

Speech of **Hon'ble Mr. Justice S.A.Bobde, Chief Justice of India**

*on the occasion of*

3<sup>rd</sup> edition of International Conference on

**Arbitration in the Era of Globalisation**

*organised by*

Indian Council of Arbitration &

Federation of Indian Chambers of Commerce and Industry

8<sup>th</sup> February 2020

1. I am delighted to have been accorded the privilege to speak to all of you on the occasion of the 3<sup>rd</sup> International Conference organised by Indian Council of Arbitration (ICA) and Federation of Indian Chambers of Commerce and Industry (FICCI). Wisdom dictates that each brings a unique perspective to the table, and like it is said, the complete picture can only emerge if all the perspectives across the legal spectrum i.e. the judges, academics and lawyers are combined. I therefore congratulate ICA and FICCI for taking the initiative and bringing together all who hold an interest in strengthening the current dispute resolution fraternity in India.
2. A defining feature of the 21<sup>st</sup> century is the global economic integration fuelled by technological innovations, enhanced communication and affordable transportation. These developments have sharply reduced relevance of national borders for trade, commerce and investment activities. Exponential growth of transboundary interactions necessitates formation of complex regulatory frameworks, including provision of effective and efficient methods of dispute resolution. Yet

attempts to resolve international commercial or investment disputes in jurisdiction-tethered-state-forums have met with little success. This void has been successfully plugged by various alternate methods of dispute resolution, in particular international arbitration. It would not be wrong to suggest that today arbitration is the most preferred mode of privately resolving a varied range of disputes, however it must be kept in mind that the same is at the cost of mediation and conciliation which is much faster and less expensive than arbitration.

3. ADR in India is not a recent phenomenon. India has a long and distinguished history of resolving disputes through utilisation of alternate methods of dispute resolution. Arbitration and mediation are a deeply embedded dispute resolution mechanisms in India's commercial practices and social life. Their usage could be traced back to when people voluntarily submitted their disputes to the *panchayat*, a group of wise men of the community, whose decisions were binding on the parties. Sage Yajnavalkya is said to have, in ancient Indian texts, referred issues to various arrangements including *Srenis* (occupational guilds), *Kula* (family or clan assemblies), and *Puga* (tribunals that comprised of people dwelling in the same place), all of which closely approximate the present system of arbitration.
4. Despite its long history, the arbitration regime in post independent India was considered to be archaic, unpredictable and expensive. A regime that was meant to expeditiously resolve disputes was used to achieve the exact opposite results. Indiscriminate resort to courts, lengthy complicated procedures, lack of competent professionals,

coupled with an inadequate understanding and acceptance of arbitration as a genuine alternative meant that arbitration regime no longer served the purpose which it was meant to. Such was the despair that it led to Desai J observing that the manner in which arbitration was worked in India “*made lawyers laugh and legal philosophers weep.*”

5. It is in this background that the Arbitration and Conciliation Act 1996 was enacted. The Act was modelled on lines of the UNCITRAL (United Nations Commission on International Trade Law) framework of laws. It marked a concerted effort to modernise the Indian arbitration law and imbue it with best global practices in an attempt to establish India as a global arbitration hub. Over the last decade or so, a catena of decisions and host of amendments, including fast track arbitration and establishment of specialised commercial courts, have attempted to transform India into a robust centre for international and domestic arbitration.
  
6. Today, arbitration plays an essential role in the global infrastructure of international trade, commerce and investment. As an integral member of the global community and a trading and investment giant, how India engages with international arbitration has important ramifications on international transboundary flows of trade, commerce and investments as a whole. It is therefore important to be cognizant of our current bearings and of what lies ahead. Success in endeavours aimed at transforming India into an international arbitration hub would depend on the diligence shown by various stakeholders in spotting and

addressing relevant concerns and issues. Let me take this opportunity to outline few pertinent ones.

7. The arbitrator is a crucial component of a successful arbitration. The standards to which they adhere have an important bearing on the independence and integrity of the arbitral process. Early practices of arbitration, which were confined to a few, were often governed by set of self-prescribed values and norms. In recent times, globalisation has led to the dramatic growth in cross border transactions involving India, which has led to an increasing demand for cross border arbitration. This has resulted in establishment of transnational practices to deal with growing quantum and complexity of matters. The net effect has been the emergence of an ultra-competitive arbitration marketplace characterised by an explosive surge of new entrants into the global arbitration community. These new entrants who often belong to diverse legal traditions bring with them varied conceptions of what constitutes ethically acceptable conduct. Absence of common or defined ethical standards can sow seeds of discordance, which in the ultimate analysis would weaken the integrity of international arbitration regime.
8. Recent years have witnessed major legal and policy reforms in the arbitration landscape. These amendments have attempted to align the Indian arbitration regime with regimes in other leading arbitration jurisdictions. However optimum results require effective working of laws and policies, which necessitates coordination among all stakeholders. This presents on the one hand great opportunities as well as great challenges, which include ensuring availability of competent

and quality arbitrators of high integrity. India is blessed with a talented and brilliant pool of individuals who can, with adequate training and orientation, act as arbitrators in the most complex of matters. Given the sheer diversity and quantum of matters being submitted to arbitration, presence of a specialist arbitration bar with members who have not migrated from the general bar who are working in close coordination with competent arbitral institutions is imperative.

9. Arbitration is not meant to mirror litigation. The time-consuming methods of long oral arguments, long written submissions and a reference to precedence are bound to bring about the same effect in arbitration as it is done in litigation.

10. That being said, Institutional arbitration has met with limited success in India. It is a well-known fact that Indian parties still show a strong preference for adhoc over institutional arbitration. The recent report by the High-Level Committee to Review the Institutionalisation of Arbitration Mechanism in India, headed by Justice BN Srikrishna, which led to the 2019 amendments, had identified following factors for such preference – (a) lack of credible arbitral institutions; (b) misconceptions relating to institutional arbitration; (c) lack of governmental support for institutional arbitration; (d) judicial attitudes towards arbitration in general and (e) lack of a specialist arbitration bar. While legislative and judicial efforts have attempted to address these factors, it is clear that for institutional arbitration to expand its footprint in India, it would require concerted support from all stakeholders, in particular members of the legal profession. A robust arbitration bar is

critical to the development of institutional arbitration India as it would ensure availability and accessibility of practitioners with knowledge and experience in the field of arbitration.

11. As we conceptualise international arbitration in a globalised era, we must also be cognizant of the synergistic opportunities available for international arbitration through utilisation of disruptive technologies. As one scholar puts it both 'IA' (International Arbitration) and 'AI' (Artificial Intelligence) are leading alternatives to status quo: IA to traditional methods of dispute resolution, AI to traditional methods of performance. Artificial Intelligence could provide immense benefits for the arbitration process and its users. By augmenting human cognitive abilities, AI powered services could assist lawyers in drafting, identification of better authorities, reviewing of documents, etc. It is also well placed to assist arbitral tribunals in preparation of award, simulation of judicial review, streamlining case management, etc. AI based analytics systems could be used to predict costs, duration and possible resolution including proposing range of settlement based on analysis of previous arbitrations of similar size and complexity. AI assisted arbitration holds immense promise for the arbitration community. Therefore, one has to ask- *Is there a future of 'AI' in 'IA', and if yes, what shape its usage and regulation ought to take?*

12. The problem lies in the fact that the notion of 'alternative' is taken literally, as a result in numerous instances litigation is seen as the default mode, with parties turning to ADR only as a secondary option. This mindset needs to change, and unless it does, all other reforms to

promote ADR methods including arbitration, are likely to remain ineffective. A conscious effort must be made by all stakeholders to reorient the way they perceive ADR mechanisms, in particular arbitration.

13. Mediation as a viable method of dispute resolution has gained enormous popularity in India. This comes as no surprise because as the famous adage suggests “*An ounce of mediation is worth a pound of arbitration and a ton of litigation!*” Court annexed and private mediations through various mediation centres operating in different parts of the country have reported significant levels of success. Specialised mediation services as part of hybrid mechanisms (Med-Arb or Med-Arb-Med) are also provided by various arbitral institutions to resolve both commercial and investment disputes. These are promising developments. But if the momentum is to be sustained then other initiatives including enhancing user awareness; improving quality of mediators; providing enhanced training to mediators and referral judges; establishing necessary and adequate infrastructural and administrative facilities; and securing a universal code of ethics and professional standards to be followed by all mediators, must also be undertaken. The pre-institution mediation and settlement as mentioned in the Commercial Courts Act would pave the way for many more institutions to emphasize on the need of pre-litigation mediations considering its very many benefits.

14.I think the time is ripe to devise a comprehensive legislation which contains compulsory pre-litigation mediation and a remedy for the biggest drawback in a mediation agreement that is to say the unenforceability of an agreement arrived at a mediation would ensure efficiency and also reduce the time pendency for parties as well as the courts. Maybe if some method could be found for certifying that an agreement has been freely entered into and for making it executable like a degree, mediation could become the most effective ADR.

15.Last few years have witnessed an accelerated maturing of the Indian arbitration regime and community spurred on by an ever-increasing demand for arbitration services in India. The resultant global interest in the development of international dispute resolution in India and the concomitant opportunities such development generates is the reason why we all gather here today. Viewed in this backdrop, this conference then is an opportune moment to take stock of developments unfolding within this field.

16.I believe this conference and its chosen themes, would provide an appropriate platform for celebrating past achievements, identifying existing and future concerns, and formulating possible solutions. Given the collective wisdom and depth of experience of panellists, I am confident that today's discussion will generate concrete action points for each stakeholder. I wish your deliberations all success.

Thank you, Jai Hind.

