parties. In the circumstances, if the parties want the arbitrator to hear and rule on only one part of a dispute between them, they can direct the arbitrator to do so. They can remove powers from an arbitrator or add to them. Large volumes of civil procedure code that one must follow if their case is before a court are replaced with a thin booklet of arbitration rules (if the arbitration is governed by an institution) or replaced with the simple procedure laid down in the Indian Arbitration Act 1996 (if the arbitration is an 'ad hoc' arbitration).

THE BENEFITS OF ARBITRATION

What is marvellous about arbitration is that one can appoint an arbitrator truly suited to their needs. For example, in a cement arbitration seated in London between an Indian and Spanish party that I had undertaken some years ago, the clause required a cement expert to be appointed as an arbitrator. Some commodities exchanges, such as the Refined Sugar Association and GAFTA in the UK, only appoint industry experts as arbitrators. Even if such arbitrators could be out of depth in terms of the law, they can appoint a lawyer as an advisor to the tribunal. Appointing experts such as accountants, engineers etc.,

as arbitrators is a power that more Indian parties should be encouraged to adopt for an award tailored to their needs.

Likewise, the appointment of younger arbitrators, if Indian parties can stomach the idea, could revolutionise arbitration. I began to get arbitrator appointments at age 40 and my co-author, Kunal Katariya, began to get them at an even younger age. Younger arbitrators are keen to establish their reputation as arbitrators, are willing to take on disputes of smaller value and since they are mid-career and extremely busy, they are far more likely to hold fewer hearings and pronounce arbitration awards more quickly.

Appointing more women as arbitrators can also restore a balance. A study that was undertaken in the US following the collapse of Lehman Brothers in 2008 revealed that a lot of major financial institutions that went under, or nearly went under, had all-male boards. Those companies that had women on their boards of directors were more resilient to risks and changes in the economic climate. This is because ideas were challenged, and not everyone in the boardroom held exactly the same view, which is healthy.

Presently, one of Western India's best arbitration institutions, the Mumbai Centre for International Arbitration (MCIA), has managed to appoint about 30% women as arbitrators. This is one of the best ratios in India and ought to increase. The Indian Arbitration and Mediation Centre, Hyderabad (IAMC), another fabulously run institution, has, in the last year, appointed over 80% women as mediators.

Mediations, if popularised as a method to resolve commercial disputes, can dramatically reduce costs for parties. Mediations also diminish the time spent in resolving a dispute to a couple of months. Mediations, however, require both sides to compromise and come to a mediation leaving ego to one side. In my experience, several private equity/shareholder disputes tend to stem from ego clashes or the siphoning of funds, and such cases are less likely to be resolved by way of mediation. When appointing a mediator, one must not be shy of asking what percentage of previous mediations undertaken by that individual has resulted in success.

THE LATEST CHANGES TO INDIA'S ARBITRATION LAWS

Since arbitration only emerges out of contract, the starting position is that only signatories to an agreement containing an arbitration clause can be made parties to an arbitration. India has, however, taken a liberal approach historically by allowing group companies to be brought into the fold of an arbitration, and thereby be bound by an arbitration ruling, even if the group companies were not signatories to the original contract that contained an arbitration clause. The Supreme Court is currently reviewing this group of companies' doctrine[1]. Several ongoing arbitrations are waiting for the outcome of this review. By comparison, England takes a strict approach to the joinder of non-parties to an arbitration agreement and Switzerland and other European civil law countries have taken the more liberal view.

Meanwhile, the NN Global case[2] has recently held that a court cannot appoint an arbitrator or send parties off to arbitration even if an arbitration clause is contained in their contract in circumstances where the underlying contract is insufficiently stamped. One of the authors, Mr Katariya, whose view is shared by the majority of arbitration practitioners in India, believes this judgment has dealt a significant blow to India's pro-arbitration stance because it is a wriggle-out method and affects the enforceability of an arbitration clause contained in an unstamped / under-stamped agreement. The other author, Karishma Vora, holds the view that the law on impounding/staying the enforcement of any under-stamped agreement should be followed in the case of an arbitration agreement too. If this needs to change, the legislature will need to amend laws to carve out an exception for the stamping of arbitration agreements.

Arbitration law in India has also been evolving rapidly and much-needed reforms were brought in by the 2015 and 2019 amendments, which added strict timelines for completion of proceedings.

WHAT DOES THE FUTURE HOLD?

Last month, I was in court in London. It was a virtual hearing and announcements were made at the beginning in the usual course that it was being recorded by the court and that no one else could record the hearing without the court's permission. No permission had been sought and we went about the hearing in the usual course. The following morning, I received a frantic call from my instructing solicitors informing me that a full transcript of

1 *Cox and Kings v. SAP India* 2022 SCC OnLine SC 570

2 *N. N. Global Mercantile Pvt. Ltd. v. Indo Unique Flame Ltd. & Ors.* 2023 SCC Online SC 495

the hearing had been circulated to everyone who attended the hearing, including the judge.

We rang the client, who is a successful co-founder of a private equity fund that specialises in investing in tech businesses. He explained that he subscribes to an AI app called Firefly that automatically allows itself into every zoom, Teams or other meeting on his calendar, transcribes it and circulates it to all who were on the calendar invite. Quite efficient but not so when one is in contempt of court.

Although the contempt was purged, the humorous judge asked the only pertinent question that ought to have been asked – how accurate was the transcription?

International arbitrations and litigation that take place in London, Dubai, Singapore etc. often engage expensive live transcribers. The sums at stake justify the few lakhs spent per week for live transcription. All parties, counsel, solicitors and the judge or arbitrator have immediate access to every word that was spoken or argued. Sometimes, to reduce costs, parties subscribe to transcription that is not live and is circulated only at the end of the day.

Bringing this to an Indian context, arbitrations tend to be conducted only in two-hour slots 5-7 pm, after court. Counsel asks his / her cross-examination question, the witness responds, and both the question and the response are dictated by the arbitrator to steno. Even the quickest steno in the world slows down the process, and often, the punch of cross-examination is lost in translation, even when it is English to English.

If technology-assisted transcription was brought into the fold, Indian arbitrations (and court proceedings, if courts were open to allowing live transcription) would see a dramatic improvement in the efficiency with which cross-examination is conducted, judgments are dictated etc. It would ensure all submissions made by advocates are recorded, which can be rather useful at the stage of appeal.

And this is just for transcription. Technology and AI can have a significant impact on India's legal system, and thereby on India's economy. Take small claims, for example. There are hundreds of thousands of people who probably, on a yearly basis, forgo money owed to them by others. These could be resolved by replacing the judge with technology. Let us take a leaf out of eBay's book. 'eBay', a platform where one can, for example, sell their old sofa, resolves 60 million disputes per year. Most of these are low value, often under Rs. 2000 ($25) in dispute.

This is an example of how online dispute resolution (ODR) can and should be the future of our struggling civil justice system. ODR can provide access to justice for lakhs of Indian citizens who may not otherwise have the means or the time to partake in the nation's court system at an incredibly fast pace.

A vision of the future of India's justice system should also include smart contracts. In basic terms, a smart contract is a self-executing contract. Think about your order on a food app such as Swiggy. You place an order, and Swiggy blocks the money on your card. Although the restaurant has not received the money, it begins to prepare your order on the faith that it will receive payment automatically once it carries out its end of the bargain. At the time of execution, being the delivery of the food, the payment is automatically released to the restaurant and the delivery person, with a small cut being retained by Swiggy. Although this is not exactly a smart contract, it is a good example of the beginnings of what a legal system could look like in the future. Traders could enter into self-executing contracts once the technology associated with smart contracts and blockchain becomes more prevalent.

When making such technology an integral part of the legal system, legislators need to think about the level of detail going into the legislation. I find that a broad-brush approach enables a tech-related law to remain relevant for a longer period of time. France is legislating technology with a tedious level of detail. This carries the risk of its laws becoming outdated soon. The UK, on the other hand, is modernising old laws by setting out only a basic framework, in the hope that the framework will not need to be changed even if underlying technology changes.

For example, the UK has just drafted a bill for electronic bills of exchange. It is called the Electronic Trade Documents Bill and is presently going through its second reading in the House of Commons (the equivalent of the Lok Sabha). The bill will reduce the estimated 28.5 billion paper trade documents printed and flown around the world daily[3]. Presently, bills of lading and bills of exchange are required to be paper based. If this bill is passed, paperless versions of these documents will be legally recognised in the UK, allowing British businesses to trade faster and cheaper and reduce employee time on

3 https://www.gov.uk/government/news/paperless-trade-for-uk-businesses-to-boost-growth

needless paperwork and bureaucracy.

This Electronic Trade Documents Bill[4] has only seven sections and says that if reliable technology is used to secure that only one person can exercise control over / alter an electronic document at any one point in time, then it would be accepted in the manner that the older paper trade documents (e.g., bills of exchange) were legally recognised. That's it. No further detailed definitions or complications. In other words, no matter what technology is used, so long as an individual can demonstrate they are the only ones in control of the electronic document, akin to a trader having physical possession of, say, a paper bill of lading, the electronic document would be legally recognised.

Like France and the UK, India needs to give some thought to how it wants to prepare itself for the enormous digitisation of trade, which is inevitable. The Indian legal system must start preparing itself now to ensure it meets the progress of the economy step by step. Modernising laws or introducing new ones are in the hands of the legislature and bureaucrats and may take some time, but the enormous advantage of India's common law judicial system is that its judges can apply existing laws and adapt them to the changing circumstances of the economy.

A good example of this is when courts began to allow service of court proceedings via WhatsApp when other methods were not acknowledged, and the recipient's chat showed a double blue tick.[5] Another issue that the Indian judiciary can think about is permitting litigants who are victims of online fraud perpetrated by faceless individuals to file cases against 'persons unknown[6]. The concept of bringing a case against someone whose name and address the plaintiff does not know is alien, but this is one of the many ways that the existing legal system, and the judiciary in particular, can assist the economy.

As for non-litigation work, such as drafting documents, the use of artificial intelligence can be pathbreaking. The drafting of property documents, hire purchase contracts, franchise agreements, trademark agreements, shareholder agreements etc., already have a revolutionary app in ChatGPT, and it is only getting better. Once legal software companies build on the open AI network of ChatGPT and enable lawyers to feed in historic drafts to train the AI, very many young associates in law firms could lose their jobs; but the drafting could easily be of an international standard and enable lawyers to improve their efficiency.

Presently, one spends a few hours a day on administrative tasks, delegation of work, reviewing work, team discussions etc. This will change as practitioners will be able to spend less time on non-legal tasks and more time on the law.

A family court in Australia replaced its mediator with an AI machine whose outcomes matched those of the family court judge by over 80% during a pilot that was conducted to test the AI. Parties were positively influenced by this percentage, and many settled along the lines of what the AI predicted in order to avoid the costs of a full-blown dispute in the family court. This is the potential of AI crossing paths with mediation.

CONCLUSION

Contracts are the foundation of commerce and nearly every Rupee that goes in and out of a household or company is governed by a contract. From a bus ticket to a large investment agreement, parties fall back on the terms of their contract for interpretation and look to a breach of those terms to bring cases against each other. A World Bank study revealed that while it takes 165 days to enforce a contract in Singapore, it takes about four years on average in India. I should admit that I find the four years also astonishingly speedy. India has about 1.09 crore civil cases pending, and this would be in addition to arbitrations. The Indian legal system needs a serious shake-up if it needs to assist economic growth.

In addition to the tech-based solutions set out above, other simple solutions can also be implemented. Senior counsels in every court could be mandated to sit as judges for a minimum of, say, three weeks per year, or for a minimum term of, say, three years at a stretch. This would reduce the backlog. Every adjournment should have a large cost associated with it, payable within one week of the adjourned hearing.

Statistics could be published revealing how many adjournments were granted by every judge in the country per term, or how many hearings were before a judge that did not result in disposing off the matter.

4 https://publications.parliament.uk/pa/bills/cbill/58-03/0280/220280.pdf

5 *Tata Sons v John Do* CS (Comm) 1601/2016, order dated 27.04.17, Delhi HC. *Kross Television v Vikhyat Chitra Productions* 2017 SCC Online Bom 1433

6 *CMOC Sales & Marketing limited v Persons Unknown & 30 others* [2018] EWHC 2230 (Comm)

Presently, most Bar Councils around India have a one-time enrolment. If an advocate was enrolled by the Bar Council of Maharashtra and Goa in 2006, he/she would not need to renew their Sanad for the rest of their lives. This should be changed to periodic renewals, say every five years, and advocates should be mandated to pay a small percentage of their last year's earnings in order to renew. This money could be re-invested in providing advocacy training to younger advocates, which would, in turn, assist judges because the quality of submissions being received by judges would improve. In December 2022, the Bombay High Court taught senior juniors, including one of the authors of this article, to impart advocacy training. Even though this training was focussed on training the teachers, the very young students who participated in this training showed a dramatic improvement in their advocacy skills over the course of just one weekend. Another rule that Indian Bar Councils may want to consider promulgating is no double booking. In other words, if an advocate has accepted a brief to argue one case on a day, he/she cannot accept a brief to argue any other case on that day. Alternatively, they could accept a maximum of three briefs per day. This will dramatically reduce adjournments and far more advocates will get an opportunity to argue cases than the present system where most briefs are concentrated in the hands of a few.

With the hope of a better tomorrow, the authors now sign off. ■

BCA JOURNAL

55th Year of Monthly Publication

- BCA Journal is driven by analysis that is independent and balanced
- Receive in-depth but to the point coverage of developments in Direct Tax, Indirect Taxes, GST, International Tax, Auditing, Accounting, Business, Commercial, Economy, Practice Management, Information Technology, Right to Information, and more
- Articles curated by specialists
- Features covering the most relevant themes
- Series of monthly features dedicated to topics – Practice Management, GST, ICDS, Ind-AS, Transfer Pricing…
- Contributions from experience professionals
- Access E-journal, repository of 16 years of Journals in a searchable format
- Special issues - covers the full spectrum of a subject such as GST
- Features in Special Issues: Interviews, view and counterview, musings, and more …

BCA Journal is printed in both paper format and electronic version.
For subscription and access to past issues: ***www.bcajonline.org***