

Professionalise Indian arbitration

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In India, both in domestic as well as in international arbitration, it is an established practice to appoint retired judges as arbitrators instead of the international practice where parties prefer professional arbitrators. One needs to examine the rationale behind such a consistent approach taken by Indian parties as well as courts while appointing an arbitrator under the Arbitration and Conciliation Act of 1996. Perhaps the desire to take recourse to professional arbitrators is yet to penetrate the psyche of Indian businesses and possibly due to cultural reasons Indians look to retired judges as 'elders' to adjudicate a dispute. It is also possible that there is more faith in retired judges than lawyers and professionals as arbitrators due to judges' background in resolving disputes and faith in the judiciary in general. This is reinforced by a strong preference for ad hoc arbitration over institutional arbitration perhaps due to broad procedural flexibility. The deficiency of trust in appointing professionals as arbitrators goes against the spirit of arbitration—expeditious resolution of disputes through a binding award.

Institutional arbitration enables the institution to appoint arbitrators and makes available a pool of professionally qualified and experienced arbitrators empanelled with the institutions. Arbitration gives party autonomy, wherein the parties have the prerogative of choosing their arbitrator and this is a significant advantage over court litigation. The choice of arbitrator is crucial as it ensures an expeditious schedule, expert determination and professional approach rather than legalistic approach to dispute resolutions. While there is no empirical data to compare retired judges and practitioners/academicians as arbitrators, international practice leans towards appointment of a practitioner or an academician or the presence of a panel of judges and academicians/practitioners and other experts to give litigants their choice of arbitrator.

The practice of appointing retired judges has recently come under criticism from proponents of international arbitration in countries with advanced arbitration regimes. To add an international context, major arbitral institutions such as the London Court of International Arbitration (LCIA), American Arbitration Association (AAA), Singapore International Arbitration Centre (SIAC), International Chamber of Commerce (ICC) have a panel of arbitrators who may be selected by the disputing parties. Typically, lawyers dominate and make up the largest group of arbitrators, academicians take up the second spot, followed by other professionals such as accountants, engineers etc.

While appointing retired judges as arbitrators has its merits, companies should re-examine their approach to arbitration given the advantages of availing panels of institutions. There is a perception among the arbitration fraternity that retired judges treat the arbitration proceedings similar to traditional litigation and grant long and frequent adjournments defeating the purpose of arbitration. Additionally, retired judges tend to have conflicting schedules as they tend to act as arbitrators in several matters and there is no administrative mechanism to coordinate hearings in different matters for retired judges. The approach to dispute resolution in arbitration is expected to be without legalese and technicalities of court litigation. Professional arbitrators are well equipped for such a pragmatic approach and would aid in a commercial rather than legalistic approach to dispute resolution.

The analysis would be incomplete without an explanation on why practitioners including academicians should be given due consideration for appointment as arbitrators. First, practitioners have rich experience of appearing before arbitrators, conducting trials, having subject area expertise in matters relating to varied issues such as construction contracts, securities law, investor disputes, etc. They are also aware of commercial considerations and importance of working in a time-bound manner. Several such practitioners are well-recognised abroad where they hold key positions in renowned international arbitral institutions. Therefore, apart from consummate international exposure, they can also give litigants a strong assurance of a more than satisfactory adjudicatory process. Second, academicians could be roped in to arbitrate disputes. Academicians in foreign jurisdictions like the EU, the US, Canada and Australia are frequently appointed as

arbitrators both by parties as well as by the arbitral institutions. Academicians, with their adept research skills, also help in speedy resolution of disputes. Further, involvement of academicians is beneficial to law schools and its students as the academicians impart the same skill-sets to train the law students.

Two decades ago, the dominant practice of appointment of retired judges as arbitrators was prevalent in India as arbitration was still evolving in India. However, in India's continued effort to become an arbitration-friendly jurisdiction (both in terms of practice and legislation), it is pertinent to bring in fundamental changes to the way arbitration is conducted in India. The Law Commission of India in Report No 246 has proposed a series of salutary amendments to the Arbitration Act. For practitioners and litigants, there is an urgent need to change the approach to arbitration particularly appointment of arbitrators. India has a dynamic talent pool comprising experienced professionals who could be inducted into this new role. Finally, like international arbitral institutions, courts in India could prepare a list of arbitrators (empanelled list to be disclosed to the public) with their subject expertise and consider them for appointment as arbitrators when an application is filed under the Arbitration Act. Similarly, parties could look at the empanelled list before nominating the arbitrators. These small measures will not only expedite the process of arbitration but also bring Indian arbitration practice in tune with international standards.

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