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The Nexus between Liberalization, Privatization, Globalization (LPG) and Arbitration and its Relevance During Covid-19

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ABSTRACT

In the era of globalization, there arose a surge in the privatization of commercial sectors, while liberalizing access to domestic and foreign markets. In time, the globalization phenomenon led to the privatization of a multitude of sectors in addition to the commercial arena, including the field of judicial institutions.

Accompanying this intense growth of trade and communication, it has become indispensable to harmonize and unify the political and economic forces of a trans-national community by way of implementing legal institutional mechanisms that prescribe for the preservation of interests and concurrently the resolution of surfacing disputes to maintain transparency, peace, and harmony amongst the countries. A legal mechanism that gained acclaim and prevalence to achieve the same in a judicial context was the practice of arbitration.

Arbitration is not limited to disputes strictly between individual countries or individual parties but is rather a remarkable blend of the two. It makes definitive provisions for providing the choice of representatives while remaining cost-efficient, time-bound, and bestows efficient resolutions while being mindful towards protecting the rights of the parties involved to a satisfactory extent.

The institution of arbitration yet remains flawed and inaccessible even with its rising popularity. This paper is an attempt by the author to identify the imperfections of arbitration as a dispute resolution mechanism, nevertheless throwing light at its significance in the era of liberalization, privatization, and globalization, and observing the impact the COVID-19 pandemic had upon the same.

***Keywords**: Arbitration, liberalization, globalization, privatization, COVID-19.*

I. INTRODUCTION

The Indian economic crisis of 1991 was a consequence of poor planning and execution of economic policies and its impact on trade, which subsequently led to the depletion of foreign

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exchange reserves, rendering the country helpless as to its repayment of borrowed funds and reached a point where it could barely sustain the country for a short period of few weeks. This led to a massive wave of economic reforms by way of implementing the concepts of 'liberalization', 'privatization', and 'globalization, most commonly known as the LPG model.

This reformation of the Indian economy was made under the Prime Ministerial reign of Sri. P V Narasimha Rao and the Finance Minister, Dr. Manmohan Singh. The duo turned the tide by implementing legislation called the 'New Economic Policy, 1991' which enabled reduced duties on import, thus opening the gates for private players from across the world while simultaneously promoting the export of indigenous goods manufactured in India. These actions were a bid to carry out the LPG model in the Indian economy successfully.

II. LPG MODEL- MEANING AND SIGNIFICANCE

Liberalization is the process wherein the economic policies of a country are made less constraining, enabling the participation and involvement of a large number of players. In other words, it was the loosening of the control the State had over economic activities.

Privatization is an act of transferring the ownership of any property or business from the government to a private entity.

Globalization includes the process of expansion of economic activities beyond the boundaries of a nation to achieve economic interdependence amongst countries.

The LPG Model, although brought the nation back from the brink of an economic collapse, was not free of its shortcomings. While it led to an astronomical growth rate in GDP, FDI, per capita income and employment rates, while reducing the government's burden as to financial administration, it also reduced the growth and development of the agricultural sector, increased competition, and contributed towards the annihilation of the environment by way of pollution and the clearance of vegetation cover and also widened the income disparities as the rich grew richer, and the poor grew poorer.

While the combined effect of LPG was significant, each aspect of the model bore its impact upon the Indian economy.

For instance, liberalization was observed to promote competition between domestic businesses and boost foreign trade, regulating imports and exports, amongst many other objectives. Thus, while it led to few desirable consequences such as free flow of the capital, enhanced stock market performance, diversification of investors, etc., it also caused few undesirable impacts such as the destabilization of the Indian economy owing to the massive redistribution of

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political and economic power. Similarly, privatization was encouraged to increase the inflow of Foreign Direct Investment (FDI), to ensure the financial strength of the country. While this decision was partially effective, it led to an increasing challenge of regulating monopoly and balancing the public interests.

Lastly, globalization was one of the most profitable actions undertaken by the country. It led to an increase in employment opportunities, thus leading to a higher standard of living for its citizens. With an expansion of the market, there was a massive influx of competition as well as development in the face of infrastructure. However, it also contributed towards the breeding of economic disparities, inflation, increased trade imbalances, and a multitude of such challenges that were to be resolved.

III. PREVALENCE OF ADR IN MODERN SOCIETY

Alternative dispute resolution mechanisms and their preference has sky-rocketed over the past few decades. There has been a notable decrease in the traditional approach to civil justice all across the world with an increased bias towards the mode of private dispute resolution and settlement. A primary argument to defend this transition was that this shift was merely a social movement wherein the public opts to prefer a justice system where a win-win situation always arises, thus equally catering to the rights of both parties.

Upon further scrutiny of the ADR mechanism, we find that, while it appears to be more beneficial rather than traditional courts in terms of monetary value, efficiency, etc., it is rather expedient in few ways.

The process of ADR does not depend upon the quality of settlement in most cases as the desired outcome is always something both parties agree to. There are no considerations as to the fairness or social impact to the most part, resulting in compromising the rights of parties in situations where they can be vindicated. ADR is in its essence a private adjudication of justice that lacks the publicity and societal exposure most cases in traditional courts are subjected to, which is essential in the dispensation of justice as it enables a way to keep the judiciary under scrutiny. The increased privatization of the judiciary has thus inevitably resulted in a massive decline in the pursuance of public court processes that is largely unregulated and unsupervised as compared to the traditional system of justice.

Another dark side of the ADR mechanism, in perspective, is the fact that the 'settlement' policy it so endorses in matters of justice is never limited to the matter at hand. Every conflict in society is to be viewed as a part of a larger class or community and not in isolation as the resolution of conflicts in courts have set an example to be followed, generalizing the principles

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incorporated within a conflict, as well as the solution provided for it. Legal rules that provide the framework to the justice system are mere exemplifications of speculative cases whose crux is based on reality. Disregarding these principles in pursuance of privatized justice system merely results in erosion of justice the parties seek, leading to inequality before law where there exists an unequal treatment of similar circumstances. ADR, in a way, has set forth a mindset that there exists nothing as 'formal justice', making the concept of a pre-established judicial system into an abstract matter. Yet, with society turning more complex, the disputes that occur within have reflected the same within them. There have been litigations that are uncharted territories to the justice system currently that need to be imminently resolved while the judiciary accommodates this massive influx of new societal conflicts. ADR is vital in ensuring justice in such situations, decreasing the burden on civil courts. However, ADR mechanisms are to adopt certain tools and principles to reflect the essence of the established legal institutions to ensure that the privatization of dispensation of the judiciary shall not dilute or eliminate the justice meant to be delivered.

(A) ADR and Arbitration in India

Alternative dispute resolution mechanisms in India provide a wide range of choices at the option and comfort of the parties as to the matters of cost, method, location, procedure, and representation. ADR mechanisms are an alternative over courts only in civil matters and are of two levels i.e., those who find their applicability nationwide, and those who are restricted to the domain of their state or union territory.

Arbitration is a mode of ADR, where a private adjudicator decides upon a matter referred to him, characterized by the autonomy of the parties involved in such adjudication. It has been a practice of antiquity in resolving family or trade disputes in India. The Indian Constitution has also directed the various state governments under Directive Principles of State Policy to incorporate arbitration in the settlement of international disputes.

The legislation relating to arbitration in India include,

1. The Arbitration Act, 1940
2. The Arbitration (Protocol and Convention) Act, 1937
3. The Foreign Awards (Recognition and Enforcement) Act, 1961
4. The Arbitration and Conciliation Act, 1996
5. The Arbitration and Conciliation (Amendment) Bill, 2015
6. The Arbitration and Conciliation (Amendment) Act, 2019
7. The Arbitration and Conciliation (Amendment) Ordinance, 2020

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8. The Arbitration and Conciliation (Amendment) Act, 2021
9. The UNCITRAL Model Law on International Commercial Arbitration
10. The New Delhi International Arbitration Centre Act, 2019

The most advancement in the legislation relating to arbitration in a global context was made in the Arbitration and Conciliation (Amendment) Bill of 2015, which was amended to include domestic and international matters within its purview. The Bill came into force on the 23rd of October, 2015. Few of the amendments included the restriction of the influence of domestic courts over matters concerning international commercial arbitration, the amendment as to Section 2(2), providing the applicability of Part-I where the place of arbitration is within India and applicability of sections 9, 27, 37(1)(a) and 37(3) to matters relating to international commercial arbitration, minimizing interference of the court in matters wherein an arbitral tribunal has been constituted etc., in its attempt to convert the country into a commercial hub at international level, making it investor-friendly.

The recent amendments to the Arbitration and Conciliation Act were made in 2019, and subsequently in 2020. The Arbitration and Conciliation (Amendment) Act, 2019 came into force on the 9th of August, 2019, with an aim to implement an effective arbitration structure while promoting institutional mechanism, trying to make up for the shortcomings of the 2015 Bill. This amendment inserted Part I-A, dealing with the establishment of the Arbitration Council of India, mandatory requirement of grading of arbitral institutions by ACI, insertion of the Eighth Schedule, enforcing confidentiality, fixing norms for accreditation of arbitrators, dealing with the requirements of qualification and experience by arbitrators, etc., making the law more progressive than it was made by the Bill of 2015.

The Arbitration and Conciliation (Amendment) Ordinance, 2020 was promulgated on the 4th of November, 2020. The Arbitration and Conciliation (Amendment) Act, 2021 was later passed on 11th March, 2021, replacing the Ordinance which contained the same provisions.

The Act of 2021 omitted the Eighth Schedule priorly introduced in the 2019 amendment, while fixing the norms for the accreditation of arbitrators as in compliance with the regulations specified along with amendment of section 36 i.e., with regards to stay on awards.

IV. ARBITRATION AND THE EFFECT OF LPG

With the countries across the world unifying their operations owing to the unprecedented development of LPG, developing countries have a window of opportunity to enforce regulations and policies to promote LPG by attracting foreign investors, traders, suppliers, and manufacturers. The inflow of international trade and the subsequent economic growth entails

complications and disputes unique to the existing legal framework in most developing countries. A lack of legal institutional mechanism should not gatekeep the entry of new players into the global scenario. Thus, arbitration is a preferential step forward in the judicial system to achieve expedite and inexpensive resolutions to the conflicts, thus overcoming barriers that would hinder investments or trading relationships with other countries.

With new participants emerging in the global market every second, it is difficult to limit the disputes of international commerce to only the International Court of Arbitration. Thus, an attempt has been made by the International Court of Arbitration to relay the expertise of the procedure of arbitration to the national committees of the International Chamber of Commerce spread across various continents, empowering them to approach the matters of international commercial disputes at the convenience of the parties. Also, the UNCITRAL Model Law on International Commercial Arbitration of 1985 has been adopted by numerous countries in a bid to enforce policies in compliance with it to draw the attention of potential players at the global market, incorporating its principles in their respective domestic legislation along with the New York Convention, which is a crucial instrument of laying the groundwork for international arbitration.

The commercial world continues to grow, adding new sectors, new chain of commands, innovations, and such that demand a reliable method of regulation. It calls for greater flexibility, accommodation, and affordability on behalf of the preferred dispute resolution mechanisms. The ADR method so commonly preferred in consideration of all these factors is arbitration, although there are other methods such as mediation, and negotiation at play.

Arbitration must balance the interests of the parties involved and the community in general and be mindful about providing the best of settlement options available to ensure proper dispensation of justice. The international arbitral practice has attracted much recognition due to the role played by the arbitrators who have opted to settle disputes beyond the purview of the respective national laws and freed the process of administration of justice beyond the constraints imposed by traditional legislative principles.

(A) Indian Scenario

The dawn of globalization has brought in a pioneering development in the Indian trade economy with policies enabling liberal movement of goods, services, labour, innovations, and finances across the globe. With this context, it is safe to say that there exists an interdependence between globalization and arbitration where both spheres have continually influenced the development of one another.

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India has been continuously affected by the evolution of commercial activities and arbitration practices of foreign nations, and its businesses are impacted by the arbitration laws of the nation and beyond. No commercial business functions in isolation. With the exposure brought in by the LPG policies, every domestic business competes nationally and internationally. It is a requirement for businesses to be familiar with international laws relating to commercial activities and arbitration and take proactive steps to align their business practices to the same, with India updating its arbitration practices to the same extent to be on par with other international arbitrary practices while catering to the needs of its citizens.

The Indian businesses on the global platform prioritize economic advancement and achieving commercial success over the legal framework they are continually subjected to. This arises a concern that the legal mechanism that India offers to its international clients may remain outdated and exploitable, hindering any further advancement of the country's economy. A precautionary measure to avoid the same is to focus on developing the arbitral laws of the country and its policies to further promote LPG.

The primary objective of establishing the arbitration mechanism in India was to present it as an alternative for dispute resolution due to the overwhelming backlog of cases in courts. The present practice of arbitration lacks consistency and application of prevailing laws and relevant legal principles and faces the urgency to constantly adapt to accommodate the changing interests and needs. It’s an impending requirement to have a definitive structure and more elaborate legislations to aid in the advancement of arbitration practices in the country.

(B) The New Delhi International Arbitration Centre

In the midst of this transformation, India had to focus on raising the FDI by highlighting the ease of conducting business in India as a selling point to the investors and introduce a mechanism to promote institutional domestic arbitration simultaneously with international arbitration, to ensure that India would be a preferred destination for arbitration procedures by international parties.

To spearhead this objective, a High-Level Committee was constituted in the Ministry of Law and Justice by the Indian Union government on the 29th December, 2016, under the aegis of Justice B. N Srikrishna, tasked with the overall aim of reviewing the institutionalization of arbitration mechanism in India. The main tasks assigned for the committee included reviewing the effectiveness of the present arbitration system and the current legal mechanism, functioning of arbitration institutions funded by the union government, financial and human resources and other facilities provided in the ADR institutions and, comparison and assessment of the gap in

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technical skill in ADR and its allied institutions of India and other countries. The report of this committee was produced in 2017 and was categorized into 3 parts.

- Part I: Committee's findings relating to the prevailing mechanism of arbitration in India and its recommendations.
- Part II: Review of the functioning of the International Centre for Alternative Dispute Resolution (ICADR) and its recommendations for its reform.
- Part III: Role played by arbitration in bilateral treaty disputes involving India and its recommendations.

The Committee then proceeded with a detailed analysis in Part II of the Report, throwing light upon the various shortcomings of the ICADR. It laid the foundation for the New Delhi International Arbitration Centre (NDIAC).

The New Delhi International Arbitration Centre Ordinance, 2019 was replaced by the New Delhi International Arbitration Centre Act, 2019, providing for the formation of the NDIAC to carry out arbitration, along with mediation and conciliation proceedings. The primary functions of the NDIAC are to facilitate the conduct of arbitration and conciliation professionally while ensuring it is timely and cost-efficient and promote studies in the field of ADR. There are seven members of the NDIAC including:

i. A Chairperson
ii. Not more than two persons having substantial knowledge, experience, research and teaching in both, domestic and international arbitration
iii. Three ex-officio members from different Ministries
iv. One representative from a recognized body of commerce and industry (part-time member)

V. COVID-19 AND ARBITRATION

The novel coronavirus affected all spheres of life of a common man. While few of such changes are temporary, others shall continue to impact conventional practices in the future. An important shift in the pandemic has been evident in the judicial system. There has been a restriction imposed in the orthodox manner of access to justice. The long-established practice of in-person interactions in the institutions of law was quickly replaced with remote technology to recommence the hearings.

While this was the last feasible option to ensure the carrying on of the judicial activities across the world, it brought in a new era in the field of legal institutions, incorporating technology

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with tradition in a manner that shall probably be adopted permanently in the near future for ease of convenience, cost, and time efficiency, while concurrently resulting in immense developments in the field of technology. In addition, it is probable that there shall be a substantial increase in accessing arbitration procedures online with a setback to traditional domestic courts. With restrictions placed upon international travel, it is difficult to assure personal presence or produce hard copies of documents and evidence in matters of international dispute.

In the domain of arbitration, to erase this inconvenience, measures have been taken by various arbitration institutions across the world to extend their services while accommodating the client's needs by digitalizing arbitration requests, establishing online portals to upload documents and publish guideline in pursuance of virtual hearings, providing the much-needed cybersecurity and flexibility in the judicial sphere and streamlining the process of arbitration as desired by the parties.

It is still a challenge to continue with this digitalized access to arbitration, as it depends on the technological expertise and competence of the parties as well as the counsels, arbitrators, etc. It is a hurdle to conduct the examination of witnesses, the privacy of consultation or to examine physical evidence over a phone call or a video call. This is more apparent in developing countries like India, where technology is not so advanced, leading to a lot of network disturbances and failures.

Another challenge posed by the pandemic for legal proceedings is the virus itself. There have been multiple contracts and legal obligations broken down due to the virus. The *force majeure* clause holds high significance in various legal relationships that are affected by the pandemic and the burden on the arbitration system is increasing at an alarming pace worldwide. The economies worldwide have taken a hit and there is a consistent threat of investor-State relationship fallouts. There is a significant spike in the break-downs within industries that led to a strain in international relations, particularly in the businesses of shipping, insurance, and energy, with the supply chains being affected owing to the travel restrictions and the conflict between the insured and the insurers over COVID related damages. This being uncharted territory for many countries, there is a definitive lack of precedents or guidelines to be followed, leading to the consistency and fairness aspect of arbitration taking a huge drop.

Digitalizing the arbitration process in the long term provides multiple advantages. While the obvious merit being the convenience of the parties, it also supports the nation financially by re-diverting the costs and other resources that would have been invested in ADR mechanisms

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for other priorities while implementing this simple technology to decide upon simple disputes in the near future. It shall also force the current arbitrators to adapt to technology and development, pushing them to be creative and practical in their duties. International arbitration finds this to be the most feasible alternative to decrease costs and increase the efficiency of deliberation of cross-country disputes, due to the fact that this was previously being experimented with for the same.

VI. CONCLUSION

In times when the economy of the world which once let humanity progress further than anyone's imagination-where the LPG model overturned the scenario of international relationships, pushing the countries towards progress-ended up in a nightmare as everything we knew changed owing to the unprecedented hurdle of the COVID-19 pandemic, we have come to see one of the foundation stones of the modern society struggling to maintain balance-the legal system. Arbitration, whether domestic or international, plays an equally vital role in all scenarios to empower every common man to seek justice in these trying times.

International arbitration is a milestone in the history of legal institutions, balancing conflicting interests across the globe. It's a trans-national phenomenon that maintains the efficacy and intricacy of international trade and economic relations.

When the backbone of international business i.e., international arbitration, took a hit due to the disruption caused by the pandemic, it was a demanding emergency to restructure the entire system to acclimatize to the uncertainty that the world was forced into and make the best out of it. While the initial stages may be rocky, it is known that humanity shall change to adapt to the forthcoming era of technology, and the judicial structure shall restructure itself for the same.

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