ARBITRATION: AN ALTERNATIVE CHOICE FOR RESOLUTION OF DISPUTES IN INDIA

DISSERTATION

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Abbreviations

SC	**SUPREME COURT**
AIR	**ALL INDIA REPORTER**
Art.	**ARTICLE**
Cons.	**CONSTITUTION**
Edn.	**EDITION**
Hon'ble	**HONOURABLE**
WTO	**WORLD TRADE ORGANISATION**
UNCITRAL	**UNITED NATIONS COMMSSION ON INTERNATIONAL TRADE LAW**
NDIAC	**NEW DELHI INTERNATIONAL ARBITRATION CENTRE**
SCC	**SUPREME COURT CASES**
Para	**PARAGRAPH**
Ors.	**OTHERS**
p.	**PAGE**
LCIA	**LONDON COURT OF INTERNATIONAL ARBITRATION**
Edn.	**EDITION**
Capt.	**CAPTAIN**
Spl.	**SPECIAL**
Ltd.	**LIMITED**
UK	**UNITED KINGDOM**

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Chapter 1

Introduction

1.1: Introduction

Nani Palkhivala once said that "*If I was appointed as a dictator of a country, then in the short period between my appointment and my assassination, I would make a law for all commercial disputes to compulsorily be referable to arbitration*."

Although, one may be hemmed with Palkhivala's impeccable humour, the quote provides an idealistic solution to one of the gravest issues plaguing the Indian judiciary: pendency of cases. Endeavours by the judiciary and the legislature have resulted in a considerable rise in the number of commercial cases being referred to arbitration.

Disputes arise in every sphere of dealings and transactions on a day to day basis. It may relate to business & commercial disputes, civil disputes, banking & cyber matters, tax disputes, IPR issues and others. These disputes result in cases before the Courts of law thereby adding to the existing backlog of cases on the Courts in India. This, perhaps, causes unnecessary litigation and which burdens upon the parties financially as well as psychologically. Due to heavy litigation costs, long and procrastinating procedures of courts and several other factors the parties to the dispute are badly hit, which adversely affects their businesses, profession, works, etc. These adverse affects are mostly responsible for inflation, significant price rise of essential commodities and added financial burden on the economy, ultimately borne by the consumer vis-à-vis common people at large. Foreign investment also decreases or the investors avoid investing in a region where commercial disputes are not settled expeditiously.

India is a country with utmost diversity. It's a developing nation, welcoming all kind of business activities, investments, trades, manufacturing, etc. Due to large scale of business and economic activities and diversity in the markets, there exist significant possibilities of schism between people, firms, business concerns, government departments, etc. These conflicts arising, mostly civil and commercial in nature, is liable to be settled and resolved through an efficient manner sans unnecessary litigation and wastage of time. Arbitration is the most suitable method of Alternative Dispute Resolution (ADR) for the settlement of civil and commercial disputes.

The research is inclined towards and has endeavoured to enumerate the significance of arbitration by highlighting various concepts and aspects of arbitration as a suitable mechanism for commercial dispute resolution.

The various modes of Alternative Dispute Resolution (ADR) facilitate the speedy disposal of commercial disputes in domestic as well as international spheres. The prospective investors sight the possibilities of efficient dispute resolution mechanisms in various regions where they may be interested to invest their capitals for the future.

Foreign investment significantly depends upon dispute resolution mechanism adopted by the country as it builds confidence in the investors that their investment is safe and in case of any dispute in the business operations it can be settled efficiently and expeditiously.

With significant discussions of international as well as domestic laws and practices of dispute resolution and interpretation by the courts it is apparent in the current research that a successful dispute resolution mechanism is one which has the enforceability and authority of law, time bound and speedy procedure, transparency, confidentiality and low costs involved.

The need and importance of arbitration in India and all over the globe, has been dealt with proper reasoning and analysing various articles and books of prominent authors. Furthermore, arbitration agreement, award and enforceability with the various types of awards and grounds of challenging the awards are discussed at length. Further, one very important aspect of arbitration has been analysed- which is the tribunal's power to lift the corporate veil of a company.

Furthermore, the arbitration agreement and its importance in enforcing the agreement and deciding the jurisdiction of the arbitral tribunal is enumerated and discussed. A relevant question arising out of the agreement, regarding enforceability of agreement if not signed and binding non-signatories, was dealt with by the discussion of case laws.

International Commercial Arbitration (ICA) as a method for international arbitration and dispute resolution has been discussed. The various International and National Arbitration Institutes have been explored with the procedure and rules they follow. ICA will also play a vital role in attracting foreign investment in India. The research has analysed the various types of International Commercial Arbitration and introduced to the readers the various sources of ICA all over the world. Moreover, the importance of "seat" and "venue" of arbitration has been analysed by discussing case laws. The issue of number of arbitrators has been dealt with.

Moreover, the pro-arbitration approach by the Indian Legislature and Judiciary has been commendable in promoting arbitration, as a tool of commercial dispute resolution. Various case laws of the Supreme Court has been discussed and analysed to stress the above point.

Moreover, various ADRs have been compared and analysed in order to ascertain the best suitable mode of commercial dispute settlement. Every mode has its own advantages and demerits but the most suitable amongst them seemed to be arbitration.

Arbitration has been successful in providing efficient dispute resolution to the parties and the stakeholders. The importance of arbitration can be recognised by the fact that, being an Alternative Dispute Resolution (ADR) mechanism, it has been recommended, though indirectly, by the likes of great personalities such as Mahatma Gandhi, Abraham Lincoln. They have given preference to compromises and out of court settlement over litigation. This shows the intent that disputes must be settled efficiently, with mutual consent and in a speedy manner. Thus, arbitration fits into the category when compared to other modes of ADRs. It is, perhaps, the best alternative method for resolution of commercial disputes, especially in India.

1.2: Research Problem

- Arbitration as an Alternative Dispute Resolution (ADR) mechanism for settlement of commercial disputes and its significance in India.
- Role of arbitration in speedy justice and thereby addressing to the problem of backlog of pending cases in courts in India.
- Economic prosperity and investment largely depends on conflict resolution mechanism of a country with respect to the importance of International Commercial Arbitration.

1.3: Hypothesis

Arbitration is a suitable mode for resolution of disputes in India, mitigating backlog of pending cases and, consequently, ensuring economic welfare and foreign investment for the country.

1.4: Literature Review

According to Eleanor Zelliot Manushi, Ahilyabai Holker: A Magnificent Ruler, Saintly Administrator (Rare Book Society of India, May 2001) -

"Arbitration has its traces everywhere, ranging from prehistoric Romans to the Malwas".

The author in the above pretext has observed that arbitration has an ancient existence as a mode of dispute resolution mechanism. It is so traditional that it can be traced from the pre-historic period of Romans and the Malwas and yet it comprehensively stands to the utilised in the modern era of commercial and technological advancements.

According to Earl S. Wolaver, "The Historical Background of Commercial Arbitration" (1934) 83 U Pa L Rev 132 –

"***Arbitration as a form of dispute resolution has its origin lost in obscurity***".

The author has applied the concepts of dispute resolution and recognised arbitration as a technique which has lost its relevance in the modern era. But he further states that new legislations both at the domestic as well as international level have helped in the revival of arbitration as the preferred mode of dispute resolution mechanism.

According to Prof. (Dr.) J Olakunle Orojo CON and Prof. M. Ayodele Ajomo in, "Law and Practice of Arbitration and Conciliation in Nigeria", Lagos: Mbeyi & Associates (Nig.) Ltd., 1999 -

"Arbitration is a procedure for the settlement of disputes, under which the parties agree to be bound by the decision of an arbitrator whose decision is, in general, final and legally binding on both parties."

The authors' in the above quote has defined arbitration as procedure of dispute resolution which has its outcome binding upon the parties with mutual consent. The finality of decision which is an award if legally enforceable and can only be challenged on limited grounds.

1.5: Research Methodology

The research was carried out on a doctrinal research pattern. Arbitration as one of the suitable and successful method for expeditious and efficient dispute resolution has been enumerated. The research highlights the importance and need of pre-litigation in commercial disputes arising in India. Moreover, several laws, both International and Indian, has been discussed and cited to press upon the significance of Arbitration and to portray its statutory recognition.

As part of research several books of prominent intellectuals in the field of Arbitration have been referred. The UNCITRAL Model Law and the Arbitration and Conciliation Act, 1996, has been analysed with international and national decisions of the courts.

The relevance of International Commercial Arbitration, its types and the various International Arbitration Institutions has been discussed. Careful analysis of the procedures followed by the arbitral institutes have been carried out in order to explore the possibilities of arbitration in various untouched fields.

A comparison of different types of Alternative Dispute Resolution (ADR) mechanisms have been done with discussion of case laws. Also the pro-arbitration approach of the courts can be traced from the analysis of recent case laws.

Moreover government articles, reports, and blogs of related authors is reviewed. Besides, some views of prominent authors and their articles and books have been discussed to stress the argument of arbitration as a suitable mode of dispute resolution in India.

Chapter 2

Arbitration, Agreement and Award

2.1) Arbitration:

2.1.1) Origin of Arbitration

The origin of market, trade and merchant evolved the term and system of commercial arbitration. Arbitration has a very long and deep history in India. Small disputes and feuds were usually settled upon by a group of wise men who were chosen by the people. At the village level, there were panchayats, which were also equivalent to the people's representatives of the village. The decisions delivered under this system was considered and accepted with ease. Later, due to various political issues, these dispute settlement boards were looked down by the people.

With the introduction of trade by the British in India, various factors changed. With this, the face of judicial administration also changed. Till this period, both, dispute settlement through traditional courts and Alternative Dispute Resolution (ADR) mechanisms worked parallel to each other. But, with the commencement of British rule, arbitration dispute resolution methods took a backseat. However, again after Bengal Regulations, arbitration was set to prominence[1]. These rules encouraged the people to choose arbitration as a speedy dispute resolution mechanism. After independence, Lok Adalats were set up for dispute settlement which also got statutory recognition by the Legal Services Authority Act, 1987.

A new revised Arbitration Act was enacted to replace the outdated Arbitration Act of 1940. This Act was the Arbitration and Conciliation Act, 1996.

2.1.2) Meaning and types of Arbitration

Arbitration is an informal method for settling disputes without going to the court in the traditional way. A counsel will prescribe arbitration as the best way to determine and decide a case. In arbitration, the question is submitted to a third neutral party, the arbitrator, who settles the disputes subsequent to a hearing and procedural pleadings by the parties. The pleadings might be submitted to the arbitrator by each side. All the more frequently, notwithstanding the documents presented, each side will make an oral contention face to face in the form of an informal discussion.

[1] Sircar Nath Nripendra, "Law of Arbitration in British India", (1942) 6 cited in 76th Report of Law Commission of India, 1978, p. 6.

Generally, each side will have a lawyer to make the oral contention for them. However, the parties themselves may also represent their entity or side.

The parties to the dispute more often not concur on the appointment of the tribunal and so the arbitrator will be somebody that both the sides have certainty that he or she will be unbiased and reasonable. The question will ordinarily be settled much sooner, as a date for the arbitral proceedings can more often than not be acquired significantly quicker than a court date. Moreover, the parties may prepare their own hearing or procedural timetable. Arbitration is typically much more affordable for the parties. This, however, depends upon the dispute in hand and the procedural laws that apply to the proceedings. This is based on the premise that the fee payable to an arbitrator may vary based on the amount involved in the dispute. More often than not the parties to the proceedings split the fees and other charges similarly. In contrast, to the normal litigation, arbitration is basically a private system, so that on the off chance that the parties want security and non disclosure of the dispute, the same can be kept classified. In addition to this, there are various other advantages and features of arbitration.

Arbitration basically consists of two types, namely:

1. Ad hoc arbitration
2. Institutional arbitration

In order to characterise the above two kinds on the arbitration clause, it is fascinating that no all-round utilised definition for either ad hoc arbitration or institutional arbitration can be recognised. Notwithstanding this, the definitions given in significant arbitration course materials are very comparative.

Moreover, numerous treaties on arbitration additionally concur by first characterising institutional arbitration and then addressing ad hoc arbitration, in this manner demonstrating the default character of ad hoc arbitration.

The debate of going for ad hoc arbitration on one hand and institutional arbitration on the other is by and large introduced according to their apparent advantages and disadvantages. There exists an existing combo or preparation, institutional arbitration, and there is a custom tailored one, ad hoc arbitration.

Let’s briefly discuss the two types and their features -:

A) Ad hoc arbitration

It can be defined as the system wherein the dispute between the parties is not submitted to an arbitral institution, and neither are the parties required to submit themselves to the rules and procedures followed in a particular arbitral institution. The parties are free and allowed to choose the rules and the methods of arbitration on their own. The rules for arbitration can be drawn by the parties themselves. If not, the parties may refer to the tribunal for its help.

Given the parties approach wherein the conduct of arbitration is the soul of the participation of the involved ones, ad hoc proceedings can be more adaptable, less expensive and quicker than an administered one. The non-occurrence of any administrative charges, alone, settle the debate on cost on this topic. The ad hoc tribunal and proceedings need not be totally separated from its institutional partner. In many cases, the arrangement of a qualified and additionally fair-minded arbitrator establishes a staying point in ad hoc proceedings. In such cases, the parties can consent to assign an institutional secretariat as the naming authority. Further, the parties can choose to connect with an institutional centre to administer the arbitration throughout an ad hoc proceeding at any point of time.

Moreover, a certain disadvantage of ad hoc approach is its dependency on the choice of the parties, especially when the choices itself are in question. Failure on the part of the parties to initiate timely proceeding can result in loss of time and hence delaying the process of settlement and justice.

In other words, it is to say that this form of arbitration is more personalised and impromptu in nature. The arbitrators are appointed by mutual decision of the parties for each case. Generally, the applicability of the rules and procedures flows from the arbitration agreement decided by the parties.

In case if the parties are not able to arbitrate or fail to agree upon the same, the necessary arbitration shall be done by the appointed arbitrators, i.e. institutional arbitrators. [2]

In the Indian context, ad hoc arbitration has a limited existence as it is only considered suitable for resolving those disputes involving petty or minimal claims and not very affluent parties.

[2] Hascher T. Dominique , "Commentary on the European Convention 1961", Yearbook Commercial Arbitration (2011).

B) Institutional Arbitration

In Institutional arbitration, the arbitration agreement designates an arbitral institution to administer the arbitration. The parties then submit their disputes to the institution that intervenes and administers the arbitral process as provided by the rules of that institution. The institution does not arbitrate the dispute. It is the arbitral panel that arbitrates the dispute.

This type of arbitration provides for important aspects such as appointment of arbitrators, managing the arbitration process, identifying venues for holding arbitration hearings. Many such, Indian arbitrations are administered by international arbitral institutions such as Court of Arbitration of the International Chamber of Commerce, the Singapore International Arbitration Centre, and the London Court of International Arbitration.

Institutional arbitration helps in getting a clear set of arbitration rules, a clear timeline to conduct arbitration, panel of arbitrators to choose from, assistance from highly trained staff, helps when parties lack proper knowledge regarding arbitral proceedings.

The parties may stipulate, in the arbitration agreement, to refer a dispute between them for resolution to a regional institution. Currently, there are almost 35 Arbitral Institutions in India for –

a) Domestic;

b) International;

c) PSUs;

d) Trade and merchant associations and;

e) City specific chambers of commerce and industry.

The above being a classification of arbitration all over the globe.

Some domestic arbitration institutions in India are -:

1) Mumbai Centre for International Arbitration,

2) Nani Palkhivala Arbitration Centre.

Moreover, the New Delhi International Arbitration Centre (NDIAC) was introduced by the Indian government which cemented the plans to promote India as an international alternative dispute resolution hub and a safe seat for international commercial arbitration.

Some High Courts in India have also set up arbitration centres affiliated with such High Courts, such as the Delhi International Arbitration Centre and the Arbitration & Conciliation Centre – Bengaluru (Domestic & International) an initiative of the High Court of Karnataka.

Such institutions either have their own rules or are governed by the rules of UNCITRAL.

Further, institutional arbitration may be preferred if the parties do not mind the administrative charges levied by the institution. However, there could be some concern if the amount in dispute is substantial as it would be necessarily mean that the administrative fees will also be high as they are calculated based on the amount in dispute. Moreover, the institution's administrative structure may lead to added time and costs which, in turn, may affect the efficacy of the arbitral process. The rules may also require the parties to respond within unrealistic time-frame. Such rules may be applicable to a particular trade or industry, but not to existing or prospective needs of one or more of the parties.

Apparently, institutional arbitration may be favoured by the parties as when the benefits outweigh the administrative cost that accrue during the procedure. But, despite the foregoing discussion, most arbitration proceedings in India are still conducted on an ad hoc basis. Fortunately, recent legislative amendments to the Arbitration Act, including in particular the amendments in 2019, have encouraged institutional arbitration with the aim of changing this position.

2.1.3) Disputes that can be settled through arbitration

The international trends have indicated a pro-arbitration shift across commercial cases, and only a very few categories remain fully inarbitrable today.

Ordinarily, every civil or commercial dispute whether based on contract or otherwise which is capable of being decided by a civil court is in principle capable of being adjudicated upon and resolved by arbitration "subject to the dispute being governed by the arbitration agreement" unless the jurisdiction of the Arbitral Tribunal is excluded either expressly or by necessary implication.

The Arbitration and Conciliation Act, 1996 does not directly address or list down the categories of disputes resolvable via arbitration. It only lays' down, under section 34, that an arbitral award can be challenged if "the subject-matter of the dispute is not capable of settlement by arbitration under the law".

The courts have, thus, on a case-to-case basis, decided the ambit and scope of arbitrability and pronounced the category of disputes not "capable of settlement by arbitration". The leading case law on the subject is ***Booz Allen & Hamilton Inc. v. SBI Home Finance Ltd.,***[3] which lays' down that a dispute that creates or affects rights in *rem* is inarbitrable, while disputes relating to rights in *personam* remain amenable to the jurisdiction of an Arbitral Tribunal. The judgment in ***Sudhir Gopi v. Indira Gandhi National Open University***[4] quotes Prof. William M. Park and states that "Like consummated romance, arbitration rests on consent." The statement stands true in arbitrations emerging out of an agreement to arbitrate. Since party autonomy is the key advantage, and one of the basic underlying principles of arbitration, consent is vital in any arbitral proceeding.

Professor Hohfeld has described a right in *personam* in the following words; "A unique right residing in a person (or group of persons) and availing against a single person (or single group of persons); or else it is one of a few fundamentally similar, yet separate rights availing against a few definite persons."[5]Thus, while rights in *rem* are to be considered against the whole world and persons generally, a right in *personam* rests in definite persons. Therefore, matters which may be settled through arbitration are of commercial and civil in nature. Disputes of criminal nature cannot be resolved through arbitration and the same are obligated to be dealt and disposed of by the court of law.

Since, ***Booz Allen*** still remains the law of the land, there arises no difficulty in positing that the arbitrability test laid down therein stands satisfied. It is also to be noted that the Indian judiciary has taken a pro-arbitration stance in the recent years, pronouncing, in certain cases for example, intellectual property disputes to be arbitrable.[6]

[3] Booz Allen & Hamilton Inc. v. SBI Home Finance Ltd., (2011) 5 SCC 532
[4] Sudhir Gopi v. Indira Gandhi National Open University, 2017 SCC Online Del 8345
[5] Wesley N. Hohfeld, Fundamental Legal Conceptions as Applied in Judicial Reasoning, 26 Yale, 1917, L.J. 710,718.
[6] Eros International Media Ltd. v. Telemax Links India (P) Ltd., 2016 SCC Online Bom 2179

2.1.4) Need for Arbitration

Arbitration has been recognised as one of the preferred mode for the resolution of commercial disputes all over the globe. Several factors are taken into consideration by investors to invest in a country, most significant of them being the dispute resolution mechanism. The prospective investors cite the efficiency of the dispute resolution mechanism of a region in order to invest capitals in that region, leading to foreign investments.

As India has been ranked at 178 out of 189 nations in the world in contract enforcement, it was felt high time to introduce and take urgent steps to facilitate quick enforcement of contracts, easy recovery of monetary claims and award of just compensation for damages suffered and reduce the pendency of cases in courts and hasten the process of dispute resolution through arbitration, so as to encourage investment and economic activity. These factors were the main reasons for enacting a comprehensive legislation to enforce arbitration as a dispute settlement mechanism. Moreover, technological advancement and liberalisation of international business relations and globalisation of international trade necessitated the invention of a flexible, reasonable, favourable and time saving method of resolution of disputes without making the parties to go through the rigorous, time consuming and resource exhausting procedure of the traditional justice delivery system.

The Indian judiciary has also, in recent years, adopted a pro-arbitration approach for dispute resolution, thereby, paving way in recognising arbitration as a preferred and suitable mode for out of court dispute settlement for commercial matters.

2.2 Arbitration Agreement:

2.2.1) Meaning of Arbitration Agreement

An arbitration agreement is an agreement whereby the parties agree, in writing, to settle a particular dispute between them through an alternative mode known as arbitration. The agreement applies to future disputes that may arise out of business relationship entered into by the parties. Such an agreement creates a legal and binding relationship between the parties, at instance of the arbitration authority. This establishes and thereby, recognises the point that the parties have mutually agreed not to go to court, being a traditional litigation, to settle disputes.

The inbuilt significance inherent in an arbitration agreement possesses a very special character. The parties involved can decide the procedure of settlement of the dispute between them.

In other words, the agreement is a composed contract in which at least two parties consent to settle a question out of court through the procedure of arbitration. The arbitration clause is a clause or provision in a contract, called the principal contract, requiring settlement of disputes through arbitration. The arbitration clause in an arbitration agreement refers to a provision in an explicit term, a case of unreasonable or illicit treatment in the working environment, a defective product or other different issues of varying character. An arbitration agreement can be as basic as an arrangement in an agreement expressing that by entering into that agreement, one gives his consent with the intention to arbitrate any dispute arising in future.

Moreover, the term "arbitration agreement" is usually used because the dispute resolution clause is an inbuilt arrangement in the principal contract. The basic premise is that the arbitration clause in itself is a separate contract within the main agreement. Although the principle of separability operates, the arbitration clause within the contract stands valid in view of the terms of the principal contract, even in the untoward situation of the principal contract becoming invalid. Any challenge to the principal contract cannot dissipate or question the validity of the dispute resolution clause in it. The arbitration clause in the agreement gives the premise to conduct or refer disputes to arbitration.[7]

The law pertaining to the arbitration procedure is characterised as the administrative law. This law leads the development, legitimacy, authorisation and end of the arbitration, i.e. until a legally valid award is ascertained. Comprehensively, the parties may decide the governing law. Generally, the most widely recognised criteria are the law relevant to the agreement containing the clause; the procedural law material to the proceedings or the substantive law picked by the parties or decided as the one to be applied to settle the dispute. Notably, under the New York Convention, the legitimacy of the arbitration award is, in any case, subject to the law picked by the parties. Moreover, the law of the place of arbitration will also guide and apply to the procedure.

[7] Rohith M. Subramoniam and Navya Jain, "International Commercial Arbitration: An Introduction", Eastern Book Company, Lucknow, 2019, Pg. no. 46.

The Supreme Court in ***Oriental Insurance Co. Ltd. v. Narbheram Power & Steel (P) Ltd.***[8] held that the arbitration clause in an agreement is to be construed carefully and it must express the intent of arbitration without any ambiguity. Further, the three-judge Bench of the court went on to explain that if a clause enlists certain scenarios and circumstances under which arbitration is not possible, then any controversy pertaining to the appointment of arbitrator has to be put to rest.

2.2.1) Scope of Arbitration Agreement

The Arbitration Act is based the United Nations Commission on International Trade Law (UNCITRAL) model law and thus, there is an onus on the judiciary to interpret it in a way which supports the intention of the drafters of the international statutes.[9]

The arbitration clause defines and delimits the jurisdiction of the Arbitral Tribunal. Arbitration clauses can be either "broad" or "narrow". It may cover all kind of disputes or may extend only to certain types. To limit the types of disputes and conflicts that fall under arbitration clause, it is better to construct the clause in its widest sense. This further prevents any confusion or complication that may otherwise arise. The intention of parties in the arbitration clause also plays a vital role.

Moreover, the principle that applies to the construction of the arbitration clause has been considered in multiple foreign cases. Recently, in ***Fili Shipping Co. Ltd. v. Premium Nafta Products Ltd.***[10], the House of Lords held that unless the language of the contract or arbitration clause made it clear that certain disputes were to be excluded from the jurisdiction of the Arbitral Tribunal, the general presumption is its submission to the tribunal.

The Supreme Court of Australia in ***Pipeline Services WA Pty Ltd. v. ATCO Gas Australia Pty Ltd.***[11], also upholds this common law principle of giving importance to the intention of the parties while interpreting the dispute resolution clause.

In India, the exercise of concurrent authority became obvious when the Supreme Court delivered judgements in the cases of ***Bhatia International v Bulk Trading***[12] and "***Venture***

[8] Oriental Insurance Co. Ltd. v. Narbheram Power & Steel (P) Ltd., (2018) 6 SCC 534
[9] Arnav Maru, (2019) PL October 66
[10] Fili Shipping Co. Ltd. v. Premium Nafta Products Ltd.,2007 Bus LR 1719:2007 UKLH 40 (HL)
[11] Pipeline Services WA Pty Ltd. v. ATCO Gas Australia Pty Ltd., 2014 WASC 10
[12] Bhatia International v Bulk Trading , (2002) 4 SCC 105; Appeal (civil) 6527 of 2001.

Global v Satyam Computer Services ltd.,[13] which confirmed the interventionist approach of the Indian judiciary. The law laid down by the Apex court attracted wide criticisms from the global community because it acted in a manner contrary to the spirit of UNCITRAL Model Law.[14] However, subsequently the Indian judiciary started interpreting arbitration agreements giving importance to the "Seat theory" of arbitration as a means of damage control to prevent judicial intervention in arbitral proceedings.

2.2.2) Enforceability of Arbitration Agreement

Before forming an arbitration agreement, it is essential for the parties to consider the commercial background to the transaction and identify which laws are likely to be relevant. Pertinently, one of the cornerstone principles of arbitration is that parties can agree how to resolve their disputes. Their agreement is often contained in the form of a contractually binding promise by each party to refer disputes to arbitration. Such an agreement is symmetrical–each party has the same right to invoke arbitration.

In a conventional court, the judicial actions of the judge who presides are clearly controlled and regulated by various domestic legal instruments.[15] He is appointed by the State and, hence, is accountable to it. Contrary to this, an arbitral tribunal derives its appointment and powers from an agreement between the parties.

The Tribunal has to decide and resolve the dispute with strict adherence to the agreement between the parties. After the appointment, the Tribunal derives its powers from the agreement and other applicable law; both domestic and international. It is from the parties that the primary power to commence the proceedings is transferred to the tribunal.

An invalid arbitration agreement may be a ground for resisting enforcement of an arbitral award. Consequently, two critical considerations are- the validity at the seat of arbitration and the governing law of the agreement. But parties should also consider validity in jurisdictions where an award might be enforced and any other jurisdictions where a party might seek to bring proceedings in breach of the arbitration agreement (for example, the parties' home courts). Moreover, a careful analysis at the drafting stage of the agreement can reduce the risk

[13] Venture Global v Satyam Computer Services ltd., (2008) 4 SCC 190.
[14] Manu Thadikkaran, 'Judicial Intervention In International Commercial Arbitration' (2012) 29 Journal of International Arbitration.
[15] A. Redfern and M. Hunter, Law and Practice of International Commercial Arbitration, London, 2003

of only discovering that the arbitration clause is unenforceable at the point a dispute arises, and when it is most needed.

- **Powers conferred on Arbitral Tribunal**

1) **Powers of Arbitral Tribunal as conferred upon it by the parties through agreement**

The relationship between arbitration agreement and parties and concurrently with the Arbitral Tribunal is by far of mutual recognition. The parties confer the power an arbitrators by deciding on the terms in the agreement. They decide upon the arbitrator who forms part of the tribunal to settle the dispute. The parties can confer power directly or indirectly by incorporating the institutional rules. For example, parties may refer ad hoc arbitral proceedings under the UNCITRAL Arbitration Rules.[16]

Such an instance provides the arbitrator with a wide discretionary power to regulate the conduct of the arbitral proceedings. The rules further extend to the selection of arbitrators, the right to determine the place of arbitration, and the language of the proceedings. The same shall be exercised and determined by the tribunal with the intention to provide an impartial and just relief to the parties.[17]

Further, the rules of arbitration were based on the "principles of party autonomy" which is an established principle of law in both common and civil law jurisdictions. The philosophy that outlines this principle is that "the contract between the parties is the fundamental constituent of international arbitration and it is the common intention of the parties through which the arbitrator deciding the dispute derives their powers".[18]

This legal relationship between the individuals by the will of the parties must be given primacy in arbitral proceedings which implies the private and consensual nature of arbitration.

[16] UNCITRAL Arbitration Rules, 2010.
[17] A. Redfern and M. Hunter, Law and Practice of International Commercial Arbitration, London, 2003
[18] Manu Thadikkaran, 'Judicial Intervention In International Commercial Arbitration' (2012) 29 Journal of International Arbitration.

However, it is said that the efficiency of this technique would be hampered if concurrent authority is conferred on the judiciary over arbitral proceedings.[19]

The parties cannot confer on the arbitrator any power(s) in a manner which is against the public policy. Also, no power(s) can be granted which can be exercised on persons who are not a party to the agreement. The agreement between the parties must be assessed by the tribunal in the light of its own commitments and obligations.

Moreover, the constitution of an arbitral court brings into reality another arrangement of legally binding obligations concerning the parties themselves.

Thus, arbitration agreement is an important instrument which confers powers upon the arbitrator with respect to deal with the issue between the conflicting parties. It comprehensively defines the jurisdiction of the arbitrator and powers connected or incidental thereto.

2) Powers conferred by the operation of law

The domestic laws of the State govern the arbitral proceeding, make provisions conferring on the arbitrator multiple regulatory powers. The best example is the Arbitration and Conciliation Act, 1996, which, under section 17, confers on the tribunal the power to deliver order for an interim measure of protection under certain specified circumstances.

Furthermore, Article 17of the UNCITRAL Model Law provides for the power of the tribunal to order interim measures. In the same context, the Arbitral Tribunal also holds power to determine the admissibility, materiality and reliance and also decide on the weight of any evidence. Additionally, the tribunal assumes the powers that the national legislation provides. In case of International Commercial Arbitration, it is the legislation of the seat of the arbitral procedure

As similar to the UNCITRAL Model Law, the Indian Arbitration Act 1996 also conferred on the courts the similar ability to order “interim measures” as it was granted to the arbitral tribunals. As per the Indian Arbitration act, 1996, the ability to issue interim measures of protection was vested concurrently on both the domestic courts and the arbitral tribunals under “Section 9” and “Section 17” respectively.

[19] Manu Thadikkaran, ‘Judicial Intervention In International Commercial Arbitration’ (2012) 29 Journal of International Arbitration.

Thus, Arbitration agreement is an important instrument which provides for and confers powers upon the arbitrator by the parties, on the one hand, and by the operation of law, on the other hand.

2.2.3) Whether arbitration clause in an unregistered and unstamped instrument enforceable?

The very relevant question that arises and is significant for arbitration agreement is whether arbitration clause in an unregistered and unstamped instrument enforceable? For this one needs to understand the doctrine of seperability and various interpretations by the court of law on the issue.

The arbitration agreement (the dispute resolution clause within the major contract) is considered to be a separate and individual status to that of the principle contract. This broadens the scope and survival of the dispute resolution clause, even when the validity of the principle contract is in question. This allows the arbitrator to make a decision even when the principal contract is void.[20] To be sure, the dispute resolution clause and the principal contract are two unique understandings regardless of the way that both exist inside the same document.

While the basic contract makes a relationship of commitment between the parties, the arbitral clause exclusively addresses the settlement of any disputes or contentions between the parties. Due to multiple reasons, the standard of separability sets up that the arbitration agreement and the basic Contract have diverse characteristics. Therefore, an arbitral clause is always immune from the invalidity of the principle contract. While the doctrine of competence— competence empowers the tribunal to decide on its own jurisdiction, the separability doctrine affects the Outcome that arises from this decision.[21]

This doctrine is helpful for the tribunal to conduct the proceedings of the case when the respondent frivolously challenges the legal validity of the agreement on the grounds of termination and therein the jurisdiction of the tribunal. The UNCITRAL Model Law empowers the tribunal to decide on any object ion relating to the arbitration agreement and its

[20] Gopinath Daulat Dalvi v. State of Maharashtra, 2004 SCC Online Bom 937: (2005) 1 Mah LJ 438.
[21] J. Lew et al, Comparative International Commercial Arbitration, 1985 (Kluwer Law International, The Hague 2003) 1

validity.[22] For the same reason, this stands as a well-grounded principle in multiple jurisdictions.

The Indian law recognises the separability of an arbitration agreement. An arbitration clause survives even if the underlying agreement of which it is a part is held to be void. A finding by an arbitral tribunal that the underlying agreement containing the arbitration clause is void does not render the finding of the tribunal without jurisdiction.

In a recent judgment in the case of ***M/s SMS Tea Estates P Ltd v M/s Chandmari Tea Co P Ltd,***[23] the Supreme Court opined on the question of whether an arbitration agreement contained in an unregistered (but compulsorily registrable) instrument was valid and enforceable. The apex court prescribed guidelines for how a court should deal with an arbitration agreement contained in an unregistered (but compulsorily registrable) instrument which is not duly stamped.

In the above case, the Guwahati High Court dismissed the application filed by the appellant under Section 11 of the Arbitration Act, holding that since the lease deed was required to be registered under Section 17 of the Registration Act and Section 106 of the Transfer of Property Act, and had not been registered, none of its term could be relied on for any purpose. Therefore, the appellant could not rely on the arbitration clause contained in the lease deed to seek reference to arbitration. The appellant filed an appeal with the Supreme Court.

Having laid down these guidelines, the Supreme Court remitted the matter to the Guwahati High Court.

Although in this case the Supreme Court opined that the arbitration agreement contained in an unregistered (but compulsorily registrable) instrument was valid and enforceable, it limited the extent to which an arbitrator can rely on the unregistered document to two circumstances (as evidence of contract in a claim for specific performance and as evidence of a collateral transaction which does not require registration). In effect, it eliminated arbitration proceedings relating to disputes arising from a non-registered lease deed. In most cases, an arbitrator appointed under such an instrument would have his or her hands tied in regard to most issues arising from such a document. Therefore, any failure by the parties to comply

[22] Art. 16(1), UNCITRAL Model Law on International Commercial Arbitration, 1985
[23] M/s SMS Tea Estates P Ltd v M/s Chandmari Tea Co P Ltd, Civil Appeal 5820/2011, July 20 2011 (arising out of SLP [C] 24484/2010).

with the requirement to register the instrument would render the arbitration clause contained therein of little or no value, even if it were held to be enforceable. [24]

Further, the judgment in ***Chloro Controls India (P) Ltd.* v. *Severn Trent Water purification Inc.,***[25] lays down conditions under which non-signatories to an arbitration agreement can be bound to a proceeding. Interpreting Section 45 of the Act, the court has given a wide meaning to the phrase "any person claiming through or under him". The case is considered to be one of the 'landmark cases in expanding the scope of arbitration to non-signatories.

Sudhir Gapi v. Indira Gandhi National Open University[26] is by far the most important case addressing the question at hand and requires a fuller discussion. The judgment in this case starts off by noting that an Arbitral Tribunal a creature of consent and its jurisdiction is circumscribed by the agreement between parties. This limited jurisdiction does not confer upon it the right to include persons who have not consented to arbitrate.

In the following paragraphs the judgment says that in limited circumstances, the court can bind non-signatories to an agreement. It lists down the two scenarios discussed earlier, implied consent and disregard f corporate personality and in doing so it relies on the decision in ***Chloro Controls***[27]**.** This is done with the intention of emphasising the fact that courts have the power, under these prescribed conditions, to bind non-signatories.

Thus, it is apparent that the instrument containing the arbitration clause may be enforceable even if it is not signed or stamped. The language of the arbitration clause contained in the agreement must be clear and unambiguous in order to be interpreted by the court. The UNCITRAL Model Law exclusively empowers the Arbitral Tribunal to decide on any objections related to arbitration agreement. The Supreme Court of India has adopted a pro-arbitration approach in resolving the commercial disputes and hence has framed guidelines to follow in case of arbitration instruments which are not signed or unstamped. Parties can be made obligated to follow the arbitration clause in order to settle a dispute by the court if the intention of the stakeholders at the time of entering into the agreement was clear in this regard.

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[24] Amarchand & Mangaldas & Suresh A Shroff & Co**.,**"Validity of arbitration agreement in unregistered instrument", ILO, 2011.

[25] Chloro Controls India (P) Ltd. v. Severn Trent Water purification Inc., (2013) 1 SCC 641
[26] Sudhir Gapi v. Indira Gandhi National Open University , 2017 SCC OnLine Del 8345
[27] Chloro Controls India (P) Ltd. v. Severn Trent Water purification Inc., (2013) 1 SCC 641

2.3) Arbitration Award:

2.3.1) Meaning and types of Arbitration Award

Arbitral award or award is the final decision by the presiding authority adjudicating on the dispute and determining the final rights and liabilities of the parties in the light of the arbitration agreement and the applicable law as per the agreement. Since time immemorial, various attempts have been made by way of various legislations to give a standard of the award. However, to date, there is no specific definition laid so far. This may be because of the possibility of varieties of awards that can be rendered by the tribunal.

Nevertheless, Article 34, UNCITRAL Arbitration Rules, 2010, defined award in the form of various essentials of an award.

Black's Law Dictionary defined an award as "the decision or determination rendered by arbitrators or commissioners, or other private or extra-judicial deciders, upon a controversy submitted to them: also the writing or document embodying such decisions"[28]

Thus, from the abovementioned definitions, it can be deciphered that an award is in writing which informs the parties of the decision of the tribunal and the reasons backing the same. According to section 34 of the Arbitration and Conciliation Act, 1996, such a decision shall be final, binding and enforceable on all the parties. Further, sections 36, 58 and 49, of the Act provides that it shall also be enforceable in every jurisdiction where the award holder wishes to enforce it. Keeping this in mind it is important to consider that every award is not final. The Arbitration Act provides that the court also retains the power to make interim awards which may be final in regards to certain disputes. Such an interim award is also enforceable and equally binding on the parties to the dispute.

Subsequently, some of the traits that can be attributed to an award may be as follows:

1) Conclusive and binding on the parties.
2) Subject to res judicata effect.
3) Subject to confirmation by recognition and enforcement.
4) Open to challenge in the courts in the place of arbitration.[29]

[28] Jeuro Development Sdn Bhd v. Teo Teck Huat (M) Sdn Bhd, (1998) 6 MLJ 545, 551 (Malaysia)
[29] Rohith M. Subramoniam and Navya Jain, "International Commercial Arbitration: An Introduction", Eastern Book Company, Lucknow, 2019, Pg. no. 86.

❖ **Types of Arbitration Award** –

There can be several types of awards that can be granted by the tribunal, namely, final award, partial award, additional award, interim award or interlocutory award. They are classified on the basis of the objective and intent of the tribunal rather than the form of passing the award or any other trait attributed to it. Subsequently, the function of the award renders its name.[30]

Since the parties have the liberty to choose the rules for their arbitration, there may be variations in the types of awards that may be issued under the rules.

Some of the common and widely used types of arbitration awards are as follows -:

1) **Final Award**

An award should be described as a 'Final Award' when it is intended to bring the arbitration to an end by deciding and disposing of all or the outstanding issues in dispute between the parties. A final award may be the first award dealing with all of the disputed issues or the last in a series of awards which deal with different issues sequentially. Such awards are binding in nature. The trait of finality causes the arbitration proceedings to come to an end as the final award is rendered. It is the fundamental attribute that accords the ability of enforcement of the award on both the parties.

If a final award is the last one in a series of awards, arbitrators should summarise any decisions made in earlier awards, so that it enables all of the arbitrators' decisions are consolidated into one stand-alone document.

A final award should also deal with the costs of the arbitration and their allocation as well as interest, if applicable. If arbitrators decide to deal with the merits before dealing with the costs they should make a partial award containing their decision on the merits and expressly state that they are going to deal with costs in a separate award.[31] Alternatively, they should make a final award save as to costs and deal with the costs in a later award.

A question arises whether "finality" of an award amounts to the waiver of a right to file an appeal against the award?

[30] Rohith M. Subramoniam and Navya Jain, "International Commercial Arbitration: An Introduction", Eastern Book Company, Lucknow, 2019, Pg. no. 88.
[31] Hilary Heilbron, A Practical Guide to International Arbitration in London (Informa 2008), p. 111

The English courts answered this question in negative in ***Shell Egypt West Manzala GmbH v. Dana Gas Egypt Ltd.***[32] stating that unless sufficiently clear in unambiguous words, nothing can give rise to the isolation of the right to appeal by the parties.

2) Partial Award

It refers to such awards which are issued upon complete determination of one or more issues which form a part of the whole dispute. The issues resolved therein are not subject to future revision.

Partial awards are most frequently used to record the determination of specific issues where the dispute is complex and can be divided into different stages, each concluded with a separate partial award. For instance, if the arbitrators bifurcate the liability and quantum issues, they may make a partial award on liability and another partial award on quantum. If there are several awards, arbitrators should consider numbering their awards consecutively to avoid any confusion.

Such awards do not decide the whole dispute but only a part of it. However, if the parties want, they may decide mutually and the tribunal can be refrained from rendering any such awards.

Therefore, in a partial award, some elements of the parties' claim have been determined but other issues remain and need to be resolved before the final award is made. Parties can continue arbitrating the remaining issues.

3) Interim or preliminary award

The term "interim" exclusively depicts the usage of this kind of an award. Such an award deals with the decision only partly or to some of the issues out of all that exists. In other words, this award is issued prior to the resolution of the entire dispute or prior to the issuance of a final award. Such an award is generally issued in the middle of the proceedings. This is a temporary award until the tribunal has given its final decision. A provisional award can only be made, according to Section 39 Arbitration Act 1996, if the parties have agreed that "the tribunal may have the power to order on a provisional basis any relief which it would have power to grant in a final award".

This includes;

[32] Shell Egypt West Manzala GmbH v. Dana Gas Egypt Ltd.2009 EWHC 2097:2010 Bus LR D 53 (Comm)

i) making a provisional order for the payment of money or the disposition of property as between the parties; or

ii) an order to make an interim payment on account of the costs of the arbitration.

The Supreme Court weaves the meaning of an interim award in **IFFCO Ltd. v. Bhandra Products**[33] by stating that an award deciding the issue of limitation is an interim award with regards to the whole of the proceedings. The court recognised the existence of an interim award, in terms of its ability to make an interim award under Section 31(6) of the Act.

Moreover, interim award may be given at a later stage of the proceedings. The jurisdiction to make an interim arbitral award is left to the good sense of the Arbitral Tribunal, and it extends to "any matter" with respect to which the tribunal may make a final arbitral award.

4) Consent or agreed award

It refers to any settlement reached by the parties on the basis of consensus between the two. Parties may then request the arbitrator to record their terms of settlement as an award. This type of award is barely rendered in any case but their enforcement is capable of invoking serious questions concerning their legality.

Furthermore, the arbitrators should be satisfied that the matters which are dealt with in the settlement agreement were within the scope of the arbitration agreement pursuant to which they have jurisdiction. If the settlement agreement extends to matters beyond the ambit of the arbitration agreement, arbitrators should ask the parties to agree to broaden their jurisdiction to encompass these new matters before issuing a consent award.

Apart from the foregoing issue, these awards rarely face any problem in terms of conflicts between the parties in enforcing the awards, since they are based out of mutual consensus between the two.

In practice, it is absolutely the arbitrator's discretion to render such an award. He is expected to ensure that he does not render such an award which may be patently illegal or against public policy.

Thus, consent or agreed award contain the mutual understanding of the parties to the dispute which is rendered upon them by the arbitrator.

[33] IFFCO Ltd. v. Bhandra Products, (2018) 2 SCC 534

5) **Additional Award**

Sometimes, the final award may not cover all the issues. In such scenarios, the additional award comes to the rescue of the parties. Most of the arbitral rules have the provision for making of an additional award.

Usually once the final award it made, the tribunal has no further authority. However, the parties can request an additional award be made on an undecided issue still in dispute. Thus, this kind of award is made post the issue of an award by the tribunal.

Therefore, in light of the forgoing discussion, arbitrators should be careful when deciding what title to give to an award because it can have different meanings in different jurisdictions. They should consider whether the relevant rules and the applicable *lex arbitri* contain definitions or specific provisions as to the labelling of arbitral awards.

2.3.2) Reliefs that can be sought in Arbitration

Termination of the arbitral award proceedings, by either mode available, puts the matter to rest. It makes the arbitrator "functus officio". It means that the extant powers, jurisdiction, and authority of the presiding arbitrator have come to an end.[34] Before expanding all powers, it is the duty of the arbitrator to prescribe appropriate relief and remedy to the winning party in order to make good the loss suffered by it. This can be done by providing the appropriate relief or remedy to the party through his award. The scope of the relief can possibly be defined by way of the agreement between the parties.

Thereafter, the possible remedies and reliefs that can be sought under an arbitral proceeding are named as follows-

1) Monetary compensation
2) Specific performance and restitution
3) Injunction
4) Declaratory relief
5) Adaptation of contract and filling gaps
6) Awarding claims for interest
7) Costs incurred for the arbitral proceedings

[34] Peter Seitz, "Remedies in Arbitration" in Labor Arbitration – Perspective and problems, p. 166

Moreover it is pertinent to mention that termination to the proceedings is considered when the final award is granted. From the foregoing discussions we have learned that the tribunal or arbitrator can grant a final award to the parties to put the arbitral proceedings to an end. Else, the arbitrator may also choose to terminate the proceedings if it finds that continuing with the proceedings is unnecessary or impossible. Section 32 of the Arbitration and Conciliation Act, 1996, provides that even the parties have the liberty to put an end to these proceedings with mutual consent or by way of withdrawal of the claims by the claimant provided the tribunal or respondent does not object to the same.

Thus, the parties to the dispute in arbitration proceedings can seek the above mentioned reliefs from the arbitration tribunal.

2.3.3) Enforcement of arbitral award

When an award is rendered, it is obvious that successful party would want to enforce that award against the defeated party. As the standards state or as in the usual practice, majority of the awards are carried out voluntarily by the parties.[35] But in situations, when the other party refuses or delays to honour the award, then in such situations the courts shall come to the rescue of the aggrieved party. There is no available recourse to the arbitrator in such situations. The role of arbitrator is solely confined to resolution of the dispute and rendering the award.

In domestic arbitration, it is generally very easy to enforce an award because the place of arbitration and the place for recognition and enforcement are within the same State.

Further, an award-creditor may be looking for either recognition or recognition or enforcement, both. An award which is enforced must necessarily be recognised by the court enforcing the award.

Moreover, while recognition is regarded as a shield of the arbitral award, enforcement is meant to act as a sword for the same. As apparent from the process, enforcement is one step ahead of recognition. Enforcement precedes recognition of the award. A court will first recognise the award and then simultaneously or later, enforce the award.

[35] Nigel Blackaby, "Recognition and Enforcement of Arbitral Awards", Oxford University Press, 605-62

Enforcement helps the successful party in achieving the remedy granted by the arbitrator by way of an award. The successful party would prefer to enforce the award in the jurisdiction where opposite party has its assets.

1. **Enforcement of the award by means of judicial intervention**

   International practice provides, where the informal means have failed to compel voluntary performance, other means may be required to be resorted to, such as approaching the national courts. Through the national courts, the defeated party can be forced to comply with the award, unless they want to attract legal sanctions in the form of fines and penalties. Before approaching the courts for forcefully enforcing the award on the party, the winning party must be cautious of where they are seeking enforcement. For effective enforcement, it ought to recognise the appropriate jurisdiction where the losing party has sufficient assets to pay off the liability. This is because enforcement takes place against the assets of the party.

   With respect to enforcement in the Indian courts, the courts have opined that the proceedings may be initiated anywhere in India "where the assets of the debtor are located"[36]- which was stated by the apex court in ***Sundaram Finance Ltd. v. Abdul Samad.***[37] The Supreme Court further stated that an award is enforceable as if it a decree passed by the civil court following the Code of Civil Procedure, 1908.

2. **Consent of the award**

   The judgment in ***Sudhir Gopi v. Indira Gandhi National Open University***[38] quotes Prof. William M. Park and states that "Like consummated romance, arbitration rests on consent." The statement stands true in arbitrations emerging out of an agreement to arbitrate. Since party autonomy is the key advantage, and one of the basic underlying principles of arbitration, consent is vital in any arbitral proceeding.

3. **Enforcement of foreign award**

   The Arbitration and Conciliation Act, 1996, provides that an award rendered in a commercial arbitration in a gazetted convention country is enforceable in India, provided-:

[36] I.C.D.S. Ltd. v. Mangala Builders (P) Ltd., 2001 SCC OnLine Kar 153: AIR 2001 Kar 364
[37] Sundaram Finance Ltd. v. Abdul Samad, (2018) 3 SCC 622
[38] Sudhir Gopi v. Indira Gandhi National Open University, 2017 SCC Online Del 8345

- The procedural requirements to enforce an award are satisfied (*section 47, Arbitration Act*).
- The award does not fall under any of the categories where enforcement can be refused (*section 48, Arbitration Act*).

The grounds for refusing enforcement of a foreign arbitral award are largely the same as the grounds set out in the New York Convention. Indian courts have further held that the grounds for refusing enforcement of a foreign award are narrower than the grounds available to challenge an award rendered in India. The public policy ground for refusing enforcement of a foreign award has been held to be significantly narrower than the public policy ground that would vitiate an award rendered in India. Further, unlike a domestic award, enforcement for a foreign arbitral award cannot be refused on grounds that it is patently illegal.

Once the court is satisfied that the foreign award is enforceable, it would be deemed to be a decree of the court under section 49 of the Arbitration Act. The process for enforcement of a foreign award is similar to that of a domestic award.[39]

4. Limitation period for enforcement of award

Globally, after the pronouncement of the arbitral award, the parties ought to make sure that they apply for the enforcement of the award within the specified time limit. Now, since the forum for enforcement of the award may wary, the limitation period will also vary. The limitation period will be decided on the basis of the law of the forum. It will also specifically provide for the duration within which the award can be enforced and when is this period expected to begin.

When the forum is India, the Arbitration and Conciliation Act, 1996 shall govern the case of recognition and enforcement of the award. The Supreme Court in ***Nityananda M. Joshi v. LIC***,[40] stated that since the Act does not stipulate anything about limitation period, the Limitation Act, 1963 shall apply.

Thus, enforcement of an award is important for the party and the arbitrator in order to ensure justice is delivered within time. The sole aim and purpose of arbitration is expeditious

[39] Pradeep Nayak, Sulabh Rewari and Vikas Mahendra, "Arbitration procedures and practice in India: overview", Thomson Reuters, Practical Law, 2019

[40] Nityananda M. Joshi v. LIC, (1969) 2 SCC 199

disposal of disputes between parties so that time and resources are not wasted or lost due to long court procedures. Enforcement comes after recognition of the award by the arbitrator. Enforcement assures the satisfaction to the winning party and the society at large. The consent of the parties is parallel significant for the successful enforcement of award. Therefore, it may rightly that be said that enforcement of arbitration award is the last nail in the coffin in the process of arbitration.

2.3.4) Appeal against the Award

The liberty to file an appeal against the award solely depends on procedural law governing the arbitration. While many jurisdictions provide the scope for judicial intervention on the merits of the arbitral award, the scope for judicial intervention on the merits of the arbitral award, UNCITRAL Model Law and Indian Arbitration Act do not allow the same.

Although it is authentic that by and large, the right to appeal is a legal right of the party in any judicial system, however, the parties are deprived of the same in case of arbitration. This is because, unlike judicial proceedings, the parties have all the liberty to choose the arbitrators of their choice, in view of their ability, and understanding of the subject-matter. It may be perceived that providing such a remedy would amount to nothing but a repetitive set of litigation. Undoubtedly, providing this remedy will ultimately defeat the purpose of an alternate and faster mechanism of dispute resolution as well.

In ***TPI Ltd. v. Union of India***[41], the constitutional validity of section 34 of the Arbitration and Conciliation Act, 1996 was challenged. The High Court of Delhi dismissed the suit stating that none of the parties is ever forced to adopt arbitration as a medium to resolve dispute.

Thus, the appeal against an arbitral award has a limited scope and can only be made on conditions specified by the law and procedure. The most apparent being the violation of principles of natural justice and breach of procedure with foul intention.

[41] TPI Ltd. v. Union of India, Civil Appeal No. 6875 of 1999, decided on 19-10-2000.

2.3.5) Grounds for challenging an arbitral award

The Arbitration and Conciliation Act, 1996 provides that an arbitral award may be set aside by a court on certain grounds specified therein. The arbitrator after making the award files the same in the court. The party desiring to have the award set aside must make an application to the court under which an award can be challenged on the grounds mentioned in section 34 of the Act. The Court can act only when such an application is made by a party. There is no special form prescribed to make the application. The section lists the grounds for setting aside which are exhaustive.

Under Section 34 of the Act, a party can challenge the arbitral award on the following grounds-:

1) the parties to the agreement are under some incapacity;
2) the agreement is void;
3) the award contains decisions on matters beyond the scope of the arbitration agreement;
4) the composition of the arbitral authority or the arbitral procedure was not in accordance with the arbitration agreement;
5) the award has been set aside or suspended by a competent authority of the country in which it was made;
6) the subject matter of dispute cannot be settled by arbitration under Indian law; or
7) the enforcement of the award would be contrary to Indian public policy.

Moreover, Section 34(2)(b) of the Act mentions two more grounds which are left with the Court itself to decide whether to set aside the arbitral award:

1) Dispute is not capable of settlement by arbitral Process
2) The award is in conflict with the public policy of India

A challenge under this section can be filed only after providing prior notice to the opposite party. In ***Municipal Corp. of Greater Mumbai v. Prestress Products (India),***[42] the court held that the new Act was brought into being with the express Parliamentary objective of curtailing judicial intervention. Section 34 significantly reduces the extent of possible challenge to an award.

[42] Municipal Corp. of Greater Mumbai v. Prestress Products (India), (2003) 4 RAJ 363 (Bom)

In ***Sanshin Chemical Industry v. Oriental Carbons & chemical Ltd.***[43], there arose a dispute between the parties regarding the decision of the Joint Arbitration Committee relating to venue of arbitration. The Apex Court held that a decision on the question of venue will not be either an award or an interim award so as to be appealable under Section 34 of the act.

In ***Brijendra Nath v. Mayank***,[44] the court held that where the parties have acted upon the arbitral award during the pendency of the application challenging its validity, it would amount to estoppel against attacking the award.

Furthermore, the remedy under this section is available only in case of domestic arbitration. Thus, an application filed under this section for setting aside an award made in connection with a contract relating to international commercial arbitration will have no applicability.

Thus, arbitration award is the conclusive decision with proper reasoning coupled with mutual understanding, by the appointed arbitrator adjudicating on the matter and thereby determining the ultimate rights and liabilities of the parties in the light of the arbitration agreement and the applicable law as per the agreement. The award is in writing and is binding upon the parties to follow. Moreover, the consent of the award is equally important as the other requirements of the award are.

Although, the UNCITRAL Model Law gives liberty to the parties to set the time limit as per their convenience. But the execution of the award must be done expeditiously so that the real purpose of speedy justice is not defeated.

[43] Sanshin Chemical Industry v. Oriental Carbons & chemical Ltd., AIR 2001 SC 1219
[44] Brijendra Nath v. Mayank, AIR 1994 SC 2562

Chapter 3

International Commercial Arbitration

3.1) International Commercial Arbitration

3.1.1) History and Origin of International Commercial Arbitration

Arbitration as a form of dispute settlement has its origin lost in obscurity.' Since the existence of trade and commerce, dispute resolution as a necessity and force developed exponentially. Arbitration had its traces everywhere, ranging from prehistoric Romans to the Malwas. One of the earliest arbitrators in world history was Solomon.[45]

From a mere dispute settlement mechanism, it has now become a relief for the trading parties in business a also protection or shield for an investor. It resolves the dispute and at the same time, keeps the bond between the parties to the dispute intact and hence overshadows litigation or the traditional form of dispute settlement.

The origin of market, trade and merchant evolved the term and System of commercial arbitration. There used to be several ludicrous and serious conflicts or disputes that arose while carrying on trade and exchange. This indirectly paved *way* to the development of various types and ways of adjudication. Usually, these adjudication bodies comprised of the merchant leaders or maybe even the trade union heads. The traders were more comfortable with the reaction of an adjudicatory body than the courts while deciding a dispute. With the advent of multiple trading bodies and Unions, there came up multiple charters and treaties that were signed and developed by the various merchant groups.

Raising claims of one party against the other became a regular affair. This created a state of equilibrium in the event of trade that involved a huge role or risk. Settlement through such adjudicatory bodies became the word for the mere fact that disputes were decided by the authorities who shared the same interest with regard to the carrying on of business. Meanwhile, in England, according to Lord Mustil, private arbitration flourished "on a scale which may not have been equalled elsewhere".[46]

3.1.2) Meaning of International Commercial Arbitration

Due to stronger connectivity amongst the nations, transactions across the borders have become a matter of daily lives. But when it comes to international arbitration there arises an acute question as to what precisely is "international transaction" or what constitutes an "international commercial transaction" and what subject-matter falls under the ambit of the

[45] Frank D. Emerson, "History of Arbitration Practice and Law", (1970) 19 Clev St L Rev 155
[46] Rene David, "Arbitration in International Trade", (Kluwer Arbitration 1985) 29

"international commercial arbitration"? There is no set definition for the word "commercial" in the field of arbitration. However, several attempts have been made to chalk out the parameters under the various conventions to identify the same.

It is contemplated that the word "commercial" should be construed broadly having regard to the manifold activities which are an integral part of the international trade today.[47] Although Model Law specifics a set of activities and their nature which may be said to be commercial in nature, however, it is not an exhaustive list.

Moreover, India, having signed the New York Convention, determines the nature of the transaction as commercial of non-commercial based upon the national legislation. The Commercial Courts Act, 2015, helps in doing the same. It specifies the transactions, which may fall under the ambit of "commercial" transactions in India.

The Arbitration Act is based the United Nations Commission on International Trade Law (UNCITRAL) model law and thus, there is an onus on the judiciary to interpret it in a way which supports the intention of the drafters of the international statutes.[48]

Section 2(1)(f) of the Arbitration and Conciliation Act, 1996, defines an International Commercial Arbitration (hereinafter ICA) as a legal relationship which must be considered "commercial", where either of the parties is a foreign national or resident, or is a foreign body corporate or is a company, association or body of individuals whose central management or control is in foreign hands.

Therefore, under Indian law, arbitration with a seat in India, but involving a foreign party will also be regarded as an ICA, and will be subject to Part I of the Act. However, where an ICA is held outside India, Part I of the Act would have no applicability on the parties but the parties would be subject to Part II of the Act.

Thus, International Commercial Arbitration can be considered to be an alternative method for resolving disputes, commercial in nature, between private parties arising out of transactions conducted across national boundaries, facilitating the parties to settle the matter without litigation in the national courts.

[47] R.M. Investment and Trading Co. (P) Ltd. v. Boeing Company, (1994) 4 SCC 541
[48] Arnav Maru, (2019) PL October 66

3.1.3) Scope of International Commercial Arbitration

Article 1(3) of the UNCITRAL Model Law, 1985 provides for scope of application of ICA:

(3) An arbitration is international if:

a) the parties to an arbitration agreement have, at the time of the conclusion of that agreement, their places of business in different States; or
b) one of the following places is situated outside the State in Which the parties have their places of business:
    i. the place of arbitration if determined in, or pursuant to, the arbitration agreement;
    ii. any place where a substantial part of the obligations of the commercial relationship is to be performed or the place with which the subject-matter of the dispute is most closely connected; or
c) the parties have expressly agreed that the subject-matter of the arbitration agreement relates to more than one country.

Furthermore, it is important to characterise what may be "commercial agreements".

Commercial agreements are contracts entered into between parties in the interest of transactions, for both business and development. They can cover multiple aspects of business and commerce such a contract has multiple parts. Some examples of commercial agreements are:

1. Joint venture agreements

2. Licensing and franchise agreements

3. Shareholder agreements

4. Contracts for the supply of goods and services

5. Employment contracts.[49]

Therefore, the above examples help in understanding what may be the commercial agreements in International Commercial Arbitration.

[49] Rohith M. Subramoniam and Navya Jain, "International Commercial Arbitration: An Introduction", Eastern Book Company, Lucknow, 2019, Pg. no. 11.

Thus, International Commercial Arbitration is an alternative medium for dispute resolution, available for the parties in case of international dispute subject to the fore-mentioned characteristics.

3.2) Types of International Commercial Arbitration

Similar to domestic arbitration, International Arbitration basically consists of two types, namely:

1. Ad hoc arbitration
2. Institutional arbitration

In order to characterise the above two kinds on the arbitration clause, it is fascinating that no all-round utilised definition for either ad hoc arbitration or institutional arbitration can be recognised. Notwithstanding this, the definitions given in significant arbitration course materials are very comparative. Moreover, numerous treaties on arbitration additionally concur by first characterising institutional arbitration and then addressing ad hoc arbitration, in this manner demonstrating the default character of ad hoc arbitration.

The debate of going for ad hoc arbitration on one hand and institutional arbitration on the other is by and large introduced according to their apparent advantages and disadvantages. There exists an existing combo or preparation, institutional arbitration, and there is a custom tailored one, ad hoc arbitration.[50]

Let's briefly discuss the two types and their features -:

A) Ad hoc arbitration

It can be defined as the system wherein the dispute between the parties is not submitted to an arbitral institution, and neither are the parties required to submit themselves to the rules and procedures followed in a particular arbitral institution. The parties are free and allowed to choose the rules and the methods of arbitration on their own. The rules for arbitration can be drawn by the parties themselves. If not, the parties may refer to the tribunal for its help.

[50] Rohith M. Subramoniam and Navya Jain, "International Commercial Arbitration: An Introduction", Eastern Book Company, Lucknow, 2019, Pg. no. 24.

Given the parties approach wherein the conduct of arbitration is the soul of the participation of the involved ones, ad hoc proceedings can be more adaptable, less expensive and quicker than an administered one. The non-occurrence of any administrative charges, alone, can settle the debate on cost on this topic. The ad hoc tribunal and proceedings need not be totally separated from its institutional partner. In many cases, the arrangement of a qualified and additionally fair-minded arbitrator establishes a staying point in ad hoc proceedings. In such cases, the parties can consent to assign an institutional secretariat as the naming authority. Further, the parties can choose to connect with an institutional centre to administer the arbitration throughout an ad hoc proceeding at any point of time.

Moreover, a certain disadvantage of ad hoc approach is its dependency on the choice of the parties, especially when the choices itself are in question. Failure on the part of the parties to initiate timely proceeding can result in loss of time and hence delaying the process of settlement and justice.

In other words, it is to say that this form of arbitration is more personalised and impromptu in nature. The arbitrators are appointed by mutual decision of the parties for each case. Generally, the applicability of the rules and procedures flows from the arbitration agreement decided by the parties.

In case if the parties are not able to arbitrate or fail to agree upon the same, the necessary arbitration shall be done by the appointed arbitrators, i.e. institutional arbitrators. [51]

In the Indian context, ad hoc arbitration has a limited existence as it is only considered suitable for resolving those disputes involving petty or minimal claims and not very affluent parties.

B) Institutional Arbitration

In Institutional arbitration, the arbitration agreement designates an arbitral institution to administer the arbitration. The parties then submit their disputes to the institution that intervenes and administers the arbitral process as provided by the rules of that institution. The institution does not arbitrate the dispute. It is the arbitral panel that arbitrates the dispute.

[51] Hascher T. Dominique , "Commentary on the European Convention 1961", Yearbook Commercial Arbitration (2011).

This type of arbitration provides for important aspects such as appointment of arbitrators, managing the arbitration process, identifying venues for holding arbitration hearings. Many such, Indian arbitrations are administered by international arbitral institutions such as Court of Arbitration of the International Chamber of Commerce, the Singapore International Arbitration Centre, and the London Court of International Arbitration.

Institutional arbitration helps in getting a clear set of arbitration rules, a clear timeline to conduct arbitration, panel of arbitrators to choose from, assistance from highly trained staff, helps when parties lack proper knowledge regarding arbitral proceedings.

The parties may stipulate, in the arbitration agreement, to refer a dispute between them for resolution to a regional institution. Some of them are – London Court of International Arbitration, Cairo Regional Centre for International Arbitration (CRCICA), Singapore International Arbitration Centre (SIAC) or Hong Kong International Arbitration Centre (HKIAC) or the Japanese Commercial Arbitration Association (JCAA) or the Asian International Arbitration Centre (AIAC) (formerly, Kuala Lumpur Regional Centre for Arbitration).

Moreover, Institutional arbitration may be preferred if the parties do not mind the administrative charges levied by the institution. However, there could be some concern if the amount in dispute is substantial as it would be necessarily mean that the administrative fees will also be high as they are calculated based on the amount in dispute. Moreover, the institution's administrative structure may lead to added time and costs which, in turn, may affect the efficacy of the arbitral process. The rules may also require the parties to respond within unrealistic time-frame. Such rules may be applicable to a particular trade or industry, but not to existing or prospective needs of one or more of the parties.

3.3) Sources of International Commercial Arbitration

The origin of law can be substantially traced back to hundreds of years; however, in the dynamic world, the facet of law keeps on evolving. Although there are various providers and sources of information on arbitration, the primary ones are the treaties, arbitration rules, national legislations and arbitral awards, Although arbitral awards are usually confidential, there are several commercial databases which provide the same to the interested community. Resources such as the Electronic Information System for International Law (EISIL), Kluwer,

EBC Reader, etc. can be used to navigate and collect extensive information on international arbitration rules, conventions and other documents, which are usually not available in the public domain. In addition to this, the secondary information is provided by several documents and Literature. This may include books, databases, journals, yearbooks and other allied materials.

Some of the leading and helpful sources with their requisite details are discussed briefly as below-:

II) UNCITRAL DIGEST OF CASE LAW ON THE MODEL LAW ON INTERNATIONAL COMMERCIAL ARBITRATION

The United Nations Commission on International Trade Law (UNCITRAL) Model law acts as a universal guide for the States to align and modernise thcir domestic arbitral procedure codes. This document provides for an explanatory case on an article to article basis. It encompasses case laws from various jurisdictions from around the world. [52]

III) ICCA YEARBOOK OF COMMERCIAL ARBITRATION AND ICCA HANDBOOK

For the first time, International Congress and Convention Association (ICCA) published its *Yearbook on International Commercial Arbitration* in the year 1976. It was compiled by Prof. Pieter Sanders, with the assistance of Prof. Albert Jan van den Berg. It is a chest of jurisprudential knowledge in the arena of arbitration and provides a dilettante view of the contemporary approach of the court over the legal matters, It not only throws light over the arbitral awards and court decisions but also Covers the commentary on another notable convection in the field, namely, the New York Convention, 1958 and all the developments around the same. In the year 2017, ICCA Yearbook Successfully marked its four decade of spreading light amongst generations.

The yearbook is also complemented by a handbook based on the same regime covering national legislation and cases from around the world.

[52] Rohith M. Subramoniam and Navya Jain, "International Commercial Arbitration: An Introduction", Eastern Book Company, Lucknow, 2019, Pg. no. 40.

IV) ARBLTRATION INTERNATIONAL

Oxford publication, Arbitration International, is a quarterly published periodical covering both, national as well as international news in the field of arbitration. It was launched in **1985** and since then has been regularly enlightening its readers on major arbitration rules, with the commentaries over the same by international scholars, coupled with the case laws developments and the debates over revolutionary aspects in arbitration. Apart from this, it also covers the reviews of the recent publications in the realm of arbitration.

V) ASA BULLETIN

Swiss Arbitration Association (ASA) Bulletin is a quarterly published and one of the leading journals in this domain. It is published by a non-profit association, looking forward to address all kinds of interest such as that of the academicians, practitioners, etc. who arc in search of the latest information on both international and domestic arbitration. It primarily focuses on providing information from Swiss jurisdiction.

VI) KLUWER ARBITRATION

Kluwer arbitration is an online database that provides easy access to the world of arbitration in no time. It is a house to various arbitral *awards,* court decisions, arbitral blogs, books, laws, journal archives, etc.

VII) CLOUT DATABASE

CLOUT database, *i.e.* Case Law on UNCITRAL Texts has today become an essential part of the arbitration system. It has been a constant source of information to its people for about 31 years. This system was designed in 1988 and primarily comprise of the decisions which solely follow UNCITRAL laws for arbitration and interpretation purposes. It was devised with the motive of facilitating and ensuring uniform interpretation of UNCITRAI laws.

VIII) GLOBAL ARBITRATION REVIEW (GAR)

GAR, a practitioner centred international journal started in the year 2oo6. It is a research journal published by Law Business Research. Tagging itself as “the leading resource of

international arbitration news and community intelligence" it is proficiently supplying news updates five days a week, original annual reports and surveys, and in-depth features covering issues in international arbitration around the world.

IX) EBC READER

This legal information provider brings forth extensive c-books and Digests on arbitration, Indian law and international law. It has a great collection of analytical legal information. It is easy to find various case briefs and legislations through this source. This platform also acts as lndia's leading legal information provider.

X) MEALEY'S INTERNATIONAL ARBITRATION REPORT

Mealey's International Arbitration Report is a monthly generated report by LexisNexis which provides a holistic view of the ongoing developments in the field of international commercial arbitration. It is easily accessible online within one day of its publication.

It also provides a monthly news brief capsule covering news from various legal segments. It is an assortment of tribunals, Boards, panels, news' letters, etc.; the origin of this capsule dates back to the year 1993 and is active to date.

XI) REVUE ARBITRAGE (REVIEW OF ARBITRATION)

Revue Arbitrage, as called in French or Review of Arbitration, in English, is a journal on arbitration. It was first started in the year 1995 by the French Arbitration Committee specifically catering to the arbitration sector in the French language. Originally, up-till the year of 1970 it was in the hands of Maitre Jean Robert; however, in 1970 when Prof. Philippe Fouchard took over the position of Editor-in-Chief, the destiny of the 1ournal changed completely. It was under the regime of Prof. Philippe Fouchard that this quarterly periodical became what it is today, the "true scientific journal". It consists of several sections which comprise of a plethora of information segregated under the heads such as jurisprudence and commentary over the decisions. It does not only restrict its ambit to the French laws but also goes on to explore the Swiss laws in the fourth publication every year.

XII) INTERNATIONAL LEGAL MATERIALS

At a stretch, for over *57* years, since 1961, International Legal Materials has been reproducing the essential international legal documents mirroring the widening scope and evolution in the field of international law. It is funded by the American Society of International Law and publishes six issues in a year. They contain a plethora of information based not only on arbitration hut also on other subject-matter, as well.

XIII) TRANSNATIONAL DISPUTE MANAGEMENT (TDM) AND OIL-GAS-ENERGY-MINING-INFRASTRUCTURE DISPUTE MANAGEMENT (OGEMID)

TDM is a peer-review online journal publishing about various aspects of international arbitration with a special focus on investment arbitration. TDM came into inception in 2004. It is a joint venture of Mans BV and Camko Ltd. Over a period of 14 years, it has expanded its foundation and seeped down as a widely used tool amongst a large number of law firms, professionals and scholars.

OGEMID is the only arbitration discussion forum which allows receiving the most recent information about arbitration from high profile professionals and staying up-to-date. It brings together most of the world's experienced professionals in the field of international dispute management and allows us to interact with them.

XIV) COMMENTARIES

Commentaries by the renowned academicians and scholars are another very reliable and informative source of information on international arbitration. Some of the well-known commentaries are:

1) Albert Jan van den Berg's The New York Arbitration Convention of *1958*
2) Howard Holtzmann and Joseph Neuhaus' Guide to the UNCITRAL Model Law on International Commercial Arbitration.
3) Fouchard Gaillard Goldman's International Commercial Arbitration
4) Gary B. Born's International Commercial Arbitration: Commentary and Materials.[53]

[53] Rohith M. Subramoniam and Navya Jain, "International Commercial Arbitration: An Introduction", Eastern Book Company, Lucknow, 2019, Pg. no. 43-44.

Thus, there are various sources of International Commercial Arbitration which are helpful in ascertaining the essence of arbitration procedure all around the globe and bring forward the various international disputes resolved through arbitration. These major sources help in deducing the available laws to resolve disputes expeditiously, of multiple facets.

3.4) Seat and Venue of International Commercial Arbitration

3.4.1) Seat of arbitration and its significance

The seat of arbitration is not just the geographical location but is a legal construct. It has numerous, practical significance in the conduct of arbitration and it addresses a myriad of issues. This helps in determining the national legislation and instruments that are applicable to the arbitral proceedings. Identifying and understanding the seat of arbitration is one of the most essential features of an arbitration clause.

If an arbitration agreement clearly mentions its seat outside India, then irrespective of the fact that Indian laws arc applicable, the courts in India cannot exercise any jurisdiction over the matters arising out from the arbitral proceedings. This situation holds valid even if the choice of law clause provides for the Indian Arbitration and Conciliation Act, 1996.

As an example, the effect of an arbitration agreement governed by Indian law is set out below, where the parties have agreed to London Court International Arbitration (LCIA) arbitration with its seat in Malaysia.

In the instant example, the procedure regarding the interpretation of the agreement shall be in accordance with the Indian laws, therefore, express regard has to be given to the Indian law while reviewing the contractual provision. The legal instruments of India have to be relied upon with while reviewing the provisions of the agreement. The institutional rules applicable in the said case are of the LCIA and, therefore, the administrative costs and fees of the arbitrators, etc. are set out in the LCIA Rules.

However, the seat of arbitration in the said example is Malaysia. Therefore, the laws of Malaysia would be applicable to the procedure of arbitration. Also certain time limits, enforcement of the arbitral award, etc. would be in accordance with the Malaysian legal regime. These are the circumstances where the seat of arbitration has a great impact on arbitration.

While enforcing an award, the signatories to the New York Convention, 1958 recognise, consider and enforce a foreign arbitral award which was decided by a tribunal in a country which is also a signatory to the Convention. Therefore, the seat of arbitration has to be chosen with great precision and thorough review.

While the decision over the seat of arbitration is made, it is advisable to consider the following:

1. Whether the country having the seat of arbitration is a party to the New York Convection of 1958.
2. Laws regarding the enforcement.
3. Grounds regarding annulment of the award.
4. National laws or rules on the selection of arbitrators.
5. Cost and other practical considerations.
6. Effect on the substantive law.[54]

Factors such as the local arbitration law and the reception of the local courts are also important considerations. It is, therefore, important to choose a country with arbitration-friendly regime as the seat of arbitration.

3.4.2) Venue of arbitration

The geographical location of the arbitral proceeding is considered to be the venue or place of arbitration. Under ordinary circumstances, the place of arbitration is chosen according to the convenience of the parties. In domestic arbitration, the venue of arbitration does not pose any hassle. This is not the case with international arbitration.

It is extremely important for the parties to international arbitration to specify the place of arbitration within the agreement. This is because of the fact that a change in the place of arbitration can bring in several procedural changes to the international arbitral proceedings. The legal instruments of India may not be the same as that of Singapore or may be Malaysia. They all differ in various ways.

When the agreement provides for both seat and venue of arbitration specifically, then the court of the country, having the seat of arbitration, has the jurisdiction over the proceedings. Meanwhile, if the party expressly designate Singapore as the venue and no designation of any seat in specified, then the courts of Singapore will have the express jurisdiction over the

[54] Rohith M. Subramoniam and Navya Jain, "International Commercial Arbitration: An Introduction", Eastern Book Company, Lucknow, 2019, Pg. no. 86.

matter. Therefore, the venue of arbitration is used to narrow down to the localisation theory when the seat of arbitration is not specified.

Thus, the "seat" and "venue" of arbitration tribunal plays a vital role in determining the rules and procedures to be applicable for the settlement of disputes between the parties concerned. Both the terms are different and the same has been recognised by the international law and various domestic laws of nations accordingly.

3.4.3) Arbitration seated in India and outside India

I) ICA seated in India

One of the foremost Indian decisions distinguishing between the concepts of 'seat' and 'venue' is that of a constitution bench of the Supreme Court in ***Bharat Aluminium Co (BALCO) v Kaiser Aluminium Technical Service Inc***[55].

In this decision, the bench analysed the Arbitration and Conciliation Act 1996 and concluded that the reference to "place" in Sections 20(1) and 20(2) is a reference to the seat of the arbitration, whereas the reference to "place" in Section 20(3) is a reference to the venue. The bench, relying on numerous foreign decisions, further acknowledged that the distinction between a 'seat' and a 'venue' can be complex. Moreover, as discussed earlier, in India, the exercise of concurrent authority became obvious when the Supreme Court delivered judgements in the cases of ***Bhatia International v Bulk Trading***[56] and "***Venture Global v Satyam Computer Services ltd.,***[57] which confirmed the interventionist approach of the Indian judiciary. The law laid down by the Apex court attracted wide criticisms from the global community because it acted in a manner contrary to the spirit of UNCITRAL Model Law.[58]

However, subsequently the Indian judiciary started interpreting arbitration agreements giving importance to the "seat theory" of arbitration as a means of damage control to prevent judicial intervention in arbitral proceedings.

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[55] Bharat Aluminium Co (BALCO) v Kaiser Aluminium Technical Service Inc., ((2012) 9 SCC 552)
[56] Bhatia International v Bulk Trading , (2002) 4 SCC 105; Appeal (civil) 6527 of 2001.
[57] Venture Global v Satyam Computer Services ltd., (2008) 4 SCC 190.
[58] Manu Thadikkaran, 'Judicial Intervention In International Commercial Arbitration' (2012) 29 Journal of International Arbitration.

II) ICA seated outside India.

Part 1 of the Arbitration and Conciliation Act, 1996, remains not applicable if the arbitration is outside India and only Part II is applicable to all the foreign awards which are sought to be enforced in India when the seat of arbitration was outside India under the New York convention. In the case of ***Bhatia International v. Bulk Trading,***[59] Supreme Court explicitly held that if an arbitral award is not been passed in a country under the convention then it will not be considered as a foreign award. Therefore, if a country is a mere signatory in the New York Convention, then it does not mean the award gets enforced in India then there are a total of 47 countries which are notified by Indian Government.
Therefore, the given below conditions need to get satisfied to make an award valid as a foreign award:[60]

1. It should be arbitral award.
2. It must have been arisen out of a dispute between the parties.
3. The dispute should come out as a legal relation which should be commercial in nature.
4. The award should pursuance of a written agreement on which New York Convention could be applied and should be applied and should have been made in anyone of those 47 countries.

Further, in the case of the ***World Sport Group (Mauritius) Ltd V. MSM Satellite (Singapore) ltd,***[61] Supreme Court observed that the allegations based on deceit and malpractices could not be a bar to direct parties in a dispute to an arbitration seated in foreign.
The Arbitration and Conciliation Act, 1996, provides for parties undergoing international commercial arbitration to bypass domestic regulatory mechanisms. If such a scheme was to be envisioned as applicable to two Indian parties as well, then it would result in Part I becoming a penalty for Indian parties for choosing to

[59] Bhatia International v. Bulk Trading, AIR 2002 SC 1432
[60] National Ability S.A. v. Tinna Oil Chemicals Ltd., 2008 (3) ARBLR 37
[61] World Sport Group (Mauritius) Ltd V. MSM Satellite (Singapore) ltd, Civil Appeal No. 895 of 2014 dated January 24, 2014

comply with Indian law. Allowing national parties to opt out of the Indian legal system may have many adverse effects.[62]

Thus, International Commercial Arbitration is a dispute settlement mechanism between parties having their origin or place of operation of business in a foreign country. The various centres and institutes of arbitration all over the globe provide a wide scope of arbitration as a dispute resolution mechanism. The seat of arbitration also plays a vital role in recognising the procedure and rules to be governed and followed by the arbitrator in dealing with a particular matter. International commercial arbitration plays a significant role in attracting foreign investment for the country as it affirms the investors and enterprises that the dispute would be dealt with fairness in pursuance of the international laws and just and proper procedure is followed to decide a dispute. The speedy disposal of disputes is also an outstanding feature and advantage of international commercial arbitration. Therefore, this provides an upper edge to attract investment as investors in other countries have full faith and assurance that in case of any dispute it would be settled in an expeditious manner by way of efficient and comprehensive arbitration.

[62] Vishvesh Vikram and Shubham Jain, "Foreign arbitral award, seat of arbitration", Kluwer Arbitration Blog, 2019

Chapter 4

Arbitration Institutions

4.1) Meaning of Arbitration Institutions

An institutional arbitration is one in which a specialised institution intervenes and takes on the role of administering the arbitration process. Each institution has its own set of rules which provide a framework for the arbitration, and its own form of administration to assist in the process. In the event where the parties opt for institutional form, it is imperative for them to ensure that the administration and rules of the institution favours their convenience.

Such institutions have specialised rules to conduct the proceedings and assist the parties. This, in turn, forms a triangular relationship between the parties, the tribunal and the institution. These arbitration centres and institutions adorn the role of a Secretariat which manages and takes care of the back end administrative procedure. They have well-trained officials and counsel to document and oversee the procedure.

An institution's panel of arbitrators will usually be made up of experts from various regions of the world and include many different vocations. This allows parties to select an arbitrator possessing the necessary skill, experience and expertise to provide a quick and effective dispute resolution process. It should be noted, however, that the parties merely nominate an arbitrator - it is up to the institution to make an appointment and the institution is free to refuse an appointment if it considers that the nominated arbitrator lacks the necessary competence or impartiality.[63]

For those who can afford institutional arbitration, the most important advantages are:

- the availability of pre-established rules and procedures which ensure the arbitration proceedings begin in a timely manner
- administrative assistance from the institution, which will provide a secretariat or court of arbitration;
- a list of qualified arbitrators to choose from;
- assistance in encouraging reluctant parties to proceed with arbitration; and
- an established format with a proven record.

Thus, the Arbitration Institutions or centres of arbitration are place where the arbitrable dispute is brought by the parties to be resolved by the procedure provided by the institution in

[63] Pinsent Masons, “Institutional vs. 'ad hoc' arbitration”, Out-Law Guide, 2011

pursuance of the international and domestic law applicable. These institutions help in speedy disposal of cases with a binding decision to be implemented and enforced by the parties at the earliest, but at their suitability.

4.2) Procedure of Arbitration Institution and its significance

The most important aspect of any adjudication is the rules and procedures that it adopts and follows in the disposal of matters at its end.

According to section 21 of the Arbitration and Conciliation Act, 1996, unless the parties agree otherwise, an arbitral proceeding of a dispute commences on the date on which a request for that dispute to be referred to arbitration is received by the respondent.

Section 19 of the Arbitration and Conciliation Act, 1996, recognises the right of the parties to agree on the procedural rules applicable to the arbitral proceedings.

Parties can adopt procedural rules (such as the Model Law) or agree to have their arbitration administered by an institution with its own rules in exercise of this choice. If the parties fail to decide on a procedure, the arbitral tribunal can conduct the proceedings in the manner it considers appropriate. The arbitral tribunal is not bound to follow the procedural rules that apply to domestic court proceedings. However, the procedure devised by the parties or the tribunal must meet the basic tenets of an adjudicatory process (such as the parties must be treated with equality and each party must be given a full opportunity of presenting his/her case).[64]

Further, under section 19(3) of the Arbitration Act, in the absence of an express agreement by the parties, the arbitral tribunal can, subject to Part I of the Arbitration Act, conduct the proceedings in the manner it considers appropriate. There is nothing in Part I of the Arbitration Act prohibiting or limiting the arbitral tribunal's power to order disclosure of documents and attendance of witnesses. Further, the courts have recognised that the arbitral tribunal has the same powers as the courts with respect to discovery, inspection, production of documents and summoning of witnesses.

The Arbitration Act also recommends that setting aside proceedings be completed within one year. In practice, while the courts have embraced to some extent the limitation on their scope

[64] Pradeep Nayak, Sulabh Rewari and Vikas Mahendra, "Arbitration procedures and practice in India: overview", Thomson Reuters, Practical Law, 2019

of enquiry, they have generally not been able to complete proceedings within the prescribed time limit.[65]

Moreover, section 26 of the Act empowers the arbitrator to appoint one or more experts to report to it on specific issues and require a party to give the expert(s) any relevant information or to produce, or to provide access to, any relevant documents, goods or other property for their inspection. The tribunal can also order the expert(s) to participate in the oral hearings where the parties have been given the opportunity to cross examine the expert(s) on their testimony.

Thus, the procedure of the arbitration plays a significant role in the speedy disposal of the disputes before it. The courts also play a vital role in filling the gaps between the legislative enactment and the enforcement institution in order to ensure and facilitate the parties with justice in an efficient and speedy manner.

4.3) Centres of Arbitration Institution

The centres of arbitration all over the world follow a procedure established by law and recognised by the parties in pursuance of their domestic law regime. There are approximately 1200 institutions worldwide which offer arbitration services, and some will deal with a particular trade or industry. Care should be taken in the selection process as some institutions may act under rules which are not adequately drafted.

In India, currently, there are almost 35 Arbitral Institutions for - a) Domestic; b) International; c) PSUs; d) Trade and merchant associations and; e) City specific chambers of commerce and industry.

Some domestic arbitration institutions in **India** are -:

I) **Mumbai Centre for International Arbitration,**

II) **Nani Palkhivala Arbitration Centre.**

[65] Pradeep Nayak, Sulabh Rewari and Vikas Mahendra, "Arbitration procedures and practice in India: overview", Thomson Reuters, Practical Law, 2019

Some High Courts in India have also set up arbitration centres affiliated with such High Courts, such as the Delhi International Arbitration Centre and the Arbitration & Conciliation Centre – Bengaluru (Domestic & International) an initiative of the High Court of Karnataka.

Moreover, the **New Delhi International Arbitration Centre (NDIAC)** was introduced in the year 2018, by the Indian government which cemented the plans to promote India as an international alternative dispute resolution hub and a safe seat for international commercial arbitration.

Such institutions either have their own rules or are governed by the rules of UNCITRAL.

Some of the **International Arbitration Centres** and **Institutions** are discussed and provided as follows-:

I) Permanent Court of Arbitration

The Permanent Court of Arbitration (PCA) was established as a result of the Convention for the Pacific Settlement of International Disputes which was concluded at The Hague, Netherlands in 1899 during the Hague Peace Conference.

II) ICC International Court of Arbitration

The International Chamber of Commerce (ICC) International Court of Arbitration was established in the year 1923 under the leadership of the ICC's first President and former French Politician Etienne Clementel.

The governing body of the ICC consists of the following:

1. President
2. Vice Presidents
3. Members

III) China International Economic and Trade Arbitration Commission

The China International Economic and Trade Arbitration Commission (CIETAC) is headquartered in the capital city of the most populous country of the world, China. It is the largest and the biggest arbitration institution in the People's Republic of China established under China Council for the Promotion of International Trade (CCPIT) in the year 1956.

IV) Asian International Arbitration Centre (formerly, Kuala Lumpur Regional Centre for Arbitration)

The Asian International Arbitration Centre (AICC) was the first regional centre of arbitration that was established in Asia by Asian-African Legal Consultative Organisation (AALCO) by its former name, the Kuala Lumpur Regional Centre for Arbitration, in the year 1978.

V) Hong Kong International Arbitration Centre

The Hong Kong International Arbitration Centre (HKIAC) was another gem of the Chinese legal fraternity. Arbitration as a dispute resolution mechanism emerged in Hong Kong in the year 1843. However, it came into full swing only by 1963, when it got its first Arbitration Ordinance enacted.

VI) Singapore International Arbitration Centre

The Singapore International Arbitration Centre (SIAC) was established in the year 1991. It is an independent, not-for-profit organisation, which has recently come out to be a prominent name in institutions for arbitration.

VII) Arbitration Institute of the Stockholm Chamber of Commerce

The Arbitration Institute of the Stockholm Chamber of Commerce (SCC) is one of the oldest known arbitration centres. It has successfully been serving parties in arbitrating their matters for over a century, since 1917.

VIII) Vienna International Arbitration Centre

The Vienna International Arbitration Centre (VIAC) is another premier international alternative dispute resolution institute widely known in Europe, America and Asia for arbitrating a significant number of disputes. It was founded in Austria in 1975 as a permanent arbitral institution of the Austrian Federal Economic Chamber (AFEC).

IX) Swiss Chambers of Arbitration Institution

Switzerland is widely known for its ancient history and contribution to the origin of arbitration. Tracing the origin to the 13th century, the Swiss Chamber of Commerce is the father of what we call today “Swiss Chambers of Arbitration

Institution (SCAI)". It has been 152 years that Swiss Chambers had been serving the parties in concluding about more than 1000 arbitrations in both domestic and international domain.

X) London Court of International Arbitration

The London Court of International Arbitration (LCIA) is by far a highly sought after arbitration institution in the European continent. It was formally inaugurated on 23 November 1892 in the light of the dire need for a tribunal to adjudicate upon domestic and transactional commercial disputes. Initially, it was a general perception that LCIA was an English dominated organisation; however, the same was done away with as soon as it appointed several non-English presidents and vice-presidents of the organisations.[66]

Thus, there are numerous arbitration institutions all over the world serving the purpose of speedy disposal of commercial disputes between parties with recognised procedures and rules established by law.

4.4) Number of Arbitrator

Number of arbitrators: One or three?

The parties to the arbitration agreement ultimately have the right to decide the number of arbitrators that would constitute the Arbitral Tribunal. The rules and domestic statute usually give the option of having either one or three arbitrators. The sole Arbitral Tribunal is constituted when the matter involves a disputed amount to a certain prescribed limit. A three-member tribunal is preferred when the dispute involves transnational laws, technicalities or other complex and foreseeable issues.

When a dispute involves a decent record of various national laws, conventions and encounters, it is better arbitrated and administered by a multi-member tribunal. Hence, a multi-member tribunal can benefit significantly from individual encounters, singular perspectives and the individual aptitude of the arbitrators. Undoubtedly, all the parties crave to appoint an individual as an arbitrator who would guarantee and assure due observance of the procedure. Every party looks forward to appointing an arbitrator who is impartial, reasonable, trustworthy and has thorough knowledge to understand the implications of the

[66] Gray Born, International Commercial Arbitration in the United States: Commentary and Materials (Kluwer Law International 2001).

situation. This gives a sense of assurance and relief to the parties that they are provided with an opportunity to present their case at the most appropriate set-up.

Hence, the number of arbitrators constituting an Arbitral Tribunal has three main impacts:

1. Timeline of the proceeding
2. Cost(s) involved
3. Party's right to appoint an arbitrator

To avoid deadlocks, it is extremely important to choose an odd number arbitration.

Preference of sole-arbitrator over the three-member tribunal can be in accordance with the legal system of the national. It is usually a thumb rule that in common law countries, there are certain preferences for a sole-arbitrator, whilst a three or more member tribunal is usually preferred by civil law nations. Today, when similar guidelines are regularly relevant to universal and important cases, and when various new organisations have been built up managing with extraordinary administration as well as with genuinely little and straightforward cases, the three-part tribunal can add up to "pointless excess", bringing superfluous expenses and postponements. India has a handful of professional arbitrators which indirectly acts as a hindrance to foreign investment.

4.5) An Arbitrinal Tribunal's power to lift the corporate veil

India recognises the principle of ***kompetenz-kompetenz***. The arbitral tribunal is empowered to decide on its own jurisdiction, as provided under section 16 of the Arbitration and conciliation Act, 1996.

If the arbitral tribunal rules that it does not have jurisdiction, the ruling can be challenged before a court. However, if the arbitral tribunal rules that it does have jurisdiction, no immediate appeal or challenge is available and the only option would be to challenge the final award passed by the arbitral tribunal on the ground of lack of jurisdiction.

There is however a narrow exception to this rule. Under Indian law, if a court is approached to refer a matter to arbitration and during the course of such reference the court decides any issue pertaining to the jurisdiction of the tribunal or the validity of the arbitration agreement, the decision of the court is binding on the tribunal. In recent times, courts have significantly narrowed the scope of their interference.

Therefore, the situation in which a decision of the court is binding on the arbitral tribunal continues to be narrowed over time. [67]

The Arbitration and Conciliation Act, 1996 does not directly address or list down the categories of disputes resolvable via arbitration. It only lays down that an arbitral award can be challenged if "the subject-matter of the dispute is not capable of settlement by arbitration under the law". The courts have, thus, on a case-to-case basis, decided the ambit and scope of arbitrability and pronounced the category of disputes not "capable of settlement by arbitration". Leading case law on the subject is ***Booz Allen & Hamilton Inc. v. SBI Home Finance Ltd.*, ,** [68] which lays down that a dispute that create or affects rights in remain inarbitrable, while disputes relating to rights in personam remain amenable to the jurisdiction of an Arbitral Tribunal.

Since, ***Booz Allen*** still remains the law of the land, there arises no difficulty in positing that the arbitrability test laid down therein stands satisfied. It is also to be noted that the Indian judiciary has taken a pro-arbitration stance in the recent years, pronouncing, in certain cases for example, intellectual property disputes to be arbitrable.[69]

Even after clearing the barrier of the Booz Allen test, S. 34 further states that awards may be rendered unenforceable if they fail to meet the prevailing public policy. Decisions In ***Kingfisher Airlines Ltd. v. Prithvl Malhotra,***[70] and ***Rajesh Korat v. Innovifi Embedded Solutions (P) Ltd.***[71], are important in this regard. They state that even where the claim in question Is a right in personam, it would be still rendered non-arbitrable in view of public policy reasons. This lays emphasis on the consequences following a private arbitration. The 1996 Act has narrowed down the scope of what stands in conflict with the public policy to three main grounds: **first**, if the award was affected by fraud, **second**, if it is rendered against the fundamental policy of Indian law, or **third**, it is In conflict with prevailing notions of morality and justice. As stated before, the public policy argument is concerned more with the consequences rather than the initial jurisdiction of the Tribunal. If any of these provisions are contravened, the party to the arbitration would not be able to avail the force of the State machinery to enforce the award.

[67] Pradeep Nayak, Sulabh Rewari and Vikas Mahendra, "Arbitration procedures and practice in India: overview", Thomson Reuters, Practical law, 2019
[68] Booz Allen & Hamilton Inc. v. SBI Home Finance Ltd., (2011) 5 SCC 532
[69] Eros International Media Ltd. v. Telemax Links India (P) Ltd., 2016 SCC Online Bom 2179
[70] Kingfisher Airlines Ltd. v. Prithvl Malhotra, 2012 SCC Online Bom 1704
[71] Rajesh Korat v. Innovifi Embedded Solutions (P) Ltd., 2017 SCC Online Kar 4975

In any case, lifting of the corporate veil, if done according to the set precedents and in accordance with the law, would not fit into any of the categories listed in the Act. This, therefore, concludes the discussion on the arbitrability of cases that necessitate the lifting of the veil. It is submitted that the reasonable conclusion that may be drawn is that there are no provisions in the Act that specifically restrict an Arbitral Tribunal from lifting the corporate veil.

Over the past decade, various cases of the High Courts of Bombay Delhi, and the Supreme Court have dealt with the question of the arbitrator' power to lift the corporate veil. The case law has, however, been inconsistent in dealing with the question, in the absence of any judgment by a Full or Constitutional Bench of the Supreme Court.

Chronologically, the first case to have cursorily dealt with the question with that of ***Indowind Energy Ltd.*** **v.** ***Wescare (I) Ltd.***[72] The Court, in the present case noted that the conditions for lifting the corporate veil were not met. While, the power of an arbitrator to lift the corporate veil was not addressed, it was emphasised that non-signatories cannot be bound by an arbitration agreement.

The next case to walk the intersection between company law and arbitration law on the issue of lifting the corporate veil was that of ***Purple Medical Solutions (P) Ltd. v. MIV Therapeutics Inc.***[73] The petitioner in the present case sought appointment of an arbitrator on behalf of two respondents of which only one was a signatory to the arbitration agreement with the petitioner. The impleadment of the second respondent was sought based on the fact that the first respondent was only a corporate veil of the second and that all transaction were performed by the first respondent on behalf of the second. A single Judge of the Supreme Court lifted the corporate veil of the second respondent and appointed an arbitrator on its behalf. The important point to be noted here is that the court has lifted the corporate veil and appointed the arbitrator after doing the same.

Sudhir Gapi v. Indira Gandhi National Open University[74] is by far the most important case addressing the question at hand and requires a fuller discussion. The judgment in this case starts off by noting that an Arbitral Tribunal a creature of consent and its jurisdiction is circumscribed by the agreement between parties. This limited jurisdiction does not confer upon it the right to include persons who have not consented to arbitrate. On this limited

[72] Indowind Energy Ltd. v. Wescare (I) Ltd., (2010) 5 SCC 306
[73] Purple Medical Solutions (P) Ltd. v. MIV Therapeutics Inc., (2015) 15 SCC 622
[74] Sudhir Gapi v. Indira Gandhi National Open University , 2017 SCC OnLine Del 8345

reasoning the court concluded that the Arbitral Tribunal would not have the power to lift the corporate.

Only three months later, however, the Judgment of another single Judge Bench of the Delhi High Court came to a contradictory conclusion and held the judgment in ***Sudhir Gopi***[75] as per incuriam. In ***GMR Energy Ltd. v. Doosan Power Systems India (P) Ltd.***[76]**,** the High Court rejected the contention that the Arbitral Tribunal does not have the power to lift the corporate veil and granted relief. It noted the categories of disputes held to be inarbitrable in the matter of ***A. Ayyasamy v. A. Paramasivan***[77] and observed that lifting of the corporate veil does not fall within the enumerated categories. Concluding its observation on this particular issue, the court noted that the issue of alter ego can be decided both by the court as well as the Arbitral Tribunal.

As has been noted, the international trends have indicated a pro-arbitration shift across commercial cases, and only a very few categories remain fully inarbitrable today. When most developed jurisdictions, which also function on legislation akin to the UNCITRAL model law, have allowed arbitrators to look beyond the corporate facade, India retains an anomalous and an uncertain position on this.

Thus, the legal position on the matter remains unclear in the absence of a judgment from a Full or a Constitutional Bench of the Supreme Court.

[75] Sudhir Gapi v. Indira Gandhi National Open University , 2017 SCC OnLine Del 8345
[76] GMR Energy Ltd. v. Doosan Power Systems India (P) Ltd., 2017 SCC Online Del 11625
[77] A. Ayyasamy v. A. Paramasivan, (2016) 10 SCC 386

Chapter 5

Alternative Dispute Resolution (ADR) Mechanisms

5.1) Alternative Dispute Resolution Mechanisms

In the words of **Abraham Lincoln**[78] -

"Discourage litigation. Persuade your clients to compromise, whenever you can. Point out to them the nominal winner is often a real loser; in fees, expenses and waste of time. As a peace-maker, the lawyer has a superior opportunity of being a good person."

It is almost impossible to eliminate contradictions, conflicts and disputes in any society, and the human society develops in contradictions. It is these contradictions and conflicts which tell us the importance of peace.

There are numerous stake-holders of justice delivery system. The most important is the consumer of justice who is a litigant. The seekers of justice come to the courts with pain and anguish in their hearts because they have faced legal problems and suffered physically and psychologically. They have a trust in the courts and believe that they would get justice from the courts, so they do not take the law into their own hands.

An effective judicial system requires not only that just results be reached but they be reached swiftly. However, the reality is that it takes a very long time to get justice through the established court system. In spite of the continuous efforts, sometimes the litigation continues for the life time of the litigant and sometimes it carries on even to the next generation. In this state of uncertainty and unending long process, the disputant or litigant may exhaust his resources besides physical and mental sufferings. Thus, there is a chain reaction of litigation process and, at times, civil cases may even give rise to criminal cases.

In India, the justice delivery system through courts has given rise to certain grave problems like inordinate delays, huge pendency of cases and expensive litigation. Thus, it has become very difficult for the poor and marginalized people to have access to justice.

In these circumstances, it becomes significantly necessary for all the stake-holders of the judicial system to find out some mechanism where such grey areas can be effectively and adequately taken care of. Alternative Dispute Resolution (ADR) contains the effective mechanism to provide speedy and cost effective justice delivered, it also has the potential to trim the huge arrears of cases to size. Parliament brought about a legislation and introduced section 89 and Rules 1-A, 1-B and 1-C to Order X in the Code of Civil Procedure, 1908, so as to make effective use of ADR process.

[78] 'Abraham Lincoln's Notes For A Law Lecture' (Abrahamlincolnonline.org) accessed 14 May 2020.

Section 89 of the Civil Procedure Code provides for the settlement of disputes outside the Court. It is based on the recommendations made by the Law Commission of India and Malimath Committee.

Moreover, the Constitution of India provides for Directive Principles of State Policy for the states to render legal aid to the aggrieved by providing equal opportunity and to promote international peace and security by encouraging arbitration. Article 39-A of the Constitution of India provides that the State shall secure that the operation of the legal system promotes justice, on the basis of equal opportunity and shall in particular, provide free legal aid, by suitable legislations or schemes or in any other way, to ensure that opportunities for securing justice are not denied to any citizen by reason of economic or other disabilities. Article 51 (d) provides for promotion of international peace and security by the state by endeavouring to encourage settlement of international disputes by arbitration.

The Malimath Committee recommended for obligatory for the Court to refer the dispute, after issues are framed, for settlement either by way of Arbitration, Conciliation, Mediation, Judicial Settlement through Lok Adalat. It is only when the parties fail to get their disputes settled through any of the alternate disputes resolution method that the suit could proceed further.

The various types of ADR and significance of arbitration have been highlighted by comparing it with the other mechanisms of dispute resolution.

The several types of Alternative Dispute Resolution (ADR) mechanisms are discussed as follows-:

5.2) Conciliation

Conciliation is an alternative dispute resolution process whereby the parties to a dispute use a conciliator, who meets with the parties separately in order to resolve their differences. They do this by lowering tensions, improving communications, interpreting issues, providing technical assistance, exploring potential solutions and bring about a negotiated settlement. For a reference to conciliation also the consent of the parties to the dispute is a must. If both the parties do not agree for conciliation, there can be no conciliation. As a consequence the court cannot refer the parties to the conciliation section 89 of the Code of Civil Procedure (CPC), in the absence of consent by all the parties. When a matter is referred to conciliation,

it does not go outside the stream of the court and if the conciliation fails, the matter is returned to court for hearing of the case. The ADR Process of Conciliation is also governed by the Arbitration and Conciliation Act. If a matter is settled through conciliation, then according to S. 74 of the Arbitration and Conciliation Act, such settlement will have the same status and effect as an arbitral award. Thus, such settlement is enforceable as a decree of the court as per section 36 of the Arbitration and Conciliation Act.

Conciliation differs from Arbitration as disputes settled through former method is not binding upon the parties and is, thus, not enforceable by court.

Most commercial disputes, in which it is not essential that there should be a binding and enforceable decision, are amenable to conciliation. Conciliation may be particularly suitable where the parties in dispute wish to safeguard and maintain their commercial relationships.

5.3) Mediation

In the modern age, worldwide mediation settlement is a voluntary and informal process of resolution of disputes. It is a simple, voluntary, party centered and structured negotiation process, where a neutral third party assists the parties in amicably resolving their disputes by using specified communication and negotiation techniques. Mediation is a process where it is controlled by the parties themselves. The mediator only acts as a facilitator in helping the parties to reach a negotiated settlement of their dispute.

One of the renowned textbooks on ADR stated that "*Mediation is negotiation carried out with the assistance of a third party. The mediator, in contrast to the arbitrator or judge, has no power to impose an outcome on disputing parties.*"[79]

The process of mediation is voluntary because the parties have the final say regarding the option as to whether to get their dispute settled through mediation. They also retain the right to decide the terms of settlement of dispute. Even if the dispute is required to be settled through mediation under the contract or statute or if the court has referred a case for mediation, the parties have the right to decide as to whether to settle the dispute and the term of settlement.

[79] Stephen B Goldberg and others, Dispute Resolution (Aspen Publishers 2014).

In the process of meditation the mediator assists the parties to bring about a resolution to their dispute. He does not adjudicate a dispute by imposing a decision upon the parties rather he works together with parties to facilitate the dispute resolution. The job of mediator is of a facilitator because he manages the interaction between the parties, encourages and promotes communication between them and manages interruption and outbursts by them so as to facilitate and motivate them to arrive at a settlement which is acceptable to the parties. But the mediator has no power to dictate his decision over the party. There is a win – win situation in the mediation.

Therefore, the settlement through mediation process results in a settlement created by the parties themselves and it is therefore acceptable to them. Thus, there is no winner and no loser in this process, only the problems are resolved. In this process the disputed parties maintains the confidentiality of proceedings.[80] But in arbitration, the arbitrator grants award to the party in accordance with settled principles of law.

The major drawback of mediation is that any party is at liberty to withdraw from the mediation proceedings, at any stage and without assigning any reason, before its termination.

On the other hand, in the process of arbitration involve a formal way and withdrawal of proceedings is only in the hands of the arbitrator if he thinks fir in the interest of justice for the parties.

Thus, arbitration is a better mode for settlement of commercial disputes rather than mediation and is preferable by the parties in civil and commercial matters in comparison to mediation.

5.4) Negotiation

Negotiation is a process where two parties in a conflict or dispute reach a settlement between themselves that they can both agree on. Negotiations are reached through discussions made between the parties or their representatives without an involvement of the third party. Each party should consult or see a lawyer before settling down the matter, so that they are well aware of their rights and duties in respect to the matter or dispute they are willing to solve.

This form of ADR is often overlooked because of how obvious it is. In negotiation, there is no impartial third party to assist the parties in their negotiation, so the parties work together

[80] L, Boulle, Mediation: Principles, process, practice (Butterworths, Sydney,1996) p10-14.

to come to a compromise. The parties may choose to be represented by their attorneys during negotiations.

But in India, Negotiation doesn't have any statutory recognition i.e., through way of legislation. Negotiation is self counselling between the parties to resolve their dispute.

The process of Negotiation involves six stages-:

(1) preparation; (2) preliminary; (3) information; (4) distributive; (5) closing; and (6) cooperative.

Furthermore, throughout the negotiation process, negotiators are bound by the Model Rules of Professional Conduct ("Model Rules"). Under generally accepted negotiation conventions, certain types of statements ordinarily are not taken as statements of material fact. An affirmative factual misrepresentation is information that a person would rely on when making a decision that is not mere puffery or embellishment.

But Negotiation as a process of ADR suffers with the following disadvantages-:

- The parties to the dispute may not come to a settlement.
- Lack of legal protection of the parties to the conflict.
- Imbalance of power between the parties is possible in negotiation.

Whereas, in arbitration the parties to the dispute mostly arrive to a settlement as the arbitrator adjudicates in accordance to the law in favour of the deserving party. Negotiation, in comparison to arbitration, is an informal method of dispute resolution and latter is a formal method. Moreover the procedure in negotiation is not legally binding and the confidentiality is only based on trust. On the other hand, in arbitration the procedure is legally binding on the parties and the confidentiality is determined by the law.

5.5) Lok Adalat

The concept that is gaining popularity is that of Lok Adalats or people's courts as established by the government to settle disputes through conciliation and compromise. It is a judicial institution and a dispute settlement agency developed by the people themselves for social justice based on settlement or compromise reached through systematic negotiations. The first Lok Adalats was held in Una aim the Junagadh district of Gujarat State as far back as 1982.

Lok Adalats accept even cases pending in the regular courts within their jurisdiction. Section 89 of the Civil Procedure Code also provides as to referring the pending Civil disputes to the Lok Adalat. When the matter is referred to the Lok Adalat then the provisions of the Legal Services Authorities Act, 1987 will apply.

The Supreme Court, emphasising the importance of Lok Adalats has observed in the case of ***Madhya Pradesh State Legal Services Authority v. Prateek Jain and Antoher***[81]-:

"*Lok Adalats have been created to restore access to remedies and protections and alleviate the institutional burden of the millions of petty cases clogging the regular courts*."

Experience has shown that not only huge numbers of cases are settled through Lok Adalats, this system has definite advantages, some of which are listed below:-

(a) speedy justice and saving from the lengthy court procedures;

(b) justice at no cost;

(c) solving problems of back-log cases, and

(d) maintenance of cordial relations."

The Lok Adalat is presided over by a sitting or retired judicial officer as the chairman, with two other members, usually a lawyer and a social worker. There is no court fee, thus making it available to those who are the financially vulnerable section of society. In case the fee is already paid, the same is refunded if the dispute is settled at the Lok Adalat. The Lok Adalat are not as strictly bound by rules of procedure like ordinary courts and thus the process is more easily understood even by the uneducated or less educated. The parties to a dispute can interact directly with the presiding officer, which is not possible in the case of normal court proceedings.

In ***Venkatesh v. Oriental Insurance Co. Ltd.***,[82] 54 Karnataka High Court held-

"a Court can suo-moto or at the request of even one of the parties, refer the case to the Lok Adalat provided that it is done after giving a hearing to all parties and it is satisfied that there are chances of settlement or that the case is a fit one to be taken cognizance by the Lok Adalat, and records such satisfaction."

[81] Madhya Pradesh State Legal Services Authority v. Prateek Jain and Antoher; (2014) 10 SCC 690
[82] Venkatesh v. Oriental Insurance Co. Ltd.Miscellaneous First Appeal No. 4357 Of 1996

In ***Punjab National Bank v. Lakshmichand Rai***,[83] after the detailed analysis of the Legal Services Authorities Act and section 96 of CPC, High Court of Madhya Pradesh held that "Lok Adalat is conducted under an independent enactment and once the award is made by a Lok Adalat the right of appeal shall be governed by the provisions of the Legal Services Authorities Act."

In ***Parmod v. Jagbir Singh And Ors***,[84] Punjab and Haryana High Court held that the aggrieved person of the Lok Adalat award cannot invoke section 151 of CPC for challenging the award; he can invoke supervisory powers of High Court under article 227 of Indian Constitution for challenging the Lok Adalat award.

In ***Manju Gupta v. National Insurance Co. Ltd***.,[85] the Allahabad High Court had taken *suo moto* cognizance of an award passed by Lok Adalat on an apparent error and grave injustice in a motor vehicle claim. The Court observed – "In Lok Adalats in the name of speedy justice, the court should not sacrifice the real cause of justice for which confidence has been reposed in them by the society."

Further, it is relevant to mention that Lok Adalats are not necessarily alternatives to the existing courts but rather only supplementary to them. They are essentially win-win systems, an alternative to 'Judicial Justice', where all the parties to the dispute have something to gain.

When compared to Arbitration, Lok Adalat as an alternative dispute resolution mechanism suffers the drawback of expeditious disposal of cases. Unlike, arbitration, in Lok Adalat the parties do not come to it by mutual decision but are referred by the court of law. Arbitration is a more flexible and suitable way as compared to Lok Adalat for the resolution of civil and commercial disputes, especially in a country with diversity of affairs.

Thus, the above modes of dispute resolution are significant in their respective jurisdiction but when compared to arbitration in the settlement of commercial disputes, the latter outweighs the others due to its wide usage and recognition all over the globe by nations. One of the significant advantage arbitration, amongst its numerous benefits, is that it has a procedure recognised by law, its award is binding on the parties and the dispute resolution process is faster and efficient as compared to litigation and any other mode of Alternative Dispute Resolution (ADR) mechanism.

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[83] Punjab National Bank v. Lakshmichand Rai, AIR 2000 MP 301
[84] Parmod v Jagbir Singh And Ors, [2003] 133 PLR 365.

[85] Manju Gupta v National Insurance Co. Ltd. [1994] ACC 242, 1994 ACJ 1036

5.6) Arbitration is, perhaps, the best alternative method for settlement of commercial disputes in India.

In the words of **Mahatma Gandhi**[86] -

"*I realized that the true function of a lawyer was to unite parties riven asunder. The lesson was so indelibly burnt into me that a large part of my time during the twenty years of my practice as a lawyer was occupied in bringing about private compromises of hundreds of cases. I lost nothing thereby- not even money, certainly not my soul*."

Moreover, significantly, **Abraham Lincoln's** quote over a century ago also remains very instructive for lawyers today:

"Discourage litigation. Persuade your neighbours to compromise whenever you can… As a peacemaker the lawyer has superior opportunity of being a good man. There will still be business enough"[87]

According to Prof. (Dr.) J Olakunle Orojo CON and Prof. M. Ayodele Ajomo:

'Arbitration is a procedure for the settlement of disputes, under which the parties agree to be bound by the decision of an arbitrator whose decision is, in general, final and legally binding on both parties.'[88]

It is well settled that owing to nature of human beings and the number of activities engaged into makes dispute and conflicts inevitable.[89] The dispute between parties is liable to be disposed of in an efficient, speedy and convincing manner. Litigation has been the formal way of dispute resolution in which the court of law disposes the disputes in accordance with established principles of law. But due to lengthy procedures, high costs, minimal confidentiality and unpredictable results, litigation has been lacking in disposing commercial disputes in a speedy manner. The parties to a commercial dispute suffer huge losses if the issue is not resolved in a time bound manner, as huge capital and stakes are at risk of the business or companies in the dispute. Therefore, any other mode which is faster, predictable, confidential and time bound and legally enforceable is to be adopted for commercial dispute

[86] Gandhi and Mahadev H Desai, An Autobiography, [Or], The Story Of My Experiments With Truth (Prakash Books 2009).
[87] Abraham Lincoln, American President, 1861-1865, Pine, J. (ed.), Wit and Wisdom of American Presidents, (Dover Publications, Inc., Mineola, New York, 2002), p. 27.
[88] Orojo Olakunle .J. and Ajomo Ayodele M. (1999): Law and Practice of Arbitration and Conciliation in Nigeria, Lagos: Mbeyi & Associates (Nig.) Ltd.
[89] Julian D M Lew et al (2003): Comparative International Commercial Arbitration, Kluwer Law International

resolution. Arbitration has been the recognised mode preferred by nations all over the world for resolving commercial disputes with the authority of law and mutual consent of the parties as well.

Moreover, several Indian laws are inclined towards arbitration as a preferred mode of dispute settlement. The Constitution of India provides for in Article 51(d) for the State to settle international disputes by way of arbitration. Subsequently, many other laws which provide for usage of arbitration as a dispute resolution mode are namely-: Section 89 of the Code of Civil Procedure, 1908, the exceptions of Section 28 of the Indian Contract Act, 1872, the Industrial Disputes Act, 1947, Specific Relief Act, 1963 and many more. This shows the importance of arbitration as a mode of dispute resolution in India.

Arbitration is a mode which enables the resolution of disputes between parties with their mutual assent which is pre decided by way of agreement. The parties are at liberty to choose the mode of arbitration, i.e., whether Ad Hoc arbitration or Institutional Arbitration. The rules and procedures of the arbitration are pre defined and recognised by the International law and domestic law, which flows from the UNCITRAL Moldel Law recognised by most of the nations of the world.

Arbitration as a mode of dispute resolution provides the following important advantages-:

1) Speedy and time bound disposal of disputes
2) There is predictability in arbitration as it involves a set procedure by mutual understanding
3) The cost and expenses are lesser as compared to other modes, especially litigation.
4) There is confidentiality in the procedure.
5) There is active involvement of parties.
6) Satisfaction of the parties with the decision is way higher as compared to litigation.
7) Decisions in arbitration are mostly final and non-appealable and binding in nature.
8) There is flexibility of choice for parties.

Furthermore, when arbitration is compared with other modes of dispute resolution, it supersedes over other modes for its wide benefits and flexible procedure.

Thus, Arbitration has numerous advantages making it a preferred mode for commercial disputes resolution, especially in India.

Conclusion

Disputes and conflicts can arise out of numerous reasons in commercial transactions. These conflicts must be dealt with priority and with utter care. The method which is applied to resolve these disputes between businesses, companies, enterprises, etc. is the significant factor and the key to survival of the commercial establishment concerned. Regular operations and time are precious for a business to survive. Therefore, if any dispute arises within the business concern, it must be resolved in an efficient and speedy manner so that the parties to the dispute do not suffer losses which may be irrecoverable. The mode of dispute resolution must be chosen efficiently for productive results. Arbitration is one of the modes of dispute resolution, recognised by many countries all over the globe for commercial conflicts.

Commercial disputes involve huge stakes of both conflicting parties. The output of business or the commercial establishment is adversely affected in a dispute which must be dealt with as soon as possible. For this the parties may chose litigation but it is a lengthy and costly procedure. The other way is the Alternative Dispute Resolution (ADR) mechanisms. These are out of court settlement modes recognised universally. But one must be careful in choosing ADR mechanisms for a particular dispute. The factors like the procedure, technicalities, binding decisions, transparency, confidentiality, and cost involved must be taken into consideration before choosing any of the out of court settlement methods. There are several ADRs such as Arbitration, Mediation, Consultation, Negotiation, Lok Adalats, etc. for dispute resolution. All have their own procedures and rules but for a specific reason or so they lack in efficiently resolving commercial matters. The most suitable amongst them for commercial dispute settlement is Arbitration.

India is a country with variety of cultures and diversity in nature of operations. A developing country like India, with its huge population is vulnerable to conflicts all over the affairs of commercial transactions. Litigation has been a lengthy and costly affair for commercial disputes in India. This has resulted in precluding foreign investment and loss of confidence among investors as the disputes take a considerable time to be settled, causing huge losses to the parties concerned. Moreover, the graving issue of backlog of pending cases on the judiciary has discouraged the foreign as well as domestic investors to invest in India.

The economic prosperity and growth of a country largely depends upon the efficiency of the dispute resolution mechanism it offers to the concerned stakeholders. If the disputes are settled in a speedy manner and with efficiency, the investment and capital influx increases as

it builds confidence in the investors. The modes of disputes resolution in India are numerous because of its diversity. Most of them have been discussed before in the research. But the most suitable mode of dispute resolution amongst them is the one which is efficient, less time taking and has the authority of law for enforcement of its decision. By analysing all the modes, it is apparent that for commercial disputes most of the methods lacked behind due to some reason or the other, except for arbitration. The procedure, efficiency and speedy disposal of cases via arbitration, is far better than any other ADR modes.

Arbitration has a legal backing in India by the Arbitration and Conciliation Act, 1996. It is a recognised concept under the UNCITRAL Model Law which paved the way of the above Arbitration Act. Most of the countries recognise arbitration as a suitable mode for commercial dispute resolution. This provides arbitration as an upper edge to conciliation for commercial disputes. Moreover, the courts in many countries have observed and held in several cases the significance of arbitration. In India, the courts have preferred to refer the parties to arbitration for commercial disputes. The Supreme Court of India has adopted a pro-arbitration approach in recent cases and has also held that even Intellectual Property Rights (IPR) can be amenable to arbitration in commercial and civil matters.

Arbitration has also been recognised by the likes of great personalities such as Mahatma Gandhi and Abraham Lincoln as a preferred mode of alternative dispute resolution.

Furthermore, International Commercial Arbitration (ICA) has played a vital role in attracting foreign investment in India. Though, India still requires efficient and professional arbitrators for providing the facility of arbitration to the parties to commercial disputes. ICA a new and developing technique in Indian perspective but by the comprehensive legislation of New Delhi International Arbitration Centre Bill, 2018 which provides for setting up of the New Delhi International Arbitration Centre for offering India as a new seat of International Commercial Arbitration. This has surely resulted in building new confidence in foreign investors to invest in India.

Arbitration, as a dispute settlement mechanism, has been used by the countries for several decades. There are numerous Arbitration Institutions all over the world which have been working efficiently in disposing of commercial matters. Also the international trends have indicated a pro-arbitration stance for commercial cases and very few categories of disputes remain non-amenable to the jurisdiction of arbitration. Thus, India seems to adopt a pro-arbitration approach to deal with commercial disputes.

Suggestions

Arbitration is a method of dispute settlement which facilitate parties to resolve disputes between them through amicable and recognised procedure and most importantly, in an expeditious manner. Domestic arbitration is helpful for the disputes within the national boundaries of the country whereas, the international commercial arbitration helps in resolving cross border conflicts with international jurisdiction. The UNCITRAL Model Law has helped in promoting arbitration as a suitable and widely adopted mode of commercial dispute resolution. India has adopted and enacted a comprehensive legislation for arbitration – The Arbitration and Conciliation Act, 1996. It has also introduced the New Delhi International Arbitration Centre Bill, 2018 for the promotion of international commercial arbitration. There are few prominent arbitration institutes in India for domestic as well as international arbitration. This indicates that India has been successful in recognising arbitration as a suitable mode of settlement of disputes. But there is still more to be done in establishing arbitration as a convincing mode of disputes resolution, which is also the need of the hour.

A few suggestions are provided in regard of the aforementioned discussion-:

1. Endeavour by the legislature in bringing clarity in the grey areas of Arbitration, such as the powers of arbitral tribunal. For instance, the power of arbitral tribunal to lift the corporate veil, which is yet to be defined by the courts also.
2. Training courses be developed by the government to train students at college level and professionals to become a professional arbitrator.
3. The judiciary must also clarify various provisions of the Arbitration Act which needs interpretation with respect to the intention of the legislature, as there is an onus on the judiciary to interpret the arbitration law based on the UNCITRAL Model in a way which supports the intention of the drafters of the international statutes.
4. Rebates and waiver of administrative costs may be offered to foreign investors in international commercial arbitration in order to promote commercial arbitration and attract foreign investment by building confidence in them.
5. The government can also propose to create a separate ministry and department dealing with arbitration, citing its numerous advantages, so that more opportunities may be devised and allocated in the field of commercial arbitration.

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