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A STUDY OF ARBITRATION VARIOUS MECHANISM

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Abstract

This research is about arbitration methods and why they are important, how they have responded to developments like globalisation and judicialization, and how they have maintained the transformation to mass democracies. The development of the court left behind the arbitration method. Continuous growth of cases and delay in adjudication which resulted in dissatisfaction and denied justice led the way for the development of Arbitration. Growing inter country trade relations resulted in the growth of disputes also. This also shows the need for evolution of conflict redressal system. An alternative method to litigation which includes the terms agreed upon the parties within the country laws. The enormous surge in economic growth of a nation in the last few decades has been followed by a significant increase in the number of commercial disputes. An alternative conflict resolution method such as arbitration has become increasingly important for enterprises operating in India as well as those conducting business with Indian firms. Having in mind the wider investigation between the standard of legal performance and economic progress, this study is an attempt to objectively analyse arbitration in India as a legal institution. In India, Lord Krishna in Mahabharata can be considered as an arbitrator who tried to mediate between Pandvas and Kaurvas and state the role of king who provides justice without throwing truth.

Keywords: - *International commercial Arbitration, ADR, Alabama Claims, Globalisation, Settlement.*

Introduction

The term arbitration is an instrument which resolves the disputes between parties without the intervention of the court but with involvement of a third person, called as arbitrator. It is one of

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the oldest ways of resolving the fights amongst people. The development of the court left behind the arbitration method. Continuous growth of cases and delay in adjudication which resulted in dissatisfaction and denied justice led the way for the development of Arbitration. This way provided a speedy and expeditious option to resolve the dispute considering the preservation of Human relations.

The commercial transaction between countries also led to the international and national dispute. To avoid litigation across the national courts over commercial disputes, International commercial Arbitration came into existence. Arbitrators may be more than one. The disputing parties rest in the judgement given by the arbitrator and show readiness to accept by the judgement. Growing inter country trade relations resulted in the growth of disputes also. This also shows the need for evolution of conflict redressal system. An alternative method to litigation which includes the terms agreed upon the parties within the country laws. Arbitration can be "institutional" or "Ad-hoc". The arbitration is based on the terms & condition of the contract.[2]

Prehistoric Scenario

The evolution of arbitration has a long history in different countries including common and civil law of the countries. The history of the origin of arbitration is ambiguous.

The first arbitrator as per Biblical account was Solomon who settled the dispute regarding a baby boy between two females who were claiming his mother. In the story[3] two mothers were fighting over to title a baby. Both mothers gave birth to a baby boy. One baby succumbs to death during night and the other mother who lost the baby claimed that the live child was hers. The king suggested that baby should be cut into pieces and each part should be given to both women.[4] Real mother instantly declared that she can give her baby to the other woman and can't see the baby being killed. The King judgement stated the woman showed empathy was the real mother and the other woman returned her baby. During the reign The Alexander the Great's father Phillip the II, referred to arbitration as a medium to settle local disputes which arose from the peace treaties as negotiated with the Greece Southern States in 337 BC. During the Babylonian days, the term arbitration was started to resolve great disputes by peace.[5] It was

[2] Tushar Kumar Biswas, Introduction to Arbitration in India: The Role of the Judiciary, 12-15(2014 ed.)
[3] The King James Bible 1 Kings 3:16-28
[4] Dr. N.V. Pranjape, Arbitration and Conciliation Act p.1, Second Edition 2002
[5] Vardachariar, Hindu Judicial System (1946), 1953 PP. 10,97

declared that the Babylon, and as per the Code sovereign have the obligation to supervise the justice by the mode of arbitration. The concept arbitration spread to Roman civilization and was slowly influenced by Roman laws. This also moved to the countries which have trading relations with Rome.

In England, the concept of arbitration existed before the establishment of Kings. As according to Massey England practiced arbitration as a means of commercial conflict settlement in 1224. The first ever recorded case expressing the arbitration law in England was in 1698.

In India, Lord Krishna in Mahabharata can be considered as an arbitrator who tried to mediate between Pandvas and Kaurvas and state the role of king who provides justice without throwing truth. In times of Aryan, disputes were peacefully used to settle the disputes with mediation of Kulas; Srenis the King had power to settle on conflict.[6]

Indian Guilds System

Guilds were an association of persons who were practicing the same trade. These guilds in fourth and third century BC settled their disputes among the members through the process of arbitration. The dispute resolution between guilds was accomplished by arbitration was an essential feature of the ancient Indian guilds system.[7]

Maurya Period

India going through, ancient history in Mauryan Dynasty there were two kinds of courts:

1. The Civil courts were known as Dharmastheya dealing with the civil matters. It was administered by three each dharmasthas & amatyas.
2. The Criminal Court called as Kantakasodhana considering the criminal cases. These courts acted as special tribunals which were administered by three pradestris or amatyas assisted by informers.

The important cities and their headquarters, which had at least one police head office and court, were arranged. Apart from the matters, small and minor cases in the villages were resolved by the elders in the village panchayats. In matters of civil cases, the code of Hindu law, cases were

[6] P.C. Rao and William Sheffiled, Arbitration Dispute Resolution-What it is and how it works P-27 1997 edn.Rep.2002
[7] Dr. Anupam Kurlwal, An Introduction to Alternative Dispute Resolution Sytem P.62-67 ed.2017

administered based on the Shastras. The law sources according to Kautalya, were Dharma (accepted principles), Vyavahara (legal codes current at the time) charitra or customs and Rajasasaru (The King's degree). [8]

Gupta Period

In Gupta age, the judicial system was placed at the lowest level. The consuls were appointed in order to resolve the disputes amongst the parties which are present before them. There were different consuls which were administered to decide different matters which are presented before them. When dispute are not resolved by any amicable settlement then it was resolved by consuls. The King, Council of ministers, judges and priest supervised by the highest solicit of appeal.[9]

Mughal Period

In Mughal period there was judicial system however which resolved dispute in village courts and in case of appeal can be made to Panchayat or caste courts, the mediation of candid empire, or by chance to enact. The rule was regulated by Islamic law, which were confined by Hedaya meaning arbitration. There was multiplicity of courts dealing with distinct kinds of cases. The main different kinds of courts are: - Court of Religious Law, Court of Political matters & Court of Secular Law resolving the matters pertaining to respective areas. Persian used as court language during this period. The punishment involved level of degree starting from imprisonment to death penalty, severe punishment included mutation and flogging. Death Penalty was given with the prior approval of the Emperors[10]. The emperor acted as the final court of appeal in the Mughal System.

Maratha Period

The law during this period was informal and not practiced strictly. If a party fails to settle their dispute friendly, they can switch to arbitrator method to get settlement between the parties. The arbitrator can settle the dispute matter lawfully. The Maratha King was the final authority.[11]

British Period

[8] Dr. Anupam Kurlwal, An Introduction to Alternative Dispute Resolution Sytem P.32-50 ed.2011
[9] R.C. Majumdar, Corporate Life in Ancient India Calcutta 1969 PP.138-147 ed. 2010
[10] Dr. N.V. Pranjape, Arbitration and Conciliation Act p.12 Second Edition 2002
[11] Avtar Singh, Law of Arbitration and Conciliation p.393 seventh ed. 2010

During the British Raj, the alternative dispute settlement system was developed and formed. However, with the British Raj onset formal legal system was introduced which had English Medium. Indian modern arbitration started with Bengal Governance. In 1772, 1780 and 1781 arbitration regulation really practiced was of arbitral nature. The Bengal Resolution Act of 1772 and 1782 provided parties may submit dispute to an arbitrator. Arbitrator can be appointed by mutual consent. The suits between the parties to be for accounts breach of contract and partnership debts. The value for suit must not be more than 200 sicca (coin used in pre independence). His verdict should have been binding on both the parties. Later, the civil courts procedure was fortified based on Act VIII of 1857 excepting one incorporated by the royal. It is prescribed as per assigned section 3(12) - 3(25) concerning arbitration in cases. Later, in 1899 the Indian Arbitration Act was enacted based on the English Arbitration Act, 1889. However, this was only limited to three presidency states namely Madras, Calcutta and Bombay. As usual this was a preliminary attempt therefore it had several shortcomings. Later, when the civil procedure code was amended and enacted again, there was no serious change in the laws. During the 1940 Arbitration Act was passed. It was replaced by the Arbitration Act of 1899 and section 89, Section 104(1) clauses (a) to (f) and the Schedule II of the civil procedure 1908.[12]

Alabama Claims- First International Arbitration

Alabama Claims of United States from the United Kingdom 1869 emphasized the need for having an international arbitration law to be followed in the matters between two or more States. In Alabama Claims, 1869, United States of America made huge demands for damages caused from the United Kingdom (Great Britain) against the attacks on merchant ships by the Confederate Navy and commerce bandits were made in British shipyards during American Civil War. In this case, the US claims Britain had breached neutrality by granting five warships to be established especially the Alabama, awaking which ultimately arrive into marine service with the covenant. The main claims were with the most Known, the CSS Alabama, which lasted for more than 60 prizes former sunk of the French cost,1864. The tribunal was composed of representative from different countries such as United States, Britain, Switzerland Italy, and Brazil. Mediations took berth in Suitland, Maryland in the residence of businessmen Samuel

[12] Nripendra Nath Sircar, The Law of Arbitration in British India, 1942 p.30 ed. 2011

Taylor Suit. The forum session was carried in the reception room of Town Hall in Geneva, Switzerland.

Britain resolved the incident compensating the United States by $15.5 million. Thus, the quarrel ended and a peace treaty was signed. This renewed the amiable alliances between the United States and Britain. This intercontinental arbitration settled antecedent. This awakened concern in the international arena for code PIL (public international law.) This case established principle of international arbitration. This mediation of the Alabama Claims was herald to The Hague Convention, the League of Nations, the World Court, and the United Nations. [13]

The Code of International Disputes for Pacific Settlement

This code is about the pacific settlement of dispute decided at The Hague in 1899. The Conference was open at the action of Car Nicolas II of Russia with an aim of probing the most intention to assure advantage to the people with original and everlasting peace and mainly of restraining the continuous evolution of existing ammunition. One of aims of the conference was to vitality scheme of mainly friendly international commercial dispute resolution, especially international commercial arbitration as a friendly settlement between parties. The members of the Conference were cautions that, during the last 100 years there had been large number of favourable international arbitration, initially with the 'Jay Treaty' which had Mixed Committee at the bit of the 18th century embracing at the height in 1871-72 during the Arbitration of Alabama. Furthermore, the Institute de Droit International adopted a convention of procedure for arbitration in 1875 for which it was acknowledged with the Nobel Prize for settling disputes in peaceful manner. This Conference developed in the establishment of the Permanent Court of Arbitration which is accessible to all. The first global structure created for the agreement of conflict amid States. The Code of 1899, the arbitration was made as the "most powerful method, and simultaneously also the most unbiased, meant for resolving conflict which has declined to decide". The Code of 1899 was amended in 1907 the 2nd Hague Convention. The Permanent Court of Settlement is the ordinary awareness but regulatory organisation with the matter of having efforts which were available to be meant to be served as the note for the purpose of international arbitration and other common procedures, including commissions of query and reconcilement.[14] Permanent Court of Arbitration has strict jurisdiction for conflict

[13] Justice Dilip B. Bhosale. An Assessment of ADR in India p.57 ed. 2005
[14] Shabhai Rosenne, "The Hague Peace Conferences of 1899 and 1907 and International Arbitration, Reports and documents" page xxi TMC Asser press (2001)

management placed on the Permanent Court of Arbitration authorizing documents or occupied on multilateral or bilateral treaties. If the tribunal of PCA consists of five arbitrators, any two are chosen by one, arbitration (nation of the party is involved). Rest four arbitrators decide the fifth one and the managing arbitrator.[15]

UNCLOS Arbitration

The United Nations Convention on the Law of the Sea (UNCLOS) charter requires to settle as per Article 287, Part XV, which provides a way out for a conflict verdict of the instrument concerning the marine border line where the member of the states can opt either the

1. International court of justice for the Sea Law.
2. Court at International level
3. Arbitral bar (Addendum VII, UNCLOS)
4. A specific arbitral bar (Addendum VIII).

When states representing two members elected any conflict resolving methods, the third measure can be utilized. On August 2016, the PCA has taken 12 cases admitted which were started by state under Addendum VII to the UNCLOS.[16]

Geneva Protocol 1923

Gradually, the concept of international arbitration gained strength on the basis of conventions held under the purview of various international treaties/organisations League of Nations whose main aims was to maintain the World Peace. The main role of these deals and code is to develop arbitration which aid to reinforcing arbitration award. The Geneva Convention 1923 was signed in the conference or the League of Nations assembly occurred on 24th September, 1923. The Geneva Protocol emphasizes the principle which focuses on issue of national armaments which needs to be reduced in order to provide national safety to the world. This Protocol consisting of eight articles inter alia provided that one of the contracting nation to be known as the legality of an alliance if connecting current or future variation amongst the parties, which subject respectively to the territory zone of difference contacting nation by which the team involves in a contracting agree to submission to arbitration or any change which may appear in contact when to contract described to commercial issues or to any other matter

[15] Avtar Singh, Law of Arbitration and Conciliation p.393 ed. seventh
[16] Dr. Anupam Kurlwal, An Introduction to Alternative Dispute Resolution Sytem P.73-76 ed.2017

adept of resolution by arbitration, when it had taken place in any country to whose borderline was not subject for any party is matter. One of contacting nation reserves the right to restrict the need cited to the above of contracts which are expressed commercial based on national law.[17] When contact state which avail the right it will be notify to the General Secretary of the League of Nations in such that way contacting states will be informed. The arbitral action, including the composition of the arbitration tribunal, will be administered by the wish of the states and the country's law in which the territory the arbitration case may takes place. Each contacting nation commit assure the performance by its authorities in conformity with the provision of law of arbitral award which is made in the own territory based on protocol.

The Convention of Geneva 1927 – Foreign Arbitral Awards

Under the Geneva code only arbitral awards are better than court decisions that could be enforced by the foreign State. Such shortcoming was eliminated in international convention on the completion of foreign arbitral awards in 1927 referred as (Geneva Convention).Since the arbitral awards are quite easier, due to its contractual nature of arbitration. Arbitral Awards Formation of the League of Nation was involved in the outcome of other alliance for attaining the awareness and execution of the international arbitral award rising out of arbitration transaction following the Protocol of the Geneva. Such convention was established on September 26, 1927 at Geneva. Such a Convention enlisted 11 articles. The provision of this convention applied only two awards such as when arbitral awards was made post coming into force of the code on arbitration clauses which opened in Geneva on 24th Sep 1923. Furthermore, the provision of this code will not take away any interested nation which availing right on himself about the arbitral award in such a way and to the ambition which is allowed by the law or code of the country where arbitral award is needed to be believed upon.[18]The Geneva Convention 1927 no doubt builds up the Geneva Protocol raising possibility enforcing an award in a contacting state. Based on the Geneva Code one eye contacting state involves requisite to recognize it is essential **a**nd to enforce in respect of procedural rules of its sovereign, arbitration awards may be other contacting state agreeable to the included the Geneva Protocol. However, this Convention not conducive to the rapid delivery of foreign arbitral awards and the demand of international trade acting as beneficiary of award which was needed to view to the court, before whom the matter came for imposition, when the award had become absolute

[17] Andrew Mc thonia and Thomas L. Shaffer, For Reconciliation, 94 Yale law Journal, 1985
[18] B.S. Murphy, ADR's Impact on international Commerce. Dispute Resolution Journal, December 1993 Pp 68-77

the country by which it was created. Thus, when the party rival the award which could have been definitely interfere with its operation on the grounds which resulted in award acted was as subject matter of lawsuit.

The Convention of Montevideo

The Montevideo Convention based on the duties and rights of the State is a bond which was signed in Uruguay on December 26, 1933 whiles the 7th American States of International Conference. The convention codifies as the declarative theory of Statehood which was accepted as customary part at international. The convention includes the definition and rights and duties of the Statehood. Article-1 of the act, agreed on the four conditions for Statehood which has been recognised by many international organisations as a correct statement about international law. As per this article, the State acts as a person of international law. They must possess such qualifications:

(a) Long Lasting population;

(b) A detailed territory;

(c) Government; and

(d) Holding capacity to which enter into relations

This is also now in charter of the United Nations. This convention of course did not dwell upon directly on international commercial arbitration. However, its acceptance by European Union, Switzerland and other countries and its acceptance by United Nations gave impetus to make contracts between various countries as per International law and solve their problem across the table. This indirectly affected in a positive way towards development of Arbitration at International level.[19]

International Commercial Arbitration based on European Code

21st April, 1961, European code was signed and came into action on 1964. Up to now 31 states have approved and authorize the convention. The Convention aimed to remove difficulties in the field of international commercial arbitration in different European countries. It is related to

[19] Elkouri and Elkouri, How arbitration works P. 45 ed. 6th 2008

arbitration agreements, procedure and awards. This is the most important regional instrument. It has given a great post in the area of global arbitration.

Washington Convention or ICSID

The International Centre for the Settlement of Investment Disputes Convention has been a major source of International Arbitration which suggests an easy way to resolve the conflict. The globalization of the economy resulted in direct investment of multinational companies in different third-world or developing countries. This also increased the altercation / disputes between States and investing companies. To streamline the arbitration in this field International Centre for the resolution of was organised. It was marked in 1965 and approved by more than 150 countries. It also focuses on investment conflicted areas, clashing which developed between the presenter state and foreign capitalist.

ICSID acts as an ad hoc Court formed agreeable to UNCITRAL regulations to mediate international agreement and provide foreign capitalist with dispute redressed against the states for any breaches of the contract. It was created such that local courts cannot view it and make it more and more foreseeable.[20]

Finally, Global arbitration is guided by multilateral and bilateral treaties, including investment deals or security against the investment agreements, commerce and navigation treaties, bilateral friendship, dealing only arbitration.

Arbitration Act 1979 of United Kingdom

Arbitration Act 1979 was enacted by the UK Parliament. Main agenda for its formation was the development of arbitration law in England. Previous to this Act, arbitration law was former to the Arbitration Act 1950 which granted the use of the case static agenda and other old methods of judicial interference. The former law has huge cost and time which was made the law for arbitration as an unpopular in order to conduct such mediation This Act completely abolished this elongated procedure and other form of judicial interference and replaced the time barred system to appeal to the High Court of England and Wales.

The Arbitration Conciliation Act, 1996 (India)

[20] B.R. Agarwala, Our Judiciary pp.1-3 ed. 3rd 2005

In recent years, various significant developments in international business are operating out of India resulting in international cases. Therefore, there was a need to amend the Arbitration Act 1940 and development of arbitration can be a fast way out to lethargic lawsuits pending for long durations. As per the 1940 Act, there are three stages of the arbitration when the court can intervene. Such as

1. Reference of the dispute to the arbitral tribunal
2. Proceeding duration before tribunal
3. Award passed by tribunal

Pertaining the above supportive reasons and as too many cook spoils the broth similar involvement of Parties, lawyers made it outdated the case and this resulted in the abolishment of the Act. The amended version of the 1996 Act came into the picture. This act gave an efficient and rapid resolving framework which raised the Indian dispute resolving system and also attracted investment across global and ensuring the belief on Indian legal process for resolving the International & national System. However this resolving dispute became a settlement way to be workout in respective given time.

The Arbitration Act of 1996 Act has four important parts.

1. Part I focus on the Practice of arbitration at domestic & International Level.
2. Part II provides the process of foreign awards which is governed as per Geneva Code.
3. Part III- Deals in the method of Conciliation another form of Arbitration.
4. Part - IV - contains supplementary provisions of the Arbitration.

UNCITRAL only considers matters of International Commercial Arbitration, whereas 1996 Act holds both international and national matters. [21]

Conclusion:

We can conclude that international arbitration has come up a long way and is in highly developed state. More and more corporate of different countries are resorting to institutional arbitration through various international institutions. International organizations have played a very

[21] Dr. Anupam Kurlwal, An Introduction to Alternative Dispute Resolution Sytem P.12-35 ed.2014

significant role in evolution of arbitration as Alternative Dispute Resolution Mechanism. The globalisation which makes one world supports the development of international arbitration due to growing development of international business and alternatively become a cheapest, quicker and more effective form of dispute resolution in the modern time. International arbitration is part of Alternate Dispute Resolution (ADR) which includes facilities in resolving commercial disputes such as negotiation, mediation, conciliation. Ample supporting reason caused growth are speed of resolution, level of confidentiality, flexibility given to both parties and effectiveness are effective methods for settling commercial disputes. Due to the recognition received by the UN, the alternative dispute settlement has been coming under increased litigation amongst the country.