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Arbitration in India

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Introduction

The significant increase in the role of international trade in the economic development of nations over the last few decades has been accompanied by a considerable increase in the number of commercial disputes as well. In India too, rapid globalization of the economy and the resulting increase in competition has led to an increase in commercial disputes. At the same time, however, the rate of industrial growth, modernization, and improvement of socio-economic circumstances has, in many instances, outpaced the rate of growth of dispute resolution mechanisms. In many parts of India, rapid development has meant increased caseloads for already overburdened courts, further leading to notoriously slow adjudication of commercial disputes. As a result, alternative dispute resolution mechanisms, including arbitration, have become more crucial for businesses operating in India as well as those doing businesses with Indian firms.

What is Arbitration?

Arbitration is a mechanism of dispute resolution with the intervention of a third person (or more persons) but without the involvement of court of law. The settlement of the dispute that is arrived the judgment of the third person (or more persons) who are called Arbitrators. The parties to the dispute repose confidence in the judgment of the Arbitrator and show their willingness to abide by his decision.

The essence of Arbitration is thus based on the principle of resolving dispute without the intervention of court of law and enabling the parties to the dispute to resolve their disputes by a domestic tribunal.

Historical Background

Arbitration has a long history in India. In ancient times, people often voluntarily submitted their disputes to a group of wise men of a community—called the panchayat—for a binding resolution. The panchayati raj system has found its place in various laws in India.

Modern arbitration law in India was created by the Bengal Regulations in 1772, during the British rule. The Bengal Regulations provided for reference by a court to arbitration, with the consent of the parties, in lawsuits for accounts, partnership deeds, and breach of contract, amongst others. Until 1996, the law governing arbitration in India consisted mainly of three statutes: (i) the 1937 Arbitration (Protocol and Convention) Act, (ii) the 1940 Indian Arbitration Act, and (iii) the 1961 Foreign Awards (Recognition and Enforcement) Act. The 1940 Act was general law governing arbitration in India along the lines of the English Arbitration Act of 1934, and both the 1937 and the 1961 Acts were designed to enforce foreign arbitral awards (the 1961 Act implemented the New York Convention of 1958)

The government enacted the Arbitration and Conciliation Act, 1996 (the 1996 Act) in an effort to modernize the outdated 1940 Act. The 1996 Act is a comprehensive piece of legislation modeled on the lines of the UNCITRAL (United Nations Commission on International Trade Law) Model Law. This Act repealed all the three previous statutes (the 1937 Act, the 1961 Act and the 1940 Act). Its primary purpose was to encourage arbitration as a cost-effective and quick mechanism for the settlement of commercial disputes. The 1996 Act covers both domestic arbitration and international commercial arbitration.

Objectives and important provisions of the Act – The Arbitration and Conciliation Act 1996

The 1996 Act, which repealed the 1940 Act, was enacted to provide an effective and expeditious dispute resolution framework, which would inspire confidence in the Indian dispute resolution system, attract foreign investments and reassure international investors in the reliability of the Indian legal system to provide an expeditious dispute resolution mechanism.

The 1996 Act has two significant parts – Part I provides for any arbitration conducted in India and enforcement of awards there under. Part II provides for enforcement of foreign awards. Any arbitration conducted in India or enforcement of award there under (whether domestic or international) is governed by Part I, while enforcement of any foreign award to which the New York Convention or the Geneva Convention applies, is governed by Part II of the 1996 Act.

The 1996 Act contains two unusual features that differed from the UNCITRAL Model Law. First, while the UNICITRAL Model Law was designed to apply only to international commercial arbitrations, the 1996 Act applies both to international and domestic arbitrations. Second, the 1996 Act goes beyond the UNICITRAL Model Law in the area of minimizing judicial intervention.

The Act provides for –

- 1) Appointment of Arbitrators (sec 11).
- 2) Grounds for Challenge of appointment of Arbitrators (sec 12)
- 3) Arbitral Awards (sec 31)
- 4) Grounds of challenging Arbitral award (sec 34)

It is pertinent to note the grounds on which an Arbitral award can be challenged (sec 34 (2)) –

- (i) Incapacity of a party
- (ii) Invalidity of an arbitration agreement
- (iii) Party applying was not given proper notice of the appointment of the arbitrator or of the arbitral proceedings or was otherwise unable to present his case.
- (iv) Award not in accordance with the terms of submission to arbitration in regard to the dispute
- (v) Arbitral tribunal not properly constituted
- (vi) Subject matter of the dispute not capable of settlement by arbitration under the law for the time being in force
- (vii) Award being in conflict with the public policy of India

Working of Arbitration in India

Arbitration in India is still evolving. One of the objectives of the 1996 Act was to achieve the twin goals of cheap and quick resolution of disputes, but current ground realities indicate that these goals are yet to be achieved

Types of Arbitration Practice - Institutional Arbitration and Ad Hoc Arbitration

Arbitrations conducted in India are mostly ad hoc. Although, the concept of institutional arbitration is gradually creeping in the arbitration system in India but, it has yet to make an impact. The advantages of institutional arbitration over ad hoc arbitration in India need no emphasis and the wide prevalence of ad hoc arbitration has its ramifications in affecting speedy and cost effectiveness of the arbitration process. There are a number of advantages of institutional arbitration over ad hoc arbitration in India, some of which are discussed below:

- In ad hoc arbitration, the procedures have to be agreed upon by the parties and the arbitrator. This requires co-operation between the parties and involves a lot of time. When a dispute is in existence, it is difficult to expect cooperation among the parties. In institutional arbitration, on the other hand, the procedural rules are already established by the institution. Formulating rules is therefore no cause for concern. The fees are also fixed and regulated under rules of the institution
- In ad hoc arbitration, infrastructure facilities for conducting arbitration pose a problem and parties are often compelled to resort to hiring facilities of expensive hotels, which increase the cost of arbitration. Other problems include getting trained staff and library facilities for ready reference. In contrast, in institutional arbitration, the institution will have ready facilities to conduct arbitration, trained secretarial/administrative staff, as well as library facilities. There will be professionalism in conducting arbitration.
- In institutional arbitration, the arbitral institutions maintain a panel of arbitrators along with their profile. The parties can choose the arbitrators from the panel. Such arbitral institutions also provide for specialized arbitrators. These advantages are not available to the parties in ad hoc arbitration.
- In institutional arbitration, many arbitral institutions such as the International Chamber of Commerce (ICC) have an experienced committee to scrutinize the arbitral awards. Before the award is finalized and given to the parties, the experienced panel scrutinizes it. As a result, the possibilities of the court setting aside the award is minimal, because the scrutiny removes possible legal or technical flaws and defects in the award.

- In institutional arbitration, the arbitrators are governed by the rules of the institution, and they may be removed from the panel for not conducting the arbitration properly. In ad hoc arbitration, the arbitrators are not subject to such institutional removal sanctions.
- In the event the arbitrator becomes incapable of continuing as arbitrator in an institutional arbitration, substitutes can be easily located and the procedure for arbitration remains the same. This advantage is not available in an ad hoc arbitration, where one party (whose nominee arbitrator is incapacitated) has to re-appoint the new arbitrator. This requires co-operation of the parties and can be time consuming
- In institutional arbitration, as the secretarial and administrative staffs are subject to the discipline of the institution, it is easy to maintain confidentiality of the proceedings. In ad hoc arbitration, it is difficult to expect professionalism from the secretarial staff.

In spite of all the advantages available to institutional arbitration over ad-hoc arbitration, there is currently an overwhelming tendency in India to resort to ad hoc arbitration mechanisms. This tendency is counter productive, since there is considerable scope for parties to be aggrieved by the functioning of ad hoc tribunals.

Some of the arbitral institutions in India are the Chambers of Commerce (organized by either region or trade), the Indian Council of Arbitration (ICA), the Federation of Indian Chamber of Commerce and Industry (FICCI), and the International Centre for Alternate Dispute Resolution (ICADR).

Arbitration – Has it developed as an effective legal Institution in India?

The present arbitration system in India is still plagued with many loopholes and shortcomings, and the quality of arbitration has not adequately developed as a quick and cost-effective mechanism for resolution of commercial disputes.

The Arbitration Act 1996 was enacted on the statute book as the earlier law, the 1940 Act, did not live up to the aspirations of the people of India in general, and the business community in particular. Even though the 1996 Act was enacted to plug the loopholes of 1940 Act, the arbitral system that evolved under it led to its failure. The main purpose of the Act was to provide a speedy and efficacious dispute resolution mechanism to the existing judicial system, marred with inordinate delays and backlog of cases. But an analysis of the arbitration system, as practiced under the 1996 act, reveals that it failed to achieve its desired objectives.

Let us elaborate as to why the Arbitration has failed to achieve the desired objective –

1) Speedy Justice

Arbitration in India is rampant with delays that hamper the efficient dispensation of dispute resolution. Though the 1996 Act confers greater autonomy on arbitrators and insulates them from judicial interference, it does not fix any time period for completion of proceedings. This is a departure from the 1940 Act, which fixed the time period for completion of arbitration proceedings. The time frame for completion of the arbitration proceedings was done away with, on the presumption that the root cause of delays in arbitration is judicial interference, and that granting greater autonomy to the arbitrators would solve the problem. However, the reality is quite different. Arbitrators, who are mostly retired judges, usually treat the arbitration proceedings in the same manner as traditional litigations and are willing to give long and frequent adjournments, as and when sought by the parties.

2) Cost Effectiveness

Arbitration is generally considered cheaper over traditional litigation, and is one of the reasons for parties to resort to it. However, the ground realities show that arbitration in India, particularly ad hoc arbitration, is becoming quite expensive vis-à-vis traditional litigation. A cost analysis on arbitration vis-à-vis litigation will throw light on the higher cost of arbitration over litigation. This is a crucial factor which weighs against developing a costeffective quality arbitration practice in India.

3) Extent of Judicial Intervention in the Act

One of the main objectives of the 1996 Act was to give more powers to the arbitrators and reduce the supervisory role of the court in the arbitral process. In effect, judicial intervention is common under the 1996 Act. Such intervention takes the form of determination in case of challenge of awards. Such a tendency to exercise their authority to intervene may be attributable to their skepticism that arbitration is not effective at resolving disputes or the judges' vested concern that their jurisdiction will be adversely eroded. The decision of the Supreme Court in the Saw Pipes case exemplifies this inclination, and threatens to hamper arbitration's progress toward speed and efficiency. In this case, the Supreme Court expanded the scope of 'public policy' from the earlier ratio laid down by a three bench judgment in the Renuagar case and that one of the grounds for challenge of an award under the 1996 Act is violation of 'public policy'. The Renuagar case, while respecting the opinion that the definition of 'public policy' ought not to be widened in the greater interest of society, has laid down three conditions for setting aside an award which are a violation of

- (a) the fundamental policy of Indian law;
- (b) the interest of India; and
- (c) justice of morality.

4) Enforcement of Awards

One of the factors for determining arbitration as an effective legal institution is the efficiency and efficacy of its award enforcement regime. Under Section 36 of the 1996 Act, an arbitral award is enforceable as a decree of the court, and could be executed like a decree in a suit under the provisions of the Civil Procedure Code, 1908

An award resulting from an international commercial arbitration is enforced according to the international treaties and conventions, which stipulate the recognition and enforcement of arbitral awards. Enforcement of foreign awards in India is governed by the 1958 New York Convention and the 1927 Geneva Convention, which are incorporated in Chapter II, Part I and Part II, respectively, in the 1996 Act. The provisions of enforcement are the same under the 1940 Act and the 1996 Act. Any party interested in foreign awards must apply in writing to a court having jurisdiction over the subject matter of the award. The decree holder must file the award, the agreement on which it is based and evidence to establish that the award comes under the category of foreign award under the 1996 Act.

The rate of enforcement of arbitral awards is high. Under the 1996 Act, the Supreme Court of India declined to enforce or recognize awards in only two out of twenty four cases relating to



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enforcement of arbitral awards (Section 36 of the 1996 Act) that came before it. Both cases involved Indian parties and Indian Laws

Conclusion

From the above analysis, it is clear that globalization of the Indian economy in the early nineties and the consequent economic reforms necessitated the existence of effective dispute resolution mechanisms to quickly settle commercial disputes. The 1996 Act was enacted to achieve this purpose of quick and cost-effective dispute resolution. Arbitration occupies a prime position in commercial dispute resolution in India. An examination of the working of arbitration in India reveals that arbitration as an institution is still evolving, and has not yet reached the stage to effectively fulfill the needs accentuated with commercial growth.

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