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WHEN THE CURE BEGINS TO RESEMBLE THE DISEASE – GROWING CONCERNS IN ARBITRATION

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INTRODUCTION

International arbitration has long been marketed as the efficient, party driven alternative to court litigation because it provides a faster, cheaper, and more attuned to commercial realities of the disputes it resolves. Yet at the 4th ICA Conference, Justice Surya Kant offered a sobering diagnosis of the system's present state, one that practitioners and scholars can no longer afford to ignore. In his words, "The remedy has come to resemble the disease it was designed to cure¹." This blog unpacks that critique, tracing three reasons identified by Justice Kant before considering what a genuine course correction might look like.

THE GATEKEPT COMMUNITY

The first face of the problem lies in who gets to arbitrate. High value international arbitrations continue to rely on a strikingly small circle of repeat arbitrators, counsel and experts. It is true that expertise develops through experience and repeat engagement is a natural by-product of specialisation. The concern arises when that concentration becomes excessive, producing perceptions of exclusivity and closing opportunities for broader participation.

The numbers illustrate the imbalance starkly. ICSID's 2020 caseload data shows that Africa and the Middle East accounted for 26% of cases yet arbitrators from Asia-Pacific region made

¹ SCC Online Blog, CJI Surya Kant at the 4th ICA Conference: Arbitrating Indo-UK Commercial Disputes (June 6, 2026), <https://www.sconline.com/blog/post/2026/06/06/cji-surya-kant-4th-ica-conference-arbitrating-indo-uk-commercial-disputes/>

up only 12.6% of appointments. This indicates a mismatch between where disputes originate and decide who is trusted to decide them. The result is what might be described as two effective sub-markets: a small pool of well known “star” arbitrators and a much larger, equally qualified but far less visible pool that rarely gets a seat at the table. This dynamic played out visibly in *Halliburton Co v Chubb Bermuda Insurance Ltd*² where the UK Supreme Court examined whether an arbitrator’s acceptance of multiple appointments in related disputes created apparent bias. The decision of the court illustrated how repeat appointments, even without bias, can undermine arbitral neutrality. In essence, arbitration has absorbed the very habits of litigation it was designed to avoid.

COST, DURATION AND COMPLEXITY

The second concern is more evident to anyone who has sat through a modern arbitration: it no longer feels quick or cheap. It is important to refer Lord Denning’s caution, “arbitration is good so long as it is expeditious and just. If it becomes dilatory or unjust, then it is worse than litigation itself.”³ That warning now reads less like hyperbole and more like prophecy.

This concern is driven by four features. First, extensive pleadings have replaced the streamlined submissions arbitration once promised, mirroring court style litigation practice rather than departing from it. Second, hearings have grown prolonged, with multiple procedural stages extending timelines well beyond what parties originally anticipated. Third, escalating costs with legal fees being the chief among them are eroding the traditional advantage over litigation. Fourth, increasingly complex arbitration clauses are generating satellite disputes of their own as seen *Enercon (India) Ltd. and Ors. v. Enercon GmbH and Anr* (2014).⁴

Parties are frequently in preliminary litigations over jurisdiction, governing law, the validity of the arbitration clause and seat determination and all these issues arise before the underlying dispute is ever addressed on its merits. The Supreme Court’s landmark ruling in *BALCO case*⁵

² *Halliburton Co. v. Chubb Bermuda Ins. Ltd.*, (2020) 3 WLR 1474 : 2020 UKSC 48.

³ Ankita Sinha & Neelambika Singh, Trend of Increasing Judicial Intervention in Arbitral Award Challenge and Its Impact: A Case Study, MONDAQ (June 19, 2025), <https://www.mondaq.com/india/trials-appeals-compensation/1639522/trend-of-increasing-judicial-intervention-in-arbitral-award-challenge-and-its-impact-a-case-study>.

⁴ *Enercon (India) Ltd. and Ors. v. Enercon GmbH and Anr.*, (2014) 5 SCC 1.

⁵ *Bharat Aluminium Co. v. Kaiser Aluminium Technical Services Inc.*, (2012) 9 SCC 552.

remains a cornerstone in this discourse and more recent decisions such as *DMRC v Delhi Airport Metro Express Pvt Ltd* (2024)⁶ and *Rohan Builders*⁷ case show that these threshold battles are far from resolved in decades later.

PARTY AUTONOMY

The third and perhaps the most significant concern is the distortion of party autonomy. Autonomy of the parties is one of the salient features of arbitration proceedings, providing the parties freedom to shape their processes according to the needs. But Justice Kant criticises that this feature has stretched beyond the intended purposes.

The distortion lies in treating autonomy as an unrestricted right to hand pick arbitrators likely to favour one's own position rather than as a guarantee of an independent, impartial, and credible process capable of inducing confidence in its decision. Party autonomy was never meant to entitle parties to engineer the identity of the decision maker most likely to rule in their favour. What is required instead is a strengthening of the institutions of arbitration so that autonomy remains a guarantee of procedural fairness and not a procedural contestation.

WAY FORWARD

Diagnosing the problem is only half the task; Justice Kant's critique also points toward a constructive agenda for reform. Institutions should widen participation by diversifying arbitrator panels and mentoring newer practitioners to reduce over reliance on a narrow circle. Tribunals and counsels alike must exercise greater procedural discipline, actively managing pleadings and hearing length to avoid litigation proceedings. Parties and drafters must ensure there is clarity through sharper drafting and better institutional guidance on jurisdiction, governing law and seat as mentioned in the *TK Vishwanath Committee report*(2024)⁸ on arbitration reforms. Autonomy itself requires recalibration so that it governs procedural fairness rather than favouring one of the parties. Finally, institutions must be strengthened through safeguards modelled in *UNCITRAL/ICSID Code of Conduct for Arbitrators* (2023)

⁶ *Delhi Metro Rail Corporation Ltd. v. Delhi Airport Metro Express Pvt. Ltd.*, 2024 SCC OnLine SC 522.

⁷ *Rohan Builders (India) Pvt. Ltd. v. Berger Paints India Ltd.*, 2024 SCC OnLine SC 2494.

⁸ T.K. Viswanathan Comm. Rep., Report of the Expert Committee to Examine the Working of the Arbitration and Conciliation Act, 1996, and Recommend Reforms, Ministry of Law & Justice, Gov't of India (Feb. 7, 2024)

on double-hatting and disqualifications⁹, so that disputes over who arbitrate do not themselves become a source of delay.

CONCLUSION

Arbitration was conceived as the answer to the flaws in formal litigation such as expenses, delay, rigidity and inaccessibility. Justice Kant's speech is a reminder that a mechanism designed to cure those flaws without proper implementation has come to resemble the very same flaws. The way forward would not be to abandon arbitration but to recommit to its founding promise of a faster, fairer and more accessible mechanism.

⁹ UNCITRAL, UNCITRAL Code of Conduct for Arbitrators in International Investment Dispute Resolution art. 4 (advance copy, Oct. 2023), https://uncitral.un.org/sites/default/files/media-documents/uncitral/en/uncitral_scode_of_conduct_for_arbitrators_advance_copy_publ.pdf.