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Arbitration: Is Its Prominence Fading away?

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Abstract

Procrastination, expansiveness and inflexible formalism are prevalent protagonists of conventional litigation, particularly in business disputes where they may go on for decades. The motive behind the emergence of arbitration is to circumvent the abovementioned difficulties. Nevertheless, international as well as domestic arbitration is not copiously free from these culpabilities. A recent survey published by Kluwer Arbitration Blog uncovers a truth that 65% of respondents believed that the cost of international arbitration is more than conventional litigation and 23% opined, it conveys identical cost as traditional litigation. Another survey conducted by the Corporate Counsel International Arbitration Group found that 100% of respondents alleged that arbitration 'takes too long and costs too much. In addition to these difficulties are wide-ranging discoveries, motion practices and over lawyering causing international arbitration's prominence to diminish. The author objectively examines the legal framework of arbitration, both domestic and international level for finding out the existing stumbling blocks. Moreover, recommendations are made regarding how arbitration trumps over contemporary crises. The methodology used in this article is doctrinal in nature. For the doctrinal method, this article relies on primary and secondary sources. The primary sources are statutes, international conventions and the secondary sources consist of library materials (textbooks, journal articles and newspapers), internet resources, annual and survey reports.

Keywords: Arbitration, commercial dispute, culpability and dispute resolution.

Introduction

Disputes are inevitable and integral part domestic or international business around the world. Due to the undeniable truth, disputes arise and need to be mitigated. However, our traditional tool, the court system, is undeniably filled with inefficiency and injustice. Justice may be delayed not for years but for decades. Therefore, alternative dispute resolution mechanisms, particularly arbitration, are necessary for resolving business disputes through objective consideration as well as people's perception (Steinepreis & Teng, 2015). According to the International Arbitration Survey 2013 conducted by the School of Arbitration, Queen Mary University of London, 81% respondents preferred arbitration to other methods. However, this statistic does not indicate that arbitration is free from all drawbacks which conventional litigation belongs. In 2010, Kluwer Arbitration Blog found that 65% respondents believed the cost of international arbitration is more than conventional litigation and 23% believed it conveyed identical cost as traditional litigation. Another recent study of the Corporate Counsel International Arbitration Group (CCIAG) found that 100% of the corporate counsel participants believe that international arbitration "takes too long" (with 56% of those surveyed strongly agreeing) and "costs too much" (with 69% strongly agreeing)(Reed, 2010).

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Basically, arbitration is led by selected philosophies such as alternative platform, less expensive, more efficient and faster, flexible about procedural claptrap *(Guru Nanak Foundation v Rattan Singh,*(1981) 634 SCC4). But unfortunately the scenario has entirely changed over the last four decades. The entiregroup of stakeholders, not only the consumers and their advocates but also businessmen and their attorneysasserted their concern that "arbitration may be losing some of its luster" (Drahozal & Wittrock, 2008).Apart from the cost and delay, underthe reinvigoration campaign, scholars identify fault linestaking place: from unambiguous and adhesive arbitration agreement (Loh, 2014) to selecting inefficientarbitratorsand counsels(Bales, 2006), complex substantive law (Richards & Burge, 2013-2014), over judicialization of arbitration process including wide-ranging discoveries, motion practices, high hardball argumentative advocacy (Stipanowich, 2008-2009) to prejudiced arbitration process (Hammond, 2009). This article objectively examines legal framework of arbitration, both domestic and international, making a comparison of international arbitration instruments under the Bangladesh Arbitration Act 2001 (hereinafter referredto as Act of 2001) to find out the stumbling block. Additionally, it contains concluding remarks with some recommendations about how arbitration has trumped over the contemporary crises.

Evolution of Arbitration

The success of arbitration is a reflection of the shortcoming of the civil justice system and the justice system of any state. Having gone to time and trouble of bringing a case through interminable pretrial motion practice, attempting to educate the decision maker while observing the intricacies of trial procedure, and waiting out of lengthy appeals, even a victorious litigant may well question whether justice has been served. In the past two decades, dissatisfaction with traditional adjudication of disputes has given rise to more general experimentation with forms of ADR and Arbitration in particular (Edelman, 1984).Justice D.A. Desai states in the *Guru Nanak Foundation Case* (1981)that the Indian Arbitration Act 1940 is a byproduct of "interminable, time consuming, complex and expensive Court procedures".

Historically, arbitration is the most popular alternative adjudication forum to the court adjudication of dispute, but over the last two decades the popularity of arbitration has started to decrease. Arbitration is criticized in many respects (Haley, 2012). Lord Justice Mustill (1989)has found similarities between arbitration proceedings and dinosaurs. He expresses his concern that arbitration is going to become extinct like dinosaurs because of their bulkiness (its larger manifestations are it can be too slowing, too formalized and too expensive). Some scholars, for instance Thomas J.Stipanowich (2010), opine that because of expensiveness, endlessness, complex arbitration law, under-qualified arbitrators and counsels, arbitration has become the new form of litigation.

Is Arbitration a New Form of Litigation?

Governing Arbitration Laws

Traditionally, Common law as well as adversarial system of justice is not friendly to arbitration (Bales, 2006). Bulk of provisions, complex structure, tough language, frequent amendments and

interaction with common law and international law make arbitration laws complex and harsh to understand and challenging to conform with. Hence,the Indian Supreme Court imposedits sanction in the case of *F.C.I. v Joginderpal Mohinderpal* (1989)2 SCC 347 whereby law of arbitration should be simple, less-technical, and more responsible to comply with realities. The tune of Arbitration Act should take account of customers, not just counsels and arbitrators, and emphasize on techniques of dispute resolution (Smith, 1994).

In Bangladesh, the Arbitration Act 1940 was the first governed legislation for domestic arbitration and the Arbitration (Protocol and Convention) Act 1937, and the Foreign Awards (Recognition and Enforcement) Act 1961 for international arbitration. In the beginning of the 21st century, the House of the Nation passed new piece of statute on arbitration, Act of 2001. It has repealed the Arbitration Act 1940, Arbitration (Protocol and Convention) Act 1937 and the Foreign Awards (Recognition and Enforcement) Act 1961. The new Act, based on the UNCITRAL Model Law on International Commercial Arbitration, 1985 and the UNCITRAL Conciliation Rules, 1980 (Kwatra, 2001) and Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958) (Bangladesh accessed 6th May 1992) consolidates the laws relating to international as well as domestic commercial arbitration (Maniruzzaman, 2003).

Arbitration Agreement

Nowadays, arbitration agreements are becoming ubiquitous as almost all commercial contracts contain arbitration clauses. The definition of arbitration agreement in the Act of 2001 is very precise and covers a wider periphery. According to section 9 (1), arbitration clause either be a part of a main contract or it may be a separate agreement. Furthermore, it may be an exchange of letters, telexes, telegrams, faxes, e-mails or other means of telecommunication stated in section 9 (2b) or an exchange of statement of claim and defense in which the existence of the agreement is alleged by one party and not denied by the other mentioned in section 9 (2c)of the said Act. Traditionally, arbitration agreement is a result of successful negotiation between or among the parties but recent inversion practices produce many adhesive arbitration agreements (imposed by superior party to inferior party). Under Section 10(1), every party has the right to sue before conventional courts against any matter they had previously agreed on to resolve through arbitration. The court has the power to entertain if they find that the arbitration agreement is void, inoperative or is incapable of determination by arbitration, section 10(2) in which case the Contract Law 1972 *(Doctor's Associates, Inc. v. Casarotto,*(1996)517 US 681) is followed. There is a general principle followed by the court that arbitration agreement is assessed according to the intention of both parties without necessary reference to a country's law. (Moens & Evans, 2015)

Constitution of Arbitral Tribunal

In commercial arbitration, parties have the autonomy to choose the arbitral forum whether ad hoc or administered by an institution (Cate, 2012).It is worth noting that ad hoc and institutional arbitration share common principles with some legislative differences (Zeller, 2015).Each forum has several pros and cons.

Ad hocforumis organized by the conflicting rivalriesas an alternative to the institutional arbitral forum (Kwatra,2001) and they have the freedom to draft their own guidelines and procedures

which are most appropriate for their dispute resolution (Indian Law Commission Report 2014). Nevertheless, in most cases clients and counsels are more inclined to have neither the time nor the expertise to craft their own process templates (Mones & Torne, 2015). On the other hand, the efficiency of a process completely hinges on the expertise of the arbitrator and the cooperation of the party's counsels (Steinepreis & Teng, 2015).

Though ad hoc forum is more reserved, confidential and has the flexibility to change course (Cate, 2012), according to the Indian experience, ad hoc tribunal is more expensive because in many cases arbitrators are arbitrary, unilateral and have disproportionate fixation of their fees. They charge on the basis of each sitting; usually a day consists of three or four sittings and the differences between days of sitting are too wide, hence a proceeding may linger for years and years causing extensive costs and delays(Indian Law Commission Report 2014).

Sections 2(m) and 8 of the Act of 2001 expressly recognizes the role of arbitral institutions. After 10 years, Bangladesh International Arbitration Centre (BIAC), the first international arbitration center in the country started working in 2011 and they promulgated their rules in April 2012. Almost all arbitral institutions in the world promulgate their own rules of proceedings by undertaking national laws as well as international convention and model laws. But the auspices of consensual character (Rowland, 1987) allow the parties to prepare tailor-made rules taking into account the nature of the particular offence (Paulson, et. al, 1999) even though has its own rules. Having sound expertise on case management, the arbitral institutions provide sound, experienced arbitrators and administrative staff. Due to aforementioned reasons, numbers of arbitration as well as ratio of adjudication are increasing exponentially. For instance, in 2013, 259 commercial disputes were filed at the Singapore International Arbitration Center, in 2011 they were 188 (SIAC Annual Report 2014). However, along with arbitrator, counsel and other representative fees, parties to arbitration bear administrative fees, use of facilities (Outlaw, 2011), expert witness fees and encounter unnecessary red tape procedure, institutional bureaucracy, unrealistic time frame and sovereignty issues (Raju, 2009); these make strong obstacles for the smooth running of institutional arbitration(Legal Service India, 2007).

Selection of Arbitrators

Effective, timely and inexpensive arbitration process profoundly depends on the role of arbitrators and counselors. All the surveys conducted by the Corporate Counsel International Arbitration Group (CCIAG) found that arbitrator availability is one of the key contributing factors to lose the efficiency of international commercial arbitration (Reed, 2010). Sections 11 & 12 of the Act of 2001 designates that parties enjoy absolute freedom to determine the number of arbitrator and appointment of arbitrator in arbitration proceeding. It is completely silent about the skills and qualifications of arbitrators except independency and impartiality. Actually, arbitration is an art and an artistic arbitrator should possess those skills such as the ability to initiate the process, have sound knowledge about new concepts and technology and render the award expeditiously. Therefore, the negative experiences various surveys have found about arbitrators are often related to situations of being overscheduled, unprepared, disorganized, reactive, timid and slow that is causing the fame of arbitration process to fade away.

Apart from that, the selection procedure of the arbitrator itself is time consuming. For example, although the Act of 2001 provides freedom to the parties about the number and the appointment procedure of arbitrator nevertheless, disagreement among the parties and consequently, judicial intervention increases expenses and exterminates more time. The assortment of arbitrator or arbitrators is the case of disagreement between the parties. Section 12 (3-13) of the Act of 2001 provides details of the *modes of operandi* for assortment of arbitrator/arbitrators in the case of disagreement between parties. The default procedure is nearly the same for arbitration with sole arbitrator and arbitration with multi-arbitrators. As per sub-section 3 (a) when the parties fail to agree to select their arbitrator within 30 days from the receipt of a request by one party from the other party, the appointment shall be made by the district judge for domestic arbitration and the Chief Justice of the People's Republic of Bangladesh for international arbitration. Following Sub section 3(b) which confers for multi-arbitrators, when any party fails to appoint an arbitrator or the appointed arbitrators fail to select a third arbitrator as the chairman of this arbitral tribunal, the district judge for domestic arbitration and the Chief Justice of the People's Republic of Bangladesh shall appoint an arbitrator as the chairman of this tribunal within 60 days from the receipt of the application thereof respectively (Sub section-8 of Section 12).

Theoretically, parties spend at least 90 days only for constitution of arbitral tribunal. If composition tribunal is not from adversity, parties have the right to raise their voice against these arbitrators' independence, impartiality and qualifications as agreed to by the parties. The application of the objection shall be made within 30 days from the day these three circumstances are highlighted. If the alleged arbitrator fails to withdraw his/her office, the tribunal shall decide within 30 days from the date of challenge. Sub-section 4 of Section 14 paves the way for the aggrieved party to go to the High Court Division of Supreme Court within 30 days from the date of decision of the tribunal and following the Sub-section which imposes an obligation on the said court to decide the matter within 90 days onward from the date on which it was filed. Hence, the appointment of the arbitrator/arbitrators and composition of tribunal are most crucial steps in the arbitration process (Moses, 2008).

Arbitration Procedure

Pleadings and Pre-Hearing Motions

The first major factor distinguishing the characteristic of the arbitration process is the comparative simplicity and brevity of the pleadings and pre-hearing stage. In contrast to arbitration, the litigants in civil lawsuits quickly discover that there is a long road to be traversed between filing the complaint and having one's day in court. More often than not, there is a barrage of preliminary motions whereby each side compels the other to sharpen, narrow and consolidate its legal claims and allegations of fact within the confines of the existing law. Resolution of each of these threshold points of contention requires a motion, a response and a hearing before the trial judge (or a designee). Following this preliminary jousting, the pre-trial practice in traditional litigation typically moves to a motion to dismiss. Order X of the Code of Civil Procedure 1908 has laid down a pre-trial procedure; it precedes discovery and serves to test the legal sufficiency

of the claims brought by the parties against one another. Though section 24 of Act of 2001 remarks that "the arbitral tribunal not bound by the Code of Civil Procedure", the arbitral tribunal shall follow the procedure to be agreed on all or any by the parties in conducting its proceedings but in the absence of any agreement as to the procedure referred to in sub-section (1), the arbitral tribunal shall, subject to this Act, decide procedural and evidential matters in conducting its proceedings (section 26 of Act of 2001). However, the customary practice is identical to traditional litigation the arbitration proceedings commence with the filing of the moving party's (claimant's) demand for arbitration, setting forth a concise description of the facts pertinent to the underlying dispute and a description of the relief the claimant seeks. Subsequently, the respondent in arbitration files an answer to the claimant's submission, taking issue with any disputed factual allegations, setting forth any defense, and articulating any counterclaims against the claimant that may arise from the subject controversy. This pleading process is largely mechanical and does not require any active intervention by the arbitrator.

The Role and Nature of Discovery in Arbitration

Discovery is an important aspect of the adversarial system (Bedikian, 1993-94). In conventional civil litigation, discovery provides multiple methods for obtaining documents and information. As a result, most litigation expenses are incurred during discovery (Kieve, 1992). However, discovery can cause countless delays and frustration. In contrast, arbitration historically provided a quick and inexpensive procedure that lacked the typical litigation tools such as pretrial deposition of witnesses and principals, rigidly enforced discovery and the like. The time and expense that are used in the typical discovery process contravene the traditional method of arbitration. Although the Federal Arbitration Act(FAA)and the Uniform Arbitration Act (UAA) of the United States of America and its rules attempt to define the arbitration discovery process, they fail to limit both the scope and nature of such discovery. As with most of the dimensions of commercial arbitration, it is difficult to generalize as to the extent and nature of pre-hearing discovery. The only reference to pre-hearing discovery contained in the AAA Commercial Arbitration Rules could be found in Rule 10 which addresses the Preliminary Conference.

The Expansion of Discovery

Arbitration hearings are now often preceded by extensive discovery, including depositions (Moseley, 2006). Because discovery has traditionally accounted for the bulk of litigation-related costs, the importation of discovery into arbitration (which traditionally operated with little or no discovery) is particularly noteworthy. Although many arbitrators and some arbitration rules aim to hold the line on excessive discovery(Conflict Prevention & Resolution (CPR) R.11), it is not unusual for legal advocates to agree to trial-like procedures for discovery, even to the extent of employing. This should not be surprising as there is a tendency to use the tools with which one is most familiar, and lawyers schooled in trial may predictably rely on their knowledge and experience in the private analog of the process. For lawyers accustomed to full-fledged discovery, anything less may seem tantamount to inviting claims of malpractice.

As observed, most lawyers are reluctant to go ahead and try the case. Many times you have tried to shorten the time frame and have the hearing sooner, but in many instances the lawyers want more time to get prepared(Hinchey, 2008). It is not hard for American lawyers to justify intensive

discovery to themselves and their clients. Legitimizing a legal position often requires pains taking reconstruction of past events, a highly labor and time intensive activity that requires conscientiously sifting through vast amounts of information, most of which is of little or no relevancy. Arbitrators' concerns about having their award subjected to a motion to vacate likely reinforce these tendencies, especially among those who lack the confidence of long experience. The reluctance to limit discovery may also reflect an arbitrator's desire to avoid offending anyone in the hope of securing future appointments (Summers, 2007).

For all of these reasons, discovery under standard arbitration procedures has tended to become more like its civil court counterpart. As one corporate general counsel explains, "if you simply provide for arbitration under [standard rules] without specifying in more detail . . . how discovery will be handled . . . you will end up with a proceeding similar to litigation" (Stipanowich, 2008).

Third-Party Discovery

The desire to obtain information prior to trial has also led to frustration with another limitation of arbitration, the difficulty of obtaining discovery from third parties who are not bound by the arbitration agreement. The strictures on non-party witnesses are amply illustrated by *Matria Healthcare, LLC v. Duthie* (2008)584 F. Supp. 2d 1078, 1080 in which a federal district court in Illinois held that seven of the FAA does not authorize arbitrators to compel the attendance of a nonparty witness at a deposition (Hay Group, Inc.2004). In response to concerns raised by the FAA language, the drafters of the Revised Uniform Arbitration Act (RUAA) specifically authorized arbitrators to issue deposition subpoenas (section 17b).

e-Discovery Even as the courts have begun to grapple with the immense and unprecedented challenges associated with the discovery of electronic data, "e-discovery" looms as the ultimate test for arbitration as an alternative to court (Stipanowich, 2010). Today, the great bulk of information that organizations produce or receive is created electronically (Mazza, Quesada & Sternberg, 2006). E-mail messages, word processing or spreadsheet documents, databases, web pages, and other data mechanism proliferate in multiple forms, including in backup or archive form, sometimes without human knowledge or direct action. These data are dynamic, metamorphosing as a result of human modification or through the automatic operation of computers. It is becoming less and less likely that a thoroughgoing dispute resolution process will fail to deal with electronic information. The magnitude and cost of e-discovery and the possibility of sanctions for spoliation are becoming primary determinants of the momentum, pace and cost of adjudication as well as the scope of trial issues and the timing and terms of settlement (Nesson, 1991).

Hearing: Advocacy Tactics and the Rules of Evidence

One of the primary selling points for the commercial arbitration alternative to traditional litigation is its relative simplicity of procedure and substance. At a hearing, this characteristic is reflected by the absence of rigid standards for the admission of evidence (Rule 31). The arbitrator is instructed to judge the relevance and materiality of the proffered evidence. Despite the fluid nature of the evidentiary standards in commercial arbitration, experience indicates that litigators are seldom able or willing to abandon the standard jury trial's*modus operandi*,

including the compulsion to continually test the boundaries of the rules of evidence applicable in court while strenuously challenging the same maneuvers by opposing counsel (International Chamber of Commerce, 1984). Hearings are also likely to be prolonged by the tendency of arbitrators to proceed cautiously in order to avoid even colourable grounds for vacate of award; these motivations may cause arbitrators to avoid dispositive rulings, accept the estimates of counsel regarding hearing schedules, and be very liberal in the admission of evidence. As a result, arbitration may be no less costly or lengthy than litigation. In the words of one experienced advocate, arbitration may or may not produce shorter resolution times, but arbitrations are more likely than litigation to "go the distance."

The roadblocks to expeditious adjudication and the inconsistency in *de facto* evidentiary standards that frequently arise at hearings are troubling and indicate a need for a careful scrutiny of this key dimension of the commercial arbitration process. Litigators, arbitrators and neutrally appointed authorities are obliged to confront this reality and openly and thoughtfully debate the utility of the current rudimentary evidentiary standards.

Judicial Intervention and Judicial Review of Arbitral Awards

There is an ongoing debate whether judicial intervention is free or judiciary supported arbitration is effective; if the answer is optimistic, then on what scale is the judicial intervention allowed?(Deniel, 2010) The involvement of judiciary with arbitration starts from very beginning even before the establishment of the arbitral tribunal by i) imposing injunction order to avoid damage, ii) verifying the arbitrability of disputes, iii) invalidating arbitration agreement, iv) examining arbitrator's ability, creditability and impartiality, v) determining all questions as to the tribunal's jurisdiction and scope, vi) enforcing of the interim order passed by the tribunal, vii) passing interim order to appoint legal guardians, to protect arbitral goods and property, to restrain transfer, to issue ad interim injunction, to appoint receiver and any other protective measure reasonable and appropriate by the court, and finally viii) the court has the authority to set aside any arbitral awards or any other awards axillary to arbitral awards. International commercial arbitration is sometimes effected by host countries' judicial intervention and it is anathema to arbitration, for instance, *Saipem S.p.A. v. the People's Republic of Bangladesh* (unreported award June 20, 2009). This arbitration proceeding was ruthlessly effected by judicial intervention; the subordinate judge of Dhaka revoked the tribunal authority, HCD of Supreme Court of Bangladesh stayed the proceeding, imposed several permanent injunctions and finally set aside proceeding of the arbitral award entertained by the HCD of the Supreme Court of Bangladesh and declared that in the eyes of law there is no existence of ICC award nor was there a need to set aside or enforce it (Roa, 2010).

According to the Justice VK Rajah in the case of *Tjong Very Sumito and others v Antig Investment Pte Ltd* (2009)SGCA 41, arbitration has firmly rooted in every legal system; judiciary shall facilitate and promot arbitration to remove any significant delay and find an appropriate balance between judicial intervention and judicial restraint.

Cost and Delay of Arbitration

In the last 30 years, commercial arbitration has been transformed into big business (Hollingdale, 2015). This conversion propagates enormous complaints and debates; two of them are about costliness and slowness. Indeed, delays are inherent in the arbitration process and costs of arbitration can be tremendous. Though all arbitration Acts, UNCITRAL model law and Act of 2001 axiom are held to reduce delays and costs but there is no provision that discusses the mechanism to justify the fee structure for arbitrators and arbitration institutions. Furthermore, Section 38 (7) Act of 2001 provides elasticity to arbitral tribunal to fix their costs of both types of arbitration.

In ad hoc arbitration, the Supreme Court of India in the case of *Union of India v. Singh Builders Syndicate* (2009) 4 SCC 523, observed that the arbitrator or arbitrators preside thus:

> *"the large number of sittings and charging of very high fees per sitting, with several add-ons, without any ceiling, have many a time resulted in the cost of arbitration approaching or even exceeding the amount involved in the dispute or the amount of the award."*

On the other hand, arbitration institution is concerned with the value of dispute not spending time for calculating arbitration cost (Hales, 2015). According to the explanation of Section 38 Act of 2001, arbitration costs include arbitrators' fees, witness fees, administrative fees, legal fees and expenses and additional layer of expenses incurred in connection with the arbitral proceedings and the arbitral award. This is vital in the absence of Bangladeshi statistics and taking into account some recent international surveys on arbitration cost and it examines Schedule I rules of arbitration of Bangladesh International Arbitration Centre (BIAC) to find the approximate cost of arbitration in Bangladesh. For better understanding we try to assess the cost of arbitration for 10 millions taka (disputed amount). The expenditure started from:

Registration fees: Each party pays 10,000 x 2= 20,000
Administrative fees 30,000 + 0.2% above 50, 00,000 = 40,000
Arbitrator's fee 5, 00, 000 + 5.0% above 50, 00,000 =7, 50,000
Total=8, 10,000

The abovementioned expenses do not include expert fees and expenses appointed by institution, witness fees and any other expenses incurred in connection with the arbitration proceeding that is payable by the parties (BIAC Rule 26 (3)).According to the Costs of International Arbitration Survey 2011 conducted by the Chartered Institute of Arbitration (CIArb), 26% of total cost were spent for the abovementioned headings that refers to 8, 10,000 taka and the remaining 74% (refers 23,00,000) were spent for barrister's and counsels' fees. This survey also states that 48% of the parties spent one fourth of the total arbitral amount and the remaining 52% on expenditure are more than one fourth of the total amount. The cost of arbitration is 13% more in civil law countries compared to common law countries where the former countries average cost is £1,521,000 and later charge £1,348,000 approximately. Furthermore, the UK charges less than other European countries. The average concluding time of arbitration is 17-20 months or more than that depending on the nature of the dispute. The length of dispute has thus increased the overall costs of arbitration dispute.

Conclusion & Recommendations

Arbitration is to provide a viable and acceptable alternative to litigation. In order to do so, it must become a more mature, more righteous process, guided by an identifiable corps of highly competent, sophisticated true neutrals. Those neutrals must consistently demonstrate to the parties, and the attorneys who represent them, that they are capable of producing thoughtful and well-reasoned results within the context of a procedurally and substantively fair adjudicatory framework. For arbitration to continue as an effective vehicle for dispute resolution, the inefficiencies inherent in the arbitration discovery process must be resolved first by identifying and analyzing the objectives of commercial arbitration and the problems that exist in the discovery process.

Also, in order for arbitration to continue as an alternative mechanism for resolving claims between disputants, discovery should be limited. A substantial portion of the arbitration expense is associated with extensive discovery. Such discovery arises from factors such as compelled arbitration, loose construction of the arbitration statutes and rules, arbitrators' lack of training in discovery, and arbitrators' lack of power to sanction. Legislatures and ADR associations should identify factors causing the extensive discovery abuses within specific industries.
Establishment of standards and trainings for arbitrators should be considered. The policies concerning arbitrators' qualifications must also be changed. Arbitrators ultimately decide on issues related to discovery, evidence and the outcome of the proceeding. However, many arbitrators are untrained and inexperienced. The parties have a right to expect consistent levels of arbitral qualifications and competency. Therefore, arbitrators should be trained to conduct discovery and taught proper consideration of the law of discovery. Moreover, arbitrators should be trained to identify parties' attempts to fish for claims, especially when the issues presented in the complaints or answers are broadly stated. The AAA and other neutral associations should educate arbitrators on the objectives that should be accomplished at each phase of a proceeding. The associations can educate the arbitrators by providing specific training and checklists. Furthermore, there should a check and balance between judicial interference and restraint and promulgate unequivocal judicial policies to facilitate and promote arbitration. Government should establish arbitration centers under auspicious supervision of the HCD of Supreme Court of Bangladesh with rational fee structures.

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