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INCREASING ACCESS TO INTERNATIONAL ARBITRATION

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ABSTRACT

"Honest Men Dread Arbitration More Than They Dread Law Suits".

-Robertson's History

In this developing era, there is a huge increase in opting for the alternative mechanism of resolving disputes over the traditional Litigation.Arbitration is the Concept of Ancient times, it all started in Greek and Roman city-states. At the end of the nineteenth century, the concept of Arbitration was introduced in India but statutorily recognized in India when the Act, "Indian Arbitration Act, 1899", came into force. It was confined to three presidency towns only and i.e., Madras, Bombay, and Calcutta. In some cases, "Arbitration has been used even when hostilities between the parties had broken out, as in the case of the RANN OF KUTCH between India and Pakistan, involving a territorial dispute which was decided by Arbitration, 1968".[2]Arbitration and International Arbitration is the most preferred method that people choose nowadays for resolving their disputes quicker and more swiftly. Where matters cross the international boundaries there particularly International Arbitration is the only method opted by the person or persons to settle the dispute. This article is enlightening about the arbitration and its proceedings, introduction to international arbitration by stating the reason behind the increasing access to it, justified by the judicial approach, and followed by the concluding remarks including tools and innovative ideas to increase access to the international arbitrations so that people can access to justice delivery system more easily without spending years for it unlike in the civil courts.

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[2]J.G. Wetter, A.W. Sijthoff, Leyden, et.al., The International Arbitral Process, vol. I, 250-275 (for the text of the award, see 7 ILM 633 (1968)).

CONCEPT OF ARBITRATION:

Arbitration is termed as 'the process of resolving disputes between states means of an arbitral tribunal appointed by the parties.[3]

The international law commission defined arbitration as the procedure for the settlement of disputes between states, by a binding award based on the law as the result of an undertaking voluntarily accepted.[4]

In a general sense, Arbitration is one of the effective methods of ADR (Alternative Dispute Resolution). Arbitration refers to a process to settle the dispute or resolve the conflict without opting for litigation. Arbitration consists of a neutral third party i.e., an Arbitrator who adjudicates the proceeding and gives the arbitral award. Arbitration can be done between individuals, States, one party is an individual and the other is a state and also between countries, companies, etc., the ADR deals with the matter related to civil, commercial, and family disputes. The decision in arbitration pronounced by the arbitrator is binding on both the parties, it is still voluntary as both the parties voluntarily agreed to come to the proceedings and appoint the arbitrator and the panel of arbitrators. Generally, Arbitration initiates when the Requesting party requests by giving notice to the other party regarding showing his intent of resolving the matter through arbitration.

Before initiating, the proceeding arbitrator asks the parties to sign an agreementthat says about the confidentiality, bindingness, and other condition that is ordered by the side of the Honorable Court.

This method of ADR has commonly opted in disputes that are commercial in nature. Normally those parties refer the dispute to the arbitration who put the arbitration clause in the contract while entering into the same. Particularly in Arbitration parties cannot withdraw

from the proceedings one-sidedly. The parties with each other consent select the language, venue, time, and date together and none of the parties gets any privilege over the other.

There are various kinds of Arbitration: Domestic Arbitration, International Arbitration, International Commercial Arbitration, Ad-hoc Arbitration, Fast-track Arbitration, Institutional Arbitration.

[3]Rudolf Bernhardt (ed.), Vol. I Encyclopedia of Public International Law, 'Settlement od Disputes', Published under the auspices of Max Plank Institute for Comparative Public Law & International Law, 1981.
[4]ILC, Report: concerning the work of its Tenth Session, 1958, G.A.O.R., Thirteenth Session, suppl. No. 9 (A/3859).

ADVANTAGES OF ARBITRATION PROCEEDING:

Lord Mustill has stated that "the great advantage of arbitration is that it combines the strength with flexibility. Strength because it yields enforceable decisions, and is backed by a judicial framework that, in the last resort, can call upon the coercive powers of the state. Flexible because it allows the contestants to choose the procedure which fits the nature of the dispute and the business context in which it occurs"[5] (footnoting diary, pg. 2-010, by book). The various other advantages of the Arbitration Proceedings are as follows;

- Cost-Effective:The topmostadvantage of the proceedings is that it is cost-effective in comparison to civil litigation. The proceedings are simple in nature which results in not too much cost for the other procedures and documentation.
- Neutrality: Here the arbitrator or the panel of arbitrators work in the capacity of a third party which remains neutral with both the parties throughout the proceedings and at the time of making the decision as well.
- Confidentiality: It is the key aspect of the Arbitration whether the proceedings take place in any manner the details shared by both the parties remain confidential by both the parties themselves and the arbitrator as well in the room and outside the room unless the parties didn't want to reveal their information related to their dispute.
- Effect of the Award: The decision made by the arbitrator or panel of arbitrators is having the involvement of the consent of both the parties moreover, it is final and binding.
- Award: In such proceedings, the award given by the arbitrator is executable and enforceable. Award of interest up to 18% maximum p.a...
- Settle Disputes Privately: When parties approach for the arbitration then appointed with one or more than one arbitrator and without any involvement of the rest public, they settle their dispute quietly and in private.
- Party-Centric: The whole procedure is based on parties. Arbitration is more formal than other alternatives of ADR and its decision is binding too on the parties but still, the process is party-centric they can try innovative ideas on their end to resolve their dispute, they can make new proposals for the opposite parties for negotiating.

[5]D. Rautray, Master guide to arbitration in India 2-010.

- Assistance: Here, the parties get the assistance of the arbitrator at every step of their discussionto resolve their dispute by communicating it with each other so that they won't be needed to go to court.
- Quick disposal: The arbitration has a good ratio of quick disposal. Comparatively to court, it takes less timing to disposed-off a case. As normally in two to four sessions the case will be disposed-off but litigation took months and sometimes years to disposing-off a particular case.

CONCEPT OF INTERNATIONAL ARBITRATION:

The Arbitration is an old institution, but in its present form, it started with a mixed claims commission established under the Jay Treaty of 1794, between Great Britain and the United States.[6]

According to "**VIA Mediation and Arbitration Centre**","The arbitration which takes place within the territory of India or outside India or it has any element which has foreign origin is termed as International Arbitration. The facts and circumstances of the dispute between the parties decide that of which origin the law should apply to the dispute".

Generally, as the name suggests International Arbitration is, where two parties enter into an agreement, and in their agreement, they add an arbitration clause which says if in the future they face any disputewhich arises from any foreign element then they will resolve it outside the domestic territory that means internationally. International arbitration is also referred to as 'future-based arbitration'.

International Arbitration is enforceable in India and Indian laws are applicable too in International Arbitration. It is the globally preferred method when it comes to resolving matters which cross international boundaries. It is a private mechanism of resolving the dispute, where parties from other countries approach a neutral panel,and the decision made by the panel is referredto as Arbitral Award is having enforceability in 157 Countries that have adopted the Convention on the "Recognition and Enforcement of Foreign Arbitral Awards", also known as the "New York Convention".

There are other methods as well to resolve cross-border matters like international mediation and negation but with a condition, that party has to be willing to negotiate only then it could work otherwise not. In choosing the International Arbitration the best part is its decision is

[6]Treaty of Amity, commerce and Navigation, 1 Mailoy 590.

final and binding so parties are bound to accept it. Also, it's not like the immediate action like a legal dispute it will take time to initiate and process, approximately it took 18 months from the date of filing till the parties are awarded the Arbitral Award by the panel of arbitrators.

REASONS BEHIND INCREASING ACCESS TO INTERNATIONAL ARBITRATION:

International Arbitration has almost the same procedure as Arbitration does, with the benefits of the arbitration proceedings adding to that there are more reasons why there is more inclination of people towards the International Arbitration.

1. Provides a neutral forum for the resolution.
   International Arbitration helps the parties in providinga neutral platform for resolving the cross-border dispute in various ways, such as;
   - It allows parties to check and appoint the arbitrator of their choice, whom they believe will be beneficial in resolving their conflict. Also, who has the potential plus give them ample time to resolve the dispute.
   - It offers each party the same opportunity to present their particular case by exchanging the various written pleading, highlighting some facts asked about legal basis supported by the actual evidence, witness statement, other required reports, etc.

2. Ample opportunity to present the case.
   International Arbitration delivers an ample number of opportunities to both parties to present well each of their sides. Such as;
   - Confidentiality: confidentiality is one of the crucial rules in most arbitration proceedings for the parties and the arbitrator as well. In these proceedings when parties are not afraid of losing the confidentiality of their dispute then they will fearlessly and being unhesitant can present their case in front of the arbitrator.
   - In actual international arbitration proceedings parties are allowed to request the important documents and other relevant material from the opposing party that is required and related to the dispute, for example, any piece of information or any documentation for proof, any other file, etc., that can help the party in making his/her argument strong.

3. Efficient Resolution.

   This mode of Arbitration offers a quick outcome of the dispute resolution than the traditional method i.e., litigation, in my ways. Also, it helps in resolving disputes more swiftly. Here the panel makes their best efforts in resolving the conflict as early as it could be practically possible. It provides efficient resolution in all manner whether it is cost, duration, speed, opportunities to make endless proposals and to make counteroffers as well to the offers others make while negotiating or arbitrating, chances to try to resolve.

4. Awarded Reimbursement.

   In international proceedings sometimes parties can seek the same form of relief as they get in the Courts, the most common one is compensation for the damages with interest. Sometimes parties are also reimbursed with the counsel's fee and other proceeding costs but it is discretionary, based on the arbitral tribunal. Under certain conditions, the Arbitral Tribunal decides whether the parties will get dispute.

JUDICIAL APPROACH TOWARDS ARBITRATION:

Initially in the country, Arbitration was governed by the Indian Arbitration Act, 1940. Through arbitration, at first, the courts of India come to know about ADR. In beginning, the courts keenly observed the supervision of Arbitral Tribunals to see how the arbitrator works in respect of facilitating the proceeding and making a decision that to binding on both the parties to resolve the dispute. But later, in the case Food Corporation of India v. Jogindarlal Mohindarpal,[7] Arbitration was successfully bought forth as a dispute resolution mechanism without any suspicion or queries (from blog VIA mediation and arbitration Centre).

The Indian Judiciary vast at some 17,000 judges and while it boasts many professional and diligent judges, the system is under strain. With almost24 a million cases still pending in the Indian judiciary system.[8]

[7]1989(2) SCC 347.

[8]Arbitration in India, Available at: https://www.herbertsmithfreehills.com/latest-thinking/arbitration-in-india-dispute-resolution-in-the-worlds-largest-democracy (Visited on March 26, 2022)

The judicial approach to the word "Arbitration" plays a very vital role. The judicial system makes huge efforts in making India arbitration-friendly. Supreme Court and High courts of various states put their contribution to making arbitration work. After a time, the courts themselves suggest the parties who initiated the proceedings in the civil courts pause the proceeding and try the matter to resolve by arbitration once, when they see that this matter could be solved or disposed of with the help of this alternative method of dispute resolution mechanism.There is an advantage that the parties can try arbitration to resolve their dispute before going to court and also try arbitration while they're at court but there are certain conditions applied for that as well. In Arbitration as well parties can seek the assistance of the court in certain areas if they wanted to.

Having said that, Section-8 of the Arbitration and Conciliation Act, 1966 states that, "power to refer parties to arbitration where there is an arbitration agreement" if the matter that is bought before the court is the subject of an arbitration agreement,then the court can introduce the parties to the theme of the arbitration and Section-45 stated about "power of judicial authority to refer parties to arbitration", but here is a condition that court can decline the refer parties for the arbitration if the court finds out that the arbitration agreement is null and void and can't be performed.

Section-9 of the Arbitration and Conciliation Act, 1966, Act deals with "Interim Measures", that means gives power to the court to grant interim measures in accordance of section-36

Another court's contribution is Section-11 of the Arbitration and Conciliation Act, 1966 i.e., "Appointment of Arbitrators" which says courts have the power of appointing an arbitrator to the parties. Either the courts supreme court or high courts or even the person designated should appoint the arbitrator within 60 days from the date of the notice issued by the requesting party and received by the opposite party.

There is one more provision inserted in the act concerning the court's assistance i.e., Section-27 of the Arbitration and Conciliation Act, 1966, provides a mechanism whereby either the arbitral tribunal or a party to the dispute but with the approval of the arbitral tribunal can seek the assistance of the court in taking evidence.

It was also observed that, after the proceedings take place and the decision was pronounced, the court cannot interfere with the award made by the Arbitral Tribunal. Also, Section-34 of the Arbitration and Conciliation Act, 1996 stated the "application for setting aside the arbitral award". Judicial authorities are not allowed to intervene in the award decided by the arbitral

tribunal but there are some conditions or special circumstances in which the court can set aside the arbitral award.

As, Section-34 (2)(a), stated grounds on which the court can set aside an arbitral award and those are;

- The party under some incapacity,
- The arbitration agreement is not valid,
- Proper notice of the Arbitrator's appointment or the proceedings is not given,
- The dispute does not fall under the terms which could be submitted for the arbitration or the award contains a decision that is way out of the scope of the arbitration,
- The tribunal was not composed following the party's agreement.

In the case, of "**Dyna Technologies Pvt. Ltd. v. Crompton Greaves Ltd.**", here, the Supreme Court held that the courts should not interfere with an award merely because an alternative view on facts and interpretation of the contract exists. The court needs to be cautious and should defer to the view taken by the arbitral tribunal even if the reasoning provided in the award is implied unless such award portrays perversity unpardonable under section-34 of the Act, 1996.[9] Also held, that the court's intervention in the Arbitration proceedings should be limited because when the parties opt for the mechanism of Alternative Dispute Resolution like Arbitration, they choose to exclude the jurisdiction of the courts because they prefer the convenience and finally it provides.

In Cases, **Union of India v. G.S. Alwal & Co**.[10] and **State of Orissa and Anr. v. Damodar Das**[11].; in both the cases it was discussed that, while interpreting the arbitration clause of the agreement, jurisdiction is there or not for the arbitration to adjudicate.

Here parties also get the flexibility of challenging the arbitral award if the party is not satisfied but there is a condition that, filing the petition under Section-34 (Arbitration and Conciliation Act, 1966) is within 90 Days that counts from the date of receipt issued of the signed copy of the arbitral award signed by both the parties, this is discussed under case law; **Dakshin Haryana Bijli Vitran Nigam Ltd. v. M/S Navigant Technologies Pvt. Ltd.**..

[9]Scope of Judicial Interpretation in Arbitration, Available at:https://blog.ipleaders.in/scope-judicial-interpretation-arbitration/#Judicial_Intervention_before_Arbitration_Proceedings (Visited on March 27, 2022)
[10]1996(3) SCC 568.
[11]1996 (2) SCC 216.

Parties can also appoint a new arbitrator after the award is set-aside. In the case, of **Jagdish kishinchand Valecha v. Srei Equipment Finance Ltd.**, the High Court of Calcutta observed the Arbitration Act, 1966 after setting aside the award the court appoint a new arbitrator with the consent of both the parties to start the dispute from a fresh note, again.

Here are some case laws, sections, provisions are mentioned concerned with different matters and areas which enlighten us about the approach of our Judicial System towards the word "ARBITRATION", there are just a few important points that are mentioned above there are various other efforts made by the judiciary to contribute in the ADR mechanism but also with all pros there are certain cons as well, there are some cases too where arbitration fails then civil courts are there to provide justice and aid but that too took huge time and high cost as well.

CONCLUSION:

In the present scenario, the preference for International Arbitration has been increased tremendously in the urge of getting the solution to the problem, resolve the dispute, disposed-off the case as soon as it could be practicably doable. With the lots of benefits and advantages,certain hindrances occur in going for the International Arbitration nowadays as the more people become aware of it the more they start opting for it which causes; the HighCost, Duration of the Proceeding extended, Lack of Speed, these are the main three hindrances that hamper the process a lot but the leading institutions find the solution of reducing the cost, making the process speedy and time-efficient the way it is in the beginning when people used to opt itby believing the same hindrances now as USP at that time. The innovative solution and tools are; Tiered Dispute Resolution clauses (as, put the clause of using other alternatives before going to the Arbitration, clause for this kind of dispute can't be settled by the arbitration, etc.), Agree on Suitable Procedure and timetable (by both the parties together, which helps in do not delaying the process as such), Planning (example, choose the arbitrator with the skill set they want, also who have potential time for them), Early Procedural Conference (to decide certain things by the use of the conference before the actual proceedings), Sensible Use of Technology (such as how to use electronic documents for their cause despite using handy documents which increase the cost as well).

The Concept of Arbitration along with the Concept of International Arbitration is still new to people in the same places but not as such, as people get aware and handy of all the alternatives of dispute resolution now. It still needs to develop more, still needs to be

amended, and adding more provisions in some sections of it so that it becomes as reliable as the litigation still is for the people, maybe because the legality and enforceability of the judgment of the court are more authentic and reliable for them, though litigation has so many cons but even then,the public use it the most but now it is changing by increasing the access to arbitration, the award or decision made by the arbitral tribunal is binding or having the same authenticity and legality from the system and especially International Arbitration is much preferred now for the cross boundaries matters. "Arbitration is becoming the Chief Vehicle for accomplishing the ends of Civil Litigation"[12].

[12]Increasing Access to International Arbitration, available at: https://lasenatusscriptors.com/2021/08/24/increasing-access-to-international-arbitration/ (Visited on 27 March, 2022)