THE UPPER CRUST AND THE UNDERBELLY OF ARBITRATION IN INDIA – MUMBAI CHAPTER

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I. INTRODUCTION

The commercial laws, beginning with the Indian Contract Act, 1872 enacted one and a half century ago, have been the justified mainstay of disputes in trade, commerce and industry in India. How the disputes came to be resolved is quite another matter.

In 1996 the parameters of arbitration were expanded to cover the international sphere aside from the domestic one under the Arbitration and Conciliation Act, 1996 ["**the 1996 Act**"]**.** [1]The new Act set out a framework to make the law of arbitration "more responsive to contemporary requirements" for the economic reforms of our country "become fully effective" and the law of arbitration "in tune" with such reforms.[2] That too went just this far and no further. Though the substantive laws were both articulately and intelligently interpreted and handled, the tardy procedures swept out the good work. The litigants, the ultimate beneficiaries of the system who were the doyens of business, judged all by the yardstick of expedition and efficiency of work rather than the intellectual ability which failed to deliver.

Alternative Dispute Resolution ["**ADR**"]**,** outside the Court system in civil jurisdiction. Arbitration, Mediation, Conciliation and Lok *Nyayalaya* came to be enshrined as a part of the Civil Justice System. Yet, there was no perceptible difference in the disposal of disputes. The Government felt the need to overhaul the system and streamline the procedure of arbitrations on the ground of economic necessity.

The 1996 Act was amended in 2016 retrospectively brought into effect from 23rd October, 2015 ["**2015 Act**"] to bring in discipline of work. [3] It was thought to be the panacea of the ills noticed. It was a quantum leap. Never was there a civil legislation in the country which cracked a whip as much. India got the law it needed and deserved. It was the way forward with no looking back. India had come of age in arbitration.

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[1] Arbitration and Conciliation Act, 1996.

[2] Statement of Objects and Reasons dated 16th August, 1996 in Act 26 of 1996.

[3] Arbitration and Conciliation Act (Amendment), 2015.

This almost perfect piece of legislation, read as a whole, in the spirit of arbitration, not only provides thought for the litigants upon expediency, but also consideration for lawyers giving them a new line of profession with the opportunity to achieve and arbitrators upon specifically legislated fees, statutorily safeguarded. It makes procedures simplified and flexible eradicating the only ill of procedural malaise in the adjudicatory process for protracted trials which brought it brickbats from all corners.[4] It sets out a broader field of arbitration by decentralizing the work force. It streamlines the work of arbitrators with structurally imposed time management. It recognizes a fair give-and-take while imposing deterrent penalties. While allowing challenge to the arbitral award when merited, it fosters finality with limited appeals; it guards against profane frivolity of protraction.

II. HOW WOULD THIS BE SO?

Legislations seek to remedy the ills present in the society. The largest single ill in the legal society on the eve of the 2015 Act, which had the arbitration culture in shambles, was the tardy delay of adjudication as also arbitrations. Hence the primary object of the 2015 Act is expedition of the arbitration system, without which the entire edifice would collapse. To that end, the 2015 Act empowers the arbitrator to pass interim orders which are deemed to be orders of the court (subject, of course, to appeal),[5] mandates day to day evidence and hearings[6] and, for the first time, sets out arithmetical timelines. For the completion of arbitration, it shows a recommended period of 6 months, an allowed period of 12 months and extension of further 6 months by consent of the parties. Thereafter it grants a further period of not more than 6 months only upon the grace of the Court and with the penalty of reduction of fees of the arbitrator seen to have attributed to the delay as also her/his substitution by another[7] and incorporates the facility of fast-track procedure.[8] For the result of the arbitration, it grants, again for the first time, interest at the rate of 2% more than the commercial rate[9] and sets out a detailed regime for compensatory and exemplary costs.[10] Even after the close of arbitration it allows a challenge to the award only on certain parameters including patent illegality (only in domestic arbitration),[11] but not by review of merits upon error and not by re-appreciation of evidence. It allows enforcement of the award but forbids stay,[12] except on

[4] Arbitration and Conciliation Act, 1996, Section 19.
[5] *Id*, Section 17 r/w Section 37.
[6] *Id*, Section 24 Proviso 2.
[7] *Id*, Section 29-A.
[8] *Id*, Section 29-B.
[9] *Id*, Section 31 (7)(b).
[10] *Id*, Section 31-A.
[11] *Id*, Section 34 (2-A).
[12] *Id*, Section 36.

sufficient cause and on conditions as in an appeal from a money decree.[13] It sets out a strict code of conduct and ethics for arbitrators requiring them to disclose their relationship with the parties, counsel, dispute or another arbitrator and their direct or indirect interest in the arbitration.[14] It mandates disclosure of the ability of the arbitrator to devote sufficient time to the arbitration and "finish the entire arbitration within twelve months".[15]

So much allowance for the merited litigants accompanies a commensurate fee for the arbitrators. The Fourth Schedule sets out ad valorem fees for arbitrators until the capping limit is reached with allowance of further amendment by the Central Government,[16] and the High Court Rules.[17] It may be at once stated that if the period of completion of the arbitration is adhered to by all parties, lawyers and the arbitrator/s, the fees would be fully justified.

The 2015 Act would have been a dream come true for the merited litigant, the enterprising lawyer and the industrious arbitrator. The litigant would get interim relief, proceed with the claim/ defence, have it decided within months upon oral hearing without or with limited evidence, in a flexible procedure, and get additional interest and compensatory costs upon proving the claim or defence on merits. The arbitrator would get her/his fees as statutorily allowed. The lawyer would be emboldened to charge fees similarly, of course as she/he would command. Each would require to devote time and effort to complete the task expeditiously and be rewarded commensurately.

The legislation manifests the application of business management principles. It would be worthwhile to appreciate the labour and thought that went into its making. The various principles may be enumerated thus:

i. **Simplification** – The procedures are flexible, amendable by parties or arbitrators without resorting to cumbersome evidence and avoidable rules of civil procedure[18] and only adhering to the fundamental rules of evidence for ensuring natural justice as its 'basic structure'.[19] It resonates what Dwight Eisenhower had said: *Genius consists in reducing the complicated into the simple.*

[13] Order 41 R.5 (3) and (5) of the Code of Civil procedure, 1908 as amended in 1976.
[14] Arbitration and Conciliation Act, 1996, The Fifth and Seventh Schedules.
[15] *Id,* The Sixth Schedule.
[16] *Id*, Section 11-A.
[17] The Bombay High Court (Fee payable to Arbitrator) Rules, 2018.
[18] *Supra* note 14, Section 19.
[19] Pradyuman Kumar Sharma v. Jaysagar M. Sancheti 2013 5 MahLJ 86.

ii. **Decentralization** – Aside from the macro level division of work between adjudication and arbitration as the main and the alternative modes of resolution of disputes respectively, at micro level the 2015 Act seeks to decentralize the work between arbitrators themselves. An interesting, provision which is a pointer to the meticulousness of the framers, though perhaps ignored, is the exclusion of a person for appointment as an arbitrator if she/he has "within the past three years received more than three appointments by the same counsel or the same law firm"[20] - a small mandate which shows the way. The disclosure of the number of arbitrations would and should make the appointing authority refrain from appointing the same persons who may not have the time to deliver within time.

iii. **Paradigm Shift** – (a) The 2015 Act empowers the arbitrator to pass interim orders for protection of properties etc. which would be enforceable as the order of the Court, a complete departure from the earlier provision which lacked teeth. (b) The time line to be adhered to is like no other. The effect was to be deterrent for arbitrators who did not perform under the norms. (c) The 'fast track' procedure would be the adoption of, what is popularly called, the Lord Woolf Report in the British Justice system reform under the rules framed by Lord Justice Harry Woolf, the then Master of the Rolls, Royal Courts of Justice, London, UK., and later Lord Justice of the Supreme Court of England and presently an Arbitrator and Mediator. (d) The grant of interest at the rate of 2% more than the commercial rate of interest is also a first-time legislative adventure in the right direction. (e) The provision for exemplary and compensatory costs goes further than the provision for costs in the Code of Civil Procedure[21] applicable to law suits in Courts. (f) The recourse against awards in the first instance dons the garb of revision rather than appeal, though patent illegality is brought within the mischief. (g) The finality of awards, subject only to challenge upon conditions for stay is an idea in a proceeding which is unlike the First Appeal under the Code of Civil Procedure. (h) The Schedules (4, 5, 6 and 7 to the Act) make for a whole new way of professional life; the fees of arbitrators are specified ad valorem. The disclosures of interest and relationships show ethical professionalism. The number of arbitrations to be disclosed demonstrate the opportunities for arbitrating to be availed by only those who have the time and the means to deliver. The undertaking to complete the arbitration within the time frame set by the legislation is an implied oath to work with efficiency, industry and expedition.

[20] *Supra* note 14, Point 29, Fifth Schedule.
[21] Code of Civil Procedure, 1908, Sections 35, 35A and 35B.

iv. **Non-Value-Added Items and Activities** - Just as a businessperson would refrain from indulging in any activity which would not add value to his work and the consequent profits, the arbitrators would also not require to apply avoidable rules and technicalities which would not alter the final decision.

v. **Blamestorming** – This principle only brainstorms the situation to find the reasons for failure or set-back. Once found, it seeks to remedy the situation by innovative ways. It is writ large on the face of the 2016 Act that the lack of power to grant interim reliefs by an arbitrator, the procedural delays resulting in delayed awards, the lack of support for earning fees by arbitrators and demand of unconscionable fees, accepting arbitrations without having the time to complete the process, the absence of interest and costs in awards and indiscriminate challenges and the upholding of such challenges must have weighed on the minds of the framers. The result is a complete volte face of the process.

vi. **Single and Double Loop Thinking: The OODA Loop** – Business decisions involve Single and Double loop thinking. The former deals with only 'what'. The latter involves 'why' and 'how'. OODA is an acronym for 'Observe, Orient, Decide and Act'. It accounts for the goal Vs. the task; 'Change the task to reach the goal.' Need it be said that the framers of the 2015 Act did just that?

vii. **Core Competence** – A businessperson believes in specialization of work. The Lord Woolf Report advocates 'Specialist Judges'. Both have yielded good results. The real specialization in arbitration is trial judges and lawyers/non-trial judges and lawyers. Another branch is the dedicated and non-dedicated lawyers (those who work only in arbitrations (for the entire working day) and those who work in courts and in arbitrations (only after 5 pm, the Court hours, leaving barely 2 – 3 hours for arbitration!) It need hardly be stated that to achieve the results which a businessperson or the British system have achieved, specialization and dedicated practice for full business hours parallel to Court working hours is the key if arbitrations have to come of age and truly make it an 'alternative' and not only an 'additional' dispute resolution system. Some arbitral institutions have explicit rules of working hours spanning a good part of the day.

viii. **Time Management** – It supports the 'Big Rocks'. It advocates that the successful businessperson puts the big rocks in his day first, because if she/he puts in the small rocks

first, there will never be space and time to put in the big ones. The 2015 Act, shorn of procedural wrangles, demands consideration of only the substance of the case, not the style.

ix. **Package Deal** – Many businesses offer goods and services together to make an attractive and economical deal. The statutory provisions relating to time limits for completion of arbitration and the fees of the arbitrator make for a package which can be imported by lawyers just as well. The charging of equal ad valorem fees by lawyers as is statutorily prescribed for arbitrators for completion of all work within the time frame would be a package too attractive for any litigant to refuse (unless, of course, she/he is only interested in delaying the completion knowing the lack of merits of her/his case). "Make money by doing good" may be the clarion call.

x. **TEAM work** – Team is the acronym for 'Together Each Achieves More'. Adjudication as much as arbitration need and deserve team work for their success. Arbitrators and lawyers are enjoined to work as a team in keeping with the spirit of the 2015 Act. Much of its success would depend upon the 'Bench-Bar vision, mission and passion', as Justice Krishna Iyer famously stated.

III. WHAT, THEN, WENT SO THOROUGHLY AWRY THAT NEITHER THE CARROT, NOR THE STICK REMAINED POTENT? WHO, AMONGST ALL, IN THE ENTIRE FIELD WOULD BE TO BLAME?

Sharing my experiences, the good, the bad and the ugly, may hit the nail.

When I retired as Judge of the Bombay High Court in 2015 and started practice as Arbitrator and Mediator in 2016, the fledgling legislation was newly born. It was to apply to all the disputes I would be referred for arbitrating. It was a law I would have needed, expected, wanted to have. I braced myself upon the task as a fresh and worthwhile challenge.

My maiden venture had a legal representative from Coimbatore and a lady lawyer from Mumbai in a dispute relating to sale of land in Kochi. It had various, at times redundant, agreements that the parties had entered into to make the case seemingly larger than it was with the applicable laws. Yet, it was all that an arbitration should be. A large part of the determination was to be not on oral evidence. Only one party led oral evidence of a couple of pages for proving damages for mental agony. The concession for an avoidable aspect was made by the lawyer of one side. Neat and apt

arguments were made by both and the award was passed within the recommended period of six months. I wishfully believed that such was to be the new era of arbitration.

A few other arbitrations followed similarly and ended expeditiously with local talent.

In a dispute of about Rs. 700 + Cr. between two large corporations under an impending merger of one of them, restoration of assets and properties was sought prior to a construction company taking over a construction project. The parties wanted fast track arbitration for a small part of the unresolved dispute. In the preliminary meeting I fixed just one full day of arguments of both the parties since all the pleadings were complete and submitted for reading. We worked literally from *9 to 5* without a break. All the issues of both the parties were agitated and considered threadbare. It was truly Med-Arb, a combination of mediation and arbitration, at the same time. The restoration of assets and properties claimed together with the liabilities to creditors and third parties to be apportioned was considered. I even started dictating the award in the presence of both the parties and their attorneys, setting out points of agreement and, failing which, my decision, until late in the evening. It was only because I did not have the stamp paper setting out the names of the parties as required under the procedure, that I had to defer the work of actual printing and service of the award till the next day! When the parties were served the award the next day my real reward was not the full fee paid in a day's time, (which was as per the Fourth Schedule as I always charge and which reached the capping limit in this case), but the remark of one of the attorneys that though I was called upon to fast track the arbitration, it was *superfast*! I captained a professionally erudite set of attorneys. It was team work at its best. I would wish and hope others follow their good practice.

In an arbitration of road construction contract, the claimant was from Allahabad, his advocate from Delhi and construction company with their advocate from Mumbai. I had to consider my own jurisdiction and then the question of termination of the contract by mutual consent under a 'No Claims Certificate' (NCC) issued by the contractor to the company. The claim for damages, for which the arbitration was filed, would come up for consideration only if the NCC was given under economic duress or coercion. Oral evidence of the parties was led to re-create the scene of the day of execution of the NCC. A summary award upon the issue of the NCC was passed in terms of the Commercial Courts Act, 2015. Upon seeing that the NCC was validly issued, no other issue came up for consideration. The arbitration which had lasted some years before the previous arbitrator, came to a conclusion again within months.

In an arbitration of sale of goods by a private party to a Government Undertaking, the case of damages of either party would rest upon the reciprocal promises of the parties. The facts leading to the delivery of some goods and non-delivery of other goods had to be considered upon the oral evidence of the procedure set out under the contract with the interpretation of the terms of the contract and the relevant law. Several months sufficed to bring the dispute to a close by an award.

Even in an arbitration between a Public Sector Undertaking ["**PSU**"] and a private party, a good set of attorneys and counsel helped in completing the task within the statutory time frame. The agreements between the parties, the correspondence by email forming a chain and other related documents which were admitted were marked, all in a day, in evidence after recording the admitted facts. Oral evidence led by both the parties was recorded such as to complete the evidence of one witness in the full day hearing of a day or two. The advantage of the parties not being distracted either for cross examining or for answering, of not recording repetitious evidence and knowing the case of the parties threadbare, would be evident. The award came to be passed in matter of months and before the end of the allowed period of one year.

In the last two mentioned matters, the award came to be passed initially by email and later upon the stamp paper got purchased after much effort during the first pandemic lockdown when even franking machines were not refilled at the banking outlets by the Reserve Bank of India.

It was a win-win-win situation for the litigants (one job done), the lawyers (fees earned earlier than otherwise) and me (emotional and financial satisfaction). I do not understand why any arbitrator or lawyer would like to 'delay to earn' and not 'work to earn' quicker. I do not see how that target cannot be achieved except in a few complex cases. I do not also see how the length of time would always be in direct proportion to the 'stakes' in the matter and the 'great guns' amongst lawyers who may have outlived their purpose leaving nothing much to rave about.

Somehow not many share such work ethic and the image of our country gets tarnished, nationally and internationally. The book *Devil's Pie* is a scathing attack primarily on bureaucratic corruption, but which demonstrates the working of a 'big-time' arbitration before a 3-Retired Judge panel.[22] The book vividly brings out how the arbitration lasted 5 years.

Then, another face of arbitration exhibited itself. In a matter, well begun, but before it was half done, the lockdown resulted in the Supreme Court being so kind as to allow extension of time for

[22] RANJAN DATAR, DEVIL'S PIE: THE DEVIL MAKES HIS PIE OF LAWYERS' TONGUES AND CLERKS' FINGERS (2014).

two entirely unrelated spheres – the Limitation for filing suits,[23] and the time limit for passing awards.[24] Whereas the former related to the litigants accessing justice, which was a near impossibility for many, the latter related to the continuation of arbitrations which had begun and which proceeded with ease online. That done, the ethos of the work took a volte face. The arbitration could proceed only by consent of the parties. So, one of them would simpliciter state that she/he does not consent! So much talent channelled wrongly – like a brilliant child going astray. The result is everything that an arbitration should not be.

Even when the arbitration proceeded with consent, the cross examination became a stumbling block with one party wanting to cross examine online and the other seeing red. The conduct of the cross examinations, in cases which did proceed, was that a junior lawyer would be given a 'watching brief' to see that the witness is not prompted to answer. This manual supervision of an electronic meeting would be like sending a man in a burning building to pull out some valuables for the owner who would stay safe of the fire by giving the poor man some money to put his life in danger. A more technological mode of supervision, successfully made, is to have one or even two other devices put up in the room of the witness facing the area in front of the witness which is otherwise unseen in online platforms. Even directing the prime witness, or the person in charge and control of the litigation who would be likely to prompt, to remain present in another room in full view of the arbitrator and the cross examiner would prove sufficient.

In an arbitration involving the Government the tardy procedures are adopted from the stage of appointment itself.

An arbitration which began in 2011 was referred to me for arbitrating after the previous arbitrator returned the papers in 2021 (after recording evidence.)

In some arbitrations, time for even filing a claim is requested again and again! This is never done in a suit, writ petition, appeal, revision or review applications. Why is it done only in arbitrations? Because it is allowed. In an otherwise tidy legislation setting out limits of time, the very first step in the proceeding is allowed to take a beating. Arbitration Petition is the only application in which interim orders are passed even without the main claim being made. The filing of the claim and the commencement of the arbitration is then delayed beyond time necessitating the application and grant of extensions.[25] Each of these illustrations manifest, what I might call, 'Civil Victimology'.

[23] Limitation Act, 1908, Section 3.
[24] Arbitration and Conciliation Act, 1996, Section 29A.
[25] *Supra* note 14, Section 9 (2).

There is always one party at such receiving end. The advice of the Great Bard William Shakespeare rings out loud and clear: *Be cruel to be kind.* Justice Krishna Iyer has denounced even such an adjudicatory system thus: '*slow motion justice, long distance justice and high-price justice are violative of natural justice*.'[26] What about arbitrations?

One corner of discord remains with the arbitrators – their fee under the Fourth Schedule to the 2015 Act. Some do not adhere to the fee. The charge per day would not eliminate the ills of protraction, the very purpose for which the 2015 Act was enacted. Only a fair chance given to the spirit of the Act, '*D'espirit Arbitrage'*, as Jurist Fali Nariman has stated, would show the fairness of the provision which has been interpreted by the Hon'ble Delhi High Court to grant the fee commensurate with the claim she/he is called upon to arbitrate.[27] The lump sum would be charged in just two instalments – at the commencement and at the end, leaving no reason to obtain fee each time. In one of the above referred arbitrations, though party appointed, I accepted the statutory fee. When the arbitration came to a close within the week, I thought it unconscionable to charge the remaining half, but the parties persisted. I reasoned that even if I had to conduct and complete the arbitration in about 10 sessions of full days of hearing, the fee would be sufficient. As Mahatma Gandhi had stated that there is enough for our need, though not for our greed.

Even the willing arbitrator may find herself/himself at the receiving end sometime. If the arbitration lasts for years the fee may prove insufficient. The reason for the delay may or may not be attributable to the arbitrator. If the parties' consent to extension of time, the extension cannot be without the consent of the arbitrator. An arbitrator who has worked diligently and not contributed to the delay would also have to consent to the extension of time upon the delay attributable to one or both parties. It would be unjust not to pay the fee of such arbitrator until the close of the extended arbitration. The arbitrator, therefore, may not consent to the extension without her/his full fee being paid. Of course, she/he would be in no position to demand the remaining fee if she/he had unjustly delayed the arbitration. A statute has to be read as a whole. Hence, Section 29-A and the Fourth Schedule laying down the time limit and the fee must be read together. That done, the ad valorem fee would stand for 12 months of arbitration. An indolent arbitrator may not earn within the year; a diligent arbitrator deserves to and must earn the full fee at the end of the arbitration or at the end of the 12-month period, whichever is earlier. Would this not smoothen the perceived crease in the statute?

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[26] V. R. KRISHNA IYER, CONSTITUTIONAL MISCELLANY, 2ND ED. EASTERN BOOK COMPANY, Chapter XI pg. 224.
[27] Rail Vikas Nigam Ltd. v. Simplex Infrastructure Ltd. 2020 Delhi High Court dated 10.7.2020. SLP (C) No. 010358 of 2020 has been filed against this order. Notice has been issued. The SLP is pending.

The legislation needed to be fortified by sound practices. It had to be hand-held for its firmness by the Courts which needed to bear down upon egal practices, both of arbitrators and lawyers, the two important stakeholders of the system, who did not conform. Instead, it was sought to be further amended (as so many other Indian legislations) on the excuse of "practical difficulties arising in implementing the amendments," none of which could be discerned by those willing to adapt and deliver.

It is as much interesting as it is disheartening to note what the lobbying power can do to any good work.

The Arbitration and Conciliation (Amendment) Act, 2019[28] ["**2019 Act**"] does not usher in a new era and is not reformatory. The creation of the Arbitral Council "to make India a hub of Institutional Arbitration," is the singular forward aim. It only takes away from one hand to give to another. But the success of the shift would only be perceived from the work of the person in charge and control of the Arbitral Institution. As Dr. Babasaheb Ambedkar, admiringly called the Chief Architect of the Constitution of India, described the Indian Constitution as 'a vehicle of life', said of its success:

> "However good a Constitution may be, it is sure to turn out to be bad because those who are called upon to work it happen to be a bad lot. However bad a Constitution may be, it is sure to turn out to be good if those who are called upon to work it happen to be a good lot."

The duties and functions of the Arbitral council is the only corner laying down a modicum of business practices for the council and the arbitrators and lawyers – laying down standards,[29] maintaining statistics,[30] advocating expedition and simplification,[31] sharing best practices,[32] and continuous education,[33] the other tested business principles embedded in corporate culture, practiced mandatorily at regular intervals between different divisions of an enterprise.

The other amendments are merely cosmetic. Some are, progressive, some, in fact, regressive. Despite the avowed object of making India what the Statement of Objects and Reasons proclaims, the amendments relating to the Arbitral Council were not brought into effect. The amendments which were brought into force diluted the structured time line. Whereas, in the 2015 Act a clear

[28] Arbitration and Conciliation (Amendment) Act, 2019.
[29] *Id*, Section 43-D (2) (a).
[30] *Id*, Section 43-D (2) (f).
[31] *Id*, Section 43-D (2) (g).
[32] *Id*, Section 43-D (2) (f).
[33] *Id*, Section 43-D (2) (d).

period of 12 months was granted for making the Award, in the 2019 Act 6 months of that period was allowed only for filing pleadings! The 12-month period commenced thereafter. India could not claim to be an 'International hub' by such molly-coddling. Internationally, awards are passed within a year. Even in India some arbitrators do complete their arbitrations within that time. The only shortcoming of the 2015 Act[34] was not addressed. Interim relief applications continue to be made and, after obtaining interim relief, the claim is not filed and the arbitration itself is not even commenced for as long as 90 days and more with applications for extension of time.

A worthy reminder is the Portuguese Procedure Code, then applicable in the State of Goa prior to the Code of Civil Procedure, 1908 being made applicable in Goa, in which the written statement of the defendant had to be filed within 9 days of the service of summons without any provision for extension of time. The Judges reported that there was no problem. The defendants filed their statements within time.

Whereas the 2016 Act was a 'Giant Leap' for the Alternative Justice System, the 2019 Amendments were but a 'small step' for almost none.

The amendments relating to the setting up of the Institutional Arbitration were the only ones not brought into force when the other innocuous ones were - on 30.08.2019. The very purpose of the 'Objects and Reasons' for the amendment – "to identify the roadblocks to the development of institutional arbitration", and "to prepare a road map for making India a robust centre for institutional arbitration" - was set at naught.

The further amendments by the Arbitration and Conciliation (Amendment) Act, 2021[35] ["**the 2021 Act**"] were two-fold:

One did away with the prescribed minimum qualifications, experience and norms of accreditation of arbitrators under the Eighth Schedule introduced by the 2019 Act. This was upon the pious object "to promote India as a hub of international commercial arbitration by attracting eminent arbitrators to the country"! The qualification required of arbitrators was a mere 10 years of experience in her/his domain. The arbitrators do and must abide the substantive law. The awards have finality, subject only to a challenge on specific grounds. Without the minimum qualification would she/he be expected to deliver better than the arbitrators have hitherto done?

[34] *Supra* note 14, Section 9 (2).
[35] Arbitration and Conciliation (Amendment) Act, 2021.

The other granted unconditional stay of enforcement of arbitral awards induced by fraud or corruption. 'Fraud vitiates everything' is the catch phrase a law student learns in college. Corruption is indeed the corrosion of anything which could never be enforced. It would go without saying that courts would shun any such act or practice if brought to its notice. The grant of stay of the operation of the award by the court is "subject to conditions it deems fit". The court would not be precluded from granting a stay upon a modicum of monetary deposit or none at all in a fit case. But the specific statutory provision would be liable to abuse (as is the result of many other legislations) by many parties alleging what is not the truth to obtain unconditional stay.

The legislature has turned full circle. The challenges would increase. The enforcements would suffer. The past era may revive. I am reminded of one newspaper article I read long years ago. The construction of a mighty dam was feverishly sought. The repercussions would be many. Engineers and architects of concern and repute advised against it with logical, scientific reasons. None would heed. The article ended with a telling phrase I have been unable to forget: "I weep for my country." The chronology of events after the Amendment Acts leads me to the same state. I would rather "work" for my country.

IV. WHAT, THEN, IS THE REMEDY?

A complete work culture change is the call. Simply stated it can be achieved by what I would call A A M I E A A.

A – Hearing Address (or interim relief application)
A – Recording Admissions
M – Marking admitted documents
I – Framing Issues
E – Recording Evidence (Oral evidence only as required)
A – Hearing Arguments
A – Passing Award

Such basic Rules of Procedure and Evidence make up the basic structure of arbitration shorn of other technicalities. Of course, certain fundamental safeguards must be adhered to, but without the need for reminders and directions; e. g. inspection of documents to be offered, demanded and given, which should go without saying. All know that in the adversarial system, no document can be relied upon without showing it to the other side whether or not the arbitrator so directs. Pleadings

(which usually contain all the evidence, submissions and precedents) may be used as evidence if accepted on oath of truthfulness. Any further disputed facts and documents may be proved on affidavit of evidence.

AAMIEAA is on the pre-condition that so soon as the pleadings are filed the papers are read by the arbitrator. An address would set the tone of the arbitration. If interim relief is applied for, the arguments would serve this purpose. That done, in the same order admitted facts must be recorded, admitted documents be marked and limited issues only on the remaining dispute thus narrowed down be framed. Summary award may not be lost sight of and may be resorted to in quite a few cases which require interpretation of admitted documents and questions of law. Oral evidence, when requested, be led to the extent required for specific issues which need to be proved thereby and for proving disputed documents. The mandate of day-to-day hearings,[36] mainly for this stage, cannot be ignored. What follows are arguments, again day to day, with the award quick on its heels. Adherence to such discipline would augur for the benefit of all with the only exception of the party with no merits of the case who would only seek to delay the decision.

Once the award is ready, another phase would kick in. The arbitrations in Western countries, more proficient in the culture of mediation, follow the system of Med-Arb. That can be fruitfully imported into our work with some modification keeping the ground realities in mind. I keep my award – interim, summary or final - signed, sealed to be delivered. I call the parties to attend one more day when it is ready. I give myself the whole day for that matter. Before serving the award, I offer to mediate at no extra cost to either. (Both have paid the due statutory fee.) I clarify that the process is wholly voluntary. I would tear out the award and substitute it by the agreement of the parties if they reach a settlement. I would serve the award and complete one process, which was my duty to do, if no agreement ensues. The parties accept the offer. No party or the lawyer would again go into the facts or the law. I go into the 'inside story'. Much has to be stated for the way the business developed, how the contract was sought, what were the underpinnings between the parties, their hopes and expectations that went awry and the real reason for the fall. Businesses having 'sister concerns' have inter-twined feelings for others in their family or group. All these issues can be thrashed out threadbare to make a clean breast of it all. The cause behind the act surfaces when Problems are discussed, Options are created and the Solution can be reached. I would call this the doctrine of POS.

[36] *Supra* note 14, Section 24.

This process is more conducive than starting with mediation or resorting to it midstream. One of the parties may not then desire to go on before the same arbitrator necessitating another circle of action for them. The lawyers would be tempted to bring in extraneous legal arguments not then required to be considered. Needless time would be consumed. The 'inside story' which is not on record may creep into the mind of the arbitrator vitiating the award. Completing the arbitration and then trying out mediation immediately results in a tidy work action and expedites even the closure of the mediation. If the parties settle, a worthwhile exercise has ended. If not, also, the germ of settlement would settle in. The parties would meet again during challenge or enforcement of the award and take off from where they left off, appreciating the goodness of settlement and continuation of business (or family) ties. The entire effort culminates in intellectual exercise and emotional satisfaction. No effort is wasted.

Some cases merit only a neutral evaluation resulting in the award. If one party is dealing with a terminal defaulter or an inveterate fraudster, determination of the dispute or conflict can be only by adjudication or award; Mediation can play no part. There can be no reconciliation and hence no conciliation.

Businesspersons of substance (and most are) see merit in settling one dispute and getting along with their business. Unfortunately, some lawyers feel a pinch. The feeling is completely erroneous. It is but a complex. The extent of the work for a legal professional does not allow any lawyer to be forgotten. It, like water, seeks its own level.

The experience, not very far away, in Bengaluru, has revealed how much those litigants respect and appreciate the work of the lawyers who bring them the fruits of the litigation by facilitating negotiation by mediation to smoothen business relationships between those parties. The litigants have expressed satisfaction with the work of lawyers and lawyers have reported that clients return for other matters resulting in continued professional work. This positive work culture has resulted in the Bengaluru Chamber of Industry and Commerce (BCIC) to partner with the Court-annexed Mediation Centre making it a settled practice. Such a culture shift in ADR is a worthwhile practice to emulate.

There is a joy in doing something as well as you could and better than others thought you could.

- JRD Tata