

WAKHARIYA & WAKHARIYA

ADVOCATES & SOLICITORS

Why I generally do not recommend Arbitration in India?

Arbitration is broadly defined as a *non-judicial* process of resolving disputes. The key word here is “non-judicial”, meaning outside the rigid structures of court processes.

Yet, experience shows that predominantly in India (and to some extent even elsewhere in the world), the judicial process is deeply inter-twined within the arbitration process because parties typically choose or are offered retired judges as arbitrators and parties almost always engage batteries of senior lawyers to represent them. This has a two-fold effect on the arbitration process. Judges can rarely give up their years of judicial discipline and rigor, and therefore require parties to follow a process which is not too dissimilar to a judicial process. Similarly, lawyers are unable to move away from their legal training and therefore, present all the legal technicalities in arbitration as they would in a courtroom, and of courses the ex-judge arbitrator allows it. This means that in reality arbitration (at least in India) is neither speedy nor inexpensive — the two principal reasons why everyone otherwise recommends arbitration.

The Government of India’s recent efforts (which are in fact a series of many over the past few years) to speed up arbitration and make it time bound, are laudatory, but in my view futile, because the ground reality is driven by the prevailing practices.

A better, albeit radical, alternative in India is to require that (i) ex-judges cannot be appointed as arbitrators; (ii) unless there is a specific question of law to be decided, lawyers should not be allowed to represent the litigants; and (iii) the supervisory jurisdiction of the local courts should be removed or seriously curtailed, and all interlocutory objections should be reserved for the time when the final award is challenged.

I believe these three radical changes to Indian arbitration rules will go a long way in making arbitration in India really attractive, speedy, litigant friendly and cost effective. Of course, most lawyers and ex-judges will not like these changes, for obvious reasons. But then, the Government’s prime objective should be to serve the ordinary litigants and not the special interests.

Shabbir S. Wakhariya, Esq.

September 24, 2018